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8 **BEFORE THE ARIZONA CORPORATION COMMISSION**

9 **RAYMOND R. PUGEL AND JULIE B.**
10 **PUGEL, husband and wife as trustees of THE**
11 **RAYMOND R. PUGEL and JULIE B. PUGEL**
12 **FAMILY TRUST,**
13 **and**
14 **ROBERT RANDALL and SALLY RANDALL,**
15 **husband and wife**
16 **Complainants,**
17 **v.**
18 **PINE WATER COMPANY, an Arizona**
19 **Corporation**
20 **Respondent..**

21 **ASSET TRUST MANAGEMENT, CORP.**
22 **Complainants,**
23 **v.**
24 **PINE WATER COMPANY, an Arizona**
25 **Corporation**
26 **Respondent.**

27 **JAMES HILL and SIOUX HILL, husband and**
28 **wife and as trustees of THE HILL FAMILY**
29 **TRUST,**
30 **Complainants,**
31 **v.**
32 **PINE WATER COMPANY, an Arizona**
33 **Corporation**
34 **Respondent.**

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AZ CORP COMMISSION
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DOCKET NO. W-03512A-06-0407
MOTION IN LIMINE

Arizona Corporation Commission
DOCKETED

MAY - 4 2007

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DOCKET NO. W-03512A-06 -0613

DOCKET NO. W-^{03512A}~~03511A~~-07-0100

1 COMES NOW RAYMOND R. PUGEL AND JULIE B. PUGEL, husband and wife as trustees of THE
2 RAYMOND R. PUGEL and JULIE B. PUGEL FAMILY TRUST, and ROBERT RANDALL and
3 SALLY RANDALL, husband and wife and ASSET TRUST MANAGEMENT, CORP. by and through
4 their attorney undersigned and respectfully move the hearing officer to grant a Motion in Limine
5 precluding the introduction of evidence or issues beyond the scope of what should lawfully be
6 considered at the hearing on the Complainants Application for the Deletion of Territory from the
7 Certificate of Convenience and Necessity {CC&N} of Pine Water Company.

8 The issues presented by this Motion constitute the grounds for most of the controversy in the
9 hearing preparation for this matter. The Complainants take the position that the scope of this hearing is
10 clearly dictated by the language of the Supreme Court of the State of Arizona in *James P. Paul Water*
11 *Company v. Arizona Corporation Commission, 137 Ariz. 426, 671 P.2d 404 (S.Ct. 1983)* wherein the
12 Court stated:

13 Only upon a showing that a certificate holder, presented with a demand for
14 service which is reasonable in light of projected need, has failed to supply
15 such service at a reasonable cost to customers, can the Commission alter
its certificate. Only then would it be in the public interest to do so. *Id.*

16 Pine Water Company has taken a contrary position. The position asserted by Pine Water
17 Company is akin to the proposition posited by some physicists that a butterfly waiving its wings in the
18 Andes of South America will have an impact, however slight, on everything else in the entire world.
19 Pine Water Company is attempting to bring in everything in the world under the guise of "public
20 interest" in a hope, like a prayer for rain, that some extraneous information will catch the mind's eye of a
21 Commissioner who will then vote to deny deletion of territory from the CC&N even though Pine Water
22 Company is not able to provide adequate service at a reasonable price.

23 While issues of the public interest are a matter for consideration, the Arizona Supreme Court in
24 *James P. Paul, supra.* clearly set forth the scope of the examination of the public interest which is
25 within the purview of the Arizona Corporation Commission in determining whether or not to delete
26 property from a CC&N, to wit:

27 Where a public service corporation holds a certificate for a given area, the
28 public interest requires that that corporation be allowed to retain its
29 certificate until it is unable or unwilling to provide needed service at a
reasonable rate.

1 So the test is:

- 2 1. Can Pine Water Company provide needed water service to the Complainant's property?
- 3 2. Can Pine Water Company provide this service at a reasonable rate?

4 All evidence must be relevant and material to answering only these two questions

5 Further clarification of the concept of "public interest" was set forth by the Arizona Court of
6 Appeals in *James P. Paul Water Company, v. Arizona Corporation Commission, 137 Ariz.432, 671*
7 *P.2d 410 (Cl. App. 1982)*. There the Court of Appeals looked at the concept of public interest in light of
8 the factual context of the case before it. The Court noted that the public interest for sustaining a CC&N
9 consists of the same elements as the public interest for allowing a deletion of territory from a CC&N.
10 The Court noted that the public interest is "the right of the certificate holder to supply the area as long as
11 the service was satisfactory and the rate reasonable." Again a limitation upon what issues the
12 Commission may address in making a determination as to whether or not to amend a CC&N.

13 The Supreme Court in *James P. Paul, 137 Ariz. 426 supra.* clearly set forth examples of areas of
14 inquiry which are **not** within the scope of the proceeding for determining whether or not property should
15 be deleted from a CC&N, as follows:

- 16
- 17 1. The Commission may not compare the capabilities and qualifications
18 of the competitors vying for the exclusive right to provide the relevant
19 service.
- 20 2. The Commission may not consider the amounts of time and money
21 competitors must spend to provide service.
- 22 3. The Commission may not compare the existing facilities of each party.
- 23 4. The Commission may not treat cost as determinative of the public
24 interest.

25 Since these matters are not within the purview of the Arizona Corporation Commission in this case,
26 evidence pertaining to such matters must be precluded. So, the evidence in this proceeding must focus
27 on whether Pine Water Company is "**unable or unwilling to provide service at reasonable rates.**"
28 *James P. Paul, 137 Ariz. 426 supra.* That is the test to be applied in this instance in determining
29 whether or not the Complainant's property should be deleted from the CC&N of Pine Water Company.

1 Pine Water Company holds its Certificate of Convenience and Necessity virtually at the grace of
2 the Arizona Corporation Commission. The Supreme Court in *James P. Paul, 137 Ariz. 426 supra.* and
3 in *Davis v. Corporation Commission, 96 Ariz. 215, 393 P.2d 909 (1964)* clearly pointed out that:

4
5 "[t]he monopoly is tolerated only because it is to be subject to vigilant and
6 continuous regulation by the **Corporation Commission** and is subject to
7 rescission, alteration or amendment at any time upon proper service when
8 the *public interest* would be served by such action."

9 The monopoly position held by Pine Water Company does not entitle them to deviate from the law when
10 issues concerning the deletion of property from its CC&N arise.

11 The Supreme Court in *James P. Paul, 137 Ariz. 426 supra.* conducted an analysis and
12 clarification of two prior Supreme Court decisions which pertained to the question of altering the
13 boundaries of a Certificate of Convenience and Necessity granted to a public service corporation,
14 *Application of Trico Electric Cooperative, Inc., 92 Ariz. 373, 377 P.2d 309 (1962)*, and *Davis v.*
15 *Corporation Commission, 96 Ariz. 215, 393 P.2d 909 (1964)*. In *Application of Trico Electric*
16 *Cooperative, Inc., supra.* the Court made it clear that a party holding a Certificate of Convenience and
17 Necessity was protected from infringement upon that Certificate unless they fail or refuse to render
18 satisfactory and adequate service at reasonable rates. That clearly narrowed the issue of the test for
19 determining whether property should be deleted from a CC&N.

20 In *Davis v. Corporation Commission, supra.* the Court merely enhanced that position and in the
21 *James P. Paul, 137 Ariz. 426 supra*, the Supreme Court made it clear that they were issuing their
22 opinion to supplement the Court of Appeals decision in *James P. Paul Water Company, v. Arizona*
23 *Corporation Commission, 137 Ariz. 432, 671 P.2d 410 (Cl. App. 1982)* which had examined both of
24 *Application of Trico Electric Cooperative, Inc., 92 Ariz. 373, 377 P.2d 309 (1962)*, and *Davis v.*
25 *Corporation Commission, 96 Ariz. 215, 393 P.2d 909 (1964)* clearly establishing the test which should
26 be relied upon in determining whether or not property should be deleted from a CC&N. This test is
27 whether or not the Certificate holder can provide adequate service at reasonable rates.

28 All evidence should be directed to those issues and nothing else. Pine Water Company has a
29 duty to serve all persons within the area of its Certificate of Convenience and Necessity in a non-

1 discriminatory manner.¹ *Arizona Revised Statutes § 40-361; Town of Wickenburg v. Sabin, 68 Ariz.*
2 *75, 200 P.2d 342 (1948); Travaini v. Maricopa County, 9 Ariz. App. 228, 450 P.2d 1021(1969).*

3 The nature of this proceeding before the Commission is quasi-judicial or judicial. . *Pacific*
4 *Greyhound Lines. v. Sun Valley Bus Lines 70 Ariz. 65, 216 P.2d 404 (1950); Arizona Corporation*
5 *Commission v. Tucson Insurance and Bonding Agency, 2 Ariz. App. 458, 415 P.2d 472(1966);*
6 *Southwest Gas Corporation v. Arizona Corporation Commission, 169 Ariz. 279, 818 P.2d 714 (Ct.*
7 *App. 1991.* In such a proceeding, contrary to a legislative proceeding, due process requires that the
8 evidence received be related to the issues to be determined, not influenced by other matters which in the
9 realm of executive or legislative actions may play a role. *State v. Arizona Corporation Commission,*
10 *143 Ariz. 219, 693 P.2d 362 (Ct. App. 1984) citing Morgan v. United States, 298 U.S. 468, 56 S.Ct.*
11 *905, 80 L.Ed.2d 1288 (1936), Southern Pacific Company v. Arizona Corporation Commission, 98*
12 *Ariz. 339, 404 P.2d 692 (S.Ct. 1965); Arizona Public Service v. Arizona Corporation Commission, 155*
13 *Ariz. 263, 746 P.2d 4 (Ct. App. 1987).*

14 The distinction between a legislative action which allows extraneous information to be provided
15 to the decision makers and a judicial action is important in analyzing what is occurring. In this case
16 what is before the Commission is an application from some distinct property owners to delete their
17 property from the CC&N of Pine Water Company because Pine Water Company cannot provide them
18 with adequate water service at reasonable rates. This not an act effecting a number of property owners,
19 but rather only effecting the ones who have made the application. The procedure to be followed is to
20 conduct a judicial process to make a determination as to the applicability of the general law to the
21 specific instance. *See Fasano v. Board of County Commissioners of Washington County, 264 Ore.*
22 *574, 507 P.2d 23 (S.Ct.1973).* In such an action, the property owners are entitled to the due process
23 protections afforded by a judicial procedure. The deciding body must make its decision based upon a
24 standard, and not on the basis of other immaterial, speculative or emotional presentations. The Arizona
25 Court has firmly adopted this concept pertaining to the Corporation Commission and clearly the hearing

26
27
28 ¹ Pine Water Company is under an obligation to provide the same service at the same price to all customers. *Town of*
29 *Wickenburg v. Sabin, 68 Ariz. 75, 200 P.2d 342(1948)cited in Application of Trlco, supra.92 Ariz at 384 Arizona Revised*
Statutes § 40-334. Clearly requiring some customers to dedicate assets of a greater value to Pine Water Company without a
full guarantee of repayment violates this concept.

1 before the administrative law judge must afford the Complainants the modicum of due process necessary
2 to be sure that extraneous information does not become the basis of the decision in this matter. *State v.*
3 *Arizona Corporation Commission, 143 Ariz. 219, 693 P.2d 362 (Ct. App. 1984).*

4 In conclusion, the Complainants request that the hearing officer enter an order limiting the
5 evidence introduced at this hearing to that which is relevant and material to the principal questions of
6 this case:

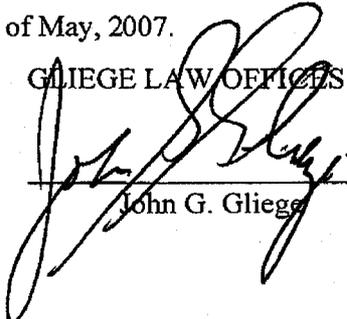
- 7 1. Can Pine Water Company provide adequate water service to the Complainants?
- 8 2. Can Pine Water Company provide this water service at reasonable rates?

9 It is respectfully requested that the Court exclude, or preclude the use of all evidence which addresses
10 other issues or is neither relevant nor material to these issues. While it may be of academic interest to
11 address topics such as the viability of the aquifer or aquifers, or what legal entity may provide water to
12 these properties if they are deleted from the CC&N, or what the impact may be upon Pine Water
13 Company or its customers of this deletion, or any of the other myriad of issues being raised by Pine
14 Water Company, such issues have no place in this legal proceeding and only serve to attempt to use
15 information suitable for a legislative or executive decision making process to attempt to obfuscate the
16 fact that Pine Water Company cannot provide reasonable service at reasonable rates to the
17 Complainants.

18 Therefore, it is respectfully requested that the hearing officer grant this Motion in Limine and
19 limit the evidence in this proceeding to that which is germane to the allowable issues in this proceeding.

20 Respectfully submitted this 2nd day of May, 2007.

21 GLIEGE LAW OFFICES P.L.L.C.

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24 John G. Gliedge
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1 Original and 17 copies mailed/delivered
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3 Arizona Corporation Commission
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6 Phoenix, AZ 85007

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