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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

MIKE GLEASON, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

IN THE MATTER OF THE APPLICATION OF PERKINS MOUNTAIN WATER COMPANY FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY IN MOHAVE COUNTY.	DOCKET NO. W-20380A-05-0490
IN THE MATTER OF THE APPLICATION OF PERKINS MOUNTAIN UTILITY COMPANY FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY IN MOHAVE COUNTY.	DOCKET NO. SW-20379A-05-0489 **MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE FOR TEMPORARY STAY OF PROCEEDINGS**

On July 18, 2007, the Administrative Law Judge ("ALJ") issued a procedural order ("First Procedural Order") that ordered Perkins Mountain Water Company and Perkins Mountain Utility Company (collectively the "Applicants") to file a response to letters filed in the docket by Commissioners Mundell and Mayes requesting that the closed record be reopened in the above-captioned matters. On July 23, 2007, Applicants filed their response ("Response") addressing the issues raised by Commissioners Mundell and Mayes in regards to reopening the closed record. On July 30, 2007, the ALJ issued a second procedural order ("Second Procedural Order") ordering that the closed record be reopened for additional testimony and evidence and scheduling a procedural conference on August 3, 2007. For the reasons set forth herein, Applicants respectfully request that the ALJ reconsider his decision reopening the closed record and proceed with the issuance of a Recommended Opinion and Order ("ROO"). In the

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alternative, Applicants hereby move for a temporary stay of these proceedings for the reasons discussed herein.

I. MOTION FOR RECONSIDERATION OF THE DECISION TO REOPEN THE CLOSED RECORD

A. Before making a determination that the closed record should be reopened, the Commission should apply a high legal standard.

Although the Applicants understand and appreciate the Commission's responsibilities in granting a Certificate of Convenience and Necessity ("CC&N"), the Commission cannot disregard fundamental fairness and due process as applied to the Applicants. In the two years that have elapsed since the filing of the CC&N applications ("Applications"), an extensive record has been developed upon which to base a decision. There have been seven separate Staff Reports, eight days of hearings, two public comment sessions in Lake Havasu City and Kingman, oral arguments, multiple rounds of data requests, multiple rounds of legal briefing, written responses to a number of letters from Commissioners, the issuance of an initial ROO (in January 2006), and thousands of pages of supporting documentation filed in the docket. At the request of the Commission, Mr. Rhodes appeared and answered questions for a full day, without any limitations. Also at the request of the Commission, a witness appeared from the Arizona Department of Water Resources.

The evidentiary record has been closed for over four months since closing briefs were filed. Throughout the entire case, the Applicants have diligently worked with the Commission and Staff to answer every question posed and to timely provide the requested information necessary for a determination on the Applications. There may not be any more extensive record ever developed by the Commission on a CC&N application.

The Commission should not reopen a closed record absent a showing that there has been a material change in the law or a material change in the facts relevant to a particular case. In *Application of James and Dina Lilly*, 2007 WL 1435572 (Pa. P.U.C.,

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May 15, 2007), following the close of the hearing and the record in a proceeding before the Pennsylvania Public Utilities Commission ("PUC"), the applicant filed a petition for the Commission to reopen the proceeding for the purpose of taking additional evidence. In determining whether to grant the petition, the Pennsylvania PUC cited to its Rules of Administrative Practice, 52 Pa. Code § 5.571, which set forth the specific criteria that must be met before the reopening of the closed record prior to a final decision. It provides, in part, as follows:

> (a) At any time after the record is closed but before a final decision is issued, a party may file a petition to reopen the proceeding for the purpose of taking additional evidence.
>
> (b) A petition to reopen shall set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing.

Similarly, in *In re Petition for Determination of Need for Electric Power Plant in Taylor County by Florida Municipal Power Agency et al.*, 2007 WL 1792514 (Fla. P.S.C. June 8, 2007), following an administrative hearing on the applicant's petition which concluded on January 18, 2007, the applicant filed a motion on March 9, 2007, for a limited reopening of the closed record and for leave to file supplemental testimony. In its decision granting the motion, the Florida Public Service Commission articulated its position regarding the showing required to reopen a closed record:

> Although we are generally hesitant to reopen the record of any proceeding, we may do so when new evidentiary proceedings are warranted based on changed circumstances. In order to reopen the record of a case, there must be a significant change of circumstances not present at the time of the proceedings, or a demonstration that a great public interest will be served. (Emphasis added, footnotes omitted).

There has been no showing in this case of any "material changes of fact or of law" or of "significant change of circumstances not present at the time of the proceedings, or a demonstration that a great public interest will be served." Rather, the Second Procedural Order states only that "[c]ertain information has come to light through reports of

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testimony given during a criminal trial in Nevada that could not have been know at the time the prior hearings in this matter concluded, and it is reasonable that the other parties, as well as Commissioners and the Administrative Law Judge, could have questions that they wish to have answered through sworn testimony." The statement lacks any specificity regarding what new information has come to light and why such information could not have been known at the time of the hearing. The Applicants submit that this assertion falls short of any legal standard warranting the reopening of a closed record.

Attachment H to the Staff Report Addendum filed on December 15, 2006, two months prior to the start of the hearing, contained two articles from the *Las Vegas Review-Journal* regarding Mr. Rhodes that discuss Ms. Kenny. The first is a March 30, 2004, article regarding a legal dispute wherein a court-appointed arbitrator entered a judgment against Mr. Rhodes. After describing the judgment, the article stated as follows:

> ... In March 2003, with ex-County Commissioner Erin Kenny working on his behalf, Rhodes purchased 2,400 acres atop Blue Diamond Hill on the border of the Red Rock National Conservation Area for 450 million. Rhodes then ran into difficulty gaining the approval to develop the land to his satisfaction, and she was netted in a federal political corruption probe. She since pleaded guilty to felony charges.[1] (Emphasis added).

The second article included in the Staff Report Addendum is dated March 10, 2006, and discussed Mr. Rhodes' Federal Election Commission settlement which was a topic of much discussion at the hearings. The article discusses federal bribery and wire fraud charges against former Clark County Commissioners Mary Kincaid-Chauncey and Lance Malone, and mentions that Ms. Kenny "pleaded guilty and cooperated with federal prosecutors." (Emphasis added). No one can deny that information regarding Ms. Kenny has been in the record since at least December 15, 2006.

[1] Despite the clever juxtaposition of these sentences, the charges to which Ms. Kenny plead guilty did not involve Mr. Rhodes, the Applicants or any of their affiliates.

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At the hearing, Mr. Rhodes was questioned about many topics, although he received no questions regarding Ms. Kenny. There has been no assertion that Mr. Rhodes testified untruthfully, that he misled the Commission in any way, or that he tried to conceal information regarding the consulting work provided by Ms. Kenny. Had he received questions regarding Ms. Kenny, he would have answered those questions truthfully and completely. Thus, the statement in the Second Procedural Order that "[c]ertain information has come to light ... that could not have been know at the time the prior hearings" is contrary to the facts in this case.

B. <u>The Rhodes Affidavit filed with the Applicants' Response is not a *de facto* reopening of the closed record</u>.

The Second Procedural Order states that the Affidavit of James Michael Rhodes filed with the Applicant's Response on July 23, 2007, may be viewed as "a *de facto* reopening of the record because the affidavit represents testimony for which cross-examination is necessary for due process purposes." Such an argument, however, puts the Applicants in an impossible Catch-22. The Applicants were ordered in the First Procedural Order to respond to the requests by Commissioners Mundell and Mayes to reopen the closed record. In an effort to respond to the letters filed by Commissioners Mundell and Mayes, the Applicants attached an affidavit of Mr. Rhodes addressing the issues raised in the letters; namely, that Ms. Kenny provided consulting services to Mr. Rhodes since early 2003, that Ms. Kenny is no longer being compensated for such consulting services, that Ms. Kenny is not now nor has she ever been an employee, officer, director or shareholder of the Applicants or their affiliates, and that Ms. Kenny has had no involvement whatsoever with the Applicants, nor will she have any involvement whatsoever in the future. The Applicant's response to a procedural order should not be viewed as a *de facto* reopening of the closed record. If the submission of the Rhodes Affidavit is to be used to support a reopening of the closed record in this case, then the Applicants hereby withdraw the Affidavit.

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C. The issue is not Mr. Rhodes' availability to testify, but the harmful delay that will be caused by reopening the closed record.

In justifying reopening the closed record, the Second Procedural Order quotes from the hearing transcript where Mr. Rhodes agreed to come back before the Commission to testify if asked. The Applicants' opposition to reopening the closed record should not be construed as a refusal by Mr. Rhodes to appear before the Commission, but rather the expression of a legitimate concern regarding the harm that will result from additional delays in this case. In his July 3, 2007 letter, Commissioner Mundell expressed that he wants additional question of "Mr. Rhodes and possibly others." (Emphasis added). In an article published in the July 31, 2007, edition of the *Las Vegas Review-Journal*, the Commission's spokesperson stated that "[t]here's a very high likelihood that the commissioners, the parties and/or the judge may want to hear from Ms. Kenny and Mr. Rhodes on this topic." Ms. Kenny is in no way connected to the Applicants or before the Commission, and an effort to compel her to testify may well devolve into a lengthy legal battle prolonging this case indefinitely. A ROO was first issued in this case on January 31, 2006, and scheduled for consideration at the February 14, 2006 Open Meeting. The delay in obtaining CC&Ns for the Golden Valley South master planned development has already had an adverse impact on the project. Further delays in securing a water and wastewater provider will place the project in greater jeopardy.

D. The Applicants have responded to the questions raised by Commissioners Mundell and Mayes regarding Ms. Kenny.

Notwithstanding the fact that recent newspaper articles regarding Ms. Kenny do not rise to the level of a material change in the law or the facts justifying a reopening of the closed record, the Applicants have responded to the concerns raised by Commissioners Mundell and Mayes in their letters. In his July 3, 2007 letter, Commissioner Mundell states that "recent [newspaper] articles have raised some additional issues that I feel need to be addressed, particularly the alleged payments from

developer Jim Rhodes to former Clark County Commissioner Erin Kenny." The letter further states that additional questioning regarding Mr. Rhodes' connection to Ms. Kenny will be necessary in order for Commissioner Mundell to make a determination as to whether the Applicants are fit and proper to operate in Arizona. Similarly, Commissioner Mayes' July 5, 2007, letter concurs with Commissioner Mundell regarding Mr. Rhodes' connection to Ms. Kenny and further states that Mr. Rhodes should appear under oath to answer questions as to "whether Ms. Kenny will have any official role in the proposed Arizona utilities."

In order to be responsive to the issues raised by Commissioners Mundell and Mayes, the Applicants submitted an affidavit from Mr. Rhodes addressing Ms. Kenny's consulting work for Mr. Rhodes and her lack of any involvement whatsoever with the Applicants. The filing of the affidavit was a good faith attempt on the part of the Applicants to provide unequivocal statements—under oath—to the Commissioners' concerns. The Applicants disagree with the characterization that they were attempting to "*minimize the importance of [Mr. Rhodes'] relationship with Ms. Kenny*" as stated in the Second Procedural Order. The Applicants are not trying to minimize the relationship, nor have they ever sought to hide the relationship from the Commission. As stated above, the existence of a relationship between Mr. Rhodes and Ms. Kenny, as well as her criminal charges and subsequent guilty plea, were known at the time of the hearing in this case.

The Applicants note also that even if the closed record were reopened so that Mr. Rhodes could be cross-examined on his affidavit, unless Staff, the Commissioners or the ALJ are prepared to introduce evidence to contradict Mr. Rhodes' statements in the affidavit, such statements will remain uncontroverted on the record and no new relevant evidence would be forthcoming. While there may be some cumulative information obtained through questioning of Mr. Rhodes, the incremental value of that additional information should be balanced against the harm that will be caused to the Applicants

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from months of additional delay. The reopening of a closed record should be an extraordinary measure that should be reserved for extraordinary cases. Absent a showing that the Applicants provided untruthful or misleading testimony, or that some material change in the law or the facts of the case has changed since the hearing, the closed record should not be reopened.

Finally, to the extent the Commission has any lingering concern regarding the Applicants or a decision not to reopen the closed record, then the numerous conditions that the Applicants have already agreed to meet (including the unprecedented requirement of $5 million in performance bonds/letters of credit) will ensure that ratepayers are adequately protected and that the public interest is served.

II. MOTION TO STAY PROCEEDINGS

If the ALJ denies Applicants' Motion for Reconsideration, in the alternative, Applicants must move for a stay of the proceedings. This matter has been pending before the Commission for over two years. At the time the Applications were filed in July 2005, Applicants believed that they would obtain CC&Ns within the Commission's normal timelines for issuing CC&Ns. In fact, the initial ROO was issued in this case on January 31, 2006, recommending approval of the CC&Ns with conditions. Eighteen months have elapsed since that ROO, and now the Applicants are faced with a reopening of the closed record. Applicants believe that reopening the closed record will cause significant additional delay, and the Applicants still have no assurance that their Applications will ultimately be approved. Because of human resource issues, market conditions, loan commitments and other business factors, the developer must consider and pursue other alternatives for water and wastewater service if the Commission proceeds to reopen the closed record. Once Applicants have made a determination regarding the need to proceed with the Applications, they will file a motion with the Commission making the appropriate request.

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III. CONCLUSION

To address the questions raised by Commissioners Mundell and Mayes, Applicants submitted their Response on July 23, 2007, as ordered by the First Procedural Order. Chairman Gleason has since filed a letter in the docket urging the ALJ to proceed towards the issuance of the ROO stating "it would appear that there is nothing to be gained in the way of relevant facts from reopening the closed record, and that the public interest might be better served by moving forward on the basis of the ample record of evidence at hand." The Applicants submit that Chairman Gleason is correct on this matter, and urge the ALJ to reconsider his decision to reopen the closed record in this case. In the event the ALJ elects to proceed to reopen the closed record, then the Applicants request that the ALJ grant their Motion to Temporarily Stay this proceeding to allow Applicants' time to determine how the developer intends to proceed.

RESPECTFULLY SUBMITTED this 1st day of August, 2007.

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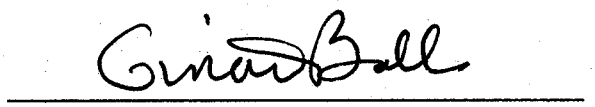

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