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Arizona Corporation Commission

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IN THE MATTER OF THE APPLICATION OF ARIZONA WATER COMPANY, AN ARIZONA CORPORATION, TO EXEND ITS EXISTING CERTIFICATE OF CONVENIENCE AND NECESSITY IN THE CITY OF CASA GRANDE AND IN PINAL COUNTY, ARIZONA

Docket No. W-01445A-06-0199

IN THE MATTER OF THE APPLICATION OF PALO VERDE UTILITIES COMPANY FOR AN EXTENSION OF ITS EXISTING CERTIFICATE OF CONVENIENCE AND NECESSITY.

Docket No. SW-03575A-05-0926

IN THE MATTER OF THE APPLICATION OF SANTA CRUZ WATER COMPANY FOR AN EXTENSION OF ITS EXISTING CERTIFICATE OF CONVENIENCE AND NECESSITY.

Docket No. W-03576A-05-0926

GLOBAL UTILITIES'
RESPONSE TO MOTION TO CONSOLIDATE

Santa Cruz Water Company, L.L.C. ("Santa Cruz") and Palo Verde Utilities Company, L.L.C. ("Palo Verde")(collectively "Global Utilities") respond in opposition to the motion to consolidate filed by Arizona Water Company ("AWC").

I. Preliminary Statement.

Consolidation is not warranted because there are substantially different legal and factual issues presented by these dockets. In particular, the Legends dockets only concern service to part

1 of one development. Moreover, consolidation will subject the Legends dockets to the stay that is
2 blocking any progress in the AWC docket. There are no grounds to include the Legends dockets
3 in that stay, and they should be allowed to proceed independently. Moreover, AWC's claim over
4 the Legends area is merely a pretextual assertion without any hope of success.

5 **II. These cases lack common issues of law or fact and should not be consolidated.**

6 **A. The "common issues of law or fact" test is widely recognized.**

7 Many authorities agree that consolidation can only be ordered when there are common
8 issues of law or fact. *See e.g. Wright & Miller, 9 Federal Practice and Procedure Civ.2d § 2383;*
9 *1A C.J.S. Actions § 259.* In Arizona, the "common question of law or fact" test is part of Rule
10 42(a) of the Rules of Civil Procedure. These rules, are in turn, incorporated into the Commission's
11 rules. *See A.A.C. R14-3-101(A).*

12 Arizona courts have therefore have stated that cases must "relate to the same subject-
13 matter" or the "same transaction" before they can be consolidated. *See London, Paris & American*
14 *Bank Ltd. v. Abrams, 6 Ariz. 87, 90, 53 P. 588, 589 (Ariz. Terr. 1898); Hershey v. Banta, 55 Ariz.*
15 *93, 99-100, 99 P.2d 81, 84 (1940).*

16 Arizona cases allowing consolidation show that consolidation is appropriate only where the
17 common issue dominates the cases. For example, in *Hershey*, the court found consolidation
18 justified where the consolidated cases involved attacks on the same prior judgment. *Id.* The Court
19 explained that both cases were brought by the same plaintiff and "were, in effect, one action." *Id.*
20 Another example is *Hancock v. McCarroll, 188 Ariz. 492, 494-95, 937 P.2d 682, 684-85 (App.*
21 *1996).* *Hancock* involved a proposed initiative challenge to the formation of a stadium district.
22 The court found that the "facts were identical" and that the "parties are the same." *Id.* The only
23 difference was that in one case the defendant was sued in her capacity as clerk of the stadium
24 district, while in the other she was sued as the clerk for the county board of supervisors. *Id.*
25 Although this minor difference meant that different legal theories were in play, the court noted that
26 the central issue – whether the initiative process can be used to challenge the formation of a
27 stadium district – was the same. *Id.* A third example is *Behrens v. O'Melia, 206 Ariz. 309, 78*

1 P.3d 278 (App. 2003). In *Behrens*, two cases were filed that both concerned the same accident on
2 a playground in Casa Grande. The court said that consolidation was appropriate because the
3 “same injury” was involved. *Id.* In each of these cases, the common issue was at the heart of the
4 consolidated cases.

5 **B. The Commission’s rules and precedent support the “common issues of law or**
6 **fact” test.**

7 The Commission follows the same path. The Commission’s rules provide that the cases
8 can be consolidated when the “issues are substantially the same.” A.A.C. R14-3-109(H). Thus,
9 the Commission has consolidated cases when the cases “rely upon the same law, facts, and
10 witnesses.” *See Utility Source, LLC*, Decision No. 67446 (Jan. 4, 2005) at 2. When cases contain
11 different facts, the Commission has denied consolidation. For example, in *Water Utility of*
12 *Greater Tonopah*, Decision No. 64890 (June 5, 2002), the utility sought to consolidate its
13 financing case with the financing case of an affiliate. Because the proposed financing was to fund
14 different types of facilities, the Commission denied consolidation. *Id.* at n. 1.

15 **C. The numerous differences between these cases outweigh any similarity.**

16 AWC seeks to consolidate two new dockets into three already consolidated dockets,
17 creating an unwieldy mass of five dockets. The five dockets at issue can be summarized as
18 follows:

19

Docket Number	Utility	Location
SW-03575A-05-0926	Palo Verde Utilities Company	South of Maricopa
W-0356A-05-0926	Santa Cruz Water Company	South of Maricopa
W-01445A-06-0199	Arizona Water Company	Much of Western Pinal County
SW-03575A-07-0300	Palo Verde Utilities Company	Part of Legends Development
W-03576A-07-0300	Santa Cruz Water Company	Part of Legends Development

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1 There are numerous differences between the Legends dockets and the AWC docket. First, there is
2 a substantial difference in size. The AWC docket concerns a vast swath of Pinal County,
3 exceeding 110 square miles. In contrast, Santa Cruz's Legends extension area is less than three
4 square miles, and is limited to part of one development. Second, there is a difference in landowner
5 support. AWC has almost no landowner support anywhere in its 110 square mile request, and it
6 has none at all within Santa Cruz's Legends extension area. Third, the Legends dockets present
7 the issue of the benefits of not splitting a development between multiple providers. Fourth, the
8 Legends dockets involve integrated water, wastewater, and reclaimed water services, while the
9 AWC docket involves only water service. Given these substantial differences, the cases should
10 not be consolidated.

11 **III. Consolidation will cause undue prejudice, inconvenience, delay and expense.**

12 Even when cases have common issues, consolidation is discretionary, not mandatory. In
13 exercising this discretion, there are many factors to consider. For example, if "consolidation will
14 cause delay in the processing of one or more of the individual cases" consolidation is often not
15 appropriate. *See Wright & Miller, 9 Federal Practice and Procedure Civ.2d § 2383.* Further, the
16 Commission's rules provide that cases should be consolidated only when "the rights of parties will
17 not be prejudiced by such procedure." A.A.C. R14-3-109(H). Moreover, procedural rules should
18 be interpreted to "obviate delay and to administer speedy justice." *Jobe v. King*, 129 Ariz. 195,
19 198, 629 P.2d 1031, 1034 (App. 1981). Likewise, the Commission's rules provide that they
20 should be construed "to secure just and speedy determination of all matters presented to the
21 Commission." A.A.C. R14-3-101(A).

22 Here, the AWC case is stayed, and no hearing in that case is in sight. If the cases are
23 consolidated, the Legends dockets will be subject to the same stay. Thus, in essence, AWC's
24 motion is a motion to extend the existing stay to include the Legends dockets. Yet AWC has
25 provided no grounds suggesting that a stay of the Legends dockets is warranted. Subjecting the
26 Legends dockets to a stay will prejudice the rights of the Global Utilities, as well as the rights of
27 the Legends landowner, to a timely ruling regarding the proper utility to serve the Legends

1 development. There is no reason to hold the Legends case hostage to AWC's larger case, and
2 doing so would be the antithesis of the "speedy determination" required by the Commission's
3 rules.

4 **IV. Consolidation is not appropriate because AWC's application is not independently**
5 **viable.**

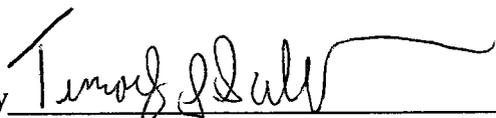
6 Under Arizona law, cases can be consolidated only if they are "independently viable."
7 *Federal Deposit Insurance Corp. v. Maricopa County*, 175 Ariz. 128, 131, 854 P.2d 161, 164 (Tax
8 1993); *Berge Ford v. Maricopa County*, 172 Ariz. 483, 486, 838 P.2d 822, 825 (Tax 1992). Here,
9 AWC's Application has a legion of flaws, and it is therefore not independently viable. Most
10 fundamentally, AWC lacks any requests for service for Santa Cruz's Legends extension area, and
11 it also lacks any plan to provide needed wastewater and reclaimed water to Palo Verde's Legends
12 extension area. Accordingly, at least with respect to Legends, AWC's application is not
13 independently viable.

14 **V. Conclusion.**

15 The Legends dockets present different legal and factual issues from the AWC docket.
16 Moreover, consolidation would only cause undue prejudicial delay by subjecting the Legends
17 dockets to the stay of the AWC docket. Further, the AWC docket is not independently viable.
18 Accordingly, these cases should not be consolidated.

19
20 RESPECTFULLY SUBMITTED this 6th day of August, 2007.

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