

ORIGINAL



0000082327

BEFORE THE ARIZONA CORPORATION
RECEIVED

COMMISSIONERS

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

2008 FEB 29 P 4: 52

AZ CORP COMMISSION
DOCKET CONTROL

Arizona Corporation Commission

DOCKETED

FEB 29 2008

DOCKETED BY

ne

IN THE MATTER OF THE APPLICATION OF PINE
WATER COMPANY FOR APPROVAL TO (1)
ENCUMBER A PART OF ITS PLANT AND SYSTEM
PURSUANT TO A.R.S. §40-285(A); AND (2) ISSUE
EVIDENCE OF INDEBTEDNESS PURSUANT TO
A.R.S. §40-302(A).

DOCKET NO. W-03512A-07-0362

STAFF'S POST HEARING REPLY
BRIEF

Hearing was held in this matter on December 12, 2007 presided over by Administrative Law Judge ("ALJ") Dwight D. Nodes. Arizona Corporation Commission ("ACC") Chairman Mike Gleason and Commissioner Kristin K. Mayes were in attendance. Mr. Robert Hardcastle provided testimony on behalf of Pine Water Company ("PWCo" or "Applicant"). Both Mr. Fred Krafczyk and Mr. Michael Greer requested and were granted intervention in this matter (collectively "Intervenors"). Each provided testimony on his own behalf. At the request of Judge Nodes, Staff of the ACC Utilities Division ("Staff") participated as well. Mr. Pedro Chaves and Mr. Steven Olea provided Staff's testimony. Mr. Olea adopted the pre-filed testimony of Mr. Marlin Scott.

At the conclusion of the hearing Judge Nodes ordered post-hearing briefs from all of the parties. The parties were to address any issues they felt were necessary to the determination of the Application. In addition, Commissioner Mayes directed the parties to brief two additional issues.

Commissioner Mayes requested that the parties respond to the following questions:

1. Does the proposed transaction between PWCo and the District violate the Arizona Constitution, Article 9 § 10?
2. If the Commission were to approve the Application, and if it were subsequently determined that the K-2 well was causing a reduction in the productivity of other wells in the Pine-Strawberry area, would the Commission have the authority to order PWCo to stop using the K-2 well?

1 Each of the parties to this matter filed post-hearing briefs in which they responded to the
2 relevant issues. Staff hereby submits its response to the briefs filed by PWCo and the Intervenors.

3 **I. THE CORPORATION COMMISSION DOES NOT HAVE JURISDICTION OVER**
4 **THE SUBJECT MATTER OF THE CLAIMS AGAINST DISTRICT ACTION**

5 To begin with, it is important to note that none of the parties has disputed the authority of the
6 Commission to hear evidence related to the public interest. The dispute arises over what action the
7 Commission may take in conjunction with that evidence. Much of the disagreement can be settled by
8 simply considering jurisdiction.

9 Intervenors have argued that the Commission should deny PWCo permission to enter into the
10 K-2 agreement because the proposed contract is constitutionally deficient. But it is the actions of the
11 District which are being challenged. One allegation is that the District is without authority to enter
12 into this agreement, and that the contract is unconstitutional as a result. Intervenors have further
13 asserted that one possible remedy in this situation would be that a court could find the agreement
14 "void". Worthy of emphasis are the use of the word "court" and the absence of the word
15 "Commission". The validity of the underlying contract is simply *not* with the jurisdiction of the
16 Commission.

17 All of the parties agree that any all disputes regarding contract law, whether they arise from
18 capacity, constitutionality, or enforceability, would properly be made and remedies properly
19 proposed in Superior Court. Likewise, no party disputes that the Commission does not have
20 jurisdiction to make a legally binding ruling in the interpretation of the contract itself. Instead, the
21 Intervenors are asking that the Commission consider the contractual law arguments, come to
22 conclusions, and then decide whether PWCo should be allowed to enter this agreement based upon
23 such considerations. But there is a substantial difference between noting the potential effect of such
24 an agreement on the public, and asserting jurisdiction over the underlying transaction itself.
25 Intervenors are asking the Commission to assert such authority by simply asking the Commission to
26 substitute the phrase "public interest" in place of "conclusions of law".

27 In this Application, the actions of PWCo are not being challenged. The actions of the District
28 are. By all accounts, PWCo has negotiated a beneficial arrangement. The District will risk its
investment first, and PWCo will risk its money second, if at all. As Staff has argued in its opening

1 brief, the evidence is clear that PWCo is requesting the indebtedness for a lawful purpose, and the
2 project is within the company's corporate power. The project is consistent with sound financial
3 practices, and the company can afford to pay any obligations that arise under the agreement. The
4 well-documented risks associated with deep well drilling that PWCo would normally assume are
5 greatly mitigated by the participation of the District. Thus, from the perspective of PWCo, this
6 arrangement could hardly be better. There is nothing in the record to support a denial of this
7 application.

8 Under these circumstances, the Commission is placed in the position of asserting that while
9 there is no evidence that PWCo is doing anything inappropriate, and to the contrary PWCo has
10 negotiated an excellent contract for its ratepayers, the Commission is nonetheless denying the
11 application. Why? Because the Commission believes the public must be protected from the actions
12 of the District. And no matter what reasoning the Commission asserted for the finding, the decision
13 would have the same effect as if the Commission asserted authority over the District's actions. From
14 the District's point of view, the Commission will have acted to prevent actions it has the lawful
15 authority to make, as an elected body, on behalf of its constituents. Under the instant circumstances,
16 such a position would be difficult for the Commission to defend.

17 The Intervenors have asked the Commission to invade the authority of the District in several
18 of the arguments presented in their post-hearing brief. Each of these arguments are outside of the
19 jurisdiction of the Commission.

20
21 **A. Article 9, Section 7**

22 The Intervenors assert that the Commission should deny the application because the "parties"
23 lack authority under the Arizona Constitution. In truth, it is only the District alleged to be acting
24 outside its authority, and that argument is misplaced. Intervenors assert that Article 9, Section 7 of
25 the Arizona Constitution prevents the District from entering into the contractual obligations of the K-
26 2 agreement. However, there is no dispute in this matter that the Pine Strawberry Water Improvement
27 District is, by definition, a tax levying improvement district. Therefore, under Article 13, Section 7
28

1 of the Arizona Constitution, the restrictions enumerated in Article 9, Section 7 do not apply.
2 Intervenor citations to the cases surrounding the transaction are simply inapplicable.

3 The fact is simple, the Commission must not usurp the authority of the District to make the
4 decisions it was elected to make, whether the Commission agrees with them or not. In this case, the
5 agreement is very good for the utility requesting permission to encumber its assets. There should be
6 no second-guessing of the prudence of the District, at the expense of the ratepayers of a regulated
7 utility. Those ratepayers deserve as much public interest scrutiny as the members of the District.

8 **B. Capacity To Contract**

9 The Intervenor also asserted that Commission should deny the Application because the
10 District lacks the capacity to contract, making the contract unconstitutional, and therefore
11 unenforceable. Again, these are arguments beyond the jurisdiction of the Commission. But to the
12 extent that they are considered in the name of public interest, the public interest is best served by
13 allowing PWCo to finally get more water.

14 **C. Authority Of The County Treasurer**

15 The Intervenor urge the Commission to deny the Application because the escrow
16 arrangement is an unlawful delegation of the power belonging exclusively to the County Treasurer.
17 The Intervenor go so far as to label this an "unlawful financial transaction". Again, the Commission
18 does not have jurisdiction over the delegation of power between government agencies. And to the
19 extent that this information is considered under the lens of public interest, there simply is no impact
20 upon the public.

21 **D. Conflict Of Interest**

22 Finally, the Intervenor suggest that there has been a conflict of interest in the dealings
23 between Mr. Brenninger and Mr. Richie. Again, conflict of interest is a contractual law issue not
24 properly before the Commission. And again, if this matter is considered by the Commission as an
25 element of the public interest, there is little or no impact.

26 All of the Intervenor's arguments regarding the actions of the District should be considered by
27 the Superior Court, not the Commission. If the Intervenor or the general public want to challenge
28 these aspects of the transaction, the Superior Court has the authority to hear these matters.

1 Intervenor are represented by counsel who is quite capable of representing the interests of his clients
2 within that forum. The Commission is simply not the proper forum for the hearing of these concerns.

3 In terms of public interest, each of these pieces has relatively little impact on the public
4 interest in general. When combined, the central issue is the effect on the public interest should the
5 Commission grant the application and the application be found invalid by a court having proper
6 jurisdiction. The answer is: there is no way to know. There are simply too many variables to the
7 manner in which that situation could arise. What the Commission does know right now is this: The
8 agreement provides for the drilling of a deep well with the capacity to double the entire currently-
9 existing production capacity of PWCO, at a time when summer is fast approaching. If the well
10 produces what all of the experts expect it to produce, this summer may be the first in recent history
11 without water charges and the associated complaints.

12 If the well is unsuccessful, Applicant will have lost little or nothing on behalf of its rate-
13 payers, and will still be financially able to consider another deep well project of its own, this time
14 armed with the additional information gained by the drilling of the K-2 project.

15 The K-2 agreement is a very low-risk, high-potential investment the Pine-Strawberry area
16 needs right now. Any arguments and concerns raised by the technicalities of the agreement itself pale
17 in comparison to the potentially huge benefits possible for the whole community.

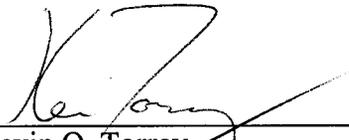
18 **II. THE BALANCE OF INTEREST WEIGHS IN FAVOR OF GRANTING THE** 19 **APPLICATION**

20 **A. Double Taxation**

21 The Intervenor have suggested that if taxes pay for the drilling of the well, and then the well
22 is later placed into rate base, the taxpayes will have "paid twice" for the same infrastructure. The
23 argument is factually flawed. If the well is successful, and is placed into rate base, that event triggers
24 the obligation of PWCo to give the District back its initial investment, at 6% interest. As Staff has
25 stated in its opening brief, a "double taxation" scenario does not and can not arise under the
26 agreement. The argument is simply misplaced.

1 hauling that are certain to arise this coming summer, if K-2 is not on line. The choice is clear. This
2 well agreement offers huge potential and very little risk to PWCo. The Application should be granted.

3 RESPECTFULLY SUBMITTED this 29th day of February, 2008.

4
5
6 By 
7 Kevin O. Torrey
8 Attorney, Legal Division
9 1200 West Washington
10 Phoenix, Arizona 85007
11 (602) 542-3402

12
13
14
15
16
17
18
19
20 ...
21 ...
22 ...
23 ...
24 ...
25 ...
26
27
28

1 Original and 13 copies of the foregoing
filed this 29th day of February, 2008, with:

2 Docket Control
3 Arizona Corporation Commission
1200 West Washington
4 Phoenix, Arizona 85007

5 Copy of the foregoing mailed this
3rd day of March, 2008, to:

6
7 Jay L. Shapiro
Patrick J. Black
8 Fennemore Craig, PC
3003 North Central Avenue, Suite 2600
9 Phoenix, Arizona 85012

10 William P. Sullivan
Curtis, Goodwin, Sullivan,
11 Udall & Schwab, P.L.C.
501 East Thomas Road
12 Phoenix, Arizona 85012-3205
Attorneys for Pine-Strawberry Water Improvement District

13 John G. Gliege
14 Gliege Law Offices, PLLC
P.O. Box 1388
15 Flagstaff, Arizona 86002-1388
Attorneys for Intervenors

16
17 
Ashley Hodge, Legal Assistant

18
19
20
21
22
23
24
25
26
27
28