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Arizona Corporation Commission

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BEFORE THE ARIZONA CORPORATION COMMISSION

7 IN THE MATTER OF THE FORMAL
8 COMPLAINT OF WESTCOR/
9 GOODYEAR, L.L.C. and GLOBE LAND
10 INVESTORS, L.L.C. AGAINST
11 LITCHFIELD PARK SERVICE COMPANY

DOCKET NO. SW-01428A-08-0234

LITCHFIELD PARK SERVICE
COMPANY'S REPLY IN SUPPORT OF
MOTION TO STAY AND REQUEST
FOR PROCEDURAL CONFERENCE

12 Litchfield Park Service Company ("Utility" or "LPSCo") hereby files its Reply In
13 Support of Motion to Stay and Request for Procedural Conference filed on May 29, 2008.
14 An order scheduling a Procedural Conference has already been issued. The Procedural
15 Conference will give the parties a chance to address the "emergency relief" the
16 Developers seek from this Commission. The extraordinary nature of Developers' request
17 for relief is readily apparent from their responsive filing, even if the specifics of
18 Developers' request are still sketchy.

19 It now appears that Developers are requesting that the Commission issue some sort
20 of preliminary, quasi-injunctive relief requiring Utility to unconditionally commit to
21 providing wastewater utility service to Developers' proposed regional shopping mall
22 project by executing the proffered form of will-serve letter and LXA. Developers'
23 Response to Motion for Stay ("Response") at 2. Developers' request ignores the fact that
24 LPSCo does not currently have adequate wastewater treatment capacity to extend service
25 to the proposed mall. Issuance of a will-serve letter and LXA will not make additional
26

1 capacity suddenly appear. Capacity still has to be built. The dispute is over how much
2 Developers have to fund and contribute to put that capacity in place.

3 In sum, without a ruling on the merits of their claims, Developers want a
4 preliminary order directing Utility to invest millions of dollars to build capacity and
5 extend service to their mall. This is truly "extraordinary."

6 DISCUSSION

7 **A. Developers Must Make A Substantial Showing To Obtain** 8 **Extraordinary Relief.**

9 If Developers are to obtain extraordinary relief before a decision on the merits,
10 Developers should be held to a standard comparable to that required to obtain preliminary
11 injunctive relief. In Arizona, it has been held that "the party seeking a preliminary
12 injunction is obligated to establish four traditional equitable criteria:

- 13 1) A strong likelihood that he will succeed at trial on the merits;
- 14 2) The possibility of irreparable injury to him not remediable by damages if the
15 requested relief is not granted;
- 16 3) A balance of hardships favors himself; and
- 17 4) Public policy favors the injunction.

18 *E.g., Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (Ariz. Ct. App. 1990).

19 Even assuming Developers could make the extraordinary showing required,
20 Developers should also be required to provide adequate security to protect Utility from being
21 wrongfully enjoined. *See* Ariz. R. Civ. P. 65(e). This would require Developers to post
22 security in an amount equal to the total cost of the capacity needed for Utility to build
23 capacity sufficient to extend service, plus carrying costs thereof, not just the lesser amount
24 Developers think they owe for such capacity. *See* Response at 3-4. Of course, unless the
25 security can be used to pay the actual cost of the necessary plant expansion, an idea
26 Developers find "unacceptable", the Commission would still be ordering LPSCo to invest

1 millions of dollars for plant to serve a new regional shopping mall before any tribunal had
2 issued a ruling on the merits of Developers' claims.

3 **B. It Is Developers, Not Utility, That Must Mitigate Their Damages.**

4 Developers contend that extraordinary relief is warranted because LPSCo needs to
5 mitigate the amount of damages it might have to pay. Response at 2. This presumptuous
6 assertion is truly remarkable. "A basic principle of the law of damages is that one who
7 claims to have been injured by a breach of contract must use reasonable means to avoid or
8 minimize the damages resulting from the breach." *West Pinal Family Health Ctr., Inc. v.*
9 *McBryde*, 162 Ariz. 546, 548, 785 P.2d 66, 68 (Ariz. Ct. App. 1989). LPSCo does not
10 have a duty to mitigate Developers' damages; Developers have the duty to mitigate their
11 damages. Mitigation means that the non-breaching party takes reasonable steps to avoid
12 the consequences of known injuries, it does not mean that a defendant is required to
13 provide the exact relief the plaintiff is seeking. *N. Ariz. Gas service, Inc. v. Petrolane*
14 *Transport, Inc.*, 145 Ariz. 467, 477, 702 P.2d 696, 706 (Ariz. Ct. App. 1984). There is
15 simply no basis for LPSCo to be ordered to mitigate Developers' damages by investing
16 tens of millions of dollars to speculatively build treatment capacity to serve Developers'
17 proposed new regional shopping center.¹

18 In contrast, if Developers have placed themselves in a position where prospective
19 tenants are relying on them (*see* Emergency Motion at 6, ¶ 18), Developers should act to
20 mitigate their damages. One way to mitigate would be to advance the funds required for
21 actual cost of the additional capacity under a non-waiver agreement. Developers refuse to
22 do this because they purport a fear that LPSCo will declare bankruptcy rather than comply
23 with an order to make a refund Response at 4. Developers don't explain how LPSCo can
24

25 ¹ In fact, as noted in Utility's motion, Developers have already waived a claim of damages
26 due to delay. *See* Commercial Agreement at § IV.C.

1 now afford to pay for the capacity Developers need, but not afford the refund that might
2 someday come due. Nor do Developers have any legitimate basis to believe that LPSCO
3 will ignore an order of the Commission to increase its rate base by refunding several
4 million dollars to the Developers.

5 **C. A Stay Is Still Warranted To Avoid Inconsistent Rulings**

6 LPSCO's rationale for the requested stay was simple—wait a short while for the
7 Superior Court to decide whether it will exercise jurisdiction. Developers have already
8 responded and sought an expedited ruling by the Court. It won't take long and it would
9 clearly aid the parties and the Commission to know what relief the court will consider.
10 Moreover, given the extraordinary relief Developers seek from the Commission, any risk
11 of inconsistent decisions must be protected against, and the risk here is plain.

12 As discussed in Utility's motion, the Commission and Civil Complaints are
13 virtually identical. Both complaints ask that the tribunal (i.e., the Commission and the
14 Court) force LPSCO to provide sewer service on terms and conditions specified by
15 Developers. Complaint at ¶¶ 7, 26; ACC Complaint at ¶¶ 8, 40. A comparison of the
16 requests for relief in both complaints demonstrates the overlapping utility issues at stake:

17 **ACC Complaint:** Plaintiffs seek an order “requiring LPSCO to provide the
18 necessary wastewater treatment capacity to Estrella Falls in exchange for the
Phase II capacity payment.” ACC Complaint, p. 13.

19 **Civil Complaint:** Plaintiffs seek a ruling “ordering that LPSCO specifically
20 perform its obligations under the 2001 Commercial Agreement by providing
21 wastewater treatment in return for Westcor/Globe's payment of the required
facilities advanced in the amount of \$2,538,760...” Civil Complaint, p. 9.

22 By way of further illustration, in the Civil Complaint Developers ask the Court to
23 decide whether there is available capacity in LPSCO's Palm Valley facility, and whether
24 Plaintiffs have a priority right to existing treatment capacity. Civil Complaint at pp. 9-10.
25 Developers also seek an order from the Court that they have contractually reserved
26

1 capacity in the Palm Valley plant, giving them a priority over all other users.² *Id.* They
2 also seek a ruling by the Court limiting Developers' payment obligations to \$2,538,000.
3 *Id.* Meanwhile, Developers seek an expedited order from the Commission that Utility
4 extend service with capacity built at its own expense, and/or, with existing capacity used
5 to serve existing customers because Developers believe they have reserved such capacity.

6 It is astonishing that Developers see no risk of inconsistent decisions. Under the
7 circumstances they have created, the risk of inconsistent and contradictory rulings by the
8 Court and the Commission is significant. If the Court were to make any rulings on the
9 Civil Complaint that are inconsistent with the Commission, Utility would run the risk of
10 violating Commission rules, mandates and policies relating to utility service, or an order
11 of the Court. This hardly fosters due process or promotes a decision that furthers the
12 public interest.

13 CONCLUSION

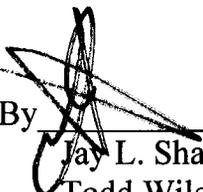
14 In their conclusion, Developers find it "simply amazing" that Utility does not find
15 their offer "generous." *See* Response at 5. Developers refer to their offer to post security
16 in an unknown amount while Utility invests several million dollars building treatment
17 capacity to serve Developer's proposed regional shopping "power center." The Utility's
18 reward for accepting Developers' generosity—protracted litigation on multiple fronts to
19 defend Developers' attempt to reduce their monetary contribution to the lowest possible
20 number. Developers are correct—Utility does not find this offer generous, particularly
21 given Developers' refusal to mitigate their own damages as required.

22
23 ² ACC Staff recently testified in a hearing for issuance of a CC&N to Perkins Mountain
24 Utility Company and Perkins Mountain Water Company that "Staff does not believe that
25 water companies should actually reserve capacity for any of the developers." *See*
26 Excerpts from Testimony of Assistant Director of Utilities Steve Olea, Hearing
Transcript, May 8, 2008, ACC Docket No. SW-20379A-05-0489 (attached hereto as
Attachment 1).

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RESPECTFULLY SUBMITTED this 12th day of June, 2008.

FENNEMORE CRAIG, P.C.

By  _____

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2073056.1/60199.010

Attachment 1

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BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE APPLICATION OF)
PERKINS MOUNTAIN UTILITY COMPANY FOR) DOCKET NO.
A CERTIFICATE OF CONVENIENCE AND) SW-20379A-05-0489
NECESSITY.)
IN THE MATTER OF THE APPLICATION OF) DOCKET NO.
PERKINS MOUNTAIN WATER COMPANY FOR A) W-20380A-05-0490
CERTIFICATE OF CONVENIENCE AND) AMENDED
NECESSITY.) APPLICATION

At: Phoenix, Arizona

Date: May 8, 2008

Filed:

REPORTER'S TRANSCRIPT OF PROCEEDINGS
VOLUME IX
(Pages 1616 through 1784, inclusive.)

ARIZONA REPORTING SERVICE, INC.
Court Reporting
Suite 502
2200 North Central Avenue
Phoenix, Arizona 85004-1481

Prepared for: By: COLETTE E. ROSS
Certified Reporter
Certificate No. 50658

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1 cases.
2 Q. And I think you have before you what has been
3 marked as Staff Exhibit CS-1 and CS-2.
4 A. Yes.
5 Q. And could you identify those for the record.
6 A. CS-1 is the amended Staff report that was filed
7 March 28th. The originator of that report was Blessing
8 Chukwu. And the April 28th report is a further
9 amendment to the Staff report that was filed April 28th.
10 And I believe Blessing -- no. That was actually done by
11 Blessing but it was docketed and it was finalized by
12 myself and Ms. Crystal Brown.
13 Q. And would you, I know you did not prepare the
14 Exhibit CS-1, but would you adopt that as your sworn
15 testimony today?
16 A. Yes, I do.
17 Q. And with respect to CS-2, would you also adopt
18 that as your sworn testimony today?
19 A. Yes.
20 Q. And --
21 ACALJ NODES: Could I ask a quick question?
22 MS. MITCHELL: Sure.
23 ACALJ NODES: Mr. Olea, the CS-1 exhibit that
24 you have before you appears to be significantly larger
25 than the one that I have. Is that because there are a

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1 lot of data requests or responses attached to it?
2 THE WITNESS: Not having looked at this in
3 awhile, it is my understanding there are a lot of data
4 requests and responses attached. There are also
5 newspaper articles. It is, I guess, about a quarter of
6 an inch is the actual report and the rest of it is
7 attachments.
8 ACALJ NODES: And let me ask your counsel.
9 Is it Staff's intent that the entirety of that
10 document six inches or so high, including all those data
11 responses, are to be considered to be part of
12 Exhibit CS-1?
13 MS. MITCHELL: Yes, Your Honor, because within
14 the body of the Staff report there are some references
15 made to the various attachments. So it would be a
16 little difficult, you know, if someone reading just the
17 Staff report and it says see exhibit -- I mean
18 Attachment F, if there is no Attachment F it may not
19 flow very well.
20 ACALJ NODES: Okay. Well --
21 MS. MITCHELL: Did Your Honor not get a copy?
22 ACALJ NODES: No, I have them all. But they
23 all, my understanding is all the data responses came in
24 kind of piecemeal. At least that's the way I received
25 them. And I didn't understand that these, that they

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1 were part of the Staff report. So maybe, unless this is
2 what you docketed as part of the Staff report, I don't
3 have the entirety of it.
4 THE WITNESS: My understanding is this is what
5 we docketed, this package like this.
6 ACALJ NODES: Oh, okay. Well, I guess I don't
7 have it then. So I will -- I guess if you want to give
8 me the remainder of -- looks like what I have is, you
9 know, I think what Mr. Olea was referring to as the top
10 part of it.
11 MS. MITCHELL: We are going to have you some
12 copies made right now.
13 ACALJ NODES: The court reporter is going to
14 have that copy.
15 Mr. Crockett, do you have the full document such
16 as looks like what is here?
17 MR. CROCKETT: Yes, Your Honor, we do. I
18 believe it was about a thousand pages in length. And we
19 have the entire copy that was docketed.
20 ACALJ NODES: Never mind. I have it. I
21 apologize. It was in my box. Sorry about that.
22 MS. MITCHELL: Oh, no, that's okay. We are more
23 than happy to get you another copy if you need it.
24 ACALJ NODES: No, no, no. I don't want that to
25 happen. Sorry about that. Go ahead, please.

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1 BY MS. MITCHELL:
2 Q. Do you have any additions, corrections or
3 changes to make to the two exhibits, the two Staff
4 reports?
5 A. Not that I know of at this point.
6 MS. MITCHELL: Your Honor, I would like to move
7 for the admission of Staff Exhibit CS-1 and CS-2.
8 ACALJ NODES: Any objections?
9 MR. CROCKETT: No, Your Honor.
10 ACALJ NODES: All right. CS-1 and CS-2 are
11 admitted.
12 BY MS. MITCHELL:
13 Q. Mr. Olea, having heard all the testimony and
14 reviewed the applications in this matter, are you
15 satisfied that the applicants are capable of providing
16 service to the requested extension areas?
17 A. Yes.
18 Q. And in your opinion, does the granting of this
19 CC&N application for Perkins Mountain and Perkins
20 Mountain Utility serve the public interest?
21 A. Yes.
22 Q. Now, there was some questions -- you were in the
23 hearing room this morning when Commissioner Mayes was on
24 the line?
25 A. Yes, I was.

<p style="text-align: right;">Page 1725</p> <p>1 Q. And I believe she asked some questions if Staff 2 could provide a review of what is known as the best 3 management practices and compare them to what has been 4 proposed by the company and determine if there are any 5 of the other best management practices that may also be 6 appropriate to be added to what the company has 7 proposed. Do you remember that question? 8 A. Yes, I heard that. 9 Q. And I think you have in front of you a document 10 that has been issued by the Arizona Department of Water 11 Resources. And it is entitled order of adoption. And 12 within that, is that what we have been commonly 13 referring to as the best management practices? 14 A. Well, the actual best management practices that 15 have been referred to is part of that document. And if 16 you go to the very last appendix, let me find the first 17 page of that, the page number on the very bottom is 18 5-52. And it is Appendix 5-N. And the title of that 19 appendix is modified non-per capita conservation 20 program, water conservation measures, Phoenix active 21 management area. 22 That is a list of the actual BMPs. The piece of 23 the document before that is the order that adopts that. 24 And it also includes the, I believe it includes the 25 statute and the report that was put together by the task</p>	<p style="text-align: right;">Page 1727</p> <p>1 category 1, which are local and/or regional messaging 2 programs, special events programs and community 3 presentations, market surveys to identify information 4 needs, slash, assess success of messages. 5 And if you go to category 2, they could probably 6 implement all those or one or more of all these. And 7 one would be, the first is the adult education and 8 training programs. Next is youth conservation education 9 program, new homeowner landscape information, xeriscape 10 demonstration garden, distribution plan for water 11 conservation materials. 12 And if you go to category 3, they could 13 implement the residential audit program, the landscape 14 consultations and the water budgeting program. 15 And not the next two, but if you go to 16 page 5-57, part of that same category would be customer 17 high water use inquiry resolution, customer high water 18 use notification and water waste investigations and 19 information. 20 In category 4, they could implement the leak 21 detection program, the meter repair and/or replacement 22 program, the comprehensive water system audit program. 23 And the fifth category, they could probably, 24 they could probably implement that entire category. 25 Category 6 I believe would not really apply to</p>
<p style="text-align: right;">Page 1726</p> <p>1 force. It is actually, it is actually a redline 2 version. Once these are, once these are finally 3 adopted, a new version will be put out that is not 4 redlined but will just be the actual correct version. 5 Q. And have you had a chance to look at those and 6 compare them to what the company has proposed to 7 determine if there are any of the items that are listed 8 in that Appendix 5-N that perhaps may be appropriate for 9 the company to adopt? 10 A. Okay. I have looked through what I am going to 11 refer to as BMPs instead of that big long title. And I 12 have not really compared them to what the company has 13 offered. But I did highlight the ones that I believe 14 can be implemented by the company that they could choose 15 from. And I can just go through that and I can tell you 16 which ones those are that I highlighted that could be 17 implemented by this company. Because as was testified 18 to by Mr. Ray Jones, there is a lot of these that are 19 set up for existing companies and not new ones. So if I 20 could, I will just go through those and I will read 21 those off that I have highlighted. 22 Q. Why, certainly. 23 A. If you go to page 5-53 of that, it is called 24 category 1. And I believe that the company could; if 25 they wanted to, implement the three items that are under</p>	<p style="text-align: right;">Page 1728</p> <p>1 them because they are a new system. 2 And category 7, they could probably do that 3 category also. 4 Q. And what page is category 7 on? I am sorry. 5 A. Category 7 is page 5-62. 6 Q. Okay. And do you have up there the company's 7 Exhibit CA-5? 8 A. Yes. 9 Q. Could you turn to page 2. 10 A. Yes. 11 Q. And it is the number 3. I think that 12 corresponds to the best management practices. 13 A. Okay, yes. 14 Q. And I believe some of the things that you read 15 are contained within this section. Can you confirm 16 that? 17 A. Yes, that's correct. 18 Q. Okay. I want to turn to, and I don't know if 19 you have up there, I wanted to get your opinion on some 20 aspects of the stock purchase agreement. 21 A. Okay. I have a copy of that. 22 Q. Okay. If you could turn to, we have already had 23 some discussion on the record on this, if you could turn 24 to section, I think it is, 5.8. 25 A. Yes.</p>

<p style="text-align: right;">Page 1729</p> <p>1 Q. And within that Section 5.8 there are various 2 covenants of some things that Utilities, Inc. said that 3 they would covenant that they wouldn't do. Have you had 4 a chance to review that section? 5 A. Yes. 6 Q. Does Staff have any opinion on some of the 7 covenants contained in that section? 8 A. On the very first one, 5.8.1, I believe you 9 asked, I don't know which witness for the company it 10 was, but you asked him a hypothetical if they had built 11 production and storage capacity such that they could 12 serve 3,000 connections and if the development for 13 Rhodes properties was going slow and at one point they 14 had 500 connections out of the 3,000 they could serve, 15 and at that point some new developer came on line that 16 was not associated with Rhodes and wanted to put in, I 17 think you said, a 300 lot subdivision, other than for 18 the distribution mains in the street, that would be part 19 of a normal main extension agreement, what else could 20 they charge that new developer for. And I can't recall 21 exactly what the company's answer was. 22 But in Staff's opinion, at that point, they 23 should not be able to charge that new developer for 24 wells and storage tanks. Staff does not believe that 25 water companies should actually reserve capacity for any</p>	<p style="text-align: right;">Page 1731</p> <p>1 ride on the wells and tank. Unfortunately that's just 2 the way R-14-2-406 is set up. That's how that rule is 3 set. And if you are that developer that comes in at the 4 right time, you get a free ride. 5 The way around that is that, once a development 6 has actually started and you have a fully functioning 7 and operating water company, at some point in the future 8 that company could come in and get a hookup fee tariff. 9 At that point, there will be no free riders, because 10 every new development that comes along, whether this 11 company at capacity or any company is at capacity or 12 not, every new development from that point on will pay 13 the hookup fee. And the hookup fee will pay for a 14 portion of the wells and tanks and the company will have 15 to pick up the other portion, because you always want 16 companies to invest some of their own money. You don't 17 want to end up ten, 15, 20 years from now with a company 18 that has no rate base because everything was done with 19 advances or contribution. 20 That's how -- there is a lot. You know, I could 21 talk about this for another half hour, but that's about 22 how that works. 23 ACALJ NODES: Let me ask something to follow up 24 on that. 25 You singled out the wells and the storage tanks</p>
<p style="text-align: right;">Page 1730</p> <p>1 of the developers. 2 Now, it is true that that initial developer, 3 Mr. Rhodes, would have paid for wells and storage tanks 4 for 3,000 connections. They, the company, cannot charge 5 Mr. Rhodes again for any more of those 3,000 6 connections. 7 The way that it would work is, as the system was 8 built out and once they got to the point where they were 9 at capacity that included Mr. Rhodes' homes and this new 10 developer's homes, at that point the company would have 11 to install additional well or storage capacity on its 12 own to meet the capacity that it needed at that time. 13 If at that, if at that particular point in time they 14 just happen to have a new developer come on line, at 15 that point, since they are at capacity, they could 16 charge that new developer for whatever he needs as far 17 as wells and tanks and charge him for his portion of 18 that. 19 And there is a lot more that goes into that but 20 basically that's how Staff sees things working as you 21 are growing and adding capacity on any system. 22 Something that could happen in the future that 23 helps get around that issue of who pays for what and 24 there is some developers that come on line, that if they 25 come in at the right time, they basically get a free</p>	<p style="text-align: right;">Page 1732</p> <p>1 as potential items on which there might be a free 2 ride -- 3 THE WITNESS: Correct. 4 ACALJ NODES: -- for a subsequent developer. 5 What about, let's say there was a water main from the 6 well running through Mr. Rhodes' development to the 7 outside the new developer, does the new developer get a 8 free ride on the mains as well? 9 THE WITNESS: Okay. And there is -- and the 10 reason I singled out the wells and the tanks, because 11 those are the easy ones. When it comes to transmission, 12 even the way that the template for the hookup fees is 13 written by Staff, transmission are mains. And they are 14 mains just because if it is the transmission that comes 15 from the well or a tank into the system, and I 16 believe -- I don't know what company witness. 17 Basically how this system is going to be 18 designed is the wells and tanks are put in such a 19 location that the system is going to function by 20 gravity. So all the water is going to come to the 21 entire system from their storage area. That main that 22 goes from the storage area to the system would be part 23 of the backbone plant that could be paid for by hookup 24 fees and would not normally be a piece of the main 25 extension because the main extension agreement is</p>

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1 strictly the mains in the street.
2 If that, once that main is built that takes it
3 from the storage tank to the system and that main is in,
4 future developers shouldn't have to pay for that because
5 it is already in. There is nothing that needs to be
6 paid for unless it is through a hookup fee tariff. So
7 that's why I purposely left out transmission, because
8 those are actually a gray area. Sometimes they are in
9 and sometimes they are not.
10 ACALJ NODES: What, asking for your nonlegal
11 opinion, this particular provision that you have
12 referred to, 5.8.1, given Staff's view as you have just
13 expressed it, what happens -- first of all, have you
14 seen any similar provisions such as this before?
15 THE WITNESS: Not in writing per se in any
16 agreement. But there have been many water companies
17 where complaints have been filed by a certain developer
18 that receives a main extension agreement that has in it
19 a price for wells and storage tanks and that certain
20 developer knew this company had capacity to serve him.
21 They would bring that complaint to us and we would tell
22 the parties just what I told you right now.
23 And so water companies have tried to make
24 developers pay for capacity that they already had, and
25 they do that because they have the understanding that a

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1 previous developer had paid for this plant but that
2 previous development didn't take off quite as fast as
3 they thought. So they were reserving that capacity for
4 the first developer. And we basically tell the water
5 company you can't reserve capacity, you have to use it
6 as you have it, and if you have it, you can't charge
7 somebody for it because you already have it. Once you
8 get to capacity, then at that point it is up to the
9 water company to do what it needs to do to put in more
10 plant.
11 ACALJ NODES: Is it the case that, given that
12 this is a stock purchase and utility services agreement,
13 is it the case that Staff and/or the Commission would
14 not necessarily see the document such as this, like an
15 agreement, if it is purely a stock purchase? That's not
16 something that the Commission typically approves, is
17 that right?
18 THE WITNESS: It is, it is my understanding that
19 yes, that's correct, that this Commission does not
20 normally approve stock purchase agreements. I don't
21 think I have ever seen an actual stock purchase
22 agreement myself until this one.
23 ACALJ NODES: Right. And I don't think they are
24 asking for approval of this. But is that a possible
25 reason why you would not have seen a provision such as

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1 this in writing, because, although this probably goes
2 more to the operational agreement than the stock
3 purchase, but given that we don't typically see or
4 approve stock purchase agreements, is it possible that
5 other agreements such as this exist but we just simply
6 would not be aware of them?
7 THE WITNESS: Oh, sure, yes.
8 ACALJ NODES: So Staff's view of this, you are
9 just expressing your concern, I guess, kind of on the
10 front end that you are giving kind of advice to the
11 company here that Staff views it differently, this
12 particular provision. And you are just trying to make
13 it clear to the company that if this hypothetical
14 situation were to arise, you just want them, you want to
15 make clear that the Commission's rules provide
16 differently than this could be interpreted. I am not
17 trying to put words in your mouth but is that
18 basically --
19 THE WITNESS: No, and that's exactly it. And
20 with this entire agreement, when Staff first got the
21 agreement we tried to make it clear to the water utility
22 that the Commission was not going to be bound by
23 anything in this agreement. And we tried to, as much we
24 could, point out those portions that we believe could be
25 a problem later on if, you know, if they, you know, just

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1 say three or four years from now they come in with a
2 main extension agreement that involves a different
3 developer other than Rhodes and in that main extension
4 agreement there is this provision in there, and at that
5 point Staff says we can't agree with that provision in
6 there, as much as we could we tried to, so that the
7 company wouldn't come back later and say, well, that was
8 in our stock purchase agreement and you didn't say
9 anything then.
10 ACALJ NODES: Right.
11 THE WITNESS: We tried as much we could to point
12 out that piece of the agreement so there would be as
13 little misunderstanding in the future as possible.
14 ACALJ NODES: Given that there is no subsequent
15 developer at this point, you are not really, no one is
16 being called on to make that decision, but you are just
17 trying to provide kind of an advisory recommendation to
18 the company?
19 THE WITNESS: Exactly.
20 ACALJ NODES: Okay. I am sorry.
21 MS. MITCHELL: No, that's okay. You asked a lot
22 of my follow-up questions. So you saved me a little
23 time.
24 ACALJ NODES: Oh, okay.
25 THE WITNESS: And I was wondering if you wanted

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1 me to continue with the other ones and make comments on
2 those.
3 BY MS. MITCHELL:
4 Q. Yes, please.
5 A. 5.8.2 is the same as point 1 except it is for
6 wastewater.
7 And then on 5.8.3, it says that Perkins will not
8 propose or request a hookup fee. And, again, this was
9 one of those, those provisions that I think somewhere in
10 one of the Staff reports that we wrote we said it had
11 some questions as to where it seemed that the seller was
12 having some kind of decision making authority over the
13 utility. And this is in 5.8.3, 5.8.4. And 5.8.5 kind
14 of seemed like that.
15 We weren't sure exactly why this was in here,
16 but to us it was put in by the seller to give him some
17 kind of authority. Maybe it was put in by the buyer to
18 give them what they thought was some kind of protection.
19 Again, we pointed those out to the utility, to
20 the company to say that sometime in the future they
21 might want to propose a hookup fee or they might want to
22 propose some kind of rate decrease or they might want to
23 apply for, you know, some kind of designation of
24 adequate water supply from the Arizona Department of
25 Water Resources.

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1 Q. And, you know, going back a little earlier in
2 the agreement, on page 7, there is a 3.3.2.7. The last
3 sentence says that buyer agrees it will not cause PMUC
4 to increase the tariff rates for effluent for ten years.
5 And that's something that Staff would not have to be
6 bound by should they come in for a rate case, am I
7 correct?
8 A. Staff nor the Commission.
9 Q. Is there anything else you wish to add? I think
10 I am about finished with my questions.
11 A. Just the one thing that I would add in general
12 again is that, you know, to make sure that both the
13 buyer and the seller and the stock purchase agreement,
14 you know, that they realize that there is nothing in
15 that that will bind the Staff of the Commission nor the
16 Commission itself, and if there is certain portions of
17 it that if the Commission issues some order later that
18 is exactly opposite of what, of what is in this
19 agreement, then that's what the utility has to follow.
20 MS. MITCHELL: All right. Thank you.
21 I don't think I moved for the admission of
22 Exhibit CA-3, which was commonly referred to as the
23 order and the best management practices, but I would
24 like to, since Mr. Olea read form it, move for its
25 admission.

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1 ACALJ NODES: CS-3?
2 MS. MITCHELL: CS-3.
3 ACALJ NODES: Any objection?
4 MR. CROCKETT: No objection, Your Honor.
5 ACALJ NODES: All right. CS-3 is admitted.
6
7 EXAMINATION
8 BY ACALJ NODES:
9 Q. Mr. Olea, would it be fair to say that Staff, I
10 guessing lack of a better word, frowns on companies,
11 developers somehow telling regulated utility companies
12 what they can or cannot do if it draws into play a
13 condition, rule or regulation?
14 A. I would say that Staff agrees with that
15 statement, yes.
16 Q. Okay. And that's kind of what this is going to,
17 even though they may have reached an arm's length
18 negotiated agreement, to the extent that any of the
19 provisions -- well, obviously the whole agreement
20 Commission or Staff is not bound by. I mean you have
21 made that clear. But to the extent they have negotiated
22 specific provisions that may invoke a subsequent, that
23 are found to be contrary to Commission rules or
24 regulations, Commission rules and regulations control
25 the actions of the utility company, not some other

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1 private agreement?
2 A. That's correct.
3 Q. Okay. So to the extent that there is some
4 conflict between the Commission's rules and a privately
5 negotiated agreement between a regulated utility and
6 some other entity, the Commission's regulations control
7 the actions of the regulated utility company?
8 A. And that is Staff's opinion, yes.
9 ACALJ NODES: Okay. Mr. Crockett?
10 MR. CROCKETT: Thank you, Your Honor. A few
11 questions, if I might.
12
13 CROSS-EXAMINATION
14 BY MR. CROCKETT:
15 Q. Good afternoon, Mr. Olea.
16 A. Good afternoon.
17 Q. Mr. Olea, have you attended the prior hearing
18 days in this case?
19 A. I was here for most of them, yes.
20 Q. And also have you attended one or more meetings
21 with the applicants in this case, the utility companies?
22 A. Yes.
23 Q. With regard to the questions that Judge Nodes
24 just asked you, has anyone from Utilities, Inc., Perkins
25 Mountain Water or Perkins Mountain Utility indicated to