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December 19, 2008

Jane Rodda, Esq
Administrative Law Judge
Arizona Corporation Commission
402 West Congress
Tucson, Arizona 85701

**Re: Coronado Utilities: Rehearing Proceeding in
Docket Nos: SW-04305A-05-0086, SW-04305A-05-0087**

Public Comment of BHP Copper, Inc.

Dear Judge Rodda:

BHP Copper, Inc. (BHP) respectfully submits public comment on certain issues set forth in the November 19, 2008 procedural order in the above dockets. BHP is not a party to this docket. By submitting these public comments, BHP is not requesting intervention in these dockets or consenting to Commission jurisdiction over BHP. Rather, BHP provides this public comment in the hope that it may be useful to the Commission as it evaluates these issues.

At the outset, BHP understands the difficult circumstances facing San Manuel. As noted in BHP's October 8, 2008 letter in this docket, BHP continues to support the San Manuel community, just as it has done for many years.

The first issue in the procedural order concerns the Commission's jurisdiction to make a determination as to whether BHP is or was a public service corporation. BHP submits that the Commission does not have jurisdiction over BHP. BHP does not hold, and has never held, a certificate of convenience and necessity. Moreover, the Arizona Constitution gives the Commission jurisdiction over public service corporations. Public service corporations are defined as "All corporations other than municipal... engaged in collecting, transporting, treating, purifying and disposing of sewage through a system, for profit." Arizona Const. Art. XV § 2. BHP does not operate a sewage system; by definition it cannot be a public service corporation. In other words, BHP is not presently a public service corporation, and thus the Commission cannot exercise jurisdiction over BHP, even to determine its past status. *See Williams v. Arizona Corporation Commission*, 102 Ariz. 382 383, 430 P.2d 144, 145 (1967); Ariz. Atty. Gen'l Op. I77-150 (July 18, 1977). To do so would improperly presume the truth of what is to be determined. *See id.*

ROSHKA DEWULF & PATTEN

Jane Rodda, Esq.
December 19, 2008
Page 2

The second issue raised in the procedural order concerns what action the Commission must take to make a determination that BHP was a public service corporation. Unless BHP voluntarily submits to the jurisdiction of the Commission, the Commission would need to seek a determination from the courts as to whether BHP is or was a public service corporation. See *Williams v. Arizona Corporation Commission, supra*; see also *Williams v. State ex rel. Smith*, 2 Ariz. App. 291, 408 P.2d 224 (1965); *Visco v. State ex rel. Pickrell*, 95 Ariz. 154, 388 P.2d 155 ((1963)). However, such an action would likely be futile, because even if the Commission could prove that BHP was a public service corporation, no provision of law allows the Commission to exercise authority over former public service corporations. Regardless, even when BHP did own and operate a sewage system in the past, it did not operate that system "for profit" and did not make a profit from the sewage system. Thus, under the Arizona Constitution, BHP was not a public service corporation in the past when it owned the sewage system. Finally, given the circumstances here, the Commission would be estopped from arguing that BHP is or was a public service corporation. See *Freightways, Inc. v. Arizona Corporation Commission*, 129 Ariz. 245, 630 P.2d 541 (1981).

BHP does not take a position on the remaining issues set forth in the procedural order. Those issues are best addressed by the entity that owns and operates the San Manuel wastewater system. However, BHP believes Decision No. 68608 reached the proper result and should not be modified through the rehearing process.

Respectfully



Michael W. Patten
Attorney for BHP Copper, Inc.

MWP:mi

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