

ORIGINAL

REHEARING MAR 1 8 2009



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BEFORE THE ARIZONA CORPORATION COMMISSION  
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COMMISSIONERS

AZ CORP COMMISSION  
DOCKET CONTROL

Arizona Corporation Commission  
DOCKETED

- KRISTIN K. MAYES, Chairman
- GARY PIERCE
- PAUL NEWMAN
- SANDRA D. KENNEDY
- BOB STUMP

FEB 26 2009

DOCKETED BY *MS*

IN THE MATTER OF THE  
APPLICATION OF WICKENBURG  
RANCH WATER, LLC, AN ARIZONA  
LIMITED LIABILITY COMPANY  
(FORMERLY CDC WICKENBURG  
WATER, LLC), FOR A RATE  
ADJUSTMENT

Docket No. W-03994A-07-0657

**APPLICATION FOR REHEARING**

**I. PRELIMINARY STATEMENT**

For more than a year, Wickenburg Ranch Water, LLC ("Company") worked through the Arizona Corporation Commission's ("Commission") regulatory process to adjust its water rates. During that time, the Company cooperated with Commission Staff at every turn. But not until the day of the Commission hearing on February 3, 2009 did anyone even mention the idea of requiring Company to adopt certain management practices or require the customers, as a condition of service, to fully xeriscape yards and install rainwater catchment systems. Notwithstanding the Company's position, the Commission adopted these requirements.

Since the hearing, the Company has learned that by development build-out the water catchment systems alone will cost its customers cumulatively at least \$14,000,000. These systems will intercept approximately 138 acre-feet of water per year before it reaches the Hassayampa River, riparian areas, and downstream users. Requiring the

1 Company and its customers to implement such an extensive water catchment program  
2 will assuredly land the Company, its customers, and the Commission in superior court  
3 litigating over the rights and responsibilities that accompany water catchment systems  
4 and the legal authority of the Commission to impose these conditions.

5 In an effort to avoid this predictable fate, the Company is filing this Application  
6 for Rehearing (“Application”) so the Commission has an opportunity to correct the errors  
7 in Order and Opinion, Decision No. 70741 (“Order”). These errors primarily relate to  
8 the amendments concerning proposed water catchment systems, xeriscape landscaping,  
9 and conservation requirements referred to in the hearing and Order as “best management  
10 practices”. These amendments go beyond the legal framework and reasonableness by  
11 which the Commission and Company can operate. As the Company has demonstrated, it  
12 is willing to work with the Commission to the extent it reasonably can do so. However,  
13 the Company cannot agree to cause undue burden to its customers that is not prevalent in  
14 the market area, are not applied to competing water providers, and not required by the  
15 other local jurisdictions. The Company cannot in good faith operate under the Order  
16 knowing that the provisions mentioned above are unlawful, onerous, and unreasonable.

## 17 **II. PURPOSE OF REHEARING**

18 Any party adversely affected by a Commission order must apply to the  
19 Commission for a rehearing to vacate or amend the order before seeking superior court  
20 review. A.R.S. § 40-253(A); *State ex rel. Church v. Arizona Corp. Com'n*, 94 Ariz. 107,  
21 382 P.2d 222 (1963); A.A.C. Rule 14-3-111. The purpose of this rehearing requirement is  
22 to give the Commission the opportunity to correct any errors before a party seeks judicial  
23 relief. *Save Our Valley Ass'n v. Arizona Corp. Com'n*, 216 Ariz. 216, 165 P.3d 194 (App.  
24 Div.1, 2007). The applicant may seek reconsideration of a decision on the grounds that  
25 findings, rules, practices, acts, demands, or services ordered are unlawful or  
26 unreasonable. *See* A.R.S. § 40-254.

27 The Company is requesting that the Commission rehear the case and amend the  
28 order by deleting the following provisions:

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- **Page 8, ¶ 18.** Although Wickenburg Ranch is located outside an Active Management Area, it should nonetheless be required to comply with some of the conservation goals and management practices of the Arizona Department of Water Resources (“ADWR”). We will require Wickenburg Ranch to implement, within 90 days of the effective date of this Decision, at least 10 Best Management Practices (“BMP”) (as outlined in ADWR’s Modified Non-Per Capita Conservation Program). Only one of these BMPs shall come from the “Public awareness/PR or Education and Training categories of the BMPs.
  - **Page 8, ¶ 19.** Because the developer in this case has insisted on building a golf course prior to the availability of effluent for the irrigation of that golf course, and because the Commission has becoming increasingly concerned with the prolonged drought in the Central Arizona, we believe it is in the public interest to require, as a compliance item in this case, the Company to file appropriate tariffs for Commission consideration that would condition the provision of water service to any customer on the implementation of full xeriscape landscaping in front yards, as well as the installation of rainwater catchment systems. These tariffs shall contain, at a minimum, the requirements for implementing such a condition of service, details of the estimated costs to the Company, if any, associated with implementation of the condition of service, proposed customer fees and charges, and any other information that Wickenburg Ranch believes would assist the Commission in evaluating these tariffs. These tariffs shall also demonstrate compliance with all applicable requirements of ADEQ and any applicable local codes.
  - **Page 17, ¶ 44.** The Commission has become increasingly concerned about the prolonged drought in Central Arizona. Therefore, we believe that Wickenburg Ranch should be required to conserve groundwater and that Wickenburg Ranch should be prohibited from selling groundwater for the purpose of irrigating any golf courses within the certificated area or any ornamental lakes or water features located in the common areas of the proposed new developments within the certificated area. We also believe that Wickenburg Ranch should be required to work with the wastewater provider for its certificated area, once that wastewater provider is approved, to ensure that effluent is used to irrigate any golf courses within the certificated area or any ornamental lakes or water features located in the common areas of the proposed new developments within the certificated area, once effluent is being produced.
  - **Page 20, line 17.** IT IS FURTHER ORDERED that, in light of the ongoing drought conditions in Central Arizona and the need to conserve groundwater, Wickenburg Ranch Water, LLC, is prohibited from selling groundwater for the purpose of irrigating any golf courses within its certificated area or any ornamental

1 lakes or water features located in the common areas of the proposed new  
2 developments within its certificated area.

- 3 • **Page 20, line 22.** IT IS FURTHER ORDERED that Wickenburg Ranch Water,  
4 LLC, shall implement, within 90 days of the effective date of this Decision, at  
5 least 10 Best Management Practices (as outlined in ADWR's Modified Non-Per  
6 Capita Conservation Program) and submit those Best Management Practices to  
7 Docket Control within 90 days of the effective date of this Order. Only one of  
8 these BMPs shall come from the "Public awareness/PR or Education and Training  
9 categories of the BMPs.
- 10 • **Page 20, line 27, through page 21, line 7.** IT IS FURTHER ORDERED that the  
11 Company shall file appropriate tariffs for Commission consideration that would  
12 condition the provision of water service to any customer on the implementation of  
13 full xeriscape landscaping in front yards, as well as the installation of rainwater  
14 catchment systems, by July 31, 2009. These tariffs shall contain, at a minimum,  
15 the requirements for implementing such a condition of service, details of the  
16 estimated costs to the Company associated with implementation of the condition  
17 of service, proposed customer fees and charges, and any other information that  
18 Wickenburg Ranch Water, LLC believes would assist the Commission in  
19 evaluating these tariffs. These tariffs shall also demonstrate compliance with all  
20 applicable requirements of ADEQ and any applicable local codes.

21 These conditions are hereinafter collectively referred to as "Contested Provisions". In  
22 addition, the Company asserts that the Conclusion of Law ¶ 2 at page 17, declaring that  
23 the Commission has jurisdiction over the Company and the subject matter of the  
24 application to adjust rates, should be revised to clarify that the Commission does not have  
25 jurisdiction over the people who own property within the Company's CC&N (hereinafter  
26 "Landowners") or private activities conducted by either the Company or the Landowners.  
27 As explained below, unless these corrections are made, the Order is unlawful and  
28 unreasonable.

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1       **III. COMMISSION JURISDICTION AND POWERS OVERVIEW.**

2               **A. The Commission’s jurisdiction must be expressly granted either by the**  
3               **Constitution or legislature.**

4               The Arizona Constitution (“Constitution”) gave the Commission jurisdiction over  
5 public service corporations (“PSCs”) and the power to set rates of PSCs. ARIZ. CONST.  
6 ART. 15 §§ 2-3; *see also Arizona Corp. Com’n v. State ex rel. Woods*, 171 Ariz. 286, 294,  
7 830 P.2d 807, 815 (1992) (“we measure the Commission’s regulatory power by the  
8 doctrine apparently established by *Pacific Greyhound* and its progeny - that the  
9 Commission has no regulatory authority under article 15, section 3 except that connected  
10 to its ratemaking power.”).

11              The Commission must have jurisdiction over the entity or subject matter before it  
12 can order a certain result regarding that entity or subject matter. To be clear, the terms  
13 “jurisdiction” and “power” are not interchangeable. “Jurisdiction” relates solely to the  
14 competency of a body to determine controversies of the general class to which the case  
15 then presented for its consideration belongs. In contrast, “power” means the ability of a  
16 decision-making body to order a certain result. *Rural/Metro Corp. v. Arizona Corp.*  
17 *Com’n*, 129 Ariz. 116, 118, 629 P.2d 83, 85 (1981). Simply put, jurisdiction means the  
18 authority to consider and power means the ability to order a certain result. *Rural/Metro*  
19 *Corp. v. Arizona Corp. Com’n*, 129 Ariz. 116, 118, 629 P.2d 83, 85 (Ariz., 1981).

20               **B. Commission’s powers must be expressly granted and are narrowly**  
21               **construed.**

22              The Commission has no inherent or implied powers. *Williams v. Pipe Trades*  
23 *Indus. Program*, 100 Ariz. 14, 17, 409 P.2d 720, 722 (1966); *Southern Pacific Co. v.*  
24

1 *Arizona Corp. Com'n*, 98 Ariz. 339, 345, 404 P.2d 692, 696 (1965). *Rural/Metro Corp.*,  
2 129 Ariz. at 117, 629 P.2d at 84.

3  
4 The Commission's power must be expressly and specifically granted by the  
5 Constitution or by statute. See *Williams v. Pipe Trades Industry Program of Ariz.*, 100  
6 Ariz. 14, 17, 409 P.2d 720, 722 (Ariz. 1966); *Burlington Northern and Santa Fe Ry. Co.*  
7 *v. Arizona Corp. Com'n*, 198 Ariz. 604, 606, 12 P.3d 1208, 1210 (Ariz. App. Div. 1,  
8 2000). Put another way, its powers are limited to those "derived from a strict  
9 construction of the Constitution and implementing statutes." *Williams v. Pipe Trades*  
10 *Industry Program of Ariz.*, 100 Ariz. 14, 17, 409 P.2d 720, 722 (Ariz. 1966) (citing  
11 *Commercial Life Insurance Co. v. Wright*, 64 Ariz. 129, 166 P.2d 943) (emphasis added).  
12 "Strict construction" means "construction that considers words narrowly .... This type of  
13 construction treats statutory and contractual words with highly restrictive readings."  
14 BLACK'S LAW DICTIONARY, "construction" (8th ed. 2004).

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18 Strict construction of a statute is that which refuses to expand the law by  
19 implications or equitable considerations, but confines its operation to cases  
20 which are clearly within the letter of the statute, as well as within its spirit  
21 or reason, not so as to defeat the manifest purpose of the Legislature, but so  
22 as to resolve all reasonable doubts against the applicability of the statute to  
23 the particular case.

24 *Id.* (quoting William M. Lile et al., *Brief Making and the Use of Law Books* 343 (1914)).

25  
26 Arizona courts have routinely rejected arguments that broad statutory language  
27 grants to Commission unbridled powers. For example, in *Phelps Dodge Corp. v. Arizona*  
28 *Elec. Power Co-op*, the appellate court rejected the argument that the Commission was  
granted broad power under A.R.S. § 40-202(A):

1 We reject the Commission's alternative argument that the legislature  
2 authorized the promulgation of [rules] by granting the Commission broad  
3 power under A.R.S. § 40-202(A). That section, which existed prior to the  
4 1998 amendment concerning competition, provides that “[t]he commission  
5 may supervise and regulate every public service corporation in the state and  
6 do all things, whether specifically designated in this title or in addition  
7 thereto, necessary and convenient in the exercise of that power and  
8 jurisdiction.” A.R.S. § 40-202(A). The Arizona Supreme Court has  
9 interpreted this section, however, as bestowing no power on the  
10 Commission beyond that already provided by the constitution or  
11 specifically granted otherwise by the legislature. *Southern Pac. Co. v.*  
12 *Arizona Corp. Com’n*, 98 Ariz. 339, 348, 404 P.2d 692, 698 (1965).

13 *Phelps Dodge Corp. v. Arizona Elec. Power Co-op., Inc.*, 207 Ariz. 95, 112-113, 83 P.3d  
14 573, 590 - 591 (Ariz.App. Div. 1, 2004) (emphasis added).

15 **C. Commission must adopt specific administrative rules before exercising**  
16 **its given powers in an individual order.**

17 Under A.R.S. § 41-1001.01, a person “is entitled to have an agency not base a  
18 licensing decision in whole or in part on licensing conditions or requirements that are not  
19 specifically authorized by statute [or] rule.” A.R.S. § 41-1001 defines license to include  
20 any agency permit, certificate, approval, or similar permission.

21 The Commission cannot govern in a piecemeal fashion through individual  
22 adjudicatory orders; it must promulgate rules through the rule-making process.

23 *Carondelet Health Services, Inc. v. Arizona Health Care Cost Containment System*  
24 *Admin.* 182 Ariz. 221, 229, 895 P.2d 133, 141 (Ariz. App. Div. 1, 1994); *Phelps Dodge*  
25 *Corp. v. Arizona Elec. Power Co-op., Inc.* 207 Ariz. 95, 116-117, 83 P.3d 573, 594 - 595  
26 (Ariz. App. Div. 1, 2004). The only exceptions where the Commission may discriminate  
27 between PSCs is where rules are either: (1) reasonably related to rate-making; (2) address  
28 problems not reasonably foreseeable by the Commission; or (3) deal with a problem so

1 unique and varying that it is impossible “to capture within the boundaries of a rule.”  
2 *Carondelet Health Services, Inc. v. Arizona Health Care Cost Containment System*  
3 *Admin.*, 182 Ariz. 221, 229, 895 P.2d 133, 141 (Ariz. App. Div. 1, 1994) (declining to  
4 extend *Arizona Corp. Com'n. v. Palm Springs Util.*, 24 Ariz. App. 124, 536 P.2d 245  
5 (1975)); *Phelps Dodge Corp. v. Arizona Elec. Power Co-op., Inc.* 207 Ariz. 95, 116-117,  
6 83 P.3d 573, 594 - 595 (Ariz. App. Div. 1, 2004). Thus, with very few exceptions, the  
7 Commission must adopt specific administrative rules before applying conditions or  
8 requirements through an individual order.  
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11 After promulgating rules, the Commission must follow them. *Cochise County v.*  
12 *Arizona Health Care Cost Containments System*, 170 Ariz. 443, 825 P.2d 968 (App. Div.  
13 2, 1991); *see also* A.R.S. § 1001.01.  
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15 **IV. THE COMMISSION HAS NO JURISDICTION OVER THE LANDOWNERS AND NO**  
16 **POWER TO DIRECT THE LANDOWNERS' LAND USES, BUILDING**  
17 **REQUIREMENTS, OR WATER USES.**

18 The Commission has no jurisdiction over non-PSCs developing land. Here, the  
19 Commission is trying to regulate land development and water use through the guise of  
20 regulating the Company by requiring xeriscaping and water catchment systems be  
21 installed by the Landowner before allowing the Company to provide water service.  
22 These requirements are unlawful and unreasonable and should be struck from the Order.  
23

24 **A. The Commission has no jurisdiction over Landowners.**

25 Article 15 of the Constitution limits the Commission’s jurisdiction to PSCs. *See*  
26 *Rural/Metro Corp.*, 129 Ariz. at 117, 629 P.2d at 84; Ariz. Const. Art. 15, § 2 (listing  
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1 PSCs); Ariz. Const. Art. 15, § 3. The Commission has no jurisdiction over non-PSCs.<sup>1</sup>  
2 See *Arizona Water Co. v. Arizona Corp. Com'n*, 161 Ariz. 389, 778 P.2d 1285 (App.  
3 1989) (Commission did not have jurisdiction over well sharing arrangement where  
4 owners were not acting as a PSC).

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6 Further, even though most of the land within the Company's CC&N is owned by a  
7 sister-company JVT, this does not mean the ACC can regulate JVT. See *Arizona Public*  
8 *Service Co. v. Arizona Corp. Com'n*, 155 Ariz. 263, 267, 746 P.2d 4, 8 (Ariz. App. 1987)  
9 (holding company is not a PSC even if its wholly-owned subsidiary is a PSC). Rather,  
10 the law is clear that the Commission has no jurisdiction over JVT or any other  
11 Landowner as long as they are acting privately and not as a PSC. *Id.*

12  
13 Without constitutional jurisdiction, the Commission is powerless to regulate  
14 Landowners' and their property uses. See *Rural/Metro Corp.*, 129 Ariz. at 118, 629 P.2d  
15 at 85. In addition, the Landowners were not even parties in this matter, which is another  
16 reason why the Commission cannot adjudicate their rights in this case. See *Tonto Creek*  
17 *Estates Homeowners Ass'n v. Arizona Corp. Com'n*, 177 Ariz. 49, 60, 864 P.2d 1081,  
18 1092 (Ariz. App. Div. 1, 1993). Hence, the provisions that require the Landowners to  
19 install xeriscaping and water catchment systems are unlawful, unreasonable, and  
20 unenforceable.  
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27 <sup>1</sup> The Company acknowledges the Commission has jurisdiction over non-public service corporations  
28 regarding certain corporate matters unrelated to the issues here, such as record keeping oversight, stock  
transfers, and their qualifications to do business in the state. See *Arizona Public Service Co. v. Arizona*  
*Corp. Com'n*, 157 Ariz. 532, 534, 760 P.2d 532, 534 (Ariz., 1988).

1 Finally, in addition to being unlawful and non-binding on the Landowners, as a  
2 practical matter, the Order unreasonably exposes both the Commission and the Company  
3 to lawsuits. This is due to the fact that an order that reaches beyond the Commission's  
4 authority is vulnerable for lack of jurisdiction and may be questioned in a collateral  
5 proceeding. *See Tucson Warehouse & Transfer Co. v. Al's Transfer, Inc.*, 77 Ariz. 323,  
6 325, 271 P.2d 477, 478 (Ariz., 1954).  
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9 **B. The Commission has no power to regulate the Landowners' private**  
10 **land use, private building design, and private water use.**

11 **1. The Commission has no power to regulate private activities.**

12 Even if one sets aside the personal jurisdiction issue, the law is clear that the  
13 Commission has no power to regulate private activities. *See Burlington Northern and*  
14 *Santa Fe Railway Company v. Arizona Corp. Com'n*, 198 Ariz. 604, 12 P. 3d 1208.  
15 There is no question that landscaping, home design, the choice to harvest rainwater for  
16 personal use are private concerns beyond the scope of the Commission's powers.  
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19 Whichever statutory authority that the Commission claims grants it such power  
20 has to be compared to, and be consistent with, the other statutes that the legislature has  
21 promulgated giving other political subdivisions power over these subjects. *See Tucson*  
22 *Warehouse & Transfer Co. v. Al's Transfer, Inc.*, 77 Ariz. 323, 326, 271 P.2d 477, 478-  
23 79 (1954) (statutes must be construed in connection with other statutory provisions  
24 dealing with the subject matter.)  
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1                   **2. The legislature has not granted the Commission power to**  
2                   **regulate land uses or building designs.**

3                   The legislature has set up a comprehensive scheme under which Yavapai County  
4 governs the land use and building design for Wickenburg Ranch. *See* A.R.S. § 11-802,  
5 *et. seq.*; *see also* Op.Atty.Gen. No. I88-126. There is no statute giving the Commission  
6 such authority. Thus, the Commission cannot infringe upon Yavapai County's  
7 jurisdiction and powers.  
8

9                   **3. The legislature has not granted the Commission power to**  
10                   **regulate water use rights.**

11                   Similarly, legislature has set up a comprehensive scheme under which ADWR and  
12 the Maricopa County Superior Court govern water rights in the Wickenburg area. *See*  
13 A.R.S., Title 45, Art. 1 and 2. Comparing the statutes governing both the Commission  
14 and ADWR makes it clear that the legislature intends for water use rights to be governed  
15 by ADWR.  
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17                   Tellingly, because it does not have powers and rules governing the state's water  
18 uses, the Commission relied upon ADWR's rules to identify "BMPs" to instruct the  
19 Company how it should manage its affairs. *See* Order at p. 8, ¶ 18. Even more peculiar,  
20 under ADWR's rules, the Company would not subject to those "BMPs" because it is  
21 located outside the Active Management Area where those rules and practices apply. If  
22 that were not enough, the Arizona Supreme Court has held that the Commission has no  
23 power to affect individual water rights or use. *Gamet v. Glenn*, 104 Ariz. 489, 455 P.2d  
24 967 (1969). So it is clear that the Commission cannot assert such jurisdiction and  
25 powers.  
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1 Furthermore, A.R.S. § 45-112(A)(7) states “[a] person is guilty of a class 2  
2 misdemeanor who ... [u]ses, stores or diverts water without or before the issuance of a  
3 permit to appropriate such waters.” In Arizona, waters of all sources belong to the  
4 public. See A.R.S. § 45-141(A) (2003); *Phelps Dodge Corp. v. Ariz. Dep't of Water Res.*,  
5 211 Ariz. 146, 149 n. 2, ¶ 13, 118 P.3d 1110, 1113 n. 2 (App. 2005); *Strawberry Water*  
6 *Co. v. Paulsen* 2008 WL 2895941, 9 (Ariz. App. Div. 1, 2008). People can secure a  
7 usufruct right to water - i.e., they can gain a right to utilize the water – but only if state  
8 law permits such action.  
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11 Currently, there is no statute granting landowners the right to capture public  
12 rainwater which may otherwise reach streams and flow to downstream water users with  
13 appropriative rights. Upon information and belief, the Company understands that Utah  
14 and Colorado prohibit rainwater catchments because they do interfere with the rights of  
15 downstream water users.  
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18 Regardless of whether one believes that capturing such rainwater requires an  
19 appropriative surface water right or not, or the legality of such an operation in Arizona,  
20 what is clear is that since rainwater catchment owners would be capturing “source water”  
21 They will have to file a statement of claimant in the massive *In re General Adjudication*  
22 *of All Rights to Use Water in Gila River System and Source*, which has been ongoing  
23 since 1974 and must adjudicate approximately 70,000 claims. That means the  
24 Commission is in effect requiring each and every Company customer to file a claim in  
25 the largest, most costly lawsuit ever initiated in Arizona.  
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1 Implementation of rainwater catchments on such a large scale will almost  
2 assuredly reduce water flows in the streams and adversely impact the water rights of  
3 downstream water users. In fact, at full build-out the Company calculates that rainwater  
4 capture during a year of normal precipitation levels would be approximately 138 acre-feet  
5 per year.<sup>2</sup> This is far beyond a *de minimis* impact on water rights and on its face illegal  
6 under A.R.S. § 45-112. Thus, the Company believes that any order requiring the  
7 Company to require development of rainwater catchment systems is both unlawful and  
8 unreasonable.  
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11 Another problem is caused by the fact that precipitation levels are intermittent and  
12 low in the Wickenburg area over the course of a year. Therefore, implementing rain  
13 catchment systems is impractical, not cost efficient, and poses a significant burden on the  
14 customer for ongoing operations and maintenance. There are also health, safety, and  
15 liability concerns when these systems are not properly maintained.  
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18 **VI. THE CONTESTED PROVISIONS VIOLATE THE COMPANY'S DUE PROCESS**  
19 **RIGHTS, DISCRIMINATE AGAINST THE COMPANY, AND ARE NOT SUPPORTED BY**  
20 **EVIDENCE.**

21 **A. The Commission violated the Company's due process rights.**

22 The Company is entitled to due process. *Residential Utility Consumer Office v.*  
23 *Arizona Corp. Com'n*, 199 Ariz. 588, 593, 20 P.3d 1169, 1174 (Ariz.App. Div. 1, 2001).  
24

25 Due process means that the actions of the state cannot be arbitrary, nor can they be  
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27 <sup>2</sup> This is a rough estimate based upon the estimation that 1,000 square foot of roof in a 1" storm = 600  
28 gallons.

1 without proper procedure. *Bennett v. Arizona State Board of Public Welfare*, 95 Ariz.  
2 170, 388 P.2d 166 (1963).

3  
4 **1. The Company was denied procedural due process.**

5 Procedural due process ensures that a party receives adequate notice, an  
6 opportunity to be heard at a meaningful time and in a meaningful way, and an impartial  
7 judge. *Mathews v. Eldridge*, 424 U.S. 319, 333-34, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976);  
8 *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); *Emmett*  
9 *McLoughlin Realty, Inc. v. Pima County*, 212 Ariz. 351, 355, 132 P.3d 290, 294 (App.  
10 2006). The purpose is to give the parties a fair opportunity to defend, and to do so he  
11 must know against what he must defend. *Sulger v. Arizona Corp. Com'n*, 5 Ariz. App.  
12 69, 73, 423 P.2d 145, 149 (Ariz. App. 1967).

13 Here, the Company did not receive the amendments until minutes before the  
14 hearing. Apparently, the amendments were docketed sometime a day or two before the  
15 hearing, but it is not known at what time they were made available to the Company.  
16 Compounding the issue, the amendments proposing the Contested Provisions had nothing  
17 to do with the subject matter of the case – an application to adjust rates.

18 Moreover, the Commission's stated reason for such amendments was due to a  
19 predisposition against the developer's building of a golf course, which was properly  
20 approved by Yavapai County and will be temporarily watered using the developers  
21 groundwater rights recognized under state law, and then effluent. Accordingly, the  
22 Company did not have meaningful opportunity to prepare for and be heard on the  
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1 amendments in a neutral forum. Thus, the Company's due process rights were denied.

2 **2. The Company was denied substantive due process.**

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4 Due process means that the actions of the state cannot be arbitrary. *Bennett v.*  
5 *Arizona State Board of Public Welfare*, 95 Ariz. 170, 388 P.2d 166 (1963), 1 Am.Jur.2d s  
6 148. The term "arbitrary" means "[d]epending on individual discretion; specif.,  
7 determined by a judge rather than by fixed rules, procedures, or law .... founded on  
8 prejudice or preference rather than on reason or fact." BLACK'S LAW DICTIONARY,  
9 "arbitrary" (8th ed. 2004).

10  
11 The Arizona Supreme Court has held that the Commission cannot apply a PSC's  
12 property to public use without a showing that it was necessary. *Southern Pac. Co. v.*  
13 *Arizona Corp. Com'n*, 98 Ariz. 339, 348, 404 P.2d 692, 698 (Ariz.1965); *see also* A.R.S.  
14 § 40-321(A) (requiring a finding of inadequate service before the Commission can direct  
15 services).

16  
17  
18 Here, there is no showing that it is necessary for the Company to dedicate property  
19 and adopt the BMPs, require xeriscaping, or require rain catchments installations. If fact,  
20 the record shows that the Company has received from ADWR a Designation of Adequate  
21 Water Supply. This determination means that based upon scientific facts and studies,  
22 taking into consideration all known current, committed, and projected groundwater  
23 demands, ADWR found that the Company has the legal right to enough groundwater that  
24 is physically available to meet all of the water demands for potable water within its  
25 service area. *See* Order at p. 6. The uncontested testimony in this case establishes that  
26 the Company can adequately provide water to the Landowners. Under these facts, the  
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1 Commission's adoption of the Contested Provision is arbitrary and violates substantive  
2 due process.

3  
4 **B. The Order unlawfully and unreasonably discriminates against the**  
5 **Company.**

6 As stated above, a person "is entitled to have an agency not base a licensing  
7 decision in whole or in part on licensing conditions or requirements that are not  
8 specifically authorized by statute [or] rule." A.R.S. § 41-1001.01. Unless the directive  
9 falls within the few exceptions, the Commission cannot order a certain result unless it has  
10 first promulgated specific rules to empower such order. *Carondelet Health Services, Inc.*  
11 *v. Arizona Health Care Cost Containment System Admin.*, 182 Ariz. 221, 229, 895 P.2d  
12 133, 141 (Ariz. App. Div. 1, 1994); *Phelps Dodge Corp. v. Arizona Elec. Power Co-op.,*  
13 *Inc.*, 207 Ariz. 95, 116-117, 83 P.3d 573, 594 - 595 (Ariz. App. Div. 1, 2004).

14  
15  
16 Further, the Commission cannot unreasonably discriminate among PSCs in the  
17 requirements it imposes by separate, individual order where a rule could apply. *See*  
18 *Arizona Corporation Com'n v. Palm Springs Utility Co.*, 24 Ariz. App. 124, 536 P.2d  
19 245 (App. 1975).

20  
21 Here, the Contested Provisions address water conservation measures, land uses,  
22 and building design features. Even if the Commission had jurisdiction over such private  
23 matters, it still needs express authority through statute or rule to apply these conditions to  
24 the Company. But no such rule or statute exists, nor do these conditions fit into any of  
25 the exceptions listed above that would allow individual treatment. Instead, the  
26  
27  
28 Commission is applying arbitrary conditions upon the Company in a discriminatory

1 fashion. The Commission has neither the authority nor power to require such conditions  
2 in the Order and cannot discriminate against the Company by applying these rules in an  
3 individual adjudicatory order.  
4

5 **C. The contested provisions of the Order are unlawful and unreasonable**  
6 **because they are not based upon evidence.**

7 The Order must be supported by substantial evidence. *Arizona Corp. Com'n v.*  
8 *Citizens Utilities Co. (App. Div. 1, 1978)* 120 Ariz. 184, 584 P.2d 1175; *Arizona Corp.*  
9 *Com'n v. Arizona Water Co.* 111 Ariz. 74, 76-77, 523 P.2d 505, 507 - 508 (Ariz. 1974).  
10 Here, however, there is no evidence on record that central Arizona is in a drought or that  
11 the xeriscaping and water catchment systems are necessary for the Company to provide  
12 adequate water service to the Landowners. To the contrary, the record shows that the  
13 Company has received a water adequacy determination by ADWR. See Order at p. 6.  
14 Thus, the findings of facts regarding these matters are arbitrary.  
15  
16

17 **D. The Commission cannot assume powers to manage the Company.**  
18

19 The Commission has no power to manage or operate a PSC. See *Arizona Corp. Com'n v.*  
20 *State ex rel. Woods*, 171 Ariz. 286, 297, 830 P.2d 807, 818 (Ariz.,1992). In fact, Arizona  
21 courts have held "we will not infer the grant of authority to interfere with the [PSC's]  
22 management decisions beyond the 'clear letter of the statute.'" *Phelps Dodge Corp. v.*  
23 *Arizona Elec. Power Co-op., Inc.*, 207 Ariz. 95, 112-113, 83 P.3d 573, 590 - 591  
24 (Ariz.App. Div. 1,2004) (citing *Southern Pac. Co.*, 98 Ariz. at 343, 404 P.2d at 695).  
25  
26

27 Similarly, the Commission has no jurisdiction or power to control a PSC's assets  
28 that are not essential to providing public utility service. *Burlington Northern and Santa*

1 *Fe Ry. Co. v. Arizona Corp. Com'n*, 198 Ariz. 604, 606, 12 P.3d 1208, 1210 (Ariz.App.  
2 Div. 1,2000); Ariz. Const. Art. 15, § 6; *see also Corporation Com'n v. Pacific Greyhound*  
3 *Lines*, 54 Ariz. 159, 176-77, 94 P.2d 443, 450 (1939); *American Cable Television, Inc. v.*  
4 *APS*, 143 Ariz. 273, 693 P.2d 928 (App. 1983) (ACC cannot regulate pole attachments on  
5 APS poles because the unused portions of the poles are not used and useful in APS'  
6 business.); *APS v. The Mountain States Telephone and Telegraph Co.*, 149 Ariz. 239, 717  
7 P.2d 918 (App. 1985).

8  
9  
10 In this case, the Commission is expressly telling the Company how to manage its  
11 business when it is ordering the Company to adopt "Best Management Practices".

12  
13 Likewise, requiring the Company to require its customers to landscape a certain way,  
14 build their homes with certain features, and buy water catchment systems, and not use  
15 water for certain purposes is an unlawful attempt to manage the Company.

16  
17 **VII. THE COMPANY WILL BE ENTITLED TO ATTORNEYS FEES.**

18 If the Order is not amended and further successful appeals occur, then the  
19 Company will be entitled to an award of costs and attorneys fees. The Company will be  
20 entitled to such an award under the private attorney general doctrine. The Company also  
21 will be entitled to costs and fees pursuant to A.R.S. § 41-1007. *See Eastern Vanguard*  
22 *Forex, Ltd. v. Arizona Corp. Com'n*, 206 Ariz. 399, 79 P.3d 86 (App. Div.1 2003)  
23 (Corporate officers entitled to an award of attorney fees incurred in underlying  
24 administrative proceeding as well as in superior court action, upon superior court's  
25 reversal of Arizona Corporation Commission's decision). Because the Commission has a  
26 duty to issue an order that does not conflict with state law and must now take action to  
27  
28

1 correct the order, the Company is entitle to costs and fees under A.R.S. § 12-2030(A) as  
2 well.

3  
4 DATED this 26th day of February, 2009.

5  
6 **MOYES SELLERS & SIMS LTD.**

7   
8 \_\_\_\_\_  
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13 **Original and thirteen** copies filed this  
14 26th day of February, 2009, with:

15 Docket Control  
16 Arizona Corporation Commission  
17 1200 West Washington  
18 Phoenix, Arizona 85007

19 Copies mailed this 26<sup>th</sup> day  
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