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AZ CORP COMMISSION
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7 **BEFORE THE ARIZONA CORPORATION COMMISSION**

8 **COMMISSIONERS**

9 KRISTIN K. MAYES, CHAIRMAN
10 GARY PIERCE
11 PAUL NEWMAN
12 SANDRA D. KENNEDY
13 BOB STUMP

Arizona Corporation Commission

DOCKETED

JUN - 8 2009

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13 IN THE MATTER OF THE
14 APPLICATION OF WICKENBURG
15 RANCH WATER, LLC, AN ARIZONA
16 LIMITED LIABILITY COMPANY, FOR A
17 RATE ADJUSTMENT

Docket No. W-03994A-07-0657

REPLY TO STAFF'S BRIEF

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20 Arizona Corporation Commission ("Commission") Staff's Pre-Hearing Brief
21 ("Staff's Brief"), which is actually Staff's response to the Application for Rehearing of
22 Wickenburg Ranch Water, LLC ("Company"), fails to specifically address many of the
23 Company's arguments and avoids mentioning most of the legal authority cited in the
24 Application for Rehearing. Staff's Brief does not cite a single case, statute or rule that
25 expressly authorizes the conditions the Company challenges (the "Contested
26 Provisions"). The reason is simple – there are none.
27
28

1 Rather than admit that simple fact, Staff's Brief attempts to bury the truth in
2 references to a myriad of generalities and trivialities. For Staff to prevail in this matter, it
3 must argue for an extension of current law. It has not done so, nor can it do so
4 successfully at this level confronting nearly 70 years of precedence that even Staff's most
5 cited case expressly said it would not reconsider. *See Arizona Corp. Com'n v. State ex rel.*
6 *Woods*, 171 Ariz. 286, 293-294, 830 P.2d 807, 814 - 815 (Ariz. 1992). Further, Staff's Brief
7 inaccurately summarizes provisions of the Application for Rehearing and then argues
8 against them. The following sections address the central arguments in Staff's Brief one
9 by one.
10
11

12
13 **I. The Commission Has No Authority to Impose the Contested Provisions.**

14 Staff's Brief argues at length that the Commission can do more than merely set
15 rates. *See Staff's Brief*, p. 2, ln. 19 – p. 4, ln. 14. Of course it can, and nothing in the
16 Company's Application for Rehearing argues differently. But that is not the issue. The
17 issue is whether or not the Commission can adopt the Contested Provisions, and nowhere
18 does Staff's Brief take the critical step and show that the Commission can impose the
19 Contested Provisions.
20
21

22 **A. Article XV, § 3 does not authorize the Commission to impose the Contested**
23 **Provisions by Order.**

24 For nearly 70 years, Arizona courts have consistently held that the Commission
25 has no implied powers. *See Corporation Com'n v. Pacific Greyhound Lines*, 54 Ariz.
26
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1 159, 176-177, 94 P.2d 443, 450 (Ariz.1939).¹ Analyzing Arizona Constitution Article
2 XV, § 3, the Arizona Supreme Court wrote:

3
4 The Corporation Commission, by Art. 15, § 3 ... is authorized to prescribe
5 'just and reasonable classifications to be used and just and reasonable rates
6 and charges to be made and collected, by public service corporations within
7 the State...' and it may 'make reasonable rules, regulations, and orders, by
8 We have repeatedly held that the power to make reasonable rules and
9 regulations and orders by which a corporation shall be governed refers to
10 the power to prescribe just and reasonable classification and just and
11 reasonable rates and charges. (emphasis added) (citations omitted).

12 *Williams v. Pipe Trades Industry Program of Ariz.*, 100 Ariz. 14, 17, 409 P.2d 720, 722
(Ariz.1966). Relying on *Williams*, the Arizona Supreme Court later explained:

13 [T]he Corporation Commission's paramount power is limited to rates,
14 charges or classifications and that, as to all other matters, the legislature has
15 the power to take what action it deems appropriate. *Williams v. Pipe Trades*
16 *Industry Program of Arizona*, 100 Ariz. 14, 409 P.2d 720 (1966); *Southern*
17 *Pacific Co. v. Arizona Corporation Commission*, 98 Ariz. 339, 404 P.2d
18 692 (1965). We stated: "(T)he paramount power to make all rules and
19 regulations governing public service corporations not specifically and
20 expressly given to the commission by some provision of the Constitution,
21 rests in the legislature, and it may, therefore, either exercise such powers
22 directly or delegate them" *Corporation Commission v. Pacific*
23 *Greyhound Lines*, 54 Ariz. 159, 176-77, 94 P.2d 443, 450 (1939).
(emphasis added).

24 *Arizona Public Service Co. v. Town of Paradise Valley*, 125 Ariz. 447, 449, 610
25 P.2d 449, 451 (Ariz., 1980). Put another way, the Commission may not exercise
26 powers unless they are "derived from a strict construction of the constitution and

27 ¹ See also *Williams v. Pipe Trades Indus. Program of Ariz.*, 100 Ariz. 14, 19, 409 P.2d 720, 723 (1966);
28 *Phelps Dodge Corp. v. Arizona Elec. Power Co-op., Inc.*, 207 Ariz. 95, 113, 83 P.3d 573, 591 (Ariz.App.
Div. 1,2004); *Cochise Sanitary Services, Inc. v. Corporation Comm.*, 2 Ariz.App. 559, 562, 410 P.2d 677,
680 (Ariz.App.1966); *Southern Pacific Co. v. Arizona Corporation Comm.*, 98 Ariz. 339, 345, 404 P.2d
692, 696 (1965).

1 implementing statutes.” *Rural/Metro Corp. v. Arizona Corp. Commission*, 129
2 Ariz. 116, 117, 629 P.2d 83, 84 (Ariz., 1981) (citations omitted).

3
4 **B. The Contested Provisions are not related to setting just and
5 reasonable rates.**

6 Instead of addressing applicable law, Staff strains to argue that the Contested
7 Provisions are “necessary to the ratemaking process” (Brief at p. 3). This defies logic
8 because the Contested Provisions have nothing to do with ratemaking. Requiring
9 customers to install rainwater catchments that they will own at their cost and prohibiting
10 turf in their front yards have nothing to do with ensuring that the Company’s rates are just
11 and reasonable. Likewise, requiring the adoption of Best Management Practices
12 (“BMPs”) and prohibitions on serving water for irrigation, ornamental lakes, or water
13 features have nothing to do with ensuring that the Company’s rates are just and
14 reasonable. Tellingly, Staff never explains how each Contested Provision is necessary to
15 ensure the Company’s rates are just and reasonable. Clearly, the Contested Provisions
16 are aimed at controlling the Company and its customers rather than rates. Therefore, they
17 are outside the Commission’s plenary ratemaking authority. *See Phelps Dodge Corp. v.*
18 *Arizona Elec. Power Co-op., Inc.*, 207 Ariz. 95, 113, 83 P.3d 573, 591 (Ariz.App. Div. 1,
19 2004).

21
22
23
24 **C. Woods does not give the Commission plenary power to impose the
25 Contested Provisions.**

26 To support its position, Staff repeatedly cites the Arizona Supreme Court’s 1992
27 *Woods* decision. However, the *Woods* court did not broaden the Commission’s authority,
28 it applied the *Pacific Greyhound* line of cases in determining that the Commission has

1 limited authority to scrutinize a public service corporation's transactions with its
2 corporate parent as necessary to properly exercise its rate making authority. In doing so,
3
4 the Court stated:

5 *Pacific Greyhound* has been precedent for over fifty years. Utilities, the
6 Commission, and countless state officials undoubtedly have relied on that
7 case. Although we examine such precedent critically in light of the history
8 and text of the constitution, we do not readily overturn it, especially if it is
9 possible to resolve the questions presented without disturbing that
10 precedent. In the present case, therefore, we measure the Commission's
11 regulatory power by the doctrine apparently established by *Pacific
Greyhound* and its progeny-that the Commission has no regulatory
power under article 15, section 3 except that connected to its ratemaking

12 *Woods*, 171 Ariz. at 293-94, 830 P.2d at 814 - 15. But Staff's Brief misleadingly cites
13 *Woods* for the proposition that Article 15, § 3 gives the Commission two sources of
14 authority: rate making power, and independent power to regulate public service
15 corporations. Staff's Brief page 3 lines 1-4. The language of *Woods* quoted above,
16 which is consistent with the historical line of case law, directly contradicts Staff's Brief
17 on this point.
18
19

20 Staff goes on to argue that *Woods* authorizes the Commission to do essentially
21 whatever it wants if it says the action is part of the rate-making process and that almost
22 anything can be considered part of rate-making. Staff's Brief, p. 3 ln. 6-18, p. 3 ln. 24 –
23 p. 4, ln. 2. There are several problems with this argument. First, the Commission did not
24 make any finding in this matter that the Contested Provisions are a necessary part of rate-
25 making. Second, even with a real stretch of the imagination there does not appear to be
26 even a remote link between the Contested Provisions and rate-making because the
27
28

1 Contested Provisions have nothing to do with water rates. Finally, in the 17 years since
2 *Woods*, its rationale has never been extended past the limited context of that case, i.e., the
3 right of the Commission to examine transactions between a regulated utility and its non-
4 regulated parent. *Woods* has never been used to justify conditions such as the Contested
5 Provisions, nor can it reasonably be read to do so. In fact, the courts have continued to
6 follow the *Pacific Greyhound* holdings that the Commission must have express statutory
7 authority and adopt rules before exercising powers that are not reasonably necessary to
8 determine rates.
9
10

11 Further, certain of the Contested Provisions burden the Company's customers
12 rather than the Company. It is obvious that monies expended by a customer to comply
13 with the Commission's order – i.e., to install a rainwater catchment system or xeriscape
14 landscaping – is not a cost of the Company that even could be considered by the
15 Commission in rate-making. Such costs bear no relationship to rate-making.
16
17

18 The Company acknowledges that the Commission has the power to set reasonable
19 rates for water service to a golf course, ornamental lake or other water feature. However,
20 there are no statutes that grant the Commission the power to prohibit a water company
21 from serving water for golf courses, lakes, and other features. As Staff's Brief notes, the
22 Company has an obligation to serve ratepayers within its service territory. Staff's Brief
23 p. 5, ln. 9-11. The Contested Provisions relating to golf courses and other facilities
24 directly contradict the Company's duty.
25
26

27 Simply stated, the Commission is attempting to regulate what a customer does
28 with its land by restricting a water company from serving certain types of lawful water

1 uses is beyond the jurisdiction of the Commission. The Commission is trying to act as a
2 super - land use planning agency in imposing the Contested Provisions. Other state and
3 local agencies, including the Arizona Department of Water Resources (“ADWR”), the
4 Arizona Department of Environmental Quality, and Yavapai County have already been
5 granted jurisdiction over the subject matter of all of the Contested Provisions by statute.
6 The Commission has not been granted such authority either in the Constitution or by
7 statute and therefore the Contested Provisions must fail.
8
9

10 **II. The Commission Cannot Regulate Non-Public Service Corporations.**

11 As the Company pointed out in the Application for Rehearing, the Commission
12 has no authority to regulate the activities of non-public service corporations. *See id.* at p.
13 8, ln. 15 – p. 11, ln. 8. Even though the order in fact would dictate to people that they
14 spend thousands of dollars on rainwater catchment systems and tell them how to
15 landscape their yards, Staff’s Brief argues that the order does “not require unregulated
16 entities to do anything”. Rather, they argue these provisions merely constitute the terms
17 and condition of service that underlie the transactions between the Company and its
18 customers. Staff’s Brief at p. 5, ln. 25-27. If an individual elects to take water service
19 from a water company, Staff’s Brief says, the Commission has jurisdiction to determine
20 the terms and conditions that will govern the transaction. Staff’s Brief at p. 5, ln. 27-28.
21 Staff’s theory appears to be that the Commission can impose any conditions it wants on
22 unregulated customers of a water company by telling those customers that if they want
23 water service from the Company, they have to do whatever the Commission wants.
24
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1 In support of its position, the Staff cites Commission rules that allow a water
2 company to require customers to install cutoff valves and backflow preventers or an
3 easement to provide service to the customer. Staff's Brief at p. 6, ln. 1-5. These
4 requirements are very different from, and do not support, the Contested Provisions.
5 These requirements are all set forth in rules adopted by the Commission, they relate
6 directly to the safe operation of the water system and they are limited in scope to the
7 minimum requirements necessary to ensure the proper operation of the water system. *See*
8 A.A.C. R14-2-405(B)(3) and (6), (C). This is very different from telling a potential
9 customer what they can do with their property, or that they cannot use their property for a
10 lawful purpose, or how they can use water they buy from a water company, without any
11 statute or rule expressly backing it up.
12

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14
15 If Staff's rationale is correct, there is no limit to what the Commission could
16 require of utility customers simply by telling the regulated utilities what they must
17 require before they provide service. The Commission could require all APS homeowner
18 customers install solar panels on their roofs as a condition of service. It could make all
19 telephone customers get computers and the internet. It could make all sewer customers
20 install gray water systems. Any such requirements would greatly increase the cost of
21 basic public services and discourage customers from hooking up to the utilities, and
22 hence would be bad public policy. This is what the Commission is claiming the right to
23 do with water customers in this case.
24
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26

27 **III. The Commission Must Adopt Rules If It Wants to Impose the Contested**
28 **Provisions.**

1 Staff wrongly attempts to argue that the *Palm Springs* case² allows the
2 Commission to impose the Contested Provisions on the Wickenburg Ranch community
3 by order alone. Staff Brief at p. 8-9. This argument fails for several reasons.
4

5 First, Staff completely ignores the fact that 23 years after *Palm Springs* was
6 decided in 1975, the legislature enacted the Regulatory Bill of Rights Act of 1998. In this
7 act, the legislature commanded that a person “is entitled to have an agency not base a
8 licensing decision in whole or in part on licensing conditions or requirements that are not
9 specifically authorized by statute [or] rule.” A.R.S. § 41-1001.01(A)(7). The Commission
10 is clearly an agency subject to this section. *See* A.R.S. § 41-1001(1) (agency means “any
11 board, commission, department ... whether created under the Constitution of Arizona or
12 by enactment of the legislature”). This proceeding is clearly a licensing decision.³ A.R.S.
13 § 41-1030(B) adds:
14

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16
17 An agency shall not base a licensing decision in whole or in part on a
18 licensing requirement or condition that is not specifically authorized by
19 statute, rule or state tribal gaming compact. A general grant of authority in
20 statute does not constitute a basis for imposing a licensing requirement or
21 condition unless a rule is made pursuant to that general grant of authority
22 that specifically authorizes the requirement or condition. (emphasis added).
23

24
25
26 Staff’s Brief neither mentions this statutory framework nor identifies any express statute
27 or rule granting the Commission the power to adopt the Contested Provisions.
28

26 ² *Arizona Corp. Commission v. Palm Springs Utility Co., Inc.* 24 Ariz.App. 124, 128-129, 536
27 P.2d 245, 249 - 250 (Ariz.App. 1975).

27 ³ *See* definitions of “license” and “licensing” in A.R.S. § 41-1001 (“10. ‘License’ includes the
28 whole or part of any agency ... approval ... or similar form of permission required by law... 11.
‘Licensing’ includes the agency process respecting the grant, denial, renewal, revocation,
suspension, annulment, withdrawal or amendment of a license.”).

1 Second, *Palm Springs* made it very clear that it was carving out an exception to
2 the general rule that “[u]nquestionably, as a general principle of administrative law, the
3 promulgation of rules and regulations of general applicability is to be favored over the
4 generation of policy in a piecemeal fashion through individual adjudicatory orders.” *Palm*
5 *Springs*, 24 Ariz.App. at 128-129, 536 P.2d at 249 – 250. In 1994, while declining to
6 extend *Palm Springs*, the *Carondelet* court further clarified when an agency can apply
7 this exception and act without a rule:
8

9
10 When problems arise in a particular case which the agency could not
11 reasonably foresee, or the problem is so specialized and varying in nature as
12 to be impossible to capture within the boundaries of a general rule....

13
14 *Carondelet Health Services, Inc. v. Arizona Health Care Cost Containment System*
15 *Admin.*, 182 Ariz. 221, 229, 895 P.2d 133, 141 (Ariz.App. Div. 1,1994); *see also*
16 Application for Rehearing p. 7 ln. 26 thru p. 8 ln. 1. Just like it ignored the Regulatory
17 Bill of Rights, Staff ignored the case law developed since the 1975 *Palm Springs* decision
18 that clearly establishes that the Commission must govern by rule with few exceptions.
19

20 Third, Staff never even attempted to explain how the Contested Provisions fit into
21 any exception. The Contested Provisions do not fall within any of the exceptions for two
22 reasons: (i) the circumstances are common to many water companies and therefore the
23 Contested Provisions must be the subject of a rule; and (ii) the Commission imposed
24 them without any evidence in the record to support them. Thus, the applicable law
25 requires that the Commission adopt a rule before ordering the Company and its customers
26 to comply with the Contested Provisions.
27
28

1 **IV. A.R.S. §§ 40-202(A), 40-321(A), or A.R.S. 40-336 do not give the Commission**
2 **the power to adopt the Contested Provisions.**

3 First, Staff argues that the legislature has granted the Commission the power to
4 require the Contested Provisions under A.R.S. § 40-202(A). However, Arizona courts
5 have specifically rejected Staff's argument that A.R.S. § 40-202(A) grants the
6 Commission broad powers to adopt rules, much less orders. *See Phelps Dodge Corp. v.*
7 *Arizona Elec. Power Co-op., Inc.* 207 Ariz. 95, 112-113, 83 P.3d 573, 590 - 591
8 (Ariz.App. Div. 1,2004); *Southern Pac. Co. v. Arizona Corp. Comm'n*, 98 Ariz. 339, 348,
9 404 P.2d 692, 698 (1965).
10
11

12 Next, Staff implies that the legislature has granted the Commission the power to
13 require the Contested Provisions under A.R.S. § 40-321(A) and A.R.S. § 40-336. These
14 statutes provide that the Commission can enforce reasonable and safe service if and when
15 it finds that a public service company is operating in an unreasonable or unsafe manner.
16 But this is not the case here. Nowhere has anyone ever even alleged that the Company is
17 doing something unsafe or unreasonable. The Commission is not trying to address an
18 unsafe or unreasonable situation; it is trying to dictate how the Company's customers use
19 their property. Further, the general grant of authority in these statutes does not mean the
20 Commission can adopt the Contested Provisions without an implementing a rule. *See*
21 *A.R.S. § 41-1001.01(A)(7)*. Thus, none of these statutes grant the Commission the
22 express power to adopt the Contested Provisions as required by law. *See Tonto Creek*
23 *Estates Homeowners Ass'n v. Arizona Corp. Com'n*, 177 Ariz. 49, 55-56, 864 P.2d 1081,
24 1087 - 1088 (Ariz.App. Div. 1,1993) ("The Corporation Commission's powers are limited
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1 and do not exceed those to be derived from a strict construction of the Constitution and
2 implementing statutes.”).

3
4 **V. Commission does not have authority to enforce rules regarding groundwater
5 use and conservation measures that do not apply under ADWR’s rules.**

6 In its pleading Staff inaccurately states that the Commission was concerned about
7 the Company’s plans for water use and lack of conservation efforts. But anyone at that
8 hearing will recall that the Commission took issue with the developer’s plans for a golf
9 course. Further, the developer has every legal right to have a golf course and there is
10 adequate water supply for both the residential and irrigation water demands as
11 determined by ADWR under the applicable rules.

12
13 To be clear, prior to 1980, groundwater throughout Arizona was subject to the
14 doctrine of reasonable use, meaning a landowner may withdraw and reasonably use as
15 much groundwater from the common supply as is necessary beneficial use of the
16 overlying land without regard to the rights of adjoining landowners. *Bristor v.*
17 *Cheatham*, 75 Ariz. 227, 237-38, 255 P.2d 173, 179-80 (1953). In 1980, the legislature
18 enacted the Groundwater Management Act. In doing so, the legislature stated:
19
20

21 It is therefore declared to be the public policy of this state that
22 in the interest of protecting and stabilizing the general
23 economy and welfare of this state and its citizens it is
24 necessary to conserve, protect and allocated the use of
25 groundwater resources of the state and to provide a
26 framework for the comprehensive management and
27 regulation of the withdrawal, transportation, use and
conservation and conveyance of rights to use the groundwater
in this state. (Emphasis added)

28 A.R.S. § 45-401.B

1 To carry out this framework for the comprehensive management and regulation of
2 the groundwater in this state, the legislature established ADWR. A.R.S. § 45-103. The
3 legislature further determined that regulation of groundwater use was necessary primarily
4 in Active Management Areas ("AMAs") established pursuant to A.R.S. Chapter 2,
5 Article 2.
6

7
8 Within AMAs, the legislature determined that ADWR must adopt management
9 plans that include "a continuing mandatory conservation program for all persons
10 withdrawing, distributing or receiving groundwater designed to achieve reductions in
11 withdrawals of groundwater." A.R.S. § 45-563.A. Prior to adopting a plan, ADWR must
12 hold a public hearing on the plan at which any person may appear and submit evidence
13 for or against the adoption of the plan. A.R.S. § 45-570.
14

15
16 Outside of AMAs, the legislature determined that any person may continue to
17 withdraw and use groundwater for reasonable and beneficial purposes. A.R.S. § 45-453.
18 ADWR is not authorized to develop management plans for the use of groundwater or to
19 impose conservation requirements on groundwater use. The legislature, however, did
20 require ADWR to evaluate the water supplies for proposed subdivisions, including those
21 served by private water companies, and to determine whether there is an adequate water
22 supply for the proposed uses of the subdivision. To carry out this responsibility, ADWR
23 has adopted extensive rules defining the process and requirements for demonstrating an
24 adequate water supply. A.A.C. R12-15-701, *et seq.*
25

26
27 At the time the legislature determined that it was necessary to invoke "the policy
28 power to prescribe which uses of groundwater are most beneficial and economically

1 effective," (A.R.S. § 45-401(A)) the legislature did not give the Commission any
2 jurisdiction over groundwater use and conservation. Indeed, the legislature has never
3 even implied that the Commission has a role to play in this regard. Clearly, the
4 legislature has decided that exclusive jurisdiction to regulate groundwater resides with
5 ADWR. ADWR's jurisdiction pre-empts the field.
6

7
8 Staff's argument that "it is within the Commission's regulatory authority to ensure
9 deliver of adequate water service to Wickenburg Ranch's customers" is without merit.
10 ADWR has already determined that Wickenburg Ranch "has demonstrated that 1,224.00
11 acre-feet per year of groundwater will be physically available, continuously available and
12 legally available for at least 100 years, which is sufficient to meet its annual estimated
13 water demand." Therefore, ADWR has designated Wickenburg Ranch as having an
14 adequate water supply. The Commission has no jurisdiction to second-guess this
15 determination or to impose unnecessary and unauthorized requirements on the company
16 in the guise of ensuring the delivery of adequate water to the company's customers.
17
18

19 Finally, Staff argues that the Company can take rainwater from the system with
20 impunity against downstream rightholders. Whether or not Staff is right is not the real
21 issue. The real issue is that the forum where this issue will be resolved is *the Gila River*
22 *Adjudication* court, and the users of rainwater catchments will have to bear the expense
23 of resolving that issue someday.
24
25

26 **VI. Staff's Brief Failed to Address the Other Issues Raised in the Brief.**

27 Staff treats all other issues raised in the Application for Rehearing with a broad
28 brush and points to no legal authority that disputes the Company's positions. Rather,

1 Staff seems to think that giving the Company an opportunity to dispute the flawed
2 decision solves all of the problems. Moreover, Staff seemingly takes the position that the
3 judge in this matter can assume the Contested Provisions are reasonable and that the
4 Company has to prove otherwise. The fact that the Commission discriminated against the
5 Company and violated the Company's substantive and procedural due process rights
6 cannot be fixed by another hearing.
7

8
9 Company notes that its claim the Contested Provisions are discriminatory rests in
10 part on the belief that these Contested Provisions do not apply to all or most water
11 companies and certain of these provisions, including the requirement for a tariff for
12 rainwater catchments and xeriscaping, have been applied to only two other water utilities
13 out of the hundreds regulated by the Commission. See Direct Testimony of Steven M.
14 Olea, May 27, 2009, page 10 lines 12-13. In fact, the Company understands that it was
15 the landowners who volunteered to install rainwater catchment and xeriscaping and adopt
16 Best Management Practices. This is not justification for the imposition of the Contested
17 Provisions on the Company.
18
19
20

21 Finally, Company notes that the Commission has the burden at rehearing to
22 introduce evidence sufficient to support each of the Contested Provisions. If the
23 Commission fails to introduce the evidence necessary to support each of the Contested
24 Provisions, then the Company has no burden to provide evidence to the contrary.
25 Unsupported Contested Provisions simply fail.
26

27 DATED June 8, 2009
28

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