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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

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IN THE MATTER OF THE APPLICATION OF ARIZONA WATER COMPANY FOR AN EXTENSION TO ITS EXISTING CERTIFICATE OF CONVENIENCE AND NECESSITY.

DOCKET NO. W-01445A-06-0199

IN THE MATTER OF THE APPLICATION OF PALO VERDE UTILITIES COMPANY FOR AN EXTENSION OF ITS EXISTING CERTIFICATE OF CONVENIENCE AND NECESSITY.

DOCKET NO. SW-03575A-05-0926

IN THE MATTER OF THE APPLICATION OF SANTA CRUZ WATER COMPANY FOR AN EXTENSION OF ITS CERTIFICATE OF ITS EXISTING CERTIFICATE OF CONVENIENCE AND NECESSITY.

DOCKET NO. W-03576A-05-0926

IN THE MATTER OF THE APPLICATION OF PALO VERDE UTILITIES COMPANY FOR AN EXTENSION TO ITS EXISTING CERTIFICATE OF CONVENIENCE AND NECESSITY.

DOCKET NO. SW-03575A-07-0300

IN THE MATTER OF THE APPLICATION OF SANTA CRUZ WATER COMPANY FOR AN EXTENSION OF ITS CERTIFICATE OF ITS EXISTING CERTIFICATE OF CONVENIENCE AND NECESSITY.

DOCKET NO. W-03576A-07-0300

ARIZONA WATER COMPANY, AN ARIZONA CORPORATON,  
  
COMPLAINANT,  
  
VS.

- DOCKET NO. W-01445A-06-0200
- DOCKET NO. SW-20445A-06-0200
- DOCKET NO. W-20446A-06-0200
- DOCKET NO. W-03576A-06-0200
- DOCKET NO. SW-03575A-06-0200

GLOBAL WATER RESOURCES, LLC, A FOREIGN LIMITED LIABILITY COMPANY;  
GLOBAL WATER RESOURCES, INC., A DELAWARE CORPORATION; GLOBAL

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1 WATER MANAGEMENT, LLC, A FOREIGN  
2 LIMITED LIABILITY COMPANY; SANTA  
3 CRUZ WATER COMPANY, LLC, AN  
4 ARIZONA LIMITED LIABILITY  
5 CORPORATION; GLOBAL WATER – PALO  
6 VERDE UTILITIES COMPANY, AN  
7 ARIZONA CORPORATION; JOHN AND  
8 JANE DOES I-20; ABC ENTITIES I-XX,

RESPONDENTS.

7 IN THE MATTER OF THE JOINT  
8 APPLICATION OF CP WATER COMPANY  
9 AND FRANCISCO GRANDE UTILITIES  
10 COMPANY TO TRANSFER THEIR  
11 CERTIFICATES OF CONVENIENCE AND  
12 NECESSITY AND ASSETS TO PALO VERDE  
13 UTILITIES COMPANY AND SANTA CRUZ  
14 WATER COMPANY.

DOCKET NO. WS-01775A-07-0485  
DOCKET NO. SW-03575A-07-0485  
DOCKET NO. W-02442A-07-0485  
DOCKET NO. W-03576A-07-0485

12 **STAFF’S CLOSING BRIEF**

13 **I. INTRODUCTION**

14 Staff has reviewed the closing briefs filed in the above-captioned matter by Palo Verde  
15 Utilities Company (“PVUC”) and Santa Cruz Water Company (“SCWC”) (collectively the “Global  
16 Utilities”) and by Arizona Water Company (“AWC”) on August 3, 2009. Staff continues to rely on  
17 the arguments set forth in its Initial Post-Hearing Brief that was filed on August 3, 2009. However,  
18 Staff feels it is necessary to respond to certain issues raised by AWC’s Opening Post Hearing Brief.

19 **II. DISCUSSION**

20 AWC devotes a substantial portion of its brief to discussing the potential that, absent  
21 Commission approval of the planning areas that are a component of the settlement agreement reached  
22 between the Global Utilities and AWC, a risk of anti-trust liability may face both AWC and the  
23 Global Utilities. AWC’s Opening Post Hearing Brief at 14-20. For that reason, AWC explains that  
24 Commission approval of the settlement agreement, and by extension the planning areas, would  
25 provide AWC and the Global Utilities the benefit of a “state action” defense in the event that a person  
26 were to allege that the settlement is an agreement not to compete. *Id.* The focus of the discussion  
27 explores the parameters of the “state action” defense, however, rather than the merits of a potential  
28 claim that the planning areas would trigger anti-trust liability. *Id.*

1 Staff recommends against Commission approval of the settlement agreement or the planning  
2 areas. Staff has acknowledged that there are benefits presented by the settlement agreement, such as  
3 sparing parties the resources devoted to litigating the complaint matter between AWC and the Global  
4 Utilities as well as serving to assist both utilities in planning capital improvements. Exhibit S-2,  
5 attached Memorandum of Linda Jaress at 1. However, Staff further noted numerous problems  
6 presented by Commission approval of the agreement. These issues include growth in unexpected  
7 locations within the planning areas resulting in higher costs to ratepayers from enforcement of the  
8 planning areas; the potential that either utility could cease to be fit or proper to hold a service  
9 territory; the potential that a more appropriate new utility may desire to serve within the planning  
10 areas; and the potential that the Commission could be called upon to expend its resources to act as an  
11 arbitrator to resolve disputes over the planning areas. *Id.* at 2. Likewise, Staff indicated that  
12 eliminating disagreement between different utilities is not necessarily always in the public interest.  
13 Tr. at 53:19-20. Additionally, Staff identified an agreement between Johnson Utilities, Inc. and  
14 Diversified Water Company that was entered without Commission approval and has operated to  
15 resolve territorial issues between the utilities that are parties to that agreement. *Id.*

16 Staff did not evaluate whether an agreement between two utilities to resolve territorial  
17 disputes would give rise to potential liability under anti-trust laws. The first mention made of the  
18 concern was in the testimony of Mr. Bill Garfield during the evidentiary hearing.

19 I'm not an attorney, but there is a benefit by having a public-bound Commission  
20 approve planning areas, settlement agreements, CC&N extensions, because we are not  
21 going to go foul with antitrust by carving up areas on our own. And defeating  
22 competition, defeating in a vacuum among ourselves, we are seeking the  
23 Commission's approval and blessing for the settlement agreement and the planning  
24 areas.

25 Tr. at 130:14-21. Absent specific evidence on the record as to how the utilities believe that the  
26 agreement or planning areas actually trigger anti-trust liability, neither Staff nor the Commission can  
27 evaluate the merits of the assertion. As the applicant requesting relief, AWC has the burden of  
28 demonstrating the appropriateness of the desired relief under the circumstances. AWC has not done  
so and therefore the agreement should not be approved.

AWC apparently assumes the presence of a risk under the particular circumstances of this

1 settlement agreement by hinting at a tendency of various plaintiffs to “target public and private utility  
2 companies with antitrust claims in the past.” AWC’s Opening Post-Hearing Brief at 15. Based on  
3 the assumption that a tangible risk exists, AWC devotes the substantial majority of its discussion to  
4 how “state action” provides a defense to such claims. The argument for approving the agreement for  
5 the sole purpose of extending “state action” protection to the utilities is not compelling.

6 Indeed, the utilities’ entire justification for Commission approval of the agreement appears to  
7 be their perceived need to avail themselves of a “state action” defense to protect against a risk that  
8 apparently is an outgrowth of the agreement that they created. This is not a sound basis for extending  
9 Commission approval to the agreement. Approving agreements in order to extend defenses to ill-  
10 described problems that, in any event, trace their origin to the conduct of the same parties requesting  
11 the defenses is not in the public interest.

12 AWC may contend that approval of the settlement is necessary to bring about other asserted  
13 beneficial conduct on the part of the utilities. Staff agrees that there are benefits to long term  
14 planning. Tr. at 54:13-14. However, as Ms. Jaress explained, “Planning for expansion is a part of  
15 any business, regulated or not. It is the responsibility of utility management to appropriately plan for  
16 expansion and the utility should assume the risk related to the implementation of those plans.”  
17 Exhibit S-2, Attached Memorandum of Linda Jaress at 1. Staff has further agreed that approving the  
18 agreement would eliminate the costs incurred by litigating the complaint between AWC and the  
19 Global Utilities. *Id.* Yet, “elimination of a potential disagreement may not always be in the public  
20 interest.” Tr. at 53:19-20. As Ms. Jaress explained, encouraging utilities to reach settlements is not  
21 necessarily a benefit that flows from Commission approval of the agreement between AWC and the  
22 Global Utilities. Tr. at 49:13-21. Finally, Staff believes that encouraging the sale of reclaimed water  
23 is not a benefit of approving the agreement because, as stated by Mr. Garfield, AWC presently has a  
24 tariff permitting the sale of reclaimed water in its existing CC&N. Tr. at 132:10-12. Therefore,  
25 AWC already has the ability to sell reclaimed water from the Global Utilities irrespective of whether  
26 the Commission approves the agreement.

27 Moreover, it is not certain that Commission approval of the planning areas will actually  
28 provide the desired degree of protection that the utilities anticipate. The “state action” that would be

1 appropriately requested under the circumstances where two large, neighboring utilities have territorial  
2 disputes is to request a CC&N. AWC concedes that a CC&N decision offers the protection of “state  
3 action.” AWC Opening Post-Hearing Brief at 15:1-3. Mr. Garfield even acknowledged that approval  
4 of CC&N extensions is a means to prevent anti-trust issues with respect to determining service  
5 territories. “[T]here is a benefit by having a public-bound Commission approve... CC&N extensions,  
6 because we are not going to go foul with antitrust by carving up areas on our own.” Tr. at 130:14-18.  
7 CC&Ns provide a clear and substantial form of protected monopoly and are the proper way for a  
8 regulated utility to monopolize territory. In that vein, both parties were asked whether their desire for  
9 certainty within the planning areas would be resolved by applications for CC&Ns for the entirety of  
10 the respective planning areas.

11 Mr. Symmonds responded on behalf of the Global Utilities that,

12 [w]ell, I think there are some benefits to doing that. There is, obviously some  
13 practicalities about it, where the Commission policy is that you need a request for  
14 service as a general provision explicit for the provision in a lot of cases. So that puts  
15 the utility in the position of having to go and solicit for service, which is something  
16 that is not something that utilities do. So from our perspective, certainly public  
policywise, you could see the benefit of having defined geographic areas. From a  
practical side – I think the judge alluded to this a little bit yesterday – you know, it’s  
tougher to administer, or certainly from our perspective. Because if you want to do  
requests for service and you are kind of – you can’t do a blanket CC&N.

17 Tr. at 277:22-278:11. In contrast to the Global Utilities, AWC provided extensive testimony  
18 suggesting that need can and has been demonstrated in the past on the basis of criteria other than  
19 requests for service alone. See Tr. at 120:12-25, 187-189; Exhibit A-1 at 26-27 (discussing the nine  
20 factor guideline produced by Staff in a Staff Report filed in Docket No. W-01445A-06-0059);  
21 ExhibitA-2 at 12-13. While a request for service is one factor among several that has been used in  
22 the past, AWC has placed emphasis on other factors that generally lend themselves to advantages of  
23 scope and scale that AWC possesses in abundance. Tr. at 120:12-25. Consequently, it would seem  
24 that AWC at least would be in a position to argue for extension of a CC&N, conceivably as large as  
25 the bounds of the planning area.

26 However, Mr. Garfield opined that, “Well, perhaps in some ways without having more  
27 demonstration of necessity for service, maybe now is not the time to apply for that.” Tr. at 125:20-  
28 22. If the necessity for service is not sufficiently clear to support the approval of a CC&N even

1 considering the multiple factors advocated under AWC's position, it would seem that determining  
2 planning areas would be premature at this time. As both parties explained, in addition to resolving  
3 territorial disputes, the purpose of the planning areas is primarily to aid in long-term planning for  
4 future capital investments to deal with growth. See Exhibit A-2 at 18:12-17; Exhibit G-2 at 4:13-16.  
5 These benefits are captured in several factors analyzed under the nine factor evaluation that AWC  
6 advocates. AWC has argued throughout this proceeding that need has been demonstrated by means  
7 other than requests for service, including operational efficiencies, inefficiencies, contiguity with  
8 existing service territory, and "squaring off" or filling in gaps in an existing service territory. Tr. at  
9 120:12-25; Exhibit A-1 at 26-27, Exhibit A-2 at 12-13. In terms of addressing operating efficiencies  
10 and resolving outstanding gaps in existing CC&Ns, those aspects of need would appear to be present  
11 under AWC's position. Consequently, AWC does not seem to be arguing consistently about the  
12 significance of addressing operating efficiencies and resolving CC&N boundary matters as a means  
13 to demonstrate need. Under these circumstances it is too early to pronounce planning areas to warn  
14 away potential alternate providers that would compete for the same territory. In either event,  
15 approving the settlement agreement does not appear to be necessary.

16 **III. CONCLUSION**

17 For all the above stated reasons and those stated in Staff's Initial Post-Hearing Brief, Staff  
18 believes that its recommendations are reasonable and should be adopted.

19 RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of August, 2009.

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