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BEFORE THE ARIZONA CORPORATIC
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COMMISSIONERS

KRISTIN K. MAYES, Chairman
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AZ CASE COMMISSION
DOCKET CONTROL

IN THE MATTER OF THE FORMAL)
COMPLAINT OF SPARTAN HOMES &)
CONSTRUCTION, INC.,)
)
COMPLAINANT)
)
vs.)
)
FAR WEST WATER AND SEWER, INC.)
)
RESPONDENT)

DOCKET NO. WS-03478A-08-0256

Arizona Corporation Commission
DOCKETED
FEB 22 2010



CLOSING BRIEF OF SPARTAN HOMES & CONSTRUCTION, INC.

FEBRUARY 22, 2010

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1 **I. INTRODUCTION.**

2 Spartan Homes & Construction, Inc., ("Spartan") filed this formal complaint as a
3 last resort to force Far West Water & Sewer, Inc., ("Far West Water & Sewer" or the
4 "Utility") to acknowledge the existence of a water main extension agreement and a
5 sewer main extension agreement that the parties signed in January 2005 for Spartan's
6 113-lot development in Yuma County, Arizona, known as Sierra Ridge Unit 1 (as
7 hereinafter described). While Spartan does not have copies of the agreements, the
8 evidence that the agreements exist is overwhelming.

9 Spartan completed construction of the water distribution infrastructure and the
10 sewer collection infrastructure for Sierra Ridge Unit 1 in the Spring of 2005. The
11 design plans and costs estimates for this water and sewer infrastructure were prepared
12 by a licensed professional engineer and approved by the General Superintendent of Far
13 West Water and Sewer. The water and sewer infrastructure was permitted, inspected
14 and tested. Far West Water & Sewer accepted the water and sewer infrastructure in a
15 letter to Yuma County dated April 14, 2005. The Utility has since connected 62 water
16 and sewer customers in the Sierra Ridge subdivision, and has signed inspection release
17 forms for all 62. None of these facts are in dispute. Yet, Far West Water & Sewer
18 obstinately refuses to acknowledge that water and sewer main extension agreements
19 exist.

20 Far West Water & Sewer insists that Spartan pay sewer capacity fees and water
21 capacity fees for lots within Sierra Ridge Unit 1. However, the evidence is undisputed
22 that Utility does not have approved capacity fees in its tariffs—now or ever. The
23 evidence is undisputed that Far West Water & Sewer did not require capacity fees in
24 any of the water and sewer main extension agreements that were executed in 2004 or
25 2005. The evidence is undisputed that Utility signed 60 water and sewer main
26 extension agreements after the infrastructure covered by those agreements was
27 installed. The evidence shows that Far West Water & Sewer has prepared main
28 extension agreements for Spartan's development but refuses to provide those

1 agreements to Spartan for review.

2 The evidence also shows that Far West Water & Sewer has violated a number of
3 rules and statutes, as detailed in Section IV of this brief. In fact, in response to
4 Spartan's assertion that Far West Water & Sewer does not follow rules, the Utility's
5 own legal counsel acknowledged this truth stating, "Your honor, I think that we have
6 established that in the case that is before you, rules were not followed."¹

7 Far West Water & Sewer presented one witness in this complaint case—Andrew
8 Capestro, who is the Utility's general counsel and spouse of one of the two owners. By
9 his own admission, however, Mr. Capestro was not involved in the day-to-day
10 operations of the Utility until some time in 2006, long after the events and
11 circumstances that gave rise to this complaint. He lacks direct personal knowledge of
12 the facts of this case, which bears directly upon his credibility and competence as a
13 witness in this case.

14 By comparison, Spartan presented two witnesses—Brian Householder, who is
15 the vice-president and co-owner of Spartan, and Francisco Galindo, the engineer
16 retained by Spartan to work on Sierra Ridge Unit 1. Both men were extensively
17 involved from start to finish in the planning, design, permitting, approval, construction,
18 testing and completion of Sierra Ridge Unit 1. Thus, their testimony in this case should
19 be given greater weight as compared to the testimony of Mr. Capestro. However, the
20 Arizona Corporation Commission ("Commission") does not need to rely upon the
21 testimony of Messrs. Householder and Galindo alone. The documentary evidence in
22 this case fully supports and corroborates their statements and claims.

23 Spartan is requesting that the Commission order that Far West Water & Sewer
24 prepare and sign water and sewer main extension agreements for Sierra Ridge Unit 1.
25 These agreements should be in a form similar to the many other agreements that were
26 executed in January 2005. Spartan is requesting that the Commission order that the
27 Utility cannot impose sewer capacity fees or water capacity fees for any of the 113 lots

28 ¹ Hearing Transcript Vol. III at page 420, lines 22-24.

1 in Sierra Ridge Unit 1. Spartan is requesting that the Commission order the immediate
2 refund of the \$154,180 cost of constructing the water distribution infrastructure for
3 Sierra Ridge Unit 1 on the grounds that Utility failed to file and obtain approval of a
4 water main extension agreement for Sierra Ridge Unit 1 in violation of Arizona
5 Administrative Code ("A.A.C.") R14-2-406(M). The Utilities Division Staff witness in
6 this case testified that this rule applies to the extent a utility company has accepted
7 infrastructure to their plant and is serving water customers. These two facts are
8 undisputed in this case.

9 Finally, Spartan is requesting additional relief from the Commission as set forth
10 in Section VI of this brief.

11 **II. RELEVANT FACTUAL BACKGROUND.**

12 **A. Far West Water & Sewer.**

13 1. Ownership and Control. The sole shareholders of Far West Water
14 & Sewer are sisters Paula Capestro and Sandy Braden.² The Board of Directors
15 ("Board") of the Utility is comprised of Ms. Capestro and Ms. Braden and their 91-
16 year-old mother, Dorothy Schechert, who is the Chairman of the Board.³ The three
17 women were elected to the Board some time shortly after September 6, 1998.⁴
18 However, Mr. Capestro testified that "they had a fairly inactive role in the company
19 until early 2006."⁵ Mr. Capestro explained:

20 Q. So these three ladies, it is your testimony that they had little to do
21 with the day-to-day operation of the company until sometime in
22 2006?

22 A. They believed at the time the best thing to do was to hand it over to
23 the experts.⁶

23 Andy Capestro is the husband of Paula Capestro and the sole witness for Far
24 West Water & Sewer in this complaint case.⁷ Mr. Capestro is not an employee of Far
25

26 ² Hearing Transcript Vol. III at page 403-404.

27 ³ Hearing Transcript Vol. III at page 405, lines 7-11 and 19-21.

28 ⁴ Hearing Transcript Vol. III at pages 405-406.

⁵ Hearing Transcript Vol. III at pages 406-407.

⁶ Hearing Transcript Vol. III at page 407, lines 6-10.

⁷ Hearing Transcript Vol. III at page 403, lines 23-24.

1 West Water & Sewer, nor is he an officer or director of the Utility.⁸ Mr. Capestro acts
2 as general counsel to Far West Water & Sewer, but he does that as an independent
3 attorney.⁹

4 Prior to the beginning of 2006, Mr. Capestro testified that he was not involved in
5 the day-to-day operations of Far West Water & Sewer.¹⁰ To be more specific, prior to
6 the beginning of 2006, Mr. Capestro testified that he:

- 7 • did not meet with developers regarding water and sewer agreements
8 for their developments¹¹
- 9 • did not review capacity assurance forms prepared by Mr. Kaveney
10 and signed on behalf of Far West Water & Sewer¹²
- 11 • did not prepare main extension agreements for the Utility¹³
- 12 • did not submit water main extension agreements to the
13 Commission's Utilities Division for approval¹⁴
- 14 • did not receive and review plans and approvals submitted by
15 developers for their developments¹⁵

16 Notwithstanding his lack of involvement with developers at the time, Mr.
17 Capestro testified that among the current officers and employees of Far West Water &
18 Sewer, he would have the most knowledge regarding the facts of this complaint case
19 because he is the one that is most intimately involved in the case.¹⁶ However, he
20 acknowledged that "the people working for the company back in 2004, 2005, and early
21 2006 would have more direct knowledge than I would, but they are no longer there."¹⁷

22 Far West Water & Sewer could have called a witness with direct knowledge of
23 the facts in this case, but chose not to. When Mr. Capestro does legal work for the
24 Utility as general counsel, he reports to Ms. Capestro and Ms. Braden.¹⁸ Under cross-

25 ⁸ Hearing Transcript Vol. III at page 409, lines 10-19.

26 ⁹ Hearing Transcript Vol. III at page 409, lines 14-15.

27 ¹⁰ Hearing Transcript Vol. III at page 451, lines 12-15.

28 ¹¹ Hearing Transcript Vol. III at page 451, lines 16-19.

¹² Hearing Transcript Vol. III at page 495, lines 19-22.

¹³ Hearing Transcript Vol. III at page 451, lines 20-22.

¹⁴ Hearing Transcript Vol. III at page 452, lines 6-13.

¹⁵ Hearing Transcript Vol. III at page 452-453.

¹⁶ Hearing Transcript Vol. III at page 414, lines 8-13.

¹⁷ Hearing Transcript Vol. III at page 415, lines 1-4.

¹⁸ Hearing Transcript Vol. III at pages 415-416.

1 examination, Mr. Capestro agreed that Mark Kaveney, the Utility's former General
2 Superintendent, would have more knowledge of what happened at the Utility in 2004
3 and 2005.¹⁹ Yet, Mr. Capestro testified at the hearing that calling Mr. Kaveney as a
4 witness was not considered:

5 Q. Did Far West Water & Sewer consider calling its former general
6 superintendent, Mark Kaveney, as a witness in this case?

7 A. Individually I think that was a question for counsel as to who should
8 be called.

9 Q. And who is counsel?

10 A. Mr. Black.

11 Q. Did Mr. Black make the decision as to whether or not Mr. Kaveney
12 would be called as a witness to testify in this case?

13 A. I know he asked me to testify.

14 Q. Did you discuss calling Mr. Kaveney as a witness with Ms.
15 Capestro?

16 A. No, I did not.

17 Q. So is it safe to say that you did not make a recommendation to Far
18 West Water & Sewer regarding calling Mr. Kaveney to testify in this
19 case?

20 A. I don't think it was considered.²⁰

21 Mr. Capestro's almost complete lack of direct personal knowledge regarding the
22 day-to-day operations of Far West Water & Sewer prior to 2006 directly bears upon his
23 credibility and competence as a witness in this case, where the events which gave rise
24 to the complaint occurred in 2003, 2004 and 2005. He simply does not know what
25 happened regarding the discussions and exchanges that transpired in those years
26 between Mr. Householder, his engineers at Yuma Territorial Engineering, the
27 regulatory authorities, and Far West Water & Sewer. To illustrate the point, Mr.
28 Capestro testified that the first time he even heard of Spartan or became aware of Mr.
Householder was April or May, 2006, at a meeting to introduce the Utility's new

¹⁹ Hearing Transcript Vol. III at page 417, lines 17-18.

²⁰ Hearing Transcript Vol. III at page 416, lines 8-25.

1 engineer.²¹ Mr. Capestro's lack of direct personal knowledge should be considered
2 when evaluating his testimony in this case and the weight to be given that testimony.

3 2. H & S Developers. H & S Developers is an affiliate of Far West
4 Water & Sewer within the meaning of A.A.C. R14-2-801 *et seq.* H & S Developers is
5 primarily a land development company, which also owns and operates a mini-mart.²²
6 Prior to a spin-off in 1998, Far West Water & Sewer and H & S Developers were
7 operated as the same company.²³ The owners of H & S Developers are Dorothy
8 Schechert (69%), Paula Capestro (15.5%) and Sandy Braden (15.5%).²⁴ As discussed
9 later in this brief, H & S Developers constructed wastewater treatment facilities for Far
10 West Water & Sewer, and the Utility then illegally forced developers to repay its
11 affiliate H & S Developers through so-called "capacity fees" as a condition of receiving
12 wastewater service from the Utility.

13 3. Mark Kaveney. Mark Kaveney is the former General
14 Superintendent of Far West Water & Sewer. Mr. Kaveney started his employment with
15 the Utility on September 29, 2003, and ended his employment by mutual agreement in
16 December 2006.²⁵ Mr. Kaveney was in charge of preparing main extension
17 agreements, preparing water service agreements, preparing sewer service agreements,
18 signing capacity assurance letters, interfacing with developers, reporting to the Arizona
19 Department of Environmental Quality ("ADEQ") and reporting to the Commission.²⁶
20 In his deposition, Mr. Kaveney testified that at one time, Far West Water & Sewer had
21 35 employees and 29 of those employees reported to Mr. Kaveney.²⁷

22 **B. Spartan Homes & Construction, Inc.**

23 Spartan Homes & Construction, Inc., is a small family-owned real estate

24 ²¹ Hearing Transcript Vol. III at page 453, lines 7-20.

25 ²² Hearing Transcript Vol. IV at pages 613-614

26 ²³ Hearing Transcript Vol. III at page 404, lines 9-11; Hearing Transcript Vol. IV at page 612, lines 7-
12.

27 ²⁴ Hearing Transcript Vol. IV at page 611, lines 10-23.

28 ²⁵ Hearing Transcript Vol. III at page 466-467.

²⁶ Hearing Transcript Vol. III at pages 471-473.

²⁷ Kaveney Deposition Transcript (Exhibit A-3) at page 20, lines 5-11.

1 development company and home builder in Yuma, Arizona. Brian Householder is the
2 vice-president of Spartan, and his wife Susan is the president. Mr. Householder has
3 lived in Yuma for more than 30 years.²⁸

4 Mr. Householder holds residential and commercial contractors licenses. These
5 licenses allow him to do underground utility work on individual residential lots
6 including wiring electric pedestals, running water and sewer lines, and installing septic
7 tanks. Mr. Householder has, in fact, installed septic systems.²⁹

8 **C. The Sierra Ridge Development—Overview.**

9 Spartan is the developer of a property in Yuma County, Arizona, known as
10 Sierra Ridge ("Sierra Ridge"). Sierra Ridge is located outside but adjacent to the city
11 limits of the City of Yuma in a portion of the west ½ of the northwest ¼ of Section 9,
12 Township 9 South, Range 21 West, Gila and Salt River Base and Meridian. Sierra
13 Ridge includes a residential subdivision (the "Residential Property") covering
14 approximately 45.83 acres and a commercial parcel (the "Commercial Property")
15 covering approximately 12.12 acres.³⁰ The Residential Property and the Commercial
16 Property are referred to collectively herein as the "Spartan Property."

17 The Residential Property is being developed by Spartan in two phases: Sierra
18 Ridge Unit 1 ("Sierra Ridge Unit 1") consists of 113 residential lots and Sierra Ridge
19 Unit 2 ("Sierra Ridge Unit 2") consists of 60 residential lots.³¹ The final plat for Sierra
20 Ridge Unit 1 ("Sierra Ridge Unit 1 Final Plat") was recorded March 11, 2005, as Fee
21 No. 2005-10314, Official Records of Yuma County Recorder. A copy of the recorded
22 final plat for Sierra Ridge Unit 1 is attached as Exhibit 1 to the Direct Testimony of
23 Brian Householder in this docket (Exhibit A-1). The final plat for Sierra Ridge Unit 2

24
25 ²⁸ Householder Direct Testimony (Exhibit A-1) at page 1.

26 ²⁹ Hearing Transcript Vol. II at page 142, lines 6-21.

27 ³⁰ Householder Direct Testimony at page 1, lines 20-28.

28 ³¹ Sierra Ridge Unit 1 is identified in certain of the exhibits in this case as Sierra Ridge #1 and #2. Sierra Ridge Unit 2 is identified in certain documents attached as exhibits to my Direct Testimony as Sierra Ridge #3. Sierra Ridge Units 1 and 2 were combined into a single unit with 113 lots at the request of Yuma County.

1 has been prepared and approved by Yuma County but has not yet been recorded.³²

2 The Commercial Property is shown on the Sierra Ridge Unit 1 Final Plat and is
3 adjacent to the Residential Property. Planning for the Commercial Property has
4 commenced but has not been completed.³³

5 **D. Certificates of Convenience and Necessity.**

6 The Spartan Property is located inside the existing water Certificate of
7 Convenience and Necessity ("CC&N") of Far West Water & Sewer, but it outside the
8 existing sewer CC&N for the Utility.³⁴ However, the Spartan Property is contiguous to
9 the Utility's sewer CC&N.³⁵ Mr. Capestro testified at the hearing that Far West Water
10 & Sewer can provide sewer service to the Spartan Property because it is contiguous to
11 the Utility's existing sewer CC&N.³⁶

12 Extensions into areas contiguous to existing CC&Ns are permitted under A.R.S.
13 § 40-281(B) which provides, in relevant part, as follows:

14 This section shall not require such corporation to secure a certificate for an
15 extension within a city, county or town within which it has lawfully
16 commenced operations, or for an extension into territory either within or
17 without a city, county or town, contiguous to its street railroad or line, plant
or system, and not served by a public service corporation of like character,
18 or for an extension within or to territory already served by it, necessary in
the ordinary course of its business. (emphasis added).

19 Thus, notwithstanding the fact that the Spartan Property is outside of Far West
20 Water & Sewer's CC&N boundaries, the Utility may lawfully serve the Spartan
21 Property pursuant to A.R.S. § 40-281(B).

22 **E. Spartan's Pre-Purchase Due Diligence.**

23 Spartan purchased the Spartan Property on or about February 27, 2004, but
24 Spartan's due diligence review of the property began in 2003. Beginning in 2003, Mr.
25 Householder considered the suitability of the Spartan Property for development as a

26 ³² Householder Direct Testimony at page 2, lines 2-12.

27 ³³ Householder Direct Testimony at page 2, lines 16-18.

28 ³⁴ Hearing Transcript Vol. III at page 462, lines 6-12, and page 463, line 2.

³⁵ Hearing Transcript Vol. III at pages 462-463.

³⁶ Hearing Transcript Vol. III at page 463, lines 12-17.

1 residential subdivision and as a commercial development. He considered the market
2 conditions at the time regarding the demand for residential housing in the vicinity of the
3 City of Yuma. He evaluated the existing zoning. He also researched the proximity of
4 utility services to the Spartan Property, including water, sewer, gas, electric, telephone
5 and cable.³⁷

6 Mr. Householder testified that in 2003, the residential real estate market in and
7 around the City of Yuma was strong and growing stronger, much like other areas of the
8 State of Arizona. He concluded that there was strong demand for single-family homes
9 constructed on the Spartan Property.³⁸

10 1. Spartan Contacts Yuma Territorial Engineering. As part of his due
11 diligence process, Mr. Householder contacted Francisco Galindo of Yuma Territorial
12 Engineering, P.C. ("YTE") in approximately July 2003 to discuss retaining YTE to
13 prepare a plat and engineering design plans for on-site infrastructure for the Spartan
14 Property.³⁹ Mr. Galindo is a professional engineer, registered since 1989, and is an
15 owner of YTE.⁴⁰ YTE specializes in site planning and design for commercial and
16 residential developments including the layout of the subdivision, designing the water,
17 sewers and roadways, evaluating the hydrology and hydraulics, completing applications
18 for the different submittals and approvals required by state and local agencies or utility
19 companies, as well as construction inspection of the development.⁴¹ Mr. Galindo
20 testified that he has specific experience with the planning and design of developments
21 within the CC&N of Far West Water & Sewer including Mesa Del Sol Units 4, 5, 6 and
22 7, the Foothills mobile home parks, Mesa Del Sol Unit 2 (comprised of Mesquite 1 and
23 Mesquite 2), Mountain Vista Unit 5, Puerto Bonita, and Sierra Ridge.⁴² With regard to

24
25
26 ³⁷ Householder Direct Testimony at page 2, lines 20-28.

³⁸ Householder Direct Testimony at page 3, lines 9-12.

³⁹ Householder Direct Testimony at page 3, lines 3-6.

⁴⁰ Hearing Transcript Vol. I at page 22, lines 2-17.

⁴¹ Hearing Transcript Vol. I at pages 22-23 and 32-33.

⁴² Hearing Transcript Vol. I at pages 23-24.

1 these projects, Mr. Galindo testified that he had "quite of bit of experience in
2 interfacing with Far West Water & Sewer."⁴³

3 With regard to the design, planning, permitting, testing and approval of Sierra
4 Ridge Unit 1, Mr. Galindo testified that YTE had substantial involvement and was
5 "involved 100 percent of the time."⁴⁴ Mr. Galindo was well positioned to assess the
6 quality and robustness of Mr. Householder's due diligence process regarding the
7 Spartan Property. When asked at the hearing whether he observed any lack of due
8 diligence on the part of Mr. Householder, Mr. Galindo responded:

9 Certainly not. As a matter of fact, Mr. Householder seemed to be more
10 diligent than any other developer or average developer that we have dealt
11 with. He put an extra interest on the process, and each step of the way,
12 from the planning to approval of the subdivisions and construction.⁴⁵

12 * * *

13 [T]hroughout the process, he was always interested on knowing why we
14 were doing the procedures that we were working on and what was the
15 purpose of them. And he was always on top of deadlines. He was aware of
16 the conditions and comments from the county and from other agencies. He
17 seemed to get the comments before we did, because he was always working
18 with them and being sure that development and approvals were smooth.⁴⁶

19 As someone who has (i) worked with developers in Yuma for many years in the
20 development process, (ii) worked on multiple development projects within the CC&N
21 of Far West Water & Sewer, and (iii) worked closely with Mr. Householder in
22 connection with the development of Sierra Ridge, Mr. Galindo's observations regarding
23 Spartan's thorough due diligence process should be given substantial weight.

24 2. Spartan Contacts Yuma County DDS. At about the same time that
25 Mr. Householder contacted Mr. Galindo and YTE in approximately July 2003, he
26 contacted an employee of Yuma County Department of Development Services ("Yuma
27 County DDS") by telephone regarding the possibility of installing individual on-site

28 ⁴³ Hearing Transcript Vol. I at page 24, lines 6-9.

⁴⁴ Hearing Transcript Vol. I at 33, lines 15-20.

⁴⁵ Hearing Transcript Vol. I at 33-34.

⁴⁶ Hearing Transcript Vol. I at 36, lines 12-20.

1 septic systems to service the residential lots at Sierra Ridge. Mr. Householder believes
2 (but is not completely certain) that the county employee was Rick Stacks, the
3 Environmental Health Manager of Yuma County DDS. The county employee told Mr.
4 Householder that a Far West Water & Sewer collection main of adequate capacity was
5 located within approximately 100 feet of the Spartan Property in Avenue 12E, which is
6 a street immediately adjacent to the Spartan Property. Prior to that time, Mr.
7 Householder had believed that no sewer facilities existed near the Spartan Property.⁴⁷

8 3. Spartan Contacts Far West Water & Sewer. At about the same
9 time that Mr. Householder contacted Mr. Galindo and Yuma County DDS in
10 approximately July 2003, he contacted Far West Water & Sewer by telephone regarding
11 the existence and proximity of water facilities to serve the Spartan Property. Mr.
12 Householder was aware that Far West Water & Sewer would be the water provider for
13 the Spartan Property based upon his familiarity with the area as a long-time resident.
14 Mr. Householder did not initially ask the employee about the existence of sewer
15 facilities near the Spartan Property because, as discussed above, he believed that none
16 existed and, in any event, he had planned on using individual on-site septic systems to
17 serve the Spartan Property.⁴⁸

18 On or about July 29, 2003, Mr. Householder received a facsimile from Mr.
19 Campbell which included: (i) a document entitled *Far West Water & Sewer, Inc.—*
20 *Development Policy & Procedures 2003*; and (ii) a document entitled *Check List for*
21 *Development, Far West Water & Sewer, Inc., Service Area*. Copies of these documents
22 are attached to Mr. Householder's Direct Testimony as Exhibit 3. Mr. Householder
23 read the documents and proceeded with his due diligence on the assumption that Far
24 West Water & Sewer would provide both water and sewer service to the Spartan
25 Property.⁴⁹

27 ⁴⁷ Householder Direct Testimony at pages 3-4.

28 ⁴⁸ Householder Direct Testimony at page 3, lines 13-25.

⁴⁹ Householder Direct Testimony at pages 4-5.

1 Far West Water & Sewer's *Development Policy & Procedures 2003* and its
2 *Check List for Development* set forth in some detail the requirements for obtaining
3 connection to the Utility's water and sewer systems. However, neither document makes
4 any mention of a requirement that a developer pay capacity fees for water service or
5 sewer service. This is entirely logical because Far West Water & Sewer did not require
6 payment of capacity fees for water service or sewer service by developers at the time,
7 and the evidence in this case is undisputed on that point.⁵⁰

8 **F. Spartan's Planning for Water and Sewer Services.**

9 The next time that Mr. Householder contacted Far West Water & Sewer by
10 telephone to discuss water and sewer service was October 2003. On that telephone call,
11 Mr. Householder was told that the fee to connect sewer service to each lot in the
12 Residential Property was \$50 and the fee to connect water service to each lot in the
13 Residential Property was \$25. Mr. Householder testified that the Utility employee⁵¹
14 may also have mentioned that there would be a water meter fee for each lot within the
15 Residential Property.⁵²

16 In late 2003 or early 2004, Mr. Householder again spoke to a Far West Water &
17 Sewer employee by telephone to discuss water and sewer service for the Spartan
18 Property. In response to this telephone call, Mark Kaveney, the General Superintendent
19 of Far West & Sewer, sent out a letter to Mr. Householder. An unsigned copy of Mr.
20 Kaveney's January 8, 2004, letter is attached to the Householder Direct Testimony as
21 Exhibit 4. In the letter, Mr. Kaveney's quoted a sewer capacity fee of \$950 per lot and a
22 water line tap fee of \$900 per lot. Mr. Householder was very surprised to receive this
23 new and different information that Spartan would be required to pay water and sewer
24 capacity fees. Upon receiving this information, Mr. Householder expressed his surprise
25 to Mr. Kaveney that Spartan would be required to pay capacity fees, especially since
26

27 ⁵⁰ See *infra* Sections III(A) and (B).

28 ⁵¹ Mr. Householder was not certain, but he believes the employee was, once again, Mr. Campbell.

⁵² Householder Direct Testimony at page 5, lines 9-15.

1 such fees had not come up in prior conversations with the Utility over the past number
2 of months.⁵³

3 Shortly after this conversation with Mr. Kaveney, Mr. Householder was
4 speaking with Mr. Galindo of YTE and Mr. Galindo told Mr. Householder that he had
5 worked on other developments served by Far West Water & Sewer, and that he was not
6 aware that the Utility had previously charged capacity fees on other developments. Mr.
7 Householder also learned at about the same time that a development known as Mesquite
8 at Mesa del Sol, which is located immediately across Interstate 8 from the Spartan
9 Property, was not being charged capacity fees by Far West Water & Sewer.⁵⁴

10 Mr. Householder was concerned enough about the issue of capacity fees that he
11 contacted John La Porta of the Commission's Consumer Affairs Division on or about
12 January 13, 2004, to discuss Far West Water & Sewer's rates and charges for service,
13 and whether or not Far West Water & Sewer was authorized by its tariffs to charge
14 capacity fees. Mr. Householder learned from Mr. La Porta that Far West Water &
15 Sewer did not have approved capacity fees in its tariffs.⁵⁵ Mr. Capestro confirmed this
16 at the hearing as well:

17 Q. And Far West Water & Sewer company did not have a Commission-
18 approved capacity fee for water or sewer service in its tariff in 2004
19 or 2005 either, did it?

20 A. That is correct.⁵⁶

21 Mr. Capestro also confirmed at the hearing that Far West Water & Sewer does
22 not have an approved water capacity or sewer capacity fee today.⁵⁷ These facts are
undisputed in this complaint case.

23 Mr. Householder spoke again with Mr. Kaveney by telephone and explained to
24 him his concerns about paying capacity fees that were not authorized in the Utility's
25 tariffs and that were not being applied to other developers requesting service from Far

26 ⁵³ Householder Direct Testimony at pages 5-6.

27 ⁵⁴ Householder Direct Testimony at page 6, lines 10-17.

28 ⁵⁵ Householder Direct Testimony at page 6, lines 19-23.

⁵⁶ Hearing Transcript Vol. IV at page 560, lines 6-9.

⁵⁷ Hearing Transcript Vol. IV at pages 559-560.

1 West Water & Sewer. Mr. Kaveney's response was that Far West Water & Sewer
2 would not provide water or sewer service to the Spartan Property unless Spartan paid
3 the capacity fees.⁵⁸

4 Mr. Householder spoke to Mr. Kaveney again regarding water and sewer service
5 some time in the Spring of 2004. This time, however, Mr. Kaveney told Mr.
6 Householder that Far West Water & Sewer did not have sewer capacity to serve the
7 Spartan Property. As a result of this very surprising disclosure, Mr. Householder
8 decided to evaluate the possible use of individual on-site septic systems to serve the
9 residential lots within the Spartan Property.⁵⁹

10 **G. Planning and Approval of Individual On-Site Septic Systems.**

11 Mr. Householder was not concerned about installing individual on-site septic
12 systems at the Spartan Property because much of the surrounding area used individual
13 septic systems. In fact, Mr. Householder testified at the hearing that "when I first
14 bought the property or was interested in the property, I assumed because of all the
15 developing around the property I was going to septic systems and I was prepared to go
16 forward with that."⁶⁰ As discussed above, Mr. Householder was licensed to install
17 septic systems and had, in fact, previously installed septic systems.⁶¹ So, Mr.
18 Householder proceeded ahead on the new assumption that he would be installing septic
19 systems in Sierra Ridge, as opposed to connecting to the sewer system.

20 During the spring of 2004 (right after his conversation with Mr. Kaveney), Mr.
21 Householder again contacted Yuma County DDS to ask whether individual on-site
22 septic systems could be installed in each residential lot within the Spartan Property.
23 Yuma County DDS told Mr. Householder that Spartan could use individual on-site
24 septic systems if Spartan: (1) maintained an average residential lot size of 8,000 square
25 feet; and (2) the Spartan Property passed soil percolation tests.⁶²

26 ⁵⁸ Householder Direct Testimony at pages 6-7.

27 ⁵⁹ Householder Direct Testimony at page 7, lines 6-10.

28 ⁶⁰ Hearing Transcript Vol. III at page 341, lines 10-14.

⁶¹ See *supra* Section II(B).

⁶² Householder Direct Testimony at page 7, lines 13-18.

1 In order to comply with Yuma County requirements for on-site septic systems,
2 Mr. Householder directed YTE to modify the schematic design for Sierra Ridge Unit 1
3 to increase lot sizes to an average of 8,000 square feet in compliance with the
4 requirements of Yuma County DDS. YTE complied and revised the schematic design
5 to increase the lot sizes. Increasing the lot sizes in Sierra Ridge Unit 1 to an average of
6 8,000 square feet per lot reduced the total number of lots that were initially planned for
7 Sierra Ridge Unit 1 from approximately 160 to 113.⁶³

8 Spartan signed a contract with YTE for engineering services in connection with
9 the development of the Spartan Property on April 27, 2004.⁶⁴ In the summer of 2004,
10 Mr. Householder directed YTE to proceed with the necessary soil percolation tests for
11 the Spartan Property. On July 19, 2004, YTE conducted soil borings and percolation
12 tests within the Spartan Property at a cost of approximately \$5,000 to Spartan. Copies
13 of the soil boring and percolation test results certified by Mr. Galindo are attached to
14 the Galindo Direct Testimony as Exhibit 1. The results of the soil boring and
15 percolation tests showed that soil percolation within the Spartan Property was suitable
16 for individual on-site septic systems. The test results were submitted to Yuma County
17 DDS by YTE in October 2004 as part of a request for approval to install individual on-
18 site septic systems within the Spartan Property.⁶⁵

19 On October 8, 2004, Mr. R. J. Stacks of Yuma County DDS issued a County
20 Approval of Subdivision to be Served by Individual On-Site Wastewater Treatment
21 Facilities (the "Approval to Install Individual On-Site Septic Systems") approving the
22 installation of individual on-site septic systems for the 113 lots in Sierra Ridge Unit 1.⁶⁶
23 A copy of the Approval to Install Individual On-Site Septic Systems is attached to the
24 Galindo Direct Testimony as Exhibit 2. There is a hand-written notation bearing Mr.
25 Mr. Stacks' initials under the heading "County Comments" on the Approval to Install

26 _____
27 ⁶³ Householder Direct Testimony at pages 8-9.

⁶⁴ Householder Direct Testimony at page 7, lines 21-22.

⁶⁵ Galindo Direct Testimony at page 4, lines 9-26.

⁶⁶ Galindo Direct Testimony at pages 4-5.

1 Individual On-Site Septic Systems which states that "Sewer is not available in the
2 foreseeable future." This notation is very significant because it enabled Yuma County
3 DDS and ADEQ to approve the installation of individual on-site septic systems for
4 Sierra Ridge Unit 1. Had sewer capacity been available through Far West Water &
5 Sewer, then as discussed below, the county could not have approved the use of
6 individual on-site septic systems at Sierra Ridge.

7 The Approval to Install Individual On-Site Septic Systems issued by Yuma
8 County DDS contains the following statement at the top of the form:

9 This form is to be filled out, signed and SUBMITTED TO ADEQ in
10 accordance with Arizona Administrative Code (A.A.C.) R18-5-408(E)(3)
11 with any *Application for Approval of Sanitary Facilities for Subdivision* for
12 which the proposed method of wastewater treatment requires owners of
some or all lots within the proposed subdivision to install Individual On-
Site Wastewater Treatment Facilities. (emphasis in original).

13 The county approval was submitted to ADEQ and on December 3, 2004, ADEQ
14 completed its review of Spartan's request to install individual on-site septic systems for
15 Sierra Ridge Unit 1 (113 lots) and issued the approval ("208 Review") attached as
16 Exhibit 7 to Mr. Householder's Deposition Transcript.⁶⁷ In addition to the 208 Review,
17 ADEQ signed the Water Quality Management Plan (208) Consistency Form that was
18 attached as Exhibit 8 to Mr. Householder's Deposition Transcript. The 208 Review
19 approval contained the following condition:

20 The project will be located 200 [sic] feet from the existing Far West Palm
21 Shadows WWTP, but capacity is already committed to other users - (Form
22 115 - *Application for Approval of Sanitary Facilities for Subdivisions*).
23 According to a most recent e-mail, Palm Shadows will conduct a feasibility
24 study for a conversion of the plant to a lift station. The developer has stated
25 that the subdivision will be dry sewered so that when sewer becomes
available, the subdivision will be able to hook up at that time. ADEQ
recommends that the subdivision hook up to adjacent sewer when the sewer
connection becomes available.

26
27
28 ⁶⁷ The Householder Deposition Transcript was admitted as Exhibit R-2.

1 Pursuant to this condition, Spartan would be required to construct a dry sewer
2 for Sierra Ridge Unit 1 so that residents could be connected to the Far West Water &
3 Sewer system if or when capacity became available.

4 **H. Far West Water & Sewer Reverses Course on Sewer Service for the**
5 **Spartan Property.**

6 Some time shortly after Yuma County DDS signed the Approval to Install
7 Individual On-Site Septic Systems, Mr. Householder received an unsolicited telephone
8 call from Mr. Kaveney in which Mr. Kaveney stated that: (i) Far West Water & Sewer
9 did have treatment capacity to provide sewer service to the Spartan Property; and
10 (ii) Far West Water & Sewer would provide sewer service to the Spartan Property
11 without requiring the payment of capacity fees.⁶⁸ Once Mr. Householder received this
12 communication, Spartan lost the ability to use individual on-site septic systems. From
13 that point forward, he would be required to obtain sewer service from the Utility in
14 order to develop the Spartan Property.

15 The rules addressing permitting and approval of septic systems are found in
16 A.A.C. R18-9-101 *et seq.* (Aquifer Protection Permits). Specifically, Rule R18-9-A309
17 sets forth the general provisions for type 4 general permits concerning on-site
18 wastewater treatment systems, which includes on-site septic systems. A copy of the
19 version of A.A.C. R18-9-A309 that was in effect until November 12, 2005, is attached
20 to this brief as Attachment 1.⁶⁹

21 Arizona Administrative Code R18-9-A309(A)(5) provides as follows:

22 The Department [ADEQ] shall require connection to a sewage collection
23 system if the connection is practical. A connection is practical if the
24 distance to connect to the sewer is 400 feet or less and the total cost of the
25 connection is less than \$6,000 if capacity is available and performance of
the sewage collection system and receiving sewage treatment facility are
not impaired. (emphasis added).

26 ⁶⁸ Householder Direct Testimony at page 9, lines 8-13.

27 ⁶⁹ At the hearing, the Administrative Law Judge requested that Spartan provide the statutory citations to
28 support its position that connection to the sewer was required once Far West Water & Sewer notified
the company that sewer capacity was available. See Hearing Transcript Vol. III at pages 465-466.
Arizona Administrative Code R18-9-A309 was amended effective November 12, 2005.

1 A "sewage collection system" is defined in A.A.C. R18-9-101(25) as follows:

2 "Sewage collection system" means a system of pipelines, conduits,
3 manholes, pumping stations, force mains, and all other structures, devices,
4 and appurtenances that collect, contain, and conduct sewage from its
5 sources to the entry of a sewage treatment facility or on-site wastewater
6 treatment facility serving sources other than a single residence.⁷⁰

7 In his deposition, Mr. Kaveney testified that at the time Spartan requested
8 service from Far West Water & Sewer, the Utility had a sewer main in Avenue 12E
9 twenty feet from the Spartan Property.⁷¹ At the hearing, Mr. Capestro testified that he
10 had no reason to dispute Mr. Kaveney's statement.⁷² The Utility's sewer line in Avenue
11 12E met the definition of a "sewage collection system" under ADEQ's rules. As a
12 result, Spartan could no longer proceed with individual on-site septic systems. Mr.
13 Householder aptly summarized his situation at the hearing:

14 So when the sewer company comes to me and says, we have capacity for
15 you, once they offer me capacity, I have no option to use septic anymore.

16 Now, the process that I was going to utilize the septic doesn't go away.
17 The signatures on the documents from all the agencies that allow me to do
18 it don't go away, but the option goes away because Far West Water &
19 Sewer took it away from me by offering me the capacity. So I'm stuck. I
20 have to use sewer at that time.⁷³

21 Mr. Householder subsequently directed YTE to deliver engineering design plans
22 ("Design Plans") and construction cost estimates ("Cost Estimates") for the water
23 distribution infrastructure and sewer collection infrastructure for Sierra Ridge Unit 1 to
24 Far West Water & Sewer.⁷⁴ Mr. Galindo testified that YTE did, in fact, deliver the
25 Design Plans and Cost Estimates to Far West Water & Sewer before construction of
26 any of the water or sewer infrastructure commenced.⁷⁵ Mr. Galindo testified that Mr.
27 Kaveney verbally approved the Design Plans in late 2004 before construction of any

28 ⁷⁰ The current version of A.A.C. R18-9-101(25) does not differ materially from the version quoted above.

⁷¹ Kaveney Deposition Transcript at pages 170-171.

⁷² Hearing Transcript Vol. III at page 464, lines 2-9.

⁷³ Hearing Transcript Vol. III at page 342, lines 2-10.

⁷⁴ Householder Direct Testimony at page 10, lines 9-11 and Galindo Direct at page 5, lines 16-19.

⁷⁵ Galindo Direct Testimony at page 5, line 22; Hearing Transcript I at page 44, lines 9-12.

1 water or sewer infrastructure commenced.⁷⁶ Mr. Galindo further testified that it was
2 not unusual for him to receive verbal approvals of design plans from Mr. Kaveney
3 "because that's the way it was for Mesquite 1 and 2 and for Mountain Vista Unit 5."⁷⁷

4 **I. Execution of Water and Sewer Main Extension Agreements.**

5 At the end of January 2005, Mr. Householder testified that he met with Mr.
6 Kaveney at the offices of H & S Developers at the southwest corner of 44th Street and
7 Foothills Boulevard in Yuma. At this meeting, the men discussed the terms of the
8 water main extension agreement ("Water MXA") and the sewer collection main
9 agreement ("Sewer MXA"), including the refunding obligations of Far West Water &
10 Sewer under the Water MXA and the Sewer MXA. Mr. Householder specifically
11 remembered this meeting because he was pleasantly surprised to learn that Spartan was
12 entitled to a refund of the advances in aid of construction made to Far West Water &
13 Sewer under the Water MXA and the Sewer MXA. As Mr. Householder and Mr.
14 Kaveney worked their way through the Water MXA and the Sewer MXA, Mr. Kaveney
15 asked questions of Mr. Householder and filled in the blanks in documents with specific
16 information for Sierra Ridge Unit 1. Mr. Kaveney completed the agreements and
17 signed the agreements on behalf of Far West Water & Sewer. Mr. Householder signed
18 the agreements on behalf of Spartan.⁷⁸

19 In this complaint case, Far West Water & Sewer produced copies of all water
20 and sewer main extension agreements signed by the Utility during the years 2004, 2005
21 and 2006. Copies of these main extension agreements are attached as Exhibit H (water)
22 and Exhibit I (sewer) to Spartan Data Requests 1.5(o) and 1.5(p), respectively, which
23 were admitted as Exhibit A-45.⁷⁹ At the hearing, Mr. Householder reviewed these
24 various agreements and testified that the water and sewer main extension agreements
25 that he signed with Mr. Kaveney looked like all of the other water and sewer main

26 _____
27 ⁷⁶ Galindo Direct Testimony at page 5, line 26; Hearing Transcript at page 44, lines 13-16.

⁷⁷ Hearing Transcript Vol. 1 at pages 44-45.

⁷⁸ Householder Direct Testimony at pages 11-12.

⁷⁹ See *infra* Sections III(A) and (B).

1 extension agreements from the years 2004-2006 that were produced by Far West Water
2 & Sewer.⁸⁰

3 In addition, Mr. Householder's testimony regarding the manner in which his
4 main extension agreements were prepared is consistent with the testimony of Mr.
5 Kaveney at his deposition. Mr. Kaveney testified as follows:

6 Q. Now, Mr. Kaveney, when you met a developer on a line extension
7 agreement, did you actually prepare the agreement?

8 A. Yeah. It was pretty much boilerplate. You just changed the dollars
9 and cents and the name of the company.

10 Q. Did you actually do that yourself on the computer?

11 A. Yes.

12 Q. So Ms. Phillips did not do that?

13 A. No.

14 Q. And how many main extension agreements did you prepare when
15 you were at Far West Water and Sewer?

16 A. Oh, Lord. I want to say 30. I don't know why, but "30" rings a bell
17 to me, for some reason.

18 Q. Does that include water and sewer agreements?

19 A. Mm-hmm.

20 Q. So there were 30 water, 30 sewer; or was there a total of 30 water
21 and sewer?

22 A. I don't recall. I just remember there was a lot of them.

23 Q. Did anyone else at the company prepare main extension agreements?

24 A. No.

25 Q. So during the period of time that you worked for Far West Water
26 and Sewer Company, you would have prepared the main extension
27 agreements?

28 A. Mm-hmm.⁸¹

Mr. Householder testified that he did not receive copies of the signed Water
MXA and Sewer MXA at his meeting because Mr. Kaveney told him that the Water

⁸⁰ Hearing Transcript Vol. III at pages 356-357.

⁸¹ Kaveney Deposition Transcript at pages 75-76. Mr. Capestro noted during the deposition that outside
counsel for Far West Water & Sewer began preparing main extension agreements in 2006.

1 MXA, and perhaps the Sewer MXA, would have to be submitted to the Commission for
2 approval. Mr. Kaveney said that once he received back approved copies from the
3 Commission, he would provide Mr. Householder with copies of both agreements.⁸² Mr.
4 Kaveney, however, never provided copies of the agreements.

5 After some time, it occurred to Mr. Householder that he had not ever received
6 signed copies of the Water MXA and Sewer MXA. He recalled that in approximately
7 April 2006, he contacted Mr. Kaveney to remind him that he had not received signed
8 copies of the agreements. Mr. Kaveney told Mr. Householder that he would contact
9 Sarah Philips in his office to obtain copies of the agreements.⁸³

10 Mr. Householder testified that shortly thereafter he met with Ms. Philips at the
11 Utility's office on the southeast corner of 44th Street and Foothills Boulevard and
12 requested copies of the Water MXA and Sewer MXA. Mr. Householder watched while
13 Ms. Philips searched through a banker's box of main extension agreements which were
14 arranged in labeled folders. He noticed that there was a file folder labeled "Sierra
15 Ridge" but he could see that the file was empty. Ms. Philips told Mr. Householder that
16 she would continue to look for the agreements and also talk to Mr. Kaveney.⁸⁴

17 Soon after his meeting with Ms. Philips, Mr. Householder spoke to her by
18 telephone and she told him that she was unable to locate copies of the Water MXA and
19 Sewer MXA. Ms. Philips also told Mr. Householder that she would search the office of
20 H & S Developers, an affiliate of Far West Water & Sewer, for copies of the
21 agreements. Shortly after the phone call, Mr. Householder spoke to Ms. Philips again
22 by telephone and she told him that she was not able to find copies of the Water MXA
23 and Sewer MXA.⁸⁵

24 In approximately June 2006, after he was unable to obtain copies of the Water
25 MXA and Sewer MXA from Far West, Mr. Householder contacted the Commission's

26 _____
27 ⁸² Householder Direct Testimony at page 12, lines 18-21.

⁸³ Householder Direct Testimony at page 12, lines 24-28.

⁸⁴ Householder Direct Testimony at page 13.

28 ⁸⁵ Householder Direct Testimony at page 13, lines 7-13.

1 Consumer Services representative to ask whether the Commission had copies of the
2 agreements. After searching, the Commission's Consumer Services representative
3 reported that he had not found copies of any main extension agreements for Sierra
4 Ridge Unit 1 on file with the Commission.⁸⁶

5 In approximately April 2007, Mr. Householder met with Mr. Capestro in another
6 attempt to obtain copies of the Water MXA and Sewer MXA for Sierra Ridge Unit 1, or
7 alternatively, to request that the Utility prepare and execute replacement agreements
8 duplicating the originals if the originals could not be found. Mr. Capestro responded
9 that Far West Water & Sewer did not have copies of the Water MXA and Sewer MXA,
10 and that the Utility would only execute new agreements if Spartan agreed to pay
11 capacity fees totaling approximately \$2,940 per lot for each of the remaining lots in
12 Sierra Ridge Unit 1. Mr. Capestro also told Mr. Householder that the capacity fees
13 would have to be paid in advance by Spartan before any additional utility service would
14 be provided by Far West Water & Sewer. Mr. Capestro showed Mr. Householder
15 copies of the new main extension agreements for Sierra Ridge Unit 1 on his computer
16 screen,⁸⁷ but when Mr. Householder asked Mr. Capestro to e-mail copies of the main

17 ⁸⁶ Householder Direct Testimony at page 13, lines 16-21.

18 ⁸⁷ Mr. Capestro's testimony does not contradict Mr. Householder's testimony regarding seeing the main
19 extension agreements on Mr. Capestro's computer screen:

20 Q. At -- in your April 2007 meeting with Mr. Householder he indicated that he saw copies of
21 main extension agreements on your computer. Is it your testimony that that did not
22 occur?

23 A. No. My testimony is that I don't remember doing that. It could have.

24 Q. It's possible that that could have happened?

25 A. Yeah. I believe by that time I had draft agreements that had been e-mailed to me by Mr.
26 Shapiro.

27 Q. Do you recall Mr. Householder asking you to send him copies of those agreements so his
28 attorney could review them?

A. Yes, and I told him that I would refer it to my attorney and he would make the decision.

Q. And do you know whether or not those agreements were ever provided to Mr.
Householder?

A. I don't know. I referred it to Mr. Shapiro at the time. Hearing Transcript Vol. IV at
pages 690-691.

1 extension agreements to him so that he could have his attorney review the agreements,
2 Mr. Capestro told him that Spartan would first need to provide copies of engineering
3 plans, approvals to construct, approvals of construction, test results and related items
4 for the water distribution infrastructure and sewer collection infrastructure for Sierra
5 Ridge Unit 1. When Mr. Householder responded that all of this documentation had
6 been provided to Far West Water & Sewer previously on multiple occasions, Mr.
7 Capestro told him that the Utility did not have any of the documentation. Mr.
8 Householder then asked Mr. Capestro if Far West Water & Sewer had lost this
9 information and he responded "yes."⁸⁸ Mr. Capestro claimed at the hearing that this
10 was the result of a misunderstanding—that he told Mr. Householder that the
11 information was not in his office, but that he would have to go back to the other office
12 to see what he had.⁸⁹ However, he also testified that "[b]y the time we got through, we
13 had several copies of everything."⁹⁰ This is consistent with Mr. Galindo's testimony
14 below that he provided multiple copies of documents to the Utility.⁹¹

15 Mr. Capestro has also now acknowledged that Far West Water & Sewer has
16 prepared draft main extension agreements for Sierra Ridge Unit 1, but those agreements
17 have never been provided to Mr. Householder.⁹² Mr. Capestro testified that he handed
18 off to outside counsel the responsibility to finalize main extension agreements between
19 the Utility and Spartan, acknowledging that there had been a "breakdown of any
20 communication" between outside counsel and Mr. Householder.⁹³ Counsel for Spartan
21 asked Mr. Capestro about this communication breakdown on cross-examination:

22 Q. Do you know whether or not the breakdown had something to do
23 with the insistence by Mr. Shapiro that Spartan Homes pay capacity
fees for water and for sewer?

24 A. That was part of it.

25 ⁸⁸ Householder Direct Testimony at page 23, lines 6-27.

26 ⁸⁹ Hearing Transcript Vol. IV at pages 691-692.

27 ⁹⁰ Hearing Transcript Vol. IV at page 692, lines 19-20.

28 ⁹¹ See *infra* Section II(K)(6).

⁹² Hearing Transcript Vol. IV at pages 687-688.

⁹³ Hearing Transcript Vol. IV at page 688, lines 12-15.

1 Q. And do you know whether or not Mr. Shapiro was also requiring that
2 Spartan Homes advance \$15,000 to cover the cost to review design
3 plans, et cetera?

4 A. There is a letter from Mr. Shapiro in the records. I don't remember if
5 it's \$15,000; I thought it was \$5,000.

6 Q. And the letter would speak for itself on that point?

7 A. Absolutely.

8 Q. Do you know -- well, given that all of the infrastructure in the
9 ground was in the ground and was accepted and being used by Far
10 West, what would be the basis for charging Mr. Householder
11 \$15,000 for administrative costs and to review engineering plans?

12 A. I'm not the one that put it in the letter. I don't know.⁹⁴

13 The May 10, 2006, letter from the outside legal counsel referenced by Mr.
14 Capestro is attached as Exhibit 18 to Mr. Householder's deposition transcript, which
15 was admitted at the hearing as Exhibit R-2. The letter is almost comical in light of the
16 facts and circumstances of this case. It begins with a statement that outside counsel
17 has been retained to negotiate an agreement to extend service to the Sierra Ridge
18 development—service which had already been extended a year earlier. The letter
19 continues, "We understand that the Development is located within Far West's CC&N
20 and is expected to contain 113 and 60 lots in Phases I and II, respectively." At the
21 time the letter was received, Far West Water & Sewer was already providing water and
22 sewer service to 62 customers within the 113-lot Sierra Ridge Unit 1 on infrastructure
23 that had been accepted by the Utility as of April 14, 2005.⁹⁵

24 Counsel's letter goes on to state that Spartan will be responsible for an allocated
25 share of the costs of off-site facilities necessary to serve the Spartan Property, and that
26 Spartan must deposit \$15,000 with Far West Water & Sewer before main extension
27 agreements will be prepared. It is not surprising that there was a communication
28 breakdown, as Mr. Capestro calls it, after Mr. Householder received this letter. The

⁹⁴ Hearing Transcript Vol. IV at pages 689-690.

⁹⁵ See *infra* Section II(K)(7).

1 letter concludes with a statement that "Far West presently estimates the Palm Shadows
2 facility will be able to serve additional connections in the Fall of 2006." We are now
3 more than three years beyond that point, and the existing moratorium on new
4 connections remains in effect.

5 **J. Documents Signed by Far West Water & Sewer for Spartan.**

6 While Spartan does not have copies of the original Water MXA and Sewer
7 MXA for the Spartan Property signed by the parties, there are a number of documents
8 which have been signed by Far West Water & Sewer and which are a part of the record
9 in this case. At the same meeting that occurred at the end of January 2005 between
10 Messrs. Kaveney and Householder, Mr. Kaveney provided Mr. Householder with
11 copies of several important documents which he had executed in his capacity as
12 General Superintendent of Far West Water & Sewer. Mr. Kaveney provided signed
13 copies of each of the following documents:

- 14 • ADEQ form captioned "Water Service Agreement and Sewer
15 Service Agreement" for Sierra Ridge #1 & 2 dated January 28, 2005
16 (the "Water and Sewer Service Agreement for Unit 1"). A copy of
17 the Water and Sewer Service Agreement for Unit 1 is attached to the
18 Householder Direct Testimony as Exhibit 10 and was admitted at the
19 hearing as Exhibit A-9.
- 20 • ADEQ form captioned "Drinking Water Service Agreement" for
21 Sierra Ridge Unit 1 dated January 29, 2005 (the "Drinking Water
22 Service Agreement for Unit 1"). A copy of the Drinking Water
23 Service Agreement for Unit 1 is attached to the Householder Direct
24 Testimony as Exhibit 11.
- 25 • ADEQ form captioned "Capacity Assurance for Sewage Collection
26 System" for Sierra Ridge Unit 1 dated January 29, 2005 (the "Sewer
27 Collection Capacity Assurance for Unit 1"). A copy of the Sewer
28 Collection Capacity Assurance for Unit 1 is attached to the
Householder Direct Testimony as Exhibit 12 and was admitted at the
hearing as Exhibit A-11.
- ADEQ form captioned "Sewage Treatment Facility Capacity
Assurance" for Sierra Ridge Unit 1 dated January 29, 2005 (the
"Sewage Treatment Capacity Assurance for Unit 1"). A copy of the
Sewage Treatment Capacity Assurance for Unit 1 is attached to the
Householder Direct Testimony as Exhibit 13.

- 1 • ADEQ form captioned "Water Service Agreement and Sewer
2 Service Agreement" for Sierra Ridge Unit 2 dated January 28, 2005
3 (the "Water and Sewer Service Agreement for Unit 2"). A copy of
4 the Water and Sewer Service Agreement for Unit 2 is attached to the
5 Householder Direct Testimony as Exhibit 14.
- 6 • ADEQ form captioned "Drinking Water Service Agreement" for
7 Sierra Ridge Unit 2 dated January 29, 2005 (the "Drinking Water
8 Service Agreement for Unit 2"). A copy of the Drinking Water
9 Service Agreement for Unit 2 is attached to the Householder Direct
10 Testimony as Exhibit 15.
- 11 • ADEQ form captioned "Capacity Assurance for Sewage Collection
12 System" for Sierra Ridge Unit 2 dated January 29, 2005 (the
13 "Sewage Collection Capacity Assurance for Unit 2"). A copy of the
14 Sewage Collection Capacity Assurance for Unit 2 is attached to the
15 Householder Direct Testimony as Exhibit 16.
- 16 • ADEQ form captioned "Sewage Treatment Facility Capacity
17 Assurance" for Sierra Ridge Unit 2 dated January 29, 2005 (the
18 "Sewage Treatment Capacity Assurance for Unit 2"). A copy of the
19 Sewage Treatment Capacity Assurance for Unit 2 is attached to the
20 Householder Direct Testimony as Exhibit 17.⁹⁶

21 Mr. Householder testified at the hearing that Spartan relied upon these signed
22 documents as a basis for moving forward with the construction and installation of water
23 infrastructure and sewer infrastructure within the Spartan Property.⁹⁷

24 **K. Permitting, Construction, Approval and Acceptance of Water and
25 Sewer Infrastructure by Utility for Sierra Ridge Unit 1.**

26 1. Approval to Construct Water Facilities—Sierra Ridge Unit 1. Mr.
27 Galindo testified that in late 2004, YTE applied to Yuma County DDS for an approval
28 to construct water facilities for Sierra Ridge Unit 1. On December 9, 2004, Rick Stacks
of Yuma County DDS issued a Certificate of Approval to Construct Water Facilities for
Sierra Ridge Unit 1.⁹⁸ A copy of the Certificate of Approval to Construct Water
Facilities for Sierra Ridge Unit 1 is attached to the Galindo Direct Testimony as Exhibit
3. The Approval to Construct Water Facilities for Sierra Ridge Unit 1 identifies Far

⁹⁶ Householder Direct Testimony at pages 14-15.

⁹⁷ Householder Direct Testimony at page 15, lines 22-27.

⁹⁸ Galindo Direct Testimony at page 6, lines 4-7.

1 West Water & Sewer as the water provider. Mr. Galindo testified that he provided a
2 copy of the Certificate of Approval to Construct Water Facilities for Sierra Ridge Unit
3 1 to Far West Water & Sewer.⁹⁹

4 2. Provisional Verification of General Permit Conformance for
5 Sewage Collection Systems—Sierra Ridge Unit 1. Mr. Galindo testified that in late
6 2004, YTE applied to Yuma County DDS for a Provisional Verification of General
7 Permit Conformance for Sewage Collection System for Sierra Ridge Unit 1. On
8 December 9, 2004, Rick Stacks of Yuma County DDS issued the Provisional
9 Verification for Sierra Ridge Unit 1.¹⁰⁰ A copy of the Provisional Verification for
10 Sierra Ridge Unit 1 is attached to the Galindo Direct Testimony as Exhibit 4. The
11 Provisional Verification identifies Far West as the wastewater provider. Mr. Galindo
12 testified that he provided a copy of the Provisional Verification for Sierra Ridge Unit 1
13 to Far West Water & Sewer.¹⁰¹ This approval has to do with the dry-sewer for the
14 development which was discussed above in Section II(G).

15 3. Construction and Construction Oversight. In early 2005, YTE
16 completed subdivision plans for Sierra Ridge Unit 1, including engineering plans for
17 water and sewer infrastructure needed for Far West Water & Sewer to provide service
18 within that subdivision. Mr. Galindo testified that the subdivision plans were approved
19 for construction by Yuma County on or about February 10, 2005. Spartan signed a
20 contract with Noll Construction Company to construct the water distribution
21 infrastructure and sewer collection infrastructure for Sierra Ridge Unit 1, and Noll
22 Construction Company completed construction of the water distribution infrastructure
23 and sewer collection infrastructure in late March or early April 2005. During
24 construction, YTE performed limited construction inspections which including
25 verifying pipe sizes, materials and bedding.¹⁰²

26 ⁹⁹ Galindo Direct Testimony at page 6, lines 11-13.

27 ¹⁰⁰ Galindo Direct Testimony at page 6, lines 18-22

28 ¹⁰¹ Galindo Direct Testimony at page 6, lines 26-28.

¹⁰² Galindo Direct Testimony at page 7, lines 4-13; Householder Direct Testimony at page 18, lines 17-27.

1 4. Testing. Mr. Galindo testified that all of the tests required by
2 Yuma County DDS, and to his knowledge Far West Water & Sewer, were completed
3 successfully. Specifically, Mr. Galindo testified that the following tests were
4 completed successfully, which is undisputed in this case:

- 5 • On March 29, 2005, Yuma County DDS performed a Chlorine
6 Residual Test of the water distribution infrastructure for Sierra Ridge
7 Unit 1. A copy of the Chlorine Residual Test is attached to the
8 Galindo Direct Testimony as Exhibit 5. The Chlorine Residual Test
9 showed an adequate chlorine residual of greater than 200 parts per
10 million within Sierra Ridge Unit 1 as of the test date.
- 11 • On March 29, 2005, Agri-Trend LLC performed a microbiological
12 analysis for total coliform on the water distribution system at lot 85
13 of Sierra Ridge Unit 1. A copy of the microbiological analysis test
14 results is attached to the Galindo Direct Testimony as Exhibit 6. The
15 test results show negative for total coliform.
- 16 • On April 5, 2005, YTE witnessed a Water Line Pressure Test of the
17 water distribution infrastructure for Sierra Ridge Unit 1. A copy of
18 the Water Line Pressure Test Verification signed and sealed by Mr.
19 Galindo is attached to the Galindo Direct Testimony as Exhibit 7.
20 The Water Line Pressure Test showed that there were no leaks
21 within the water distribution system for Sierra Ridge Unit 1.
- 22 • On March 31, 2005 and April 5, 2005, YTE witnessed Low Pressure
23 Air Tests of the sewer collection infrastructure for Sierra Ridge Unit
24 1. A copy of the Low Pressure Air Tests signed and sealed by Mr.
25 Galindo is attached to the Galindo Direct Testimony as Exhibit 8.
The Low Pressure Air Test showed that the sewer collection
infrastructure for Sierra Ridge Unit 1 passed.
- 26 • On April 8, 2005, Mr. Galindo issued his Engineer's Certificate of
27 Testing for Sierra Ridge Unit 1. A copy of the Engineer's Certificate
28 of Testing signed and sealed by Mr. Galindo is attached to the
Galindo Direct Testimony as Exhibit 9. Mr. Galindo certified that,
to the best of his knowledge and belief or that of his inspector,
"testing on the above-described project [Sierra Ridge Unit 1] has
been substantially completed, and materials used and installed are in
conformance with the approved plans and specifications."¹⁰³

There can be no credible argument that the water and sewer infrastructure for
Sierra Ridge Unit 1 was not properly tested.

¹⁰³ Galindo Direct Testimony at pages 7-8.

1 5. Approvals of Construction.

2 a. Water System. On April 12, 2007, Rick Stacks of Yuma
3 County DDS issued an Approval of Construction for the water distribution
4 infrastructure for Sierra Ridge Unit 1. A copy of the Approval of Construction for the
5 water distribution system for Sierra Ridge Unit 1 was attached to the Galindo Direct
6 Testimony as Exhibit 10 and admitted at the hearing as Exhibit A-24. As reflected in
7 the Approval of Construction, Mr. Galindo certified on April 11, 2005, the following:

- 8 • A final construction inspection was conducted on April 9, 2005;
- 9 • The project was constructed according to the approved plans and
10 specifications and Yuma County DDS's Certificate of Approval to
Construct;
- 11 • Water system pressure and leakage tests were conducted on April 5,
12 2005, and the results were within the allowable leakage rates;
- 13 • The water distribution system was disinfected according to an
14 ADEQ-approved method; and
- 15 • Microbiological samples were collected and analyzed by Agri-
Trend. The sample results were negative for total coliform.¹⁰⁴

16 b. Sewer System. On April 15, 2005, ADEQ issued its
17 Certificate of Approval of Sanitary Facilities for Subdivision pertaining to the sewer
18 collection infrastructure for Sierra Ridge Unit 1. A copy of ADEQ's Certificate of
19 Approval of Sanitary Facilities for Subdivision is attached to the Galindo Direct
20 Testimony as Exhibit 11.

21 6. Documentation Provided to Far West Water & Sewer by Spartan.
22 Mr. Galindo testified that in the Spring of 2005, YTE provided copies of documentation
23 to Far West Water & Sewer evidencing the construction, completion and testing of the
24 water distribution infrastructure and sewer collection infrastructure for Sierra Ridge
25 Unit 1. Mr. Galindo testified that later, Far West Water & Sewer could not find copies
26 of this documentation and requested that YTE resend the documentation. YTE did
27 resend the documentation on March 13, 2006, and then again on or about April 4, 2007,

28 _____
¹⁰⁴ Galindo Direct Testimony at pages 8-9.

1 as evidenced by the Letter of Transmittal ("Letter of Transmittal") from YTE to Sarah
2 Philips ("Ms. Philips"), a former employee of Far West Water & Sewer. A copy of the
3 Letter of Transmittal is attached to the Galindo Direct Testimony as Exhibit 12. The
4 Letter of Transmittal shows that all of the following documentation was transmitted by
5 YTE to Far West Water & Sewer:

- 6 • Engineer's Design Report for water and sewer.
- 7 • Certificate of approval to construct water facilities.
- 8 • Water Adequacy Report.
- 9 • Provisional Verification of General Permit Conformance for Sewage
10 Collection Systems.
- 11 • Yuma County Chlorine Residual Test.
- 12 • Agri-Trend LLC Microbiological Analysis.
- 13 • Engineer's Certificate of Testing.
- 14 • Water Line Pressure Test Verification.
- 15 • Capacity Assurance for Sewage Collection System.
- 16 • Water Service Agreement and Sewer Service Agreement.
- 17 • Drinking Water Service Agreement.
- 18 • Subdivision Plat - book 21 of plats pages 23-25.

19 At the hearing, Mr. Capestro confirmed that all of the above-listed items are
20 currently found in the files of Far West Water & Sewer.¹⁰⁵

21 7. Utility's Letter of Acceptance issued April 14, 2005. On April 14,
22 2005, Far West Water & Sewer issued its letter of acceptance ("Letter of Acceptance")
23 to Yuma County DDS accepting the water and sewer infrastructure for Sierra Ridge
24 Unit 1. In the Letter of Acceptance, Mr. Kaveney, the General Superintendent of Far
25 West Water & Sewer, stated that:

26 Far West Water & Sewer, Inc. is granted the Certificate of Convenience
27 and Necessity ("CC&N") by the Arizona Corporation Commission to
28 provide water and sewer utility services to Sierra Ridge Units 1 & 2.

¹⁰⁵ Hearing Transcript Vol. IV at page 686, lines 7-14.

1 All necessary documents, test results, and as-built drawings have been
2 received by Far West Water & Sewer, Inc., and as such, Far West Water &
3 Sewer, Inc. accepts the completed improvements into the water and
wastewater system. Utility service can be requested for all lots as needed.

4 A copy of the Letter of Acceptance was admitted at the hearing as Exhibit A-25.
5 Mr. Capestro acknowledged in his pre-filed direct testimony that "the onsite
6 infrastructure was accepted by Mr. Kaveney in April 2005."¹⁰⁶ Thus, the acceptance of
7 the water and sewer infrastructure for the 113 lots in Sierra Ridge Unit 1 by Far West
8 Water & Sewer as of April 14, 2005, is undisputed.

9 Commencing in mid-2005 and continuing through April 2006, Spartan
10 constructed and sold 62 homes in Sierra Ridge Unit 1.¹⁰⁷ The first homes were
11 completed toward the end of 2005. All 62 homes have been connected to Far West
12 Water & Sewer's water system and sewer system.¹⁰⁸ Copies of the Inspection Release
13 forms for each of the 62 lots with homes were admitted as Exhibit A-23A.

14 The owners of the 62 homes in Sierra Ridge Unit 1 all receive water and sewer
15 service from Far West Water & Sewer,¹⁰⁹ and the Utility receives payments for water
16 and sewer service from all of these homeowners. Far West Water & Sewer provides
17 water service and sewer service to these homes through water distribution infrastructure
18 and sewer collection infrastructure that was paid for by Spartan.¹¹⁰

19 **L. No Capacity Fees Were Imposed on the 62 Lots in Sierra Ridge Unit**
20 **1 that have Connected to the Water and Sewer Systems.**

21 For each of the 62 homes in Sierra Ridge Unit 1, Spartan paid a water service
22 establishment fee of \$25 and a sewer service establishment fee of \$50.¹¹¹ A copy of an
23 invoice from Far West Water & Sewer for Lot 28 of Sierra Ridge Unit 1 showing these

24 ¹⁰⁶ Capestro Direct Testimony at page 7, lines 2-4 (Exhibit R-1).

25 ¹⁰⁷ At the hearing, Mr. Householder corrected his Direct Testimony at pages 21-22 where he testified
26 that 63 homes were constructed in Sierra Ridge Unit 1. The actual number of constructed homes is 62.
For a period of time, Mr. Householder had allowed an employee to live on a lot in a recreational vehicle
to help out with security in the development. This temporary arrangement was inadvertently included
as a 63rd home. See Hearing Transcript Vol. II at pages 152-153.

27 ¹⁰⁸ Householder Direct Testimony at page 21, lines 11-16.

28 ¹⁰⁹ Hearing Transcript Vol. III at page 458, lines 19-22.

¹¹⁰ Householder Direct Testimony at page 21, lines 17-27.

¹¹¹ Householder Direct Testimony at page 22, lines 3-6.

1 service establishment fees is attached to the Householder Direct Testimony as Exhibit
2 24. This invoice is representative of invoices for the other 62 lots.

3 **M. Cost of Water Distribution Infrastructure for Sierra Ridge Unit 1.**

4 Mr. Householder testified that Spartan paid approximately \$154,180 in
5 engineering costs, construction costs and taxes to construct the water distribution
6 infrastructure for Sierra Ridge Unit 1.¹¹² The amounts paid by Spartan to construct the
7 water distribution infrastructure for Sierra Ridge Unit 1 are advances in aid of
8 construction within the meaning of A.A.C. R14-2-401(1). It is undisputed that Spartan
9 has not received a refund of any portion of the amounts advanced for construction of
10 the water distribution infrastructure.¹¹³ It is likewise undisputed that Far West Water &
11 Sewer accepted the water infrastructure on April 14, 2005, as evidenced by the
12 Acceptance Letter. As discussed in Section IV(A) below, Spartan is entitled to the
13 immediate refund of \$154,180 in accordance with A.A.C. R14-2-406(M).

14 **N. Cost of Sewer Collection Infrastructure for Sierra Ridge Unit 1.**

15 Mr. Householder testified that Spartan paid approximately \$135,437 in
16 engineering costs, construction costs and taxes to construct the sewer collection
17 infrastructure for Sierra Ridge Unit 1.¹¹⁴ The amounts paid by Spartan to construct the
18 sewer collection infrastructure for Sierra Ridge Unit 1 are advances in aid of
19 construction within the meaning of A.A.C. R14-2-601(1). It is undisputed that Spartan
20 has not received a refund of any portion of the amounts advanced for construction of
21 the sewer collection infrastructure.¹¹⁵ It is likewise undisputed that Far West Water &
22 Sewer accepted the sewer infrastructure on April 14, 2005, as evidenced by the
23 Acceptance Letter. As discussed in Section IV(F) below, Far West Water & Sewer is
24 in violation of A.A.C. R14-2-606(C).

25 **O. Failure of Palm Shadows Wastewater Treatment Plant.**

26 _____
27 ¹¹² Householder Direct Testimony at page 22, lines 9-11.

¹¹³ Householder Direct Testimony at page 22, lines 26-27.

¹¹⁴ Householder Direct Testimony at page 22, lines 14-15.

28 ¹¹⁵ Householder Direct Testimony at page 22, lines 26-27.

1 As specified in the signed capacity assurance forms provided to Mr.
2 Householder by Far West Water & Sewer, treatment of wastewater from the Spartan
3 Property was to occur at Far West Water & Sewer's Palm Shadows wastewater
4 treatment plant ("Palm Shadows WWTP").¹¹⁶ The capacity assurance forms state
5 specifically that capacity exists for the Spartan Property. At the time that Mr. Kaveney
6 signed the capacity assurance forms, Mr. Householder reasonably believed that the
7 Utility had sewage treatment capacity for the Spartan Property. However, Mr.
8 Householder subsequently learned that while the Palm Shadows WWTP had the
9 capacity to treat the wastewater from the Spartan Property, the disposal of the treated
10 wastewater was a problem. Mr. Capestro explained the problem in his testimony:

11 The Palm Shadows plant did not perc like the engineering tests said they
12 would. It was supposed to perc to 12 feet a day. It does not perc at all
because its over clay, and it does not properly denitrify.¹¹⁷

13 Mr. Capestro did not know when Far West Water & Sewer first began having
14 problems with percolation at the Palm Shadows WWTP, but he testified that it was
15 prior to the time that he became involved in day-to-day operations of the Utility.¹¹⁸
16 During discovery in this case, Far West Water & Sewer produced a copy of a
17 memorandum dated July 2, 2004, from Mr. Kaveney to Dusty Thomas of H & S
18 Developers. The subject line of the memorandum reads "Sierra Ridge - Tentative,"
19 referring to Sierra Ridge Unit 1. In the memorandum, Mr. Kaveney stated as follows:

20 The attached tentative plat [for Sierra Ridge Unit 1] is unsatisfactory due to
21 the available sewage capacity that remains at the Palm Shadows WWTP.
22 Along with the already committed sewage capacity, we are having serious
23 issues with the effluent disposal capabilities. Last winter we experienced,
24 on two occasions, effluent pond overflow. This condition will only be
25 worse this coming season. We are currently looking into a temporary fix to
our effluent disposal needs for the upcoming season, and hope to find a
permanent resolve in the near future. If you have questions, please contact
me.

27 ¹¹⁶ See also Hearing Transcript Vol. III at page 435, lines 20-23.

28 ¹¹⁷ Hearing Transcript Vol. III at page 434, lines 9-12.

¹¹⁸ Hearing Transcript Vol. III at page 435, lines 3-7.

1 A copy of the July 2, 2004, memorandum is attached to the Householder Direct
2 Testimony as Exhibit 18. However, Mr. Householder never saw a copy of the July 2,
3 2004, memorandum until it was produced by Far West Water & Sewer during
4 discovery in this complaint case.

5 Notwithstanding the July 2, 2004, memorandum, the directors of Far West Water
6 & Sewer—Paula Capestro, Sandy Braden and Dorothy Schechert—did not meet with
7 ADEQ for the first time until January 2006 to determine if there were any problems
8 with any of the Utility's sewer plants.¹¹⁹ They waited for 18 months before deciding to
9 get involved in the bad situation.

10 In February and March 2006, ADEQ issued notices of violations ("NOVs") to
11 Far West Water & Sewer for violations of regulations pertaining to six of the utility's
12 seven sewer treatment plants.¹²⁰ An overview of the NOVs is contained in a Consent
13 Order ("Consent Order") that was signed in Docket P-105-06 dated October 2006
14 between Far West Water & Sewer and ADEQ. A copy of the Consent Order was
15 admitted at the hearing as Exhibit A-32. According to the Consent Order, the Utility's
16 violations included operating sewer treatment plants without proper permits, providing
17 and applying reclaimed sewer for direct use without proper reuse permits, exceeding
18 discharge permits for total nitrogen, failing to conduct sampling, and emissions of
19 odorous materials causing air pollution. Currently, there is a moratorium on new
20 connections to certain of the Utility's wastewater treatment plants including the Palm
21 Shadows WWTP.

22 The Consent Order established a compliance schedule and set forth stipulated
23 penalties for Far West's failure to comply with the schedule. The compliance schedule
24 for the Palm Shadows WWTP is set forth in Section III.H of the Consent Order
25 beginning on page 12. When asked at the hearing whether or not Far West Water &
26

27 ¹¹⁹ Hearing Transcript Vol. III at page 431, lines 14-17.

28 ¹²⁰ Householder Direct Testimony at page 24, lines 8-10; *see also* Hearing Transcript Vol. III at page
434, lines 19-24.

1 Sewer has complied with the compliance schedule for the Palm Shadows WWTP, Mr.
2 Capestro responded as follows:

3 Once again, I am in the position of litigating with ADEQ, and I'm close to a
4 settlement on that matter. I'm feeling very uncomfortable about saying
5 whether or not we made these time limits because I have various problems
6 with the timeline that ADEQ took to be able to settle and approve permits
7 for Section 14 where this effluent was going to.¹²¹

8 Thus, we don't know whether or not Far West Water & Sewer is in compliance
9 with the mandated schedule.

10 As a result of the violations by Far West Water & Sewer at its sewer treatment
11 plants, Yuma County DDS ceased issuing building permits for new construction in Far
12 West's CC&N in mid-April 2006.¹²² This has had a substantial adverse impact on
13 Spartan. Mr. Householder explained at the hearing as follows:

14 Q. You have testified, have you not, that Spartan has stopped
15 constructing and selling homes in Sierra Ridge Unit 1?

16 A. Yes.

17 Q. What is the reason that you have stopped constructing and selling
18 homes in Sierra Ridge Unit 1?

19 A. There is no sewer capacity.

20 Q. Is there any other reason besides that reason that you stopped selling
21 homes?

22 A. No.

23 Q. In other words, had Far West Water & Sewer been able to
24 adequately provide sewer service to you, you would still be selling
25 homes in Sierra Ridge Unit 1 today?

26 A. Yes.

27 Q. Do you believe that you would have sold out the lots in Sierra Ridge
28 Unit 1 by this point in time?

¹²¹ Hearing Transcript Vol. III at page 436, lines 17-23.

¹²² Householder Direct Testimony at page 24, lines 20-22.

1 A. Oh, quite a bit earlier than this point in time, sure.¹²³

2 P. **Construction of New Homes in Sierra Ridge Unit 1 Has Been Blocked**
3 **Since Mid-2006 to the Great Financial Detriment of Spartan.**

4 Since mid-April 2006, Spartan has not been able to obtain building permits from
5 Yuma County DDS for construction within Sierra Ridge Unit 1, or for any other part of
6 the Spartan Property, because of a moratorium on Far West Water & Sewer.¹²⁴ Thus,
7 Spartan was forced to suspend sales of new homes and construction activities within
8 Sierra Ridge Unit 1 in mid-2006. Spartan cancelled approximately 15 sales contracts
9 for new homes in Sierra Ridge Unit 1 and closed its sales models in late 2006.¹²⁵
10 Unfortunately, based upon the Utility's erroneous statements that the Palm Shadows
11 WWTP would be back online within a few months, Spartan kept its sales models open
12 for an additional six months, waiting, at a cost of roughly \$9,998 per month.¹²⁶ Of
13 course, Far West Water & Sewer still cannot provide new sewer service more than
14 three years later.

15 Mr. Householder testified at the hearing that Spartan has incurred other costs as
16 a result of the moratorium. On the 51 remaining lots in Sierra Ridge Unit 1, Spartan is
17 paying property taxes of approximately \$20,000 per year. Spartan must pay for dust
18 control and weed control on the vacant lots. Spartan was required to pay a \$41,958
19 penalty to APS for failing to meet the required sales target, as shown on the invoice
20 from APS that was admitted as Exhibit A-39. Similarly, Spartan will forfeit a deposit
21 balance of approximately \$21,000 with Southwest Gas¹²⁷ for failing to meet the
22 required sales target.¹²⁸

23 Perhaps most significantly, despite continuing demand for its product, Spartan
24 has been unable to construct homes on the 51 remaining lots in Sierra Ridge Unit 1, or
25 any of the 60 lots in Sierra Ridge Unit 2, because Far West Water & Sewer cannot or

26 ¹²³ Hearing Transcript Vol. III at pages 360-361.

27 ¹²⁴ Householder Direct Testimony at page 24, lines 3-5.

28 ¹²⁵ Householder Direct Testimony at page 25, lines 7-10.

¹²⁶ Hearing Transcript Vol. III at page 361, lines 13-23.

¹²⁷ See Exhibit A-37.

¹²⁸ Hearing Transcript Vol. III at pages 362-363.

1 will not provide sewer service. All told, as a result of the failure of Far West to
2 properly maintain and operate its Palm Shadows WWTP and other wastewater
3 treatment plants, Spartan has incurred financial losses exceeding \$750,000 and
4 approaching \$1 million.¹²⁹

5 The inability to obtain building permits has also impacted the development of
6 Spartan's Commercial Property. Mr. Householder testified that although Spartan has
7 attempted to market its Commercial Property, potential buyers will not buy because
8 they cannot obtain sewer service for the property at the present time from Far West
9 Water & Sewer.¹³⁰

10 The difficulties experienced by Spartan have been exacerbated by an inexcusable
11 lack of communication by Far West Water & Sewer. Mr. Householder testified that the
12 Utility failed to keep him correctly informed regarding the utility's progress—or lack
13 thereof—in correcting problems at the Palm Shadows WWTP.¹³¹ In the May 10, 2006
14 letter discussed above, Mr. Householder was told that "Far West is in the process of
15 designing and installing improvements that will allow additional wastewater flows to be
16 treated at Palm Shadows."¹³² Now, more than three years later, the Palm Shadows
17 WWTP remains out of compliance and Spartan still cannot obtain a building permit.

18 Further, following receipt of the May 10, 2006, letter Mr. Householder received
19 notice that Far West Water & Sewer had scheduled a meeting in late May 2006 with the
20 developers in the utility's CC&N area. Mr. Householder attended the May meeting. At
21 the meeting, the Utility and its outside engineering firm told the developers that Yuma
22 County DDS would resume issuing building permits in late August or September 2006.
23 Far West Water & Sewer also committed that a follow-up meeting would be called in
24 July 2006 to provide further updates. However, Mr. Householder has no knowledge
25 that a follow-up meeting was ever scheduled or held. During the next several months,

26
27 ¹²⁹ Householder Direct Testimony at page 25, 10-16.

¹³⁰ Householder Direct Testimony at page 25, lines 17-21.

¹³¹ Householder Direct Testimony at page 25, lines 27-28

¹³² A copy of the May 10, 2006, letter is attached to the Householder Direct Testimony as Exhibit 26.

1 Mr. Householder placed multiple calls to the Utility regarding the status of compliance
2 at the Palm Shadows WWTP and none of those calls were ever returned.¹³³

3 In approximately September 2006, Far West Water & Sewer communicated with
4 the developers that problems at the Utility's sewer treatment plants were being
5 addressed, and that Yuma County DDS would resume issuing building permits by late
6 2006. From September 2006 through the end of 2006, Mr. Householder again made
7 many attempts to contact Far West Water & Sewer regarding his inability to obtain
8 building permits from Yuma County DDS, but the Utility failed to respond to any of his
9 calls.¹³⁴

10 As discussed more fully in Section IV(I) below, Far West Water & Sewer has a
11 statutory duty under A.R.S. § 40-361(B) to "*furnish such service, equipment and*
12 *facilities as will promote the safety, health, comfort and convenience of its patrons,*
13 *employees and the public, and as will be in all respects adequate, efficient and*
14 *reasonable.*" Utility's inability to operate its wastewater plants in accordance with the
15 law falls below this standard. Utility's inability to accommodate new sewer
16 connections on its system falls below this standard. Utility's failure to communicate, as
17 well as Utility's failure to communicate accurate and timely information, falls below
18 this standard.

19 **Q. Discrimination by Far West Water & Sewer.**

20 While Spartan has been unable to obtain sewer service from Far West Water &
21 Sewer since mid-1986, the Utility has connected new dwellings for other developers
22 and other individual lot owners. From approximately October 25, 2006, which is the
23 date of the Consent Order, through January 4, 2010, Far West Water & Sewer provided
24 sewer connections to at least 115 and maybe more new dwellings or structures, as well
25 as double wide manufactured homes within the Rancho Rialto Park. While all of these
26 connections are within the vicinity of the Spartan Property, Far West Water & Sewer
27 has refused to provide sewer service to additional connections within Sierra Ridge Unit

28 ¹³³ Householder Direct Testimony at page 26, lines 7-16.

¹³⁴ Householder Direct Testimony at page 26, lines 17-22.

1 1.¹³⁵ A list of the Utility's sewer connections since approximately October 25, 2006,
2 was admitted at the hearing as Exhibit A-27A.

3 As discussed more fully in Section IV(H) below, under A.R.S. § 40-334(A), "[a]
4 public service corporation shall not, as to rates, charges, service, facilities or in any
5 other respect, make or grant any preference or advantage to any person or subject any
6 person to any prejudice or disadvantage." Far West Water & Sewer's practice of
7 allowing sewer connections for some developers while denying any new connections to
8 Spartan constitutes discriminatory and prejudicial treatment against Spartan Far West
9 Water & Sewer in violation of A.R.S. § 40-334(A).

10 **III. MAIN EXTENSION AGREEMENTS 2004-2006.**

11 **A. Water Main Extension Agreements.**

12 Spartan's First Set of Data Requests to Far West Water & Sewer and the Utility's
13 responses to those data requests were admitted at the hearing as Exhibit A-45. In Data
14 Request 1.5(o), Spartan requested copies of "all main extension agreements for water
15 service signed by Far West Water & Sewer, Inc., during the years 2004, 2005 and
16 2006." In response to that request, the Utility provided copies of eleven water main
17 extension agreements, which are attached under Exhibit "H" to Exhibit A-45. At the
18 hearing, Mr. Capestro testified that to the best of his knowledge, this is all of the water
19 main extension agreements that were executed by Far West Water & Sewer during the
20 years 2004 through 2006.¹³⁶

21 Exhibit A-58 provides certain summary information regarding these water main
22 extension agreements. Of the 11 agreements, seven were dated January 31, 2005, two

23 _____
24 ¹³⁵ Householder Direct Testimony at pages 26-27.

25 ¹³⁶ Hearing Transcript Vol. IV at page 548, lines 7-14. There was some confusion at the hearing by Mr.
26 Capestro regarding whether or not he had, in fact, produced copies of all water main extension
27 agreements signed by Far West Water & Sewer during the years 2004, 2005 and 2006. In addition, the
28 copies of the water main extension agreements provided in Tab "H" of Exhibit A-45 were incomplete.
Mr. Capestro agreed to review his files and late-file any additional water main extension agreements
that were signed during the 2004-2006 time period. See Hearing Transcript Vol. IV at page 550, lines
11-20. Far West Water & Sewer has not late-filed any additional water main extension agreements, but
on February 16, 2010, counsel for the Utility e-mailed complete copies of the water main extension
agreements to counsel for Spartan.

1 dated January 25, 2005, one was dated June 30, 2004, and one was dated June 28, 2004.
2 There were no agreements dated in 2006. All 11 agreements had estimated start dates
3 and estimated completion dates that were prior to the dates the agreements were signed.
4 The agreement for Estrella at Mesa Del Sol Unit 1, for example, was dated 13 months
5 after the estimated completion date. Nine of the agreements were approved by the
6 Utilities Division on February 8, 2005, while the remaining two were approved on
7 January 14, 2005, and July 24, 2004.

8 Each of the 11 water main extension agreements was in the same standard form,
9 which is just over two pages in length, exclusive of the construction cost estimate
10 exhibit.¹³⁷ Each of the 11 water main extension agreements requires the refund of
11 developer advances at 10% per annum. However, the nine agreements that were dated
12 in 2005 have a 20-year refund period while the two agreements dated in 2004 have a
13 10-year refund period. Ten of the agreements were signed by Mr. Kaveney as the
14 General Superintendent of Far West Water & Sewer, and one agreement was signed by
15 Dusty Thomas as the Secretary/Treasurer of the Utility.

16 All of the 11 water main extension agreements require the applicant to "install
17 water line improvements according to Far West Water's specifications and practices."
18 However, none of the 11 agreements require the payment of any capacity fees or off-
19 site infrastructure fees. At the hearing, Mr. Capestro explained on cross-examination
20 that Far West Water & Sewer was not assessing water capacity fees during the time that
21 the agreements were signed in 2004-2006:

22 Q. So if you have a capacity fee associated with water service, it would
23 now be included in the water main extension agreement?

24 A. That's correct.

25 Q. And I have read this water main extension agreement, and, in fact, I
26 have read all the 12 [sic] water main extension agreements that were
27 responsive to this question, and I don't see a capacity fee referenced
28 in any of them.

¹³⁷ See Exhibit "H" of Exhibit A-45.

1 A. No. The agreements after -- there was no capacity fees in any of
2 those.

3 Q. And when did you begin requiring a capacity fee for water service?

4 A. After May of 2006.

5 Q. Okay.

6 A. As we got estimates from our engineers to what it would require to
7 improve the plant.

8 Q. So when Mr. Householder was working with Far West Water &
9 Sewer for water and sewer service in 2004 and 2005, you -- at that
10 period of time you were not requiring a water capacity fee of
11 developers?

12 A. That's correct.¹³⁸

13 Far West Water & Sewer does not have an approved water capacity fee in its
14 water division tariff, and it did not have a water capacity fee in its tariff in 2004 and
15 2005.¹³⁹ Mr. Capestro acknowledges that absent a tariffed water capacity fee, the
16 Utility would have to include such a fee in its water main extension agreements in order
17 to collect the fee.¹⁴⁰ Far West Water & Sewer was not including a capacity fee in its
18 water main extension agreements in 2004 and 2005.

19 **B. Sewer Main Extension Agreements.**

20 In Data Request 1.5(p), Spartan requested copies of "all collection main
21 extension agreements for sewer service signed by Far West Water & Sewer, Inc.,
22 during the years 2004, 2005 and 2006." In response to that request, the Utility provided
23 copies of 49 sewer main extension agreements, which are attached under Exhibit "I" to
24 Exhibit A-45. The sewer main extension agreements provided by the Utility were all
25 lacking the cost estimate attachments. On February 16, 2010, counsel for the Utility e-
26 mailed complete copies of 23 of the 49 sewer main extension agreements. Spartan can
27 only assume that Far West Water & Sewer does not have complete copies of the

28 ¹³⁸ Hearing Transcript Vol. IV at pages 555-556.

¹³⁹ Hearing Transcript Vol. IV at pages 559-560.

¹⁴⁰ Hearing Transcript Vol. IV at page 560, lines 10-20.

1 remaining 26 sewer main extension agreements signed in the years 2004, 2005 and
2 2006.

3 Exhibit A-59 provides certain summary information regarding the sewer main
4 extension agreements. Of the 49 agreements, 47 were dated either January 25 or
5 January 31, 2005.¹⁴¹ The other two agreements were dated February 11, 2005, and June
6 4, 2005. Mr. Kaveney signed all of the agreements as General Superintendent of Far
7 West Water & Sewer. At the hearing, Mr. Capestro agreed that Mr. Kaveney was
8 probably very busy around the end of January 2005 working on main extension
9 agreements.¹⁴² This, of course, was the very same time that Mr. Householder met with
10 Mr. Kaveney to sign the water and sewer main extension agreements for Sierra Ridge
11 Unit 1.

12 All 49 of the sewer main extension agreements had estimated start dates and
13 estimated completion dates that were prior to the dates of the agreements. In fact, many
14 of the agreements had completion dates that were more than five years prior to the date
15 of the agreements.

16 All 49 of the sewer main extension agreements are in the same standard form,
17 which is just two pages in length, exclusive of the construction cost estimate exhibit.¹⁴³
18 All of the sewer water main extension agreements require the refund of developer
19 advances at 5% per annum for 20 years.¹⁴⁴

20 All 49 of the sewer main extension agreements require the applicant to "install
21 sewer line improvements according to Far West Water's specifications and practices."
22 However, none of the 49 agreements require the payment of any capacity fees or off-
23 site infrastructure fees.

24 _____
25 ¹⁴¹ When combined with the water main extension agreements, there were a total of 56 main extension
26 agreements that were dated on just two days in January 2005. This is of a total of 60 agreements dated
in the three years 2004, 2005 and 2006.

27 ¹⁴² Hearing Transcript Vol. IV at page 580, lines 6-9.

28 ¹⁴³ See Exhibit "I" of Exhibit A-45.

¹⁴⁴ The sewer main extension agreement for Yuma East Estates #5&6 omits one line of text, which is
the line that sets forth the percentage amount of the refund. Presumably, the refund percentage is 5%
like all of the other agreements.

1 **C. Sewer Capacity Fees Imposed by Utility on behalf of its Unregulated**
2 **Affiliate H & S Developers.**

3 Exhibit A-57 is a response by Far West Water & Sewer to a data request from
4 Spartan asking whether the Utility imposed sewer capacity fees, hook-up fees or other
5 analogous fees on developers. The exhibit contains a series of documents which
6 correspond to developments that are served by Far West Water & Sewer, and which
7 show lot numbers and payments, and in some cases payment dates, check numbers
8 and/or connection dates. Although the December 24, 2009, e-mail which accompanied
9 the exhibit states that the documents show payments made by developers, the exhibit is
10 deceptively misleading. The payments that are shown on the documents in Exhibit A-
11 57 are not payments by developers to Far West Water & Sewer, but payments by
12 developers to Far West Water & Sewer's unregulated affiliate, H & S Developers. Mr.
13 Capestro acknowledged this on cross-examination:

14 Q. Okay. Then if you would turn to the first document [in Exhibit A-
15 57].

16 A. Yes.

17 Q. There is a spreadsheet for Seasons No. 1 sewer connect. Is this a
18 document that is kept in the ordinary course of business or was that
19 prepared for this case?

20 A. It was not prepared for this case, but quite frankly I don't know how
21 it was kept up.

22 Q. Where did it come from?

23 A. I had asked for an accounting a couple years ago as to what fees had
24 been paid and what fees had not been paid.

25 Q. Who did you ask to do that accounting?

26 A. I asked the CPA for H & S Developers.

27 Q. Why would the CPA for H & S Developers have information about
28 hook-up fees or capacity fees that were paid to Far West Water &
 Sewer?

1 A. On Seasons No. 1, when the CC&N was extended, the report before
2 the Arizona Corporation Commission was that the developer would
3 be financing the Seasons wastewater treatment plant. An agreement
4 was made between the developer and H & S that H & S would pay
5 for the new plant that was being put in.

6 Q. Was that a written agreement?

7 A. I don't know. That was between Mr. Weidman and with Mr.
8 Spencer.

9 Q. Do you know -- okay. So you testified you do not know if that was a
10 written agreement?

11 A. No, I do not.

12 Q. And it's safe to say that you have never seen a written agreement
13 between those two parties?

14 A. I have never seen an agreement. All I know is that it was broken
15 down based upon the cost of that plant.

16 Q. Okay. So this chart or spreadsheet for Seasons 1, this is a document
17 that was not maintained by Far West Water & Sewer but by H & S
18 Developers?

19 A. I asked H & S to do it, and at the time, I don't know if Far West was
20 keeping a similar account or not.

21 Q. When you asked a developer to pay capacity fees, how is that
22 communicated to the developer?

23 A. I'm not sure that it's a capacity fee. It's their portion of the cost of
24 that development. Seasons was just one developer, and that was
25 Scott Spencer, and he agreed to pay his proportionate share of what
26 the cost of that development was. And all checks were made
27 payable to H & S Developers, not Far West.¹⁴⁵ (emphasis added).

28 Exhibit A-57 is deceptively misleading because on its face, it leads one to
believe that developers were paying sewer capacity fees for their lots to Far West Water
& Sewer when, in fact, the developers were making payments to the Utility's

¹⁴⁵ Hearing Transcript Vol. IV at pages 602-604.

1 unregulated affiliate, H & S Developers. What's more, Mr. Capestro could not even
2 authenticate the documents contained in Exhibit A-57:

3 Q. But these documents are in the files of Far West Water & Sewer?

4 A. No, they are files in my office.

5 Q. Those are not files of Far West Water & Sewer?

6 A. I was given a box of files that was in the CPA's office, Lloyd
7 Sunderman, S-u-n-d-e-r-m-a-n, and I don't know the source. I tried
8 to confirm the source because I knew it would be importance, and I
9 just don't know.

10 Q. Does that apply to the entire list of documents?

11 A. That is correct.¹⁴⁶

12 At the hearing, Mr. Capestro described how the strange and illegal process
13 worked under cross-examination:

14 Q. So how did you figure out when a developer wanted sewer service --
15 again, when I ask you these questions, they will pertain to the
16 2004/2005 time period -- but when a developer came in and said, I
17 want water and sewer service, first off, with regard to water service,
18 you are not going to ask that developer to pay any kind of capacity
19 fee because you weren't requiring those back then?

20 A. Not at that time.

21 Q. So with regard to sewer service, how would you determine what a
22 developer was going to pay or what you were going to ask a
23 developer to pay?

24 A. It was based upon the cost of the plant or any addition to the cost and
25 divided by the number of homes that could be put on that plant.

26 Q. So if a developer was going to do 100 lots and it was going to cost
27 \$100 to build the plant, then you would ask the developer to pay \$1
28 per lot using those numbers?

A. Who is "you would"?

Q. The utility.

A. The utility wasn't asking.

¹⁴⁶ Hearing Transcript Vol. IV at page 631, lines 10-19.

1 Q. Who was asking?

2 A. H & S Developers. H & S was advancing the funds. Far West was
3 not advancing funds.

4 Q. I'm moving beyond Seasons. I'm talking generally.

5 A. Back then the only plants that there was a fee were ones where
6 H & S -- where the agreement was the original developer agreed to
7 finance the plant. There were no plants financed by Far West back
then that were being charged a connection fee.

8 * * *

9 Q. (BY MR. CROCKETT) So which plants did H & S Developers pay
10 to build?

11 A. H & S paid for the Seasons plant. It paid for the Palm Shadows
12 plant. It paid for the expansion of the Del Oro Plant. And then those
plants were contributed as CIAC to Far West.

13 Q. By H & S Developers?

14 A. Correct.

15 * * *

16 Q. So I'm trying to understand, what is the legal basis to require a
17 developer to go sign an agreement with H & S Developers, which is
18 not a utility company?

19 A. Because it was -- it had financed it. I totally understand where you
20 are coming from, and that is why in the future it's going to be part of
21 what Far West does, not what H & S does.

22 * * *

23 Q. Okay. And I guess my point is, Mr. Capestro, is that quite often in
24 my questioning you come back to what we are doing today and what
25 we are doing in the future. This case is about what happened to Mr.
26 Householder back in 2004, 2005; correct?

27 A. Correct.¹⁴⁷

28 Mr. Capestro testified that Dorothy Schechert, who is one of the three directors
of Far West Water & Sewer, is "owed quite a bit of money by H & S Developers."¹⁴⁸

¹⁴⁷ Hearing Transcript Vol. IV at pages 604-606 and 625-626 (emphasis added).

¹⁴⁸ Hearing Transcript Vol. IV at page 615, lines 6-7.

1 This might explain, in part, why Mr. Capestro is so interested in developers making
2 payments to H & S Developers.

3 Although Mr. Capestro testified at the hearing that he believed there was some
4 type of an agreement between Far West Water & Sewer and H & S Developers
5 pertaining to the construction of sewer treatment plants, he was unable to provide any
6 reliable information. At the request of counsel for Spartan, Mr. Capestro agreed to
7 search his files after the hearing to see if he could locate an agreement between H & S
8 Developers and Far West Water & Sewer pertaining to the construction of the Palm
9 Shadows wastewater treatment plant.¹⁴⁹ The administrative law judge requested that
10 any such document be late-filed in the docket.¹⁵⁰ No such agreement has been docketed
11 by the Utility, so the presumption can be safely made that none exists.

12 **D. After-the-Fact Preparation and Execution of Main Extension**
13 **Agreements.**

14 As discussed above, nine water main extension agreements and 47 sewer main
15 extension agreements are dated on just two days in January 2005. Mr. Kaveney
16 explained in his deposition how this came about under questioning from counsel for
17 Spartan:

18 Q. Now, Mr. Kaveney, I noticed from the files that I've looked at, there
19 are a large number of line extension agreements that were dated in
20 January of 2005. Was there anything unusual that happened in
21 January of 2005 that caused the company to submit -- or to sign a
22 large number of line extension agreements?

23 A. If my memory serves me correct, it was discovered that there were a
24 lot of line extension agreements that never got generated from before
25 I was here. If I recall, Dusty had found those and said -- it was a
26 discovery. "We never did extension agreements for these developers.
27 We need to get them going."

28 Q. Did you prepare those agreements for developers that had not
previously been prepared?

A. Yes. That was when I was over at the water plant. I distinctively
remember that because there were a lot of them all at once.

¹⁴⁹ Hearing Transcript Vol. IV at page 629, lines 7-11.

¹⁵⁰ Hearing Transcript Vol. IV at page 723, lines 10-12.

1 Q. With respect to those agreements that were prepared late, was the
2 water and sewer infrastructure already constructed?

3 A. Yeah. I went back and pulled the developer files and got all the data
4 from their files to compile the agreement itself.

5 Q. So these agreements were -- they were prepared after the fact?

6 A. Yeah. For the most part, we had all the required materials here that
7 were required to generate the agreement. The agreement just never
8 got done.

9 Q. Did you have an attorney review any of the agreements that you
10 prepared?

11 A. No.

12 Q. Did Mr. Thomas review any of the agreements that your prepared?

13 A. No.

14 Q. Did Mr. Capestro review any of the agreements that you prepared?

15 A. Prior to Jay Shapiro, no.

16 Q. So you were, is it safe to say, a one-man operation, with regard to
17 main extension agreements?

18 A. Under a delegated authority, yes.¹⁵¹

19 At the hearing, Mr. Capestro was asked whether there is anything in the above-
20 quoted testimony of Mr. Kaveney with which Mr. Capestro disagrees, and he
21 responded, "No."¹⁵² Specifically, with regard to these late main extension agreements,
22 Mr. Capestro responded as follows on cross examination:

23 Q. Just trying to nail this down. I apologize, Mr. Capestro, but were
24 you involved in any way in these main extension agreements that
25 were prepared after the fact in January of 2005?

26 A. No.¹⁵³

27 Assuming, *arguendo*, that Far West Water & Sewer and Spartan never did sign
28 water and sewer main extension agreements, it is interesting that Utility was obviously
willing to prepare and sign 11 water main extension agreements and 49 sewer extension
agreements all after the water and sewer facilities covered under those agreements had

¹⁵¹ Kaveney Deposition Transcript at pages 78-79.

¹⁵² Hearing Transcript Vol. III at page 531, lines 8-10.

¹⁵³ Hearing Transcript Vol. III at page 531, lines 21-25.

1 been constructed and installed. Perhaps the reason is that a substantial number of the
2 main extension agreements are between Utility and its unregulated affiliate H & S
3 Developers.

4 **IV. UTILITY'S VIOLATIONS OF COMMISSION RULES AND STATUTES.**

5 **A. Violation of A.A.C. R14-2-406(M).**¹⁵⁴

6 Arizona Administrative Code R14-2-406(M) states:

7 *All agreements under this rule shall be filed with and approved by the*
8 *Utilities Division of the Commission. No agreement shall be approved*
9 *unless accompanied by a Certificate of Approval to construct as issued by*
10 *the Arizona Department of Health Services. Where agreements for main*
11 *extensions are not filed and approved by the Utilities division, the*
12 *refundable advance shall be immediately due and payable to the person*
13 *making the advance.*

14 At the hearing, Vicki Wallace testified regarding this rule on behalf of Utilities
15 Division Staff.¹⁵⁵ Ms. Wallace is an executive consultant for the Commission's Utilities
16 Division and her duties include processing main extension agreements for water
17 utilities.¹⁵⁶ In connection with the processing of water main extension agreements, Ms.
18 Wallace reviews the agreements to make sure they contain all of the information that is
19 required by the rules.¹⁵⁷

20 Ms. Wallace testified that the utility is responsible for submitting water main
21 extension agreements to the Utilities Division Staff for approval.¹⁵⁸ Under A.A.C. R14-
22 2-406(M), "[w]here agreements for main extensions are not filed and approved by the
23 Utilities division, the refundable advance shall be immediately due and payable to the
24 person making the advance." Ms. Wallace testified that advanced "funds" may be in
the form of "plant," as explained in the following answer to a question from Spartan's
attorney:

¹⁵⁴ Count IV of the Formal Complaint.

¹⁵⁵ Hearing Transcript Vol. III, pages 367-383.

¹⁵⁶ Hearing Transcript Vol. III at page 368, lines 23-24. It should also be noted that Ms. Wallace has substantial experience reviewing and approving water main extension agreements. She testified that in one two-month period, she reviewed up to 45 water main extension agreements. Hearing Transcript Vol. III at page 370, lines 11-13.

¹⁵⁷ Hearing Transcript Vol. III at pages 369-370.

¹⁵⁸ Hearing Transcript Vol. III at page 379, lines 9-11.

1 Q. Okay. So whether the developer provides cash to the utility to
2 construct the infrastructure or whether the developer actually
3 constructs the infrastructure and then the utility accepts that
4 infrastructure, the amount of that advance is refundable where the
5 developer does not get a main extension agreement for water
6 approved?

7 A. Correct, and let me explain that. In the definition of refundable
8 advances it says "funds." It does refer to the word funds, but Staff is
9 of the opinion that funds can be in the form of plant.

10 ALJ MARTIN: Can or cannot, Ms. Wallace?

11 THE WITNESS: Can be in the form of plant. We made that prior
12 determination before.¹⁵⁹ (emphasis added)

13 Ms. Wallace further testified, as detailed in the exchange below, that the
14 refunding requirement of A.A.C. R14-2-406(M) applies in all situations where a utility
15 has accepted infrastructure and is supplying water to customers, which we have in this
16 case, regardless of whether a written agreement exists:

17 Q. Okay. I guess -- let me give you a scenario here. And I'm going to
18 assume -- and to make it very clear for the record this is an
19 assumption that obviously we do not agree with -- but assume that
20 Far West Water & Sewer is correct that there is not a water main
21 extension agreement that was signed between Spartan and Far West
22 in this case, and also -- I don't think you have to assume this because
23 I think it's in evidence -- that Far West is currently and has been
24 serving a number of utility customers, as many as 62 or 63 in the
25 subdivision, and I believe it's also in evidence that the water
26 infrastructure has been constructed, that Far West Water & Sewer
27 has issued a letter of acceptance that indicates that the water
28 infrastructure was accepted, that the testing and certifications and
things have been done and have been submitted. So assuming all of
that is true, does Rule 406(M) apply in that situation, in your
opinion?

A. To the extent that the utility company has accepted infrastructure to
their plant and is serving water customers, yes, the rule would apply.

Q. Even if the evidence in this case or even if the judge concluded that,
in fact, no water main extension agreement was ever signed between
Far West and Spartan?

¹⁵⁹ Hearing Transcript Vol. III at page 381, lines 1-13.

1 A. You know, I can't give an opinion on the agreement because I
2 haven't reviewed it or I don't know of its existence or anything. I
3 can only tell you Staff's opinion of the applicability of that rule. It
4 applies to all situations wherein the company has accepted
5 infrastructure and is supplying water to customers.¹⁶⁰ (emphasis
6 added).

7 It is clear that Spartan is entitled to the immediate refund of the cost of the water
8 distribution infrastructure constructed to serve Sierra Ridge Unit 1. It is undisputed that
9 the water distribution infrastructure was constructed to serve Sierra Ridge Unit 1 in
10 2005. It is undisputed that the water distribution infrastructure was permitted,
11 inspected, tested and certified. It is undisputed that Far West Water & Sewer accepted
12 the water infrastructure for Sierra Ridge Unit 1 on April 14, 2005, as evidenced by the
13 Utility's Acceptance Letter.¹⁶¹ It is undisputed that Far West Water & Sewer is using
14 the water distribution infrastructure today to provide water service to customers in
15 Sierra Ridge Unit 1. Finally, it is undisputed that Far West Water & Sewer never
16 submitted a water main extension agreement for Sierra Ridge Unit 1 to the Utilities
17 Division Staff for approval.

18 Mr. Householder testified that Spartan and Far West Water & Sewer executed a
19 written water main extension agreement for Sierra Ridge Unit 1 on or about January 29,
20 2005. However, Ms. Wallace made clear that the advance refunding requirement of
21 A.A.C. R14-2-406(M) is not dependant upon the existence of a written agreement.
22 Rather, the refunding requirement would apply "to all situations wherein the company
23 has accepted infrastructure and is supplying water to customers." The facts are
24 undisputed that Far West Water & Sewer has accepted infrastructure from Spartan and
25 is currently supplying water to customers in Sierra Ridge Unit 1. Thus, Utility owes
26 Spartan the money regardless of whether the parties ever signed a water main extension
27 agreement.

28 _____
¹⁶⁰ Hearing Transcript Vol. III at pages 382-383.

¹⁶¹ Exhibit A-25.

1 Mr. Householder testified that Spartan paid \$154,180 in engineering costs,
2 construction costs and taxes to construct the water distribution system for Sierra Ridge
3 Unit 1. This testimony is undisputed by Far West Water & Sewer. Mr. Wallace made
4 clear that advanced "funds can be in the form of plant." Thus, the \$154,180 paid by
5 Spartan to construct the water distribution infrastructure for Sierra Ridge Unit 1
6 constitutes an advance of "funds" under A.A.C. R14-2-406. Accordingly, Spartan is
7 entitled to an immediate refund from Far West Water & Sewer in the amount of
8 \$154,180 because Far West failed to file and obtain approval of a water main extension
9 agreement for Sierra Ridge Unit 1.

10 It bears noting that Far West Water & Sewer did not ask a single question of Ms.
11 Wallace on cross-examination regarding the operation of A.A.C. R14-2-406(M). In
12 fact, the Utility asked only three brief questions of Ms. Wallace, and they had to do
13 with A.A.C. R14-2-406(C)(2), which will be discussed next.

14 **B. Violation of A.A.C. R14-2-406(C)(2).**¹⁶²

15 Arizona Administrative Code R14-2-406(C)(2) states:

16 *Each applicant shall be provided with a copy of the written main extension*
17 *agreement.*

18 At the hearing, Ms. Wallace testified regarding this rule on behalf of the Utilities
19 Division.¹⁶³ Ms. Wallace testified that it is the responsibility of the utility to comply
20 with this rule, and that failure to provide an applicant for a water main extension with a
21 written copy of a main extension agreement is a violation of the rule:

22 Q. In your opinion, whose responsibility is it to provide an applicant for
23 an extension of water service with a copy of the written main
24 extension agreement?

24 A. It would be the utility company.

25 Q. And if a utility company failed to provide a copy of a written main
26 extension agreement to an applicant for service, would that be a
27 violation of this rule?

28 ¹⁶² Count I of the Formal Complaint.

¹⁶³ Hearing Transcript Vol. III at pages 383-384.

1 A. Yes.¹⁶⁴

2 Mr. Householder testified that Far West Water & Sewer and Spartan executed
3 the Water MXA for Sierra Ridge Unit 1 on or about January 29, 2005. Mr.
4 Householder testified that Far West Water & Sewer did not provide Spartan with a copy
5 of the Water MXA at the time it was executed on or about January 29, 2005. Mr.
6 Householder testified that Spartan requested a copy of the Water MXA from the Utility
7 on multiple occasions since January 29, 2005. Mr. Capestro testified that Far West
8 Water & Sewer has prepared main extension agreements for Sierra Ridge Unit 1 but
9 that those main extension agreements have not been provided to Mr. Householder. Far
10 West Water & Sewer has failed and/or refuses to provide a copy of the Water MXA for
11 Sierra Ridge Unit 1 in violation of A.A.C. R14-2-406(C)(2).

12 C. Violation of A.A.C. R14-2-406(D) and (E).¹⁶⁵

13 Arizona Administrative Code R14-2-406(D) and (E) requires that amounts
14 advanced under main extension agreements be refunded to the party making the
15 advance in accordance with the rule. At the hearing, Ms. Wallace testified on behalf of
16 Utilities Division Staff that A.A.C. R14-2-406(D) and (E) would not apply in a case
17 where the advance is immediately refundable to the developer under A.A.C. R14-2-
18 406(M). Specifically, Ms. Wallace testified as follows:

19 But I go back to my original contention. To the extent that we did not
20 receive or approve an MXA, then, in my opinion -- in my opinion, this
21 would not apply because [A.A.C. R14-2-406(M)] would rule that all
22 refundable advances are immediately due to the developer.

23 Q. (BY MR. CROCKETT) So if I understand your testimony, and I
24 think I do, 14-2-406(D) and (E) don't really apply because 14-2-
25 406(M) would require the utility to return the funds or the value of
26 the infrastructure.

27 A. Correct.¹⁶⁶

28 ¹⁶⁴ Hearing Transcript Vol. III at page 384, lines 6-13.

¹⁶⁵ Count II of the Formal Complaint.

¹⁶⁶ Hearing Transcript Vol. III at page 386, lines 11-20.

1 Thus, if the Commission orders Far West Water & Sewer to immediately refund
2 to Spartan the \$154,180 spent to construct the water infrastructure for Sierra Ridge Unit
3 1, then Spartan would not be entitled to future refunds under A.A.C. R14-2-406(D) and
4 (E). At the hearing, Mr. Capestro confirmed that Far West Water & Sewer has not
5 made any refund payments to Spartan for Sierra Ridge Unit 1.¹⁶⁷ Mr. Capestro also
6 testified that Far West Water & Sewer is not making refunds of advances in aid of
7 construction to any developer at the present time.¹⁶⁸

8 **D. Violation of A.A.C. R14-2-406(G).**¹⁶⁹

9 Arizona Administrative Code R14-2-406(G) states:

10 *All agreements entered into under this rule shall be evidenced by a written*
11 *statement, and signed by the Company and the parties advancing the funds*
12 *for advances in aid under this rule or the duly authorized agent of each.*

13 At the hearing, Ms. Wallace testified that this rule speaks for itself: "The rules
14 require written agreements."¹⁷⁰ Ms. Wallace also testified that under A.A.C. R14-2-
15 406(C)(2), it is the responsibility of the utility to provide an applicant for a water main
16 extension with a written copy of the main extension agreement.¹⁷¹

17 It is undisputed that the water distribution infrastructure was constructed in 2005
18 to serve all lots within Sierra Ridge Unit 1. It is undisputed that the water distribution
19 infrastructure for Sierra Ridge Unit 1 was accepted by Far West Water & Sewer on
20 April 14, 2005, as evidenced by the Utility's Acceptance Letter.¹⁷² It is undisputed that
21 Far West Water & Sewer currently provides water service to customers residing within
22 Sierra Ridge Unit 1 utilizing the water distribution infrastructure constructed by
23 Spartan. It is undisputed that Far West Water & Sewer has failed to produce a written
24 water main extension agreement for Sierra Ridge Unit 1 signed by Spartan and the
25 Utility. Thus, Far West Water & Sewer is in violation of A.A.C. R14-2-406(G)

26 ¹⁶⁷ Hearing Transcript Vol. IV at page 681, lines 6-10.

27 ¹⁶⁸ Hearing Transcript Vol. IV at page 680, lines 22-25.

28 ¹⁶⁹ Count III of the Formal Complaint.

¹⁷⁰ Hearing Transcript Vol. III at page 387, lines 4-8.

¹⁷¹ Hearing Transcript Vol. III at page 384, lines 6-9.

¹⁷² Exhibit A-25.

1 because it accepted water distribution infrastructure from Spartan for Sierra Ridge Unit
2 1 which it is using to provide water service to customers without a signed written
3 statement evidencing the agreement.

4 **E. Violation of A.A.C. R14-2-606(B)(2).**¹⁷³

5 Arizona Administrative Code R14-2-606(B)(2) states:

6 *Each applicant shall be provided with a copy of the written collection main*
7 *extension agreement.*

8 Mr. Householder testified that Far West Water & Sewer and Spartan executed
9 the Sewer MXA for Sierra Ridge Unit 1 on or about January 29, 2005. Mr.
10 Householder testified that Far West Water & Sewer did not provide Spartan with a copy
11 of the Sewer MXA at the time it was executed on or about January 29, 2005. Mr.
12 Householder testified that Spartan requested a copy of the Sewer MXA from the Utility
13 on multiple occasions since January 29, 2005. Mr. Capestro testified that Far West
14 Water & Sewer has prepared main extension agreements for Sierra Ridge Unit 1 but
15 that those main extension agreements have not been provided to Mr. Householder. Far
16 West Water & Sewer has failed and/or refuses to provide a copy of the Sewer MXA for
17 Sierra Ridge Unit 1 in violation of A.A.C. R14-2-606(B)(2).

18 **F. Violation of A.A.C. R14-2-606(C).**¹⁷⁴

19 Arizona Administrative Code R14-2-606(C) requires that Far West Water &
20 Sewer make refunds of advances in aid of construction to Spartan for sewer
21 infrastructure constructed by Spartan to serve Sierra Ridge Unit 1 and accepted by Far
22 West in 2005 as evidenced by Far West's April 14, 2005, Acceptance Letter. It is
23 undisputed that Far West Water & Sewer commenced providing sewer service to
24 customers in Sierra Ridge Unit 1 in or about 2005 and currently provides sewer service
25 to approximately 62 customers residing in Sierra Ridge Unit 1. It is undisputed that Far
26 West Water & Sewer charges customers for sewer service within Sierra Ridge Unit 1
27 and receives revenue from those customers. At the hearing, Mr. Capestro confirmed

28 ¹⁷³ Count VI of the Formal Complaint.

¹⁷⁴ Count VII of the Formal Complaint.

1 that Far West Water & Sewer has not made any refund payments to Spartan for Sierra
2 Ridge Unit 1.¹⁷⁵ Mr. Capestro also testified that Far West Water & Sewer is not
3 making refunds of advances in aid of construction to any developer at the present
4 time.¹⁷⁶ The failure of Far West Water & Sewer to make refund payments to Spartan
5 for advances in aid of construction is a violation of A.A.C. R14-2-606(C).

6 **G. Violation of A.A.C. R14-2-606(A)(5).**¹⁷⁷

7 A.A.C. R14-2-606(A)(5) states:

8 *All collection main extension agreements requiring payment by the*
9 *applicant shall be in writing and signed by each party before the utility*
10 *commences construction.*

11 It is undisputed that the sewer collection infrastructure was constructed in 2005
12 to serve all lots within Sierra Ridge Unit 1. It is undisputed that the sewer collection
13 infrastructure for Sierra Ridge Unit 1 was accepted by Far West Water & Sewer in
14 2005 as evidenced by Far West's April 14, 2005, Acceptance Letter. It is undisputed
15 that Far West Water & Sewer currently provides sewer service to customers residing
16 within Sierra Ridge Unit 1 utilizing the sewer collection infrastructure constructed by
17 Spartan.

18 Mr. Householder testified that he signed a sewer main extension agreement for
19 Sierra Ridge Unit 1. However, even if the Commission determines that the parties did
20 not sign a written agreement regarding the provision of sewer service to Sierra Ridge
21 Unit 1, an agreement between the parties nevertheless exists, based upon the course of
22 conduct between the parties. Thus, if the Commission determines that no written sewer
23 main extension agreement was signed for Sierra Ridge Unit 1, then Far West Water &
24 Sewer is in violation of A.A.C. R14-2-606(A)(5) because it accepted sewer collection
25 infrastructure from Spartan for Sierra Ridge Unit 1 which the Utility is using to provide
26 sewer service to customers without a signed written agreement.

27 **H. Violation of A.R.S. § 40-334(A).**¹⁷⁸

28 ¹⁷⁵ Hearing Transcript Vol. IV at page 681, lines 6-10.

¹⁷⁶ Hearing Transcript Vol. IV at page 680, lines 22-25.

¹⁷⁷ Formal Complaint County V.

1 Arizona Revised Statutes § 40-334(A) states:

2 *A public service corporation shall not, as to rates, charges, service,*
3 *facilities or in any other respect, make or grant any preference or*
4 *advantage to any person or subject any person to any prejudice or*
disadvantage.

5 Far West Water & Sewer has permitted many connections of new homes to its
6 sewer system by other developers in the vicinity of the Spartan Property from
7 approximately October 25, 2006, the date of the Consent Order, through January 4,
8 2010 but has refused to provide sewer service to new connections within Sierra Ridge
9 Unit 1. The Utility's refusal to permit new sewer connections in Sierra Ridge Unit 1
10 while permitting new sewer connections in other subdivisions in the vicinity of Sierra
11 Ridge Unit 1 is a "preference or advantage" in services and facilities which is
12 prohibited under A.R.S. § 40-334(A). Further, the Utility's refusal to permit new sewer
13 connections in Sierra Ridge Unit 1 while permitting new sewer connections in other
14 subdivisions in the vicinity of Sierra Ridge Unit 1 subjects Spartan to "prejudice or
15 disadvantage" which is prohibited under A.R.S. § 40-334(A).

16 Likewise, Utility's preparation and execution of 11 water main extension
17 agreements and 49 sewer extension agreements after the water and sewer facilities
18 covered under those agreements had been constructed and installed, while steadfastly
19 refusing to sign main extension agreements with Spartan, is a "preference or advantage"
20 bestowed on other developers to the "prejudice or disadvantage" of Spartan. Far West
21 Water & Sewer's conduct is all the more egregious because a substantial number of the
22 main extension agreements that were prepared and signed after-the-fact are between
23 Utility and its unregulated affiliate H & S Developers.¹⁷⁹

24 **I. Violation of A.R.S. § 40-361(B).**¹⁸⁰

25 Arizona Revised Statutes § 40-361(B) states:

27 ¹⁷⁸ Formal Complaint County VIII.

28 ¹⁷⁹ See *supra* Section III(D)

¹⁸⁰ Count IX of the Formal Complaint.

1 *Every public service corporation shall furnish and maintain such service,*
2 *equipment and facilities as will promote the safety, health, comfort and*
3 *convenience of its patrons, employees and the public, and as will be in all*
4 *respects adequate, efficient and reasonable.*

5 As evidenced by the Consent Order and the facts established in this case, Far
6 West Water & Sewer has failed to operate its Palm Shadows WWTP and other sewer
7 treatment plants in a way which promotes the "safety, health, comfort and convenience
8 of its patrons, employees and the public" in violation of A.R.S. § 40-361(B). As
9 evidenced by the Consent Order and the facts established in this case, the Utility is not
10 providing sewer service which is "in all respects adequate, efficient and reasonable" in
11 violation of A.R.S. § 40-361(B).

12 **V. PUBLIC INTEREST IN A COMPLAINT CASE.**

13 The Administrative Law Judge asked the parties to address in briefing the role of
14 "public interest" in the Commission's decision-making in a complaint case.¹⁸¹ Because
15 of the Commission's unique constitution-based authority and its expertise regarding the
16 regulation of public service corporations, the Arizona legislature saw fit to expand the
17 Commission's jurisdiction to include complaints brought against those utilities that the
18 Commission regulates. This specific statutory authority is found in A.R.S. § 40-246.
19 In addition, the Commission has established its own Consumer Services Section to
20 assist utility customers and others who have disputes with regulated utilities. The
21 Commission has both a formal and an informal complaint process that the public may
22 utilize.

23 In addition to its statutory authority to resolve disputes involving public service
24 corporations, the Commission has a statutory mandate to enforce the laws that affect
25 public service corporations. Specifically, A.R.S. § 40-421(A) provides as follows:

26 The Commission shall require that the laws affecting public service
27 corporations, the enforcement of which is not specifically vested in some
28 other officer or tribunal, are enforced and obeyed, and that violations
 thereof are promptly prosecuted and penalties due the state therefore

¹⁸¹ Hearing Transcript Vol. IV at page 720, lines 12-16.

1 recovered and collected, and for such purposes may bring actions in the
2 name of the state.

3 The Commission must consider the public interest in resolving a complaint case
4 just as it must consider the public interest in deciding a rate case. In Decision 70355
5 (Docket No. T-03632A-06-0091 *et al.*), the Commission approved a settlement
6 agreement between Qwest and DIECA Communications (doing business as Covad
7 Communications Company and Mountain Telecommunications), Eschelon Telecom of
8 Arizona, McLeodUSA Telecommunications Services and XO Communications
9 Services. The approval of a settlement agreement between adverse parties is analogous
10 to the resolution of a formal complaint. In approving the Qwest settlement agreement
11 in Decision 70355, the Commission specifically affirmed the role of the public interest
12 in making such decisions:

13 We do not agree with Qwest that the Commission can not, or should not,
14 employ a “public interest” test to whether it should approve the proposed
15 Settlement Agreement. An agreement that complies with the terms of the
16 TRRO, but which purports to implement burdensome or unfair procedures
17 by, for example, imposing draconian time frames for objections to the non-
18 impaired wire center list, or adversely affects non-parties, would not be in
the public interest, and should not be approved. That being said, however,
we find that the proposed Settlement Agreement, with the clarifications
discussed herein below, is reasonable, comports with the TRRO, is in the
public interest and should be approved.¹⁸²

19 The Commission has applied the public interest standard in reviewing
20 complaints and rescinding CC&Ns. For example, in Decision 69954 (Docket No. T-
21 04004A-01-0259), an order to show cause complaint brought by Utilities Division
22 Staff, the Commission considered the public interest:

23 The Commission, having reviewed the complaint concludes that it is in the
24 public interest to rescind Decision No. 64065 and cancel the Certificate of
Convenience and Necessity of Total Call International, Inc.¹⁸³

25
26
27 ¹⁸² Decision 70355 at page 22, lines 1-8.

28 ¹⁸³ Decision 69954 at page 3, lines 6-8. This decision was subsequently modified by Decision 70344,
but that does not alter the fact that the Commission considers the public interest in resolving complaint
cases. *See also* Decision No. 69967 (Docket No. T-04014A-01-0340).

1 In *Arizona Corporation Commission v. State of Arizona ex rel. Grant Woods*,
2 830 P.2d 807, 171 Ariz. 286 (1992), the Arizona Supreme Court considered the
3 Commission's authority to promulgate rules, and concluded as follows:

4 The Commission was not designed to protect public service corporations
5 and their management but, rather, was established to protect our citizens
6 from the results of speculation, mismanagement, and abuse of power.¹⁸⁴

7 Protection of Arizona's citizens from speculation, mismanagement and abuse of
8 power by public service corporations is certainly at the core of the public interest
9 standard. A complaint case such as this provides a mechanism for the Commission to
10 determine whether or not a utility is complying with the governing statutes, regulations,
11 tariffs and orders.

11 **VI. RELIEF REQUESTED BY SPARTAN.**

12 Spartan is requesting relief from the Commission as specified below.

13 **A. Order Far West Water & Sewer to Immediately Refund to Spartan**
14 **the \$154,180 Cost of Constructing the Water Distribution System for**
15 **Sierra Ridge Unit 1 Pursuant to A.A.C. R14-2-406(M).**

16 Spartan requests that the Commission order Far West Water & Sewer to
17 immediately refund to Spartan the \$154,180 cost of constructing the water distribution
18 infrastructure for Sierra Ridge Unit 1 in accordance with A.A.C. R14-2-406(M).

19 **B. Order Far West Water & Sewer to Immediately Prepare and Execute**
20 **Water and Sewer Main Extension Agreements with Spartan for**
21 **Sierra Ridge Unit 1.**

22 Spartan requests that the Commission order Far West Water & Sewer to
23 immediately prepare a water main extension agreement and a sewer main extension
24 agreement for Sierra Ridge Unit 1. The Utility should be required to use a form of
25 main extension agreement that is substantially similar to the main extension agreements
26 that are attached as Exhibits "H" and "I" of Exhibit A-45. The Utility would not be
27 required to make refund payments under the water main extension agreement as a result
28 of the order that Utility immediately refund the cost of the water infrastructure.

¹⁸⁴ *In ex rel Woods*, 171 Ariz. 286, 296, 830 P.2d 807 (1992) ().

1 Refunds under the sewer main extension agreement would be based on 5% per annum
2 for 20 years, and Utility would comply in all respects with A.A.C. R14-2-606. The
3 Utility would be prohibited from imposing any water capacity fees or sewer capacity
4 fees on any of the 113 lots in Sierra Ridge Unit 1. The main extension agreements
5 would be prepared by the Utility at no cost to Spartan.

6 **C. Confirm the Authority of Far West Water & Sewer to Serve the**
7 **Spartan Property.**

8 Spartan requests that the Commission enter an order confirming that Far West
9 Water & Sewer may lawfully provide sewer service to the Spartan Property on the
10 grounds that the Spartan Property is contiguous to Far West's existing CC&N pursuant
11 to A.R.S. § 40-281(B). Alternatively, Spartan requests that the Commission order Far
12 West to file an expedited application, at no cost to Spartan, to extend its sewer CC&N
13 to include the Spartan Property. This request is appropriate in light of the fact that the
14 Utility is already serving approximately 62 water and sewer customers in Sierra Ridge
15 Unit 1.

16 **D. Order Far West Water & Sewer to Deal Fairly with Spartan in**
17 **Executing Main Extension Agreements for Sierra Ridge Unit 2 (60**
18 **Lots) or the Commercial Property.**

19 Spartan requests that the Commission order Far West Water & Sewer to deal
20 fairly with Spartan in executing water and sewer main extension agreements for Sierra
21 Ridge Unit 2 (60 lots) and the Commercial Property. This means at a minimum that
22 Utility shall: (i) comply with all Commission rules and regulations, including the
23 Utility's tariffs and orders of the Commission; (ii) cooperate with Spartan in good faith
24 in negotiating and timely executing main extension agreements for Sierra Ridge Unit 2
25 and the Commercial Property; and (iii) be responsive to Spartan's requests for plan
26 reviews, approvals, authorizations, documentation, and such other information as
27 Spartan may require with regard to water and sewer service for the Spartan Property.

28 **E. Order Finding that Far West Water & Sewer Violated A.A.C. R14-2-**
406(C)(2) or alternatively, A.A.C. R14-2-406(D) and (E); A.A.C. R14-
2-406(G); A.A.C. R14-2-406(M); A.A.C. R14-2-606(A)(5); A.A.C.

1 R14-2-606(B)(2); A.A.C. R14-2-606(C); A.R.S. § 40-334(A); and
2 A.R.S. §40-361(B).

3 Spartan requests that the Commission issue its order finding that Far West
4 Water & Sewer violated: (i) A.A.C. R14-2-406(C)(2) or alternatively, A.A.C. R14-2-
5 406(D) and (E); (ii) A.A.C. R14-2-406(G); (iii) A.A.C. R14-2-406(M); (iv) A.A.C.
6 R14-2-606(A)(5); (v) A.A.C. R14-2-606(B)(2); (vi) A.A.C. R14-2-606(C); (vii) A.R.S.
7 § 40-334(A); and (viii) A.R.S. §40-361(B).

8 **F. Impose Fines and Penalties Against Far West Water & Sewer for the**
9 **Violations Enumerated in Section VI(E) above Pursuant to A.R.S.**
10 **§§ 40-421 et seq.**

11 Spartan requests that the Commission impose fines and penalties against Far
12 West Water & Sewer for the violations enumerated in Section VI(E) above pursuant to
13 A.R.S. §§ 40-421 *et seq.* Specifically, A.R.S. § 40-424(A) provides the Commission
14 with the following authority to impose fines:

15 If any corporation or person fails to observe or comply with any order, rule,
16 or requirement of the commission or any commissioner, the corporation or
17 person shall be in contempt of the commission and shall, after notice and
18 hearing before the commission, be fined by the commission in an amount
19 not less than one hundred nor more than five thousand dollars, which shall
20 be recovered as penalties.

21 Additional authority is found in A.R.S. § 40-425(A) which provides:

22 Any public service corporation which violates or fails to comply with any
23 provision of the constitution or of this chapter, or which fails or neglects to
24 obey or comply with any order, rule or requirement of the commission, the
25 penalty for which is not otherwise provided, is subject to a penalty of not
26 less than one hundred nor more than five thousand dollars for each offense.

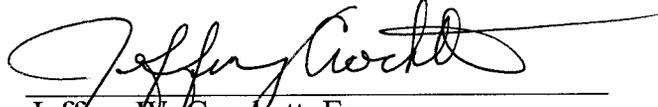
27 The evidence in this case is undisputed that Far West Water & Sewer has
28 violated multiple Commission rules and statutes. Accordingly, the Utility should be
29 subject to fines in accordance with one or both of the above-cited statutes.

30 **G. Order Such Other Relief as the Commission Deems Just and**
31 **Reasonable Under the Circumstances of this Case.**

32 Finally, Spartan requests that the Commission order such other relief as the
33 Commission deems just and reasonable under the circumstances of this case.

1 RESPECTFULLY SUBMITTED this 22nd day of February, 2010.

2 SNELL & WILMER L.L.P.

3 

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7 ORIGINAL and 13 copies of the foregoing brief
8 hand-delivered this 22nd day of February, 2010, to:

9 Docket Control
10 Arizona Corporation Commission
11 1200 West Washington Street
12 Phoenix, Arizona 85007-2996

11 COPIES of the foregoing brief hand-delivered
12 this 22nd day of February, 2010, to:

13 Belinda A. Martin, Administrative Law Judge
14 Hearing Division
15 ARIZONA CORPORATION COMMISSION
16 1200 West Washington Street
17 Phoenix, Arizona 85007-2996

16 Wesley C. Van Cleve, Staff Legal Counsel
17 Legal Division
18 ARIZONA CORPORATION COMMISSION
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19 Steven M. Olea, Director
20 Utilities Division
21 ARIZONA CORPORATION COMMISSION
22 1200 West Washington Street
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22 COPY of the foregoing sent via e-mail and first
23 class mail this 22nd day of February, 2010, to:

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27 Suite 200-676
28 Phoenix Arizona 85028
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ATTACHMENT 1

Permit is subject to the enforcement actions under A.R.S. § 49-261;

- B. A person who violates this Article or a specific term of a general permit for an on-site wastewater treatment facility is subject to enforcement actions under A.R.S. § 49-261.

Historical Note

New Section adopted by final rulemaking at 7 A.A.R. 235, effective January 1, 2001 (Supp. 00-4).

R18-9-A309. General Provisions For Type 4 General Permits Concerning On-site Wastewater Treatment Systems

A. General requirements and prohibitions.

1. Sewage or wastewater that contains sewage shall not be discharged from an on-site wastewater treatment facility except under an Aquifer Protection Permit issued by the Director.
 2. A person shall not install, allow to be installed, or maintain a connection between any part of an on-site wastewater treatment facility and a drinking water system or supply so that sewage or wastewater contaminates the drinking water.
 3. A person shall not bypass untreated sewage from an on-site wastewater treatment facility.
 4. A person shall not use a cesspool for sewage disposal.
 5. The Department shall require connection to a sewage collection system if the connection is practical. A connection is practical if the distance to connect to the sewer is 400 feet or less and the total cost of the connection is less than \$6000 if capacity is available and performance of the sewage collection system and receiving sewage treatment facility are not impaired.
 6. The Department shall prohibit installation of an on-site wastewater treatment facility if the installation will create an unsanitary condition or environmental nuisance or cause or contribute to a violation of an Aquifer Water Quality Standard.
 7. A permittee shall service or repair an operating on-site wastewater treatment facility, or install a replacement facility if the facility has created or if its use creates an unsanitary condition or environmental nuisance or has caused or causes a violation of an Aquifer Water Quality Standard.
 8. A permittee shall operate the permitted on-site wastewater treatment facility so that:
 - a. Flows to the facility consist of typical sewage and do not include any motor oil, gasoline, paint, varnish, solvent, pesticide, fertilizer, or other material not generally associated with toilet flushing, food preparation, laundry, and personal hygiene;
 - b. Flows to the facility from commercial operations do not contain hazardous substances or hazardous wastes, as defined under A.R.S. § 49-921(5);
 - c. A typical sewage flow with a component of flow from nonresidential food preparation or laundry service is adequately pretreated by an interceptor that complies with R18-9-A315 or another device authorized by a general permit or approved by the Department under R18-9-A312(G);
 - d. Except as provided in subsection (A)(8)(c), a sewage flow that does not meet the numerical levels for typical sewage is adequately pretreated to meet the numerical levels before entry into an on-site wastewater treatment facility authorized by this Article;
 - e. Flow to the facility does not exceed the design flow specified in the Verification of General Permit Conformance;
- f. Activities at the site do not adversely affect the operation of the facility.
- B. Notice of Intent to Discharge. In addition to the Notice of Intent to Discharge requirements specified in R18-9-A301(B), an applicant shall submit the following information in a format approved by the Department:
1. A site investigation report that summarizes the results of the site investigation conducted under R18-9-A310(C), including:
 - a. Results from any soil evaluation, percolation test, or seepage pit performance test; and
 - b. Any limiting site conditions identified by the site investigation.
 2. A site plan that includes:
 - a. The parcel and lot number, if applicable, the property address or other appropriate legal description, the property size in acres, and the boundaries of the property on which the on-site wastewater treatment facility will be installed;
 - b. A plan of the site drawn to scale, dimensioned, and with a north arrow that shows:
 - i. Proposed and existing on-site wastewater treatment facilities; dwellings and other buildings; driveways, swimming pools, tennis courts, wells, ponds, and any other paved, concrete, or water feature; and cut banks, retaining walls, and any other constructed feature that affects proper location, design, construction, or operation of the facility;
 - ii. Any feature less than 200 feet outside the property boundary that constrains the location of the on-site wastewater treatment facility because of setback limitations specified in R18-9-A312(C);
 - iii. Topography, delineated with an appropriate contour interval, showing original and post-installation grades;
 - iv. Location and identification of the treatment and disposal works and connecting pipelines, the reserve disposal area, and location and identification of all sites of percolation testing and soil evaluation performed under R18-9-A310; and
 - v. Location of any public sewer if 400 feet or less from the property line.
 - c. For improvements in areas in which occupancy of property may depend on installation of a drinking water well and an on-site wastewater treatment facility, the location of features within the boundaries of each adjoining undeveloped property if setback requirements may mutually constrain well, cut bank, and on-site wastewater treatment facility locations.
 3. Design flow, sources of flow, and characteristics of the sewage. The applicant shall calculate the design flow from a list included with the site plan showing the applicable unit sewage flows into the on-site wastewater treatment facility. The applicant shall prepare this list based on Table 1, Unit Daily Design Flows and include the number of bedrooms and plumbing fixtures if the facility serves a residence.
 4. Construction quality drawings that show the following:
 - a. Systems, subsystems, and key components, including manufacturer's name, model number, and associated construction notes and inspection milestones, as applicable;

Department of Environmental Quality – Water Pollution Control

- b. A title block, including facility owner, revision date, space for addition of the Department's application number, and page numbers;
 - c. A plan and profile with the elevations of treatment and disposal components, including calculations justifying the absorption area, to allow Department verification of hydraulic and performance characteristics;
 - d. Cross sections showing construction details and elevations of treatment and disposal components, original and finished grades of the land surface, seasonal high water table if less than 10 feet below the bottom of a disposal field or 60 feet below the bottom of a seepage pit, and a soil elevation evaluation to allow the Department to verify installation design and performance;
 - e. Drainage pattern, drainage controls, and erosion protection, as applicable, for the facility; and
 - f. Construction quality drawings are not required if the entire facility at the site, including treatment and disposal works, is permitted under R18-9-E302.
5. A list of materials, components, and equipment for constructing the on-site wastewater treatment facility. A list is not required if the entire facility at the site, including treatment and disposal works, is permitted under R18-9-E302.
6. An operation and maintenance plan required by R18-9-A313 for the on-site wastewater treatment facility. An operation and maintenance plan is not required if the entire facility at the site, including treatment and disposal works, is permitted under R18-9-E302.
7. Drawings, reports, and other information that are clear, reproducible, and in a size and format specified by the Department. An applicant may submit the drawings in an electronic format approved by the Department.
- C. Additional verification of general permit conformance requirements.**
- 1. If the entire on-site wastewater treatment facility at the site, including treatment and disposal works, is permitted under the 4.02 General Permit, the Director shall issue the Verification of General Permit Conformance only if the site plan accurately reflects the final location and configuration of the components of the treatment and disposal works.
 - 2. If the facility is permitted under any 4.03 through 4.23 General Permit, either separately or in some combination of these permits or the 4.02 General Permit, the Director shall issue the Verification of General Permit Conformance only if the following record documents have been submitted:
 - a. As-built plans;
 - b. A final list of equipment and materials, if different from the list specified in subsection (B)(5);
 - c. A final operation and maintenance plan;
 - d. Other documents, if required by the separate general permits; and
 - e. A Certificate of Completion signed by the person responsible for assuring that installation of the facility conforms with the design approved under the Provisional Verification of General Permit Conformance.
 - 3. The Director shall specify in the Verification of General Permit Conformance:
 - a. The permitted design flow of the facility,
 - b. The characteristics of the wastewater sources contributing to the facility, and
 - c. A list of the record documents accepted by the Department satisfying subsection (C)(2).
- D. Closure requirements.** A permittee who permanently discontinues use of, wishes to close an on-site wastewater treatment facility, or is ordered by the Director to close an abandoned facility shall:
- 1. Remove all sewage from the facility and dispose of the sewage in a lawful manner;
 - 2. Disconnect and remove electrical and mechanical components;
 - 3. Remove or collapse the top of any tank or containment structure;
 - a. Fill the tank or containment structure or any cavity resulting from its removal with earth, sand, gravel, concrete, or other approved material; and
 - b. Regrade the surface to provide positive drainage.
 - 4. Cut and plug both ends of the abandoned sewer drain pipe between the building and the on-site wastewater treatment facility not more than five feet outside the building foundation if practical, or cut and plug as close to each end as possible; and
 - 5. Notify the applicable county health or environmental department within 30 days of closure.
- E. Proprietary and other reviewed products.**
- 1. The Department shall maintain a list of proprietary and other reviewed products that may be used for on-site wastewater treatment facilities to comply with the requirements of this Article. The list shall include appropriate information on the applicability and limitations of each product.
 - 2. The list of proprietary and other reviewed products may include manufactured systems, subsystems, or components within the treatment works and disposal works if the products significantly contribute to the treatment performance of the system or provide the means to overcome site limitations. The Department shall not list components that do not significantly affect treatment performance or provide the means to overcome site limitations.
 - 3. A person may request that the Department add a product to the list of proprietary and other reviewed products. The request may include a proposed reference design for review. The Department may assess fees for product review.
 - 4. The Director may contract for services in administering this subsection.

Historical Note

New Section adopted by final rulemaking at 7 A.A.R. 235, effective January 1, 2001 (Supp. 00-4).

R18-9-A310. Site Investigation For On-site Wastewater Treatment Facilities

- A. Definition.** For purposes of this Section, "clean water" means water free of colloidal material or additives that could affect chemical or physical properties if the water is used for percolation testing or testing of seepage pit performance.
- B. The investigator shall perform a site investigation if an on-site wastewater treatment facility is proposed for installation. The applicant shall submit the following information in a format prescribed by the Department and shall provide sufficient data to:**
- 1. Determine if any of the following limiting conditions exist:
 - a. The soil absorption rate determined by the requirements of this Article is more than 1.20 gallons per square foot per day;