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John R. Dacey #004962
Alicia M. Corbett #021722
GAMMAGE & BURNHAM
A PROFESSIONAL LIMITED LIABILITY COMPANY
ATTORNEYS AT LAW
TWO NORTH CENTRAL AVENUE
18TH FLOOR
PHOENIX, AZ 85004
TELEPHONE (602) 256-0566

Attorneys for Maricopa Water District

BEFORE THE ARIZONA
POWER PLANT AND TRANSMISSION LINE SITING COMMITTEE

IN THE MATTER OF THE APPLICATION OF)
ARIZONA PUBLIC SERVICE COMPANY IN)
CONFORMANCE WITH THE REQUIREMENTS)
OF ARIZONA REVISED STATUTES)
SECTION 40-360, et seq., FOR A CERTIFICATE)
OF ENVIRONMENTAL COMPATIBILITY)
AUTHORIZING THE WEST VALLEY-SOUTH)
230 KV TRANSMISSION LINE PROJECT,)
INCLUDING THE CONSTRUCTION OF)
APPROXIMATELY 18 MILES OF 230 KV)
TRANSMISSION LINES AND THREE)
230 KV SUBSTATIONS IN MARICOPA)
COUNTY, ARIZONA, ORIGINATING)
SOUTH OF BROADWAY ROAD)
AT AN EXISTING 230KV TRANSMISSION)
LINE IN SECTION 28, TOWNSHIP 1 NORTH,)
RANGE 2 WEST, G&SRB&M THAT WILL)
INTERCONNECT WITH THE PROPOSED)
TS4 SUBSTATION IN SECTION 19,)
TOWNSHIP 1 NORTH, RANGE 2 WEST AND)
CONTINUING TO THE PROPOSED TS3)
SUBSTATION IN SECTION 22,)
TOWNSHIP 2 NORTH, RANGE 2 WEST,)
G&SRB&M AND TERMINATING AT THE)
PROPOSED TS2 SUBSTATION IN SECTION 28,)
TOWNSHIP 3 NORTH, RANGE 2, WEST,)
G&SRB&M)

Docket No:
L-00000D-03-0122

Case No: 122

**MARICOPA WATER
DISTRICT'S LEGAL
MEMORANDUM RE:
EMINENT DOMAIN AND
BEARDSLEY CANAL**

Arizona Corporation Commission
DOCKETED

SEP 19 2003

DOCKETED BY *GR*

Intervenor Maricopa Water District ("MWD" or the "District") hereby
submits to the Arizona Power Plant and Transmission Line Siting Committee (the

1 "Committee") its Memorandum of Points and Authorities regarding powers of eminent
2 domain. Arizona Public Service Company ("APS") cannot condemn MWD land in order
3 to site the 230kV transmission line, proposed by APS in its Application for a Certificate of
4 Environmental Compatibility ("CEC") in the above-captioned matter, along MWD's
5 Beardsley Canal (the "Canal").

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. INTRODUCTION.**

8 MWD was organized as an irrigation district in 1925 to reclaim land for
9 agricultural purposes in the West Valley through construction of canals and irrigation
10 systems. A.R.S. §§ 48-2901 *et seq.* MWD is a "municipal corporations for all purposes."
11 A.R.S. § 48-2901. MWD's boundaries are irregular, but generally run from Reems Road
12 in the east to Perryville Road in the west, and from McDowell Road in the south to Grand
13 Avenue in the north.

14 MWD includes approximately 40,000 acres within its boundaries. All land
15 within the boundaries of the District is owned by members of the District or the District
16 itself. Approximately 2700 acres are owned by the District and are held for the benefit of
17 the members. MWD owns the land immediately adjacent to the Canal, all of which is
18 necessary for the operations of the Canal and the entire District.¹ MWD owns and
19 operates the Canal to supply water for irrigation to members' lands. The land adjacent to
20 the Canal is necessary for the operation and maintenance of the Canal.

21 As the Committee knows, MWD objects to placement of the line along the
22 Canal. From a legal standpoint, APS may not condemn MWD's property. From a
23 practical standpoint, placement of transmission lines over or adjacent to the Canal would
24

25 _____
26 ¹ The District also owns land not essential to the operation of the Canal, which may be developed in the future. This land is not at issue, and is not relevant to the discussion in this memorandum.

1 interfere significantly with MWD's control and operation of the Canal and its associated
2 property corridor.

3 APS has filed a Pre-Hearing Memorandum urging the Committee not to
4 consider the Canal as an alternate route. MWD concurs with APS' bottom-line
5 conclusion, and hereby submits its separate objection to any consideration of the Canal as
6 an alternate route.

7 **II. APS DOES NOT HAVE POWER OF EMINENT DOMAIN OVER**
8 **THE BEARDSLEY CANAL.**

9 APS, a private company performing a public service, does not have power
10 of eminent domain over the Canal, which is the property of MWD, a political subdivision
11 of the state. The general Arizona condemnation statutes, A.R.S. §§ 12-1111, *et seq.*, list
12 what types of property may be condemned for public use, including for placement of
13 transmission lines. Specifically, A.R.S. § 12-1114 allows condemnation in limited
14 circumstances of "Lands belonging to the state, or to any county, city, town or village, *not*
15 *appropriated to some public use*" [emphasis added]. No statute provides a general
16 authorization for the condemnation of property owned by a public body that is being put
17 to public use.

18 Under Article 13, Section 7 of the Arizona Constitution, irrigation districts
19 are "political subdivisions of the State, and vested with all the rights, privileges and
20 benefits, and entitled to the immunities and exemptions granted municipalities and
21 political subdivisions under this Constitution or any law of the State." APS cannot
22 condemn land owned by MWD that is used for a public purpose.

23 Since territorial days, Arizona courts have recognized that canals used for
24 irrigation are used for public purposes. *See Oury v. Goodwin*, 3 Ariz. 255, 26 P. 376
25 (1891).

1 Here, MWD's primary governmental purpose is to provide irrigation water.
2 If APS condemns land adjacent to the Canal, MWD's ability to perform its governmental
3 purpose and provide irrigation water to its landowners will be significantly and materially
4 impaired. In addition, APS does not enjoy the same status as a city. APS is not a political
5 subdivision of the state, and does not enjoy the same status as MWD. For these reasons,
6 APS is not allowed to condemn land along the Canal.

7 The Arizona Attorney General issued an informal opinion, Op. Att'y Gen.
8 No. I86-080, analyzing A.R.S. § 12-1114. The issue was whether a railroad corporation
9 could condemn county property to construct a railroad line. The Attorney General
10 concluded that the railroad could only condemn county land if that land was not presently
11 appropriated for a public use. *Id.* Furthermore, the Attorney General concluded that land
12 owned and already appropriated to a public use by any governmental entity is not subject
13 to condemnation. *Id.* Wisely, the opinion states that the Attorney General even does "not
14 believe it was the intent of the legislature to require courts to decide which of two political
15 subdivisions of the state could put land to a 'higher public use' pursuant to A.R.S. § 12-
16 1112(3)." *Id.* Specific legislation is necessary to authorize any specific type of
17 condemnation of public land, the opinion concludes.

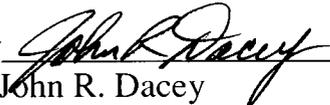
18 **III. CONCLUSION.**

19 The Canal and MWD land adjacent are not subject to APS' power of
20 eminent domain. If and when the State of Arizona decides to empower private entities to
21 condemn land owned by governmental entities that are used for public purposes, the
22 decision should be made by the Arizona Legislature, and not by the courts.
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RESPECTFULLY SUBMITTED this 19th day of September, 2003.

GAMMAGE & BURNHAM P.L.C.

By 
John R. Dacey
Alicia M. Corbett
Two North Central Avenue, 18th Floor
Phoenix, Arizona 85004
Attorneys for Maricopa Water District

ORIGINAL + 30 copies filed this 19th day of September, 2003, with:

Arizona Corporation Commission
Utilities Division - Docket Control
1200 West Washington Street
Phoenix, Arizona 85007

COPIES of the foregoing hand-delivered this 19th day of September, 2003, to:

David M. Ronald
Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Ernest G. Johnson, Director of Utilities
Arizona Corporation Commission
Utilities Division
1200 West Washington Street
Phoenix, Arizona 85007

Laurie Woodall, Chairman
Arizona Power Plant & Transmission
Line Siting Committee
Office of the Attorney General
1275 West Washington Street
Phoenix, Arizona 85007

Thomas H. Campbell
Lewis & Roca LLP
40 North Central Avenue
Phoenix, Arizona 85004

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C. David Martinez
Pinnacle West Capital Corporation
Law Department
400 North 5th Street
Phoenix, Arizona 85004

Roger K. Ferland
Laura Raffaelli
Quarles & Brady Streich Lang LLP
One Renaissance Square
Two North Central Avenue
Phoenix, Arizona 85004-2391

Lynne A. Lagarde
Earl, Curley & Lagarde
3101 N. Center Avenue, Suite 1000
Phoenix, Arizona 85012

Karrin Kunasek Taylor
Biskind, Hunt & Taylor
11201 N. Tatum Boulevard, Suite 330
Phoenix, Arizona 85028

Jordan Rose
Jorden, Bischoff, McGuire & Rose
7272 E. Indian School Road, #205
Scottsdale, Arizona 85251

Walter W. Meek
Arizona Utility Investors Association
2100 North Central Avenue, Suite 210
Phoenix, Arizona 85004

