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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

COMMISSIONERS

DOCKETED

GARY PIERCE - Chairman
BOB STUMP
SANDRA D. KENNEDY
PAUL NEWMAN
BRENDA BURNS

JUL 30 2012

DOCKETED BY [Signature]

IN THE MATTER OF: 1) THE APPLICATION OF GARY SMYTH, AN INDIVIDUAL, TO TRANSFER WATER SYSTEM ASSETS AND CERTIFICATE OF CONVENIENCE AND NECESSITY TO TIERRA LINDA WATER COMPANY, INC.; AND 2) THE APPLICATION OF TIERRA LINDA WATER COMPANY, INC. FOR AUTHORIZATION TO ISSUE STOCK TO ACQUIRE WATER SYSTEM ASSETS AND CERTIFICATE OF CONVENIENCE AND NECESSITY.

DOCKET NO. W-20689A-11-0252
DOCKET NO. W-20810A-11-0252

DECISION NO. 73271

OPINION AND ORDER

DATE OF HEARING: May 17, 2012
PLACE OF HEARING: Tucson, Arizona
ADMINISTRATIVE LAW JUDGE: Belinda A. Martin
APPEARANCES: Larry V. Robertson, Jr., and Robert J. Metli, MUNGER CHADWICK, P.L.C., on behalf of Gary Smyth and Tierra Linda Water Company, Inc.; and Robin Mitchell, Staff Attorney, Legal Division, on behalf of the Utilities Division of the Arizona Corporation Commission.

BY THE COMMISSION:

Having considered the entire record herein and being fully advised in the premises, the Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

FINDINGS OF FACT

Procedural History

1. Gary Smyth, in his individual capacity, is authorized to provide water service to customers in an unincorporated area of Pima County pursuant to Decision No. 72002 (December 10, 2010), in which the Commission approved Tierra Linda Homeowners Association, Inc.'s ("TLHOA") sale of its water system and transfer of its Certificate of Convenience and Necessity

1 (“CC&N”) to Mr. Smyth.

2 2. On June 24, 2011, Mr. Smyth filed an application for the sale and transfer of the water
3 system and CC&N (“Water System Assets”) to Tierra Linda Water Company, Inc., an Arizona for-
4 profit S corporation formed by Mr. Smyth (“TLWC”). The application also contained a request from
5 TLWC for authorization to issue 501 shares of common stock to be conveyed to Mr. Smyth as
6 consideration for his transfer of the Water System Assets to TLWC (“Application”). (Mr. Smyth and
7 TLWC shall be referred to jointly as the “Applicants.”)

8 3. On July 22, 2011, the Commission’s Utilities Division Staff (“Staff”) filed an
9 Insufficiency Letter, and on February 1, 2012, the Applicants filed their responses.

10 4. On February 28, 2012, Staff filed its Sufficiency Letter stating that the Application
11 was sufficient under the Arizona Administrative Code (“A.A.C.”).

12 5. On March 6, 2012, a Procedural Order was issued setting the hearing in this matter for
13 May 17, 2012, and establishing certain deadlines.

14 6. On March 28, 2012, the Applicants filed an Affidavit of Publication indicating that
15 notice of the hearing was published in *The Daily Territorial* on March 15, 2012, and averring that the
16 notice was mailed to all property owners and customers in the service area on March 7, 2012. No
17 customer comments were received in response to the notice.

18 7. On April 23, 2012, Staff filed its Staff Report recommending approval of the
19 Application subject to certain conditions.

20 8. On May 8, 2012, the Applicants filed their Response to Staff Report.

21 9. On May 14, 2012, the Applicants filed a Notice of Association of Co-Counsel.

22 10. On May 17, 2012, a public hearing was held at the Commission’s Tucson offices and
23 the parties appeared through counsel. Mr. Smyth and Lisa Sullivan, an employee of Smyth Utility
24 Management, Inc., testified regarding Mr. Smyth’s compliance with previous Commission Decisions,
25 the operations and maintenance of the water system, and the formation of TLWC. Blessing Chukwu,
26 Staff Executive Consultant, Brendan Aladi, Staff Public Utilities Analyst, and Del Smith, Staff
27 Engineering Supervisor, testified on behalf of Staff.¹ No members of the public appeared for public

28 _____
¹ Mr. Aladi appeared telephonically.

1 comment. At the conclusion of the hearing, the matter was taken under advisement pending
2 submission of a Recommended Opinion and Order to the Commission.

3 **Background and Compliance with Previous Commission Decisions**

4 11. On July 9, 2004, in Decision No. 67104, the Commission granted a CC&N to TLHOA
5 to provide water service in the Tierra Linda Nueva subdivision northwest of Tucson. The Decision
6 required TLHOA to file a rate application within three months of the fifth anniversary of the
7 Decision, or approximately October 9, 2009.²

8 12. On June 26, 2009, TLHOA and Mr. Smyth filed with the Commission a joint
9 application requesting approval for TLHOA's sale and transfer of the Water System Assets to Mr.
10 Smyth.³

11 13. While this sale and transfer application was pending, on August 7, 2009, TLHOA filed
12 a Motion for Extension of Compliance Condition Filing Deadline requesting an extension of time to
13 file the rate application required by Decision No. 67104. The Commission approved the Motion in
14 Decision No. 71291 (October 7, 2009), and directed that the rate application should be filed no later
15 than June 30, 2011, using a December 31, 2010, test year, noting that the rate application should be
16 filed by either TLHOA or Mr. Smyth, depending upon who held the CC&N at the time of filing.

17 14. The sale and transfer was still pending on October 7, 2010, when TLHOA filed a
18 Motion for Extension of Compliance Condition Filing Deadline in Decision No. 71291, requesting a
19 second extension of the deadline to file the rate application so that Mr. Smyth would have an
20 opportunity to develop a full 12-month test period under his ownership if the Commission approved
21 the transfer. The Commission granted the Motion in Decision No. 72250 (April 7, 2011), extending
22 the deadline to file the rate application to June 30, 2012, using a December 31, 2011, test year.

23 15. On December 10, 2010, the Commission issued Decision No. 72002 approving the
24 sale and transfer of TLHOA's Water System Assets to Mr. Smyth, subject to certain conditions. One
25 of the conditions required Mr. Smyth to monitor the system's water loss, which at the time was
26 greater than ten percent, and to prepare a water loss reduction plan or to submit a detailed cost/benefit
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28 ² Decision No 67104, page 9.

³ Docket Nos. W-20689A-09-0327, *et al.*

1 analysis supporting any conclusion that it was not cost effective to take steps to reduce water loss.⁴

2 16. The Decision also noted that in order for TLHOA to implement sale and transfer of the
3 Water System Assets to Mr. Smyth, it was necessary to amend TLHOA's Conditions, Covenants and
4 Restrictions ("CCRs") governing the subdivision. However, before TLHOA could amend the CCRs,
5 it had to obtain approval of the amendment from the Veterans Administration ("VA") because the
6 VA held mortgages on some of the homes in the subdivision.⁵ Accordingly, the Decision required
7 TLHOA to file a copy of the VA's approval of the amended CCRs within 180 days of the Decision's
8 effective date.⁶

9 17. Mr. Smyth filed a letter dated May 18, 2011, with Docket Control on June 20, 2011, to
10 provide a status update about compliance with the requirements of Decision No. 72002. Attached to
11 the letter was a copy of email correspondence dated March 4, 2011, from the VA stating the VA had
12 concluded that it did not need to approve the CCRs' amendment.⁷ Mr. Smyth's letter advised the
13 Commission that TLHOA's sale and transfer of the Water System Assets to him occurred on April
14 11, 2011.⁸

15 18. On July 15, 2011, Mr. Smyth filed correspondence and documentation relating that the
16 system's water loss percentages were still above ten percent and advising the Commission of the
17 efforts he was taking to reduce the rate of loss.⁹ Ultimately, on February 10, 2012, Mr. Smyth filed a
18 copy of a Water Loss Reduction Plan for the water system as required in Decision No. 72002.¹⁰

19 19. On May 7, 2012, Mr. Smyth filed a Motion to Briefly Extend Time Deadline
20 requesting an extension of time to file the rate application for another three months, until September
21 30, 2012, using an April 30, 2012, test year. Mr. Smyth explained that, because he did not acquire
22 the Water System Assets until April 2011, he sought the short extension in order to complete a full
23 twelve months of operation of the water system under his ownership.¹¹

24 _____
25 ⁴ Decision No. 72002, pages 8-9.

⁵ *Id.*, page 6.

⁶ *Id.*, page 8.

⁷ Mr. Smyth's May 18, 2011, Compliance Letter filed in Docket Nos. W-20689A-09-0327, *et al.*, Appendix B.

⁸ Mr. Smyth's May 18, 2011, Compliance Letter filed in Docket Nos. W-20689A-09-0327, *et al.*, page 1.

⁹ July 15, 2011, Water Loss Report filed in Docket Nos. W-20689A-09-0327, *et al.*

¹⁰ Filed in Docket Nos. W-20689A-09-0327, *et al.*

¹¹ Staff filed a Memorandum on June 20, 2012, recommending Commission approval of the Motion, and also recommending that the deadline for filing the rate case application should be extended to October 31, 2012.

1 **The Application**

2 20. In the Application filed June 24, 2011, Mr. Smyth explained that shortly after the
3 Commission approved the sale and transfer of the Water System Assets in December 2010, but
4 before the April 2011 closing on the transaction, he determined that, based on the financial, tax and
5 liability advice of his accountant, it would be better for him to own the Water System Assets through
6 an Arizona for-profit S corporation.¹² However, upon consultation with legal counsel, Mr. Smyth
7 learned that pursuant to the terms of Decision No. 72002, TLHOA could only transfer the Water
8 System Assets to Mr. Smyth in his individual capacity—they could not be transferred from TLHOA
9 directly to a new corporation owned by Mr. Smyth. Once Mr. Smyth acquired the Water System
10 Assets, he could then apply to transfer them to the corporation.¹³

11 21. After the sale and transfer of the Water System Assets to Mr. Smyth in April 2011, he
12 filed Articles of Incorporation for TLWC with the Commission's Corporations Division, which were
13 approved on April 18, 2011.¹⁴ Under the Articles of Incorporation, Mr. Smyth is TLWC's president
14 and a director. Lisa Sullivan is TLWC's vice president, secretary, treasurer and second director.
15 TLWC has the authority to issue 1,000 shares of common stock.¹⁵ TLWC remains in good standing
16 with the Corporations Division.¹⁶

17 22. Having created TLWC, Mr. Smyth filed the instant Application in order to implement
18 the new ownership structure, but the Applicants maintain that all other aspects of the water system's
19 management, operations and oversight will remain unchanged, and they emphasize that, "[f]or all
20 practical purposes, the water system assets will continue to be owned and operated by Mr. Smyth."¹⁷

21 23. In the Application, the Applicants noted that if the Commission approves the transfer
22 of Mr. Smyth's Water System Assets to TLWC, TLWC will become a public service corporation
23 subject to the terms of § 40-301, *et seq.*, requiring a public service corporation to obtain Commission
24 approval before it issues stock. In anticipation of Commission approval of the transfer, TLWC seeks
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26 ¹² Application, page 4; Transcript of May 17, 2012, Hearing, page 13. (Hereinafter, "Tr. at ____.")

27 ¹³ Application, page 4.

28 ¹⁴ Application, Appendix C.

¹⁵ *Id.*

¹⁶ Hearing Exhibit A-2.

¹⁷ Application, pages 4, 6-7; Tr. at 14, 19.

1 Commission approval for the issuance of 501 common stock shares that TLWC will tender to Mr.
2 Smyth as consideration for the transfer of the Water System Assets.

3 24. Mr. Smyth testified that receiving 501 of the 1,000 authorized common stock shares
4 will allow him to retain a majority position in the corporation if others acquire shares of TLWC
5 stock.¹⁸ According to Mr. Smyth, TLWC will rely on him as its sole shareholder for its financial
6 resources.¹⁹ At hearing Mr. Smyth presented a personal financial statement dated May 16, 2012,
7 demonstrating that he has substantial financial resources upon which TLWC may rely.²⁰

8 25. Other companies owned by Mr. Smyth, either individually or through other entities,
9 are: Smyth Industries, Inc., which constructs and installs water systems for water utilities in Arizona
10 (including the system in this matter); Cayetano, Inc. d/b/a Lakewood Water Company and Saguaro
11 Water Company, both of which are regulated by the Commission;²¹ and Smyth Utilities Management,
12 Inc., which provides utility management services to small- and medium-sized water companies in
13 Southern Arizona, including those owned by Mr. Smyth.²² Each of the entities is in good standing
14 with the Corporations Division.²³

15 The Water System

16 26. The water system consists of one well that produces 200 gallons per minute, one
17 400,000 gallon storage tank, three booster pumps, one 5,000 gallon pressure tank, and a distribution
18 system serving approximately 60 service connections, although the subdivision is platted for
19 approximately 190 customers.

20 27. As noted earlier, the system's water loss for 2009 was 10.5 percent, exceeding
21 acceptable water loss limits. Pursuant to Decision No. 72002, Mr. Smyth filed a Water Loss
22 Reduction Plan with the Commission on February 12, 2012, outlining the steps he had taken and
23 would continue to take to minimize the water loss, such as replacing meters that were under-reading,
24 conducting ground penetrating radar testing of the mains and distribution lines and replacing them as

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26 ¹⁸ Application, page 5; Tr. at 14.

¹⁹ Tr. at 51-52.

²⁰ Hearing Exhibit A-8.

27 ²¹ Only the Water System Assets are the subject of the Application; Mr. Smyth is not seeking to transfer the Lakewood
and Saguaro entities to TLWC.

28 ²² Tr. at 17, 19-20, 25, 27, 31.

²³ Hearing Exhibits A-3 through A-6.

1 leaks were detected.²⁴ At hearing, Mr. Smyth testified that the water loss is being calculated monthly
2 and the last reading before the hearing showed that the system was experiencing a loss of 6.7
3 percent.²⁵

4 28. In the Staff Report, Staff recommended TLWC should continue with the water loss
5 reduction efforts and file documentation with the Commission demonstrating water loss at less than
6 ten percent for the July 1, 2012, through June 30, 2013, time period.²⁶ At hearing, Staff
7 acknowledged Mr. Smyth's efforts to reduce the rate of water loss, but reiterated Staff's
8 recommendation that TLWC should continue implementation of the Water Loss Reduction Plan and
9 should be required to file water loss data as stated in the Staff Report in order to verify that the
10 system's water loss is consistently less than ten percent.²⁷

11 29. In Decision No. 72002, the Commission noted TLHOA and Mr. Smyth acknowledged
12 that arsenic levels in the system's water were above the EPA concentration limit of 10 parts per
13 billion ("ppb"), necessitating the construction of arsenic treatment facilities. Mr. Smyth testified at
14 the hearing in that docket that he would provide the capital for the arsenic treatment system.²⁸

15 30. During the hearing on the current Application, Mr. Smyth testified that the average
16 arsenic level in the water is now less than 10 ppb without any treatment to reduce arsenic levels. Mr.
17 Smyth provided a Water Quality Report from May 2012 for the January 1, 2011, through December
18 31, 2011, time period, reflecting average arsenic levels of 9.1 ppb.²⁹ In the Application, Mr. Smyth
19 affirmed that he will finance the construction of an arsenic treatment system if treatment of the water
20 becomes necessary.³⁰

21 31. Mr. Smyth testified that upon transfer of the Water System Assets, TLWC will assume
22 the obligations for customer security deposits, refunds due on meter and service line installations, and
23 refunds due on main extension agreements.³¹

24
25 ²⁴ Water Loss Reduction Plan filed in Docket Nos. W-20689A-09-0327, *et al.*

26 ²⁵ Tr. at 21.

27 ²⁶ Staff Report, page 5.

28 ²⁷ Tr. at 41.

29 ²⁸ Decision No. 72002, page 4.

30 ²⁹ Hearing Exhibit A-7; Tr. at 15-16.

31 ³⁰ Application, page 6.

³¹ Tr. at 23.

1 32. Pursuant to § 40-282(B), TLWC filed a copy of the Public Utility License Agreement
2 approved by the Pima County Board of Supervisors on July 12, 2011, authorizing TLWC to operate
3 the water system within the public rights-of-way in Pima County.

4 33. According to Staff, an Arizona Department of Environmental Quality status report
5 dated July 27, 2011, stated the water system has no major deficiencies and is delivering water that
6 meets water quality standards required by 40 CFR 141 and A.A.C., Title 18, Chapter 4.

7 34. Staff noted that the water system is located within the Tucson Active Management
8 Area and an Arizona Department of Water Resources Compliance Status Report dated July 6, 2011,
9 concluded that Mr. Smyth is currently in compliance with departmental requirements governing
10 water providers and/or community water systems.

11 35. Mr. Smyth has Commission-approved Backflow Prevention and Curtailment Tariffs
12 for the water system.

13 36. Staff stated there are currently no compliance delinquencies, noting that Mr. Smyth
14 has substantially met the compliance requirements of Decision No. 72002.

15 37. Based on Staff's review of the Application and documentation provided by the
16 Applicants, Staff concluded that the water system has adequate well production and storage capacity
17 to serve existing customers and reasonable growth.³² Staff also concluded that TLWC has the
18 knowledge and technical means to operate and expand the water system.³³

19 **Staff Recommendations**

20 38. In the Staff Report, Staff recommended that the Commission approve Mr. Smyth's
21 Application for authorization of the sale and transfer the Water System Assets to TLWC, and also
22 TLWC's Application for authorization to issue stock for the transfer of Mr. Smyth's Water System
23 Assets. Staff made the following additional recommendations:

- 24 a. That TLWC be required to charge the authorized rates and charges in the certificated
25 area.
- 26 b. That the Commission authorize Mr. Smyth and TLWC to engage in any transactions
27 and to execute or cause to be executed any documents necessary to effectuate the
28 granted authorizations.

³² Staff Report, Attachment A, page 3.

³³ *Id.*

- 1 c. That TLWC be required to file copies of all pertinent documents evidencing the
2 consummation of the transaction with the Utilities Division's Compliance Section no
3 later than 30 days from the effective date of the transaction, and file a letter in Docket
4 Control stating that copies of the documents have been filed with the Utilities
5 Division's Compliance Section.
- 6 d. That TLWC be required to continue to implement the Water Loss Reduction Plan filed
7 on February 10, 2012, in compliance with Decision No. 72002. The water loss should
8 be reduced to less than ten percent by June 30, 2013. To verify this, TLWC should
9 file by July 31, 2013, as a compliance item in this docket, documentation that
10 demonstrates the water loss for the preceding 12-month period is less than ten percent.
11 This filing should include a completed water use data sheet for the period of July 1,
12 2012, through June 30, 2013, and include the monthly water loss data and the
13 calculation of the water loss percentage.
- 14 e. That Mr. Smyth's transfer of the Water System Assets to TLWC be considered null
15 and void, after due process, should the Applicants fail to comply with conditions (c)
16 and (d), above.

17 39. The Applicants agreed with Staff's recommendations.³⁴

18 40. Staff testified at hearing to Staff's conclusion that TLWC is a fit and proper entity to
19 own and operate the water system, and that both the transfer of Mr. Smyth's Water System Assets to
20 TLWC, and TLWC's issuance of stock as consideration for the transfer, are in the public interest.

21 41. We agree with Staff's conclusions and, based on the evidence and testimony presented
22 by the Applicants, we find that TLWC, with Mr. Smyth as its sole shareholder, has sufficient
23 financial resources to operate, maintain and expand the water system.

24 42. Accordingly, we find that Staff's recommendations are reasonable and we adopt them.

25 43. We also believe that Mr. Smyth's May 7, 2012, Motion to Briefly Extend Time
26 Deadline in Decision No. 72250, requesting an extension of time to file the rate application for
27 another three months, until September 30, 2012, using an April 30, 2012, test year is reasonable and
28 the Motion is granted, except that we adopt Staff's recommendation that the filing deadline should be
October 31, 2012. The rate application should be filed by either Mr. Smyth or TLWC, whoever holds
the CC&N at that time.

CONCLUSIONS OF LAW

1. Mr. Smyth owns and operates a public service corporation within the meaning of
Article XV of the Arizona Constitution and A.R.S. §§ 40-281, 40-282 and 40-285.

³⁴ Response to Staff Report, page 1; Tr. at 14.

1 IT IS FURTHER ORDERED that Gary Smyth and Tierra Linda Water Company, Inc. are
2 authorized to engage in any transactions and to execute or cause to be executed any documents
3 necessary to effectuate the granted authorizations.

4 IT IS FURTHER ORDERED that Tierra Linda Water Company, Inc. shall file with the
5 Utilities Division's Compliance Section copies of the documents evidencing the consummation of the
6 transaction no later than 30 days from the closing date of the transaction, and shall simultaneously
7 file a letter with Docket Control stating that the closing documents have been filed with the Utilities
8 Division's Compliance Section.

9 IT IS FURTHER ORDERED that Tierra Linda Water Company, Inc. shall continue to
10 implement the Water Loss Reduction Plan filed by Gary Smyth with the Commission on February
11 10, 2012, in compliance with Decision No. 72002. The system's water loss should be reduced to less
12 than ten percent by June 30, 2013, and Tierra Linda Water Company, Inc. shall file with Docket
13 Control, as a compliance item in this docket, by July 31, 2013, a completed Water Use Data Sheet for
14 the period of July 1, 2012, through June 30, 2013, demonstrating that the system's water loss is less
15 than ten percent. The Water Use Data Sheet shall include the monthly water loss data and the
16 calculation of the monthly water loss percentage.

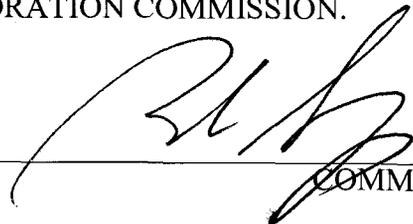
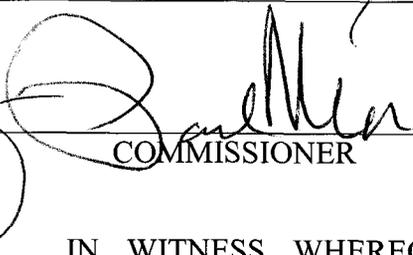
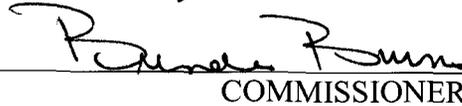
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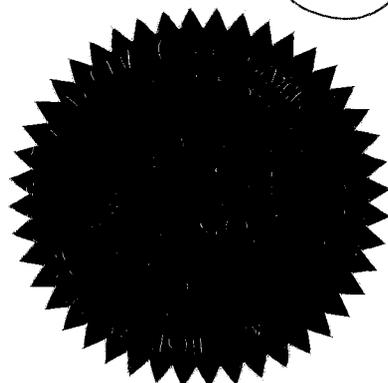
1 IT IS FURTHER ORDERED that that the sale of the water system and transfer of the CC&N
2 held by Gary Smyth that are the subject of this Application, to Tierra Linda Water Company, Inc.,
3 shall be considered null and void, after due process, should Gary Smyth and/or Tierra Linda Water
4 Company, Inc. fail to comply with the above conditions.

5 IT IS FURTHER ORDERED that Gary Smyth's Motion to Briefly Extend Time Deadline in
6 Decision No. 72250 is granted, extending the compliance deadline for filing the rate application to no
7 later than October 31, 2012, using an April 30, 2012, test year. The rate application should be filed
8 by either Gary Smyth or Tierra Linda Water Company, Inc., whoever holds the CC&N at that time.

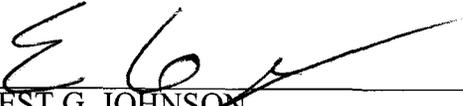
9 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

10 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

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12
13  CHAIRMAN  COMMISSIONER
14  COMMISSIONER  COMMISSIONER  COMMISSIONER
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17 IN WITNESS WHEREOF, I, ERNEST G. JOHNSON,
18 Executive Director of the Arizona Corporation Commission,
19 have hereunto set my hand and caused the official seal of the
20 Commission to be affixed at the Capitol, in the City of Phoenix,
21 this 30th day of July, 2012.

22 
ERNEST G. JOHNSON
EXECUTIVE DIRECTOR

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24 DISSENT _____

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26 DISSENT _____

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SERVICE LIST FOR:

GARY SMYTH AND TIERRA LINDA WATER
COMPANY, INC.

DOCKET NOS.:

W-20689A-11-0252 and W-20810A-11-0252

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