

OPEN MEETING AGENDA ITEM



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ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

Arizona Corporation Commission

DOCKETED

DEC -9 2008

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BEFORE THE ARIZONA CORPORATION COMMISSION

8 IN THE MATTER OF THE APPLICATION
9 OF PINE WATER COMPANY FOR
10 APPROVAL TO (1) ENCUMBER A PART
11 OF ITS PLANT AND SYSTEM
12 PURSUANT TO A.R.S. § 40-285(A); AND
13 (2) ISSUE EVIDENCE OF
14 INDEBTEDNESS PURSUANT TO A.R.S.
15 § 40-302(A).

DOCKET NO: W-03512A-07-0362

**PINE WATER COMPANY'S REPLY
TO INTERVENORS' OPPOSITION TO
NOTICE OF WITHDRAWAL**

16 Pine Water Company ("PWCo") submits the following reply to the Opposition to
17 Pine Water Company's Notice of Withdrawal ("Opposition") filed by Intervenors Fred
18 Krafczyk and Michael Greer ("Intervenors") on December 2, 2008.

19 As Napoleon Bonaparte once said, "[i]n politics, absurdity is not a handicap." That
20 quote aptly summarizes the Intervenors' Opposition. To say the least, Intervenors'
21 Opposition is a political filing based on a mixture of hyperbole, speculation and innuendo.
22 This reply is necessary because Intervenors make several absurd and speculative
23 arguments, which uniformly lack any basis in law or fact. The Commission should
24 disregard the Opposition filed by the Intervenors, and the administrative closure of this
25 docket should be undertaken.

26 **I. THIS DOCKET IS NOT REQUIRED BY THE JOINT WELL DEVELOPMENT AGREEMENT.**

As stated in its notice of withdrawal, PWCo currently does not seek approval to (1)
encumber a part of its plant and system pursuant to A.R.S. § 40-285(A) or (2) issue evidence

1 of indebtedness pursuant to A.R.S. § 40-302(A) relating to the Joint Well Development
2 Agreement (“JWDA”) between PWCo and the Pine-Strawberry Water Improvement
3 District (“District”) dated May 1, 2007. The primary reason for PWCo’s withdrawal of
4 the pending application is that approval of the application in this docket is not necessary at
5 this time. Nor is such approval required by the terms of the JWDA.

6 Instead of addressing these points, Intervenors claim PWCo overlooks the “terms
7 and conditions of A.R.S. § 40-301 which clearly gives this Honorable Commission the
8 right to regulate this type of activity for which the application of Pine Water Company
9 originally instituted.”¹ Intervenors then claim that PWCo “is effectively admitting that
10 they brought an action before the Commission, which has no merit.”² That claim is silly
11 because this docket originally was filed at the request of the District as a pre-condition to
12 deposit of the District’s funds into escrow under the JWDA. Further, when this docket
13 was filed, the District intended to comply with the terms of the JWDA.

14 As PWCo has stated previously, the relief sought in this docket is not necessary for
15 PWCo to perform its obligations under the terms of the JWDA.³ Rather, PWCo filed the
16 pending application out of an abundance of caution and because approval to encumber an
17 asset that was to be built in the future (*i.e.*, the K2 project) was required by the District as
18 a pre-condition to deposit of the \$300,000 in escrow under ¶ 4.2.1.1 of the JWDA. After
19 executing the JWDA, the District waived that requirement and deposited that money in
20 escrow, which means that approval of the encumbrance is no longer needed under the
21 JDWA.⁴ The District also waived the requirement for a lien against the K2 project.⁵

22 Intervenors flat ignored these undisputed facts in their Opposition. Intervenors also
23

24 ¹ Intervenors’ Opposition at 2.

25 ² *Id.*

26 ³ *See, e.g.*, Direct Testimony of Robert T. Hardcastle, p. 4, filed November 7, 2007.

⁴ Escrow Instructions (Joint Well JDWA)(K2 Site) dated February 8, 2008, ¶ 1(a).

⁵ *Id.*

1 did not dispute that the requested approval allowing PWCo to issue evidence of
2 indebtedness (via refund) in favor of the District under A.R.S. § 40-302(A) is not ripe.
3 Under ¶ 4.2.2 of the JWDA, until the K2 Project is constructed *and* the ACC issues a
4 decision putting the K2 project in PWCo's rate base, such indebtedness is not necessary.

5 Not only is such refund obligation not ripe, but the District has refused to release
6 the required payment to PWCo under the JWDA. Instead, the District improperly
7 terminated the JWDA, which forced PWCo to file arbitration claims against the District
8 for breach of the JWDA and unlawful, bad-faith termination. Put simply, the District's
9 actions in purporting to terminate the JWDA and refusing to perform have further
10 rendered ACC approval of the application in this docket unnecessary at this time. PWCo
11 and the District have an arbitration hearing scheduled for February 9-12, 2009. The result
12 of that arbitration proceeding will determine whether the parties will continue with the
13 JWDA and, in turn, whether the approvals sought in this docket ultimately will become
14 necessary. Under these circumstances, the need for the approvals sought in this docket is
15 speculative and it makes little sense to continue this Commission docket.

16 **II. THIS COMMISSION SHOULD DISREGARD INTERVENORS'**
17 **SPECULATIVE AND UNFOUNDED ARGUMENTS IN THE OPPOSITION.**

18 Rather than address these undisputed facts, Intervenors make a series of specious
19 arguments in their Opposition. These arguments are meritless, both factually and legally.

20 **A. The District Has Acted In Bad Faith, Not PWCo.**

21 To start, Intervenors argue that "[f]or Pine Water Company to now unilaterally
22 withdraw its Application after the incredible expenditure of resources by the Commission
23 and the Intervenors prior to a final decision is clearly an act of bad faith."⁶ Boiled down,
24 Intervenors urge the Commission to reach an unnecessary decision on debt and
25 encumbrance approvals relating to the JWDA, which the District has terminated and

26 ⁶ Intervenors' Opposition at 2.

1 refused to perform in reliance on the advice of Mr. Gliege, who represents both the
2 District and Intervenors.

3 That argument is not only disingenuous, but it highlights the conflicts and
4 contradictions resulting from Mr. Gliege's representation of Intervenors and the District.
5 As counsel for the District, Mr. Gliege advised the District to terminate the JWDA. Yet,
6 now as counsel for the Intervenors, Mr. Gliege argues that PWCo is acting in bad faith by
7 withdrawing the application in this docket, which revolves around debt and encumbrance
8 approvals for an agreement which Mr. Gliege terminated on behalf of his other client, the
9 District. The District's actions relating to the K2 project constitute bad faith, not PWCo's
10 withdrawal of its pending and no longer necessary application in this docket.

11 **B. A Commission Order Denying the Approvals In this Docket Will**
12 **Increase the District's Liabilities to the District in the Arbitration**
13 **Proceeding.**

14 Next, Intervenors claim that PWCo has withdrawn its application because it "is
15 obviously concerned about the impact of any decision of this Commission on the pending
16 Arbitration proceeding they have brought against the District for breach of the JWDA."⁷
17 Intervenors go on to argue that "[a]ny decision unfavorable in any way to Pine Water
18 Company could have a negative effect on the outcome of the Arbitration Hearing."⁸

19 Aside from being rampant speculation, Intervenors have it backwards. In reality, if
20 this Commission were to issue a decision denying the pending application in this docket,
21 such decision would strengthen, not weaken, PWCo's arbitration claims against the
22 District because such denial would result from the District's actions (and the actions of its
23 counsel Mr. Gliege) opposing Commission approval of the pending application and
24 terminating the JWDA. In no uncertain terms, the District and its counsel have failed to
25 comply with the District's express duties and obligations to cooperate in completing the

26 ⁷ *Id.* at 3.

⁸ *Id.*

1 K2 Project under the JWDA, including the obligation to support any necessary
2 Commission approvals.⁹ Any Commission decision in this docket denying the requested
3 approvals would substantiate PWCo's claims against the District for violations of the
4 JWDA.

5 Given these circumstances, PWCo did not file its notice of withdrawal as a
6 litigation tactic. Rather, PWCo seeks to withdraw its application to avoid moving forward
7 with an application that currently is unnecessary, speculative and contingent and to avoid
8 wasting any additional resources of the Commission, the Intervenors and PWCo.

9 **C. PWCo Remains Subject to ACC Jurisdiction.**

10 Finally, Intervenors claim that PWCo's notice of withdrawal "is designed to
11 remove Pine Water Company's business practice from under the jurisdiction and authority
12 of the Commission."¹⁰ Intervenors then criticize PWCo for "attempting to carry on a
13 multifaceted encounter with the District."¹¹ Intervenors, however, again have it
14 backwards because PWCo demanded and urged the District to comply with the JWDA.
15 The District, not PWCo, refused to perform the JWDA and initiated the "multifaceted
16 encounter" with PWCo. That's not to mention that PWCo remains subject to ACC
17 jurisdiction, irrespective of this docket.

18
19 ⁹ See JWDA, Recital D ("Now, both parties desire to work cooperatively to develop a new
20 water source to supplement the water supplies currently available in PSWID and PWCo's
21 CC&N."); ¶ 3.1 ("PSWID shall have the right to participate in all planning, decisions and
22 proceedings relating to the K2 Well Project, and shall be provided copies of planning
23 documents as necessary to participate in a commercially reasonable manner, *including,*
24 *reasonably cooperating in obtaining necessary government approvals.*")(emphasis
25 added); ¶ 10.1 ("The Parties agree to cooperate at all times in good faith to achieve their
26 goal of developing a permanent well at the K2 site..."); ¶ 10.2 ("PSWID covenants and
agrees to support any effort by PWCo to obtain approval of this Agreement by the
ACC...Such support shall, upon reasonable request by PWCo, include PSWID providing
public comment supporting this Project and the inclusion of the fair and reasonable cost
thereof in rate base in proceedings before the ACC.").

¹⁰ Intervenors' Opposition at 2.

¹¹ *Id.*

1 Finally, Intervenors argue that “[t]he Commission must retain and conclude this
2 case to protect the customers of the water company from the situation that would remain if
3 Pine Water Company were somehow to retain its assets and then attempt to include in its
4 next rate case application the costs of this proceeding which they are now so willing to
5 abandon.”¹² That argument lacks any merit whatsoever because this proceeding has no
6 impact on whether the costs of this proceeding may be included in a future rate case filed
7 by PWCo. The Commission will decide that issue in a future rate case and it would be
8 speculative for the Commission to even attempt to consider such issue in this docket.

9 **III. CONCLUSION.**

10 PWCo respectfully requests that the Commission and/or Administrative Law Judge
11 issue an order acknowledging PWCo’s withdrawal of the pending application in this
12 docket, and directing administrative closure of this docket.

13 DATED this 9th day of December, 2008.

14 FENNEMORE CRAIG, P.C.

15
16 By 

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¹² *Id.* at 2-3.

1 **ORIGINAL** and thirteen (13) copies of the
2 foregoing filed this 9th day of December, 2008:

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7 **COPY** of the foregoing hand-delivered
8 this ___ day of December, 2008:

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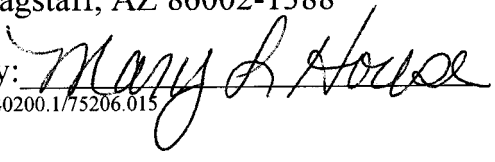
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