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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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8 IN THE MATTER OF THE APPLICATON
OF WATER UTILITY OF GREATER
9 TONOPAH, INC. FOR APPROVAL TO
10 TRANSFER THE CC&N FROM WEST
UTILITY OF GREATER TONOPAH, INC.

DOCKET NO. W-02450A-05-0430

STAFF'S POST HEARING BRIEF

11
12 Following the evidentiary hearing in the above captioned proceeding, Administrative
13 Law Judge ("ALJ") Kinsey directed Applicant Water Utility of Greater Tonopah, Inc.
14 ("Greater Tonopah") to file a post hearing brief. ALJ Kinsey instructed Greater Tonopah
15 to brief the issue of whether a *nunc pro tunc* order is a more appropriate procedural
16 mechanism than a transfer of the Certificate of Convenience and Necessity ("CC&N").
17 ALJ Kinsey also requested Greater Tonopah to provide citations to prior decisions of the
18 Arizona Corporation Commission (the "Commission") and to evidence demonstrating
19 when the omission occurred in the legal description. Finally, ALJ Kinsey instructed Staff
20 to file a responsive brief. Staff respectfully submits the following brief in accordance with
21 ALJ Kinsey's instructions.

22
23 **INTRODUCTION**

24 In the above captioned proceeding, Greater Tonopah requests that the
25 Commission transfer the CC&N of West Phoenix Water Company ("West Phoenix") to
26 Greater Tonopah. Greater Tonopah's president, Mr. John Mihlik, Sr. testified that the
27 company filed the application after becoming aware that 1 ½ sections of West Phoenix's
28 certificated area had not been transferred to Greater Tonopah in Decision No. 54419.

1 Transcript at pp. 18-19. Upon investigation, Mr. Mihlik discovered that the legal
2 description in that decision inadvertently omitted the 1 ½ sections. *Id.* at p. 29, lines 1-15.
3 Mr. Mihlik also testified that he was the president of West Phoenix at the time of the
4 decision and until the company was dissolved. *Id.* at p. 16, lines 16-18.

5
6 In its Staff Report, marked and admitted as exhibit S-1, Staff testified that the proper
7 applicant should be West Phoenix. At the hearing, Mr. Mihlik testified that West Phoenix
8 was dissolved sometime in 1986. Transcript at p. 15, lines 15-24. Staff recommended use
9 of a *nunc pro tunc* order rather than an order transferring the CC&N. Staff's testimony
10 was based on the fact that West Phoenix was dissolved approximately 19 years ago. Staff
11 questioned the authority of Mr. Mihlik to wind up the affairs of West Phoenix 19 years
12 after the company was dissolved. However, Staff witness Ms. Linda Jaress testified that
13 Staff would not oppose a finding that Mr. Mihlik has authority to wind up the affairs of
14 West Phoenix and request a transfer of its CC&N to Greater Tonopah. *Id.* at p. 46, lines
15 15-18.

16
17 Staff does not dispute any facts or evidence presented by Greater Tonopah at the
18 hearing. Staff agrees with the company's presentation of the procedural history of the 1 ½
19 sections at issue in this matter. Furthermore, Staff agrees with Greater Tonopah's legal
20 conclusions. Staff's responsive brief is submitted to provide a more complete discussion
21 of the legal questions presented in the hearing and in Greater Tonopah's post hearing
22 memorandum.

23 **THE COMMISSION HAS AUTHORITY TO ISSUE**
24 **A NUNC PRO TUNC ORDER**

25 The Commission has statutory authority to retroactively rescind, alter or amend any
26 of its orders or decisions at any time pursuant to ARS §40-252. ARS §40-252 provides in
27 relevant part:

28 *The commission may at any time, upon notice to the corporation affected, and after opportunity to be heard as upon a complaint, rescind, alter or amend any order or decision made by it. When the*

1 order making such rescission, alteration or amendment is served
2 upon the corporation affected, *it is effective as an original order or*
3 *decision.*

4 ARS § 40-252 (West) (2005) (emphasis added). See also *Tonto Creek Estates*
5 *Homeowners Ass'n. v. ACC*, 177 Ariz. 49, 57, 864 P.2d 1081, 1089 (Ariz. Ct. App. 1993)
6 (Rules prescribed in ARS § 40-252 are applicable and binding on the Commission if a
7 decision clearly alters or amends a prior decision.). ARS § 40-252 does not expressly
8 address the issue of correcting a decision for clerical errors. Furthermore, decisions
9 amending or altering a decision pursuant to ARS § 40-252 are effective when issued rather
10 relating back to the date of the original decision.

11 However, Arizona Administrative Code (“AAC”) § R14-3-101(A) provides that:

12 In all cases in which procedure is set forth neither by law, nor by
13 these rules, nor by regulations or orders of the Commission, the
14 Rules of Civil Procedure for the Superior Court of Arizona as
15 established by the Supreme Court of Arizona shall govern.

16 AAC § R14-3-101(A) (2005). Two rules of civil procedure address the issue of correcting
17 a decision for clerical errors.

18 Arizona Rule of Civil Procedure (“ARCP”) Rule 58(a) provides that “on such notice
19 as justice may require, the court may direct the entry of a judgment *nunc pro tunc*, and the
20 reasons for such direction shall be entered of record.” ARCP Rule 58(a) (West) (2005).

21 ARCP Rule 60(a) also provides that:

22 Clerical mistakes in judgments, orders, *or other parts of the record*
23 and errors therein *arising from oversight or omission* may be
24 corrected by the court *at any time* of its own initiative or on motion
25 of any party and after such notice, if any, as the court orders.

26 ARCP Rule 60(a) (West) (2005) (emphasis added). In *Crye v. Edwards*, 178 Ariz. 327,
27 873 P.2d 665, the Court of Appeals of Arizona noted that “trial courts must generally
28 engage in factfinding to determine whether to grant relief under Rule 60(a).” *Id.*, 178
Ariz. at 329, 873 P.2d at 667.

1 To determine whether a *nunc pro tunc* entry is appropriate in the instant case, two
2 legal questions must be answered: (1) Is the omission in the legal description a clerical
3 error for which a *nunc pro tunc* entry is appropriate; and (2) Is a *nunc pro tunc* entry
4 appropriate for a decision issued 20 years earlier?
5

6 **A NUNC PRO TUNC ENTRY IS APPROPRIATE FOR**
7 **AN ERROR IN A LEGAL DESCRIPTION**

8 In *Ace Automotive Products, Inc v. Van Duyne.*, 156 Ariz. 140, 750 P.2d 898 (Ariz. Ct.
9 App. 1988), the Court of Appeals of Arizona held that:

10 Whether error is judgmental or clerical turns on the question [of]
11 whether the error occurred in rendering judgment or in recording the
12 judgment rendered. The power to correct clerical error does not
13 extend to the changing of a judgment, order, or decree which was
14 entered as the court intended.

15 *Id.*, 156 Ariz. at 142-143, 750 P.2d at 900-901 (internal citations omitted). Although Staff
16 did not find a case that defines clerical errors, it has found cases approving the use of *nunc*
17 *pro tunc* issues for a variety of errors.

18 For example, in *Arizona v. Surety Insurance Company of California*, 137 Ariz. 351,
19 670 P.2d 1175 (Ariz. Ct. App. 1983), the error was omission of a party on the judgment.
20 *Id.*, 137 Ariz. at 353, 670 P.2d at 1177. The court approved a *nunc pro tunc* entry because
21 a preceding minute entry included the named party. *Id.* On the other hand, in *Ace*
22 *Automotive Products, supra*, the court held that the requested correction was judgmental
23 and not clerical. *Ace Automotive Products*, 156 Ariz. at 143, 750 P.2d at 901. The court
24 concluded that the dollar amount in the judgment was the amount intended by the court.
25 *Id.*

26 Even if a judgment reflects the intent of a court, a *nunc pro tunc* entry may be used to
27 correct the record. ARCP 60(a) expressly states that a *nunc pro tunc* entry may correct
28 “other parts of the record.” ARCP Rule 60(a) (West) (2005). In *Crye, supra*, the court
held that “the record may be corrected to reflect that the 1982 renewal affidavit was timely
filed.” *Crye*, 178 Ariz. at 330, 873 P.2d at 668. In *Crye*, a required affidavit was timely

1 presented to the clerk of court but was never entered into the record by the clerk. *Id.*, 178
2 Ariz. at 329, 873 P.2d at 677.

3 In the instant case, Greater Tonopah seeks to correct the record to reflect the legal
4 description that should have been included in Decision No. 54419. Greater Tonopah
5 initially requested a transfer of the CC&N to correct the record. Greater Tonopah
6 subsequently agreed with Staff's recommendation to use a *nunc pro tunc* entry to correct
7 the record.
8

9 The legal description included in Decision No. 54419 appears to be the legal
10 description intended by the Commission. The Commission used the legal description
11 provided by West Phoenix. Mr. Mihlik testified that the company inadvertently failed to
12 list the 1 ½ sections in the application to transfer the CC&N to Greater Tonopah.
13 Transcripts at p. 33, lines 1-8.

14 In its post hearing memorandum, Greater Tonopah provided sufficient explanation for
15 the omission in the legal description. Staff agrees that the Company and the Commission
16 believed that Decision Nos. 54418 and 54419 transferred the entire service area included
17 in West Phoenix's CC&N. The legal descriptions were lengthy and detailed because West
18 Phoenix sought to transfer its service area to two successor public service corporations.
19 But for the omission in the legal description in Decision No. 54419, West Phoenix's
20 CC&N would have been cancelled following the two transfers.
21

22 Staff believes that there is legal authority for the Commission to use a *nunc pro*
23 *tunc* order to correct an omission in a legal description. Even though the omission was
24 due to an inadvertent error by West Phoenix instead of the Commission, a *nunc pro tunc*
25 order may be used to correct the record.
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**A NUNC PRO TUNC ORDER MAY BE ISSUED
FOR A DECISION ENTERED 20 YEARS EARLIER**

Courts typically do not view the lapse of time as a bar to *nunc pro tunc* orders. See e.g. *Kveton v. Farmers Royalty Holding Co.*, 161 S.W.2d 583, 584 (Tex.Civ.App. 1942) (“[T]he court has the inherent power and authority, under proper notice to the interested parties, to enter such judgment *nunc pro tunc* and the lapse of time will not affect such right or authority except in cases where the rights of third persons...have intervened.”); see also *Allegheny County v. Pennsylvania Public Utility Commission*, 192 Pa.Super. 100, 109-110, 159 A.2d 227, 232 (Holding that a lapse of time is not necessarily a bar to a *nunc pro tunc* entry; the court explained that, even though 29 ½ years was an unusually long period of time, there was an adequate explanation and evidence for the lapse of time).

In *Surety Insurance Company of California, supra*, the Court of Appeals of Arizona rejected an argument that a judgment must be amended within 15 days pursuant to ARCP Rule 59(I). *Surety Insurance Company of California* 137 Ariz. at 353, 670 P.2d at 1177. The court approved a *nunc pro tunc* entry five years after the judgment because there was “no amendment to the substance of the judgment.” *Id.* In *Crye, supra*, the court approved a *nunc pro tunc* entry eight years after the judgment. *Crye*, 178 Ariz. at 330, 873 P.2d at 668.

Staff only identified one limitation cited by Arizona courts related to a lapse of time. In *Allen v. Allen*, 129 Ariz. 112, 628 P.2d 995 (Ariz. Ct. App. 1981), Court of Appeals of Arizona held that a *nunc pro tunc* entry is inappropriate if the lapse of time was caused by the party applying for the entry. *Id.*, 129 Ariz. at 114, 628 P.2d at 997.

In the instant case, West Phoenix and Greater Tonopah did not cause the lapse of time that occurred. Mr. Mihlik testified that Greater Tonopah filed the application in the above captioned proceeding as soon as it became aware of the omission in the legal description.

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