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AZ CORP COMMISSION
DOCKET CONTROL

BEFORE THE ARIZONA CORPORATION COMMISSION

RAYMOND R. PUGEL AND JULIE B.
PUGEL, husband and wife as trustees of THE
RAYMOND R. PUGEL and JULIE B. PUGEL
FAMILY TRUST,
and
ROBERT RANDALL and SALLY RANDALL,
husband and wife
Complainants,
v.
PINE WATER COMPANY, an Arizona
Corporation
Respondent.

DOCKET NO. W-03512A-06-0407
REQUEST FOR PROCEDURAL
CONFERENCE

AND

RESPONSE TO MOTION TO DISMISS

AND

MOTION FOR PARTIAL SUMMARY
ADJUDICATION ON SETTLED PORTIONS
OF CASE

ORAL ARGUMENT REQUESTED

ASSET TRUST MANAGEMENT, CORP.
Complainants,
v.
PINE WATER COMPANY, an Arizona
Corporation
Respondent.

DOCKET NO. W-03512A-06 -0613

JAMES HILL and SIOUX HILL, husband and
wife and as trustees of THE HILL FAMILY
TRUST,
Complainants,
v.
PINE WATER COMPANY, an Arizona
Corporation
Respondent.

DOCKET NO. W-03512A-07-0100

Arizona Corporation Commission
DOCKETED

AUG 18 2008

DOCKETED BY

1 **BRENT WEEKES,**
2 **Complainants,**
3 **v.**
4 **PINE WATER COMPANY, an Arizona**
5 **Corporation**
6 **Respondent.**

DOCKET NO. W-03512A-07-0019

7 COMES NOW RAYMOND R. PUGEL, JULIE B. PUGEL AS TRUSTEES OF THE
8 RAYMOND R. PUEL AND JULIE B. PUGEL FAMILY TRUST AND ROBERT RANDALL AND
9 SALLY RANDALL, {the "Complainants"} by and through their attorney undersigned and submit the
10 following request for a Scheduling Conference so that the above captioned matter can be scheduled for
11 the completion of the hearings on the Rebuttal Testimony and the conclusion of this matter, and response
12 to the Motion to Dismiss of Pine Water Company, filed on the 7th day of August, 2008, and, and further
13 request that the Hearing Officer, pursuant to *Arizona Administrative Code § R14-3-110*, issue an
14 Opinion and Order in conformance with the Stipulations entered into by and between Respondent Pine
15 Water Company and Brent Weekes and Pine Water Company and Asset Trust Management Corporation
16 disposing of that portion of this case and forwarding the same to the full Corporation Commission for
17 action thereon.

18 **I. REQUEST FOR PROCEDURAL CONFERENCE**

19 The Complainants noted above hereby respectfully request that the hearing officer, pursuant to
20 *Arizona Administrative Code § R14-3-108* set a time and place certain for a Procedural Conference to
21 set hearing dates on the continuation of the hearing in the foregoing matter and to resolve any
22 outstanding discovery disputes which may yet exist as of the time of the conference. The Complainants
23 are ready, willing and able to continue with this proceeding and request that this Honorable Hearing
24 Officer notify the undersigned on their behalf of the time and place of such procedural conference and
25 allow him to appear telephonically at the same.

26 **II. RESPONSE TO MOTION TO DISMISS**

27 Pine Water Company is seeking the dismissal of an action for failure to prosecute the same
28 during the midst of the action, following the taking of direct evidence, the filing of rebuttal testimony
29 and following the propounding of discovery on the Complainants and the receipt of their responses

1 thereto. Additionally, there is the usual discovery dispute with the attorney for Pine Water Company
2 wanting to dictate the form and content of the answers received to the discovery propounded by them.
3 So, in an effort to be creative and imaginative Pine Water Company has filed a Motion to Dismiss a
4 presently ongoing proceeding.

5 First of all, this concern of Pine Water Company could easily have been handled by a Procedural
6 Conference with the Hearing Officer pursuant to *Arizona Administrative Code § R14-3-108*. Instead,
7 citing a Rule of Procedure which was repealed over seven and half years ago, *Rule V Uniform Rules of*
8 *Practice of the Superior Court*, Pine Water Company is attempting to concoct a new remedy for itself in
9 this case. The present rendition of the rule which they sought to rely upon is found in *Rule 38.1,*
10 *Arizona Rules of Civil Procedure*, which is a rule concerned with placing cases on the inactive calendar
11 when a Motion to Set and Certificate of Readiness has not been filed. That rule does not cover issues
12 concerning cases in which the evidentiary hearings have started.

13 The case cited by Pine Water Company in support of its concocted remedy, *Campbell v.*
14 *Deddens, 93 Ariz. 247, 379 P.2d 963 (S.Ct. 1963)* likewise is inappropriate and of no application to this
15 matter before the Hearing Officer. This case also concerns itself with failure to file a Motion to Set and
16 Certificate of Readiness in a timely manner, not with a delay during the presentation of the case itself. It
17 should be noted that the Court made it abundantly clear in *Campbell, supra.* while refusing to dismiss
18 the case pending in the Court because of issues pertaining to the filing of a Motion to Set and Certificate
19 of Readiness that the purpose of the rule, now embodied in *Rule 38.1 Arizona Rules of Civil Procedure*
20 is not:

21 . . . intended to place a sword in the hands of defendants' attorneys
22 which will enable them to abruptly terminate litigation if their opponents
23 miss a deadline. *Campbell, supra, 93 Ariz. at 250, 379 P.2d at 965.*

24 Additionally under *Rule 38.1* and its predecessors the parties to the litigation are always given ample
25 notice of the potential for dismissing the litigation for failure to file their Motions to Set and Certificates
26 of Readiness. Pine Water Company is taking the position that such notice is not require in this case and
27 that the Hearing Officer should administer this draconian remedy.

28 A brief review of the applicable case law pertaining to the interpretation of the Rule cited by Pine
29 Water Company and the progeny of that Rule clearly indicate that the Rule clearly is concerned with
failure to bring the case to trial, not failure to move the judge, or in this case a hearing officer, to set a

1 matter for a continuation of the proceedings. *See Mission Insurance Company v. Cash, Sullivan &*
2 *Cross, 170 Ariz. 1056, 822 P.2d 1 (Ct. App. 1991); Flynn v. Cornoyer-Hedrick Architects & Planners,*
3 *Inc., 160 Ariz. 187, 772 P.2d 10 (Ct. App. 1988).* In fact, in cases such as this one before the hearing
4 officer where both parties have actively participated in the presentation of the case dismissal is not
5 warranted.

6 Pine Water Company cites to *Rule 41(b)* as the authority for allowing the matters pending
7 against it to be dismissed. It should be noted that the enforcement of this rule is discretionary with the
8 trial judge after weighing all the equities to all parties to the proceeding. *Goodman v Gordon, 103 Ariz.*
9 *538, 447 P.2d 230 (S.Ct. 1968); Gorman v. City of Phoenix, 152 Ariz. 179, 731 P.2d 74 (S.Ct. 1987).*

10 Pine Water Company has made no showing of why that discretion should be exercised in their
11 favor. In fact, as the Motion filed by Pine Water Company indicates, both parties have worked towards
12 the resolution of this matter through the hearing process and in fact the hearing is well on its way to final
13 conclusion. Under such circumstances, the discretion of the Court as noted above should be exercised in
14 favor of not dismissing the proceedings, but rather in continuing and concluding the same. As noted by
15 our Supreme Court in *W.T. Rawleigh Company v. J.W. Spencer and C.P. Breinholt, 58 Ariz. 182, 118*
16 *Pl2d 674 (1941):*

17
18 It is true the trial court has inherent power to dismiss a case for
19 want of prosecution. . . . But we think such power should not be used
20 where the record shows that both parties nursed the case along with the
21 court's approval.

22 Pine Water Company's attempt at concocting a remedy through in appropriate reliance upon
23 rules and cases which are not applicable in this matter should be denied. As pointed out by the Arizona
24 Court of Appeals in *Bickerstaff v. Denny's Restaurant, Inc., 142 Ariz. 27, 688 P.2d 673 (Ct. App.*
25 *1984)* referencing *Reif v. A.H. Robins Co., 90 F.R.D. 526 (E.D. Pa 1981):*

26 . . . The Court . . . has made clear that dismissal for failure
27 to prosecute is a 'harsh remedy and should be resorted to only in
28 extreme cases,' because the law favors disposition of cases on their
29 merits {citations omitted}

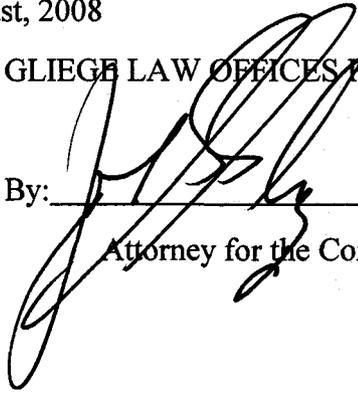
1 The Complainants respectfully request that this Hearing Officer deny the motion of Pine Water
2 Company and hear this case on the merits.

3 **III. MOTION FOR SUMMARY ISSUANCE OF ORDER REGARDING THE WEEKES**
4 **MATTER AND THE ASSET TRUST MANAGEMENT MATTER**

5 The Complainants respectfully request that the Hearing Officer, pursuant to *Arizona*
6 *Administrative Code § R14-3-110*, issue an Opinion and Order in conformance with the Stipulations
7 entered into by and between Respondent Pine Water Company and Brent Weekes and Pine Water
8 Company and Asset Trust Management Corporation disposing of that portion of this case and
9 forwarding the same to the full Corporation Commission for action thereon. There is no reason to justify
10 any delay in concluding that portion of these proceedings which have been settled, the Stipulations
11 having been filed in the Docket in the foregoing matter. Any delay in the conclusion of that portion of
12 this matter merely prejudices all parties to those agreements. Since both the Weekes matter and the
13 Asset Trust Management matters were initially brought as separate proceedings and then consolidated
14 with the Complainants proceedings, it is respectfully requested that these matters be severed from this
15 consolidated proceeding and brought to conclusion in the most expeditious manner possible.

16 Respectfully submitted this 14th day of August, 2008

17 GLIEGE LAW OFFICES PLLC

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19 By: 

20 Attorney for the Complainants
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26 Rule V, Uniform Rules of Practice was repealed October 10, 2000, effective December 1, 2000.
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1 Original and 19 copies mailed/delivered
2 This 14th day of August, 2008 to:

3 Arizona Corporation Commission
4 Attn: Docket Control
5 1200 W. Washington
6 Phoenix, AZ 85007

7 Copies of the foregoing mailed/delivered
8 This 14th day of August, 2008 to:

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