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Arizona Corporation Commission

ARIZONA CORPORATION COMMISSION
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COMMISSIONERS

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- BOB STUMP
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BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE FORMAL
COMPLAINT OF CHARLES J. DAINS
AGAINST RIGBY WATER COMPANY

DOCKET NO. W-01808A-09-0137

**RIGBY WATER COMPANY'S
RESPONSE IN OPPOSITION TO
MOTION TO CONSOLIDATE
FILED BY COMPLAINANT**

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Complainant's Motion to Consolidate filed December 29, 2010 ("Motion") seeking to consolidate two independent and separate dockets should be denied. Complainant's Motion seeks to consolidate matters that involve different factual circumstances, implicate differing legal standards and that are in substantially different procedural postures. In addition, contrary to Complainant's unsupported allegations, consolidation would prejudice Rigby Water Company by requiring it to relitigate issues that have already been heard by one tribunal and delaying its constitutionally-mandated receipt of just compensation proceeds for the taking of its property by the City of Avondale (the "City").

I. THE MOTION IS BASED IN A COMPLETELY FLAWED PREMISE .

Complainant's Motion is predicated on a misrepresentation of the compensation that Rigby Water Company is entitled to receive as a result of the City's condemnation of Rigby Water Company's plant, property and operations in separate Maricopa County Superior Court proceedings (the "Condemnation Case"). Complainant did not seek to intervene in

1 the Condemnation Case, and was not named as a party having any interest whatsoever in the
2 condemnation proceeds. Complainant repeatedly argues in the present Motion, as well as in
3 other filings, that Rigby Water Company is receiving a “windfall” from being condemned
4 by the City, and that Complainant should share in that windfall, despite not making that
5 claim in the Condemnation Case itself. Complainant’s position reveals a fundamental
6 misunderstanding of the condemnation process and constitutional mandates relating to
7 condemnation valuation.

8 A.R.S. § 9-518 defines how a condemned water utility and its Certificate of
9 Convenience and Necessity (“CC&N”) must be valued in a condemnation case. Unlike
10 condemnation of non-utility property, the condemnation of a utility requires compensation
11 not only for the value of the plant and property taken (such as the Terra Ranchettes’ pipes
12 and equipment), but additional compensation for the goodwill or business value of the
13 exclusive right to serve encompassed by the utility’s CC&N, which the statute calls “going
14 concern value.” A.R.S. § 9-518(B) (“the court or jury shall ascertain the compensation to be
15 paid for the taking of the plant and property of the public utility, which shall include the fair
16 and equitable value of such plant and property, including its value as a going concern, . . .”)
17 (emphasis supplied); see also City of Phoenix v. Consolidated Water Co., 101 Ariz. 43, 45,
18 415 P.2d 866, 868 (1966) (utility loses not only real property, but also its franchise when
19 city condemns property); City of Tucson v. El Rio Water Co., 101 Ariz. 49, 52, 415 P.2d
20 872, 875 (1966) (“consideration must be given to the utility’s exclusive right to engage in
21 business”).

22 Complainant, with no support or citation to evidence in the Condemnation Case,
23 claims that Rigby Water Company is receiving a “windfall” because the depreciated value
24 of the infrastructure reported in schedules in its annual reports is less than the compensation
25 it is to receive from the City. But Complainant ignores the fact that the substantial bulk of
26 the Condemnation Case settlement related to going concern value and had nothing to do
27 with the relatively minimal plant and property in Terra Ranchettes. Complainant’s
28 unsupported arguments predicated on an emotional appeal to supposed “windfall” profits

1 should be ignored, and Complainant waived those arguments by refusing to intervene in the
2 Condemnation Case.

3 **II. FACTUAL AND PROCEDURAL BACKGROUND.**

4 In October 2006, after waiting seven years to do so, Complainant, Mr. Dains, lodged
5 an informal complaint with the Arizona Corporation Commission (“Commission”) alleging
6 that the mainline extension agreement between Rigby Water Company and Terra Ranchettes
7 Mobile Estates (“Terra Ranchettes”) had not been filed or approved by the Commission.
8 [Informal Complaint materials docketed by Staff in Docket No. W-01808A-09-0137
9 (6/2/2009).] In that informal complaint, Complainant sought, in essence, to rescind the
10 agreement between the parties and force Rigby Water Company to pay Complainant the
11 entire alleged cost of constructing the water infrastructure for Terra Ranchettes, despite
12 Rigby Water Company never receiving any advance of funds from Complainant. The
13 Commission took no action on Mr. Dains’ informal complaint. Mr. Dains also took no
14 further action.

15 In January of 2009, the City filed the Condemnation Case against Rigby Water
16 Company in Maricopa County Superior Court. [See Maricopa County Superior Court Case
17 No. CV2009-003060.] In that litigation, the City condemned all of Rigby Water Company’s
18 operations and business. Following the City’s filing, and nearly ten years after the events
19 giving rise to his complaint, Mr. Dains filed a formal Complaint (Docket No. W-01808A-
20 09-0137 (the “Formal Complaint Proceeding”)) seeking immediate repayment of all
21 amounts allegedly spent installing the water infrastructure for Terra Ranchettes, plus
22 interest. That proceeding is nearing its completion, having been through the discovery
23 process, a hearing held in September 2010 before Administrative Law Judge Kinsey, and
24 initial post-hearing briefing. Responsive briefing is scheduled for filing later this winter,
25 with a recommended opinion and order expected thereafter.

26 In September 2010, the City and Rigby Water Company reached a settlement of the
27 Condemnation Case. Because the City condemned Rigby Water Company’s operations and
28 will be providing water service to everyone within Rigby Water Company’s existing

1 CC&N, Rigby Water Company sought the deletion of its remaining CC&N from the
2 Commission under A.R.S. §40-285. Rigby Water Company's request to delete its CC&N
3 was assigned Docket No. W-01808A-10-0390 (the "Deletion Proceeding").

4 Notably, Rigby Water Company is not seeking approval of the transfer of its CC&N
5 to the City, because the City does not need a CC&N to provide water service. The City has,
6 pursuant to A.R.S. § 9-516, the authority to take Rigby Water Company's property and
7 operations, and has done so, subject only to entry of a final judgment by the Superior Court.

8 On November 30, 2010, Complainant moved to intervene in the Deletion Proceeding.
9 Rigby Water Company did not contest that intervention, ensuring that all of Complainant's
10 interests would be protected in the Deletion Proceeding. On December 20, 2010,
11 Commission Staff filed a sufficiency letter in the Deletion Proceeding. Complainant waited
12 until December 28, 2010, three months after the hearing in the Formal Complaint
13 Proceeding, to seek consolidation of these matters. No procedural order has yet been issued
14 and no hearing date set in the Deletion Proceeding.

15 **III. LEGAL ARGUMENT.**

16 **A. Applicable Standard**

17 Consolidation is only appropriate where independent actions involve "a common
18 question of law or fact" and where the hearing body can make orders that "avoid
19 unnecessary cost or delay." Ariz. R. Civ. P. 42(a); see also Ariz. Admin. Code. R14-3-101
20 (Arizona Rules of Civil Procedure govern proceedings before Commission). The tribunal
21 has discretion to grant or deny consolidation of separate actions. See Hancock v.
22 McCarroll, 188 Ariz. 492, 495, 937 P.2d 682, 685 (App. 1996). However, a tribunal's
23 discretion to order consolidation is not "unbounded." See Enterprise Bank v. Saettelle, 21
24 F.3d 233, 235 (8th Cir. 1994) (judgment vacated because district court improperly
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1 consolidated actions for trial); Solvent Chem. Co. v. E.I. DuPont De Nemours & Co.,
2 242 F. Supp. 2d 196, 221 (W.D.N.Y. 2002).¹

3 The prerequisite to consolidation under Rule 42(a) is that the actions to be
4 consolidated involve common questions of law or fact. In the absence of such commonality,
5 consolidation is an abuse of discretion. Enterprise Bank, 21 F.3d at 235. The mere fact that
6 a common issue exists, however, does not warrant consolidation, particularly where
7 consolidation will cause confusion or prejudice. See Kendzierski v. Corey, 1985 WL 5176,
8 2 (N.D. Ind.); Continental Bank & Trust Co. v. Platzer, 304 F. Supp. 228, 229 (S.D. Tex.
9 1969); Henderson v. Nat'l. R.R. Passenger Corp., 118 F.R.D. 440 (N.D. Ill. 1987). Arizona
10 courts have long held that “joinder of several causes of action is not compulsory...even if
11 the identical facts lie at the foundation of the distinct causes of action.” Windauer v.
12 O’Connor, 13 Ariz. App. 442, 446, 477 P.2d 561, 565 (App. 1970), vacated on other
13 grounds, 107 Ariz. 267, 485 P.2d 1157 (June 17, 1971); see also Wilson v. Bramblett, 91
14 Ariz. 284, 371 P.2d 1014 (1962) (joinder of several causes of action is not compulsory),
15 cert. denied, 371 U.S. 888 (Nov. 5, 1962). In deciding whether to consolidate actions,
16 “considerations of convenience and economy must yield to a paramount concern for a fair
17 and impartial trial.” In re Repetitive Stress Injury Litig., 11 F.3d 368, 373 (2d Cir. 1993)
18 (citation and quotation omitted).

19 **B. The Motion Should be Denied Because of the Lack of Requisite**
20 **Commonality.**

21 On a motion to consolidate, the moving party bears the burden of demonstrating the
22 commonality of factual or legal issues. In re Repetitive Stress Injury Litig., 11 F.3d at 373;
23 Solvent Chem. Co., 242 F. Supp.2d at 221; Watkinson v. Great Atlantic & Pacific Tea Co.,

24 _____
25
26 ¹ Because Arizona’s Rules of Civil Procedure were adopted from the Federal Rules
27 of Civil Procedure, the Arizona Supreme Court has recognized that tribunals should give
28 great weight to the interpretation of comparable federal rules by the federal courts. See
Jenney v. Arizona Exp., 89 Ariz. 343, 362 P.2d 664 (1961); Edwards v. Young, 107 Ariz.
283, 486 P.2d 181 (1971).

1 Inc., 585 F. Supp. 879, 883 (E.D. Pa. 1984). If the moving party (here, Complainant) does
2 not meet that burden, consolidation should be denied. Complainant has failed to make the
3 requisite showing justifying consolidation.

4 **1. Consolidation is Inappropriate Because of the Differing Factual**
5 **Issues.**

6 As an initial matter, there is simply no common factual issue between the Deletion
7 Proceeding and the Formal Complaint Proceeding. While Complainant alleges that the
8 amount of refund to be paid to Complainant pursuant to an existing mainline extension
9 agreement presents a common factual question, an examination of the two dockets
10 demonstrates that this is not the case. In the Formal Complaint Proceeding, Complainant
11 seeks to force Rigby Water Company to pay to Complainant all of the alleged costs of
12 building the infrastructure necessary to serve Terra Ranchettes due to Rigby Water
13 Company's alleged failure to obtain Commission approval of the parties' mainline extension
14 agreement. To that end, the parties have pursued discovery and presented evidence related
15 to the negotiation and execution of a mainline extension agreement in the mid to late-1990s
16 and Rigby Water Company's and Complainant's subsequent conduct with respect to that
17 agreement.

18 Conversely, the Deletion Proceeding relates to the City's condemnation of Rigby
19 Water Company in 2009 and the appropriateness of deleting Rigby Water Company's
20 remaining CC&N in light of that condemnation. While Staff has inquired as to how Rigby
21 Water Company's obligations under the mainline extension agreement will be handled
22 following deletion, the mainline extension agreement that is the focus of the Formal
23 Complaint Proceeding is not otherwise germane to the Deletion Proceeding, and
24 Complainant's interests can be adequately protected though his intervention without
25 consolidation. No evidence related to the filing of that agreement, or Complainant's failure
26 to meet his obligations under that agreement, is relevant in the Deletion Proceeding.
27 Resolution of the Deletion Proceeding does not depend in any way on any factual question
28

1 relevant to the Formal Complaint Proceeding. They are simply independent actions with no
2 common factual issues.

3 **2. Consolidation is Inappropriate Because of the Different Legal**
4 **Standards to Be Applied.**

5 The two dockets proposed for consolidation also have no legal issues in common. As
6 this tribunal is aware, the Formal Complaint Proceeding is focused on whether or not Rigby
7 Water Company violated Ariz. Admin. Code R14-2-406(M) by failing to obtain
8 Commission approval of a mainline extension agreement, whether Rigby Water Company's
9 actions were excused by Complainant's breaches of that agreement, whether Complainant's
10 failure to meet Terra Ranchettes' contractual obligations estops him from relief, and whether
11 Complainant's recovery is barred by laches or the relevant statute of limitations. The
12 Deletion Proceeding, on the other hand, will essentially ministerially approve the deletion of
13 Rigby Water Company's CC&N arising out of the City's total taking of Rigby Water
14 Company's plant, property and CC&N. Under Arizona law, the Deletion Proceeding is
15 limited, at most, "to the necessary hearings and orders to make sure that sale by the utility
16 will not leave persons served neither by the utility nor the municipality." Ariz. Att'y Gen.
17 Op. No. 62-7 at 12 (addressing sale of assets by utility, not condemnation, but addressing
18 the outermost limits of Commission jurisdiction with respect to the Deletion Proceeding).

19 While Staff has inquired as to how the mainline extension agreement with Terra
20 Ranchettes will be addressed in the remaining years of that agreement, that inquiry does not
21 mean that there are common legal questions between the two dockets.² The Commission's
22 focus in the Deletion Proceeding "must be directed only to a determination that there are no
23 other customers or persons who have been served by the private utility and that it will, in
24 fact, have been relieved of all its duties to serve such customers." Ariz. Att'y Gen. Op. No.
25 62-7 at 14. Once the Commission makes that determination, "there are no public duties then

26
27 ² Rigby Water Company has, as noted by Complainant, informed Commission Staff
28 that it will continue to make the annual refund payments to Complainant using information
provided by the City.

1 left to the utility and none of its assets used in the service of water would be necessary or
2 useful in the performance of its duties,” *id.* at 12, and deletion is appropriate. Simply stated,
3 the Commission’s determination of the Deletion Proceeding cannot, as a matter of law, turn
4 on the legal issues pertinent to the Formal Complaint Proceeding. As a result, Complainant
5 has failed to demonstrate the requisite commonality of legal issues necessary to consolidate
6 these matters.³

7 **C. Consolidation is Inappropriate Because of the Different Procedural**
8 **Aspects of the Cases.**

9 In addition to the lack of commonality discussed above, the two dockets that
10 Complainant seeks to consolidate are in entirely different procedural posture, a point which
11 Complainant ignores, but which militates against consolidation. See Sommerfield v. City of
12 Chicago, No. 08 C 3025, 2009 WL 500643, at *5 (N.D. Ill. Feb. 26, 2009) (although cases
13 involved common question of fact, consolidation was improper as cases were “in very
14 different procedural postures”); Dilettoso v. Potter, 243 Fed. Appx. 269, 273 (9th Cir. 2007)
15 (consolidation of cases in differing procedural postures “would have only caused needless
16 delay and inconvenience”); Blumenthal v. Mgmt. Assistance, Inc., 480 F. Supp. 470, 474
17 (N.D. Ill. 1979). Because of the procedural posture of these dockets, consolidation would
18 not avoid “unnecessary duplication of effort in related cases.” EEOC v. G-K-G, Inc., 39
19 F.3d 740, 745 (7th Cir. 1994). Instead, consolidation would impose additional burdens on
20 both the Commission and the parties.

21 Staff has just issued a sufficiency letter in the Deletion Proceeding. No scheduling
22 order has been issued. No hearing is currently scheduled. In contrast, the Formal
23 Complaint Proceeding has already been heard by this tribunal. Post-hearing briefing is

24
25 ³ To the extent Complainant is urging that consolidation is necessary to prevent
26 inconsistent results or preserve Commission jurisdiction, Complainant is asking the
27 Commission to infringe upon Rigby Water Company’s constitutionally-protected rights to
28 receive fair value for its condemned property, under circumstances where Complainant
never intervened or made a claim in the Condemnation Case itself. Ariz. Const. Art. 2, Sec.
17.

1 almost complete. A recommended opinion and order is expected shortly. If the Formal
2 Complaint Proceeding is consolidated with the Deletion Proceeding, Rigby Water Company
3 will be forced to endure another hearing at which Complainant will seek a “second bite at
4 the apple” with respect to the issues raised in the Formal Complaint Proceeding – injecting
5 extraneous issues into the Deletion Proceeding and increasing costs and delays to all
6 involved. In addition, Complainant’s proposed consolidation would delay resolution of the
7 Formal Complaint Proceeding, in a clear attempt to prejudice Rigby Water Company and
8 extort it to pay him sums to which he is not entitled.

9 **D. Consolidation Would be Prejudicial to Rigby Water Company.**

10 Finally, contrary to Complainant’s unsupported assertions, consolidation of the
11 Formal Complaint Proceeding and the Deletion Proceeding would be very prejudicial to
12 Rigby Water Company. The procedural mechanism of consolidation cannot be used to
13 “merge the suits into a single cause, or change the rights of the parties.” Yavapai County v.
14 Superior Court, 13 Ariz. App. 368, 476 P.2d 889 (1970) (an order of consolidation cannot
15 effect a merger of the cases consolidated). In other words, Complainant cannot use
16 consolidation to force the Commission to consider the status of his complaint in the Formal
17 Complaint Proceeding as a factor in determination of the Deletion Proceeding, where that
18 status is irrelevant to the Commission’s consideration. See supra at 7-8.

19 Moreover, and as noted above, the Formal Complaint Proceeding is nearly complete,
20 with the parties finishing post-hearing briefing in the next two weeks. Once that is
21 complete, a decision could be issued at any time. Consolidation would delay that decision
22 until after the Deletion Proceeding had been heard by the Commission. Inevitably,
23 Complainant will seek to relitigate the issues already heard in the Formal Complaint
24 Proceeding in the Deletion Proceeding if the matters are consolidated. This will require
25 additional expenditures by Rigby Water Company and waste the judicial and Staff effort
26 that has already gone into the Formal Complaint Proceeding. Consolidating the two matters
27 would result in unnecessary confusion, wasted Commission resources and impermissible
28 delay and prejudice to Rigby Water Company and its constitutionally-protected rights.

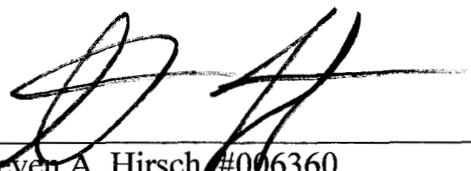
1 Complainant's appropriate venue to make such arguments was in Superior Court in the
2 Condemnation Case, not by consolidation of the two unrelated Commission dockets.

3 **IV. CONCLUSION.**

4 In seeking consolidation at this late date, Complainant seeks to delay entry of final
5 judgment in the City's condemnation suit and to delay Rigby Water Company's receipt of
6 constitutionally-protected just compensation for the taking of its property. Such a delay
7 prejudices Rigby Water Company and would foster the waste of scarce Commission and
8 Staff resources. Because Complainant has not demonstrated any common factual or legal
9 grounds outweighing these concerns and justifying consolidation, Complainant's Motion
10 should be denied.

11
12 RESPECTFULLY SUBMITTED this 7th day of January, 2011.

13 BRYAN CAVE LLP

14
15
16 By 

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22 **ORIGINAL** and 13 copies of the foregoing
23 filed this 7 th day of January, 2011 with:

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28 COPIES of the foregoing hand-delivered
this 7 th day of January, 2011, to:

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