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Arizona Corporation Commission

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ARIZONA CORPORATION COMMISSION
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BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE APPLICATION
OF RIGBY WATER COMPANY FOR
APPROVAL OF TRANSFER OF ASSETS
AND CONDITIONAL CANCELLATION OF
ITS CERTIFICATE OF CONVENIENCE
AND NECESSITY

DOCKET NO. W-01808A-10-0390

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

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Intervenor's Motion to Consolidate filed December 29, 2010 ("Motion") seeking to consolidate two independent and separate dockets should be denied. Intervenor'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 Intervenor'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 .

Intervenor'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"). Intervenor did not seek to intervene in the

1 Condemnation Case, and was not named as a party having any interest whatsoever in the
2 condemnation proceeds. Intervenor 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 Intervenor should share in that windfall, despite not making that claim
5 in the Condemnation Case itself. Intervenor’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 Intervenor, with no support or citation to evidence in the Condemnation Case, claims
23 that Rigby Water Company is receiving a “windfall” because the depreciated value of the
24 infrastructure reported in schedules in its annual reports is less than the compensation it is to
25 receive from the City. But Intervenor ignores the fact that the substantial bulk of the
26 Condemnation Case settlement related to going concern value and had nothing to do with
27 the relatively minimal plant and property in Terra Ranchettes. Intervenor’s unsupported
28 arguments predicated on an emotional appeal to supposed “windfall” profits should be

1 ignored, and Intervenor 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, Intervenor, Mr. Dains, lodged an
5 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, Intervenor sought, in essence, to rescind the
10 agreement between the parties and force Rigby Water Company to pay Intervenor the entire
11 alleged cost of constructing the water infrastructure for Terra Ranchettes, despite Rigby
12 Water Company never receiving any advance of funds from Intervenor. The Commission
13 took no action on Mr. Dains’ informal complaint. Mr. Dains also took no further action.

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

25 In September 2010, the City and Rigby Water Company reached a settlement of the
26 Condemnation Case. Because the City condemned Rigby Water Company’s operations and
27 will be providing water service to everyone within Rigby Water Company’s existing
28 CC&N, Rigby Water Company sought the deletion of its remaining CC&N from the

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

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

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

14 III. LEGAL ARGUMENT.

15 A. Applicable Standard

16 Consolidation is only appropriate where independent actions involve "a common
17 question of law or fact" and where the hearing body can make orders that "avoid
18 unnecessary cost or delay." Ariz. R. Civ. P. 42(a); see also Ariz. Admin. Code. R14-3-101
19 (Arizona Rules of Civil Procedure govern proceedings before Commission). The tribunal
20 has discretion to grant or deny consolidation of separate actions. See Hancock v.
21 McCarroll, 188 Ariz. 492, 495, 937 P.2d 682, 685 (App. 1996). However, a tribunal's
22 discretion to order consolidation is not "unbounded." See Enterprise Bank v. Saettelle, 21
23 F.3d 233, 235 (8th Cir. 1994) (judgment vacated because district court improperly
24 consolidated actions for trial); Solvent Chem. Co. v. E.I. DuPont De Nemours & Co.,
25 242 F. Supp. 2d 196, 221 (W.D.N.Y. 2002).¹

26
27 ¹ Because Arizona's Rules of Civil Procedure were adopted from the Federal Rules
28 of Civil Procedure, the Arizona Supreme Court has recognized that tribunals should give
great weight to the interpretation of comparable federal rules by the federal courts. See

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

17 **B. The Motion Should be Denied Because of the Lack of Requisite**
18 **Commonality.**

19 On a motion to consolidate, the moving party bears the burden of demonstrating the
20 commonality of factual or legal issues. In re Repetitive Stress Injury Litig., 11 F.3d at 373;
21 Solvent Chem. Co., 242 F. Supp.2d at 221; Watkinson v. Great Atlantic & Pacific Tea Co.,
22 Inc., 585 F. Supp. 879, 883 (E.D. Pa. 1984). If the moving party (here, Intervenor) does not
23 meet that burden, consolidation should be denied. Intervenor has failed to make the
24 requisite showing justifying consolidation.

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Jenney v. Arizona Exp., 89 Ariz. 343, 362 P.2d 664 (1961); Edwards v. Young, 107 Ariz.
28 283, 486 P.2d 181 (1971).

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

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

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

26 **2. Consolidation is Inappropriate Because of the Different Legal**
27 **Standards to Be Applied.**

28 The two dockets proposed for consolidation also have no legal issues in common.
The Formal Complaint Proceeding is focused on whether or not Rigby Water Company

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

13 While Staff has inquired as to how the mainline extension agreement with Terra
14 Ranchettes will be addressed in the remaining years of that agreement, that inquiry does not
15 mean that there are common legal questions between the two dockets.² The Commission's
16 focus in the Deletion Proceeding "must be directed only to a determination that there are no
17 other customers or persons who have been served by the private utility and that it will, in
18 fact, have been relieved of all its duties to serve such customers." Ariz. Att'y Gen. Op. No.
19 62-7 at 14. Once the Commission makes that determination, "there are no public duties then
20 left to the utility and none of its assets used in the service of water would be necessary or
21 useful in the performance of its duties," *id.* at 12, and deletion is appropriate. Simply stated,
22 the Commission's determination of the Deletion Proceeding cannot, as a matter of law, turn
23 on the legal issues pertinent to the Formal Complaint Proceeding. As a result, Intervenor
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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 has failed to demonstrate the requisite commonality of legal issues necessary to consolidate
2 these matters.³

3 **C. Consolidation is Inappropriate Because of the Different Procedural**
4 **Aspects of the Cases.**

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

17 Staff has just issued a sufficiency letter in the Deletion Proceeding. No scheduling
18 order has been issued. No hearing is currently scheduled. In contrast, the Formal
19 Complaint Proceeding has already been heard. Post-hearing briefing is almost complete. A
20 recommended opinion and order is expected shortly. If the Formal Complaint Proceeding is
21 consolidated with the Deletion Proceeding, Rigby Water Company will be forced to endure
22 another hearing at which Intervenor will seek a “second bite at the apple” with respect to the
23 issues raised in the Formal Complaint Proceeding – injecting extraneous issues into the

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 Deletion Proceeding and increasing costs and delays to all involved. In addition,
2 Intervenor's proposed consolidation would delay resolution of the Formal Complaint
3 Proceeding, in a clear attempt to prejudice Rigby Water Company and extort it to pay him
4 sums to which he is not entitled.

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

6 Finally, contrary to Intervenor's unsupported assertions, consolidation of the Formal
7 Complaint Proceeding and the Deletion Proceeding would be very prejudicial to Rigby
8 Water Company. The procedural mechanism of consolidation cannot be used to "merge the
9 suits into a single cause, or change the rights of the parties." Yavapai County v. Superior
10 Court, 13 Ariz. App. 368, 476 P.2d 889 (1970) (an order of consolidation cannot effect a
11 merger of the cases consolidated). In other words, Intervenor cannot use consolidation to
12 force the Commission to consider the status of his complaint in the Formal Complaint
13 Proceeding as a factor in determination of the Deletion Proceeding, where that status is
14 irrelevant to the Commission's consideration. See supra at 6-8.

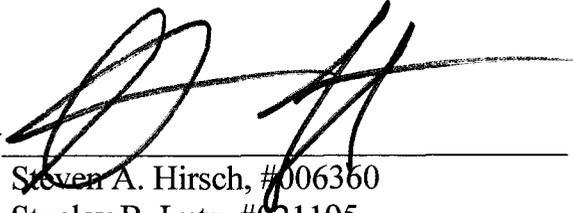
15 Moreover, and as noted above, the Formal Complaint Proceeding is nearly complete,
16 with the parties finishing post-hearing briefing in the next two weeks. Once that is
17 complete, a decision could be issued at any time. Consolidation would delay that decision
18 until after the Deletion Proceeding had been heard by the Commission. Inevitably,
19 Intervenor will seek to relitigate the issues already heard in the Formal Complaint
20 Proceeding in the Deletion Proceeding if the matters are consolidated. This will require
21 additional expenditures by Rigby Water Company and waste the judicial and Staff effort
22 that has already gone into the Formal Complaint Proceeding. Consolidating the two matters
23 would result in unnecessary confusion, wasted Commission resources and impermissible
24 delay and prejudice to Rigby Water Company and its constitutionally-protected rights.
25 Intervenor's appropriate venue to make such arguments was in Superior Court in the
26 Condemnation Case, not by consolidation of the two unrelated Commission dockets.

1 **IV. CONCLUSION.**

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

9
10 RESPECTFULLY SUBMITTED this 7th day of January, 2011.

11 BRYAN CAVE LLP

12
13 By 

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