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2011 JUN 16 P 4: 22

AZ CORP COMMISSION
DOCKET CONTROL

8 **BEFORE THE ARIZONA CORPORATION COMMISSION**

9 **COMMISSIONERS**

10 GARY PIERCE, CHAIRMAN
11 PAUL NEWMAN
12 SANDRA D. KENNEDY
13 BOB STUMP
14 BRENDA BURNS

Arizona Corporation Commission

DOCKETED

JUN 16 2011

DOCKETED BY 

15 **IN THE MATTER OF THE**
16 **APPLICATION OF CERBAT WATER**
17 **COMPANY FOR APPROVAL OF A**
18 **RATE INCREASE**

DOCKET NO. W-02391A-10-0218
W-02391A-11-0166

19 **IN THE MATTER OF STAFF'S**
20 **REQUEST FOR THE COMMISSION**
21 **ISSUANCE OF AN ORDER TO SHOW**
22 **CAUSE FOR THE FAILURE OF**
23 **CERBAT WATER COMPANY TO**
24 **COMPLY WITH COMMISSION**
25 **RULES AND REGULATIONS**

APPLICATION FOR
RECONSIDERATION OF DECISION
NO. 72385

26 The Cerbat Water Company ("Cerbat") hereby files an application for
27 reconsideration regarding Arizona Corporation Commission ("Commission") Decision
28 No. 72385 ("Decision"). Cerbat asserts that neither the facts nor the law justifies the
appointment of an interim manager in this case. For the reasons explained below, the

1 Commission should reconsider and strike the Decision provisions directing Commission
2 Staff to appoint an interim manager.
3

4 **LEGAL ARGUMENT**

5 The Commission does not have the authority or power to take managerial control
6 of the Company from its owners. *Corporation Com'n v. Consolidated Stage Co.*, 63
7 Ariz. 257, 261-262, 161 P.2d 110, 112 (Ariz.1945); *Phelps Dodge Corp. v. Ariz. Electric*
8 *Power Coop.*, 207 Ariz. 95, 101, 83 P.3d 573, 579 (App. 2004); *Williams v. Pipe Trades*
9 *Industry Program of Ariz.*, 100 Ariz. 14, 409 P.2d 720 (1966); *Miller v. Arizona Corp.*
10 *Com'n* , 251 P.3d 400, 605 Ariz. Adv. Rep. 16, ¶ 19 (Ariz.App. Div. 1, 2011). As
11
12 pointed out in the most recent case addressing the managerial interference doctrine, long
13 ago the Arizona Supreme Court held that the Commission could not interfere with the
14 management of a company, stating:
15
16

17 [T]he commission has no authority or jurisdiction to control the internal
18 affairs of the corporation. It cannot dictate who its officers shall be, whom
19 it shall employ, who may invest money in it, nor what provisions it shall
20 make for the recognition of its shareholders, nor the manner of transferring
21 shares of stock upon its books *Corporation Commission v.*
22 *Consolidated Stage Co.*, 63 Ariz. 257, 161 P.2d 110 (1945) at 263, 161
23 P.2d at 112; *see also S. Pac. Co. v. Ariz. Corp. Comm'n*, 98 Ariz. 339, 343,
24 404 P.2d 692, 694 (1965) (discussing regulatory actions that “act as a
25 barrier to the normal accomplishments of progressive management”).

26 *Miller*, 251 P.3d 400, ¶ 19 (Ariz.App. Div. 1,2011). Just seven years earlier, this appellate court
27 observed that Arizona courts have held “we will not infer the grant of authority to interfere
28 with the [public service corporation’s] management decisions beyond the ‘clear letter of
the statute.’” *Phelps Dodge Corp.*, 207 Ariz. At 112-113, 83 P.3d at 591 (citing *Southern*
Pac. Co., 98 Ariz. at 343, 404 P.2d at 695).

1 Yet, without citing any specific legal authority, in Decision No. 72385 the
2 Commission ordered Staff “to appoint an Interim Manager for Cerbat Water Company as
3 soon as possible.” *Id.* at p. 5, ln. 20-21. No constitutional provision, statute, or rule that
4 grants the Commission such authority. Thus, under Arizona law, the Commission lacks
5 the power and authority to take managerial control away from the Company’s owners in
6 favor of a state-appointed manager.
7

8
9 Finally, appointing an interim manager over the objections of the Company owner
10 constitutes a taking. *See* Ariz. Const. Art. 2, § 17. The State of Arizona is liable for
11 injuries to both real and personal property under the constitutional provision that “no
12 private property shall be taken or damaged” without just compensation. *State v. Leeson*,
13 84 Ariz. 44, 323 P.2d 692 (Ariz.1958). Consequently, unless the Decision is amended by
14 removing the order to appoint an interim manager, the taxpayers of the State of Arizona
15 will be financially responsible to pay for taking the Company.
16
17

18 **ATTORNEYS FEES.**

19
20 If the Decision is not amended and further successful appeals occur, then the
21 Company will be entitled to an award of costs and attorneys’ fees. The Company will be
22 entitled to such an award under the private attorney general doctrine. The Company also
23 will be entitled to costs and fees pursuant to A.R.S. § 41-1007. *See Eastern Vanguard*
24 *Forex, Ltd. v. Arizona Corp. Com'n*, 206 Ariz. 399, 79 P.3d 86 (App. Div.1 2003)
25 (Corporate officers entitled to an award of attorney fees incurred in underlying
26 administrative proceeding as well as in superior court action, upon superior court's
27 reversal of Arizona Corporation Commission's decision). Because the Commission has a
28

1 duty to issue an order that does not conflict with state law and must now take action to
2 correct the order, the Company is entitled to costs and fees under A.R.S. § 12-2030(A) as
3 well.
4

5 **RELIEF REQUESTED**

6 The Company moves the Commission to reconsider and amend the Decision by
7 striking the provision ordering Staff to appoint an interim manager.
8

9 RESPECTFULLY SUBMITTED this 16th day of June, 2011.

10 **MOYES SELLERS LTD.**

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13 _____
14 Steve Wene

15 Original and 15 copies filed
16 this 16th day of June, 2011 with:

17 Docket Control
18 Arizona Corporation Commission
19 1200 West Washington
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