

OPEN MEETING AGENDA ITEM



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ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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SEP - 4 2013

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AZ CORP COMMISSION
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IN THE MATTER OF THE APPLICATION OF FAR WEST WATER & SEWER, INC., AN ARIZONA CORPORATION, FOR A DETERMINATION OF THE CURRENT FAIR VALUE OF ITS UTILITY PLANT AND PROPERTY AND FOR INCREASES IN ITS WASTEWATER RATES AND CHARGES BASED THEREON FOR UTILITY SERVICE

DOCKET NO. WS-03478A-12-0307

EXCEPTION

Far West Water and Sewer, Inc. ("Far West") hereby excepts to the August 26, 2013, Recommended Opinion and Order ("ROO").¹ The ROO would improperly "grant Staff the authority, without further action of the Commission, to appoint an interim manager if the Company fails to comply" with certain conditions in the ROO. Far West does not object to the recommended conditions and certainly intends to comply with them. However, the purported grant would violate Far West's due process rights and should not be included in the final order.

I. Initial Statement

Far West would first like to thank the parties for their professional conduct in this case. The issues were certainly contentious, but the parties conducted themselves admirably.

Far West would next like to thank Judge Nodes for his conduct of the hearing and his thorough, balanced ROO. Of course, Far West would have liked to prevail on more issues, but it will not contest the substantive conclusions in the ROO.

There is only one issue to which Far West excepts. The ROO would improperly "grant Staff the authority, without further action of the Commission, to appoint an interim manager if

¹ As amended on August 29, 2013.

the Company fails to comply” with certain conditions in the ROO. This grant would violate Far West’s due process rights guaranteed by the United States Constitution.

II. Due Process

The 14th Amendment of the United States Constitution requires that a party receive notice and a fair hearing before being deprived of personal or property rights.

[D]ue process of law under the Fourteenth Amendment of the Constitution of the United States requires that there be notice of hearing, a hearing, the right to produce witnesses, examine adverse witnesses and to have a full consideration and determination according to evidence before the body with whom the hearing is held.

Southern Pac. Co. v. Arizona Corp. Commission, 98 Ariz. 339, 347; 404 P.2d 692, 697 (Ariz. 1965).

The 14th Amendment applies equally to corporations and natural persons. “[A] corporation is a “person” within the meaning of the due process clause.” *Arizona Public Service Co. v. Arizona Corp. Com’n*, 155 Ariz. 263, 371; 746 P.2d 4, 12 (App. 1987).²

A corporation certainly has the right to determine who manages that corporation. In fact, the Commission ordinarily cannot interfere with that right:

[T]he commission has no authority or jurisdiction to control the internal affairs of the corporation. It cannot dictate who its officers shall be, whom it shall employ, who may invest money in it, nor what provisions it shall make for the recognition of its shareholders, nor the manner of transferring shares of stock upon its books.

Corp Com’n v. Consolidated Stage Co., 63 Ariz. 257, 263; 161 P.2d 110, 112 (1945).

When the Commission considers abridging a public service corporation’s rights, such as its management rights, it acts in a quasi-judicial manner and must afford the affected party its due process rights guaranteed by the Constitution.

We note, however, a common thread running through the statutes and the case law: in each, the Commission is acting in a judicial or quasi-judicial manner, that is, the Commission is resolving a conflict between a public service corporation and the public or is ruling on rate changes or property valuations of a public service corporation that will directly affect the public. In such instances, due

² Approved in relevant part, *Arizona Public Service Co. v. Arizona Corp. Com’n*, 157 Ariz. 532, 760 P.2d 532 (Ariz., 1988).

process requires that the Commission give the affected parties notice and an opportunity to be heard.

Arizona Public Service Co. v. Arizona Corp. Com'n, 155 Ariz. 263 at 271, 746 P.2d at 12.

The Commission has heretofore justified appointment of an interim manager only in extraordinary circumstances, where public health and safety is jeopardized. And in every case, the appointment followed a public hearing where the affected utility had notice, an opportunity to appear and present evidence, and the Commission issued an order containing findings of fact and conclusion of law. The ROO would bypass these due-process safeguards by delegating to Staff the ability to appoint an interim manager if it determined in its sole discretion that Far West had failed to comply with any of nine listed conditions.

It is difficult to understand the relationship of these conditions to public health and safety. For example, one condition would require that Far West “shall file tariffs with an effluent rate of \$0.25 per thousand gallons or local market rates.”³ Another would require that Far West “shall develop and adopt a formal written affiliate transaction policy consistent with Condition No. 9 in Exhibit A-8.”⁴

Even if a condition arguably implicated public health and safety, the Commission still could not bypass due process in the name of expediency.

The right to such a hearing is one of ‘the rudiments of fair play’ assured to every litigant by the Fourteenth Amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored.

Southern Pac. Co. v. Arizona Corp. Commission, 98 Ariz. at 347; 404 P.2d at 697.

It could be expedient to delegate to Staff the extraordinary power to appoint an interim manager, but it is constitutionally prohibited. This is particularly true when a public service corporation has the right in Arizona to control its “internal affairs.” *Corporation Commission v. Consolidated Stage Co.*, *supra*.

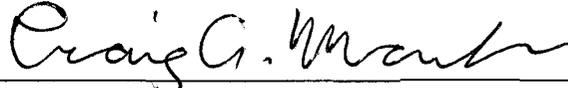
³ ROO at 53:24-25.

⁴ ROO at 54:2-3.

III. Recommended Amendment

Exhibit A is a recommended amendment to the ROO that preserves Far West's due process rights.

Respectfully submitted on September 4, 2013, by:



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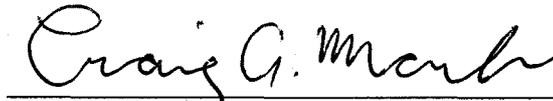
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**DOCKET NO. WS-03478A-12-0307
RECOMMEND AMENDMENT
TO RECOMMENDED OPINION AND ORDER**

- Page 25 DELETE the comma and phrase at lines 12 and 13:

 “, as well as the tenth condition advocated by Staff”
- Page 27 DELETE the paragraph beginning on line 26 and REPLACE it with the following paragraph:

 We appreciate Staff’s desire to deal a future violation by Far West of the modified conditions by granting it the power to appoint an interim manager without further action by the Commission. However, due process requires that the Commission take such an extraordinary step only after notice of the alleged violation, the opportunity for a hearing on the merits, and an order by the Commission containing findings of fact and conclusions of law. Staff is certainly free, as it is now, to recommend that the Commission institute a show cause hearing concerning a possible future failure to comply with a condition.
- Page 38 DELETE the paragraph beginning on line 25 and REPLACE with the following paragraph:

 Appointment of an interim manager is not justified at this time. As indicated above, we have adopted the nine stipulated conditions with certain modifications. These nine conditions will provide a significant incentive to Far West to continue to improve its management decisions. Should Far West not comply with one of the nine conditions, Staff may recommend that the Commission institute a show cause hearing.
- Page 44 Lines 5-8. DELETE the following sentence:

 The adoption of the tenth condition, that Staff shall be authorized to appoint an interim manager in the event Far West fails to comply with those conditions, should provide additional incentive to the Company to comply with Commission rules and Orders.
- Page 50 DELETE paragraph number 57 and renumber subsequent paragraphs.

 Line 26, delete “ten” and replace with “nine.”
- Page 54 DELETE the last two Ordering paragraph (approximately lines 7-13).