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2014 MAY 20 P 4:41

AZ CORP COMMISSION
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ORIGINAL

8 **BEFORE THE ARIZONA CORPORATION COMMISSION**

10 **COMMISSIONERS**

11 BOB STUMP, CHAIRMAN
12 GARY PIERCE
13 BRENDA BURNS
14 SUSAN BITTER-SMITH
15 BOB BURNS

Arizona Corporation Commission

DOCKETED

MAY 20 2014

DOCKETED BY

16 **APPLICATION OF NACO WATER
17 COMPANY, LLC FOR A PERMANENT
18 INCREASE TO ITS WATER RATES**

DOCKET NO: W-02860A-13-0399
**RESPONSE TO STAFF'S MOTION
TO COMPEL OR SUSPEND THE
TIME CLOCK**

21 Naco Water Company, L.L.C. ("Company" or "Naco"), hereby files its response
22 to Staff's Motion to Compel or, In the Alternative, to Suspend Time Clock ("Staff's
23 Motion"). As explained below, neither is appropriate. Freeport McMoRan Copper and
24 Gold Inc. ("Freeport") has recently agreed to allow Staff to inspect the agreement. *See*
25 Attachment 1. This should satisfy Staff. Thus, Staff's Motion should be denied as moot.

27 ////

1 **Freeport Agreement Disclosure**

2 To mitigate the impact of a sulfate plume, Freeport agreed to fund the replacement
3 of certain plant owned by Naco. In 2013, the project was completed and the plant was
4 placed in service. This system improvement occurred after the 2012 test year. Consistent
5 with utility practices, Naco booked the reimbursements for the plant as contributions in
6 aid of construction ("CIAC") and the test year capital costs were booked as construction
7 work in progress ("CWIP"). Consequently, there is no impact on rates in this case.
8

9
10 Nonetheless, Naco cooperated with Staff's data requests regarding the project and
11 provided Staff the invoices as requested. At great time and expense, Naco has collected,
12 copied and provided Staff 393 pages of invoices and related documents detailing what
13 was built, by whom, and how the costs were paid. Naco believes the agreement now
14 sought by Staff has no bearing on Naco's rate case because the plant was placed into
15 service after the test year and it was contributed. Besides, Staff has all of documents that
16 give details on the project.
17
18

19 Meanwhile, Staff has never explained why it believes this project is relevant to the
20 rate case or why it needs to see the agreement. Even after receiving and reviewing
21 hundreds of pages of documents, Staff cannot, or will not, explain how any of it is
22 relevant to setting Naco's rates. Staff still persists to seek review of the actual agreement
23 between Freeport and Naco.
24
25

26 As explained often to Staff, the reason Naco has not disclosed the agreement is
27 simple: Freeport required a confidentiality provision prohibiting Naco from releasing the
28 agreement to anyone. Unauthorized disclosure would subject Naco to breach of contract

1 and attorneys' fees claims. Freeport is a Fortune 500 Company with \$30 billion dollars
2 in assets, so it should be no surprise to the Court that Naco has no desire to squander the
3 good will demonstrated by Freeport, breach their agreement, and expose Naco and its
4 customers to huge legal costs and fees. The risk to Naco for unauthorized disclosure is
5 huge, while there is nothing to be gained because the project will not affect rates.
6

7
8 What is most troubling about Staff's Motion is that it does not accurately describe
9 Naco's position to the Court. A week before Staff raised this issue with the Court, Naco
10 concisely explained its position:

11
12 The person who represents Freeport on this matter is Dal Moellenberg. I
13 have no problem if you want to speak with him. In fact, I encourage it.
14 Understand confidentiality is a condition Freeport sought, and I understand
15 why Freeport does not want its settlement to become public knowledge.
16 But for the fact that it does not want to get crosswise with Freeport over
17 disclosure, Naco does not care if Staff reviews the settlement.

18
19 *See Attachment 2, electronic correspondence dated May 2, 2014, 8:44 a.m. This written*
20 *response clearly illustrates Naco was being cooperative.*

21
22 But instead of acknowledging the Company's efforts to cooperate, Staff chose to
23 portray Naco as being uncooperative and take statements out of context to support this
24 inaccurate position. For example, initially Staff has demanded a copy of the agreement.
25 Only once before filing its motion did Staff say they would agree to a review of the
26 document rather than full disclosure. Further, Staff failed to mention that it was Naco's
27 suggestion that Staff should seek review of the document because Freeport was likely
28 willing to agree to such a demand.

1 Staff also states, "Naco does not appear to understand, as its most recent
2 communications continue to refer to 'public' disclosure." [sic] Staff's Motion at p. 2.
3
4 But this statement is both taken out of context and is wrong. As shown above, the
5 "public" statement referenced by Staff was a general statement that Freeport does not
6 want the settlement to become public knowledge. More importantly, Staff is the public.
7
8 Showing the agreement to Staff without Freeport's consent is a breach of contract.
9
10 Giving the document to Staff would make the agreement presumptively a public record
11 available to anyone. See A.R.S. § 41-1350. Despite Staff's assertions, Naco has not
12 disclosed the agreement because of a misunderstanding; rather, Naco has not disclosed
13 the agreement because it understands the ramifications of such disclosure.

14 Since Staff first spoke to Naco regarding this issue, Naco has made it perfectly
15 clear that it is willing to seek permission from Freeport to disclose the agreement to Staff.
16
17 Knowing that Freeport's attorneys are well-versed in Arizona Rules of Civil Procedure
18 Rule 26, Naco has repeatedly asked Staff to state exactly what relevant information it is
19 seeking so Naco could offer Freeport a credible basis for disclosing the agreement. As
20 this Court knows, Rule 26 provides for discovery of information relevant to disputed
21 issues, but such discovery can be limited if obtainable from another convenient source.
22
23 Although Naco has asked several times, Staff has never explained with any specificity
24 how the agreement is relevant to setting rates in this case or what information it seeks that
25 cannot be learned from the 1,500 pages of documents Naco has already disclosed.

26
27 ////
28

1 Finally, as it pledged to do from the beginning, Naco has continued to work with
2 Freeport to receive permission for Staff to see the agreement. Freeport has agreed to
3 allow such inspection. See Attachment 1. This should satisfy Staff and makes Staff's
4 motion moot.
5

6 **Time Clock Suspension**
7

8 At first glance, it is not clear if Staff has moved for a suspension of the time clock
9 or not. The pleading is entitled "Staff's Motion to Compel or, In the Alternative, to
10 Suspend Time Clock". This title suggests that if Naco is not compelled to disclose the
11 Agreement, then the Court should suspend the time clock. But in the one sentence
12 addressing this alternative, it writes "[a]t this time, Staff does not seek a suspension of the
13 time clock, though it is offered as an alternative should it be deemed appropriate." Thus,
14 there is no motion to suspend the time clock before the Court. More importantly, there is
15 no reason to suspend the time clock because Freeport has allowed Staff to review the
16 agreement
17 agreement
18

19 **Action Requested**
20

21 Accordingly, the Court should deny Staff's Motion as moot.

22 RESPECTFULLY SUBMITTED this 20th day of May, 2014.
23

24 **MOYES SELLERS & HENDRICKS LTD.**

25 
26 _____
Steve Wene
27
28

1 Original and 13 copies of the foregoing
2 filed this 20th day of May, 2014, with:

3 Docket Control
4 Arizona Corporation Commission
5 1200 West Washington
6 Phoenix, Arizona 85007

7 Donnelly Herbert
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ATTACHMENT 1

Steve Wene

From: Moellenberg, Dalva L. <DLM@gknet.com>
Sent: Tuesday, May 20, 2014 11:25 AM
To: Steve Wene
Cc: Sheila H. Deely, Esq.
Subject: Bisbee

Steve, I have consulted with my client regarding the ACC's motion to compel a review of the agreement between our clients and it consents to an inspection of the agreement, provided that the review is strictly limited, as described in the motion, to an in person inspection of the document with no copy or copies to be given to ACC or anyone else and no placement of the document in the record. Please advise if you have questions.

Sent from my Verizon Wireless 4G LTE smartphone

Please note that Gallagher & Kennedy has moved its Santa Fe office from 1233 Paseo de Peralta to 1239 Paseo de Peralta.

Please update your records accordingly. All other information remains unchanged.

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ATTACHMENT 2

Steve Wene

From: Steve Wene
Sent: Friday, May 02, 2014 8:44 AM
To: 'Bridget Humphrey'; Matthew Laudone
Cc: Steven Olea; James Armstrong; Phan Tsan; Dorothy Hains
Subject: RE: Freeport Agreement

Hello Bridget,

The person who represents Freeport on this matter is Dal Moellenberg. I have no problem if you want to speak with him. In fact, I encourage it. Understand confidentiality is a condition Freeport sought, and I understand why Freeport does not want its settlement to become public knowledge. But for the fact that it does not want to get cross-wise with Freeport over disclosure, Naco does not care if Staff reviews the settlement.

Again, I will reiterate my earlier point that if there is something specific you are looking to know, I'm sure we can provide you that information through some other means. Naco has already provided Staff with over 1,500 pages of documents. You have all of the related receipts. I don't know why you need to see the actual agreement to set rates. If there is something else that concerns Staff, let me know.

-----Original Message-----

From: Bridget Humphrey [<mailto:BHumphrey@azcc.gov>]
Sent: Thursday, May 01, 2014 8:05 AM
To: Steve Wene; Matthew Laudone
Cc: Steven Olea; James Armstrong; Phan Tsan; Dorothy Hains
Subject: RE: Freeport Agreement

Steve -

Staff cannot specify what it needs to see in the document because Staff does not know what is in the document. Staff is not asking for a copy of the document; Staff simply needs to review the document. Staff would then determine if it is relevant to the rate application. If the Company will not allow Staff to review the same, even with a confidentiality agreement in place, Staff will simply take the matter to the ALJ. Please advise us by close of business today so we can file our motion to compel tomorrow.

I am telecommuting this morning and expect to be in the office this afternoon. I can be reached on my cell phone at 602-321-9123. Matt is out today, so I will be addressing this matter.

It is my understanding that Webb Crocket represents Freeport in this matter. If so, I can certainly contact him directly in this regard, but I would prefer to give you the opportunity to do so first.

Please advise me of your position regarding this issue.

Bridget Humphrey
Arizona Corporation Commission
Attorney, Legal Division
Ph: (602) 542-3402

Fax: (602) 542-4870
email: bhumphrey@azcc.gov

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-----Original Message-----

From: Steve Wene [<mailto:swene@law-msh.com>]
Sent: Wednesday, April 30, 2014 5:10 PM
To: Matthew Laudone; Bridget Humphrey
Subject: RE: Freeport Agreement

Matt,

Freeport is very serious about protecting its settlement. Again, I don't mind asking Freeport for permission to let Staff see it, but they will want a good reason. So what exact information does Staff want that can't be discovered anywhere else? That is the question Freeport will pose. Please let me know the answer. Thanks.

-----Original Message-----

From: Matthew Laudone [<mailto:MLaudone@azcc.gov>]
Sent: Wednesday, April 30, 2014 4:11 PM
To: Steve Wene; Bridget Humphrey
Subject: RE: Freeport Agreement

Steve,

Staff believes that seeing the agreement is necessary in order to make a full and proper evaluation of the application. Staff would not agree on the documents relevance to rate-making without actually being able to see the agreement in question.

-ML

-----Original Message-----

From: Steve Wene [<mailto:swene@law-msh.com>]
Sent: Wednesday, April 30, 2014 1:21 PM
To: Matthew Laudone; Bridget Humphrey
Subject: Freeport Agreement

Hello,

As we discussed previously, the Freeport agreement is business confidential or trade secret information not subject to public disclosure. I am willing to ask Freeport to let Staff take a look at the agreement (in fact, I've already asked), but they will want to know why Staff needs to see it. They know it is irrelevant to rate-making. So please explain what information Staff is seeking to gain from the agreement. Thanks.