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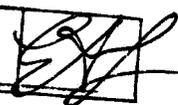
**Attorneys for Town of Fountain Hills**

**ORIGINAL**

**BEFORE THE ARIZONA CORPORATION COMMISSION**

**COMMISSIONERS**  
**BOB STUMP, Chairman**  
**GARY PIERCE**  
**BRENDA BURNS**  
**BOB BURNS**  
**SUSAN BITTER SMITH**

Arizona Corporation Commission  
**DOCKETED**  
NOV 17 2014

DOCKETED BY 

IN THE MATTER OF THE TOWN OF  
FOUNTAIN HILLS' FORMAL  
COMPLAINT AGAINST CHAPARRAL  
CITY WATER COMPANY.

Docket No. W-02113A-14-0359

**RESPONSE TO CCWC'S MOTION  
TO DISMISS**

When a complaint is filed under A.R.S. §40-246(A), A.R.S. §40-246(C) requires the Commission to set a hearing on the reasonableness of a public service corporation's rates and charges. Chaparral City Water Company's ("CCWC") Motion seeks to evade the hearing mandated by A.R.S. §40-246(C), so it is improper and should be denied.

A.R.S. §40-246 provides a process for rate payers and communities to complain to the Commission about a public service corporation's unreasonable rates and charges and triggers Commission review of the rates and charges. The Mayor and a unanimous Town Council of the Town of Fountain Hills ("Town") filed a valid complaint seeking Commission review of CCWC's onerous rates and charges under A.R.S. §40-246(A), so the Town is entitled to a hearing on its Complaint.

1       **I.   CCWC’S MOTION SHOULD BE DENIED.**

2               **A. A.R.S. §40-246(C) requires a hearing on the reasonableness of**  
3               **CCWC’s rates, so CCWC’s motion is improper and meritless.**

4               A.R.S. §40-246(C) states that “[u]pon filing the complaint, the commission **shall**  
5 set the time when and place where a hearing will be had upon it . . .” (emphasis added).  
6 Use of the word “shall” in a statute “indicates a mandatory intent by the legislature.”  
7 *Insurance Co. of North America v. Superior Court*, 166 Ariz. 82, 85, 800 P.2d 585, 588  
8 (1990). Thus, A.R.S. §40-246(C) requires the Commission to conduct a hearing on the  
9 reasonableness of rates when an A.R.S. §40-246(A) complaint is filed. CCWC’s  
10 Motion seeks to evade the hearing required by statute, so it is improper and under the  
11 plain language of the statute should be denied.

12              The Attorney General Opinion cited by CCWC also states that a hearing is  
13 required. CCWC cites Attorney General Opinion 69-6 in support of its Motion, but the  
14 Attorney General’s Opinion supports the Town’s request for a hearing on its Complaint,  
15 not CCWC’s Motion (“AG Opinion”). [Exhibit A.] In fact, the AG Opinion states that  
16 the statute requires the Commission to conduct a hearing regarding the reasonableness  
17 of rates, which is the relief requested by the Town in its Complaint.

18              The AG Opinion examines the limited question of whether a complaint under the  
19 statute requires the Commission to conduct “a full-scale rate hearing.” The AG Opinion  
20 concludes that a full-scale rate hearing is not required, but opines that a hearing on the  
21 reasonableness and constitutionality of rates is required by the statute. The AG Opinion  
22 states:

23              The procedure set up by the foregoing statute [A.R.S. 40-246] is, we  
24 believe, an activator procedure designed to initiate an inquiry by the  
25 Corporation Commission who has the power over rates.  
26

1 The Town's Complaint requests a hearing regarding the reasonableness and  
2 constitutionality of CCWC's rates. [Complaint at ¶48.] A.R.S. 40-246(C) mandates  
3 such a hearing on the Town's Complaint, so CCWC's Motion should be denied.

4 **B. The Town's Complaint is sufficient under A.R.S. §40-246(A) and R-**  
5 **14-3-106(H).**

6 Motions to dismiss are disfavored in Arizona. *Acker v. CSO Chevira*, 188 Ariz.  
7 252, 255, 934 P.2d 816, 819 (App. 1997.) "A court should not grant such a motion  
8 unless it appears certain that the plaintiff would not be entitled to relief under any state  
9 of facts susceptible of proof under the claim stated." *Id.* When adjudicating a motion to  
10 dismiss, the Commission must "assume the truth of the well-pled factual allegations and  
11 indulge all reasonable inferences therefrom." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz.  
12 417, 419, 189 P.3d 344, 419 (2008).

13 R-14-3-106(H) states that an "answer shall include a motion to dismiss if a party  
14 desires to challenge the sufficiency of the complaint." CCWC's Motion fails to  
15 challenge the sufficiency of the Town's Complaint, but the Complaint is sufficient.

16 A.R.S. §40-246(A) provides that a party may complain to the Commission about  
17 rates or charges of a water company if:

18 "it is signed by the mayor or a majority of the legislative body of the city or  
19 town within which the alleged violation occurred, or by not less than  
20 twenty-five consumers or purchasers, or prospective consumers or  
21 purchasers, of the service."

21 The Town's Complaint meets all of the requirements of A.R.S. §40-246(A). The  
22 Town's Complaint was signed by Mayor Linda Kavanagh and its filing was authorized  
23 by a unanimous Town Council. Moreover, as of the date the Complaint was filed, 64  
24 citizens of the Town of Fountain Hills, or 39 more than the amount required by the  
25 statute, had complained to the Commission regarding CCWC's unjust and unreasonable  
26 rates. [Complaint at ¶23.] The Commission rules only permit a motion to dismiss on

1 the sufficiency of complaints, the Town's Complaint is sufficient, so CCWC's Motion  
2 should be denied.

3 The Town's Complaint alleges that CCWC's charges and rates are unreasonable  
4 and unconstitutional. The motion to dismiss standard requires that factual allegations in  
5 the Town's Complaint be taken as true. The Town's factual allegation that CCWC's  
6 rates and charges are unreasonable and unconstitutional, if proven, would entitle the  
7 Town to the relief it seeks. Therefore, CCWC's Motion should be denied.

8 **C. The Town's Complaint under A.R.S. §40-246 does not render other**  
9 **statutes meaningless, but CCWC's Motion would if granted.**

10 CCWC seeks dismissal of the Town's Complaint on multiple grounds. First,  
11 CCWC argues that the Town failed to follow statutory remedies and that the Town's  
12 Complaint makes other statutes meaningless.

13 A.R.S. §40-246(A) does not render other statutes meaningless. The statute  
14 provides a process for a community to complain to the Commission about a public  
15 service corporation's rates. Communities and groups of rate payers are best situated to  
16 recognize the unreasonableness of a public service corporation's rates and charges, as  
17 they apply to a particular community. The Town of Fountain Hills and its citizenry  
18 know more about the reasonableness of CCWC's rates, as applied to Fountain Hills,  
19 than any other party, so the legislature deliberately provided a method for Fountain Hills  
20 to challenge rates the Town believes are unreasonable.

21 Public Service Corporations are granted a monopoly in Arizona. Fountain Hills  
22 and its citizenry can only obtain water from CCWC. The Legislature enacted A.R.S.  
23 §40-246(A) so rate payers may seek Commission review and oversight of unreasonable  
24 rates and charges.

25 The statutes referenced by CCWC, A.R.S. 40-252 *et seq.* relate to an appeal  
26 process for Commission decisions, which is an entirely separate process from the

1 Town's Complaint under A.R.S. §40-246. If the statutes cited by CCWC require  
2 dismissal of the Town's Complaint, then CCWC's statutes would render A.R.S. §40-  
3 246 meaningless.

4 CCWC complains that the Town's Complaint is a collateral attack on the  
5 Commission's decision in CCWC's rate case, so it should be dismissed. But if the  
6 Commission were to follow CCWC's argument, all complaints under A.R.S. §40-  
7 246(A) concerning rates would be dismissed, because all rates and charges are set by  
8 the Commission and, therefore, challenge Commission decisions. None of the cases  
9 cited in CCWC's Motion hold that a complaint challenging reasonableness and  
10 constitutionality of a utility's rates, brought under A.R.S. §40-246 is an impermissible  
11 collateral challenge to a prior rate case. In fact, none of CCWC's cited cases even cite  
12 to or discuss A.R.S. §40-246 or involve a complaint brought under that statute.  
13 CCWC's Motion and the cases it cites contain no support for dismissal of the Town's  
14 statutorily authorized Complaint.

15 Second, CCWC complains that the Town filed its Complaint only a few months  
16 after the decision in its rate case. But there is nothing in A.R.S. §40-246 or anywhere  
17 else, requiring the Town to wait any amount of time to complain about CCWC's  
18 onerous and unreasonable rates and charges. In fact, the plain language of A.R.S. §40-  
19 246(A) makes it clear that there is neither a waiting period before, nor a limitations  
20 period within which a complaint may be filed about a public service corporation's rates.  
21 The statute states that "prospective consumers or purchasers" may file a complaint  
22 under A.R.S. §40-246. *See* A.R.S. §40-246(A). In other words, a rate payer or  
23 community does not have to pay rates for even one month before they may file a  
24 complaint with the Commission regarding unreasonable rates and charges, they need  
25 only be a "prospective purchaser."

1 **CONCLUSION**

2 For the foregoing reasons, CCWC's Motion should be denied and the  
3 Commission should schedule a hearing regarding the reasonableness of CCWC's rates  
4 and charges, as required by A.R.S. §40-246(C) and requested in the Town's Complaint.

5 DATED this 17th day of November, 2014.

6  
7 GUST ROSENFELD P.L.C.

8  
9 By: /s/ Andrew J. McGuire  
10 David A. Pennartz  
11 Landon W. Loveland  
12 Attorneys for Town of Fountain Hills

13 ORIGINAL AND THIRTEEN COPIES  
14 of the foregoing filed this 17th day  
15 of November, 2014 with:

16 Docket Control  
17 Arizona Corporation Commission  
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19 Phoenix, Arizona 85007

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21 mailed this 17th day of November, 2014 to:

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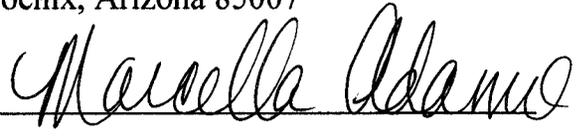
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11 /s/ 

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# **Exhibit A**

GARY K. NELSON, THE ATTORNEY GENERAL  
STATE CAPITOL  
PHOENIX, ARIZONA

February 5, 1969

DEPARTMENT OF LAW OPINION NO. 69-6 (R-38)

LAW LIBRARY  
ARIZONA ATTORNEY GENERAL

REQUESTED BY: THE HONORABLE MILTON J. HUSKY,  
CHAIRMAN  
Arizona Corporation Commission

QUESTION: Does A. R. S. Sec. 40-246 (A) which provides, in part, that "no complaint shall be entertained by the commission, . . . as to the reasonableness of any rates or charges of any gas, electrical, water or telephone corporation, unless it is signed . . . by not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of the service" require the commission, upon the filing of such a complaint, to hold a full-scale rate hearing?

ANSWER: No.

A. R. S. Sec. 40-246 provides, in pertinent part, as follows:

"A. Complaint may be made by . . . any person or association or persons by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service corporation in violation or claimed to be in violation, of any provision of law or any order or rule of the commission, but no complaint shall be entertained by the commission, . . . as to the reasonableness of any rates or charges of any gas, electrical, water or telephone corporation, unless it is signed . . . by not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of the service.

\* \* \*

"C. Upon filing the complaint, the commission shall set the time when and a place where a hearing will be had upon it and shall serve notice thereof, . . . upon the party complained of not less than ten days before the time set for the hearing, . . ."

Opinion No. 69-6 (R-38)  
February 5, 1969  
Page Two

Although the statute provides for a hearing upon the filing of a complaint, the statute is silent as to the type of hearing to be held. It seems clear to us that this hearing can only be directly related to the constitutional powers of the Corporation Commission pursuant to Article 15, Section 3, Arizona Constitution:

"The Corporation Commission shall have full power to, and shall prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected, by public service corporations within the state for services rendered therein. . . ."

The procedure set up by the foregoing statute is, we believe, an activator procedure designed to initiate an inquiry by the Corporation Commission who has the power over rates.

Upon the filing of a complaint "as to the reasonableness of any rates or charges of any gas, electrical, water or telephone corporation. . . signed by twenty-five (25) consumers or purchasers or prospective consumers or purchasers of the service", the Commission would be complying with the provisions of A. R. S. Sec. 40-246 by holding a hearing to determine whether or not there is sufficient evidence to warrant a full-scale rate hearing. We can find no Arizona case covering this question. In Residents of City of Hartford v. Hartford Electric Light Company, 9 PUR N S 228 (1935), a petition signed by 15 customers of the utility alleged that the utility's rates were unreasonable and discriminatory. Upon receiving such petition, the Commission was required to set a hearing upon the complaint. The Commission, before proceeding to a full-scale rate hearing with its incidental burden of expense, required a prima facie showing that the rates were unreasonable. In deciding that there was not enough evidence alleged in the petition to justify a full-scale rate hearing, the Commission stated:

"A general rate inquiry necessarily occasions substantial expense to the state and the company. This expense must ultimately be paid, in part, at least, by the customers of the company. It would be entirely inequitable if a small group of customers could impose this burden upon all the others in the absence of a reasonable anticipation that a full investigation would result in a substantial reduction in the rates."

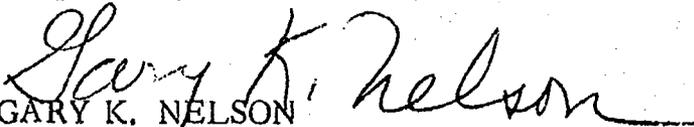
In Utility Users League v. Illinois Bell Telegraph Co., 43 PUR 3rd 38 (1961), the Commission, in considering a complaint as a request for a full-scale investigation of the utility's rates, stated:

Opinion No. 69-6 (R-38)  
February 5, 1969  
Page Three

"...In this consideration, it must be borne in mind that formal rate investigations of large utilities such as this company are time-consuming and expensive, and ultimately such expense must be borne by the ratepayer. As the Illinois Supreme Court has observed: 'Certainly as a practical matter a utility should not, in the absence of explicit legislative direction, be required to embark upon a full-dressed justification of its rate structure every time an individual customer files a complaint....'"

It would be unreasonable to assume that the Legislature, in enacting A. R. S. Sec. 40-246, intended that each time a group of twenty-five consumers or purchasers, or prospective consumers or purchasers of a public service corporation filed a complaint as to the reasonableness of such corporation's rates and charges, the Commission would be required to hold a full-scale rate hearing. The provisions of the statute are complied with by the holding of a hearing to determine whether there is sufficient evidence to warrant a full-scale rate hearing. If the Commission determines that there is sufficient evidence, then arrangements would have to be made with the Legislature for funding the investigation and hearing, if necessary.

Respectfully submitted,

  
GARY K. NELSON  
The Attorney General *wen*

GKN:bh