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BEFORE THE ARIZONA CORPORATION COMMISSION

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Docket No. W-01445A-14-0305

**ARIZONA WATER COMPANY'S
SUPPLEMENTAL REPLY
MEMORANDUM**

COMMISSIONERS

- SUSAN BITTER SMITH, Chairman
- BOB STUMP
- BOB BURNS
- DOUG LITTLE
- TOM FORESE

IN THE MATTER OF THE PETITION OF
ARIZONA WATER COMPANY FOR AN
INCREASE OF AREA TO BE SERVED AT
CENTRAL HEIGHTS, ARIZONA.

Pursuant to the Commission's March 6, 2015 Procedural Order, Arizona Water Company files this Supplemental Reply addressed to the additional arguments raised in the memoranda filed by Commission Staff and the City of Globe on March 27, 2015. Arizona Water Company incorporates the arguments it previously presented to the Commission in its opening Motion to Dismiss filed January 16, 2015 and its reply filed February 23, 2015, as well as the matters presented in oral argument of that motion on March 4, 2015. For the reasons stated there and below, the City's Petition should be dismissed and this matter should not proceed further through the formal hearing process.

I. DISMISSAL OF THE PETITION NOW IS APPROPRIATE AND CONSISTENT WITH THE COMMISSION'S DECISION TO REOPEN DECISION NO. 33424.

Staff, noting that the Commission reopened Decision No. 33424 pursuant to A.R.S. §40-252 "to conduct a procedural conference to discuss the process for this matter" (Staff Response at p. 1, l. 21), contends that dismissal of the Petition would not allow for the development of the necessary facts to determine the matter (Staff Response at p. 2, ll. 3-4). This position misses the point of Arizona Water Company's motion to dismiss, which is that

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1 even if the City's relevant facts are taken as true, the relief sought cannot be granted as a
2 matter of law. Even though the City has alleged contested facts, the purpose of a motion to
3 dismiss is to accept the facts as pled by the petitioning party as true and to test them legally
4 as to whether the City has alleged any claim upon which relief may be granted. There is no
5 reason or justification to burden the Commission's resources with extended hearing
6 proceedings to "develop facts" or "thoroughly examine" the City's allegations if there is no
7 legal basis for the relief sought, even if the alleged facts are accepted as true. This is the
8 reason the Petition should be dismissed, and neither the Staff nor the City's briefing
9 provides a sufficient legal basis for the City's requested deletion of Arizona Water
10 Company's CC&N to be granted.

11 As explored during the March 4, 2015 oral argument, the Petition (and again the
12 City's supplemental March 27 reply) alleges both 1961 and post-1961 facts. Significant
13 argument was held concerning the post-1961 allegations on March 4. The City's approach
14 to defend the portions of its Petition alluding to post-1961 service issues (which have never
15 been clearly pled) in the face of James P. Paul v. Arizona Corporation Commission, 137
16 Ariz. 426, 671 P.3d 404 (1983) and the duty to condemn and pay just compensation to take
17 over a CC&N under A.R.S. §9-516 was to argue that James P. Paul and A.R.S. §9-516 did
18 not apply its case is based solely on an "initial mistake" focused exclusively on 1961 facts.
19 Staff's March 27 response brief acknowledges this election by the City in Section III. See
20 Staff Response at p. 2, ll. 18-19 (arguing that "Paul does not apply to this scenario" because
21 the case is now exclusively focused on "an initial grant of a CC&N that was in error"). But
22 the City now sneaks post-1961 allegations back into its March 27 supplemental response,
23 suggesting that the parties' conduct after 1961 in the disputed areas is relevant. The City
24 cannot have it both ways: faced with the argument that its case either had to be one based on
25 a "mistake" in 1961 when the subject CC&N was granted in Decision No. 33424, or
26 alternatively that the CC&N was validly granted but should be deleted under James P. Paul
27 v. Arizona Corporation Commission, 137 Ariz. 426, 671 P.3d 404 (1983), the City elected
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1 the former theory. The City recognized it could not secure deletion of the Company's
2 certificate under the latter theory, and that it must follow A.R.S. §9-516 to acquire Arizona
3 Water Company's CC&N. The vague facts concerning alleged water delivery issues within
4 the subject CC&N after 1961 have no remaining relevance in this proceeding.

5 Thus, even if the Commission does not grant Arizona Water Company's motion to
6 dismiss this case in its entirety at this time, the Commission should, at the very least, enter
7 an order dismissing any claims raised in the Petition based on post-1961 events, because
8 those claims are legally inconsistent with the theory the City has elected that the CC&N was
9 initially granted "by mistake." This will ensure that discovery is appropriately limited and
10 that the parties do not submit prefiled testimony on post-1961 events.

11 The task before the Commission now is to view the remaining portion of requested
12 relief through the prism of Rule 12. The purpose of Rule 12 is to "expedite and simplify the
13 pretrial phase of . . . litigation while at the same time promoting the just disposition of civil
14 cases." 5B Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1342, at
15 23 (3d ed. 2004). Rule 12(b)(6) supports this purpose because it permits parties and the
16 courts to dispose of cases that are legally insufficient early on, which serves the public
17 interests of judicial economy, speedy resolution, avoidance of discovery abuses, and
18 limiting expenses. See id. § 1349, at 57 (a well-taken Rule 12(b) motion is "likely to
19 produce an overall savings in time and resources as well as avoid delay in the disposition of
20 cases, thereby benefiting both the parties and the courts"); at 60 (motions to dismiss
21 promote "speedier pretrial procedures, eliminate needless trials"). It is inappropriate to
22 engage in an open-ended fishing expedition over the 1961 events as the supplemental
23 briefing suggests; the Rule instead compels the City to meet appropriate standards of
24 pleading its case, and those pleadings are now to be tested at this stage, before additional
25 discovery occurs and the parties prepare for a fully contested hearing.

26 Further, dismissal now, following extensive briefing and consideration of the Rule 12
27 issues, would be consistent with the Commission's order to reopen Decision No. 33424.
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1 The Commission's direction was not to hold fully contested hearings even if the Petition
2 lacked legal merit or failed to state a claim upon which relief could be granted. The
3 reopening empowers the Hearing Division to test the sufficiency of the legal basis of the
4 relief the City seeks in the Petition. It would not be in the public interest or a prudent
5 expenditure of the Commission's limited hearing resources to continue further with the
6 City's legally insufficient Petition.

7
8 **II. EVEN IF ALL OF THE CITY'S ALLEGATIONS ARE TRUE, THE CITY'S RELIEF
IS BARRED BY LACHES AS A MATTER OF LAW.**

9 Staff and Arizona Water Company agree on the standard for laches. See AWC
10 Motion at p. 11; Staff Response at p. 4. For laches to bar a claim, the delay in filing suit
11 must be unreasonable and result in prejudice to the other party. See id. Arizona courts have
12 recognized that a party may be sufficiently injured for purposes of applying laches by the
13 mere passage of time. See, e.g., Jerger v. Rubin, 106 Ariz. 114, 117, 471 P.2d 726, 729
14 (1970). All the elements necessary for application of laches are present here and are evident
15 from the face of the Petition. Arizona Water Company is prejudiced by the decades that
16 have passed since the Commission issued the Decision. The parties have relied upon and
17 conducted themselves based upon the unquestioned validity of the CC&N for over five
18 decades. Id. It does not require further discovery or fact finding to deduce that, due to the
19 passage of over 53 years, none of the pertinent witnesses, such as commissioners, parties,
20 counsel, executives, and City leaders, are available to provide evidence concerning the 1961
21 proceedings. No one is available to identify what evidence was presented in 1961, what
22 assumptions were made (if any), how the evidence was weighed, or what notice was
23 provided and to whom. The prejudice to Arizona Water Company is further underscored by
24 the fact that none of the parties—not Arizona Water Company, not the City, not the
25 Commission or Staff—have access to the Commission's file related to the initial 1961
26 proceeding. Arizona Water Company requests that the Commission now take judicial
27 notice of that fact.

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1 Staff suggests that the mere existence of a dispute between the City and Arizona
2 Water Company over whether the Commission made a “mistake” in the initial grant of the
3 CC&N should be sufficient to avoid dismissal based on laches, at least at this stage of the
4 case. See Staff Response at p. 5. However, Staff does not identify any legally sufficient
5 allegations and points to no additional contested that could allow the City to state a claim for
6 the deletion it seeks. The circumstances of five decades of delay from the events in 1961,
7 coupled with the City’s unreasonable delay in filing this Petition (another issue concerning
8 which no factual hearing need be held), plainly prejudice Arizona Water Company and the
9 public interest and justify dismissal.

10 Staff further asserts that the facts of Walker v. DeConcini, 86 Ariz. 143, 341 P.2d
11 933 (1959), do not support Arizona Water Company’s position. Staff Response at p. 4.
12 However, the fact that Walker has some different factual background from this matter does
13 not lead to the conclusion that laches is inapplicable; it supports the application of laches.
14 The Walker opinion did not hold that laches is generally unavailable in all cases. Rather, it
15 was a simple matter for the Arizona Supreme Court to reject the laches argument in Walker
16 because it was dealing with a void certificate. However, this is not a case where Arizona
17 Water Company is trying to breathe life into a jurisdictionally void CC&N by arguing
18 laches. Here, unlike in Walker, the Company’s CC&N is unquestionably valid. The
19 Decision itself recites that the Commissioners were present and that the Commission heard
20 and considered evidence. None of the Walker defects exist here. Instead, the City is
21 attempting to delete portions of Arizona Water Company’s CC&N on different factual
22 grounds. Importantly to the laches analysis, in Walker only eight years had passed since the
23 issuance of the certificate, where here over 53 years have passed. At the time the Supreme
24 Court was considering the questions presented in Walker, the parties, the Commission, and
25 the courts still had a record upon which to examine the initial hearing on the Walkers’
26 application. Here, none of the pertinent witnesses are available to provide evidence
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1 concerning the proceedings 53 years ago and the Commission’s record of the original
2 proceedings is no longer available.

3 Laches must apply at some point to bar attacks on existing CC&Ns, and 53 years is
4 too long to procedurally allow a competing provider to attack a valid CC&N decision on the
5 grounds that an obscure “mistake” might have been made when it was first issued. No
6 amount of additional fact-finding is necessary to make this determination now, and the case
7 law, the public interest, and Rule 12 support dismissal now.

8 **III. FREIGHTWAYS SUPPORTS DISMISSAL BASED ON LACHES AND**
9 **ESTOPPEL AT THIS TIME AS A MATTER OF LAW.**

10 Freightways, Inc. v. Arizona Corporation Commission, 129 Ariz. 245, 630 P.2d 541
11 (1981) supports the application of laches under these circumstances. In addition,
12 Freightways provides that the Commission may be estopped from granting the City the
13 relief it seeks, even when all of the relevant facts in the City’s Petition are admitted for
14 purposes of the pending motion.

15 In Freightways, the Supreme Court considered whether the Commission was
16 “estopped to deny the validity of a certificate of public convenience and necessity because
17 of a defect in the certificate’s renewal or issuance in 1928, some fifty years earlier.” Id. at
18 245, 630 P.2d at 541. The Supreme Court held that the Commission was estopped from
19 denying the CC&N’s validity, finding that “a half a century is sufficient” for “a void
20 certificate [to] ripen into a valid certificate.” Id. at 248, 630 P.2d at 544. The Supreme
21 Court’s statement that 50 years is sufficient to prevent an attack on the validity of a
22 certificate was unqualified. Thus, Staff and the City are incorrect that Freightways does not
23 provide a basis for dismissal without a hearing—no fact investigation is required under the
24 circumstances present here. Even though the analysis in Freightways centered on equitable
25 estoppel, its rationale is equally relevant to the application of the parallel equitable doctrine
26 of laches, because the passage of over 50 years since the issuance of the certificate at issue
27 was a critical consideration.
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1 The necessary elements of estoppel are present in this case, even when all the
2 Petition's allegations are taken as true. "The three elements of equitable estoppel are
3 generally stated as follows: (1) affirmative acts inconsistent with a claim afterwards relied
4 upon; (2) action by a party relying on such conduct; and (3) injury to the party resulting
5 from a repudiation of such conduct." Tucson Elec. Power Co. v. Ariz. Dep't of Revenue,
6 174 Ariz. 507, 516, 851 P.3d 132, 141 (App. 1993) (citations omitted). The Commission,
7 after a contested evidentiary hearing on the application, issued a CC&N to Arizona Water
8 Company in 1961, which has stood uncontested until the Petition was filed. No factual
9 hearing is necessary to determine that Arizona Water Company will be damaged if its
10 CC&N is deleted; the City is compelled to pay just compensation to take over the CC&N of
11 a public service corporation under A.R.S. §9-516.

12 Both Staff and the City argue that Freightways is inapplicable here because it is
13 factually distinguishable. However, the factual distinctions they rely on are inconsequential,
14 and do not support their arguments that estoppel does not apply here, or that a further
15 hearing is necessary.

16 Staff identifies three specific facts that purportedly distinguish the present case from
17 Freightways: "the long period of time the CC&N had been in use; the Commission's failure
18 to revoke the CC&N, and Freightways' reliance interests." Staff's Response at p. 3. To the
19 contrary, this case and Freightways are completely in line as to those three circumstances.
20 In this case no factual hearing is needed to find that Arizona Water Company's CC&N at
21 issue has been in place for over 53 years and that neither the Commission nor the City had
22 ever before questioned the validity of the Company's CC&N.

23 The City asserts that in Freightways the Court was able to determine that the
24 Commission had knowledge of the defect based upon the Commission's records, whereas in
25 this case no one was aware of the error made by the Commission in granting Arizona Water
26 Company's CC&N. City's Supplemental Response at p. 2. The City's assertions
27 concerning the Commission's knowledge is nothing more than speculation and conjecture—
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1 there are no allegations in the Petition regarding the state of the Commission’s knowledge
2 regarding an error. Importantly, the Commission’s file underlying Decision No. 33424 no
3 longer exists, meaning that there are no facts that could support the City’s allegations.
4 Estoppel is properly applied to preclude an attack on the evidentiary foundation of Decision
5 No. 33242 where no file or witnesses exist concerning that evidence. The City also suggests
6 that Arizona Water Company, presumably unlike Freightways, would not be prejudiced if
7 the Commission were to grant the Petition because the Company has no customers in the
8 disputed area. Id. However, as explained in James P Paul, the deletion of part of the CC&N
9 would not only be prejudicial to Arizona Water Company, it would also be “antithetical to
10 the public interest.” 137 Ariz. at 429-30, 671 P.2d 407-08. The City does concede,
11 however, that in both cases the certificate holder had no knowledge of an error made by the
12 Commission in granting the CC&N. Id. at 2. In sum, all the necessary elements for
13 estoppel are met, just as in Freightways.

14 Both Staff and the City acknowledge that, under Freightways, estoppel may be
15 applied against the Commission if its “wrongful conduct threatens to work a serious
16 injustice and if the public interest would not be unduly damaged by the imposition of
17 estoppel.” Staff’s Response at p. 3; City’s Supplemental Response at p. 3. Staff does not
18 present any argument as to whether it would be improper to apply estoppel under the facts
19 of this case, suggesting instead further discovery is needed before that determination might
20 be made. Staff’s Response at pp. 3-4. The City, on the other hand, suggests that equitable
21 estoppel should not be available here because (1) the Commission made an error, (2)
22 Arizona Water Company has no infrastructure or customers in the disputed areas, and (3)
23 Arizona Water Company could not have relied on the CC&N because it does not serve
24 anyone in the disputed areas. City’s Supplemental Response at pp. 3-4. The City’s
25 assertions are completely unfounded and speculative, and are not based on any sufficiently
26 pled facts in the Petition. The authority provided by Arizona Water Company supports
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1 dismissal in these circumstances because 53 years is too long to allow a collateral attack on
2 a CC&N under the facts as alleged by the City.

3 The factual disparity between the two cases that is significant, which neither Staff nor
4 the City address, is that in this case there is no void certificate—nor has the City even
5 suggested as much. Over 53 years have passed since the Commission granted Arizona
6 Water Company the CC&N at issue, both the parties and the Commission have conducted
7 themselves according the continued validity of that CC&N, and the CC&N has gone
8 unchallenged all that time. If 50 years supports the viability of a void certificate, as the
9 Arizona Supreme Court has held, then it is certainly enough time to prevent an attack on a
10 valid certificate on the basis of some theoretical mistake, the assertion of which is
11 unsupported by specific fact allegations.

12 Finally, the public interest will not be damaged by upholding the validity of Arizona
13 Water Company's CC&N, because the Commission previously determined that the public
14 interest would be best served by granting the CC&N in the first instance, and there is no
15 longer any dispute under James P. Paul that Arizona Water Company is unable to provide
16 reasonable service at reasonable rates to those who request it within the contested areas. As
17 a matter of law, a serious injustice will be avoided and the public interest will not be harmed
18 if the Commission is estopped from deleting portions of Arizona Water Company's CC&N.

19 **IV. THE RELIEF THE PETITION SEEKS IS DELETION OF ARIZONA WATER**
20 **COMPANY'S CC&N, AND JAMES P. PAUL STILL CONTROLS.**

21 Although the City has elected its theory that this case now focuses solely on 1961
22 facts, James P. Paul still provides a compelling basis for dismissal of the City's Petition. As
23 provided in Decision No. 33424, the Commission conducted an investigation based on
24 Arizona Water Company's application and determined that issuance of the subject
25 certificates would serve the public interest. Now, over 50 years later, the City seeks to
26 delete a portion of Arizona Water Company's certificate. Thus, in both cases, there is an
27 existing certificate holder and a competitor who seeks to delete that certificate (even more
28 compelling, a competitor that must take steps under A.R.S. §9-516 to do so).

1 Paul does not address the standard for competing water companies concerning a
2 particular area. Indeed, the Arizona Supreme Court specifically found that the
3 Commission’s treatment of “Paul and Pinnacle as two equally situated water companies,
4 competing for a right to serve an uncertificated area” was inappropriate. Id. at 430-31, 671
5 P.3d 408-09. Further, Staff is incorrect when it asserts that Paul did not address the
6 situation of an initial grant of a CC&N in error. In Paul, the argument was made that the
7 deletion of Paul’s certificate was justified on the grounds that the initial grant of the
8 certificate “was inappropriate because it was granted before there was ‘a public need and
9 necessity for that certificate.’” Id. at 429 n.3, 671 P.2d at 407 n.3. The Supreme Court
10 rejected this similar “mistake” argument as the justification for the deletion of a portion of
11 Paul’s CC&N. Id.

12 Under Paul, which clearly has application to the relief the City seeks, the Supreme
13 Court has made it clear that “[w]here a public service corporation holds a certificate for a
14 given area, the public interest requires that the corporation be allowed to retain its certificate
15 until it is unable or unwilling to provide needed service at a reasonable rate.” Id. at 430, 671
16 P.2d at 408. The public interest is not served by further entertaining the City’s Petition. If
17 the Commission were to grant the City’s Petition, it would encourage surreptitious
18 infringement into CC&N territories by competitors, increase costs to service providers who
19 would have to police their CC&N boundaries, undermine incentives to public service
20 corporations to take on the risks and obligations related to future service in a certificated
21 area, and generally inject uncertainty into the viability of CC&Ns. No matter how they
22 phrase their request for relief, the City is in fact seeking to delete a portion of Arizona Water
23 Company’s CC&N. Their request for deletion is contrary to the public interest because the
24 City has not alleged any facts that can meet the Paul standard.

25 **V. CONCLUSION.**

26 From both a public policy and Arizona law perspective, the City’s Petition should be
27 dismissed with prejudice under Rule 12(b)(6) of the Arizona Rules of Civil Procedure and
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1 the Commission's Rules of Practice. Following months of significant briefing and
2 argument, dismissal would meet the Commission's directive following its order reopening
3 Decision No. 33424 that the Hearing Division appropriate process this matter under Arizona
4 law.

5 Alternatively, to guide the parties going forward in discovery and hearing
6 preparation, if the matter is not dismissed in its entirety, a Procedural Order should be
7 entered confirming the City's election of the A.R.S. §40-252 "mistake" remedy as opposed
8 to the inconsistent theory that there was no mistake, but that the disputed areas should be
9 deleted under the James P. Paul factors.

10 RESPECTFULLY SUBMITTED this 10th day of April, 2015.

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