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BEFORE THE ARIZONA CORPORATION COMMISSION

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2015 MAR 27 P 1:50

AZ CORP COMMISS
DOCKET CONTROL

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

DOCKET NO. W-01445A-14-0305

RESPONSE TO ARIZONA WATER
COMPANY'S MOTION TO DISMISS
(NEW CASE LAW INTRODUCED AT
ORAL ARGUMENT)

The City of Globe (the "City" or "Globe"), through undersigned counsel, in accordance with the procedural order dated March 6, 2015 hereby responds to Arizona Water Company's ("AWC") Motion to Dismiss ("Motion") filed in the above captioned docket on January 16, 2015. This Response will be limited to the new case law that was introduced by AWC at the status conference on March 4, 2015.

*Freightways Inc v Arizona Corporation Commission*¹ was a case introduced by AWC at the oral argument to make, essentially, two points: The Commission is estopped from correcting an error in the current docket and that 50 years was enough time to vest a void certificate. When the facts in the *Freightways* case are compared to the facts in this case, neither points asserted by AWC hold up.

The *Freightways* case dealt with a motor carrier who, through various transfers, came into possession of certificate that was defective based upon action (or inaction) of the Commission

Arizona Corporation Commission

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¹ 630 P.2d 541, 129 Ariz. 245 (1959).

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1 fifty years prior.² At that time of the procedural defect, the Commission regulated motor carriers
2 and required annual renewals of the certificate.³ In 1928, a previous certificate holder filed after
3 the deadline for renewal but before the expiration of the certificate.⁴ The same certificate holder
4 also filed another application some 2 months later but did not indicate whether it was for a
5 renewal or a new certificate.⁵ Fifty years later, Freightways filed to transfer the certificate to
6 another carrier but an intervenor filed a motion to dismiss based upon the actions in 1928 and
7 alleged that the certificate expired in 1928.⁶ The Commission subsequently granted the
8 intervenor's motion.⁷ Freightways appealed the decision and the Arizona Supreme Court
9 ultimately heard the case.
10

11 **ELEMENTS OF ESTOPPEL**

12 The *Freightways* court used a balancing of the equities standard to decide this case.⁸ The
13 Court first determined that the elements of estoppel were met by the facts.⁹ The Court found the
14 Commission had knowledge of the defect based upon records kept at the Commission.¹⁰ The
15 *Freightways* Court then found that Freightways was not aware of the defect and would be
16 prejudiced by the Commission's decision.¹¹
17

18 This is the exact opposite of what has occurred in the instant case. The Commission,
19 Globe nor AWC were aware of the error contained in the Commission decision granting AWC
20 the initial CC&N. Additionally, AWC would not be prejudiced by the action of the Commission
21 because AWC has no customers in the disputed area. The only entity that could be prejudiced is
22 the City of Globe.
23

24 ² Id. at 542, 246.

25 ³ Id.

26 ⁴ Id.

27 ⁵ Id.

28 ⁶ Id.

⁷ Id.

⁸ Id. at 544, 248.

⁹ Id. at 543, 247

¹⁰ Id.

¹¹ Id.

1
2 **ESTOPPEL AGAINST THE SOVEREIGN**

3 The *Freightways* Court, after determining that the elements of estoppel had been met,
4 needed to determine if the “no estoppel” against government rule should be applied.¹² The Court
5 detailed when it was appropriate to allow estoppel to apply to government, specifically when the
6 decision “resulted in injustice.”¹³ The Court then discussed a Ninth Circuit Case that held the
7 “sovereign can be estopped if government’s wrongful conduct threatens to work *a serious*
8 *injustice and if the public interest would be unduly damaged.*”¹⁴ The Court then discussed how
9 there was no threat to the public interest but that the “damage that will be done to Freightways
10 which relied upon the certificate in the operation of its freight business will be great.”¹⁵ The
11 Court, citing a New Mexico case, said “where right and justice demand it, the doctrine [of
12 estoppel] will be applied.”¹⁶ The Court, in balancing the equities, decided that estoppel should be
13 applied.¹⁷

14
15 The facts of the current case could not be further from the *Freightways* facts. A
16 Commission decision granting AWC a CC&N was granted with an error. The Commission
17 granted a CC&N over an area that was already being served by Globe, which is in direct conflict
18 with its order. Globe is in the only entity that has been serving in the disputed area. AWC has no
19 meters, no customers, nothing that shows they have ever provided any water service to a customer
20 in the disputed area. In this case, serious injustice and damage of the public interest would only
21 occur if AWC were successful in their Motion or in their Notices of Claim against the City.
22
23 AWC has not relied on the error in the original decision because they have not served anyone in
24

25
26 ¹² Id at 544, 248.

27 ¹³ Id.

28 ¹⁴ Id. (emphasis added).

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

1 the disputed area for the last fifty years. Based upon the standards laid out in the *Freightways*
2 case, the rule of “no estoppel” against the government should be applied.

3
4 **VESTING A VOID CERTIFICATE**

5 AWC, in oral argument, suggested a paragraph of *Freightways* that stated 50 years was
6 enough time for a void certificate to ripen into a valid certificate bolsters AWC’s laches
7 argument. The facts in the *Freightways* case as discussed above are very different than the facts
8 in this case. If Globe were asking to make the entire certificate void, AWC’s argument might
9 hold water. Globe is only asking that the portion that was in error be corrected. The discussion in
10 *Freightways* is not applicable to AWC’s argument regarding laches.¹⁸

11
12 **CONCLUSION**

13 As more fully detailed in Globe’s initial Response to the Motion to Dismiss, Globe would
14 respectfully request the Commission deny AWC’s Motion to Dismiss.

15
16
17 RESPECTFULLY submitted this 27th day of March, 2015.

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28 ¹⁸ Globe fully briefed laches in its first Response and will not make those same arguments again but will incorporate by reference.

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ORIGINAL and thirteen (13) copies of the foregoing filed this 27th day of March, 2015, with:

Docket Control
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

Copy of the foregoing hand-delivered/mailed this 27th day of March, 2015, to:

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