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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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MAR 27 2015

AZ CORP COMMISSION
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IN THE MATTER OF THE PETITION OF
ARIZONA WATER COMPANY FO AN
INCREASE OF AREA TO BE SERVED AT
CENTRAL HIEGHTS, ARIZONA.

DOCKET NO. W-01445A-14-0305

STAFF'S RESPONSE TO MOTION TO
DISMISS

The Utilities Division ("Staff") of the Arizona Corporation Commission ("Commission") files its response to the motion to dismiss filed by Arizona Water Company ("Company" or "AWC"). For the reasons set forth herein, Staff does not support AWC's motion to dismiss.

I. BACKGROUND.

On August 18, 2014, the City of Globe, Arizona ("City" or "Globe") filed a petition to Amend Decision No. 33424 pursuant to ARS §40-252. In its petition, the City requested that the Commission amend AWC's certificate of convenience and necessity ("CC&N") to remove areas that the City has allegedly served since the early 1900s. In Decision No. 33424 (September 20, 1961), AWC was granted a CC&N to serve certain areas that are now in dispute. On October 16, 2014, the Commission voted to reopen Decision No. 33424 pursuant to §40-252 and directed the Commission's Hearing Division to conduct a procedural conference to discuss the process for this matter.

II. DISMISSAL IS NOT WARRANTED AT THIS TIME.

A.R.S. §40-252 states in part: "The commission may at any time, upon notice to the corporation affected, and after opportunity to be heard as upon a complaint, rescind, alter or amend any order or decision made by it." The City has alleged that the Commission erred in its grant of AWC's that includes areas that were already being served. If the Commission made a mistake in the

1 initial grant of its CC&N to AWC, a proceeding and a hearing would allow for a thorough
2 examination of those allegations. To dismiss the City's petition at this point would not for the
3 development of the necessary facts to allow the Commission to determine if a mistake has been
4 made. By virtue of A.R.S. §40-252, the Commission is vested with the power to rescind, alter or
5 amend a certificate of convenience and necessity after it has been granted. The exercise of this power
6 requires an affirmative showing that the public interest would thereby be benefited. *Davis v.*
7 *Corporation Commission*, 96 Ariz. 215, 218, 393 P.2d 909 (1964).

8 **III. PAUL DOES NOT APPLY TO THIS SCENARIO.**

9 AWC relies on *James P. Paul v. Arizona Corporation Commission*, 137 Ariz. 426, 671 P.2d
10 404 (1983), in support of its position that Globe's petition should be dismissed. *Paul* is factually
11 distinguishable from the instant case. In *Paul*, Pinnacle Water, a water utility that was adjacent to
12 Paul's CC&N, requested that the Commission delete a portion of Paul's CC&N and grant that area to
13 Pinnacle. The Commission granted Pinnacle's request, deleting a portion of Paul's CC&N and
14 awarding that territory to Pinnacle.

15 On appeal, the Supreme Court reversed the Commission decision, explaining that the
16 Commission may not delete territory from an existing CC&N unless the existing CC&N holder is
17 unable or unwilling to provide adequate service at reasonable rates. *Paul* addressed the standard for
18 competing water companies concerning a particular area; it did not address the situation of an initial
19 grant of a CC&N that was in error. Further, *Paul* holds that the public interest is the controlling factor
20 concerning service by water companies. *Paul*, 137 Ariz. at 429, 671 P.2d at 407. In this instance, a
21 hearing would be appropriate to examine the factual allegations and to determine how best to serve
22 the public interest.

23 **IV. THE DEFENSES OF ESTOPPEL AND LACHES REQUIRE A FACTUAL**
24 **PREDICATE.**

25 During oral argument on March 4, 2015, AWC asserted that the Commission is estopped from
26 any action with respect to the City's petition, relying on *Freightways, Inc. v Arizona Corp.*
27 *Commission*, 129 Ariz. 245, 630 P.2d 541 (1981). At this juncture in the proceeding, there has been
28 no factual evidence presented to establish that estoppel is warranted. Establishing the elements of

1 estoppel requires the development of facts, which is best accomplished in the context of a hearing.

2 As a general rule, estoppel may not be invoked against the sovereign. *Freightways*, 129 Ariz.
3 at 246, 630 P.2d at 54. The court in *Freightways* went on to say that the government may be estopped
4 only when its “wrongful conduct threatens to work a serious injustice and ... the public interest would
5 not be unduly damaged....” *Id.* at 248, 630 P.2d at 544. Estoppel sounds in *equity* and will therefore
6 not apply to the detriment of the public interest. *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 108 Ariz.
7 178, 184, 494 P.2d 700, 706 (1972).

8 In *Freightways*, the Commission had issued a general order that required transportation
9 CC&N holders to renew their CC&Ns yearly. In 1929, *Freightways*’ predecessor, Louis Schade,
10 failed to apply for renewal by the deadline. Mr. Schade subsequently filed both an untimely renewal
11 request and an original application, which by statute should have required a hearing. It is unclear
12 which application was granted. Fifty years later, when *Freightways* attempted to transfer the CC&N,
13 the Commission found the CC&N void.

14 The court held that the Commission could not invalidate a transportation CC&N that had been
15 in use for a long period of time, even though, the holder of the CC&N had not complied with the
16 rules relating to renewal. The evidence revealed that the Commission knew of Schade’s failure to
17 renew. The *Freightways* opinion reflects three specific facts: the long period of time the CC&N had
18 been in use; the Commission’s failure to revoke the CC&N and *Freightways*’ reliance interests.

19 The *Freightways* Court cited *United States v. Lazy FC Ranch*, 481 F.2d 985, 989, 27
20 A.L.R.Fed. 694 (9th Cir.1973), which states that the “sovereign can be estopped if the government’s
21 wrongful conduct threatens to work a serious injustice and if the public interest would not be unduly
22 damaged by the imposition of estoppel.” 129 Ariz. at 248, 630 P.2d at 544. Applying the *Lazy FC*
23 *Ranch* test to the facts in *Freightways*, the Arizona court refused to apply the “no-estoppel” rule,
24 concluding that estoppel would result in great damage to *Freightways*. The Court also concluded that
25 the public would not be damaged by upholding the CC&N, and under those specific circumstances,
26 there would be no threat to the Commission’ sovereignty.

27 To establish estoppel, one must show the following: (1) the party to be estopped commits acts
28 inconsistent with a position it later adopts; (2) reliance by the other party; and (3) injury to the latter

1 resulting from the former's repudiation of its prior conduct. *Freightways*, See, e.g., *Tucson Electric*
2 *Power Co. v. Arizona Dep't of Revenue*, 174 Ariz. 507, 516, 851 P.2d 132,141 (1992). Estoppel is
3 therefore a fact specific inquiry. It appears that the present case presents disputed facts and there are
4 simply not enough facts established to determine estoppel at this time.

5 Finally, AWC argues that laches bars Globe's petition. Generally, laches will "bar a claim
6 when the delay [in filing suit] is unreasonable and results in prejudice to the opposing party." *League*
7 *of Ariz. Cities & Towns v. Martin*, 219 Ariz. 556, 558, ¶ 6, 201 P.3d 517, 519 (2009) (alteration in
8 original) (citing *Sotomayor v. Burns*, 199 Ariz. 81, 83, ¶ 6, 13 P.3d 1198, 1200 (2000)). Delay alone,
9 however, is not sufficient to establish a laches defense. *Id.* Rather, in determining whether the delay
10 was unreasonable, "courts examine the justification for delay, including the extent of plaintiff's
11 advance knowledge of the basis for challenge." *Harris v. Purcell*, 193 Ariz. 409, 412 ¶ 16, 973 P.2d
12 1166, 1169 (1998). The delay must also result in prejudice, either to the opposing party or to the
13 administration of justice, *id.*, which may be demonstrated by showing injury or a change in position
14 as a result of the delay. *Flynn v. Rogers*, 172 Ariz. 62, 66, 834 P.2d 148, 152 (1992) (citing *Jerger v.*
15 *Rubin*, 106 Ariz. 114, 117, 471 P.2d 726, 729 (1970)); see also *Lubin v. Thomas*, 213 Ariz. 496, 497,
16 ¶ 10, 144 P.3d 510, 511 (2006) (finding prejudice to system).

17 AWC relies upon *Walker v. De Concini*, 86 Ariz. 143, 341 P.2d 933 (1959) to support its
18 assertions of laches; the facts of that case, however do not support AWC's position. In 1948, Walker
19 applied for a CC&N. On the day of the hearing, one member of the Commission and his staff were
20 present to hear other various matters pending before the Commission. The commissioner assigned the
21 taking of testimony to W. H. Linville, the Director of the Utilities Division. Sworn testimony was
22 taken before Mr. Linville, who made penciled notes of the same, and the hearing was concluded.¹ No
23 commissioner, stenographer, or court reporter was present at this hearing, and no testimony was
24 transcribed and filed with the Commission, with the exception of Mr. Linville's brief notes.
25 Thereafter, evidently based on the recommendation of Mr. Linville, the Commission granted the
26 CC&N to Walker.

27 In 1956, Walker applied to the Commission to transfer the water utility and the CC&N to
28

¹ The Commission stated that it lacked the funds to hire a court reporter.

1 Sunnyside Water Company, Inc. At the hearing, De Concini, a landowner in the certificated area,
2 appeared and challenged the validity of the CC&N. Walker filed for a declaratory judgment.

3 Among the arguments made by Walker was that De Concini was barred by laches from
4 contesting the validity of the CC&N. The court held:

5 We do not feel the doctrine of laches can be applied to this case for the
6 certificate was void from the outset because the Commission did not hear the evidence
7 and such a certificate cannot later be validated by any acts of appellees or anyone else
8 on the theory of laches. This principle of law was laid down by this Court in the case
9 of *Pacific Greyhound Lines v. Sun Valley Bus Lines*, 70 Ariz. 65, 216 P.2d 404, 409,
10 in which the Court said:

11 * * * Certificates of convenience and necessity can only be acquired from the
12 corporation commission by an affirmative showing that its issuance would best
13 subserve the public interest and not by estoppel or laches. * * *

14 AWC asserts that there is no defect in the initial grant of its CC&N, however, the City appears
15 to making a contrary assertion, that is, the City alleges that it was already providing service in the
16 area granted to AWC in 1961.

17 **V. CONCLUSION.**

18 For the foregoing reasons, Staff does not support of AWC's motion to dismiss at this time.

19 RESPECTFULLY SUBMITTED this 27th day of March, 2015.

20 

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27 Original and thirteen (13) copies of the
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