

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

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3 COMMISSIONERS

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AZ CORP COMMISSION
DOCKET CONTROL

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

DOCKET NO. W-01445A-14-0305

RESPONSE TO ARIZONA WATER
COMPANY'S MOTION TO DISMISS

13 The City of Globe (the "City" or "Globe"), through undersigned counsel, hereby responds
14 to Arizona Water Company's ("AWC") Motion to Dismiss ("Motion") filed in the above
15 captioned docket on January 16, 2015.

16 AWC's Motion is without merit and should be denied. In order to grant the Motion, the
17 Commission would have to disregard the single biggest fact contained in the City's Petition to
18 Amend ("Petition"), which is the City was serving customers in the disputed area¹ before AWC
19 was granted a CC&N. Additionally, AWC fails to mention that it does not have any customers in
20 the disputed area and the City is the only entity with infrastructure in place to serve customers in
21 the disputed area. Moreover, the Motion relies on a case that does not apply and is easily
22 distinguishable from the facts in the Petition. Thus, AWC's baseless allegations in the Motion are
23 easily refuted, and the Commission should deny AWC's Motion and proceed with the matter
24 consistent with the desire of all five Commissioners who voted to reopen Decision No. U-1445 at
25 the Staff Meeting on October 16, 2014.

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28 ¹ The disputed area is defined in Exhibit E of the Petition.

1 I. INTRODUCTION.

2 As laid out in the City's Petition, the City is the provider of water and wastewater service both
3 inside and outside of its municipal boundaries. The City has provided these services for over 100
4 years. Globe has presented information to the Commission in its Petition showing that Globe was
5 serving customers in the disputed area before AWC was granted a CC&N.² AWC and Globe have
6 interacted over the years on a fairly regular basis. For example, AWC sold land to the City that
7 the City used for a water tank to serve the disputed areas in the 1970s and there is an
8 interconnection agreement between the parties under which the City sells water to AWC.³
9
10 Contrary to the claims made in the Motion, Globe was forced to file the petition with the
11 Commission because AWC filed two notices of claim against the City in the aggregate amount of
12 \$7,685,618.⁴ Ironically these notices of claim show that AWC does not have the necessary
13 infrastructure in the disputed area to serve the current customers.⁵
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15 II. THE PETITION IS NOT A REQUEST FOR A DELETION.

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17 In its Motion, AWC tries to cast this case as a James P. Paul Water Company v Arizona
18 Corporation Commission case ("Paul Case").⁶ However the Paul Case does not apply in this
19 instance, because this is not a CC&N deletion case. The court in the Paul Case specifically cites
20 Arizona Corporation Commission v. Arizona Water Co.,⁷ a case upon which the City relied in its
21 Petition, and the court notes that "Arizona Water Co. is distinguishable from the Paul Case
22 because the Arizona Water Co. case presented a challenge to the Commission's initial grant of a
23 certificate of convenience and necessity."⁸ The facts of the Arizona Water Co. case, not the Paul
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25 ² Petition page 6, lines 10-22.

26 ³ Id. at lines 23-25.

27 ⁴ Id. at Exhibits C&D.

28 ⁵ Id.

⁶ 137 Ariz. 426, 671 P.2d 404 (1983).

⁷ 111 Ariz. 74, 523 P.2d 505 (1974)

⁸ James P. Paul 137 Ariz. at 431, 671 P.2d at 408.

1 Case are exactly the facts in this case, where the Commission made an error in the initial grant of
2 the CC&N to AWC. The Commission should follow the Arizona Water Co. case, not the Paul
3 Case.

4 Following the reasoning of the Arizona Water Co. case, the City filed a request under
5 A.R.S. §40-252 requesting the Commission correct an error that occurred in the initial 1961 grant
6 of the CC&N to AWC in Decision No. U-1445. In that 1961 order, the Commission erroneously
7 assumed that no entity was providing water service in the area.⁹ However, the City was, in fact,
8 providing water service to that area decades before AWC received the CC&N in Decision No. U-
9 1445. In its Petition, the City provided several instances where it can prove that service was
10 established before the erroneous initial 1961 grant of the CC&N to AWC.¹⁰ The City plans to pre-
11 file conclusive testimony on this subject from its expert witness who will be available for cross-
12 examination at trial. The Paul Case does not in any way, shape or form apply to a scenario where
13 the Commission erroneously granted a CC&N over a municipality's existing service area and
14 customers. Notwithstanding AWC's attempt to couch this as a deletion case, it is not and the
15 Commission should deny the motion.
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18 AWC continually claims throughout its Motion that the City is violating Arizona law in
19 that the City has "poached" AWC's certificated area. As a political subdivision of the State of
20 Arizona, the City does not appreciate the specious and self-serving allegations that the City has
21 violated Arizona law. The statute that AWC references when it makes these baseless allegations
22 is A.R.S. § 9-516(A), which states:
23

24 It is declared as the public policy of the state that when adequate public utility
25 service under authority of law is being rendered in an area, within or without the
26 boundaries of a city or town, a competing service and installation shall not be
27 authorized, instituted, made or carried on by a city or town unless and until that
28 portion of the plant, system and business of the utility used and useful in rendering
such service in the area in which the city or town seeks to serve has been acquired.

⁹ Petition Exhibit A.

¹⁰ Petition Page 6 lines 11-18.

1 A.R.S. § 9-516(A) does not apply to the instant case for several reasons. The only public utility
2 service provided now, or ever in the disputed area is provided by the City. AWC does not now
3 serve nor has it ever, served customers in the disputed area. Thus this statute actually supports
4 the City's case. The City is serving water customers in the disputed area and that service should
5 continue uninterrupted. The City has shown and will continue to show that it provided service to
6 the disputed area long before a mistake was made in granting a CC&N over an area where
7 adequate public utility service was already being provided. Additionally, in relying on this
8 statute, AWC fails to acknowledge that the only plant and system in this area are owned by the
9 City of Globe. AWC's notice of claim is telling on this point. The June 3, 2014 Notice asks for
10 damages of \$2,008,600 and Exhibit D of that notice provided a detailed list of new infrastructure
11 AWC would need to provide service because it currently can not serve the City's customers.¹¹
12 AWC demanded that the City pay for this new infrastructure. AWC's allegations about the City
13 being in violation of Arizona law can only be sustained when the facts that are central to this
14 matter are ignored. AWC was mistakenly granted a CC&N in 1961 and currently has no ability
15 to serve customers in the disputed area. The City has been serving in the area for at least ninety
16 years.
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19 AWC attempts to make a public interest argument as to why the Petition should be
20 dismissed but in doing so ignores all facts in this matter. AWC asserts that granting the Petition
21 would allow for duplicative service by the City thereby causing the costs of the duplicative
22 service to be borne by the public. This logic is impossible to follow based upon AWC's own
23 notice of claim, where it specifically asks the City to pay millions of dollars for infrastructure to
24 serve the disputed area as was discussed in greater detail above. To add insult to injury, any
25 amount that would be paid to AWC would be borne by the public.
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27 AWC goes on further to say if a party comes in decades after service was established
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¹¹ Petition exhibit d

1 attempting to provide competing service, it would render the Paul Case and A.R.S §9-516(A)
2 meaningless.¹² The City is in complete agreement with AWC on this point. The only party
3 trying to provide competing service here is AWC. Globe provided service decades before the
4 1961 CC&N was erroneously granted to AWC. Granting the Motion would clearly not be in the
5 public interest.

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8 III. THE PETITION IS NOT A COLLATERAL ATTACK

9 AWC alleges that the Petition is a collateral attack on the 1961 Decision. This could not be
10 further from the truth. AWC asserts the Petition is a collateral attack because AWC believes the
11 Petition is a question of sufficiency. AWC cites to Walker v. DeConcini, a case which will be
12 discussed in greater detail below, as its rationale for why the Petition is a collateral attack.¹³ The
13 Walker case was discussing an omission, not a mistake. The case goes on further to say that
14 when the Commission grants CC&Ns, it acts within the scope its authority.¹⁴ The 1961 Decision
15 contains a mistake that was outside the scope of the Commission's authority to grant. In Walker,
16 the court was addressing a private water company and a private land owner. That case did not
17 deal with a municipality lawfully providing water to its customers before the CC&N was granted.
18 In the 1961 Decision the Commission did not have the authority to grant a CC&N over a
19 municipality's existing service area.
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21 A mistake was made in granting a CC&N over the City's service area in 1961. A.R.S. § 40-
22 252 exists for exactly this type of situation. The Commission must be able to ensure that its
23 orders are as accurate and correct as possible. The ability of the Commission to rectify a mistake
24 in one of its orders, should be viewed as an important matter of public policy. The City has
25 shown in its Petition that the Commission made an error in the 1961 grant of the CC&N. The
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27 ¹² Motion at page 7 lines 1-4.

28 ¹³ 86 Ariz. 143, 148, 341 P.2d 933, 936 (1959)

¹⁴ Id.

1 Commission should deny the motion so that the Commission can address this prior mistake.

2 IV. THE CITY'S LACK OF NOTICE IS MATERIAL

3 In its Motion, AWC again cites to the Walker case but this time to prove that Globe's lack of
4 notice in the 1961 decision is immaterial. In it's Motion, AWC quotes Walker to assert there was
5 no requirement that notice be given to potential water customers of a CC&N hearing.¹⁵ The City
6 was not a potential water customer but was already providing water service, a critical distinction.
7 The Walker case involved a challenge of an initial CC&N because landowners in the CC&N area
8 did not receive notice.¹⁶ The CC&N in question was located in Pima County, south of the City of
9 Tucson. The Court detailed exactly what the Commission did to notice interested parties. "The
10 Commission . . . followed its own rules of procedure and sent notice, under the Commission's
11 normal practice, to the City of Tucson, the County of Pima, the attorneys of record, and a news
12 item to the Arizona Daily Star."¹⁷ Walker has now established that the Commission had rules of
13 procedure and normal practice to notify effected municipalities. As was shown in the Petition,
14 Globe did not receive notice of the proceeding.¹⁸

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17 V. THE PETITION DOES NOT VIOLATE THE DOCTRINE OF LACHES

18 AWC would lead the Commission to believe that the City was laying in wait for some untold
19 event to occur in order to file the Petition. This is just not the case. The only reason the City is in
20 front of the Commission at this time is because AWC filed two notices of claim against the City
21 for \$7,685, 618.

22 AWC's Motion asserts that the City knew about the issue years ago and failed to act.
23 AWC alleges that the City knew exactly where the CC&N boundaries where based upon various
24 letters that AWC contends shows a CC&N existed. There is no doubt the City knew AWC had a
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27 ¹⁵ Id.

¹⁶ Id.

¹⁷ Id. at 149, 937.

¹⁸ Petition Exhibit B.

1 CC&N but no one, including AWC, was exactly sure of the boundaries until AWC filed the first
2 notice of claim. If AWC's logic is followed, then AWC must have known that Globe was serving
3 in the CC&N when AWC sold land to Globe for a well site to serve the disputed area in the
4 1970s. If that was true, then AWC would be barred under A.R.S. § 12-821.01 from filing the
5 notices of claim against the City. That is not the case. As was discussed in the Petition, neither
6 AWC nor the City knew where the exact boundaries of the CC&N were. As was stated in the
7 Petition, Globe informed AWC of the northern disputed area at a December 5, 2013 meeting at
8 AWC's office.

9
10 The Walker case is also helpful on the matter of laches. In that case, the argument was
11 made that the CC&N issuance could not be attacked because it would be barred by laches.¹⁹ The
12 Court, citing an earlier case, held that "[c]ertificates of convenience and necessity can only be
13 acquired from the corporation commission by an affirmative showing that its issuance would best
14 subserve the public interest and not be by estoppel or laches."²⁰ The laches argument is just
15 another attempt by AWC to mislead and confuse the Commission.

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17 AWC makes other erroneous assertions which must be addressed. AWC contends that
18 correcting the mistake would be based upon speculation. This is completely false. The City, as
19 discussed above, intends to provide an expert witness to prove that the City was serving
20 customers in the disputed area before the issuance of the 1961 CC&N. Having an expert witness
21 testify and be cross-examined is in no way speculative. The City would have to assume that
22 AWC would also have experts present their side of the story. This baseless assertion is just meant
23 to confuse and mislead the Commission.

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25 AWC would lead the Commission to believe that correcting the mistake of the
26 Commission is not appropriate because AWC, the City and the customers have relied upon the

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28 ¹⁹ Walker at 153, 940.

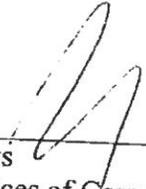
²⁰ Id.

1 CC&N for half a century. This argument has not merit whatsoever since AWC has never served
2 a customer in the disputed area. The City and its customers have relied upon the City to provide
3 public utility service for decades and the City still intends to do just that. No one in the disputed
4 area has relied upon AWC for anything.

5 VI. CONCLUSION

6 The City of Globe has filed a Petition in accordance with A.R.S. § 40-252 to correct an error
7 in the 1961 Decision granting AWC a CC&N in an area in and near the City where the City
8 already served. Globe attempted to settle the matter before bringing it to the Commission's
9 attention but was unsuccessful. The \$7,685,618 requested by AWC for infrastructure and lost
10 revenue is simply unsupportable. The City has shown in its Petition and will show at a hearing
11 that it was providing public utility service in the disputed area before the CC&N was granted.
12 The Petition was brought up at a Staff Meeting where all five Commissioners voted to send it to
13 hearing to adjudicate the issue. AWC's Motion to Dismiss is an attempt to thwart the will of the
14 Commission to hear this case. The City would respectfully request the Commission deny AWC's
15 Motion.
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20 RESPECTFULLY submitted this 9th day of February, 2015.
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