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BEFORE THE ARIZONA CORPORATION COMMISSION

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.	Docket No. W-01445A-14-0305 **MOTION TO DISMISS PETITION TO AMEND DECISION 33424 PURSUANT TO A.R.S. § 40-252**

Pursuant to Arizona Rule of Civil Procedure 12(b)(6),[1] Arizona Water Company hereby moves to dismiss the Petition to Amend Decision 33424 filed August 18, 2014 by the City of Globe ("City"). Although the Commission voted to reopen the docket, it referred the matter to the Hearing Division for further proceedings, and has not yet heard or reviewed any objections or opposition to the Petition. Now is the proper procedural time to test the City's allegations.

The basis of this motion is straightforward: even if all of the City's allegations are accepted as true, the City has not pled the necessary elements for the relief it seeks under controlling Arizona law, specifically James P. Paul Water Co. v. Arizona Corporation

[1] The Arizona Rules of Civil Procedure are applicable to this proceeding and govern whether it should be dismissed for petitioner failing to state a claim as a matter of law. A.A.C., R14-3-101(A). The Commission's Rules of Practice expressly provide for dismissal of proceedings where appropriate. A.A.C., R14-3-109(C).

Commission, 137 Ariz. 426, 671 P.2d 404 (1983). Because the City has not (and cannot) allege that (1) Arizona Water Company has been presented with a reasonable demand for service, and (2) Arizona Water Company has been unable or unwilling to supply such service, the City has no legal basis to move to delete the Company's Certificate of Convenience and Necessity ("CC&N"). Other remedies may exist to address some of the City's allegations, but deletion is not available to the City as a matter of law under A.R.S. § 40-252 under the circumstances of this case.

I. INTRODUCTION.

The City's Petition requests that the Commission "correct" Decision No. 33424 (the "Decision") to "remove" certain areas of Arizona Water Company's CC&N both within and without of the City's boundaries. Petition, at 1. The City alleges that the Commission erred *more than 53 years ago* in the initial grant of the CC&N to the Company by including areas in which the City contends it provided service as of September 20, 1961, the date of the Decision. Id. at 3-4, 6-8.

Without providing any evidentiary support for the boundaries of the service territory it seeks to take from Arizona Water Company (Exhibit E to the Petition), the City alleges that the Commission should summarily "remove" areas it describes as the Northern Area and the Southern Area from Arizona Water Company's CC&N. Id. at 3-4. The Petition describes the Southern Area as an area known as Arlington Heights, which is not within the City's corporate limits. Id. at 3. The Petition identifies the Northern Area as an area inside the City near where the City's wastewater treatment plant happens to be located. Id.

Globe currently provides water service to portions of the Northern Area and the Southern Area, which are within Arizona Water Company's CC&N, in violation of Arizona law. A.R.S. § 9-516(A) provides:

> It is declared as the public policy of the state that when adequate public utility service under authority of law is being rendered in an area, within or without the boundaries of a city or town, a competing service and installation shall not be authorized, instituted, made or carried on by a city or town unless

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and until that 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.

Nowhere in the Petition does the City allege that Arizona Water Company is unable or unwilling to serve the areas within the Company's CC&N at issue. Nor has the City taken steps required under A.R.S. § 9-516(A) to acquire Arizona Water Company's CC&N. Instead, the City has filed this Petition seeking to take portions of the Company's CC&N by asking the Commission to delete those portions, apparently so that the City can justify its illegal provision of municipal service within the Company's certificated area, and even to expand that illegal service. The City is not entitled to this relief on the basis of the allegations it has pled, and the Petition should be dismissed on this basis.

II. THE CITY'S PETITION SHOULD BE DISMISSED AS A MATTER OF LAW.

A. The City's Petition, Taken As True, Does Not State A Claim Under Arizona Law.

Rule 12(b)(6), Arizona Rules of Civil Procedure, provides for the dismissal of a petition if it fails "to state a claim upon which relief can be granted." Dismissal is appropriate when "as a matter of law ... plaintiffs would not be entitled to relief under any interpretation of the facts susceptible to proof." Rowland v. Kellogg Brown & Root, Inc., 210 Ariz. 530, 534, 115 P.3d 124, 128 (App. 2005)(citing Fidelity Sec. Life Ins. Co. v. State Dep't of Ins., 191 Ariz. 222, 224, 954 P.2d 580, 582 (1998). For the following reasons, even accepting the allegations as true, the City's Petition must be dismissed as a matter of law because it has failed to state any basis that entitles it to the relief it requests.

When ruling on a motion to dismiss, the Court (here, the Commission) may consider a document on which the complaint relies if the document is central to the petitioner's claim. Strategic Dev. & Constr., Inc. v. 7th Roosevelt Partners, LLC, 224 Ariz. 60, 64, 226 P.3d 1046, 1050 (App. 2010). The City attached several documents to the Petition and refers to them throughout the Petition as providing the basis for its claims. Although no foundation has been laid for any of these documents, they are accepted as true for purposes

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of this motion only.

B. The Basis Of The Relief The City Seeks Is Deletion Of Arizona Water Company's CC&N Under A.R.S. § 40-252, And It Has Not Pled (And Cannot Demonstrate) The Necessary Components Of A Deletion Case.

Although the City casts its Petition as a request to "correct" the Decision and "remove" a portion of Arizona Water Company's CC&N (Petition at 1), it is incontrovertible that the remedy the City seeks is deletion of two areas of the Company's CC&N. Since it seeks deletion, the City must allege the elements supporting a claim for deletion or its Petition cannot stand. The City has not pled the necessary components of a deletion case under Arizona law, and accordingly the Petition must be dismissed for failure to state a claim.

The applicable standard for deletion of a CC&N under Arizona law was set forth by the Arizona Supreme Court in James P. Paul Water Co. v. Arizona Corporation Commission, 137 Ariz. 426, 671 P.2d 404 (1983):

> Only upon a showing that a certificate holder, presented with a demand for service which is reasonable in light of projected need, has failed to supply such service at a reasonable cost to customers, can the Commission alter [the certificate holder's] certificate.

Id. at 429, 671 P.2d at 407 (emphasis supplied). The showing required under James P. Paul may be made only through evidence demonstrating that the certificate holder is either unable or unwilling to provide service at reasonable rates. Id. at 431, 671 P.3d at 409. A.R.S. § 40-252 provides an avenue for a potential "alteration" or "amendment" of Arizona Water Company's CC&N only if the City can demonstrate that Arizona Water Company has been "presented with a demand for service" and that the Company then "failed to supply such service." James P. Paul, supra. Further, as the Arizona Supreme Court made clear in James P. Paul, the public interest requires that a certificate holder (here, Arizona Water Company) "retain its certificate until it is unable or unwilling to provide the needed service at a reasonable rate." Id. at 430, 671 P.2d at 408.

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The Petition does not contain allegations sufficient to state a claim under Arizona law for deletion of Arizona Water Company's CC&N. The City only vaguely alleges that "AWC is not capable of providing adequate service to the area", Petition at 6, with no details or mention of the James P. Paul factors, and that "it has been brought to the City's attention that AWC is not providing adequate service to several areas of the City." Id. at 9-10. These allegations, if proven, would call at best for an order that the Company show cause why it is not providing adequate service; but they do not set forth a claim for inability or unwillingness to provide service, which can be the only basis for the relief the City seeks. Further, there are no allegations of which customer was allegedly denied service, whether Arizona Water Company was requested to, and refused to, provide service, or any of the other James P. Paul factors. The City's allegations are wholly speculative and do not state a claim, and the City's Petition should be dismissed. See Cullen v. Auto-Owners Ins. Co., 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008) ("Because Arizona courts evaluate a complaint's well-pled facts, mere conclusory statements are insufficient to state a claim upon which relief can be granted. . . ."); Aldabbagh v. Ariz. Dep't of Liquor Licenses & Control, 162 Ariz. 415, 417, 783 P.2d 1207, 1209 (App. 1989) ("[W]ell-pleaded material allegations of the complaint are taken as admitted, but conclusions of law or unwarranted deductions of fact are not." (citations omitted)).

The City, apparently recognizing that it must meet the James P. Paul test for deletion under A.R.S. § 40-252, attempts to argue in the Petition that James P. Paul is inapplicable. Petition at 5, n. 17. The City's assertion can be tested now as a matter of law, and should be rejected. James P. Paul is directly on point and controlling—it sets forth the standard for deletions of CC&N areas under A.R.S. § 40-252—the very statute the City is relying upon in its Petition. In James P. Paul, supra, the petitioner sought deletion under A.R.S. § 40-252 of a CC&N that had been issued seven years earlier. The Supreme Court specifically found that petitioner was seeking deletion of the certificate, and not challenging an initial grant, even though there were questions about the propriety of the initial grant. See 137

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Ariz. at 429-30 & n. 3, 671 P.2d at 407-08. The Supreme Court held that once a CC&N has been issued, the Commission may not delete it unless and until the criteria set forth by the Arizona Supreme Court and listed above have been satisfied (or, in this case, properly alleged as the basis for stating a claim).

Just as in James P. Paul, the City's attempt to delete Arizona Water Company's CC&N both within and without the City's borders must be measured under the Arizona Supreme Court's standards. It is facetious and disingenuous for the City to try to dress up its deletion case as a "correction" to a certificate issued 53 years ago. If such allegations could state a case for deletion, every such attempt would be labeled a request for "correction" of a CC&N. It is particularly improper for the City to collaterally attack this CC&N, which has stood unchallenged by the City or anyone else *for more than five decades*. For these reasons, before it may pursue deletion of Arizona Water Company's CC&N, the City must plead all of the necessary elements for deletion under James P. Paul. Because it has not done so, the Petition fails on its face to state a claim upon which relief may be granted and should be dismissed.

There are also sound public policy reasons for dismissing the Petition at this stage. The relief the City seeks is contrary to the public interest. A principal public interest protected by the Commission's CC&N process is that of preventing duplicative facilities, the costs of which would ultimately be borne by the consuming public. James P. Paul, 137 Ariz. at 429, 671 P.2d at 407. The relief the City seeks flies directly in the face of this public interest. The City appears to allege that since it has now poached into Arizona Water Company's certificated area in violation of under A.R.S. § 9-516(A), a failure to delete the Northern and Southern Areas from the Company's 53-year-old CC&N would result in duplicative costs to the public. To allow such a claim for relief would reward the City's unlawful conduct. It is the City's service that is duplicative and violates Arizona law, not Arizona Water Company's 53 year old CC&N.

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Moreover, if a party trying to provide competing service can come in decades after a CC&N is issued by the Commission and seek deletion of a portion of the CC&N on speculative grounds that a "mistake" occurred more than 53 years ago, then A.R.S. § 9-516(A) and James P. Paul would have no meaning. Permitting the City to pursue deletion would undermine the very interests a CC&N is meant to protect. Under James P. Paul, the Commission may only issue a certificate "upon a showing that the issuance to a particular applicant would serve the public interest. Once granted, the certificate confers upon its holder an exclusive right to provide the relevant service for as long as the grantee can provide adequate service at a reasonable rate." James P. Paul, 137 Ariz. at 429, 671 P.2d at 407. Allowing the Petition to proceed would "discourage[] service by companies that would supply service to sparsely populated areas today, at a marginal profit. . . ." James P. Paul, 137 Ariz. at 429, 671 P.2d at 407. It would also lead to uncertainty and encourage litigation. The City's Petition undermines the public interests on which Arizona's regulated monopoly system was founded. See James P. Paul, 137 Ariz. at 429-430, 671 P.2d at 407-408 (enumerating the public interests served by regulated monopoly system; "It is well established that Arizona's public policy respecting public service corporations, such as water companies, is one of regulated monopoly over free-wheeling competition.").

1. The Purported Expense of "Transferring" Customers and Infrastructure Is A Red Herring.

The Commission, after hearing testimony and receiving evidence, issued Arizona Water Company the subject CC&N areas in 1961. Since that time, Arizona Water Company has held the exclusive right to build infrastructure and serve customers in the certificated area.

The City's reliance on Arizona Corporation Commission v. Arizona Water Company, 111 Ariz. 74, 523 P.2d 505 (1974) (Petition at 5, n. 14), is misplaced. That case dealt with competing applications for an initial grant of a CC&N. Here, on the other hand, the City is seeking to delete the Company's CC&N over 50 years after it was granted, under

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circumstances where the City has surreptitiously extended its service into Arizona Water Company's CC&N in violation of Arizona law.

Using the proper standard the Arizona Supreme Court set forth in James P. Paul, the City's arguments concerning the comparative cost advantages of deleting portions of Arizona Water Company's CC&N are not relevant. It is only during the initial grant of a CC&N that the Commission compares the capabilities and qualifications of competing applicants. James P. Paul, 137 Ariz. at 430, 671 P.2d at 408. James P. Paul makes clear that a CC&N holder must have an opportunity to respond to a reasonable demand for service, and then fail to supply such service at reasonable costs, before the Commission may delete its CC&N. Id. at 429, 671 P.2d at 407. The City has not made any such allegations and its Petition should be dismissed for failing to do so.

2. The City's Arguments Concerning Allegedly Inadequate Service In An Area Not Within The Scope Of Its Petition Are Irrelevant.

In its Petition, the City alleges that Arizona Water Company's service is inadequate in unspecified areas that are not tied to any of the areas involved in this dispute. Petition at 9-10. These allegations are irrelevant, as the allegations would not support deletion under the James P. Paul factors. Complaints concerning adequacy of service are not properly addressed in A.R.S. § 40-252 deletion proceedings, especially with a CC&N that has stood unchallenged for 53 years.

C. The Petition Also Fails As A Matter Of Law Because It Is An Impermissible Collateral Attack Upon Arizona Water Company's 53-Year-Old CC&N.

As set forth in A.R.S. § 40-252, "[i]n all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive." Any attack on the sufficiency of a Commission order is a collateral attack and such attacks, "if of merit, are permitted by law to be raised only in direct proceedings of direct appeals from the Commission's rulings." Walker v. DeConcini, 86 Ariz. 143, 341 P.2d 933 (1959). The City has admitted that the Petition "goes to the initial grant of the CC&N." Id. at 5, n. 17. The

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stated basis of its attack on the initial grant is a purported mistake made by the Commission in its findings of fact. Petition at 6-8. Accordingly, the Petition's allegations that the Commission issued the certificate based on a mistake is an impermissible collateral attack upon the certificate and should be dismissed on this basis as well.

A.R.S. §§ 40-253 and 40-254 set forth the procedures and timelines for direct appeal of a ruling of the Commission. See A.R.S. § 40-253 (application for rehearing must be made within 20 days of entry of the order or decision); A.R.S. § 40-254 (challenge to Commission order or decision must be filed in superior court within 30 days after a rehearing is denied or granted). The Commission issued Decision No. 33424 in 1961. Following the issuance of the Decision, no party sought a rehearing of the Decision or challenged it in the courts.

Moreover, the premise of the City's "mistake" argument is fatally flawed. The City speculatively asserts, without any basis, that the Commission must not have known where the CC&N boundaries were at the time of the Decision. Petition at 6. However, the Decision itself contains the exact legal description of the certificated area. See Petition at Ex. B. Moreover, as the City recognizes, the Commission issued the Decision based upon testimony presented, both oral and documentary, in favor of and in opposition to Arizona Water Company's application. The evidence available to the Commission at the time, on an application that was actively opposed, was undoubtedly greater than that which is available now, 53 years later. The Commission found "from the testimony, files and records in the matter . . . that the applicant has complied with the statutes of Arizona and with the rules and regulations of the Commission for the issuance of a certificate of convenience and necessity." Id. The City has offered nothing more in its Petition about the factual basis upon which the Commission issued its Decision other than unsubstantiated assertions and unfounded speculation. See, e.g., Petition at 6, ("it *would stand to reason* that no one at the Commission knew where the exact CC&N boundaries were at the time of the Decision), 7 ("the caption itself *leads to the conclusion* that granting a CC&N over the area . . . was in

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error"), 8 ("It is *very likely* that AWC and the Commission assumed the legal description matched the commonly known description of Central Heights") (emphasis added). Even if the City were able to collaterally attack the Decision, its allegations are insufficient on their face to establish the level of mistake justifying the drastic relief it seeks.

D. Whether the City Received Notice Of The Decision 53 Years Ago Is Immaterial.

In 1961, when the Commission issued the CC&N to Arizona Water Company, "there [was] no requirement that notice of the application hearing be given to all landowners or potential water customers residing within the area covered by an original application for a certificate of convenience and necessity to operate a domestic water utility." Walker v. DeConcini, 86 Ariz. 143, 148, 341 P.2d 933, 936 (1959); see also Ariz. Corp. Comm'n v. Tucson Ins. & Bonding Agency, 3 Ariz. App. 458, 415 P.2d 472 (1966) (holding that lack of notice of an application to landowners within certificated area "does not affect its validity, as the commission was not required to give such notice, there being no constitutional or statutory provision requiring same.").

The City twice asserts it did not receive formal notice of the Decision issued by the Commission in 1961, apparently based upon a copy of the Decision it received from the Utilities Division Staff containing a handwritten list. Petition at 2, 7. In so pleading, the City suggests, without expressly stating, that the handwriting somehow undermines the validity of the Decision, even if the handwritten list constitutes a "service list," which is unknown. Moreover, the City points to no statute, code provision, or rule that required the Commission in 1961 to provide the City with formal notice of the Decision, or even of the hearing on Arizona Water Company's application for a certificate. Nor does the City allege that it did not have actual notice of Arizona Water Company's application or of the Commission's Decision at that time. Given the passage of time, it is unlikely that there are any witnesses that could testify with adequate foundation as to the City's actual knowledge of the application, hearing or Decision in 1961. Indeed, the City's allegations and exhibits

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demonstrate that it knew or could have known of Arizona Water Company's CC&N boundaries at all times. See, e.g., Petition, Exhibit D at 2 (citing December 5, 2000 letter from the City Manager evidencing the City's knowledge of Arizona Water Company's CC&N and its boundaries). Regardless, even if the City could establish that it had no formal or actual notice of the Decision, Arizona Water Company's application for a certificate, or a hearing on that application, lack of notice does not affect the validity of the Decision under Walker v. DeConcini and Ariz. Corp. Comm'n v. Tucson Ins. & Bonding Agency, supra.

E. Even If The City Stated A Claim That Would Support Deletion, Which It Has Not, The Petition Is Barred Under The Doctrine Of Laches.

Even if the City stated a valid claim for deletion, which it has not, or even if it were able to attack the Decision on the grounds of mistake, which it cannot, the Petition should be dismissed under the doctrine of laches. Laches is a form of estoppel that applies when the party against whom the late-filed claim is asserted "either is injured (by the mere lapse of time) or changes his position in reliance on the other party's inaction." Jerger v. Rubin, 106 Ariz. 114, 117, 471 P.2d 726, 729 (1970) (citations omitted). In addition, the "delay must be unreasonable under the circumstances, including the party's knowledge of his or her right, and it must be shown that any change in the circumstances caused by the delay has resulted in prejudice to the other party sufficient to justify denial of relief." Flynn v. Rogers, 172 Ariz. 62, 66, 834 P.2d 148, 152 (1992). In this instance, both the City's unreasonable delay and the prejudice to Arizona Water Company are apparent from the face of the Petition.

First, Arizona Water Company is prejudiced because over 53 years have passed since the Commission issued the Decision. The City seeks to delete a portion of the CC&N based upon speculation. None of the pertinent witnesses are available to provide evidence concerning these speculative allegations—none of the commissioners, none of the parties' counsel, none of the executives at Arizona Water Company, none of the City's leaders. There does not appear to be a single witness available at this time who could testify as to the

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quality of evidence presented and how the Commission weighed that evidence. The City is asking the Commission to revisit the entire decision-making process that occurred in 1961 and to come to a different conclusion, based upon incomplete historic records and in the absence of the witness testimony and knowledge that was available to the Commission at the time it originally rendered its decision.

Second, the City is asking the Commission to delete a portion of the CC&N that Arizona Water Company, its customers, and the City itself have relied upon for over half a century. The City previously has represented to Arizona Water Company and others that it provides no water service to customers in the certificated area. See Petition, Exhibit D at 2. For instance, the allegations in the Petition show that in 2000, the City Manager notified a customer that the City could not provide service for certain parcels because they fell within Arizona Water Company's CC&N. In 2003, the City acknowledged in an Emergency Connections Agreement that it did not provide water service within Arizona Water Company's CC&N. In 2010, the City Manager requested permission from Arizona Water Company to serve an area within the Company's CC&N, which the Company declined because it stood ready, willing and able to provide service to that area. See id. at 2-3. The Petition's allegations establish that both Arizona Water Company and the City have undertaken actions and entered into agreements based on the unquestioned validity of the CC&N the Commission granted to Arizona Water Company 53 years ago.

Finally, as made clear by the City's allegations and the exhibits attached to the Petition, the City has been aware of and acknowledged Arizona Water Company's CC&N for decades. See Petition at 3 (allegations regarding business dealings between Arizona Water Company and the City since the 1970s). If the City truly believed that the Commission had granted the CC&N in error, then its unexcused 53-year delay in challenging its validity is patently unreasonable. Under these circumstances, the Petition is barred by laches and should be dismissed.

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III. CONCLUSION.

Although the docket has been reopened for purposes of allowing the Hearing Division to hold appropriate proceedings regarding the Petition, that is not a determination on the merits. The merits of the allegations of the Petition have not been considered until now. For the foregoing reasons, the Commission should dismiss the City's Petition with prejudice for failure to state a claim under Rule 12(b)(6) of the Arizona Rules of Civil Procedure and the Commission's Rules of Practice.

RESPECTFULLY SUBMITTED this 16th day of January, 2015.

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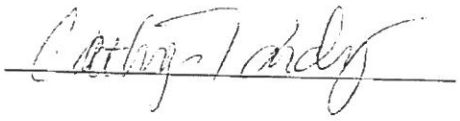

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