BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

TOM FORESE – Chairman
BOB BURNS
DOUG LITTLE
ANDY TOBIN
BOYD DUNN

IN THE MATTER OF THE APPLICATION OF ARIZONA WATER COMPANY TO EXTEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY IN CASA GRANDE, PINAL COUNTY, ARIZONA.	DOCKET NO. W-01445A-03-0559 **APPLICATION FOR REHEARING**

Pursuant to A.R.S. § 40-253 and A.A.C. R14-3-111, Arizona Water Company ("Arizona Water" or "Company") hereby submits this Application for Rehearing ("Application") in the above-captioned docket.

I. INTRODUCTION

Arizona Water fully intends to pursue settlement conversations with Cornman Tweedy 560, L.L.C. ("Cornman Tweedy") in this matter, as the Commission directed at its April 5, 2017 Open Meeting. However, the Company is in a procedural quandary. On February 7, 2017, after extensive participation by the parties and deliberation by the Commission, the Commission voted to approve the December 22, 2016 Recommended Opinion and Order ("ROO") in this docket, and to deny Cornman Tweedy's request to delete the portion of Arizona Water's certificate of convenience and necessity ("CC&N") that includes property owned by Cornman Tweedy. Despite the unambiguous legal requirement that the Commission "make and file an order containing its [February] decision," *see* A.R.S. § 40-257(B), the Commission failed to do so.

Instead, almost two months later, on March 29, 2017 – just seven days before the April 5 Open Meeting—the Commission filed the April Open Meeting agenda in

this docket, listing reconsideration of that February 7 decision as an item for discussion. Specifically, Item 20 read:

> Commission discussion and possible vote regarding suspension and/or reconsideration of the Commission's previous vote on Arizona Water Company's Application to Extend its Certificate of Convenience and Necessity in Casa Grande, Pinal County.

At the Open Meeting, Commissioner Tobin explained that he had "concerns" and "reservations" about his February vote and that "this idea of the CC&N needs a deeper dive." *See* April 5 Open Meeting Transcript (Tr.) at 4:2-5. With little discussion afforded the parties[1], the Commission then voted to: (1) reopen and reconsider its February decision in this docket; (2) order the parties to participate in settlement conversations to try to resolve the dispute, reporting back in 60 days; and (3) postpone the vote on reconsideration until the end of that 60 day period, perhaps after publishing a signed order memorializing its February 7, 2017 decision "if there is a determination that we have [to have] a signed order." *See* Tr. at 4: 8-14; 13:1-9; 15: 20-23.[2]

Arizona Water will pursue settlement conversations with Cornman Tweedy in good faith as the Commission has ordered and as the Company has done on several occasions during the more than 13 year duration of the proceedings in this docket. Nevertheless, as explained in detail below, the Commission's April 2017 determination to rescind its February decision, order the parties to attempt settlement as if the February decision had never happened, and formally rule on the reconsideration 60 days later was both procedurally and substantively deficient as a matter of law. Arizona Water is therefore compelled to file this Application under A.R.S. § 40- 253 to preserve its right to appeal the Commission's action.

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[1] The parties were allowed only to address new matters, "since this issue has already been heard and everyone had a chance to speak. . . [it is] in the hands of the Commissioners . . . to be discussed." Tr. at 5:19-24.

[2] While the Company believes, after reviewing the transcript, that this is a fair characterization of the Commission's April decision, the precise outcome of the discussion was not entirely clear.

II. The April 2017 Decision Failed to Meet the Procedural and Substantive Requirements for Rescission, Reconsideration or Alteration of a Prior Commission Decision.

At its April 5, 2017 Open Meeting, the Commission voted to reopen and reconsider its February 2017 decision in this docket. The impetus for reconsidering the February decision was not new evidence related to the CC&N dispute, but the reservations of a single Commissioner who had voted in the majority and believed that "the issue of the CC&N needs a deeper dive." Such a decision, made without following the process provided in Title 40, Article 3 of the Arizona Revised Statutes, was both procedurally and substantively improper.

A. The Commission's April 2017 Decision is Procedurally Deficient.

The Commission should reverse its April 2017 decision because of several procedural and substantive deficiencies. The Commission's April determination clearly rescinds, alters, or amends its February decision to uphold the ROO and preserve Arizona Water's CC&N. In such a case, the rules prescribed by A.R.S. § 40-252 and its sister statutes apply and are binding on the Commission. See *Tonto Creek Homeowners Ass'n v. Arizona Corporation Commission,* 177 Ariz. 49, 56, 864 P.2d 1081, 1088-89 (1993) ("Before the Commission may change an order or decision made by it, the Commission is required by statute to provide the affected corporation with notice and an opportunity to be heard."). The Commission is legally bound to comply with the procedural rules the legislature prescribes, and any decision rendered by the Commission which fails to comply with those legislative requirements is void for lack of jurisdiction. *See id.*, 177 Ariz. 49, 56-57, 864 P.2d 1081, 1088-89.

The legislature's prescribed process for A.R.S. § 40-252 rehearings requires the Commission to memorialize in writing its February 2017 decision and serve it on the Company. *See* A.R.S. § 40-247(B) and A.R.S. § 40-245(B). Although there is no definitive time clock on the Commission for reducing its decisions to writing, the

statutory scheme presented in Title 40 clearly contemplates that the Commission will issue a written order prior to determining whether to rescind or alter its original decision. A.R.S. § 40-245 requires that "every order, authorization or certificate approved by the Commission … shall be in writing and entered on the record of the Commission." Similarly, A.R.S. § 40-247, which governs the Commission's rehearing process, plainly states that "after conclusion of the hearing, the Commission shall make and file an order containing its decision," and "a copy of the order, certified under seal of the Commission, shall be served upon" the affected party or its attorney. The Commission's written order becomes operative twenty days after it has been served, and continues in full force and effect "until changed or abrogated by the Commission." *See* A.R.S. § 40-247. The "until changed or abrogated by the Commission" language used in A.R.S. § 40-247 relates to the Commission's subsequent ability to "rescind, alter, or amend any order or decision made by it" under § 40-252. In other words, the Commission cannot invoke the A.R.S. § 40-252 process until it has published its original decision and served it on the parties.

This rule makes sense as a practical matter. The Commission speaks through its orders, and only when the order is reduced to writing can there be an objective and transparent means of understanding what the Commission requires of those it regulates. Similarly, the Commission cannot effectively communicate what it wants to amend in an original decision without pointing to the written provisions of the order that it seeks to change. The fact that the Commission's practice for decades has been to publish orders reflecting the decisions it makes on the dais shortly after they are rendered underscores this interpretation. *See, e.g., Marlar v. State*, 136 Ariz. 404, 666 P.2d 504 (App. 1983) (an agency's past practice under a statute is relevant to the statute's interpretation). To this point, the Company notes that every item on the Commission's February 2017 open meeting agenda has resulted in a signed and docketed order, except for the Commission's decision on this matter. Because the Commission's April 2017

decision to reconsider this matter preceded the service of a written order reflecting the February decision, it is procedurally deficient.

Moreover, the Commission's action violates Arizona Water's due process rights. The Commission's powers may be broad, but they are not without limit. The Commission cannot rescind or modify a previous order without giving the affected corporation notice and the opportunity to be heard "as upon a complaint" – language that invokes the procedural requirements specified in A.R.S. §§ 40-246 through 40-249. *See* A.R.S. §40-252. That process requires the Commission to give the affected corporation ten days of actual notice prior to a hearing and the opportunity to present evidence at a hearing (either in person or through an attorney). *See* A.R.S. §§40-246 to 249.

In this case, the Commission did not serve Arizona Water with notice that the February decision would be reconsidered ten days in advance. Rather, a week before the April Open Meeting, it filed an open meeting agenda that listed the suspension or reconsideration of the February decision as an item for discussion and possible vote. That agenda gave Arizona Water no indication as to why the item was being reconsidered and left the Company wholly in the dark as to how to prepare to address the Commission's apparent concerns. The first time the Commission articulated its reasoning for seeking to stay or reconsider the matter was the April 5 Open Meeting, at which the Commission offered the parties little occasion to speak and certainly did not afford the Company any opportunity to present evidence relevant to the Commission's deliberations. Such a process falls far below what is required by law. *See, e.g., Tonto Creek Homeowners Association*, 864 P.2d at 1089, 177 Ariz. at 57 ("Absent the most extenuating circumstances, obtaining actual notice of charges while seated in the very hearing convened to decide the issues would not afford the parties a meaningful opportunity to be heard.").

Arizona Water therefore respectfully requests that the Commission enter a written order reflecting its February decision. If the Commission then chooses to

reopen and reconsider the matter, the Company requests that it be given the notice and opportunity to be heard required by law.

B. The Commission's April Decision to Reconsider its February Ruling Regarding Arizona Water's CC&N is Substantively Deficient.

Apart from the procedural issues, the Commission abused its discretion in the April Open Meeting by failing to meet the substantive standard governing the rescission, modification, and amendment of prior CC&N decisions under A.R.S. §40-252. Arizona courts have made clear that "the exercise of the Commission's power [to rescind, alter, or amend a certificate of convenience and necessity once it has been granted] requires showing due cause for such action – an affirmative showing that the public interest would thereby be benefited." *Ariz. Corp. Comm. v. Tucson Ins. and Bonding Agency*, 3 Ariz. App. 458, 463, 415 P.2d 472, 477 (Ct. App. 1966). To preserve the integrity of the Commission and out of respect for the need to act in reliance on the Commission's decisions, the decision to reopen or reconsider *any* matter must be made judiciously and only under appropriate circumstances, not simply to effect a future change in regulatory policy. *Cf. McCAllister v. United States*, 3 Cl.Ct. 394 (1983) (holding that an agency's rescission of a prior order entered because the agency "decided to change its official mind" was an "ad hoc decision that did not "deserve judicial deference.")

When it comes to the Commission's CC&N decisions specifically, the "public interest" is dictated by law. As the Supreme Court held in the controlling case of *James P. Paul Water Company v. Arizona Corporation Commission*, 137 Ariz. 426, 671 P.2d 429 (1983), "where a public service corporation holds a certificate for a given area, the public interest requires that the corporation be allowed to retain its certificate until it is unable or unwilling to provide needed service at a reasonable rate." *Id.* at 137Ariz. at, 430, 671 P.2d at 408. The Court's decision in *Paul* was founded on fundamental precepts of sound regulatory policy. In the regulated

monopoly scheme, a public service corporation like Arizona Water must comply with all Commission decisions, orders and regulations that are promulgated in the public interest. *See James P. Paul Water*, 137 Ariz. at 430, 671 P.2d at 408. A regulatory regime that requires compliance with Commission decisions but that deprives a corporation from the benefit of being able to rely on the reasonable finality of those same decisions would render regulated entities functionally paralyzed, unable to provide efficient, cost-effective public service. *See id.*

The Commission's February decision affirmed that it had previously found Arizona Water's CC&N for the Cornman Tweedy property to be unconditional, a holding that has important legal consequences. The legal standard governing a forceful deletion of a CC&N on a § 40-252 proceeding is clear: "Once granted, the certificate confers upon its holder the exclusive right to provide the relevant service for as long as the grantee can provide adequate service at reasonable rates." *Id.* at 137 Ariz. 426, 429, 671 P.2d 404, 407. There is not now nor has there ever been evidence that Arizona Water is unwilling or unable to provide service to the Cornman Tweedy property. It is for this reason that the Administrative Law Judge recommended, and the Commission approved in February, an order preserving Arizona Water's CC&N against Cornman Tweedy's attack.

Importantly, the proceeding underlying the vote in February was also initiated under A.R.S. § 40-252. *See* Decision No. 69722, COL ¶¶ 4-5. At that time, the Commission was called upon to determine whether it should delete Cornman Tweedy's property from Arizona Water's CC&N, which had already been found unconditional. *See* Decision No. 69722 at 20:15 – 21:4. As a matter of law, *James P. Paul* controlled that decision: "Only upon a showing that a certificate holder, presented with a demand for service which is reasonable in light of a projected need, has failed to supply such service at a reasonable cost to customers, can the Commission alter its certificate. Only then would it be in the public interest to do so." *James P. Paul*, 137 Ariz. at 429, 671 P.2d at 407. Cornman Tweedy's alleged present

lack of need for service, desire to take service from Arizona Water, or preference for integrated water and wastewater service was then and remains irrelevant as a matter of law. Indeed, any decision in February other than to uphold the ROO would have been an abuse of the Commission's discretion.

Nothing has changed since the Commission's February 7, 2017 decision that would justify the Commission reopening the matter for the purpose of "diving deeper" into the issuance of the CC&N. There is no new evidence that Arizona Water is unwilling or unable to provide adequate service at reasonable rates, and any concern the Commission has about the lack of present development on the property or the Commission's past practice in granting CC&N extensions is not adequate justification to alter the Company's CC&N on the record of this case.

The grant of a CC&N bestows a property right on the certificate holder, and altering that order to do anything other than address a change in circumstance or correct an error is constitutionally impermissible without payment of just compensation. *See, e.g., Application of Trico Elec. Co-op., Inc.*, 92 Ariz. 373, 381-82 (1962) (the territorial right conveyed by a CC&N "is a vested property right, protected by Article 2, Section 17, of the Arizona Constitution."). It would be a misuse of the Commission's discretion to use its authority to reopen and modify a decision solely because the Commission has reservations about a pre-established policy. *See, e.g., Chapman v. El Paso Natural Gas Co.*, 204 F.2d 46, 53-54 (U.S. App. D.C. 1953) ("It may well be appropriate for a licensing authority to reopen proceedings of this kind after final determination has been made in order to correct clerical errors or to modify rulings on the basis of newly discovered or supervening facts, but a decision may not be repudiated for the sole purpose of applying some new change in administrative policy."); *Calvert County Planning Commission v. Howlin Realty Manangment, Inc.*, 772 A.2d 1209, 1223 (Md. App. 2001) ("A 'mere change of mind' on the part of the agency" is not permissible grounds to reconsider a prior decision.)

There is little doubt that the Commission has continuing regulatory authority over those it regulates, and there may be circumstances when the public interest requires reopening a decision. However, to reopen a decision for the single purpose of changing policy or encouraging settlement talks between the parties as if the Commission had never ruled on the matter would result in tremendous uncertainty for all of the utilities under this Commission's jurisdiction, including Arizona Water, which must act in reliance on Commission decisions. Any such decision on the facts of this CC&N deletion matter is an abuse of the Commission's discretion and erroneous as a matter of law.

III. Conclusion

As previously discussed, Arizona Water fully intends to engage in settlement conversations with Cornman Tweedy in good faith to try to resolve and settle this dispute and will do so, as the Commission has ordered. Nevertheless, the Company has significant concerns about the manner in which the Commission chose to prompt those settlement conversations – ignoring its legal obligation to publish an order reflecting its February decision and deciding to reconsider that decision without following the process for reconsideration detailed in A.R.S. § 40-252. Arizona Water therefore urges the Commission to reverse its April 2017 decision and follow the process and standards for reconsideration of Arizona Water's CC&N required by law.

RESPECTFULLY SUBMITTED this 24th day of April, 2017.

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