



OPEN MEETING AGENDA ITEM
BEFORE THE ARIZONA CORPORATION C

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Chairman
- 4 WILLIAM A. MUNDELL
Commissioner
- 5 MARC SPITZER
Commissioner
- 6 MIKE GLEASON
Commissioner
- 7 KRISTIN K. MAYES
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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

**ARIZONA WATER COMPANY'S
 JOINDER IN AND RESPONSE TO
 11/22/05 STAFF'S LEGAL
 MEMORANDUM**

Arizona Water Company joins in the position expressed by the Staff in its Memorandum filed on November 22, 2005 pursuant to the September 28, 2005 Procedural Order. Fundamental due process requires that Arizona Water Company be afforded notice and an opportunity to be heard prior to any Arizona Corporation Commission (the "Commission") action in response to an alleged failure to comply with conditions subsequent contained in the Certificate of Convenience and Necessity ("CCN"). In addition, a number of other reasons also support the Staff's position that the relevant CCN did not automatically become null and void based on the conditions subsequent not yet being fully completed.

I. Fundamental Due Process Requires that Arizona Water Company Receive Notice and an Opportunity to Be Heard Before Its CCN Rights Are Declared Null and Void.

The Staff has correctly noted that the Commission's grant of a CCN to a utility creates a vested property right similar to a contract between the utility and the State, relying

1 upon Application of Trico Electric Cooperative, Inc., 92 Ariz. 373, 380-81, 377 P.2d 309,
2 315 (1962). As the Supreme Court stated in Trico,

3
4 By the issuance of a certificate of convenience and necessity to a public service
5 corporation the State in effect contracts that if the certificate holder will make
6 adequate investment and render competent and adequate service, he may have the
7 privilege of a monopoly as against any other private utility. Trico's right to maintain
8 its distribution lines in the area of its certificate, and to make extensions therefrom to
9 customers resulting from the development of the area served by it, is a vested
10 property right, protected by Article 2, Section 17, of the Arizona Constitution. . . .

11 Quite aside from statutory requirements the rescission or revocation of all or a
12 portion of a certificate of convenience and necessity requires strict compliance with
13 the procedural requisites of notice and hearing.

14 92 Ariz. at 380-81, 377 P.2d at 315 (citation omitted; emphasis added). As further held by
15 the Supreme Court, the Commission may only rescind, alter or amend the grant of a CCN
16 "upon notice to [the] public service corporation and after opportunity to be heard." Arizona
17 Corporation Commission v. Arizona Water Company, 111 Ariz. 74, 76, 523 P.2d 505, 507
18 (1974). Thus, the Arizona and federal constitutions protect Arizona Water Company's right
19 to notice and an opportunity to be heard before rescission or alteration of its vested CCN
20 rights, and prohibit any automatic revocation of Arizona Water Company's CCN in the
21 manner advocated by Cornman Tweedy, LLC ("Cornman Tweedy").

22 Moreover, rules of statutory and contract interpretation also support Arizona Water
23 Company's right to notice and an opportunity to be heard before any "automatic" rescission.
24 Courts regularly avoid interpreting contractual and statutory provisions so as to create a
25 forfeiture. See Schaeffer v. Chapman, 176 Ariz. 326, 329, 861 P.2d 611, 614 (1993); Hale
26 v. Flores, 19 Ariz. App. 236, 237, 506 P.2d 276, 277 (App. 1973). Thus, "forfeiture is
27 generally abhorred by the law. . . . Every reasonable presumption is against a forfeiture."
28 Yank v. Juhrend, 151 Ariz. 587, 590, 729 P.2d 941, 944 (App. 1986). When a document
"providing for a forfeiture is capable of two constructions, that against forfeiture should be
followed." Eisele v. Kowal, 11 Ariz. App. 468, 471, 465 P.2d 605, 608 (App. 1970).

...

1 Cornman Tweedy argues for an interpretation of the CCN that would result in an
2 automatic forfeiture of Arizona Water Company's constitutionally-protected CCN rights,
3 due to the failure of a condition subsequent which fell within Cornman Tweedy's (not
4 Arizona Water Company's) control. Such a result, without providing Arizona Water
5 Company with notice and an opportunity to be heard, does not comply with due process and
6 cannot be the law.

7
8 **II. Cornman Tweedy Should Not Be Allowed to Intentionally Block and Frustrate**
9 **the Occurrence of the Conditions Subsequent and Thereby Profit From Its**
10 **Actions.**

11 In addition to the due process concerns discussed above, Cornman Tweedy and its
12 affiliated company, Picacho Water Company, should not be allowed to profit from an
13 alleged failure to comply with a condition subsequent when, as here, Cornman Tweedy
14 purposefully frustrated Arizona Water Company's compliance with the condition. As noted
15 above, the Arizona Supreme Court has characterized a utility CCN issued by the
16 Commission as a contract between the State and the certificate holder, resulting in a vested
17 property right for the contract holder, and contract principles clearly have relevance to this
18 matter. See Application of Trico Electric Cooperative, Inc., 92 Ariz. 373, 380-81, 377 P.2d
19 309, 315 (1962). When Corman Tweedy's predecessor in interest, Core Group Consultants
20 Ltd., requested service from Arizona Water Company in 2003, and the CCN was granted,
21 Core Group Consultants, Ltd. became a party to the contractual relationship between
22 Arizona Water Company and the State, or at the very least a third party beneficiary of that
23 relationship, and had a duty to act in good faith to complete all necessary steps for Arizona
24 Water Company's provision of water service to the property. Cornman Tweedy stepped
25 into the shoes of Core Group Consultants Ltd. See, e.g., K.B. v. State Farm Fire & Cas.
26 Co., 189 Ariz. 263, 267, 941 P.2d 1288, 1292 (App. 1997)("An assignee steps into the shoes
27 of her assignor"); Stephens v. Textron, Inc., 127 Ariz. 227, 230, 619 P.2d 736, 739
28 (1980)("As an assignee, appellant can stand in no better position than the assignor"); Pima

...

1 Farms Co. v. Fowler, 32 Ariz. 331, 338-39, 258 P. 256, 259 (1927)(purchaser of land took
2 the land burdened by related contracts, including contract providing irrigation water).

3 Arizona law has long recognized that “A party to a contract cannot prevent the
4 fulfillment of a condition precedent [or subsequent] and later rely on the failure of the
5 condition to argue that no contract exists.” Johnson International, Inc. v. City of Phoenix,
6 192 Ariz. 466, 471, 967 P.2d 607, 612 (App. 1998); see also Security National Life Ins. Co.
7 v. Pre-Need Camelback Plan, Inc., 19 Ariz. App. 580, 582, 509 P.2d 652, 654 (1973)(“if
8 one prevents fulfillment of a condition precedent one cannot thereafter rely on such failure
9 of condition to defeat the agreement”); Williams v. Nall, 4 Ariz. App. 416, 420, 420 P.2d
10 988, 992 (1966)(“one who prevents performance of a contract may not complain of such
11 nonperformance”); Siegal v. Haver, 4 Ariz. App. 119, 122, 417 P.2d 928, 931 (1966)(“One
12 waives the performance of a condition and cannot rely on it to prevent recovery where its
13 non-performance is caused or consented to by him”).

14 The Restatement (Second) of Contracts, consistent with these Arizona cases, makes
15 clear that in circumstances where the actor’s performance is rendered impracticable or
16 where it is frustrated by another party, the conditions are discharged. See Restatement
17 (Second) of Contracts §§ 261, 265 (1981). Thus, separate and apart from the due process
18 considerations prohibiting automatic operation of the “null and void” provision in Decision
19 No. 66893, the law provides that the conditions subsequent at issue in this case are
20 discharged altogether under the circumstances presented. (“Where, after a contract is made,
21 a party’s performance is made impracticable without his fault by the occurrence of an event
22 the non-occurrence of which was a basic assumption on which the contract was made, his
23 duty to render that performance is discharged, unless the language or the circumstances
24 indicate the contrary.” Id., §261.) Fundamental principles of equity compel this result as
25 well.

26 Arizona Water Company’s performance of the post-hearing conditions contained in
27 its CCN, including filing a copy of the developer’s assured water supply documentation and
28

1 main extension agreements, was necessarily conditioned upon the developers good faith
2 performance of the developer's obligations to cooperate with Arizona Water Company to
3 fulfill both conditions. Arizona Water Company obviously could not file the required items
4 within 365 days of the Commission's decision if the new developer, here Cornman Tweedy
5 and Robson Communities as its parent company, refused to cooperate with Arizona Water
6 Company. After it purchased the land from the original developer who requested service
7 from Arizona Water Company, Cornman Tweedy stepped into the developer's shoes and
8 should not be allowed to manufacture the forfeiture of Arizona Water Company's CCN for
9 the benefit of its affiliated company, Picacho Water Company, by blocking Arizona Water
10 Company's ability to fulfill the conditions subsequent.

11
12 **III. Equity Prevents Cornman Tweedy from Causing Forfeiture of Arizona Water
13 Company's CCN Rights by Preventing Occurrence of the Conditions.**

14 The doctrine of "unclean hands" prevents a party who has acted in bad faith from
15 seeking the assistance of a court or other governmental entity to reap the benefits of his or
16 her actions:

17 The maxim 'He who comes into equity must come with clean hands' means
18 'whenever a party, who, as actor, seeks to set the judicial machinery in motion and
19 obtain some remedy, has violated conscience, or good faith, or other equitable
20 principle, in his prior conduct, then the doors of the court will be shut against him in
21 limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to
22 award him any remedy.'

23 Dawson v. McNaney, 71 Ariz. 79, 86, 223 P.2d 907, 911 (1950). In other words, "Equity
24 will not grant relief to one who has been wanting in good faith or good conscience or in fair
25 dealing." Hamblin v. Woolley, 64 Ariz. 152, 161, 167 P.2d 100, 105-06 (1946).

26 Here, the family of Robson entities—including Robson Communities, EJ Ranch,
27 Picacho Water Company and Cornman Tweedy--had within their power the ability to block
28 Arizona Water Company's performance of the conditions subsequent in the CCN. Cornman
Tweedy and its related entities did so in bad faith, ensuring that Arizona Water Company
would not be able file the required documentation, and now seek to profit from that bad

1 faith conduct by having the CCN declared “null and void” and awarded to Picacho Water
2 Company. The equitable doctrine of unclean hands prevents Cornman Tweedy from
3 benefiting from such conduct and from its own actions in preventing occurrence of the
4 conditions subsequent.

5 In addition, Cornman Tweedy’s bad faith would also harm Harvard Investments and
6 other property owners in the CCN, even though those property owners have acted in good
7 faith and cooperated in Arizona Water Company’s efforts to comply with the CCN
8 conditions subsequent. Also, Arizona Water Company already has undertaken efforts and
9 incurred costs to plan for and obtain additional water supplies to serve the CCN, including
10 costs to obtain a Central Arizona Project water treatment site and planning for related
11 infrastructure needed to provide water service to this area.

12
13 **IV. The Commission Has Previously Granted Extensions Related to Such**
14 **Conditions Subsequent and Even Disregarded the Failure of Such Conditions**
15 **Related to Other CCNs.**

16 The Commission has also regularly granted extensions of conditions subsequent
17 contained in its decisions, and has extended them beyond the compliance dates. For
18 example, in Decision No. 62754 dated July 25, 2000, the Commission granted Arizona
19 Water Company a CCN to provide water service to a Robson Communities development in
20 the Oracle Junction area “conditioned upon Arizona Water Company filing a copy of the
21 SaddleBrooke Ranch developer’s Certificate of Assured Water Supply within five (5) years
22 from the effective date of this Decision.” Docket No. W-01445A-00-0017, Decision No.
23 62754 at 4-5. The developer experienced various delays in planning and, on May 6, 2005,
24 Arizona Water Company filed a request for additional time, which the Commission granted
25 in a procedural order dated November 25, 2005, well after the five (5) year period had run.

26 Similarly, in Decision No. 64406 dated January 31, 2002, the Commission granted
27 Voyager Water Company an CCN subject to filing certain materials including a Certificate
28 of Assured Water Supply within 365 days or the CCN would be “deemed denied.” Docket
No. W-02104A-01-0742, Decision No. 64406 at 5. On November 18, 2002, Voyager

1 requested an extension of time, which the Commission granted until November 1, 2003.
2 Docket No. W-02104A-01-0742, Decision No. 66745, ¶ 3. In June 2003, Voyager
3 requested an elimination of all time limits. Id., ¶ 4. Following a hearing, the Commission
4 granted Voyager an extension to file the Certificate of Assured Water Supply no later than
5 November 1, 2005. Id. at 7.

6 The Commission has also often allowed the time periods for compliance with
7 conditions subsequent to lapse, with no adverse action taken against the water company.
8 For example, in Decision No. 65277 dated October 16, 2002, the Commission granted a
9 CCN extension to Eagletail Water Company, stating that the CCN extension would be
10 “deemed to be denied” if Eagletail did not file a municipal franchise agreement within 365
11 days. Docket No. W-03936A-01-0966, Decision No. 65277 at 5. Twenty months later, on
12 June 1, 2004, Eagletail wrote the Commission “requesting clarification of exactly what a
13 municipal franchise agreement is.” Ultimately, Eagletail filed a county franchise on
14 September 8, 2004, almost a year beyond the October 16, 2003 “deemed to be denied”
15 deadline, without any apparent adverse action by the Commission, and without the CCN
16 being “deemed to be denied” merely by the passage of time.

17 Thus, based on previous practice of the Commission, in these and other cases it is
18 clear that compliance with similar conditions subsequent has been extended or even waived
19 by the Commission on prior occasions. To rule otherwise, when Arizona Water Company
20 timely sought an extension of time after it became clear that Cornman Tweedy was seeking
21 to frustrate performance of the condition, would violate due process and be inconsistent with
22 the Commission’s prior practice.

23 **V. Conclusion.**

24 For the reasons stated above, as set forth in previous pleadings, Arizona Water
25 Company again asserts that the Commission should approve Arizona Water Company’s
26 timely, reasonable request for an extension of time to comply with the CCN conditions at
27 issue. Alternatively, based on Staff’s Memorandum and the law cited in this brief, the
28

1 Commission should rule that the conditions themselves have been discharged by Cornman
2 Tweedy's own bad faith conduct and no longer form a basis upon which the CCN can be
3 challenged.

4 Respectfully submitted this 19th day of December, 2005.

5 BRYAN CAVE LLP

6
7 By 

8 Steven A. Hirsch, #006360

9 Rodney W. Ott, #016686

10 Two N. Central Avenue, Suite 2200

11 Phoenix, AZ 85004-4406

12 ARIZONA WATER COMPANY

13 Robert W. Geake

14 P. O. Box 29006

15 Phoenix, AZ 85038

16 Attorneys for Arizona Water Company

17
18
19
20
21
22
23
24
25
26
27
28
BRYAN CAVE LLP
TWO NORTH CENTRAL AVENUE, SUITE 2200
PHOENIX, ARIZONA 85004-4406
(602) 364-7000

1 ORIGINAL and 15 copies filed this
2 19th day of December, 2005, with:

3 Docket Control
4 Arizona Corporation Commission
5 1200 W. Washington Street
6 Phoenix, AZ 85007

7 COPY of the foregoing hand-delivered
8 this 9th day of December, 2005, to:

9 Christopher C. Kempley, Chief Counsel
10 Legal Division
11 ARIZONA CORPORATION COMMISSION
12 1200 West Washington Street
13 Phoenix, Arizona 85007

14 Ernest G. Johnson, Director
15 Utilities Division
16 ARIZONA CORPORATION COMMISSION
17 1200 West Washing Street
18 Phoenix, Arizona 85007

19 Lyn Farmer
20 Chief Administrative Law Judge
21 ARIZONA CORPORATION COMMISSION
22 1200 West Washington Street
23 Phoenix, Arizona 85007

24 Janice M. Alward
25 David M. Ronald
26 ARIZONA CORPORATION COMMISSION
27 1200 West Washington Street
28 Phoenix, Arizona 85007

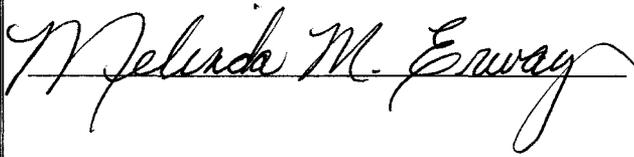
1 COPY of the foregoing e-mailed and mailed
2 this 19th day of December, 2005, to:

3 Jeffrey W. Crockett, Esquire
4 Marcie Montgomery, Esquire
5 SNELL & WILMER
6 One Arizona Center
7 Phoenix, Arizona 85004-2202

e-mail: jcrockett@swlaw.com

8 Peter M. Gerstman
9 Vice President and General Counsel
10 ROBSON COMMUNITIES, INC.
11 9532 E. Riggs Road
12 Sun Lakes, AZ 85248

13 Attorneys for Cornman Tweedy, LLC

14
15 
16
17
18
19
20
21
22
23
24
25
26
27
28

BRYAN CAVE LLP
TWO NORTH CENTRAL AVENUE, SUITE 2200
PHOENIX, ARIZONA 85004-4406
(602) 364-7000