

ORIGINAL OPEN MEETING AGENDA ITEM



BEFORE THE ARIZONA CORPORATION (

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AZ CORP COMMISSION  
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IN THE MATTER OF THE APPLICATION OF  
ARIZONA WATER COMPANY FOR AN  
EXTENSION OF THE SERVICE AREA  
UNDER ITS EXISTING CERTIFICATE OF  
CONVENIENCE AND NECESSITY TO  
PROVIDE WATER UTILITY SERVICES

DOCKET NO. W-01445A-03-0559

STAFF'S REPLY PURSUANT TO THE  
NOVEMBER 23, 2005 PROCEDURAL  
ORDER

On November 22, 2005, Staff filed a Legal Memorandum ("Legal Memorandum") on the issue of whether the Certificate of Convenience and Necessity ("CC&N") granted in Decision No. 66893 is null and void. On December 19, 2005, Arizona Water Company ("AWC" or "Arizona Water") and Cornman Tweedy 560, LLC ("Cornman") filed Responses to the Legal Memorandum. The November 22, 2005, Procedural Order in the above-captioned matter directed Commission Staff to file a Reply to the Responses from AWC and Cornman.

**I. INTRODUCTION.**

Staff's position in this case continues to be that Decision No. 66893 granted AWC a CC&N for the extension area, even though Decision No. 66893 required AWC's compliance with certain conditions subsequent. Staff also maintains that the null and void language in Decision No. 66893 did not automatically make the CC&N null and void because AWC is entitled to notice and an opportunity to be heard on its failure to timely comply with the conditions subsequent before a Commission action in this case.

In AWC's Response to the Staff Legal Memorandum ("AWC Response") AWC argues that Staff "has correctly noted that the Commission's grant of a CC&N to a utility creates a vested property right similar to a contract between the utility and the State." (AWC Response at 1). This is an incorrect assertion of Staff's position in this matter. On the other hand, Cornman's position that AWC has no protectable interest under Decision No. 66893 cannot be reconciled with due process

...

1 principles. In the discussion below, Staff first addresses AWC's brief, and then responds to  
2 Cornman's arguments.

3 **II. THERE IS NO CC&N "CONTRACT" BETWEEN THE COMPANY AND THE**  
4 **STATE.**

5 The granting of a CC&N does not create a contract between the utility and the State. In *US*  
6 *West Communications, Inc. v. Arizona Corporation Commission*, 197 Ariz. 16, 3 P.3d 936 (App.  
7 1999), US West argued to the Arizona Court of Appeals that the Arizona Corporation Commission  
8 ("Commission") had breached a contract with the telecommunications company. The Court pointed  
9 out that there was no contractual relationship between US West and the Commission, and that US  
10 West has "cited no authority that holds that there is an actual contract or that contract remedies are  
11 available under these circumstances." *Id.* at 22, 3 P.3.d at 942. The Court went on to point out that in  
12 the relationship between US West and the Commission there was no bargained-for exchange and no  
13 term to the supposed contract. *Id.* Similarly, in this case, there was no bargained-for exchange  
14 between the Commission and AWC.

15 In *Phelps Dodge Corporation v. Arizona Electric Power Cooperative, Inc.*, 207 Ariz. 95, 121,  
16 83 P.3d 573, (App. 2004), the Arizona Court of Appeals ruled that the electric competition rules  
17 promulgated by the Commission did not impair the contract rights of electric cooperatives. The  
18 Court distinguished a CC&N from a traditional contractual relationship. There are no contractual  
19 rights "to generate the electricity that is ultimately transmitted and sold for public use" or to  
20 "exclusively sell electricity." *Id.* In this case, since there is no contractual relationship between AWC  
21 and the Commission, the standard remedies related to contract law are not available. Thus, Arizona  
22 Water's arguments that extend contract law principles to Cornman Tweedy's position are not  
23 compelling. Similarly, its arguments related to "forfeiture" under contract law cases are without  
24 merit in this matter.

25 **III. ARIZONA WATER DOES NOT HAVE VESTED PROPERTY RIGHT IN A CC&N.**

26 Arizona Water broadly asserts that it has a "vested property right" protected by its CC&N  
27 contract with the State. As noted above, there is no CC&N contract, and hence no contract right  
28 protecting a vested property interest in this case. Monopoly regulation is a public policy, not a

1 property right. See *Tennessee Elec. Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 141  
2 (1939). See also, *City of Tucson v. El Rio Water*, 101 Ariz. 49, 52, 415 P.2d 872, 878 (1966)  
3 (expressly declining to determine whether a CC&N is a property right and recognizing that its  
4 discussion of the utility's monopoly was focused solely upon arriving at an appropriate valuation for  
5 purposes of condemnation). Further, although the Phelps Dodge opinion recognized a public service  
6 corporation has a "vested interest" under Arizona Constitution Article 15, Section 3, that interest only  
7 addresses a utilities rights to construct and operate lines across the State. See: *Phelps Dodge* at 102,  
8 83 P.3d at 580. Neither the *Phelps Dodge* or US West opinions, nor Article 15, Section 7 state that a  
9 utility has a vested property right in a CC&N granted under A.R.S. § 40-281, 282.

10 **IV. ARIZONA WATER HAS A DUE PROCESS RIGHT TO NOTICE AND AN**  
11 **OPPORTUNITY TO BE HEARD.**

12 Although Arizona Water's brief attempts to establish contract rights and vested property rights  
13 as the source of a protectable interest, the basis for the Staff's Memorandum's position is much more  
14 direct. In Decision No. 66893 the Commission entered a decision granting Arizona Water a CC&N.  
15 In order to change that decision, the Commission needs to take some action. Under the facts of this  
16 case, where there is no compelling competing public interest, due process requires that prior to a  
17 Commission action to alter its decision granting Arizona Water a CC&N, Arizona Water has notice  
18 and an opportunity to be heard. This due process requirement reflects the notice and opportunity to  
19 be heard provisions in A.R.S. § 40-252 (statute for amending a final Commission Order). But  
20 procedural due process requirements do not invest Arizona Water with either contract or vested  
21 property rights it does not otherwise have.

22 **V. RESPONSE TO CORNMAN.**

23 Cornman's brief asserts that the failure to meet "null and void" conditions in a CC&N order  
24 operate automatically to void a CC&N granted by a Commission decision. Staff does not dispute that  
25 under appropriate circumstances implicating a compelling public interest, a CC&N order may  
26 become null and void for a public service corporation's failure to meet conditional requirements.  
27 However, the facts of this case do not appear to reach a compelling point wherein AWC should be  
28 denied notice and an opportunity to be heard prior to a Commission action in this matter.

1           Cornman argues “Staff’s declaration that the ‘null and void’ language is meaningless creates  
2 ambiguity in the many prior Commission decisions which contain that language.” (Cornman  
3 Response at 10). First, Staff never declared that the null and void language is meaningless. Second,  
4 the Commission reviews each application on a case by case basis. The Commission examines the  
5 facts in each case before ordering that a particular company’s CC&N is null and void. Finally, the  
6 null and void language is still meaningful in Decision No. 66893 since the Commission may, “upon  
7 notice to the corporation affected, and after opportunity to be heard as upon a complaint, rescind,  
8 alter or amend any order or decision made by it.” A.R.S. § 40-252.

9           Cornman refers to several prior Commission decisions that have “null and void” language.  
10 All of the above decisions refer to CC&N’s becoming “null and void without further Order of the  
11 Commission.” Cornman argues that the above language implies automatic nullification and voidance  
12 of the CC&N without due process. However, none of the above decisions, including the present case,  
13 has language in the ordering paragraphs that specifically prohibit notice and an opportunity to be  
14 heard prior to Commission action

15           Cornman singles out *In re Utility Source, L. L.C.* (Decision No. 67446) as evidence of the  
16 Commission’s specific intent with regard to “null and void” language. In Decision No. 67446, the  
17 applicant was seeking a conditional CC&N and an order preliminary for different phases of the same  
18 project. The Commission, in discussing the Order Preliminary, explains that “under the Conditional  
19 CC&N policy, no further action by the Commission is necessary because the CC&N automatically  
20 becomes effective upon satisfaction of the conditions, or becomes null and void if the conditions are  
21 not met within the time period designated in the Order.” A.C.C. Dec. No. 67446 at 10. Although the  
22 Commission found it necessary to specify that the CC&N would “automatically” become effective,  
23 the word “automatically” is conspicuously absent in front of “null and void.” In fact, none of the  
24 prior Commission decisions referred to by Cornman specifically include the word “automatically” in  
25 front of “null and void.” Thus, Cornman’s argument that the Commission has “specifically  
26 acknowledged the procedural effect of the ‘null and void’ language” in prior Commission decisions is  
27 incorrect. (Cornman Response at 4).

28 ...

1 **VI. ESTOPPEL DOES NOT RUN AGAINST THE COMMISSION.**

2 It is not clear whether Arizona Water or Cornman are asserting that the Commission is  
3 somehow bound by estoppel to decide the issues in this case in a particular manner. Estoppel does  
4 not run against the Commission, and the Commission decides each case on the merits and facts  
5 before it. The Idaho Supreme Court recognized this in stating that a public service commission must  
6 be free to take such steps as may be proper in the circumstances, regardless of past decisions, because  
7 “[e]ven when the conditions remain the same, the administrative understanding of those conditions  
8 may change, and the agency must be free to act.” *Citizens Util. Co. v. Idaho Pub. Util. Comm’n*, 112  
9 Idaho 1061, 1063, 739 P.2d 360, 362 (1987).

10 **V. CONCLUSION.**

11 As stated in the Staff’s initial Memorandum, Arizona Water has a right to notice and an  
12 opportunity to be heard on the relevant conditions subsequent in Decision No. 66893. However,  
13 these due process rights do not confer on Arizona Water either CC&N contract or vested property  
14 rights in this matter.

15 RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of January, 2006.

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24 9<sup>th</sup> day of January, 2006 with:

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