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9 Commissioner

10 IN THE MATTER OF THE APPLICATION
11 OF ARIZONA WATER COMPANY TO
12 EXTEND ITS CERTIFICATE OF
13 CONVENIENCE AND NECESSITY IN
14 CASA GRANDE, PINAL COUNTY,
ARIZONA

Docket No. W-01445A-03-0559

**ARIZONA WATER COMPANY'S
POST-HEARING MEMORANDUM**

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15 Pursuant to Administrative Law Judge Wolfe's request and agreement of the parties,
16 Arizona Water Company respectfully submits its post-hearing memorandum in this matter.
17 The memorandum addresses the appropriateness of Arizona Water Company's requested
18 extension of time to fully perform certain conditions required by the Arizona Corporation
19 Commission ("Commission") in Decision No. 66893 dated April 6, 2004 (the "CCN
20 Decision"). The CCN Decision granted an extension to Arizona Water Company's existing
21 Certificate of Convenience and Necessity ("CCN") for its Casa Grande system covering
22 eleven sections of property (the "Extended CCN").

23 Additionally, this memorandum demonstrates that under all the facts and
24 circumstances presented at the hearing, Arizona Water Company should be deemed to have
25 complied with the conditions in the CCN Decision, or that those conditions have been
26 excused as a matter of law to the extent they cannot be complied with, and that the Extended
27 CCN must be recognized as valid in all respects. Because fundamental due process requires
28 that Arizona Water Company be afforded notice and an opportunity to be heard prior to any

1 Commission action that would rescind, alter or amend the Commission’s prior grant of a
2 CCN extension to Arizona Water Company, the Extended CCN did not automatically
3 become null and void based on an argument that the conditions subsequent were not fully
4 performed as of April 6, 2005. This is especially true in light of Arizona Water Company’s
5 timely filing of a request for an extension of time in which to perform the conditions
6 subsequent, and the improper conduct of Intervener Cornman Tweedy 560, LLC (“Cornman
7 Tweedy”) (and its affiliated entities, Robson Communities and Picacho Water Company) in
8 preventing Arizona Water Company from timely complying with the conditions in the CCN
9 Decision, which conduct has caused those conditions to be legally excused.

10 Accordingly, the Commission should enter an order concluding, as a matter of law,
11 that Arizona Water Company has complied with the CCN Decision, and denying the relief
12 sought by Cornman Tweedy.

13 **I. FACTUAL AND PROCEDURAL BACKGROUND.**

14 **A. The Parties.**

15 Arizona Water Company has provided public utility water service to numerous
16 Arizona communities for over 50 years. [See Decision No. 28794 (March 23, 1955)]
17 Currently, Arizona Water Company provides water service pursuant to CCNs duly issued by
18 the Commission within the communities of Casa Grande, Stanfield, Arizona City, and
19 Coolidge, among others, in Pinal County. [Pre-Filed Direct Testimony of Michael J.
20 Whitehead (“Pre-Filed Whitehead Direct”) at 5:20-22.]¹ The Arizona Department of Water
21 Resources (“ADWR”) has issued Physical Availability Determinations to Arizona Water
22 Company demonstrating that Arizona Water Company has sufficient physically available
23

24 _____
25 ¹ The pre-filed direct and rebuttal testimony of witnesses shall be referred to as “Pre-
26 Filed Direct Testimony of _____” or “Pre-Filed Rebuttal Testimony of _____”, with
27 following references to the page and line numbers of that pre-filed testimony. Testimony
28 taken live at the hearing shall be referred to as “Transcript,” with following references to the
page and line numbers of the referenced transcript. Hearing Exhibits shall be referred to as
“Ex. ____.”

1 water to provide service to its currently certificated areas of operation, including the
2 Extended CCN area, as well as surrounding, uncertificated areas of Pinal County. [Pre-
3 Filed Direct Testimony of William M. Garfield (6/12/2006) (“Pre-Filed Garfield Direct”) at
4 6:18-21.]

5 Cornman Tweedy is a subsidiary of Robson Communities organized to purchase,
6 hold and develop several parcels of property located near the intersections of Florence
7 Boulevard and Tweedy Road in Pinal County. [Pre-Filed Direct Testimony of Jim Poulos
8 (6/12/2006) (“Pre-Filed Poulos Direct”) at 2:12-17; Ex. CT-1.] Cornman Tweedy owns
9 approximately 1,138 acres within the Extended CCN area. [*Id.* at p. 5, ll. 4-14.] Cornman
10 Tweedy assembled this property after the date of the CCN Decision as part of its plan to
11 develop a master planned community known as EJR Ranch. [*See* Pre-Filed Poulos Direct at
12 5:4-7:15; CT-1.] Cornman Tweedy acquired approximately 240 acres of this total acreage,
13 which is a planned development previously known as Florence Country Estates, from the
14 development’s prior owners in late 2004, after the Commission issued the CCN Decision.
15 [*Id.* at 5:16-26.] Cornman Tweedy is also affiliated with Picacho Water Company, another
16 subsidiary of Robson Communities, which has subsequently sought to provide service in
17 Arizona Water Company’s Extended CCN area. [Docketed Letter from Peter M. Gerstman
18 to the Commission (4/7/2005) at 2.]

19
20 **B. Arizona Water Company’s Request for an Extension of its Existing CCN
and Current Work in the Area.**

21 In September 2002, Arizona Water Company provided a “will-serve” letter to Core
22 Group Consultants Ltd., for the Florence Country Estates development. [Pre-Filed
23 Whitehead Direct at 7:22.] In May of 2003, Arizona Water Company received a separate
24 request to provide water service from Harvard Investments, the developer of Post Ranch,
25 and subsequently followed up with plans to serve that development as well. [*Id.* at 6:22.]
26 Both developments were located between Arizona Water Company’s Casa Grande and
27 Tierra Grande service areas in Pinal County, immediately adjacent to Arizona Water
28 Company’s existing CCNs for those service areas. [*Id.* at 5:8-16; Ex. MJW-32] Until they

1 were added by the CCN Decision, the developments were not within Arizona Water
2 Company's existing CCNs, but were within Arizona Water Company's Pinal Valley Master
3 Plan for service. [*See id.* at 5:20-6:9; Ex. MJW-2.]

4 Based on these requests for service and its master planning process, Arizona Water
5 Company sought an extension of its existing CCN for its Casa Grande system to serve these
6 developments and future entities who would be constructing developments along Florence
7 Boulevard east of Interstate 10. [*See* Docketed Arizona Water Company's Application to
8 Extend Existing Certificate of Convenience and Necessity (8/12/2003).] The request
9 sought the extension of Arizona Water Company's CCN to an additional eleven sections of
10 land forming a connecting link between Arizona Water Company's existing Casa Grande
11 and Tierra Grande CCNs. [*See* Exs. MJW-2, MJW-32.] By extending its CCN to these
12 eleven sections, Arizona Water Company sought to complete an orderly, interconnected
13 water distribution system serving Pinal County in accordance with the Master Plan. [Pre-
14 filed Whitehead Direct at 5:17-6:9; Transcript at 44:24-45:8.]

15 Following notice to all affected landowners in the Extended CCN area, there were no
16 objections to the requested extension and no attempts by anyone to intervene in those
17 proceedings. [*See* Transcript at 292:4-13; 325:19-326:5; Pre-Filed Rebuttal Testimony of
18 William M. Garfield (7/6/2006) ("Pre-Filed Garfield Rebuttal") at 11:2-8.] In the CCN
19 Decision, the Commission granted the Extended CCN as requested. The CCN Decision
20 directed Arizona Water Company to "file a copy of the Developers' Assured Water Supply
21 for each respective development" (*i.e.*, Florence Country Estates and Post Ranch) and "file a
22 main extension agreement associated with the extension area," within 365 days of the date
23 of the CCN Decision. [CCN Decision.] The Commission further stated that the CCN
24 Decision would be "deemed null and void without further order of the [Commission]" if
25 Arizona Water Company failed to meet these conditions. [*Id.*]

26 Since the CCN Decision, Arizona Water Company has received approval to construct
27 the initial infrastructure necessary to provide water utility service to the Extended CCN area.
28

1 [Pre-Filed Whitehead Direct at 6:10-15; Transcript at 45:13:18; Ex. MJW-1.] Arizona
2 Water Company plans to begin construction of the initial water main interconnecting
3 Arizona Water Company's Casa Grande and Tierra Grande systems this year, consistent
4 with the orderly service demands of developers in the area. [Transcript at 48:7-25,
5 testimony of Mike Whitehead ("I would like to bid that and be at least under construction
6 before the end of this year").]

7 In addition, following the CCN Decision, Arizona Water Company received requests
8 for service from five other developers/landowners in the Extended CCN area. [Pre-Filed
9 Whitehead Direct at 11:20-14:11.] One of these developers, AG Robertson, requested
10 service for properties surrounding portions of the land owned by Cornman Tweedy,
11 rendering deletion of those properties from the Extended CCN inefficient and illogical, and
12 greatly injuring an innocent third party. [Pre-Filed Whitehead Direct at 13:24-14:2; Ex.
13 MJW-32 (AG Robertson property is in the blue shaded areas to the South, East and North of
14 Cornman Tweedy property).] Arizona Water Company prepared plans for construction of
15 that system for AG Robertson's development, entered into a main extension agreement with
16 AG Robertson, and received approval to construct the water system for that development.
17 [Pre-Filed Whitehead Direct at 13:11-18.] Accordingly, Arizona Water Company will
18 operate the water utility system that surrounds the Cornman Tweedy land, in addition to
19 constructing a transmission main along Florence Boulevard to serve the entire Extended
20 CCN area. [*Id.*; Ex. MJW-32.] Therefore, deleting the Extended CCN area that is now
21 owned by Cornman Tweedy so that Picacho Water Company can serve a small peninsula
22 surrounded by Arizona Water Company's water system is inconsistent with the public
23 interest.

24 **C. Arizona Water Company's Role in Obtaining Certificates of Assured**
25 **Water Supply and the Timing of Main Extension Agreements.**

26 Arizona Water Company, as a regulated public service corporation, cannot obtain a
27 Certificate of Assured Water Supply ("CAWS") from ADWR for a developer, or force a
28 developer to enter into a main extension agreement. [See Transcript at 311:21-312:5; Pre-

1 Filed Rebuttal Testimony of Jim Poulos (7/6/2006) (“Pre-Filed Poulos Rebuttal”) at 13:7-18
2 (“[T]he developer drives the process of obtaining water service for new development, and
3 this is as it should be”); Transcript at 42:2-22 (Arizona Water Company must wait for the
4 developer to request a CAWS and main extension agreement).] Under controlling law and
5 practice, the developer itself must apply for and obtain a CAWS from ADWR. [*Id.*; Pre-
6 Filed Garfield Direct at 4:5-9, 19-5:4.] While Arizona Water Company provides support, as
7 requested, to the developer in this process, the timing of the application is entirely within the
8 developer’s discretion. [Pre-Filed Whitehead Direct at 4:1-23; Transcript at 42:2-22.] The
9 timing of the grant of such an application is also outside Arizona Water Company’s control,
10 as ADWR determines when a CAWS is issued. [Pre-Filed Garfield Direct at 5:6-6:7; 8:12-
11 18.] Similarly, the execution of a main extension agreement is subject to the developer’s
12 timing. [See Pre-Filed Direct Testimony of Jim Poulos (6/16/2006) (“Pre-Filed Poulos
13 Direct”) at 11:23-12:4 (recognizing that absent approved subdivision plans, it would be
14 impossible to enter into a main extension agreement); Transcript at 42:12-17]. While
15 Arizona Water Company can (and did in this instance) send main extension agreements to
16 developers, Arizona Water Company cannot force the developers to sign the agreements.
17 [Pre-Filed Whitehead Direct at 7:7-8; 11: 13-15; Exs. MJW-15, MJW-26] Commonly,
18 developers do not sign main extension agreements, which obligate them to undertake large
19 investments in infrastructure, until after their plats have been approved by the appropriate
20 governing authority, and they are ready to begin installation of offsite improvements. [See
21 Pre-Filed Poulos Direct at 11:23-12:4.] Such approvals may not occur for several years
22 after a request for service is received by Arizona Water Company. [Pre-Filed Garfield
23 Direct at 8:3-18.] Arizona Water Company has no control over this process. [Pre-Filed
24 Whitehead Direct at 4:1-7.]

25 In recognition of these timing issues, the Commission’s Staff (“Staff”) recently began
26 recommending that the Commission not include the conditions imposed upon Arizona
27 Water Company in the CCN Decision in future grants of CCNs to water utilities. Rather,
28

1 Staff is now recommending that the Commission require utilities to complete and file a
2 Physical Availability Determination, which is prepared by the utility (like Arizona Water
3 Company has done in this case), as a condition of all new or extended CCNs. [Transcript at
4 311:4-312:5, 313:13-22.] Staff is also recommending a two year period for compliance, as
5 “developer delays are fairly routine in water certificate proceedings.” [Id. at 318:19-25] As
6 noted at the hearing, a literal and arbitrary application of the CCN Decision conditions
7 would fail to recognize these realities of development and the CAWS process. [Id.; Pre-
8 Filed Garfield Direct at 12:8-15.]

9
10 **D. Arizona Water Company’s Efforts to Meet the Conditions Subsequent.**

11 Even before the CCN Decision, Arizona Water Company was taking the steps within
12 its power to provide service and install the required infrastructure within the Extended CCN
13 area. With respect to the Post Ranch property, Arizona Water Company provided Harvard
14 Investments with a preliminary cost estimate for construction of necessary infrastructure on
15 April 27, 2004. [Pre-Filed Whitehead Direct at 6:5-26; Ex. MJW-4.] While Harvard
16 Investments initially requested service in May of 2003, its work on the Post Ranch
17 development was substantially delayed. [Pre-Filed Garfield Direct at 7:18-8:2.] Arizona
18 Water Company had no control over the pace of that development. [Id.; Transcript at 57:21-
19 58:13.] As a result of this delay, Harvard Investments did not provide initial plans to
20 Arizona Water Company for review until May 5, 2005. [Pre-Filed Whitehead Direct at 7:1-
21 2.] On May 9, 2005, Arizona Water Company provided its initial plan review to Harvard
22 Investments. [Id. at 7:3-4; Ex. MJW-7.] In September 2005, Harvard Investments made an
23 inquiry to Arizona Water Company about the main extension agreement. [Id. at 7:5-6;
24 10:22-27; Ex. MJW-8.] Arizona Water Company provided a main extension agreement to
25 Harvard Investments in October 2005. [Id. at 7:7-8; 11:1-2; Ex. MJW-9.] Also during
26 October, Arizona Water Company reviewed and approved Harvard Investments’ revised
27 plans. [Id. at 7:9-16.] In December 2005, Arizona Water Company sent a second copy of
28 the main extension agreement to Harvard Investments. [Id. at 7:17-18; 11:4-6; Ex. MJW-

1 14.] Following revisions, a final version of the main extension agreement was sent to
2 Harvard Investments on May 18, 2006 [*Id.* at 7:19-20, 11:8-10; Ex. MJW-15] and Arizona
3 Water Company is awaiting receipt of the signed agreement. [*Id.* at 11:8-10.]

4 In addition to these efforts, Arizona Water Company also provided a Notice of Intent
5 to provide water service to the Post Ranch development at the request of Harvard
6 Investments. [Pre-Filed Garfield Direct at 7:3-8; Ex. WMG-2.] A Notice of Intent is part of
7 the package the developer is required to submit to ADWR to demonstrate the legal
8 availability of sufficient water to obtain a CAWS. [Pre-Filed Garfield Direct at 6:9-14.]
9 Harvard Investments filed its application for a CAWS with ADWR in October 2005. [*Id.* at
10 7:8-10.] Because Harvard Investments was able to extinguish certain grandfathered
11 groundwater rights, it was able to quickly demonstrate compliance with ADWR's applicable
12 water management targets. [*Id.* at 7:10-17.] ADWR approved the CAWS for Post Ranch
13 on February 22, 2006. [*Id.*; Ex. WMG-3.] That CAWS has been filed with the
14 Commission. [Transcript at 315:22-25; Docketed Certificate of Filing Compliance Items
15 and attachments (7/14/2006).]

16 Similarly, Arizona Water Company undertook efforts to facilitate the development of
17 the Florence Country Estates property. [See Pre-Filed Whitehead Direct at pp. 6-11.]
18 Following receipt of the request to serve Florence Country Estates, and prior to the CCN
19 Decision, Arizona Water Company entered into discussions with Core Group Consultants
20 about water plans for the development. [*Id.* at 7:24-25; Ex. MJW-4.] Those discussions
21 resulted in Arizona Water Company approving Core Group Consultants' plans on or about
22 October 17, 2003. [*Id.* at 8:17-21; Ex. MJW-28.] On October 9, 2003, Arizona Water
23 Company sent a main extension agreement to Core Group Consultants. [Pre-Filed
24 Whitehead Direct at 11:13-15; Ex. MJW-26.] Neither the developer nor Core Group
25 Consultants responded to or executed that document. [*Id.* at 11:17-19.]

26 Core Group Consultants submitted an application for a CAWS to ADWR in late
27 2003, and amended that request in May of 2004. [Exs. WMG-3, WMG-4.] In support of
28

1 Core Group Consultants' efforts to obtain a CAWS for the Florence Country Estates
2 property, Arizona Water Company provided Core Group Consultants with an executed
3 Notice of Intent to serve on or about December 11, 2003. [Pre-Filed Whitehead Direct at
4 8:22-27; Ex. WMG-4.] Arizona Water Company subsequently provided revised Notices of
5 Intent to serve the Florence Country Estates development to Core Group Consultants on
6 May 18, 2004 and June 7, 2004. [Pre-Filed Whitehead Direct at 9:7-12; Ex. WMG 4.] In
7 October of 2004, ADWR informed Core Group Consultants that the CAWS for Florence
8 Country Estates had been processed and that ADWR was waiting on Core Group
9 Consultants to provide certain corporate resolutions (not involving Arizona Water
10 Company) before the CAWS would be issued. [Ex. WMG 10.] However, Core Group
11 Consultants never provided those resolutions. [*Id.*] Rather, at the direction of Cornman
12 Tweedy, as set out below, Core Group Consultants withdrew its nearly complete
13 application, just when the CAWS was ready to be issued. Arizona Water Company had no
14 control over or input into Core Group Consultants' decision to withdraw its application for
15 the CAWS. [*See supra.*]

16 **E. Cornman Tweedy's Efforts to Thwart Arizona Water Company's Ability**
17 **to Fulfill the CCN Decision's Conditions.**

18 Rather than proceeding to obtain the approved CAWS and executing the main
19 extension agreement, neither of which were in Arizona Water Company's control (but both
20 of which were in Cornman Tweedy's control and could have occurred prior to the April
21 2005 date set forth in the CCN Decision), Cornman Tweedy and its affiliates secretly
22 thwarted Arizona Water Company's ability to fulfill these conditions. Because the time
23 frame for appealing or seeking a rehearing of the CCN Decision was long past, Cornman
24 Tweedy was unable to challenge the CCN Decision directly.² However, Cornman Tweedy

25 _____
26 ² In another untimely and secret maneuver to collaterally attack the CCN Decision,
27 Cornman Tweedy arranged to have one of the parties from whom it was purchasing land
28 within the Extended CCN area complain as to an alleged lack of notice (even though the
record was uncontradicted that notice of the proceeding was properly given). [*See Poulos*

1 has since attempted to take advantage of the conditions in the CCN Decision to reach the
2 same objective—the transfer of Arizona Water Company’s CCN for the Cornman Tweedy
3 property within the Extended CCN area to Cornman Tweedy’s affiliated water company,
4 Picacho Water Company. [See Poulos Rebuttal at 14:3-5 (requesting that the Commission
5 exclude all of the property owned by Cornman Tweedy from Arizona Water Company’s
6 CCN).]

7 Specifically, the record shows that rather than finalizing its CAWS in October 2004
8 and completing that component of the CCN Decision’s conditions as to Florence Country
9 Estates, upper management and in-house counsel at the Robson entities, including both
10 Cornman Tweedy and EJ Ranch, conspired to halt these steps, making it impossible for
11 Arizona Water Company to fulfill the conditions. Meanwhile, the Robson entities were
12 poised to spring a demand on the Commission *the very day after the 365-day time period in*
13 *the CCN Decision had run* that Picacho Water Company, not Arizona Water Company,
14 should serve that portion of the Extended CCN area.

15 The record shows that Core Group Consultants, at the behest of Cornman Tweedy’s
16 management, informed ADWR (without informing Arizona Water Company) that Robson
17 Communities was trying to buy the Florence Country Estates property, and that if that sale
18 closed, Core Group Consultants would “withdraw our Application [for a CAWS], since
19 Robson will include this land in their master plan and make their own arrangements for
20 water supply.” [Ex. WMG 10.] In late October 2004, Core Group Consultants requested a
21 two week extension from ADWR to decide whether or not to have the CAWS issued and
22 recorded, again concealing its communications from Arizona Water Company, which it had
23 specifically listed in its CAWS application as being its sole water provider, and while giving
24 Arizona Water Company every indication that the CAWS process was on track. [Exs.
25 WMG 5, WMG 11.]

26
27 Pre-Filed Direct at 8:21-27; Garfield Pre-Filed Rebuttal at 1:8 – 5:26; Ex. CT-3.] The
28 Commission rejected that challenge as untimely.

1 A little over a week later, Core Group Consultants withdrew the pending application
2 for a CAWS for Florence Country Estates and requested that ADWR close its file on the
3 matter. [Ex. WMG 12.] Again, at no time did Core Group Consultants, Cornman Tweedy
4 (the purchaser of the property), Picacho Water Company or management at Robson
5 Communities disclose to Arizona Water Company or the Commission that they were
6 conspiring to withdraw the application or of the impending sale. [Pre-filed Garfield Direct
7 at 9:25-10:6; Transcript at 245:6-21; 246:9-19.] By this action, Cornman Tweedy, without
8 Arizona Water Company's knowledge, actively subverted Arizona Water Company's good
9 faith efforts in support of the CAWS application and rendered it impossible for Arizona
10 Water Company to perform that condition in the CCN Decision, which as set forth below
11 excuses the condition as a matter of law.

12 While initially denying any role in Core Group Consultants' actions, the record
13 eventually revealed that Cornman Tweedy had actually ordered the sellers of Florence
14 Country Estates to withdraw their nearly complete application for a CAWS in late October
15 2004.³ [Ex. CT-10(A) ("Poulos Revised Rebuttal") at 6:22-27; Transcript at 255:23-258:18;
16

17 ³ At the hearing, Cornman Tweedy's Vice President and only witness, Mr. Poulos, initially
18 testified vehemently—in pre-filed testimony submitted just days before the hearing—that
19 Cornman Tweedy was completely unaware that Core Group Consultants had sought a
20 CAWS for the Florence Country Estates property. [Poulos Pre-Filed Rebuttal (7/6/2006) at
21 6:13-22.] During the hearing, however, internal e-mails and letters were produced showing
22 different facts. Mr. Poulos then substantially revised his testimony, completely
23 countermanding his earlier testimony in several respects, and admitted that Cornman
24 Tweedy and Robson Communities' management had specifically mandated that the owners
25 of Florence Country Estates withdraw their application for a CAWS prior to the sale of the
26 property to Cornman Tweedy. [Poulos Revised Rebuttal at 6:22-27; Transcript at 255:6-
27 258:18; Exs. CT-17, 20.] While Mr. Poulos continued to insist that Cornman Tweedy's
28 instruction to Core Group Consultants was not a condition of the pending purchase of the
property, the facts are uncontroverted that (1) Arizona Water Company's 365-day CCN
Decision condition clock was running during this time frame, (2) Cornman Tweedy was
under contract to purchase the property during these communications, and (3) the purchase
closed just weeks after Robson Communities' directions to Core Group Consultants that led
to the secret withdrawal of the Florence Country Estates CAWS Application. [See Ex. CT-
20; Transcript at 240:8-242:11; 256:5-257:24.]

1 Exs. CT-17, 20 (e-mail instructing Core Group Consultants to “pull their application and
2 close the file”).]

3 At the same time, in another secret effort to start a process that it hoped would lead to
4 its sister entity Picacho Water Company’s expropriation of Arizona Water Company’s valid
5 CCN, Cornman Tweedy filed its own, new application for an Analysis of Assured Water
6 Supply with ADWR. [Pre-Filed Garfield Direct at 10:8-12; Transcript at 263:7-12; Ex.
7 WMG-13.] That application covered the lands formerly known as Florence Country Estates
8 (now part of Robson Communities’ EJR Ranch) and other lands controlled by Robson
9 Communities located both within and south of the Extended CCN area. [Exs. WMG-13,
10 WMG-16.] In its Application, Cornman Tweedy listed both Arizona Water Company and
11 Picacho Water Company as the future water providers to EJR Ranch. [Ex. WMG 13.]
12 However, Cornman Tweedy wrongly represented to ADWR that the property was not
13 located within any water company’s service area or CCN boundary. [Transcript at 263:21-
14 264:2; Ex. WMG-16.] Cornman Tweedy never corrected this misrepresentation.
15 [Transcript at 264:24-265:4.] Nor did Cornman Tweedy ever notify Arizona Water
16 Company of either the withdrawal of the application for a CAWS for Florence Country
17 Estates or the submission of the application for an Analysis of Assured Water Supply for
18 EJR Ranch *in which it had listed Arizona Water Company as one of its water providers.*
19 [Pre-Filed Garfield Direct at 9:25 –10:18; Pre-Filed Garfield Rebuttal at 8:23-27; Transcript
20 at 246:9-19.] Cornman Tweedy also did not request that Arizona Water Company provide a
21 Notice of Intent to serve its newly-acquired property within the Extended CCN area. [See
22 Transcript at 234:12-235:16; Ex. WMG–13.] By design, Cornman Tweedy simply did not
23 contact Arizona Water Company about the Florence Country Estates property prior to
24 springing its attempted revocation of Arizona Water Company’s CCN for that property in
25 April 2005, literally on the 366th day after the CCN Decision was entered. [Transcript at
26 246:9-19.]

27 When it became apparent to Arizona Water Company that the CAWS for the
28

1 Florence Country Estates and Harvard Investments developments would not be issued
2 before the one-year condition time frame ran on April 6, 2005, Arizona Water Company
3 duly requested an extension of time from the Commission to comply with the CCN
4 Decision. [See Docketed Request for Additional Time to Comply with Filing Requirements
5 (3/30/2005).] That request was made by motion filed March 30, 2005, within the one year
6 time frame of the CCN Decision. [Id.] From Arizona Water Company's perspective, since
7 it had been kept in the dark concerning Robson Communities' and Cornman Tweedy's
8 conduct over the past several months, it appeared the developers simply needed more time
9 to comply with the conditions, which was very typical for this type of development. [See
10 Transcript at 58:18-59:4 (it became obvious that the developers needed more time because
11 they had not received a CAWS nor requested a main extension agreement); 151:7-17.]
12 Based on its prior experience in its Pinal Valley service areas, Arizona Water Company
13 stated as grounds for its request for an extension that its chain of communications over the
14 prior years with the developers suggested that at least another year's extension would be
15 necessary to comply. [Docketed Request for Extension of Time to Comply With Filing
16 Requirements (3/30/2005) at 2.] Specifically, the request stated that the developers "have
17 informed the Company that development in the areas they propose to develop will be
18 delayed for another year." [Id.] This anticipated delay was indeed accurate, and was based
19 on Arizona Water Company's monitoring of both developments and the overall
20 communications (or lack of communications) it was having with the developers. [Transcript
21 at 56:17-59:4.] As stated previously, Arizona Water Company did not know that Cornman
22 Tweedy had already subverted the CAWS application process and rendered the condition
23 impossible to perform as to the Florence Country Estates property, and justifiably believed
24 that the silence from Florence Country Estates' consultants communicated a need for an
25 extension of the CCN conditions.

26 The Commission did not act on the request for an extension of time prior to its one
27 year deadline. On April 7, 2005, one day after the one year period set out in the CCN
28

1 Decision for compliance with the conditions subsequent, Cornman Tweedy sent a letter to
2 the Commission arguing that the Extended CCN had become automatically null and void
3 and requesting that Picacho Water Company be granted a CCN to serve two sections of land
4 within the Extended CCN area. [See Docketed Letter from Peter M. Gerstman to the
5 Commission (4/7/2005).]

6 Confirming its intentions to prevent Arizona Water Company from providing water
7 service within portions of the Extended CCN area, following docketing of its April 7, 2005
8 letter, Picacho Water Company filed a new application seeking to extend its CCN into the
9 Extended CCN area. [See Docketed Application to Extend Water Certificate of
10 Convenience and Necessity in No. W-03528A-05-281 (4/15/05); signed by Jim Poulos.]
11 Subsequently, both Cornman Tweedy and Picacho Water Company sought to intervene in
12 the present matter. [See Docketed Cornman Tweedy 560 and Picacho Water Company's
13 Motion to Intervene and Request for Leave to File Reply to Arizona Water Company's
14 Response to Staff Recommendation for Additional Evidentiary Proceedings and Exceptions
15 to ALJ's Proposed Order (5/19/2005).] Picacho Water Company also sought to consolidate
16 its request to extend its CCN to the EJR Ranch properties with this docket. [See Docketed
17 Picacho Water Company's (1) Notice of Appearance of Counsel; (2) Motion to Consolidate;
18 (3) Request to File Brief on Issue of Whether Arizona Water Company's CC&N is Null and
19 Void and Request for Oral Argument; and (4) Request for Ruling on Motion for
20 Intervention (10/5/2005).] While Cornman Tweedy, as a new landowner in the Extended
21 CCN area, was eventually allowed (over Arizona Water Company's objection) to intervene
22 in the present matter, Picacho Water Company's requests to intervene and to consolidate
23 were denied. [Procedural Order (11/14/2005).] Administrative Law Judge Farmer correctly
24 recognized that the present matter should be limited to the issue of whether or not Arizona
25 Water Company's request for an extension of time in which to comply with the conditions
26 subsequent contained in the CCN Decision should be granted in light of the factual
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1 circumstances.⁴ [*Id.*]

2 **II. ARGUMENT.**

3 **A. Arizona Water Company's Requested Extension to Comply with the**
4 **CCN Decision's Conditions Subsequent Should be Granted Consistent**
5 **with the Commission's Prior Practice in Comparable Situations.**

6 As an initial matter, the Commission regularly grants extensions of time to comply
7 with the conditions subsequent contained in its Decisions, even when such extensions are
8 requested beyond the compliance dates. [Transcript at 321:24-322:2 (Steve Olea
9 testimony: the majority of requests for extensions of time are granted).] For example, in
10 Decision No. 62754 dated July 25, 2000, the Commission granted Arizona Water Company
11 a CCN to provide water service to a Robson Communities development in the Oracle
12 Junction area "conditioned upon Arizona Water Company filing a copy of the SaddleBrooke
13 Ranch developer's Certificate of Assured Water Supply within five (5) years from the
14 effective date of this CCN Decision." Docket No. W-01445A-00-0017, Decision No. 62754

15 ⁴ The brazenness of Cornman Tweedy's efforts to undermine Arizona Water Company's
16 CCN are highlighted by Cornman Tweedy's expectations of differing treatment for its own
17 related entity, Picacho Water Company. Approximately two weeks before the hearing,
18 Cornman Tweedy, for the first time, informed Arizona Water Company that Cornman
19 Tweedy did not intend to develop its property within the Extended CCN area for at least five
20 more years. [Pre-Filed Poulos Direct at 7:16-8:10.] Cornman Tweedy's objections to
21 granting an extension of time to Arizona Water Company now rest entirely upon Cornman
22 Tweedy's new-found assertion that no water service will be needed for this property until at
23 least 2011. [*Id.* at 8:9:12; Transcript at 285:23-286:2; 286:13-18.] This is also the sole
24 basis for Cornman Tweedy's argument that its property should be deleted from the
25 Extended CCN. [*Id.* at 285:23-286:2.] At the same time, however, Cornman Tweedy is
26 seeking to confirm the validity of *Picacho Water Company's* CCN for the portion of the
27 EJR Ranch property located immediately south of the Extended CCN area, even though that
28 property also will not be developed for at least five years under Robson Communities'
newest policy formulation revealed on the eve of these hearings. [*Id.* at 286:19-22 (the
same circumstances exist in the remainder of the EJR Ranch Phase 2 property).] So when it
comes to an opportunity to poach on Arizona Water Company's valid and existing CCN, the
newly-announced policy of "no development for five years" supports a deletion, but as to its
own CCN *immediately contiguous to the south* of Arizona Water Company's CCN, Picacho
Water Company is moving full speed ahead and vigorously asserts that its CCN is beyond
attack. [Transcript at 281:10-15; 286:19-287:21; Ex. AWC-5.]

1 at 4-5. The developer experienced various delays in planning and, on May 6, 2005, Arizona
2 Water Company filed a request for additional time, which the Commission granted in a
3 procedural order dated November 25, 2005, well after the five (5) year period had run.

4 Similarly, in Decision No. 64406 dated January 31, 2002, the Commission granted
5 Voyager Water Company a CCN subject to filing certain materials including a Certificate of
6 Assured Water Supply within 365 days or the CCN would be “deemed denied.” Docket No.
7 W-02104A-01-0742, Decision No. 64406 at 5. On November 18, 2002, Voyager requested
8 an extension of time, which the Commission granted until November 1, 2003. Docket No.
9 W-02104A-01-0742, Decision No. 66745, ¶ 3. In June 2003, Voyager requested an
10 elimination of all time limits. *Id.*, ¶ 4. Following a hearing, the Commission granted
11 Voyager an extension to file the Certificate of Assured Water Supply no later than
12 November 1, 2005. *Id.* at 7.

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

24 Here, Arizona Water Company timely sought an extension of time after it became
25 clear that compliance with the conditions in the CCN Decision would not be met in the
26 specified time frame. [Transcript at 264:9-13.] While Cornman Tweedy argues that its
27 recent decision to shelve development of property in the Extended CCN area is a changed
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1 circumstance that justifies denial of the requested extension of time (but not as to its own
2 CCN immediately south of the Extended CCN area), it provides no reason or authority for
3 the proposition that its unilateral decision to delay development should result in denial of
4 Arizona Water Company's request for an extension of time to comply with the conditions
5 subsequent in the CCN Decision. Even though Cornman Tweedy will allegedly not be
6 developing the lands it owns in the Extended CCN area for five years, that does not alter the
7 validity of the CCN Decision or impact the requested extension of time. [See Transcript at
8 288:9-15 (admitting that Arizona Water Company is ready, willing and able to provide
9 service to Cornman Tweedy property, among other property).] Rather, as discussed below,
10 Cornman Tweedy's decision actually supports Arizona Water Company's requested
11 extension of time. Arizona Water Company remains ready, willing and able to provide
12 water service in the eleven sections of the Extended CCN area, and there is no evidence or
13 argument in the record otherwise from Cornman Tweedy or Staff. The developers' refusal
14 or inability to meet the conditions subsequent in the CCN Decision—conditions that
15 Arizona Water Company does not and cannot control—cannot be allowed to undermine the
16 Commission's determination that an extension of time is in the public interest. Absent some
17 changed circumstances impacting Arizona Water Company's fitness, willingness and ability
18 to serve, which are not in dispute here, Arizona Water Company's request for additional
19 time should, like the requests of all other utilities awaiting developer compliance, be granted
20 as a matter of course.

21 As Staff recognizes, the conditions subsequent inserted into the CCN Decision are
22 largely outside the control of Arizona Water Company (or any private water utility for that
23 matter). [Transcript at 313:13-314:2 (Steve Olea testimony).] Staff is now recommending
24 that the Commission require the water utility simply to submit evidence of matters it can
25 control regarding water supply, including a "physical availability demonstration" in support
26 of an application for a new CCN or an extension to an existing CCN. [*Id.* at 311:4-24.] The
27 physical availability demonstrations "are actually done by the water utility, where an
28

1 analysis of either an adequate water supply or an assured water supply is conducted by the
2 landowner.” [*Id.* at 312:3-5.] Such utility-controlled submissions make much more sense
3 than the conditions found in the CCN Decision, and would have been met in this instance.
4 [Pre-Filed Garfield Direct at 6:18-21 (prior to requesting extension of CCN, Arizona Water
5 Company already had completed a Physical Availability Determination demonstrating
6 sufficient water to supply Florence Country Estates and Post Ranch); Transcript at 313:13-
7 314:2 (Mr. Olea’s recognition that if the Physical Availability Determination had been the
8 condition as he and his staff now recommend “we wouldn’t even be having this hearing
9 today with regard to water because [Arizona Water Company] would have met that
10 requirement ...”).]

11 While the Commission may have a legitimate interest in assuring that it is not
12 granting a CCN for an area where service will not be needed in the foreseeable future or
13 where there is not an adequate water supply, those concerns should be addressed as part of
14 the application process, not in a collateral attack on a final decision beyond the time and in
15 violation of the rules for appeal of a Commission decision, and based on conditions over
16 which the water utility has no control.⁵ As the present situation demonstrates, development
17 of a given parcel of land can be beset by a variety of delays and contingencies. [*See*
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19
20 ⁵ Here, Arizona Water Company fully satisfies both identified interests—need for service
21 and available water supply. As noted above, Arizona Water Company has received requests
22 for service from five developers located within the Extended CCN area, including from the
23 developer of the property surrounding Cornman Tweedy’s property. [Pre-Filed Whitehead
24 Direct at 11:20-14:11.] Arizona Water Company has executed a main extension agreement
25 with that developer and is in the process of finalizing main extension agreements with
26 several other developers. [*See* Pre-Filed Whitehead Direct at 7:19-20, 11:8-10.] Harvard
27 Investments has now received its CAWS for the Post Ranch development. [Pre-Filed
28 Garfield Direct at 7:10-17; Ex. WMG-3.] Moreover, Cornman Tweedy received an
Analysis of Assured Water Supply in March of 2004, within the 365-day CCN Decision
condition window, that not only established the physical availability of sufficient water for
the Florence Country Estates property, but also locked up that quantity of water through
2014. [Transcript at 146:10-17; 149:5-150:8; 155:25-156:9; 310:22-311:3; Pre-filed
Garfield Rebuttal at 9:1-12; Pre-filed Poulos Direct at 11:4-22; Ex. WMG-16.]

1 Transcript at 318:19-25 (Commission Staff routinely sees requests for extensions of time to
2 deal with developers in CCN proceedings and is now recommending two year time frames
3 for compliance).] However, that does not mean that Arizona Water Company's request for
4 an extension of time should not be granted. Rather, the realities and ever-changing
5 circumstances of development suggest that the Commission should continue its practice of
6 routinely granting requests for extensions of time to fulfill the conditions contained in its
7 CCN extension decisions, *especially in circumstances like this, where a competing utility*
8 *provider has conspired to delay compliance or make it impossible to comply.* Any other
9 course will result in exactly what has happened in this case: a wasteful and untimely battle
10 over the propriety of the Commission's prior CCN Decision and harm to the public interest.

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

14 Cornman Tweedy's argument rests on the assertion that the Extended CCN became
15 automatically null and void, without further Commission action and without regard to any of
16 the underlying circumstances or balancing of the equities, on April 6, 2005, freeing up the
17 property for Picacho Water Company, and leaving all of the other developers in the area
18 suddenly without a water utility provider. However, such a draconian and inflexible
19 application of the CCN Decision language is not justified under Arizona law for a number
20 of reasons.

21 First, because of the nature of a CCN right, due process concerns are implicated by
22 such actions. The Commission's grant of a CCN to a private water utility creates a vested
23 property right as between the utility and the State. *Application of Trico Elec. Coop.*, 92
24 Ariz. 373, 380-81, 377 P.2d 309, 315 (1962); *Russell v. Sebastian*, 233 U.S. 195, 204 (1914)
25 ("That the grant, resulting from an acceptance of the state's offer, constituted a contract, and
26 vested in the accepting individual or corporation a property right, protected by the Federal
27 Constitution, is not open to dispute ..."); *City of Mesa v. Salt River Project Agric.*
28 *Improvement & Power Dist.*, 92 Ariz. 91, 99-100, 373 P.2d 722, 728 (1962) ("[SRP] by its

1 investment has committed itself to a public utility undertaking plainly accepting the grant of
2 the state to engage in that business. By such conduct a property right has been created
3 which is protected by the Constitution ...”); *City of Tucson v. El Rio Water Co.*, 101 Ariz.
4 49, 51, 415 P.2d 872, 874 (1966) (“It is settled that the franchise of a public service
5 corporation is property ...”(using “franchise” as a shorthand for the CCN)); *Flecha Caida*
6 *Water Co. v. City of Tucson*, 4 Ariz. App. 331, 334, 420 P.2d 198, 201 (App. 1966) (“The
7 only property taken was [water company’s] certificate of public convenience and
8 necessity”). As the Supreme Court stated in *Trico*,

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

17 Quite aside from statutory requirements *the rescission or revocation of all or a*
18 *portion of a certificate of convenience and necessity requires strict compliance with*
19 *the procedural requisites of notice and hearing.*

20 92 Ariz. at 380-81, 377 P.2d at 315 (citation omitted; emphasis added).

21 While the Commission may place conditions subsequent on that grant, the
22 Commission may only rescind, alter or amend the grant “upon notice to [the] public service
23 corporation and after opportunity to be heard.” *Arizona Corp. Comm’n v. Arizona Water*
24 *Co.*, 111 Ariz. 74, 76, 523 P.2d 505, 507 (1974); A.R.S. § 40-252 (requiring Commission to
25 provide notice and opportunity to be heard before rescinding, altering or amending a prior
26 Decision); *see also Wilson v. Dep’t of Pub. Svc. Regulation*, 260 Mont. 167, 171-72,
27 858 P.2d 368, 371 (Mont. 1993) (“Inasmuch as [public service corporations] may not carry
28 on their business except under the authority of a certificate of public convenience and
necessity issued by the PSC, it follows that if that agency intends to take action which might
result in the [companies’] loss of their certificate, and hence their right to do business,
fundamental fairness and due process require that they at a minimum be given notice of the

1 alleged bases for the possible revocation”). Our Supreme Court’s consistent position
2 acknowledges that the Legislature has expressly limited the Commission’s ability to rescind,
3 alter or amend a CCN without giving the affected utility notice and opportunity to be heard.
4 Thus, the relevant statutory and constitutional provisions prohibit any arbitrary or automatic
5 revocation of any portion of Arizona Water Company’s CCN in the manner sought by
6 Cornman Tweedy.⁶

7 Second, well-established rules of statutory and contract interpretation support
8 Arizona Water Company’s right to notice and an opportunity to be heard before any
9 “automatic” rescission. Courts regularly avoid interpreting contractual and statutory
10 provisions so as to create a forfeiture. *See Schaeffer v. Chapman*, 176 Ariz. 326, 329, 861
11 P.2d 611, 614 (1993); *Hale v. Flores*, 19 Ariz. App. 236, 237, 506 P.2d 276, 277 (App.
12 1973). Thus, “forfeiture is generally abhorred by the law. ... Every reasonable presumption
13 is against a forfeiture.” *Yank v. Juhrend*, 151 Ariz. 587, 590, 729 P.2d 941, 944 (App.
14 1986). When a document “providing for a forfeiture is capable of two constructions, that
15 against forfeiture should be followed.” *Eisele v. Kowal*, 11 Ariz. App. 468, 471, 465 P.2d
16 605, 608 (App. 1970).

17 Here, Cornman Tweedy seeks an interpretation of the CCN Decision that would
18 result in an automatic forfeiture of a portion of Arizona Water Company’s constitutionally-
19 protected CCN rights, due to the failure of a condition subsequent which fell within
20 Cornman Tweedy’s (not Arizona Water Company’s) control. Specifically, Cornman
21 Tweedy seeks to have the property it owns within the Extended CCN deleted from that
22

23 ⁶ To the extent Staff has argued that the “vested rights” principles do not apply to the
24 present situation, that contention has been rejected by both the Arizona Supreme Court and
25 the United States Supreme Court. *See Russell*, 34 U.S. at 204; *City of Mesa*, 92 Ariz. at 99-
26 100, 373 P.2d at 728. While the case of *U.S. West Commun., Inc. v. Arizona Corp.*
27 *Comm’n*, 197 Ariz. 16, 3 P.3d 936 (2000), rejected the extension of contract principles to
28 deregulation of the telecommunications industry, that holding was based on US West’s
failure to provide existing authority to the contrary. *Id.* at 22, 3 P.3d at 942. Because such
binding authority does exist in this context, the *US West* decision is of questionable validity
on this point.

1 CCN. [Poulos Rebuttal at 14:16-26 (“Cornman Tweedy requests that the Commission
2 exclude the Cornman Tweedy Property from Arizona Water Company’s CC&N...”).]
3 Under any interpretation of the law, Cornman Tweedy is requesting the Commission to
4 fundamentally alter and partially rescind its prior CCN Decision. Such action requires both
5 notice and an opportunity to be heard on that specific question. A.R.S. §40-252. Altering
6 the CCN Decision without providing Arizona Water Company such notice and an
7 opportunity to be heard in defense, does not comply with due process and cannot be the
8 law.⁷ It also constitutes an improper collateral attack on the CCN Decision far beyond the
9 time frames for proper rehearing or appeal of that decision.

10 **C. The CCN Decision Conditions Have Been Discharged By Cornman
11 Tweedy’s Purposeful and Wrongful Interference With Arizona Water
12 Company’s CCN.**

13 Arizona law has long recognized that “[a] party to a contract cannot prevent the
14 fulfillment of a condition precedent [or subsequent] and later rely on the failure of the
15 condition to argue that no contract exists.” *Johnson Int’l, Inc. v. City of Phoenix*, 192 Ariz.
16 466, 471, 967 P.2d 607, 612 (App. 1998); *see also Security Nat’l Life Ins. Co. v. Pre-Need*
17 *Camelback Plan, Inc.*, 19 Ariz. App. 580, 582, 509 P.2d 652, 654 (1973) (“if one prevents
18 fulfillment of a condition precedent one cannot thereafter rely on such failure of condition to
19 defeat the agreement”); *Williams v. Nall*, 4 Ariz. App. 416, 420, 420 P.2d 988, 992 (1966)
20 (“one who prevents performance of a contract may not complain of such nonperformance”);
21 *Siegal v. Haver*, 4 Ariz. App. 119, 122, 417 P.2d 928, 931 (1966) (“One waives the
22 performance of a condition and cannot rely on it to prevent recovery where its non-

23
24 ⁷ In addition, allowing the CCN Decision to be altered as requested by Cornman Tweedy is
25 both outside the scope of this proceeding, which is limited to the question of whether an
26 extension of time should be granted to Arizona Water Company, and against the public
27 interest. Granting Cornman Tweedy’s requested relief under these circumstances will result
28 in a patchwork of conditional CCNs, leading to uncertainties in utility service, unnecessary
work for the Commission and its Staff and many other unintended consequences. [See
Transcript at 327:8-13.]

1 performance is caused or consented to by him”).

2 The Restatement (Second) of Contracts, consistent with Arizona law, makes clear
3 that in circumstances where the actor’s performance is rendered impracticable or where it is
4 frustrated by another party, the conditions are discharged. See Restatement (Second) of
5 Contracts §§ 261, 265 (1981). Thus, separate and apart from the due process considerations
6 prohibiting automatic operation of the “null and void” provision in the CCN Decision, the
7 law provides that the conditions subsequent at issue in this case are discharged altogether
8 under the circumstances presented. *Id.*, §261 (“Where, after a contract is made, a party’s
9 performance is made impracticable without his fault by the occurrence of an event the non-
10 occurrence of which was a basic assumption on which the contract was made, his duty to
11 render that performance is discharged, unless the language or the circumstances indicate the
12 contrary”); see also 17A Am. Jur. 2d *Contracts* § 666 (2004) (“Impossibility that arises
13 directly or even indirectly from the acts of the promisee [here, Cornman Tweedy] is
14 considered a sufficient excuse for the other party not performing, since one who prevents
15 performance may not take advantage of the situation”).

16 Cornman Tweedy and its affiliated/parent entities, Picacho Water Company and
17 Robson Communities, cannot be allowed to profit from an alleged failure to comply with a
18 condition subsequent when they purposefully frustrated Arizona Water Company’s efforts
19 to fulfill the conditions in the CCN Decision. As noted above, the Arizona Supreme Court
20 has characterized a utility CCN issued by the Commission as a contract between the State
21 and the certificate holder, resulting in a vested property right for the holder, and contract
22 principles have direct application in this matter. See *Trico*, 92 Ariz. at 380-81, 377 P.2d at
23 315 (1962); *City of Mesa*, 92 Ariz. at 99-100, 373 P.2d at 728; see also *Phelps Dodge Corp.*
24 *v. Arizona Elec. Power Coop.*, 207 Ariz. 95, 121, 83 P.3d 573, 599 (App. 2004)
25 (recognizing that under prior decisions of Arizona Supreme Court, Art. 15, § 7 of Arizona
26 Constitution confers property rights on public service corporation involved in transmission
27 of electricity). Moreover, Cornman Tweedy’s predecessor-in-interest expressly requested
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1 service from Arizona Water Company through Core Group Consultants, and supported
2 Arizona Water Company's application to obtain the necessary CCN to provide such service.
3 Arizona Water Company sought and the Commission approved the Extended CCN for the
4 benefit of the developers/owners (i.e., the Florence Country Estates developers and
5 Cornman Tweedy), and more importantly, the ultimate rate-paying customers residing on
6 that property.

7 When Core Group Consultants requested service from Arizona Water Company in
8 2003 on behalf of the Florence Country Estates developers, and the Extended CCN was
9 granted, Florence Country Estates became a party to the contractual relationship between
10 Arizona Water Company and the State, or alternatively, at the very least, was an intended
11 third party beneficiary of that relationship. As such, Florence Country Estates' agents and
12 successors had a duty to act in good faith to complete all necessary steps for Arizona Water
13 Company's provision of water service to that property. In addition, those parties had an
14 independent duty to act in good faith with respect to their request to Arizona Water
15 Company to provide water utility service to Florence Country Estates. *See Taylor v. State*
16 *Farm Mut. Auto. Ins. Co.*, 185 Ariz. 174, 176, 913 P.2d 1092, 1094 (1996) ("The duty of
17 good faith requires that neither party act in a manner that would damage the rights of the
18 other party to receive the benefits flowing from the underlying contractual relationship").
19 The Florence Country Estates developers could not, in good faith, frustrate Arizona Water
20 Company's efforts to obtain the necessary CCN to provide the service it had requested. Nor
21 could Cornman Tweedy as its successor.

22 Upon acquiring Florence Country Estates, Cornman Tweedy stepped into the shoes
23 of that developer. *See, e.g., K.B. v. State Farm Fire & Cas. Co.*, 189 Ariz. 263, 267, 941
24 P.2d 1288, 1292 (App. 1997) ("An assignee steps into the shoes of her assignor"); *Stephens*
25 *v. Textron, Inc.*, 127 Ariz. 227, 230, 619 P.2d 736, 739 (1980) ("As an assignee, appellant
26 can stand in no better position than the assignor"); *Pima Farms Co. v. Fowler*, 32 Ariz. 331,
27 338-39, 258 P. 256, 259 (1927) (purchaser of land took the land burdened by related
28

1 contracts, including contract providing irrigation water). Accordingly, Cornman Tweedy
2 had an obligation to not frustrate, and render impossible, Arizona Water Company's efforts
3 to comply with the CCN Decision. Rather than meet this obligation, however, Cornman
4 Tweedy engaged in a series of acts designed to deny Arizona Water Company the ability to
5 comply, all as set forth in detail above and throughout the record in this proceeding. Of
6 course, Cornman Tweedy's purpose was to subvert Arizona Water Company's ability to
7 fulfill the conditions so that its own affiliated water company, Picacho Water Company,
8 could step in and take over the CCN already granted to Arizona Water Company.

9 Arizona Water Company's performance of the conditions contained in the CCN
10 Decision, including filing a copy of the developer's assured water supply documentation
11 and a main extension agreement, was necessarily conditioned upon the developers',
12 including Cornman Tweedy's, good faith cooperation. Arizona Water Company obviously
13 could not file the required items within 365 days of the CCN Decision because the new
14 developer, here Cornman Tweedy and Robson Communities as its parent company, refused
15 to cooperate with Arizona Water Company. Cornman Tweedy's behavior in this matter and
16 its recent decision to delay development of its property justify an order that the CCN
17 Decision condition relating to the CAWS for Florence Country Estates has been discharged
18 as a matter of law. *See* Restatement (Second) of Contracts §§261, 265.

19 At the hearing, Cornman Tweedy admitted that a CCN should not be deleted simply
20 because there are no immediate plans for development. [Transcript at 285:6-22 (Picacho
21 Water Company is not seeking to delete *its* CCN for the EJR Ranch property just over the
22 section line to the south of the Extended CCN area); 287:16-21 (Mr. Poulos would not
23 contend from a public policy standpoint that CCN should be deleted because development
24 was not imminent).] In fact, Cornman Tweedy is proceeding to obtain a CAWS for that
25 property just outside the Extended CCN area in order to satisfy the Commission's decision
26 in a separate docket and confirm its affiliate Picacho Water Company's extension of its own
27 CCN to that property. [*Id.* at 283:15-284-1; Ex. AWC-9.]
28

1 Refusing to grant the requested extension of time in these circumstances, where
2 Cornman Tweedy intentionally frustrated performance of the conditions contained in the
3 CCN Decision and seeks to now take advantage of its own misdeeds, while at the same time
4 adopting diametrically opposed positions in a separate docket, would not only violate due
5 process, but would be grossly inequitable and inconsistent with the Commission's prior
6 practice and the public interest. Cornman Tweedy should not be allowed to manufacture the
7 forfeiture of the Extended CCN in whole or in part for the benefit of its affiliated company,
8 Picacho Water Company, by blocking Arizona Water Company's ability to fulfill the
9 conditions subsequent.⁸ Accordingly, the Extended CCN should be affirmed, and the
10 remaining conditions should be deemed excused and satisfied.

11 **D. Cornman Tweedy's Unclean Hands and Equity Also Preclude the Relief it**
12 **Seeks.**

13 Finally, principles of equity preclude the result sought by Cornman Tweedy in the
14 present situation. The doctrine of "unclean hands" prevents a party who has acted in bad
15 faith from seeking the assistance of a court or other governmental entity to reap the benefits
16 of his or her bad faith actions. *Dawson v. McNaney*, 71 Ariz. 79, 86, 223 P.2d 907, 911
17 (1950). In other words, "[e]quity will not grant relief to one who has been wanting in good
18 faith or good conscience or in fair dealing." *Hamblin v. Woolley*, 64 Ariz. 152, 161, 167
19 P.2d 100, 105-06 (1946).

20 Here, as detailed above, the Robson entities—including Robson Communities,
21 Picacho Water Company and Cornman Tweedy—had within their power the ability to block
22 Arizona Water Company's performance of the conditions subsequent in the CCN Decision,
23 and did so in a carefully planned and deliberate way. Cornman Tweedy and its related

24 _____
25 ⁸ Alternatively, when Cornman Tweedy acquired Florence Country Estates and decided to
26 combine that property into a larger development, Florence Country Estates ceased to exist
27 and was, thus, no longer a "respective development" under the CCN Decision. As a matter
28 of law, then, the condition related to Florence Country Estates was discharged. Arizona
Water Company's filing of a CAWS for the Post Ranch property therefore satisfies the
condition in the CCN Decision and renders Cornman Tweedy's objections moot.

1 entities did so in bad faith to ensure that Arizona Water Company would not be able to file
2 the required documentation, and now seek to profit from that bad faith conduct by having
3 the CCN declared “null and void” and instead awarded to their affiliate, Picacho Water
4 Company. Cornman Tweedy’s unclean hands should preclude it from benefiting from its
5 own bad faith actions.

6 In addition, equity precludes the relief sought by Cornman Tweedy. Cornman
7 Tweedy’s bad faith would harm not only Arizona Water Company, but also the other
8 innocent property owners/developers in the Extended CCN area, even though those property
9 owners have acted in good faith and cooperated in Arizona Water Company’s efforts to
10 comply with the CCN Decision. Arizona Water Company already has undertaken efforts
11 and incurred costs to plan for and obtain additional water supplies to serve the Extended
12 CCN area, including costs to develop a Central Arizona Project water treatment facility that
13 will serve this and other areas, and plans for related infrastructure needed to provide water
14 service to many other developers in the Extended CCN area. [See Pre-Filed Whitehead
15 Direct at 5:20-6:15; 12:12-25; Ex. MJW-32.] Arizona Water Company has entered into a
16 main extension agreement with AG Robertson, which is developing property within the two
17 sections of property Cornman Tweedy is seeking to delete from the Extended CCN. [Id. at
18 13:11-18; Ex. MJW-32.] Also, Arizona Water Company is awaiting receipt of the signed
19 main extension agreement with Harvard Investments. [Id. at 11:8-10.] Arizona Water
20 Company is also committed to providing service to four other developers working on
21 projects in the Extended CCN area. [Id. at 11:20-14:11.]

22 If Arizona Water Company’s request for an extension of time is denied and the CCN
23 Decision is deemed automatically “null and void,” there will be no service provider for any
24 of these third party developers, who in good faith have processed their development
25 entitlements in reliance on the Extended CCN and with the comfort that Arizona Water
26 Company will be their water utility provider. As a result, the main extension agreements
27 with two of the developers and the CAWS for Post Ranch will become worthless. The
28

1 developers will be unable to begin installing their water systems, or will have to halt
2 installations that are already underway. Likewise, the CAWS for Post Ranch will become
3 invalid, as Harvard Investments will be unable to demonstrate the legal availability of water
4 if the CCN Decision is determined to be null and void. The developers (and Arizona Water
5 Company) will be in a legal limbo due to no fault of their own. The developers will be
6 forced to place their developments on hold until that contested case is finally decided. If
7 Cornman Tweedy prevails, Arizona Water Company will lose its substantial investments
8 made to provide service to the Extended CCN area, and its long-term plans for the efficient
9 provision of water service in this portion of Pinal County will be irreparably damaged.
10 Even if Arizona Water Company is again awarded an extension to its CCN, it will have lost
11 substantial infrastructure installation time and been forced to waste substantial resources, all
12 for reasons beyond its control. Just as importantly, innocent third parties, both the eventual
13 homeowners/ratepayers and the landowners/developers, will suffer inordinate and entirely
14 preventable harm. Such a result is not consistent with equity or the public interest and
15 should not be allowed in these circumstances.

16 **E. A Strict Reading Of The CCN Decision Conditions Reveals That Arizona**
17 **Water Company Has Complied With The Conditions.**

18 As set forth above, under the compelling circumstances set forth in this record and
19 based on controlling Arizona law, Arizona Water Company is entitled to an order extending
20 the time frame for fulfilling the CCN Decision conditions subsequent, or that those
21 conditions have been excused and discharged as a matter of law. However, the record also
22 supports a finding that Arizona Water Company has already complied with the CCN
23 Decision conditions at this time.

24 First, it is incontrovertible that Arizona Water Company has complied with the main
25 extension agreement condition (“file a main extension agreement associated with the
26 extension area”) by filing an executed main extension agreement dated March 13, 2006 with
27 JBC Development, located within the Extended CCN Area. [Docketed Compliance
28 Certificate, Attachment A (7/14/06)]. Thus, “a main extension agreement” has been

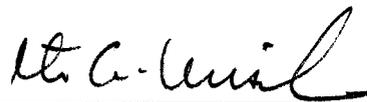
1 entered into, and filed, for a development “associated with the extension area.” Second, the
2 CCN Decision calls for Arizona Water Company to “file a copy of the Developers’ Assured
3 Water Supply for each respective development” (*i.e.* Florence Country Estates and Post
4 Ranch). The CCN Decision does not indicate what type of “Assured Water Supply” must
5 be filed. As argued above, Arizona Water Company’s Physical Availability Determination
6 is sufficient evidence of an “Assured Water Supply” for use by the developers in the
7 Extended CCN area. [See Docketed Compliance Certificate, Attachment D (7/14/06)]
8 Additionally, Arizona Water Company has filed an ADWR-issued Analysis of Assured
9 Water Supply covering the Extended CCN, and this document meets the condition of an
10 “Assured Water Supply” as well. [Docketed Compliance Certificate, Attachment B
11 (7/14/06)]. Thus, the Commission can and should deem all CCN Decision conditions
12 satisfied on this record, and reject Cornman Tweedy’s arguments on this basis alone.

13 **III. CONCLUSION.**

14 For the reasons stated above, and as set forth in previous pleadings, Arizona Water
15 Company again asserts that the Commission should approve Arizona Water Company’s
16 timely, reasonable request for an extension of time to comply with the Extended CCN
17 conditions at issue. Additionally, for the foregoing reasons, the Commission should rule
18 that the conditions have either been complied with, or discharged and excused as a matter of
19 law, and order that the Extended CCN as set forth in the CCN Decision is final in every
20 respect.

21 Respectfully submitted this 15th day of September, 2006.

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