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BEFORE THE ARIZONA CORPORATION RECEIVED

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2006 SEP 15 P 4: 52

AZ CORP COMMISSION
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Arizona Corporation Commission

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IN THE MATTER OF THE
APPLICATION OF ARIZONA WATER
COMPANY, AN ARIZONA
CORPORATION, TO EXTEND ITS
EXISTING CERTIFICATE OF
CONVENIENCE AND NECESSITY AT
CASA GRANDE, PINAL COUNTY,
ARIZONA

DOCKET NO. W-01445A-03-0559

CLOSING BRIEF OF CORNMAN
TWEEDY 560, LLC

I. INTRODUCTION

In Decision 66893 (April 6, 2004), the Arizona Corporation Commission ("Commission") approved the conditional extension of the certificate of convenience and necessity ("CC&N") of Arizona Water Company ("AWC") to include eleven square miles in Pinal County, Arizona (the "Conditional Extension Area"). Included in the Conditional Extension Area are 1,138 acres (the "Cornman Tweedy Property") owned by intervenor Cornman Tweedy 560, LLC ("Cornman Tweedy"). The Cornman Tweedy Property constitutes approximately one-half of a contiguous 2,344-acre tract of land that will eventually be developed as a master-planned residential community. The 2,344-acre tract is referred to by Cornman Tweedy as EJR Ranch.¹

Although the Conditional Extension Area covers eleven square miles, AWC submitted only two requests for service with its application: Florence Country Estates, a 240-acre parcel that is now owned by Cornman Tweedy and included in the Cornman

¹ The 1,138-acre Cornman Tweedy Property is highlighted in pink on Exhibit CT-1 attached to the Direct Testimony of Jim Poulos in this case. EJR Ranch is outlined in blue on Exhibit CT-1, and AWC's Conditional Extension Area is outlined in orange on Exhibit CT-1. A copy of Exhibit CT-1 is attached.

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1 Tweedy Property;² and Post Ranch, a 480-acre parcel owned by Harvard Investments.
2 *Decision 66893* at FOFs 11 and 12. *Decision 66893* was conditioned upon AWC filing
3 copies of certificates of assured water supply and main extension agreements for Florence
4 Country Estates and Post Ranch within 365 days of *Decision 66893*, or by April 6, 2005.
5 *Id.* at FOF 9 and page 7, lines 1-6. If AWC failed to satisfy these conditions within the
6 specified time, then *Decision 66893* "is deemed null and void without further order of the
7 Arizona Corporation Commission." *Id.* at 7, lines 7-9.

8 AWC failed to satisfy either of the conditions as the compliance deadline
9 approached, and on March 30, 2005, filed a Request for Additional Time to Comply with
10 Filing Requirements of *Decision 66893* (the "Extension Request") asking for an additional
11 365 days to comply with the conditions. More than two years after the issuance of
12 *Decision 66893*, no main extension agreement has been executed or certificate of assured
13 water supply issued for the 240-acre parcel formerly known as Florence County Estates,
14 the balance of the 1,138-acre Cornman Tweedy Property, or for most of the eleven
15 sections included in *Decision 66893*.

16 In this case, the Commission must decide whether to grant AWC's Extension
17 Request for all or portions of the Conditional Extension Area, including the 1,138-acre
18 Cornman Tweedy Property. If any area where the Commission denies the Extension
19 Request, AWC's conditional CC&N will be null and void in accordance with the ordering
20 language of *Decision 66893*.

21 Staff properly acknowledged that the circumstances supporting *Decision 66893*
22 have materially changed in the 29 months since the decision was issued and recommended
23 the evidentiary hearing on the merits of the Extension Request that was held July 10-11,
24 2006. *See Staff Memorandum* dated April 11, 2005. At the hearing, Staff did not take a
25 position on whether the Extension Request should be denied or granted, but instead
26 identified reasons why the request should be denied and reasons why the request should

27 ² The request for service for Florence Country Estates was submitted on behalf of Madison Diversified 882
28 Corp. and HWY 287-Florence Boulevard, Inc., the predecessors-in-interest to Cornman Tweedy. Cornman Tweedy has never requested water service from AWC for the Cornman Tweedy Property.

1 be granted, leaving the decision to the Administrative Law Judge and ultimately the
2 Commissioners. *Trans. Vol. II* at 309, lines 9-19.

3 In ruling on the Extension Request, the Commission must of course be guided by
4 what is in the public interest. Determining what is in the public interest cannot be reduced
5 to a standardized formula or fixed set of factors. Rather, the Commission must evaluate
6 the material facts on a case by case basis, as such facts exist at a specific point in time,
7 applying relevant Commission polices and precedents as well as applicable statutes and
8 rules. Staff has provided useful guidance to the Commission in making its decision in this
9 case. First, in the June 12, 2006, Staff Report, Assistant Director Steve Olea explained:
10 (i) why Staff recommends time limits for compliance items such as those in Decision
11 66893 and why Staff believes the Commission orders such time limits; (ii) how Staff
12 determines the recommended length of the time limits; and (iii) how Staff analyzes
13 requests for additional time to comply with the time limits. *Staff Report* (June 12, 2006)
14 at 1. The Commission should keep in mind the reasons for the time limits on conditional
15 CC&Ns when it considers whether denial of the Extension Request is appropriate in light
16 of the changed circumstances regarding the Cornman Tweedy Property.

17 Second, in his testimony at hearing, Mr. Olea set forth reasons why the Extension
18 Request should be denied and reasons why it should be granted:

19 **Reasons to Deny the Extension Request:**

- 20
- 21 • The current property owner does not want to be served by AWC.
 - 22 • There is no planned development for the Cornman Tweedy Property
23 for at least five years.
 - 24 • If there ever is development, the Cornman Tweedy Property can be
25 served by someone other than AWC, and that would be Picacho
26 Water Company.
 - 27 • If the Cornman Tweedy Property is served by Picacho Water
28 Company, it can also be provided sewer service by Picacho Sewer
Company.

1 **Reasons to Approve the Extension Request:**

- 2 • AWC is fit and proper to serve the area.
- 3 • AWC is capable of serving the area.
- 4 • AWC is willing to serve the area.

5 There is a third concept that should guide the Commission in evaluating AWC's
6 Extension Request in this case. The Commission's analysis of the Extension Request
7 should follow a similar path to its analysis of the original application. *See generally,*
8 *Trans. Vol. II* at 322, lines 13-14. If the Commission would not approve a CC&N
9 extension request for the Cornman Tweedy Property under the facts as they exist today,
10 then the Commission should not grant the Extension Request with regard to the Cornman
11 Tweedy Property. In other words, the approval of the conditional CC&N in Decision
12 66893 required a showing by AWC of the need for water service, and the Commission
13 should require a showing of the present need for water service on the Cornman Tweedy
14 Property in order to grant the Extension Request.

15 Cornman Tweedy submits that the following considerations are the most important
16 in evaluating the evidence in this case:

- 17 • Is there a present need for water service on the Cornman Tweedy
18 Property?
- 19 • Has Cornman Tweedy requested water service from AWC?
- 20 • Does Cornman Tweedy want to be served by AWC?
- 21 • When development does occur in the future, can Cornman Tweedy
22 obtain water service from a provider other than AWC?
- 23 • When development does occur in the future, can Cornman Tweedy
24 obtain water and sewer service from an integrated water and sewer
25 provider?
- 26 • Can AWC comply with the conditions of Decision 66893 for the
27 Cornman Tweedy Property?
- 28

1 Relating the facts of this case to the considerations identified above, it is clear that
2 AWC's Extension Request should be denied with regard to the 1,138-acre Cornman
3 Tweedy Property. Circumstances have changed, and development of the Cornman
4 Tweedy Property has been shelved for five years or longer. There is no present need for
5 water service, and Cornman Tweedy has not requested water service from AWC. AWC
6 has not met the conditions of Decision 66893, and cannot meet those conditions in the
7 foreseeable future. When development does eventually occur, the owner of the Cornman
8 Tweedy Property can obtain water service from AWC or Picacho Water Company. In the
9 event that the owner of the Cornman Tweedy Property subsequently requests water
10 service from Picacho Water Company, the property owner could also obtain sewer service
11 from Picacho Sewer Company, thereby obtaining the benefits of an integrated water and
12 sewer provider. Finally, there is no harm or prejudice to AWC or Cornman Tweedy if the
13 Commission denies the Extension Request.

14 Cornman Tweedy is aware that the Commission's hearing division has limited the
15 scope of this case to "the circumstances and events that have resulted in Arizona Water
16 not complying with the time periods established in Decision No. 66893" and that "[t]he
17 hearing will not be a reopening of the Decision granting Arizona Water a CC&N and will
18 not address whether a different utility should be providing service to the extension area."
19 *Procedural Order* (Mar. 22, 2006) at p. 6. To be clear, Cornman Tweedy is not
20 advocating that Picacho Water Company should be certificated to serve the Cornman
21 Tweedy Property. Rather, Cornman Tweedy submits that no water provider—AWC,
22 Picacho Water Company or any other—should be certificated at this time to serve the
23 Cornman Tweedy property because there is no need for service and no request for service.
24 That being said, the fact that Picacho Water Company could serve the Cornman Tweedy
25 Property in the future is a relevant fact that should be considered as part of the changed
26 circumstances of this case, as stated by Mr. Olea in his testimony. *Trans. Vol. II* at 310,
27 lines 2-5. We begin with a discussion of the changed circumstances of this case.
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Tweedy did not have an opportunity to participate in this case prior to the Commission's approval of Decision 66893.

- The prior owners of the 240-acre Florence Country Estates property requested water service from AWC, but Cornman Tweedy opposes water service from AWC. (The balance of the 1,138-acre Cornman Tweedy Property never had a request for service to AWC).
- While the prior owners of the 240-acre Florence Country Estates property had plans to develop the property, Cornman Tweedy never intended to use those plans and, in fact, has shelved plans to develop EJR Ranch (including the former Florence Country Estates property) for five years or longer.
- Since issuance of Decision 66893, Picacho Water Company obtained a CC&N extension in Decision 67670 (March 9, 2005) to provide water service in the southern half of EJR Ranch, which is contiguous to the Cornman Tweedy Property, and could serve the Cornman Tweedy Property in the future upon receipt of a request for service. Decision 67670 also granted a CC&N extension to Picacho Sewer Company for all of EJR Ranch, including the 1,138-acre Cornman Tweedy Property. All conditions to vest these CC&N extensions have been met.

Each of these changes in circumstances is discussed below.

A. Cornman Tweedy is the New Owner of the 1,138-Acre Cornman Tweedy Property within the Conditional Extension Area.

When Decision 66893 was approved on April 6, 2004, the 1,138 acres now owned by Cornman Tweedy in the Conditional Extension Area were owned by four different entities as follows:

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OWNERS OF CORNMAN TWEEDY PROPERTY AS OF APRIL 6, 2004³		
PROPERTY OWNER	NUMBER OF ACRES	DATE ACQUIRED BY CORNMAN TWEEDY
Madison Diversified 882 Corp. HWY 287-Florence Boulevard, Inc.	325 acres (includes 240 acres which comprise Florence Country Estates)	December 8, 2004
Dermer Family Trust	649 acres	December 17, 2004
HCG Ventures II, LLC	164 acres	February 11, 2005
Total Acreage	1,138 acres	

Today, Cornman Tweedy owns all 1,138 acres which at some point in the future will be developed with the additional 1,206 acres owned by Cornman Tweedy as EJR Ranch. Cornman Tweedy commenced negotiations to acquire the lands that now comprise the Cornman Tweedy Property in the Spring of 2004, and opened the first escrow on April 4, 2004, which was *after* the February 17, 2004 hearing in this case and *after* the March 30, 2004, Open Meeting where the Commission approved Decision 66893. *Poulos Direct Testimony* at 7, lines 4-7.

AWC witness William Garfield argued in his Rebuttal Testimony that Cornman Tweedy was not a party to this case and did not participate in this case until 2005. *Garfield Rebuttal Testimony* at 3, lines 25-26. However, Cornman Tweedy did not open escrow on any of the Cornman Tweedy Property until after the Open Meeting which approved Decision 66893, so Cornman Tweedy had no opportunity to participate in this case prior to the approval of Decision 66893. This is a relevant factor in the decision to grant or deny the Extension Request.

³ *Poulos Direct Testimony* at 6, lines 13-23.

1 **B. No Request for Water Service.**

2 Although Core Group Consultants submitted a request for service to AWC for the
3 240-acre Florence Country Estates Property on behalf of owners Madison Diversified 882
4 Corp. and HWY 287-Florence Boulevard, Inc., there has never been any request for
5 service to AWC on the remaining 898 acres that comprise the 1,138-acre Cornman
6 Tweedy Property. *Poulos Direct Testimony* at 8, lines 19-21. In fact, the Dermer Family
7 Trust which owned 649 acres in the Conditional Extension Area docketed a letter dated
8 April 21, 2004, stating that due to the illness and death of Mr. John Dermer, a principal of
9 the Dermer Family Trust, the Dermer Family Trust was not aware of AWC's application,
10 did not receive notice of the application, and did not want the Dermer Family Trust's 649
11 acres included in the Conditional Extension Area. A copy of the April 21, 2004, Dermer
12 Family Trust letter was attached as Exhibit CT-3 to the Direct Testimony of Mr. Poulos.

13 In his Rebuttal Testimony, AWC witness William Garfield devotes two pages to a
14 discussion of the measures taken by AWC to satisfy the Commission's notice
15 requirements with regard to the Dermer Family Trust property, concluding that "the
16 property owner must be deemed to have received it." *Garfield Rebuttal Testimony* at 4-5.
17 Mr. Garfield is trying to deflect the Commission's attention from what is truly relevant.
18 Cornman Tweedy does not know whether or not any representative of the Dermer Family
19 Trust in fact received notice of this proceeding. The point is—and AWC does not dispute
20 this—that the Dermer Family Trust never requested water service from AWC and to this
21 day there is no request for service to AWC for the 649 acres formerly owned by the
22 Dermer Family Trust. Cornman Tweedy notes also that HCG Ventures II, LLC, the prior
23 owner of 164 acres within the Cornman Tweedy Property, never requested water service
24 from AWC.

25 Cornman Tweedy has never requested water service from AWC for the 240-acre
26 Florence Country Estates property or any other portion of the 1,138-acre Cornman
27 Tweedy Property located within the Conditional Extension Area. To the contrary,
28 Cornman Tweedy has sought the exclusion of its property from the Conditional Extension

1 Area on the grounds that the Cornman Tweedy Property is not going to be developed for
2 at least five years and there is not need for service. *Poulos Rebuttal Testimony* at 4, lines
3 15-21.

4 **C. There is No Need for Water Service on the Cornman Tweedy Property.**

5 At the hearing, Mr. Poulos testified that the business plan for the Cornman Tweedy
6 Property changed 180 degrees since December 2004. Cornman Tweedy purchased the
7 Cornman Tweedy Property with the plan of developing the property in a strong real estate
8 market, and Cornman Tweedy commenced the process of entitling the property.
9 However, Cornman Tweedy did not anticipate the tremendous appreciation in the value of
10 the Cornman Tweedy Property which occurred after the acquisition. As a result of the
11 unexpected, tremendous appreciation in the value of the Cornman Tweedy Property, the
12 tax implications associated with developing and selling the property dictated a change in
13 the business plan from developing the property to holding the property as an investment.
14 Cornman Tweedy ceased further development activities, but allowed certain pending
15 entitlement activities to continue that could be expeditiously completed. Mr. Poulos
16 testified that there are significant tax benefits in holding the Cornman Tweedy Property as
17 a long-term investment in order to obtain capital gains treatment on Cornman Tweedy's
18 income taxes. *Poulos Direct Testimony* at 7-8.

19 In addition, Mr. Poulos testified that with home sales slowing in the Phoenix
20 metropolitan area, affiliate Robson Communities decided to focus on its new Robson
21 Ranch immediately south of the EJR Ranch property which opened for sales in August
22 2005. Robson Communities currently has approximately 24,000 lots which are being
23 readied for sale in its core retirement community business, so the Cornman Tweedy
24 Property (which will be a conventional development project) is not needed for inventory.
25 As a result of these circumstances, Cornman Tweedy has no plans to develop the
26 Cornman Tweedy Property in the near term. The Cornman Tweedy Property has been
27 shelved. *Id.* at 8, lines 4-10.

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1 Cornman Tweedy has made clear to AWC that the Cornman Tweedy Property will
2 not be developed for five years or longer. Cornman Tweedy has no plans to enter into a
3 line extension agreement with AWC, as evidenced by the following exchange between
4 AWC legal counsel Hirsch and Mr. Poulos:

5 Hirsch: Cornman Tweedy has no intention of executing a line
6 extension agreement with Arizona Water Company for the
7 1,138 acres at issue within the company's certificated area as
8 shown as CT-8 in pink?

9 Poulos: Not at this time. That's correct. *Trans. Vol. II* at 229, lines 4-8.

10 AWC acknowledged the obvious in this case: it cannot force a developer to
11 develop property before the developer is ready. Mr. Garfield testified at the hearing as
12 follows:

13 But I've stated that we cannot force the developer to develop or to
14 complete the certificate process. That's a developer-driven process.
15 *Trans. Vol. I* at 136, lines 21-23.

16 In addition, AWC acknowledged that a developer must "have planning and zoning
17 approval ... prior to the preliminary plat as part of the CAWS process." *Garfield Direct*
18 *Testimony* at 7, line 27 through p. 8, line 2. Moreover, a certificate of assured water
19 supply is a precondition to the execution of a main extension agreement as stated in
20 AWC's June 26, 2003, letter from James Wilson to Eric Stephenson of Core Group
21 Consultants, which reads: "The developer must obtain a Certificate of Assured Water
22 Supply for the project and furnish a copy of it to the Company before the Company will
23 sign a contract for installation of the water system." *Exhibit MJW-19* at 2, paragraph g.
24 AWC witness Michael Whitehead explained the reason for this requirement at the hearing
25 in the following exchange with Cornman Tweedy's legal counsel:

26 Crockett: So isn't the company's policy that until the developer has a
27 certificate of assured water supply, Arizona Water Company
28 will not enter into a main extension agreement?

Whitehead: Yes.... [W]e just didn't want a developer spending lots of
money installing water facilities only to find out that he could
not get a certificate of assured water supply. We just didn't

1 want that situation on our hands, and that's why this policy in
2 our A-B-C letter was created. *Trans. Vol. I* at 63, lines 18-22,
3 and p. 64, lines 4-10.

4 Thus, the development sequence is as follows: the developer obtains planning and
5 zoning approval in order to prepare a preliminary plat; the preliminary plat is required in
6 order to obtain a certificate of assured water supply from the Arizona Department of
7 Water Resources; a certificate of assured water supply is required by AWC before AWC
8 will enter into a line extension agreement with the developer. *Garfield Direct Testimony*
9 at 7, line 27 through p. 8, line 2, *Trans. Vol. I.* at 93, lines 15-19, and p. 63, lines 18-22.
10 Obviously, without a present plan and intention to develop property, it is impossible to
11 complete the steps necessary to obtain a certificate of assured water supply and to
12 complete a main extension agreement.

13 **D. Cornman Tweedy Can Obtain Water Service in the Future from a**
14 **Provider Other than AWC.**

15 In Decision 67670 (March 9, 2005), Picacho Water Company obtained an
16 extension of its CC&N to include the south half of EJR Ranch, so Picacho Water
17 Company's certificated territory is now contiguous to the Cornman Tweedy Property.
18 Thus, when development of the Cornman Tweedy Property proceeds in the future, the
19 owner of the property can obtain service from AWC, Picacho Water Company or an
20 improvement district or community facilities district. Decision 67670 also granted a
21 CC&N extension to Picacho Sewer Company for all of EJR Ranch, including the 1,138-
22 acre Cornman Tweedy Property. All of the conditions to vest the CC&N extensions
23 granted to Picacho Water Company and Picacho Sewer Company have been met.

24 To be clear, Cornman Tweedy is not advocating in this proceeding that the
25 Commission grant the water CC&N for the Cornman Tweedy Property to Picacho Water
26 Company. However, the fact that Picacho Water Company *could* serve the Cornman
27 Tweedy Property in the future is a relevant fact that should be considered as part of the
28 changed circumstances of this case. Staff witness Olea identified this very fact as one of

1 the reasons why the Commission might deny AWC's Extension Request. *Trans. Vol. II* at
2 310, lines 2-5.

3 **III. PUBLIC INTEREST ANALYSIS**

4 In determining whether to grant or deny AWC's Extension Request regarding the
5 Cornman Tweedy Property, the Commission must act in the public interest. While this
6 case involves a request to extend a compliance deadline under a conditional CC&N, the
7 evaluation of that request should follow the same path as the original evaluation
8 performed by the Commission when it issued the conditional CC&N. If the Commission
9 would not approve a CC&N under the facts as they exist today, then the Commission
10 should not grant an extension for compliance with the deadlines. Each of the following
11 factors clearly supports denying AWC's Extension Request.

12 **A. Cornman Tweedy Has Not Requested Water Service from AWC.**

13 Cornman Tweedy has not requested water service from AWC. This Commission
14 has a well-established history of requiring a request for service before granting or
15 extending a CC&N. The issuance or extension of a CC&N requires a demonstration of
16 necessity by the applicant, and the Commission finds necessity by looking for requests for
17 service. Staff has recently stated that:

18 [A CC&N] should not be issued lightly... [it] by definition, requires a
19 showing of necessity. Ordinarily, a showing of necessity is made by
20 demonstrating requests for service for the area. In an exceptional situation,
21 a showing of necessity can be made by other means. *Staff's Response to
Johnson Utilities Company's Motion to Continue* at 1 (April 29, 2005) in
Docket No. W-02859A-04-0844.

22 Absent compelling reasons to do otherwise (which do not exist in this case), the
23 Commission has routinely excluded the lands of landowners who have not requested
24 utility service or who have affirmatively opposed the inclusion of their property in the
25 CC&N of a public service corporation. For example, in a case involving Beardsley Water
26 Company, the Commission refused to grant the entire extension where Beardsley Water
27 Company had received requests for service covering only 25% of the requested extension
28 area. *Decision 59396* (Nov. 28, 1995) (Docket W-02074A-95-0103). In limiting the

1 extension to only that area which had requests for service, the Commission explained that
2 “there is no need to grant exclusive rights to [Beardsley Water Company] for the three
3 quarters of [the area] in which no development is taking place.” *Id.* at 2.

4 Similarly, in a recent case involving competing CC&N applications filed by AWC
5 and Woodruff Water Company (the “Woodruff Case”), the Commission denied AWC’s
6 requested extension in areas where AWC had not received requests for service. *Decision*
7 68453 (Feb. 2, 2006) (Docket W-04264A-04-0438 *et al.*). In partially denying AWC’s
8 extension request, the Commission explained that “we also concur with Staff’s
9 recommendation that additional areas which have not requested service should not be
10 included in AWC’s certificated area at this time.” *Id.* at 29. Also at issue in the case was
11 which water company would serve a 3,000-acre master planned development named
12 Sandia. The owner of the Sandia property had requested water service from its affiliate,
13 Woodruff Water Company, and not AWC. The Commission denied AWC’s competing
14 application to serve Sandia stating that “[n]either...Sandia nor CHC has requested that
15 their properties be included in the CC&N extension that AWC seeks.” *Id.*⁴ The fact that
16 the Commission granted a new CC&N to the newly formed Woodruff Water Company
17 instead of extending the existing CC&N of AWC speaks to the importance that the
18 Commission places on the desires of the property owner.

19 Of particular relevance to this case, a parcel of land was excluded from AWC’s
20 requested extension area in Docket W-01445A-05-0469 because the landowner revoked
21 his request for service and AWC honored the landowner’s request. *Decision* 68607 at
22 FOF 13 (March 23, 2006). AWC should likewise honor the landowner’s request in this
23 case.

24 The examples cited above are not isolated examples but represent the norm. The
25 Commission has cited to a lack of requests for service as a primary factor in limiting a
26 CC&N extension area in the following cases:

27 _____
28 ⁴ AWC has appealed the Commission’s decision in the Woodruff Case to the Maricopa County Superior Court.

1 1. Decision 68859 (July 28, 2006). In a recent decision involving an AWC
2 CC&N extension application in Rimrock, Arizona, Staff found that granting an extension
3 to Parcel Three, a 160-acre parcel, was not in the public interest “because it is contiguous
4 to another water company’s service territory, and neither company currently has requests
5 for service to the area.” *Id.* at FOFs 5, 27 (emphasis added). The Commission agreed
6 with Staff’s finding that it was premature to grant AWC a CC&N to serve Parcel Three.
7 *Id.* at FOF 30.

8 2. Decision 68445 (Feb. 2, 2006). Lyn Lee Water Company applied for a
9 CC&N extension to serve the south ½ of Section 19 after it discovered that 30 of its
10 customers were not located within its service territory. Since the 30 customers were only
11 located in the southwest ¼ of Section 19 and there were no requests for service, Staff
12 recommended—and the Commission concurred—that the extension area be limited to the
13 southwest ¼ of Section 19. *See Id.* at FOF 22.

14 3. Decision 68247 (Oct. 25, 2005). Sunrise Utilities’ application to provide
15 water and wastewater service was approved for only the areas in which the company
16 received requests for service. *See Id.* at FOFs 31, 33.

17 4. Decision 64062 (Oct. 4, 2001). Johnson Utilities Company acknowledged
18 that two parcels of land within the proposed CC&N extension area did not have requests
19 for service. Consequently, Johnson Utilities Company withdrew part of its CC&N
20 extension application due to a lack of requests for service. *See Id.* at FOF 48.

21 5. Decision 64288 (Dec. 28, 2001). This is another CC&N extension
22 application filed by Johnson Utilities Company that was denied due to a lack of requests
23 for service. The Commission found that the public need and necessity was not established
24 by Johnson Utilities Company because it did not have any requests for service in the
25 proposed extension area from developers or prospective customers. *See Id.* at FOFs 47,
26 70 and 84.

27 6. Procedural Order dated May 11, 2005 (Docket W-02859A-04-0844). In a
28 matter involving Diversified Water Utilities, the Commission indefinitely continued a

1 utility's application after the landowners withdrew their requests for service, noting that
2 "the public interest would not be served by conducting a hearing on competing
3 applications, or on one of those applications, where there does not currently exist a request
4 for service from any property owner in the proposed extension areas of either
5 application." *Id.* at 4. The Commission noted that the lack of requests for service was the
6 critical factor in determining whether the applications should be continued. *Id.*

7 Cornman Tweedy is not a small landowner. The Cornman Tweedy Property
8 comprises nearly two square miles. Consistent with the Commission's well-established
9 history as evidenced by the decisions cited above, AWC's Extension Request should be
10 denied with regard to the Cornman Tweedy Property. Cornman Tweedy has not
11 requested water service, does not want water service at this time, and the Cornman
12 Tweedy Property should not be included in AWC's CC&N.

13 **B. Cornman Tweedy Opposes the Inclusion of its Property in AWC's**
14 **CC&N.**

15 One reason Staff witness Olea cited for not granting AWC's Extension Request
16 with regard to the Cornman Tweedy Property is that the "current property owner does not
17 want to be served by Arizona Water." *Trans. Vol. II* at 309, lines 20-22. In adopting
18 Decision 68453 in the Woodruff Case discussed above, former Commissioner Spitzer
19 repeated comments of Commissioner Gleason that the desire of a landowner is relevant in
20 certifying a public utility to serve the landowner's property: "Commissioner Gleason
21 alluded to it very early that the property owner ought to have some say in how utility
22 service is provided...the rights of the property owner ought to be accorded some degree of
23 respect." *Transcript of Open Meeting* at 109 (Jan. 27, 2006). Cornman Tweedy does not
24 want AWC as its water provider for the northern half of EJR Ranch. The Commission
25 should respect the rights of Cornman Tweedy and deny AWC's Extension Request with
26 regard to the Cornman Tweedy Property.
27
28

1 C. There is No Present Need for Water Service on the Cornman Tweedy
2 Property.

3 The single most important question in addressing whether AWC's Extension
4 Request should be granted with regard to the Cornman Tweedy Property is whether there
5 is a present need for water service. In the Woodruff Case discussed above, Assistant
6 Director Steve Olea testified for Staff as follows:

7 Staff has always been [of] the opinion that there has to be a need for
8 service, and without a request, there is not a need, so there is no need to
9 have a certificate of convenience and necessity because the necessity
10 portion isn't met. *Hearing Transcript Vol. VII* at 1,415 (Aug. 4, 2005)
(Docket W-04264A-04-0438).

11 Consistent with the Woodruff Case, Staff witness Steve Olea testified in this case
12 as follows:

13 When Staff is considering either a new CC&N or an extension, one of the
14 primary things we look at is the need. Because just by its name, it's a
15 Certificate of Convenience and Necessity. The last word, necessity, is is
16 there a need for this utility, you know, whether it be water, sewer, electric,
17 gas, whatever, is there a need for it to be there and serve that land.

18 ***

19 And also, as far as the actual convenience part of that term, is it in the
20 public interest for them to be there. So the need is a major portion that
21 we'll look at. But like you said, it's not the only thing that we consider.
22 *Trans. Vol. II* at 338, lines 21-25, and 339, lines 1-2 (emphasis added).

23 The requirement of a "need" and a "necessity" for water service is the very reason
24 that the Commission includes time limits in conditional CC&Ns. In the June 12, 2006
25 Staff Report, Assistant Director Olea stated that "[t]he basic reason to require a time limit
26 for the submission of both the developer's CAWS and the MXA is to help ensure that
27 there is truly a necessity for the service being provided." *Staff Report* at 1 (June 12,
28 2006). Without a showing of need, a CC&N would not be issued in the first instance. If
an applicant for an extension of a deadline in a conditional CC&N cannot show that there

1 is a continuing need for utility service, then the extension request should be denied and the
2 CC&N deemed null and void.

3 Mr. Poulos testified at the hearing that upon acquisition of the EJR Ranch property,
4 various activities were initiated to entitle and develop the property in a strong real estate
5 market. However, the value of the EJR Ranch property increased more than ten-fold
6 during 2005. As a result of this unexpected and tremendous run-up in value, the tax
7 strategy for the property took priority over any plans to develop the property. Between
8 December 2005 and the end of first quarter 2006, the strategy shifted from development
9 of EJR Ranch to shutting the project down. In addition to the tax consideration, the other
10 factors that led to this decision included: (1) the real estate market slowed significantly
11 from December 2005 through March 2006; (2) Cornman Tweedy did not have a
12 significant investment in the EJR Ranch property, and therefore, could afford to carry the
13 property indefinitely; (3) Cornman Tweedy would have to make a significant investment
14 to open EJR Ranch (in a declining real estate market), and was unwilling to commit the
15 financial resources at this time; and (4) EJR Ranch is not integral to the Robson business
16 plan which is to construct amenitized adult retirement communities. All entitlement and
17 development activities ceased at the end of the first quarter 2006, except for certain
18 limited activities that could be expeditiously completed. *Poulos Rebuttal Testimony* at 3-
19 4.

20 The evidence shows that there is no present need for water service on the Cornman
21 Tweedy Property. Mr. Olea stated in his testimony that "[a]ccording to what has been
22 filed and what I have heard in the last two days of this hearing, there's no planned
23 development for what's been now termed the Cornman Tweedy property at least for the
24 next five years." *Trans. Vol. I* at 309, lines 22-25. Since there is no need for service,
25 AWC's Extension Request should be denied.

26 AWC itself acknowledges that it does not drive the development process, and that
27 it must wait for developers to drive the process of extending service. Mr. Whitehead
28 stated in his pre-filed testimony that Arizona Water Company has no reason to provide

1 water service before the developer is ready. *Whitehead Direct Testimony* at 4, lines 1-7;
2 *Trans. Vol. I* at 41, lines 14-21. The fact is that Cornman Tweedy is not prepared to
3 develop the Cornman Tweedy Property at this time. AWC's Extension Request should be
4 denied for the Cornman Tweedy Property.

5 **D. When Development of the Cornman Tweedy Property Occurs in**
6 **the Future, Cornman Tweedy Can Obtain Water Service from a**
7 **Provider other than AWC.**

8 One reason Staff witness Olea cited for not granting AWC's Extension Request
9 with regard to the Cornman Tweedy Property is that the "property can be served by
10 someone other than Arizona Water, and that would be the Picacho Water Company."
11 *Trans. Vol. II* at 309, lines 20-25. In Decision 67670, the Commission approved an
12 extension of the CC&N of Picacho Water Company to include the southern half of EJR
13 Ranch which is contiguous to the Cornman Tweedy Property. Thus, in the future, the
14 owner of the Cornman Tweedy Property would have multiple options for water service,
15 including at least two public service corporations.

16 **E. When Development of the Cornman Tweedy Property Occurs in**
17 **the Future, Cornman Tweedy Can Obtain Water and Sewer**
18 **Service from an integrated provider.**

19 Another reason Staff witness Olea cited for not granting AWC's Extension Request
20 with regard to the Cornman Tweedy Property is that "if this [property] is served
21 eventually by Picacho Water, it can also be provided sewer [service] by the Picacho
22 Sewer Company, which would make the water and sewer basically provided by the same
23 entity." *Trans. Vol. II* at 310, lines 5-8. In Decision 67670, the Commission approved an
24 extension of the CC&N of Picacho Sewer Company to include almost all of the Cornman
25 Tweedy Property.

26 **F. AWC did not Achieve Compliance with the Conditions of**
27 **Decision 66893.**

28 The Commission should not overlook the fact that AWC failed to achieve any
compliance with the conditions of Decision 66893 within the time period ordered by the

1 Commission. In its Extension Request, AWC requested that the original compliance
2 deadline of April 6, 2005 be extended an additional 365 days to April 6, 2006. We have
3 now gone beyond even AWC's modified extension request, and it would not be prudent
4 for the Commission to establish a new deadline given the changed circumstances. Mr.
5 Poulos has testified that development of the Cornman Tweedy Property will be delayed
6 for five years or longer. Given the fact that there is no present need for water service, it
7 would be nonsensical to establish new deadlines for compliance.

8 It is Staff's position that areas of a CC&N should be deleted where compliance has
9 not been achieved, as evidenced by the following exchange between Messrs. Hirsch and
10 Olea at the hearing:

11 Hirsch: Can you explain to us what the impact would be from a
12 regulatory standpoint within the Utility Division if a provider
13 that otherwise is ready, willing, and able to serve, and in
14 compliance and doing what it can do to be a water provider,
15 started to lose slivers and pieces and hunks of its certificate
16 whenever a developer decided to shelve a project for a period
17 of time? Is that consistent with good public policy?

18 Olea: I don't think so, and I don't believe that's what Staff was
19 looking at. Staff believes that the areas of a CC&N that
20 should be deleted are those areas for which compliance is not
21 achieved.

22 And in this particular case, as stated earlier, Staff's intent was
23 that the certificate of assured water supply and main
24 extension agreement should be submitted for the two
25 developments that were part of the extension. Cornman
26 Tweedy is one of those two developments. Certain
27 documents were not submitted in time. *Trans. Vol. II* at 324
28 lines 6-24 (emphasis added).

It is clear that as of the July 2006 hearing in this case—which was 27 months after
the date of Decision 66893—AWC has not satisfied both conditions for either Post Ranch
or the 240-acre Florence Country Estates property. For that matter, AWC had not
executed a main extension agreement or received a certificate of assured water supply for
any other portion of the eleven sections covered by Decision 66893, including the 1.138-

1 acre Cornman Tweedy Property.

2 There is no question that AWC failed to achieve compliance with the conditions of
3 Decision 66893. The question is whether the Extension Request should be granted. The
4 answer to that question is no unless AWC can demonstrate that there remains a need for
5 water service. The evidence in this case shows that there is no need for service, so the
6 Extension Request should be denied for the Cornman Tweedy Property.

7 **G. No Harm or Prejudice to AWC.**

8 The denial of AWC's Extension Request will cause no harm or prejudice to AWC,
9 for the following reasons:

10 1. **Florence Boulevard Transmission Main.**

11 AWC is planning the construction of a 16" transmission main along Florence
12 Boulevard (the "Florence Boulevard Transmission Main") which will bisect the
13 Conditional Extension Area on the north side of the Cornman Tweedy Property. BY
14 AWC's own admission, the denial of AWC's Extension Request will not adversely affect
15 the construction of the Florence Boulevard transmission main by AWC, as evidenced by
16 the following exchange between Cornman Tweedy's legal counsel and Mr. Whitehead:

17 Crockett: Whether or not the Cornman Tweedy property was in your
18 [AWC] CC&N, you would still have the ability to run the
19 Florence Boulevard line extension or the line extension; is
20 that correct?

21 Whitehead: True. *Trans. Vol. I* at 49 lines 8-13.

22 Moreover, AWC testified that it has the legal authority to construct a transmission
23 line through the CC&N of another private water company if necessary, as evidenced by
24 the following exchange between Cornman Tweedy's legal counsel and Mr. Whitehead:

25 Crockett: And do you know whether, in fact, Arizona Water Company
26 has the legal authority to construct a water line through the
27 CC&N of another certificated water provider?

28 Whitehead: I believe we do. *Trans. Vol. I* at 47, lines 15-19.

1 Thus, even if another private water company were ultimately certificated to serve
2 the Cornman Tweedy Property, AWC would still have the unfettered ability to
3 interconnect its systems. The denial of the Extension Request for the Cornman Tweedy
4 Property will not prohibit or impede construction of the Florence Boulevard Transmission
5 Main.

6 2. **No Construction of Infrastructure in the 1,138 Acres.**

7 AWC testified at the hearing that it has not commenced construction of any water
8 utility infrastructure within the Requested Extension Area, and specifically the Cornman
9 Tweedy Property. AWC witness Michael Whitehead testified that AWC "maintains and
10 regularly amends a Master Plan for its Pinal Valley operations, which includes its Casa
11 Grande, Stanfield, Tierra Grande and Arizona City and Coolidge systems." *Whitehead*
12 *Direct Testimony* at 5, lines 20-21, referencing *Exhibit MJW-2*. However, Mr. Whitehead
13 testified that "when you look at this Pinal Valley water system master plan, I'm going to
14 guess we don't have approvals to construct for about 90 percent of it." *Trans. Vol. I* at 51,
15 lines 8-10. Since there has been no construction of water facilities within the Cornman
16 Tweedy Property, the denial of the Extension Request for the Cornman Tweedy Property
17 will not adversely affect AWC.

18 3. **No effect on JBC Development, Storey Farms, AG Robertson,**
19 **Springwater Pointe, Hacienda Estates or Hacienda Highlands.**

20 In addition to the Post Ranch property, AWC witness Michael Whitehead testified
21 that AWC has received inquiries from within the Conditional Extension Area from
22 (i) JBC Development for the northeast ¼ of Section 23; (ii) Storey Farms for portions of
23 Sections 20 and 21; (iii) AG Robertson for portions of Sections 22, 23, 26 and 27; (iv)
24 Springwater Pointe, LLC, for the southeast ¼ of Section 30; and (v) Hacienda Estates and
25 Hacienda Highlands for the southwest ¼ of Section 30. *Whitehead Direct Testimony* at
26 13-14. The denial of AWC's Extension Request with regard to the Cornman Tweedy
27 Property will have no effect on any of these developers and/or developments.
28

IV. CONCLUSION

1
2 The Commission may not approve the Extension Request unless it determines that
3 it serves the public interest. In making this determination, the Commission should
4 consider whether it would approve the extension of AWC's CC&N to include the
5 Cornman Tweedy Property under the facts as they exist today. Since Decision 66892 was
6 issued more than two years ago, there has been a material change in circumstances with
7 regard to the Cornman Tweedy Property. First—and most importantly—there is no need
8 for water service on the Cornman Tweedy Property because the property is not being
9 developed today and it will not be developed for five years or longer. Without a
10 demonstrated need for service, there is no basis to support a CC&N for the Cornman
11 Tweedy Property. Moreover, Cornman Tweedy has not requested water service from
12 AWC and it opposes the inclusion of its property in AWC's CC&N.

13 There is no question that the owner of the Cornman Tweedy Property will have
14 multiple options for water service when service is actually needed in the future. With at
15 least two certificated water providers in the immediate vicinity (AWC and Picacho Water
16 Company), there can be no harm or prejudice to Cornman Tweedy in denying AWC's
17 Extension Request. Likewise, there can be no harm to AWC in denying the Extension
18 Request since AWC has not started the construction of water facilities within the
19 Cornman Tweedy Property, and the deletion of the Cornman Tweedy Property will not
20 impede AWC's plans to construct the Florence Boulevard Transmission Main.

21 AWC has not complied with the conditions of Decision 66893 for the Cornman
22 Tweedy Property, and in light of the changed circumstances discussed herein, it is clear
23 that AWC cannot comply with those conditions in the foreseeable future. Any new
24 compliance deadlines would be meaningless. Thus, the Commission should deny AWC's
25 Extension Request with regard to the Cornman Tweedy Property because it is not in the
26 public interest.

1 RESPECTFULLY submitted this 15th day of September, 2006.

2 SNELL & WILMER

3 

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9 ORIGINAL and thirteen (13) copies of the
10 foregoing have been filed with Docket
11 Control this 15th day of September, 2006.

12 A COPY of the foregoing was hand-
13 delivered this 15th day of September, 2006, to:

14 Teena Wolfe, Administrative Law Judge

15 Hearing Division

16 ARIZONA CORPORATION COMMISSION

17 1200 West Washington Street

18 Phoenix, Arizona 85007

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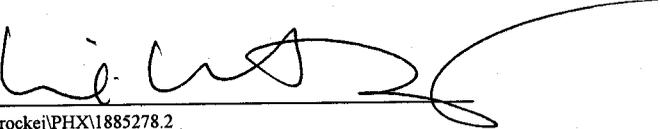
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