



BEFORE THE ARIZONA CORPORATION C

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
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Arizona Corporation Commission
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IN THE MATTER OF THE APPLICATION OF
ARIZONA WATER COMPANY FOR AN
EXTENSION OF THE SERVICE AREA
UNDER ITS EXISTING CERTIFICATE OF
CONVENIENCE AND NECESSITY TO
PROVIDE WATER UTILITY SERVICES

DOCKET NO. W-01445A-03-0559

STAFF'S RESPONSE BRIEF

Introduction

Staff has reviewed the closing briefs in the above-captioned matter filed by Arizona Water Company ("Arizona Water" or "AWC") and Cornman Tweedy 560, LLC ("Cornman Tweedy") on September 15, 2006. On September 15, 2006, Staff filed its Opening Brief in this matter. Staff continues to rely on the arguments put forth in its Opening Brief. However, Staff found it necessary to respond to some of the issues raised by AWC in its Post-Hearing Memorandum.

Response to AWC Issues

AWC argues that a contract exists between AWC and the State. In its brief, AWC argues that "contract principles have direct application in this matter." (AWC Opening Brief at 23). The granting of a CC&N does not create a contract between the utility and the State. In *US West Communications, Inc. v. Arizona Corporation Commission*, 197 Ariz. 16, 3 P.3d 936 (App. 1999), US West argued to the Arizona Court of Appeals that the Arizona Corporation Commission ("Commission") had breached a contract with the telecommunications company. The Court pointed out that there was no contractual relationship between US West and the Commission, and that US West has "cited no authority that holds that there is an actual contract or that contract remedies are available under these circumstances." *Id.* at 22, 3 P.3.d at 942. The Court went on to point out that the relationship between US West and the Commission there was no bargained-for exchange and no term to the supposed contract. *Id.* Similarly, in this case, there was no bargained-for exchange between the Commission and AWC.

1 In *Phelps Dodge Corporation v. Arizona Electric Power Cooperative, Inc.*, 207 Ariz. 95, 121,
2 83 P.3d 573, (App. 2004), the Arizona Court of Appeals ruled that the electric competition rules
3 promulgated by the Commission did not impair the contract rights of electric cooperatives. The
4 Court distinguished a CC&N from a traditional contractual relationship. There are no contractual
5 rights “to generate the electricity that is ultimately transmitted and sold for public use” or to
6 “exclusively sell electricity.” *Id.* In this case, since there is no contractual relationship between AWC
7 and the Commission, the standard remedies related to contract law are not available. Thus, Arizona
8 Water’s arguments that extend contract law principles to Cornman Tweedy’s position are not
9 compelling. Similarly, its arguments related to “forfeiture” under contract law cases are without
10 merit in this matter.

11 AWC argues that it has a “vested property right” protected by its CC&N contract with the
12 State. (AWC Opening Brief at 19). As noted above, there is no CC&N contract, and hence no
13 contract right protecting a vested property interest in this case. Monopoly regulation is a public
14 policy, not a property right. See *Tennessee Elec. Power Co. v. Tennessee Valley Authority*, 306 U.S.
15 118, 141 (1939). See also, *City of Tucson v. El Rio Water*, 101 Ariz. 49, 52, 415 P.2d 872, 878 (1966)
16 (expressly declining to determine whether a CC&N is a property right and recognizing that its
17 discussion of the utility’s monopoly was focused solely upon arriving at an appropriate valuation for
18 purposes of condemnation). Further, although the *Phelps Dodge* opinion recognized a public service
19 corporation has a “vested interest” under Arizona Constitution Article 15, Section 3, that interest only
20 addresses a utilities rights to construct and operate lines across the State. See: *Phelps Dodge* at 102,
21 83 P.3d at 580. Neither the *Phelps Dodge* or *US West* opinions, nor Article 15, Section 7 state that a
22 utility has a vested property right in a CC&N granted under A.R.S. § 40-281, 282.

23 AWC argues that the original CC&N Decision by the Commission (Decision No. 66893) may
24 not be altered by the hearing that was held on July 10th and 11th, 2006. (AWC Opening Brief at 22).
25 Due process requires that prior to a Commission action to alter its decision granting Arizona Water a
26 CC&N, Arizona Water has notice and an opportunity to be heard. This due process requirement
27 reflects the notice and opportunity to be heard provisions in A.R.S. § 40-252 (statute for amending a
28 final Commission Order). Staff’s position is that the hearing held on July 10th and 11th, 2006 meets

1 the standards set out in A.R.S. § 40-252. AWC attended the hearing and presented testimony. AWC
2 cross-examined witnesses. AWC knew why the hearing was being held. In this case, the procedural
3 order points out that AWC will have “an opportunity to be heard on its request for additional time for
4 compliance.” (Procedural Order at 6, March 22, 2006). Given the “null and void” language from
5 Decision 66893, it would have been reasonable for AWC to infer that the time extension request may
6 not be granted. The above reasonable inference should have led AWC to the logical conclusion that
7 AWC might lose all or a part of the original extension area. Thus, the Commission may rely on the
8 July 10th and 11th, 2006 hearing to make a determination whether the original CC&N decision
9 (Decision No. 66893) should be altered.

10 AWC argues that a strict reading of the CC&N Decision (Decision No. 66893) shows that
11 AWC has complied with Decision No. 66893. (AWC Opening Brief at 28). First, even if that were
12 true, Decision No. 66893 requires timely compliance. Any compliance that may have been achieved
13 in this case was certainly outside the time specified in Decision No. 66893. Second, AWC argues that
14 AWC is free to file any document having to do with “Assured Water Supply” in the extension area in
15 order to satisfy Decision No. 66893. (AWC Opening Brief at 29). Although AWC was able to get a
16 Physical Availability Determination and ADWR-issued Analysis of Assured Water Supply, Decision
17 No. 66893 calls for AWC to file the “Developer’s Assured Water Supply for each respective
18 development.” (Decision No. 66893 at 7). This specific language suggests separate documents for
19 each development that are procured by the particular developer. Staff’s witness, Steve Olea, testified
20 that “Staff’s intent was that the certificate of assured water supply and main extension agreement
21 should be submitted for the two developments that were part of the extension.” (Tr. at 324). The
22 “certificate of assured water supply” referred to by Mr. Olea is a document issued by the Arizona
23 Department of Environmental Quality to individual developers. Thus, Staff disagrees with AWC’s
24 assertion that it has complied with Decision No. 66893.

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1 RESPECTFULLY SUBMITTED this 6th day of October, 2006.

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