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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

CORNMAN TWEEDY'S
RESPONSE TO AWC'S MOTION
TO STRIKE AND PRE-HEARING
BRIEF ON LEGAL ISSUES

Pursuant to the telephonic procedural conference held February 8, 2008, and the subsequent Procedural Order dated February 12, 2008, Cornman Tweedy 560, LLC ("Cornman Tweedy"), through counsel undersigned, hereby submits its combined: (1) Response to Arizona Water Company's ("AWC") Motion to Strike ("Motion to Strike") filed February 7, 2008; and (2) Pre-Hearing Brief on the Legal Issues raised by Arizona Corporation Commission ("Commission") Decision 69722 and by the pre-filed testimony of the parties in this remand proceeding. As counsel for Cornman Tweedy stated at the telephonic procedural conference, Cornman Tweedy is combining its Response to AWC's Motion to Strike and its Pre-Hearing Brief on Legal Issues because the arguments asserted by AWC in its Motion to Strike and pre-filed testimony implicate a threshold legal question, the disposition of which directly impacts the scope of this remand proceeding and is potentially case dispositive. Specifically, given the Commission's clear directive in Decision 69722 to "develop a record [broad in scope] to consider the overall public interest underlying service to the Cornman property that is included in the extension area granted by Decision No. 66893,"¹ the threshold legal

¹ Decision 69722 at 4, lines 23-26.

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1 question is "What are the appropriate legal limits on the scope of this remand
2 proceeding?"

3 Cornman Tweedy submits that under applicable Arizona law, the Commission
4 can and should consider and weigh all relevant evidence which bears upon the overall
5 public interest underlying utility service to the Cornman Tweedy property. What's more,
6 the Commissioners have been very clear that they expect a proceeding broad in scope to
7 consider the various public interest issues surrounding utility service to the Cornman
8 Tweedy Property. Under the applicable legal standards, as discussed herein, and
9 consistent with the express desires of the Commissioners, the pre-filed testimony and
10 exhibits of Mr. Jim Poulos, Dr. Fred Goldman and Mr. Paul Hendricks go directly to the
11 issues the Commissioners want to hear in this remand proceeding, and should not be
12 stricken as AWC requests.

13 **I. SUMMARY OF LEGAL ISSUES.**

14 Based upon Decision 69722 and the pre-filed testimony in this remand
15 proceeding, Cornman Tweedy submits that the following legal issues should be
16 addressed:

- 17 • **What is the legal standard the Commission should apply in**
- 18 **determining whether the Cornman Tweedy property can be**
- 19 **deleted from the area conditionally granted in Decision 66893?**
- 20 • **To what extent does *James P. Paul* apply in this remand**
- 21 **proceeding?**
- 22 • **What is the scope of the evidentiary hearing the Commission has**
- 23 **ordered in Decision 69722?**
- 24 • **What factors should the Commission consider in determining**
- 25 **the public interest in this remand proceeding?**

26 These legal issues, including the threshold legal issue relating to the legal
27 standard the Commission should apply for the deletion of a CC&N, are directly or
28 indirectly implicated by AWC's Motion to Strike and will be addressed in Cornman

1 Tweedy's Response to the Motion to Strike. Therefore, Cornman Tweedy has briefed
2 these issues in conjunction with its Response to Motion to Strike set forth below.

3 **II. RESPONSE TO MOTION TO STRIKE.**

4 **A. Background.**

5 In order to address the arguments asserted in AWC's Motion to Strike, it is
6 necessary to set forth how and why this remand proceeding came about. On June 12,
7 2007, the Administrative Law Judge ("ALJ") issued a Recommended Opinion and Order
8 ("ROO") which found that AWC had complied with the conditions imposed in Decision
9 66893, a decision which conditionally granted AWC's application for a 7,000-acre
10 extension of its Certificate of Convenience and Necessity ("CC&N") in Pinal County.
11 The area covered by Decision 66893 included 1,138 acres which are now owned by
12 Cornman Tweedy (hereinafter, the "Cornman Tweedy Property"), and which are subject
13 to this remand proceeding. The ROO was scheduled for consideration by the
14 Commission at its June 26-27, 2007 Open Meeting.

15 On June 21, 2007, Cornman Tweedy filed exceptions to the ROO requesting that
16 the Commission exclude the Cornman Tweedy Property from the area conditionally
17 granted in Decision 66893. On June 22, 2007, Chairman Gleason docketed Gleason
18 Proposed Amendment #1 which, if adopted, would have deleted the Cornman Tweedy
19 Property from the area conditionally granted in Decision 66893.² At the June 26-27
20 Open Meeting, there was extensive discussion among the Commissioners, the ALJ and
21 the Legal Division regarding whether the Commission could adopt Gleason Proposed
22 Amendment #1 without subjecting the Commission to a potential claim by AWC that the
23 Commission failed to provide procedural due process. Specifically, the Commission
24 discussed whether AWC had received adequate legal notice that it could lose that
25 portion of the CC&N area conditionally granted in Decision 66893 that included the
26 Cornman Tweedy Property. As a result, the Commissioners elected not to vote on the

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28 ² The reference to Gleason Proposed Amendment #1 is solely for the purpose of historical background
and not for its substantive content.

1 ROO at that time in order to have more time to consider the legal implications of
2 Gleason Proposed Amendment #1 and to consider possible alternative amendments to
3 address the legal concerns.

4 The ROO was rescheduled for consideration at the July 24-25, 2007 Open
5 Meeting. On July 19, 2007, Chairman Gleason docketed Gleason Proposed Amendment
6 #3 which contained the following language³ which was ultimately incorporated into
7 Decision 69722:

8 After considering the evidence in this matter, we are concerned that
9 there may not be a current need or necessity for water service in the
10 portions of the extension area that are owned by Cornman. We also
11 recognize that Cornman does not wish to have its property included in
12 Arizona Water's CC&N at this time. We believe that these issues bear
13 further examination and that they may have some relevance to the best
14 interests of the area ultimately to be served.

15 We also recognize that the proceeding before us is limited to
16 relatively narrow issues: whether, for purposes of compliance, Arizona
17 Water should be granted an extension of time to fulfill the conditions of
18 Decision No. 66893 and whether, in fact, those conditions have been
19 fulfilled. We have concluded that these conditions have been fulfilled, and
20 we therefore recognize that, by the terms of Decision No. 66893, Arizona
21 Water holds a CC&N for the extension areas at issue in this proceeding.

22 Nonetheless, regarding the property that is owned by Cornman, we
23 would like an opportunity to consider the overall best interests of the
24 Cornman area and of the public. We will therefore reopen the record in this
25 matter pursuant to A.R.S. § 40-252 and remand this case to the Hearing
26 Division for further proceedings regarding whether Arizona Water should
27 continue to hold a CC&N for the Cornman extension area at this time. We
28 recognize that Arizona Water, as the CC&N holder, is entitled to
appropriate notice and an opportunity to be heard. We therefore officially
place Arizona Water on notice that our subsequent proceeding on remand
will be for the purpose of considering whether the Cornman property
should be deleted from the CC&N extension granted to Arizona Water by
Decision No. 66893. The Hearing Division is directed to conduct further
evidentiary proceedings in this matter, including appropriate opportunities
for intervention and an appropriate opportunity for Arizona Water to
present its case.

While the matter currently before us presented relatively narrow issues, we view the proceeding on remand as broad in scope so that the Commission may develop a record to consider the overall public interest underlying service to the Cornman property that is included in the extension area granted by Decision No. 66893. By identifying these issues and requiring further proceedings, we are not prejudging this matter in any

³ Gleason Proposed Amendment #2 would have rendered null and void Decision 66893 in its entirety.

1 way; instead, we merely desire an opportunity to consider the broader
2 public interests implicated herein.⁴ (emphasis added).

3 At the July 24-25 Open Meeting, there was considerable discussion regarding
4 (i) whether Gleason Proposed Amendment #3 would fully resolve any legal concerns
5 regarding proper notice to AWC; and (ii) whether remanding the proceeding under
6 A.R.S. §40-252 to permit the broader public interest discussion the Commissioners
7 desired was the best way to achieve the Commissioners' objective. Cornman Tweedy
8 urged the Commission that the law would permit the Commission to simply expand the
9 scope of the prior proceeding regarding AWC's request to extend the compliance
10 deadlines in Decision 66893 and remand the matter back for additional evidentiary
11 hearings on the broader public interest issues. However, concerns persisted that such a
12 course of action might not comport with the Commission's notice requirements, thus
13 subjecting the Commission to a legal challenge by AWC. Ultimately, the Commission
14 adopted Gleason Proposed Amendment #3 and it was incorporated in Decision 69722.

15 The Commissioners' extensive discussions at the June 26-27 and July 24-25 Open
16 Meetings, the adoption of Gleason Proposed Amendment #3, and the plain language of
17 Decision 69722 leave no doubt that the Commissioners intended a remand proceeding—
18 broad in scope—to develop an evidentiary record regarding the public interest issues
19 underlying utility service to the Cornman Tweedy Property. Likewise, there can be no
20 doubt that the Commissioners believed that their unanimous adoption of Gleason
21 Proposed Amendment #3 accomplished their objective, consistent with the procedural
22 due process interests of AWC.

23 On August 17, 2007, Cornman Tweedy filed an Application for Rehearing and
24 Reconsideration of Decision 69722 pursuant to A.R.S. §40-253 and A.A.C. R14-3-111
25 ("Application for Reconsideration). The purpose of the Application for Reconsideration
26 was, in part, to advise the Commission that AWC might attempt to thwart the
27 Commission's wishes for a broad remand proceeding as set forth in Gleason Proposed

28 ⁴ The entire Gleason Proposed Amendment #3 is attached as Exhibit A.

1 Amendment #3 and Decision 69722 by citing *James P. Paul Water Company v. Arizona*
2 *Corporation Commission* ("*James P. Paul*"), 137 Ariz. 426, 671 P.2d 404 (1983). The
3 Application for Reconsideration stated the following:

4 Cornman Tweedy is concerned that a party may try to argue in the
5 remanded proceeding that *James P. Paul Water Company v. Arizona*
6 *Corporation Commission*, 137 Ariz. 426, 671 P.2d 404 (1983) ("*James P.*
7 *Paul*") limits the Arizona Corporation Commission's review of Decision
8 66893 to whether Arizona Water Company ("AWC") can provide adequate
9 service to the Cornman Tweedy property at reasonable rates, thereby
10 subverting the Commission's stated and unanimous desire to "***develop a***
11 ***record [broad in scope] to consider the overall public interest underlying***
12 ***service to the Cornman property that is included in the extension area***
13 ***granted by Decision No. 66893.***" *Decision 69722* at 4, lines 23-26.
14 Specifically, Decision 69722 clearly sets forth the Commission's concern
15 that "there may not be a current need or necessity for water service in the
16 portions of the extension area that are owned by Cornman" and recognizes
17 that Cornman Tweedy "does not wish to have its property included in
18 Arizona Water's CC&N at this time." *Id.* at lines 1-5.⁵

12 As predicted, AWC has attempted to use *James P. Paul* to improperly limit the
13 scope of this remand proceeding. In its Motion to Strike, AWC completely misstates
14 Cornman Tweedy's position by stating that "Cornman Tweedy conceded that *James P.*
15 *Paul* ... would limit matters in the remand proceeding to whether Arizona Water
16 Company 'can provide adequate service to the Cornman Tweedy property at reasonable
17 rates.'" Motion to Strike at 4, lines 18-21. To the contrary, Cornman Tweedy stated in
18 its Application for Rehearing that "Cornman Tweedy does not concede that *James P.*
19 *Paul* limits the issues the Commission may consider on remand under A.R.S. §40-252."
20 Application for Rehearing at 1, footnote 2.

21 Cornman Tweedy believes that the Commissioners have properly rejected any
22 notion that *James P. Paul* limits the scope of this remand proceeding. In its Application
23 for Reconsideration, Cornman Tweedy concluded with the following:

24 If the Commission, however, does not believe that *James P. Paul* applies to
25 limit the issues in the remand proceeding, Cornman Tweedy believes that
26 the denial of this Application will make the Commission's position clear to
27 the parties, thereby precluding any assertion of the applicability of *James P.*
28 *Paul* to limit the issues considered in the remand proceeding, which would
then be conducted consistent with the Commission's expressed wishes set
forth in Decision 69722. *Id.* at 8.

⁵ Application for Reconsideration at 1-2.

1 The Commission had ample time to consider the potential legal issues raised in the
2 Application for Reconsideration, and since the Commission did not grant the
3 Application for Reconsideration, Cornman Tweedy believes the Commission has
4 already determined that it would be inappropriate to use *James P. Paul* as the basis to
5 circumvent the Commission's stated wishes for a broad remand proceeding to examine
6 the public interest issues underlying utility service to the Cornman Tweedy Property.
7 The applicability of *James P. Paul* in this remand proceeding will be discussed in more
8 detail below.

9 **B. AWC's Motion to Strike Flies in the Face of the Commission's**
10 **Express Direction Set Forth in Decision 69722 by Asserting that**
11 **the Remaining Issue on Remand is Whether AWC Remains Fit**
12 **and Willing to Serve the Cornman Tweedy Property.**

13 In its Motion to Strike, AWC openly acknowledges that the Commission directed
14 that the remand proceeding "should be broad in scope so that the Commission may
15 develop a record to consider the overall public interest underlying service to the
16 Cornman property." Motion to Strike at 4, lines 3-5. However, AWC implicitly faults
17 the way in which the Commission remanded this case and attempts to block the
18 Commission's stated direction, arguing that:

19 [B]ecause the Commission held that Arizona Water Company was a fit and
20 proper entity to hold the CC&N, the Commission made no provision for
21 any further hearings on the fitness of Arizona Water Company or whether
22 Picacho or some other entity should hold the CC&N instead, nor did it
23 grant intervention to Picacho Water Company, Robson Communities, or
24 any other party to present such evidence or exhibits

25 Accordingly, the appropriate remaining issues on remand are whether
26 Arizona Water Company remains fit and willing to serve the Cornman
27 Tweedy CC&N area, and whether the Cornman Tweedy portion of Arizona
28 Water Company's CC&N may be legally deleted under Arizona law on this
record. *Id* at 4, lines 6-15 (emphasis added).

A remand proceeding based on the scope described by AWC is nonsensical. In
Decision 69722, the Commission already held that AWC is fit and proper, and AWC has
made clear in this proceeding that it is willing to serve the Cornman Tweedy Property.

1 Thus, what would be left to consider in the remand proceeding limited as AWC
2 proposes? Clearly, the Commission has directed a broad remand proceeding to consider
3 the public interest issues underlying utility service to the Cornman Tweedy Property,
4 specifically addressing (i) whether there is "a current need or necessity for water service
5 in the portions of the extension area that are owned by Cornman" and (ii) the reasons
6 why "Cornman does not wish to have its property included in Arizona Water's CC&N at
7 this time." Gleason Proposed Amendment #3.

8 AWC argues in its Motion to Strike that much of the pre-filed direct and rebuttal
9 testimony and exhibits of Mr. Poulos, Dr. Goldman and Mr. Hendricks are "completely
10 irrelevant even to an 'expanded scope' of the issues to be presented in this remand
11 proceeding." Motion to Strike at 1, lines 17-21. However, all of the pre-filed direct and
12 rebuttal testimony and exhibits of the Cornman Tweedy witnesses goes to the complete
13 lack of a need and necessity for utility service at the Cornman Tweedy Property and the
14 various reasons why Cornman Tweedy does not want AWC to provide water service to
15 the property. This testimony is exactly within the scope of this remand proceeding as set
16 forth in Decision 69722, and relevant to the Commission's consideration of the public
17 interest issued raised in this case. If the ALJ was to grant AWC's Motion to strike, it
18 would deny the Commission the opportunity to develop the evidentiary record that it
19 specifically ordered in Decision 69722. Accordingly, the Motion to Dismiss should be
20 denied on this basis alone.

21 C. **James P. Paul is Not Applicable in this Case Because it is**
22 **Distinguishable from this Case.**

23 While AWC does not explicitly state in its Motion to Strike that *James P. Paul*
24 applies to limit the scope of this remand proceeding, AWC's statement of the scope of
25 this remand proceeding is clearly based on the standard set forth in *James P. Paul*.
26 Thus, whether *James P. Paul* applies to limit the scope of this case should be addressed
27 as a threshold issue, and rejected as inapplicable and distinguishable in this case.
28

1 Just as Cornman Tweedy predicted in its Motion for Reconsideration, AWC is
2 attempting to strike relevant, Commission-ordered testimony and establish inapplicable
3 legal parameters in this remand case by surreptitiously advocating the legal standard set
4 forth in *James P. Paul*, which if applicable, would preclude the Commission from
5 deleting the Cornman Tweedy Property from the area conditionally granted in Decision
6 66893 unless the Commission found that AWC is unable or unwilling to provide utility
7 service to the property at reasonable rates. Notwithstanding clear directive of Decision
8 69722, AWC argues that any testimony other than testimony relating to its narrow
9 standard is outside the scope of this remand case. This argument should be rejected at
10 this time for the following reasons.

11 There are several facts in this case which clearly distinguish it from *James P.*
12 *Paul*, and the Commission should have an opportunity to consider these facts in the
13 remand case. In *James P. Paul*, the Arizona Supreme Court defined the criteria under
14 which the Commission may delete territory from a CC&N under a specific set of facts.
15 The James P. Paul Water Company (“Paul Water Company”) was granted a CC&N to
16 provide water service to several sections of largely undeveloped land in Maricopa
17 County, including approximately 240 acres that were the subject of the case. Pinnacle
18 Paradise Water Company (“PPWC”) held a CC&N to provide water service to an area
19 adjacent to the 240 acres within Paul Water Company's CC&N. PPWC filed a petition
20 with the Commission to delete the 240 acres from Paul Water Company's CC&N and the
21 Commission granted the petition. Paul Water Company was not providing water service
22 to the 240 acres, nor had it constructed any facilities to serve the property since no
23 demand for service had been made by the owner of the property. The owner of the 240
24 acres was also a 50% owner of PPWC. PPWC had facilities in an area adjacent to the
25 240 acres and could have extended its facilities at a relatively low cost. *James P. Paul*,
26 137 Ariz. at 427-428, 671 P.2d at 405-406.

27 The Arizona Supreme Court held in favor of the Paul Water Company, ruling that
28 the “public interest is the controlling factor in decisions concerning service of water by

1 water companies.” *Id.* at 429, 671 P.2d at 407. In applying the public interest standard
2 in *James P. Paul*, the court stated that “[o]nce granted, the certificate confers upon its
3 holder an exclusive right to provide the relevant service for as long as the grantee can
4 provide adequate service at reasonable rates.” *Id.* This language from *James P. Paul*
5 appears to provide the entire basis for AWC’s legal position in this case, including the
6 rationale underlying its Motion to Strike.

7 The Arizona Supreme Court specifically distinguished the Paul Water Company
8 situation from another case which is more instructive for this case. In *Arizona*
9 *Corporation Commission v Arizona Water Company*, 111 Ariz. 74, 523 P.2d 505 (1974)
10 (“*Arizona Water Company*”), AWC and R.J. Fernandez doing business as Holiday Forest
11 Water Company filed competing applications for a CC&N to supply water to a half
12 section of land which was undergoing residential development. AWC was granted the
13 CC&N. Mr. Fernandez filed for rehearing and on remand, the Commission rescinded
14 the CC&N and gave it to Mr. Fernandez. An appeal ensued, and the Superior Court
15 vacated the Commission’s actions and the Court of Appeals affirmed, holding that
16 “evidence that the public interest would best be served by the certification of [the
17 competitor] in place of the Arizona Water Company is insubstantial as opposed to the
18 evidence offered by the Arizona Water Company and, therefore . . . the record clearly
19 supports the Superior Court’s conclusions.” *Id.* at 77, 523 P.2d. at 508. The Arizona
20 Supreme Court quoted this language in *James P. Paul*, and then distinguished *Arizona*
21 *Water Company* from *James P. Paul*, stating:

22 *Arizona Water Co.* is distinguishable because it presented a challenge to the
23 Commission’s *initial* grant of a certificate of convenience and necessity.
24 Where a request for a certificate of convenience and necessity is made in
25 the first instance, the public interest is determined by comparing the
26 capabilities and qualifications of competitors vying for the exclusive right
27 to provide the relevant service. The amounts of time and money
28 competitors must spend (at the consumers’ ultimate expense) to provide
service become primary determinants of the public interest. But the instant
case did not involve a request for certification in the first instance. Instead,
it involved a request for a deletion in a certificate issues some seven years

1 earlier. Where a public service corporation holds a certificate for a given
2 area, the public interest requires that that corporation be allowed to retain
3 its certificate until it is unable or unwilling to provide needed service at a
reasonable rate. *James P. Paul* at 430 (emphasis in original).

4 What is significant about the *Arizona Water Company* case is that the
5 Commission may consider the full panoply of public interest issues when considering an
6 initial grant of a CC&N. By comparison, where a CC&N was granted years earlier, as in
7 *James P. Paul*, the Commission's review is more limited.

8 The facts and circumstances of this case—which is for all intents an purposes an
9 initial grant—are more akin to *Arizona Water Company* than *James P. Paul*. In
10 Decision 66893 the Commission granted a conditional CC&N extension holding that if
11 AWC did not comply with the conditions within one year, the CC&N would be
12 considered null and void without further order of the Commission. When AWC could
13 not timely comply with the conditions, it applied for an extension of time in the very
14 same docket, effectively a continuation of the CC&N case. A proceeding was then held
15 to determine whether AWC had met the conditions and whether the requested extension
16 should be granted, which led to Decision 69722. However, it is very significant that
17 Decision 69722: (i) remanded the proceeding pursuant to A.R.S. §40-252 within the
18 same docket once again; (ii) acknowledged that the previous proceeding had been
19 narrow in scope; (iii) put AWC on notice that the Cornman Tweedy Property could be
20 deleted from the area conditionally granted in Decision 66893; and (iv) requested that
21 the proceeding on remand be broad in scope so that the Commission could develop a
22 record to consider the overall public interest underlying service to the Cornman Tweedy
23 Property. The current remand proceeding under Decision 69722 is simply a further
24 continuation of the Docket W-01445A-03-0559 which led to the issuance of Decision
25 66893. As such, the narrow legal standard set forth in *James P. Paul* does not apply
26 here, and the Commission may consider the broader public interest considerations
27 relevant in the grant of an initial CC&N as discussed in *Arizona Water Company*.
28

1 The pre-filed direct and rebuttal testimonies and exhibits which AWC seeks to
2 strike go directly to the public interest considerations applicable in the grant of an initial
3 CC&N, and should be considered and weighed by the Commission in this case.
4 Specifically, the Cornman Tweedy witnesses have presented evidence relating to need
5 and necessity for service, splitting a development between two providers, the cost-
6 benefit and resource analysis of integrating water and wastewater service versus stand-
7 alone water providers, and other recent policy initiatives of the Commission. AWC
8 would deny the Commission the opportunity to consider this important evidence.

9 There are other important distinguishing factors between this case and *James P.*
10 *Paul*. First, in *James P. Paul*, the Commission was asked to take an unconditional
11 CC&N from Paul Water Company which it had already held for seven years and give it
12 to a competitor where a request for service existed at the time. In this case, there has
13 been one continuous proceeding regarding the area covered in Decision 66893,
14 culminating in the remand proceeding ordered in the recent Decision 69722. By
15 comparison, in *James P. Paul*, the Paul Water Company had held its CC&N for seven
16 years. Moreover, AWC has been on notice since Cornman Tweedy's intervention and
17 throughout this proceeding that the Cornman Tweedy Property might not be included in
18 its CC&N. Second, unlike *James P. Paul*, there is no need and necessity or request for
19 service on the Cornman Tweedy Property at this time. Third, AWC's assertions
20 regarding Cornman Tweedy's affiliate Picacho Water Company notwithstanding,
21 Cornman Tweedy has not asked the Commission to delete the CC&N and give it to an
22 AWC competitor. Rather, Cornman Tweedy has requested that its property be deleted
23 from the AWC CC&N to restore the *status quo ante*. At such time that a request for
24 service is made, AWC would have the opportunity, along with Picacho Water Company
25 or any other certificated water provider, to apply for the CC&N for the Cornman
26 Tweedy Property. At such time, the Commission can once again consider all of the
27 public interest considerations relevant in the issuance of a CC&N. Fourth, AWC will
28

1 not be adversely impacted by the deletion of the Cornman Tweedy Property, as
2 discussed in Cornman Tweedy's pre-filed testimony.

3 There is another significant detail with regard to *James P. Paul* that should not go
4 unnoticed and which precludes the application of *James P. Paul* in this case. In framing
5 the legal standard applicable in CC&N deletion cases which are analogous to *James P.*
6 *Paul*, the Arizona Supreme Court stated that:

7 . . . the public interest requires that that corporation be allowed to retain its
8 certificate until it is unable or unwilling to provide needed service at a
9 reasonable rate. (Emphasis added.) (*Id.*)

10 In this case, the water service is simply not needed at the Cornman Tweedy
11 Property, and much of Cornman Tweedy's pre-filed testimony addresses this point.
12 Whether there is a need for service at the Cornman Tweedy Property was specifically
13 raised as a concern by the Commission in Decision 69722, which states:

14 After considering the evidence in this matter, we are concerned that
15 there may not be a current need or necessity for water service in the
16 portions of the extension area that are owned by Cornman. We also
17 recognize that Cornman does not wish to have its property included in
Arizona Water's CC&N at this time. We believe that these issues bear
further examination and that they may have some relevance to the best
interests of the area ultimately to be served. Decision 69722 at 4, lines 1-5
(emphasis added).

18 AWC may point to footnote 23 in *James P. Paul* which states that even if the
19 Commission's initial grant of the CC&N was inappropriate because it was granted
20 before there was a need and necessity, that factor did not justify the decision to delete
21 the 240 acres from Paul Water Company's CC&N. *James P. Paul* at 408, footnote 3.
22 However, while there may not have been a need and necessity for service seven years
23 earlier when the CC&N was granted, there was a need for service at the time of the
24 deletion proceeding in *James P. Paul*. *Id.* at footnote 4. In this case, there is no need
25 and necessity for service at this time and Cornman Tweedy has no current plans to
26 develop the Cornman Tweedy Property. This is a distinguishing factor. The *James P.*
27 *Paul* standard specifically discusses needed service. This is clearly not the situation that
28 exists today with respect to the Cornman Tweedy Property.

1 Cornman Tweedy submits that its pre-filed testimony and exhibits that AWC
2 seeks to strike provide evidence that goes directly to the distinguishing factors discussed
3 above, in addition to addressing the broad public interest considerations the Commission
4 seeks to consider pursuant to Decision 69722. Cornman Tweedy further submits that the
5 Commission may take all of this evidence into consideration in determining the overall
6 public interest underlying utility service to the Cornman Tweedy Property consistent
7 with the holdings in *Arizona Water Company* and *James P. Paul*.

8 **D. Even if *James P. Paul* Were Applicable in this Case, the**
9 **Testimony Relating to Integration of Water and Wastewater**
10 **Service and Cost Savings Discussed in Cornman Tweedy's Pre-**
11 **Filed Testimony Is Relevant to the Issue of whether AWC can**
12 **Provide Adequate Service At Reasonable Rates.**

13 It appears that AWC is seeking to exclude all testimony that does not specifically
14 address the narrow legal standard set forth in *James P. Paul*. The Motion to Strike
15 further inappropriately cites to Decision 69722 and the November 8, 2007 Procedural
16 Order as a basis for its position that the since the Commission has determined AWC's
17 fitness, no issue exists in the remand proceeding as to AWC's fitness to serve. Even if
18 the Commission were to find that the narrower *James P. Paul* standard applies in this
19 case, AWC may still be found to unable or unwilling to provide adequate service at
20 reasonable rates because (i) it cannot provide integrated water and wastewater service
21 and (ii) the additional facilities that it must construct to serve the Cornman Tweedy
22 Property would result in duplication and increased costs to the ratepayers. These issues
23 are clearly addressed in Cornman Tweedy's pre-filed testimony and exhibits which
24 AWC seeks to strike, and this evidence could ultimately form the basis of a Commission
25 determination that AWC is unable or unwilling to provide needed utility service at
26 reasonable rates. Cornman Tweedy should have the opportunity to present its evidence
27 on the these issues to establish the record on this issue.

28 **E. It is Unnecessary for the ALJ to Decide on the Motion to Strike.**

Given the amount of testimony that AWC seeks to strike, the granting of the
Motion to Strike leaves very little for the evidentiary hearing and is, in effect, potentially

1 case dispositive if the ALJ rules that AWC has already met the narrow *James P. Paul*
2 criteria. As discussed above, this would preclude the Commission from having an
3 evidentiary record on the broader public policy issues underlying utility service to the
4 Cornman Tweedy Property as was ordered in Decision 69722.

5 The granting of a motion to strike in an administrative proceeding before the
6 Commission is not a usual occurrence. This is because the ALJ can simply reserve
7 judgment on the motion and allow the proceeding to go forward. If at the end of the
8 proceeding, the ALJ agrees with the legal arguments underlying the motion, the ALJ can
9 simply assign no weight to the testimony and prepare a ROO accordingly. Although this
10 means going through a hearing, in the event that the Commissioners were to file
11 amendments changing the ROO's recommendations, those amendment could still be
12 supported by an underlying evidentiary record. Without that record, the matter would
13 have to be remanded back to resume the hearing once again. In the instant case, this
14 matter has already been through two evidentiary hearings and the Commission
15 specifically remanded it for another. If AWC's Motion to Strike was granted and the
16 Commission still wanted to hear evidence on the public policy issues notwithstanding,
17 the matter would have to be sent back down yet again causing further delay and expense.
18 Given that the testimony has already been filed and the matter is ready to go to hearing,
19 conducting the evidentiary hearing preserves all options for the ALJ and the
20 Commissioners with minimal offense to judicial economy.

21 These points are further augmented in a current Commission case in Docket No.
22 E-0396A-06-0168, *In the Matter of the Application of Sempra Energy Solutions LLC for*
23 *a Certificate of Convenience and Necessity for Competitive Retail Electric Service.*
24 Sempra Energy Solutions LLC ("Sempra") filed a motion to strike in its entirety, the
25 pre-filed testimony of three witnesses. Very similar to the arguments raised by AWC in
26 its Motion to Strike, Sempra asserted that the testimony it sought to strike expanded the
27 issues in the proceeding beyond those necessary for the Commission to address in its
28 prior decision on Sempra's application and is so broad and general in nature and

1 conflicts with existing Arizona law. In a procedural order dated December 20, 2007, the
2 ALJ rejected Sempra's arguments and denied the motion to strike. The procedural order
3 held:

4 Far from being "irrelevant," facts pertaining to the public interest in regard to the
5 grant of a CC&N in this proceeding are very likely to be relevant, material and
6 appropriate. The parties may differ in their opinion of whether certain individual
7 facts actually pertain to the public interest, but at this juncture of the proceeding,
8 it is inappropriate to strike the entirety of a witness' prefiled testimony simply
9 because its scope exceeds the narrow criteria that an applicant wishes the
10 Commission to consider. As Sempra states in its argument, the Commission, in
its consideration of Sempra's application under current authorities, is "fully
capable of delineating its oversight role of both determining and applying the
relevant constitutional, statutory and regulatory criteria to Sempra. ...

11 ...
12 Precluding a party from presenting facts regarding the public interest implications
13 of granting a CC&N an application runs counter to the purpose of an
14 administrative proceeding such as this one and could deprive the Commission of
information helpful to its determination. Procedural Order dated December 20,
2007 at 8-9 (Docket No. E-03964A-06-0168) (emphasis added).

15 AWC's Motion to Strike attempts to narrow the issues in this proceeding despite
16 what the Commission ordered in Decision 69722 regarding the scope of the proceeding.
17 Moreover, although the instant case is a remand proceeding for a possible deletion, the
18 public interest is still a threshold determination that it must make, even under *James P.*
19 *Paul*, to the extent applicable. Cornman Tweedy should not be denied the opportunity to
20 present facts regarding what it considers to be the public interest implications relating to
21 the deletion of the Cornman Tweedy Property from the AWC CC&N.

22 **F. Cornman Tweedy's Witnesses in this Proceeding Have Standing
to Testify and Present Exhibits in this Proceeding.**

23 AWC's specious assertions regarding the ability of Cornman Tweedy to present
24 evidence in this case are nothing more than a red herring. AWC cites to a November 14,
25 2005 Procedural Order which limited Cornman Tweedy's intervention in the prior
26 proceeding as to whether the CC&N in Decision 66893 should be held null and void and
27 whether the requested extension of time should be granted. Corman Tweedy provided
28 evidence in that proceeding, filed Exceptions to the ROO, and filed its Motion for

1 Reconsideration. In each of these instances, Cornman Tweedy presented evidence and
2 made legal arguments all relating to the issues raised in the pre-filed testimony and
3 exhibits that AWC now seeks to strike. Moreover, and more importantly, the
4 Commission remanded the case for the express purpose of hearing evidence relating to
5 the public policy and other issues relating to utility service to the Cornman Tweedy
6 Property and whether AWC should continue to hold the CC&N for the Cornman
7 Tweedy Property. Therefore, it is safe to say that the purpose and scope of this remand
8 proceeding has been expanded and/or changed by the Commission as a direct
9 consequence of the initial narrowing of the scope of the underlying proceeding in which
10 Cornman Tweedy's initial intervention was based. To say, in effect, that Cornman
11 Tweedy may only present evidence relating to whether the original conditions were
12 fulfilled and the time extension should be granted is ridiculous at this point in the
13 proceeding.

14 AWC also claims that Mr. Poulos is offering testimony on behalf of Picacho
15 Picacho Water Company ("Picacho") (whose intervention was previously denied in the
16 underlying proceeding) and Robson who are not parties to this case. It is uncontroverted
17 that Cornman Tweedy is owned by Robson, is an affiliate of Picacho, and Mr. Poulos
18 has positions with each of these entities. Although the positions taken by Mr. Poulos
19 may in fact also be shared by these other companies, Mr. Poulos is presenting evidence
20 on behalf of intervenor Cornman Tweedy and not on behalf of parties that were not
21 granted intervention in the proceeding. Any references made to Robson or Picacho are
22 for the purpose of Cornman Tweedy providing evidence relating to relevant facts
23 associated with the public interest considerations that the Commission should take into
24 consideration and not for the purpose of bringing forth positions of non-parties to the
25 proceeding.

26 AWC seeks to strike page 1, line 14 through page 5, line 7 of Mr. Poulos' pre-
27 filed direct testimony. These are standard witness foundational questions and answers
28 that generally appear in almost all pre-filed testimony. The questions and/or answers

1 AWC seeks to exclude relate to Mr. Poulos' educational and professional background,
2 his duties as general manager, descriptions of his employer Robson Communities and its
3 business model, including the master planned community that is the subject of this
4 proceeding and are, therefore, relevant and should not be stricken.

5 AWC seeks to strike page 9, line 10 through page 10, line 17 of Mr. Poulos' pre-
6 filed direct testimony. This testimony relates to issues for the Commission's
7 consideration of having a single provider for an entire development versus splitting a
8 development between two providers and the option for an integrated provider versus
9 separate stand-alone water and wastewater providers, and establishes why Cornman
10 Tweedy selected Dr. Goldman and Mr. Hendricks to testify in this proceeding. This
11 testimony, as well as the direct and rebuttal testimonies of Dr. Goldman and Mr.
12 Hendricks, relates to the broad public policy considerations underlying service to the
13 Cornman Tweedy Property that that the Commission expressly ordered in Decision
14 69722 and is therefore relevant and should not be stricken.

15 AWC seeks to strike page 15, line 7 through page 19, line 16 of Mr. Poulos' pre-
16 filed direct testimony. These questions and answers go to the public policy issue of
17 whether the Commission should allow a CC&N for property where the owner does not
18 want to be included in a CC&N (an issue specifically referenced in Decision 69722), the
19 benefits of integration including the conservation of groundwater and the developer's
20 preference for integration. This testimony also goes to the public policy discussion that
21 the Commission ordered in Decision 69722, and is also relevant to whether AWC is, in
22 fact, able to provide service at reasonable rates if and when service is requested in the
23 future. It is therefore relevant and should not be stricken.

24 AWC also seeks to strike the direct testimony of Dr. Goldman and Mr.
25 Hendricks, as well as all rebuttal testimony and exhibits filed in the case. AWC objects
26 to Dr. Goldman's direct and rebuttal testimony relating to public policy cost issues from
27 an engineering and design standpoint by splitting the water service to EJR Ranch
28 between two different providers and that Picacho can ultimately service the Cornman

1 Tweedy Property more efficiently from many different perspectives. This goes directly
2 to the issue of AWC's ability to serve the Cornman Tweedy Property at reasonable rates.
3 Regarding Mr. Hendricks' testimony, AWC asserts that the testimony regarding the
4 "operational benefits" and preferences for integrated water and wastewater service is
5 also irrelevant. It too goes to the issue of AWC's ability to provide service at reasonable
6 rates. Finally, Mr. Poulos' rebuttal testimony and exhibits properly addresses AWC's
7 direct testimony wherein AWC's witness testifies that the only legal issue in this
8 proceeding is whether AWC is no longer fit and proper to hold a CC&N for the
9 Cornman Property. Mr. Poulos' rebuttal testimony and exhibits refutes that and
10 maintains that the broad public policy considerations should be taken into consideration
11 by the Commission. Therefore, all of the testimony and related exhibits that AWC seeks
12 to strike are relevant and within the scope of the remand proceeding and should not be
13 stricken.

14 Although AWC maintains that the *only* relevant testimony in this case relates to
15 "fit and proper" and since the Commission has found that AWC is "fit and proper" in the
16 previous two decisions, Cornman Tweedy's testimony is irrelevant and should be
17 stricken. As already stated several times herein, Cornman Tweedy disagrees with this
18 narrow scope and reiterates the following language from Decision 69722 regarding what
19 the Commission has already said about relevant issues and the public interest relating to
20 the area to be served:

21 After considering the evidence in this matter, we are concerned that there
22 may not be a current need or necessity for water service in the portions of
23 the extension area that are owned by Cornman. We also recognize that
24 Cornman does not wish to have its property included in Arizona Water's
25 CC&N at this time. We believe that these issues bear further examination
26 and that they may have some *relevance* to the best interests of the area
ultimately to be served. Decision 69722 at 4, lines 1-5 (emphasis added.).

26 Cornman Tweedy's pre-filed direct and rebuttal testimony and exhibits are all
27 relevant to the remand ordered in Decision 69722. Accordingly, the Motion to Strike
28 should be denied in its entirety.

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G. Cornman Tweedy Was Not Required to Seek Relief From Decision 69722 Nor Has a Final Decision Been Rendered in this Docket.

The Commission, though Decision 69722, ordered an immediate remand of the proceeding pursuant to A.R.S. §40-252 within the same docket on the issue of whether the Cornman Tweedy Property should be deleted from the AWC CC&N. The deletion of the Cornman Tweedy Property is the very relief that Cornman Tweedy requested in its Exceptions and in its Motion for Reconsideration. Cornman Tweedy believes that it would be required to continue to seek relief through the remand proceeding and wait for the Commission to issue a subsequent decision which would form the basis of any appeal that Cornman Tweedy elects to bring in the future. Moreover, AWC bringing forth this argument in a Motion to Strike has no bearing or relevance whatsoever on the remand proceeding. Pursuant to A.R.S. §40-252, the Commission may, at any time, "rescind, alter or amend any order or decision." Cornman Tweedy's decision not to appeal Decision 69722 to the Maricopa County Superior Court is completely irrelevant to the Motion to Strike and appears to be designed to merely set forth a legal position that it might assert in some future proceeding.

III. CONCLUSION.

On the basis of the foregoing, Cornman Tweedy respectfully requests that AWC's Motion to Strike be denied in its entirety.

RESPECTFULLY submitted this 15th day of February, 2008.

SNELL & WILMER L.L.P.



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1 ORIGINAL and thirteen (13) copies of the
2 foregoing filed with Docket Control
this 15th day of February, 2008.

3 COPY of the foregoing hand-delivered
4 this 15th day of February, 2008, to:

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6 William A. Mundell, Commissioner
7 Jeff Hatch-Miller, Commissioner
8 Kristin K. Mayes, Commissioner
9 Gary Pierce, Commission
10 ARIZONA CORPORATION COMMISSION
11 1200 West Washington
12 Phoenix, Arizona 85007

13 Teena Wolfe, Administrative Law Judge
14 Hearing Division
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CARROLBPHX\2103442.3

EXHIBIT A

ORIGINAL

RECEIVED

2007 JUL 19 P 3: 58

THIS AMENDMENT:

Passed _____ Passed as amended by _____

Failed _____ Not Offered _____ Withdrawn _____

AZ CORP COMMISSION
DOCKET CONTROL

GLEASON PROPOSED AMENDMENT #3

DATE PREPARED: July 19, 2007

Arizona Corporation Commission
DOCKETED

JUL 19 2007

COMPANY: Arizona Water Company

DOCKET NOS: W-01445A-03-0559

OPEN MEETING DATES: July 24 and 25, 2007

AGENDA ITEM: U-1

DOCKETED BY 

Page 3, Line 27, INSERT:

"After considering the evidence in this matter, we are concerned that there may not be a current need or necessity for water service in the portions of the extension area that are owned by Cornman. We also recognize that Cornman does not wish to have its property included in Arizona Water's CC&N at this time. We believe that these issues bear further examination and that they may have some relevance to the best interests of the area ultimately to be served.

We also recognize that the proceeding before us is limited to relatively narrow issues: whether, for purposes of compliance, Arizona Water should be granted an extension of time to fulfill the conditions of Decision No. 66893 and whether, in fact, those conditions have been fulfilled. We have concluded that these conditions have been fulfilled, and we therefore recognize that, by the terms of Decision No. 66893, Arizona Water holds a CC&N for the extension areas at issue in this proceeding.

Nonetheless, regarding the property that is owned by Cornman, we would like an opportunity to consider the overall best interests of the Cornman area and of the public. We will therefore reopen the record in this matter pursuant to A.R.S. § 40-252 and remand this case to the Hearing Division for further proceedings regarding whether Arizona Water should continue to hold a CC&N for the Cornman extension area at this time. We recognize that Arizona Water, as the CC&N holder, is entitled to appropriate notice and an opportunity to be heard. We therefore officially place Arizona Water on notice that our subsequent proceeding on remand will be for the purpose of considering whether the Cornman property should be deleted from the CC&N extension granted to Arizona Water by Decision No. 66893. The Hearing Division is directed to conduct further evidentiary proceedings in this matter, including appropriate opportunities for intervention and an appropriate opportunity for Arizona Water to present its case.

While the matter currently before us presented relatively narrow issues, we view the proceeding on remand as broad in scope so that the Commission may

develop a record to consider the overall public interest underlying service to the Cornman property that is included in the extension area granted by Decision No. 66893. By identifying these issues and requiring further proceedings, we are not prejudging this matter in any way; instead, we merely desire an opportunity to consider the broader public interests implicated herein."

Page 17, STRIKE lines 27 and 28 (Finding of Fact No. 96)

Page 18, STRIKE line 1

Renumber Findings of Fact to conform

Page 18, between lines 16 and 17 INSERT new Findings of Fact to read:

"100. There may not be a current need or necessity for water service in the portions of the extension area that are owned by Cornman, and Cornman does not wish to have its property included in Arizona Water's CC&N at this time. These issues bear further examination and may have some relevance to the best interests of the area ultimately to be served.

101. It is in the public interest to remand this case to the Hearing Division for further proceedings regarding whether Arizona Water should continue to hold a CC&N for the Cornman extension area at this time.

102. As the CC&N holder, Arizona Water is entitled to appropriate notice and an opportunity to be heard. Our subsequent proceeding on remand will be for the purpose of considering whether the Cornman property should be deleted from the CC&N extension granted to Arizona Water by Decision No. 66893.

103. The Hearing Division should conduct further evidentiary proceedings in this matter, including appropriate opportunities for intervention and an appropriate opportunity for Arizona Water to be heard.

104. The proceeding on remand should be broad in scope so that the Commission may develop a record to consider the overall public interest underlying service to the Cornman property that is included in the extension area granted by Decision No. 66893. By identifying these issues and requiring further proceedings, we are not prejudging this matter in any way; instead, we merely desire an opportunity to consider the broader public interests implicated herein."

Page 18, STRIKE lines 22 and 23 (Conclusion of Law No. 3)

Renumber Conclusions of Law to conform

Page 18, between lines 25 and 26 INSERT two new Conclusions of Law to read:

"4. Reopening the record in this matter pursuant to A.R.S. § 40-252 is in the public interest.

5. This Decision serves as notice to Arizona Water Company that the Commission will reopen the record in the matter pursuant to A.R.S. § 40-252."

Page 19, between lines 2 and 3 INSERT two new Ordering Paragraphs to read:

"IT IS FURTHER ORDERED that this case is remanded to the Hearing Division for further proceedings regarding whether Arizona Water Company should continue to hold a CC&N for the Cornman extension area at this time.

IT IS FURTHER ORDERED that Arizona Water Company is hereby on notice that the Commission's subsequent proceeding on remand will be for the purpose of considering whether the Conman property should be deleted from the CC&N extension granted to Arizona Water Company by Decision No. 66893."

Make all conforming changes.