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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

Arizona Corporation Commission
DOCKETED

MAR 17 2009

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

DOCKETED BY NE

IN THE MATTER OF THE APPLICATION
OF MOUNT TIPTON WATER CO., INC.
FOR APPROVAL OF A SALE OF PROPERTY.

DOCKET NO. W-02105A-08-0500

DECISION NO. 70836

ORDER

Open Meeting
March 3 and 4, 2009
Phoenix, Arizona

BY THE COMMISSION:

Having considered the entire record herein and being fully advised in the premises, the Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

FINDINGS OF FACT

1. Pursuant to a Certificate of Convenience and Necessity ("CC&N") granted in Decision No. 40644 (May 26, 1970), Mount Tipton Water Co., Inc. ("Mount Tipton") provides water service to approximately 750 metered customers in an approximately 11-square-mile area centered in Dolan Springs, Arizona, which is approximately 35 miles northwest of Kingman in Mohave County. Mount Tipton is a nonprofit Arizona corporation and was classified as a Class C utility in its last full rate case in 2004.

2. On September 5, 2007, in Docket No. W-02105A-07-0510 ("OSC Docket"), the Commission's Utilities Division Staff ("Staff") filed a Complaint and Petition for an Order to Show Cause against Mount Tipton for failure to comply with Commission rules and regulations. Decision No. 69913 (September 27, 2007) ordered Mount Tipton to appear and show cause why its actions did not represent violations of specified Commission decisions, statutes, and rules. The OSC Docket is still pending, as Mount Tipton failed to meet late-filed-exhibit filing deadlines, and new information regarding Mount Tipton's compliance status with the Arizona Department of Environmental Quality

1 (“ADEQ”) came forth after the hearing. The two remaining counts in the OSC Docket involve
2 Mount Tipton’s mishandling and misuse of hook-up fee funds and Mount Tipton’s noncompliance
3 with ADEQ standards.

4 3. On October 23, 2008, in Decision No. 70559, the Commission granted Mount Tipton
5 an emergency interim surcharge of \$10.00 per customer per month, to become effective only after
6 Mount Tipton first posts with the Commission a performance bond or irrevocable sight draft letter of
7 credit in the amount of \$20,000. The Decision authorizes Mount Tipton to use the emergency interim
8 surcharge funds only to (1) pay its past due accounts; (2) make repairs to its system; (3) replace
9 galvanized pipe as required by ADEQ; (4) make other system improvements required or
10 recommended by ADEQ; (5) purchase and install new meters; (6) refurbish and reinstall existing
11 meters; and (7) have its books and accounts audited by an Arizona Certified Public Accountant,
12 preferably an accountant with a background in forensic accounting. Among other things, the
13 Decision also requires Mount Tipton to file a permanent rate case application by April 30, 2009, and
14 to engage in discussions with Mohave County regarding whether it is possible to have the amount of
15 Mount Tipton’s back tax liability attributable to interest, penalties, and fees waived or otherwise
16 forgiven and to determine whether it is possible to establish a payment plan for the amount of back
17 tax liability that cannot be waived or otherwise forgiven. The Commission determined in the
18 Decision that Mount Tipton had back tax liability of \$84,559.88, \$67,117.77 of which is the original
19 tax liability and the remaining \$17,442.11 of which represents interest, fees, and penalties. In
20 addition, the Commission determined that Mount Tipton had collected approximately \$41,200 in
21 hook-up fees between August 11, 2004, and December 6, 2007, and spent approximately \$40,363.04
22 of those funds between January 31, 2005, and October 6, 2007. Although the Commission did not
23 determine the extent to which those expenditures were for unauthorized purposes, the Commission
24 did find that Mount Tipton’s former office manager had testified in the OSC Docket that Mount
25 Tipton had misspent approximately \$39,863.14 in hook-up fee funds. Thus far, Mount Tipton’s
26 compliance filings for Decision No. 70559 show that Mount Tipton has not been able to obtain a
27 performance bond or irrevocable sight draft letter of credit and thus has been unable to implement the
28 emergency interim surcharge.

1 4. Staff stated that Mount Tipton is now in compliance with the Commission order
2 requiring it to file reports on hook-up fees collected and spent, but that Mount Tipton is out of
3 compliance with its existing hook-up fee tariff due to having misspent hook-up fee funds.

4 5. Mount Tipton's CC&N service area is not located in an Arizona Department of Water
5 Resources ("ADWR") Active Management Area. According to the Staff Report, ADWR has
6 determined that Mount Tipton is in compliance with requirements governing water providers and/or
7 community water systems.

8 6. Staff stated that ADEQ cannot determine whether Mount Tipton is currently
9 delivering water that meets quality standards required by Arizona Administrative Code Title 18,
10 Chapter 4, as Mount Tipton has monitoring and reporting deficiencies due to its failure to submit total
11 coliform test results for May, June, and July 2008. Staff also reported that Mount Tipton is in
12 violation of ADEQ operation and maintenance requirements because of deficiencies in its water
13 source and its treatment and distribution system.

14 7. According to Staff, Mount Tipton has 8 wells producing 204 gallons per minute and
15 11 storage tanks with a total capacity of 618,500 gallons. Staff's analysis indicates that Mount
16 Tipton's existing well production is inadequate, but that it has sufficient storage capacity to serve
17 approximately 1,250 additional customers.

18 **Sale of Property**

19 8. On September 29, 2008, Mount Tipton filed with the Commission an application
20 requesting Commission approval of the sale of an office building located at 16055 Pierce Ferry Road,
21 Dolan Springs, Arizona. Mount Tipton stated that it has prospective buyers and would like to move
22 forward as soon as possible. Mount Tipton also stated that it would like to use the proceeds from the
23 sale to help pay tax arrearages of approximately \$84,559 owed to Mohave County and to pay a Water
24 Infrastructure Finance Authority of Arizona ("WIFA") lien on the property.¹

25 9. With its application, Mount Tipton included a copy of a letter from WIFA, dated
26 August 25, 2008, stating that WIFA has no objections to Mount Tipton's selling the property to pay
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28 ¹ According to the Staff Report, the office building is collateral for a WIFA loan.

1 taxes and reduce indebtedness. WIFA also stated its understanding that the property does not contain
2 any storage tanks, equipment, or structures that are needed for Mount Tipton's operations and that its
3 sale will not in any way affect the delivery of drinking water to Mount Tipton's customers. WIFA
4 identified the property by parcel number as follows: APN #s 319-20-110A & 319-20-108C.

5 10. On November 19, 2008, Mount Tipton filed a letter asking the Commission to provide
6 a timeline for the application process and stating that if permission were not provided soon, Mount
7 Tipton might "miss the boat" for selling the building. Mount Tipton further stated that the sale would
8 enable it to pay its back taxes, reimburse its hook-up fee account, and put some much-needed money
9 into its water system.

10 11. On December 31, 2008, Staff issued a Staff Report recommending that Mount
11 Tipton's application be approved and further recommending:

- 12 a. That any proceeds from the sale be used for the following purposes, listed by
13 priority:
- 14 i. To repay the hook-up fee fund account for unauthorized expenditures
15 and imputed interest earnings;
 - 16 ii. To pay delinquent property taxes; and
 - 17 iii. To reduce Mount Tipton's indebtedness as required by WIFA;
- 18 b. That Mount Tipton develop an additional source of water rather than spending
19 any of the proceeds from the sale on constructing a new storage tank; and
- 20 c. That Mount Tipton be in full compliance with ADEQ requirements by January
21 31, 2009.

22 12. Mount Tipton did not file a response to the Staff Report.

23 13. The office building includes two office units, totaling approximately 1,628 square feet
24 in size, and one two-bedroom residential unit that is approximately 1,326 square feet in size. One of
25 the office units is currently being rented for use as a medical clinic, and the residential unit is
26 currently being rented by another individual. According to the Staff Report, both of the current
27 renters and a third individual are interested in purchasing the property. Mount Tipton has stated that
28 the renters will get a 30-day notice before a sale agreement becomes final.

1 14. Mount Tipton does not currently use the office building for its water utility operations.
2 Mount Tipton's offices are located elsewhere.

3 15. Mount Tipton estimates that the market value of the property is between \$300,000 and
4 \$330,000.

5 16. According to the Staff Report, Mount Tipton plans to use the proceeds from the sale of
6 the property to pay its back and current tax liability, which has reached \$104,045 with 2009 liability.

7 17. Staff has determined that the property is not being used and is no longer useful to
8 Mount Tipton's providing water service. Staff also believes that the sale would not prevent Mount
9 Tipton from providing water service to its customers now or in the future and that Mount Tipton's
10 application to sell the assets is reasonable and appropriate and should be approved.

11 18. The relevant statute, A.R.S. § 40-285, provides, in pertinent part:

12 **A. A public service corporation shall not sell . . . or otherwise**
13 **dispose of or encumber the whole or any part of its . . . system necessary**
14 **or useful in the performance of its duties to the public . . . without first**
15 **having secured from the commission an order authorizing it so to do.**
Every such disposition, encumbrance or merger made other than in
accordance with the order of the commission authorizing it is void.

16 **C. Nothing in this section shall prevent the sale, lease or other**
17 **disposition by any such corporation of property which is not**
18 **necessary or useful in the performance of its duties to the public, and**
19 **any sale of its property by such corporation shall be conclusively**
presumed to have been of property which is not useful or necessary in the
performance of its duties to the public as to any purchaser of the property
in good faith for value.²

20 19. A.R.S. § 40-285 has been interpreted to require a public service corporation to obtain
21 prior Commission approval of a sale of property only when it disposes of property that is necessary or
22 useful in the performance of its duties to the public. (*Babe Invs. v. Arizona Corp. Comm'n*, 189 Ariz.
23 147, 151, 939 P.2d 425, 429 (Ariz. Ct. App. 1997).) In *Babe Investments v. Arizona Corporation*
24 *Commission*, the Arizona Court of Appeals stated:

25 The legislature enacted A.R.S. section 40-285 to prevent "looting" of a
26 utility's facilities and impairment of service to the public. *American*
27 *Cable Television v. Arizona Pub. Serv.*, 143 Ariz. 273, 277, 693 P.2d 928,

28 ² A.R.S. § 40-285(A),(C) (emphasis added).

1 932 (App. 1983). The qualifying “necessary or useful” language is to
2 protect public service corporations from the expense of administrative
3 proceedings when disposing of useless or unnecessary property.
Subsection C allows them to initially determine whether a given piece of
property is necessary or useful.³

4 20. Although neither the office building nor the property on which it is located is used by
5 Mount Tipton for its water utility operations, as Mount Tipton does not have its offices at the building
6 and does not keep at the property any storage tanks, equipment, or structures that are needed for
7 Mount Tipton’s operations, the building is useful in Mount Tipton’s performance of its duties to the
8 public in that it provides Mount Tipton a source of revenue through the rents collected for the use of
9 its units. Thus, the sale of the property must be approved by the Commission as provided under
10 A.R.S. § 40-285(A).

11 21. Mount Tipton’s ability to serve its customers would not be negatively impacted as a
12 result of selling the building. Indeed, the proceeds from the sale could greatly enhance Mount
13 Tipton’s financial stability and thus its ongoing ability to serve its customers.

14 22. In light of Mount Tipton’s past difficulties with compliance and specifically with
15 mishandling funds, we agree with Staff that restrictions should be imposed upon Mount Tipton’s use
16 of the proceeds from the sale of the property. A.R.S. § 40-202 authorizes the Commission to
17 “supervise and regulate every public service corporation in the state and do all things, whether
18 specifically designated in [Title 40] or in addition thereto, necessary and convenient in the exercise of
19 that power and jurisdiction.”⁴ We find that it is both necessary and convenient to order Mount Tipton
20 to use the proceeds from the sale of its property as recommended by Staff in Findings of Fact No.
21 11(a), but with payment of its delinquent tax liabilities receiving first priority, so as to stop the
22 ongoing accrual of interest and penalties, and with Staff’s recommendation set forth in Findings of
23 Fact No. 11(a)(i) modified to require Mount Tipton to reimburse the hook-up fee fund account in the
24 amount determined in the pending OSC Docket, to ensure that the reimbursement requirement is
25 based on a full evidentiary record and is clear for compliance purposes.

26 23. We also find that, if any proceeds from the sale remain after Mount Tipton has spent
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28 ³ 189 Ariz. at 151, 939 P.2d at 429.

⁴ A.R.S. § 40-202(A).

1 the proceeds for the purposes described in Findings of Fact No. 11(a), as modified by Findings of
2 Fact No. 22, Mount Tipton should be permitted to use the additional proceeds from the sale as
3 follows: (1) to pay its past due accounts; (2) to make repairs to its system; (3) to replace galvanized
4 pipe as required by ADEQ; (4) to make other system improvements required or recommended by
5 ADEQ; (5) to purchase and install new meters; (6) to refurbish and reinstall existing meters; and (7)
6 to have its books and accounts audited by an Arizona Certified Public Accountant, preferably an
7 accountant with a background in forensic accounting.⁵

8 24. We also find that it is appropriate to require each member of Mount Tipton's Board
9 and each employee of Mount Tipton, both present and future, to complete and file with the
10 Commission's Docket Control a copy of the attestation attached hereto as Exhibit A and incorporated
11 herein swearing or affirming that the Board member or employee has read and understands the
12 restrictions imposed on the use of the proceeds from the sale of the property and understands that
13 Mount Tipton must comply with the restrictions on the use of the proceeds. Each current Board
14 member and employee will be required to complete and file such a document within 30 days after the
15 effective date of this Decision, and each future Board member and employee will be required to
16 complete and file such a document within 30 days after becoming a Board member or employee.

17 25. We also find that Mount Tipton should be required to file with the Commission's
18 Docket Control, as soon as Mount Tipton becomes aware of the closing date for the sale of the
19 property, a notice naming the buyer and stating the closing date and the agreed-upon selling price for
20 the property.

21 26. We also find that Mount Tipton should be required to file the following with the
22 Commission's Docket Control, within 45 days after the closing date for the sale of the property, as a
23 compliance item in this docket: (1) documentation establishing that the sale has taken place and
24 showing the closing date and the amount Mount Tipton received from the sale; (2) documentation
25 issued by Mohave County establishing that Mount Tipton has paid its delinquent taxes and showing
26 the date the taxes were paid and the amount paid; (3) documentation issued by Mount Tipton's bank

27 _____
28 ⁵ These are the uses authorized for the funds that would be generated by the emergency interim surcharge approved in
Decision No. 70559 (October 23, 2008).

1 showing that funds have been deposited into Mount Tipton's separate hook-up fee fund account and
2 showing the deposit date and the deposit amount; and (4) documentation showing any other
3 expenditures or payments made with the proceeds from the sale, including for each the recipient of
4 the funds, the amount of funds used, the date the funds were used, and a description of what was
5 purchased or paid for.

6 27. Because one of the remaining counts in the pending OSC Docket concerns Mount
7 Tipton's failure to provide a satisfactory and continuous level of service due to ADEQ reporting
8 violations and maximum contaminant level exceedances, we find that the issue of Mount Tipton's
9 ADEQ compliance should be dealt with in the OSC Docket rather than in this matter and thus do not
10 adopt Staff's recommendation set forth in Findings of Fact No. 11(c).

11 28. Finally, we note that Decision No. 70559 (October 23, 2008) already requires Mount
12 Tipton to develop an additional water source before it adds more storage to its system. Thus, we do
13 not need to also impose such a requirement herein, although we remind Mount Tipton of that
14 obligation.

15 CONCLUSIONS OF LAW

16 1. Mount Tipton is a public service corporation within the meaning of Article XV of the
17 Arizona Constitution and A.R.S. §§ 40-202 and 40-285.

18 2. The Commission has jurisdiction over Mount Tipton and the subject matter of its
19 application for approval of a sale of property.

20 3. The property to be sold is not necessary in Mount Tipton's performance of its duties to
21 the public, but is useful to Mount Tipton's performance of those duties. Thus, the sale requires the
22 Commission's approval under A.R.S. § 40-285(A).

23 4. Under A.R.S. § 40-202, it is both necessary and convenient to order Mount Tipton to
24 use the proceeds from the sale of its property for the purposes recommended by Staff in Findings of
25 Fact No. 11(a), as modified in Findings of Fact No. 22, and, if any proceeds from the sale are
26 remaining, for the further uses identified in Findings of Fact No. 23.

27 5. Under A.R.S. § 40-202, it is both necessary and convenient to order Mount Tipton to
28 make compliance filings in this docket to apprise the Commission of the closing date for the sale of

1 property, the name of the buyer, and the selling price for the property and, after the closing date, to
2 demonstrate to the Commission that the sale has been completed and how the proceeds from the sale
3 have been used.

4 6. It is not necessary for the Commission to hold an evidentiary hearing before issuing
5 this Order.

6 **ORDER**

7 IT IS THEREFORE ORDERED that Mount Tipton Water Co., Inc. shall use the proceeds
8 from the sale of the property located at 16055 Pierce Ferry Road, Dolan Springs, Arizona, for the
9 following purposes, in the following order: (1) to pay its delinquent property taxes, (2) to reimburse
10 Mount Tipton Water Co., Inc.'s hook-up fee fund account in the amount determined in the Decision
11 in Docket No. W-02105A-07-0510, and (3) to reduce Mount Tipton Water Co., Inc.'s indebtedness as
12 required by the Water Infrastructure Finance Authority of Arizona.

13 IT IS FURTHER ORDERED that if any proceeds from the sale of the property located at
14 16055 Pierce Ferry Road, Dolan Springs, Arizona, remain after the funds are used as prescribed in
15 the previous ordering paragraph, Mount Tipton Water Co., Inc. may use the remaining proceeds from
16 the sale only as follows: (1) to pay its past due accounts; (2) to make repairs to its system; (3) to
17 replace galvanized pipe as required by the Arizona Department of Environmental Quality; (4) to
18 make other system improvements required or recommended by the Arizona Department of
19 Environmental Quality; (5) to purchase and install new meters; (6) to refurbish and reinstall existing
20 meters; and (7) to have its books and accounts audited by an Arizona Certified Public Accountant,
21 preferably an accountant with a background in forensic accounting.

22 IT IS FURTHER ORDERED that each member of the Board of Mount Tipton Water Co., Inc.
23 and each employee of Mount Tipton Water Co., Inc., both present and future, shall complete and file
24 with the Commission's Docket Control, as a compliance item in this docket, a copy of the attestation
25 attached hereto as Exhibit A and incorporated herein swearing or affirming that the Board member or
26 employee has read and understands the restrictions imposed on the use of the proceeds from the sale
27 of property and understands that Mount Tipton must comply with the restrictions on the use of the
28 proceeds. Each current Board member and employee shall complete and file such a document with

1 the Commission's Docket Control within 30 days after the effective date of this Decision. Until
2 further Order of the Commission, each future Board member and employee shall complete and file
3 such a document with the Commission's Docket Control within 30 days after becoming a Board
4 member or employee.

5 IT IS FURTHER ORDERED that Mount Tipton shall file with the Commission's Docket
6 Control, as a compliance item in this docket, as soon as Mount Tipton becomes aware of the closing
7 date for the sale of the property, a notice naming the buyer and stating the closing date and the
8 agreed-upon selling price for the property.

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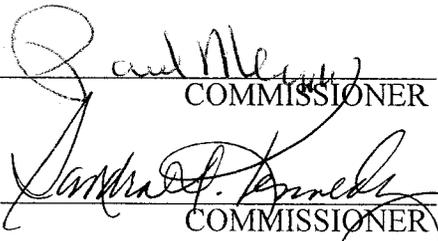
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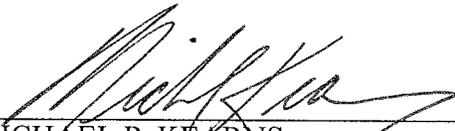
1 IT IS FURTHER ORDERED that Mount Tipton shall file the following with the
2 Commission's Docket Control, within 45 days after the closing date, as a compliance item in this
3 docket: (1) documentation showing that the sale has taken place, the closing date, and the amount
4 Mount Tipton received from the sale; (2) documentation issued by Mohave County showing that
5 Mount Tipton has paid its delinquent taxes, the date the taxes were paid, and the amount paid; (3)
6 documentation issued by Mount Tipton's bank showing that funds have been deposited into Mount
7 Tipton's separate hook-up fee fund account, the deposit date, and the deposit amount; and (4)
8 documentation showing every other expenditure or payment made with the proceeds from the sale
9 and including for each the recipient of the funds, the amount of funds used, the date the funds were
10 used, and a description of what was purchased or paid for.

11 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

12 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

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14 
15 CHAIRMAN
16 
17 COMMISSIONER
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19 COMMISSIONER
20 
21 COMMISSIONER
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23 COMMISSIONER

18 IN WITNESS WHEREOF, I, MICHAEL P. KEARNS, Interim
19 Executive Director of the Arizona Corporation Commission,
20 have hereunto set my hand and caused the official seal of the
21 Commission to be affixed at the Capitol, in the City of Phoenix,
22 this 17th day of March, 2009.

23 
24 MICHAEL P. KEARNS
25 INTERIM EXECUTIVE DIRECTOR

26 DISSENT _____

27 DISSENT _____

28 SNH:db

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SERVICE LIST FOR: MOUNT TIPTON WATER CO., INC.

DOCKET NO.: DOCKET NO. W-02105A-08-0500

John Janik, President
MOUNT TIPTON WATER CO., INC.
P.O. Box 38
Dolan Springs, AZ 86441
By Certified Mail

Janice Alward, Chief Counsel
Legal Division
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, AZ 85007

Ernest G. Johnson, Director
Utilities Division
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, AZ 85007

ATTESTATION

First and Last Name: _____ Title: _____

Board Member Employee First Day as Board Member/Employee: _____

Read the following and complete the attestation below.

The Arizona Corporation Commission ("Commission") has ordered Mount Tipton Water Co., Inc. ("Mount Tipton") to use the proceeds from the sale of the property located at 16055 Pierce Ferry Road, Dolan Springs, Arizona, only as follows:

- 1. To pay Mount Tipton's delinquent property taxes,
- 2. To repay Mount Tipton's hook-up fee fund account in the amount determined in the Commission Decision issued in Docket No. W-02105A-07-0510, and
- 3. To reduce Mount Tipton's indebtedness as required by the Water Infrastructure and Finance Authority of Arizona ("WIFA").

If any proceeds from the sale remain after Mount Tipton has used the proceeds as described above, the Commission has ordered that Mount Tipton may use the remaining proceeds from the sale only as follows:

- 1. To pay its past due accounts;
- 2. To make repairs to its system;
- 3. To replace galvanized pipe as required by the Arizona Department of Environmental Quality ("ADEQ");
- 4. To make other system improvements required or recommended by ADEQ;
- 5. To purchase and install new meters;
- 6. To refurbish and reinstall existing meters; and
- 7. To have its books and accounts audited by an Arizona Certified Public Accountant, preferably an accountant with a background in forensic accounting.

I hereby attest, under oath or affirmation, that I have read the above restrictions on Mount Tipton's use of the proceeds from the sale of the property located at 16055 Pierce Ferry Road, Dolan Springs, Arizona; that I understand the restrictions on Mount Tipton's use of the proceeds; and that I understand that Mount Tipton must comply with the restrictions on the use of the proceeds.

Signature: _____ Date: _____

State of Arizona
County of _____

Subscribed and sworn (or affirmed) before me this _____ day of _____, 20_____.

(seal)

Notary Public

