

ORIGINAL



0000126455

1 Steve Wene, No. 019630  
 2 MOYES SELLERS LTD.  
 3 1850 N. Central Avenue, Suite 1100  
 4 Phoenix, Arizona 85004  
 5 (602)-604-2189  
 6 swene@lawms.com  
 7 Attorneys for Truxton Canyon Water Company

RECEIVED

2011 JUN 16 P 4: 21

AZ CORP COMMISSION  
DOCKET CONTROL

**BEFORE THE ARIZONA CORPORATION COMMISSION**

**COMMISSIONERS**

9 GARY PIERCE, CHAIRMAN  
 10 PAUL NEWMAN  
 11 SANDRA D. KENNEDY  
 12 BOB STUMP  
 13 BRENDA BURNS

Arizona Corporation Commission

**DOCKETED**

JUN 16 2011

DOCKETED BY

14 **IN THE MATTER OF THE**  
 15 **COMMISSION ON ITS OWN MOTION**  
 16 **INVESTIGATING THE FAILURE OF**  
 17 **TRUXTON CANYON WATER**  
 18 **COMPANY TO COMPLY WITH**  
 19 **COMMISSION RULES AND**  
 20 **REGULATIONS**

Docket No. W-02168A-10-0247

**APPLICATION FOR  
MODIFICATION AND  
RECONSIDERATION OF  
DECISION NO. 72386**

21 Truxton Canyon Water Company ("Truxton" or "Company"), hereby files an  
 22 application for reconsideration regarding Arizona Corporation Commission  
 23 ("Commission") Decision No. 72386 ("Decision"). The Company is requesting the  
 24 Commission to modify the Decision in two ways. First, the Commission needs to clarify  
 25 that the Agreement between the Trust and the Association will not be reformed when it is  
 26 transferred to the Company. Second, the Company asserts that the law does not allow the  
 27 Commission to appoint an interim manager to control the Company. For the reasons  
 28

1 explained below, the Commission should revise the Decision making these revisions and  
2 strike the Decision provisions that would allow Commission Staff to appoint an interim  
3 manager.  
4

#### 5 **LEGAL ARGUMENT**

6 First, the Decision indicates that the Agreement between the Claude K. Neal  
7 Family Trust and the Valle Vista Property Owners Association (“Association”) should  
8 transfer to the Company without substantive changes. *See* Decision at ¶ 24(A)(5), 42, &  
9 43. The Decision notes that the issues raised by the Association “would be best resolved  
10 in a rate case proceeding.” The Company agrees.  
11  
12

13 Meanwhile, the Association continues to assert that in the Decision, Commission  
14 has essentially reformed the Agreement. Specifically, the Association is claiming that  
15 once the Agreement is transferred to the Company, the Agreement provision requiring  
16 the Association to buy at least 200,000,000 gallons per year would no longer apply.  
17 Further, the Association has now asserted for the first time they no longer have to prepay  
18 for the water as required by the contract. The Company disagrees with the Association’s  
19 position and submits that such a reformation of the contract would cause serious financial  
20 harm to the Company. *See id.* at ¶ 42. Therefore, the Company moves the Commission  
21 to amend the Decision to expressly state that the Agreement will not be reformed when it  
22 is assigned to the Company.  
23  
24  
25

26 Second, the Commission does not have the authority or power to take managerial  
27 control of the Company from its owners. *Corporation Com'n v. Consolidated Stage Co.*,  
28 63 Ariz. 257, 261-262, 161 P.2d 110, 112 (Ariz.1945); *Phelps Dodge Corp. v. Ariz.*

1 *Electric Power Coop.*, 207 Ariz. 95, 101, 83 P.3d 573, 579 (App. 2004); *Williams v. Pipe*  
2 *Trades Industry Program of Ariz.*, 100 Ariz. 14, 409 P.2d 720 (1966); *Miller v. Arizona*  
3 *Corp. Com'n*, 251 P.3d 400, 605 Ariz. Adv. Rep. 16, ¶ 19 (Ariz.App. Div. 1, 2011). As  
4 pointed out in the most recent case addressing the managerial interference doctrine, long  
5 ago the Arizona Supreme Court held that the Commission could not interfere with the  
6 management of a company, stating:  
7

8  
9 [T]he commission has no authority or jurisdiction to control the internal  
10 affairs of the corporation. It cannot dictate who its officers shall be, whom  
11 it shall employ, who may invest money in it, nor what provisions it shall  
12 make for the recognition of its shareholders, nor the manner of transferring  
13 shares of stock upon its books .... *Corporation Commission v.*  
14 *Consolidated Stage Co.*, 63 Ariz. 257, 161 P.2d 110 (1945) at 263, 161  
15 P.2d at 112; *see also S. Pac. Co. v. Ariz. Corp. Comm'n*, 98 Ariz. 339, 343,  
16 404 P.2d 692, 694 (1965) (discussing regulatory actions that “act as a  
17 barrier to the normal accomplishments of progressive management”).

18 *Miller*, 251 P.3d 400, ¶ 19 (Ariz.App. Div. 1,2011). Just seven years earlier, this appellate court  
19 observed that Arizona courts have held “we will not infer the grant of authority to interfere  
20 with the [public service corporation’s] management decisions beyond the ‘clear letter of  
21 the statute.’” *Phelps Dodge Corp.*, 207 Ariz. At 112-113, 83 P.3d at 591 (citing *Southern*  
22 *Pac. Co.*, 98 Ariz. at 343, 404 P.2d at 695).

23 No constitutional provision, statute, or rule grants the Commission authority to  
24 appoint an interim manager. Nevertheless, Decision No. 72386 provides that  
25 Commission Staff may appoint an Interim Manager for Truxton if the Company is not in  
26 full compliance with all Commission and Arizona Department of Environmental Quality  
27 rules and regulations for certain dates. *See* Decision at ¶ 24(A)(2). But based upon  
28

1 Arizona law, the Commission lacks the power and authority to take managerial control  
2 away from the Company's owners in favor of a state-appointed manager.  
3

4 The Company has always maintained that appointing an interim manager would  
5 be inappropriate. While the Company did sign the stipulation that contemplates having  
6 an interim manager appointed to take the Company, it did so under duress. The choice  
7 presented to the Company was to either: (1) have an interim manager appointed  
8 immediately; or (2) sign the stipulation and try to solve the issues before the Commission  
9 appoints an interim manager. Put another way, by signing the stipulation, the Company  
10 bought some time to fix some problems before the Commission appoints an interim  
11 manager.  
12  
13

14 If an interim manager is appointed, then a taking will occur. *See* Ariz. Const. Art.  
15 2, § 17. The State of Arizona is liable for injuries to both real and personal property  
16 under the constitutional provision that "no private property shall be taken or damaged"  
17 without just compensation. *State v. Leeson*, 84 Ariz. 44, 323 P.2d 692 (Ariz.1958).  
18 Consequently, if an interim manager is appointed, the taxpayers of the State of Arizona  
19 will be financially responsible to pay for taking the Company.  
20  
21

22 Finally, if the Decision is not amended and further successful appeals occur, then  
23 the Company will be entitled to an award of costs and attorneys' fees. The Company will  
24 be entitled to such an award under the private attorney general doctrine. The Company  
25 also will be entitled to costs and fees pursuant to A.R.S. § 41-1007. *See Eastern*  
26 *Vanguard Forex, Ltd. v. Arizona Corp. Com'n*, 206 Ariz. 399, 79 P.3d 86 (App. Div.1  
27 2003) (Corporate officers entitled to an award of attorney fees incurred in underlying  
28

1 administrative proceeding as well as in superior court action, upon superior court's  
2 reversal of Arizona Corporation Commission's decision). Because the Commission has a  
3 duty to issue an order that does not conflict with state law and must now take action to  
4 correct the order, the Company is entitled to costs and fees under A.R.S. § 12-2030(A) as  
5 well.  
6

7  
8 **RELIEF REQUESTED**

9 The Company moves the Commission to reconsider and amend the Decision by  
10 clarifying that the Agreement will not be reformed when it is assigned to the Company  
11 and by striking the provision ordering Staff to appoint an interim manager.  
12

13 RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of June, 2011.

14 **MOYES SELLERS LTD.**

15  
16   
17 Steve Wene

18 Original and 13 copies filed  
19 this 16<sup>th</sup> day of June, 2011 with:

20 Docket Control  
21 Arizona Corporation Commission  
22 1200 West Washington  
23 Phoenix, Arizona 85007

24 Copy of the foregoing mailed this  
25 16<sup>th</sup> day of June, 2011 to:

26 Kimberly Ruht  
27 Legal Division  
28 Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007

1 Todd Wiley  
2 Fennemore Craig  
3 3003 N. Central Ave. Ste. 2600  
4 Phoenix, AZ 85012-2913

5 Donnelly, Herbert  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28