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Arizona Corporation Commission

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BEFORE THE ARIZONA CORPORATION COMMISSION

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

Docket No. W-01445A-03-0559

**ARIZONA WATER COMPANY'S
RESPONSE TO CORNMAN
TWEEDY 560'S MOTION TO
COMPEL RESPONSES TO DATA
REQUESTS**

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As directed in the Procedural Order dated September 23, 2011, Arizona Water Company responds in opposition to Cornman Tweedy's Motion to Compel Responses to Data Requests filed September 23, 2011 ("Motion"). The parties' mutual request for a procedural order has been addressed by entry of the September 23 Order.

Cornman Tweedy's Motion is predicated on a misreading of the prior decisions of the Arizona Corporation Commission ("Commission"), and is evidence of Cornman Tweedy's continued quest to reopen the Commission's final decisions as to issues that are no longer subject to challenge as a matter of law. Cornman Tweedy's entire argument is based on the phrase "under the circumstances presented in this case," (see February 10, 2011 Procedural Order at p. 2, ll. 3-10) which it somehow reads as a directive to reopen the issues already tried and determined in this proceeding. For the reasons that follow, Cornman Tweedy's Motion should be denied, and it should not be allowed to renew its

1 collateral attack on the Commission's prior determination that Arizona Water Company's
2 Certificate of Convenience and Necessity ("CC&N") has been duly extended to include the
3 Cornman Tweedy property.

4 **I. PROCEDURAL BACKGROUND**

5 Rather than repeating the factual and procedural matters that are set forth in Arizona
6 Water Company's pending Motion to Compel Responses to Data Requests and Request for
7 Procedural Conference dated September 21, 2011 ("Arizona Water Company's Motion"),
8 this Response incorporates those background matters by reference and focuses on Cornman
9 Tweedy's mischaracterization of the procedural status of this matter and the issues to be
10 considered in the latest remand.

11 As the Commission is aware, this case has been before the Commission since 2003.
12 In that time, the Commission has twice determined that Arizona Water Company is the fit
13 and proper water utility service provider for the property owned by Cornman Tweedy.
14 Cornman Tweedy nonetheless seeks to relitigate issues that have been settled since the entry
15 of Decision No. 66893 on April 6, 2004 and Decision No. 69722 on July 30, 2007.
16 Cornman Tweedy is precluded as a matter of law from asserting that Arizona Water
17 Company is unfit to serve (the very issues on which Cornman Tweedy seeks discovery in
18 the disputed data requests), because Cornman Tweedy twice failed to challenge that
19 determination in Superior Court. (See Arizona Water Company's Motion at pp. 3-4.)

20 The fatal flaw in Cornman Tweedy's Motion is that the issue on remand as framed in
21 the February 10, 2011 Procedural Order "must be read in the context of Decision 69722"
22 (Motion at p. 2, ll. 15-16). But the remand called for in Decision No. 69722 already
23 occurred; substantial evidence was taken and a comprehensive Recommended Opinion and
24 Order ("ROO") fully addressing those issues was docketed on November 29, 2010 (then
25 amended on November 30, 2010). At its Open Meeting in February, 2011, the Commission
26 did not take issue with the findings in that ROO; rather, the entirety of its discussion (at least
27 what could be heard outside of Executive Session) focused on a remand for a narrow, new
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1 issue, which was then restated in the February 10, 2011 Procedural Order. Simply stated,
2 the issues of Arizona Water Company's ability and willingness to serve, and the questions
3 of demand and the status of development in the subject area, are closed and fully
4 determined. Not only should the issue as framed in the February Procedural Order not be
5 "read in the context of Decision 69722," but the prior remand as set forth in that Decision
6 delineates what is now expressly "out of bounds" for purposes of the newest remand. In the
7 February Open Meeting, the Commission did not direct a rehearing of the matters
8 previously decided in the case or as determined in the November, 2010 ROO; it instead
9 directed the Hearing Division to additionally consider a new issue (an issue which is
10 properly addressed in Arizona Water Company's Data Requests to Cornman Tweedy, but
11 not in Cornman Tweedy's data requests to Arizona Water Company).

12 **II. ARGUMENT**

13 Arizona Rule of Civil Procedure 26(b)(1) limits discovery to non-privileged matters
14 that are relevant to the claim or defense of a party. Ariz. R. Civ. P. 26(b)(1). Rule 26(c)
15 further provides that "upon motion by a party ... and for good cause shown, the court in
16 which the action is pending ... may make any order which justice requires to protect a party
17 or person from annoyance, embarrassment, oppression, or undue burden or expense,
18 including one or more of the following: (1) that the discovery not be had; ... [or] (4) that
19 certain matters not be inquired into, or that the scope of the discovery be limited to certain
20 matters" Here, the Commission should deny Cornman Tweedy's Motion and order that
21 Arizona Water Company not be required to provide additional responses to the contested
22 data requests due to the limited nature of the single issue remaining for decision, the
23 extensive existing record, and the overly broad and irrelevant nature of the discovery sought
24 by Cornman Tweedy.

25 **A. Discovery Should Be Limited To The Issue Remaining On Remand.**

26 Discovery is limited to information "that is relevant to any party's claim or defense."
27 Ariz. R. Civ. P. 26(b)(1). Even with the liberal construction of relevance under the Rules of
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1 Civil Procedure, discovery is not unlimited. Harris v. Purcell, 193 Ariz. 409, 413, 973 P.2d
2 1166, 1170 (1998) (“Where proposed discovery pursues a theory that is neither germane nor
3 probative, denying it cannot be an abuse of discretion”); see also Epstein v. MCA, Inc.,
4 54 F.3d 1422, 1423 (9th Cir. 1995) (“the right of a party to obtain discovery is not unlimited.
5 A discovery request must be relevant to the subject matter involved in the pending action or
6 reasonably calculated to lead to the discovery of admissible evidence”) (quotations omitted).
7 The data requests that Arizona Water Company objected to seek information concerning
8 issues that not only have already been determined, but do not relate at all to the remaining
9 issue before the Commission.

10 As repeatedly noted in this proceeding and detailed in Arizona Water Company’s
11 pending Motion to Compel, Cornman Tweedy has waived any right to challenge the original
12 grant of the CC&N extension to Arizona Water Company, or the Commission’s finding that
13 Arizona Water Company is a fit and proper entity to hold the extended CC&N for the
14 subject area. The single issue remaining for determination, which relates to all Arizona
15 public service corporations, does not require additional factual inquiries of Arizona Water
16 Company or its operations. Rather, the issue largely turns on a legal analysis applicable to
17 all public service corporations providing water service without “integration” with a
18 wastewater provider, as well as an analysis of whether developer-controlled utilities that
19 purport to be “integrated” are actually conserving water resources. Given the express
20 limitation on this remanded proceeding and the impropriety of additional factual inquiry as
21 to the extension of Arizona Water Company’s certificated area, the objectionable data
22 requests are irrelevant and fall squarely outside the scope of remand.

23 **B. Cornman Tweedy’s Data Requests Seek Irrelevant Information And**
24 **Should Be Limited.**

25 Cornman Tweedy’s Request Nos. 5-1 through 5-6 seek information concerning
26 requests for water service received by Arizona Water Company, “will serve” letters issued
27 by Arizona Water Company, and mainline extension agreements and water infrastructure
28 (whether planned or constructed) for the Cornman Tweedy property. As noted above, the

1 Commission has already determined that Arizona Water Company is a fit service provider
2 for the subject area, and that determination is final and not subject to collateral attack
3 without complying with the due process requirements of Arizona law as set forth in James
4 P. Paul Water Co. v. Arizona Corp. Comm'n, 137 Ariz. 426, 671 P.2d 404 (1983). Under
5 any version of the facts that could be discovered, Cornman Tweedy cannot now relitigate
6 the issues of demand for water in the area, the status of development, or other issues that go
7 to Arizona Water Company's fitness and ability to serve. Cornman Tweedy permanently
8 foreclosed its right to do so by not challenging Decision No. 69722 in Superior Court (after
9 it unsuccessfully urged rehearing before the Commission making the same arguments it is
10 making here). The only question remaining for determination is whether an Arizona public
11 service corporation, like Arizona Water Company, can provide reasonable water service
12 without following an "integrated" service model. While the Commission directed that that
13 determination be made in the context of the "circumstances presented in this case," the
14 inclusion of that qualifying language did not (and cannot) broaden the scope of these
15 remand proceedings to permit a collateral attack on the Commission's prior, final
16 determinations.

17 At best, Request Nos. 5-1 through 5-6 seek information that might be relevant to the
18 initial determination of whether to grant a certificate extension to Arizona Water Company,
19 a question which been finally decided for over four years. Further, Request No. 5-15 seeks
20 information about any residential development where Arizona Water Company "serves only
21 a portion of the development." This request is not limited to the extension area in question.
22 It seeks solely to test Arizona Water Company's fitness to serve as a water provider, an
23 issue that has also already been determined. The request has no bearing on the issue of
24 whether a non-"integrated" service provider is capable of providing reasonable service
25 under the James P. Paul standards to the subject area. The request instead is based
26 exclusively on Cornman Tweedy's prior challenge to Arizona Water Company's fitness to
27 provide service to the EJ Ranch development, which is partially located within Arizona
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1 Water Company's extended CC&N and partially within Picacho Water Company's CC&N.
2 That issue has already been conclusively decided against Cornman Tweedy.

3 Finally, Request Nos. 5-16 through 5-18 seek information related to Arizona Water
4 Company's existing customer base in the extension area, customer growth in the extension
5 area since 2004 and Arizona Water Company's future projections of customer growth in the
6 extension area. Again, these requests might be germane if this were an initial proceeding to
7 determine Arizona Water Company's fitness to receive a CC&N for the subject area. But
8 these requests are not germane to the "integration" issue before the Commission. The rate
9 of growth of Arizona Water Company's customer base in developments located within the
10 extension area, which is largely determined by the economic climate, has no relevance as to
11 whether or not Arizona Water Company is capable of providing reasonable service within
12 the boundaries of its extended CC&N without "integration" with a wastewater utility.
13 Likewise, Arizona Water Company's internal growth projections for the extension area have
14 no probative value on the remaining question before the Commission.

15 **III. CONCLUSION**

16 For the foregoing reasons, Cornman Tweedy's Motion should be denied and the
17 Commission should enter an order precluding Cornman Tweedy from seeking further
18 responses to the inappropriate and irrelevant requests discussed above.

19 RESPECTFULLY SUBMITTED this 3rd day of October, 2011.

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