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AZ CORP COMMISSION  
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 Water Company, Inc.

BEFORE THE ARIZONA CORPORATION COMMISSION

7 IN THE MATTER OF THE  
 8 APPLICATION OF ARIZONA-  
 AMERICAN WATER COMPANY, AN  
 9 ARIZONA CORPORATION, FOR A  
 DETERMINATION OF THE CURRENT  
 10 FAIR VALUE OF ITS UTILITY PLANT  
 AND PROPERTY AND FOR  
 11 INCREASES IN ITS RATES AND  
 CHARGES BASED THEREON FOR  
 12 UTILITY SERVICE BY ITS SUN CITY  
 WEST WATER AND WASTEWATER  
 13 DISTRICTS.

DOCKET NO. WS-01303A-02-0867

14 IN THE MATTER OF THE  
 APPLICATION OF ARIZONA-  
 AMERICAN WATER COMPANY, INC.,  
 15 AN ARIZONA CORPORATION, FOR A  
 DETERMINATION OF THE CURRENT  
 16 FAIR VALUE OF ITS UTILITY PLANT  
 AND PROPERTY AND FOR  
 17 INCREASES IN ITS RATES AND  
 CHARGES BASED THEREON FOR  
 18 UTILITY SERVICE BY ITS SUN CITY  
 WATER AND WASTEWATER  
 19 DISTRICTS.

DOCKET NO. WS-01303A-02-0868

20 IN THE MATTER OF THE  
 APPLICATION OF ARIZONA-  
 AMERICAN WATER COMPANY, AN  
 21 ARIZONA CORPORATION, FOR A  
 DETERMINATION OF THE CURRENT  
 22 FAIR VALUE OF ITS UTILITY PLANT  
 AND PROPERTY AND FOR  
 23 INCREASES IN ITS RATES AND  
 CHARGES BASED THEREON FOR  
 24 UTILITY SERVICE BY ITS MOHAVE  
 WATER AND HAVASU WATER  
 25 DISTRICTS.

DOCKET NO. W-01303A-02-0869

Arizona Corporation Commission

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1 IN THE MATTER OF THE  
2 APPLICATION OF ARIZONA-  
3 AMERICAN WATER COMPANY, AN  
4 ARIZONA CORPORATION, FOR A  
5 DETERMINATION OF THE CURRENT  
6 FAIR VALUE OF ITS UTILITY PLANT  
7 AND PROPERTY AND FOR  
8 INCREASES IN ITS RATES AND  
9 CHARGES BASED THEREON FOR  
10 UTILITY SERVICE BY ITS ANTHEM  
11 WATER, AGUA FRIA WATER AND  
12 ANTHEM/AGUA FRIA WASTEWATER  
13 DISTRICTS.

**DOCKET NO. WS-01303A-02-0870**

8 IN THE MATTER OF THE  
9 APPLICATION OF ARIZONA-  
10 AMERICAN WATER COMPANY, AN  
11 ARIZONA CORPORATION, FOR A  
12 DETERMINATION OF THE CURRENT  
13 FAIR VALUE OF ITS UTILITY PLANT  
14 AND PROPERTY AND FOR  
15 INCREASES IN ITS RATES AND  
16 CHARGES BASED THEREON FOR  
17 UTILITY SERVICE BY ITS TUBAC  
18 WATER DISTRICT.

**DOCKET NO. W-01303A-02-0908**

**ARIZONA-AMERICAN WATER  
COMPANY'S REPLY TO STAFF'S  
STATEMENT OF OBJECTIONS TO  
ARIZONA-AMERICAN WATER  
COMPANY'S REBUTTAL  
TESTIMONY**

14 Arizona-American Water Company ("Arizona-American") hereby submits its  
15 response to Staff's Statement of Objections to Arizona-American Water Company's  
16 Rebuttal Testimony ("Statement"). In the Statement, Staff objects to specified portions of  
17 the rebuttal testimony offered by two Arizona-American expert witnesses on the ground  
18 that it constitutes "'testimony' as to the interpretation of the Arizona Constitution and  
19 cases interpreting it." Statement at 2. Staff argues that the Commission should give "no  
20 weight" to this testimony because it is well-settled that expert testimony is impermissible  
21 as to matters of domestic law. Id. Staff's objections should be overruled.

22 In this rate case, Arizona-American asserts that it is entitled to a just and  
23 reasonable return on the fair value of its property devoted to public service under the  
24 Arizona Constitution. The testimony Staff seeks to strike was offered explain how the fair  
25 value of such property was determined. See Rebuttal Testimony of Thomas J. Bourassa at  
26 9 ("appropriate to use the RCND [replacement cost new less depreciation] as the FVRB

1 [fair value rate base]).” Similarly, Dr. Zepp, the Company’s cost of equity expert,  
2 testified that “use of an RCND rate base is appropriate and consistent with the ‘fair value’  
3 concept.” Zepp Rebuttal at 30. In support of such testimony, Mr. Bourassa and Dr. Zepp  
4 identify applicable legal authorities, which they understand to clarify the bases for their  
5 recommendations. These are not legal opinions, nor are they intended to usurp the  
6 province of the ALJ and the Commission to interpret the law and render the final decision.  
7 Under such circumstances, there is no reason to strike the testimony, nor is it somehow  
8 automatically inadmissible, as Staff’s recitation of federal law implies.

9 To begin with, there is no black line rule in Arizona against the admissibility of the  
10 testimony at issue here, even if this were a civil judicial proceeding. In State v. Fendler,  
11 127 Ariz. 464, 622 P.2d 23 (Ariz. App. 1980), the Court addressed the propriety of expert  
12 testimony in a criminal tax evasion prosecution regarding the expert’s interpretation of  
13 Arizona statutes, revenue rulings, and case law. The trial court excluded the expert’s  
14 testimony—which was offered by the defendant in an attempt to establish that he lacked  
15 intent to evade the payment of taxes—on the ground that the testimony concerned only  
16 questions of law. Id. at 474, 33, n. 18. In reversing the trial court’s ruling, the Court of  
17 Appeals agreed that it would be improper for a witness to “lecture the jury on the law of  
18 the case,” but nonetheless held that the testimony was “clearly admissible for the limited  
19 purpose of lending credence to appellant’s assertion that he never intended to evade the  
20 payment of taxes.” Id. at 474, 33.

21 Moreover, each of the three federal cases Staff’s cites for the purportedly  
22 unqualified rule that expert testimony is not permitted as to matters of domestic law  
23 involved civil judicial proceedings. See Statement of Objections at 2 (citing Southern  
24 Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc., 320 F.3d 838, 841 (8<sup>th</sup> Cir.  
25 2003); Christiansen v. City of Tulsa, 332 F.3d 1270, 1283 (10<sup>th</sup> Cir. 2003); Aguilar v.  
26 International Longshoreman’s Union Local #10, 966 F.2d 443, 447 (9<sup>th</sup> Cir. 1992)). The

1 reasons the federal courts preclude expert testimony in civil litigation are not present in  
2 rate proceedings before the Arizona Corporation Commission.

3 For example, there is no concern that testimony as to legal matters or standards  
4 may lead to confusion of the jury or otherwise invade its province. See, e.g., Karns v.  
5 Emerson Elec. Co., 817 F.2d 1452, 1459 (10<sup>th</sup> Cir. 1987) (holding that although expert  
6 testimony as to a legal standards is not inadmissible because it embraces an ultimate issue  
7 to be decided by the trier of fact, such testimony may be excluded “for other reasons, such  
8 as the likelihood of jury confusion.”); Benjamin J. Vernia, Annotation, *Admissibility of*  
9 *Expert Testimony Regarding Questions of Domestic Law*, 66 A.L.R. 5<sup>th</sup> 135 (1999)  
10 (noting that “many of the traditional bases for the rule relate to confusion of the jury”).  
11 Obviously, such a rationale does not support application of the rule in the current  
12 proceedings.

13 Another traditional basis for applying the rule against expert testimony as to legal  
14 issues is that such testimony is inadmissible under Rule 702 of the Federal Rules of  
15 Evidence. See, e.g., Aguilar, 966 F.2d at 447 (affirming district court’s exclusion of  
16 testimony as to legal matters on the ground that it was “utterly unhelpful” under Rule  
17 702). Rule 702, which is in pertinent part identical to Rule 702 of the Arizona Rules of  
18 Evidence, provides that expert testimony is admissible only if “scientific technical, or  
19 other specialized knowledge will assist the trier of fact to understand the evidence or to  
20 determine a fact in issue.”

21 Rule 702 need not be blindly applied here either. A.R.S. § 40-243(A) provides that  
22 in hearings before the Commission, “[n]either the commission nor a commissioner shall  
23 be bound by technical rules of evidence.” A.A.C. R14-3-109(K) provides that, although  
24 the Rules of Evidence “will be generally followed,” the Rule also states that they may be  
25 “relaxed in the discretion of the Commission” when deviation from the rules “will aid in  
26 ascertaining the facts.” Accordingly, even if it were determined that the rule announced in

1 Staff's cited cases applied with equal force to the testimony here, the Commission should  
2 nonetheless exercise its broad discretion to consider the testimony on the ground that it is  
3 helpful in understanding the bases for Arizona-American's witnesses' testimony  
4 concerning the propriety of employing the Reconstruction Cost New Less Depreciation or  
5 RCND rate base as Arizona-American's Fair Value Rate Base. From there, the ALJ and  
6 Commission are free to give such testimony its due weight.

7 Based on the foregoing, Arizona-American respectfully requests that the  
8 Commission overrule Staff's objections.

9 DATED this 17<sup>th</sup> day of November, 2003.

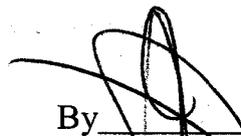
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By   
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An original and 21 copies of the  
foregoing, and attached documents  
were delivered this 17th day of  
November, 2003, to:

Docketing Supervisor  
Docket Control  
Arizona Corporation Commission  
1200 West Washington  
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A copy of the foregoing, hand-  
delivered this 17th day of  
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