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BEFORE THE ARIZONA CORPORATION

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AZ CORP COMMISSION
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2005 SEP -6 A 10: 17

IN THE MATTER OF THE APPLICATION OF
PINEVIEW WATER COMPANY, INC., FOR
AUTHORITY TO ISSUE PROMISSORY
NOTE(S) AND OTHER EVIDENCES OF
INDEBTEDNESS PAYABLE AT PERIODS OF
MORE THAN TWELVE MONTHS AFTER
THE DATE OF ISSUANCE.

DOCKET NO. W-01676A-04-0463

IN THE MATTER OF THE APPLICATION OF
PINEVIEW WATER COMPANY, INC. FOR
AN INCREASE IN ITS WATER RATES FOR
CUSTOMERS WITHIN NAVAJO COUNTY,
ARIZONA.

DOCKET NO. W-01676A-04-0500

**STAFF'S RESPONSE TO PINEVIEW'S
MOTION TO AMEND DECISION NO.
67989 NUNC PRO TUNC**

Pineview asks that the Commission amend Decision No. 67989 "nun pro tunc" by changing the approved interest rate. Staff assumes that Pineview meant "*nunc pro tunc*". An order *nunc pro tunc* can only be issued to correct a clerical or similar mistake, and not to substantively alter what was intended. Altering an approved interest rate is a material change that cannot be made in a *nunc pro tunc* order. Thus, Pineview's motion should be denied.

Pineview may well argue that it can not be expected to know the exact interest rate that will be available when it seeks to execute the loan. But Pineview's motion admits that its Application requested approval of a loan "at an interest rate not to exceed 4.20%." Motion at 1. Pineview thus requested approval of a range of rates - i.e. any rate up to and including 4.20%. And the Commission's order approved "an interest rate not to exceed 4.20 percent." Decision No. 67989 at 35. Pineview seeks to change this language to read "Prime Rate plus 2.0%", which it claims is now approximately 6.20% - a substantial 48% increase above the maximum rate it requested.

The purpose of an order *nunc pro tunc* is to "make the record reflect the intention of the parties or the court at the time the record was made." *State v. Johnson*, 113 Ariz. 506, 509, 557 P.2d 1063, 1066 (1976); *State v. Sabalos*, 178 Ariz. 420, 421, 874 P.2d 977, 978 (App. 1994)(same). Pineview has presented no evidence that the parties or the Commission actually intended to say

1 “6.20%” when they in fact said “4.20%”. The change requested by Pineview is no mere typo, but a
2 material change to the terms of the loan. This simply cannot be accomplished by an order *nunc pro*
3 *tunc*.

4 In *Johnson*, the Arizona Supreme Court explained: “We have consistently held that the
5 function of an order or judgment *nunc pro tunc* is to make the record speak the truth.... We have
6 made it clear that the court cannot do more than make the record correspond with the actual facts.”
7 *Id.* (quoting *Black v. Industrial Comm’n*, 83 Ariz. 121, 125, 317 P.2d 553, 555-556 (1957)). Thus, a
8 *nunc pro tunc* order reflects a decision that was actually made, but “which through some oversight or
9 inadvertence was never entered upon the records of the court by the clerk or which was incorrectly
10 entered.” *Id.* Thus, there is “no authority to enter a *nunc pro tunc* order in a situation where the
11 record reflected what the court had actually done.” *City of Phoenix v. Geyley*, 144 Ariz. 323, 327,
12 697 P.2d 1073, 1078 (1985). Here, the Commission never had the new interest rate before it, nor did
13 it intend to approve the new rate in its order. Thus, the new interest rate cannot be approved by a
14 *nunc pro tunc* order.

15 There is no question that these same principles when an agency considers a request to amend
16 one of its orders *nunc pro tunc*. Squarely on point is *Asarco, Inc. v. Industrial Comm’n of Arizona*,
17 204 Ariz. 118, 60 P.3d 258 (App. 2003). There, the court held that the agency has authority to make
18 *nunc pro tunc* corrections only to “correct clerical or stenographic errors in awards.” *Id.* Here, the
19 proposed new interest rate does not correct a clerical error, but rather proposes a material change to
20 the order.

21 Thus, Decision No. 67989 cannot be changed by a *nunc pro tunc* order to approve a new
22 interest rate. If Pineview desires a higher interest rate, it can file a new application for financing.
23 Alternatively, Pineview could seek to modify Decision No. 67989 under A.R.S. § 40-252. Pineview
24 has not asked for relief under § 252. Further, § 252 relief is entirely within the discretion of the
25 Commission. It is used sparingly, and it is not ordinarily used to correct the mistakes of the
26 applicant.

27 Even if Pineview actually requested § 252 relief, and the Commission decided to consider
28 such relief, Pineview would need to show that modification is in the public interest. *See James P.*

1 *Paul Water Co. v. Arizona Corp. Comm'n*, 137 Ariz. 426, 671 P.2d 404 (1983). It has made no such
2 showing here. It has not explained why its mistake is excusable. It has not shown the effect of the
3 higher rate on its financial condition. Instead, Pineview offers the conclusory assertion that the
4 "Company has determined that the applicable interest rate will not substantially or adversely impact
5 the Company's cash flows. That rate will not affect the Company's ability to perform under the loan,
6 nor impair its ability to fulfill its public service obligations." Motion at 2. Pineview offers no
7 citations to the record, nor any new evidence, to support this assertion. Without this information,
8 Staff cannot say that the public interest would be served by modifying Decision No. 67989.

9 For these reasons, Staff recommends that Pineview's motion be denied.

10 **RESPECTFULLY SUBMITTED** this 6th day of September 2005.

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21 The original and fifteen (15) copies
22 of the foregoing were filed this
23 6th day of September 2005 with:

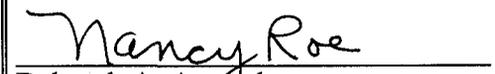
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