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EXCEPTION

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FENNEMORE CRAIG
Norman D. James
Jay L. Shapiro
3003 N. Central Ave.
Suite 2600
Phoenix, Arizona 85012
Attorneys for Arizona-American Water Company, Inc.

Arizona Corporation Commission
DOCKETED
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BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF ARIZONA-AMERICAN WATER COMPANY – AGUA FRIA DIVISION SEWER HOOK-UP FEE TARIFF REVISIONS	DOCKET NO. SW-01303A-02-0628
IN THE MATTER OF ARIZONA-AMERICAN WATER COMPANY – AGUA FRIA DISTRICT – WATER FACILITIES HOOK-UP FEE TARIFF REVISIONS	DOCKET NO. W-01303A-02-0629 **ARIZONA-AMERICAN WATER COMPANY'S EXCEPTIONS TO RECOMMENDED OPINION AND ORDER**

Arizona-American Water Company (hereinafter "Arizona-American" or "the Company") hereby submits its exceptions to the recommended form of opinion and order ("the Recommended Order") filed in the above-captioned dockets, and urges the Commission to reject the Recommended Order as a departure from established Commission precedent that is neither required under Arizona law nor sensible public policy.

Hook-up fees, like those at issue here, are contributions in aid of construction ("CIAC"). CIAC is contributed capital. CIAC does not constitute revenue and has no impact on a utility's operating income. Therefore, hook-up fees have no impact on a utility's return on its "fair value" rate base. Indeed, as discussed below, the Commission itself has recognized this distinction in approving hook-up fee tariffs in prior proceedings. The decision in *US West Communications, Inc. v. Ariz. Corp. Comm.*, 201 Ariz. 242, 34

P.2d 351 (2001) ("*US West II*"), which is the basis for the Recommended Order's "factual finding" that the Commission is required to determine the fair value of the utility's property prior to allowing a utility to collect hook-up fees (Recommended Order at 4), is simply not applicable to this case.

As a consequence, the Recommended Order should be rejected, Staff's motion to dismiss denied and the Company's requested relief should be granted.

A. BACKGOUND FACTS.

In Decision No. 64307 (Dec. 28, 2001), issued after *US West II* was decided, the Commission authorized Arizona-American's predecessor, Citizens Communications, to collect hook-up fees within a portion of its certificated area west of Phoenix. Recommended Order at 1. These hook-up fees are treated as CIAC. They are maintained in a separate interest-bearing account and can be used only for the construction of utility plant. Decision No. 64307 at 9. Consequently, notwithstanding *US West II*, the existing hook-up fee tariff was approved by the Commission without any fair value finding.[1]

In this docket, as Staff has recognized, the Company merely seeks to extend the previously approved hook-up fee tariff in a non-discriminatory fashion throughout the remainder of its certificated area:

> Arizona-American filed revised tariffs for their Agua Fria District water and wastewater facilities hook-up fees on August 16, 2002. **The facilities hook-up fees are identical to the ones already approved by Decision No. 64307 dated December 28, 2001** for the "Whitestone" Certificate of Convenience and Necessity (CC&N). **The revisions in these applications will extend the same tariffs to other areas of the Agua Fria District** in Maricopa County.[2]

---

[1] Decision 64307 was hardly remarkable. The Commission has previously held that hook-up fees treated as CIAC do not require a fair value finding because they are not rate increases. *See* Decision No. 63259 (Dec. 14, 2000)(approving hook-up fee tariff for H2O, Inc.).

[2] There is no separate "Whitestone CC&N." In Decision No. 64307, the Commission approved the extension of the CC&N for the Agua Fria water and wastewater districts to include the 8,800 acre (footnote continued on next page)

> The fees were developed based on typical construction costs for backbone plant in the Agua Fria District. The water hook-up fees are based on meter size. The wastewater hook-up fees are based on equivalent residential units (ERU). The fees will recover a portion of the costs associated with the construction of the backbone plant.
>
> The hook-up fees for water can be used for offsite facilities such as treatment facilities, wells, transmission lines, storage tanks pressure tanks, booster pumps and related appurtenances necessary for proper operation which provide regional or system wide benefits.
>
> The hook-up fees for wastewater can be used for treatment facilities, effluent disposal equipment, sludge disposal equipment, lift stations, force mains, collection mains and appurtenances necessary for proper operation which provide regional or system wide benefits.
>
> Engineering has reviewed the proposed revisions and finds them acceptable as submitted by AZ-American.

Staff Engineering Memorandum, December 20, 2002 (emphasis supplied). Thus, there is no dispute that the hook-up fees are reasonable and are intended to finance plant. Nevertheless, the Recommended Order would mandate, as a matter of law, a full-blown rate proceeding in order to extend a tariff that does not produce revenue and does not impact the Company's operating income. Such a departure from previously established Commission precedent is not necessary or appropriate.

B. Hook-Up Fees Are Contributions in Aid of Construction and Can Be Approved Outside a General Rate Case.

The Recommended Order concludes that approval of hook-up fees constituting CIAC requires a fair value determination because hook-up fees are "rates." Recommended Order at 4. In reaching this conclusion, the Recommended Order finds that the holding in *US West II* mandates a broad interpretation of the term "rate."

(footnote continued from previous page)

Whitestone project. The subject hook-up fee tariff was approved at the same time, but only for the Whitestone area.

However, *US West II* did not involve a dispute over the term "rate," and the Supreme Court did not hold that CIAC constitutes a rate or should be treated as revenue. Instead, that case involved issue of whether the Commission must find and use the fair value of a utility's property to set rates in a competitive market setting. *US West II*, 201 Ariz. at 244-46, 34 P.2d at 353-55. The court affirmed that in a monopolistic setting, prior court decisions such as *Simms v. Round Valley Light & Power Co.*, 80 Ariz. 145, 294 P.2d 378 (1956), continue to apply. This is hardly a sea change, requiring the Commission to overrule its own precedent.[3]

The Commission has historically and currently recognizes that certain amounts collected by utilities have no impact on revenue or operating income, and therefore can be adjusted without a fair value finding. For example, the Commission's rules authorize a utility to "collect from its customers a proportionate share of any privilege, sale or use tax." A.A.C. R14-2-409(D)(5). If sales or use taxes are increased, the utility is not required to file a general rate application and obtain a fair value determination before collecting the additional taxes from its customers. Very simply, sales and use taxes, although collected from customers, are not revenue and do not affect the utility's operating income and return on rate base.

Like the collection of sale and use taxes, CIAC does not constitute revenue, has no impact on a utility's operating income and has no impact on a utility's return on its "fair value" rate base. Plant financed by CIAC is excluded from a utility's rate base. *E.g., Cogent Public Service v. Ariz. Corp. Comm.*, 142 Ariz. 52, 55-56, 688 P.2d 698, 701-02 (App. 1984) (holding that CIAC provided under the terms of a service connection tariff is excluded from rate base). Presumably, for this reason, the Commission's rules plainly distinguish between CIAC, which is defined as "[f]unds provided to the utility by the

[3] For the Commissioners' convenience, a copy of *US West II* is attached to these Exceptions.

applicant [for service] under the terms of a main extension agreement and/or service connection tariff the value of which is non-refundable" (A.A.C. R14-2-401(8)), and various other types of rates and charges for service, such as a "commodity charge," "customer charge" and "minimum charge" (A.A.C. R14-2-401(7), (10) & (18)).

Other jurisdictions have concluded that CIAC is different from other types of charges for ratemaking purposes. *See Housatonic Cable Vision Company v. Department of Public Utility Control*, 622 F. Supp. 798, 808 (D. Conn. 1985)(concluding that contributions in aid of construction are not "rates" within the meaning of the federal Cable Communications Act's provisions concerning state authority to set rates). At least one other court has also recognized that an accounting treatment that does not impact the utility's bottom line requires different treatment. In *Cities for Fair Utility Rates v. Public Utility Commission of Texas*, 884 S.W. 2d 540, 550 (Texas App. 1994), *rev'd on other grounds* 924 S.W. 2d 933 (Tex. 1996), the court rejected the argument that Texas' ratemaking procedures must be followed before approving certain deferred accounting treatment. The court held that such accounting treatment was not a "rate" because it did not affect the utility's compensation, i.e., its revenue from the provision of utility service. CIAC, likewise, has no impact on a utility's bottom line. Instead, it is a form of capital used to finance plant at no cost to customers because it is deducted from rate base.

If the position adopted by the Recommended Order were carried to its logical conclusion, however, CIAC would necessarily be treated as revenue, and plant financed by CIAC would be included in rate base, like other plant financed by means of internally-generated funds. Notwithstanding the line of decisions discussed in *US West II*, which go back nearly 90 years, this has never been the case: the Commission has consistently held that hook-up fees and other forms of CIAC collected from service applicants do not require fair value determinations. *E.g.*, *In re H2O, Inc.*, Decision No. 63259 (Dec. 14, 2000); *In re Citizens Communications Company*, Decision No. 64307 (Dec. 28, 2001).

Thus, adoption of the Recommended Order would indeed be a sea change.

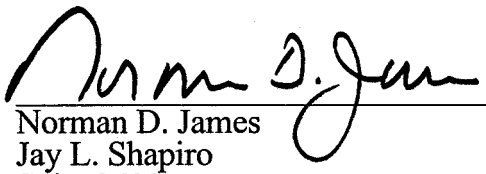
C. CONCLUSION.

The Recommended Order, if adopted, would constitute a substantial departure from long-standing Commission precedent. Such a departure is not warranted under the decision in *US West II*, which did not address what constitutes a "rate" and did not overrule prior precedent establishing that certain types of charges may be authorized by the Commission without fair value findings. *See RUCO v. Commission*, 199 Ariz. 588, 591-92, 20 P.3d 1188, 1991-92 (App. 2001) (recognizing that there are circumstances where rates can be fixed or adjusted without fair value findings because they leave the "utility's net income unchanged"). There is simply no reason for the Commission to determine the "fair value" of a public service corporation every time it authorizes a tariff to collect an amount that has no impact on the utility's operating income or its return on fair value rate base. In such circumstances, the fee for service does not require a finding of fair value under the under the Arizona Constitution, any more than would the collection of a new sales or use tax from customers.

Adoption of the Recommended Order will also create uncertainty concerning the prospective validity of hook-up fees and similar service connection tariffs previously approved by the Commission. This confusion is clearly illustrated by the illogical situation faced by Arizona-American: In one portion of its certificated area, the Company will be able to collect hook-up fees that were previously approved without any fair value determination; however, throughout the remainder of its certificated area, the collection of the very same charge under the same terms and conditions would be unlawful because there is no fair value determination attendant to its approval. Such an anomaly is neither warranted by Arizona law nor by considerations of public policy. Therefore, the Recommended Order should be rejected.

RESPECTFULLY SUBMITTED this 26th day of March, 2003.

FENNEMORE CRAIG, P.C.

By 

Norman D. James
Jay L. Shapiro
Suite 2600
3003 North Central Avenue
Phoenix, Arizona 85012
Attorneys for Applicant

An original and 15 copies of the foregoing was delivered this 26th day of March, 2003, to:

Docket Control
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

A copy of the foregoing was delivered this 26th day of March, 2003, to:

Chairman Marc Spitzer
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

Commissioner William Mundell
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

Commissioner Jim Irvin
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

Commissioner Mike Gleason
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

Commissioner Jeff Hatch-Miller
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

Paul Walker, Aide to Chairman Spitzer
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

Hercules Dellas, Aide to Commissioner Mundell
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

Kevin Barlay, Aide to Commissioner Irvin
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

Dean Miller, Aide to Commissioner Hatch-Miller
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

Jodi Jerich, Esq., Aide to Commissioner Gleason
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

Dwight D. Nodes, Assistant Administrative Law Judge
Hearing Division
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

Timothy J. Sabo, Attorney
Legal Division
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

By: Mary L House

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H

Supreme Court of Arizona,
En Banc.

US WEST COMMUNICATIONS, INC., a Colorado corporation, Plaintiff-Appellant,
v.
The ARIZONA CORPORATION COMMISSION, an agency of the State of Arizona; Renz D. Jennings, Marcia Weeks, and Carl J. Kunasek, as members of the Arizona Corporation Commission; and Brooks Fiber Communications of Tucson, Inc., a Delaware corporation; MFS Intelenet of Arizona, Inc.; TCG Phoenix; Electric Lightwave, Inc.; MCI Metro Access Transmission Communications of the Mountain States, Inc.; GST Net (AZ), Inc.; American Communications Services of Pima County, Inc.; Sprint Communications Company, L.P.; Cox Wireless of Arizona, Inc., Defendants-Appellees.

No. CV-00-0379-PR.

Nov. 15, 2001.

Non-competitive local telephone service provider brought suit against Corporation Commission alleging that Commission's adoption of rules allowing competitors into market breached contract with State and that rules were improperly promulgated. Service provider also brought separate actions against competitors, which were consolidated with suit against Corporation Commission. The Superior Court, Maricopa County, Nos. CV 95-14284, 96-03355, 96-03356, 96- 08891, Steven D. Sheldon, J., denied service provider's motion for partial summary judgment, and granted Corporation Commission's motion for summary judgment and competitor's motions to dismiss. Service provider appealed. The Court of Appeals, 198 Ariz. 208, 8 P.3d 396, affirmed in part, reversed in part, and remanded with directions. On remand, the Superior Court, Rebecca A. Albrecht, J., dismissed the service provider's constitutional claim. Service provider appealed. The Supreme Court, Zlaket, C.J., held that: (1) a determination of fair value by the Corporation Commission is necessary with respect to a public service corporation; (2) Corporation Commission is not required to use fair value as the exclusive basis in setting rates and charges for local and intraLATA telecommunications business provided by competitive public service corporations; and (3) fair value determination with respect to a public service corporation is neither in conflict with, nor preempted by, the federal Telecommunications Act of 1996.

Reversed, vacated, and remanded.

West Headnotes

[1] Appeal and Error 893(1)
30k893(1) Most Cited Cases

Pure questions of law are reviewed de novo by the Supreme Court.

[2] Public Utilities 124
317Ak124 Most Cited Cases

A determination of fair value by the Corporation Commission is necessary with respect to a public service corporation to enable the Commission to properly discharge its duties, including its primary duty to set rates. A.R.S. Const. Art. 15, § § 3, 14.

[3] Constitutional Law 14
92k14 Most Cited Cases

Unambiguous constitutional language is to be given its plain meaning and effect.

[4] Constitutional Law 14
92k14 Most Cited Cases

[4] Statutes 190
361k190 Most Cited Cases

Under ordinary circumstances, where there is involved no ambiguity or absurdity, a statutory or constitutional provision requires no interpretation.

[5] Telecommunications 323
372k323 Most Cited Cases

Corporation Commission was not required to use fair value of competitive local exchange carriers' (CLECs) state property as the exclusive basis in setting rates and charges for local and intraLATA telecommunications services provided by CLECs, although fair value, in conjunction with other information, could be used to insure that the CLECs and the consumer were treated fairly. A.R.S. Const. Art. 15, § § 3, 14.

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[6] States 18.81
360k18.81 Most Cited Cases

[6] Telecommunications 323
372k323 Most Cited Cases

Fair value determination of potential competitive local exchange carriers' (CLECs) in-state property as part of rate-setting process, as required by state constitution, was neither in conflict with, nor preempted by, the federal Telecommunications Act of 1996; following a fair value determination, the Corporation Commission was free to decide the just and reasonable rates that may be charged by a potential CLEC to whom a certificate of convenience and necessity had been granted. Communications Act of 1934, § 253(a), as amended, 47 U.S.C.A. § 253(a); Const. Art. 15, § 14.

[7] Constitutional Law 18
92k18 Most Cited Cases

Whenever possible, the Arizona Supreme Court will construe the Arizona Constitution to avoid conflict with the United States Constitution and federal statutes.

****352 *243** Fennemore Craig by Timothy Berg, Janice Procter- Murphy, Theresa Dwyer, Phoenix, Attorneys for Appellant U.S. West Communications, Inc.

Janet F. Wagner, Janice M. Alward, Phoenix, Attorneys for the Arizona Corp. Comm'n.

Lewis & Roca, L.L.P. by Thomas H. Campbell, W. Todd Coleman, Phoenix, Thomas F. O'Neil III, Mark B. Ehrlich, William Single IV, Washington DC, Attorneys for Appellees MCI Metro Access Transmission Servs., Inc., Brooks Fiber Communications of Tucson, Inc. and MFS Intelenet of Arizona, Inc.

Gallagher & Kennedy, P.A. by Michael M. Grant, Todd C. Wiley, Phoenix, Attorneys for Appellee Electric Lightwave, Inc.

Ridge & Isaacson, P.C. by Steven J. Duffy, Phoenix, Attorneys for Appellee Sprint Communications Co., L.P.

Osborn Maledon, P.A. by Andrew D. Hurwitz, Joan S. Burke, Phoenix, Attorneys for Appellees AT & T Communications of the Mountain States and TCG Phoenix.

Roshka, Heyman & DeWulf, P.L.C. by Michael W. Patten, (formerly with Brown & Bain, P.A.), Phoenix, Attorneys for Appellees American Communications Servs. of Pima County, Inc. and Cox Arizona Telcom, Inc.

Arizona Center for Law in the Public Interest by Timothy M. Hogan, Phoenix, Attorney for Amicus Curiae Arizona Consumers Council.

Waterfall, Economidis, Caldwell, Hanshaw & Villamana, P.C. by Russell E. Jones, D. Michael Mandig, Tucson, Attorneys for Amicus Curiae Trico Elec. Coop., Inc.

OPINION

ZLAKET, Chief Justice.

¶ 1 We are called upon to address the following issues: (1) whether the Arizona Corporation Commission is constitutionally required to ascertain the fair value of a public service corporation's in-state property when setting rates; (2) if so, the extent to which such a fair value determination must be utilized in the rate-setting process; and (3) whether federal law preempts and precludes the application of this constitutional mandate to corporations in the telecommunications sector. We have jurisdiction pursuant to article VI, § 5(3) of the Arizona Constitution.

FACTS AND PROCEDURAL HISTORY

¶ 2 Until very recently, U.S. West and its predecessor occupied the status of a regulated monopoly in the Arizona telecommunications market. In setting U.S. West's rates, the Arizona Corporation Commission customarily determined the fair value of the company's in-state property and calculated a reasonable rate of return on those assets.

¶ 3 In 1995, the corporation commission adopted rules opening the door to competition in local service and interLATA [FN1] markets. *See* Competitive Telecommunications Rules, Ariz. Admin. Code § § R14-2-1101 to -1115. The following year, Congress enacted the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (codified at ****353 *244** 47 U.S.C. § 151, et. seq.) to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the

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rapid deployment of new telecommunications technologies." *See* S. Res. 652, 104th Cong., 110 Stat. 56 (1996). This federal legislation bars any state law that would "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."47 U.S.C. § 253(a) (2001 Supp.).

FN1. "LATA" is an acronym for "Local Access and Transport Area." LATAs were formed as a result of the Bell monopoly breakup. *See United States v. Western Elec. Co., Inc.*, 569 F.Supp. 990, 993 n. 9 (D.D.C.1983). An "interLATA" transmission originates in one LATA and terminates in another. *Id.* at 994.

¶ 4 In 1996 and 1997, competitive local exchange carriers (CLECs) filed applications with the corporation commission for certificates of convenience and necessity, allowing them to provide both local and interLATA service throughout Arizona. The commission issued the certificates, concluding that to do so was in the public interest. No effort was made to determine the fair value of any Arizona-based property of these eleven CLECs.

¶ 5 U.S. West filed separate actions, arguing that article XV of the Arizona Constitution compels a fair value finding with respect to each CLEC. Following consolidation, the trial court declared the fair value clause inapplicable because the CLECs were engaged in a competitive, rather than a monopolistic, environment. The judge also ruled that the fair value requirement would constitute a barrier to the telecommunications market in violation of the foregoing federal law. Thus, she granted pending motions to dismiss.

¶ 6 The court of appeals reversed, holding that article XV, section 14 of the Arizona Constitution requires the corporation commission to determine the fair value of each CLEC's Arizona property. *US West Communications, Inc. v. Ariz. Corp. Comm'n*, 198 Ariz. 208, 218, 8 P.3d 396, 406, ¶ 34 (App.2000).

> We ... reject an interpretation of the fair value clause as discretionary because it disregards the nature of the constitutional imperative. Although the framers' expression of their purpose in imposing the fair value clause may be unusual, it does not abrogate the mandatory nature of the fair value clause itself. If fair value determinations were optional, it would have been pointless to include the fair value clause in the constitution in the first instance.
>
> The framers may not have envisioned a competitive telecommunications market when they drafted article 15 of the Arizona Constitution. Fair value rate base determinations, and perhaps rate setting itself, may be anachronistic processes in a competitive market. Nevertheless, given that our supreme court has consistently held that the constitution requires fair value rate base determinations for public service corporations, but has never restricted such language to monopolies, the trial court erroneously disregarded constitutional authority in distinguishing this case from *Simms* and *Scates* ....

Id. at 216-17, 8 P.3d at 404-05, ¶ ¶ 24-25. The appellate court also reversed the judge's finding that a fair value determination would violate the federal Telecommunications Act of 1996. *Id.* at 217-18, 8 P.3d at 405-06, ¶ ¶ 28-30.

[1] ¶ 7 We granted review, owing to the statewide importance of these issues. Because they involve pure questions of law, we review them de novo. *In re Hall v. Lalli*, 194 Ariz. 54, 57, 977 P.2d 776, 779, ¶ 5 (1999).

ANALYSIS

A. The Arizona Constitution

¶ 8 The corporation commission's duties are outlined in article XV of the Arizona Constitution. Section 3 states that the commission "shall have full power to, and shall, prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected, by public service corporations within the State for service rendered therein." Section 14 requires that "[t]he Corporation Commission shall, to aid it in the proper discharge of its duties, ascertain the fair value of the property within the State of every public service corporation doing business therein."

[2] ¶ 9 The commission and the CLECs claim that the court of appeals erred in mandating a fair value determination for each competitor. Asserting that the constitutional ****354 *245** language in question was intended to govern a monopolistic market and is an anachronism in today's competitive environment, they argue that a fair value determination lacks utility and should no longer be required.

[3][4] ¶ 10 Unambiguous constitutional language, however, is to be given its plain meaning and effect.

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"Nothing is more firmly settled than under ordinary circumstances, where there is involved no ambiguity or absurdity, a statutory or constitutional provision requires no interpretation." *Adams v. Bolin*, 74 Ariz. 269, 273, 247 P.2d 617, 620 (1952); *see also Pinetop- Lakeside Sanitary Dist. v. Ferguson*, 129 Ariz. 300, 302, 630 P.2d 1032, 1034 (1981) ("[W]here a constitutional provision is clear, no judicial construction is required or proper."). Furthermore, the Arizona Constitution plainly dictates how it is to be applied: "The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise." Ariz. Const. art. II, § 32.

¶ 11 Section 14 states that the corporation commission *shall* make a fair value determination. This is an imperative. The commission is charged with an affirmative duty to act. The constitutional provision in question does not condition its mandate upon the presence of a monopolistic market, nor does it say or imply anything about the existence of discretion in the commission.

¶ 12 Should they think it wise, our citizens are free to amend the Arizona Constitution to reflect changed circumstances in the telecommunications industry. It is noteworthy, however, that the people have rejected such an amendment three times, most recently just a year ago. [FN2] Because neither this court nor the corporation commission possesses the power to ignore plain constitutional language, we hold that a determination of fair value is necessary with respect to a public service corporation.

FN2. The voters defeated proposed amendments to the fair value clause in the 1984, 1988, and 2000 elections.

¶ 13 But what is to be done with such a finding? In the past, fair value has been the factor by which a reasonable rate of return was multiplied to yield, with the addition of operating expenses, the total revenue that a corporation could earn. *See, e.g., Scates v. Ariz. Corp. Comm'n*, 118 Ariz. 531, 533- 34, 578 P.2d 612, 614-15 (App.1978). That revenue figure was then used to set rates.

¶ 14 Our cases have historically supported such a method. Two years after the Arizona Constitution was adopted, this court stated:

> The "fair value of the property" of public service corporations is the recognized basis upon which rates and charges for services rendered should be made, and it is made the duty of the Commission to ascertain such value, not for legislative use, but for its own use, in arriving at just and reasonable rates and charges....

State v. Tucson Gas, Elec. Light & Power Co., 15 Ariz. 294, 303, 138 P. 781, 785 (1914). Thirty-four years later, in *Ethington v. Wright*, 66 Ariz. 382, 391-92, 189 P.2d 209, 215-16 (1948), we affirmed the need to use the fair value determination in setting just and reasonable rates.

¶ 15 In *Simms v. Round Valley Light & Power Co.*, 80 Ariz. 145, 294 P.2d 378 (1956), a public service corporation appealed the commission's decision to set rates based on information obtained from a review of the company's books. We relied on *Tucson Gas* and *Ethington* for the proposition that "under our constitution as interpreted by this court, the commission is required to find the fair value of the company's property and use such finding as a rate base for the purpose of calculating what are just and reasonable rates." *Id.* at 151, 294 P.2d at 382.

¶ 16 This ruling has been followed in subsequent cases. *See, e.g., Ariz. Corp. Comm'n. v. Ariz. Pub. Serv. Co.*, 113 Ariz. 368, 370, 555 P.2d 326, 328 (1976) (same holding); *Ariz. Corp. Comm'n. v. Ariz. Water Co.*, 85 Ariz. 198, 202, 335 P.2d 412, 414 (1959) ("[T]he Commission must establish the rate base on the basis of fair value and that alone.").

[5] ¶ 17 But while the constitution clearly requires the Arizona Corporation Commission to perform a fair value determination, ****355 *246** only our jurisprudence dictates that this finding be plugged into a rigid formula as part of the rate-setting process. Neither section 3 nor section 14 of the constitution requires the corporation commission to use fair value as the *exclusive* "rate basis." Those provisions merely mandate that the commission "ascertain the fair value of the property within the State of every public service corporation doing business therein" and "prescribe just and reasonable classifications to be used and just and reasonable rates and charges...." Ariz. Const. art. XV, § § 3, 14.

¶ 18 As we have seen, a line of cases nearly as old as the state itself has sustained the traditional formulaic approach. The commission and the CLECs correctly point out, however, that those decisions were rendered during a time of monopolistic utility markets. In such a setting,where rates were determined by giving the utility a reasonable return on its Arizona property, the fair

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value requirement was essential.

¶ 19 We still believe that when a monopoly exists, the rate-of-return method is proper. Today, however, we must consider our case law interpreting the constitution against a backdrop of competition. In such a climate, there is no reason to rigidly link the fair value determination to the establishment of rates. We agree that our previous cases establishing fair value as the exclusive rate base are inappropriate for application in a competitive environment.

¶ 20 It is important to note what we do not decide today. We do not hold that a fair value determination should play *no* role in the establishment of rates, or that it can simply be ignored. On the contrary, section 14 mandates that the corporation commission determine fair value "to aid it in the proper discharge of its duties." One of the commission's primary duties is to set rates. *See* Ariz. Const. art. XV, § 3.

¶ 21 The fair value of a public service corporation's Arizona property may be important in determining and avoiding the harsh extremes of the rate spectrum. Set too low, rates can result in a confiscatory taking of a company's property. Set too high, they can lead to state-sanctioned price gouging. Thus, fair value, in conjunction with other information, may be used to insure that both the corporation and the consumer are treated fairly. In this and any other fashion that the corporation commission deems appropriate, the fair value determination should be considered. The commission has broad discretion, however, to determine the weight to be given this factor in any particular case.

B. Federal Telecommunications Act

[6] ¶ 22 We must also decide whether the federal Telecommunications Act of 1996 prohibits the commission from determining the fair value of potential competitors' in-state property as part of the rate-setting process. It is undisputed that the legislation in question was enacted to initiate competition in the historically monopolistic telecommunications industry. To insure that states did not interfere, Congress declared that "[n]o state or local statute or regulation ... may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). However, this section does not prevent states from regulating telecommunications on a "competitively neutral basis." *Id.* § 253(b).

[7] ¶ 23 Obviously, if Arizona's fair value requirement conflicts with the federal act, the latter preempts and precludes application of this constitutional provision. *See* U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). Whenever possible, however, we construe the Arizona Constitution to avoid conflict with the United States Constitution and federal statutes. *Ruiz v. Hull*, 191 Ariz. 441, 448, 957 P.2d 984, 991, ¶ 24 (1998).

¶ 24 We have previously indicated that while the commission is constitutionally required to ascertain the fair value of the CLECs' Arizona property, it has considerable discretion in a competitive environment to determine how such information should be ****356 *247** used. Thus, the issue before us is whether the fair value requirement alone acts to "prohibit or have the effect of prohibiting" the entry of competition in the telecommunications industry. *See* 47 U.S.C. § 253(a). We think not.

¶ 25 Fair value can be determined in an impartial manner. Such objective data may prove helpful in the rate-setting process, though not necessarily as the sole factor to be assessed. We recognize that some competitors may have little, if any, physical property in Arizona. The commission can consider this in setting rates. In any event, following a fair value determination the corporation commission is free to decide the "just and reasonable rates" that may be charged by a CLEC to whom a certificate of convenience and necessity has been granted. We fail to see how such a procedure impedes telecommunications competition in Arizona.

¶ 26 We therefore hold that the fair value determination required by article XV, § 14 of the Arizona Constitution is neither in conflict with, nor preempted by, the federal Telecommunications Act of 1996.

CONCLUSION

¶ 27 We reverse the judgment of the superior court, vacate the opinion of the court of appeals, and remand the matter for further proceedings consistent with this opinion.

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