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OPEN MEETING ITEM



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Executive Secretary  
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ARIZONA CORPORATION COMMISSION

2003 MAR 19 P 1:03

DATE: March 19, 2003  
DOCKET NO: SW-01303A-02-0628, et al.  
TO ALL PARTIES:

AZ CORP COMMISSION  
DOCUMENT CONTROL

Enclosed please find the recommendation of Assistant Chief Administrative Law Judge Dwight D. Nodes. The recommendation has been filed in the form of an Order on:

ARIZONA-AMERICAN WATER COMPANY  
(TARIFF)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by 12:00 noon on or before:

MARCH 28, 2003

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Open Meeting to be held on:

APRIL 1 and 2, 2003

For more information, you may contact Docket Control at (602)542-3477 or the Hearing Division at (602)542-4250.

Arizona Corporation Commission  
**DOCKETED**

MAR 19 2003

BRIAN C. McNEIL  
EXECUTIVE SECRETARY

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This document is available in alternative formats by contacting Shelly Hood, ADA Coordinator, voice phone number 602-542-3931, E-mail [SHood@cc.state.az.us](mailto:SHood@cc.state.az.us)

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**BEFORE THE ARIZONA CORPORATION COMMISSION**

COMMISSIONERS

MARC SPITZER, Chairman  
JIM IRVIN  
WILLIAM A. MUNDELL  
JEFF HATCH-MILLER  
MIKE GLEASON

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

DECISION NO. \_\_\_\_\_

**ORDER**

Open Meeting  
April 1 and 2, 2003  
Phoenix, Arizona

**BY THE COMMISSION:**

On August 16, 2002, Arizona-American Water Company, Agua Fria District (“Arizona-American” or “Company”), filed proposed tariff revisions with the Arizona Corporation Commission (“Commission”). The Company proposes to expand the applicability of its water (Docket No. W-01303A-02-0629) and wastewater (Docket No. W-01303A-02-0628) hook-up fee tariffs to the entirety of its Agua Fria District. Currently, the hook-up fee tariffs are applicable only to new service connections within the portion of the Company’s Agua Fria Certificate of Convenience and Necessity (“CC&N”) area known as “Whitestone.”

In Decision No. 65201 (September 20, 2002), the Commission suspended the Company’s tariff filing for 120 days. In Decision No. 65536 (January 24, 2003), the Commission granted an additional 90-day suspension, through and including April 12, 2003, to allow the Hearing Division to review this matter.

\* \* \* \* \*

Having considered the entire record herein and being fully advised in the premises, the Commission finds, concludes, and orders that:

**FINDINGS OF FACT**

1  
2 1. By its applications in these consolidated cases, Arizona-American seeks to establish  
3 water and wastewater facilities hook-up fees so that the Company can “equitably apportion the costs  
4 of constructing additional facilities” to provide water production, water and wastewater treatment,  
5 transmission, storage, pressure, flow, effluent disposal, and sludge disposal among all new service  
6 connections in the Company’s Agua Fria Division.

7 2. In Decision No. 64307 (December 28, 2001), the Commission approved a CC&N  
8 extension application for Citizens Communications Company’s (now Arizona-American’s) Agua Fria  
9 District to include an 8,800 acre area in the town of Buckeye, Arizona known as Whitestone. As part  
10 of that Decision, the Commission approved tariffs, in accordance with Staff’s recommendation, for  
11 water and wastewater hook-up fees for the Whitestone area of the Agua Fria District.

12 3. Arizona-American’s applications in these consolidated proceedings seek to impose  
13 hook-up fees across the remaining portion of the Agua Fria District consistent with those now in  
14 effect for Whitestone. The Company intends to treat the amounts collected under these tariffs as  
15 contributions in aid of construction (“CIAC”), consistent with the requirement in Decision No. 64307  
16 that the Whitestone hook-up fees be treated as CIAC.

17 4. On January 7, 2003, Staff filed a Motion to Dismiss (“Motion”) in each of these cases.  
18 Staff contends that the Company’s tariff filings raise “fair value” problems because the proposed  
19 tariffs constitute a “rate” within the meaning of Article XV, Section 3, of the Arizona Constitution.  
20 Staff argues that because the charges for hook-up fees are rates, the Commission is required to make  
21 a fair value finding, which can only be done in the context of a rate case proceeding (when the rate is  
22 proposed by a monopoly utility provider such as Arizona-American). Staff cites *US West*  
23 *Communications, Inc. v. Arizona Corporation Commission*, 201 Ariz. 242, 34 P.3d 351 (2001) (“*US*  
24 *West IP*”) in support of its position that the Commission must make a fair value finding in any matter  
25 setting rates. Staff asserts that, because Arizona-American’s Agua Fria District has a rate case  
26 currently pending before the Commission (Docket No. WS-01303A-02-0870), the hook-up fee tariff  
27 issue should be addressed in that docket.

28 5. On January 27, 2003, Arizona-American filed a Response to Staff’s Motion. The

1 Company argues that Staff's Motion ignores established Commission policy and precedent with  
2 respect to tariff changes outside of a rate case, and could render numerous hook-up fees previously  
3 approved by the Commission subject to attack<sup>1</sup>. Arizona-American points out that Staff Engineering  
4 has already found the proposed hook-up fee tariffs to be acceptable and that numerous hook-up fee  
5 tariffs have been routinely approved by the Commission outside the context of a rate case, and  
6 without fair value findings. Arizona-American claims that the term "rate" cannot be determined by a  
7 generic dictionary definition, but must be evaluated under Arizona law and Commission precedent.  
8 The Company also asserts that the *US West II* decision does not address whether hook-up fees, which  
9 are treated as CIAC, constitute a rate that requires a fair value finding. Arizona-American cites  
10 *RUCO v. Arizona Corporation Commission*, 199 Ariz. 588, 20 P.3d 1188 (App. 2001) ("*Rio Verde*")  
11 for the proposition that there are circumstances where rates can be set without a fair value finding,  
12 such as interim rates or for adjustor clauses. Arizona-American argues that CIAC received from  
13 hook-up fees are not "revenues" and have no impact on the Company's operating income. Because  
14 CIAC have no impact on the Company's return on its fair value rate base, Arizona-American claims  
15 that such contributions are not "rates" within the meaning of Article XV of the Arizona Constitution  
16 or court decisions such as *US West II*. The Company also expresses concern that all of the prior  
17 decisions approving hook-up fees outside of a rate case could be rendered invalid and could expose  
18 many utilities, as well as the Commission, to a legal challenge every time a utility collects a hook-up  
19 fee.

20 6. On February 5, 2003, Staff filed a Reply to Arizona-American's Response. Staff  
21 claims that the term "rate" must be given a broad interpretation in accordance with the meaning of the  
22 Arizona Constitution. With respect to the *Rio Verde* case, Staff points out that the court found an  
23 automatic adjustment must be approved in a rate case, even where the adjustor mechanism is revenue  
24 neutral. Staff also disputes the Company's contention that granting Staff's Motion will allow parties  
25 to challenge prior Commission decisions. Staff asserts that, pursuant to A.R.S. §40-252, the  
26 Commission's existing orders are not subject to collateral attack and the Commission may alter,

27 <sup>1</sup> In response to a data request served by Arizona-American, Staff states that it "intends to treat all future hook-up fee  
28 applications in the same manner as these cases" (i.e., Staff will only recommend approval in a rate case or where a fair  
value finding can be made).

1 amend, or rescind a prior order or decision only after the affected utility is afforded notice and a  
2 hearing. Staff argues that case law changes all the time without invalidating final orders of the  
3 Commission that are not under appeal. Staff therefore requests that the Commission grant its Motion  
4 to Dismiss.

5         7. Article XV, Section 3, of the Arizona Constitution states that the Commission “shall  
6 have full power to, and shall, prescribe just and reasonable classifications to be used and just and  
7 reasonable rates and charges to be made and collected, by public service corporations within the State  
8 for service rendered therein.” Section 14 of Article XV requires that the Commission “shall, to aid it  
9 in the proper discharge of its duties, ascertain the fair value of the property within the State of every  
10 public service corporation doing business therein.” We agree with Staff that a proposed rate, as that  
11 term is used in Article XV of the Arizona Constitution, should be given a broad interpretation.  
12 Because Arizona-American’s proposed hook-up fees require an amount to be paid for a service, they  
13 constitute a “rate” under Article XV and therefore, there must be a “fair value” determination.

14         8. Although we recognize that this ruling may represent a departure from prior decisions  
15 granting approval of hook-up fee tariffs outside the context of a rate case, we believe that it is  
16 necessary to comply with the precedent established by the Arizona Supreme Court in *US West II*. In  
17 that case, the Court stated that “[u]nambiguous constitutional language” must be given its “plain  
18 meaning and effect” and a “determination of fair value is necessary with respect to a public service  
19 corporation.” *US West II*, 201 Ariz. at 245. Therefore, the Commission is required to make a fair  
20 value finding prior to approving the requested hook-up fees. Accordingly, Arizona-American’s  
21 proposed hook-up fee tariffs should be evaluated in the Company’s pending rate case.

22         9. We are not persuaded by Arizona-American’s argument that the *Rio Verde* case  
23 requires a different conclusion. The court in *Rio Verde* cited two exceptions to the fair value  
24 requirement, for emergency rates and adjustor clauses, neither of which are applicable here.  
25 Although Arizona-American compares an adjustor mechanism to a hook-up fee, because both are  
26 revenue neutral, the *Rio Verde* court stated that an automatic adjustment rate must be determined in a  
27 rate case. *Rio Verde*, 199 Ariz. at 593. Nor are we persuaded by Arizona-American’s claim that a  
28 jurisdictional defect would be imposed on all prior Commission orders approving hook-up fees

1 outside of a rate case. The Commission clearly has jurisdiction to approve hook-up fees and,  
2 pursuant to A.R.S. §40-252, the Commission's prior decisions are not subject to collateral attack.  
3 For the reasons set forth above, we believe it is appropriate to evaluate Arizona-American's proposed  
4 hook-up fee tariffs in the context of the Company's pending rate application rather than in the above-  
5 captioned tariff filing dockets.

6 **CONCLUSIONS OF LAW**

7 1. Arizona-American Water Company, Agua Fria District, is a public service corporation  
8 within the meaning of the Arizona Constitution and A.R.S. §§ 40-201, -250, -361,-365 and -367.

9 2. The Commission has jurisdiction over Arizona-American and the subject matter of the  
10 applications.

11 3. Pursuant to Article XV §§ 3 and 14 of the Arizona Constitution, Arizona-American's  
12 proposed hook-up fee tariffs constitute rates that require a fair value determination prior to approval.

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**ORDER**

IT IS THEREFORE ORDERED that Staff's Motion to Dismiss is granted.

IT IS FURTHER ORDERED that Staff shall review and make a recommendation, regarding the water and wastewater hook-up fee tariffs proposed by Arizona-American Water Company, Agua Fria District, in the Company's pending rate case (Docket No. WS-01303A-02-0870).

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN

COMMISSIONER

COMMISSIONER

COMMISSIONER

COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this \_\_\_\_ day of \_\_\_\_\_, 2003.

\_\_\_\_\_  
BRIAN C. McNEIL  
EXECUTIVE SECRETARY

DISSENT \_\_\_\_\_

DISSENT \_\_\_\_\_  
DDN:mlj

1 SERVICE LIST FOR: ARIZONA-AMERICAN WATER COMPANY

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