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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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AZ CORP COMMISSION
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IN THE MATTER OF ARIZONA-AMERICAN
WATER COMPANY – AGUA FRIA DISTRICT
– WATER FACILITIES HOOK-UP FEE
TARIFF REVISIONS

DOCKET NO. SW-01303A-02-0628

STAFF'S REPLY TO
COMPANY'S RESPONSE TO
STAFF'S
MOTION TO DISMISS

I. Introduction.

On January 7, 2003, Staff filed a Motion to Dismiss in this docket. The Motion to Dismiss argued that the hook-up fee requested by the Company was a rate, and therefore a fair value finding was necessary, and that making a fair value finding in this matter would be impractical. The Company filed a Response to the Motion to Dismiss on January 27, 2003. The Response does not dispute that if the hook-up fee is a rate, a fair value finding is necessary, nor does it dispute that a making a fair value finding in this proceeding would be impractical. But the Company does dispute whether a hook-up fee is a "rate". Staff files this Reply in order to further address this issue.¹

II. A hook-up fee is a rate, within the meaning of the Arizona Constitution.

The term "rate", as used in Article XV of the Arizona Constitution, should be given a broad interpretation, consistent with the purposes and history of the Arizona Constitution. The Arizona Constitutional Convention of 1910 was heavily influenced by the "Progressive Movement", which sought to limit the power of large corporations. Accordingly, in Article XV, the Arizona Constitution grants the Commission broad powers over public service corporations. See *Arizona Corp. Comm'n v. State ex rel. Woods*, 171 Ariz. 286, 290-91, 830 P.2d 807 (1992). In *Woods*, the Arizona Supreme Court upheld the Commission's Affiliated Interest Rules, finding them to be within the Commission's

¹ Staff is filing an identical Reply in Docket No. SW-01303A-02-0629, which is a parallel application concerning the Company's sewer hook-up fee.

1 broad ratemaking powers. *Id.*, 171 Ariz. at 296-97. But if the Commission's ratemaking powers are
2 broad, then their subject - rates - must also be broad. And the Company does not dispute that a hook-
3 up fee is money paid for a service. Therefore, hook-up fees fall squarely within the Constitutional
4 definition of "rate".

5 The Company cites two cases in support of its claim that the term "rate" should be
6 interpreted narrowly. But these two cases are not on point as to what the term "rate" should mean
7 under the Arizona Constitution. The Company first cites *Cities for Fair Utility Rates v. Public*
8 *Utilities Comm'n of Texas*, 884 S.W.2d 540, 550 (Tex. App. 1994). But this case concerns a deferred
9 accounting order, that is, an order deferring costs for future consideration in a rate case. *Id.* Under
10 such an order, customers do not pay until the costs are included in rates as part of a future rate case.
11 In contrast, customers will pay for hook-up fees immediately, if and when the hook-up fee tariff is
12 approved. Moreover, the meaning of the term "rate" under a Texas statute has little relevance to the
13 meaning of the term "rate" in the Arizona Constitution, because constitutional terms are given a
14 broader definition than terms in a statute.

15 The Company also cites *Housatonic Cable Vision Company v. Department of Public Utility*
16 *Control*, 622 F.Supp. 789, 809 (D.Conn. 1985). This case found that the federal preemption of state
17 regulation of cable rates, pursuant to a federal statute with a savings clause, did not extend to state
18 regulation of line extensions that were treated as contributions in aid of construction. *Id.* But the
19 definition of the term "rate" in a federal statute - especially a federal statute with a savings clause - is
20 different than interpreting the same term in the Arizona Constitution. In interpreting such a statute,
21 the Court must concern itself with the relevant legislative history, the presumption that the existence
22 of a savings clause implies there is something substantial to save, and the concerns of federalism and
23 comity. Therefore, for example, the D.C. Circuit has concluded that the term "rate" must be
24 interpreted narrowly in a provision prohibiting state regulation of wireless rates, but which contained
25 a savings clause. See *Cellular Telecommunications Industry Assoc. v. FCC*, 168 F.3d 1332 (1999)
26 see also *Southwestern Bell Mobile Systems, Inc.*, 14 F.C.C.R. 19898 at ¶ 23, 1999 WL 1062835, FCC
27 99-356 (rel. 11/24/1999)(same). The factors relating to federalism and the savings clause are not
28

1 present in interpreting the Arizona Constitution, and the legislative history of the Arizona
2 Constitutional Convention supports a broad reading of the term "rate".

3 **III. The Rio Verde case does not support the Company's position.**

4 The Company next points to the *Rio Verde* case, *Residential Utility Consumer Office v.*
5 *Arizona Corporation Commission*, 199 Ariz. 588, 20 P.3d 1188 (App. 2001). *Rio Verde* found that
6 there were two exceptions to the fair value requirement - emergency rates and adjustor clauses. The
7 Company argues that a hook-up fee is analogous to an automatic adjustment, because neither affects
8 the utility's revenue. But, unfortunately, the court in *Rio Verde*, in overruling the Commission's
9 decision, implied that the two exceptions mentioned were the only two exceptions. Moreover, the
10 court expressly found that an automatic adjustment had to be established a rate case. *Rio Verde* at ¶¶
11 20-21. But this hook-up fee was not established in a rate case, even if it was somehow similar
12 enough to an automatic adjustment to fall within the automatic adjustment exception. Moreover, the
13 Commission decision that was overturned by *Rio Verde* approved a CAP adjustor that was revenue
14 neutral, a fact that the Commission emphasized to the Court. Thus, *Rio Verde* is definitely not good
15 authority with regard to the proposition that revenue neutrality makes something not a "rate".

16 **IV. The Commission's prior hook-up fee orders are not subject to collateral attack.**

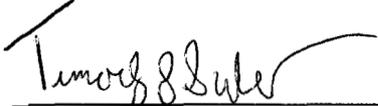
17 Lastly, the Company raises the specter of the chaos and confusion resulting from some of the
18 Commission's prior orders regarding hook-up fees being possibly collaterally attacked. But the
19 Commission's existing final orders are not subject to collateral attack. *See* A.R.S. § 40-252. The
20 Company cites two cases (*Al's Transfer* and *Tonto Creek*) that appear to ignore the plain words of
21 this statute and create an exception when the Commission's order is beyond its jurisdiction. But
22 whatever the validity of these cases, there is no jurisdictional defect in the Commission's prior hook-
23 up fee orders, and therefore, they are not subject to attack even if the cases cited by the Company are
24 correct. The Company asserts that if Staff's view is adopted, the failure to make a fair value finding in
25 some of the Commission's prior hook-up fee orders would be a jurisdictional defect. The Company
26 appears to misconceive the nature of "jurisdiction", which is the power of a tribunal to enter an order.
27 *See* Black's Law Dictionary (7th ed. 1999) at p. 855 (the "power to decide a case or issue a decree").
28 There is no question that the Commission has the power to enter hook-up fee orders. Therefore, its

1 jurisdiction is not at issue. Moreover, the Commission could not be expected to foresee the rulings in
2 *Rio Verde* and *US West*. Case law changes all the time without invalidating final judgments that are
3 not under appeal. The cases cited by the Company referred to the Commission's statutory power
4 under § 252 to revise its own prior orders. The courts in these cases found that to invoke this
5 statutory power the Commission had to follow the procedure set forth in the statute. But the
6 Commission's power over hook-up fees is part of its constitutional ratemaking power, not its § 252
7 power.

8 **V. Conclusion.**

9 Because the term "rate" should be interpreted broadly, a hook-up fee is clearly a rate.
10 Accordingly, Staff's Motion to Dismiss should be granted.

11
12 **RESPECTFULLY SUBMITTED** this 5th day of February 2003.

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