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BEFORE THE ARIZONA CORPORATION

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Arizona Corporation Commission
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IN THE MATTER OF ARIZONA PUBLIC SERVICE COMPANY AND VERIZON CALIFORNIA, INC.'S JOINT PETITION FOR THE ESTABLISHMENT OF AN UNDERGROUND CONVERSION SERVICE AREA

DOCKET NO. E-01345A-07-0663
DOCKET NO. T-01846B-07-0663

ARIZONA PUBLIC SERVICE COMPANY AND VERIZON CALIFORNIA, INC.'S NOTICE OF FILING CLOSING BRIEF

I. INTRODUCTION

On November 27, 2007, Arizona Public Service Company ("APS") and Verizon California, Inc. ("Verizon") (collectively, the "Petitioners") filed with the Arizona Corporation Commission ("Commission") a Joint Petition to Establish Underground Conversion Service Area ("UCSA") as required by Arizona Revised Statutes ("A.R.S. §40-343(B)") ("Joint Petition"). On January 18, 2008, a full evidentiary hearing was held in this matter at the Commission's offices in Phoenix, Arizona. On May 16, 2008, a Recommended Opinion and Order ("ROO") was issued for further consideration by the Commission. The ROO was placed on the Open Meeting Agenda for July 1st and 2nd of 2008. At the Open Meeting on July 1, 2008, the Commission discussed the ROO at length and ultimately determined that the matter should be pulled from the agenda without decision to allow the parties to file additional information in the docket going to the issue of economic feasibility of the UCSA for the Hillcrest Bay Property owners. On or about July 3, 2008, the Hearing Division issued a Procedural Order keeping the record open to allow further creation of a more fully-developed evidentiary record on the issue of economic feasibility.

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1 On April 1, 2009, a Notice of Appearance was filed by attorneys hired to represent
2 Hillcrest Bay, Inc. ("HBI"), one of the owners. On May 1, 2009, APS filed an Economic
3 Feasibility Update ("Update") for the UCSA in which APS indicated that it did not
4 anticipate that the costs of the UCSA would decrease based upon labor and material costs
5 associated with various projects performed in the Hillcrest Bay area. In addition APS
6 intends to re-bid the UCSA project if the UCSA is approved, as the contractor that
7 previously provided APS cost estimates for trenching no longer performs such work. APS
8 also stated that, since the ROO was issued, 14 additional owners had filed letters
9 requesting to change their votes to "no" due to changes in the economy, loss of jobs, or
10 changed financial circumstances.

11 Also on May 1, 2009, HBI filed Updated Documentation in Support of UCSA. On
12 May 11, 2009, the Hearing Division issued a Procedural Order setting an additional
13 evidentiary hearing specifically related to economic feasibility,¹ the current level of owner
14 support for the UCSA, and the standard for Commission approval of the UCSA.

15 On July 21 and 22, 2009, an additional evidentiary hearing was held in this matter
16 at the Commission's offices in Phoenix, Arizona. At the conclusion of the additional
17 evidentiary hearing, the ALJ requested the parties brief the following issues set forth in
18 Section II, 1-5 below.

19 II. DISCUSSION.

- 20 1. **What is meant by the provision in A.R.S. § 40-346(A) requiring "that**
21 **owners of no more than forty percent of the real property within the**
22 **underground conversion service area, or no more than forty percent of**
23 **the owners of real property, have not objected to the formation of the**
24 **underground conversion service area. . .?"**

25 In order to establish an UCSA, the owners of not less than sixty percent of the
26 "contiguous real property within a reasonably compact area of reasonable size, and who
27 own not less than sixty percent on a square foot basis . . . shall petition each public service
28 corporation or public agency serving such area by overhead electric or communication

¹ As to economic feasibility, the Commission believes that evidence should be received as to changes in costs, changes in the utilities' and the owners' ability to pay the costs and the benefits of the UCSA. (Procedural Order dated May 11, 2009.)

1 facilities to make a study of the costs which will be related to the establishment of such
2 area as an underground conversion service area.” A.R.S. § 40-342(A) (the “First
3 Petition”). If not less than 60 percent of the owners who own sixty percent of the real
4 property within the area “excluding public places” support the cost proposal and want the
5 utilities to proceed with the UCSA, they may submit a second petition to the public
6 service corporation or public agency seeking conversion. A.R.S. § 40-343(A) (the
7 “Second Petition”).

8 Petitioners did not find any case law analyzing or interpreting the meaning of A.R.S.
9 § 40-346(A). In addition, a search of the legislative history of A.R.S. § 40-341 *et seq.*
10 also provided no guidance. What is confusing is that A.R.S. § 40-346(A) provides, in
11 pertinent part, that the Commission, when determining whether the requirements to create
12 an underground conversion area have been met, must establish that “owners of no more
13 than forty percent of the real property within the underground conversion service area, or
14 no more than forty percent of the owners of real property, have not objected to the
15 formation of the underground conversion service area.”

16 Given the requirements of A.R.S. §§ 40-342(A), 343(A), which requires more than
17 60 percent affirmative support for the underground conversion, thus mathematically
18 eliminating the possibility of over 40 percent opposition, Petitioners agree that the
19 standard in A.R.S. § 40-346(A) is confusing and unclear. If the statute is read literally, it
20 would mean that the Commission would need to establish that either forty percent or
21 fewer of the owners or owners of forty percent or less of the real property have not
22 objected (meaning that more than 60 percent of the owners in the proposed conversion
23 area or individuals owning more than 60 percent of the real property would have
24 objected). This clearly contradicts the 60 percent support requirement in A.R.S. § 40-
25 342(A) and § 40-343(A) and if followed literally by the Commission, would lead to an
26 absurd and contradictory result.

27 ...
28 ...

1 It appears that based upon previous Commission Orders², the Commission resolved
2 this contradiction by ignoring the negative language of A.R.S. §40-346A and focusing on
3 the requirement of over sixty percent approval which, if attained, would necessarily mean
4 that less than forty percent disapproved of the conversion. A reasonable interpretation of
5 A.R.S. § 40-346(A) is that in order for the Commission to approve the Joint Petition and
6 impose involuntary costs on a minority of homeowners that, at a minimum, a super
7 majority of affirmative supporters of conversion should be required.

8 Given this rationale, Petitioners submit that interpreting the statute based on its plain
9 language would be contrary to well-settled principles of statutory construction. In
10 construing statutes, Arizona courts avoid a statutory interpretation that leads to absurd
11 results that could not have been contemplated by the legislature. *See, e.g., Bilke v. State*,
12 206 Ariz. 462, 464 (2003); *Porter v. Triad of Ariz.*, 203 Ariz. 230, 233 (Ct. App. 2002);
13 *State v. Altamirano*, 166 Ariz. 432, 437 (Ct. App. 1990). A result is “absurd ‘if it is so
14 irrational, unnatural, or inconvenient that it cannot be supposed to have been within the
15 intention of persons with ordinary intelligence and discretion.’” *State v. Estrada*, 201
16 Ariz. 247, 251 (2001) (quoting *Bussanich v. Douglas*, 152 Ariz. 447, 449-50 (Ct. App.
17 1986)). If necessary in order to make a statute intelligible, “the court may, and should,
18 correct the palpable mistakes in writing, grammar, spelling, or punctuation.” *Sullivan v.*
19 *Burns*, 51 Ariz. 384, 392 (1938). Moreover, Arizona courts interpret statutory provisions
20 in harmony with one another whenever possible. *Johnson v. Mohave County*, 206 Ariz.
21 330, 333 (Ct. App. 2005).

22 Petitioners believe that A.R.S. § 40-346(A) should require the Commission to make
23 two separate findings: (1) that owners of more than sixty percent of the real property in
24 the affected area on a square footage basis have supported to the UCSA; and (2) that more
25 than sixty percent of the owners of property in the UCSA have supported to the UCSA. If
26 the percentage of objections on either basis exceeds forty percent, then the initial

27 ² *In re Tucson Electric Power Company*, Decision 55490; *In re Mountain States Telephone and Telegraph*,
28 Decision 57051; and *In the Matter of Qwest Corporation's Petition for the Establishment of an*
Underground Conversion Service Area, Docket No. T-01051B-04-0276.

1 requirements for proceeding with the UCSA are no longer met and the UCSA should not
2 be established.

3 An example of this approach is set forth in Decision No. 67437.³ In that case, more
4 than 60 percent of the owners who owned more than 60 percent of the real property within
5 the UCSA signed the petition to establish the district. During the proceeding, two owners
6 timely withdrew their support, thereby reducing these calculations to below 60 percent.
7 As a result, the Commission dismissed the petition relying in part on the failure to meet
8 the statutory requirements in A.R.S. §§ 40-343(A), 346(A).⁴ See Decision No. 67437 at 7.

9 **2. Is it appropriate for the Commission to consider late**
10 **withdrawals of signatures and/or objections to the UCSA, in**
11 **considering whether the standard for approval of the UCSA is**
12 **met, given A.R.S. § 40-345(1)?**

13 A.R.S. § 40-345(1) provides:

14 *In determining protests, withdrawals of signatures and objections, the*
15 *corporation commission, . . . shall be guided by the following rules:*

- 16 1. *Each paper containing signatures shall have attached thereto an*
17 *affidavit of an owner of real estate within the proposed underground*
18 *conversion area, stating that each signature was affixed in his*
19 *presence and is the signer's genuine signature.*

20 The ROO established that property owners owning 62.917 percent of the parcels
21 included in the proposed UCSA and property owners owning 59.690 percent of the total
22 square footage of the proposed UCSA supported the establishment of the UCSA. Since
23 the issuance of the ROO, there have been 16 letters filed in this docket from property
24 owners who previously signed the petition in favor of the UCSA who are now asking to
25 "change their vote to no". The reasons provided include: changes in the economy, loss of
26 job, or changed financial circumstances, all issues that go directly to economic feasibility.
27 It does not appear that the withdrawals have the requisite affidavit as required by A.R.S.
28 § 40-345(1).

³ Docket No. T-01051B-04-0276, *In the Matter of Qwest Corporation's Petition for the Establishment of an Underground Conversion Service Area.*

⁴ The Commission also relied on the Maricopa County Board of Supervisor's refusal to establish the UCSA. The Board of Supervisors also based its denial on a lack of sufficient signatures.

1 Yet, pursuant to the Procedural Order dated May 11, 2009 (“Procedural Order”),
2 Petitioners were required to publish and post notice of the additional hearing, which
3 included the following provision:

4 ***Any owner who desires to (1) withdraw the owner's signature from the***
5 ***petition of owners requesting establishment of the UCSA, (2) object to the***
6 ***establishment of the UCSA, or (3) object to the underground conversion***
7 ***costs included in the joint report for the owner's parcel within the proposed***
8 ***UCSA must file an objection/withdrawal of signature with the***
9 ***Commission's Docket Control, 1200 West Washington, Phoenix, Arizona***
10 ***85007, by July 10, 2009. Any objection/withdrawal shall include the***
11 ***owner's full name, mailing address, telephone number, and signature; the***
12 ***address and/or parcel number for the owner's property within the proposed***
13 ***UCSA; the docket number provided above; and a short explanation of what***
14 ***the owner wishes to do (withdraw signature or object) and why. The***
15 ***Commission will determine the legal effect of these withdrawals/objections***
16 ***after the hearing in this case.***

17 The Procedural Order does not require the affidavit of the homeowner that wishes
18 to remove his/her name from the UCSA petition.⁵ The procedure to remove a signature
19 from the petition set forth in the procedural order conflicts with A.R.S. § 40-345(1).

20 Exhibit “A” to Arizona Public Service Company and Verizon California, Inc.’s
21 Brief Pursuant to Procedural Order Dated May 11, 2009, filed on July 6, 2009,
22 recalculated the percentages based upon the withdrawal of support of the 16 residents who
23 previously signed the petition in favor of the UCSA at the time of the ROO. If the
24 Commission determines that the withdrawal of such signatures should be taken into
25 account, Petitioners calculated that property owners owning 55.23 percent of the parcels
26 included in the proposed UCSA and property owners owning 55.03 percent of the total
27 square footage of the proposed UCSA now support the establishment of the UCSA.

28 A review of the 16 letters reveals that when you require all information set forth in
the Procedural Order (*owner's full name, mailing address, telephone number, and
signature; the address and/or parcel number for the owner's property within the proposed
UCSA; the docket number provided above; and a short explanation of what the owner*

⁵ The Commission’s December 6, 2007 Procedural Order contained a different notice requirement which did include a reference to A.R.S. § 40-345 (“For additional requirements related to withdrawals and objections, please see A.R.S. § 40-345, available on the website for the Arizona State Legislature (www.azleg.gov).”)

1 wishes to do (withdraw signature or object) and why), only seven parcel owners fully
2 complied with the Procedural Order and provided all of the requisite information. It is
3 noteworthy that six parcel owners included all the requisite information except their phone
4 number, and two parcel owners included all the requisite information except an
5 explanation as to why they desire to withdraw their signatures.

6 If the Commission only allowed the withdrawal of the above-mentioned seven
7 parcels, Petitioners calculate that property owners owning 60.25 percent of the parcels
8 included in the proposed UCSA and property owners owning 57.96 percent of the total
9 square footage of the proposed UCSA would support the establishment of the UCSA.

10 In Decision No. 67437, two property owners subsequently filed letters with the
11 Commission withdrawing their support of the UCSA in that case, thereby reducing the
12 requisite percentages to less than 60 percent. As described above, the Commission
13 dismissed the petition relying in part on the failure to meet the statutory requirements in
14 A.R.S. §§ 40-343(A), 346(A).⁶ See Decision No. 67437 at 7. A review of the docket
15 reveals that the two owners filed the requisite affidavit along with their withdrawal as
16 required by A.R.S. §345(1).

17 If the Commission determines that the 16 homeowners that submitted letters
18 requesting removal of their support of the UCSA did not conform with A.R.S. § 40-345(1)
19 because they did not include an affidavit and therefore the withdrawals are disallowed, the
20 Commission always has the discretion to weigh any withdrawals as part of its analysis to
21 determine whether establishing the conversion area is economically feasible.

22 **3. Given the fact that the Commission ordered a new hearing, is it**
23 **appropriate for the Commission to consider subsequent**
24 **withdrawals of signatures and/or objections to the UCSA, in**
25 **considering whether the standard for approval of the UCSA is**
26 **met?**

27 A.R.S. § 40-344 provides the time frame for which the withdrawal of signatures
28 will be accepted by the Commission. Specifically, A.R.S. § 40-344(A) provides:

⁶ The Commission also relied on the Maricopa County Board of Supervisor's refusal to establish the UCSA. The Board of Supervisors also based its denial on a lack of sufficient signatures.

1 *A. Upon receipt of a petition to establish an underground conversion*
2 *service area, the corporation commission, . . . shall set a date for a*
3 *hearing on the petition, which date shall be not later than sixty days*
4 *nor sooner than thirty days after receipt of such petition. . . . Any*
5 *person owning property within the proposed underground*
6 *conversion service area and wishing to withdraw such person's*
7 *signature from the petition of owners referred to in § 40-343,*
8 *subsection A, or object to the establishment of the underground*
9 *conversion service area or to the underground conversion costs as*
10 *contained in the joint report pertaining to his lot or parcel included*
11 *within the proposed underground conversion service area shall, not*
12 *later than ten days before the date set for the hearing, file such*
13 *person's objections. . . with the corporation commission. . . .*

8 It is unclear whether there is a statutory prohibition that would prevent the
9 Commission from conducting an additional hearing in this case as the requisite 60 day
10 limit has past. There is no case law that addresses this issue, and the statute is silent
11 regarding any tolling provision.⁷ If it is determined that the time frame was tolled based
12 upon the Commission's decision to pull this case from the agenda (without decision) to
13 allow the parties to file additional information in the docket to evaluate whether the
14 creation of the UCSA is economically feasible for Petitioners and the Hillcrest Bay
15 Property owners, by scheduling a subsequent hearing, it would appear that the withdrawal
16 requirements set forth in A.R.S. § 40-344(A) would be applicable.

17 Whether or not there is explicit statutory authority to conduct additional hearings
18 on the original Joint Petition, or to allow for the withdrawal of petition support after the
19 initial hearing, the Commission still has the discretion to weigh such withdrawals as part
20 of its economic feasibility analysis.

21 In addition, the withdrawal of signatures on public petitions is somewhat of a
22 unique legal matter with a dearth of case law, particularly with regard to underground
23 conversion areas. However, land annexations conducted by cities have many similarities
24 in terms of petitioning the public and the potential for withdrawing signatures. In the
25 annexation context, a petitioner may not withdraw its annexation consent "after the
26 petition has been finally acted upon and the ordinance adopted." *DeConcini v. City of*

27 ⁷ The statute does provide that the Commission has the authority to conduct additional hearings to
28 determine whether additional territory should be included in the conversion areas pursuant to A.R.S. § 40-346(B).

1 Phoenix, 74 Ariz. 46, 49 (1952) (citing *Valley Center School Dist. No. 20 v. Hansberger*,
2 28 Ariz. 493 (1925)).⁸ In fact, “once affirmative legislative action has commenced upon
3 a petition for annexation, jurisdiction attaches and the petitioners cannot withdraw so as
4 to divest the city council of jurisdiction to act in its legislative capacity.” *DeConcini*, 74
5 Ariz. at 50. Affirmative legislative action puts “the legislative wheels in motion and
6 look[s] toward the actual passage of the annexation ordinance.” *Id.* The Arizona
7 Supreme Court has found that establishing a time frame “beyond which private rights
8 must give way to the interests of society in having a stable and smooth-functioning
9 government” is vital to the orderly functioning of city government and helps to avoid
10 additional expenses and delay. *Id.* (holding that the city council’s meeting to consider
11 the annexation ordinance was an affirmative legislative act, precluding petitioner’s
12 withdrawal).

13 In this instance, the Commission has not yet made a determination on the petition
14 but is instead requiring additional information. Similar to the annexation context, A.R.S.
15 § 40-344 establishes a time frame in which private rights must give way to the
16 functioning of government—“ten days before the date set for hearing.” Allowing
17 withdrawal of signatures at this phase of the proceeding would not create any uncertainty
18 in allowing the “Commission to proceed with its consideration of the petition or divest
19 the Commission of its jurisdiction to act in its legislative capacity.”

20 **4. Given the subsequent withdrawals of signatures and/or**
21 **objections to the UCSA, is dismissal of the Petition appropriate?**

22 The ROO established that property owners owning 62.917 percent of the parcels
23 included in the proposed UCSA and property owners owning 59.690 percent of the total

24 _____
25 ⁸ The League of Arizona Cities and Towns believes:

26 A property owner who has signed an annexation petition may withdraw his signature from
27 such petition any time prior to five o’clock on the date the petition is actually filed with
the county recorder....To withdraw a petition signature a person may...

28 LEAGUE OF ARIZONA CITIES AND TOWNS, A GUIDE FOR ANNEXATION at 9 (citing *Ferree v. City of Yuma*,
124 Ariz. 225 (1979)).

1 square footage of the proposed UCSA supported the establishment of the UCSA. As set
2 forth above, APS recalculated the percentages based upon the withdrawal of support of
3 the 16 residents who "changed their vote to no". If the withdrawal of such signatures is
4 taken into account, property owners owning 55.23 percent of the parcels included in the
5 proposed UCSA and property owners owning 55.03 percent of the total square footage of
6 the proposed UCSA now support the establishment of the UCSA. These percentages are
7 below the requisite minimums established by A.R.S. §40-343.

8 If the current level of support is less than 60 percent for either the number of
9 parcels or square footage, the Commission does not have the statutory authority to
10 approve the UCSA. A.R.S. §40-343 requires that in order to approve the establishment
11 of an UCSA, the Commission must determine, among other things that: (1) property
12 owners owning at least 60 percent of the parcels included in the proposed UCSA support
13 the establishment of the UCSA; and (2) property owners owning at least 60 percent of the
14 total square footage of the proposed UCSA support the establishment of the UCSA.
15 Based upon the updated information provided by HBI, Petitioners now calculate that
16 property owners owning 55.23 percent of the parcels and property owners owning 55.03
17 percent of the total square footage of the proposed UCSA now support the establishment
18 of the UCSA. As a result, the Joint Petition should be dismissed as a matter of law.

19 **5. Given A.R.S. 40-342(D), can service costs be attributed on a**
20 **square footage basis?**

21 A.R.S. §40-347 and 40-348 set forth the guidelines for determining how facilities
22 to be placed in public places ("Conversion Costs") and on private property ("Service Area
23 Costs") are calculated in the UCSA. For Conversion Costs, A.R.S. §40-347(B) provides:

24 *B. The cost incurred in placing underground the facilities in public places*
25 *shall be apportioned among the owners of property within the area on the*
basis of relative size of each parcel by the corporation commission,

26 For Service Area Costs, A.R.S. § 40-348(A) provides:

27 *A. The service facilities within the boundaries of each lot or parcel within*
28 *an underground conversion service area shall be placed underground at*
the same time as or after the underground system in private easements and

1 *public places is placed underground. The public service corporation or*
2 *public agency involved, directly or through a contractor, shall, at the*
3 *expense of the owner, convert to underground its facilities on any such lot*
4 *or parcel up to the point of delivery, in the case of an electric public*
5 *service corporation or public agency, or to the connection point within the*
6 *house or structure, in the case of a communication corporation, upon being*
7 *requested by the owner. . . .*

8 (Emphasis added).

9 It appears that although the Conversion Costs are to be apportioned on a pro-rata
10 basis based upon parcel size, Service Costs are to be determined on a lot by lot basis, each
11 property owner paying the actual cost to convert electric lines within their property.
12 According to the testimony of Chris Kellogg, senior vice president of Tades Inc., Service
13 Costs were apportioned on a square footage basis, not on a lot by lot basis as required by
14 A.R.S. § 40-348(A). Mr. Kellogg testified as follows:

15 *APS service cost for trenching conduit is basically based on the square*
16 *footage on the properties. . . .It's based on square footage, is the way we*
17 *divided everything to try to come up with the easiest for everybody to*
18 *understand. We did the trenching per foot, but then we divided it by the*
19 *square footage of each property line through the whole development to*
20 *where there is nobody that is getting charged more for that public cost. It's*
21 *all based on the square footage of their property.*

22 Tr. Vol. I, p. 158, lines 1-14.

23 Mr. Kellogg testified further:

24 *Q. Okay. But we are talking about the service cost column, right, APS*
25 *service cost, trenching, conduit?*

26 *A. Right, but it's still divided that way.*

27 *Q. Okay. Divided according to square footage?*

28 *A. Correct.*

Tr. Vol. I, p. 158, lines 15-19.

 To the extent that Tades Inc. calculated Service Costs according to a parcel
owners' square footage, some parcel owners would not be paying their statutory share of
the Service Costs. According to the testimony of APS witness Donald L. Wilson, the cost
estimate provided by the contractor in the original Joint Report included a detailed cost

1 per lot for each lot so that that property owner was paying actual cost for that service
2 conversion. Mr. Wilson raised concerns that by allocating Service Costs on a square
3 footage basis, as opposed to actual cost, there is a potential that the new cost estimates for
4 certain lots under the Tades Inc. estimate would be higher than the cost estimates in the
5 Joint Report while others would be lower. This is not only contrary to A.R.S. § 40-
6 348(A), it may have misled some individuals concerning the potential costs of
7 conversion.

8 RESPECTFULLY submitted this 26th day of August, 2009.

9 SNELL & WILMER L.L.P.

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26 filed this 26th day of August, 2009, with:

27 Docket Control
28 ARIZONA CORPORATION COMMISSION
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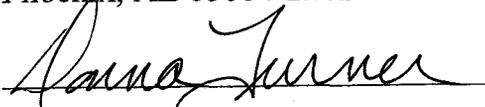
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