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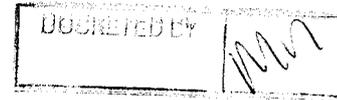
BEFORE THE ARIZONA CORPORATION COMMISSION

2009 OCT -2 P 2:01

- 1 KRISTIN K. MAYES
- 2 Chairman
- 3 GARY PIERCE
- 4 Commissioner
- 5 PAUL NEWMAN
- 6 Commissioner
- 7 SANDRA D. KENNEDY
- 8 Commissioner
- 9 BOB STUMP
- 10 Commissioner
- 11

AZ. CORP. COMMISSION Arizona Corporation Commission
DOCKET CONTROL DOCKETED

OCT - 2 2009



12 IN THE MATTER OF THE SALE AND

13 TRANSITION BY ARIZONA PUBLIC SERVICE

14 TO ELECTRICAL DISTRICT NO. 3 OF CERTAIN

15 ELECTRICAL FACILITIES IN PINAL COUNTY

16 PURSUANT TO A.R.S. § 40-285(A) AND FOR

17 DELETION FROM ITS CERTIFICATE OF

18 CONVENIENCE AND NECESSITY CERTAIN

19 AREAS OF PINAL COUNTY

DOCKET NO. E-01345A-08-0426

20 **SECOND MOTION OF**

21 **ELECTRICAL DISTRICT No. 3 OF PINAL COUNTY FOR**

22 **ADMISSION OF LATE-FILED EXHIBITS, AND**

23 **REQUEST FOR RESUMPTION OF COMMISSION CONSIDERATION**

24 Electrical District No. 3 of Pinal County ("ED3") moves the Commission, pursuant to

25 Arizona Administrative Code ("A.A.C.") Rule 14-3-106, for admission of the following late-filed

exhibits in response to issues and questions raised by the Chair and Commissioners upon

consideration of the Recommended Opinion and Order issued June 8, 2009, in this proceeding

during the Commission's June 23, 2009 open meeting:

1. Rider for Low Income and Medical Assistance Supplemental to All Residential Price Plans (Exhibit ED3-21);
2. Resolution No. 2009-06 of the Board of Directors of ED3, Adopting an Amended Renewable Energy Policy (Exhibit ED3-22);

1 Both APS and ED3 submitted extensive testimony in this proceeding explaining how the
2 relief sought in the Application furthers the public interest in reliable and efficient electric
3 distribution service. Neither Commission Staff nor any other interested party indicated any
4 disagreement with showings of APS and ED3 concerning the public interest benefits of separating
5 their electric distribution systems. Approval of the Application will help to resolve various
6 operational, safety and reliability issues, and will provide benefits to Pinal County similar to those
7 realized by Maricopa County and other parts of the State under the territorial settlements
8 approved by the Commission between APS and the Salt River Project. For decades, disputes
9 have arisen as land owners, developers, and residents seek to have different utilities provide
10 service to previously undeveloped lands. In the area around Casa Grande, there are at least four
11 electrical providers with power lines on both sides of many roads. Clearly the capital cost of such
12 distribution systems is twice what it should be for a geographic area, and the financial costs,
13 service issues, and safety issues are much more difficult to manage. The City of Casa Grande has
14 been very vocal about its problems managing streets, roads and services with the complicated
15 utility situation in that portion of Pinal County.

16 In 2002, the Federal Energy Regulatory Commission affirmed ED3's ownership and
17 operation of the ED3 system -- that is, the subtransmission and distribution system APS sold to
18 ED3 in 1961 with this Commission's approval. The Application in this proceeding represents
19 the resolution of many electrical system issues for "split ends" which will benefit customers, land
20 owners, municipalities, and utilities in Pinal County by avoiding stranded costs, duplication of
21 facilities, and potential safety and reliability issues created by requiring two utility crews to work
22 the same power lines.

1 ED3 has operated its system since October 2001. During that time, system load grew
2 from approximately 35 MW to over 170 MW, and ED3's customer base increased by over 15,000
3 new customers. The reconstruction and expansion of ED3's system required that ED3 invest in
4 excess of \$125 million in new capital over the past seven years in the construction of new
5 substations, new subtransmission and distribution circuits, a rebuild and expansion of the only
6 230kV substation serving the area, and substantial distribution system improvements. ED3 has
7 focused its efforts on the infrastructure required to meet this substantial growth. As a result of
8 these efforts, outage times have substantially reduced for the area as ED3 has completed
9 subtransmission loops and underground distribution systems to reduce customer outages system-
10 wide.

11 ED3's central concern with the provision of safe, adequate and reliable electricity supply
12 to its customers has deferred to some extent the implementation of formal programs for pursuing
13 energy efficiency, renewable energy resources and accommodation for customers experiencing
14 economic challenges. The relative absence of formal programs in these areas should not be
15 interpreted as indifference to these concerns, however. For example, ED3 has actively pursued
16 development of demand resources where opportunities permit, and the 30 percent of its resource
17 portfolio that consists of federal hydroelectric entitlements hardly suggests indifference to
18 renewable resources. The interest expressed by the Chair and Commissioners during the June 23
19 open meeting in ED3's pursuit of more formalized programs in these areas has been taken by the
20 ED3 Board as an opportunity to excel.

1 **II. ED3's RESPONSES TO ISSUES RAISED IN THE JUNE 23 OPEN MEETING**

2 ED3 has adopted or refined three significant policies in response to the questions raised by
3 the Chair and some of the Commissioners during the June 23 open meeting: (1) low income and
4 medical assistance rates; (2) renewal energy policy and energy efficiency infrastructure; and (3)
5 energy efficiency programs. ED3 has undertaken these actions in the face of a significant
6 disadvantage in size relative to the investor-owned utility it is being asked to emulate, significant
7 economic challenges to its customers ranging from one of the nation's highest foreclosure rates^{2/}
8 to difficult transitions in the dairy industry that has been a traditional mainstay of the Pinal
9 County economy. ED3 believes that it has met these challenges effectively and innovatively in
10 formulating these policies.

11 **A. Exhibit ED3-21: Low Income and Medical Assistance**

12 Exhibit ED3-21 is ED3's revised low income and medical assistance rider, Rate No. 13,
13 Low Income and Medical Assistance Rider Supplemental to All Residential Price Plans
14 (Effective 7/1/2009). The revised schedule directly responds to the Commission's concerns that
15 ED3 does not have comparable low income or medical assistance programs, and that the low
16 income and medical assistance rates should apply to anyone who might in the future reside in the
17 area proposed in the Application to be deleted from APS's certificate of convenience and
18 necessity, not just to transferring customers (Tr. at 5-6).

19 In particular, under the revised schedule ED3 will provide both (i) the transferring APS
20 residential "split ends" customers and (ii) any future customers residing at an address served by
21

22 ^{2/} "Realty Trac: Phoenix Ninth for Foreclosures," *Phoenix Business Journal* (April 22, 2009)
23 (reporting that in "Maricopa County, one in every 41 homes had received foreclosure warnings,
24 according to RealtyTrac. In Pinal County the rate was one in 37").

1 APS as of the date of a final Commission order approving the Application in this proceeding, the
2 benefit of low income and medical assistance rates (both standard and time-of-use). Earlier
3 concerns about coordinating various APS discount levels with ED3's billing software have been
4 resolved in favor of a simple percentage discount of 16 percent for low income customers
5 (defined in the same terms as under the comparable APS program) and 25 percent for customers
6 eligible for the medical assistance discount. On an overall basis, these discount levels are (1)
7 comparable (if not superior) to those available under the APS program and programs of other
8 large Arizona utilities, and (2) superior in terms of benefits to the affected groups of customers to
9 any program offered by any utility in the State of comparable size to ED3.

10 **B. Exhibit ED3-22: Renewable Energy Policy and Efficiency Infrastructure**

11 Exhibit ED3-22 is Resolution 2009-06 of the ED3 Board of Directors ("Amended
12 Renewable Energy Policy"), adopted on July 22, 2009. Resolution 2009-06 establishes the
13 general rules applicable to ED3's commitment to helping its customers conserve energy and save
14 money through the use of energy-efficiency programs, the Renewable Energy Standard and Tariff
15 rules adopted by the Commission (A.A.C. R 14-2-1801 through -1815) and the rules being
16 promulgated in the energy efficiency rulemaking docket now pending at the Commission. ED3's
17 Amended Renewable Energy Policy provides that ED3 will enhance its energy efficiency
18 offerings and implement a renewable energy policy that compares to that promulgated by the
19 Commission to the fullest extent feasible consistent with ED3's existing contractual
20 commitments, District purposes, the federal integrated resource planning requirements set forth in
21 Section 114 of the Energy Policy Act of 1992 (42 U.S.C. § 7276b), its size and the economic
22 needs and objectives of its consumers.

1 Specifically, ED3's Amended Renewable Energy Policy requires that ED3 management
2 and senior staff anticipate ED3's need for additional electricity supply resources to serve ED3's
3 loads beginning upon the earliest expiration of its current contractual power supply commitments
4 (on or around January 1, 2014), and evaluate the acquisition of supply from Eligible Renewable
5 Energy Resources and Distributed Renewable Energy Resources (both as defined in A.A.C. R 14-
6 2-1802). Resolution No. 2009-06 further requires that ED3 management and senior staff pursue
7 the objective of acquiring an energy supply from such resources comparable to the Annual
8 Renewable Energy Requirement set forth in A.A.C. R 14-2-1804 by December 31, 2018 to the
9 maximum extent possible consistent with District purposes, the federal integrated resource
10 planning requirements, ED3's size, and the economic needs and objectives of its consumers.
11 ED3's Amended Renewable Energy Policy ensures that the progress of these efforts will be fully
12 transparent to ED3's customers and other interested parties by requiring ED3 management and
13 senior staff, beginning effective January 1, 2014 and annually on a calendar year basis thereafter,
14 to prepare and present to the ED3 Board and make available for posting on the ED3 website a
15 report providing substantially the information described in A.A.C. R 14-2-1812 B. Finally,
16 ED3's Amended Renewable Energy Policy requires ED3 management and senior staff to
17 immediately begin to develop and implement energy efficiency programming that compares to
18 the maximum extent possible consistent with District purposes, the federal integrated resource
19 planning requirements, ED3's size, and the economic needs and objectives of its consumers to the
20 energy efficiency programming now offered by Arizona Public Service Company. These are the
21 specific programs that have been approved by the Commission and that were described by its
22 Chair as the "gold standard" for the State of Arizona (Tr. at 9).

1 The timing of the implementation of its Amended Renewable Energy Policy is driven by
2 existing contractual commitments. ED3's current power supply portfolio is committed to (a) its
3 federal hydroelectric power allocations, and (b) its long-term purchase of power from APS
4 through December 31, 2014. Attachment A to this motion is a graphic representation of ED3's
5 anticipated loads for the calendar years 2010 through 2015 and the power supply resources
6 already under contract to serve those loads. As a matter of good utility practice, during period
7 prior to the expiration of its existing contractual commitments, ED3 will continue to facilitate
8 development of its customer-owned distributed solar facilities, deployment of low head hydro
9 generation on the irrigation canals of the Maricopa-Stanfield Irrigation and Drainage District
10 (ED3's largest customer), and exploration of other renewable projects as they become
11 commercially available.

12 ED3's Amended Renewable Energy Policy also supplements ED3's already existing
13 policy. ED3's existing policy addressed a number of energy conservation efforts, including
14 assisting its largest customer in decreasing power consumption through an irrigation efficiency
15 program, a Compact Fluorescent Lighting ("CFL") discount program, an HVAC rebate program,
16 energy efficiency audits, and use of automated metering infrastructure. The energy efficiency
17 component of the Amended Renewable Energy Policy will be reinforced by Energy Efficiency
18 Services Sharing Agreement under final negotiation with APS (as discussed in Part C.3. of this
19 motion, below) to increase the effectiveness of ED3's ongoing investment in energy efficiency.
20 Thus, for example, ED3 has already deployed the backbone facilities for its advanced metering
21 infrastructure ("AMI") system. Through experience that it expects to gain as a result of
22 implementing a Two Way Automatic Communications System ("TWACS") to create an initial 6
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1 to 8 MW of dispatchable load with its largest customer's irrigation pumping loads by early 2010,
2 ED3 will be well positioned to accelerate the implementation of ongoing load control programs.
3 Over the course of the next few years, ED3 will have customer energy conservation programs for
4 residential, commercial, and irrigation customers. ED3 will be developing direct load control
5 systems in conjunction with its AMI system expansion for the new APS customers, which it
6 expects will provide better metering, improved system reliability and system operations. This
7 new system will also provide for customer direct load control programs. ED3 will have funding
8 assistance programs for customer solar systems and energy services funded through recovery of
9 its Renewable Energy Surcharge into its Conservation and Renewable Energy Fund.

10 **C. Exhibit ED3-23: Energy Efficiency and Conservation**

11 Exhibit ED3-23 is the Term Sheet for Agreement, agreed in principle on August 12, 2009,
12 between Arizona Public Service Company and ED3 for retail energy efficiency program sharing
13 ("Energy Efficiency Services Sharing Agreement"). The short-term objective of the Energy
14 Efficiency Sharing Agreement is to make APS's current energy efficiency programs available to
15 all ED3 customers immediately upon the approval by the Commission of the proposed sale of
16 assets and transfer of customers to ED3. The longer term objective is to provide ED3 with a
17 platform from which it can develop its own diverse portfolio of similar energy efficiency
18 programs as soon as possible and to implement those programs independently from APS.

19 The term sheet for the Energy Efficiency Sharing Agreement provides that APS will allow
20 all of ED3 customers to participate in APS's current portfolio of energy efficiency programs,
21 through which ED3's customers will be provided with incentives and rebates, customer training
22 and technical assistance, and education regarding the APS programs. All eligible ED3 residential
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1 and non-residential customers will be allowed to participate in the APS programs, not just those
2 customers impacted by the sale and transfer. APS has agreed to work with ED3 to ensure that (i)
3 customers be properly identified as qualifying for the programs, (ii) APS's databases will track
4 separately program participation by ED3 customers, and (iii) ED3 personnel will be trained to
5 answer customer questions regarding the programs.

6 The Energy Efficiency Sharing Agreement makes available to all ED3 customers
7 (including those who would transition to ED3 from APS upon Commission approval of the
8 Application) the same or similar programs as are available to APS customers^{3/} for at least the next
9 two years. The Agreement is expressly intended to empower ED3 to expand its capabilities and
10 programs to all of its customers. The basic program which will be implemented is that APS will
11 make available its staff, programs, and contractors to ED3 for ED3 to provide to its customers, in
12 exchange for which ED3 will pay APS's fully loaded costs for providing these services, plus an
13 agreed margin.

14 Over the next two years, ED3 will establish its own contracts with service providers and
15 agencies to develop freestanding ED3 programs. For example, through recent meetings with
16 APS, ED3 has already initiated contact with the Pinal County Community Action Human
17 Resources Agency ("CAHRA") offices for weatherization programs for ED3's customers. ED3
18

19 ^{3/} These programs include (1) an expanded consumer products program for discounted prices on
20 compact fluorescent bulbs in participating retail stores; (2) expanding the home HVAC Program
21 (providing for rebates for installing high efficiency cooling equipment and for the quality
22 installation of that equipment); (3) implementing an Energy Star Home Program (providing for
23 incentives to home builders who build homes that save at least 15% energy compared to standard
24 built homes); (4) a Low Income Weatherization Program; (5) a Solutions for Business Program
25 (providing for rebates, training, and technical assistance to business customers for installation of
energy efficient motors, refrigeration, lighting, and cooling equipment); and (6) an Energy
Information Service Program (providing for metering and software subscription to enable
customer to access, monitor, and modify the customer's hourly energy use via the internet).

1 intends to establish programs and relationships with CAHRA identical to those that APS
2 currently has in place to provide funds for low income weatherization services to customers. ED3
3 also plans to investigate the expansion of its existing CFL rebate program to include discount
4 pricing through local merchants similar to APS' CFL program.

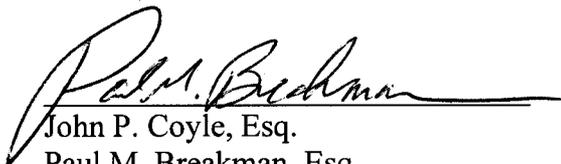
5 **D. Summary**

6 Through the programs implemented under Exhibits ED3-21 through ED3-23, ED3 has
7 responded directly and fully to the concerns expressed by the Chair and Commissioners during
8 the June 23 open meeting. ED3 has done so effectively and innovatively. ED3 believes that its
9 responses in Exhibits ED3-21 through ED3-23, along with the other public interest benefits of
10 approval of the Application demonstrated on the record of this proceeding, deserve the
11 Commission's favorable consideration.

12 **CONCLUSION**

13 For the foregoing reasons, ED3 requests that the Commission accept Exhibits ED3-21
14 through ED3-23 into the record of this proceeding, resume its consideration of the Recommended
15 Opinion and Order in this proceeding in light of these late-filed exhibits, and approve the
16 Application.

17 Respectfully submitted,

18 
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Dated at Mesa, Arizona
this 2nd day of October, 2009.

Original and 13 copies of the foregoing were
filed this 2nd day of October, 2009 with:

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

Paul M. Brubaker

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing documents and associated exhibits via electronic or U.S. mail upon each person designated on the Service List in this proceeding.

Dated at Mesa, Arizona this 2 day of October, 2009.



A handwritten signature in cursive script, appearing to read "Paul W. Boehm", is written over a horizontal line.

Exhibit ED3-21

ELECTRICAL DISTRICT NO. 3 OF PINAL COUNTY



RIDER - LOW INCOME AND MEDICAL ASSISTANCE SUPPLEMENTAL TO ALL RESIDENTIAL PRICE PLANS

Page 1 of 1

REVISION NO.: 0

EFFECTIVE: 07/01/09

Applicability

To residential use only in single private residences or apartments for lighting, appliances, domestic single-phase power with no motor over five (5) HP, heating and cooling served through one (1) meter where the customer has qualified for this rate.

Availability

Subject to the requirements of the primary purposes of the District and the availability of power and energy as determined in the opinion of the District. Available to residential customers who (i) qualify during the billing period for low income assistance as determined by the Arizona Department Security (DES), and (ii) with respect to the Medical Assistance Discount, an individual in the qualifying household must require medical life support equipment that is in use and discontinuance of service from the equipment for a period longer than four (4) hours could be especially dangerous to an individual's health, and (iii) reside at a service address that was served by Arizona Public Service Company as of the date on which an order of the Arizona Corporation Commission approving the deletion of that area currently served by the District from the certificate of convenience and necessity of Arizona Public Service Company under Docket No. E-01345A-08-0426 became final.

The customer whose name is on the account must fill out, sign, and send a completed Energy Support application as directed by ED-3. The customer must meet the eligibility requirements in order to qualify for the program. Please note: Processing the application and determining the eligibility of the applicant generally takes from 30 - 45 days.

Customers may not receive discounts under both Low Income Assistance and Medical Assistance concurrently.

DISCOUNT

	LOW INCOME	MEDICAL ASSISTANCE
DISCOUNT	16%	25%
<i>The monthly bill will be in accordance with the above specified price plans with the addition of the above specified discount for each billing cycle. The bill before taxes, credits, penalties and fees cannot be reduced below zero (0).</i>		
<i>Customers may not elect the Low Income Discount in addition to the Medical Assistance Discount Rider.</i>		

Exhibit ED3-22

RESOLUTION NO. 2009-06

**RESOLUTION OF THE
BOARD OF DIRECTORS
OF
ELECTRICAL DISTRICT NO. 3
OF PINAL COUNTY, ARIZONA**

(Amended Renewable Energy Policy)

WHEREAS Electrical District No. 3 of Pinal County ("ED3") has, since its formation in 1926, played a significant role in the stewardship of the natural resources available for the use of its consumers; and

WHEREAS ED3 is now, and has historically been, committed to helping its consumers conserve energy and save money through energy efficiency programs;

WHEREAS ED3, through its participation in Arizona Corporation Commission ("Commission") Docket No. E-1345A-08-0426 has become aware of and familiar with both the Renewable Energy Standard and Tariff rules adopted by the Commission (codified in Arizona Administrative Code ("A.A.C.") R 14-2-1801 through -1815) and the energy efficiency rulemaking docket now pending at the Commission; and

WHEREAS ED3 recognizes that the leadership shown by the Commission in requiring the use of renewable sources of electric generation and the offering of energy efficiency program options within the State of Arizona, and in particular through the Renewable Energy Standard and Tariff rules and the anticipated energy efficiency rules, brings significant benefits, not only to the customers of the electric utilities under the Commission's jurisdiction, but to the entire State of Arizona; and

WHEREAS ED3 endorses the Commission's leadership in the areas of renewable energy and energy efficiency and believes that, in light of ED3's own commitment to renewable energy and energy efficiency and its intent to contribute to the benefits achieved under the Commission's guidance in these areas, ED3 should enhance its energy efficiency offerings and implement a renewable energy policy that compares to that promulgated by the Commission to the fullest extent feasible consistent with ED3's existing contractual commitments, District purposes, the federal integrated resource planning requirements set forth in Section 114 of the Energy Policy Act of 1992 (42 U.S.C. § 7276b) and implementing regulations (10 C.F.R. Part 905) (the "Federal IRP Requirements"), its size and the economic needs and objectives of its consumers;

WHEREAS approximately thirty percent (30%) of ED3's present power supply for its consumers is obtained from hydropower, a renewable energy resource, through long-term contracts for the output of federal hydroelectric projects;

WHEREAS the remaining approximately seventy percent (70%) of ED3's present power supply for its consumers is fully committed under existing contracts through December 31, 2013, and committed to a significant extent during 2014;

RESOLVED that the Board of Directors of Electrical District No. 3 of Pinal County ("ED3") hereby adopts an Amended Renewable Energy Policy, as follows:

1. ED3 management and senior staff are directed to anticipate ED3's need for additional electricity supply resources to serve ED3's loads beginning upon the expiration of its current contractual, non-hydropower, power supply commitments (about January 1, 2014), and to evaluate the acquisition of supply from Eligible Renewable Energy Resources and

Distributed Renewable Energy Resources (both as defined in A.A.C. R 14-2-1802), with the objective of acquiring an energy supply from such resources comparable to the Annual Renewable Energy Requirement set forth in A.A.C. R 14-2-1804 by December 31, 2018 to the maximum extent feasible, consistent with District purposes, the Federal IRP Requirements, ED3's size, and the economic needs and objectives of its consumers.

2. ED3 management and senior staff are directed, beginning effective January 1, 2014 and annually on a calendar year basis thereafter, to prepare, present to the Board and make available for posting on the ED3 website a report providing substantially the information described in A.A.C. R 14-2-1812 B.

FURTHER RESOLVED that, effective immediately, the Board of Directors hereby directs ED3 management and senior staff to develop and implement energy efficiency programs that compare, to the maximum extent feasible consistent with District purposes, the Federal IRP Requirements, ED3's size, and the economic needs and objectives of its consumers, to the energy efficiency programs offered by Arizona Public Service Company, which programs were approved by the Commission and have been described by its Chair as the "gold standard" for the State of Arizona.

PASSED AND APPROVED by the Board of Directors of Electrical District No. 3 of Pinal County, Arizona, on this **22nd Day of July, 2009**.



ELECTRICAL DISTRICT NO. 3 OF PINAL COUNTY, ARIZONA
Dan Thelander, Chairman

CERTIFICATION

I, Kelly Anderson, being the duly elected Secretary of the Board of Directors of the Electrical District No. 3 of Pinal County, Arizona, do hereby certify that the foregoing is a true and correct copy of the Resolution of the Board of Directors of said District held on the 22nd day of July, 2009, at which a quorum was present and that said Resolution has not been amended, repealed or rescinded.

Dated this 22nd day of July 2009.



Kelly Anderson, Secretary

Exhibit ED3-23

TERM SHEET FOR AGREEMENT BETWEEN
ARIZONA PUBLIC SERVICE COMPANY AND
ELECTRICAL DISTRICT No.3 OF PINAL COUNTY FOR
RETAIL ENERGY EFFICIENCY PROGRAM SHARING

(AUGUST 12, 2009)

PARTIES:

Arizona Public Service Company ("APS") and Electrical District No. 3 of Pinal County ("ED-3").

OBJECTIVES:

The short-term objective of the agreement is to make APS's current Energy Efficiency programs available to all ED-3 customers immediately upon the approval of the sale of assets and transfer of customers to ED-3 in the matter now pending before the Arizona Corporation Commission in docket number E-1345A-08-0426. The longer term objective is to provide ED-3 with a platform from which it can work to develop its own diverse portfolio of similar Energy Efficiency programs as soon as possible and to implement those programs independent from APS.

TERM AND TERMINATION:

Initial term of two years, renewable thereafter for successive terms of one year each; terminable at will by either party on ninety days' notice (billing and payment obligations to survive termination).

SCOPE OF WORK:

APS will allow ED-3 customers to participate in APS's current portfolio of Energy Efficiency programs, as listed in Table 1 below. In doing so, APS and/or its implementation contractors will work with ED-3 to provide customer incentives and rebates, customer training and technical assistance and customer education regarding the APS programs. All eligible ED-3 residential and non-residential customers will be allowed to participate in the APS programs, not just those customers impacted by the sale agreement. APS will work with ED-3 to ensure that customers can be properly identified as qualifying for the programs, that APS's databases will track separately program participation by ED-3 customers, and that ED-3 personnel are trained to answer customer questions regarding the programs.

TABLE 1

Program	Coverage
<u>Residential Customer Programs</u>	
Consumer Products Program	Discounted prices on compact fluorescent bulbs in participating retail stores.
Existing Home HVAC Program	Rebates for installing high efficiency cooling equipment and for the quality installation of that equipment.
Energy Star Home Program	Incentives to home builders who build homes that save at least 15% energy compared to standard built homes.
Low Income Weatherization Program	Home weatherization and bill assistance to limited income households.
<u>Non-Residential Customer Programs</u>	
Solutions for Business Program	Rebates, training, and technical assistance to business customers for installation of energy efficient motors, refrigeration, lighting, and cooling equipment. Separate program budgets for (i) existing facilities, (ii) new construction, (iii) small businesses, and (iv) Schools.
Energy Information Service Program (EIS)	Metering and software subscription to enable customer to access, monitor, and modify the customer's hourly energy use via the internet.

PROGRAM MARKETING:

ED-3 assumes sole responsibility for marketing the foregoing programs to its retail customers and for handling inquiries from ED-3 customers regarding the programs. The Parties shall coordinate to ensure that marketing material accurately describes the programs.

COMPENSATION, BILLING AND PAYMENT:

ED3 shall pay APS monthly for (i) all direct and indirect costs incurred on account of participation by ED3 retail customers in the foregoing programs (indirect costs include, but are not limited to, training and technical assistance, application and rebate processing, savings verification and customer education, and will be billed at a rate of 30% of the direct costs); plus (ii) time and materials incurred by APS and/or its implementation contractors for training or consulting with ED-3 personnel regarding the programs; plus (iii) a five percent (5 %) markup on all such costs. APS shall provide ED3 with a monthly bill identifying the number of ED3 customers participating, the program(s) in which each such customer participated, the direct cost to APS of each such customer's participation, the indirect costs (including subcontractor billings), and the time

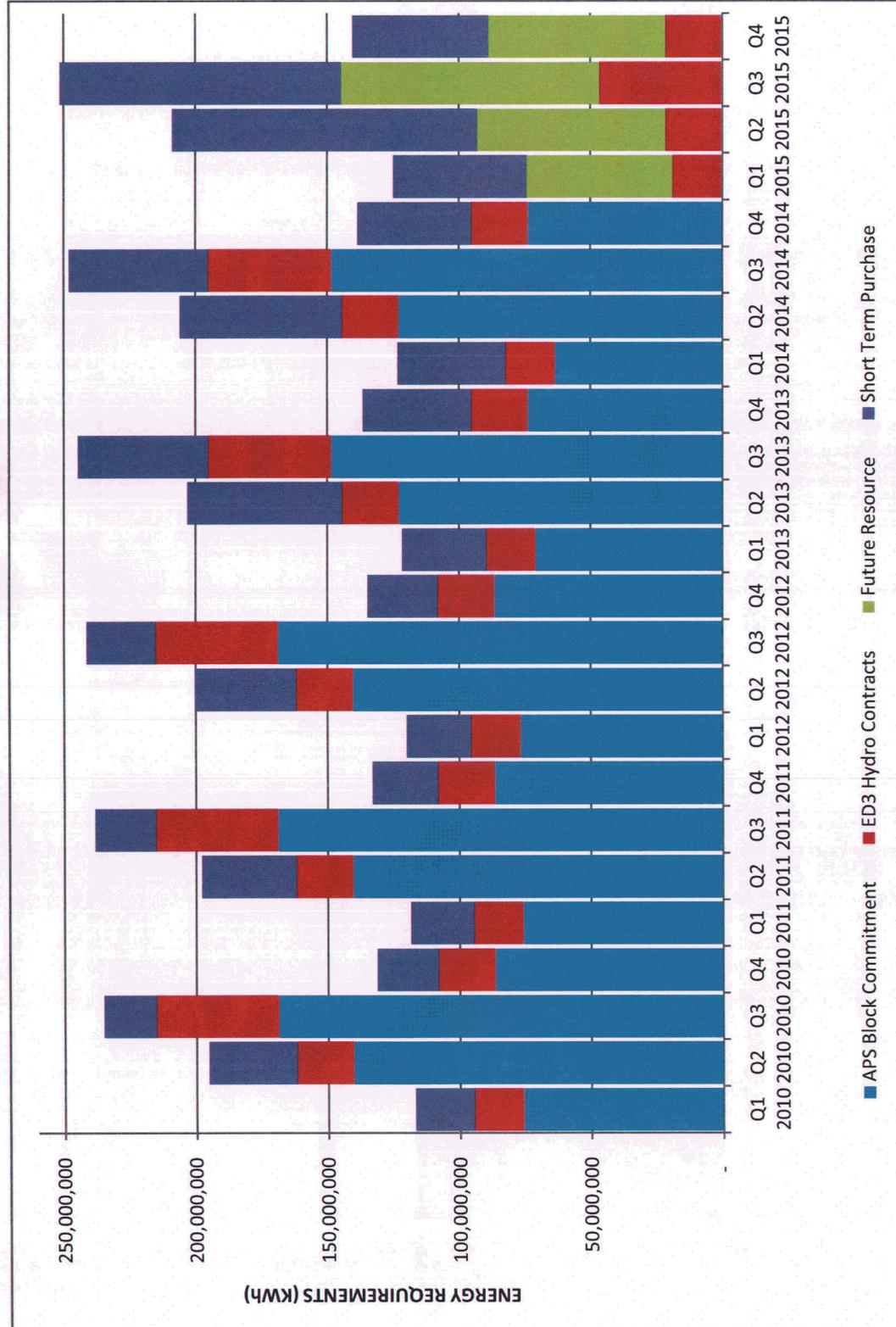
and material costs incurred during the month. APS will invoice ED-3 monthly, and payment shall be due within 15 days of presentation of invoice.

INTELLECTUAL PROPERTY:

ED3 will not acquire any rights in intellectual property developed by or belonging to APS or its subcontractors in connection with the foregoing programs. Such intellectual property and other intangibles associated with the programs will remain the property of APS or its subcontractors, as applicable.

Attachment A

Electrical District No. 3
 Projected Energy Requirements and Contracted Resources
 (Includes APS Split End Customer Load)



NOTES:

1. Projected ED3 Energy Requirements from 2010 forward assume approval of Application and include loads of current APS customers.
2. Portion of projected system energy requirements denominated as "Short-term Purchases" is intended to incorporate contingencies of forecasted load not materializing and opportunities for short-term improvement of supply economics (e.g., low cost purchases, hydro firming and similar opportunities).

Arizona Attorney General
Opinion No. 62-7

*Morris Rozar
Phil Haggerty* } concurred

January 8, 1962
Opinion No. 62-7

R-641

REQUESTED BY: Honorable George F. Senner, Commissioner
Arizona Corporation Commission

OPINION BY: ROBERT W. PICKRELL
The Attorney General

QUESTIONS: 1. Does the Corporation Commission have jurisdiction to hold hearings regulating the transfer of assets from a privately owned water utility to a municipality and to enter an Order approving or disapproving said transfer?

2. If it does have jurisdiction to conduct such a hearing, may it inquire into the following:

A. Amount and reasonableness of the consideration to be paid by the municipality.

B. Reasonableness of terms and conditions of deferred payments.

C. Reasonableness of conditions in the agreement not related to the amount of the consideration or the terms of payment.

D. The duties and obligations of the privately owned public utility and the conditions surrounding the disposition of any certificate of convenience and necessity held by it.

3. What is the effect upon the Corporation Commission's jurisdiction of A.R.S. §9-516(C) and the declaration of public policy contained therein? (Chap. 111, Sec. 1, Laws 1960).

CONCLUSIONS: 1. Yes. A.R.S. §40-285 (1956) requires that a privately owned public utility obtain the approval of the Corporation Commission prior to disposing of its assets. This statute is not rendered inoperative even though a municipality or charter city is a purchaser.

2. A. No.

B. No.

C. Yes, but only insofar as the conditions relate to the future acts and duties of the private utility and to the customers who will be served thereby after the purchase or acquisition of the utility's properties by the municipality.

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D. Yes.

3. Subparagraph C of A.R.S. §9-516 has the effect of requiring the Corporation Commission to make a determination of fact that a city or town has refused private utility service before it may issue a new certificate of convenience and necessity in detriment to the rights of the holder of the existing certificate whose property is required by the municipality. It is intended to protect the seller, to preserve his rights as a regulated monopoly, pending completion of final purchase and to require the Corporation Commission to make orders when approving such a sale by a privately owned public utility as are necessary to preserve the existence of the original franchise until the municipality has completed the sale or refuses to serve part of the formerly enfranchised area.

REASONING

These questions may be answered by defining the conflicting jurisdictional areas of municipalities and the Corporation Commission and determining the effect of §§40-285, 9-515 and 9-516 A.R.S. (1956) on this situation. The Commission in its request for an opinion pointed out the following:

"Specifically, pursuant to §40-285, Arizona Revised Statutes, we have recently held hearings upon the transfer of the assets of Government Heights Water Company in Tucson to the City of Tucson. The question was raised at that hearing and thereby necessitating this request.

In view of the fact that most sales of privately owned water utility companies to municipalities are made on an installment payment basis, usually the certificate of convenience and necessity is held in abeyance pending the final payment and in case of default the certificate of convenience and necessity automatically reverts back to the seller. Further, pursuant to General Order No. U-4, water utilities under our jurisdiction are allowed to collect certain contributions, advances and deposits which are refundable under definite terms and conditions and are the responsibility of the utility under our jurisdiction.

Does the Arizona Corporation Commission have jurisdiction to hold hearings and regulate the transfer of assets of a privately owned water utility to a municipality? Particularly, does the Commission have juris-

diction to inquire into the transaction as to sales price, terms and conditions of payment and other specific conditions of sale and purchase?"

In addition to the facts given in the letter, we have been informed that the water company has executed a contract of sale with the City of Tucson for the complete transfer of all its property rights, interests, and assets used to serve water. All of its former customers are being served by the city, and the territory which the water company was entitled to serve under its certificate of convenience and necessity lies within the corporate limits of the city. The city expanded its territory and encroached on the area being served by the water company. The agreement by its terms was made subject to the approval of the Corporation Commission. The Commission, at a hearing under A.R.S. §40-285, passed upon the proposed sale, received objections by both the city and the utility on any inquiry relating to the amount of the sale price or the reasonableness of the terms as related to the consideration, and the parties have not submitted themselves voluntarily to any jurisdiction of the Commission. It was stipulated that the Commission shall exercise only such jurisdiction as it may have by law. On May 1, 1961 the city began serving and has since served all the customers of the private utility using the utilities system.

The statute under which the Commission was acting reads as follows:

"§40-285 Disposition of plant by public service corporations; acquisition of capital stock of public service corporation by other public service corporations

A. A . . . water corporation shall not sell, lease, assign, mortgage or otherwise dispose of or encumber the whole or any part of its . . . system, necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, . . . without first having secured from the commission an order authorizing it so to do. Every such disposition, encumbrance or merger made other than in accordance with the order of the commission authorizing it is void.

B. The approval or permit of the commission under this section shall not revive or validate any lapsed or invalid franchise or permit, or enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or waive any forfeiture.

C. Nothing in this section shall prevent the sale, lease or other disposition by any such corporation of property which is not necessary or useful in the performance of its duties to the public, . . ." (Emphasis supplied).

It is our opinion that this statute can and should be given effect in this situation and has not been repealed by implication by A.R.S. §9-511, et seq., regarding the municipality's powers and duties in acquiring private utilities. Repeals by implication are not favored and statutes are to be construed together so as to give effect to all. Industrial Commission v. Hartford Accident & Indemnity Co., 61 Ariz. 86, 144 P.2d 548 (1943). In our opinion A.R.S. §40-285 must be construed with A.R.S. §§9-515 and 9-516 and the constitutional powers of municipalities and the Commission. Before discussing the effect of A.R.S. §40-285, we deem it pertinent to review the mutual powers of the Corporation Commission and the municipality and attempt to resolve apparent or actual conflicts therein.

The Corporation Commission's powers are constitutional and the Legislature may extend its powers, but may not limit them. Arizona Constitution Art. 15 Sec. 6; Garvey v. Trew, 64 Ariz. 342, 170 P.2d 845; Cert. Denied, 91 L.Ed. 673 (1946). The Legislature may not extend the Corporation Commission's powers into fields of subject matter different from those given it by the Constitution. Menderson v. City of Phoenix, 51 Ariz. 280, 76 P.2d 321 (1938). The Corporation Commission has no statutory power over municipalities, we doubt it may be given any by the Legislature. It has no jurisdiction to regulate the relationships of municipalities with the consumers of city owned water utilities. City of Phoenix v. Wright, 52 Ariz. 227, 80 P.2d 390 (1938). The Commission's jurisdiction is limited to the exercise of the powers given it by the Constitution and statutes, and should it make an order in excess of its constitutional and statutory grants of power, such orders are vulnerable for lack of jurisdiction and could be questioned in any collateral proceeding. Walker v. De Concini, 86 Ariz. 143, 341 P.2d 933 (1959). The Corporation Commission has no jurisdiction to regulate the relationships between a municipality and its consumers, even though such consumers lie beyond the boundaries of the city. The relations between the municipality and its consumers can only be regulated through the Legislature. City of Phoenix v. Kasun, 54 Ariz. 470, 97 P.2d 210 (1939). That the Commission had no jurisdiction over the acquisition and operation of public utilities by municipalities, at least over the area and consumers within municipal boundaries, was long ago recognized by the Commission. Southside Gas and Electric Co., Docket 462, Arizona Corporation Commission P.U.R. Annotated 1918A, 493 (1917). The Commission asserted its jurisdiction over the municipalities' customers outside the city limits under the then existing statutory sections. Harber v. City of Phoenix, Docket 383, Arizona Corporation 1918D, 352, (interpreting §§2277 and 2339, Revised Statutes of Arizona, 1913). Commissioner Cole dissented considering the Corporation Commission's jurisdiction could not be extended in any fashion so as to affect the powers of a municipality in the field of public utilities. The dissenting opinion was ultimately accepted. See City of Phoenix v. Kasun, supra.

We consider it now settled law that the Arizona Corporation Commission has no jurisdiction over the municipalities in either the regulation, purchase, acquisition or operation of their public utility

activities within or without municipal boundaries. However, the Commission may exercise all necessary express and implied powers to carry out its own proper functions, acting within the scope of its own jurisdiction over privately owned public service corporations. Garvey v. Trew, supra.

The denial of jurisdictional power to regulate municipalities does not give power to the municipal corporations to regulate relationships between the enfranchised privately owned public utility and members of the public. This power is vested solely in the Corporation Commission. City of Phoenix v. Sun Valley Bus Lines, 64 Ariz. 319, 170 P.2d 289 (1946).

Article 15, Sec. 3, is an Arizona Constitution grant of jurisdictional power to regulate public service corporations by the Corporation Commission. It contains a proviso:

" . . . Provided, that incorporated cities and towns may be authorized by law to exercise supervision over public service corporations doing business therein, including the regulation of rates and charges to be made and collected by such corporations; . . . "

This proviso is not self-executing and requires legislation to give it effect. Phoenix Railway Co. v. Lount, 21 Ariz. 289, 187 Pac. 933 (1920). Northeast Rapid Transfer Co. v. Phoenix, 41 Ariz. 71, 81, 15 P.2d 951 (1932). As of this date we have found nothing which leads us to believe that the Legislature has passed enabling legislation to carry into effect this constitutional proviso. The history of past legislation shows a strong tendency by the Legislature to leave regulation under the Commission and this would militate against any construction of the statutes that would give a municipality regulatory authority. We therefore conclude that there is no legislative intent shown by general statute to vest in a municipality power to regulate a privately owned public utility in any fashion. Municipal powers granted by the Constitution and enabling statutes concern only acquisition of utilities or, as given by charter, direct operation. The municipality's rights to enter into and do business also stem from the constitution. (Art. 2, Sec. 34, Art. 13, Sec. 5). This is a broad grant of power and is in Tucson's case carried into effect by the city charter. City of Tucson v. Polar Water Co., 76 Ariz. 126, 259 P.2d 561 (1953). Title 9, Chap. 5, Art. 2, A.R.S. (1956), deals with municipal ownership. The pertinent parts are as follows:

"§9-511.

A. A municipal corporation may engage in any business or enterprise which may be engaged in by persons by virtue of a franchise from the municipal corporation, and may construct, purchase, acquire, own and maintain within or without its corporate limits any such business . . .

B. The municipality may exercise the right of eminent domain either within or without its corporate limits for

the purposes as stated in subsection A . . . "

"§9-514.

Before construction, purchase, acquisition or lease by a municipal corporation, . . . shall be undertaken, . . . purchase, . . . shall be authorized by the affirmative vote of a majority of the qualified electors who are taxpayers of the municipal corporation "

"§9-515.

A. When a municipal corporation and the residents thereof are being served under an existing franchise by a public utility, the municipal corporation, before constructing, purchasing, acquiring or leasing, . . . shall first purchase and take over the property and plant of the public utility.

B. The property and plant shall become the property of the municipal corporation upon payment by the municipal corporation of the fair valuation thereof within eighteen months after the determination of the valuation . . .

C. The fair valuation of the public utility shall be the equivalent of the compensation to be paid for the taking of private property for public use as provided by article 2, chapter 8 of title 12, and the amount shall be determined by one of the following methods:

1. By agreement between the municipal corporation and the public utility.
2. By arbitrators . . .
3. By a court of competent jurisdiction determining the compensation . . .

D. The municipal corporation and the public utility shall have right of appeal as provided by article 2, chapter 8 of title 12."

These statutes may not be construed as limiting the right of the municipalities to engage in business, nor need they be construed as giving authority by the Legislature to the municipalities to engage in business. City of Tombstone v. Macia, 30 Ariz. 218, 245 Pac. 677, 46 A.L.R. 828 (1926). This case pointed out that the municipality's powers to engage in business were given by the constitution and that the predecessor statute §2035 Civil Code 1913, et seq., be construed as a statute authorizing the issuance of municipal bonds. (Distinguished, City of Tucson v. Polar Water Co., on rehearing, infra).

To the extent that these statutes relate to cities, they are repealed when in conflict with a charter granted pursuant to Art. 13, Sec. 2, Const. of Arizona. See §9-284(A). Tucson is a charter city.

It may enter into the utility business as a constitutional right. The charter is enabling legislation. City of Tucson v. Polar Water Co., 76 Ariz. 126. In that case the Supreme Court held that a privately owned public utility could not recover damages for injuries to it resulting from competition by the charter city when the city entered into the utility business. In the decision on rehearing of the same case, City of Tucson v. Polar Water Co., 76 Ariz. 404, 265 P.2d 773 (1954), the Court affirmed the holding modifying the reasoning and affirmed that part which held that A.R.S. §9-515 (16-604 ACA 1939) had no application to the situation where a municipality expands its territory and encroaches upon an existing utility. This opinion deals with a similar fact situation. The court held that the city could not be required, under the then existing statutes, to compensate the private utility for its damages and pointed out that unless a franchise were exclusive, any damage resulting from competition with the municipality would be without legal effect and would not constitute a legal injury. The court further pointed out that the franchise issued by the Corporation Commission was not an exclusive franchise and that no one could successfully sustain a contention that it was. The court did not cite any authority therefor, but we believe that the statement is amply supported by our constitutional provisions affecting such franchises. (Art. 2 Sections 9 and 13; Art. 4, Part 2, Sec. 19, Sub Sec. 13; Art. 13, Sec. 4; Art. 13, Sec. 6; Art. 14, Sec. 7.).

On rehearing, the court reversed itself only to say A.R.S. §9-515 (16-604 ACA 1939) was an eminent domain statute of general effect, of statewide concern, and would necessarily prevail and take precedence over any provisions of a city charter in conflict therewith.

The court, on rehearing, refused to read into the then existing statutes any provisions requiring the municipality in that case to compensate the private utility; but it said that the Legislature could pass appropriate legislation to protect the franchises issued by the Corporation Commission and the businesses operating thereunder from damage or destruction from municipal competition. They said that there was no constitutional basis for saying that the Legislature could not require the cities to pay a just compensation for such destruction, even though it resulted from competition. They pointed out that there was no such protective legislation.

The Twenty-first Legislature was in its Second Regular Session at the time the second Polar Water case was decided and they promptly passed Sections 1 and 2, Chap. 105, Session Laws 1954, (A.R.S. §9-516 (A) and (B)). The conclusion is inescapable that these amendments to the Cities and Towns Code were intended to provide the protective legislation said to be missing by the court. In 1960 this Section was further amended by adding Subsection C, which reads as follows:

"§9-516. Declaration of public policy; eminent domain

C. It is declared the public policy of the state that when a city or town has purchased the property or plant of a public

utility serving in an area within or without the boundaries of the city or town pursuant to this article, the corporation commission shall not be authorized or empowered to grant a new certificate of convenience and necessity or franchise to any person, firm or corporation to provide the same kind of public utility service within the area or territory previously authorized to said public utility under its certificate of convenience and necessity or franchise, but if the city or town refuses to provide utility service to a portion or part of the area or territory previously authorized to the public utility, the corporation commission may issue a new certificate of convenience and necessity or franchise to a public utility to provide utility service in that portion or part of the area or territory. As amended Laws 1960, Ch. 111, §1."

The Legislature has required the Corporation Commission to continue in effect, but to hold in abeyance the certificate of convenience and necessity granted to those utilities that are in the process of being acquired by the municipality; and to prohibit the Corporation Commission from issuing a new certificate unless it were to find, as a matter of fact, that the city or town had refused to provide utility service to a portion of the area previously enfranchised and which the city or town has taken over from the private utility.

This opinion cannot interpret the impact of this statute on all conceivable fact situations. We give full effect to the presumption of constitutionality. It is sufficient for the purposes of this opinion to interpret the entire §9-515 A.R.S. as being a statute intended to compel the municipalities to pay just compensation to privately owned public utilities whether it chooses to purchase or compete. The City of Tucson has decided to purchase. There is no question of competition. The city charter provides for such purchase. (See Chap. IV §§ 6, 7, 14 and 24). It is given all necessary power to contract. The city elected officials, being responsible to the city voters, are charged with the duty of protecting the consumers to be served by the city upon purchase. No such duty is imposed upon the Corporation Commission.

A.R.S. §9-516 makes applicable to charter municipalities §9-515 as an eminent domain statute, and establishes the method whereby fair valuation is to be determined when the city seeks to acquire the assets of the privately owned public utility. In none of the Constitutional provisions, statutes, or cases is there any intimation that either the people, Legislature, or the courts has placed the determination of value in the hands of the Corporation Commission, either as a fact-finding agency or a judicial body. We have already expressed our doubts that such a function could be given to the Corporation Commission without conflicting with the constitutional powers given to municipalities. A.R.S. §9-516(C) is therefore a statute preserving the rights of the holder of the certificate of convenience and necessity during the period when the utilities' assets

are being purchased. It limits the powers of the Corporation Commission to issue an additional certificate of convenience and necessity during the time the municipality is completing the purchase and is serving all the customers in the area formerly served by the utility. It is implicit in the statute that the Corporation Commission must give effect to the possibility of non-service and that its order authorizing the privately owned public utility to sell its assets to a municipality is to be made preserving, among other matters, the certificate of the private utility.

A.R.S. §9-516(A) (B) and (C) having been passed, the constitution thereof is presumed, and this office is bound by that presumption. We conclude that the Arizona Supreme Court has considered, insofar as it is pertinent to this opinion, that it is proper for the Legislature to enact legislation compelling a municipality to reimburse a public utility operating within its corporate limits for such losses the utility may sustain; even though those losses result from competition with the city insofar as the serving of water is concerned. A.R.S. §9-515(C) sets forth the methods whereby a municipality may exercise its right of eminent domain. Where the statute is not operative the city charter would prevail to determine the method of purchase of the terms, conditions and consideration. The constitutional section, Article 13, No. 5, was not considered self-executing and §9-511, et seq., is the enabling legislation. Hartford Accident and Indemnity Co. v. Wainscott, 41 Ariz. 439, 19 P.2d 328 (1933).

The entire method for determining fair compensation and the right to exercise eminent domain has been set forth in these statutes or in the charters. It has also set forth (absent a charter) how property shall be valued and when the property and plant shall become the property of the municipal corporation. (A.R.S. §9-515(B), (C), (1) and (2)).

Do these sections repeal, by implication, A.R.S. §40-285? This section requires that a privately owned public utility obtain permission from the Arizona Corporation Commission before encumbering or disposing of its assets used in its public service function, as quoted above. §40-285 A.R.S. was taken from California. Trico Electric Corporation v. Ralston, 67 Ariz. 358, 196 P.2d 470 (1948). See Section 851, Public Utilities, West's Annotated California Code. Formerly Sec. 51(A) California Public Utilities Act.

In that case our Supreme Court cited with approval Hanlon v. Eshleman, et al, 146 Pac. 656, 169 Cal. 200 (1915):

" . . .The owner may not transfer such properties unless authorized by the commission. All that the commission is concerned with therefore, is whether a proposed transfer will be injurious to the rights of the public. If not, the owner may be authorized to make the transfer. With the rights of an intending purchaser the commission has nothing to do. . ." (Emphasis supplied).

The Hanlon case held the statute permissive, and the proper parties to a proceeding thereunder were only the privately owned public utility and the Commission. By reenacting A.R.S. §40-285 following the Trico decision in substantially the same wording, it is presumed that the Legislature was aware of the decision and adopted the construction placed thereon. Moore v. Chilson, 26 Ariz. 244, 224 Pac. 818 (1924). In the case of Baldwin, et al v. Railroad Commission of California, 275 Pac. 425, 206 Calif. 581 (1929), the California Supreme Court construed the effect of the California counterpart to our statute in an analogous situation. On application of those former consumers of the water company who would be served by an irrigation district after sale, the Commission refused to pass upon the reasonableness of value, feasibility of project or the reasonableness of purchase price of an agreement made between a privately owned water company and a water storage district (an agency not subject to commission jurisdiction) on the grounds that the Commission lacked jurisdiction. The State of California had vested in a different agency a requirement to make a determination as to the values and the amount to be paid under such a contract. The Commission contended and conceded that a transfer of public utilities does not put an end to all obligations of service but that its regulatory functions were not concerned with rights of the future consumers of the storage district. This situation is parallel to ours in that our law places determination of fair value in agencies other than the Corporation Commission. We quote at length from that case:

"Section 51(a) of the Public Utilities Act, . . . does not in terms require the commission to inquire into the value of the properties sought to be transferred for the purpose of determining the reasonableness or adequacy of the contemplated purchase price. Obviously, neither does it hamper the commission's investigation into any of such facts, should such an investigation be deemed necessary or advisable in a matter within its jurisdiction.

. . . we think the position taken by the Railroad Commission is sound. It is thereby precluded from determining that a transfer to the district would not be beneficial to the consumers included within the district. That question is left to the determination of other state agencies. When the Commission has safeguarded, as it has in its order authorizing the transfer of the rights of consumers of the canal company outside the district, and has provided that the consumers within the district shall be served as provided in the Storage District Act, it is clear that the Commission has properly performed its functions. With other questions it has no concern. . . .

The Railroad Commission will have no regulatory powers over the service of water which will be made to these protesting consumers, when completion of the proposed project is voted favorably by the electors in the district. . . .

Petitioners complain that, if none of these matters needs to be determined by the Railroad Commission, then its authority in this case under section 51(a) of the Public Utilities Act becomes nothing more than a 'rubber stamp' approval. This is not true. The Commission must determine whether and to what extent, under the showing made by the applicant for authority to transfer the public utility properties, the canal company may be properly relieved of its public utility obligations.

We therefore conclude that the Railroad Commission, in the proceeding before it, has regularly exercised its jurisdiction. . . ." (Emphasis supplied).

If a municipality did undertake to purchase or acquire by agreement the assets of a privately owned water company the municipality could not later disregard the order of the Corporation Commission permitting the sale. Henderson v. Oroville-Wyandotte Irrigation District, Supreme Court California, 2 P.2d 803, 809 (1931). Under A.R.S. §9-515(C), three statutory methods are provided by which the municipal corporation may have determined the fair value of the assets of the public utility. Since the passage of A.R.S. §9-516 these methods are available to municipalities. In none of these instances is any action required by the Corporation Commission. All cases in California, wherein the railroad commission has determined value of purchases by municipalities, are based upon a 1914 addition to the California Constitution; Section 23A, Article 12, Constitution, West's Annotated California Code, Vol. 3, Page 93. There is no comparable Arizona constitutional provision. In California, even with such power, the railroad commission cannot fix purchase price nor make a contract for the persons involved, but can only decline to approve if the purchaser would be financially unable to furnish service or that the transfer would be contrary to the public interest. Atomic Express, 56 Calif. P.U.C. 182 (1958). The city officials are responsible to their electorate. They must decide whether to acquire by purchase or by court action. The determination of what constitutes fair value, at least insofar as charter cities are concerned, lies solely with the city officials. The Corporation Commission's concern is only with the franchised utility and its duty as a public service corporation. Until it is relieved by the Commission of its duties, and the certificate of convenience and necessity is retired, it is subject to the Commission's regulation.

The members of the public to be protected by the Corporation Commission in deciding whether or not to approve a transfer or sale, are not the former consumers who are now to be served by the municipality. See Baldwin v. Railroad Commission, supra. Those to be protected by the Corporation Commission are the persons who will or may be served by the public service corporation after the transfer.

A.R.S. §9-515 provides for several methods by which a municipal corporation may acquire the assets of a privately owned public utility. Two of these are by negotiation and in both cases the public utility

must be a party to the negotiation. Before it can become a party to a valid agreement it must secure permission of the Corporation Commission under A.R.S. §40-285. If such an agreement is made and approved between a municipal corporation and the public utility under the provisions of A.R.S. §9-515(B) and (C)(1), then the parties have entered into an executory bi-lateral contract. In this particular case, the purchase of all the physical assets, including the real property rights of the public utility. Until the sale is complete and all customers in the area are served, the utility has an interest under A.R.S. §9-516(C) as the holder of the certificate, and the Commission continues to retain jurisdiction over the utility and its certificate. As an alternative procedure, the municipality may of course condemn as provided in A.R.S. §9-515(C)(3), by court action. Where however the municipal corporation by voluntary agreement seeks to purchase a privately owned public utility it acquires, subject to the statutory requirement, that the utility obtain permission from the Commission to enter into the contract of sale. This does not thereby result in making a municipality subject to the jurisdiction of the Corporation Commission. The seller-utility must obtain permission in order to make the transfer, and the purpose thereof is to permit the Corporation Commission to make sure that the rights of the customers of the utility will be adequately protected. This requirement is not removed even though the municipality undertakes to acquire all property and serve all the customers of the privately owned public utility. In that case the Corporation Commission still must require the utility to obtain its permission. The duties and powers of the Commission are limited to the necessary hearings and orders to make sure that sale by the utility will not leave persons served neither by the utility nor the municipality. Once the municipality serves all the customers, there are no public duties then left to the utility and none of its assets used in the service of water would be necessary or useful in the performance of its duties. This section does not permit the Corporation Commission to refuse to allow the corporation's assets to be sold. (See A.R.S. §40-285(c)). The Corporation Commission in the instant case, would only be able to go into those matters which would affect the former customers of the utilities, to an orderly disposition of the remaining obligations of the public utility, and to ascertain that all such obligations have been properly provided.

Regarding the certificate, the Commission's jurisdiction continues under A.R.S. §9-516(C) until it has determined that the municipality is serving the entire area and there is no area requiring certification or service by any private utility.

CONCLUSIONS

1. The Corporation Commission has not been given any jurisdiction over a municipality in the municipality's determination of what fields of business, including public utilities, it will enter, nor over the feasibility, desirability or consideration to be paid by the municipality in the acquisition or purchase of public utilities.

2. The Legislature, exercising its power over non-charter municipalities, has decreed that municipalities shall pay fair value to acquire the facilities of public service corporations and has specified how that valuation is to be determined. (A.R.S. §§9-515(C) and 9-516).

3. Under A.R.S. §9-516(A) and (B) the Legislature has declared its intent that charter cities shall not destroy the property of franchised utilities by direct competition. The charter city is free to acquire by purchase, and where it chooses so to do, the question of consideration and terms as they relate to all acts of the municipality are not subject to scrutiny by the Commission. This situation involves a mutual voluntary agreement and we do not need to discuss the effect of A.R.S. §9-516(A) and (B) on purchases by a charter city.

4. Municipalities have not been given legislative grant to carry into effect the constitutional privilege of regulation of private utility within its boundaries. (Art. 15, Sec. 3). As a result municipalities are not authorized to exercise any direct supervision over the manner of doing business of public service corporations within its city limits. They may not by agreeing to purchase the assets of the utility, oust the Commission of its jurisdiction under A.R.S. §40-285. The Corporation Commission must give permission to a utility before it may dispose of its assets by agreement to a municipality or any other purchaser.

5. This statute is a permissive statute passed for the protection of the public interest. The Corporation Commission may only concern itself with questions relating to whether or not the proposed transfer will be injurious to the rights of the public. The Commission has nothing to do with the rights of the intended purchaser and has no power to determine the validity of the contract, fairness of the purchase price, or feasibility of the project.

6. When the municipality acquires the assets of a private public service corporation through purchase it necessarily requires that the private utility must voluntarily agree to sell to the municipality in this manner. The municipality is therefore on notice as to the requirement under A.R.S. §40-285 that the public service corporation must obtain permission of the Corporation Commission to sell. They are bound to honor the order made by the Commission in approving the sale.

7. In the situation where only part of the assets of the private utility are being conveyed to a municipality and the utility will continue to serve, after the sale, some customers, the Commission shall make its order relative to those customers which will not be served by the municipality, and the private utility may not then dispose of the assets that the Commission finds are necessary to meet the needs of those customers remaining.

8. In the situation when the entire assets of the private utility are acquired by a municipality and all the customers are to be served by it, the utilities' public service function is ended. The

Hon. George F. Senner
Corporation Commission

January 8, 1962
Page 14

Corporation Commission cannot prohibit the sale of its assets. The hearing and order must be directed only to a determination that there are no other customers or persons who have been served by the private utility and that it will, in fact, have been relieved of all its duties to serve such customers. The Commission's determination is to be made relating only to these matters. They may not enter an order denying the public utility the right to dispose of its assets, except upon the grounds that the utility is not in fact terminating its function in the service of its customers. This is the effect of A.R.S. §40-285(C).

9. The Corporation Commission in its order approving any sale under A.R.S. §40-285, must give effect to §9-516(C) to the extent that it shall protect from encroachment by additional certification the rights of the holder of the certificate of convenience and necessity of the utility being purchased and can only terminate the certificate of the privately owned public utility being purchased and relieve it from the duties of a public service corporation after it is apparent that the municipal corporation has not and will not refuse "to provide utility service to a portion or part of the area or territory previously authorized to the public utility."

10. If the municipality refuses to serve customers in the area taken over, the Corporation Commission then may issue a new certificate of convenience and necessity to a public utility to provide service to that portion of the area or territory which the municipality has refused to service. Its power of investigation to determine the necessary facts is preserved. To perform these duties the Commission retains jurisdiction over the utility after sale and has full power to investigate completion of sale.

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