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BEFORE THE ARIZONA CORPORATION

COMMISSIONERS

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Arizona Corporation Commission

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KRISTIN K. MAYES, Chairman  
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ARIZONA CORPORATION COMMISSION  
DOCKET CONTROL

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IN THE MATTER OF THE APPLICATION OF  
CHAPARRAL CITY WATER COMPANY, INC.,  
AN ARIZONA CORPORATION FOR A  
DETERMINATION OF THE CURRENT FAIR  
VALUE OF ITS UTILITY PLANT AND  
PROPERTY AND FOR INCREASES IN ITS  
RATES AND CHARGES FOR UTILITY BASED  
THEREON.

DOCKET NO. W-02113A-07-0551

STAFF RESPONSE

**I. BACKGROUND.**

On October 21, 2009, the Commission issued Decision No. 71308, which authorized new rates and charges for Chaparral City Water Company, Inc. ("Chaparral" or "Company"). On November 3, 2009, the Company filed a Motion for Order Amending Decision No. 71308 *nunc pro tunc*. In its motion, the Company alleges that the rate design approved in Decision No. 71308 fails to produce the authorized revenue and instead produces an annual short-fall of \$490, 041. The Company requests that the Commission act to correct the rate design by November 20, 2009. In the event that a correction is not made by that date, the Company asks the Commission to impose a surcharge along with interest at 10% per annum for six months in order to collect the revenue short-fall.

A procedural order was issued on November 5, 2009 directing the parties to address whether the Decision can be amended *nunc pro tunc* and whether the computational error in the rate design was reflected in the Recommended Opinion and Order. As directed by this Procedural Order, the Utilities Division of the Arizona Corporation Commission ("Staff") files this response.

**II. IS AMENDING DECISION NO. 71308 NUNC PRO TUNC APPROPRIATE IN THESE CIRCUMSTANCES?**

The purpose of an order *nunc pro tunc* is to "make the record reflect the intention of the parties or the court at the time the record was made." *State v. Johnson*, 113 Ariz. 506, 509, 557 P.2d

1 1063, 1066 (1976); *State v. Sabalos*, 178 Ariz. 420, 421, 874 P.2d 977, 978 (App. 1994). In *Johnson*,  
2 the Arizona Supreme Court explained the scope of an order *nunc pro tunc*:

3       We have consistently held that the function of an order or judgment *nunc pro tunc*  
4 is to make the record speak the truth.... We have made it clear that the court  
cannot do more than make the record correspond with the actual facts.

5 (Quoting *Black v. Industrial Comm'n*, 83 Ariz. 121, 125, 317 P.2d 553, 555-556 (1957)). Thus, a  
6 *nunc pro tunc* order reflects a decision that was actually made, but “which through some oversight or  
7 inadvertence was never entered upon the records of the court by the clerk or which was incorrectly  
8 entered.” *Id.* Thus, there is “no authority to enter a *nunc pro tunc* order in a situation where the  
9 record reflected what the court had actually done.” *City of Phoenix v. Geyler*, 144 Ariz. 323, 327,  
10 697 P.2d 1073, 1078 (1985).

11       These same principles govern when an agency considers a request to amend one of its orders  
12 *nunc pro tunc*. In *Asarco, Inc. v. Industrial Comm'n of Arizona*, 204 Ariz. 118, 60 P.3d 258 (App.  
13 2003), the court held that an agency has authority to make *nunc pro tunc* corrections only to “correct  
14 clerical or stenographic errors in awards.” *Id.*

15       Staff’s analysis of the rates set forth in Decision No. 71308 reveals that the rates do not  
16 produce the revenue authorized by that Decision. Unfortunately, the rate design presented in Staff’s  
17 testimony did not incorporate the most recent billing determinants for certain customers. The Staff  
18 rate design was adopted by the ROO, which therefore also contains this same computational error.  
19 The billing determinants that should be used will be filed in the docket shortly. The question now is  
20 how to adjust the rate design to recover the short-fall.

21       In an effort to expediently resolve the discrepancy, a rate design was proposed to recover the  
22 short-fall. These proposed rates modify the applicable commodity rates for each tier, with no  
23 modification of the monthly minimum charge. The Company does not support this proposal, stating  
24 that the allocation method used is not consistent with the allocation typically proposed by Staff and  
25 that the correct allocation would require a modification of the monthly minimum charge. The  
26 Company complains that the proposed rate design, which only modifies the commodity rates, would  
27 harm the Company should its customers use less water, thus preventing it from earning its authorized  
28

1 rate of return. Company's Motion at 5. Although the rate proposal is one alternative to address the  
2 revenue short-fall, it is not the only acceptable alternative. Staff acknowledges that other equally  
3 appropriate rate designs could be developed.

4         Nonetheless, the Company's arguments against the proposed rate design effectively defeat its  
5 arguments in support of an amendment *nunc pro tunc*. The determination of the allocation is not  
6 merely clerical; it goes to the heart of rate design, that is, how to allocate revenue among the rate  
7 classes and how to allocate between the monthly minimum charge and the commodity rate. To  
8 amend Decision No. 71308 *nunc pro tunc* under these circumstances would appear to be inconsistent  
9 with this concept.

10 **III. SHOULD THE COMPANY'S MOTION BE CONSIDERED A MOTION FOR**  
11 **REHEARING PURSUANT TO A.R.S. § 40-253?**

12         The purpose of A.R.S. § 40-253 is to afford the Commission the opportunity to correct its  
13 own mistakes before the matter is brought to court. *Horizon Moving & Storage Co. v. Williams*, 114  
14 Ariz. 73, 75, 559 P.2d 193, 195 (1976). In *Horizon*, the application for rehearing simply referred to  
15 the transcript in the Commission's proceedings and the applicant's memorandum. The court  
16 determined that there was only one objection which the applicant raised before the Commission, and  
17 therefore there was "no actual doubt or uncertainty as to the position" of the applicant on rehearing.  
18 *Id.* at 75, 559 P.2d at 195. Thus, the court concluded that the applicant had complied with A.R.S. §  
19 40-253.C. The requirement of A.R.S. § 40-253.C. "is satisfied if the legal or factual point ... relied  
20 upon was raised in the petition for rehearing." *State v. Arizona Corp. Comm'n*, 94 Ariz. 107, 112,  
21 382 P.2d 222, 225 (1963).

22         The Company's Motion requests relief pursuant to A.R.S. §40-252 or as otherwise allowed by  
23 law. Company's Motion at 1. Although the Company did not specifically refer to A.R.S. § 40-253,  
24 the phrase "or as may otherwise be allowed by law" appears to indicate that the Company seeks relief  
25 through any applicable means. Taking a cue form the court's reasoning in *Horizon*, the Company's  
26 motion could be considered a motion pursuant to A.R.S. § 40-253.

27         In the alternative, Staff hereby moves for rehearing pursuant to A.R.S. § 40-253 to remove  
28 any ambiguity and to allow the Commission the opportunity to correct the revenue short-fall. Staff's

1 application for rehearing also requests that the Commission reconsider the rate design approved in  
2 Decision No. 71308 to the extent necessary to address the revenue short-fall. Staff would also  
3 request any other relief that the Commission deems appropriate.

4 **IV. THE COMPANY'S REQUEST FOR A SURCHARGE WITH INTEREST SHOULD**  
5 **BE DENIED.**

6 Another factor precluding the application of an order *nunc pro tunc* is the Company's request  
7 for a surcharge and interest at 10% per annum in the event that the Commission does not modify  
8 Decision No. 71308 on or before November 20, 2009. The award of a surcharge and any allegedly  
9 associated interest is not a clerical matter; it is a substantive issue that, at a minimum, requires  
10 comment from the parties and consideration by the Commission. The mere assertion in a pleading, as  
11 has been done by the Company in this case, does not provide an entirely sufficient basis for the  
12 requested relief. Staff recommends denial of the Company's request for a surcharge with interest.

13 **V. THE SOLUTION FOR CORRECTION.**

14 The proposed solution to revise the commodity rate was rejected by the Company in its  
15 Motion. Staff would suggest that the parties attempt to resolve the matter and submit, as a joint  
16 filing, a proposed rate design for consideration. Should this proposal be unacceptable, Staff would  
17 request a procedural conference as soon as possible so that the Administrative Law Judge ("ALJ")  
18 may consider how best to allow the parties to present their positions regarding appropriate allocations  
19 through rate design.

20 **VI. CONCLUSION.**

21 The Company continues to complain about alleged delays that have occurred in this docket.  
22 *See generally* Company's motion at 5-6. These complaints, however, are not helpful in developing a  
23 solution to the current dilemma. The Company certainly bears some part in contributing to any delay  
24 that may have occurred, and the Company's tendency to repeatedly chastise Staff or the Commission  
25 is counter-productive. Staff would urge the Company to set aside these concerns and instead focus its  
26 energies on working with the parties to develop a solution to the present circumstances.

1 Staff would respectfully request that the Commission grant rehearing and direct the Hearing  
2 Division to issue a procedural order directing the parties to work together to attempt to develop an  
3 acceptable rate design to present to the Commission for its consideration. In the event that the parties  
4 are unable to reach a resolution, the ALJ may then determine the scope of any subsequent  
5 proceedings that may be necessary. The Company's request for a surcharge with interest should be  
6 denied.

7 RESPECTFULLY submitted this 10<sup>th</sup> day of November, 2009.  
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10 

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16 Original and thirteen (13) copies  
17 of the foregoing were filed this  
18 10<sup>th</sup> day of November, 2009 with:

19 Docket Control  
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