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5 **BEFORE THE ARIZONA CORPORATION COMMISSION**

6 IN THE MATTER OF THE
7 APPLICATION OF LITCHFIELD PARK
SERVICE COMPANY, AN ARIZONA
8 CORPORATION, FOR A
9 DETERMINATION OF THE FAIR
10 VALUE OF ITS UTILITY PLANTS AND
PROPERTY AND FOR INCREASES IN
11 ITS WATER AND WASTEWATER
RATES AND CHARGES FOR UTILITY
SERVICE BASED THEREON.

DOCKET NO: SW-01428A-09-0103

Arizona Corporation Commission
DOCKETED

NOV 17 2009

DOCKETED BY 

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13 APPLICATION OF LITCHFIELD PARK
SERVICE COMPANY, AN ARIZONA
14 CORPORATION, FOR A
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SERVICE BASED THEREON.

DOCKET NO: W-01427A-09-0104

MOTION TO BIFURCATE ISSUES

(Expedited Action Requested)

17 In accordance with Arizona Rules of Civil Procedure 42(b), and for the reasons
18 noted below, Litchfield Park Service Company (“LPSCO” or “Company”) requests that
19 the Administrative Law Judge (“ALJ”) issue an order bifurcating this rate case into two
20 phases. The first phase (“Phase 1”) would involve issues relating to establishing the fair
21 value of LPSCO’s plant and property used for providing public water and wastewater
22 utility service and determining permanent rates and charges for utility service designed to
23 produce a fair return on such fair value rate base. The second phase (“Phase 2”) would
24 involve consideration of the Company’s request for a new water hook-up fee tariff (HUF)
25 and modification of its existing HUF for wastewater service. *LPSCO requests expedited*
26 *consideration of this motion because its rebuttal testimony is due December 4, 2009.*

1 **I. BRIEF STATEMENT OF THE MOTION.**

2 LSPCO requests that the ALJ bifurcate this rate case into two phases.¹ Bifurcation
3 is necessary because intervenors PebbleCreek Properties Limited Partnership (“PPLP”),
4 Westcor/Goodyear, LLC and Globe Land Investors, LLC (collectively “Westcor/Globe”)
5 have filed testimony raising issues relating to not only the design and amount of LPSCO’s
6 proposed HUF tariffs, but also the present and possible future application of the HUFs to
7 their individual developments. Further, Commission Staff has raised potentially
8 complicated issues related to Commission-approved HUFs in its recommendations. As a
9 result, inclusion of the HUF issues in the evidentiary hearings currently scheduled for
10 January 5-8, 2010 poses a substantial threat of pushing back completion of the evidentiary
11 hearings and delaying a final decision establishing rates by the Commission.

12 Under A.A.C. R14-2-103(B)(11)(d-f), the time clock for issuance of a final
13 decision is set to expire on or about May 15, 2010 based on the four days currently
14 scheduled for hearing. If the HUF issues are interjected into the January 2010 hearing, it
15 is likely that the evidentiary hearing will not be completed by January 2010. Further,
16 given the limited availability of hearing dates in early 2010, the hearing may not
17 reconvene in a timely fashion. As such, combining the HUF issues with the principal
18 portions of the rate case will jeopardize the ALJ’s ability to issue a recommended opinion
19 and order in time for issuance of a final decision by the Commission before May 15, 2010.

20 In order to ensure that HUF tariffs do not delay a determination of rates, LPSCO
21 requests bifurcation into two phases. As proposed, the Phase 1 evidentiary hearing would
22 be conducted on January 5-8, 2010, and would address the revenue requirement (rate base,
23 income statement and cost of capital), and rate design, except the HUFs. At the
24 conclusion of the Phase 1 evidentiary hearing and after submission of closing briefs by the

25 ¹ By filing this motion, the Company is not waiving any rights relating to lack of
26 compliance with the applicable rate case time clock, including the statutory time clock
under Ariz. Rev. Stat. § 40-256(A).

1 parties, the ALJ would issue a recommended opinion and order relating to a determination
2 of rate base, revenue requirement and just and reasonable rates. Phase 1 then would
3 conclude at open meeting before the Commissioners prior to May 15, 2010 under the
4 Commission's time clock rule. After issuance of the Phase 1 decision, the new rates
5 ordered by the Commission would go into effect, but this docket would remain open.

6 On a separate track, but under the same docket, LPSCO requests that the ALJ issue
7 a Phase 2 procedural order setting forth dates for the filing of testimony (LPSCO rebuttal,
8 Staff/Intervener surrebuttal and LPSCO rejoinder) and hearings. Thereafter, following
9 hearings, briefing and issuance of a Commission decision, a Phase 2 decision would be
10 issued regarding the HUF tariffs and this docket can be closed.

11 **II. THE ADMINISTRATIVE LAW JUDGE SHOULD GRANT BIFURCATION**
12 **OF THE GENERAL RATE CASE FROM THE HUF PROCEEDINGS.**

13 Rule 42(b) provides that "[t]he court, in furtherance of convenience or to avoid
14 prejudice, or when separate trials will be conducive to expedition and economy, may
15 order a separate trial of any claim...or of any separate issue..."² Trial courts have "broad
16 discretion in exercising its severance power under Rule 42(b)."³

17 Here, bifurcation is warranted because the HUF issues raised by PPLP and
18 Westcor/Globe are separate and distinct from the general rate case issues relating to a
19 determination of fair value rate base and associated rates thereon. Specifically,
20 Westcor/Globe contends that "LPSCO's proposed new water and revised wastewater
21 hook-up fees should not require [Westcor/Globe] or their successors to pay LPSCO any
22 additional funds for development within the Estrella Falls Master Plan."⁴ Put simply,
23 Westcor/Globe argues that LPSCO's proposed HUFs for water and wastewater service
24 should not be applied to the Estrella Falls development as a result of the September 10,

25 ² Arizona Rule of Civil Procedure 42(b). *See also* Fed. R. Civ. P. 42(b).

26 ³ *Williams v. Thude*, 180 Ariz. 531, 534, 885 P.2d 1096, 1099 (App. 1994).

⁴ Testimony of Garrett Newland at 6, docketed by Westcor/Globe on November 4, 2006.

1 2008 Settlement Agreement between LPSCO and Westcor/Globe. Clearly, whether to
2 apply HUFs to Westcor/Globe in the future doesn't impact LPSCO's rate base or the
3 setting of rates for water or wastewater utility service in this docket.⁵

4 Likewise, the HUF issues raised by intervenor PPLP can and should be decided in
5 a separate proceeding or phase. In its direct testimony, PPLP challenges the water and
6 wastewater HUFs proposed by LPSCO.⁶ PPLP essentially raises three HUF issues, all of
7 which can be addressed in the Phase 2 proceedings. First, PPLP asserts that LPSCO and
8 PPLP previously "negotiated certain contributions and advances in aid of construction in
9 exchange for an agreement that PPLP would not have to pay HUFs."⁷ Second, PPLP
10 contends that "the differences in system demands created by Active Adult versus non-age
11 restricted communities should result in different HUFs for these types of communities."⁸
12 Finally, PPLP questions the "structure of the current proposed HUF tariff" submitted by
13 LPSCO, and PPLP asserts that the "HUF places an unfair burden on residential
14 development as opposed to commercial development."⁹

15 A determination of whether HUFs should be applied to a specific developer for a
16 specific project at some point in the future is not something that should be decided in the
17 context of a general rate case. As a matter of law, LPSCO could move to dismiss the
18 HUF claims asserted by PPLP and Westcor/Globe for that reason. Rather than moving to
19 dismiss the HUF issues and forcing the developers to file a separate complaint, LPSCO
20 simply seeks bifurcation, which would allow the Commission to undertake a separate
21 inquiry into the proposed HUFs and whether to apply them to Westcor/Globe or PPLP.

22 It bears emphasis that whatever the Commission decides on the HUF issues will

23
24 ⁵ In February 2009, Westcor/Globe postponed opening of the Estrella Falls regional mall
until fall 2011.

25 ⁶ See Direct Testimony of Phil Zeblisky at 3, docketed by PPLP on November 4, 2009.

26 ⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 3-4.

1 not impact LPSCO's rates based on a test year ending September 30, 2009. Any decision
2 issued by the Commission relating to whether the HUFs should be applied to
3 Westcor/Globe and PPLP in the future, or establishing the proper amounts for the HUFs
4 to be applied by LPSCO, will not impact determinations of LPSCO's fair value rate base,
5 revenue requirements or just and reasonable rates for the current Test Year. For that
6 reason, the HUF issues can and should be evaluated in a separate Phase 2 proceeding to
7 avoid delays in the issuance of new rates based on the fair value of LPSCO's plant.
8 Further, bifurcation is necessary to prevent substantial harm and damages to LPSCO--any
9 delay in the approval of new water and sewer rates will deprive the Company of several
10 hundred thousand dollars per month in lost revenues.¹⁰

11 In other rate cases, the Commission has used a first phase to determine rate base
12 and the rates based thereon, and then in subsequent phases dealt with issues that require
13 additional and more targeted evidence. The HUF issues necessitate bifurcation for the
14 same reasons. Resolution of the HUF issues will require answers to questions like, among
15 many others, how to determine a HUF level, whether specific types of housing should be
16 specifically recognized, the meaning of collecting a HUF with respect to remaining
17 funding of back bone plant, whether the Commission should shift development risk to the
18 utility and ratepayers, and whether certain customers should be treated differently than
19 other customers. What's more, both Westcor/Globe and PebbleCreek are asking for a
20 determination that they executed prior agreements with LPSCO which exempt those

21 ¹⁰ For water, LPSCO seeks an operating revenue increase of \$7,508,146 or \$625,678.83
22 per month. In its testimony relating to water rates, Commission Staff recommends an
23 operating revenue increase of \$5,328,747, which equates to \$444,062.55 per month in
24 increased revenue. See Direct Testimony (water) of Jeffrey Michlick at p. 4, docketed by
25 Commission Staff on November 4, 2009. For wastewater, LPSCO seeks an operating
26 revenue increase of \$4,991,601 or \$415,966.75 per month. Staff recommends an
operating revenue increase of \$2,841,618 for wastewater or \$236,801.50 per month. See
Direct Testimony (wastewater) of Jeffrey Michlick at p. 8, docketed by Commission Staff
on November 4, 2009. Any delays in issuance of a final decision establishing rates for
LPSCO will cause the Company to lose more than \$600,000 in lost revenues per month of
delay.

1 developers from future HUFs. The Commission not only must decide that issue in the
2 specific circumstances of those intervenors, but the Commissioners will need to decide
3 that issue as a matter of general policy. These various issues will necessitate additional
4 testimony, discovery, data requests and, potentially, further expert witnesses. Attempting
5 to fully and fairly address those issues within the time-clock for the general rate case
6 would put undue pressure on the Commission, ALJ and other parties.

7 It also should be noted that the HUF issues raised by the intervenors pose a
8 significant threat of unduly complicating and delaying the rate case with procedural
9 issues. For example, the direct testimony of Phil Zeblisky offered by PPLP is largely
10 inadmissible. In that testimony, Mr. Zeblisky offers his beliefs regarding interpretation of
11 prior line extension agreements between LPSCO and PPLP, and prior development
12 agreements between PPLP and Suncor Development Company.¹¹ But Mr. Zeblisky was
13 not involved in negotiating, drafting or executing any of those agreements. Likewise, Mr.
14 Zeblisky offers opinions as to what he believes to be fair or equitable relating to
15 application of the HUF tariffs to PPLP.¹² By law, “expert testimony that merely tells the
16 [fact finder] what result to reach is inadmissible.”¹³ Likewise, “an expert may not give an
17 opinion as to a legal conclusion” or ultimate issue.¹⁴ Bifurcation will avoid these types of
18 procedural delays and legal complications in the general rate case.

19 **III. CONCLUSION.**

20 For the reasons above, the ALJ should issue an order bifurcating this rate case
21 proceeding into two phases as proposed above. LPSCO respectfully requests an expedited
22 ruling on this motion because the Company’s rebuttal testimony is due December 4, 2009.
23

24 _____
25 ¹¹ Zeblisky Direct Testimony at 5-10.

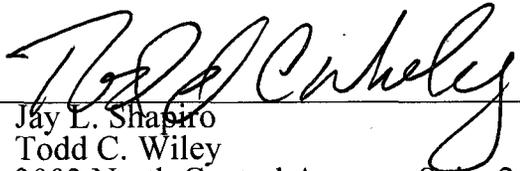
26 ¹² *Id.*

¹³ *In Re Apollo Group Inc. Sec. Litigation*, 527 F.Supp. 2d 957, 962 (D. Ariz. 2007).

¹⁴ *Whitaker v. Maldonado*, 2009 WL 1936803 at *3 (D. Ariz. 2009).

1 RESPECTFULLY SUBMITTED this 17th day of November, 2009.

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11 **ORIGINAL** and fifteen (15) copies of
12 the foregoing, were delivered
13 this 17th day of November, 2009, to:

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