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AZ CORP COMMISSION
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Arizona Corporation Commission

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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

KRISTIN K. MAYES, Chairman

PAUL NEWMAN

GARY PIERCE

SANDRA D. KENNEDY

BOB STUMP

IN THE MATTER OF THE FORMAL
COMPLAINT OF GARY R. BAHR AND
LARRY C. ROWLEY

COMPLAINANTS,

vs.

TRICO ELECTRIC COOPERATIVE, INC.

RESPONDENT.

Docket No. E-01461A-10-0073

**MEMORANDUM OF TRICO
ELECTRIC COOPERATIVE, INC.
IN SUPPORT OF ITS MOTION
TO DISMISS**

TRICO ELECTRIC COOPERATIVE, INC., Respondent in the above proceedings ("Trico"), herewith submits its Memorandum in Support of its Motion to Dismiss filed with the Arizona Corporation Commission ("Commission") on March 25, 2010, and duly served on that date. The motion is stated as two issues both of which establish that the Commission does not have jurisdiction over the subject matter in this proceeding insofar as Trico is concerned.

1 I. The Complaint makes no allegations that could establish a basis that Trico
2 has any legal obligation to Complainants for which relief can be granted. In this regard, the
3 Complainants allege with respect to Trico:

4 1. Silver Star Drive ("Road") is in an unusable state due to the fact that
5 the utilities did not return the road to the condition it was before they trenched along and
6 across it.

7 2. The State has a responsibility to provide for the health and welfare of
8 its citizens.

9 3. Complainants and a third party laid gravel along the entire length of
10 their property which kept their section of the road from washing away but many others,
11 including Pima County and another land owner did nothing to fix their respective sections
12 of the Road and the utilities failed to fix them.

13 4. The Complaint is based upon alleged negligence, a form of tort, of the
14 Respondent. The Arizona court in *Kiser v. A.J. Bayless Markets, Inc.*, 9 Ariz.App. 103,
15 106, 107, 449 P.2d 637, 640, 641 (1969) stated:

16 "... It is fundamental that before a plaintiff may recover in a
17 negligent action she must show a duty owed by defendant to
18 plaintiff, a breach of the duty, and an injury proximately caused by
19 the breach of the duty ..."

20 The Arizona Supreme Court stated in *Phoenix Professional Hockey Club, Inc. v.*
Hier, 108 Ariz. 482, 483, 502 P.2d 164, 165 (1972):

21 "Appellant correctly states Arizona's position as to the
22 traditional duty requirement; the existence of a duty to the plaintiff is
23 a prerequisite to tort liability ..."

24 Similarly, the court in *Ivicevic v. City of Glendale*, 26 Ariz.App. 460, 461, 549 P.2d
25 240, 241 (1976), stated:

26 "In order to state a cause of action in tort, plaintiff must prove
the existence of a duty owed by the defendant to plaintiff ..."

1 *Accord: Brookover v. Roberts Enterprises, Inc.*, 215 Ariz. 52, 55, 156 P.3d 1157, 1160
2 (2007); *Boyle v. City of Phoenix*, 115 Ariz. 106, 107, 563 P.2d 905, 906 (1977); *Nicoletti v.*
3 *Westcor, Inc.*, 131 Ariz. 140, 142, 639 P.2d 330, 332 (1982); *Matts v. City of Phoenix*, 137
4 Ariz. 116, 118, 669 P.2d 94, 96 (1983); and *Flowers v. K-Mart Corp.*, 126 Ariz. 495, 497,
5 616 P.2d 955, 957 (1980).

6 The Courts, when not acting as triers of facts, determine whether there is a legal
7 duty not the trier of fact, such as a jury. *Flowers, supra*, 126 Ariz. at 497, 616 P.2d at 957;
8 *Gipson v. Kasey*, 214 Ariz. 141, 143, 150 P.3d 228, 230 (2007). In these proceedings the
9 Commission as a legal matter should determine whether a legal duty owed by Trico to
10 Complainants exists. In *Dube v. Likens*, 216 Ariz. 406, 424, 167 P.3d 93, 111 (2007), the
11 court stated:

12 “Even under liberal notice pleading rules, a ‘plaintiff’s
13 obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief
14 requires more than labels and conclusions, and a formulaic recitation
15 of the elements of a cause of action will not due.’ *Bell Atl. Corp. v.*
16 *Twombey*, 550 U.S. 544 127 S.Ct. 1955, 1964-65, 167 L.Ed.2d
17 929 (2007), quoting Fed.R.Civ.P. 8a(2) (alteration in *Bell Atlantic*
Corp.) the Supreme Court specifically rejected an interpretation of
Rule 12(b)(6), Fed.R.Civ.P. that would allow a ‘wholly conclusory
statement of claim ... [to] survive a motion to dismiss whenever the
pleadings left open the possibility that a plaintiff might later
establish some ‘set of [undisclosed] facts’ to support recovery.’ ...”

18 Complainants have made no allegations upon which any constitutional provision,
19 statute, Pima County ordinance, Commission decision, order, rule or regulation or any
20 Arizona appellate court case can establish that Trico owed any duty to Complainants with
21 respect to the Road.

22 The only allegation concerning a duty in the Complaint is the allegation that the
23 State has the responsibility to provide for the health and welfare of its citizens. Perhaps
24 “welfare” can be stretched to include “safety” and perhaps “state” can be stretched to
25 include other governmental entities, but that would not include Trico.
26

1 Complainants' failure to make allegations upon which Trico owed a duty to them,
2 requires their Complaint to be dismissed as to Trico.

3 II. The Complaint is based upon negligence or the alleged tortious conduct of
4 Trico to Complainants for which the Arizona courts rather than the Commission have
5 jurisdiction. Complainants make no allegations in their Complaint with respect to Trico
6 concerning rates and/or charges, classifications of consumers, electric service or Trico's
7 facilities. These are the type of matters as to which the Commission has jurisdiction
8 pursuant to Article 15, Section 3 of the Arizona Constitution and Article 15, Section 6, by
9 which the Legislature can increase the powers of the Commission so long as such powers
10 are consistent with the Commission's jurisdiction as granted by the Constitution.
11 *Rural/Metro Corp. v. Arizona Corporation Commission*, 129 Ariz. 116, 117, 629 P.2d 83,
12 84 (1981). In *Campbell v. Mountain States Tel. & Tel. Co.*, 120 Ariz. 426, 586 P.2d 97, the
13 court dealt with a customer's complaint against a telephone utility which alleged that the
14 utility tortiously interfered with plaintiff's telephone service, had inflicted emotional
15 distress on plaintiff, invaded the plaintiff's privacy and breached the contract with plaintiff.

16 The court stated as follows:

17 "Despite appellees' [utility's] contentions, however,
18 appellant's [plaintiff's] complaint deals with much more than the
19 mere manner and means of providing telephone service. As our
20 summary of the complaint above indicates, appellant has proffered
21 three claims in tort for tortious interference with telephone service,
22 intentional infliction of emotional distress, and invasion of privacy
23 and one claim for breach of contract. Obviously, each of these
24 claims is elementally based on the manner and method of providing
25 service and other matters within the particular expertise of the
26 Corporation Commission. However, the claims' most important
aspects involve facts and theories of tort and contract far afield of
the Commission's area of expertise and statutory responsibility.
Indeed, appellant's tort and contract claims are the type of traditional
claims with which our trial court's of general jurisdiction are most
familiar and capable of dealing. See *Trico Electric Cooperative v.*
Ralston, supra; *General Cable Corp. v. Citizens Utility Co.*, supra;
...

Thus, while it is undeniable that appellant's claims do involve
the adequacy and method of telephone service and that such issues

1 are within the Commission's jurisdiction under A.R.S. § 40-203 and
2 § 40-321(A) these issues are not predominant. This case, as
3 determined by the complaint does not involve the question of
4 whether appellees are adequately providing telephone service to the
5 public. Further, appellant is not seeking injunctive relief to establish
6 broad public doctrines, public rights to service or levels of service.
7 In short, appellant's case involves relatively simple tort and contract
8 issues revolving around a central inquiry; whether under traditional
9 judicial principles, appellee has committed a civil wrong against
10 appellant. ..."

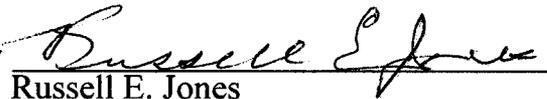
11 In *Qwest v. Kelly*, 204 Ariz. 25, 59 P.3d 789 (2002), the court stated:

12 "We conclude that the respondent judge's reliance on
13 *Campbell* was not misplaced. As in *Campbell*, McMahon's
14 complaint raises claims that revolve 'around a central inquiry:
15 whether, under traditional judicial principles, [Qwest] committed a
16 civil wrong against [the tenants].' 120 Ariz. at 432, 586 P.2d at 993.
17 Likewise, as in *Campbell* 'these issues predominate, [therefore] it is
18 clearly not essential for the courts to 'refrain' from exercising (their)
19 jurisdiction until after' the specialized administrative agency 'has
20 determined some question of some aspect of some question arising
21 in the proceeding before the court.'" *Id. quoting Davis, supra*,
22 §19.01 at 3. Based on *Campbell* as well as the other authorities
23 discussed herein regarding the commission's constitutional and
24 statutory authority, the allegation of McMahon's complaint, and the
25 nature of his claims against Qwest, the respondent judge did not err
26 in denying Qwest's motion to dismiss for lack of subject matter
jurisdiction pursuant to Rule 12b)1), Ariz.R.Civ.P."

17 Trico's position in this proceeding that the courts, rather than the Commission, have
18 jurisdiction is much stronger than the utility's positions in *Campbell, supra*, and *Kelly,*
19 *supra*. In those cases telephone service to plaintiffs was involved. In this proceeding no
20 electric service by Trico to Complainants is involved. The types of issues in this
21 proceeding being in tort are those types for which the courts rather than the Commission
22 have jurisdiction. Therefore, the courts rather than the Commission clearly have
23 jurisdiction and the Motion to Dismiss should be granted.

1 RESPECTFULLY SUBMITTED this 11th day of June, 2010.

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9 Original and 13 copies of the foregoing
10 filed this 11 day of June, 2010, with:

11 Docket Control (filed with Tucson office)
12 Arizona Corporation Commission
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15 Copy mailed this 11 day of
16 June, 2010, to:

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