

OPEN MEETING AGENDA ITEM



0000158446

1 **GUST ROSENFELD P.L.C.**
2 One E. Washington, Suite 1600
3 Phoenix, Arizona 85004-2553
4 602-257-7422 Fax 602-254-4878
5 David A. Pennartz – 006429
6 dpennartz@gustlaw.com
7 Landon W. Loveland – 024033
8 lloveland@gustlaw.com

9 **Attorneys for City of Sedona**

RECEIVED

2014 DEC -4 P 12: 21

AZ CORP COMMISSION
DOCKET CONTROL

ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

10 **COMMISSIONERS**
11 **BOB STUMP, Chairman**
12 **GARY PIERCE**
13 **BRENDA BURNS**
14 **BOB BURNS**
15 **SUSAN BITTER SMITH**

DOCKETED

DEC 04 2014

DOCKETED BY

16 IN THE MATTER OF THE
17 APPLICATION OF ARIZONA PUBLIC
18 SERVICE COMPANY'S APPLICATION
19 FOR APPROVAL OF AUTOMATED
20 METER OPT-OUT SERVICE
21 SCHEDULE 17

Docket No. E-01345A-13-0069

**CITY OF SEDONA'S MOTION TO
LIMIT OPT-OUT FEES TO
DEMONSTRATED RECOVERY OF
REASONABLE AND ACTUAL
COSTS CAUSED BY OPT-OUT
AND DENY INDEMNIFICATION
REQUEST**

22 The City of Sedona ("Sedona") requests the Commission, in ruling on Arizona
23 Public Service Company's ("APS") proposed Schedule 17 for charges ("Opt-Out Fees")
24 to those electric customers who choose to opt-out of AMI or Smart Meter¹ technology
25 and instead to keep their existing service by analog electric meters ("Opt-Out" or

26 ¹ Sedona is not unmindful of the fact that there are certain technical differences
between the various types of electronic meters. For this purpose, however, "Smart
Meter" is used to refer to the electronic meters that APS is installing in its service area.

1 “Opting-Out”), to limit any Opt-Out Fees to amounts reasonable and necessary to
2 recover no more than the actual and necessary incremental costs incurred by APS by
3 reason of the Opt-Out, as demonstrated by clear and substantial evidence by APS.
4 Additionally, Sedona requests the Commission to deny outright APS’ request in its
5 application that the Commission impose a legal indemnification requirement on those
6 customers who choose to Opt-Out. Schedule 17, Sec. 9.1

7 **I. THE OPT-OUT FEES ARE NOT FOR RAISING UTILITY REVENUE**
8 **GENERALLY OR PROVIDING A RATE OF RETURN TO APS.**

9 The stated purpose in the APS Application is to recover supposed additional
10 costs APS claims it will incur which are allegedly caused by the customer’s decision to
11 Opt-Out and to stay with analog meter service. Nowhere in the application does APS
12 argue for the Commission to grant it the right to charge the Opt-Out Fees for the
13 purpose of raising general utility revenue or as part of obtaining a fair value rate of
14 return. Indeed, the application is entirely devoid of any data or analysis on how the
15 revenue stream to be obtained by APS from the Opt-Out Fees relates to earning any
16 return on its invested capital in infrastructure used to serve any of its customers.

17 For the Opt-Out Fees to be considered in any such context would require a rate
18 case and the hearings, documentation and Commission determinations that are unique to
19 its rate making function. A.R.S. Sec. 40-250 *et seq.*; *Residential Utility Consumer*
20 *Office v. Arizona Corporation Commn.*, 199 Ariz. 588, 591, ¶ 10, 20 P.3d 1169, 1172
21 (App. 2001). No such application has been filed in connection with Schedule 17 and
22 the Opt-Out Fees. Instead, for sound legal reasons explored in more detail below, the
23 Opt-Out Fees application must stand or fall as a mechanism to recover reasonable and
24 actual costs from the Opt-Out decisions of individual customers.

25 ///

26 ///

1 **II. APS SEEKS TO IMPOSE THE OPT-OUT FEES THROUGH EXERCISE**
2 **OF ITS MONOPOLY POWER AS SOLE ELECTRIC PROVIDER.**

3 Sedona is an Arizona municipal corporation that has a variety of buildings, parks,
4 traffic signals, utility facilities, an airport, and other uses that require and utilize
5 electricity in their operation for the benefit of the citizens of Sedona. Sedona and its
6 citizens are electric customers of APS – the sole electric utility and monopoly provider
7 of electric service in and around Sedona. As a regulated utility, the State grants
8 monopoly service rights to APS as a public trust and solely for the benefit of the
9 consuming public.

10 Arizona is a regulated monopoly state “The monopoly is
11 tolerated only because it is to be subject to vigilant and continuous
12 regulation by the Corporation Commission, and is subject to
rescission, alteration or amendment at any time upon proper notice
when the public interest would be served by such action.”

13 *Arizona Corporation Commn. v. Arizona Water Co.*, 111 Ariz. 74, 76, 523 P.2d 505,
14 507 (1974), *quoting Davis v. Corporation Commn.*, 96 Ariz. 215, 218, 393 P.2d 909, 911
15 (1964).

16 According to information supplied to Sedona by APS, of the approximately
17 15,000 electric meters in the greater Sedona area, approximately 1,600 customers – over
18 10 % -- have made a decision to Opt-Out in favor of keeping their existing analog
19 meters. The Commission’s decision on the APS application will have a direct impact
20 on a substantial number of residents in the Sedona area.

21 Sedona requests that the Commission exercise vigilance in scrutinizing the basis
22 and amounts requested by APS in its application and Schedule 17. The burden plainly
23 is on APS to justify that the amount of the Opt-Out Fees it requests the Commission to
24 approve is reasonable and prudent, actual and necessarily caused by customers’
25 decisions to Opt-Out. Sedona respectfully submits that APS has not and cannot meet its
26 burden with respect to the Opt-Out Fees as proposed.

1 **III. THE OPT-OUT FEES MUST BE DEMONSTRATED BY SUFFICIENT**
2 **EVIDENCE TO RECOVER NO MORE THAN REASONABLE AND ACTUAL**
3 **COSTS INCURRED SOLELY BY REASON OF THE OPT-OUT.**

4 The funds to be generated to APS from collection of the Opt-Out Fees are not
5 general revenues or to provide a rate of return on fair value rate base. Their legitimate
6 basis, if there is one, can only be as a user fee to recover actual costs incurred by APS
7 beyond those which it would otherwise incur² if the customer had not Opted-Out.

8 A specific example from Schedule 17 serves to illustrate the point. Schedule 17,
9 if approved, would permit APS to charge a customer an additional account set-up or
10 establishment fee of \$75.00 upon making the decision to Opt-Out. Schedule 17, Sec.
11 5.1.1. To set up a customer account is primarily an accounting function that only has to
12 be performed upon becoming a new APS utility customer. An existing APS customer
13 does not cause a new account to be established upon Opting-Out of having his existing
14 meter changed to a new meter; he simply continues to use and pay for electricity as he
15 has already been doing. There is no incremental actual cost to be recovered for setting
16 up a new account for an existing customer.

17 Similarly, there is no apparent reason, and APS has supplied none, why a new
18 customer who opts to be served by an analog meter would cause a greater expense to set
19 up his customer account than if he established the same account and chose to be served
20 by a Smart Meter. Therefore, the requested account establishment fee included in the
21 application for the Opt-Out Fees would relate to normal operating costs that should be
22 accounted for in a rate case and does not represent a user fee calculated to recover
23 incremental cost caused by a customer Opting-Out of use of a Smart Meter.

24
25 ² Only the additional incremental costs, if any, of service by APS through analog
26 meters logically can be viewed as an Opt-Out cost. Costs APS incurs regardless of the
type of meter used by the customer are part of its normal operating costs and must be
accounted for in a general rate case.

1 Other examples include APS' unwarranted assumption that the customers who
2 have not already switched from an analog meter to a Smart Meter will, upon Opting-
3 Out, require installation of an analog meter – which they already have. Schedule 17,
4 Secs. 2.3, 5.2; Application, p. 6. Therefore these customers Opting-Out will save APS
5 money by not being required to change out the meter to a Smart Meter (meter reading
6 costs aside). Additionally, on the supposed shortage of analog meters for future needs,
7 those removed from 85% of APS customers (Application, p. 4, n. 3.) will supply a stock
8 of analog meters that will be sufficient for all reasonably foreseeable future needs, if
9 prudently managed, especially with existing customers Opting-Out keeping their analog
10 meters.

11 Additionally, Sedona joins Commission staff in opposing the “blended cost”
12 approach APS has used to derive its \$75 initial set-up fee the utility would charge to
13 customers who have service through an existing analog meter. APS' approach clearly
14 demonstrates its intent to use approval of Schedule 17 to charge existing customers fees
15 in excess of its actual and necessary costs by reason of the Opt-Out decision of those
16 customers. Sedona supports staff's recommendation that such existing customers not be
17 charged any part of the \$75 set-up fee.

18 Sedona wishes to emphasize its support for Commission staff's proposal that
19 Opt-Out customers be given multiple meter reading options, including self-reading.
20 Self-reading and reporting presents a very economical and practical method for billing
21 analog meter users. If residents' self-readings are found to be inaccurate on a repeated
22 basis, they could be required to use one of the other methods of meter reading identified
23 by Commission staff, including being required to pay an appropriate fee for monthly
24 meter reading service. There are ample remedies already available to address any
25 concerns about fraudulent reporting of electric consumption. Allowing self-reading
26

1 would serve to reduce the actual and necessary costs to APS from the Opt-Out decision.

2 Sedona requests that the Commission adopt the staff recommendation.

3 The monthly meter reading charge of \$30 (even as recommended by
4 Commission staff to be reduced to \$20) appears to be grossly overstated and
5 unsubstantiated by APS. This Commission found in Decision No. 69736, Findings of
6 Fact, ¶ 16, that APS' cost of a meter read is "about \$0.90 per conventional meter"
7 compared to the communication cost per Smart Meter of "about \$0.15 per month."
8 Even the \$20 figure is twenty-two times \$0.90 amount. Especially with Sedona being a
9 fairly compact geographical area, there is no reason that reading 1,600 meters even
10 monthly should cost \$20 to \$30 each. The meter read monthly charge should be limited
11 to \$0.90 as found in Decision No. 69736.

12 There are several other apparent examples, the point being that if APS is going to
13 able to justify the Opt-Out Fees as user fees, they must be able to prove that these costs
14 actually and necessarily are incurred, as a result of the Opt-Out decision, and are
15 otherwise reasonable and prudent. Otherwise they become general revenues³ or perhaps

16 ///

17 ///

18 _____
19 ³ *Dex Media West, Inc. v. City of Seattle*, 696 F.3d 952, 956 (9th Cir. 2012) (opt-out fee
20 for avoiding delivery of paper copy of Yellow Pages, reduced and off-set waste disposal
21 costs of unwanted directories, a substantial burden on city, and was imposed on those
22 who directly benefitted from the service being provided; fee was shown to be
23 reasonably based on cost of maintenance of opt-out registry, therefore, a user fee);
24 *Maricopa County v. Maricopa County Muni. Water Conserv. Dist.*, 171 Ariz. 325, 330,
25 830 P.2d 846, 851 (App. 1991) (fee on recreational users of water reservoir authorized
26 by statute "which [fee] shall not be in excess of the amount required to improve and
maintain parks."); *Jachimek v. State*, 205 Ariz. 632, 636-37, 74 P.3d 944, 948-49 (App.
2003) (a tax is imposed on the many to raise general revenue; a fee is imposed on those
deciding to make use of a service and must bear a reasonable relationship to the
provision of the service).

1 more accurately, monetary penalties⁴ assessed against those Opting-Out. Generally,
2 reasonable and prudent utility operating expenses are to be recovered as part of a rate
3 proceeding that considers all of the company's operating costs and revenue needs.
4 *People ex rel. Madigan v. Illinois Commerce Commn.*, 354 Ill. Dec. 662, 675, 958
5 N.E.2d 405, 418 (2011). Special cost recovery riders bypass that process and are rarely
6 justified. They must show special circumstances sufficient to warrant such treatment
7 and recovery of unique costs that are out of the utility's control. *Id.*, 354 Ill. Dec. at
8 670, 674; 958 N.E.2d at 413, 417. Simply by throwing around some cost estimates,
9 APS has not made such a showing here.

10 **IV. THERE IS NO STATUTORY BASIS FOR THE COMMISSION TO**
11 **REQUIRE CUSTOMERS OPTING-OUT TO INDEMNIFY APS.**

12 The Commission's constitutionally granted power is over rate making for public
13 service corporations. Art. 15, Sec. 3, Ariz. Const. While the Legislature, within certain
14 parameters, is permitted to grant powers to the Commission involving its regulation of
15 utilities, Art. 15, Sec. 6, Ariz. Const., *Sulger v. Arizona Corporation Commn.*, 5
16 Ariz.App. 69, 72-73, 423 P.2d 145, 148-49 (1967); *Corporation Commn. v. Pacific*
17 *Greyhound Lines*, 54 Ariz. 159, 176-77, 94 P.2d 443, 450 (1939), there must be a
18 statute passed empowering the Commission in such additional matters.

19 Title 40, Ariz. Rev. Stat., contains no statute that authorizes the Commission to
20 require utility customers to insure or indemnify the monopoly utility provider. The
21 proposed indemnification provision, as submitted (Schedule 17, Sec. 9.1) doesn't even

22 _____
23 ⁴ *Pima Savings & Loan Assn. v. Rampello*, 168 Ariz. 297, 299-300, 812 P.2d 1115,
24 1117-18 (App. 1991) (liquidated damages are appropriate where it is difficult to prove
25 the actual damages and approximates the actual loss; there is no justification, economic
26 or otherwise, for excessive amounts posited as liquidated damages and they are
unenforceable as penalties on grounds of public policy).

1 purport to limit the indemnification to incidents occurring on the customer's property or
2 to acts of customer negligence. As broadly worded, the indemnification provision
3 perhaps could be triggered with an automobile accident the APS meter reader gets into
4 on the way to an area to read customer meters. Of course, the customer also may rent
5 the property and not even carry liability insurance on the exterior premises, which
6 would leave the customer with an indemnification obligation for which it could not even
7 insure. Besides having no legal support, the requirement is coercive and
8 unconscionable.

9 If an APS employee is injured on any customer's property, regardless of the type
10 of meter used, by a property defect for which the customer is legally responsible, there
11 are ample remedies through the Worker's Compensation laws and insurance and by tort
12 law to seek appropriate compensation. There is no valid reason or legal authority to
13 thrust an additional indemnification obligation on the backs of Opting-Out customers
14 and APS' application therefor must be denied.

15 **V. CONCLUSION**

16 To truly qualify as user fees, the Commission should judge APS' requested Opt-
17 Out Fees using a legal test of whether they are demonstrated by sufficient evidence to
18 recover actual, reasonable and necessary costs incurred solely by reason of the
19 customer's decision to Opt-Out of use of a Smart Meter, keeping their analog meter
20 instead.

21 ///

22 ///

23 ///

24

25

26

1 Michael Curtis
501 East Thomas Road
2 Phoenix, Arizona 85012-3205

3 Charles Moore
1878 West White Mountain Boulevard
4 Lakeside, Arizona 85929

5 Warren Woodward
55 Ross Circle
6 Sedona, Arizona 86336

7 Steve Olea
Arizona Corporation Commission
8 1200 West Washington
Phoenix, Arizona 85007

9 Janice Alward
10 Arizona Corporation Commission
1200 West Washington
11 Phoenix, Arizona 85007

12 Lyn Farmer
Arizona Corporation Commission
13 1200 West Washington
Phoenix, Arizona 85007-2927

14
15 Maurella Adams
16

17
18
19
20
21
22
23
24
25
26