



0000161686

**BEFORE THE ARIZONA CORPORATION COMMISSION**

**COMMISSIONERS**

SUSAN BITTER SMITH Arizona Corporation Commission  
BOB BURNS  
BOB STUMP  
DOUG LITTLE  
TOM FORESE

2015 APR 17 P 1:04

**DOCKETED**

AZ CORP COMMISSION  
DOCKET CONTROL

APR 17 2015

DOCKETED BY 

**ORIGINAL**

IN THE MATTER OF THE APPLICATION  
OF UTILITY SOURCE, LLC, AN ARIZONA  
CORPORATION, FOR A DETERMINATION  
OF THE FAIR VALUE OF ITS UTILITY  
PLANTS AND PROPERTY AND FOR  
INCREASES IN ITS CHARGES FOR  
UTILITY SERVICE BASED THEREON.

DOCKET NO. WS-04235A-13-0331

**NIELSEN FINAL REPLY CLOSING  
BRIEF**

**Introduction**

Erik A. Nielsen (Intervenor) hereby files his Final Closing Reply Brief in the matter of Utility Source LLC application for a determination of the fair value of its utility plants and property and for increases in its charges for utility service based thereon.

This brief addresses claims made in Utility Source's Post Hearing Brief that Nielsen's proposed adjustments represent a collateral attack and that Nielsen's and RUCO's adjustments are mere conjecture and absent a factual basis. Next Nielsen addresses Staff's position on new information introduced in this case by the intervenors and the hookup fee that had not yet been refunded. Finally Nielsen discusses the outstanding compliance issues and penalties related to Company behavior.

**Company Assertion of Collateral Attack**

The Company asserts that the law and standard rate making procedures justifies the Arizona Corporation Commission ignoring new information in a rate case and "blindly" or rigidly carrying forward of water and wastewater rate base from a previous ACC Decision, in this case Decision 70140. The company alleges the adjustments proposed by RUCO and

1 Nielsen, based on evidence not refuted by the Company, represent collateral attacks on a  
2 previous ACC decision. The Company's reading of ARS § 40-252 only addresses the final  
3 sentence of the statute and the Company's interpretation of law on this matter is deeply flawed.

4 First and foremost the Arizona Constitution Article XV, § 14 affirmatively charges the  
5 ACC to ascertain the fair value of property and those regulated companies are required to assist  
6 in this endeavor. Section 14 reads "*The corporation commission shall, to aid it in the proper  
7 discharge of its duties, ascertain the fair value of the property within the State of every public  
8 service corporation doing business therein; and every public service corporation doing  
9 business within the State shall furnish to the commission all evidence in its possession, and all  
10 assistance in its power, requested by the commission in aid of the determination of the value of  
11 the property within the State of such public service corporation.*" (Emphasis added)

12 The law is clear that the ACC is "obliged to ascertain the fair value of the property  
13 within the state of every public service corporation, and use this figure as a utility's rate base."  
14 *Litchfield Park Serv. Co. v. Arizona Corp. Comm'n*, 178 Ariz. 431, 874 P.2d 988, 163 Ariz.  
15 *Adv. Rep. 10*, 1994 Ariz. App. LEXIS 76 (Ariz. Ct. App. 1994).

16 The AZ Supreme Court directly addressed the interpretation of ARS§ 40-252 cited by  
17 the Company as prohibiting collateral attack as follows in *Davis v. Corporation Commission*,  
18 96 Ariz. 215 393 P.2d 909 (1964). The full text of ARS§ 40-252 reads:

19 "The commission may at any time, upon notice to the corporation affected, and after  
20 opportunity to be heard as upon a complaint, rescind, alter or amend any order or decision  
21 made by it. When the order making such rescission, alteration or amendment is served upon the  
22 corporation affected, it is effective as an original order or decision. In all collateral actions or  
23 proceedings, the orders and decisions of the commission which have become final shall be  
24 conclusive."

25 The court stated that "The monopoly is tolerated only because it is to be subject to  
26 vigilant and continuous regulation by the Corporation Commission, and is subject to rescission,  
27  
28

1 alteration or amendment at any time upon proper notice when the public interest would be  
2 served by such action.”

3 Furthermore that Supreme Court found that: “There is no merit in appellants' argument  
4 that this case involves a collateral attack on the prior order of the Commission, which is  
5 prohibited by the final sentence of A.R.S. § 40-252. This court has held that "collateral attack"  
6 as used in that section means an attack such as an application for injunctive relief against an  
7 order of the Commission. Arizona Public Service Co. v. Southern Union Gas Co., 76 Ariz. 373,  
8 265 P.2d 435; Winslow Gas Co. v. Southern Union Gas Co., 76 Ariz. 383, 265 P.2d 442;  
9 Tucson Rapid Transit Co. v. Old Pueblo Transit Co., 79 Ariz. 327, 289 P.2d 406. An  
10 application to the Commission to rescind, alter or amend an order, pursuant to A.R.S. § 40-252  
11 does not constitute a collateral attack upon an order of the Commission”. Davis v. Corporation  
12 Commission, 96 Ariz. 215 393 P.2d 909 (1964).

13 Perhaps most importantly the court concluded that “The public interest is always the  
14 thing to which this Commission must give first consideration”.

15 Neither Nielsen nor RUCO are seeking injunctive relief and therefore the information  
16 provided by the intervenors in these proceedings and the subsequent adjustments proposed  
17 based on these facts do not represent collateral attack as defined by Davis v ACC (1964). The  
18 ACC is therefore required under the Arizona Constitution to examine all information in its  
19 forward looking rate base decisions.

20 The suggestion by the Company that the ACC cannot revisit, revalue or otherwise  
21 modify previous orders based on new evidence is ludicrous and violates guidance in Davis that  
22 public service companies be “subject to vigilant and continuous regulation by the Corporation  
23 Commission”.

24  
25 **Utility Source Claim that Intervenors Lack Evidence to Support Proposed Adjustments**

26 The Company asserts that Nielsen and RUCO have presented no credible evidence that  
27 commission’s decision 70140 was incorrect or based on testimony that was erroneous or  
28

1 misleading. I believe that decision 70140 did not address the issues raised by RUCO and  
2 Nielsen due to the lack of disclosure and documentation on the part of the company to support  
3 the original cost rate base. Through data requests, testimony and under oath during the hearing  
4 the company had every opportunity to rebut the evidence presented by Nielsen and clearly  
5 establish the original cost rate base. The Company could not or would not provide data or  
6 testimony to rebut Nielsen even though they are required by law to maintain records to  
7 substantiate the value of their plant for the purpose of rate base. ACC decision #70140 was  
8 based on the information available to the commission staff and commissioners at the time of  
9 that rate case. Mr. Michlik as ACC staff made his evaluation based on the information  
10 provided to the ACC staff by the company at that time. Because the company had developed  
11 most of their plant prior to filing for a CC&N (WS-04235A-04-0073) and their initial rate case  
12 (WS04235A-06-0303), some of the accounting and evidence do not appear to have been  
13 provided. If Mr. Michlik now has seen new evidence suggesting that there were unrecorded  
14 CIAC then I believe he is a more credible witness. In the present case had the Nielsen not  
15 discovered many facts about the Company's shared operation, the ACC would have made its  
16 determination based on the information available to it and allowed those unreasonable costs

17 For example, the evidence or unreported or undeclared CIAC is clear. Based on Mr.  
18 McCleve's testimony in hearing for this rate case that the company did in fact collect hookup  
19 fees prior to becoming regulated by the ACC and when combined with Nielsen's evidence of  
20 prior hookup fees, it is quite clear that these hookup fees were collected. As to the question of  
21 if these hookup fees were ever included as CIAC in the rate base-- the record speaks for itself.  
22 No hookup fees are recorded in the original rate case even though they were included in the  
23 Company's initial CC&N application. Company rejoinder testimony from Mr. McCleve states  
24 "As for the property owners' association records, those documents were turned over to the  
25 property owners' association approximately seven years ago. Apparently, Nielsen is attempting  
26 to establish that the property owners' association paid for the construction of the utilities, which  
27 is not true. In the previous rate case, the rate base for the Company was established and any  
28

1 contributions were identified at that time.” This statement is clearly not true in light on Mr.  
2 McCleve’s hearing testimony and the fact that the application for the first rate case did not  
3 include these contributions.

4 In another instance the Company suggests that Mr. McCleve has presented unrefuted  
5 testimony that the company does not have shared use of corporate offices and personnel. The  
6 Company is asking the ACC to take Mr. McCleve at his word and that Nielsen’s documentation  
7 clearly demonstrating shared use of company offices, equipment and personnel are based on  
8 conjecture and devoid from truth. Furthermore Mr. McCleve’s hearing testimony clearly states  
9 that the only expense paid by Utility Source was the electrical bill and the “other expenses are  
10 paid by my other partnerships”— (at 2 hours 12 minutes of Mr. McCleve’s day 1 hearing  
11 testimony).

12 In the present rate case, had the intervenors and RUCO not made numerous data  
13 requests and conducted independent investigation to fact check claims made by the Company,  
14 the ACC would not be aware of the following facts that have been established in this case and  
15 have direct bearing on the determination of rate base, recoverable expenses, and the company  
16 revenue requirement:

17 **Operational Expenses:**

- 18 1 Utility Source inappropriately included payment of SRP electrical bills for Mr.  
19 McCleve’s personal home as recoverable expenses.
- 20 1) Utility Source inappropriately included cell phones charges for two individuals (Mr.  
21 McCleve’s daughter and wife) totally unaffiliated with the Company as recoverable  
22 expenses.
- 23 2) Mr. McCleve is operating multiple businesses out of the listed Utility Source office.
- 24 3) The Utility Source office is clearly identified as a visitor Center for the Pecans  
25 subdivision in Queen Creek.
- 26  
27  
28

1 4) Mr. Parry does not exclusively work for Utility Source even through her only  
2 compensation is through Utility Source. She “primarily” works for Utility Source  
3 according to Mr. McCleve.

4 5) Mrs. Perry and her Utility Source cell phone are listed as contacts for The Pecans HOA.

5 6) Mrs. Perry also serves other roles for companies listed at the Utility Source address.

6 **Rate Base:**

7 1) County records indicate substantially lower original cost land values than those declared  
8 in the Company schedules. The Company never provided documentation or could  
9 testify to support land valuation included in rate base for the water and wastewater  
10 subdivisions. The Company application declares that they are using the Original Cost  
11 basis of Fair Value Rate Base. The Original cost rate base (OCRB) defined original cost  
12 in A.A.C R-14-102 as the cost of property at the time it was first devoted to public  
13 service.”

14 2) The Company could not provide any documentation supporting their investment in  
15 water and sewer distribution systems for The Townhomes at Flagstaff Meadows or  
16 Flagstaff Meadows Unit II and all other evidence shows Empire Builders obtained  
17 permits for, hired engineers and likely constructed these portions of the distribution  
18 system.

19 3) The principles of the company were required to install hydrants as part of Flagstaff  
20 Meadows subdivision and the value of those should then be considered CIAC

21 4) That hook-up fees were recently charged to customers in direct violation of CC&N  
22 order establishing the Company.

23 5) Hookup fees were charged to builders/homeowners by company principles prior to  
24 Utility Source receiving CC&N yet these fees were unrecorded in initial rate  
25 application.

26 Again the Company contends that Nielsen’s proposed adjustments are conjecture and  
27 devoid of fact and the ACC should defer to the credibility of the owner’s testimony. In order to  
28

1 refute any of Nielsen's proposed adjustments, all the company needed to do was produce any  
2 receipts or documentation to demonstrate the original cost or fair value estimation of the  
3 company wells, hookup fees, land value appraisal, and expenditures for water and sewer mains  
4 for Flag Meadows Unit II and The Townhomes at Flag Meadows. The Company was asked by  
5 RUCO, Nielsen and the ACC Staff to produce documentation reconciling value of plant in  
6 service listed in schedules, CIAC and AIAC, and other key values associated with this rate  
7 case. The company could not produce any documentation supporting land valuation,  
8 expenditures for water and sewer mains, shallow wells 1-5 original costs, and who contributed  
9 to CIAC and the amounts and in fact objected to providing documentation regarding CIAC and  
10 land valuation. Furthermore the company has been reluctant to provide supporting evidence for  
11 operational expenses (e.g. phone bills, car allowance details for Mrs. Perry, and standpipe sales  
12 data).

13           Regarding the wastewater excess capacity adjustments, the Company's argument that a  
14 disconnected active sewage treatment plant should be classified as used and useful rather than  
15 excess capacity because it is being used to dry sludge defies common sense. According the  
16 Utility Source general ledger in 2012 the company paid \$12,659.00 for sewage hauling. Given  
17 that the company would earn approximately \$30,000 as return on the rate base of the not active  
18 sewage treatment it is hard to believe they would incur an additional \$35,000 to haul sewage if  
19 this plant were not being used to dry sludge. Given the fact that the ACC staff engineer  
20 declared the 100,000 gal active treatment is designed to function with the stand alone sludge  
21 storage tanks thus there should be no need for additional storage as it was designed. I find it  
22 interesting that the company makes an economic argument for including this in rate base when  
23 they have made no effort to minimize water pumping costs by utilizing shallow wells.

24           I would be willing to support carrying over previously determined values if the  
25 evidence indicated that the ACC staff had been provided the full information by the company at  
26 the time of the original CC&N (WS04235A-04-0073) and subsequent rate case (WS04235A-  
27 06-0303). It does not appear the company provided full documentation at the time of the  
28

1 original rate case or in the present instance. However the company is required by law to  
2 maintain documents to establish the value of their investments and to provide those to the ACC  
3 so that they may make full determinations. The burden of proof for the original costs of plant in  
4 service lies with the company not the ACC staff, RUCO or other intervenors. If the Company  
5 cannot support the value of its plant in service then the ACC should not accept representations  
6 of value even if they appear reasonable (e.g. land original costs).

7           Given the facts presented by Nielsen in this case the adjustments proposed in Nielsen  
8 Post Hearing Schedule should be adopted by the Commission.

9  
10 **ACC Staff Failure to Address New Information Presented by Intervenors**

11           ACC staff's post hearing brief does not address any of the new evidence raised by  
12 Nielsen in testimony and the hearing. It appears that the ACC staff privileges the  
13 representations of the Company over the clear facts of this case that demonstrate operational  
14 expenses not related to the provision of a public service as well as some rate base values not  
15 supported by the company. Given the detail of the information provided to ACC staff by  
16 Nielsen the rejection of these adjustments should have been addressed with the logic for their  
17 dismissal. It is particularly appalling that ACC staff accepted the idea of payment in lieu of rent  
18 and justified these rental amounts using employees that do not work or live in Queen Creek and  
19 thus overinflating reasonable square footage as well as ignoring the shared use and primary use  
20 of these offices.

21  
22 **Hook-up Fee Refund**

23           On February 18<sup>th</sup>, 2015 in testimony under oath, Mr. McCleve assured the ALJ that the  
24 hookup fees collected from Mrs. Teague would be refunded immediately. As of April 14<sup>th</sup>,  
25 2015 Mrs. Teague has not received a refund of the hookup fees she paid to the Company.  
26  
27  
28

1 **NIELSEN REQUESTS OF THE CORPORATION COMISSION**

2 **Compliance Issues**

3 I would request that the ACC require the company to comply with the following items  
4 prior to the decision in this case becoming effective.

- 5 1) Transfer of Fuelco LLC owned Utility Plant into Utility Source ownership as was  
6 required in Decision 67446. The Company should provide the ACC with a letter from  
7 Coconino County that the deed transfers have been accepted.
- 8 2) File an application for an extension of its CC&N territory to cover mobile home  
9 customers the company is service outside of its service area. This are is not contiguous  
10 to Utility Source CC&N authorized territory.
- 11 3) Refund of Hookup fees collected from Bellemont Residents since initial CC&N.
- 12 4) Commission a full financial forensic audit of Utility Source and related companies from  
13 the time of the initial installation of plant infrastructure to the present.

14  
15 **Violations and Penalties**

16 Nielsen requests that the ACC should, in accordance with A.R.S. Article 9, Violations  
17 and Penalties A.R.S. § 40-421 to 40-429 , enforce all laws governing the behavior of Utility  
18 Source and thus prosecute and enact penalties for Utility Source's failure to comply with  
19 provisions of the law and violation of previous ACC orders. The ACC should also consider  
20 revoking the CC&N of the company given the degree of current and historical violations of  
21 Arizona law and the public interest. Any penalties associated with these violations should be  
22 non-recoverable. These violations include:

- 23 1. Violation of ACC order to consolidate all Utility Plant to Utility Source and subsequent  
24 submissions certifying compliance with decision 67446 when in fact the Company had not  
25 complied with the order. To this day the Company remains out of compliance with the  
26 order even though they were notified on September 2, 2014 in Nielsen's Direct Testimony  
27 that they were out of compliance with ACC order (A.R.S. 40-202(L)).
- 28

- 1 2. Violation of ACC Decision 67446 that prohibited the Company from charging customers  
2 hookup fees for water and wastewater service (A.R.S. 40-202(L)).
- 3 3. Unauthorized expansion of CC&N to provide water service to mobile home park on nearby  
4 but not contiguous parcel to authorized CC&N (A.A.C. R14-2-402E.1)
- 5 4. Unauthorized construction of standpipe to serve customers outside CC&N area and  
6 compete directly with nearby ACC authorized standpipe operation, Bellemont Water.
- 7 5. Violations of rule requiring notification of system outages/interruption in service to ACC  
8 for hydrant pressure and community water system (R14-2-407D.5)
- 9 6. Multiple violations of public safety requirements for minimal operating system conditions  
10 with hydrant pressure (R14-2-407(E)).
- 11 7. Testimony in original ACC CC&N case regarding company knowledge of ACC authority  
12 for provision of public water and sewer system (Nielsen Direct Testimony, p. 4-6)
- 13 8. Inaccurate disclosures to Nielsen and ACC data requests regarding standpipe operation  
14 (Nielsen Direct Testimony p.9) (ARS 40-204A and B)
- 15 9. Failure to submit main extension agreements as per A.A.C. R14-2-406M for system  
16 expansion constructed by Empire companies for Flagstaff Meadows Unit III, Phase I  
17 without any main extension agreement filed with ACC.
- 18 10. Noncompliance with ADWR statute for Deep Well #4 requirements to file drillers report  
19 and well log (A.R.S. 45-600)
- 20 11. Violations of ADWR disclosure of proposed uses of DW 1 and #2 (A.R.S. 45-596C.7)  
21 under Article 12, ARS 45-631 to ARS 45-636.
- 22 12. Sanctions for dispensing bulk water for consumption without ADEQ permits. ACC Staff  
23 engineer testified that dispensing bulk water for consumption would require ADEQ permit  
24 as well as backflow checks.
- 25 13. Failure to maintain accounts and records as required by A.A.C. R14-2-411(d.1) and the  
26 provision of those to the ACC as per A.A.C. R14-2-411(d.3) for valuation of shallow wells,  
27  
28

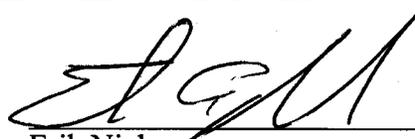
1 land values for water and wastewater plant, and records to reconcile listed CIAC and  
2 expenses for distribution system (ARS 40-204A and B).

3 14. Improper, unlawful and unreasonable inclusion of personal phone bills, personal home  
4 utility bills, and shared operational expenses as inauthentic information on the Company's  
5 accounts and submitted as legitimate operational expenses for the purpose of determining  
6 the Company revenue requirement (A.A.C. R14-2-411D).

7 15. Inappropriate leveraging monopoly power to obtain public customer support for Company  
8 actions that would benefit the company principles and not necessarily in the public interest  
9 (Nielsen Testimony p.8-9).

10 In closing I ask that the ACC fully scrutinize Utility Source's books, make the public  
11 interest the first consideration, and strive for a just resolution that makes it clear in the  
12 regulatory bargain that public service companies such as Utility Source must subject  
13 themselves to ACC scrutiny and act in the public interest if they are to continue in existence as  
14 a public service utility.

15  
16 RESPECTFULLY SUBMITTED this 16th day of April, 2015.

17  
18 

19 Erik Nielsen  
20 4680 N. Alpine Drive  
21 P.O. Box 16020  
22 Bellemont, Arizona 85015

23 **Original and thirteen (13) copies of**  
24 **the foregoing filed this 16th day of**  
25 **April, 2015, with:**

26 Docket Control  
27 Arizona Corporation Commission  
28 1200 West Washington Street  
Phoenix, Arizona 85007

29 **Copy of the foregoing mailed this**  
30 **16th day of April, 2015, to:**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Steve Wene, Esq.  
MOYES SELLERS & HENDRICKS, LTD.  
1850 North Central Avenue, Suite 1100  
Phoenix, Arizona 85004  
[swene@law-msh.com](mailto:swene@law-msh.com)  
Attorneys for Utility Source, LLC

Wes Van Cleve  
Matthew Laudone  
Legal Division  
Arizona Corporation Commission  
120 West Washington  
Phoenix, AZ 85007

Daniel Pozefsky  
Residential Utility Consumer Office  
1110 West Washington St., Suite 220  
Phoenix, Arizona 85007

Terry Fallon  
4561 Bellemont Springs Drive  
Bellemont, Arizona 85015

By:   
Erik A. Nielsen