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BEFORE THE ARIZONA CORPORATION COMMISSION

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**COMMISSIONERS**

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Arizona Corporation Commission

**DOCKETED**

DEC 16 2016

DOCKETED BY

IN THE MATTER OF THE FORMAL  
COMPLAINT OF TALKING ROCK  
RANCH ASSOCIATION FOR  
COMMUNITY PRESERVATION  
CONCERNING BILLING DISPUTE WITH  
ICR WATER USERS ASSOCIATION, INC.,  
A PUBLIC SERVICE CORPORATION  
LOCATED IN YAVAPAI COUNTY,  
ARIZONA.

DOCKET NO: W-02824A-16-0409

ICR WATER USERS ASSOCIATION, INC.'S  
REPLY RE: MOTION TO DISMISS OR IN THE  
ALTERNATIVE, MOTION TO STAY

The ICR Water Users Association, Inc. ("ICRWUA") hereby replies to the response of the Talking Rock Ranch Association For Community Preservation ("Association") to ICRWUA's motion to dismiss, or in the alternative stay the Association's complaint filed in this docket ("ICRWUA's Motion"). The Association requests the Arizona Corporation Commission ("Commission") to simply ignore the complaint pending in the Arizona superior court and trample upon the Court's exclusive jurisdiction even though the complaint fails to state a claim for which relief can be granted. For the reasons set forth in ICRWUA's Motion and below, the Commission must reject the Association's request.

**Motion to Dismiss**

A. Lack of Subject Matter Jurisdiction<sup>1</sup>

This matter involves the payment of what is due on the contract between ICRWUA and the

<sup>1</sup> Contrary to the Association's contention, the Arizona Rules of Civil Procedure govern unless the procedure is set forth by law or Commission rule. See A.A.C. R14-3-101. The rules relied on by the Association do not establish the scope of complaints that can be heard by the Commission nor when a motion to dismiss is appropriate.

1 Association just as the case of *General Cable Corp. v. Citizens Utilities Co.*, 27 Ariz. App. 381, 386,  
2 555 P.2d 350, 355 (1976) involved whether General Cable was required to pay the full amount for the  
3 utility service it contracted to receive. In *General Cable*, the customer planned to build a pulp plant  
4 and entered into a take or pay contract for service. When the customer later decided not to build the  
5 plant, the utility sued for full payment. The customer alleged that the resulting rates were  
6 discriminatory, since it was being forced to pay twice what other customers in its class would pay for  
7 the amount of energy actually used. The customer filed a separate complaint with the Commission  
8 asking the Commission find the contract discriminatory or alternatively, to establish new just and  
9 reasonable rates. The Commission dismissed the complaint on the grounds it lacked jurisdiction to  
10 determine the legality of the subject matter of the contract. In affirming the Commission's  
11 determination, the Court held: "the construction and interpretation to be given to legal rights under a  
12 contract reside solely with the courts and not with the Corporation Commission." *Id.*

13 The issue presented here is whether the Association is required to pay the full price for water  
14 received when there is an intervening billing mistake over a substantial period of time. The matter is  
15 governed by the contract between ICRWUA and the Association, consisting of ICRWUA's tariffed  
16 rates and the rules promulgated by the Commission. ICRWUA has invoked the jurisdiction of the  
17 courts because only the courts can determine if, and to what extent, there is a legal claim for payment  
18 and then provide ICRWUA full relief (i.e., enter a money judgment, together with post-judgment  
19 remedies). The absence of a separate physical document between the parties does not alter the fact  
20 that the tariffs and Commission rules constitute a contract between the utility and its customers. The  
21 fundamental nature of the dispute presented is one based on contract.

22 Arizona law is clear – the tariffs and Commission regulations constitute a contract between  
23 ICRWUA and the Association. This axiom was just recently confirmed by the Arizona Supreme  
24 Court when it affirmed the Court of Appeals decision in *U.S. Airways, Inc. v. Qwest Corp.*, 238 Ariz.  
25 413 (App. 2015) aff'd depublishing portion 2016 Ariz. LEXIS 309, 752 Ariz. Adv. Rep. 18 (Ariz.

1 Nov. 23, 2016). In fact, in *U.S. Airways*, the court held a tariff provision limiting a utility's liability  
2 was binding on non-customers as well. There simply is no requirement that a separate contract be  
3 involved to invoke the "long line of Arizona case law holding that contract disputes are left to the  
4 exclusive jurisdiction of Arizona courts." Response at 3.

5 For the foregoing reasons, the Association's Complaint should be dismissed pursuant to Rule  
6 12(b)(1) of the Arizona Rules of Civil Procedure.

7 **B. Failure to State A Claim For Which Relief May Be Granted**

8 By its complaint, the Association requests the Commission prohibit ICRWUA from  
9 retroactively correcting underbilling errors.<sup>2</sup> Complaint at 6. The Association suggests the  
10 Commission could disallow recovery of five years of underbilling on the grounds it was "not just and  
11 reasonable or in the public interest." Complaint at 4. While these considerations are appropriate when  
12 setting rates, they do not legally justify the retroactive setting of rates and conditions for water that has  
13 already been delivered for the benefit of a single customer.

14 Recognizing the Commission lacks legal authority to retroactively set rates and amend the  
15 conditions of service, the Association now suggests the following assertions constitute a claim for  
16 which relief can be granted: (1) ICRWUA has not "provided sufficient evidence to substantiate the  
17 alleged outstanding amount" and (2) the Association needs an opportunity to determine whether there  
18 was an issue with the meter. These issues, if in fact relevant, can be fully explored through the  
19 superior court action. Certainly, the Commission affords no greater opportunity to the Association to  
20 conduct discovery and present evidence than provided by the superior court.<sup>3</sup>

21 The documentation included with the complaint sufficiently evidences the amount owed. In  
22 fact, the complaint demonstrates ICRWUA acted reasonably and cooperatively with the Association to

23 <sup>2</sup> The Association also requested ICRWUA be prohibited from disconnecting water service to the Association. ICRWUA  
24 will readily stipulate it will not disconnect water service during the pendency of the superior court action for nonpayment  
of amounts accruing before February 1, 2016.

25 <sup>3</sup> The Association continues to misrepresent Decision No. 70977. As explained in ICRWUA's motion, the action leading  
to the Commission's "concern" was taken without the approval of either the Commission or the ICRWUA Board by the  
individual managing the system at the time.

1 ensure that the revised bills were accurate. The Association was informed of the current amount due  
2 more than seven months ago. The Association's failure to point to a particular month as being  
3 recalculated incorrectly or to a particular payment as not being properly credited is telling. If there  
4 truly were remaining concerns about the re-calculation and credits, the Association would have  
5 presented them in its complaint. The assertion that sufficient evidence has not been provided is false  
6 and in any event does not constitute a legal claim upon which relief can be granted.

7 The Association's assertion that there "might" have been an issue with the meter is nothing but  
8 a red herring. As the Commission is well aware, as meters age they read slower not faster. Therefore,  
9 almost all water meter errors under report the amount of water used. Under such circumstances, the  
10 correction resulting from bad meters favors the water company not the customer. Importantly, the  
11 Association never requested its meter be tested. If the Association truly believed the revised billings  
12 reflected a meter malfunction, it would have requested a meter test long ago. It did not. In accordance  
13 with its Tariff BMP 4.2, ICRWUA replaced all of its 2-inch meters over the period commencing late-  
14 2015 through mid-2016, including the meter in question. There is no opportunity to test the meter  
15 today. Mere speculation about whether a meter was faulty does not state a legal claim upon which  
16 relief can be granted.<sup>4</sup>

17 For the foregoing reasons, the Association's complaint should be dismissed pursuant to Rule  
18 12(b)(6) of the Arizona Rules of Civil Procedure.

19 **Alternative Motion to Stay**

20 Just because a case involves a regulated entity or enterprise, the Commission is not vested with  
21 exclusive jurisdiction. The Commission's exclusive jurisdiction is limited to cases involving  
22 determining just and reasonable terms of services offered by a public service corporation, the rates  
23 charged for such services and extends to the enactment of the rules and regulations that are reasonably

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25 <sup>4</sup> The Association incorrectly states that if a billing error is due to a faulty meter, ICRWUA's recovery would necessarily be limited to three months. In fact, A.A.C. R14-2-408(E).1.b. allows billings back to the time of the error, if it can be determined when the meter malfunctioned. There is no dispute as to when the billing error commenced.

1 necessary steps in ratemaking. *Campbell v. Mountain States Tel. and Tel. Co.*, 120 Ariz. 426, 432  
2 (App. 1978). This is a case where the underlying dispute sounds in contract, not in the subject matter  
3 where the Commission has exclusive jurisdiction.

4 A.A.C. R14-3-106 subsections L and M do not vest exclusive jurisdiction in the Commission  
5 nor justify proceeding with the Commission complaint in lieu of allowing the superior court to  
6 determine the matter. The rules merely set forth optional processes for filing both informal and formal  
7 complaints with the Commission. Neither attempt to establish the extent of the Commission's  
8 jurisdiction. Nor do they inform the Commission as to when a matter should be stayed in favor of  
9 allowing a court action to proceed unabated.

10 While tangentially involving matters within the Commission's expertise, the heart of the issue  
11 is a breach of contract/accounting matter (i.e., what charges should have been billed to and paid by the  
12 Association). Regardless of the forum involved, neither the Commission nor the courts may ignore  
13 ICRWUA's duly tariffed rates and the Commission's existing rules.

14 The Commission staff had processed the informal complaint without resolution.<sup>5</sup> The mere  
15 statement that the Association intended to file a formal complaint does not make the Commission the  
16 more appropriate venue to hear the complaint. ICRWUA notified the Association of the past due  
17 amount (as revised) on March 22, 2016. ICRWUA then waited over two months for a meeting, only  
18 to receive a low ball offer of partial payment from the Association. Subsequently, the Association did  
19 agree to meet and the parties continued discussing the matter into June. At that point, the Association  
20 indicated it had reached out to start the process at the Commission and ICRWUA sent a formal billing.  
21 One week later, the Association submitted its informal complaint. ICRWUA then communicated with  
22 Commission staff for another two and one half months trying to resolve the matter, only to have the  
23 Association reject ICRWUA's multi-year payment proposal. After evaluating its options, ICRWUA  
24 authorized the preparation and filing of a complaint in the superior court. Whether, or when, the

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<sup>5</sup> ICRWUA stands by its letter to its member as an accurate representation of the situation.

1 Association would have filed a formal complaint with the Commission is pure speculation. The  
2 Association had little incentive to act promptly.

3 ICRWUA seeks only full payment, at the Commission approved rates, for the water delivered  
4 and used by the Association. ICRWUA is not seeking to terminate the Association's water service.  
5 The court provides the only forum where ICRWUA can secure an enforceable money judgment  
6 against the Association or secure post-judgment remedies (other than authorizing termination of water  
7 service). The inability of the Commission to provide complete relief to ICRWUA justifies dismissing  
8 or, alternatively, staying the Commission action.

9 For the foregoing reasons, ICRWUA respectfully requests, this action be dismissed, or stayed  
10 pending resolution of ICRWUA's previously filed complaint in the Yavapai County Superior Court.

11 RESPECTFULLY SUBMITTED this 16th day of December, 2016.

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LAW OFFICES OF  
WILLIAM P. SULLIVAN, PLLC



William P. Sullivan, Esq.  
501 East Thomas Road  
Phoenix, Arizona 85012  
Attorneys for ICR WATER USERS ASSOCIATION

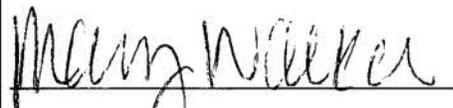
PROOF OF AND CERTIFICATE OF MAILING

1  
2 I hereby certify that on this 16th day of December, 2016, I caused the foregoing document to  
3 be served on the Arizona Corporation Commission by delivering the original and one (1) copy of the  
4 above to:

5 Docket Control  
6 Arizona Corporation Commission  
7 1200 West Washington  
8 Phoenix, Arizona 85007

9 COPY of the foregoing emailed and mailed  
10 this 16th day of December, 2016, to:

11 Fennemore Craig  
12 Patrick Black  
13 2394 East Camelback Road  
14 Suite 600  
15 Phoenix, Arizona 85016-3429

16   
17 \_\_\_\_\_  
18 2068-0100-0200\Pleadings\Reply re: Motion to Dismiss (ACC)