BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

ROBERT "BOB" BURNS, Chairman
ANDY TOBIN
BOYD DUNN
SANDRA KENNEDY
JUSTIN OLSON

IN THE MATTER OF THE APPLICATION OF
EPCOR WATER ARIZONA INC., FOR
INTERIM WATER RATES PURSUANT TO
A.A.C. R14-2-103(B)(11)(h).

Docket No. WS-01303A-19-0011

MAY 6 - 2019

RURO'S APPLICATION FOR REHEARING

The Residential Utility Consumer Office ("RURO"), pursuant to A.R.S. §40-253, files its Application for Rehearing of Decision No. 77147 docketed on April 16, 2019. RURO requests Decision No. 77147 be rescinded and the Commission issue the appropriate final order in the underlying rate case – Docket No. WS-01303A-17-0257 ("the 17-0257 docket", "underlying rate case") disapproving the proposed rate increase. RURO’s purpose for filing this application is solely to protect ratepayers. RURO believes that the legal issues relating to the filing of interim rates were not fully vetted. RURO is concerned with the negative precedent this case may set for future requests of this Commission. Most importantly, RURO is fulfilling its statutory charge to represent the interests of residential ratepayers, many of which were strongly opposed to the process the Commission used to adopt the interim rates. RURO incorporates by reference the procedural history set forth in Decision No. 77147.

The question before the Commission is whether interim rates are appropriate for the Commission to approve, based on the facts of this case? The Commission is subject to Arizona Open Meeting Law under A.R.S. § 38-431(6). Under A.R.S. § 38-431(4) a quorum is

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required to hold an open meeting and to make any legally binding decisions. According to the Open Meeting Law section of the Arizona Ombudsman Office website "A quorum is a majority of the members of the public body unless otherwise provided by law." A similar requirement, unique to the Commission, is found in A.R.S. § 40-102, where it states, "[t]he act of a majority of the commissioners when in session as a board shall be the act of the commission." Arizona Attorney General Opinion No. I16-005 (R16-002) dated Wednesday, May 4, 2016, cited to A.R.S. § 40-102(C) in support of his opinion that the Commission's ratemaking and rulemaking authority "must ultimately be exercised by the Commission, not an individual Commissioner."

Majority rule is a principle used throughout government for making legally binding decisions. It is used in Arizona by the State Legislature and most other State and Municipal Boards and Commissions. Merriam-Webster Dictionary defines majority rule as "a political principle providing that a majority usually constituted by fifty percent plus one of an organized group will have the power to make decisions binding upon the whole." Typically a 5-0, 4-1, 3-2, or 2-1 yes votes, in favor of a requested action, results in the majority rule legally binding approval of the requested action. A less than majority vote results in the non-approval of the requested action. A.A.C. R14-2-103(B)(11)(d) requires the Commission to issue a final order after voting, or disposing of "all parts or phases of the proceeding," on a "Request by a Public Service Corporation Doing Business in Arizona for a Determination of the Value of Property of the Corporation and of the Rate of Return Thereon, or in Support of Proposed Increased Rates or Charges." The relevant part of the rule is:

d. The Commission shall issue a final order that disposes of all issues involved in all parts or phases of the proceeding within the following number of days from the date that a filing is accepted pursuant to subsection (B)(7):

i. For Class A utilities, within 360 days
In addition, in a 1971 Arizona Attorney General Opinion it states, "under the Mountain States Telephone case, supra, the inability of the Commission to grant rate relief within a reasonable time would be grounds for granting interim relief."¹ (Emphasis added). A final decision or order of the Commission triggers a party's legal rights—such as the right to appeal the Commission’s final decision or order. A party can only appeal an order of the Commission relating to rate making to the Court of Appeals. A.R.S. § 40-254.01(A). As a protection to the party, if the Commission fails to issue a final order within the time allotted under A.A.C. R14-2-103(B)(11)(d), a party may seek a remedy of interim rates. A.A.C. R14-2-103(B)(11)(h). The requirement to issue a final order within a certain number of days may be extended under A.A.C. R14-2-103(B)(11)(e), which states in relevant part:

e. Upon motion of any party to the matter or on its own motion, the Commission or the Hearing Officer may determine that the time periods prescribed by subsection (B)(11)(d) should be extended or begin again due to:

ii. An extraordinary event, not otherwise provided for by this subsection.

LESS THAN MAJORITY VOTE IS A FAILED VOTE

Is a less than majority vote made by a quorum of Commissioners considered a decision of the Commission? Yes, when a quorum of the Commission legally meets and votes on a request made by a regulated entity, the inability to reach a majority vote is considered a failed vote and the request fails for lack of majority. The facts of the case are as follows, the Commission held a properly noticed and legally valid Special Open Meeting on January 25, 1971 Op. Att'y Gen. at 13(1971)

¹
2019, for the sole purpose of voting on EPCOR's ("Company") "Application for a Determination of the Current Fair Value of its Utility Plant and Property and For Increases/Decreases in its Rates and Charges." A quorum was present with four of the five Commissioner's participating. By a vote of 2-2, the proposed rate increase by the Company did not receive a majority vote, therefore the request failed. After the vote was taken, the Commission went into Executive Session to obtain legal advice. Upon the Commission returning, there appeared to still be confusion. Commissioner Olson attempted to have the issue reconsidered, however no further action was taken on the item. Legally the proposed rate increase had failed because no approval or "act of the commission" was authorized by a majority vote. Chairman Burns seems to agree with this point when he stated in the March 28, 2019 Open Meeting that the 2-2 tie vote resulted in a “failed” vote.

COMMISSION SHOULD HAVE ISSUED A FINAL ORDER

Should the Commission have issued a final order after the failed vote in the January 25, 2019 Special Open Meeting? Yes, the Commission should have issued a final order, as required by A.A.C. R14-2-103(B)(11)(d), rejecting the proposed rate increase. This did not and has not to date occurred. The Commission cannot treat the issuance of a final order as a formality since the law requires a final order be issued, for among other reasons, to allow parties the opportunity to appeal and to stop the statutory time clock associated with A.A.C. R14-2-103(B)(11)(d). The reason for the inaction by the Commission is not entirely clear, but it seems to be rooted in an interpretation of A.R.S. § 40-102, where it states, "[t]he act of a majority of the commissioners when in session as a board shall be the act of the commission."

Reading this statute out of context may lead one to believe that a less than majority 2-2 or 1-1 vote is not an "act of the commission". By implication this means that only a majority
vote in favor of or against a proposed action is an "act of the commission." This reasoning is inconsistent with majority rule and loses sight of the intent of the vote, which was to approve a request by a regulated entity. No voting majority is required to deny the request because the request was for approval. Such an interpretation creates an obscure voting standard that completely disregards the real possibility of a tie vote, even one taken by a majority of Commissioners. RUCO was unable to locate any case law supporting this interpretation of the Commission's voting procedure. Additionally, this reasoning is inconsistent with Arizona Attorney General Opinion No. 116-005 which states that A.R.S. § 40-102(C) delineates the authority of an individual commissioner with that of the Commission acting as a body. The reasonable interpretation of the Commission's voting procedure, consistent with majority rule and the voting procedures of the State Legislature and most other State and Municipal Boards and Commissions, is that the 2-2 vote of the Commission is an actionable failed vote and the Commission should have issued a final order, thereby protecting the parties legal rights.

Even though the Commission has not as of yet issued the final order, the appropriate action is for the Commission to rescind Decision No. 77147 and issue the appropriate final order in the underlying rate case — Docket No. WS-01303A-17-0257, disapproving the proposed rate increase.

INTERIM RATES UNDER A.A.C. R14-2-103(B)(11)(h) ARE INAPPROPRIATE

Does the lack of a final order warrant the use of interim rates under A.A.C. R14-2-103(B)(11)(h) for exceeding the number of days in which to issue a final order? No, the facts and circumstances of this case provide a reasonable basis for disregarding the time constraints warranting the use of interim rates and the Commission should issue the final order in the underlying case. During the January 25, 2019 Special Open Meeting, Chairman Burns, upon
returning from Executive Session and after a motion to reconsider the item by Commissioner Olson was withdrawn, unilaterally directed the hearing division to open a new docket to consider interim rates pursuant to A.A.C. R14-2-103(B)(11)(h) and to commence the evidentiary hearing process under the Rule. Chairman Burns further directed the Company to file an Application for interim rates pursuant to this same rule. Of note, there was no majority vote or "act of the commission" under A.R.S. 4-0102(C), finding that the 360 day time clock prescribed by A.A.C. R14-2-103(B)(11)(d) had been exceeded. In fact, just prior to the conclusion of the meeting, the issue relating to the 360 day requirement was discussed and Judge Rodda, the Chief Administrative Law Judge, stated the requirement to issue the final order within the 360 days does not apply in this case because there was essentially eleven different rate cases.2

Additionally, the "reasonable time" standard found in the Mountain States case and the AG opinion must consider the number of systems (cases), the size of the case, the number of issues, the number of interveners, etc. Given the number of systems (11), the number of intervenors (more than 10) and the magnitude of the issues in the underlying Company case (full consolidation), it is not unreasonable for the 360 day requirement to not be applicable, as Judge Rodda explained. Therefore, extending the time well beyond the 360 days is not inconsistent with Mountain States and the AG opinion. As such, the requirement to issue a final order within 360 days in inapplicable in the underlying case. With the time clock requirement inapplicable, there is no legal basis for the filing of interim rates under A.A.C. R14-2-103(B)(11)(h). No other basis was provided or used to support the approval of interim rates. Therefore, Decision No. 77147 should be rescinded and the Commission should issue the

2 Special Open Meeting Video starting at 1:56:30.
appropriate final order in the underlying rate case – Docket No. WS-01303A-17-0257, disapproving the proposed rate increase.

For the foregoing reasons, RUCO recommends the Commission rehear the matter, rescind Decision No. 77147, and finalize the underlying rate case by issuing a final order.

RESPECTFULLY SUBMITTED this 6th day of May, 2019.

Daniel W. Pozefsky
Chief Counsel
On this 6th day of May, 2019, an original and thirteen copies of the foregoing document were filed with Docket Control and copies of the foregoing document were mailed on behalf of RUCO to the following who have not consented to email service. On this date or as soon as possible thereafter, the Commission's eDocket program will automatically email a link to the foregoing document to the following who have consented to email service.

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