



MEMORANDUM

Date: July 18, 2022

To: The Honorable Chair and Members
Pima County Board of Supervisors

From: Jan Leshner
County Administrator

A handwritten signature in black ink, appearing to read "Jan Leshner", is written over the printed name and title.

Re: **City of Tucson Differential Water Rate Lawsuit Update**

On [July 5, 2022](#), I provided you with the City of Tucson's reply in support of their motion to dismiss the County's equal protection claims and noted this was the last filing related to that motion. The Court has granted the County request to hear oral arguments related to the matter, scheduled for August 12.

Other procedural updates to share include the City filing a supplemental disclosure statement (Attachment 1) and the County's disclosure of areas of expert testimony (Attachment 2) exchanged with the City.

Please let me know if you have any questions.

JKL/anc

Attachments

c: Carmine DeBonis, Jr., Deputy County Administrator
Yves Khawam, PhD, Senior Advisor, County Administrator's Office

ATTACHMENT 1

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10 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

11 **IN AND FOR THE COUNTY OF MARICOPA**

12 PIMA COUNTY, a body politic in the
State of Arizona,

13 Plaintiff,

14 v.

15 CITY OF TUCSON, et al.,

16 Defendants.
17

Case No.: CV2022-001141

**DEFENDANTS' FIRST
SUPPLEMENTAL DISCLOSURE
STATEMENT**

18
19 Pursuant to Rule 26.1(a) of Civil Procedure, Defendants disclose the following
20 information (supplemental information is shown in *bold italic* type):

21 **I. Factual basis for each defense:**

22 **Count I – A.R.S. § 9-511.01**

23 The City complied with the statutory standards and procedures. Such
24 compliance is detailed in the documents referenced herein and/or produced herewith.

25 The City adopted rates in Ordinance 11881 that are “just and reasonable” and
26 supported by valid policy and financial considerations, including:

1 a. Ordinance 11811 rates support annexation and incorporation by
2 providing a price reduction following annexation or incorporation, thereby incentivizing
3 annexation and incorporation;

4 b. The rates promote environmental sustainability and water conservation
5 in areas outside the City limits, where the City has limited powers to promote those
6 interests. The rates provide a price reduction to customers who decrease their usage,
7 and the Tucson has directed that increased revenue from the differential rates be applied
8 to environmental sustainability and water conservation efforts in the City and the
9 unincorporated area.

10 c. The City, as the owner of the Tucson Water utility, bears financial risks
11 and liabilities that are not shared with the unincorporated county, including financial
12 backstopping of the utility, and

13 d. The rates are supported by the Cost of Service Phase 1 and Cost of
14 Service Phase 2 studies by Galardi Rothstein Group and Raftelis, which found “outside
15 city rate differentials ranging between 6.1% and 25.7%.” (Phase I), based on rate of
16 return differentials, and a “cost-based differential,” of 5% (Phase 2). The 5%
17 differential is “driven by the higher peak demands of the Outside City customers and
18 well as the greater relative cost of constructing, operating, and maintaining the
19 distribution system that serves” them. (Phase 2). The Mayor and Council directed staff
20 to proceed with certain proposed rates, but also directed that the funds from any such
21 rates go to the following categories: (1) Assistance to the Low-Income Program,
22 including rate forgiveness for COVID-19 related uncollectible accounts both inside and
23 outside the City; (2) Infrastructure Replacement, and (3) Water Conservation and
24 Environmental Sustainability. Given this recent direction, it is apparent that the
25 revenues from these increased rates will go toward necessary Tucson Water expenses,
26 and not to the “profit” of the City’s general funds.

1 **Count II – Common Law Rate Discrimination**

2 The circumstances of rendering water service to customers inside and outside the
3 City are not the same.

4 The rates in Ordinance 11881 are supported by the policy and financial
5 considerations recited above.

6 **Count III – Equal Protection – Similarly Situated Customers**

7 The Complaint fails to state a claim upon which relief can be granted. The
8 County is not a “citizen” or a “person.”

9 Customers inside and outside the City are not similarly situated.

10 **Count IV – Race Based Discrimination**

11 The Complaint fails to state a claim upon which relief can be granted. The
12 County is not a “citizen” or a “person.” The County has no race.

13 Before the enactment of Ordinance 11881, the City had agreements with the
14 Tucson Unified School District, the Pascua Yaqui Tribe, and the Tohono O’odham
15 Nation that oblige the City to provide service at the City’s rate.

16 **Count V – Special Law**

17 Ordinance 11881 has a rational relationship to legitimate legislative objectives as
18 recited above.

19 The classification of customers inside and outside the City is legitimate and
20 applies to all customers who are similarly situated. Before the enactment of Ordinance
21 11881, the City had agreements with the Tucson Unified School District, the Pascua
22 Yaqui Tribe, and the Tohono O’odham Nation that oblige the City to provide service at
23 the City’s rate.

24 Water customers can come within the classification through annexation.

25

26

1 **II. Legal theory upon which each defense is based:**

2 **Count I – A.R.S. § 9-511.01**

3 Compliance with statutory standards and procedures.

4 *Jung v. City of Phoenix*, 160 Ariz. 38 (1989).

5 The City Council is presumed to have acted within its legislative authority and
6 constitutional limits.

7 **Count II – Common Law Rate Discrimination**

8 *Town of Wickenburg v. Sabin*, 68 Ariz. 75 (1948).

9 A.R.S. § 9-511(A) establishes the terms for rates charged for water provided to
10 other municipalities like Oro Valley, Marana, and South Tucson.

11 The City Council is presumed to have acted within its legislative authority and
12 constitutional limits.

13 **Count III – Equal Protection – Similarly Situated Customers**

14 See Motion to Dismiss filed May 23, 2022.

15 The County is not a “citizen” under Article 2, Section 13 of the Arizona
16 Constitution or a “person” within the meaning of the Fourteenth Amendment to the
17 United States Constitution, and therefore may not assert an equal protection claim.

18 A.R.S. § 9-511(A) establishes the terms for rates charged for water provided to
19 other municipalities like Oro Valley, Marana, and South Tucson.

20 The City Council is presumed to have acted within its legislative authority and
21 constitutional limits.

22 **Count IV – Race Based Discrimination**

23 See Motion to Dismiss filed May 23, 2022.

24 The County lacks standing to assert an equal protection claim on behalf of any
25 citizen or person.

1 The City Council is presumed to have acted within its legislative authority and
2 constitutional limits.

3 **Count V – Special Law**

4 *E.g., Gallardo v. State*, 236 Ariz. 84 (2014); *Sherman v. City of Tempe*, 202 Ariz.
5 339 (2002).

6 The City Council is presumed to have acted within its legislative authority and
7 constitutional limits.

8
9 **III. Names, addresses and telephone numbers of any witnesses whom the**
10 **disclosing party expects to call at trial and a description of the substance of the**
11 **testimony sufficient to fairly inform the other parties of each witness’ expected**
12 **testimony:**

13 1. Timothy Thomure, Assistant City Manager, City of Tucson. Mr. Thomure
14 was the Director of the Tucson Water Department from 2016 until January 2021, and
15 has been an Interim and now Assistant City Manager since that time. Mr. Thomure was
16 Tucson Water’s primary point of contact with the City’s Mayor and Council during the
17 Council’s adoption of differential rates. Mr. Thomure is expected to testify about
18 Tucson Water’s “Rate Process” that began in FY 2020 and resulted in studies showing
19 that a revenue increase on or about July 2020 for FY 2021 was justified by Tucson
20 Water and its rate consultants’ staff work prior to the commencement of the COVID-19
21 pandemic in the spring of 2020. In the spring of 2020, the City reacted to the COVID-
22 19 pandemic by postponing the ongoing rate/revenue process, and also suspending
23 collection of past-due or delinquent accounts (a “no-shut-offs” policy), and adopting
24 other measures to attempt to decrease the severity of the pandemic with concurrent
25 uncertainty for Tucson Water rates and revenues. Mr. Thomure was responsible for
26 coordinating and leading Tucson Water’s public outreach regarding the differential rates

1 proposal beginning in early 2021, including briefing the Mayor and Council, conducting
2 public meetings, and supervising the preparation of Mayor and Council materials
3 regarding the differential rate proposal. Mr. Thomure is also expected to testify
4 regarding the facts in Section 1.

5 2. John Kmiec, Interim Director, Tucson Water. Mr. Kmiec was the Deputy
6 Director of the Tucson Water Department prior to January 2021, and has been an
7 Interim Director of Tucson Water since that time. Mr. Kmiec was a point of contact
8 with the City Manager's Office and its Mayor and Council during the Council's
9 adoption of differential rates. Mr. Kmiec was responsible for operating and supervising
10 Tucson Water's operations beginning in January 2021, and was involved in Tucson
11 Water's public outreach regarding the differential rates proposal beginning in early
12 2021, including briefing the Mayor and Council, conducting public meetings, and
13 supervising the preparation of Mayor and Council materials regarding the differential
14 rate proposal. Mr. Kmiec is also expected to testify regarding the facts in Section 1.

15 3. Silvia Amparano, Deputy Director, Tucson Water. Ms. Amparano was the
16 Deputy Director of Tucson during the development of the outside-City differential rate,
17 and supervised Tucson Water Business Services and Finance operations. Ms.
18 Amparano led the development of Tucson's "Rate Process" that began in FY 2020 and
19 resulted in studies showing that a revenue increase on or about July 2020 for FY 2021
20 was justified by Tucson Water and its rate consultants' staff work prior to the
21 commencement of the COVID-19 pandemic in the spring of 2020. In the spring of
22 2020, the City reacted to the COVID-19 Pandemic by postponing the ongoing
23 rate/revenue process, and also suspending collection of past-due or delinquent accounts
24 (a "no-shut-offs" policy), and adopting other measures to attempt to decrease the
25 severity of the pandemic with concurrent uncertainty for Tucson Water rates and
26 revenues. Ms. Amparano was responsible for supervising the coordination with Tucson

1 Water's rate consultants during development of the differential rate and was involved in
2 Tucson Water's public outreach regarding the differential rates proposal beginning in
3 early 2021, including briefing the Mayor and Council, conducting public meetings, and
4 supervising the preparation of Mayor and Council materials regarding the differential
5 rate proposal. Ms. Amparano is also expected to testify regarding the facts in Section 1.

6 4. Harold Smith, Raftelis, 5619 DTC Parkway Suite 850, Greenwood Village,
7 CO, 80111; (303) 305-1135. Mr. Smith is expected to testify to his extensive
8 experience with rate design and development, including his work as a consultants to
9 both Tucson Water and Pima County. Mr. Smith will testify to the development of
10 materials for the uncompleted FY 2020 rates and revenue process; the development of
11 the differential rates in Ordinance 11881 and alternate rate proposals for Mayor and
12 Council consideration; the conduct of the Phase I and Phase 2 Cost of Service Study
13 Reports; and responses to Pima County concerns regarding the Phase 1 report. Mr.
14 Smith is also expected to testify regarding the facts in Section 1(a) through 1(d).

15 5. Deborah Galardi, Galardi Rothstein Group, 7327 SW Barnes Road, #224,
16 Portland, OR, 97225; (503)236-0002. Ms. Galardi is expected to testify to her extensive
17 experience with rate design and development, including her work as a consultants to
18 both Tucson Water and Pima County. Ms. Galardi will testify to the development of
19 materials for the uncompleted FY 2020 rates and revenue process; the development of
20 the differential rates in Ordinance 11881 and alternate rate proposals for Mayor and
21 Council consideration; the conduct of the Phase I and Phase 2 Cost of Service Study
22 Reports; and responses to Pima County concerns regarding the Phase 1 report. Ms.
23 Galardi is also expected to testify regarding the facts in Section 1(a) through 1(d).

24 6. Eric Rothstein, Galardi Rothstein Group, 7327 SW Barnes Road, #224,
25 Portland, OR, 97225; (503)236-0002. Mr. Rothstein is expected to testify to his
26 extensive experience with rate design and development, including his work as a

1 consultants to both Tucson Water and Pima County. Mr. Rothstein will testify to the
2 development of materials for the uncompleted FY 2020 rates and revenue process; the
3 development of the differential rates in Ordinance 11881 and alternate rate proposals for
4 Mayor and Council consideration; the conduct of the Phase I and Phase 2 Cost of
5 Service Study Reports; and responses to Pima County concerns regarding the Phase 1
6 report. Mr. Rothstein is also expected to testify regarding the facts in Section 1(a)
7 through 1(d).

8
9 **IV. Names and addresses of each person whom the disclosing party believes may**
10 **have knowledge or information relevant to the subject matter of the action, and a**
11 **fair description of the nature of the knowledge or information each such person is**
12 **believed to possess:**

13 1. The Mayor, Councilmembers and City Manager defendants have knowledge
14 and information regarding the adoption of Ordinance 11881 and the reasons for doing
15 so.

16 2. Kris LaFleur, Office of the Director, Tucson Water, has knowledge or
17 information regarding the development and preparation of materials for submission to
18 the Mayor and Council and the Citizen's Water Advisory Committee and its
19 subcommittees during the development and adoption of differential rates.

20 3. Amber Kerwin, Rates and Revenue Manager, Tucson Water, has knowledge
21 or information regarding Tucson Water's Naviline billing system and other Tucson
22 Water database assets used to provide information to Raftelis and Galardi to operate
23 their rate models.

1 V. Names and addresses of each person who has given a statement – as defined
2 in Rule 26(b)(3)(C)(i) and (ii) – relevant to the subject matter of the action, and the
3 custodian of each of those statements:

4 None.

5
6 VI. The anticipated subject areas of expert testimony:

7 *Rate setting approaches and methodology*

8 *Standard industry practices*

9 *Use of rates to advance policy considerations*

10 *City's financial risks and liabilities*

11 *Factors bearing on reasonableness*

12 *Comparative costs of service to Inside City and Outside City Customers*

13 *Justness and reasonableness of selected rates and rate components*

14 *Reasonableness of differential rates*

15 *Any other subjects of expert testimony within the scope of the Phase 1 and 2*

16 *Outside Differential Analyses*

17
18 VII. A computation and the measure of each category of damages alleged by the
19 disclosing party, the documents and testimony on which such computation and
20 measure are based, and the name, address and telephone number of each witness
21 whom the disclosing party expects to call at trial to testify on damages:

22 Not applicable.

23
24 VIII. The existence, location, custodian and general description of any tangible
25 evidence, documents or electronically stored information that the disclosing party
26 plans to use at trial, including any material to be used for impeachment:

1 1. Mayor and Council Meeting Notice & Agenda dated October 19, 2021 and
2 the following Supporting Documents to Agenda item no. 8

3 MAYOR AND COUNCIL COMMUNICATION OCT19-21-325

4 ATTACHMENT A: PROPOSED ORDINANCE

5 ATTACHMENT B: ADOPTED SCHEDULE OF DIFFERENTIAL RATES

6 ATTACHMENT C: RAFTELIS PHASE 1 PRELIMINARY OUTSIDE
7 DIFFERENTIAL RATE ANALYSIS

8 ATTACHMENT D: RAFTELIS PHASE 2 OUTSIDE DIFFERENTIAL RATE
9 ANALYSIS

10 ATTACHMENT E: PIMA COUNTY CORRESPONDENCE WITH CWAC

11 ATTACHMENT F: PIMA COUNTY RESPONSE TO DIFFERENTIAL RATE
12 COS STUDY

13 ATTACHMENT G: FINAL CWAC RESPONSE ON REVIEW OF
14 DIFFERENTIAL WATER RATES COST OF SERVICE ANALYSIS

15 TUCSON WATER PROPOSED DISCRIMINATORY WATER RATES
16 +++ADDED - OCTOBER 13, 2021+++ ORDINANCE 11881

17 Available at:

18 <https://tucsonaz.onbaseonline.com/1801AgendaOnline/Meetings/ViewMeeting?id=1546>
19 <https://tucsonaz.onbaseonline.com/1801AgendaOnline/Meetings/ViewMeeting?id=1546>
&doctype=2

20 4. Water Service Agreement with Tucson School District No. 1 (1970). (CITY
21 1-9)

22 5. Water Service Agreement with Papago Tribal Utility Authority dated
23 November 20, 1986. (CITY 10-15)

24 6. Water Service Agreement with Tucson Unified School District Number One
25 dated November 19, 1990. (CITY 16-22)

1 7. First Amended and Restated IGA between the City and the Pascua Yaqui
2 Tribe (2021). (CITY 23-58)

3
4 **IX. The existence, location, custodian and general description of any tangible**
5 **evidence, documents or electronically stored information that may be relevant to**
6 **the subject matter of the action:**

7 1. Exhibits to County's Complaint herein.

8 2. Agendas, minutes, audio recordings, materials regarding meetings of the
9 City's Citizen's Water Advisory Committee on February 2, 2021 and March 3, 2021,
10 and the September 16, 2021 Citizen's Water Advisory Committee Financial
11 Subcommittee. Available at:

12 <https://www.tucsonaz.gov/clerks/boards?run=pastminutesaudio&board=23>

13 3. Agendas, minutes, recordings, and materials regarding City Mayor and
14 Council Meetings, including the Regular Session meetings of June 8, 2021 (Agenda
15 Item 8) and June 22, 2021 (Agenda Item 8). Available at:

16 <https://tucsonaz.onbaseonline.com/1801AgendaOnline>.

17 <https://www.tucsonaz.gov/gov/meeting-schedules-and-agendas>

18 <https://www.tucsonaz.gov/gov/mayor-and-council-meetings-audio-archive>

19 [https://www.tucsonaz.gov/tv12/tucson-mayor-council-meeting-regular-session-](https://www.tucsonaz.gov/tv12/tucson-mayor-council-meeting-regular-session-june-8-2021)
20 [june-8-2021](https://www.tucsonaz.gov/tv12/tucson-mayor-council-meeting-regular-session-june-8-2021)

21 [https://www.tucsonaz.gov/tv12/tucson-mayor-council-meeting-regular-meeting-](https://www.tucsonaz.gov/tv12/tucson-mayor-council-meeting-regular-meeting-june-22-2021)
22 [june-22-2021](https://www.tucsonaz.gov/tv12/tucson-mayor-council-meeting-regular-meeting-june-22-2021)

23 4. Tucson Water billing records.

24 5. Documents to be produced by Raftelis Financial Consultants, Inc. in response
25 to subpoena.

1 Original of the foregoing
2 mailed and copy emailed
3 on July 15, 2022 to:

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12 /s/ Adriana Taylor

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ATTACHMENT 2

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11
12 *Attorneys for Plaintiff Pima County*

13
14 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
15 IN AND FOR THE COUNTY OF MARICOPA

16 PIMA COUNTY, a body politic in the State
of Arizona,

No. CV2022-001141

17 Plaintiff,

18 v.

**PLAINTIFF'S DISCLOSURE OF
AREAS OF EXPERT TESTIMONY**

19 CITY OF TUCSON, a municipal
corporation of the State of Arizona,
20 REGINA ROMERO, in her official
capacity as the Mayor of Tucson, LANE
21 SANTA CRUZ, in her official capacity as
Tucson City Councilmember, PAUL
22 CUNNINGHAM, in his official capacity as
Tucson City Councilmember, KEVIN
23 DAHL, in his official capacity as Tucson
City Councilmember, NIKKI LEE, in her
24 official capacity as Tucson City
Councilmember, RICHARD FIMBRES, in
25 his official capacity as Tucson City
Councilmember, STEVE KOZACHIK, in
26 his official capacity as Tucson City
Councilmember, and MICHAEL
27 ORTEGA, in his official capacity as
Tucson City Manager,

Assigned to Hon. Randall Warner

28 Defendants.

1 Plaintiff Pima County (“Pima” or “County”) discloses the following anticipated
2 subjects of expert testimony:

3 1. The inaccuracy and irrationality of the Phase I and Phase II Cost of Service
4 Studies (collectively “COSS”) conducted by Galardi Rothstein Group and Raftelis
5 Financial Consultants, Inc., including but not limited to the issues of: (1) whether the COSS
6 utilized the correct methodology, (2) whether the allocation factors employed in the
7 allocation of costs are reasonable and appropriate (3) whether the COSS appropriately
8 categorized charges and expenses, including whether it accurately categorized charges and
9 expenses as “inside city” versus “outside city”, (4) whether it was appropriate for the COSS
10 to apply a specified “rate of return” to certain customers in unincorporated areas; (5)
11 whether the “rate of return” is fair and reasonable and correctly applied to the “rate base”
12 for unincorporated areas; (6) whether depreciation rates are appropriate; and (7) whether
13 the calculations supporting the COSS were correct.

14 2. The cost of service to Tucson Water Department (“Tucson Water”) customers
15 that are subject to the rates in Tucson City Ordinance No. 11881.

16 3. The difference in cost, if any, to serve Tucson Water customers that are
17 subject to the rates in Tucson City Ordinance No. 11881 (i.e., customers in unincorporated
18 areas that are not exempted) versus customers that are not subject to those rates (i.e.,
19 customers in incorporated areas, Tucson Unified School District campuses, and Native
20 American tribal lands).

21 4. The economics of water and wastewater supply in Pima County, including
22 but not limited to the issues of: (1) whether the City of Tucson and/or Tucson Water
23 customers in incorporated areas bear disproportionate “financial risks” in connection with
24 Tucson Water as compared to Tucson Water customers living in unincorporated areas; (2)
25 whether Tucson Water customers in unincorporated areas subsidize Tucson Water
26 customers in incorporated areas by, among other things, paying more in ad valorem and
27 water service taxes for Central Arizona Project waters and covering the costs to treat and
28 convey water containing contaminants like perfluoroalkyl substances; (3) whether Pima

1 County subsidizes Tucson Water customers by providing recycled water to the City; and
2 (4) how Tucson Water is using funds generated by the rates found in Ordinance No. 11881.

3 5. The impact, if any, that Ordinance No. 11881 has on annexation, including
4 by evaluating whether Ordinance No. 11881 is likely to increase annexation from
5 unincorporated Pima County into incorporated areas.

6 6. The impact, if any, that Ordinance No. 1881 will have on environmental
7 sustainability and water conservation.

8 7. The history of water and wastewater services in Pima County and the City of
9 Tucson.

10 8. The similarities between Tucson Water customers that are subject to the rates
11 in Ordinance No. 11881 (i.e., customers in unincorporated areas that are not exempted) and
12 customers that are not subject to those rates (i.e., customers in incorporated areas, Tucson
13 Unified School District campuses, and Native American tribal lands).

14 9. Race based discrimination, including whether Ordinance No. 11881
15 discriminates on the basis of race by exempting certain Tucson Water customers living on
16 Native American lands from the different rates.

17 10. Rational basis review, including whether Ordinance No. 11881 is rationally
18 related to any legitimate government interest.

19 11. Pursuant to the Court's May 16, 2022 Scheduling Order, Pima reserves the
20 right to supplement this response based on the areas of expert testimony disclosed by
21 Tucson.

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DATED this 15th day of July, 2022.

SNELL & WILMER L.L.P.

By: /s/ Brett W. Johnson
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COPY of the foregoing e-mailed and mailed this 15th day of July, 2022 to:

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/s/ Dominique Clark

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