SUPREME COURT
STATE OF ARIZONA

US AIRWAYS, INC., Petitioner, vs. QWEST CORPORATION et al., Respondents.	No. CV-16-0027-PR Arizona Court of Appeals No. 1 CA-CV 14-0226 Maricopa County Superior Court No. CV2011-001859

BRIEF OF AMICUS CURIAE
ARIZONA INVESTMENT COUNCIL
(FILED WITH THE PARTIES' CONSENT)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

ADMINISTRATIVE DECISIONS

FCC TARIFF

INTRODUCTION[1]

Utility liability limitations must be applied to both customers and non-customers in order to maintain reasonable rates for utility providers. Without liability limitations, the cost of insurance for a utility provider would be astronomical—assuming insurance would be obtainable at all. Utility rates would accordingly skyrocket to cover the insurance costs. From an investor's perspective, voiding the liability limitations in Qwest's tariff would place Qwest's shareholders in the position of shouldering vast liability that they reasonably believed the plain language of the tariff precluded. Clearly established Arizona law upholds tariff provisions as having the force of law, regulated on behalf of the public and applicable to the public in general—not just to customers. Changing the state of the law now to alter the scope of Qwest's tariff is manifestly unfair to Qwest and its shareholders and would have an impact that reaches beyond this particular case, likely dissuading potential investors from investing in Arizona utilities generally. Such a result is contrary both to established law and the public good.

[1] This Brief is being filed with the parties' consent.

INTERESTS OF AMICUS CURIAE

AIC offers this brief in support of the position that the Court of Appeals correctly held that Qwest's tariff limiting its liability for service interruption applies to non-customers under the circumstances presented here. AIC is an organization with nearly 6,000 members, including Arizona utility service providers and individuals who hold stock or debt investments in utilities of all types, including electric, gas, water, and telecommunications. Part of AIC's purpose is to promote policies that encourage utility investment and infrastructure development in Arizona, and to represent the interests of debt and equity investors in Arizona utilities.

AIC and its members have a substantial interest in this proceeding because liability limitations like the one in Qwest's tariff are essential for keeping rates at a reasonable level—a concern for utilities, utility investors, and customers. Honoring the liability limitation of a utility provider's tariff is therefore important for public policy reasons, as well as consistent with longstanding Arizona law.

ARGUMENT

I. Under Clearly Established Arizona Precedent, Utility Tariffs Have the Force of Law, Regardless of the "New" Regulations Passed in the 1990s.

Before the Court of Appeals, US Airways contended "that the tariff does not apply to its negligence claim because it is not a direct customer of Qwest." (Op. ¶ 10.) The Court of Appeals disagreed with US Airways, affirming the trial court's order holding that the tariff is binding on both customers and non-customers. In its petition for review, US Airways abandoned its argument that Qwest's tariff applies to customers only and instead asserted that the tariff is not binding law *at all*, despite plentiful Arizona law to the contrary, due to changes in the regulatory scheme that took place two decades ago, in the 1990s.

As the Court of Appeals noted, Qwest is "a regulated public utility," and as such, its "rates, rules, fees and responsibilities are governed by tariffs enacted and enforced by the FCC and the ACC." (Op. ¶ 11.) Like federal tariffs, state public utility tariffs have the force of law and are binding on all customers. *Sommer v. Mountain States Tel. & Tel. Co.*, 21 Ariz. App. 385, 387, 519 P.2d 874, 876 (1974) ("It is well established that [tariffs] are binding upon all customers whether or not they agree to or have knowledge of their existence."). Limitations on liability for ordinary negligence in the delivery of services are common in tariffs and have been routinely upheld by Arizona courts. *Id.*; *Olson*

v. Mountain States Tel. & Tel. Co., 119 Ariz. 321, 323–24, 580 P.2d 782, 784–85 (App. 1978). Such liability limitations have been routinely upheld in courts around the country as well. *See, e.g.*, *Application of Cent. Power & Light Co.*, 7 Tex. P.U.C. Bull. 53, 1981 WL 178870 (June 22, 1981) (noting that "the acceptability of including limitation clauses in the tariffs of regulated utilities is virtually universal in this country").

US Airways does not and cannot argue that Qwest is no longer regulated, as it clearly remains regulated by both the FCC and the ACC. Rather, US Airways argues that the regulatory changes in the 1990s diminished the *quality* of public utility regulation, such that the Court can no longer trust that the regulations are doing what they are intended to do. US Airways urges that the revised regulatory scheme that has been in place for the last two decades is inadequate and requests that this Court radically change the law to make tariffs nonbinding.

Whether the FCC is regulating utilities strictly enough is a matter for legislative consideration; the Court should not be second-guessing Congress's regulatory scheme. The FCC knew that tariffs have the force of law when it approved the regulatory scheme that has been in place for the past two decades. The FCC would not have altered tariff review as it did unless it believed that the streamlined regulatory scheme effectively protects the public. To the extent

that US Airways believes the regulatory scheme does not provide sufficient oversight, those concerns should be addressed to the FCC or other appropriate legislative body.

Moreover, liability limitations have never been tied to the "strictness" of regulatory oversight. A "limitation of liability [is] an inherent part of the rate" even where the legislature decides that "stringent provisions [are] not required to secure the end in view." *W. Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 571–74 (1921). Contrary to US Airways' assertion (US Airways' Supplemental Brief at 7), there is no "requirement" that the utility be "strictly regulated" for a tariff to have the force of law.[2] Pursuant to § 204(a)(3) of the Telecommunications Act of 1996, tariffs filed on a streamlined basis are "deemed lawful," and the FCC has clarified that this means that "a streamlined tariff that takes effect without prior suspension or investigation is conclusively presumed to be reasonable and, thus, a lawful tariff during the period that the tariff remains in effect." *Implementation of Section 402(b)(1)(A)*, 12 F.C.C. Rcd. 2170, 2182 ¶ 19 (1997).

[2] US Airways does not cite any federal or Arizona law to support the assertion that such a requirement exists.

II. The Plain Language of Qwest's Tariff Binds Non-Customers, Consistent with Public Policy Rationales for Liability Limitations in Utility Tariffs.

In its petition for review, US Airways did not raise the issue of whether a utility tariff limiting liability for service interruption binds *non-customers* in the same manner that it binds customers. Nevertheless, the Court has granted review on this question, and US Airways reembraced the argument in its supplemental brief.

The Court of Appeals' holding that the tariff is binding on the public generally, including non-customers, accords with the plain language of Qwest's tariff and is consistent with the rationales for why liability limitations for utilities are important as a matter of public policy.

Qwest's FCC tariff expressly states that liability is limited to the amount of the service charge on any claim—except for a claim of willful misconduct—brought "by a customer or by any others" for damages arising from a service interruption. Qwest Corporation, Tariff F.C.C. No. 1 § 2.13(B)(1) (Oct. 2011). Thus, the scope of the tariff plainly includes non-customers such as US Airways.

This makes sense as a matter of policy. If the tariff limited liability only on claims brought by customers, a perverse situation would arise in which customers get the worst of both worlds—their own opportunity to recover

damages would remain limited, but they would have to pay much higher rates to cover the cost of insuring the public utility against claims from non-customers. Because rates and liability are inextricably entwined, *Esteve Bros.*, 256 U.S. at 571, allowing non-customers, who will *not* feel the burn of heightened rates, to seek damages from public utilities that never agreed to provide them service, is patently unfair.

The other policy rationale for liability limitations in public utility tariffs also applies to both customers and non-customers. Because a public utility has no way to know to what ends its services will be used or how its facilities may be compromised, there is no practical way for the public utility to estimate and protect itself from the risks. When the non-customer is a huge corporation like US Airways, potential losses could be astronomical, yet a public utility has no way to insulate itself from liability except by means of a liability limitation clause in its tariff. Thus, customers and non-customers facing potential losses if a service interruption occurs are better positioned to insure themselves, rather than forcing a public utility to act as an insurer to all customers and non-customers who might use its services. *Cent. Power & Light*, WL 178870 at *5; *Colich & Sons v. Pac. Bell*, 198 Cal. App. 3d 1225, 1239, 244 Cal. Rptr. 714

(1988).[3] This is especially true in the case of non-customers, as it is even more difficult to estimate risks and insure against potential losses when the public utility would further have to attempt to ascertain which of its non-customer entities are making use of its services.

The argument that non-customers cannot be bound by the language of the tariff due to lack of assent is misplaced; neither customers nor non-customers have an opportunity to assent to a tariff. *Esteve Bros.*, 256 U.S. at 571 ("The rate became, not as before a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed. Assent to the terms of the rate was rendered immaterial, because when the rate is used, dissent is without effect."). The public is both protected and bound by the regulatory scheme approved by lawmakers.

The cases cited by US Airways are not on point. In *Tesoro Ref. & Mktg. Co. LLC v. Pac. Gas & Elec. Co.*, 146 F. Supp. 3d 1170 (N.D. Cal. 2015), the

[3] The issue of whether tariffs bind non-customers is a matter of first impression in Arizona. Both the Arizona Court of Appeals and the Superior Court judge in the case at hand found *Colich* persuasive. The *Colich* court, analyzing facts similar to those here, relied on *Trammell v. W. Union Tel. Co.*, 57 Cal. App. 3d 538, 553, 129 Cal. Rptr. 361 (1976), for the proposition that "limitation of liability provisions [in a tariff] 'are binding on the public generally' because they 'are an inherent part of the established rates and have the force and effect of law.'" US Airways' assertion that "it was error for the Court of Appeals to ignore Arizona precedent and instead rely on *Colich*" (US Airways' Supplemental Brief at 6) is perplexing, considering that no Arizona precedent exists for the proposition that a tariff cannot bind non-customers.

Northern District of California interpreted a tariff that the court found to contain ambiguous language, as it was unclear whether the tariff was limiting liability for negligence or only for service interruptions that were beyond the utility's control. Here, the language of Qwest's tariff unambiguously limits its liability for any claim of service interruption (other than those involving willful misconduct) made by customers or non-customers.

US Airways relies on *1800 Ocotillo, LLC v. WLB Grp., Inc.*, 219 Ariz. 200, 196 P.3d 222 (2008), but that case involved a contract, not a tariff,[4] and moreover, the Court held that the liability-limitation clause was not contrary to public policy.[5]

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[4] US Airways misses the mark when it complains that the limitation clause in the tariff "is unenforceable under Arizona contract law." (US Airways' Supplemental Brief at 3.) A tariff is not a contract. *Esteve Bros.*, 256 U.S. at 570-72 (contrasting limitations of liability in contract law with those in tariffs). Even in the context of an industry that has been *deregulated*, which is not the case here, the Ninth Circuit has explained that "even after deregulation, a tariff, required by law to be filed, is not a mere contract. It is the law." *TransWorld Airlines, Inc. v. Am. Coupon Exch., Inc.*, 913 F.2d 676, 681 (9th Cir. 1990) (internal citation and quotation marks omitted).

[5] US Airways' only policy argument is that enforcing the liability limitation in the tariff renders Qwest's duty of care "irrelevant." (US Airways' Supplemental Brief at 13). Under the tariff, nQwest's liability is limited, not abrogated. An interruption in service exposes Qwest to liability to its many customers and many more non-customers, and also results in negative publicity, which affects its investors and potential investors. Limiting liability in no way eliminates Qwest's incentive to exercise due care.

US Airways included no explanation for how the "filed rate doctrine" cases it cited support its analysis. (*See* Petition at 9 n.3.) The doctrine (requiring that those who use carriers must pay no more or less than the established rate, even if the carrier promises a different rate) applies to entirely different circumstances and has no clear application here.

CONCLUSION

For the reasons outlined above, AIC respectfully requests this Court to affirm the Court of Appeals' holding that Qwest's tariff limiting its liability for service interruption applies to non-customers such as US Airways.

RESPECTFULLY SUBMITTED this 28th day of October, 2016.

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