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April 13, 2004

Lyn Farmer, Chief Administrative Law Judge
Hearing Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

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**Re: Arizona Public Service Company
Docket No.: E-01345A-03-0437**

Dear Judge Farmer:

This letter is to inform you of the refiling of the letter filed with the Corporation Commission on April 8, 2004 together with attachment "A" which was inadvertently left out.

Should you have any questions or concerns, please do not hesitate to contact our office.

Very Truly Yours,

Rochelle D. Jones
Legal Assistant to
Christy C. Brown
For the Firm

Arizona Corporation Commission
DOCKETED

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/rdj

Enclosures

DOCKETED BY

cc: S. David Childers, Esq.
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April 8, 2004

Lyn Farmer, Chief Administrative Law Judge
Hearing Division
Arizona Corporation Commission
1200 W. Washington
Phoenix, AZ 85007

**Re: Arizona Public Service Company
Docket No. E-01345A-03-0437**

Dear Judge Farmer:

This letter concerns the unavailability of certain portions of the rebuttal case of Arizona Public Service Company ("APS" or "the Company") filed with the Commission on March 30.

The APS rebuttal testimony includes extensive discussion and analysis regarding the results of the Company's pending Request for Proposals ("RFP"), which was the subject of a Motion in December 2003 by the Arizona Competitive Power Alliance (the "Alliance") and ruled upon in the Commission's January 8, 2004, Procedural Order.¹ The RFP is discussed on pages 30 to 40 of Mr. Wheeler's rebuttal testimony, and an accompanying exhibit (Schedule SMW-2RB) includes a list of those respondents to the RFP that offered an asset sale to APS or a long-term power purchase agreement ("PPA") backed by specific plants. Mr. Bhatti, in turn, performed a "valuation" of the PWEC Assets based on his "analyses" of the actual bids in the RFP,² which reached the conclusion that "the PPAs offered would be consistently and substantially more costly to APS and its customers over their term than would an asset purchase and subsequent rate-basing for an identical term of years." (Wheeler, p. 39, lines 8-9)

The Alliance's concern is that none of the data supporting these "analyses" performed by APS is available to intervenors in this proceeding, including the Alliance. Schedule SMW-2RB and Mr. Bhatti's Schedules AB-6RB and AB-10RB were redacted, and Mr. Bhatti's workpapers supporting these two Schedules were excluded from the other workpapers. When the Alliance requested that APS provide the unredacted versions, APS replied that the requested information "was provided only to Staff" due to the "confidentiality agreements that APS entered into with

¹ Motion to Revise the Procedural Schedule or, in the Alternative, to Bifurcate Rate Case to Exclude Issues Regarding PWEC Assets, dated December 19, 2003.

² Mr. Bhatti discusses his "valuation" study based on the RFP responses at pages 8-10 and 36-42 of his rebuttal testimony, and includes accompanying exhibits (Schedules AB-6RB and AB-10RB) and workpapers as supporting documentation for the statements and conclusions offered in his testimony.

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Chief Administrative Law Judge Farmer

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the bidders in the RFP [which] do not permit disclosure of information to parties other than the ACC.” (See e-mail dated April 2 from Jeff Guldner to Jamie Van Nostrand, included as Attachment A.) The Alliance – as well as other intervenors – are thus faced with the situation where APS is using the RFP results as the basis for strategic assertions in its rebuttal testimony in this case while at the same time denying parties (other than Staff) access to the data necessary to mount any challenge to APS’s testimony and conclusions regarding the RFP results.

According to the APS rebuttal testimony, making this data unavailable apparently was necessary to preserve the integrity of the RFP process:

“To further preserve bidder confidentiality and to prevent those participating in the RFP from gaining an advantage in that process through their access in this proceeding to the Company’s specific internal economic analysis of their own bids, Mr. Bhatti has submitted portions of his Rebuttal Testimony under seal, and APS has provided them to Staff and intervenors on a confidential and/or redacted basis.” (Wheeler, p. 38, line 23 through page 39, line 2.)

In the Alliance’s view, however, the integrity of the RFP process can be preserved without making the data unavailable. The Alliance has procedures in place that would allow outside counsel and consultants for the Alliance – and **NOT** the Alliance’s Executive Director or its members – to have access to the data for purposes of their participation in the rate proceedings. The Alliance’s outside counsel and consultants have previously executed confidentiality agreements with APS to that effect. (See e-mail from Alliance counsel Jamie Van Nostrand to Jeff Guldner, included as Attachment A.) It is clear from APS’s response in Attachment A, however, that the data will not be made available, notwithstanding these measures in place that would “prevent those participating in the RFP from gaining an advantage.”

It is also apparent from APS’s response to the Alliance that all parties to this case – except for Staff – will be denied access due to the terms of the confidentiality agreements which APS propounded in the RFP process. Thus, parties (other than Staff) are left with no basis upon which to challenge the assertions made by APS, no opportunity to evaluate the analyses or test the underlying assumptions, and no ability to run any sort of competing analyses whatsoever, due to the unavailability of data which only APS (and Staff) have in their possession. This is not the fault of the other parties to this proceeding. It was APS that inserted the confidentiality provisions into the RFP. While we do not object to the provisions, APS cannot now use the data in this proceeding without providing the parties with an opportunity to see the data being used against them.

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Pursuant to the Rate Case Procedural Order, the Alliance requests that this issue be addressed in a procedural hearing. It is our understanding that a procedural conference has been set for April 15 in response to Staff's Motion to Amend Procedural Schedule. We request that this issue be taken up at that conference. This goes beyond a basic discovery dispute such as is contemplated in the Procedural Order.³ Rather than failing to respond to a discovery request, a party is denying access to key data underlying its case, and is thereby denying virtually all the other parties an ability to participate effectively in this proceeding. If all parties cannot be given access to the data necessary to evaluate the statements and conclusions in APS's rebuttal testimony, it is inappropriate for those statements and conclusions to be offered as evidence.

Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "James M. Van Nostrand", followed by a small flourish or mark.

James M. Van Nostrand

JMV:jlf

cc: All parties of Record

³ The Rate Case Procedural Order provides that "in the alternative to filing a written motion to compel discovery, any party seeking resolution of a discovery dispute may telephonically contact the Commission's Hearing Division to request a date for a procedural hearing to resolve the discovery dispute; that upon such a request, a procedural hearing will be convened as soon as practicable; and that the party making such a request shall forthwith contact all other parties to advise them of the hearing date and shall at the hearing provide a statement confirming that all other parties were contacted." (August 2003 Rate Case Procedural Order, p. 4.)

Van Nostrand, James M.

From: Guldner, Jeff [jguldner@swlaw.com]
Sent: Friday, April 02, 2004 1:07 PM
To: Van Nostrand, James M.
Cc: VanNess, Jana.; Thomas.Mumaw@pinnaclewest.com
Subject: RE: APS Rebuttal Testimony



Jamie,

The confidentiality agreements that APS entered into with the bidders in the RFP do not permit disclosure of information to parties other than the ACC (and its Staff, consultants, etc.). Thus, the fact that APS and the ACPA has a confidentiality agreement does not permit APS to disclose this information. The information in the schedules you reference was only provided to Staff.

If there are other materials unrelated to the RFP information to which you are referring, let me know and we'll see if we can work something out as we have done in prior discovery requests.

Best regards,

Jeff Guldner
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-----Original Message-----

From: Van Nostrand, James M. [mailto:JMVANNOSTRAND@stoel.com]
Sent: Friday, April 02, 2004 10:45 AM
To: Guldner, Jeff
Cc: VanNess, Jana.
Subject: APS Rebuttal Testimony

Please provide the confidential portions of the APS rebuttal testimony and exhibits including, without limitation, Schedule SMW-2RB to Mr. Wheeler's testimony and Schedules AB-6RB and AB-10RB to Mr. Bhatti's testimony. Both the outside counsel and outside consultants for the Arizona Competitive Power Alliance have executed the necessary confidentiality agreements to be permitted access to these materials. As we indicated earlier, access to these documents will be limited to outside counsel and outside consultants for the Alliance for purposes of participation in this case, and will not be shared with the Executive Director of the Alliance or any individual members of the Alliance.

Jamie Van Nostrand
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Original and 13 copies of the foregoing filed
this 13th day of April, 2004 with:

Docket Control
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

Copy of the foregoing hand-delivered this
13th day of April, 2004 to:

VIA HAND DELIVERY

Lyn Farmer
Chief Administrative Law Judge
Hearing Division
Arizona Corporation Commission
1200 W. Washington St. **Room 104**
Phoenix, AZ 85007

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