



BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF THE NOTICE OF)
PROPOSED RULE MAKING REGARDING)
THE TRANSPORTATION OF NATURAL)
GAS, OTHER GASES AND HAZARDOUS)
LIQUIDS BY PIPELINES)

DOCKET NO. RG-00000A-04-0169

STAFF'S ADDITIONAL
SUPPLEMENTAL RESPONSE
TO AUG'S COMMENTS ON THE
PROPOSED RULEMAKING

Staff of the Utilities Division ("Staff") of the Arizona Corporation Commission ("Commission") submits its additional supplemental response to the Arizona Utility Group's ("AUG's") comments. Staff does support amending the proposed rule on bedding and shading to allow more flexibility in addressing steel pipe. But Staff does not support the alternative language proposed by Southwest Gas Corporation ("SWG"). Rather, Staff would support the amended language proposed by UniSource Gas, Inc. ("UNS Gas") Staff supports language further defining the term 'failure' within the laboratory testing subsections. Finally, this pleading will indicate why the changes proposed here are not substantial changes and why a supplemental notice is not necessary.

A. SWG's comments on Staff Response to Comments from SWG on the Laboratory

Testing.

SWG filed its written comments August 2, 2004, criticizing the proposed laboratory testing rules. But Staff cannot support the proposals from SWG. Staff does support the comments of UNS Gas, which further specifies and delineates the kinds of removals that are subject to the proposed laboratory testing subsections. Staff believes UNS Gas comments address the concerns aired during the July 19, 2004, public comment hearing.

SWG, in its August 2, 2004, filing gave several different legal arguments as to why the proposed laboratory rules, as initially proposed should not be adopted. The issues are legitimate

1 issues, and analyzing them is important. It is the intent of Staff to fully describe all of those
2 points here. Even so, Staff does not agree with SWG's conclusions about the laboratory testing
3 rules.

4 **1. OPS will not be an operator if the laboratory testing rules are approved.**

5 The proposed laboratory testing rules do not make OPS an operator. An operator is
6 defined in the federal rules as being "a person who engages in the transportation of gas."¹ These
7 federal rules were adopted in Arizona via A.A.C. R14-5-202.B. Neither OPS, nor Staff will be
8 engaged in the transportation of gas. Staff regulates gas transportation, period. Just because OPS
9 is taking a stricter stand over the selection of a laboratory to examine a failed section of pipeline
10 does not thrust it into the realm of being an operator.

11 SWG also impresses upon the Commission that these proposed laboratory testing rules
12 will render the state incompatible with the federal rules. Specifically, the proposed laboratory
13 testing rules will be incompatible with 49 CFR 192.617, which states "Each operator shall
14 establish procedures for analyzing accidents and failures, including the selection of samples of
15 the failed facility or equipment for laboratory examination, where appropriate, for the purpose of
16 determining the causes of the failure and minimizing the possibility of a recurrence." But the two
17 provisions do not conflict with each other. SWG must still establish procedures, only now SWG
18 must work within the framework of the proposed laboratory testing rules for intrastate pipelines.
19 Those procedures can incorporate the laboratory testing rules. Two statutes dealing with the same
20 subject matter should be construed in harmony so as to give force and effect to each². The same
21 principle should be applied to these two regulations, in light of the public safety interests at stake.
22 Staff believes the two regulations can be read in harmony and the laboratory testing rules should
23 not be denied for this reason.

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28 ¹ 49 CFR § 192.3.

² State Land Dept. v. Tucson Rock and Sand Company, 107 Ariz. 74, 481 P.2d 867 (1971).

1 **2. Absolute Immunity may apply; even if it does not apply, proving liability of**
2 **the Commission will be difficult at best.**

3 The law of government immunity against lawsuits has evolved in Arizona over the years³.
4 In the modern day, immunity is considered the exception and not the rule. Even so, the courts in
5 Arizona have recognized that immunity still exists in certain circumstances, especially when
6 dismissing immunity would hamper important governmental objectives from being achieved⁴.
7 Absolute immunity will only apply when the government is performing legislative or judicial
8 functions, or administrative functions involving fundamental governmental policy⁵. Fundamental
9 governmental policy usually involves considerable discretion and weighing of alternatives before
10 proceeding with one course of action⁶. Those functions which are routine and day-to-day
11 functions involving limited or no discretion are considered to be operational and are not cloaked
12 with the protection of immunity⁷. An example would be the difference between the decision to
13 require certification of teachers, where absolute immunity applies, and the decision to certificate
14 an individual teacher⁸. While the former is described as a policy decision, the latter is
15 characterized as implementation of that policy, and is not protected with absolute immunity⁹.

16 The purpose of these laboratory testing rules is for the public health and safety. The
17 decision to require independent laboratory testing and for OPS to choose the lab(s) for testing
18 involve considerable thought and discretion. It is fundamental governmental policy to approve of
19 these laboratory testing rules. The Commission, if it promulgates these rules, is protected by
20 absolute immunity.

21 Whether immunity applies to the implementation of the rules requires more
22 comprehensive analysis, because whether absolute immunity applies is not clear-cut. But OPS'

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24 ³ See *Clouse v. State*, 199 Ariz. 196, 16 P.3d 757, (2001).

25 ⁴ *Clouse*, 199 Ariz. at 202, 16 P.2d at 763;

26 ⁵ A.R.S. § 12-820.01. *Fidelity Security Life Insurance Co., v. State*, 191 Ariz. 222, 225, 954 P.2d
27 580, 583 (1998).

28 ⁶ *Id.*

⁷ See *Warrington v. Tempe Elementary School District*, 187 Ariz. 249, 252-53, 928 P.2d 673,
676-77 (App. Div. 1 1996).

⁸ *Doe ex. rel. Doe v. State*, 200 Ariz. 174, 24 P.3d 1269 (2001).

⁹ *Id.*, at 177, 24 P.3d at 1272.

1 implementation is hardly a routine, daily matter. This is different than simply certifying a
2 teacher, or placing a stop sign for school buses. Choosing a laboratory and choosing what types
3 of tests to perform will be a matter of considerable discretion, depending on the type of incident.
4 The determination of what types of laboratory testing should be done is comparable to the
5 decision of constructing a particular building that is described in the *Fidelity* case as being a
6 policy decision entitled to immunity¹⁰. The lab test rules do not involve routine, day-to-day, and
7 nondiscretionary implementation of policy matters. The decision to send a removed portion of
8 pipeline to a laboratory – as well as the determination of the number and types of tests – is a key
9 decision to determine the root causes of a serious incident to better protect and preserve the
10 public safety. Even so, the question of to choose the number and types of laboratory testing – as
11 well as the laboratory itself – may not be viewed as fundamental governmental policy. But
12 absolute immunity is only part of the story.

13 Showing liability involves more than just a determination of whether absolute immunity
14 applies. Even if absolute immunity does not apply, any party would have to show that the duty of
15 the Commission was breached when OPS chose a particular lab, or when the number and types
16 of testing was inappropriate. None of the cases cited above held that the government entity is
17 liable; rather, those cases reversed rulings in favor of the state because it was not shown that
18 absolute immunity automatically applies¹¹. The case, *Allied Signal Inc. v. City of Phoenix*,
19 further illustrates this point¹². The federal court, interpreting Arizona's absolute immunity
20 statute, held that the negligence lawsuit by the plaintiff, a sprinkler company, against the city for
21 providing bad water should not have been dismissed because of the narrow scope of immunity.
22 But the court stated that it was not making any determinations that the city was negligent, only
23 that it was unable to state that the plaintiffs could not prove negligence:

24 We do not, of course mean to imply that the City or one of its employees was
25 guilty of this or any other negligent act in implementing its water disinfection
policy. Our intent is merely to illustrate that, on its face, AlliedSignal's complaint

26 ¹⁰ *Fidelity*, at 225, 954 P.2d at 583.

27 ¹¹ *Warrington*, at 253, 928 P.2d at 677; *Fidelity*, at 227, 954 P.2d at 585; *Doe*, at 178, 24 P.3d at
1273.

28 ¹² 182 F.3d 692 (9th Cir. 1999).

1 suggests the existence of negligence by the City in delivering the tainted water
2 and, given the narrow scope of governmental immunity in Arizona, if
3 AlliedSignal can produce such evidence showing such negligence it may be able
4 to prevail on its claim¹³.

5 Any person suing the Commission because of laboratory testing would have to show a breach of
6 a duty to prove negligence. If OPS personnel use proper discretion in selecting the number and
7 types of tests, including consultation with the operator, and if OPS personnel select a laboratory
8 in accordance with the proposed laboratory testing rules, then proving a breach of a duty will be
9 difficult at best.

10 Even when a breach is proven, to show a breach was the proximate causation of damages
11 will be still another hurdle. Damages will also have to be shown to be caused by the OPS'
12 selection of a laboratory and/or the number and types of tests. Since damages will more likely be
13 the result of the operation of the pipeline, and since OPS, as described above, will not be an
14 operator, one is hard-pressed to concoct a scenario of how OPS' selection of a lab is the
15 proximate cause of any damages. No amount of creative lawyering will create something out of
16 nothing. Furthermore, qualified immunity could apply, where a showing of gross negligence or
17 recklessness would be required per A.R.S. § 12-820.02, even if absolute immunity does not.
18 Finally, Staff of this Commission makes many decisions implementing Commission policy
19 where absolute immunity does not apply. Yet, those decisions are made to protect and ensure the
20 public interest. This Commission should make the decision on the laboratory testing rules on
21 whether it would advance the public safety and not be paralyzed by the possibility of liability.
22 Staff believes the benefits of these laboratory testing rules still outweigh the costs.

23 **3. Suppression of evidence is appropriate only in circumstances where bad faith
24 can be shown.**

25 Evidence of laboratory test results may be suppressed, but only under certain limited
26 circumstances. Issues concerning destruction of evidence and appropriate sanctions should be
27 decided on a case-by-case basis, considering all relevant factors¹⁴. This issue implicates the
28 spoliation of evidence doctrine that is discussed in several cases in other jurisdictions, which is

¹³ *Id.* at 696.

¹⁴ *Souza v. Fred Carries Contracts, Inc.*, 191 Ariz. 247, 955 P.2d 3 (App. Div. 2 1997).

1 that an adverse inference may only be drawn when intentional conduct causes the destruction or
2 evidence or the failure to preserve evidence¹⁵. In Arizona criminal cases, when evidence that
3 might have aided the defendant is lost or destroyed, a court may instruct a jury that an inference
4 may be drawn that the lost evidence could be unfavorable to the state¹⁶. But the testing done by
5 the state is not suppressed and unless it is shown that the state acted in bad faith, there is no
6 denial of due process¹⁷. So, even prosecutors, when evidence is not intentionally destroyed, are
7 permitted to introduce lab results of destroyed evidence. Similarly, in certain civil proceedings,
8 the state's failure to preserve a sample so that the adverse party can conduct testing on its own is
9 not a due process violation and the lab results may be admitted¹⁸.

10 It is hard to see how lab test results from an independent laboratory – which is not OPS'
11 laboratory – would be suppressed even if destructive laboratory testing occurs. So long as some
12 of the removed portion of pipeline is preserved so that other parties can conduct testing, there is
13 no prejudice or denial of due process. Since other portions of a pipeline involved in an incident
14 can be removed, the issue becomes more remote. Suppressing evidence is a radical remedy that
15 only should occur in very egregious situations. And SWG fails to show how the laboratory
16 testing rules themselves contribute to the suppression of evidence. Simply by not ordering
17 destructive testing until all parties have a chance to address that issue remedies any due process
18 concerns. The independence of laboratory testing enhances the credibility of those results. Just
19 because suppression is a possible remedy does not mean it is probable. Only in rare
20 circumstances should evidence be suppressed. Thus, the Commission should not fear in
21 approving these rules just because of the remote possibility that a scenario may arise where the
22 lab results could be suppressed.

23 **4. No inappropriate cost-shifting is occurring.**

24 SWG relies on cases that are irrelevant to pipeline safety regulation because those cases
25 discuss the Commission's constitutional authority to regulate public service corporations. By

26 ¹⁵ *Hodge v. Wal-mart Stores, Inc.*, 360 F.3d 446 (4th Cir. 2004)

27 ¹⁶ *See State v. Youngblood*, 173 Ariz. 502, 506, 844 P.2d 1152, 1157 (1993).

28 ¹⁷ *Id.* at 504-05, 844 P.2d at 1153-54.

¹⁸ *See Werner v. Prins*, 168 Ariz. 271, 812 P.2d 1089 (App. Div. 1 1991).

1 contrast, pipeline safety regulation stems from A.R.S. § 40-441 and was granted by the
2 legislature. So, the requirement is not a violation of Arizona law.

3 Furthermore, the characterization of this “cost-shifting” as punitive is not accurate. The
4 fact is that operators pay for the testing currently and regulators can make operators pay to
5 perform certain functions and incur certain costs. For instance, there are federal processes, when
6 the National Environmental Policy Act and an Environmental Impact Statement is required,
7 where an entity might pay for analyses even though federal agencies select the consultant doing
8 the analyses and when those federal agencies dictate types of analyses conducted. That process is
9 hardly punitive but a legitimate exercise of government power, regardless of the outcome.
10 Furthermore, laboratory testing is often done before any report is issued and before any adversary
11 administrative proceeding commences. Nothing precludes SWG or any other operator from
12 having its own testing done and proffering evidence and testimony from its testing. Since
13 requiring the operator to pay costs for laboratory testing is not a penalty, A.R.S. § 40-442 is not
14 implicated.

15 **5. Ultimately, the Commission should support the laboratory testing rules**
16 **because the benefits significantly outweigh the risks.**

17 Staff supports UNS Gas’ proposal because it largely achieves the appropriate narrowing
18 of the laboratory testing rules. Its proposal does not sacrifice the public interest. By contrast,
19 SWG’s proposal weakens the purpose of ensuring independent laboratory testing in order to best
20 ensure the public safety of customers and citizens in Arizona. SWG raises many arguments, some
21 more valid than others, but all of those arguments do not fairly describe the potential risks of the
22 laboratory testing rules. These rules, as all rules, are not without some risk, but that risk must be
23 measured with the benefit of preserving the public safety. Staff believes these rules accomplish
24 that benefit. The Commission should only not approve these laboratory testing rules if it finds
25 that the benefits do not outweigh the costs, after those costs have been fully explained. Staff
26 believes it has done that here.

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1 **B. Staff proposes amending R14-5-202(O) in light of comments submitted by AUG and**
2 **El Paso**

3 Staff understands the comments of AUG and El Paso and believes modification of the
4 proposed rule is reasonable. Staff does believe that their concerns are legitimate and that the rule
5 can be modified to their favor while also ensuring that steel pipe coatings are protected from
6 damage. Staff would propose that the proposed regulation, R14-5-202(O), be modified to read as
7 follows:

8 Operators of an intrastate pipeline transporting natural gas, ~~or other gas or~~ hazardous liquid, pipeline system that construct an underground pipeline system
9 using plastic pipe, will bury the installed pipe with a minimum of 6 inches of
10 sandy type soil surrounding the pipe for bedding and shading, free of any rock or
11 debris, unless otherwise protected and approved by the Office of Pipeline Safety. Steel pipe shall be installed with bedding and shading, free of any debris or
12 materials injurious to the pipe coating, unless otherwise protected and approved
13 by the Office of Pipeline Safety.

13 Also, since R14-5-205(I) addresses bedding and shading for master meter system operators, Staff
14 would now propose that the additional sentence addressing steel pipe separately from plastic pipe
15 be included as follows:

16 Operators of a master meter system that construct an underground pipeline using
17 plastic pipe, will bury the installed pipe with a minimum of 6 inches of sandy type
18 soil surrounding the pipe for bedding and shading, free of any rock or debris,
19 unless otherwise protected and approved by the Office of Pipeline Safety. Steel
20 pipe shall be installed with bedding and shading, free of any debris or materials
21 injurious to the pipe coating, unless otherwise protected and approved by the
22 Office of Pipeline Safety.

23 **C. Since these changes are not substantial, there is no need to provide supplemental**
24 **notice or to start the process from scratch.**

25 A.R.S. § 41-1025(B) dictates whether a variance from the proposed rules is substantial,
26 requiring supplemental notice and additional public comment per A.R.S. § 41-1022(E). To
27 determine whether a change from the proposed rule is substantial, the following three criteria are
28 used:

- The extent to which all persons affected by the rule should have understood that the published proposed rule would affect their interests.

- 1 • The extent to which the subject matter of the rule or the issues determined by that
2 rule are different from the subject matter or issues involved in the published
3 proposed rule.
- 4 • The extent to which the effects of the rule differ from the effects of the published
5 proposed rule if it had been made instead¹⁹.

6 Here, the published proposed rules are those that were noticed in the Arizona Administrative
7 Register on June 4, 2004. The rules would be those ultimately submitted for review after
8 approval by the Commission.

9 Staff submits that, using the statutory criteria above, the changes proposed here are not
10 substantial. The same parties are being affected: intrastate pipeline operators and master meter
11 system operators. The changes incorporated here do not expand to encompass other persons or
12 entities. The subject matter, bedding and shading of pipelines and laboratory testing, was
13 introduced in the published proposed rules. No new subject matter is being introduced by the
14 incorporated changes to the published proposed rules. Furthermore, for bedding and shading, the
15 effect of the rules is still the same: to ensure steel pipelines are free from debris that may damage
16 the coating. The changes provide for more flexibility in how that is achieved for steel piping. For
17 laboratory testing, the definition of failure was refined and narrowed to make it clear that the
18 intent of these subsections was that the laboratory testing subsections to apply in certain cases.
19 But the intent of the laboratory testing subsections has not changed with the additional changes
20 incorporated here. Thus, Staff does not believe the changes proposed here are substantial in the
21 sense that they require additional notice and hearings before proceeding to an open meeting for
22 Commission approval.

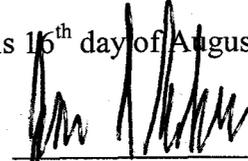
23 **D. Conclusion**

24 Staff supports amending the rules to incorporate most of the comments provided. But
25 Staff does not support SWG's proposed amendments to the rules. Staff believes UNS Gas'
26 amendments on the laboratory testing rules achieve the goals of appropriately scoping what types
27 of failures would mandate OPS notification and the determination by OPS of the lab testing.
28 Staff also believes El Paso's and AUG's comments on amending R14-5-202(O) are appropriate

¹⁹ See A.R.S. § 41-1025(B).

1 and should be adopted for intrastate gas operators and master meter system operators. Finally,
 2 because the proposed amendments are not substantial changes, requiring supplemental notice and
 3 additional hearings is not necessary. Staff recommends the Commission adopt the proposed
 4 Pipeline Safety Rules, as amended by Staff in this pleading and in its past pleadings.

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 6 RESPECTFULLY SUBMITTED this 16th day of August, 2004.



8 Jason D. Gellman, Attorney
 9 Legal Division
 Arizona Corporation Commission
 10 1200 West Washington Street
 Phoenix, Arizona 85007
 (602) 542-3402

11 The original and thirty (30) copies
 12 of the foregoing were filed this 16th day of
 13 August, 2004, with:

14 Docket Control
 Arizona Corporation Commission
 1200 West Washington Street
 15 Phoenix, Arizona 85007

16 COPIES of the foregoing were mailed
 17 this 16th day of August to the following:

18 Mr. Charles G. Taylor, Jr., President & CEO
 Local Gateway Exchange, Inc.
 19 700 North Pearl, Suite 200
 Dallas, Texas 75201

Mr. Larry Daniel
 Customer Construction Dept. Leader
 Arizona Public Service Company
 Post Office Box 53999
 Mail Station 3015
 Phoenix, Arizona 85072-3999

20 Ms. Connie Wightman
 Technologies Management, Inc.
 21 210 North Park Avenue
 Winter Park, Florida 32789

Mr. Mark Battaglia
 City Manager
 City Of Benson
 Post Office Box 2223
 Benson, Arizona 85602

22 Mr. Steve Williams
 Plant Manager
 Arizona Public Service Company
 23 Post Office Box 53999
 Mail Station 4120
 24 Phoenix, Arizona 85072-3999

Mr. Gail Robinson
 Southwest Gas Corporation
 Post Office Box 1028
 Page, Arizona 86040

25 ...
 26
 27
 28

1	Mr. Doug Mann	Mr. Ken Mecham
2	Manager	Director
3	Energy West Arizona	Gila Resources
4	200 West Overland	Post Office Box 272
5	Payson, Arizona 85541	Safford, Arizona 85548
6	Mr. Gary Powell	Mr. Gary Smith
7	Manager	Vice President
8	Amerigas Terminal	Unisource Energy
9	14702 West Olive Avenue	2901 West Shamrell Boulevard, No. 110
10	Waddell, Arizona 85355	Flagstaff, Arizona 86001
11	Mr. Jack McBride	Mrs. Debra Jacobson
12	Copper Market Incorporated	Manager Regulatory Affairs
13	c/o Cyprus Bagdad Copper Company	Southwest Gas Corporation
14	Post Office Box 245	Post Office Box 98510
15	Bagdad, Arizona 86321	Las Vegas, Nevada 89193-8510
16	Mr. Jim Vescio	Mr. Frank Gonzales
17	Station Manager	Director of Utilities
18	Swissport Fueling Inc.	City of Wilcox
19	4200 East Airplane Drive	155 West Maley
20	Phoenix, Arizona 85034	Wilcox, Arizona 85643
21	Mr. Jack Shilling	Mr. Steve Barlett
22	General Manager	Manager
23	Duncan Rural Service Cooperative	Applied LNG Technologies
24	Post Office Box O	8101 North 34 th Street
25	Duncan, Arizona 85534	Amarillo, Texas 79121
26	Mr. Dennis LLOYD	Ms. Becky Gardner
27	Manager, Compliance	Senior Human Resources Assistant
28	El Paso Natural Gas Company	City of Mesa
29	5151 East Broadway, Suite 1680	Post Office Box 1466
30	Tucson, Arizona 85711	Mesa, Arizona 85211-1466
31	Mr. Steve Lines	Mr. Jay Bowcutt
32	General Manager	Vice President/General Manager
33	Graham County Utilities, Inc.	Nucor Steel Utah
34	Post Office Drawer B	Post Office Box 100
35	Pima, Arizona 85543	Plymouth, Utah 84330
36	Mr. David Plumb	Mr. Jack Williams
37	Gas Manager	Pinalco Aerospace Aluminum
38	City of Mesa	6833 West Willis Road
39	Post Office Box 1466	Box 5050
40	Mesa, Arizona 85211-1466	Chandler, Arizona 85226

1	Pinal County Building Inspections	Mr. Jim Gholson
2	Queen Creek, Magma Gas Area	Northern Pipeline Construction Co
3	Building Safety Division	3024 West Weldon Avenue
4	Post Office Box 827	Phoenix, Arizona 85017
5	31 North Pinal St. Bldg. D	
6	Florence, Arizona 85232	Mr. Walt Jones
7		Henkles and McCoy, Inc.
8	U S WEST Communications	21601 North 3 rd Avenue
9	Regulatory Division	Phoenix, Arizona 85027-2907
10	3033 North 3 rd Street	
11	Room 1010	Mr. Tom Mattingly
12	Phoenix, Arizona 85012	Superintendent
13	Mr. Greg Merdick	City of Mesa
14	Cox Cable	Building Inspections
15	Community Relations	Post Office Box 1466
16	17602 North Black Canyon Highway	Mesa, Arizona 85211-1466
17	Phoenix, Arizona 85053	
18	Chris Tyrek	ASARCO Incorporated
19	Cable America	c/o Webb Crockett, Esq.
20	2720 East Camelback Road	Fennemore Craig
21	Phoenix, Arizona 85016	3003 North Central Avenue, Suite 2600
22		Phoenix, Arizona 85012
23	Jones Intercable	The Arizona Utility Group
24	Regulatory Division	c/o Kevin Kent
25	8251 North Cortaro Road	City of Mesa
26	Tucson, Arizona 85743-9599	Post Office Box 1466
27		Mesa, Arizona 85211-1466
28	Tucson Electric Power	
29	Legal Department – DB203	Mr. John H. Shorbe, Sr.
30	220 West 6 th Street	Southern Arizona Home Builders
31	Post Office Box 711	Association
32	Tucson, Arizona 85072	2840 North Country Club Road
33		Tucson, Arizona 85716
34	Mr. David Martin	
35	Association of General Contractors	Mr. John Rueter
36	1825 West Adams	Park Manager
37	Phoenix, Arizona 85007	Canyon Valle Airpark
38		801 South State Route 64, Space 100
39	Mr. Clark Tartar and Mr. Frank Harris	Williams, Arizona 86406
40	Arizona Pipeline Company	
41	3111 West Lincoln Street	Mr. Bryan Jaconi
42	Phoenix, Arizona 85009	Manager
43		Havasas Springs Resort
44		2581 Highway 95
45		Parker, Arizona 85344

1 Mr. Rus Brock
2 Deputy Director
3 HBACA
4 2111 East Highland, Suite 190
5 Phoenix, Arizona 85016

6 Mr. Glen Myers
7 Manager
8 Ikard and Newsom
9 Post Office Box 217
10 Flora Vista, New Mexico 87415

11 Mr. Tom Yazzi
12 Superintendent of Schools
13 Kayenta School District No. 27
14 Post Office Box 9000
15 Window Rock, Arizona 86515

16 Ms. Janet Slowman Chee
17 Superintendent of Schools
18 Red Mesa Unified School District No. 27
19 HCR 6100, Box 40
20 Teec Nos Pos, Arizona 86514

21 Dr. Hector G. Tahu
22 Superintendent of Schools
23 Tuba City Unified School District No. 15
24 Post Office Box 67
25 Tuba City, Arizona 86045

26 Mr. Donimic Antignano
27 President
28 Zapco Energy Tactics Corporation
1420 - D Church Street
Bokemia, New York 11716

Mr. Ray Vernon
Superintendent
Pinon Unified School District No. 4
Post Office Box 839
Pinon, Arizona 85610

Mr. David A. Salyers
Abbott RPD Manager
Utility & Facility Manager
Abbott Labs
1250 West Maricopa Highway
Casa Grande, Arizona 85222

Mr. Lyle Iedje
Manager, Pipeline Operations
Calpine Pipeline Company
60 River Road
Rio Vista, California 94571

Mr. Justin B. Jessop
Gas Department Supervisor
Colorado City Gas
Post Office Box 840809
Hildale, Utah 84784

Dr. Peter M. Belleto
Superintendent
Ganado Unified Scholl District No. 20
Post Office Box 1757
Ganado, Arizona 86505

Mr. Dan Baer
Plant Manager
Panda Gila River
1414 West Broadway Road
Suite 145
Tempe, Arizona 85282


Angela L. Bennett