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BEFORE THE ARIZONA CORPORATION COMMISSION

30B

COMMISSIONERS

MARC SPITZER - Chairman
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AZ CORP COMMISSION
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Arizona Corporation Commission
DOCKETED

NOV 19 2004

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AVIS READ, individually, and behalf of all others
similarly situated,

Complainant,

v.

ARIZONA PUBLIC SERVICE COMPANY,

Respondent.

DOCKET NO. E-01345A-04-0657

IN THE MATTER OF THE APPLICATION OF
ARIZONA PUBLIC SERVICE COMPANY FOR A
DECLARATORY ORDER REGARDING BILL
ESTIMATION PROCEDURES.

DOCKET NO. E-01345A-03-0775

**ARIZONA CORPORATION
COMMISSION STAFF'S BRIEF**

On November 2, 2004, the Administrative Law Judge issued a procedural order asking the parties to brief the following legal issues:

1. The Commission's jurisdiction to maintain a class action;
2. The effect of the Superior Court's ruling on the issue of a class action;
3. Whether the Complaint has met the requirements of Ariz. R. Civ. P. 23;
4. Whether the Commission should, instead of maintaining a class action pursuant to Ariz. R. Civ. P. 23, exercise its statutory and constitutional jurisdiction to hear the Complaint and expand its scope and remedies class-wide if the evidence warrants;
5. What is the appropriate legal standard for evaluating whether APS' meter reading and bill estimation practices are reasonable, appropriate, and in compliance with Commission statutes and rules; and
6. What kind of notice, if any, is appropriate at this stage of the proceeding.

The following brief provides Staff's response to these issues.

1 **I. THE COMMISSION HAS JURISDICTION TO MAINTAIN A CLASS ACTION.**

2 §The Arizona Corporation Commission (“Commission”) has jurisdiction to maintain a class
3 action both under the Arizona Administrative Code and the Arizona Rules of Civil Procedure.

4 The Commission’s administrative regulations appear to allow class-action suits both for
5 parties and intervenors. Parties may form a class, for the purpose of a hearing, under A.A.C. R14-3-
6 104(C):

7 When two or more parties have substantially like interests and positions,
8 the presiding officer may declare them a class of parties present and
9 appearing for purposes of the hearings. The members of a class shall
10 designate one of their numbers to be representative of a class in the
11 hearing. If the members of a class cannot agree on a representative, the
presiding officer designates one of them to be representative of the class.
The presiding officer may deem participation by other members of the
same class to be cumulative and may restrict its presentation accordingly.
More than one class may be established for a hearing.

12 A.A.C. R14-3-104(C). An intervenor may proceed to establish a class under A.A.C. R14-3-105(C),
13 which states:

14 When two or more interested persons under this rule have substantially
15 like interests and positions, the presiding officer may declare them a class
16 of interested persons for purposes of the hearing. The members of the
17 class shall designate to be spokesman for the class one of their number, or
18 his attorney, or such greater of their number, or attorneys, as the presiding
officer shall determine. More than one class may be established for a
hearing.

19 Class action suits in administrative proceedings have been sanctioned by the court system. See
20 Arizona Dept. of Revenue v. Dougherty, 200 Ariz. 515, 522, 29 P.3d 862, 869 (2001) (“[W]e hold
21 that the class device is a suitable vehicle for exhaustion of administrative remedies when not
22 expressly prohibited by statute”).

23 While the Commission’s class participation rules are less defined than the class-action rule
24 seen under the Arizona Rules of Civil Procedure, the essence is the same. The Commission’s rules
25 appear to do what a class-action suit in a state or federal courtroom would do: take numerous people
26 with “substantially like interests and positions” and instead of hearing individual cases, a class is
27 formed with one chosen “representative.” See A.A.C. R14-3-104(C), -105(C). This a less formal
28 class-action test than that required under the Arizona Rules of Civil Procedure; however,

1 administrative proceedings are known for being less formal than Superior Court proceedings. See
2 A.A.C. R14-3-109(K).

3 Additionally, the Commission's regulations state that "[i]n all cases of which procedure is set
4 forth neither by law, nor by these rules, nor by regulations or orders of the Commission, the Rules of
5 Civil Procedure for the Superior Court of Arizona as established by the Supreme Court of the state of
6 Arizona shall govern." A.A.C. R14-3-101. Even if the Commission were to determine that R14-3-
7 104(C) does not provide for class actions, R14-3-101 provides an alternate authority for class-action
8 suits before the Commission. This conclusion is consistent with the purpose of class actions.

9 Class actions were developed to provide a convenient method of litigating
10 claims involving large numbers of people. In appropriate cases, class
11 actions provide benefits to both claiming and defending parties and serve
12 as a practical tool for resolving multiple claims on a consistent basis at the
least cost and with the least disruption to an overloaded judicial system.

13 Andrew S. Arena, Inc. v. Superior Court in and for County of Maricopa, 163 Ariz. 423, 425, 788 P.2d
14 1174, 1176 (1990). See Dougherty, 200 Ariz. at 522, 29 P.3d at 869.

15 **II. THE COMMISSION IS NOT BOUND BY THE SUPERIOR COURT'S RULING ON**
16 **CLASS ACTION STATUS.¹**

17 Even though the Superior Court failed to certify Read's class-action case, the Commission has
18 no obligation to follow the Superior Court's class-action decision. This is because under Ariz. R.
19 Civ. P. 23(c)(1) a court may change its ruling on a class certification until such time as a decision on
20 the merits has been made within the case.

21 As soon as practicable after the commencement of an action brought as a
22 class action, the court shall determine by order whether it is to be so
23 maintained. An order under this subdivision may be conditional, and may
be altered or amended before the decision on the merits.

24 Ariz. R. Civ. P. 23(c)(1) (emphasis added). In the Superior Court, Read's case was dismissed
25 without prejudice before any decision on the merits had been reached. Thus, the judge in the Superior
26 Court case could have changed her mind about whether to certify the class or not.

27
28

¹ Commission Staff does realize that section II of this brief was originally the third question asked by the ALJ. However,
it is believed that by switching question two and question three's order, the brief is easier to understand and follow.

1 “Ordinarily, an order granting or denying permission to proceed with a class action is merely
2 interlocutory, and is not final until all issues and parties involved in the lawsuit are finally disposed
3 of.” Markiewicz v. Salt River Valley Water Users' Ass'n, 118 Ariz. 329, 340, 576 P.2d 517,
4 528 (App. 1978). In Read’s Superior Court case, the court never reached the merits. The court
5 dismissed the case without prejudice, concluding that Plaintiff’s claims fall within the Commission’s
6 areas of primary jurisdiction. (Minute Entry at 1, August 19, 2004). Where the court has clearly not
7 addressed the merits, the court’s failure to certify the class has no preclusive effect. Garcia v. Gen.
8 Motors Corp., 195 Ariz. 510, 514, 990 P.2d 1069, 1073 (App. 1999) (“For collateral estoppel to
9 apply . . . a valid and final decision on the merits must have been entered.”) (emphasis added); State
10 v. Whelan 208 Ariz. 168, 91 P.3d 1011, 1015 (App. 2004).

11 In Eaton v. Unified School Dist. No. 1 of Pima County, the court followed this logic,
12 concluding that “it cannot even be said that the order finally disposed of the only issue with which it
13 was concerned—class certification. Rule 23(c)(1), Ariz. R. Civ. P., expressly provides that such an
14 order ‘may be altered or amended before the decision on the merits.’” Eaton, 122 Ariz. 391, 392,
15 595 P.2d 183, 184 (App. 1979). Additionally, the Markiewicz court recognized that “[t]he Arizona
16 Rules of Civil Procedure do not contemplate that an order allowing or disallowing a class action will
17 be final.” Markiewicz, 118 Ariz. at 341, 576 P.2d at 529 (footnote 10).

18 The Commission has jurisdiction to rule on the class action issue because the Superior Court
19 case was dismissed without prejudice. “[D]ismissal ‘without prejudice’ by its very terms permits a
20 new suit to be brought on the same cause of action. The clear weight of authority is that dismissal
21 ‘without prejudice’ has no res judicata effect.” Oldenburger v. Del E. Webb Development Co., 159
22 Ariz. 129, 133, 765 P.2d 531, 535 (App. 1988).

23
24 **III. THE COMPLAINT HAS FAILED TO MEET THE REQUIREMENTS OF RULE 23**
25 **OF THE ARIZONA RULES OF CIVIL PROCEDURE.**

26 The requirements for certifying a class action suit can be found under Rule 23 of the Arizona
27 Rules of Civil Procedure. The first step to having a certifiable class is to pass the four requirements
28 of Rule 23(a). Once Rule 23(a) has been satisfied, then one must fulfill at least one of the

1 requirements of Rule 23(b). In addition, Read's complaint would also have to fulfill the
2 discretionary requirements of A.A.C. R14-3-104(c). At this time, Read's Complaint fails to meet the
3 requirements of a class action suit.

4 **A. Read Appears to Meet All Four Requirements Under Ariz. R. Civ. P. 23(a).**

5 The rule for certifying class-action suits can be found under Ariz. R. Civ. P. 23. The first part
6 of the rule has four requirements, all of which Read appears to have met at the moment.

7 One or more members of a class may sue or be sued as representative
8 parties on behalf of all only if (1) the class is so numerous that joinder of
9 all members is impracticable, (2) there are questions of law or fact
10 common to the class, (3) the claims or defenses of the representative
11 parties are typical of the claims or defenses of the class, and (4) the
representative parties will fairly and adequately protect the interests of the
class.

12 Ariz. R. Civ. P. 23(a)

13 **1. Class Size.**

14 From all appearances, the size of the potential class makes it a natural for a class-action
15 setting. In her Superior Court case, Read sought to certify as a class all persons who paid estimated
16 APS bills, from September 1, 1998 to the present. According to APS' own webpage, it serves "more
17 than 900,000 customers in 11 of the state's 15 counties."

18 http://www.aps.com/general_info/newsrelease/newsreleases/NewsRelease_230.html.

19 There is no bright line rule regarding the number of class members that
20 will satisfy the numerosity prerequisite of rule 23. ...It has been
21 determined, however, that if the named representatives are the only
members of the class, rule 23(a)(1) has not been satisfied.

22 London v. Green Acres Trust, 159 Ariz. 136, 141, 765 P.2d 538, 543 (App.1988) (internal citations
23 omitted).

24 In the previous Superior Court proceedings, APS failed to argue that Read had not satisfied
25 the class-size requirement, assumably because the class is legally numerous enough to proceed under
26 a class-action suit. At this point, it appears that Read has met the requirements of Ariz. R. Civ. P.
27 23(a)(1).

1 **2. Common Questions of Law or Fact.**

2 The potential class appears to share a common question of law, although it may not share a
3 common question of fact. “Rule 23(a)(2) requiring that common questions of law or fact be present
4 does not require that all questions of law and fact raised by the dispute be common.” Reader v.
5 Magma-Superior Copper Co., 110 Ariz. 115, 118, 515 P.2d 860, 863 (1973).

6 The basic question of law is whether APS used reasonable measures to determine when to
7 estimate its bills and how to estimate those bills. This question of law appears to underlie Read’s
8 Complaint. At this time, it is too early to determine if the class shares a common question of fact, as
9 there are many situations in which bills may have been estimated. See A.A.C. R14-2-210(3)(a-e)
10 (listing conditions under which estimated bills may be issued).

11 **3. The Claims or Defenses of the Representative Parties Are Typical of the**
12 **Claims or Defenses of the Class.**

13 When evaluating the typicality requirement under Rule 23(a)(3), courts look to see if the
14 claims are typical and not necessarily how typical the relief would be. In Arnold v. Arizona Dept. of
15 Health Services, 160 Ariz. 593, 775 P.2d 521 (1989), the Superior Court certified 4,500 indigent
16 chronically mentally ill persons as a class. The action sought to compel local government to provide
17 the class members with adequate mental health care. The court certified the class even though it
18 recognized that each class member had individualized needs; yet as a collective, they met the
19 typicality requirement. Arizona courts have looked at the representative of the class to see if there
20 are common questions between the representative and the class, to determine if the class
21 representative’s position is antagonistic to the interests of the class, and to determine if the class
22 representative’s alleged grievance is identical to that of the class. Lennon v. First Nat. Bank of
23 Arizona, 21 Ariz. App. 306, 309, 518 P.2d 1230, 1233 (App. 1974).

24 In her motion to intervene, Read claims that “APS has been knowingly and systematically
25 secretly billing APS customers for electricity that its customers have not used and that such bills were
26 rendered and collected based on procedures and methodologies that are unlawful” Read Motion
27 to Intervene, February 25, 2004. These are the same claims in Read’s Complaint to the Commission.
28

1 In short, Read's concerns center around the appropriateness of APS' bill estimation procedures, and
2 her claims appear to be typical of those of the potential class.

3 **4. The Representative Party Will Fairly and Adequately Protect the Interests**
4 **of the Class.**

5 This last prong of Rule 23(a) requires the party heading the class action to fairly and
6 adequately protect the interests of the class as a whole.

7 (A)n essential concomitant of adequate representation is that the party's
8 attorney be qualified, experienced and generally able to conduct the
9 proposed litigation. Additionally, it is necessary to eliminate so far as
10 possible the likelihood that the litigants are involved in a collusive suit or
that plaintiff has interests antagonistic to those of the remainder of the
class.

11 Lennon at 309, 1233 quoting Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562-563 (2nd Cir. 1968).

12 Read has been involved in this matter since June 4, 2002 when she first filed a class-action
13 lawsuit against APS. After APS filed its Application for Declaratory Order before the Commission,
14 Read moved to intervene. Finally, after her Superior Court case was dismissed in August of 2004,
15 Read filed a complaint before the Commission. This history appears to support the conclusion that
16 Read has obtained competent and tenacious legal counsel. Under these circumstances, Read appears
17 to be a satisfactory class representative.

18 **B. This Case Fails to Meet the Requirements of Rule 23(b) of the Arizona Rules of**
19 **Civil Procedure.**

20 Besides having to meet the requirements of Rule 23(a), a class action must also meet at least
21 one requirement of Rule 23(b). However, Read has failed to meet any of the prongs set forth in Rule
22 23(b). One of the following factors must be applicable in order for a class to be certified:

23 (1) the prosecution of separate actions by or against individual
24 members of the class would create a risk of (A) inconsistent or varying
25 adjudications with respect to individual members of the class which
26 would establish incompatible standards of conduct for the party
27 opposing the class, or (B) adjudications with respect to individual
28 members of the class which would as a practical matter be dispositive
of the interests of the other members not parties to the adjudications or
substantially impair or impede their ability to protect their interests; or

1 (2) the party opposing the class has acted or refused to act on grounds
2 generally applicable to the class, thereby making appropriate final
3 injunctive relief or corresponding declaratory relief with respect to the
4 class as a whole; or (3) the court finds that the questions of law or fact
5 common to the members of the class predominate over any questions
6 affecting only individual members, and that a class action is superior to
7 other available methods for the fair and efficient adjudication of the
8 controversy. The matters pertinent to the findings include: (A) the
9 interest of members of the class in individually controlling the
prosecution or defense of separate actions; (B) the extent and nature of
any litigation concerning the controversy already commenced by or
against members of the class; (C) the desirability or undesirability of
concentrating the litigation of the claims in the particular forum; (D)
the difficulties likely to be encountered in the management of a class
action.

10 Ariz. R. Civ. P. 23(b).

11 **1. A Class Action is Not the Best Method to Adjudicate this Dispute in This**
12 **Forum.**

13 Read claims that her case qualifies as a class action under Rule 23(b)(3), which contains two
14 requirements: 1) the questions of law or fact common to the class members must predominate over
15 any questions affecting only individual members; and 2) a class action must be superior to other
16 available methods of adjudication. Read cannot meet these requirements because a class action is not
17 a superior method for adjudicating this controversy.

18 Rule 23(b)(3) allows the decision maker to consider “the desirability or undesirability of
19 concentrating the litigation of the claims in the particular forum” and “the difficulties likely to be
20 encountered in the management of a class action.” Ariz. R. Civ. P. 23(b)(3). Rule 23(b)
21 acknowledges that not every forum is appropriate for a class action. In this case, any difficulties
22 presented by a class action could certainly be managed by the Commission’s able Hearing Division.
23 The more important issue, however, is whether certification of the class will provide sufficient public
24 benefits to outweigh any potential difficulties and complexities. Staff believes that it will not.

25 The Commission already has the ability to broaden the inquiry in this matter and to fashion
26 appropriately broad relief, even in the absence of any class certification. The additional procedural
27 complexities and special notice requirements that apply to class actions will only serve to make the
28 proceeding longer, more difficult, and more expensive for the parties to litigate. A class action

1 therefore creates the potential to complicate the proceeding without adding any benefits that are not
2 already available. This result would appear to interfere with the Commission's desire to handle this
3 matter as efficiently as possible. Under these circumstances, Staff contends that class action
4 certification is not desirable.

5 Relying on Rule 23(b)(3), the Superior Court rejected Read's request to certify the class,
6 although it did so by concentrating on the individualized refunds that might be a remedy if Read and
7 her class succeeded. However, previous court cases examine the typicality of the claims, and not the
8 atypicality of the relief requested.

9 We initially note that although individual class members may seek
10 different monetary amounts, this does not mean that the claims of the
11 named plaintiffs/appellees are atypical. In an action to recover overtime
12 compensation, in which there was no indication that the amounts sought
were identical, the Arizona Supreme Court found that a class action was
proper under Rule 23(a).

13 Godbey v. Roosevelt School Dist. No. 66 of Maricopa County, 131 Ariz. 13, 16, 638 P.2d 235, 238
14 (App. 1981) referring to State v. Boykin, 109 Ariz. 289, 508 P.2d 1151 (1973). See also Lennon,
15 supra. (Class action was certified against a bank for adding illegal service charges in connection with
16 check-cashing cards.)

17 **2. Read Will Probably not be Able to Meet the Alternative Requirements of**
18 **Rule 23(b).**

19 To invoke Rule 23(b)(1)(A), plaintiffs must show that there is a risk that defendant's efforts to
20 comply with the judgment in one action will require them to act inconsistently with the judgment in
21 another. Sueoka v. U.S. 101 Fed.Appx., 649, 654, 2004 WL 1042541, 4 (9th Cir. 2004). However,
22 the Commission already has the authority to make whole every APS customer who may have been
23 adversely affected by APS' bill estimating procedures. It is already within the Commission's powers,
24 without certifying a class action, to require APS to make refunds to customers, if appropriate. Thus,
25 by continuing the case with the Commission and without certifying the class, the defendant will not
26 be subject to inconsistent judgments.

27 A Rule 23(b)(1)(B) class action is commonly referred to as a "limited fund" class action
28 because courts use it when plaintiffs all seek redress from a limited amount of funds that could run

1 out, leaving some plaintiffs at a disadvantage. See Ortiz v. Fibreboard Corp., 527 U.S. 815, 817
2 (1999). Read has never alleged that APS will run out of funds before all cases are adjudicated

3 Finally, Read has failed to allege that her class action is sustainable under Ariz. R. Civ. P.
4 23(b)(2). Actions brought under Rule 23(b)(2) are concerned with cases where injunctive or
5 declaratory relief is proper for an entire class, and a party's action or inaction has affected the entire
6 class. 5 Moore's Federal Practice § 23.43(1)(a) (3d ed. 1999). This section of Rule 23 was created to
7 allow class actions concerning civil rights. Id.

8 **C. The Commission Should Also Consider the Requirements of A.C.C. R14-3-104(c)**
9 **When Deciding Whether Class Certification is Appropriate.**

10 Under this rule, the requirements to certify a class are not as strict as those set forth in Rule
11 23. A.C.C. R14-3-104(c) requires “two or more parties” with “substantially like interests and
12 positions.” Additionally, this administrative rule is permissive and gives the presiding officer
13 great discretionary leeway. A.A.C. R14-3-104(c) (“[T]he presiding officer may declare them a class
14”) (emphasis added).

15 **D. The Commission Should Not Certify the Class in the Absence of a Motion**
16 **Requesting Such Relief.**

17 Although Read’s complaint asks for class certification, it does not discuss the various
18 requirements of Rule 23, the requirements of the Commission’s class-related rules, or the
19 implications of certifying this matter as a class action. As the party seeking class action status, Read
20 bears the burden of demonstrating that this action meets the requirements of those rules. Without the
21 benefit of such a motion, Staff can only attempt to anticipate Read’s arguments.

22 Finally, Staff has been informed that the Complainant in this matter, Avis Read, has recently
23 passed away. To the best of our knowledge, Read’s counsel has not yet indicated an intent to
24 substitute a new class representative. Although he may intend to proceed on behalf of Read’s estate,
25 some clarification of his intent may be helpful. Certainly, if Read’s case depends on her testimony—
26 and it may not—then her absence may affect her suitability as a class representative.

1 **IV. THE COMMISSION SHOULD DECLINE TO CERTIFY A CLASS IN THESE**
2 **CIRCUMSTANCES BUT SHOULD INSTEAD BROADEN THE SCOPE OF ITS**
3 **INQUIRY PURSUANT TO ITS CONSTITUTIONAL AND STATUTORY**
4 **JURISDICTION.**

5 Clearly, the Commission may certify this matter as a class action if it chooses. The more
6 complex issue is whether such a certification would serve the public interest. Because of the
7 Commission's unique constitutional and statutory authority, Staff believes that the Commission will
8 be able to adequately address these issues without certifying a class.

9 A class action may provide a remedial vehicle in suits where the monetary damage is slight to
10 the individual but consequential to the group. See Godbey, 131 Ariz. at 18, 638 P.2d at 240. As in
11 Godbey, Read's complaint may concern such "relatively small individual recoveries" as to make it
12 impractical for individuals to sue, yet the amount of overbilling could be substantial if Read's
13 allegations are correct. Nonetheless, the Commission need not certify a class to deal with this
14 potential issue.

15 In the absence of class certification, the Superior Court would be limited to dealing with an
16 individual complaint. Unlike the Superior Court, however, the Commission may expand the scope of
17 the inquiry and award broad relief, if appropriate and if supported by the evidence. Even though a
18 class has not been certified, Staff's inquiry into this matter will not be limited to Read's individual
19 complaint. Instead, Staff intends to examine APS' meter reading and billing estimation practices as a
20 whole in order to determine whether systemic problems are present.

21 If the Commission were to determine that APS' billing estimation procedures are
22 unreasonable, it could, for example, order APS to pay for an independent audit to determine the
23 extent of any problems and to calculate any potential customer refunds. Such a result avoids the
24 potential procedural complexities that might be associated with a class action but nonetheless
25 provides a vehicle for broad-based relief.

26 Finally, Staff notes that the availability of attorney's fees may sometimes provide an incentive
27 to initiate a class action. However, attorney's fees are not available as a remedy in Commission
28 proceedings. Therefore, the availability of attorney's fees should not be a factor in determining
whether to certify this matter as a class action.

1 **V. THE APPROPRIATE LEGAL STANDARD FOR EVALUATING APS' BILL**
2 **ESTIMATION AND METER READING PROCEDURES IS WHETHER THOSE**
3 **PROCEDURES ARE JUST AND REASONABLE.**

4 The Commission has enacted a regulation, A.A.C. R14-2-210, to address estimated bills. This
5 rule, however, does not provide any overarching standard, but instead addresses certain specific
6 circumstances related to bill estimation. These circumstances are fairly specific and may not
7 encompass all bill estimation or meter reading issues that will be raised in this proceeding. Since any
8 standards contained in Rule 210 relate to fairly specific circumstances, they are unlikely to entirely
9 answer the variety of issues that may be raised in this proceeding. Accordingly, we will have to look
10 elsewhere to determine the overarching legal standard that will apply.

11 The Commission is granted broad authority by the Arizona Constitution and statutes. Under
12 these powers, the Commission has the authority to determine whether APS' bill estimating
13 procedures are reasonable. As provided in the Arizona Constitution,

14 [t]he Corporation Commission shall have full power to, and shall prescribe
15 . . . just and reasonable rates and charges to be made and collected, by
16 public service corporations within the State for service rendered therein,
17 and make reasonable rules, regulations, and orders, by which such
18 corporations shall be governed in the transaction of business within the
19 State and may prescribe the forms of contracts and the systems of keeping
20 accounts to be used by such corporations in transacting such business, and
21 make and enforce such reasonable rules, regulations, comfort, and safety,
22 and the preservation of the health of the employees and patrons of such
23 corporations

24 Ariz. Const. art. XV, §3. APS is a public service corporation, and the Commission has the
25 constitutional power to determine whether APS' bill estimation procedures are reasonable.

26 The "just and reasonable" standard appears again in the Arizona Revised Statutes. A.R.S.
27 §40-321 provides that the Commission "shall determine what is just, reasonable, safe, proper,
28 adequate or sufficient" when evaluating the service of any public service corporation. A.R.S. §40-
321(A). The Commission is also allowed to "[a]scertain and set just and reasonable standards,
classifications, regulations, practices, measurements or services to be furnished and followed by
public service corporations" A.R.S. 40-322(A)(1). Finally, APS is charged by A.R.S. §40-
361(C) to ensure that all of its "rules and regulations . . . affecting or pertaining to its charges or
service to the public shall be just and reasonable."

1 Staff believes that APS has an obligation to employ reasonable meter reading and bill
2 estimation procedures. Staff further contends that Article XV, Section 3 of the Arizona Constitution
3 and A.R.S. §§40-321, -322, and -361 empower the Commission to evaluate APS' meter reading and
4 bill estimation procedures to determine if they are just and reasonable. If the Commission finds that
5 they are not just and reasonable, the Commission may take appropriate remedial actions.

6 **VI. NOTICE.**

7 If there is no class certification in this matter, then there is no legal notice requirement to be
8 met. However, in the interest of the public, it might be recommended to have APS put a bill insert
9 into a designated month's bills so that all customers can be kept apprised of the current litigation.

10 If this case were to proceed as a class action, then Rule 23(c) of the Arizona Rules of Civil
11 Procedure must be followed. The Ninth Circuit has held that "[r]ule 23(c) directs certain procedural
12 protections in a class action depending upon the Rule 23(b) subsection under which the court certifies
13 the action." EEOC v. General Tel. Co. of Northwest, Inc., 599 F.2d 322, 334 (9th Cir.1979) affirmed
14 General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318 (1980).

15 According to the 2003 advisory committee notes on Rule 23, notice can differ depending on
16 how the class is certified under Rule 23(b). There is no right to request exclusion from a class
17 certified pursuant to rule 23(b)(1) or (b)(2). However, under 23(b)(3), there is an automatic "opt-out
18 option." Because of this opt-out option, the Arizona Rules require a 23(b)(3) case to have the "best
19 notice practicable," including individual notice to all those in the class who can be identified with
20 reasonable effort. Ariz. R. Civ. P. 23(c). The notice in that case must state that the court will exclude
21 members of the class only if requested, that the judgment will cover all class members who do not
22 opt-out, and that any class member who does not opt-out may enter an appearance through counsel.

23 Id.

24 When a court directs certification notice in either a (b)(1) or (b)(2) class action, there may be
25 a great deal of discretion and flexibility in how that notice is accomplished.

26 Notice facilitates the opportunity to participate. Notice calculated to
27 reach a significant number of class members often will protect the
28 interests of all. Informal methods may prove effective. A simple
posting in a place visited by many class members, directing attention
to a source of more detailed information, may suffice. The court

1 should consider the costs of notice in relation to the probable reach of
2 inexpensive methods.

3 Newton-Nations v. Rogers, 316 F.Supp.2d 883, 890 (D.Ariz. 2004)

4 It would seem that the notice requirement would be met for a 23(b)(1) case by noticing APS'
5 customers via bill inserts. In a 23(b)(3) case, it would seem that bill inserts in connection with a letter
6 to each individual customer would satisfy the notice requirements at this stage.

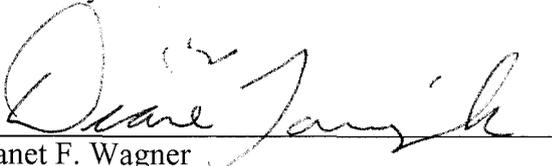
7 **VII. CONCLUSION**

8 Staff concludes that the Commission has jurisdiction to maintain a class action. Staff further
9 concludes that the Superior Court's failure to certify the class does not preclude the Commission
10 from doing so, because the Superior Court never addressed the merits of the case. Nonetheless, the
11 Commission should not certify the class in this case because Read cannot meet the requirements of
12 Rule 23 and because any benefits to be achieved by class certification do not outweigh the associated
13 drawbacks.

14 Article XV, Section 3 of the Arizona Constitution and A.R.S. §§40-321, -322, and -361
15 require APS to use operating procedures that are just and reasonable. Those same authorities
16 empower the Commission to evaluate APS' meter reading and bill estimation procedures to
17 determine if they are just and reasonable. If the Commission finds that they are not, it may take
18 appropriate remedial actions.

19 Finally, if the Commission chooses to certify the class, specific notice is required to all class
20 members who can be identified with reasonable effort. If the Commission chooses to reject class
21 certification, appropriate notice to APS' customers may be in the public interest.

22 RESPECTFULLY SUBMITTED this 19th day of November 2004.

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