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Arizona Corporation Commission  
DOCKETED

NOV 19 2004

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**Attorneys for Applicant/Respondent Arizona Public Service Company**

**BEFORE THE ARIZONA CORPORATION COMMISSION**

COMMISSIONERS

MARC SPITZER, Chairman  
WILLIAM A. MUNDELL  
JEFF HATCH-MILLER  
MIKE GLEASON  
KRISTIN K. MAYES

AVIS READ; individually,  
on Behalf of All Others Similarly Situated,

Complainant,

vs.

ARIZONA PUBLIC SERVICE  
COMPANY,

Respondent.

DOCKET NO. E-01345A-04-0657

DOCKET NO. E-01345a-03-0775

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

**ARIZONA PUBLIC SERVICE COMPANY'S BRIEF SUBMITTED  
PURSUANT TO THE NOVEMBER 2, 2004, PROCEDURAL ORDER**

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1 In its Procedural Order of November 2, 2004, the Commission asked the  
2 parties to address six issues. Arizona Public Service Company ("APS") files this  
3 legal memorandum in response. After a short introduction and summary, APS  
4 discusses each issue in detail below.

5 **I. INTRODUCTION**

6 The Commission's six questions concern the fundamental issue of how to  
7 shape relief in an individual case that potentially raises issues that may be, in whole or  
8 in part, common to an as-yet-undefined group of customers. The answer is clear: the  
9 Commission has authority to order relief in an individual case that goes beyond the  
10 claims of the individual complainant if it is deemed warranted by the facts and the  
11 equities, but it need not, and cannot in this instance, certify a "class action" complaint  
12 within the meaning of Rule 23 of the Arizona Rules of Civil Procedure ("Rule 23").

13 The Complaint filed in this matter by an individual customer, Avis Read  
14 ("Complainant"), contests APS's method of estimating bills.<sup>1</sup> The Complaint thus  
15 challenges this Commission's clear precedent requiring a utility to bill its customers at  
16 the specified rate, using estimates when necessary, for all electricity consumed by a  
17 customer. This Commission has told APS time and again that it *must* bill such  
18 customers, and do so using a "reasonable" -- not perfect -- estimate when necessary.  
19 APS believes that the Commission will reject Complainant's argument and conclude  
20 that APS's estimation methods are reasonable and consistent with the Commission's  
21 many previous rulings. *See, e.g., Ciccone v. Ariz. Pub. Serv. Co.,* Docket No. U-

22  
23  
24 <sup>1</sup> As the Commission may know by now, Avis Read passed away on October 14,  
25 2004 -- the very day that the last procedural conference in these proceedings was held.  
26 It is presently unclear what impact the death of Mrs. Read has on the Read complaint  
proceeding, but APS will not raise any issue in that regard in this brief.

1 1345-96-162, Decision No. 59919 (December 10, 1996) (concluding procedures  
2 employed by APS resulted in an "appropriate demand estimate").

3 But whether the Commission decides this dispute for or against APS, any final  
4 ruling will bind APS and govern its actions as a regulated electric utility. Thus, APS  
5 does not contest that the Commission has authority -- even when sitting in a quasi-  
6 judicial capacity -- to issue a ruling that has impact beyond the individual complainant  
7 so long as there are sufficient factual, legal and equitable bases to do so. APS  
8 submits, however, that the Commission need not, and cannot in this instance, employ  
9 the class action mechanism of Rule 23 to achieve that result.

10 **II. SUMMARY OF POSITION**

11 As APS explains in more detail below, the Commission's six questions have the  
12 following answers:

13  
14 *1) Does the Commission have jurisdiction to maintain a class action?*

15 No. The Commission's rules and precedent do not allow it to certify a Rule 23  
16 class action.

17 *2) What effect should be given the Superior Court's ruling on the issue of a class  
18 action?*

19 If the Commission disagrees with APS and decides that it does have authority  
20 to entertain Rule 23 class actions, then the Superior Court's ruling denying class  
21 certification should bind the Commission and Mrs. Read under well established  
22 legal principles of issue preclusion and the "law of the case" doctrine.

23 *3) Has the Complaint met the requirements of Ariz. R. Civ. P. 23?*

24 No. For the reasons expressed by the Superior Court and for other reasons, the  
25 Complaint's allegations do not meet (and cannot meet) Rule 23's requirements.

26 *4) What kind of notice, if any, is appropriate at this stage of the proceeding?*

No notice is appropriate or required because Rule 23 does not apply to the  
Commission and, even if it did, its requirements are not met in this case.  
Normally, under Rule 23, notice is sent not at the outset of the case, but only after

1 a class has been defined, its members identified, and a court issues a decision  
2 certifying a class.

3 5) *Should the Commission, instead of maintaining a class action, exercise its*  
4 *statutory and constitutional jurisdiction to hear the Complaint and expand its*  
5 *scope and remedies class-wide if evidence warrants?*

6 If ultimately the Commission determines that APS's estimation method is  
7 unreasonable -- a result that APS believes would contradict both clear precedent  
8 and the facts it intends to present at hearing -- the Commission may issue a  
9 decision that requires APS to revise its estimation methods and, if warranted and  
10 otherwise permitted by law, to recalculate the bills of other customers who were  
11 issued bills using estimated consumption and/or demand, or such other system-  
12 wide relief as it finds is warranted. Until it is determined whether an identifiable  
13 group of aggrieved or, for that matter, unjustly enriched customers actually exists,  
14 however, it would be premature to decide that any "class" or "group" relief is  
15 warranted.

16 6) *What is the appropriate legal standard for evaluating whether APS's meter*  
17 *reading and bill estimation practices are reasonable, appropriate, and in*  
18 *compliance with Commission statutes and rules.*

19 Under the Commission's precedent, APS is required each month, in all cases,  
20 to issue an estimated bill to a customer whose meter was not read. The burden is  
21 on the customer to establish that APS's estimate was unreasonable. The  
22 appropriate legal standard is "reasonableness," taking into consideration the nature  
23 of the account being estimated, any criteria established by the Commission  
24 regarding estimating procedures, and the Commission's prior interpretation and  
25 application of its own rules and regulations relating to acceptable estimating  
26 procedures and practices. Moreover, an estimating methodology is not  
unreasonable simply because it produces individual estimates of electric usage  
(kWh) and/or demand (kW) that arguably exceed that customer's "actual" usage  
and/or demand. What is important is that there be no unreasonable bias in the  
methodology that produces systematic over-estimates of energy consumption  
and/or demand.

### 19 **III. THE COMMISSION'S RULES DO NOT ALLOW CLASS ACTION** 20 **COMPLAINTS.**

21 APS has located no case, published or unpublished, in which the Commission  
22 has attempted to certify a class action. This comports with the Commission's rules,  
23 which nowhere mention the availability of class actions and nowhere describe how  
24 they should be handled. The omission is not surprising, given the Commission's  
25 ability to issue rulings involving the utilities it regulates that have broad impact, and  
26

1 to do so without stepping through the notice, opt-in and opt-out procedures required in  
2 a class action under Rule 23.

3         The Commission's rules are not only silent about the use of class actions as a  
4 substitute for the Commission's broad regulatory powers, they leave no room into  
5 which class actions may be squeezed by inference. When addressing squarely the  
6 problem of multiple claims, **the Commission's rules allow only for consolidation of**  
7 **similar, individual complaints.** Specifically, under A.A.C. R14-3-103G, two or  
8 more complainants may join in one complaint if "their *respective* complaints are  
9 against the same respondent or respondents and involve substantially the same matter  
10 or thing and a like state of facts." *Id.* (emphasis added). This rule requires that each  
11 separate complainant initiate his own complaint. Although those separate complaints  
12 may then be consolidated, the individual complainants are not converted into  
13 representatives of absent class members.

14         The rules also provide for intervention of a party who may be affected by the  
15 proceedings before the Commission. *See* A.A.C. R14-3-105. And, the rules proscribe  
16 procedures for individuals appearing together before the Commission, presuming  
17 participation by an *identifiable* individual. *See* A.A.C. R14-3-104C, R14-3-105A and  
18 R14-3-105B (relating to the appearance of parties). Conspicuously absent from these  
19 provisions is *any* mention of class actions.

20         Significantly, when Complainant requested intervention in Docket  
21 No. E-01345A-03-0775 earlier this year on her own behalf and on behalf of "all  
22 others similarly situated," the Administrative Law Judge, citing the above-mentioned  
23 Commission rules, granted her intervention but only "as an individual." *See*  
24 Procedural Order dated March 26, 2004.

1           The general reference elsewhere in the Commission's rules to the Arizona  
2 Rules of Civil Procedure<sup>2</sup> does not suffice to import a class action mechanism. The  
3 Arizona Rules of Civil Procedure are imported to Commission procedures only where  
4 no procedure is set forth elsewhere in the Commission's rules. Because the rules state  
5 quite explicitly what complaints may be filed and how to handle related complaints,  
6 the field is covered without room to import a class action procedure.<sup>3</sup>

7  
8 **IV. EVEN IF THE COMMISSION HAD GENERAL AUTHORITY TO**  
9 **CERTIFY A CLASS UNDER RULE 23, CLASS CERTIFICATION**  
10 **MUST BE DENIED IN THIS INSTANCE UNDER PRINCIPLES OF**  
11 **ISSUE PRECLUSION AND THE "LAW OF THE CASE" DOCTRINE.**

12           Having taken her proverbial "bite at the apple," Complainant may not relitigate  
13 the Rule 23 class certification issue before the Commission. All parties have agreed  
14 that the Superior Court and the Commission have concurrent jurisdiction over the  
15 claims asserted by Mrs. Read. *See Qwest Corp. v. Kelly*, 204 Ariz. 25, 59 P.3d 789  
16 (App. 2003)(Arizona Corporation Commission has concurrent, quasi-judicial  
17 authority with the Superior Court over certain claims); (*Campbell v. Mountain States*  
18 *Tel. & Tel. Co.*, 120 Ariz. 426, 586 P.2d 987 (App. 1978)(same). Mrs. Read chose to  
19 file suit in Maricopa County Superior Court, was represented by competent legal  
20 counsel, pursued the litigation for approximately a year and a half, and sought class  
21 certification of her claims in Superior Court. Superior Court Judge Rebecca Albrecht

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22 <sup>2</sup> R14-3-101A provides, in part, that "[i]n all cases in which the procedure is set  
23 forth **neither by law, nor by these rules, nor by regulations or orders of the**  
24 **Commission**, the [Arizona] Rules of Civil Procedure . . . shall govern." (Emphasis  
25 added.)

26 <sup>3</sup> The fact that the Commission's Rules do not import the class action  
mechanism's of Rule 23 is not surprising for at least two reasons. First, as noted  
above, the Commission already has the authority to order group relief if it deems it  
warranted. Second, the customer claims that come before the Commission usually are  
highly individualized, requiring an individual analysis of a customer's account to  
determine whether relief is warranted. By definition, a Rule 23 class action cannot  
exist if individual issues predominate.

1 considered the class certification issues and determined that the allegations did not  
2 warrant certification (copies of the class certification briefs are attached hereto as  
3 **Appendix A**). *See also* Judge Albrecht's Order dated May 28, 2004 in *Avis Read v.*  
4 *Ariz. Pub. Serv. Co.*, CV 2002-010760, attached hereto as **Appendix B** ("May 28  
5 Order").

6         If the Commission concludes (over APS's objection) that its rules permit class  
7 actions in cases brought before the Commission, it must deny certification in this case  
8 based on Judge Albrecht's ruling. The doctrine of issue preclusion, sometimes also  
9 called *collateral estoppel*, bars a party from relitigating an issue identical to one  
10 previously litigated to a determination on the merits in another action before a tribunal  
11 having requisite jurisdiction. *Yavapai County v. Wilkinson*, 111 Ariz. 530, 531, 534  
12 P.2d 735, 736 (1975). Issue preclusion applies whenever: (1) the issue was actually  
13 litigated in a previous proceeding, (2) the parties had a full and fair opportunity and  
14 motive to litigate the issue, (3) a valid and final decision on the merits was entered,  
15 (4) resolution of the issue was essential to the decision, and (5) there is a common  
16 identity of the parties. *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 716 P.2d  
17 28 (1986). Each of the five elements exists here.

18         First, the issue was actually litigated. When an issue is properly raised by the  
19 pleadings or otherwise, submitted for determination, and determined, the issue is  
20 actually litigated. *Id.* at 573, 716 P.2d at 30; *see also* RESTATEMENT (SECOND) OF  
21 JUDGMENTS § 27 cmt. d (1982). Judge Albrecht's May 28, 2004, Order satisfies this  
22 requirement.

23         Second, both parties had a full and fair opportunity to litigate this issue.  
24 Mrs. Read pled class action allegations in her original complaint and added additional  
25 class action allegations in her amended complaint. Counsel for both parties submitted  
26

1 briefs on whether class certification was warranted, and the court heard oral argument.  
2 Judge Albrecht, after studying the issues, determined that the Complainant did not  
3 meet the requirements of Ariz. R. Civ. P. 23 because “individual factors overwhelm  
4 the common elements in this case.” **Appendix B** at 2. Judge Albrecht also denied  
5 Complainant’s Motion for Reconsideration (June 29, 2004 Order, attached hereto as  
6 **Appendix C**). Clearly, the parties actually (and vigorously) litigated the class  
7 certification issue in Superior Court. Indeed, that issue was the thing most vigorously  
8 litigated in the Superior Court.

9 Third, the Superior Court issued a final decision on the merits. For issue  
10 preclusion, a final judgment may include “any prior adjudication of an issue in  
11 another action that is determined to be sufficiently firm to be accorded conclusive  
12 effect.” *Elia v. Pifer*, 194 Ariz. 74, 81, 977 P.2d 796, 803 (App. 1998) (quoting  
13 RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982)). Factors for determining  
14 whether a ruling is sufficiently final include the nature of the decision, the adequacy  
15 of the hearing and the opportunity for review. *See id.* Because an order denying class  
16 certification is appealable under A.R.S. § 12-2101(D) and was not appealed, the  
17 Superior Court’s order denying class certification to the Complainant qualifies as a  
18 final judgment for issue preclusion purposes. *See Reader v. Magma-Superior Copper*  
19 *Co.*, 108 Ariz. 186, 187, 494 P.2d 708, 709 (1972) (order denying class certification is  
20 a “final” disposition, thus allowing immediate appeal).

21 Fourth, resolution of the issue was clearly essential to the decision. Indeed,  
22 here the only “issue” -- whether Mrs. Read’s claims meet the requirements for class  
23 certification under Rule 23 -- was not only essential to Judge Albrecht’s decision, it  
24 was the entire basis for her decision denying class certification.

1 Finally, complete identity of parties exists. The Complaint now before the  
2 Commission finds the same parties presenting the same issue: whether the claims of  
3 the putative class members meet the requirements of Rule 23. As the Superior Court  
4 has already determined, they do not. Thus, Complainant is precluded from  
5 relitigating the issue before this Commission.

6 It also makes no difference that the prior proceeding occurred in state court  
7 while this proceeding will transpire before a state agency. Arizona courts have long  
8 recognized that issues properly litigated in one forum should have preclusive effect in  
9 the other. For example, in *Campbell v. Superior Court*, 18 Ariz. App. 287, 290, 501  
10 P.2d 463, 466 (1972), the Court of Appeals held that the Superior Court was required  
11 to give preclusive effect to a decision of the Motor Vehicle Division. *See also Smith*  
12 *v. CIGNA HealthPlan of Arizona*, 203 Ariz. 173, 52 P.3d 205 (App. 2002) (collateral  
13 estoppel applies to administrative agencies acting in quasi-judicial capacity); *Hawkins*  
14 *v. State Dept. of Econ. Sec.*, 183 Ariz. 100, 900 P.2d 1236 (App. 1995) (same). The  
15 same goals of efficiency and finality require that an administrative agency give  
16 preclusive effect to the decisions of judicial courts. *See Irby Const. Co. v. Arizona*  
17 *Dept. of Revenue*, 184 Ariz. 105, 907 P.2d 74 (App. 1995) (Arizona Department of  
18 Revenue could not relitigate a prior court decision in favor of the taxpayer). To hold  
19 otherwise would upset underlying considerations of economy and certainty that are  
20 the basis for the legal doctrine of issue preclusion/collateral estoppel. *See*  
21 *Commissioner v. Sunnen*, 333 U.S. 591, 597, 68 S. Ct. 715, 719, 92 L. Ed. 898, 905  
22 (1948).<sup>4</sup>

23  
24 <sup>4</sup> Indeed, to hold that Complainant could relitigate the Superior Court's Rule 23  
25 class action determination in this proceeding before the Commission would imply that  
26 Complainant could have litigated her entire case in Superior Court, lost on the merits,  
and then re-filed the same case in the Commission and relitigated everything a second  
time. Plainly, that is neither a reasonable result nor is it the law. The legal doctrine of  
issue preclusion/collateral estoppel precludes such relitigation in whole or in part.

1 Even if the Superior Court's denial of class certification had not become a  
2 "final" decision, it would still be inappropriate and contrary to Arizona law for the  
3 Commission to revisit the issue in this companion proceeding brought by  
4 Complainant. A species of issue preclusion known as the "law of the case" doctrine  
5 ordinarily precludes a decided issue -- even one that is still not strictly "final" -- from  
6 being reheard or decided a second time absent a showing of an intervening change of  
7 law or other extenuating circumstances. *See, e.g., United States v. Caterino*, 29 F.3d  
8 1390, 1395 (9th Cir. 1994) ("The law of the case doctrine 'ordinarily precludes a  
9 court from re-examining an issue previously decided by the same court . . . in the  
10 same case.'") (quoting *United States v. Maybusher*, 735 F.2d 366, 370 (9th Cir.  
11 1984)); *accord, Donlann v. MacGurn*, 203 Ariz. 380, 385-86, 55 P.3d 74, 79-80 (App.  
12 2002); *Hibbs. Calcot, Ltd.*, 166 Ariz. 210, 214, 801 P.2d 445, 449 (App. 1990).  
13 Application of the law of the case doctrine is particularly warranted where, as here,  
14 there has been a change of tribunal/change of judge in the same case. *See Union Rock*  
15 *& Material Co. v. Scottsdale Conference Center*, 139 Ariz. 268, 678 P.2d 453 (App.  
16 1983) (reconsideration by a new judge of a previously decided motion in the same  
17 case would be an "abuse of discretion" and would constitute an "improper lateral  
18 appeal" absent new circumstances justifying reconsideration). Because the  
19 Commission sits in a quasi-judicial capacity in this case and has concurrent  
20 jurisdiction along with the Superior Court over Complainant's claims (and because  
21 this case is, in effect, just a continuation of the Superior Court case that Complainant  
22 litigated there for a year and a half), the law of the case doctrine applies in this  
23 proceeding with the same force as it would in Superior Court. Thus, even assuming  
24 that the Commission determined that it had the authority consistent with its own rules  
25 and regulations to entertain a Rule 23 class action, doing so in this proceeding would  
26

1 clearly violate the law of the case doctrine and would therefore be an abuse of  
2 discretion.

3 For all these reasons, APS respectfully submits that principles of issue  
4 preclusion prevent the Commission from reconsidering the Superior Court's denial of  
5 Rule 23 class certification in these proceedings.<sup>5</sup>

6 **V. ISSUE PRECLUSION ASIDE, THE COMPLAINT FAILS THE**  
7 **REQUIREMENTS OF RULE 23.**

8 Not only is this Commission required to honor Judge Albrecht's decision under  
9 principles of issue preclusion, APS submits that if the Commission were to  
10 nonetheless re-examine the class certification issue on the merits, it would certainly  
11 confirm that Judge Albrecht's ruling was correct.

12 Under Rule 23, a plaintiff seeking class certification bears the burden of  
13 showing that her case meets each of the four requirements of Rule 23(a) and at least  
14 one of the requirements of Rule 23(b). *See Markiewicz v. Salt River Valley Water*  
15 *Users' Ass'n*, 118 Ariz. 329, 341, 576 P.2d 517, 529 (App. 1978). Thus, to certify a  
16 class under Rule 23, the Complainant must demonstrate, among other requirements,  
17 that (i) "the questions of law or fact common to the members of the class predominate  
18 over any questions affecting only individual members" and (ii) "a class action is  
19 superior to other available methods for the fair and efficient adjudication of the  
20 controversy." Ariz. R. Civ. P. 23(b)(3).

21 \_\_\_\_\_  
22 <sup>5</sup> The recent death of Avis Read and the possible substitution of a new lead  
23 Complainant in this proceeding (be it either Mrs. Read's estate or some other new  
24 Complainant) does not change the analysis regarding the binding force of issue  
25 preclusion with respect to the Superior Court's denial of class certification. Under  
26 principles of "virtual representation," any new Plaintiff or Complainant seeking the  
same determination would be bound by the Court's earlier determination. *El Paso*  
*Natural Gas Co. v. State*, 123 Ariz. 219, 222, 599 P.2d 175, 178 (1979) ("[A]  
judgment for or against a party representing a general class operates as res judicata in  
favor of or against all who are thus represented.").

1 As the Superior Court has already found, the alleged class fails the  
2 predominance and superiority tests because of the difficulties of proving that each  
3 class member suffered injury in fact and actual damages. As an initial matter,  
4 Complainants' proposed class definition -- "all current and former residential and  
5 business APS customers in Arizona who, since January 1, 1999, have been, or in the  
6 future will be, subject to improper estimation and billing procedures on demand  
7 meters not approved by the Arizona Corporation Commission" (Complaint in ACC at  
8 ¶ 1) -- is so vague that it makes identification of the alleged class members  
9 impossible, at least until the Commission first determines that there actually were  
10 "improper estimation and billing procedures on demand meters not approved by" the  
11 Commission.<sup>6</sup>

12 Moreover, APS presented convincing evidence to the Superior Court that the  
13 required element of "injury in fact" and "actual damage" could not be determined --  
14 under any of Plaintiff's various legal theories -- without analyzing each estimated bill  
15 sent to each alleged class member. For example, in the case of Mrs. Read herself,  
16 APS demonstrated that Mrs. Read's four estimated bills between January and June  
17 1999 (the last time that Mrs. Read had a demand meter account) actually  
18 **underestimated** her demand and consumption for those four months, irrespective of  
19

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20 <sup>6</sup> In the Superior Court, Mrs. Read and her attorneys at the outset did not limit  
21 their request for class certification to just demand meter customers, but they suggested  
22 at oral argument on the class motion that perhaps separate classes of customers -- one  
23 class of demand meter customers and one class of standard (kWh) consumption meter  
24 customers might be appropriate because Mrs. Read and her attorneys recognized that  
25 the two proposed classes were not "similarly situated" due to the fact (1) that standard  
26 consumption meter customers have their bills estimated, when necessary, using less  
data than is used for estimating the demand of demand meter customers, and (2) the  
estimated bills of standard consumption meter customers are self-correcting as soon  
as an actual reading of the meter can be obtained. Nevertheless, the Superior Court  
denied certification of all of Mrs. Read's proposed classes because they all failed to  
satisfy the requirements of Rule 23.

1 what estimating procedures might have been used. (See the detailed analysis of  
2 Mrs. Read's demand meter account attached as Exhibit F to APS's Response to  
3 Mrs. Read's (Commission) Complaint in the ACC and attached hereto as **Appendix**  
4 **D.**) APS also demonstrated to the Superior Court that, even assuming that the Court  
5 ultimately concluded that APS should have used a different estimating method,  
6 whether any **single** customer suffered "injury" or "damage" or whether customers  
7 had, **as a group**, been somehow overbilled still required each individual account to be  
8 recalculated **after the Court determined what the different estimating method**  
9 **should have been.** Thus, the Superior Court concluded that a class could not be  
10 certified (let alone identified) under the facts and circumstances pleaded by Plaintiff  
11 because the "individual factors [of injury and damage] overwhelm the common  
12 elements in this case." **Appendix A** at 2.<sup>7</sup>

13 Moreover, although Judge Albrecht did not see the need to specifically address  
14 the individual issues presented by the statute of limitations, the statute of limitations  
15 (a defense raised by APS both here and in the Superior Court) would have to be  
16

17 <sup>7</sup> In their motion for reconsideration of Judge Albrecht's ruling denying class  
18 certification, Plaintiffs' counsel tried to argue that mere differences in the amount of  
19 damage among class members will not defeat class certification. It is plain, however,  
20 that Judge Albrecht's ruling was broader than mere differences in the amount of  
21 damages. Her ruling was based principally on the record evidence that there was no  
22 way to determine **whether a purported class member or the "class" itself had been**  
23 **damaged at all** without doing an individualized analysis of all customer accounts  
24 within such "class." That, among other things, is what defeated class certification.  
25 As one leading commentator has stated:

22 [A]lthough variations in the amount of damages will not defeat  
23 certification, the fact that some class members may not have been  
24 damaged at all generally defeats certification, because the fact of injury,  
25 or "impact," must be established by common proof.

24 II Areeda & Hovenkamp, *Antitrust Law* ¶ 331, at 283 (2d ed. 2002). See also *Newton*  
25 *v. Merrill, Lynch, et al*, 259 F.3d 154, 188-90 (3rd Cir. 2001) ("While obstacles to  
26 calculating damages may not preclude class certification, the putative class must first  
demonstrate economic loss on a common basis. As noted, the issue is not the  
calculation of damages but whether or not class members have any claims at all.").

1 considered before any class could be certified by the Court or by the Commission.  
2 The Complaint in the ACC contains essentially two claims: (1) a claim under the  
3 Arizona Consumer Fraud Act (A.R.S. § 44-1522), and (2) a claim that APS violated  
4 A.R.S. § 40-361 by receiving payment for services that allegedly were not authorized  
5 by the Commission. Both claims have a one-year limitations period because they are  
6 claims “created by statute.” See A.R.S. §12-541. Although in some situations the  
7 tolling of the statute of limitations can be a common issue that will not preclude class  
8 certification if the other requirements of Rule 23 are satisfied, this is not such a case.  
9 Alleged fraud claims, such as those pleaded here, are ordinarily held to raise  
10 individual issues that prevent class certification. See, e.g., *Cocca v. Philip Morris*  
11 *Inc.*, No. CV 1999-008532, 2001 WL 34090200, at \*3 (July 14, 2001)(Arizona  
12 Superior Court Judge Roger Kaufman denying class certification of a consumer fraud  
13 claim because, among other things, “Statute of Limitations issues will vary from class  
14 member to class member.”); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 149 (3d Cir.  
15 1998) (“[D]etermining whether each class member’s claim is barred by the statute of  
16 limitations raises individual issues that prevent class certification.”).<sup>8</sup>

17 In short, for the reasons stated by the Superior Court, and for other reasons  
18 stated herein, class certification of the case pleaded by Complainant fails to satisfy the  
19 requirements of Rule 23.  
20  
21

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22 <sup>8</sup> Quite apart from the impact of the statute of limitations on the issue of class  
23 certification, the Commission will eventually have to determine whether the statute of  
24 limitations or similar provision bars some or all of the claims in this case or whether  
25 the statute limits the extent to which APS can be ordered to make refunds to  
26 customers under any of the theories presented in the Complaint. Indeed, had the  
Superior Court certified a class, APS fully expected that the Court would have limited  
the start of the class period to one year before the filing of the complaint in Superior  
Court.

1 **VI. NO NOTICE IS APPROPRIATE OR REQUIRED UNLESS AND UNTIL**  
2 **A CLASS IS CERTIFIED.**

3 No class notice is appropriate or required unless and until the Commission  
4 identifies and certifies a class. Before then, there is no defined class, no list of class  
5 members, no approved form of notice, and no notice contemplated under Rule 23.  
6 *See* Newburg & Conte, Class Actions § 4:35 (4th ed. 2002) (“[N]otice considerations  
7 technically do not come into play until a class is certified.”).

8 Thus, should the Commission disagree with APS and entertain the notion that  
9 this case might be certified as a class action under Rule 23, then notice at this stage is  
10 premature. As provided in Rule 23, before any notice issues, the plaintiff must first  
11 file a motion for class certification, the matter must then be briefed and heard (after a  
12 period of discovery on class issues), it must be determined that a class can be  
13 identified without first determining merits-related issues, and then, only if the court  
14 defines and certifies a class under the provisions of Rule 23(b)(3), is notice  
15 appropriate. *See* Ariz. R. Civ. P. 23(c)(2) (“In any class action maintained under  
16 subdivision (b)(3), the court shall direct to the members of the class the best notice  
17 practicable under the circumstances....”)

18 Indeed, the purpose of notice under Rule 23 is to inform class members that  
19 their rights may be affected by the pending action and to give them the opportunity to  
20 opt out of the class either to pursue their own separate action or prevent preclusive  
21 effect of the ultimate judgment, win or lose. Since the Commission has authority to  
22 grant relief on behalf of an identifiable group of customers if it determines that such  
23 relief is warranted and not otherwise barred by applicable legal defenses, the notice  
24 and opt-out procedures of Rule 23 make no sense in this instance and would only  
25 create confusion and needless expense.  
26

1 **VII. THE COMMISSION MAY ISSUE ORDERS GRANTING WIDE**  
2 **RELIEF IN CASES BROUGHT BY AN INDIVIDUAL COMPLAINANT**  
3 **WHERE WARRANTED.**

4 The absence of a Rule 23 class action procedure in this case would in no way  
5 leave the Commission powerless to remedy a problem if it concluded that APS has  
6 used an improper estimation methodology that has resulted in a net overcharge to  
7 APS customers. Although APS is confident that its estimation method is reasonable  
8 as applied to its customers in general and that the method comports with the  
9 Commission's precedent, if the Commission finds otherwise it has power over APS, a  
10 regulated utility, to order changes to the methodology and to grant other remedies not  
11 restricted to Mrs. Read. Thus, the Commission's inability to certify a class action will  
12 not in any material way restrict its otherwise appropriate and lawful remedial options.

13 **VIII. THE APPROPRIATE STANDARD FOR EVALUATING THE**  
14 **COMPANY'S METERING AND BILL ESTIMATION PRACTICES IS**  
15 **ONE OF OVERALL "REASONABLENESS," AND THE BURDEN IS**  
16 **ON THE COMPLAINANT OR OTHER PARTY ASSERTING THEIR**  
17 **UNREASONABLENESS TO SHOW THAT APS'S METER READING**  
18 **AND BILL ESTIMATION PRACTICES ARE UNREASONABLE.**

19 APS estimates bills when valid meter readings are unavailable. It does so  
20 because the Commission mandates that it do so. As the Commission has often noted,  
21 "A.R.S. §40-374 and Ariz. Cons. Art. XV §12 **prohibit** APS from charging less than  
22 the amount set forth in its lawful tariffs and place upon APS an **absolute affirmative**  
23 **duty** to rebill customers who have been erroneously underbilled for electric service."  
24 *In the Matter of the Complaint by George C. Wadsworth Against Ariz. Pub. Serv. Co.*,  
25 Docket No. U-1345-86-244, Decision No. 55544, at 5 (April 23, 1987) (emphasis  
26 added); *accord*, *In the Matter of the Complaint by B.J. Shaddy Against Ariz. Pub.*  
*Serv. Co.*, Docket No. U-1345-85-207, Decision No. 54982, at 5 (April 21, 1986); *In*  
*the Matter of Jasper Simmons Against Ariz. Pub. Serv. Co.*, Docket No. U-1345-85-  
149, Decision No. 54976, at 4 (April 21, 1985). Failure to secure payment for

1 consumption adversely affects all rate-payers because the non- or under- paying  
2 consumer is unjustly enriched at the expense of the other consumers. *In the matter of*  
3 *the Complaint of Audrey I. Dietz Against Ariz. Pub. Serv. Co.*, Docket No. U-1345-  
4 85-349, Decision No. 54952, at 5 (March 26, 1986)(“Delays in securing revenues to  
5 which [APS] is lawfully entitled affect all rate-payers.”); *In the Matter of the*  
6 *Complaint by George C. Wadsworth* at 3 (Complainant must pay backbill even if  
7 there is no evidence that Complainant engaged in meter tampering because “any  
8 benefits derived from meter tampering would have gone to Complainant.”); *In the*  
9 *Matter of the Complaint Filed by Ronald R. Metzler Against Ariz. Pub. Serv. Co.*,  
10 Docket No. U-1345-87-275, Decision No. 56072, at 6 ( August 3, 1988)  
11 (Complainant liable for cost of actual electricity consumed regardless of who engaged  
12 in meter tampering, otherwise Complainant “would be unjustly enriched at the  
13 expense of other APS customers.”).

14 Under standards previously articulated by the Commission, when APS meets  
15 its obligation to bill for missed meter readings its estimation method must be  
16 “reasonable.” *See Girard v. Ariz. Pub. Serv. Co.*, Docket No. U-1345-86-096,  
17 Decision No. 55983 (May 26, 1988); *In the Matter of the Complaint by George C.*  
18 *Wadsworth* at 3; *In the Matter of the Complaint of Audrey I. Dietz* at 9; *In the Matter*  
19 *of the Complaint Filed by Donald E. Collicott Against Ariz. Pub. Serv. Co.*, Docket  
20 No. U-1345-85-183, Decision No. 54890, at 4 (February 11, 1985); *In the Matter of*  
21 *the Complaint of William Henderson and R.C. Henderson Against the Ariz. Pub. Serv.*  
22 *Co.*, Docket No. U-1345-83-235, Decision No. 54126, at 5 (August 1, 1984). And,  
23 where a customer brings a complaint about an estimated bill, the Complainant bears  
24 the burden of demonstrating that APS’s practices are unreasonable. *See In the matter*  
25 *of the Complaint of Audrey I. Dietz* at 9 (rejecting customer complaint because he  
26

1 showed “no evidence that Respondent’s use of degree/day analysis was unreasonable  
2 or prejudicial”); *In the Matter of the Complaint Filed by Donald E. Collicott at 4*  
3 (rejecting claim without “evidence that APS’s use of the formula in arriving at said  
4 estimated billing was unreasonable or prejudicial”); *cf. In the Matter of the Complaint*  
5 *by Charles Urrea & Sons Against Ariz. Pub. Serv. Co.*, Docket No. U-1345-84-115,  
6 Decision No. 54314, at 3 (February 14, 1985) (burden of contesting estimate is borne  
7 by the Complainant unless he shows “unique characteristics”).

8         The standard of “reasonableness” with respect to estimates must include, of  
9 course, any specific requirements set forth in the Commission’s rules and regulations.  
10 Those regulations, however, offer very little guidance as to what constitutes a  
11 reasonable estimate, particularly when it comes to demand meter estimates. Indeed,  
12 A.A.C. R14-2-210A(2) states that an estimate of “consumption” (*i.e.*, kWh) for the  
13 billing period shall “giv[e] consideration [to] the following factors **where applicable**:

- 14             a. The customer’s usage during the same month of the previous year,
- 15             b. The amount of usage during the preceding month.” (Emphasis added.)

16 The regulations provide no other guidance and say nothing specific about procedures  
17 for estimating demand (kW).

18         APS **does give consideration** to the two above-mentioned elements of the  
19 regulations, where applicable, both when it estimates consumption (kWh) and in  
20 estimating demand (kW). But it also uses other available, tested and reasonable data  
21 for estimating both consumption (kWh) and demand (kW). And the standard of  
22 “reasonableness” is not violated merely because Complainant (or even an alleged  
23 “expert” retained by Complainant) thinks that APS should have used a different  
24 method of estimating demand (kW). Complainant’s burden of showing  
25 “unreasonableness” is exactly that -- a requirement that it be shown that APS’s  
26

1 estimating method for demand accounts does not on average reasonably approximate  
2 the demand of customers whose meters cannot be read.<sup>9</sup>

3 Although the Commission has never articulated the complete parameters of  
4 what constitutes a “reasonable” estimate, by definition, any estimation is merely an  
5 approximation, not a precise replication of actual usage. Webster’s Dictionary  
6 defines an “estimate” as “a rough or approximate calculation” or as “a numerical  
7 value obtained from a statistical sample and assigned to a population parameter.”  
8 *Webster’s New Collegiate Dictionary* at 391 (3d ed. 1997). A “reasonable” estimate  
9 of electric usage necessarily allows for less accuracy than an actual meter read.  
10 Indeed, an estimate, by its very nature, is a reasoned judgment based on available  
11 information.<sup>10</sup> And, the methodology used to arrive at an estimate should be  
12 workable and reasonable across a wide range of customers in order to ensure  
13 consistency and reduce the impact of individual customer usage anomalies.

14  
15 <sup>9</sup> Although not a part of the information that the Commission requested to be  
16 addressed in this submission, APS will show that its internal analysis of its estimating  
17 procedures used since *Ciccone* -- for both demand meter accounts and standard  
18 consumption accounts -- indicates that for all major classes of customers, APS  
19 **underbilled its customers on all types of accounts, and to an even greater extent**  
20 **on demand accounts.** Moreover, the evidence will show that APS’s estimates of its  
demand meter accounts were underbilled on average to an even greater extent prior to  
the time in 2002 and again in 2004 when APS adjusted the inputs to its estimating  
formula to more realistically approximate the load factor and/or energy component of  
the demand estimation formula. In short, the evidence will show that APS’s  
estimating procedures -- as the Commission itself concluded in the *Ciccone* decision  
and other cases -- is reasonable and is designed to be a fair approximation under the  
circumstances.

21 <sup>10</sup> The inability to achieve perfection in estimating is particularly evident when  
22 estimating demand meter accounts. As APS explained in some detail in its Response  
23 to the Complaint made with the Commission, demand meter accounts require that the  
24 demand meter (which measures the peak kW level during the billing period) be reset  
25 each month. If access to the meter is denied by the customer or is otherwise unable to  
be read and reset, it is impossible to know with complete certainty what the actual kW  
reading was during the month when the meter could not be read. In contrast, the  
actual consumption of electricity by the customer (the kWh) can ultimately be  
determined and can be corrected upward or downward from a previous month’s  
estimate as appropriate.

1 To bar APS's use of reasonable estimates would not only unjustly enrich some  
2 customers at the expense of the others (in violation of APS's statutory and  
3 constitutional duties), it could encourage the small number of customers to impose  
4 obstacles to meter readings by deliberately locking gates, leaving dogs loose, and  
5 using other methods designed to prevent safe access to their properties. Although the  
6 vast majority of APS customers are cooperative and abide with Commission rules,  
7 one need only review the Commission's long history of meter tampering cases to  
8 know that some individuals within APS's customer base does not always demonstrate  
9 ethical perfection. Those consumers who might give in to temptation or who are  
10 uncooperative should know that no economic incentives exist: If APS is unable to  
11 obtain a meter reading for any reason, the customer will still be billed an amount that  
12 approximates on average what the reading would have shown.

13 The Commission has recognized that reasonable approximation suffices in its  
14 many decisions discussing and approving APS's various estimation methods. For  
15 example, in cases involving non-demand based customers, the Commission has  
16 approved APS's estimation based on a customer's prior usage history and a "degree-  
17 day" extrapolation. *In the Matter of the Complaint Filed by Ronald F. Metzler* at 6  
18 ("The degree-day-method of computing electrical usage has been determined to be an  
19 accurate [gauge] of electrical usage when a meter is defective or has not correctly  
20 measure electrical usage."); *In the Matter of the Complaint of Audrey I. Dietz* at 4  
21 ("[The degree/day method] has been accepted by the Commission and found  
22 reasonable in the vast majority of other jurisdictions where this problem has arisen.").

23 Of even more direct relevance here, the Commission in *Ciccone v. Ariz. Pub.*  
24 *Serv. Co.*, Docket No. U-1345-96-162, Decision No. 59919 (December 10, 1996)  
25 approved APS' use of a estimation method for demand meter customers similar to  
26

1 APS' current estimation method. There, the Commission found as an "appropriate  
2 demand estimate" APS' estimation model that considered factors such as a  
3 "customer's actual kWh [usage], his previous months' demands, and the peak demand  
4 of other customers with similar kWh usage." *Id.* at 11. And, when circumstances  
5 prevented APS meter readers from obtaining successful reads, the Commission found  
6 in *Ciccone* that APS followed "reasonable procedures" when it estimated the meter  
7 reads. *Id.* at 7.

8         With its long history of prior rulings, the Commission should not change  
9 course mid-stream. An agency's interpretation of its own rules must be reasonable  
10 and consistent with its past practice. *See Bradberry v. Director*, 117 F.3d 1361, 1366  
11 (11th Cir.1997) ("It is well-established that courts must defer to an agency's  
12 *consistent* interpretation of its own regulation . . .") (emphasis added). No deference  
13 is afforded to ad hoc positions of agencies adopted in reaction to the exigencies of  
14 litigation; rather, deference is due when an agency has taken a constant and  
15 unchanging -- and reasonable -- position on the proper interpretation of its regulation.  
16 *See id.* Because this Commission has a long-standing practice of analyzing APS  
17 meter reading and bill estimating procedures under an overall "reasonableness"  
18 standard, it should adhere to that standard here.

19         Further, APS has a right to rely on the determinations made by the  
20 Commission in the past that announce and define the standard of "reasonableness"  
21 with respect to bill estimation. One important purpose of agency determinations is to  
22 provide guidance to those who are subject to the agency's regulatory authority. *See*  
23 *WLOS TV, Inc. v. FCC*, 932 F.2d 993 (D.C. Cir. 1991). For that reason, "an agency  
24 changing its course must supply a reasoned analysis indicating that prior policies and  
25 standards are being deliberately changed . . . ." *Greater Boston Television Corp. v.*  
26

1 FCC, 444 F2d 841, 852 (D.C. Cir. 1971). Otherwise, a departure from past policy  
2 “could constitute action that must be overturned as ‘arbitrary, capricious, [or] an  
3 abuse of discretion’ within the meaning of the Administrative Procedure Act.” *INS v.*  
4 *Yang*, 519 U.S. 26, 32 (1996); *accord Ariz. Hosp., Inc. v. Shalala*, 185 F.R.D. 263,  
5 266-67 (D. Ariz. 1998).

6 In short, the legal standard to be applied by the Commission in evaluating  
7 Complainant’s claims regarding APS’ estimating procedures is an overall  
8 “reasonableness” standard, and the scope and application of that standard is subject to  
9 any valid Commission rules relating to estimating and to the past interpretation and  
10 construction by the Commission of its rules and requirements relating to estimating.

11 **IX. CONCLUSION.**

12 Mrs. Read’s complaint cannot be certified as a class action. The Commission’s  
13 Rules do not allow it. In any event, the Superior Court has already determined that  
14 class treatment is improper. That ruling was correct, and it bars Mrs. Read’s second  
15 attempt to secure certification here.

16 When the Commission eventually addresses the merits of Mrs. Read’s claims,  
17 Complainant should bear the burden of proving that APS’s bill estimation methods  
18 are unreasonable. Because APS must, under the Arizona Constitution and state  
19 statute, collect amounts from customers whose meters were not read, it must have  
20 available a method to estimate the customer’s actual use. If, however, the  
21 Commission ultimately determines that APS’s estimation method was unreasonable  
22 and that APS customers were, as a group, over-billed as a result, it has authority  
23 (subject to available defenses such as estoppel, statute of limitations, set off, and  
24 others) to craft relief that will impact, whether positively or negatively, customers  
25 other than Complainant.

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DATED this 19th day of November, 2004.

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By   
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\_\_\_\_\_

# **EXHIBIT A**

1-14

272.15 Read motion

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

16 AVIS READ,  
Individually and on Behalf of Herself and All Others  
17 Similarly Situated,  
18 Plaintiffs,  
19 vs.  
20 ARIZONA PUBLIC SERVICE COMPANY,  
21 Defendant.

No: CV 2002-010760  
**NOTICE OF MOTION AND  
MOTION FOR CLASS  
CERTIFICATION**  
  
(Assigned to the Honorable  
Rebecca A. Albrecht)

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26 OSBORN & MALEDON

27 JAN 20 2004

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**NOTICE OF MOTION**

TO: Defendant ARIZONA PUBLIC SERVICE COMPANY ("Defendant" or "APS"), and its Counsel of Record, Debra A. Hill, OSBORN MALEDON, 2929 N. Central Avenue, Suite 2100. Phoenix, Arizona 85012.

PLEASE TAKE NOTICE that as soon as the matter may be heard, before the Honorable Rebecca A. Albrecht in the Maricopa County Superior Court, East Court Building - 4<sup>th</sup> Floor, 101 W. Jefferson, Courtroom 411, Phoenix, Arizona 85003, Plaintiffs will move the Court pursuant to ARIZ.R.CIV.P. 23 and any other applicable rule of procedure, for an order certifying the above-referenced case as a class action.

**MOTION**

Plaintiffs hereby move the Court pursuant to ARIZ. R. CIV. P. 23(b) and 23(c) for an Order certifying the above-referenced case as a class action as to all counts set forth in their Amended Complaint. The Plaintiff Class (or subclasses) consists of all persons meeting the following definition:

All persons who, from September 1, 1998, paid estimated bills that were based upon unlawful, unapproved estimating procedures, formulae and practices. Subclass A consists of all those APS customers who were billed for estimated demand readings during the class period. Subclass B consists of all those APS customers, who were not on a "demand" rate, whose bills were estimated for more than three consecutive months during the class period.

Plaintiffs also move the Court to appoint Plaintiffs Avis Read, Paul Schaeffer and Linda Schaeffer as the class representatives and to name Barry G. Reed of Zimmerman Reed P.L.L.P.; David A. Rubin of the Law Offices of David A. Rubin; and, Jeffrey M. Proper of the Law Offices of Jeffrey M. Proper as class counsel.

Said motion shall be based on the file with records herein, memorandum and affidavits to be filed in support of this motion and arguments of counsel.

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Respectfully submitted,

DATE: January 16, 2004



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1 The ORIGINAL and two (2) copies of  
2 the foregoing were filed by hand delivery  
3 this 10<sup>th</sup> day of January, 2004.

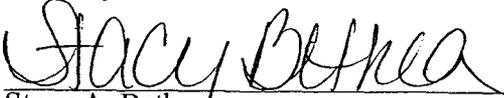
3 Clerk of the Court  
4 MARICOPA COUNTY SUPERIOR COURT  
5 101 W. Jefferson  
6 Phoenix, AZ 85003

6 Copies of the foregoing were sent  
7 by facsimile & U.S. Mail  
8 this 10<sup>th</sup> day of January, 2004 to:

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Read motions

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

15  
16 AVIS READ,  
Individually and on Behalf of Herself and All Others  
17 Similarly Situated,  
18 Plaintiffs,  
19 vs.  
20 ARIZONA PUBLIC SERVICE COMPANY,  
21 Defendant.

No: CV 2002-010760  
**MEMORANDUM OF LAW IN  
SUPPORT OF MOTION FOR  
CLASS CERTIFICATION**  
(Assigned to the Honorable  
Rebecca A. Albrecht)

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1 I. INTRODUCTION

2 Plaintiffs Avis Read and Paul and Linda Shaeffer have brought this action against Defendant,  
3 Arizona Public Service Company ("APS"), challenging APS' computer-driven, system-wide use of  
4 unlawful estimating and billing procedures.<sup>1</sup>

5 The record in this case establishes that APS has acted with blatant disregard for its position as  
6 a public service company whose activities are governed by specific statutes and regulations. Instead,  
7 APS has systematically deceived and overcharged its customers for electricity by failing to follow  
8 legally required practices and procedures regarding meter reading, estimating and billing.

9 The APS customers affected by these practices can be easily identified and divided into two  
10 subclasses: those who received estimates for consumption alone, and those customers who were billed  
11 for both consumption and estimated demand. All APS customers who received estimated bills will fall  
12 into one group or another, depending upon their meter type and rate plan. It is the estimated billing  
13 procedures and practices that will be on trial or ruled upon by motion, making this a perfect case for  
14 class-wide resolution.

15 The record is undisputed in this case that Defendant has used unlawful and deceptive procedures  
16 in estimating demand meters. Prior to 1998, Defendant could not automatically estimate demand, so  
17 billing clerks manually estimated demand using a variety of unapproved methodologies. The estimating  
18 procedures Defendant has used since it began generating computer-driven estimates of demand in 1998  
19 are uniform, contrary to the law, unapproved by the Arizona Corporation Commission ("ACC"), and  
20 actually created *ad hoc* by APS employees. Further, in the case of the first bill after an estimate or  
21 series of estimates, the bills fail to disclose that the demand portion of the bill is an estimate at all,  
22 although Defendant has admitted that that is what the demand reading really is.

23 With respect to non-demand meters, Defendant's computer program has generated far more  
24 consecutive months of estimated bills than the law permits, requiring consumers to pay inflated.

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27 <sup>1</sup> Defendant has stipulated to the proposed Amended Complaint, but no Order has been issued by  
28 the Court.

1 estimated bills that are unlawful. This practice went on unabated from 1998 until late 2002.

2 Defendant concedes that it has a single computer system that applies uniform estimating and  
3 billing procedures to its customers. Because all estimated bills are rendered using the same system,  
4 these uniform billing practices are either lawful or they are not as to every APS customer who has had  
5 his or her bill estimated. Indeed, the case can be decided as to all APS customers in a single class-wide  
6 summary judgment motion post certification.

7 Defendant's estimating procedures are programmed into a computer, and hence they are applied  
8 uniformly. This Court can look at them; place them side-by-side with the governing laws and  
9 regulations; and determine whether they comply. This relatively simple comparison will decide these  
10 issue as to the entire class. This case is not only appropriate for class certification, it is the kind of case  
11 that Rule 23 was designed to efficiently resolve. These are small claims that aggregate to a large sum,  
12 involving system-generated bills and narrow legal issues. Rule 23 is not only the best way; it is the only  
13 way to resolve them.

14 The requirements of Ariz. Rule Civ. Pro. 23 are clearly satisfied and this action should be  
15 certified as a class action on behalf of the class as defined in Plaintiff's certification motion. Regulation  
16 serves as the surrogate guardian of fairness in place of competition for a regulated monopoly: the  
17 constraints and supervision mandated by the Regulations are not advisory, nor are they just an  
18 administrative nuisance to APS. They govern and must be followed.

19 **II. THE REGULATIONS THAT CONTROL APS' PROCEDURES**  
20 **WITH RESPECT TO ESTIMATING METERS**

21 As described above, APS is a tightly regulated monopoly provider of an essential product.  
22 Because of its absolute market power, the people of Arizona, acting through their Legislature and  
23 Corporation Commission, have put in place rules to be followed by APS and enforced by both the ACC  
24 and the Courts to restrict APS' freedom to operate independently, like any other business. The trade-off  
25 for monopoly power is strict regulation.

26 In the area of meter estimating, APS' procedures are tightly controlled and its freedom to act  
27 is severely restricted. It is allowed to estimate meter reads under very limited circumstances, and  
28 crucially, it may not render an estimated bill at all, if the procedure by which it was created has not been

1 approved by the Commission. Further, any estimated bill must clearly state that it is an estimate, and  
2 APS may not send estimated bills for more than three consecutive months without taking direct steps  
3 to ensure an actual meter reading.

4 Even if it is justified in sending out an estimated bill, that bill must, in addition, be based solely  
5 on the factors set forth in the Regulations, which require specific reference to particular past months'  
6 usage.

7 As the following will describe, Defendant's post-1998 estimating procedures and billing  
8 practices have treated the Commission and the Rules as annoyances to be evaded, ignored, or pacified  
9 according to need. The result has been a flood of fraudulent, misleading, and unauthorized and  
10 excessive estimated bills paid for by class members.

### 11 12 **III. STATEMENT OF FACTS**

#### 13 **APS Bills Customers Using Unapproved, Unlawful and Deceptive** 14 **Billing Practices and Procedures**

15 As a public service company, APS is required, by law, to seek approval of its rates, charges, and  
16 estimating procedures by the ACC. See A.R.S. § 40- 365. Also, any change in any rate, charge or  
17 service by APS is subject to a hearing and approval by the ACC. See A.R.S. § 40-361, *et seq.* In  
18 principal, this regulatory scheme should result in bills that are the product of uniform, fair, and  
19 governmentally and publicly approved standards. However, while APS has implemented a uniform  
20 mechanism for billing its customers, the record in this case reveals that APS has, to the extent possible  
21 without easily getting caught, taken the role of fashioning its charges and billing methods upon itself.<sup>2</sup>  
22 This is true notwithstanding a robust regulatory scheme that dictates, with great specificity, stringent  
23 rules relating to estimating meter reads and billing customers based upon those estimates. Arizona  
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25 <sup>2</sup> In anticipation of mandatory reporting to the ACC, APS employees have expressed their concern  
26 regarding APS' unapproved estimating practices: "I'm concerned that [the ACC] will order us to share the  
27 rest of our #'s around estimated reads." See APS01651, Exh. 1. In addition, APS employees have admitted  
28 that during the class period, apart from estimates that were "beyond APS control, there are a significant  
amount of estimates that were created by APS." *Id.*

1 Administrative Code R14-2-210<sup>3</sup>, governing electrical utilities, provides:

2 A. Frequency and estimated bills

- 3 1. Unless otherwise approved by the Commission, the utility or billing  
4 entity shall render a bill for each billing period to every customer in  
5 accordance with its applicable rate schedule and may offer billing  
6 options for the services rendered. Meter Readings shall be scheduled for  
7 periods of not less than 25 days Or more than 35 days without customer  
8 authorization. If the Utility or Meter Reading Service Provider changes  
9 a meter reading route or schedule resulting in a significant a alteration  
10 of billing cycles, notice shall be given to the affected customers.
- 11 2. Each billing statement rendered by the utility or billing entity shall be  
12 computed on the actual usage during the billing cycle. If the utility or  
13 Meter Reading Service Provider is unable to obtain an actual reading,  
14 the utility or billing entity may estimate the consumption for the billing  
15 period giving consideration to the following factors where applicable:
- 16 a. The customer's usage during the same month  
17 of the previous year.
- 18 b. The amount of usage during the preceding month.
- 19 3. Estimated bills will be issued only under the following conditions  
20 unless otherwise approved by the Commission:
- 21 a. When extreme weather conditions, emergencies, or  
22 work stoppages prevent actual meter readings.
- 23 b. Failure of a customer who reads his own meter to deliver his  
24 meter reading to the utility or Meter Reading Service provider  
25 in accordance with the requirements of the utility or Meter  
26 Reader Service Provider billing cycle.
- 27 c. Provider is unable to obtain access to the customer's premises  
28 for the purpose of reading the meter, or in situations where the  
customer makes it unnecessarily difficult to gain access to the  
meter, that is, locked gates, blocked meters, vicious or  
dangerous animals. If the utility or Meter Reader Service  
Provider is unable to obtain an actual reading for these  
reasons, it shall undertake reasonable alternative to obtain a  
customer reading of the meter.
- d. Due to customer equipment failure, a 1-month estimation will  
be allowed. Failure to remedy the customer equipment  
condition will result in penalties for Meter Service Providers  
as imposed by the Commission.

24 <sup>3</sup>The history of Regulation R14-2-210 is as follows:

25 Adopted effective March 2, 1982 (Supp. 82-2). Amended by an emergency action effective August 10,  
26 1998, pursuant to A.R.S. § 41-1026, in effect for a maximum of 180 days (Supp. 98-3). Emergency  
27 amendment replaced by exempt permanent amendment effective December 31, 1998 (Supp. 98-4).  
28 Amended by exempt rulemaking at 5 A.A.R. 3933, effective September 24, 1999 (Supp. 99-3). See  
A.A.C. R14-2-210 (2004).

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- e. To facilitate timely billing for customers using load profiles.
- 4. After the 3<sup>rd</sup> consecutive month of estimating the customer's bill due to lack of meter access, the utility or Meter Reading Service Provider will attempt to secure an accurate reading of the meter. Failure on the part of the customer to comply with a reasonable request for meter access may lead to discontinuance fo service.
- 5. A utility or billing entity may not render a bill based on estimated usage if:
  - a. The estimating procedures employed by the utility or billing entity have not been approved by the Commission.
  - b. The billing would be the customer's 1<sup>st</sup> or final bill for service.
  - c. The customer is a direct-access customer requiring load data.
  - d. The utility can obtain customer-supplied meter readings to determine usage.
- 6. When a utility or billing entity renders an estimated bill in accordance with these rules it shall:
  - a. Maintain accurate records for the reasons therefor and efforts made to secure an actual reading;
  - b. Clearly and conspicuously indicate that it is an estimated bill and note the reason for its estimation.

(emphasis added).

APS has utilized only two systems to estimate bills throughout the proposed class period. The first system was in place until September 1998. Under this billing system, when a demand read was unavailable, the demand calculation was produced using unapproved methods. See Exhibit 2. On or about March 1999, APS implemented a new computer billing and estimating system, which APS employees refer to as the "Customer Information System," or "CIS." Smith Depo. at p. 24. (See Exhibit 3). This system replaced an older computerized billing system, which had been used to generated bills for all APS customers prior to the implementation of the "new" CIS in September 1998. It is uncontroverted that the "new" CIS was used to generate bills for all customer accounts relevant to this class action from the date of its implementation. Moreover, it is this system, acting upon parameters created and/or commissioned by APS that is responsible for calculating and producing estimated bills for APS customers whose meters are not read.

APS' conduct with respect to demand meters represents an extraordinary disregard for these regulations. As described above, any estimated bill must, under R14-2-10, be based upon the factors

1 stated in Section 2(a) and 2(b): the customers usage in the same month of the previous year, and the  
2 usage during the previous month. The restriction could not be clearer, and self-evidently any variation  
3 from it would, under 5(a), require the approval of the Commission.

4 The practice under the "old" billing system for estimating demand meters was summarized in  
5 a memo dated November 30, 2000 from Janet Smith to Cynthia Janka, another APS employee:

6 "I met with Lori and her group yesterday to discuss some estimating issues. One of the  
7 items raised was how to properly estimate a demand. After some discussion we arrived  
8 at what is the best method, so this is a heads up to you in case you are ever asked by the  
9 Commission. As you know the old system did not estimate demands. The billing  
consultants and associates used various methods to estimate demands when needed (it  
varied depending upon the person doing the estimating, not the situation)."

10 Exh. 2.

11 From this bizarre arrangement, APS, in September 1998, changed its computer system to allow it to  
12 automatically estimate demand for APS' demand customers where no actual demand reading had been  
13 taken.

14 As Ms. Smith describes in her memo, she and her colleagues "decided" to program in a series  
15 of percentage "load factors" that would be determined by meter type. There was no mention of the  
16 Section 2(a) and 2(b) factors, and APS, through Ms. Smith, created them around, rather than through  
17 Commission approval. The only approval of the procedure was provided by "Jana and Cynthia" in a  
18 memo dated December 4, 2000, that apparently approves the use of the "Smith formula" for all demand  
19 estimates.

20 Incredibly, on June 19, 2002, Smith wrote a memo instructing the technical staff at APS to  
21 change the load factors used to generate an estimated demand bill by changing the percentage load  
22 factors to be used from those she had initially set. See Exh. 4. Again, these changes were made without  
23 any Commission involvement.

24 The "Smith formula" was created *ad hoc*, internally, by APS. Indeed, in a later memo, Smith  
25 describes having created the procedure in "20 minutes" (See Smith E-mail, Exh. 5). Thus, since  
26 September 1998, Defendant has been regularly estimating demand under a formula that is completely  
27 unlawful under Section 5(a).

28 The mis-estimation of demand is particularly egregious because of the doubtful accuracy and

1 non-accountability of the entire process. As all of Defendant's witnesses have agreed, estimated  
2 demand cannot be recaptured, because demand is only accurate in the month after a demand meter is  
3 "reset". Thus a meter read after three months of estimating will record the highest demand at any point  
4 in the previous three months. Further, when the meter is finally read, because there is no way to know  
5 when the highest demand occurred, the actual reading is just an estimate. A meter finally read in  
6 October will be billed as if the demand had reached the point shown in October, when that point may  
7 have been reached in August. In truth, with respect to demand meters, the first actual reading after an  
8 estimated month is itself an estimate for that month, although APS represents it as actual demand for  
9 that month. As noted above, this is directly contrary to Section 6(b) which requires disclosure of all  
10 estimates.

11 In short, Defendant's estimating procedures have been and remain an *ad hoc*, unapproved,  
12 misrepresented, self-created hodge-podge. That said, it is indisputable that the whole procedure, with  
13 its succeeding self-created changes has been reduced to a computer-driven, uniform estimating and  
14 billing system using the "Smith formula" for estimating demand. Whether it is lawful is a simple,  
15 common question resolved by analysis of the regulations applied to the procedures, not individual facts.

16 Apart from utilizing unapproved and unlawful methodologies for estimating demand reads, the  
17 new CIS produced thousands of unlawful bills for those customers who were on a standard, or non-  
18 demand rate. When APS purchased its new CIS, APS failed to adjust the new CIS's pre-programmed  
19 estimating mechanisms to comply with Arizona law and regulations, notwithstanding the fact that the  
20 new CIS's non-compliance with Arizona law was patently evident, even from the CIS's very operating  
21 manual. See APS02772 , Exh. 6. ([CIS] will estimate four consecutive months if necessary before  
22 requiring the meter be read.") On July 26<sup>th</sup>, 2002 APS finally corrected this problem with its Customer  
23 Information System that was causing the computer billing system, in violation of Arizona law, to  
24 automatically estimate electric bills for up to four months. See APS03352, Exhibit 7. The existence  
25 of the illegal bills generated by the CIS from September 1998 to July 2002 has, to Plaintiffs'  
26 knowledge, never been reported to the ACC or APS customers. This blatant conduct went uncorrected  
27 for close to four years and caused APS to generate thousands of bills in violation of Arizona law to the  
28 detriment of the members of the class.

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8 **IV. PROPOSED CLASS**

9 Plaintiffs seek to certify the following class:

10 All persons who, from September 1, 1998, paid estimated bills that were based upon  
11 unlawful, unapproved estimating procedures, formulae and practices. Subclass A  
12 consists of all those APS customers who were billed for estimated demand readings  
13 during the class period. Subclass B consists of all those APS customers, who were not  
14 on a "demand" rate, whose bills were estimated for more than three consecutive months  
15 during the class period.

16 **A. The Common Factual and Legal Issues in this Action Merit Class Certification**

17 Plaintiffs in this action seek relief for all persons who paid estimated bills that were based upon  
18 unlawful, unapproved estimating procedures, formulae and practices. Plaintiffs propose that, for the  
19 ease of management of this action and in the interest of justice, the class be divided into two subclasses.

20 1. Subclass A - Those APS Customers on "Demand" Rates Issued Estimated Bills

21 As described, *supra*, many APS customers are billed based upon both their usage of Kilowatt  
22 hours and peak Kilowatt usage over a specified period, or "demand". Subclass A consists of all those  
23 APS customers who were billed for estimated demand readings during the class period.

24 The interests of Subclass A will be protected adequately and fairly by Avis Read, who was  
25 billed repeatedly for estimated demand usage during the proposed class period. Plaintiff Avis Read's  
26 demand meter (meter # 90683) had been estimated using unapproved formulae by APS on many  
27 occasions relevant to this action. See Exh. A&B from Amd. Complaint. All members of Subclass A  
28 premise liability on all ten counts listed in Plaintiff's First Amended Complaint.

29 2. Subclass B- Those APS Customers with KWh Only Meters That Were Estimated in  
30 Violation of Arizona Law

31 In addition to Subclass A, another readily definable group of APS customers has been adversely  
32 impacted by APS' unlawful billing and estimating practices. Class B can easily be defined as those  
33 APS customers, who were not on a "demand" rate, whose bills were estimated for more than three  
34 consecutive months during the class period.

35 The interests of this class of customers will be fairly and adequately represented by Paul and  
36 Linda Schaeffer, who were forced to pay estimated bills by APS for months at a time, effectively

1 forcing them to provide APS with interest-free loans. Plaintiffs allege that APS' conduct towards each  
2 member of this Subclass constitutes violations of A.R.S. § 44-1522, Arizona Administrative Code R-2-  
3 210 and A.R.S. § 40-367. Additionally, Class B seeks relief under claims of: breach of contract; breach  
4 of fiduciary duty; breach of express warranty; and, negligence.

5 **V. CLASS CERTIFICATION STANDARDS UNDER ARIZ. RULE CIV. PRO. 23**

6 In determining whether a class action will be certified, the substantive allegations of the  
7 complaint should be taken as true, except where clearly controverted by evidence<sup>4</sup>. See, Blackie v.  
8 Barrack, 524 F.2d 891, 901 (9th Cir. 1975), cert. denied, 429 U.S. 816, 97 S.Ct. 57, 50 L.Ed.2d 75  
9 (1976). Inquiry into the merits of the case is forbidden in ruling on a motion for class certification. See,  
10 Eisen v. Carlisle Jacquelin, 417 U.S. 156, 177-78 (1974). Moreover, “[g]enerally, [Rule 23] should be  
11 construed liberally, and doubts concerning whether to certify a class should be resolved in favor of  
12 certification. ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc., 203 Ariz. 94, 98,  
13 50 P.3d 844, 848 (App.Div.1 2002) (review denied) (emphasis added). While the certification of a class  
14 is discretionary, “[t]he trial court, if possible, should employ its discretion to define the class in a  
15 manner that will allow utilization of the class action procedure.” Lennon v. First National Bank of  
16 Arizona, 21 Ariz.App. 306, 308, 518 P.2d 1230, 1232 (App.Div.1 1974). Last, “[c]lass action  
17 certifications to enforce consumer protection laws are ‘desirable and should be encouraged.’” Duran  
18 v. Credit Bureau of Yuma, Inc., 93 F.R.D. 607, 610 (D.Ariz. 1982) quoting Watkins v. Simmons and  
19 Clark, Inc., 618 F.2d 398, 404 (6th Cir. 1980).

20 **A. Numerosity**

21 Rule 23(a)(1), commonly known as the “numerosity” element, requires that the Class be “so  
22 numerous that joinder of all the members is impracticable.” Ariz. Rule Civ. Pro 23(a)(1). While there  
23 is no bright line rule regarding the number of class members required to satisfy the numerosity  
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25 <sup>4</sup> Because the language of Arizona Rule of Civil Procedure 23 is identical to Rule 23 of the Federal  
26 Rules of Civil Procedure, federal cases construing F.R.Civ.P. Rule 23 are authoritative. See ESI Ergonomic  
27 Solutions, LLC v. United Artists Theatre Circuit, Inc., 203 Ariz. 94, 98 n.2, 50 P.3d 844, 848 (App.Div.1  
28 2002) (citing Lennon v. First Nat’l Bank of Arizona, 21 Ariz.App. 306, 308 n. 3, 518 P.2d 1230, 1232 n.3  
(1974)).

1 requirement, so long as the putative class consists of more members than the named class  
2 representatives alone, the numerosity requirement may appropriately be satisfied. See London v. Green  
3 Acres Trust, 159 Ariz. 136, 140, 765 P.2d 538, 542 (App.Div.1 1989)(review denied).

4 Here, the numerosity requirement is clearly met. APS currently has over 902,000 customers.  
5 See Exhibit 8, APS news release. Each APS customer is billed by the same computer billing and  
6 information system, and has either a consumption and demand or consumption meter. Accordingly,  
7 APS' business records confirm that all APS customers who were issued estimated bills with a demand  
8 component were billed using unapproved estimating procedures. Additionally, APS' business records  
9 demonstrate that thousands of customers had their bills estimated for periods in excess of the statutory  
10 period.

11 For instance, according to APS internal audits, from January 1, 2001 through March 25, 2002,  
12 over 100,000 customer accounts "had automatic system estimates of meter reads performed by the  
13 billing system when meter reads were missing or unavailable for all meter read dials required for  
14 billing." See Exhibit 7 at APS03349. Pursuant to APS internal audits, over 2000 accounts were  
15 automatically "system estimated" over four times from March, 2001 to March 2002. See Exhibit 7 at  
16 APS03350.

17 **B. Commonality**

18 Rule 23(a)(2) requires that "there are questions of law or fact common to the class." See Ariz.  
19 Rule Civ. Pro 23(a)(2). The standard for commonality is satisfied when "relief is based on questions  
20 of law applicable in the same manner to each member of the class." Brink v. First Credit Resources,  
21 185 F.R.D. 567, 570 (D.Ariz 1999) (internal quotations omitted). Like the other aspects of Rule 23,  
22 this requirement has been construed very liberally by Arizona courts:

23 Maintenance of a class action does not depend upon commonality of all questions of  
24 fact and law, but only that such questions predominate over questions affecting  
25 individual members of the class. Like v. Carter, 448 F.2d 798 (8th Cir. 1971); Goldstein  
26 v. Regal Crest, Inc., 59 F.R.D. 396 (D.C.1973). The common questions need not be  
27 dispositive of the entire action. Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), cert.  
28 den., 394 U.S. 928, 89 S.Ct. 1194, 22 L.Ed.2d 459.

27 Godbey v. Roosevelt School District No. 66 of Maricopa County, 131 Ariz. 13, 18, 638 P.2d 235, 240  
28 (App.Div.1. 1981) (review denied 1981).

1 Also, the commonality standard is satisfied when relief is based on "questions of law applicable  
2 in the same manner to each member of the class." O'Connor v. Boeing North Am., Inc., 180 F.R.D.  
3 359, 371 (C.D.Cal. 1997) (quoting General Tel. Co. Of the Southwest v. Falcon, 457 U.S. 147, 155,  
4 102 S.Ct. 2364, 2369,, 72 L.Ed.2d 740 (1982)). Additionally, if common questions of law of fact exist,  
5 the possibility of variable damages for each class member is not a proper basis for finding that  
6 commonality among the class members does not exist. See, Blackie, 524 F.2d at 905.

7 In the case at Bar, common questions of law and fact affect all class members' claims. All  
8 subclass members pursue the same legal remedies under the same statutes and regulations, regarding  
9 the same business practices of APS. Resolution of those claims depends on answering the same  
10 questions, which can be done for all by considering common evidence regarding APS' business  
11 practices concerning billing, electric bill estimation and regulatory compliance, and simply comparing  
12 the computer driven procedures to the regulations that govern them. The following questions of fact  
13 that must be resolved in any one case will apply and also resolve the issue for all the other class  
14 members' claims:

- 15 a. whether APS' estimating and billing practices were and/or remain to the present  
contrary to controlling State law and Regulations;
- 16 b. whether APS' customers were being billed for the amount of electricity they  
actually consumed;
- 17 c. whether APS' customers were being billed for the amount of electricity they  
actually demanded;
- 18 d. whether APS' bills were false and misleading;
- 19 e. whether APS overcharged customers for electricity;
- 20 f. whether APS concealed the illegality of its actions from the consuming public;  
and,
- 21 g. whether Plaintiffs and the other members of the Class have been damaged by  
way of the aforementioned actions of the Defendant.

22 Additionally, the following questions of law are common among the class members:

- 23 a. whether Defendant has perpetrated consumer fraud in violation of A.R.S. § 44-  
1522, *et seq*;
- 24 b. whether Defendant, by reason of its alleged conduct, has violated Arizona  
Administrative Code R14-2-210;
- 25 c. whether Defendant, by reason of its alleged conduct, has been unjustly enriched;
- 26 a. whether Defendant, by reason of its alleged conduct, has breached its fiduciary  
duties to Plaintiffs and the Class;
- 27 e. whether APS, by reason of its alleged conduct, has breached express warranties  
to the class;
- 28 f. whether APS, by reason of its alleged conduct, has breached contracts entered  
with Plaintiff and the Class;
- g. whether APS, by reason of its alleged conduct, has violated A.R.S. § 40-361;

1 whether APS, by reason of its alleged conduct, has violated A.R.S. § 40-367;

- 2 h. whether Defendant, by reason of its alleged conduct, proximately caused injury  
3 to Plaintiff and the members of the Class and, if so, what is the proper measure  
4 of such damages; and,  
5 i. whether injunctive relief is appropriate to curtail said actions of the Defendant  
6 and require it to send estimated bills only upon following the procedures set  
7 forth in controlling Regulations.

8 Defendant APS billed each class member using the same computer billing system throughout  
9 the class period. Likewise, the central legal and factual issues in this case involve standardized,  
10 systematic conduct by APS towards its customers. Although the class members share a myriad of  
11 common facts and legal issues, "all that is required is a common issue of law or fact." Blackie, 524  
12 F.2d at 904. Additionally, "[t]he existence of shared legal issues with divergent factual predicates is  
13 sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class."  
14 Hanlon v. Chrysler Corp., 150 F.3d 1011, 10 (9th Cir. 1998). In the case at Bar, the commonality  
15 standard is clearly met.

#### 14 C. Typicality

15 Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of  
16 the claims or defenses of the class . . ." Ariz. Rule Civ. Pro. 23(a)(3). "The test of typicality refers to  
17 the nature of the claim or defense of the class representative, and not to the specific facts from which  
18 it arose or the relief sought." Jones v. Shalala, 64 F.3d 510, 514 (9th Cir. 1995); See also, e.g., Hanlon  
19 v. Chrysler Corp., 150 F.3d 1001, 1020 (9th Cir. 1998); Donaldson v. Pillsbury Co., 554 F.2d 825, 830  
20 (8th Cir. 1977); Wright v. Stone Container Corp., 524 F.2d 1058 (8th Cir. 1975). The requirements of  
21 Rule 23(a)(3) were fully considered in Lennon v. First National Bank of Arizona, 21 Ariz.App. 306,  
22 518 P.2d 1230 (1974). There the court summarized:

23 Under Rule 23(a)(3) the claims of the representative party must be "typical" of the  
24 claims of the class. Some courts have held that the typicality requirement is satisfied  
25 when common questions of law or fact exist. Green v. Wolf Corp., 406 F.2d 291, 299  
26 (2d Cir. 1968). Others have held a representative's claim typical if the interests of the  
27 representative are not antagonistic to those of absent class members. Thomas v.  
Clarke, 54 F.R.D. 245 (D.C.Minn.1971); Katz v. Carte Blanche Corp., 52 F.R.D. 510  
(W.D.Pa.1971). Still others require the representative to demonstrate that absent class  
members have suffered the same grievances of which he complains. White v. Gates  
Rubber Company, 53 F.R.D. 412, 415 (D.C.Colo.1971).

28 Lennon., 21 Ariz.App. at 309, 518 P.2d at 1233.

1 In Lennon, the Court found that each test was independently met. Id. Subsequently, in the  
2 Godbey case, the Court of Appeals recognized that meeting any one of the three standards examined  
3 by the court in Lennon could satisfy the typicality requirement. See Godbey, 131 Ariz. at 17.  
4 Nonetheless, in the instant case typicality exists regardless of which test is applied.

5 With respect to the first test for commonality suggested in Lennon, as described in commonality  
6 section of this motion, *infra*, the plaintiffs' claims and the facts surrounding their claims are typical of  
7 the rest of the class. Plaintiff Read had her demand meter estimated pursuant to the same formulas used  
8 to estimate the demand meters of other class members. Also, Plaintiffs Paul and Linda Schaffer's  
9 electric bills were automatically estimated for over 3 months, in contravention of Arizona law and  
10 regulations, just as the other members of Subclass B were forced to pay bills that were based on  
11 estimates for over 3 consecutive months.

12 Next, both Subclasses will be represented by plaintiffs who meet the second test suggested by  
13 the Lennon court. No facts exist in the record, or elsewhere, to suggest that either Read or the Schaffers  
14 are interested in any way that would be antagonistic to the class. On the contrary, both Read and the  
15 Schaffers have shown a willingness to assist in vindicating the rights of Arizona consumers through  
16 their participation in this litigation.

17 Last, the third test for typicality is also met by the lead plaintiffs in this class action. Here, the  
18 absent class members, by virtue of the very definition of the Subclasses, have suffered the same  
19 grievances of which the named plaintiffs complain. This is especially true, because, as explained  
20 throughout this motion, all APS customers who received and paid for estimated bills were billed using  
21 the same billing and computer systems and guidelines.

22 In this case, the typicality requirement is met by Plaintiff Read for Subclass A and Plaintiffs  
23 Paul and Linda Schaffer with respect to Subclass B. Although, as established by the decision in  
24 Godbey, 131 Ariz. at 17, only one of the three possible tests for typicality need be met, here, each test  
25 is clearly and easily satisfied.

26 **D. Adequacy**

27 Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the  
28 interests of the class." Ariz. Rule Civ. Pro. 23(a)(4). This requirement centers on the character and

1 quality of the named representatives and the quality and experience of the attorneys representing the  
2 class. See London, 159 Ariz. at 141, 765 P.2d at 543. Alternatively stated, “[r]epresentation is  
3 adequate if counsel for the class is competent and qualified, and the class representatives do not have  
4 interests antagonistic to or conflicting with those of the unnamed class members.” Brink v. First Credit  
5 Resources, 185 F.R.D. 567, 571 (D.Ariz. 1999); see also Lerwill v. Inflight Motion Pictures, Inc., 582  
6 F.2d 507, 512 (9th Cir. 1978).

7 In the present case the requirements of Rule 23(a)(4) have been fully satisfied. First, there is  
8 no evidence that Plaintiff Avis Read has any interests antagonistic to the class, or that she will not  
9 vigorously pursue claims on behalf of the class. The same is true of the Shaeffers. Plaintiff Read’s  
10 demand and consumption meters were estimated repeatedly during the class period. See, Exh. A&B  
11 to Amended Complaint. In addition, Ms. Read and Mr. And Mrs. Shaeffer have retained counsel with  
12 substantial experience with consumer class actions. See Reed Affidavit. Clearly, the adequacy  
13 requirement is met in this case.

14 **E. Rule 23(b) Requirements**

15 In addition to satisfying the requirements of Ariz. Rule Civ. Pro. 23(a), the provisions of at least  
16 one subsection of Ariz. Rule Civ. Pro. 23(b) must be satisfied. In the instant case, the class should be  
17 certified pursuant to Rule 23(b)(3) as: (1) common questions of law or fact will predominate over  
18 questions affecting only individual members; and (2) a class is “superior to other available methods”  
19 of adjudicating the case. Certification is also appropriate, as described, infra, under Rule 23(b)(2), as  
20 Plaintiff seeks a court order declaring Defendant’s practices unlawful and deceptive, and injunctive  
21 relief enjoining further commission of those ongoing practices.

22 **VI. THE REQUIREMENTS OF ARIZ. RULE CIV. PRO. 23(B)(3) ARE MET**

23 **Common Issues of Law or Fact Predominate**

24 The predominance standard is met when common issues of fact and law, while not necessarily  
25 dispositive, predominate over questions affecting individual members of the class. See Godbey, 131  
26 Ariz. at 18. Also, “the requirements of Rule 23(b)(3) (and Rule 23(a)(3), to the extent they overlap)  
27 should be liberally construed.” Id. The predominance test does not require an exact conformity of the  
28 claims among Class members, and instead merely “tests whether proposed classes are adhesive enough

1 to warrant adjudication by representation.” Local Joint Ex. Board of Culinary/Bartender Trust Fund v.  
2 Las Vegas Sands, Inc., 244 F.3d 1152, 1162 (9th Cir. 2001), cert denied 151 L. Ed. 2d 299 (U. S. 2001),  
3 quoting Amchem Prod. v. Windsor, 521 U.S. 591. The test is satisfied “[w]hen common questions  
4 present a significant aspect of the case and they can be resolved for all members of the class in a single  
5 adjudication.” Hanlon, 150 F.3d at 1022.

6 In the case at Bar, the predominance requirement is satisfied, as a jury could reasonably  
7 conclude that APS is liable under legal theories applicable to all class members and based on evidence  
8 applicable to all members of the class. Moreover, the alleged violations can be established on a class-  
9 wide basis since the jury will be able to conclude, by reviewing common evidence of APS’ billing  
10 practices and procedures, whether APS’ conduct violated Arizona laws and Regulations. Plaintiffs will  
11 present evidence showing that APS acted with blatant disregard to the laws and regulations that govern  
12 its conduct with respect to billing and estimation. In light of APS’ defenses to these allegations, the  
13 jury will be able to make a determination on the merits of this case based on common evidence of  
14 standard, computer-driven practices, without having to examine a myriad of individual facts or legal  
15 theories. The result of this process will obviate the need for a multiplicity of actions and the resulting  
16 cost and confusion that would be caused if all affected APS customers were forced to proceed with their  
17 actions individually.

#### 18 **Class Action Is the Superior Method of Proceeding in this Case**

19 The final requirement to certify a class under Rule 23(b)(3) is that the Court determine that a  
20 class action is the superior method of proceeding. The real issue in determining superiority is the  
21 manageability of the case as one class action, or alternatively, as thousands of individual-actions. See  
22 Brink, 185 F.R.D. at 571-72. In reaching its determination with regard to superiority, the Court may  
23 consider the following factors<sup>5</sup>:

24 (A) the interest of members of the class in individually controlling the prosecution or  
25 defense of separate actions; (B) the extent and nature of any litigation concerning the  
26 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;

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27 <sup>5</sup> These factors are enumerated in Rule 23 to provide guidance to the court and are not exclusive.  
28 See Duran, 93 F.R.D. 607, 610.

1 (D) the difficulties likely to be encountered in the management of a class action.

2 Ariz.R.Civ.Pro. 23(b)(3).

3 The factors are designed to examine whether a class action is more efficient than individual  
4 litigation, thereby promoting judicial economy. See Valentino v. Carter Wallace, Inc., 97 F.3d 1227,  
5 1232 (9th Cir. 1996); Brink, 185 F.R.D. at 572. The absence of individual lawsuits militates in favor  
6 of supporting the superiority of a class action. See ESI, 203 Ariz. 94, 99, 50 P.3d 844, 848. This is true  
7 because the lack of other suits is consistent with the fact that the putative class members are unaware  
8 of their claims, that even if aware of their claims, pursuit of those claims is not economically feasible  
9 and the lack of other suits suggests that proposed class members would have no interest to control their  
10 own litigation. Id. at 98-99, 848-849.

11 In the case at Bar, no other cases that seek to determine the rights of APS customers with respect  
12 to APS' billing practices are, to Plaintiff's knowledge, pending. The real issue in determining  
13 superiority is the manageability of the case as one class action, or, alternatively, as thousands of  
14 individual actions. See, e.g., In re Workers Comp., 130 F.R.D. 99 (D.Minn.1990).

15 Consideration of these factors leads inexorably to the conclusion that a class action is  
16 appropriate here. First, the interest of class members in individually pursuing claims against APS is  
17 minimal because most class members have a relatively modest claim in relation to the money that  
18 would be required to prosecute such actions. This type of action is precisely the sort of case  
19 contemplated by Rule 23 – a scheme by Defendant to unlawfully obtain payment, possibly in the  
20 millions of dollars, by impermissibly overbilling APS customers by obtaining moderate sums from a  
21 large number of persons, resulting in ill-gotten gains, but insufficient damage to almost every customer  
22 to warrant individual actions. Because no one plaintiff could feasibly bring a lawsuit seeking recovery  
23 of the individual claims at issue, an aggregation of those claims is not only the superior way to resolve  
24 the claims, it is probably the only way.

25 The alternative against which the Court must evaluate the superiority element is the filing of  
26 thousands of individual suits, not the absence of any suits by absent class members. Due to the  
27 deceptive nature of APS' billing practices and procedures, most class members are likely unaware of  
28 the fact that their electric bills were fictitious and unlawful. Finally, as described, the existence of

1 centralized billing and information systems and the documents and business records related thereto  
2 greatly facilitates the management of this case. A class action, therefore, is the superior way to proceed.

3 **VII. THE REQUIREMENTS OF ARIZ. RULE CIV. PRO. 23(B)(2)**  
4 **ARE INDEPENDENTLY SATISFIED**

5 Plaintiffs also seek separate certification of the class under Rule 23(b)(2), which authorizes  
6 certification when:

7 the party opposing the class has acted or refused to act on grounds generally applicable  
8 to the class, thereby making appropriate final injunctive relief or corresponding  
9 declaratory relief with respect to the class as a whole.

9 Ariz. Rule Civ. Pro 23(b)(2).

10 Here, Plaintiffs seek a Court order declaring Defendant APS' business practices unlawful and  
11 deceptive, and injunctive relief enjoining further commission of these ongoing practices. Unless  
12 enjoined, Defendants will continue their deceptive and unlawful practices and both current and future  
13 APS customers will be forced to pay unlawful and deceptive bills in the future. As a result, separate  
14 certification under Rule 23(b)(2) is appropriate. See, e.g., Beckmann v. CBS, Inc., 192 F.R.D.608, 614  
15 (D.Minn.2000) (certifying class under FED.R.CIV.P 23(b)(2) and (b)(3)); Fogie v. Rent-A-Center, 867  
16 F.Supp. 1398 (D.Minn. 1993) (certifying claims for injunctive relief under FED.R.CIV.P 23(b)(2) and  
17 damage claims under 23(b)(3)); Smith v. United Healthcare Services Inc., 2002 WL 192565 \*5 (D.Minn.  
18 2002) *citing DeBoer* ("A request for monetary relief is an insufficient basis for refusing to certify a class  
19 action under Rule 23(b)(2).")

20 **VIII. CONCLUSION**

21 For the foregoing reasons, the motion to certify the class should be granted.  
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Respectfully submitted,

DATE: January 16, 2004

  
~~Barry G. Reed~~  
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1 The ORIGINAL and two (2) copies of  
2 the foregoing were filed by hand delivery  
3 this 11th day of January, 2004.

3 Clerk of the Court  
4 MARICOPA COUNTY SUPERIOR COURT  
5 101 W. Jefferson  
6 Phoenix, AZ 85003

6 Copies of the foregoing were sent  
7 by facsimile & U.S. Mail  
8 this 11th day of January, 2004 to:

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17 Stacy A. Bethea  
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292.17 Read motions

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

16 AVIS READ,  
17 Individually and on Behalf of Herself and All Others  
Similarly Situated,

18 Plaintiffs,

19 vs.

20 ARIZONA PUBLIC SERVICE COMPANY,

21 Defendant.

No: CV 2002-010760

**AFFIDAVIT OF BARRY G. REED**

(Assigned to the Honorable  
Rebecca A. Albrecht)

22 STATE OF ARIZONA  
23 COUNTY OF MARICOPA } ss.

24 Barry G. Reed, being first duly sworn upon oath, deposes and says:

25 1. I am a partner of Zimmerman Reed, P.L.L.P. and am a member in good standing of the  
26 State Bars of Arizona and Minnesota. I have personal knowledge of the statements contained in this  
27 Affidavit and if called to testify, I could and would testify competently to them.

28 2. Along with attorneys David A. Rubin and Jeffrey M. Proper, I am counsel for Plaintiffs

1 Avis Read and Paul Schaeffer and Linda Schaeffer in the above referenced action.

2 3. This Affidavit is submitted in support of Plaintiffs' Motion for Class Certification, and  
3 specifically sets forth the qualifications of Plaintiffs' counsel to serve as class counsel in this action.

4 4. Attached hereto as Exhibit A is a true and correct copy of the firm résumé of  
5 Zimmerman Reed, P.L.L.P., which describes the credentials of the attorneys in the firm and many of  
6 the cases in which the firm has been involved. Zimmerman Reed, P.L.L.P. has extensive experience  
7 in the prosecution, trial and settlement administration of class actions.

8 5. Zimmerman Reed, P.L.L.P. is experienced specifically in class action consumer  
9 protection and deceptive trade practices litigation and Real Estate Settlement Procedures Act  
10 ("RESPA") litigation, and has been responsible for significant settlements as well as legal decisions that  
11 enable litigation such as this to be successfully prosecuted.

12 6. A significant portion of the Firm's practice has been devoted to representing individuals  
13 who contest allegedly unlawful practices regarding the origination, funding, servicing and payoff of  
14 residential mortgage loans.

15 7. Zimmerman Reed, P.L.L.P. and Barry G. Reed have been appointed class counsel in  
16 each of the following class actions involving consumer protection issues:

17 Boschee v. Burnet Title Co., United States District Court, Court File No. 00-CV-194.

18 Schlink v. Edina Realty Title, Hennepin County District Court, Fourth Judicial District,  
19 State of Minnesota, Court File No. CT 02-018380, (Minn. Dist. Ct. 2003).

20 Edwards v. Long Beach Mortgage Company and White, et al. v. Washington Mutual,  
21 Inc., et al., Hennepin County District Court, Fourth Judicial District, State of  
22 Minnesota, Consolidated Court File No. CT 02-016446, (Minn. Dist. Ct. 2003).

23 Mitchell v. Chicago Title Insurance Company, Hennepin County District Court, Fourth  
24 Judicial District, State of Minnesota, Court File No. CT 02-017299, (Minn. Dist.  
25 Ct. 2003).

26 Gretchen De Boer vs. Mellon Mortgage Company, United States District Court, District  
27 of Minnesota, Court File No. 4-92-822; 64 F.3d 1171 (8<sup>th</sup> Cir. 1995).

28 Calkins vs. Fidelity Bond & Mortgage Company, United States District Court, Court  
File No. 94-C-5971; 1998 WL 719569 (N.D. Ill.)

O'Neill v. Sovereign Bank, 1998 WL 1543498 (Pa. Ct. Common Pleas, 1998)

Miller v. Chevy Chase Bank, F.S.B., 1998 WL 142394 \*4 (N.D. Ill. 1998)

Charles & Lynette Graham vs. Knutson Mortgage Corp., Hennepin County District  
Court, Fourth Judicial District, State of Minnesota, Court File No. 94-11043;  
1996 WL 407491, (Minn. Dist. Ct. 1996).

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Underhill vs. Norwest Mortgage, United States District Court, Court File No. 95-C-4737

Cusack v. Bank United of Texas, 159 F.3d 1040 (7<sup>th</sup> Cir. 1998)

Mark vs. KeyCorp Mortgage, Inc., United States District Court, Northern District of Illinois, MDL No. 899, RICO Bus. Disp. Guide 9158, 1996 WL 465400 (N.D.Ill. 1996)

Markowitz vs. Ryland Mortgage Company, United States District Court, Northern District of Illinois, Court File No. 94-C-7682

Bradford vs. Independence One Mortgage, United States District Court, Court File No. 94-C-1742

Glenos vs. GL Mortgage Corp., United States District Court, Northern District of Illinois, Court File No. 94-CV-6393

Robinson vs. Marine Midland Banks, Inc., United States District Court, Northern District of Illinois, Court File No. 95-C-5635

Ziefel vs. M&T Bank, et al., United States District Court, Northern District of Illinois, MDL No. 899

Goss vs. Alliance Mortgage, United States District Court, Northern District of Illinois, MDL No. 899

Mayard vs. United Mortgage Corp., Hennepin County District Court, Fourth Judicial District, State of Minnesota, Court File No. 94-10818

Miller vs. FBS Mortgage Corp., Hennepin County District Court, Fourth Judicial District, State of Minnesota, Court File No. 94-13743

Maddox vs. Magnolia Federal Bank, Circuit Court of Jefferson County, Court File No. 94-2702

Gray vs. Columbia National, Inc., Circuit Court of Jefferson County, Court File No. 94-006668

Bell vs. Prudential Home Mortgage Company, Inc., Circuit Court of Montgomery County, Court File No. CV-94-2717-G

Ward vs. First Federal Savings and Loan Assoc. of Rochester, County of Monroe, Supreme Court of New York, Court File No. 8136-93

Reigle vs. Sibley Mortgage Corp., County of Monroe, Supreme Court of New York, Court File No. 5897-93

Herrmann vs. Meridian Mortgage Corp., Court of Common Pleas Philadelphia County, Court File No. 1381

Murray vs. Shawmut Mortgage Company, County of Monroe, Supreme Court of New York, Court File No. 3037-94

Singleton vs. Dale Mortgage Bankers Corp., County of Monroe, Court File No. 8135-93

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- Pecorella vs. Emigrant Savings Bank, County of New York, Court File No. 125889-94
- Trotman vs. Market Street Mortgage Corp., Circuit Court of Montgomery County, State of Alabama, Court File No. CV-94-2716-PH.80
- Jackson vs. Compass Bank, Circuit Court of Shelby County, State of Alabama, Court File No. 95-520
- Kessler vs. First Federal of Alabama, Circuit Court of Jefferson County, State of Alabama, Court File No. CV-94-6140
- Searcy vs. Victoria Mortgage Co., United States District Court, Northern District of Illinois, MDL No. 899
- Gleeson vs. Superior Mortgage Corporation, United States District Court, District of Minnesota, Court File No. CV 4-93-70
- Gina G. & Rollin Neist vs. Shearson Lehman Hutton Mortgage Corp., United States District Court, Central District of California No. 91-6369 WMB(GHKx)
- Wingate vs. Bank of America, NT & SA, United States District Court, Central District of California No. CV-92 5786 MRP(SHx)
- Douglas Schultz; James & Andrea Hawkins vs. J.I. Kislak Mortgage Corp., Superior Court of California, County of Contra Costa No. C91-01541
- Bridgewater vs. Sunbelt National Mortgage Corp., Superior Court of California, County of Marin, Court File No. 158424
- Gary R. & Deborah L. vs. Leader Federal Bank for Savings, United States District Court, District of Minnesota No. 4-91-516
- Daniel & Suzanne Kruse vs. Barclays American/Mortgage Corp., United States District Court, District of Minnesota, Court File No. 4-92-197
- Beth Wills vs. Cenlar Federal Savings Bank, United States District Court, District of Minnesota, Court File No. 4-92-202
- Thomas J. & Therese Johnston vs. Comerica Mortgage Corp., United States District Court, District of Minnesota, Court File No. 4-91-675
- Karin E. & David M. Danforth vs. First Union Mortgage Corp., United States District Court, District of Minnesota, Court File No. 4-91-457
- Phillippa & Kenneth Saunders vs. Metropolitan Financial Mortgage Corp., United States District Court, District of Minnesota, Court File No. 4-92-195
- Terry & Larry Jacobson vs. Midland Mortgage Co., United States District Court, District of Minnesota, Court File No. 4-91-443
- Louis H. & Sue vs. Sears Mortgage Corp., United States District Court, District of Minnesota, Court File No. 4-91-477
- Kenneth J. & Karen Bovy vs. Lumbermen's Investment Corp., United States District Court, District of Minnesota, Court File No. 4-91-766

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Nelson vs. Investors Savings Bank F.S.B., United States District Court, District of Minnesota, Court File No. 4-92-919

Littler, et al. vs. Twin City Federal Mortgage Corp., United States District Court, District of Minnesota, Court File No. 4-92-998

Julio A. & Stacy J. Fesser vs. Household Mortgage Services, Inc., Hennepin County District Court, Fourth Judicial District, State of Minnesota, Court File No. 91-011595

Nasset vs. Margaretten & Co., Inc., Hennepin County District Court, Fourth Judicial District, State of Minnesota, Court File No. 94-9240

Strommer vs. GE Capital Mortgage Services, Inc., Hennepin County District Court, Fourth Judicial District, State of Minnesota, Court File No. 92-16064

Harlow Robinson and Fantastic Enterprises vs. Fleet Mortgage Corp. and Fleet Real Estate Funding Corp., United States District Court, Northern District of Illinois No. 91-C-7019

Charles H. & Pamela K. Puleston vs. Chase Home Mortgage Corp., United States District Court, Northern District of Illinois, Court File No. 95 C 3318

Glen and Sheila Allen vs. Citicorp Mortgage Co., United States District Court, Northern District of Illinois, Court File No. 91-C-7020

Paul Turney vs. Lomas Mortgage U.S.A., Inc., United States District Court, Northern District of Illinois, Court File No. 91-C-7018

Kathleen D. Morton vs. BancPLUS Mortgage Corp., United States District Court, District of Minnesota, Court File No. 4-92-198

Lake vs. First Nationwide Bank, United States District Court, Eastern District of Pennsylvania, Court File No. 93-0021; 156 F.R.D. 615 (E.D.Pa., 1995)

Stefani vs. American Home Funding, Inc., United States District Court, Western District of New York, Court File No. 93-CV-0093S

Lyons vs. Atlantic Mortgage & Investment Corp., County of Monroe, Supreme Court of the State of New York, Court File No. 11410-93

Hurley vs. Citizens Mortgage Service Co., County of Monroe, Supreme Court of New York, Court File No. 9862-93

Murphy, et al. vs. The Dime Savings Bank of New York, County of Queens, Supreme Court of New York, Court File No. 012712-93

Troy vs. Onbancorp, et al., County of Orleans, Supreme Court of New York, Court File No. 93-21061

Gallardo vs. PHH U.S. Mortgage Corp., United States District Court, Northern District of Illinois

1 Thomason vs. Bisys Loan Services, Inc., Circuit Court of Jefferson County, State of  
2 Alabama, Court File No. CV-94-2756

3 Williams vs. First NH Mortgage Corp., Circuit Court of Jefferson County, State of  
4 Alabama, Court File No. CV-94-5993

5 Hope vs. STM Mortgage Company, Circuit Court of Jefferson County, State of  
6 Alabama, Court File No. CV-94-3194

7 Reed vs. Banc One Mortgage Corp., Marion Supreme Court, County of Marion, Court  
8 File No. 49D02-9310-CP-1113CZ

9 Lang v. Town and Country Credit, No. 97-2068 Court File No. OO-CV-243  
10 MJD/JGL) (D.Minn.)

11 Bjustrom v. Trust One Mortgage Corp., No. 00-CV-1166 (D.Wash., February  
12 22, 2001)

13 Glover v. Standard Federal Bank, No. 97-2068 (DWF/SN) (D.Minn., March 22,  
14 2000),

15 Wilson v. Commercial Federal Mortgage Corp., No. 98-J-0184-S (N.D.Ala. March 22,  
16 2000)

17 8. Zimmerman Reed, P.L.L.P. has also recently served as court-appointed class counsel  
18 in the following consumer class actions pending in Minnesota state courts:

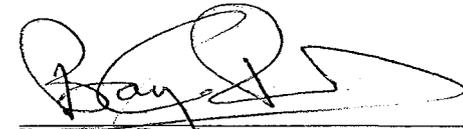
19 Fischl v. Direct Merchants Bank, Court File No. CT 00-007129 (Hennepin County  
20 Minnesota (Court approved settlement involving more than 7 million current  
21 and former cardholders)

22 Kurvers v. National Computer Systems, Court File No. MC 00-11010 (Hennepin  
23 County, Minnesota (Court approved settlement for 7,700 Minnesota students  
24 who were erroneously told that they failed the Minnesota Basic Standards Test).

25 O'Hara v. Marvin Windows & Doors, Court File No. PD 00-014027 (Hennepin County,  
26 Minnesota (Class action settlement involving over 200,000 homeowners with  
27 allegedly defective doors and windows treated with PILT).

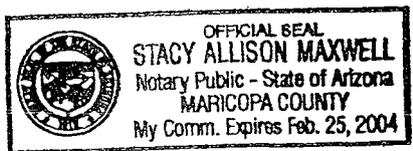
28 9. In addition, Zimmerman Reed P.L.L.P. is serving as member of the Plaintiffs' Steering  
Committee in In re St. Jude Medical Inc. Silzone Heart Valves Products Liability Litigation, 2003 WL  
1589527 (D.Minn. March 27, 2003), which has been certified as a class action.

1 FURTHER YOUR AFFIANT SAYETH NOT.

2  
3   
Barry G. Reed

4 Subscribed and sworn to before me on  
5 this 10<sup>th</sup> day of January, 2004.

6 Stacy Allison Bethea  
Notary Public



7 Stacy Allison Maxwell  
8

9 The ORIGINAL and two (2) copies of  
10 the foregoing were filed by hand delivery  
11 this 10<sup>th</sup> day of January, 2004.

12 Clerk of the Court  
13 MARICOPA COUNTY SUPERIOR COURT  
101 W. Jefferson  
Phoenix, AZ 85003

14 Copies of the foregoing were sent  
15 by facsimile & U.S. Mail  
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Attorney for Defendant

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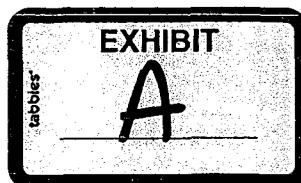
**FIRM RESUME FOR ZIMMERMAN REED, P.L.L.P.**

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ZIMMERMAN REED has been class counsel in some of the largest and most complex cases throughout the United States. We represent individuals, groups, and companies in federal and state courts. The firm's practice includes a wide range of legal issues and class actions involving dangerous or defective products, especially drugs and medical devices, consumer financial services, food contamination, health insurance coverage, environmental torts, contract disputes, human rights violations, and securities and anti-trust violations. Zimmerman Reed has an "AV" rating from Martindale Hubbell. A list of our class action cases is included below.

**ZIMMERMAN REED PARTNERS:**

CHARLES S. ZIMMERMAN is senior and managing partner of the firm. He has been continuously engaged in the private practice of law since 1972. Mr. Zimmerman is a 1972 graduate of the University of Minnesota School of Law and also received his undergraduate degree from the University of Minnesota. Mr. Zimmerman focuses his practice on complex and multi-district litigation, and he has participated in numerous national and multi-state class actions. He has been appointed lead counsel and to the National Steering Committee in many national class actions in Securities, Consumer, Mass Tort, Product Liability, and Toxic Tort cases. Mr. Zimmerman is currently serving as co-lead counsel in MDL 1431, involving thousands of lawsuits concerning the pharmaceutical drug Baycol.<sup>®</sup> Mr. Zimmerman is a member of the Zimmerman Reed Castano tobacco litigation team which received the "Breath of Life" award from the American Lung Association in 2000. This award is presented to recognized persons or groups who have been



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dedicated to community service. Mr. Zimmerman has been named a "Super Lawyer™" in 2000 and 2001 by his peers in Minnesota as compiled by *Minnesota Law & Politics*.

Charles Zimmerman is a member in good standing of the Bar of the State of Minnesota as well as the United States District Court for the District of Minnesota, the United States District Court for the District of Ohio, the United States District Court for the District of California, and the Third, Sixth, Seventh, Eighth, and Eleventh Circuit Courts of Appeals.

Mr. Zimmerman lectures and has taught courses for the Minnesota State Bar Association Continuing Legal Education, University of Minnesota School of Law, William Mitchell College of Law, the Minnesota Trial Lawyers Association (MTLA), and Association of Trial Lawyers of America (ATLA). Mr. Zimmerman has also lectured and served as a member of the faculty at Mealey's "Norplant Conference," Mealey's "Breast Implant Conferences," Mealey's "Propulsid Conference," and Andrew's Publications' "Medical Devices Litigation Conference", as well as numerous conferences on the subject of Tobacco Litigation and "Youth and Addiction." Mr. Zimmerman has also been a guest lecturer at the University of Minnesota School of Law in conjunction with course work prepared by Professor Robert J. Levy, and the William Mitchell College of Law in conjunction with course work prepared by the Honorable Thomas Carey, on the subject of Complex Litigation.

Mr. Zimmerman is a member of the Association of Trial Lawyers of America (ATLA) and the Minnesota Trial Lawyers Association (MTLA), the Federal Bar, the Minnesota State Bar Association, the Hennepin County Bar Association, and the Bar Associations of the Fifth and Eighth Federal District Courts.

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**BARRY G. REED** is a founding partner of the firm. He has been in practice since 1977 when he joined the law firm of Robins, Davis, and Lyons as an associate. In 1982 Bucky Zimmerman and Barry Reed formed the firm now known as Zimmerman Reed. Mr. Reed directs the firms in the areas of Practice Management and Professional Development as well as serving as mentor to the firm's associate attorneys.

Mr. Reed focuses on complex litigation and has a long history representing consumers in many large class action cases including cases: contesting the legality of lender payments to mortgage brokers; involving allegations of improper mortgage escrow accounting practices; and challenging the legality of credit card-financed Internet gambling transactions; and disputing credit card company practices.

A native of England, Barry G. Reed is a 1977 graduate of the University of California at Los Angeles School of Law. He received his B.A., *summa cum laude*, from U.C.L.A. in 1974. He is also a member of Phi Beta Kappa. Barry has made a number of conference and CLE presentations including, "Internet Sales of Consumer Financial Services: Emerging E-Commerce Litigation Issues" at "Consumer Financial Services Litigation 2000" sponsored by the Practising Law Institute in April and May, 2000.

Mr. Reed is admitted to practice before, and is a member in good standing of, the Bars of the States of Arizona and Minnesota as well as United States District Court for the Districts of Arizona and Minnesota. He is also admitted to United States District Courts for the Districts of North Dakota, Northern District of Illinois, Eastern District of Wisconsin, and Eastern District of Michigan. He is also admitted before the Third, Sixth, Seventh, Eighth, Ninth and Eleventh Circuit Courts of

Appeals as well as the United States Supreme Court. Mr. Reed is a member of the Minnesota State Bar Association and the Hennepin County Bar Association.

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**RONALD S. GOLDSER** joined Zimmerman Reed in 1985. He has been a partner in the firm since 1987 and has been Chief Financial Officer since 1994. He is also a member of the Firm's Management Committee. Prior to joining Zimmerman Reed, Mr. Goldser maintained a personal services law practice with several firms in the Twin Cities.

Mr. Goldser graduated from Yale University in 1975 where received a B.A. degree *cum laude* in Urban Studies. While at Yale, Mr. Goldser engaged in numerous poverty and consumer law endeavors including work with the Connecticut Citizen Action Group.

He received his law degree in 1978 from the University of Minnesota. While at the University of Minnesota, Mr. Goldser worked with the Alcohol and Drug Abuse Programming group within the University's College of Pharmacy. This work included counseling and supervised representation of individuals charged with drug offenses. In addition, together with others, Mr. Goldser taught Law for Health Sciences in the College of Pharmacy.

At Zimmerman Reed, Mr. Goldser focuses on both medical device mass tort litigation and consumer law litigation. These cases include Fen-Phen/Redux diet drugs, Propulsid®, Rezulin®, orthopedic bone (pedicle) screw, and other prescription medication litigation as well as collateral protection insurance and bankruptcy reaffirmation litigation.

Mr. Goldser is admitted to practice in Minnesota and Wisconsin, in the United States Courts of Appeals for the Third, Fourth, Fifth, Sixth, and Eighth Circuits, and in the United States District

Court for the Districts of Minnesota, Eastern Wisconsin, Western Wisconsin, and North Dakota. He is a member of the Minnesota State Bar Association and the Hennepin County Bar Association.

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**ROBERT R. HOPPER** has been a partner in the firm since 1991 after being Of Counsel for a short time. Mr. Hopper's practice focuses on complex civil litigation and government relations, with an emphasis on the public policy, legislative, and substantive legal issues that lie at the nexus of these two disciplines. Prior to joining Zimmerman Reed, Mr. Hopper practiced with Larkin, Hoffman, Daily & Lindgren in that firm's Government Relations and Litigation Departments. He also has held numerous positions in the public and private sectors including: work on a White House - sponsored urban education program in inner city Atlanta and both Harlem and the South Bronx, New York City; Manager of Public Affairs for the Cummins Engine Company and as Program Officer in its corporate foundation; as Director of State Development Planning for the State of Minnesota; as an Advisor on a special Economic Development program serving Minnesota Governor Al Quie; and Finance Director for the successful Ramstad for Congress Campaign.

Mr. Hopper is a 1976 graduate with honors of the University of Tennessee, where he majored in Psychology and Pre-med. In his senior year, Mr. Hopper was distinguished by the Dean of the College of Liberal Arts for outstanding work on "Off-Campus/Independent Study." Mr. Hopper also studied Political Philosophy and Social Ethics at the Hubert H. Humphrey Institute of Public Affairs at the University of Minnesota and at the Union Theological Seminary in New York City.

Mr. Hopper is a 1987 graduate of the William Mitchell College of Law. Upon graduation, Mr. Hopper was awarded the Excellence in Trial Advocacy Award having been previously

distinguished by the ATLA - Association of Trial Lawyers of America - through a National Trial Competition as one of the top ten student trial advocates in the United States.

Mr. Hopper is admitted to practice in all courts in Minnesota and several Federal Courts including the United States District Court for the District of Minnesota; the United States District Court for the District of Arizona; the Eighth Circuit Court of Appeals; and, the Eleventh Circuit Court of Appeals. Mr. Hopper is a member in good standing of the American Bar Association, the Minnesota State Bar Association and the Hennepin County Bar Association, as well as a member in good standing of both ATLA and the Minnesota Trial Layers Association. Mr. Hopper is also a member of the Minnesota Governmental Relations Council and a founding member of the Winston S. Churchill Center for Policy Studies at George Washington University, Washington, D.C. Mr. Hopper has also been a member of the adjunct faculty at William Mitchell College of Law teaching "Corporate Ethics and Advising Corporate Clients." Mr. Hopper is chair of the CLE "Dealing with the Media in High Profile Cases" and is a member of the faculty, along with Mr. Zimmerman, in the CLE "Managing Complex Litigation."

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**J. GORDON RUDD, JR.** is a partner with Zimmerman Reed practicing in the areas of commercial class action litigation and complex mass tort litigation. Mr. Rudd is a member of the firm's Management Committee and is the partner in charge of the Minneapolis office operations.

Mr. Rudd concentrates his practice in complex consumer and product liability class actions. He has been appointed class counsel in cases venued in state and federal courts throughout the country. Presently, Mr. Rudd is serving as liaison counsel and as a member of the Executive Committee in the multi district litigation entitled, *In re St. Jude Silzone® Heart Valves Product Liab.*

*Litig.*, MDL 1396, in which the Honorable John R. Tunheim has certified national classes on behalf of personal injury and medical monitoring classes. Mr. Rudd was also appointed lead settlement class counsel in *Fischl v. Direct Merchants Bank*, Hennepin County District Court, Fourth Judicial District, State of Minnesota, Court File No. CT 00-007129. Mr. Rudd is currently serving as co-counsel in *Kurvers v. National Computer Systems*, Hennepin County District Court, Fourth Judicial District, State of Minnesota, Court File No. 00-11010, a class action in which students were incorrectly told they had failed the 2000 Minnesota Basic Standards Test. Mr. Rudd was also a contributor to the *Report on Mass Tort Litigation* presented to Chief Justice Rehnquist in 1999.

He is a 1986 graduate of Connecticut College and a 1991 graduate of the University of Cincinnati College of Law where he received the American Jurisprudence Award in legal research and writing. Mr. Rudd also attended Bowdoin College and studied in London, U.K. during his undergraduate training.

Mr. Rudd is admitted to practice before, and is a member in good standing of, the Bar of the State of Minnesota and the United States District Court for the District of Minnesota. Mr. Rudd is also admitted to the United States Court of Appeals for the Eighth Circuit. He has also been admitted to appear *pro hac vice* in cases pending in the states of California, Oregon, Arizona, New Mexico, Texas, North Dakota, Ohio, Florida, Georgia, Tennessee, and Michigan. He is a member of the Minnesota State Bar Association and the Hennepin County Bar Association.

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CAROLYN GLASS ANDERSON is a partner with Zimmerman Reed practicing primarily in the area of consumer fraud, products liability, and complex litigation.

Mrs. Anderson graduated from Trinity College, where she received a Bachelor of Arts degree, *cum laude*, in Psychology. She received her law degree *cum laude* from Hamline University School of Law where she was a Dean's Scholar, received the Cali Award for Excellence in Constitutional Law, and was on Hamline Law Review. Her case note article was selected for publication. Carolyn also studied law at Hebrew University in Jerusalem, Israel in course-work focusing on Law, Religion, & Ethics.

Carolyn has concentrated her practice in large, complex cases involving defective products, food-borne illnesses, securities transactions, and international human rights violations. She also represents businesses in international trade relationships. Carolyn is a member of the Zimmerman Reed *Castano* tobacco litigation team which received the "Breath of Life" award from the American Lung Association in 2000. This award is presented to recognized persons or groups who have been dedicated to community service.

In addition to her involvement in complex litigation, Carolyn has extensive experience in qualitative research, conducting business, consumer, and jury research. She provides jury research consulting for law firms nation-wide, for the United States District Court, District of Minnesota, and has served as a Minnesota Institute for Legal Education faculty member in the area of jury research. She has experience with trial preparation for consumer products liability cases, mass tort litigation, contract dispute litigation, and medical device litigation.

Carolyn is admitted to practice before, and is a member in good standing of, the Bar of the State of Minnesota and the United States District Court for the District of Minnesota. She is a member of the Association of Trial Lawyers of America, the Federal Bar Association, the Minnesota Bar Association, and the Hennepin County Bar Association.

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**HART L. ROBINOVITCH** is a partner with Zimmerman Reed practicing in the areas of consumer class action litigation, primarily in the areas of mortgage banking, shareholder actions and general civil and business litigation.

Over the past several years, he has represented clients in a series of class action lawsuits contesting mortgage lenders' excessive billing and deposits practices for mortgage escrow accounts. Mr. Robinovitch is now involved in numerous federal court lawsuits around the country alleging that mortgage banks and lenders have violated federal and state laws. These cases allege payment of kickbacks and/or illegal and unearned referral fees by the banks and lenders to mortgage brokers who refer mortgage clients who are then charged inflated interest rates on the mortgages. He also represents consumers in other actions contesting the imposition of overcharges and improper fees in various mortgage transactions.

Mr. Robinovitch, a native of Canada, is a 1992 graduate of the University of Toronto Law School. He served as an Associate Editor on the University of Toronto Faculty of Law Review. He is also a 1993 *magna cum laude* graduate of William Mitchell College of Law. He received his B.S. in 1989 from the University of Wisconsin-Madison.

Hart Robinovitch is admitted to practice before, and is a member in good standing of, the Bars of the States of Arizona and Minnesota and the United States District Court for the Districts of Arizona and Minnesota. He is also admitted to United States District Courts for the Northern and Middle Districts of Alabama, Northern District of Georgia, the District of Hawaii, and the Northern District of Oklahoma. Mr. Robinovitch is also admitted to practice before the United States Courts

of Appeals for the Sixth, Eighth, Ninth and Eleventh Circuits. Hart is a member of the National Association of Consumer Advocates.

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**ZIMMERMAN REED SENIOR TRIAL COUNSEL:**

**ROBERT C. MOILANEN** joined Zimmerman Reed as Senior Trial Counsel, practicing in the areas of securities litigation, accountant malpractice litigation and commercial litigation. Mr. Moilanen was selected by Minnesota judges to receive the Judge's Choice Award as one of the most courteous, most prepared and "winningest" lawyers in the State of Minnesota. He carries an AV rating with Martindale-Hubbell and was recognized by Minnesota Law and Politics as a "Super Lawyer" in 2000 and 2002.

Bob has been practicing law for 25 years; his extensive experience includes working on Capitol Hill for Senators Walter Mondale and Hubert Humphrey, working in the Office of the Vice President for Walter Mondale and working for the Attorney General's Office of the State of Minnesota representing the Minnesota Pollution Control Agency. Mr. Moilanen was an associate and partner at the law firm of Popham, Haik, Schnobrich & Kaufman for 16 years before beginning his own law practice.

Bob is a 1973 graduate of Gustavus Adolphus College, where he majored in Political Science and Environmental Studies. In 1977, he received his J.D. degree from George Washington University Law School. Bob's most recent articles include an analysis of the Sarbanes-Oxley Act published in Minnesota Lawyer in July, 2002.

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**ZIMMERMAN REED ASSOCIATES:**

(Zimmerman Reed Associate Attorneys are: **David M. Cialkowski, and Timothy J. Becker.**)

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**DAVID M. CIALKOWSKI** joined Zimmerman Reed as an attorney practicing in the area of complex and mass tort litigation and class action litigation with a primary focus on consumer protection and products liability litigation.

Mr. Cialkowski graduated in 1995 from the University of Illinois's College of Liberal Arts and Sciences *cum laude* with High Distinction in the Department of English. In addition to participating in the honors program as a James Scholar, Mr. Cialkowski received the Elizabeth and Charles Ellis Merit Scholarship and was a member of Phi Beta Kappa. Mr. Cialkowski graduated in 1998 from the University of Illinois College of Law, where he participated in the civil litigation clinic, was an editor for the Poetic Justice literary magazine, and was voted one of the top ten percent of university teaching assistants.

Mr. Cialkowski is admitted to practice before, and is a member in good standing of, the Bars of the State of Minnesota and the State of Illinois. He is also a member of the Minnesota State Bar Association and Hennepin County Bar Association.

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**TIMOTHY J. BECKER** joined Zimmerman Reed as an associate practicing primarily in the areas of a complex commercial litigation and anti-trust. Mr. Becker's work includes cases with an emphasis in complex commercial and anti-trust issues including Bankruptcy Reaffirmation and *In re Vitamin* anti-trust litigation.

Mr. Becker is a 1992 graduate of the University of Illinois -Chicago where he received a B.A. in History. In 1995, he received his *Juris Doctorate* from William Mitchell College of Law where he graduated *cum laude*. Mr. Becker served as a Staff Member of the William Mitchell Law Review from 1993 to 1994, and as an Associate Editor from 1994 through 1995. He has been a member of the Minnesota Bar since 1995 and the Federal Bar since 1997.

Mr. Becker is a member of the Minnesota Trial Lawyers Association and Minnesota State Bar Association. In 1999 he was recognized by Minnesota Law and Politics as a "Rising Young Star" and in 2000 was inducted into Stratmore's Who's Who. His publications include *Is the Doctor In? Reasonableness and the Neal Decision*, Hennepin County Lawyer, 1998.

#### **ZIMMERMAN REED CASES:**

In the following certified class actions, Zimmerman Reed has served as Class Counsel:

#### **ALABAMA STATE COURT ACTIONS**

*Gray v. Columbia National, Inc.*, Circuit Court of Jefferson County, Court File No. 94-006668

*Maddox v. Magnolia Federal Bank*, Circuit Court of Jefferson County, Court File No. 94-2702

*Bell v. Prudential Home Mortgage Company, Inc.*, Circuit Court of Montgomery County, Court File No. CV-94-2717-G

#### **ARIZONA STATE COURT ACTIONS**

*McLaughlin v. Abbott Laboratories*, No. CV 95-0628 (Super. Ct., Yavapai County)

*Verity v. Bank One Arizona*, Maricopa County, Arizona Superior Court No. 97-13019

#### **CALIFORNIA STATE COURT ACTIONS**

*Pickett. v. Blue Cross of California*, Los Angeles County Superior Court, Court File No. BC-133-886

*Diamond v. Avco*, Monterey County Superior Court, Court File No. M38427

**DISTRICT OF COLUMBIA**

*Goda v. Abbott Laboratories*, No. 01445-96 (Super. Ct., D.C.)

**FLORIDA STATE COURT ACTIONS**

*Yasbin v. Abbott Laboratories*, No. 97-01141 CA 03 (Cir. Ct. Dade County)

**NORTHERN DISTRICT OF ILLINOIS**

*Calkins v. Fidelity Bond & Mortgage Company*, United States District Court, Court File No. 94-C-5971

*Bradford v. Independence One Mortgage*, United States District Court, Court File No. 94-C-1742

*Mark v. KeyCorp Mortgage, Inc.*, United States District Court, Northern District of Illinois, MDL No. 899

*Glenos v. GL Mortgage Corp.*, United States District Court, Northern District of Illinois, Court File No. 94-CV-6393

*Robinson v. Marine Midland Banks, Inc.*, United States District Court, Northern District of Illinois, Court File No. 95-C-5635

*Goss v. Alliance Mortgage*, United States District Court, Northern District of Illinois, MDL No. 899

*Cusack v. Bank United of Texas*, United States District Court, Northern District of Illinois, Court File No. 95-C-544

*Finkelstein v. Bluebonnet Savings Bank, FSB*, United States District Court, Northern District of Illinois, Court File No. 96-C-2361

*Pieper v. D&N Savings Bank, FSB*, United States District Court, Northern District of Illinois, Court File No. 96-C-545

*Larson v. First Security Savings Bank*, United States District Court, Northern District of Illinois, Court File No. 96-C-541

*Basmoen v. Inland Mortgage Corp.*, United States District Court, Northern District of Illinois, Court File No. 96-C-2322

*Keck v. National City Mortgage*, United States District Court, Northern District of Illinois, Court File No. 96-C-543

*Dusterhoft v. Security Federal Savings Bank*, United States District Court, Northern District of Illinois, Court File No. 96-C-545

*Wuebben v. Colonial Savings Bank*, United States District Court, Northern District of Illinois, Court File No. 96-C-3412

*Bastin v. First Indiana*, United States District Court, Northern District of Illinois, Court File No. 95-C-4085

*Boehly v. First Federal Bank*, United States District Court, Northern District of Illinois, Court File No. 96-C-0936

#### **KANSAS STATE COURT ACTIONS**

*Holdren v. Abbott Laboratories*, No. 96C15994 (Dist. Ct., Johnson County)

#### **LOUISIANA STATE COURT ACTIONS**

*Scott v. American Tobacco Co.*, No. 96-8461, Parish of Orleans

#### **MAINE STATE COURT ACTIONS**

*Karofsky v. Abbott Laboratories*, No. CV-95-1009 (Super. Ct., Cumberland County)

#### **MICHIGAN STATE COURT ACTIONS**

*Wood v. Abbott Laboratories*, No. 96-512561-CZ (Cir. Ct., Oakland County)

#### **MINNESOTA STATE COURT ACTIONS**

*Charles & Lynette Graham v. Knutson Mortgage Corp.*, Hennepin County District Court, Fourth Judicial District, State of Minnesota, Court File No. 94-11043

*Mayard v. United Mortgage Corp.*, Hennepin County District Court, Fourth Judicial District, State of Minnesota, Court File No. 94-10818

*Miller v. FBS Mortgage Corp.*, Hennepin County District Court, Fourth Judicial District, State of Minnesota, Court File No. 94-13743

*Porch v. General Motors Acceptance Corporation*, Hennepin County District Court, Fourth Judicial District, State of Minnesota, Court File No. 97-7457

*Kerr v. Abbott Laboratories*, Hennepin County District Court, Fourth Judicial District, State of Minnesota, Court File No. 96-2837

*Fontaine v. Abbott Laboratories*, Hennepin County District Court, Fourth Judicial District, State of Minnesota, Court File No. 97-012124

*Wright, v. Malt-O-Meal Company*, Hennepin County District Court, Fourth Judicial District, State of Minnesota, Court File No. 98-008931

*In re Salmonella Litigation*, Hennepin County District Court, Fourth Judicial District, State of Minnesota, Court File No.94-16304

*Fischl v. Metris*, Hennepin County District Court, Fourth Judicial District, State of Minnesota, Court File No. CT 00-007129

*Kurvers, et al. v. National Computer Systems*, Hennepin County District Court, Fourth Judicial District, State of Minnesota, Court File No. 00-11010

#### **SOUTHERN DISTRICT OF MISSISSIPPI**

*Ballance v. Hibernia National Bank*, Southern District of Mississippi, No. 1:96CV13GR

#### **NEW YORK STATE COURT ACTIONS**

*Levine v. Abbott Laboratories*, No. 95-117320 (Sup. Ct. New York County)

*Zukauskas v. Atlantic Residential Mortgage Corp.*, County of Monroe, Supreme Court of New York Court File No. 11409-93

*Ward v. First Federal Savings and Loan Assoc. of Rochester*, County of Monroe, Supreme Court of New York, Court File No. 8136-93

*Reigle v. Sibley Mortgage Corp.*, County of Monroe, Supreme Court of New York, Court File No. 5897-93

#### **NORTH CAROLINA STATE COURT ACTIONS**

*Long v. Abbott Laboratories*, No. 97-CV-8289 (Super. Ct. Mecklenburg County)

#### **OHIO STATE COURT ACTIONS**

*Cairns v. Ohio Savings Bank*, Common Pleas of Cuyahoga County, Ohio, Court File No. 270875

#### **SOUTHERN DISTRICT OF OHIO**

*Dante v. Dow Corning*, (S.D. Ohio 1992)

*In re Telectronics Pacing Systems, Inc.*, MDL 1057 (S.D. Ohio)

#### **PENNSYLVANIA STATE COURT ACTIONS**

*Herrmann v. Meridian Mortgage Corp.*, Court of Common Pleas Philadelphia County, Court File No. 1381

## TENNESSEE STATE COURT ACTIONS

*Dearmon v. Mercury Finance Tennessee*, Williamson County Chancery Court, File No. 24583

*Meyers v. Abbott Laboratories*, No. 97C612 (Cir. Ct., Davidson County)

## WISCONSIN STATE COURT ACTIONS

*Scholfield v. Abbott Laboratories*, No. 96 CV 0460 (Cir. Ct., Dane County)

## CASES SETTLED

*Cress v. Sara Lee*, Circuit Court of Cook County, State of Illinois, Court File No. 98 L 15072

*Wentworth v. First Bank National Association*, Hennepin County District Court File No. 95-10295

*Cooksey v. Hawkins Chemical Company*, Hennepin County District Court File No. 95-3603

*Ziefel v. M&T Bank*, United States District Court, Northern District of Illinois, MDL No. 899

*Markowitz v. Ryland Mortgage Company*, United States District Court, Northern District of Illinois, Court File No. 94-C-7682

*Murray v. Shawmut Mortgage Company*, County of Monroe, Supreme Court of New York, Court File No. 3037-94

*Singleton v. Dale Mortgage Bankers Corp.*, County of Monroe, Court File No. 8135-93

*Pecorella v. Emigrant Savings Bank*, County of New York, Court File No. 125889-94

*Trotman v. Market Street Mortgage Corp.*, Circuit Court of Montgomery County, State of Alabama, Court File No. CV-94-2716-PH.80

*Jackson v. Compass Bank*, Circuit Court of Shelby County, State of Alabama, Court File No. 95-520

*Kessler v. First Federal of Alabama*, Circuit Court of Jefferson County, State of Alabama, Court File No. CV-94-6140

*Searcy v. Victoria Mortgage Co.*, United States District Court, Northern District of Illinois, MDL No. 899

*Gretchen De Boer v. Mellon Mortgage Company*, United States District Court, District of Minnesota, Court File No. 4-92-822

*Gleeson v. Superior Mortgage Corporation*, United States District Court, District of Minnesota, Court File No. CV 4-93-70

*Gina G. & Rollin Neist v. Shearson Lehman Hutton Mortgage Corp.*, United States District Court, Central District of California No. 91-6369 WMB(GHKx)

*Wingate v. Bank of America*, United States District Court, Central District of California No. CV-92 5786 MRP(SHx)

*Douglas Schultz; James & Andrea Hawkins v. J.I. Kislak Mortgage Corp.*, Superior Court of California, County of Contra Costa No. C91-01541

*Bridgewater v. Sunbelt National Mortgage Corp.*, Superior Court of California, County of Marin, Court File No. 158424

*Gary R. & Deborah L. v. Leader Federal Bank for Savings*, United States District Court, District of Minnesota No. 4-91-516

*Daniel & Suzanne Kruse v. Barclays American/Mortgage Corp.*, United States District Court, District of Minnesota, Court File No. 4-92-197

*Beth Wills v. Cenlar Federal Savings Bank*, United States District Court, District of Minnesota, Court File No. 4-92-202

*Thomas J. & Therese Johnston v. Comerica Mortgage Corp.*, United States District Court, District of Minnesota, Court File No. 4-91-675

*Karin E. & David M. Danforth v. First Union Mortgage Corp.*, United States District Court, District of Minnesota, Court File No. 4-91-457

*Phillippa & Kenneth Saunders v. Metropolitan Financial Mortgage Corp.*, United States District Court, District of Minnesota, Court File No. 4-92-195

*Terry & Larry Jacobson v. Midland Mortgage Co.*, United States District Court, District of Minnesota, Court File No. 4-91-443

*Louis H. & Sue v. Sears Mortgage Corp.*, United States District Court, District of Minnesota, Court File No. 4-91-477

*Kenneth J. & Karen Bovy v. Lumbermen's Investment Corp.*, United States District Court, District of Minnesota, Court File No. 4-91-766-

*Nelson v. Investors Savings Bank F.S.B.*, United States District Court, District of Minnesota, Court File No. 4-92-919

*Little, et al. v. Twin City Federal Mortgage Corp.*, United States District Court, District of Minnesota, Court File No. 4-92-998

*Julio A. & Stacy J. Fesser v. Household Mortgage Services, Inc.*, Hennepin County District Court, Fourth Judicial District, State of Minnesota, Court File No. 91-011595

*Nasset v. Margaretten & Co., Inc.*, Hennepin County District Court, Fourth Judicial District, State of Minnesota, Court File No. 94-9240

*Strommer v. GE Capital Mortgage Services, Inc.*, Hennepin County District Court, Fourth Judicial District, State of Minnesota, Court File No. 92-16064

*Harlow Robinson and Fantastic Enterprises v. Fleet Mortgage Corp. and Fleet Real Estate Funding Corp.*, United States District Court, Northern District of Illinois No. 91-C-7019

*Charles H. & Pamela K. Puleston v. Chase Home Mortgage Corp.*, United States District Court, Northern District of Illinois, Court File No. 95 C 3318

*Glen and Sheila Allen v. Citicorp Mortgage Co.*, United States District Court, Northern District of Illinois, Court File No. 91-C-7020

*Paul Turney v. Lomas Mortgage U.S.A., Inc.*, United States District Court, Northern District of Illinois, Court File No. 91-C-7018

*Kathleen D. Morton v. BancPLUS Mortgage Corp.*, United States District Court, District of Minnesota, Court File No. 4-92-198

*Lake v. First Nationwide Bank*, United States District Court, Eastern District of Pennsylvania, Court File No. 93-0021

*Stefani v. American Home Funding, Inc.*, United States District Court, Western District of New York, Court File No. 93-CV-0093S

*Lyons v. Atlantic Mortgage & Investment Corp.*, County of Monroe, Supreme Court of the State of New York, Court File No. 11410-93

*Hurley v. Citizens Mortgage Service Co.*, County of Monroe, Supreme Court of New York, Court File No. 9862-93

*Murphy, v. The Dime Savings Bank of New York*, County of Queens, Supreme Court of New York, Court File No. 012712-93

*Troy v. Onbancorp*, County of Orleans, Supreme Court of New York, Court File No. 93-21061

*Gallardo v. PHH U.S. Mortgage Corp.*, County of Niagara, State of New York, Court File No. 085444

*Thomason v. Bisys Loan Services, Inc.*, Circuit Court of Jefferson County, State of Alabama, Court File No. CV-94-2756

*Williams v. First NH Mortgage Corp.*, Circuit Court of Jefferson County, State of Alabama, Court File No. CV-94-5993

*Hope v. STM Mortgage Company*, Circuit Court of Jefferson County, State of Alabama,  
Court File No. CV-94-3194

*Reed v. Banc One Mortgage Corp.*, Marion Supreme Court, County of Marion, Court File  
No. 49D02-9310-CP-1113CZ

*Verity v. Bank One Arizona*, Maricopa County, Arizona Superior Court No. 97-13019

**ZIMMERMAN REED, P.L.L.P. HAS ALSO BEEN INVOLVED IN THE FOLLOWING  
NATIONAL MULTI-DISTRICT LITIGATION CASES:**

*In re: Baycol Products Litigation* MDL 1431 (Co-Lead Counsel)

*In re: Breast Implant Litigation* MDL 926 (Member of settlement committee; co-state  
liaison for Minnesota)

*In re: Mortgage Escrow Litigation* MDL 899 (Lead counsel)

*In re: TMJ Implant Litigation* MDL 1001 (Member of Plaintiffs Steering Committee)

*In re: Orthopedic Bone Screw Litigation* MDL 1014 (Member of Discovery Committee)

*In re: Telectronics Pacemaker Litigation* MDL 1057 (Member of Plaintiffs Steering  
Committee)

*In re: Propulsid Products Liability Litigation* MDL 1355 (Member of Plaintiffs' Steering  
Committee)

*In re: Sulzer Inter-Op Orthopedic Hip Implant Litigation* MDL 1401 (special counsel to  
Plaintiffs Steering Committee)

**ZIMMERMAN REED, P.L.L.P. HAS ALSO BEEN COUNSEL FOR THE CLASS IN  
THE FOLLOWING MAJOR CLASS ACTIONS:**

*Gustafson v. Alstead, Strangis & Dempsey*, United States District Court File No. 3-82-965

*Jenson v. Touche Ross & Co.*, Hennepin County District Court File No. 737803

*In re Flight Transportation Corporation Securities Litigation*, United States District Court  
Master Docket No. 4-82-874

*In re Control Data Corporation Securities Litigation*, United States District Court Master  
Docket No. 3-85-1341

*In re Pillsbury Corporation Securities Litigation*, Hennepin County District Court File  
No. 88-17834

*In re Northwest Airlines Securities Litigation*, Hennepin County District Court No. 89-5506

*In re First Bank System*, Hennepin County District Court No. 88-22227

*In re Endotronics Securities Litigation*, United States District Court Master Docket  
No. 4-87-130

*In re TGI Fridays Securities Litigation*, Hennepin County District Court No. 89-8362.

*Baron v. Honeywell*, United States District Court File No. 3-92-355.

*In re St. Jude Silzone<sup>®</sup> Heart Valves Product Liab. Litig.*, MDL 1396 (D. Minn)

1504

292.73 Read motions

1 Barry G. Reed  
ZIMMERMAN REED P.L.L.P.  
2 14646 N. Kierland Boulevard, Suite 145  
Scottsdale, AZ 85254  
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12 AZ Bar No. 003099

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

16 AVIS READ,  
Individually and on Behalf of Herself and All Others  
17 Similarly Situated,

18 Plaintiffs,

19 vs.

20 ARIZONA PUBLIC SERVICE COMPANY,

21 Defendant.

No: CV 2002-010760

**AFFIDAVIT OF BARRY G. REED IN  
SUPPORT OF MOTION FOR  
CLASS CERTIFICATION**

(Assigned to the Honorable  
Rebecca A. Albrecht)

22  
23  
24  
25  
26  
27 OSBORN & MALEDON

JAN 20 2004

28  
APS05624

1 STATE OF ARIZONA  
2 COUNTY OF MARICOPA } ss.

3 Barry G. Reed, being first duly sworn upon oath, deposes and says:

4 1. I am a partner of Zimmerman Reed, P.L.L.P. and am a member in good standing of the  
5 State Bars of Arizona and Minnesota. I have personal knowledge of the statements contained in this  
6 Affidavit and if called to testify, I could and would testify competently to them.

7 2. I submit this affidavit is support of Plaintiff's Motion for Class Certification.

8 3. Attached hereto as Exhibit 1 is a true and correct copy of an electronic correspondence  
9 from Jana K. Van Ness dated March 12, 2002 (APS01651).

10 4. Attached to this affidavit as Exhibit 2 is a true and correct copy of an electronic  
11 correspondence from Cynthia Janka dated November 30, 2000 (APS01726).

12 5. Attached to this affidavit as Exhibit 3 is a true and correct copy of page 24 of the  
13 Deposition of Janet Michelle Smith taken April 22, 2003.

14 6. Attached to this affidavit as Exhibit 4 is a true and correct copy of an electronic  
15 correspondence from Janet M. Smith dated June 19, 2002 (APS01746).

16 7. Attached to this affidavit as Exhibit 5 is a true and correct copy of an electronic  
17 correspondence from Janet M. Smith dated June 18, 2002 (APS02324).

18 8. Attached to this affidavit as Exhibit 6 is a true and correct copy of "BL-19 Estimating"  
19 (APS02772).

20 9. Attached to this affidavit as Exhibit 7 is a true and correct copy of Pinnacle West Capital  
21 Corporation's CIS Compliance to ACC Rules and Regulations Audit dated August 13, 2002  
22 (APS03344).

23 10. Attached to this affidavit as Exhibit 8 is a true and correct copy of a news release "APS  
24 Tree Care Program Honored" dated January 5, 2004 as printed from [www.aps.com](http://www.aps.com).

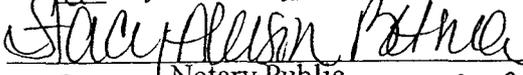
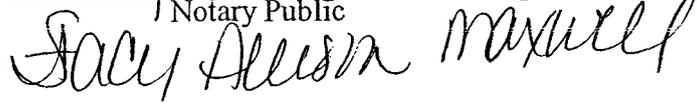
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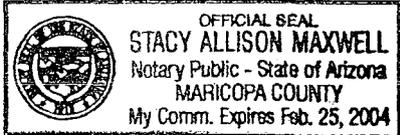
1 FURTHER YOUR AFFIANT SAYETH NOT.

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Barry G. Reed

Subscribed and sworn to before me on  
this 10th day of January, 2004.

  
Notary Public  




The ORIGINAL and two (2) copies of  
the foregoing were filed by hand delivery  
this 10th day of January, 2004.

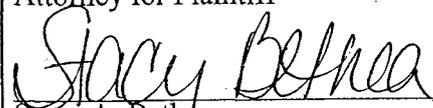
Clerk of the Court  
MARICOPA COUNTY SUPERIOR COURT  
101 W. Jefferson  
Phoenix, AZ 85003

Copies of the foregoing were sent  
by fax, file & U.S. Mail  
this 10th day of January, 2004 to:

Debra A. Hill  
OSBORN MALEDON  
2929 N. Central Avenue, Suite 2100  
Phoenix, Arizona 85012  
Attorney for Defendant

David A. Rubin  
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Attorney for Plaintiff

Jeffrey M. Proper  
LAW OFFICES OF JEFFREY M. PROPER  
3550 N. Central Avenue, Suite 1200  
Phoenix, Arizona 85012-2111  
Attorney for Plaintiff

  
Stacy A. Betha

# Exhibit 1

APS05627

**Janka, Cynthia J(H8689)**

---

**From:** Van Ness, Jana K(H95986)  
**Sent:** Tuesday, March 12, 2002 10:21 AM  
**To:** Willis, Delia M(H98097); Froetscher, Daniel T(H36154)  
**Cc:** Vega, Jennie A(H96038)  
**Subject:** FW: Estimated Meters

Hi guys -- I just wanted to add that I am very concerned about estimated reads of any nature at this time. Let me provide a little background which forms the basis of my concerns.

In April 2002, we are going to have to file a new semi-annual report (at the direction of the ACC) which illustrates the number of first and final bills that were estimated. When doing research for preparing this filing, I found out that last year, in July alone, we had 998 accounts (first or final) that had been estimated for various reasons. While some of the causes were beyond APS control, there are a significant amount of estimates that were created by APS.

While I do not know what the other months look like, as we're still pulling all of the #'s together for the report, I am very concerned that the other months will provide similar results.

As a result, I'm concerned that the ACC will the first and final #'s, be very surprised at the volume and then react. Typically, reactions of this nature aren't a good thing. I'm concerned that they will order us to share the rest of our #'s around estimated reads.

Of course, I will be following up with the appropriate folks (once I get the final #'s) to express my concerns in this area and work to make whatever changes are needed to decrease these numbers. And, anything you all can do in an effort to prevent/reduce estimated reads (of any type) should be considered and implemented as quickly as possible.

Thanks for indulging me through this long note.. it's important that we get these estimated reads under control. If there is anything I can do on my end, please don't hesitate to let me know.

-----Original Message-----

**From:** Vega, Jennie A(H96038)  
**Sent:** Tuesday, March 12, 2002 9:30 AM  
**To:** Van Ness, Jana K(H95986)  
**Subject:** FW: Estimated Meters

I spoke with Delia on 3/11/02. She told me they were up against the last day for the 25-35 "window" to get these reads in and that's why they had to estimate.

I explained our concern that we could have increased scrutiny from the ACC because we now have to report first and last read estimates. She said the estimated area is old town Bisbee and she felt confident they didn't have any first or last estimates. I clarified our concern was more with the possibility of increased scrutiny from the ACC.

Delia told me about the difficulty of getting supplemental meter readers. Even though they have someone that is crosstrained for her area they can't just call and get someone, they have to submit paperwork. She said they should have the supplemental meter reader by today.

**Jennie Vega**  
**Consumer Advocate**  
**602-250-2038**

-----Original Message-----

**From:** Willis, Delia M(H98097)  
**Sent:** March 11, 2002 9:17 AM  
**To:** Consumer Advocate, (ConsAdv)  
**Cc:** Froetscher, Daniel T(H36154)  
**Subject:** Estimated Meters

Our meter reader in Bisbee injured his knee today and is on desk duty so 278 meters will be estimated today. We have paperwork in to bring a supplemental meter reader in so hopefully we won't have to estimate too many more. Thanks, Delia

# **Exhibit 2**

**APS05629**

**Smith, Janet M(H50500)**

---

**From:** Janka, Cynthia J(H86891)  
**Sent:** Thursday, November 30, 2000 7:30 AM  
**To:** Smith, Janet M(H50500); Van Ness, Jana K(H95986)  
**Subject:** RE: Estimating Demands

This sounds great to me. Jana?

—Original Message—

**From:** Smith, Janet M(H50500)  
**Sent:** Thursday, November 30, 2000 7:03 AM  
**To:** Van Ness, Jana K(H95986); Janka, Cynthia J(H86891)  
**Subject:** Estimating Demands

I met with Lori and her group yesterday to discuss some estimating issues. One of the items raised was how to properly estimate a demand. After some discussion we arrived at what I believe is the best method so this is a heads up to you in case you are ever asked by the Commission.

As you know, the old system did not estimate demands. The billing consultants and associates used various methods to estimate demands when needed (it varied depending on the person doing the estimating, not the situation). Our current CIS does estimate demands. When we first converted there were numerous concerns that the demands being estimated by the system were unreasonable. Around March of 1999, the Pricing Department was asked to provide some better guidelines to IS for system estimating. Taking into consideration something that would be easy to implement and fair (actually very generous) to the customer, we decided the best way to estimate a demand is by using a load factor. We provided to IS the following guidelines which were implemented in late March early April 1999:

If the account is non-residential with an L or M meter type, or on E-34, do not estimate the demand.

If the account is residential with a C or G meter type, use a load factor of 45%.  
If the account is residential with a F, J, K, or L meter type, use a 50% load factor.  
If the account is non-residential with a C or G meter type, use a 60% load factor.

Yesterday's meeting brought out the fact that if a demand had to be estimated by Billing Services, there were still various methods being used. After some discussion I suggested we use the same method used by our Billing system. This would provide consistency regardless of if the estimate is being done by the system or someone in Billing Services.

As you know, the rules R14-2-210, state that when estimating we should give consideration where applicable to the customer's usage during the same month a year ago; and the amount of usage during the preceding month. These guidelines are in place for estimating kWh in the system and are also considered by Billing Services when they need to estimate kWh. I feel as long as we are using these guidelines to determine the kWh, we are fine with our methodology for determining a kW. And, as I mentioned before this will provide consistency between a system bill and "manual" bill.

I wanted to send this to the two of you first in case you wanted to discuss. If you are in agreement, then I can resend the note to Jennie and Angela, as well as Lori and Joy for documentation.

Thanks.

APS01726

APS05630

# **Exhibit 3**

**APS05631**

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF MARICOPA

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

Plaintiffs, )

vs. )

ARIZONA PUBLIC SERVICE COMPANY, )

Defendant. )

NO. CV 2002-010760

**COPY**

DEPOSITION OF JANET MICHELLE SMITH

Scottsdale, Arizona  
April 22, 2003  
8:50 a.m.

PREPARED FOR:  
MR. BARRY G. REED  
(COPY)

PREPARED BY:  
Christina L. Larsen, RPR, CCR  
Certified Court Reporter #50011  
California CSR #8546

**JD Reporting, Inc.**  
Certified Court Reporters

389 East Palm Lane • Suite 9  
Phoenix, Arizona 85004  
602-254-1345 • Fax 602-254-2548  
jdreport@aol.com

APS05632

**DISK  
ENCLOSED**

1 Q. BY MR. REED: Was that one of your duties  
2 from 1990 onwards?

3 A. I probably had some involvement in that area.

4 Q. Did your involvement in that area increase as  
5 you became more experienced as an analyst?

6 A. No.

7 Q. Was there one particular time when that  
8 responsibility was assigned to you?

9 A. No.

10 Q. By 1996, were you involved in interpretation  
11 of the Arizona Administrative Code with respect to  
12 issues surrounding estimating of meter reading?

13 A. Yes.

14 Q. I would like to ask you some questions about  
15 the system before the 1998 changeover.

16 What was -- was there a name, you know, a  
17 shorthand name that the system was known by prior to  
18 1998? In other words, is there a way to distinguish,  
19 shorthand, without me having to say "the system prior  
20 to 1998"? Is there, you know, an acronym or something  
21 like that?

22 A. We refer to them within the company as old  
23 CIS and new CIS.

24 Q. Gotcha. So old CIS would be the system  
25 before 1998, before the changeover in September of

# Exhibit 4

APS05634

**Smith, Janet M(H50500)**

---

**From:** Smith, Janet M(H50500)  
**Sent:** Wednesday, June 19, 2002 8:37 AM  
**To:** Nelson, Joy L(H72346)  
**Cc:** Nair, Ravi (ZB1310); Rumolo, David J(Z80729); Van Ness, Jana K(H95986); Janka, Cynthia J (H86891); Froetscher, Patti (ZB2407)  
**Subject:** Estimating Demand

Joy, can you please write a defect or enhancement or whatever you guys do now and ask for a change to the load factors we currently use to estimate a demand.

Currently, we use a 50% load factor for ECT-1R, 45% for EC-1, and 60% for non-residential (for the service plans we let the system estimate).

I know there has been concern from the field that the demand being estimated by the system is too low and didn't always look right "historically." In response to these concerns and to bring the load factors more in line with recent load research data, we would like the load factors for the residential rates lowered to 35% and the load factor for non-residential lowered to 50%.

In a perfect world, and if we were designing a system from scratch, we would still support using load factor, only we would make it customer specific and have the system estimate a demand using the customer's annual load factor. Since our world isn't perfect and we aren't designing a new system, we still believe estimating demands using these average rate specific load factors is the fairest methods for all customers. is defensible to the Commission, and is easy to train to the Billing Reps so they can use the same methodology if they need to estimate a demand.

Let me know the status of this request.

Thanks.

<b>Tracking:</b>	<b>Recipient</b>	<b>Read</b>
	Nelson, Joy L(H72346)	Read: 6/19/02 9:38 AM
	Nair, Ravi (ZB1310)	Read: 6/19/02 8:40 AM
	Rumolo, David J(Z80729)	Read: 6/19/02 9:02 AM
	Van Ness, Jana K(H95986)	Read: 6/21/02 1:18 PM
	Janka, Cynthia J(H86891)	Read: 6/19/02 8:40 AM
	Froetscher, Patti (ZB2407)	Read: 6/19/02 8:38 AM

APS01746

APS05635

# **Exhibit 5**

**APS05636**

Nair, Ravi (ZB1310)

---

**From:** Smith, Janet M(H50500)  
**Sent:** Tuesday, June 18, 2002 2:38 PM  
**To:** Nair, Ravi (ZB1310)  
**Subject:** RE: Estimation

I don't think load factors change that much. We are going to compare these numbers to some other numbers we have and see how much they have varied. That will give us a better idea of frequency, but I honestly don't think we will see much change. If we only change them when we have a rate case, our last full blown rate case was 1988, so every 15-20 years. Hmm, we could have a new system by then.

By the way, if we were designing from scratch, the best way of estimating a demand would be to calculate the customers load factor for the past 12 months and use that to determine the demand for the current month. Since we didn't design from scratch, and had about 20 minutes to come up with something, we'll stick to the methodology we have now, with maybe some better numbers.

-----Original Message-----

**From:** Nair, Ravi (ZB1310)  
**Sent:** Tuesday, June 18, 2002 2:32 PM  
**To:** Smith, Janet M(H50500)  
**Subject:** RE: Estimation

Please go thru Joy.... How often do you foresee these numbers to change , typically.. guestimate??

-----Original Message-----

**From:** Smith, Janet M(H50500)  
**Sent:** Tuesday, June 18, 2002 2:31 PM  
**To:** Nair, Ravi (ZB1310)  
**Subject:** RE: Estimation

We have some new numbers based on load data that will support the rate case. the numbers are lower than what we have now, so I want to make sure if we want to use the newer numbers, it can be done painlessly. Sounds like it can so as soon as I get the buy off from Dave Rumolo on the new numbers, do I tell you, or does Joy need to write an enhancement/defect?

-----Original Message-----

**From:** Nair, Ravi (ZB1310)  
**Sent:** Tuesday, June 18, 2002 2:29 PM  
**To:** Smith, Janet M(H50500)  
**Subject:** RE: Estimation

Yes.... it is. If we foresee these numbers to change dynamically, we probably ought to have them as factors (reference table driven). But I suspect these are pretty static in nature, if we stick with the present approach to demand estimation.

-----Original Message-----

**From:** Smith, Janet M(H50500)  
**Sent:** Tuesday, June 18, 2002 2:27 PM  
**To:** Nair, Ravi (ZB1310)  
**Subject:** RE: Estimation

Ravi, if we only want to change the numbers we have in place now (the 45%, 50% and 60%) is that a simple change?

-----Original Message-----

**From:** Nair, Ravi (ZB1310)  
**Sent:** Tuesday, June 18, 2002 9:53 AM  
**To:** Smith, Janet M(H50500)  
**Subject:** Estimation

we will be putting a new exception/bsns rule... This is fyi -

-----Original Message-----

**From:** Nair, Ravi (ZB1310)

APS02324

APS05637

# **Exhibit 6**

**APS05638**

**BL - 19 Estimating**  
**Hi-Lo Checking**  
**Rounding**

**Business Event:**

Estimate usage for accounts on which the meters are not read

**Scenario:**

Discuss how estimating is accomplished in the CIS system to determine if it meets APS requirements.

**Background:**

NIPSCO will estimate four consecutive months if necessary before requiring the meter be read. Post Card readings will be accepted as good readings but for a maximum of four also. Only KWH metered accounts can be estimated. KW (Demand) metered accounts cannot be estimated and the meter reread or the reading calculated and entered like a post card read.

The CIS system estimates two different ways:

**I. Current Usage Pattern System(CUPS)**

CUPS is based on using the average usage over winter/summer periods and applying a Load Estimation Factor that is based on the overall increase/decrease in use for the same group of customers for the previous cycle billed this year versus last year.

**II. Prior Period Usage**

Prior Period Usage is based on using estimated and/or actual usage from prior billing periods and applying a Load Estimation Factor that is based on the overall increase/decrease in use for the same group of customers for the previous cycle billed this year versus last year.

- CUPS is the primary way that CIS accomplishes estimating and hi-lo checking.
- If there is insufficient history to use CUPS then Prior Period Usage is used.
- If there is insufficient history to use Prior Period Usage then the usage cannot be estimated by the system and a read must be obtained or the usage manually estimated.

APS02772

# **Exhibit 7**

**APS05640**

Smith EXHIBIT 10

4-22-2003

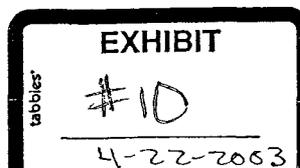
CHRISTINA L. LARSEN



**PINNACLE WEST**  
Capital Corporation

# CIS COMPLIANCE TO ACC RULES AND REGULATIONS AUDIT

Report #21054  
August 13, 2002



APS03344

APS05641

EXECUTIVE SUMMARY  
CIS COMPLIANCE TO ACC RULES AND REGULATIONS AUDIT  
AUDIT #21054  
REPORT DATE: AUGUST 13, 2002

OBJECTIVE

The objective of this audit is to review APS compliance with rules and regulations of the Arizona Corporation Commission (ACC).

SUMMARY OF MAJOR FINDINGS AND RECOMMENDATIONS

Our review showed that Customer Service and Regulatory Affairs take compliance with ACC Rules and Regulations very seriously. These groups set goals that go beyond what the rules and regulations require and meet them on a continuous basis.

Areas reviewed that meet or exceed compliance are:

- Curtailment
- Filing Requirements
- Handling of complaints and correspondence
- Handling of Cogeneration Customers

Areas reviewed that need improvement are:

- Access to meters
  1. Current processes are not designed to deal with all access issues and are mainly focused on Metropolitan Phoenix residential accounts.
  2. Access issues exist for all service plans and are not limited to Time of Use accounts. Additionally access issues relating to non-residential accounts have grown substantially since the implementation of estimating demand meter readings in March 1999.
  3. Customer accounts were being estimated for more than three consecutive months without creating a billing exception, as the rules and regulations require. These errors were fixed in July 2002.
  4. Estimating meter readings and demands for non-residential accounts presents the risk of under billing or over billing a customer on the demand side. These over and under billings normally go uncorrected, unless the customer questions the charges.
- Totalized metering
  1. Review of the set up of totalized accounts by the Design Project Leader most familiar with the actual field configuration should be made to ensure that all billing and contract values are correct. This review will ensure that accounts are billing correctly and all revenues collected.

STATUS

APS03345

APS05642

**BACKGROUND**

APS is required to comply with rules and regulations contained in the Arizona Administrative Code, Title 14. Public Service Corporations; Corporations and Associations; Securities Regulation, Chapter 2, Corporation Commission Fixed Utilities. These rules and regulations define information to be provided to the Arizona Corporation Commission, including timeframes, treatment of depreciation, and rate hearings. Also contained within these rules and regulations is specific wording regarding meter reading, billing, line extension, etc. These rules must be adhered to when APS conducts business with its Customers.

**SCOPE**

Review of all rules and regulations contained in the Arizona Administrative Code, Title 14, Public Service Corporations, Corporations and Associations, Securities Regulation, Chapter 2 Corporation Commission Fixed Utilities, Article 1 General Provisions, Article 2 Electric Utilities.

A review was performed of all rules, regulations and schedules to determine if audits currently scheduled for completion in 2002 or completed in 2001 addressed the issue of compliance with the rules, regulations or schedules.

Rules, regulations and items in schedules to be included in this audit are:

- Totalized Metering – billings and creation during 2001
- No Access issues – through current date
- Correspondence – through current date
- Complaint Handling – through current date
- Schedule 5 – Guidelines for Electric Curtailment
- Filings – for 2001
- Accident Reporting – for 2001
- Schedule 15 – Conditions Governing the Providing of Electric kWh Pulses
- Schedule 02 - Terms and Conditions for Energy Purchases from Qualified Cogeneration and Small Power Production Facilities
- Service to Abnormal Load Equipment
- General Trailer Park Policy

All items relative to direct access were excluded from this audit.

**CONCLUSION**

Customer Service and Regulatory Affairs are aware of ACC Rules and Regulations and diligently work to meet or exceed those requirements.

**AUDIT TEAM**

Team Lead: Nancy Bullock, Senior Auditor  
Mary Thiesing, Senior Auditor

Audit Supervisor: Sandra Alexander

APS03346

## TOTALIZED METERING

### BACKGROUND

The process of totalizing a customer's metering and billing configuration is covered by Schedule # 4 of the Schedules Regarding Arizona Corporation Commission Rules and Regulations for Electric Utilities. This schedule was last updated on October 01, 1999. This metering configuration allows customers at a single premise whose load requires multiple points of delivery through multiple service entrance sections to be metered and billed from a single meter through Adjacent or Remote Totalized Metering. Totalized Metering (adjacent or remote) is the measurement for billing purposes on the appropriate rate, through one meter, of the simultaneous demands and energy of a customer who receives electric service at more than one service entrance section at a single premise. Customer sites are evaluated based on the terms of Schedule #4 to determine eligibility for this type of metering and billing configuration. The Totalizing Committee, chaired by Steve Bischoff, Director - Construction, Maintenance and Operations, performs the evaluation. Records relating to the customer sites approved and denied are maintained by Steve Bischoff's area. This information is received from customer service personnel who are working with the customer to establish their metering and billing configuration. Additional information is received from the Electric Meter Shop when the meters are actually set in the field for the customer. As of March 29, 2002 there were 205 accounts set up with a totalized metering configuration in CIS.

### FINDINGS AND RECOMMENDATIONS

1. The company has a comprehensive review process to determine if a customer site qualifies for totalized metering and billing.
2. All accounts set up in a totalized metering and billing configuration received approval by the Totalizing Committee.
3. A review of the contract values for billing delivery point charges uncovered two accounts that were set up and billed in error. One account had been over charged \$12,000 and has been rebilled and a refund check issued for the over billing. Another account was undercharged \$40,000 for the past two years. This account has been corrected and no backbilling is planned.
4. Of the 205 accounts coded as having a totalized metering configuration, nine accounts had coding errors. These errors were pointed out to Customer Operations personnel and the errors were corrected. These coding errors occurred when new accounts were being created in CIS and the totalized value was selected for the meter kind rather than individual.
5. A review of the totalized meter records found inconsistencies with the information in CIS. Discrepancies were found in the site identification number, customer name, service address, meter numbers, delivery points and charges. The area representing the most risk to the company is the delivery point and charges, as this is the basis for the billing of the customer account.

APS03347

August 13, 2002

6. In addition to the records kept by Steve Bischoff's area, the Electric Meter Shop and Regulatory Affairs also keep information on Totalized accounts. A comparison of the data kept by the various groups found inconsistencies in the information.
7. A initial review of the meter and service level voltage information in CIS indicated that we were not in compliance with Rule #2 of Schedule 4 which states "Power will generally be delivered at no less than 277/480 volt (nominal), three-phase, four wire; and". Follow up discussions with Glenn Ensor from the Electric Meter Shop explained that only the submeters in the totalized metering configuration should be included in this review. An additional review of only the submeters showed that we comply with rule #2.

#### Recommendations

- A review needs to be made of all totalized accounts to determine if delivery point charges are being applied correctly when accounts are established or the configuration of the site changes.
- One area of the company should be the record keeper for all of the totalized metering documentation. Other areas that need access to the information should receive information from that single source to eliminate inconsistent information.
- Information regarding totalized accounts needs to be reviewed and updated annually to ensure that changes have not occurred to items, such as customer name, status of account, etc.
- Update Rule #2 of Schedule 4 to clearly define that the voltage requirements are for the sub meters only and does not apply to the billing meter.
- Documentation of the actual process for creating a totalized account needs to be created so that all necessary steps to get the account entered into CIS are completed correctly.

#### Response

- *A review has been completed and all totalized account data is now correct.*
- *We agree with the concept of having a single database and shared file for keeping track of the totalized accounts. There will be a limited number of areas that can update, but read access to the information will be more general. A team is putting the finishing touches on the totalizing procedure. We have pulled together another team to analyze and evaluate the who, where and how this information will be stored. Our intent is to implement in the first quarter of 2003.*
- *The Customer Operations Technology Team has provided a query to the totalized metering committee. Annually in April, the totalized metering committee will perform an audit of the CIS totalized data.*
- *Our interpretation of Rule #2 of Schedule 4 is that "delivered" implies sub meters. Since energy is always delivered through a sub meter never directly through the totalizing meter. No modification to the rule is necessary.*
- *A cross functional team was created with the task of documenting the totalized metering process. This has been completed and a process document created.*

APS03348

APS05645

BACKGROUND

APS has over 900,000 meters currently set in the field. Many of these meters require that the meter reader physically touch the meter each month to obtain meter readings, reset demand measuring devices, etc. Meter reads analyzed between January 1, 2001 through March 25, 2002 showed over 13,000 occurrences of no access meters problems that caused billing exceptions. Accounts with no access for more than one month during that same timeframe totaled over 10,000 accounts. In addition, over 100,000 accounts had automatic system estimates of meter reads performed by the billing system when meter reads were missing or unavailable for all meter read dials required for billing. The breakdown of meters not read each month is less than 1% of the total meters read.

R14-2-210, Billing and Collection, of the Arizona Administrative codes states:

"A. Frequency and estimated bills

1. Unless otherwise approved by the Commission, the utility or billing entity shall render a bill for each billing period to every customer in accordance with its applicable rate schedule and may offer billing options for the services rendered. Meter readings shall be scheduled for periods of not less than 25 days or more than 35 days without customer authorization. If the utility or Meter Reading Service Provider changes a meter reading route or schedule resulting in a significant alteration of billing cycles, notice shall be given to the affected customers.
2. Each billing statement rendered by the utility or billing entity shall be computed on the actual usage during the billing period. If the utility or Meter Reading Service Provider is unable to obtain an actual reading, the utility or billing entity may estimate the consumption for the billing period giving consideration the following factors where applicable:
  - a. The customer's usage during the same month of the previous year,
  - b. The amount of usage during the preceding month.
3. Estimated bills will be issued only under the following conditions unless otherwise approved by the Commission:
  - a. When extreme weather conditions, emergencies, or work stoppages prevent actual meter readings.
  - b. Failure of a customer who reads his own meter to deliver his meter reading to the utility or Meter Reading Service Provider in accordance with the requirements of the utility or Meter Reading Service Provider billing cycle.
  - c. When the utility or Meter Reading Service Provider is unable to obtain access to the customer's premises for the purpose of reading the meter, or in situations where the customer makes it unnecessarily difficult to gain access to the meter, that is, locked gates, blocked meters, vicious or dangerous animals. If the utility or Meter Reading Service Provider is unable to obtain an actual reading for these reasons, it shall undertake reasonable alternatives to obtain a customer reading of the meter.
  - d. Due to customer equipment failure, a 1-month estimation will be allowed. Failure to remedy the customer equipment condition will result in penalties for Meter Service Providers as imposed by the Commission.
  - e. To facilitate timely billing for customers using load profiles.

4. After the 3rd consecutive month of estimating the customer's bill due to lack of meter access, the utility or Meter Reading Service Provider will attempt to secure an accurate reading of the meter. Failure on the part of the customer to comply with a reasonable request for meter access may lead to discontinuance of service.
5. A utility or billing entity may not render a bill based on estimated usage if:
  - a. The estimating procedures employed by the utility or billing entity have not been approved by the Commission.
  - b. The billing would be the customer's 1st or final bill for service.
  - c. The customer is a direct-access customer requiring load data.
  - d. The utility can obtain customer-supplied meter readings to determine usage.
6. When a utility or billing entity renders an estimated bill in accordance with these rules, it shall:
  - a. Maintain accurate records of the reasons therefor and efforts made to secure an actual reading;
  - b. Clearly and conspicuously indicate that it is an estimated bill and note the reason for its estimation."

### FINDINGS AND RECOMMENDATIONS

1. We found 2,247 accounts that used automatic system estimated reads for billing over 4 times from March 2001 to March 2002. 94 accounts used automatic system estimated meter reads over 8 times during this same period. 8 accounts used automatic system estimated reads every month during that period. All of these automatic system estimated reads were a result of No Access exceptions.
  - Access problems exist for all service plans.

Service Plan	Count of No Access
100	3051
120	4603
160	319
208	4
212	10
232	49
233	10
244	2
300	3518
400	4
800	1305
900	47
999	2
1800	498
2000	5
2300	3
4400	1
7402	7

- Access problems associated with meter reading exist in Metro Phoenix and State Region areas.

*CIS Compliance to C Rules and Regulations  
 Report #21054  
 August 13, 2002*

Meter Read Department	# of No Access Exceptions
116	56
117	63
119	32
191	79
192	91
193	77
291	1968
293	1935
391	123
392	75
393	4518
394	160
395	86
396	477
397	641
613	598
622	3
641	14
642	96
651	31
652	1
671	90
691	578
711	228
713	71
732	22
734	270
751	13
753	97
811	222
812	128
831	334
832	86
971	29
991	146

- Meter reads automatically estimated by the system are not reported as a no access billing exception.
- Reports for no access problems are not worked consistently by Meter Reading offices statewide.
- Reports for no access problems lack information that would allow Meter Reading Offices to work the reports efficiently.
- Reads were estimated due to no access
- Reads were estimated due to weather conditions
- Reads were estimated due to difficulty in reaching remote sites, such as mountain tops, etc. Many accounts in Northern Arizona areas cannot be read during the winter season because the roads in the area have been closed by the county or Forest Service and we do

not have keys to their gates. These accounts are currently coded as no read due to snow when that reason code is not accurate.

2. A system problem was found with the timing for creating an exception when the prior two months meter reads have been estimated by the system. The system creates the exception on the 4<sup>th</sup> consecutive month rather than the 3<sup>rd</sup> consecutive month. Changes were made to the Customer Information System on July 26, 2002 to correct this problem.
3. A system problem was found with the automatic estimating of accounts. The system is allowing accounts coded with an irregular use code to estimate more than three consecutive months without creating a billing exception. Changes were made to the Customer Information System on July 26, 2002 to correct this problem.
4. Billing Services works the accounts that have a no access billing exceptions. They send a postcard to the customer requesting that they read their meter and provide that information to APS so that the account can be billed and/or follow-up with the appropriate Meter Reading area to request assistance in obtaining an actual meter read. We asked Lori Moyer to have her staff clarify which specific account or accounts had an issue when adding notes to customers with multiple sites and meters.
5. An unmanned outbound calling program is currently running to contact residential customers in Metropolitan Phoenix. Here is a sample of the messages played:

"This is an important message from APS regarding your electric bill. We have been unable to read your electric meter for at least three consecutive months; therefore, your billings have been estimated. Please call us at (602) 493-4371 to resolve this issue and insure that your future bills are accurate. The number again is (602) 493-4371. We thank you in advance for your cooperation in this matter."

- Customers in areas other than Metro do not receive such messages.
  - Non-residential customers do not receive such messages.
6. Automatic system estimation of non-residential customer meter reads was implemented in March 1999. Prior to that date system estimation of meter reads for non-residential accounts was not allowed. A review of accounts with demand that were estimated shows problems with that process that allow customers to be under charged as much as 50% for demand charges and in many instances over charged. In addition, the automatic system estimation of non-residential accounts with less than 12 months worth of history represents a financial risk to the company. Approximately 2,500 non-residential accounts are automatically system estimated on a monthly basis.

#### Recommendations

- Shereen Loveridge, Department Leader for Metro Field Services has put together a comprehensive revision to how we deal with the no access problem. These recommendations have been reviewed as part of the audit and we would recommend implementation of these changes statewide. Limiting the changes to Metro would put us at risk because we would be dealing with Metro customers in a stronger manner than state region customers.
- Discontinue the automatic estimation of meter reads for non-residential customer accounts. This will require some programming changes and potentially additional training for Billing Service Representatives.
- Add additional no read codes so those areas such as in Northern Arizona that are not read due to lack of seasonal accessibility can be correctly coded.

Response

- *The Metro No Access Process and Procedures revisions were presented at the Division Manager meeting in January 2003 by Tammy McLeod. Due to differences in staffing personnel between State and Metro, some changes in responsibility are being determined and incorporated into the revisions. The state Division Managers have agreed to adopt a policy of consistently addressing access issues. Each division manager is currently determining a point person for their areas. Communication and training will follow to facilitate a first quarter 2003 roll-out of the revised process and procedures.*
- *Because the Customer Information system uses the same process to estimate that is used in a manual estimation, Billing Services will continue to let the system estimate. Increased manual estimation would require additional staffing without a corresponding increase in accuracy. The current system estimating routine may have its flaws but there will always be numerous accounts identified to demonstrate that any estimating routine does not work in certain situations. Since we are estimating based on norms, there are always exceptions in the real world that will make the routine appear flawed. If the estimating algorithm is changed, our opinion is that the Rates department should perform an extensive study and get a new routine refined before it is brought to IS as an enhancement.*
- *A new no access read code named "Seasonal Closure" has been added to the Itron and CIS systems to allow better identification of accounts when meter reading is not able to obtain a read due to lack of seasonal accessibility.*

APS05650

APS03353

**GENERAL TRAILER PARK POLICY**

**BACKGROUND**

This frozen policy exempts trailer park customers who connected before May 1, 1964 from receiving a minimum bill when no usage is reported. Trailer spaces on this policy will continue on the policy until they are disconnected or they have a change in ownership. Under this policy, the customer is billed under service plan 800.13 or 800.14.

**FINDINGS AND RECOMMENDATIONS**

1. We found seven accounts being billed under the General Trailer Park Policy in error. Four of these errors were a result of clerical errors and three of these accounts defaulted to the 800.13 service plan in error.

**Recommendation**

We recommend that the process to default service plan values be reviewed and changes made to CIS to insure that all accounts default to the correct service plan.

**Response**

*The CIS system has been modified so that these accounts are currently defaulting to the 100.1 service plan when service is re-established at these sites. All accounts billing on this rate in error have been corrected.*



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## APS Tree Care Program Honored

January 5, 2004

Phoenix, AZ -

For the eighth consecutive year, APS will be honored with the Tree Line USA Award for its national leadership in urban forestry and environmental stewardship. The National Arbor Day Foundation and the National Association of State Foresters sponsor Tree Line USA.

The award will officially be presented March 30 as part of the Arbor Day Foundation's 11<sup>th</sup> Annual Trees and Utilities National Conference in Omaha, Nebraska.

The award recognizes both public and private utilities throughout the country that demonstrate superior practices to protect and enhance America's urban forests. Utilities are considered for the award for meeting standards in quality tree care, annual worker training, and tree planting and public education. There are 102 Tree Line USA utilities.

The award is presented to utilities that demonstrate commitment "to protect community trees while providing reliable service," according to National Arbor Day Foundation president John Rosenow.

"This award is particularly gratifying in a year when we've had to deal with forest fires, bark beetle devastation, and other challenges while meeting our primary goal – properly caring for trees near power lines while continuing to provide safe, reliable electric service," said APS Forestry and Special Programs Manager Mike Neal.

"Trees and utility lines contend for overhead space along our streets," added Neal, who is also president of the International Society of Arboriculture (ISA), the world's largest scientific and education tree care organization. "Our goal is to allow trees and power lines to coexist through careful pruning of existing trees and by encouraging residents to plant trees that won't spread into the lines when mature."

APS has almost 100 vegetation management employees statewide. These professionals help ensure that trees do not grow into – or fall onto – more than 20,000 miles of transmission and distribution power lines statewide, preventing power disruptions and dangerous situations for APS employees and customers.

APS, Arizona's largest and longest-serving electricity utility, serves more than 902,000 customers in 11 of the state's 15 counties. With headquarters in Phoenix, APS is the largest subsidiary of [Pinnacle West Capital Corp.](#) (NYSE: PNW).

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**APS05653**

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

AVIS READ; and PAUL SCHAEFFER  
and LINDA SCHAEFFER, husband and  
wife; On Behalf of Themselves and All  
Others Similarly Situated,

Plaintiffs,

vs.

ARIZONA PUBLIC SERVICE  
COMPANY,

Defendant.

No. CV 2002-010760

**OPPOSITION OF DEFENDANT  
ARIZONA PUBLIC SERVICE  
COMPANY TO PLAINTIFFS'  
MOTION FOR CLASS  
CERTIFICATION**

**(Oral argument requested)**

(Assigned to the Honorable  
Rebecca A. Albrecht)

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**INTRODUCTION**

Plaintiffs purport to bring this action on behalf of thousands of current and former APS customers in Arizona who received estimated bills from APS after September 1, 1998. Plaintiffs identify two putative subclasses that they claim were adversely effected by APS's estimated billing procedures and practices: Subclass A consists of those APS customers who received estimated "demand" rate readings and Subclass B consists of APS non-demand rate customers whose bills were estimated for more than three consecutive months.

Certification of the proposed classes would be improper on two grounds. *First*, a decision by the Arizona Corporation Commission ("ACC") on APS's pending Application to the ACC could render moot all of Plaintiffs' claims. *Second*, Plaintiffs' claims are factually and legally incorrect, raise a host of individual issues, and otherwise fail to satisfy the requirements of Ariz. R. Civ. P. 23(b)(2) and (3).

**FACTUAL BACKGROUND**

**A. The Nature of Plaintiff's Claims**

Plaintiffs allege that since September 1998, APS has used unlawful, unapproved procedures and practices to estimate bills of demand customers when an actual meter reading cannot be obtained. (Mot. at 1.) Specifically, Plaintiffs allege that, beginning in 1998, APS failed to have its estimating methods for demand accounts approved by the ACC, as required by Arizona Administrative Code ("A.A.C.") R14-2-210(A)(5)(a). (Am. Compl. at ¶¶ 13-16.) Plaintiffs further allege that from September 1998 through July 2002, APS issued estimated bills on some non-demand accounts for up to four months, in violation of A.A.C. R14-2-210(A)(4).<sup>1</sup>

---

<sup>1</sup> Plaintiffs various statutory and common law claims for consumer fraud, unjust enrichment, breach of fiduciary duty, breach of contract, breach of warranty, and negligence all flow from the alleged failure to have the ACC approve APS's estimating procedures.

1 Plaintiffs' contention that APS has engaged in a wholesale change of its  
2 estimated billing procedures since September 1998 is flatly untrue and is, quite  
3 frankly, much ado about nothing. Contrary to what Plaintiffs would have the Court  
4 believe, the methodology APS uses to estimate bills for demand accounts today is  
5 essentially and materially the same as it used prior to 1998. Furthermore, when APS  
6 is required to estimate a customer's bill for more than three consecutive months, it  
7 takes appropriate action to attempt to obtain an actual meter reading, which is all that  
8 the ACC regulations require. Thus, the rhetoric and unfounded assertions of  
9 Plaintiffs' Motion are not only inaccurate, but also fail to establish even the most  
10 basic requirement for class certification -- well-pleaded allegations of fact and law  
11 equally applicable to all members of the proposed classes. *See Castano v. American*  
12 *Tobacco Co.*, 84 F.3d 734, 744 (5<sup>th</sup> Cir. 1996) (court must go "beyond the pleadings"  
13 and "must understand the claims, defenses, relevant facts, and applicable substantive  
14 law in order to make a meaningful determination of the certification issues").

15 **B. APS's Estimated Billing Procedures for Demand Accounts Have**  
16 **Remained Essentially and Materially the Same.**

17 APS offers its customers a number of billing rates from which to choose. The  
18 main distinction between those rates are the bases on which they are calculated --  
19 consumption and demand. "Demand rate" accounts use both components.  
20 Consumption, or "kWh" (kilowatt hours), is the total amount of electricity that a  
21 customer has used during that billing cycle. Demand, or "kW" (kilowatt), is the peak  
22 electric capacity consumed during a one-hour period in that billing cycle for  
23 residential accounts and a fifteen-minute period for commercial accounts.<sup>2</sup> Kilowatt  
24 hours (kWh) and kilowatts (kW) are both billed at certain rates, and those line items

25  
26 <sup>2</sup> A customer on a demand rate account can usually reduce his or her overall  
27 electric utility charges by minimizing periodic increases in demand during a billing  
28 cycle. In other words, by using a relatively constant amount of electricity during the  
billing cycle and avoiding large spikes in electricity use, the customer is charged at a  
reduced rate per kWh.

1 are then totaled, resulting in a sum owed to APS for electrical use during that billing  
2 period. Contrary to what Plaintiffs assert, APS has consistently estimated demand  
3 and consumption for demand rate accounts based upon, where applicable, “the  
4 customer’s usage during the same month of the previous year” and “the amount of  
5 usage during the preceding month.” See A.A.C. R14-2-210(A)(2). The only  
6 significant change has been the extent to which the estimated billing process has been  
7 computerized.

8  
9 **1. Estimated Billing Method Under the Old CIS.**

10 Prior to September 14, 1998, APS generated bills using a computer system  
11 commonly referred to as “old CIS.” When estimated bills were necessary, the old CIS  
12 estimated both consumption (kWh) and demand (kW) based on a customer’s  
13 individual account history. Consumption was estimated based on the customer’s  
14 usage during the same month of the previous year and the amount of usage during the  
15 preceding two months of the same year. Demand was estimated using a “load factor,”  
16 a number calculated by averaging kW of the two previous months, the same month of  
17 the prior year, and peak demand of other customers with similar kWh usage.  
18 (McLeod Affidavit at ¶¶ 2-11, **Exhibit A** hereto.)

19 The old CIS did not automatically send estimated bills to demand rate  
20 customers. Instead, bills with a demand component that required estimates under the  
21 old CIS triggered what is referred to as a “billing exception.” A billing exception  
22 caused that customer’s account to be sent to a billing representative in APS’s Billing  
23 Department. At that point, the billing representative could either (1) use the estimated  
24 numbers calculated by the old CIS; or (2) if the CIS data appeared to be insufficient,  
25 manually calculate the consumption and/or demand estimates based on that  
26 customer’s account history and peak demand of other customers with similar kWh  
27 usage; and/or (3) request that a meter reader make another attempt to obtain an actual  
28 meter read. (*Id.* at ¶¶12-13.)

1           The estimating procedures used by the old CIS were well known to the ACC  
2 and were addressed and applied by the ACC in several written orders prior to 1998,  
3 including a detailed order dated December 10, 1996 in Docket No. U-1345-96-162  
4 (*Ciccone v. Arizona Public Service Co.*) (a copy of which is attached hereto as  
5 **Exhibit B**) (“[W]e find 8.9 kW to be the appropriate demand estimate for the  
6 September 1995 bill because it is based on APS’s estimation model which considers  
7 such factors as Mr. Ciccone’s actual kWh used in September 1995, his previous  
8 months’ demands and the peak demand of other customers with similar kWh usage.”)

9  
10           **2. Estimated Billing Method Under the New CIS.**

11           On September 14, 1998, APS began using a new computer system, which is  
12 commonly referred to as “new CIS.” Although the new CIS system has always been  
13 able to estimate consumption (kWh), at its inception and for approximately the next  
14 eight months, the new CIS was unable to estimate demand (kW). Thus, from  
15 September 14, 1998, through late March or early April 1999, if the new CIS did not  
16 have an actual read for the demand number, the system would create a billing  
17 exception for that account. As with the old CIS system, the billing exceptions caused  
18 a billing representative to review the account and calculate the required estimate. The  
19 billing representative could do so by manually calculating the estimates based on that  
20 customer’s account history, the peak demand of other customers with similar kWh  
21 usage, or could request that a meter reader make another attempt to obtain an actual  
22 read of the meter if possible. (McLeod Affidavit, Exhibit A, at ¶¶14-16.)

23           In late March or early April 1999 the new CIS was programmed so that it  
24 could estimate demand (kW), as well as consumption (kWh). The new CIS estimated  
25 demand -- as was also done by the old CIS -- using a load factor.<sup>3</sup> Thus, as of late

26  
27 <sup>3</sup> In approximately July 2002, APS lowered the load factor percentage used to  
28 calculate estimated demands to 35% for residential accounts and 50% for non-  
residential accounts. APS based this change on market research regarding the  
accuracy of the load factors in estimating demand. McLeod Affidavit, at ¶18.

1 March or early April 1999, the new CIS estimated both consumption *and* demand and  
2 automatically sent out bills that contained estimates. However, in a number of  
3 instances the new CIS still generated a billing exception for some bills that required  
4 estimates (thus requiring the billing representative to review the calculation or prepare  
5 the estimated bills). For example, if the customer did not have a sufficient history  
6 from which to calculate consumption (kWh), the new CIS would generate a billing  
7 exception, requiring a billing representative to manually calculate the estimates based  
8 on the customer's available account history. (*Id.* at ¶¶15-16.) *See also* Affidavit of  
9 Janet Smith, **Exhibit C** hereto.)<sup>4</sup>

10 In short, although APS has refined the methodology used to provide estimates  
11 on bills to more accurately reflect actual demand estimates on bills and to  
12 computerize the process, the basic method used to estimate consumption and demand  
13 is the same under the old CIS and the new CIS systems.

14 **C. Estimating Bills for More than Three Consecutive Months Is**  
15 **Neither Prohibited by ACC Regulations Nor Necessarily**  
16 **Detrimental to a Customer.**

17 Plaintiffs' discussion of the Subclass B issues is likewise inaccurate. Plaintiffs  
18 contend that APS violated A.A.C. R14-2-210(A)(4) by sending estimated bills to  
19 some customers for more than three consecutive months, but that regulation does not  
20 prohibit estimated bills for more than three consecutive months. The regulations  
21 states:

22 After the 3<sup>rd</sup> consecutive month of estimating the customer's bill due to  
23 lack of meter access, the utility or Meter Reading Service Provider will

24 <sup>4</sup> Beginning in early December 2000, the spreadsheet used by the billing  
25 representatives to estimate demand in those instances when a billing exception had  
26 been generated by the new CIS was revised to include the load factor percentages that  
27 the CIS system used to estimate demand. The billing representatives thus had the  
28 same three options that had been available to them under the old CIS: they could use  
the computer-generated demand estimate; they could recalculate the demand estimate  
using the previous two months history of the same year, the same month of the  
previous year, and the peak demand of other customers with similar kWh usage; or  
they could request that the meter reader again attempt to get an actual read of the  
meter. (McLeod Aff. at ¶17.)

1 attempt to secure an accurate reading of the meter. Failure on the part  
2 of the customer to comply with a reasonable request for meter access  
may lead to discontinuance of service.

3 As set forth below, that is precisely what APS attempts to do -- secure an accurate  
4 reading of the meter -- each month that a bill is estimated, both before and after the  
5 third month. Indeed, where meter access issues require a bill to be estimated, the  
6 customer is better off receiving an estimated bill than having service terminated. For  
7 this reason, APS seeks to minimize disruption and inconvenience for the customer  
8 even when APS has the right to terminate the customer's electric service due to the  
9 customer's repeated refusal to provide meter access.  
10

### 11 ARGUMENT

#### 12 **I. The Court Should Defer Consideration of Class Certification Until the ACC has Interpreted Rule R14-2-210 ("Rule 210").**

13 As a preliminary matter, this Court should defer consideration of class  
14 certification pending a decision by the ACC on the Application APS filed with the  
15 ACC in October 2003. APS seeks the ACC's interpretation of A.A.C. R14-2-210(A)  
16 and a determination of whether APS is in compliance with that rule. The technical  
17 intricacies of the estimating procedures -- as outlined above -- and the long history  
18 and expertise that the ACC has with regard to its own regulations make this a case in  
19 which the Court should defer to the ACC at least in the first instance.<sup>5</sup>

20 <sup>5</sup> As the Court is aware, APS's Application asks that the ACC find that APS and  
21 the other incumbent utilities should be declared to be in compliance with or otherwise  
22 exempt from Rule 210 at all times since the amendment of the Rule in 1998 and  
23 should be able to continue using their established estimating procedures, without any  
24 further approval by the ACC, until such time as the Director issues new and different  
25 "operating procedures" under A.A.C. R14-2-1612 ("Rule 1612"). In addition, APS's  
26 Application to the ACC asks the ACC to find that APS's estimating procedures have  
27 in fact been approved by the ACC within the meaning of amended Rule 210 given  
28 that the ACC has never indicated that APS's estimating methods were unsatisfactory  
when those methods were outlined to the ACC in connection with other contested  
hearings and reporting requirements. APS also raised in its Application an issue as to  
whether Amended Rule 210 and Rule 1612 are valid and enforceable or whether those  
Rules ever actually took effect in light of other events and court rulings relating to  
these and other deregulation rules. On January 27, 2004, the Arizona Court of  
Appeals affirmed in relevant part a lower court decision invalidating Rule 1612  
(among others). By implication, this ruling would also invalidate the 1998  
amendment to Rule 210 upon which Plaintiffs' claims for Subclass A are based. *See*

1           Should the ACC find that APS's bill estimating procedures are either exempt  
2 from or comply with the requirements of the ACC Rules, there would be little or  
3 nothing left to litigate because such a ruling would validate the estimated bills  
4 rendered by APS to Plaintiffs and all other potential class members. At the very least,  
5 a decision by the ACC will clarify any ambiguity in the procedures and provide  
6 further direction for the Court in deciding whether any of the claims in this litigation  
7 have merit. Thus, before initiating expensive and time-consuming discovery and  
8 notice to potential class members, the Court should allow the ACC to render its  
9 decision on the pending Application -- a decision that goes to the very heart of the  
10 claims that Plaintiffs seeks to pursue on behalf of the putative classes.

11 **II. Class Certification Is Inappropriate Under Ariz. R. Civ. P. Rule 23(b).**

12           Apart from the issues raised by APS's Application before the ACC, Plaintiffs'  
13 Motion for Class Certification should be denied because it fails to satisfy the  
14 requirements of Ariz. R. Civ. P. Rule 23(b). Plaintiffs bear the burden of showing  
15 that their case is appropriate for class action certification by showing that they have  
16 met each of the four requirements of Rule 23(a) and at least one of the requirements  
17 of Rule 23(b). *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th  
18 Cir. 2001); *see also Markiewicz v. Salt River Valley Water Users' Ass'n*, 118 Ariz.  
19 329, 341, 576 P.2d 517, 529 (App. 1978). Plaintiffs seek class certification under  
20 both Rule 23(b)(3) and (b)(2), but they fail to meet their burden of proof for either.

21           **A. Certification of Subclass A Should Be Denied Because It Fails to**  
22           **Satisfy the Predominance and Superiority Requirements of Rule**  
23           **23(b)(3).**

24           In order to certify a Rule 23(b)(3) class, the Court must find (i) "that the  
25 questions of law or fact common to the members of the class predominate over any  
26 questions affecting only individual members" and (ii) "that a class action is superior

27 \_\_\_\_\_  
28 *Phelps Dodge Copr. V. Ariz. Elec. Power Coop., Inc.*, No. CA-CV-0068 (Ariz. App.,  
January 27, 2004, at pp. 45-48).

1 to other available methods for the fair and efficient adjudication of the controversy.”  
2 Ariz. R. Civ. P. 23(b)(3).<sup>6</sup> Subclass A fails both the predominance and superiority  
3 tests because of the difficulties of proving that each class member suffered injury in  
4 fact and actual damages.

5 **1. Individual Issues of Injury-in-Fact and Damages**  
6 **Predominate Over Any Common Issues.**

7 As detailed above, Plaintiffs seek monetary relief for Subclass A through a  
8 variety of claims, most of which require Plaintiffs to prove that APS’s allegedly  
9 unlawful estimated billing practices injured each member of the subclass. The  
10 existence of predominating individual issues of liability -- i.e., injury in fact and  
11 actual damages -- renders class certification improper in this instance.

12 The predominance inquiry under Rule 23(b)(3) tests whether a proposed class  
13 is sufficiently cohesive to warrant certification. *Amchem Products, Inc. v. Windsor*,  
14 521 U.S. 591, 623, 117 S. Ct. 2231, 2249 (1997). Where individual issues  
15 predominate over the common questions of law or fact, the class lacks cohesiveness  
16 and certification is inappropriate. *See Markiewicz*, 118 Ariz. at 342, 576 P.2d at 530.  
17 Specifically, where “proof of the essential elements of the cause of action requires  
18 individual treatment, then class certification is unsuitable.” *Johnston v. HBO Film*  
19 *Mgmt., Inc.*, 265 F.3d 178, 187 (3d Cir. 2001). Thus, even where some common  
20 questions of law or fact arise, class certification is inappropriate in cases where  
21 individualized issues of liability predominate.<sup>7</sup> *Id.*

22 <sup>6</sup> As part of its rigorous analysis of the predominance and superiority criteria, the  
23 court must take a “close look” at (A) the class members’ individual interest in  
24 controlling the prosecution of the case, (B) any existing litigation regarding the  
25 controversy, (C) the desirability of concentrating litigation of the claims in the  
26 particular forum, and (D) the difficulties likely to be encountered in the management  
27 of the class action. Ariz. R. Civ. P. Rule 23(b)(3); *see also Amchem*, 521 U.S. at 615-  
16, 117 S.Ct. at 2246. Where the first three factors “are not relevant, the key question  
involved in the two Rule 23(b)(3) findings should be manageability.” *Lennon v. First*  
*Nat’l Bank of Arizona*, 21 Ariz. App. 306, 311, 518 P.2d 1230, 1234 (1974).

28 <sup>7</sup> Courts have held in a variety of contexts that individualized issues of liability  
predominate over common questions, making class certification improper. *Johnston*  
*v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 187 (3d Cir. 2001) (Rule 10b-5 claims require

1  
2 In this case, individual questions of whether each class member sustained  
3 economic injury present an insurmountable obstacle to certification. *See, e.g. Newton*  
4 *v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187 (3d Cir. 2001).  
5 Plaintiffs allege that APS's bill estimating procedures resulted in "excessive estimated  
6 bills" (Pls. Mot. at 3), but Plaintiffs have failed to present evidence that the sole class  
7 representative (Mrs. Read) -- let alone a single member of Subclass A -- was  
8 overcharged as a result of APS's estimated billing procedures.<sup>8</sup> In fact, record  
9 evidence shows that estimated billing may work to a customer's economic benefit  
10 where the estimated demand (kW) was lower than actual demand. (McLeod Aff.,  
11 Exhibit A, at ¶20-23.) In those cases where estimated bills work to the customer's  
12 favor, APS does not seek a rebate from the customer. (Id. at ¶23.) And in those cases  
13 where APS is able to obtain a normal read and finds that the previous month(s)  
14 estimated read was too high, APS issues the customer a credit on his or her account.

15 individualized determination of whether stockholders relied on alleged material  
16 misrepresentations); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d  
17 154, 180 (3d Cir. 2001) ("In a securities class action, a putative class may  
18 presumptively establish economic loss on a common basis only if the evidence  
19 adequately demonstrates some loss to each individual plaintiff."); *Zinser*, 253 F.3d at  
20 1189 (causation and damages for products liability plaintiffs presented individualized  
21 issues for trial); *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228, 1240 (11th  
22 Cir. 2000) (civil rights plaintiffs' claims for damages must "focus almost entirely on  
23 facts and issues specific to individuals rather than the class as a whole") (citation  
24 omitted); *Daly v. Harris*, 209 F.R.D. 180, 193 (D. Haw. 2002) (liability and proving  
25 damages with respect to plaintiffs' First Amendment claims turn on factual  
26 circumstances of each class member).

27 <sup>8</sup> Plaintiffs contend that the court must take the substantive allegations in the  
28 complaint as true. Pls. Mot. at 9. However, in making the class certification decision,  
the court need not take as true the allegations in the complaint where those allegations  
are unsupported and rebutted by the record. *Johnston v. HBO Film Mgmt, Inc.*, 265  
F.3d at 186-87. Furthermore, the Court must conduct a "rigorous analysis" into  
whether the prerequisites of Rule 23 are met before certifying the class. *Zinser*, 253  
F.3d at 1186. The Supreme Court has held that "sometimes it may be necessary for  
the court to probe behind the pleadings before coming to rest on the certification  
question." *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160, 102 S.Ct.  
2364, 2372 (1982). Accordingly, the Court's "rigorous analysis" may include  
consideration of the factual and legal issues comprising the plaintiff's cause of action  
as well as the evidence in support of and in opposition to class certification *Id.*  
(citations omitted); *see also Reader v. Magma-Superior Copper Co.*, 110 Ariz. 115,  
116, 515 P.2d 860, 861 (1973).

1 (Id. at ¶24.) The Court cannot presume that the members of Subclass A have suffered  
2 economic damages on a class-wide basis; economic injury will have to be determined  
3 on a bill-by-bill basis for each individual class member. *See, e.g., Newton*, 259 F.3d  
4 at 187.

5 Plaintiffs will also have to prove the amount of actual damages for each class  
6 member. Here again, assuming the Court determines that an individual class member  
7 suffered an injury in fact, the Court then will have to engage in an individualized  
8 inquiry to determine the amount of that injury. There simply is no overall mechanism  
9 -- and Plaintiffs suggest none -- for (1) identifying customers whose estimated charges  
10 were higher than actual use, or (2) quantifying the amount of any actual economic  
11 damage. Indeed, there is every reason to believe that APS's estimating procedure for  
12 demand customers was more favorable to the customers as a whole and resulted in an  
13 overall loss of revenue to APS. (McLeod Aff. at ¶25.)

14 Thus, Plaintiffs have not met their burden of proving that common issues  
15 predominate in this case. Injury in fact and actual damages -- essential elements to  
16 Plaintiffs' claims -- are individualized questions that will have to be resolved by mini-  
17 trials examining the particular circumstances of each class member's account. *See,*  
18 *e.g., In Re Methionine Antitrust Litigation*, 204 F.R.D. 161, 165 (N.D. Cal. 2001).  
19 The need for individualized determinations of essential elements of Plaintiffs' claims  
20 makes class certification inappropriate.

21 **2. Class Treatment Is Not Superior Because of the**  
22 **Manageability Problems Created by the Need for**  
23 **Individualized Determination of Essential Elements of**  
**Plaintiffs' Claims.**

24 In a related vein, Plaintiffs have also failed to prove that a class action would  
25 be superior to other available methods for resolving the controversy. In determining  
26 superiority, courts address "the difficulties likely to be encountered in the  
27 management of a class action." Ariz. R. Civ. P. 23(b)(3)(D). Courts recognize that  
28

1 “[i]f each class member has to litigate numerous and substantial separate issues to  
2 establish his or her right to recover individually, a class action is not ‘superior.’”  
3 *Zinser*, 253 F.3d at 1192 (citations omitted); *see also Daly v. Harris*, 209 F.R.D. 180,  
4 194 (D. Haw. 2002) (holding that the superiority criteria of Rule 23(b)(3) is not  
5 satisfied where “[r]esolution of liability and damage issues with respect to members  
6 of these classes... will require the Court to conduct individualized and time-  
7 consuming inquiries”). The bottom line is that when injury and damage  
8 determinations must be made on an individual basis, “adjudicating the claims as a  
9 class will not reduce litigation or save scarce judicial resources. Under these  
10 circumstances, plaintiffs fail to satisfy the superiority standard.” *Newton*, 259 F.3d at  
11 192 (citations omitted).  
12

13 Here, the fact that the court will need to hold individualized mini-trials  
14 regarding injury and damages offsets any benefits that may be achieved by class  
15 treatment. Class certification will neither reduce litigation nor conserve judicial  
16 resources, and therefore fails the superiority test of Rule 23(b)(3)(D).  
17

18 **B. Subclass B Also Fails to Meet the Predominance and Superiority  
Requirements of Rule 23(b)(3).**

19 Plaintiffs also face insurmountable hurdles to certification of Subclass B  
20 because individualized issues predominate over common issues. Plaintiffs contend  
21 that APS acted improperly as to every customer who received more than three  
22 consecutive estimated bills on non-demand accounts. Plaintiffs’ entire Subclass B  
23 claim is based on the invalid assumption that ACC rules and regulations require that  
24 APS stop issuing estimated bills to a customer (and presumably terminate the  
25 customer’s service) after the customer has received three consecutive months of  
26 estimated bills. As noted above, however, the ACC rules and regulations do not  
27 prohibit more than three consecutive estimated bills. According to A.A.C. R14-2-  
28 210(A)(4), after the third consecutive month of estimating a customer’s bill due to

1 lack of meter access, the utility “will attempt to secure an accurate reading of the  
2 meter.” Nothing in the regulation prohibits a utility from continuing to send the  
3 customer estimated bills if access to the customer’s meter cannot be obtained. At  
4 most, therefore, the issue for Subclass B is what constitutes an “attempt to secure an  
5 accurate reading of the meter” and did APS do so with respect to each member of the  
6 purported class.

7 A number of factors may prevent APS from obtaining access to a customer’s  
8 meter, including a locked or inaccessible gate, the presence of a dog, vegetation  
9 obstructing the view of the meter, or lack of access to the home itself. Any time an  
10 APS meter reader is unable to access a customer’s meter, either (1) the meter reader  
11 leaves a door hanger that states the reason the meter was not read and asks the  
12 customer to contact APS, or (2) the customer is sent a Meter Access Request letter.  
13 (McLeod Aff. at ¶¶26-36.) APS issues the customer an estimated bill with a side bill  
14 message that reads as follows: “**\*ALERT/ALERT\* A meter reading issue exists**  
15 **at your location. Please call us at 602-371-7171 (Metro Phoenix area) or 1-800-**  
16 **253-9405 (other areas).”** (*Id.* at ¶34.) After more than one month of estimated  
17 billing, APS uses various tools to contact the customer about obtaining access to the  
18 meter, including automated voice messages, postcards, additional letters, personal  
19 phone calls, and continued monthly visits by meter readers. (*Id.* at ¶¶32-36.)

20 Thus, whether APS attempted to secure an accurate reading of each subclass  
21 members’ meter after the third consecutive estimated bill and whether the estimated  
22 bill caused damage are highly individualized questions. The Court will have to  
23 review each class member’s billing history to see what attempts were made to read  
24 that particular customer’s meter. Such a process would involve not only countless  
25 documents and customer files, but also the testimony of numerous witnesses such as  
26 meter readers, billing representatives, and the individual class members themselves.

1  
2 Indeed, a review of the account of the Schaeffer Plaintiffs -- the proposed  
3 representatives for Subclass B -- demonstrates how the court will have to make an  
4 individualized assessment of whether APS attempted to obtain an accurate reading of  
5 each customer's meter. In April, May, June, and July 2002, the Schaeffers received  
6 estimated bills with a side bill message asking them to call APS because of lack of  
7 meter access. In July 2002, the fourth consecutive month of estimated bills, they were  
8 also sent a blue card (asking them to read the meter) and APS had a phone  
9 conversation with them regarding access issues. In August 2002, the Schaeffers  
10 received a fifth estimated bill with a side bill message. That month, APS again spoke  
11 to the Schaeffers, who gave APS a reading of their meter over the telephone and said  
12 they would unlock the gate to allow access by the meter reader. The Schaeffers were  
13 issued corrected monthly bills for April through August based on the reading they  
14 gave to APS which showed that APS had been underbilling the Schaeffers during  
15 those months. (*Id.* at ¶39.) Thus, APS made attempts from the very first estimated bill  
16 to access the customer's meter and continued to do so thereafter. Other accounts  
17 reveal similar attempts by APS to secure an accurate reading of a customer's meter  
18 after three consecutive estimated bills, and, in virtually every case, with the very *first*  
19 estimated bill. (*Id.* at ¶40 and 41.)

20 Moreover, because Plaintiffs seek monetary damages for Subclass B, there are  
21 even additional individualized issues with respect to this proposed class. The Court  
22 will have to determine whether each class member was injured and, if so, what the  
23 amount of his or her actual damages are. In fact, there is and can be no evidence of  
24 damage because billing on kWh (non-demand) accounts is based on accumulated  
25 usage much like the mileage on a car's odometer. Therefore, when a bill is estimated,  
26 the next bill that is based on an actual read (when added to the estimated bills), will be  
27 a "true up" and reflect the actual consumption since the last meter read. For example,  
28 if the estimate of usage in the first month was higher than actual usage, the following

1 “true up” bill for month two will be correspondingly lower than actual usage for  
2 month two and the combination of month one and month two bills will be the actual  
3 usage between meter reads. Therefore, the customer has only paid for actual usage  
4 and has not been damaged.

5         Additionally, in many cases, just as with the Schaeffers, the estimated bills are  
6 lower than actual usage and the “true up” bill based on an actual meter read is a  
7 “catch up” bill that includes usage not previously included in the estimated bills.  
8 Thus, there simply is no damage to members of the proposed Subclass B no matter  
9 how many months their bills are estimated.

10         In short, just as with Subclass A, individualized questions of law and fact  
11 predominate over any common issues, making Subclass B inappropriate for class  
12 certification under Rule 23(b)(3). Furthermore, individualized determination of these  
13 issues will create management problems that defeat Rule 23(b)(3)’s superiority  
14 criteria. Accordingly, Subclass B should not be certified under Rule 23(b)(3).

15         **C. Class Certification Is Inappropriate for Both Subclasses Under**  
16         **Rule 23(b)(2).**

17         Plaintiffs give cursory treatment to certification under Rule 23(b)(2),  
18 contending that unless enjoined, APS will continue its “deceptive and unlawful  
19 practices.” (Pls. Mot. at 17.) Plaintiffs’ assertion that injunctive relief is necessary is  
20 belied by the fact that APS has sought clarification from the ACC of the very  
21 regulations that Plaintiffs contend APS violated. The ACC is the entity most qualified  
22 to determine the scope and effect of its regulations. The ACC has constitutional and  
23 statutory authority to promulgate rules and regulations governing the ratemaking and  
24 billing functions of public service corporations in Arizona. Given that estimated  
25 billing procedures fall squarely within the ACC’s ratemaking power, the Court need  
26 not and should not certify a Rule 23(b)(2) class. Indeed, if the class is certified  
27 without a decision first being obtained from the ACC on the pending Application,  
28 there is the potential for customer confusion and inconsistent decisions. As such,

1 class certification under Rule 23(b)(2) is neither necessary nor appropriate, and, at a  
2 minimum, should be deferred until the ACC issues its decision.

3  
4 **CONCLUSION**

5 The Court should deny Plaintiffs' Motion for Class Certification. Class  
6 certification is inappropriate because Plaintiffs have not met their burden under Rule  
7 23(b)(3) of proving that common issues predominate and that a class action is a  
8 superior method of adjudicating this controversy. Similarly, Plaintiffs have failed to  
9 show that there is any need for injunctive relief under Rule 23(b)(2), and any action in  
10 that regard by this Court would potentially conflict with decisions, and impinge upon  
11 the authority, of the ACC. At a minimum, the Court should defer consideration of  
12 Plaintiffs' Motion until the ACC has ruled on APS's pending Application to the ACC  
13 because that ruling by the ACC will necessarily impact the issues in this litigation and  
14 may dispose of them altogether.

15 DATED this 27th day of February, 2004.

16  
17 OSBORN MALEDON, P.A.

18  
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1 that billing cycle for residential accounts and a fifteen-minute period for commercial  
2 accounts. This is referred to as "demand" or "kW" (kilowatt). (See Exhibit 1  
3 hereto.) Kilowatt hours (kWh) and kilowatts (kW) are both billed at certain rates, and  
4 those line items are then totaled, resulting in a sum owed to APS for electrical use  
5 during that billing period.  
6

7 3. On September 14, 1998, APS began using a new computer system,  
8 which is commonly referred to as "new CIS." Prior to September 14, 1998, APS was  
9 using a computer system commonly referred to as "old CIS."

10 4. In Avis Read's Motion for Class Certification, Read states that prior to  
11 1998, APS' computer system could not automatically estimate demand. (Motion at  
12 page 1, line 16). This statement is incorrect.  
13

14 5. The old CIS estimated both consumption (kWh) and demand (kW)  
15 based on that customer's individual account history. (See Exhibit 2 hereto.)

16 6. Consumption under the old CIS system was estimated based on the  
17 customer's usage during the same month of the previous year and the amount of usage  
18 during the preceding two months of the same year. Id. at p. 4.

19 7. Demand under the old CIS system was estimated by using the following  
20 formula:  
21

$$22 \text{ Estimated Demand} = \frac{\text{kWh consumption (actual or estimated)}}{\text{Average Load Factor} \times \text{No. of Read Days} \times 24 \text{ Hours}}$$

23 Id.  
24

25 8. For instance, assume that consumption (kWh) for July 1999 was 6535.  
26 Also assume, however, that demand (kW) was missing and needed to be estimated.

1 In calculating the demand estimate in this hypothetical, the old CIS would first  
 2 calculate the "load factor" for the two previous months of the same year and the same  
 3 month a year ago. "load factor" is the percent of maximum electricity consumption  
 4 (based on demand) that was actually used. Id.

5  
 6 9. In determining the load factor, the old CIS used the following formula:

7 
$$\text{Load Factor} = \frac{\text{kWH}}{\text{KW} \times \text{No. of Read Days} \times 24 \text{ Hours}}$$

8 Id. at p. 5.

9  
 10 10. In our hypothetical, assume that the load factor for June 1999 was  
 11 90.28%, the load factor for May 1999 was 97.57%, and the load factor for July 1998  
 12 was 97.36%. The second step in the calculation using the old CIS estimating method  
 13 would be to calculate the Average load factor, which was calculated by adding up the  
 14 percentages outlined in the last sentence and dividing by three, resulting in an  
 15 Average load factor of 95.07%. Id.

16  
 17 11. Once this was done, the Average load factor could be inserted in the  
 18 formula for estimated demand.

19 
$$\text{Estimated Demand} = \frac{\text{kWh consumption (actual or estimated)}}{\text{Average Load Factor} \times \text{No. of Read Days} \times 24 \text{ Hours}}$$

20  
 21 
$$\text{Estimated Demand for July 1999} = \frac{6535}{.9507 \times 30 \times 24} = \frac{6535}{684.50} = 9.5 \text{ kW}$$

22 Id.

23  
 24 12. The old CIS did not automatically send bills based on estimates to  
 25 demand account customers. Instead, bills with a demand component that required  
 26

1 estimates triggered what is referred to as a "billing exception." A billing exception  
2 caused that customer account to be sent to a Billing representative.

3 13. Under the old CIS, a Billing representative reviewed every account for  
4 which a billing exception had been created for that particular month. At that point,  
5 the billing representative could either: (1) use the estimate numbers calculated by the  
6 old CIS; (2) manually calculate the consumption and/or demand estimates based on  
7 that customer's account history and peak demand of other customers with similar  
8 kWh usage; or (3) request that a meter reader again attempt to obtain an actual meter  
9 read.  
10

11 14. On September 14, 1998, the new CIS system became operational.  
12 Although the new CIS system has always been able to estimate consumption (kWh),  
13 at its inception and for approximately the next eight months, the new CIS was unable  
14 to estimate demand (kW). Thus, from September 14, 1998 through late March or  
15 early April 1999, if the new CIS did not have an actual read for the demand number,  
16 the system would create a billing exception for that account billing. As with the old  
17 CIS system, the billing exceptions caused a billing representative to review the  
18 account and calculate the required estimate. The Billing representative could do so by  
19 manually calculating the estimates based on that customer's account history or could  
20 request that a meter reader again attempt to obtain an actual read of the meter.  
21

22 15. In late March or early April 1999, however, the new CIS was  
23 programmed so that it could estimate demand (kW), as well as consumption (kWh).  
24 The new CIS estimated demand - - as was also done by the old CIS - - using a load  
25  
26

1 factor. At this point, the load factor was calculated using an average figure based on  
2 all customers in that particular rate class.

3 16. Thus, as of late March or early April 1999, the new CIS estimated both  
4 consumption and demand and automatically sent out bills that contained estimates.  
5 The new CIS estimated "demand" (kW) based on the average load factor described in  
6 ¶ 15. In a number of instances, however, the new CIS generated a billing exception  
7 for bills that required estimates. For example, if the customer did not have a  
8 sufficient history from which to calculate consumption (kWh), the new CIS would  
9 generate a billing exception. Again, as described in ¶¶ 13 and 14 above, the billing  
10 exception required that account to be reviewed by a billing representative who  
11 manually calculated the estimates based on the customer's account history, or  
12 requested that a meter reader again attempt to obtain an actual read of the meter.  
13  
14

15 17. Beginning in early December 2000, the spreadsheet used by the Billing  
16 representatives to estimate demand was revised to include the load factor percentages  
17 outlined above in ¶ 15. (The Billing representatives still had the authority to revise  
18 the estimate obtained by using the load factor percentages if that estimate appeared  
19 unreasonable. In such a case, the Billing representative could recalculate the demand  
20 estimate using the available historical information. The Billing representative could  
21 also request that the meter reader again attempt to get an actual read of the meter).  
22

23 18. In approximately July 2002, APS lowered the load factor percentage  
24 used to calculate estimated demands from 45% and 50% respectively, to 35%, for all  
25 types of residential demand rate accounts.  
26

1 19. Although APS has tweaked and refined the methodology used to  
2 provide estimates on bills, the basic method used to estimate consumption and  
3 demand is the same under the old CIS and the new CIS systems.

4 20. Bills that contain estimated demand reads can work to the customer's  
5 favor. Attached as **Exhibits 3 and 4** are copies of the billing histories of two demand  
6 account customers who received bills that contained estimates. In each instance, the  
7 estimated demand is clearly lower than the demand actually used in the months both  
8 before and after the estimated reads.

9 21. **Exhibit 3** hereto is the account history for Meter Number E26017. This  
10 customer had an actual demand meter read in February 1999 of 9.1. The customer  
11 then received bills that estimated demand in March, April and May 1999. The  
12 estimated demands were 5, 4.7, and 4.3, respectively. Beginning in June 1999, the  
13 customer then received bills that contained actual reads, and the actual demand reads  
14 were significantly higher than the estimated demand reads. For instance, the demand  
15 read in June was 9.5; July was 8.7; August was 8.4; and September was 9.8.

16 22. A customer is charged per unit of demand (kW). In March 1999, APS  
17 billed \$7.68 for each kW used. Thus, in March 1999, the charge for the account  
18 referenced in ¶ 21 for the estimated demand was \$38.40. If the demand had been  
19 estimated at 8.5, for instance, which is a figure much more in line with this customer's  
20 historical demand use, the charge for the demand would have been \$65.28. Id.

21 23. **Exhibit 4** hereto is the account history for Meter Number C87111. On  
22 October 25, 2000, the actual demand read was 8. From November 2000 through  
23

1 March 2001, APS estimated the demand at numbers that ranged from 1.6 to 3.9.  
2 Beginning in April 2001, however, APS was able to obtain actual reads of the meter,  
3 and for the next seven months, the actual demand was 5.8; 6.8; 6.3; 6.2; 6.3; 6.6; and  
4 5.9.

5  
6 24. Even if it appears that estimated demands were too low based on  
7 historical usage, APS never goes back to the customer and requests additional  
8 payment. Thus, in instances in which estimated demands were lower than what was  
9 probably actually used, the estimated demand figures inure to the benefit of the  
10 customer. In contrast, if APS discovers that an estimate of a demand account was too  
11 high, APS gives the customer a rebate.

12  
13 25. In order to determine whether the estimated reads resulted in over  
14 billing or under billing to the customers billed on demand rates, it would be necessary  
15 to examine each individual bill that contained estimated reads for each particular  
16 customer and perform a historical analysis of that customer's account. Even then,  
17 some interpretation and judgment would be required.

18  
19 26. On September 18, 1995, APS adopted a new "no access" procedure for  
20 residential customers with an access problem in the Metro area. Under that policy, if  
21 the customer service representative determined there was an access problem when  
22 speaking with the customer, the representative could do one of the following: offer  
23 the Info Line number for the customer's meter read office so that the customer could  
24 guarantee that APS would have unassisted access to the meter; offer to send the  
25 customer a read schedule so that the customer will know when to call the Info Line  
26

1 and find out the days of the month the meter reader will be in their area; or offer an  
2 APS company lock. (See Exhibit 5 hereto.)

3           27. Under the 1995 policy, if the customer was unable to provide unassisted  
4 access to the meter, the representative referred the customer to the Meter Read  
5 Section Leader for the customer's read office. The Meter Read Section Leader would  
6 offer one of two options: (1) offer a non-demand time-of-use ("TOU") rate to the  
7 customer when a digital TOU meter could be read over the fence or (2) offer the  
8 customer a non-demand TOU rate and an Access Card (or Pink Card), which would  
9 be mailed monthly to the customer so that the customer could obtain a read and send  
10 the card back in the mail. Id.

11  
12           28. Since before 1998, Ariz. Admin. Code R14-2-210(A)(4) has required  
13 that, after the third consecutive month of estimating the customer's bill due to lack of  
14 meter access, the utility attempt to secure an accurate reading of the meter. APS has  
15 always complied with that requirement.

16  
17           29. The Pinnacle West Audit of APS's CIS Compliance to ACC Rules and  
18 Regulations, dated August 13, 2002, indicated that "customer accounts were being  
19 estimated for more than three consecutive months without creating a billing exception  
20 as the rules and regulations require." This assessment was incorrect. The ACC rules  
21 and regulations do not require APS to create a "billing exception"; they require only  
22 that APS again attempt to secure an accurate reading of the meter.  
23

24  
25  
26

1           30.    APS takes a number of steps under its current no-access policy to  
2    “attempt to secure an accurate reading of a customer’s meter” from the first month  
3    there are access problems.

4           31.    In June 2003, APS changed its no access policy to add steps for each  
5    estimated read. This policy is currently in effect, with minor revisions.

6           32.    Under the new no-access policy, each month that a Meter reader is  
7    unable to access the meter for a monthly read, the Meter reader leaves a door hanger,  
8    indicating the reason he or she could not access the meter, such as “the gate was  
9    locked or inaccessible,” “your pet is protecting your home from strangers and would  
10   not allow me to enter your yard,” “plants and trees are covering or blocking the view  
11   of the meter,” or “the path to your meter is blocked or inaccessible.” The door hanger  
12   provides the phone number for the call center and asks that the customer call APS.  
13   (See **Exhibit 6** hereto.)

14           33.    Each month APS is unable to access a meter, Meter Reading  
15   Administration confirms that the Meter reader left a no-access door hanger; if no door  
16   hanger was left, Meter Reading Administration creates a Meter Access Request letter  
17   to be sent to the customer.

18           34.    Each estimated bill includes a side bill message in the margin which  
19   reads as follows: “\*ALERT/ALERT\* A meter reading issue exists at your location.  
20   Please call us at 602-371-7171 (Metro Phoenix area) or 1-800-253-9405 (other  
21   areas).” (See **Exhibit 7** hereto.)  
22  
23  
24  
25  
26

1 35. Since early 2001 (within the metro Phoenix area and thereafter  
2 expanded state wide), in the third consecutive month of no access, the customer's  
3 account has been downloaded into an automated dialer, which leaves an automated  
4 voice message at the customer's phone number (assuming that APS has a good phone  
5 number) that informs the customer of the "no access" problem. The recorded  
6 message is as follows: "This is an important message from APS regarding your  
7 electric bill. We have been unable to read your electric meter for at least three  
8 consecutive months; therefore, your billings have been estimated. Please call us at  
9 [relevant number] to resolve this issue and insure that your future bills are accurate.  
10 The number again is [relevant number]. We thank you in advance for your  
11 cooperation on this matter."  
12

13  
14 36. Meter Reading Administration creates and mails the customer a  
15 postcard on the fourth consecutive month of no access. The postcard instructs the  
16 customer to contact the call center for access solutions.

17 37. By the fifth consecutive month of no access, the customer has received  
18 four door hangers or meter access letters, a dialer call, and a post card. In the fifth  
19 month, Meter Reading Administration sends an Active Accounts No Access letter that  
20 instructs the customer to contact the Call Center to obtain access solutions to avoid  
21 interruption of service. The letter informs the customer that APS will disconnect the  
22 customer's service, following the next month's read, if the meter is still inaccessible.  
23

24 (See Exhibit 8 hereto.)  
25  
26

1           38.    In the sixth consecutive month of no access, Meter Reading  
2 Administration reviews an account for any indication that the customer has called to  
3 resolve access. If none is found, Meter Reading Administration will attempt to call  
4 any listed daytime phone numbers. If the customer is unreachable by phone, a  
5 disconnect order is generated to Field Services personnel. The serviceman makes one  
6 more attempt to access the meter before service is disconnected.  
7

8           39.    A review of the Schaeffer account demonstrates how APS continually  
9 attempted to reach the Schaeffers to attempt to secure an accurate reading of their  
10 meter. In April, May, June, and July 2002, the Schaeffers received estimated bills  
11 with a side bill message asking them to call APS. In July 2002, the fourth consecutive  
12 month of estimated bills, they were also sent a blue card requesting that the customer  
13 provide a reading of the meter. The Schaeffers contacted APS and said that their dogs  
14 would be away from the meter and the gate would be unlocked. In August 2002, the  
15 Schaeffers received a fifth estimated bill with a side message alerting the customer to  
16 call APS to address the meter access issue. That month, APS spoke to the Schaeffers,  
17 who gave APS a read and said they would move the lock to the outside of the gate.  
18 The Schaeffers were issued corrected monthly bills for April through August based on  
19 the read they gave that showed APS had been underbilling the Schaeffers during those  
20 months. APS called the Schaeffers multiple times on September 9 and 10 and left  
21 voicemail messages. The Schaeffers were issued an estimated bill in September 2002  
22 with a side bill message. APS spoke to Mr. Schaeffer on September 16, who said he  
23 would ensure that the lock could be opened from the outside and that the dogs would  
24  
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26

1 be inside or fenced. There was a normal meter read and bill in October 2002, but the  
2 Schaeffers received estimated bills with side bill messages in November and  
3 December 2002 and in January and February 2003. In addition to the side bill  
4 message, in January and February 2003 APS sent the Schaeffers blue cards requesting  
5 that they provide a reading of the meter. (See Exhibit 9 hereto.)  
6

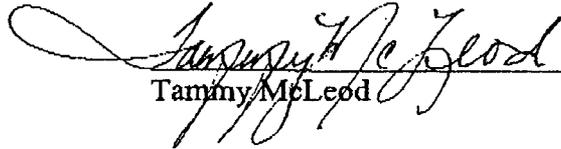
7 40. A further example is that, from September through December 2001,  
8 account 021872280 at 7107 E. Lowden Drive received four consecutive estimated  
9 bills because of a locked gate. Each bill had a side bill message, requesting that the  
10 customer contact APS. An access letter was sent with the fourth bill. The customer  
11 called in, gave APS the code to their lock, and received normal probed read bills  
12 thereafter. (See Exhibit 10 hereto.)  
13

14 41. A third example is that, from June through December 2002, account  
15 026183288 for 3115 W. Cactus Rd. received four consecutive estimated bills, each of  
16 which had the "\*\*ALERT ALERT\*\*" side bar message. After the second, third, and  
17 fourth bills, the automated dialer called the customer regarding the lack of access.  
18 After the fourth bill, the APS billing department sent a blue card to the customer. The  
19 customer had one normal read, followed by another estimated bill, which indicated  
20 that the meter had not been read because of the dog. The customer was sent a meter  
21 read schedule along with a no access letter. The following month, a normal read was  
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obtained and the customer was rebilled because APS had overestimated the previous month. Id.

DATED this 27<sup>th</sup> day of February, 2004.

  
\_\_\_\_\_  
Tammy McLeod

**EXHIBIT 1**

**APS05688**

# Definitions:



← Demand (kW)  
= rate of speed  
*speedometer*

← Energy (kWh)  
= unit measure  
*odometer*

**EXHIBIT 2**

**APS05690**

# SYSTEM DESCRIPTION

CIS NO: BI SYS

FUNCTION: Billing

TITLE: BILLING SYSTEM  
DESCRIPTION

EFFECTIVE: 04/04/85 REVISED 01/06/87

\*\*\* CIS USER MANUAL \*\*\*\*\*

Batch billing is the process by which the system bills accounts by cycle on a nightly basis, based on the scheduled bill dates of 21 cycles. Meter Readers enter reads into the PBM (portable billing machine). This information is then transmitted to the Meter Read Data Base and is held for processing with the scheduled batch billing validations. When an account passes validation, the system calculates the billing charges and produces a normal bill. The system assigns a Type of Bill Code to accounts that do not pass validation. These accounts are then routed to Special Bills and operators correct them on-line.

The system will not estimate services with missing reads if any of the following conditions exist:

- Flagged DO NOT ESTIMATE,
- Estimated the previous two months,
- Billed with less than one active, non-zero consumption month of the three possible months used for estimating, (must have at least one active month with consumption in order to estimate).
- Billed in the first month after redistricting,
- Billed with meter change occurring during this billing period, or
- Billed with EC-1 Rate indicated.

## BILLING CALCULATION

The system calculates billing amounts by individual billing service using data supplied from tables of information (e.g., billing rate factors, city tax, state tax and regulatory assessment percentage factors). The system determines the consumption (KWH) and demand (KW) amounts used for billing from the meter reads and/or fixed values associated with the billing service. The system selects the appropriate rate factor based upon the Rate Code assigned to the billing service and the meter read date. The system then calculates the billing charges for the billing service.

The example below illustrates how the system performs a billing calculation.

EXAMPLE: E-10 Rate (0800 Rate Code)  
Consumption 3240 KWH  
Billing cycles May through October

APS03549

APS05691

CIS NO: BI SYS

TITLE: BILLING SYSTEM DESCRIPTION

\*\*\* CIS USER MANUAL \*\*\*\*\*

1. The system determines the seasonal rate factors using the billing month for the account.
2. The system calculates the base rate.  
(This example uses the summer rate schedule.)

Basic charge =		7.50
3240 KWH		
-400 1st 400 KWH @ 0.068598 per KWH =		27.439200
<u>2840</u>		
-400 Next 400 KWH @ 0.096798 per KWH =		38.719200
2440 All additional KWH @ 0.090123 per KWH =		219.90012
		<u>\$293.558520</u>

(Round to 2 decimal places) SUB TOTAL \$293.56

3. The system calculates the fuel adjustment charge, if applicable.

3240 X .003099 / KWH =		10.04
Round to 2 decimal places		
		\$293.56
		+ 10.04
		<u>\$303.60</u>
	SUB TOTAL	\$303.60

4. The system calculates the regulatory assessment.

0.001261 x 303.60 =		.382839
Round to 2 decimal places =		.38
		\$303.60
		+ .38
		<u>\$303.98</u>
	SUB TOTAL	\$303.98

5. The system calculates the city and state tax using the Tax Code assigned to the billing service.

City and state tax (Phoenix)		
6.4244% x 303.98 =		19.528891
Round to 2 decimal places		19.53
State - 5.5% x 303.98 =	16.72	
City - Difference of total taxes		
minus state tax =	2.81	
	<u>19.53</u>	

	\$303.98
	+ 19.53
TOTAL	<u>\$323.51</u>

APS03550

APS05692

CIS NO: BI SYS

TITLE: BILLING SYSTEM DESCRIPTION

\*\*\* CIS USER MANUAL \*\*\*\*\*

6. If Miscellaneous Charges are to be billed, the system calculates the total of those charges and the taxes on that amount.

Meter Test Charge =	\$ 25.00
\$25.00 X 0.000857% =	0.021425
Round to 2 decimal places =	0.02
	\$ 25.00
	+ .02
	<u>\$ 25.02</u>

---

NOTE: The Non-Residential Regulatory assessment factor is used on all classes of service for miscellaneous charges.

---

TAXES

25.02 X 6.4244% (City and State tax-Phoenix)	1.607384
Round to 2 decimal places =	1.61

State - 5.5% x 25.02 =	1.38
City - Difference of total	
taxes minus state tax	<u>.23</u>
	1.61

	\$ 25.02
	+ 1.61
	<u>\$ 26.63</u>

SHARE-THE-LIGHT BILLING

Prior to cycle billing of the first cycle on the contract, those accounts that are identified to a street light contract and are "Active" are totaled by the system. The monthly contract amount is then divided by the total number of active accounts identified to the street light contract, to arrive at the monthly base charge per account.

ESTIMATING RESIDENTIAL AND NON-RESIDENTIAL CONSUMPTION

The system uses several formulas to estimate reads. These formulas are discussed below and may be used as guidelines for the user when the system cannot supply an estimated read.

The system applies an estimate factor to residential and non-residential accounts to compensate for weather variance. This factor is derived from accounts having actual reads within the same town with similar historical consumption. This is a variable factor that can be obtained from Report No. CS14R02, Estimating Factors.

APS03551

APS05693

CIS NO: BI SYS

TITLE: BILLING SYSTEM DESCRIPTION

\*\*\* CIS USER MANUAL \*\*\*\*\*

To estimate consumption for July of the current year, the system uses the 30-day prorated consumption for the previous two months (May and June) plus the 30-day prorated consumption from same month (July) of last year and divides by three.

EXAMPLE: June (prorated consumption, current year) = 4750  
 May (prorated consumption, current year) = 5000  
 July (prorated consumption, previous year) = + 6200  
15,950  
 15,950 ÷ 3 = 5316.67 or 5317 (average consumption)

Average consumption X estimate factor = estimated billing consumption

5317 X 1.05 (current estimate factor) = 5582.85 or 5583

*5583 + 30 X actual # days of current bill =*  
~~The estimated consumption for July of the current year is 5583.~~  
*current estimated monthly*

If there is ZERO consumption in any month considered (previous 2 months or a year ago) the system will not use the zero month when calculating the average.

EXAMPLE: June (prorated consumption, current year) = 4750  
 May = 70  
 July (prorated consumption, previous year) = 6200  
10,950

10,950 ÷ 2 = 5475 (average consumption)

Average consumption X estimate factor = estimated billing consumption

5475 X 1.05 (current estimate factor) = 5748.75 or 5749.

The estimated consumption for the current month would be 5749, for a 30 day billing.

ESTIMATING DEMAND

The system uses the following formula to calculate the estimated demand:

$$\text{Estimated Demand} = \frac{\text{KWH consumption (actual or estimated)}}{\text{Average Load Factor X No. of Read Days X 24 Hours}}$$

EXAMPLE: KWH consumption July 1986 = 6535  
 KW consumption July 1986 = Missing (need to estimate)

APS03552

APS05694

CIS NO: BI SYS

TITLE: BILLING SYSTEM DESCRIPTION

\*\*\* CIS USER MANUAL \*\*\*\*\*

<u>Month</u>	<u>KWH Consumption</u>	<u>KW Consumption</u>	<u>Number of Read Days</u>
June 86	6500 KWH	10 KW	30
May 86	5620 KWH	8 KW	30
July 85	7010 KWH	10 KW	30

The first step in the calculation of the demand is to calculate the Load Factor for the two previous months and the same month a year ago.

Load Factor (LF) = Percent of maximum KWH (based on KW) that was actually used

$$LF = \frac{KWH}{KW \times \text{No. of Read Days} \times 24 \text{ hours}}$$

$$LF \text{ for June 1986} = \frac{6500}{10 \times 30 \times 24} = \frac{6500}{7200} = 90.28\%$$

$$LF \text{ for May 1982} = \frac{5620}{8 \times 30 \times 24} = \frac{5620}{5760} = 97.57\%$$

$$LF \text{ for July 1981} = \frac{7010}{10 \times 30 \times 24} = \frac{7010}{7200} = 97.36\%$$

The second step in the calculation of the demand is to calculate the Average Load Factor.

$$\text{Average Load Factor (ALF)} = \frac{\begin{matrix} \text{1st Previous} & \text{2nd Previous} & \\ \text{month's LF} & \text{month's LF} & \\ + & + & \\ \text{LF for} & & \\ \text{same} & & \\ \text{month} & & \\ \text{last year} & & \end{matrix}}{3}$$

$$ALF = \frac{90.28\% + 97.57\% + 97.36\%}{3} = 95.07\%$$

The final step of the demand calculation is to substitute the results of the previous calculations into the formula for estimated demand.

$$\text{Estimated Demand} = \frac{KWH \text{ consumption (actual or estimated)}}{\text{Average Load Factor} \times \text{No. of Read Days} \times 24 \text{ hours}}$$

$$\text{Estimated Demand for July} = \frac{6535}{.9507 \times 30 \times 24} = \frac{6535}{684.50} = 9.5 \text{ KW}$$

NOTE: The method illustrated above describes how the system arrives at an estimated demand figure. Users should refer to the appropriate rate schedule when it is necessary to estimate demand.

CIS NO: BI SYS

TITLE: BILLING SYSTEM DESCRIPTION

\*\*\* CIS USER MANUAL \*\*\*\*\*

SYSTEM VALIDATION

The billing system has validation that reviews all accounts at cycle billing for:

- high/low consumption
- high/low demand
- high consumption as compared to the demand (load factor check)

Bills that fail the system established validation become Special bills:

- Type C - failed high-low check on consumption
- Type I - failed high-low check on demand
- Type K - failed load factor check on demand

Type C - Failed High-Low Check on Consumption

The billing system will consider an account as Type C - failed high-low check on consumption if any of the following conditions exist:

- Consumption is greater than \*9 times the system estimated consumption.
- Consumption is less than \*1/9 the system estimated consumption.
- Consumption exceeds 950 KWH and no active billing history exists for any of the months used to create system estimate.
- TOU peak KWH is less than 20% of total consumption.
- TOU peak KWH is greater than 80% of total consumption.

Type I - Failed High-Low Check on Demand

The billing system will consider an account as Type I - failed high-low check on demand if any of the following conditions exist:

- Demand is too high if it is greater than \*9 times the system estimated demand.
- Demand is too low if it is less than \*1/9 of the system estimated demand.
- Consumption is greater than 500 KWH and demand is ZERO.

---

\* This is a variable factor which may be changed at user request. However, the high and low are controlled from the same field. If high is changed to 8, low becomes 1/8.

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APS05696

APS03554

(0075s)

ARIZONA PUBLIC SERVICE COMPANY

Page 6

CIS NO: BI SYS

TITLE: BILLING SYSTEM DESCRIPTION

\*\*\* CIS USER MANUAL \*\*\*\*\*

Type K - Failed Load Factor Check on Demand

The billing system will consider an account as Type K - failed load factor check on demand if the following condition exists:

- Consumption exceeds maximum possible.

The maximum possible consumption is calculated as:

TOU

KW x # of days x 24 hours x 75% if Residential

KW x # of days x 24 hours x 85% if Commercial

KW x # of days x 24 hours x 95% if Industrial

KW x # of days x 24 hours x 85% of Irrigation

PRORATION

A proration or assessment of cost, based on the number of days occurs:

- when a rate increase/decrease occurs and proration is indicated by the Corporation Commission.
- when redistricting has taken place and the number of days in the billing period is less than 25 or more than 35.
- on connect or disconnect billings where the number of days in the billing period is less than 25 or more than 35.
- on all dusk to dawn connect or disconnect billings. The customer's bill will be prorated based on the number of days active.

If a customer's first month's bill is greater than 16 days but less than 25 days, the system will prorate the bill. Bills of 25 to 35 days will be considered normal bills, 36 to 49 days will be prorated.

The exception to system proration occurs on miscellaneous charges and share the light billings. No proration of charges is done for any miscellaneous charge or share the light contract billings. Reference Billing Procedure 9 (BI PRO 9) - Share the Light Street Lights.

The example below illustrates how the system performs proration where the number of days in the billing is less than 25 or more than 35.

EXAMPLE: E-10 Rate - Summer  
Consumption 500 KWH for a 20 Day Final Bill

APS03555

APS05697

(0075s)

ARIZONA PUBLIC SERVICE COMPANY

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**EXHIBIT 3**

**APS05698**

# EXHIBIT 1

Installed Service - ELECTRIC - 239440269 - 3707 E WETHERSTON DR

Installed Services Selected View Help

Meter Number is E26017 Meter Trail 383-08-09-42700

Next SA Window 02/06/2004 Thru 02/17/2004

Status	TOU	Source	Date	Begin	End	Billing Usage	Dmd Rdg	B
BILLED		NOP	12/08/1999	2964	4372	1,408.0	6,900	
BILLED		NOP	11/08/1999	1716	2964	1,248.0	9,400	
BILLED		REA	10/08/1999	0	1716	1,716.0	9,400	
BILLED		SER	09/15/1999	0	0	0.0	0,000	
BILLED		SER	09/15/1999	44262	44816	554.0	8,500	
BILLED		MAN	09/09/1999	41383	44262	2,879.6	9,600	
BILLED		REA	08/09/1999	39146	41383	2,237.0	8,400	
BILLED		REA	07/12/1999	36657	39146	2,489.0	8,700	
BILLED		REA	06/09/1999	35772	36657	885.0	9,500	
BILLED		* AUT	05/11/1999	34351	35772	1,421.0	4,300	
BILLED		* AUT	04/09/1999	32799	34351	1,562.0	4,700	
BILLED		* AUT	03/11/1999	31158	32799	1,641.0	5,000	
BILLED		REA	02/09/1999	30177	31158	981.0	9,100	

Add Reading...  Hide Void/Cancelled

Page 1 of 1

General

Usage History

Refresh

Profile

ENDX AZ 05032, APS

WETHERSFIELD DR

# E26017, ON, N

Start | Info... | CS... | Ste... | Law... | Mor... | Cust... | Inst... | Serv... | 9:55 AM

**EXHIBIT 4**

**APS05700**

# EXHIBIT 2

Installed Services - ELECTRIC - 129901203 - 18002 N 15 AVE PHOENIX AZ

Installed Services Selected Print View Help

Meter Number is C87111 Meter Trail 393-19-09-3600

Next SA Window 02/23/2004 Thu 03/02/2004

Status	TOU	Source	Date	Begin	End	Billing Usage	Dmd Pdg	Bld C
BILLED		NORMA	10/25/2001	88684	90174	1,490.0	5,900	
BILLED		NORMA	09/25/2001	86235	88684	2,449.0	6,600	
BILLED		NORMA	08/24/2001	83628	86235	2,607.0	6,300	
BILLED		NORMA	07/26/2001	81019	83628	0.0	6,200	
BILLED		NORMA	06/28/2001	78735	81019	2,284.0	6,300	
BILLED		NORMA	05/29/2001	76744	78735	1,991.0	6,800	
BILLED		NORMA	04/26/2001	75328	76744	0.0	5,800	
BILLED		OFFICE	03/28/2001	74407	75328	921.0	0,000	
BILLED		OFFICE	02/27/2001	73496	74407	912.0	3,900	
BILLED		AUTOM	01/25/2001	73019	73496	476.0	1,500	
BILLED		AUTOM	12/27/2000	72491	73019	528.0	1,600	
BILLED		AUTOM	11/27/2000	71874	72491	617.0	1,700	
BILLED		PROBE	10/25/2000	68984	71874	2,890.0	8,000	

Add Reading...  Hide Void/Cancelled

Page 1 of 1

General

Usage History

Rel'ship

Profile

85023, APS

N 15 AVE PHOENIX AZ

Meter # C87111, DN, NO

NUM

Start | Inbox... | CIS W... | Site U... | Lowst... | Micros... | Custo... | Instal... | 9:18 AM

APS05701

**EXHIBIT 5**

**APS05702**

Date September 18, 1995

To Distribution

From Gayle Blake

Sta # 3851

Ext # 83-7696

**SUBJECT New No Access Guidelines for Existing Customers**

Effective immediately, there will be a new no access procedure for existing residential customers that currently have an access problem in the Metro area

The procedure for new customer connects or existing customers requesting a rate change to a TOU rate has not changed. These customers will need to provide unassisted access and are not eligible for the options listed below.

The new guidelines for existing no access problems have been established to

- Help reduce the number of verifies that are sent to the field by Billing Services
- Reduce the number of estimated bills
- To improve our safety goals by eliminating potential meter read hazards

If you determine there is an access problem when speaking with a customer, the following options are available:

- 1 Offer the Info Line phone number for your customer's meter read office. This will provide the customer with enough information so they can guarantee that we will have unassisted access to the meter (Rate Codes: 1800, 1200, 1600, 1300, 0800, 0100)

The Info Line phone numbers are as follows

<u>Read Office</u>	<u>Info Line Number</u>
191, 192, 193	250-2558
291, 391, 396	250-2552
293, 395	250-2556
392, 393	250-2560
394, 397	250-2562

AND

APS05703

- 2 Offer to send the customer a meter read schedule so they will know when to call the Info Line and find out the days of the month the meter reader will be in their area (Rate Codes: 1800, 1200, 1600, 1300, 0800, 0100)

**Note** It is important to generate a meter reading schedule through the IVR so the CSIF screen is automatically updated to generate a new meter reading schedule each year

OR

- 3 Offer an APS company lock (if applicable) (Rate Codes: 1800, 1200, 1600, 1300, 0800, 0100)

If you have a customer that absolutely cannot provide unassisted access to the meter, you will need to refer the customer to the Meter Read Section Leader for the customer's read office. You may transfer the call directly to the Meter Read Section Leader or send a VISTA note with the customer's account information and phone number.

The Meter Read Section Leader will follow up with the customer and field check the location if necessary. The Meter Read Section Leader may offer one of the following options:

- 1 If a TOU digital meter can be read over the fence, the Section Leader may offer the TOU rate to the customer. However, sunlight, meter location, etc. will affect the ability to obtain a read from a digital meter over the fence. (Rate Codes: 1200, 0800, 0100)
- 2 The Meter Read Section Leader may offer an Access Card (Pink Card). This card will be offered **ONLY** when no other options are available to access the meter. The Access card will be mailed monthly to the customer so they can obtain a read. The customer will need to send the card back with a read the same day they receive the card in the mail. (Rate Codes: 1200, 0800, 0100)

If the access card is returned to us on the scheduled read date - the meter reader will enter the reads that afternoon.

If the access card is returned after the scheduled read date - the information will be sent to Billing Services.

If the access card is not returned - the customer's bill will be estimated.

The Meter Read Section Leaders will be monitoring the no access reports on a daily basis. The CMSG screen will be updated to indicate what options or arrangements were made with the customer.

APS05704

As a reminder, please refer to the standard line of questioning listed below to determine accessibility to the meter

**Q Where is the meter located?**

Access the MTRR or MVTO screen to view the MTR RD MSG field for reason codes or meter read message codes that indicate any previous access problems Refer to Meter Read Message Codes in the Codes and Terms chapter or Rep Direct

Access the MRDC screen to check the meter location codes to determine if there may be an access problem Update the MRDC screen with any new information Refer to Meter Read Location and Instruction Code in Codes and Terms chapter or Rep Direct

**Note** If the meter is located inside (porch, garage, house, etc ), a TOU rate is not an option Advise the customer they have the option of paying to have the meter and service entrance relocated You will need to refer the customer to a Service Coordinator (Metro) or the CSP (State) for the area

**Q Do you have a dog?**

Advise the customer that the dogs will need to be secured away from the meter by a dog run, fence, or inside the home on the date the meter will be read Update the MRDC with the type of dog (example dog/pit bull or dog/retriever)

**Note** Do not indicate whether the dog is bad or okay A dog's temperament may be different with different meter readers so each meter reader will determine their own comfort level with a dog

**Q Do you have a swimming pool?**

Advise customer that the locking part of the latch needs to be on the outside of the gate You may offer the customer an APS lock

If the customer is unable to provide you with enough information to determine that APS will have unassisted access Please refer the customer the appropriate Meter Read Section Leader

If you have any questions, please contact Donna Frazer at ext 81-1224 or pager 226-2233

*This information will be updated in the next edition of Rep Direct.*

Distribution

Metro Region Customer Office & Support  
State Region Customer Office Section Leaders  
Local Reps

cc

Jeanne Jones	3192	Karen Wolff	3858
Shereen Lovendge	3855	Denise Hutchinson	3851

Donna Frazer	4621	Phil Cea	3378
Chuck Evans	4038	Brian Riffle	2618
Dan Kolmos	3378	Ruben Alcocer	4621
Ed Guthne	4038	Ginger Pitts	4101

**EXHIBIT 6**

**APS05707**

## Meter Reader Responsibility

### Monthly No Access

- Meter Readers will leave door hangers, indicating No Access reason The door hanger will provide the phone number for the call center
- Meter Reader will enter code 40 "left door-hanger" into the handheld

### Meter Reading Admin (Metro) Head Meter Reader or Business Office (State)

The Shop Admin will process the Access Reports daily Each site on the report should be reviewed in CIS to determine the number of consecutive months no access and appropriate actions taken

Reports to be worked

KM06R20 NO ACCESS METERS  
KMO6R70 ROUTE IRREGULARITIES  
KM06R36 DEMAND METERS TO BE RESET

- **1<sup>st</sup> Month –**
  - Review site in CIS and confirm meter reader left door hanger and input code "40" in hand held. The message "door hanger" appears in CIS on usage history detail
  - If meter reader did not leave door hanger, create a Meter Access Request letter to be sent to the customer and add a site note stating letter sent.
- **2<sup>nd</sup> Consecutive Month –**
  - Review site in CIS to confirm meter reader left door hanger
  - Accounts that were NOT noted for door hanger should be brought to the attention of the leader to enable follow-up with meter reader on door hanger and code 40 requirement
  - If meter reader did not leave door hanger, create a Meter Access Request letter to be sent to the customer and enter a site note stating letter sent
  - Identify large non-residential accounts and send account information and no access reasons to the Key Account rep via e-mail Rep will attempt customer contact to resolve access issue
  - Enter "Access" note in CIS stating
    - Customer has had Door hanger/Meter Access Request letter 2 consecutive months.
    - Key account rep has been notified.

- **3<sup>rd</sup> Consecutive Month** – Account will download to the outbound dialer to leave a recorded no access message
  - Review site in CIS to confirm door hanger or other communications have been made and documented
  - If no communications have been made, send the Meter Access Request letter
  - Outbound dialer will update account with call action
  - Identify large non-residential accounts and send account information and no access reasons to the Key Account rep via e-mail stating
    - 3<sup>rd</sup> consecutive month no access
    - Door hangers left and/or no access letter sent
  - Enter “Access” note in CIS stating
    - Customer has had Door hanger/Meter Access Request letter 3 consecutive months
    - Key account rep has been notified
  
- **4<sup>th</sup> Consecutive Month** - From the daily No Access reports, accounts that have four consecutive months of no access will be mailed a No Access post card. The information will instruct the customer to contact Call Center to obtain access solutions to avoid future interruption of service.

The residential post card will also indicate we will be estimating their billings on the STANDARD RATE option.

- Check for door hanger message and/or meter access request letter
- Change TOU rate to standard rate
- Generate a “No Access Post Card – via the custops website
- Identify large non-residential accounts and send account information and no access reasons to the Key Account rep via e-mail stating
  - 4<sup>th</sup> consecutive month no access
  - Door hangers left and/or no access letter sent
- Enter “Access” note in CIS stating:
  - Customer has had Door hanger/Meter Access Request letter 4 consecutive months
  - Customer has been changed from TOU to standard rate.
  - No Access Post Card has been sent.
  - Key account rep has been notified
  
- **5<sup>th</sup> Consecutive Month** - (The customer has received 4 door hangers or meter access letter sent, a dialer call and a post card). From the daily No Access reports, the accounts that have had access issues 5 consecutive months will receive a Active Account No Access letter. The information will instruct the customer to contact Call Center to obtain access solutions to avoid interruption of service. The letter informs

the customer of a disconnect following the next scheduled read date if the meter is still inaccessible.

**EXCEPTIONS:** customers who have had service, at this site, prior to 1998 and the no access issues existed then and still exist, will not receive a service interruption notice, we will continue to leave door hangers and send post cards. If they have been at the site since 1998 and the no access issues began AFTER that year, they will receive the service interruption notice. Accounts that meet this criteria will have a note indicating access exception

- Check for door hanger message and/or meter access request letter
  - Research account thoroughly to ensure that customer has **not** responded (to any access door hangers, letters, dialer calls and post card ) to resolve access issue
  - Generate an Active Account No Access letter – via the custops website
  - Identify large non-residential accounts and send account information and no access reasons to the Key Account rep via e-mail stating
    - 5<sup>th</sup> consecutive month no access
    - Customer has not responded to door hangers, letters, or dialer calls
  - Enter “Access” note in CIS stating
    - Customer has had Door hanger/Meter Access Request letter 5 consecutive months
    - Active Account No Access letter has been sent
    - Key account rep has been notified
- 
- **6<sup>th</sup> Consecutive Month** - (Customer has received 5 door hangers, dialer call, post card and service interruption notice). Meter Reading Admin (Metro), and Head Meter Reader (State) will view account for any indication customer has called to resolve access. If none are found, the Admin/Head Meter Reader will attempt to call any listed daytime phone numbers. If unable to reach customer by phone, a disconnect order should be generated to Field Services personnel. One more attempt is made by the serviceman, if there is still no access to disconnect at the meter, the order will be reassigned to OH or UG (Metro) or Field Service Supervisor (State). (See Schedule 1, Section 5.4)
    - Check for door hanger message and/or meter access request letter
    - Check for Service Interruption notice
    - Utilize any customer contact phone numbers available and attempt to make contact to offer access solutions.
    - Create and schedule Shut-Off order for next working day – make sure instructions on the order are clear by stating the complete access issue
    - Identify large non-residential accounts and send account information and no access reasons to the Key Account rep via e-mail stating:
      - 6<sup>th</sup> consecutive month no access
      - Customer has not responded to door hangers, letters, or dialer calls

- Service interruption notice has been mailed
  - Attempts have been made to contact by phone with no success
  - Enter "Access" note in CIS stating
    - Customer has had Door hanger/Meter Access Request letter 6 consecutive months
    - Active Account No Access letter has been sent
    - Key account rep has been notified
    - Attempts have been made to contact customer by phone
    - "Shut-off order for 6 consecutive months no access" has been scheduled
- Indicate reasons, i e latch on inside middle portion of gate, locked.

**PROCESS GUIDELINES:**

- When working reports, identify meter reader messages that are unclear or incomplete for leader follow-up. Leader will instruct meter reader on the necessity for thorough understandable messages. For Example
  - "Mtr Blk" without a freeform makes it difficult to communicate with the customer to effectively resolve the access issue
  - "Mtr Blk" with freeform "blocks on pallets" enables customer contact with more specific field issues and improves success in resolving

OR

  - "Gt Ltch" with no freeform vs.
  - "Gt Ltch" with freeform "on inside, middle" enables contact with customer to discuss moving latch to top or front side of gate and offer a company lock/key
- Coded messages such as No display, dead meter, generate service orders to resolve these meter issues. When these messages are entered in freeform only, a service order will not generate. Bring these flag issues to leader to enable instruction with meter reader on proper use of No Access codes in hand held. Generate a service order to correct field condition
- Messages flagged "other", should always have a freeform indicating the reason. When no reason is indicated, bring these to the attention of the leader for meter reader instruction on this requirement

## ACCEPTABLE ACCESS SOLUTIONS

### DOGS

#### **CONNECTED AFTER 1998, OR ACCESS ISSUES OCCURRED AFTER 1998**

1. Will dog(s) be secured by a fenced dog run that prevents access to the area where the meter is located and the path to walk to the meter? (If no, customer does not meet criteria for TOU rate - go to number 2 )
2. If customer is unable to provide dog runs ask if they would meet with a meter reading coordinator, between the hours of 7 and 3 to determine accessibility solutions? If so, transfer the call to the meter reading coordinator to schedule an appointment.

#### **FOR T O U CUSTOMERS WHERE ACCESS ISSUES HAVE BEEN ON-GOING PRIOR TO 1998**

1. Can the dog be secured during the five-day window when we read the meter? If so, a read schedule and info line may be offered.
2. If customer is unable to provide dog runs, secure pets for read day windows or opt for the standard rate, ask if they would meet with a meter reading coordinator, between the hours of 7 and 3 to determine accessibility solutions? If so, transfer the call to the meter reading coordinator to schedule an appointment

### LOCKED GATES (ALL RATES)

1. Customer can leave gate to meter location unlocked if latch is on the outside of the gate
2. If latch is on the outside of the gate but customer wants to lock the gate, offer the customer the option of utilizing an **APS lock** on their gate. Locks are individually keyed and the customer will have a key for their personal use.
3. If customer prefers to utilize **their own lock**, inquire if they will provide us a key for access on read days. If so instruct the customer as follows:
  - Please tape the key to a piece of paper that has your service address and name on it for identification purposes. The key must be placed at the bottom of the envelope or taped to the bottom of the envelope (if not, the US Postal Service may not deliver the key to us).
  - Give the customer the address of the meter reading office the key should be mailed to

**NOTE** If the lock is a deadbolt and the same as the house key, we **require** the gate be re-keyed differently from the house key

**BUILDING KEYS** - If a non-residential customer offers a key to a building to access a meter, please transfer the customer to the respective meter reading office.

### GATE LATCHES OUT OF REACH (ALL RATES)

APS personnel may not be tall enough to reach over a gate to unlock the lock with a key. Ask the customer to relocate the latch to the outside portion of the gate

DATE \_\_\_\_\_

X863-01N

**aps.**  
WE CARE HOW YOU LIVE

CUSTOMER ACCOUNT NUMBER:  
04 16 276660

We were unable to read your electric, gas meter(s) today because:

① Premises were locked.  
② Meter(s) blocked by BUSH  
\_\_\_\_\_

3. Dogs.  
4. Dial Card Missing.  
⑤ Not Home.  
6. Other \_\_\_\_\_

Months not read 3

As a result, your bill will be estimated this month. Please take the necessary action to make the reading of our meter possible in the future.

Thanks for the assistance.  
APS Meter Reading Department  
Phone: 271-2063

Account No. 04 16 276660  
Address 2817 E. ANGELA DR  
Months Est. 3 E ⓐ  
Remarks: LOCKED - BLKD, BUSH

Date: 02/10/21 Name BARR  
Foreman: BARNES  
Date \_\_\_\_\_ Name \_\_\_\_\_

3) The Door Hanger - This form is available from your Foreman and is used when reads are missed, because of lockouts and/or blocked meters. A lockout occurs when you cannot obtain access to a meter, because the gate is locked and the customer is not at home to let you in his yard. A blocked meter occurs when the view of the meter is obstructed by some object, which prohibits you from reading the meter from outside the yard, with your monocular. Complete this form, with appropriate information and detach along perforation. Hang top portion on the customer's front door knob and place the bottom of the form in the Meter Book, with the corresponding page. Be sure to complete this form so the customer will know why you were unable to read his meter and attempt to resolve the reading problem.

A message from your **APS** Meter Reader..

I was here today to read the APS meter, but could not get a read because:



Your gate was locked and/or you latch is out of reach.



Your pet is protecting your house from strangers and would not allow me to enter your yard.



Foliage is covering or blocking the view of the meter.

Path to meter is inaccessible.



---

**We have solutions to offer you.**

Please take a minute to call us:

English: (602) 371-7061

Spanish: (602) 371-7051

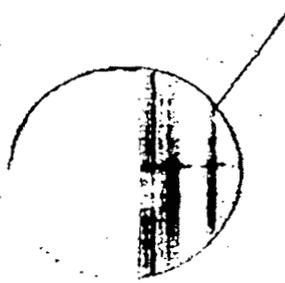
Toll-free: (877) 873-8798

**Your assistance is appreciated!**

**APS**

APS03375

APS05714



**Regarding your meter . . .**

Date: \_\_\_\_\_ Time: \_\_\_\_\_

ACCOUNT NUMBER: \_\_\_\_\_

A timely, accurate meter read is important to you and to APS. Unfortunately, we were unable to  read your meter or  access your demand meter today because: *(No hemos podido leer el medidor porque:)*

- Promise locked *(Propiedad cerrada)*
- No one home *(Nadie estaba en casa)*
- Dog(s) *(Perros sueltos)*
- Dirty meter glass *(Vidrio del medidor esta sucio)*
- Meter blocked by: *(Imposibilidad de llegar al medidor)*
  - Plants
  - Other: \_\_\_\_\_
- Other: \_\_\_\_\_

Please help us in the future by:

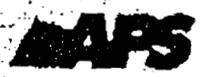
- Trimming plants or bushes near the meter *(Corte plantas y arbustos cercanos al medidor)*
- Cleaning meter glass so it can be read from a distance *(Mantenga limpio vidrio del medidor para ver los numeros)*
- Providing free access to your yard/meter *(Deje acceso al medidor en su jardin)*

Until this problem is corrected, your bill may need to be estimated by looking at your previous energy use. Your cooperation will help ensure that your bill is based on actual reads.

**THANK YOU!**

If you have questions or need further assistance, call your local APS Meter Reading Office at: *(Si tiene preguntas sobre este aviso, llame su oficina)*

Phone: \_\_\_\_\_



**URGENT MESSAGE**

**APS Needs Complete Access to Our Electric Meter**

We are committed to providing you with the best service at the lowest price possible.

The electric service plan you have selected can save you money and we would like you to be able to continue on this plan. To obtain the information necessary to provide you with an accurate bill for this service plan, we must have complete and safe monthly access to our meter (without knocking on your door or making appointments).

There are several ways we can work together to develop an ideal solution to this situation. Please call our 24-hour Customer Solution Center at 602-371-7171 or the number listed on the reverse side of this door hanger.

If you cannot provide us with safe, unassisted access to the meter, it will be necessary to transfer you to another service plan that may not be as economical for you.

We are confident that working together we will be able to resolve this access problem.

You are a valued customer and we appreciate your business.



APS03374

APS05715



Date \_\_\_\_\_ Time \_\_\_\_\_ Signed \_\_\_\_\_

If no one is home, APS will provide power from your meter to your breaker box (off/on switch), provided your meter and breaker box are accessible or not locked. However, we cannot provide power from the breaker box (off/on switch) to your building, unless someone is home.

**YOU MAY TURN ON ELECTRIC BY:**

- Turning Main Switch On
- Turning Individual Circuit Breakers On
- Turning On Additional Circuit Breakers That May Be Off Inside Home/Apartment
- Contact Apartment Manager or Owner
- Turn Fuse Block Over

**CAUTION:**

BEFORE TURNING ON ELECTRIC, TURN OFF ELECTRIC APPLIANCES. REMOVE FOREIGN OBJECTS FROM ELECTRIC RANGE TOP WHEN, SUCH AS CARDBOARD BOXES, PAPER GOODS, ETC. WATER MUST BE ON TO ELECTRIC WATER HEATER.

DEPOSIT DUE ON \_\_\_\_\_

FOR INFORMATION PLEASE CALL **371-7171**

OUR REPRESENTATIVE CALLED TODAY AND  DID  DID NOT COMPLETE THE FOLLOWING

- Turn On Electric
- Change Electric Meter
- Reread Meters
- Disconnect Electric Service

**BECAUSE**

- Need City/County Clearance
- Account Past Due
- Please Establish Service In Your Name
- Electric Meter Socket Not Identified (Need Apartment/House Number on Socket)
- Meter Not Accessible
- Gate(s) Locked
- Dog(s) Not Secured
- Contact An Electrician, Your Electrical System Is In Need Of Repair
- Blue Tag Has Been Installed, Hazardous Condition Exists
- Breaker Box Is Locked
- Multi-Meter Panel Has Not Been Approved By APS

850-004 Rev 8/96 0741-900163



Fecha \_\_\_\_\_ Hora \_\_\_\_\_ Firma \_\_\_\_\_

Si no hay nadie en casa, APS proporcionará energía hasta el medidor, siempre y cuando el medidor y el interruptor (on/off switch) estén a nuestro alcance y no encerrados. Será necesario prender el interruptor para que la energía pueda pasar al edificio.

**USTED PUEDE PRENDER LA ELECTRICIDAD CON SOLO:**

- Abrir el interruptor principal
- Abrir los interruptores individuales
- Abrir interruptores adicionales que podran estar cerrados dentro de la casa o el apartamento
- Ponerse en contacto con el dueño o administrador del apartamento
- Voltrear el fusible a la posición (ON)

**PRECAUCION:**

ANTES DE PRENDER LA ELECTRICIDAD, APAGUE LOS APARATOS ELECTRICOS. quite objetos de encima de la estufa o del horno, tales como cajas de carton, articulos de papel, etc. EL AGUA DEBE ESTAR CONECTADA AL CALENTADOR DE AGUA ELECTRICO.

DEPOSITO DE \$ \_\_\_\_\_ DEBE SER PAGADO

ANTES DE \_\_\_\_\_

PARA MAS INFORMACION FAVOR DE LLAMAR AL **371-7171**

NUESTRO REPRESENTANTE LLEGO AQUI HOY Y  PUDO

NO PUDO LLEVAR A CABO LO SIGUIENTE.

- Prender la electricidad
- Cambiar el medidor electrico
- Confirmar la lectura de los medidores
- Desconectar su servicio electrico

**PORQUE.**

- Necesita permiso de la ciudad o condado
- La cuenta esta delinciente
- Favor de establecer servicio en su nombre
- El enchufe del medidor electrico no está identificado (Necesita el numero del apartamento/casa en el enchufe)
- El medidor no esta accesible
- Verja(s) Cerrada(s)
- Perro(s) Suelto(s)
- Pongase en contacto con un electricista, su sistema electrico necesita ser reparado
- Existe un defecto de seguridad, una etiqueta azul ha sido aplicada
- La caja del interruptor está cerrada
- El tablero de multimedidores no ha sido aprobado por APS

850-004 Rev 8/96 0741 900163

## *A Message from your APS Meter Reader...*

I was here today to read the APS meter, and could not due to:

- The gate was locked or inaccessible
- Your pet is protecting your home from strangers and would not allow me to enter your yard
- Plants and trees are covering or blocking the view of the meter
- The path to your meter is blocked or inaccessible
- Other \_\_\_\_\_

**We have solutions to offer you.**

**Please take a minute to call us:**

**English: (602) 371-7061**

**Toll-Free: (877) 873-8798**

- To ensure accurate reads every month, the meter reader must have unassisted access to your meter
- In many cases the meter reader needs to physically touch the meter to obtain reads and monitor meter functions
- Continued inaccessibility to your meter will result in estimated bills and may result in a change of your current rate plan or disconnected service
- APS is dedicated to providing it's customers with excellent service. Please take the time to call us so we can find the right solution for you

***Your Assistance is Appreciated***



**THE POWER TO MAKE IT HAPPEN™**

**aps.com**

863-01NR

## *Un mensaje del técnico que lee el medidor de APS..*

Pasé hoy para tomar la lectura del medidor de APS, y no la pude obtener debido a que:

- El portón estaba cerrado con llave o inaccesible
- Su perro (animal doméstico) estaba protegiendo su hogar contra personas desconocidas y no me permitió que entrara a su yarda
- Hay obstáculos bloqueando el medido, tales como árboles y plantas que no permiten que obtengamos la lectura
- Hay obstáculos en el camino que impiden el paso a su medidor
- Otra razón \_\_\_\_\_

**Tenemos soluciones que ofrecerle.**

**Por favor tome un minuto y llámenos:**

**Español: (602) 371-7051**

**Llamada gratis: (877) 873-8798**

- Para asegurar que el técnico que lee su medidor cada mes obtenga lecturas exactas es necesario que tenga acceso a su medidor sin ninguna interrupción
- En muchos casos el técnico que lee el medidor necesita tocar físicamente el medidor para obtener la lectura y inspeccionar las funciones del medidor
- La inaccesibilidad continua a su medidor resultará en facturas estimados y es posible que tengamos que cambiar su plan de tarifa actual o desconectar su servicio eléctrico
- En APS estamos dedicados a proveer excelente servicio a nuestros clientes. Por favor tome unos cuantos minutos y llámenos para poder determinar la solución perfecta para usted

***Apreciamos su Asistencia***



**EL PODER DE NUESTRA ENERGÍA™**

**aps.com**

**APS05717**

**EXHIBIT 7**

**APS05718**

**LINDA SCHAEFFER**  
 Your Account Number  
 Billing Date

**824204282**  
 Apr 16, 2002

Questions? Visit our website at [www.aps.com](http://www.aps.com) or  
 call 602-371-7171, 24 hours a day, 7 days a week.  
 Para servicio en español llame al 602-371-6861.

Previous Balance	Payments Received	Current Charges	Total Due by 04/29/2002
0.00	0.00	47.95	47.95

**\* ALERT/ALERT \***

A meter reading issue exists at your location.

PLEASE CALL US at: 602-371-7171 (Metro Phoenix area) or 1-800-253-9405 (other areas).

**SERVICE INFORMATION**

Service number 300TS20286  
 Your service plan Time Advantage Rate  
 Service address 3638 W Caribbean Ln

Your meter number E38746  
 Your meter is read in cycle 07

On Apr 11 your total kWh read was 54186  
 On Mar 14 your total kWh read was 54118  
 Your total kWh usage is 68

This month's read was estimated - DOG  
 On Apr 11 your on-peak kWh read was 22764  
 On Mar 14 your on-peak kWh read was 22739  
 Your on-peak kWh usage is 25  
 Your off-peak kWh usage is 43

ENERGY USE COMPARISON			
	This Month	Last Month	Last Year
Days	28	N/A	N/A
Daily kWh	2	N/A	N/A
Daily Cost \$	0.75	N/A	N/A

**CURRENT CHARGES**

Basic service charge 15.00  
 Charge for on-peak kWh used 2.76  
 Charge for off-peak kWh used 1.84  
 ACC mandated environmental surcharge 0.06  
 Regulatory assessment 0.04  
 Sales tax 1.41  
**Current energy & delivery charges 21.11**

Service establishment charge 03/14/2002 25.00  
 Regulatory Assessment 0.05  
 Sales Tax 1.79  
**Current miscellaneous charges & credits 26.84**

**Total current charges 47.95**

When paying in person, please bring bottom portion of this bill.

Billing Date  
 Apr 16, 2002

Account Number  
 824204282

Account Number  
 824204282

Billing Date  
 Apr 16, 2002

ENTER AMOUNT ENCLOSED

MAKE CHECK  
 PAYABLE TO: APS

ENTER S.H.A.R.E. AMOUNT

Check No. \_\_\_\_\_

Date paid \_\_\_\_\_

Amount \_\_\_\_\_

LINDA SCHAEFFER  
 PAUL SCHAEFFER  
 3638 W CARIBBEAN LN  
 PHOENIX AZ 85053-4637

If contributing to S.H.A.R.E.  
 please enter amount in S.H.A.R.E.  
 box and add to your total

TOTAL AMOUNT OF  
 \$47.95  
 DUE BY 04/29/2002

**KEEP THIS STUB  
 PORTION FOR  
 YOUR RECORDS**

07 R 1 1

00000008242042828020020416000002684900000479564 000

**APS05719**

**EXHIBIT 8**

**APS05720**

Active Account  
No Access

September 9, 2003

«cust\_name»  
«addr1»  
«addr2»

Dear «Cust\_Name»

The electric service will be disconnected at «SADD» as we have been unable to safely access and read the electric meter for five or more consecutive months

We want to provide you uninterrupted service and accurate billings, so please take a moment to contact us

Your service will be disconnected following your next read if we are unable to safely access your meter. To re-establish service, safe access will be required and reconnect charges will apply.

Please call (602) 371-7061 or 1-877-873-8798 to provide us an opportunity to offer access solutions. We can also assist you in Spanish at (602) 371-7051 (en Español)

Sincerely,

APS Customer Service

APS05721

**EXHIBIT 9**

**APS05722**

## Schaeffer Account History

4/16/02 Estimated bill. Side bill message states “\*ALERT/ALERT\* A meter reading issue exists at your location. Please call us at 602-371-7171 (Metro Phoenix area) or 1-00-253-9405 (other areas).”

5/13/02 Estimated bill. Side bill message.

6/12/02 Estimated bill. Side bill message.

7/16/02 Estimated bill. Side bill message.

7/16/02 Blue card sent.

7/17/02 Spoke to Schaeffer, who said dogs will be away from meter and gate will be unlocked.

8/16/02 Estimated bill. Side bill message.

8/22/02 Spoke to Schaeffers, gave read to APS and said they would move lock to outside of gate. Changed rate to 0100.

8/22/02 Corrected monthly bill for April through July sent.

8/29/02 Corrected monthly bill sent for August, corrected to reflect ET-1 rate.

8/30/02 APS left voicemail for Schaeffer.

9/9/02 APS left message on answering machine for Schaeffer.

9/10/02 APS called Schaeffer three times, no answer, left voice message.

9/11/02 Estimated Bill. Side bill message.

9/16/02 APS spoke to Mr. Schaeffer who said he would ensure lock could be opened from outside and dogs will be inside or fenced.

10/10/02 Normal meter read and bill.

11/12/02 Estimated bill. Side bill message.

12/12/02 Estimated bill. Side bill message.

1/23/03 Estimated bill. Side bill message.

1/23/03 APS sent blue card to Schaeffers.

APS05723

2/20/03 Estimated bill. Side bill message.

2/20/03 Blue card sent to Schaeffers.

April through Normal meter reads and bills sent.  
August 2003

9/11/03 Estimated bill. Side bill message.

10/8/03 Normal meter read and bill sent.

11/10/03 Service disconnected 10/23 and actual read obtained. Final bill mailed.

**EXHIBIT 10**

**APS05725**

Description for CA 021672260 at 7107 E Lowden Dr

9/10/2001 New CIS System Estimated Locked gate, code isn't working. Bill said est with locked gate, also have alert message on bill. bill.  
10/10/2001 New CIS System Estimated Locked gate, code isn't working. Bill said est with locked gate, also have alert message on bill. bill.  
11/7/2001 New CIS System Estimated Locked gate, code isn't working. Bill said est with locked gate, also have alert message on bill. bill.  
12/10/2001 Exception created- Office Estimated-Locked gate, code isn't working. Bill said est with locked gate, also have alert message. Sent access letter to cust, cust called in and gave us new code.  
1/10/2002 Normal Probed Read Billed

Description for CA 026183288 for 3115 W Cactus Rd

6/15/2002 New CIS System Estimated-Locked gate. Bill said locked gate and gave the alert alert message.  
7/16/2002 New CIS System Estimated-Locked gate. Bill said locked gate and gave the alert alert message.  
7/19/2002 Dialer called for no access.  
8/14/2002 New CIS System Estimated-Locked gate. Bill said locked gate and gave the alert alert message.  
8/17/2002 Dialer called for no access.  
9/13/2002 Exception created-office estimated-locked gate Bill said locked gate and gave alert alert message. Billing sent blue card to customer.  
9/19/2002 Dialer called for no access.  
10/15/2002 Normal Probed Read BI Customer had called in to review billing. Had not had good read since lum on. B Bill was high.  
11/14/2002 New CIS System Estimated-Dog Bill said dog and gave alert alert message.  
11/19/2002 Had sent customer meter read schedule with no access letter.  
12/19/2002 Normal Probed Read-exception created- rebilled previous month and sent bill out had over estimated previous month.

8 400 400 400

BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

DOCKETED

DEC 10 1996

RENZ D. JENNINGS  
CHAIRMAN  
MARCIA WEEKS  
COMMISSIONER  
CARL J. KUNASEK  
COMMISSIONER

DOCKETED BY *(L)*

ROBERT A. CICCONE,  
Complainant,

DOCKET NO. U-1345-96-162

vs.

ARIZONA PUBLIC SERVICE CO.,  
Respondent.

DECISION NO. 59919

OPINION AND ORDER

DATE OF HEARING: May 20, 1996  
PLACE OF HEARING: Phoenix, Arizona  
PRESIDING OFFICER: Scott S. Wakefield  
APPEARANCES: Mr. Robert A. Ciccone, in pro personis; and  
Mr. Bruce A. Gardner, Senior Attorney, on behalf of Arizona  
Public Service Company.

BY THE COMMISSION:

On March 18, 1996, Robert A. Ciccone filed a Complaint with the Arizona Corporation Commission ("Commission") against Arizona Public Service Co. ("APS"). On April 12, 1996, APS filed its Answer to the Complaint. The Commission scheduled a hearing on the matter for May 20, 1996. The hearing was held as scheduled before a duly authorized Hearing Officer of the Commission at its offices in Phoenix, Arizona. Mr. Ciccone appeared on his own behalf, and APS appeared through counsel. At the conclusion of the hearing, the Hearing Officer took the matter under advisement pending submission of a Recommended Opinion and Order to the Commission.

DISCUSSION

Mr. Ciccone is a residential customer of APS. Since 1989, Mr. Ciccone has received electric service from APS under its Demand Advantage Rate (EC-1). Under the Demand Advantage Rate, customers are billed based upon two components of their electric usage: (1) the kilowatt hours (kWh)

1 used (the "usage portion") and (2) the highest 60 minute use of kilowatts (kW) during the month (the  
2 "demand portion"). Both components are determined by readings of APS's meter.

3 The demand portion of APS's meters registers the highest kW usage during any single hour-long  
4 period since the meter was last reset. To insure an accurate bill for the each billing period, the meter dials  
5 (or digits if meter is electronically read) which record the demand portion of electric usage must be reset  
6 by APS's meter reader at the beginning of the billing period. In his Complaint, Mr. Ciccone alleged that  
7 APS on a number of occasions failed to reset the demand portion of his meter, resulting in over billings  
8 in the months following the alleged failures to reset.

9 Demand Advantage Rate customers can minimize their electric bills by spreading out electric  
10 usage so that no one hour's consumption is greater than any other hour in the month. Demand can be  
11 managed by (1) use of a load controller, (2) using timers on household appliances, (3) manually  
12 controlling when appliances are allowed to run, or (4) having a lifestyle that is conducive to an even  
13 consumption of electricity.

14 Mr. Ciccone has no load controller to manage his electricity usage. His primary electric  
15 appliances include air conditioning, a pool pump, and the usual household appliances. His home is  
16 heated by gas. Mr. Ciccone and his family do not use a timer to regulate their electric usage, except on  
17 the pool pump, which is set to run in the middle of the night. During most of the time periods relevant  
18 to Mr. Ciccone's Complaint, there were three people living in Mr. Ciccone's home.

19 Mr. Ciccone has had two types of meters measure his electric usage since he has been billed under  
20 the Demand Advantage Rate. From 1989 until October 1995, APS used an analog meter to measure Mr.  
21 Ciccone's electricity usage. The analog meter required APS's meter reader to manually record the  
22 meter's cumulative kWh and peak demand readings in his hand held computer, to break the seal on the  
23 demand portion of the meter, and to manually reset the dials on the demand portion of the meter to zero.  
24 Immediately upon resetting the demand dial, the meter begins to return to a reading reflecting the kW  
25 demand for the current hour. The meter reader then inserts a new seal of a different color on the meter.  
26 APS uses seals of three different color in rotation. By monitoring whether the seals are changed,  
27 customers or APS can confirm that the meter had been reset by the meter reader each month.

28 On October 30, 1995, APS replaced Mr. Ciccone's analog meter with a digital meter, due to the

1 concerns he had expressed about the reading and resetting of his meter. To read the digital meter, APS's  
2 meter reader inserts a probe, which is connected to his hand held computer, into the meter. The probe  
3 automatically reads the meter and resets the demand portion of the meter. There is no seal on the digital  
4 meter which needs to be broken to reset the meter.

5 On occasion, a Demand Advantage Rate customer will call APS to complain that the demand  
6 portion of his meter has not been reset. APS has a policy of resetting the meter for such a customer,  
7 without attempting to determine whether the meter was in fact reset at the regularly scheduled meter  
8 reading.

9 Mr. Ciccone alleged that APS failed to reset the demand portion of his meter on numerous  
10 occasions. Mr. Ciccone claimed that he had direct evidence of three such occasions. On two of those  
11 occasions, APS reset the meter after Mr. Ciccone complained to APS that the meter had not been reset.  
12 Mr. Ciccone agreed that no over billing resulted from those two alleged failures to reset the meter  
13 because the meter was later reset.

14 In addition, Mr. Ciccone offered circumstantial evidence which he claimed proved that APS failed  
15 to reset his meter on 13 other occasions. Mr. Ciccone asked that the Commission award him \$538 to  
16 compensate for over billings resulting from those 13 alleged failures to reset his meter, plus accrued  
17 interest of \$115. Mr. Ciccone's Complaint indicated that the relief he is seeking is primarily the  
18 assurance that APS is properly resetting his demand meter, without his having to monitor its performance  
19 every month. We will discuss each of the alleged failures to reset separately.

#### 20 **Alleged "Direct" Evidence of Failures to Reset**

##### 21 February 1995

22 Pat Ciccone, Mr. Ciccone's wife, testified that in February 1995, she observed the APS meter  
23 reader come into her yard to read the meter. Because she had suspicions about whether the meter had  
24 been properly reset in prior months, as soon as the meter reader left, Mrs. Ciccone read the meter herself.  
25 Mrs. Ciccone said that she observed the meter less than one minute after the APS meter reader finished  
26 reading it. She observed that the dials which measured the electric demand did not read zero. She did  
27 not recall what they did read, but said that "it was not low, it was something very high." Mrs. Ciccone  
28 said that she did not notice what color the seal on the meter was at that time, and did not know if the seal

1 color had changed. Mrs. Ciccone called APS to complain that the meter had not been reset. APS sent  
2 someone out to reset the meter.<sup>1</sup>

3 Cynthia Singley, a Consumer Advocate with APS, testified that the fact that dials on the meter  
4 did not register zero at the time Mrs. Ciccone observed them did not necessarily indicate that the meter  
5 had not been reset. Ms. Singley indicated that the dials would begin to return to a position indicating the  
6 average electricity demand for the current hour immediately upon their being reset to zero. According  
7 to Ms. Singley, before the meter reader is able to attach the new seal to the meter, the dials could be  
8 registering some demand. Ms. Singley said that the fact that Mrs. Ciccone observed the dials registering  
9 something other than zero would not be unexpected, even if the demand meter was reset by the meter  
10 reader only moments before.

11 We do not find that Mr. Ciccone has sufficiently proven that APS failed to reset his meter in  
12 February 1995. Mrs. Ciccone did not notice whether the seal had been changed by the meter reader.  
13 Further, the demand reading which Mrs. Ciccone observed did not necessarily indicate that the meter  
14 reader failed to reset the meter.

15 September 1995

16 Mr. Ciccone also alleged that APS failed to reset his demand meter in September 1995. He  
17 testified that the seal color on the demand portion of the meter did not change after the scheduled meter  
18 reading on September 19, 1995. According to Ms. Singley, APS used grey seals when they reset demand  
19 meters in August. In September, they used blue seals. Mr. Ciccone testified that after the scheduled  
20 September reading, the seal was still grey. After noticing that the seal color had not changed, Mr.  
21 Ciccone called APS to complain that the meter had not been reset. APS sent someone out to reset the  
22 meter. Because APS reset the meter before the October reading, Mr. Ciccone has not claimed that the  
23 October bill was in error due to APS's failure to reset the meter on September 19, 1995.

24 Based on Mr. Ciccone's testimony that the seal on the meter after the September 19, 1995 reading  
25 was grey, we find that APS failed to reset Mr. Ciccone's demand meter on September 19.<sup>2</sup> Because the  
26

27 <sup>1</sup> Mr. Ciccone did not include this instance of APS's alleged failure to reset the meter in his  
28 computation of overcharges, presumably because APS reset the meter after Mrs. Ciccone complained.

<sup>2</sup> See *infra* for discussion of when the grey seal was installed.

1 meter was reset after Mr. Ciccone alerted APS to the problem, however, Mr. Ciccone's October 1995 bill  
2 would not have been in error, and we need not order APS to refund any over billed amount for its failure  
3 to reset the meter.

4 On October 30, 1995, APS replaced Mr. Ciccone's analog meter with a digital meter programmed  
5 to record both the usage and demand components. APS replaced the meter in response to Mr. Ciccone's  
6 repeated concerns that his meter was not being properly reset. With the electronic meter, APS cannot  
7 take a reading of the demand component without automatically resetting the demand portion of the meter.  
8 If a problem exists which prevents APS's meter reader from obtaining a reading for the demand  
9 component, the reader's hand held computer records a code which automatically generates a follow-up  
10 visit by an APS "trouble man" to attempt to secure a reading and to perform any necessary repairs to the  
11 meter.

12 January 1996

13 Mr. Ciccone also alleged that APS failed to read and/or reset his meter in January 1996. Mr.  
14 Ciccone testified that he learned from APS that they would be reading the digital meter on January 19,  
15 1996. He monitored his meter that day, and observed that the cumulative kWh reading was 3331 at 10:48  
16 a.m. and 3349 at 7:53 p.m. He also observed that the demand indicator read 7.0 all day. On January 23,  
17 1996, Mr. Ciccone spoke with Ms. Singley and asked her to confirm whether APS had in fact read his  
18 meter on January 19. Ms. Singley consulted APS's Meter Route Activity Report, which indicated that  
19 the meter reader inserted his probe into Mr. Ciccone's meter at 9:11 on January 19, 1996. Ms. Singley  
20 therefore informed Mr. Ciccone that the meter had been read at that time. Later in the day on January  
21 23, Ms. Singley learned that when APS's meter reader attempted to obtain a reading on January 19, his  
22 hand held computer was unable to obtain a reading from Mr. Ciccone's meter. Ms. Singley contacted  
23 Mr. Ciccone that day to inform him of the problem, and said that an APS "trouble man" would attempt  
24 to read the meter and perform any necessary repairs on January 24, 1996.

25 The meter reader was unable to obtain a reading on January 19 due to a "clock error." Clock  
26 errors occur for one of two reasons: either the clock in the meter is malfunctioning, or there is more than  
27 a ten minute difference between the clock in the meter and the clock in the meter reader's hand held  
28 computer. When the meter reader's hand held computer detects a clock error, it records a code indicating

1 that the account needs to be reviewed manually, and it does not reset the demand portion of the meter.

2 Ms. Singley testified that APS recognized that they were receiving a significant number of clock  
3 errors. In an effort to reduce the number of clock error its meter readers received, APS initiated a change  
4 in the procedures by which meter readers set the clock in their hand held computers. Previously, each  
5 meter reader set the clock in his hand held computer daily based on any clock. APS changed its  
6 procedure to require meter readers to call APS's electric meter shop and to set the clock in their hand held  
7 computers based on the clock located there. Ms. Singley was unsure whether APS initiated that change  
8 in procedure before or after January 19, 1996.

9 On January 24, 1996, the APS "trouble man" arrived at Mr. Ciccone's residence. Mr. Ciccone  
10 accompanied him to the meter, and observed him insert the probe and obtain a reading from the meter,  
11 with no clock error. The "trouble man" obtained a reading of 3575 kWh total usage and a demand  
12 reading of 7.0 kW. Upon the successful reading of the meter by the "trouble man", the probe  
13 automatically reset the demand portion of the meter.

14 Later, Mr. Ciccone received a bill from APS dated January 25, 1996, which indicated that on  
15 January 19, his meter had read 3359 kWh and the demand reading was 7.0 kW. Mr. Ciccone complained  
16 that APS could not have obtained such a reading from his meter, and that APS therefore failed to read  
17 his meter on January 19.

18 APS does not deny that it was unable to obtain a successful reading from Mr. Ciccone's meter  
19 on January 19, 1996. APS claims that it properly billed Mr. Ciccone based on the information it obtained  
20 when it successfully read Mr. Ciccone's meter on January 24, 1996.

21 APS had previously read Mr. Ciccone's meter on December 19, 1995, which was 36 days before  
22 the January 24, 1996 reading. A.A.C. R14-2-210(A)(1) requires APS to read meters and bill customers  
23 for periods of 25 to 35 days. Therefore, APS issued Mr. Ciccone a bill for his prorated consumption  
24 between December 19 and January 19, computing an estimated kWh figure of 3359 as of January 19.  
25 The bill sent to Mr. Ciccone did not disclose that it was prorated based on the reading obtained on  
26 January 24. Instead, it stated that Mr. Ciccone's meter reading on January 19 was 3359. APS's failure  
27 to indicate that the bill was an estimate of consumption through January 19, based on a prorating of the  
28 January 24 reading, was a violation of A.A.C. R-14-2-210(A)(6), which requires that estimated bills be

1 designated as such.

2 We cannot conclude that APS failed to properly read and reset Mr. Ciccone's meter in January  
3 1996. When APS was unable to obtain a reading on January 19, it followed reasonable procedures to  
4 obtain a reading, and issued a bill for a period which complied with A.A.C. R14-2-210(A)(1). APS's  
5 failure to indicate that the bill was an estimate of consumption through January 19, however, caused Mr.  
6 Ciccone to question the accuracy of the bill.

7 **Circumstantial Evidence of Previous "Over Billings"**

8 In October 1995, Mr. Ciccone reviewed all his previous bills since he began on the Demand  
9 Advantage Rate in 1989. Upon examining those bills, Mr. Ciccone discovered thirteen additional  
10 instances in which he alleged that APS failed to reset his demand meter. In each of those instances, APS  
11 billed Mr. Ciccone for the same demand as it had in the prior month.

12 Mr. Ciccone computed the overcharges for these alleged over billings to be \$538. For the purpose  
13 of computing the over billing, Mr. Ciccone assumed that the proper demand reading was 4.0 kW, which  
14 was the lowest demand Mr. Ciccone has experienced since he has been on the Demand Advantage Rate.  
15 Mr. Ciccone further claims that APS should pay interest of 8.5 percent per year on the over billed  
16 amounts. Mr. Ciccone computed interest to be \$115, and the total refund to be \$653. In addition, Mr.  
17 Ciccone argued that APS should be ordered to make a refund of \$653 to each of its Demand Advantage  
18 Rate customers, or in the alternative, APS should be ordered to pay to Mr. Ciccone 100 times his alleged  
19 over billing, or \$65,300, as "retribution" for APS's failure to properly reset demand meters.

20 APS responded that the consistent demand patterns indicated on several of Mr. Ciccone's bills  
21 do not indicate a failure to reset the demand meter. Instead, APS claimed, consistent billings are logical  
22 and even expected under the Demand Advantage Rate, which promotes consistent use of electricity  
23 throughout the month.

24 APS has a computer program which it uses to estimate customer's demand when it is unable to  
25 read a customer's meter for some reason. The computer program estimates a customer's kW demand  
26 based on the customer's actual kWh usage, his previous months' usage, and kW demand readings for  
27 other customers with similar kWh usage. APS used that computer program to estimate what Mr.  
28 Ciccone's demand readings may have been in the 13 months Mr. Ciccone claims his meter was not reset.

1 Based on the computer model, APS computed that it may have over billed Mr. Ciccone by \$223.69 if,  
2 in fact, it had failed to reset Mr. Ciccone's meter as he alleged.

3 Because the Demand Advantage Rate is designed to promote an even consumption of electricity,  
4 we cannot conclude that two or three months of consistent demand readings necessarily indicate that APS  
5 failed to reset Mr. Ciccone's demand meter. We will, however, evaluate each instance in which Mr.  
6 Ciccone has identified a pattern of consistent demand readings.

7 January 1992

8 Mr. Ciccone alleged that APS failed to reset his demand meter in January 1992, resulting in an  
9 over billing in February 1992. APS billed Mr. Ciccone for demand of 6.6 in both January and February  
10 1992. Billing for the same demand in two consecutive months is not sufficient evidence that APS failed  
11 to reset the demand meter in January 1992.

12 August - December 1992

13 Mr. Ciccone further alleged that APS failed to reset his demand meter from August 1992 to  
14 December 1992, resulting in over billings in each month from September 1992 to January 1993. Mr.  
15 Ciccone offered evidence that APS billed him for demand of 7.7 kW in each of the six months from  
16 August 1992 to January 1993. Mr. Ciccone also offered evidence that APS billed his neighbor, Mr.  
17 Hinchion, who is also on the Demand Advantage Rate, for demand of 5.0 kW in each of those months.  
18 We note that Mr. Ciccone and Mr. Hinchion both had relatively high electricity usage in August 1992,  
19 as would be expected in the summer. Both of the neighbors experienced substantial decreases in usage  
20 over the next six months, but neither had a decrease in peak demand. Because the pattern of consistent  
21 peak demand spans such a long period of time (six months), that period of time is historically one in  
22 which electric demand decreases as the weather cools, and both Mr. Ciccone and his neighbor  
23 experienced the same billing pattern, we find that APS failed to reset Mr. Ciccone's demand meter from  
24 August to December 1992.

25 Mr. Ciccone alleged that APS should refund him \$242 for over billing from September 1992 to  
26 January 1993, including interest. Mr. Ciccone claims that, because APS failed to reset his demand meter,

27 \_\_\_\_\_  
28 It also appears that Mr. Hinchion's demand meter was not reset during the same time  
period.

1 it should compute his bill for those months as if his demand had been 4.0 kW. Based on APS's computer  
 2 estimates of Mr. Ciccone's demand during the period September 1992 to January 1993, it claims that it  
 3 may have over billed Mr. Ciccone \$100.06.

4 We will order APS to refund \$100.06 to Mr. Ciccone for the estimated over billing from  
 5 September 1992 to January 1993. We reject Mr. Ciccone's argument that a refund should be based on  
 6 an estimate that the proper bill would have been for a demand of 4.0. We believe that APS's computer  
 7 program, which is based on actual data of Mr. Ciccone's usage patterns and usage of other similar  
 8 customers, results in a more accurate estimate of Mr. Ciccone's actual demand during the period when  
 9 APS failed to reset the meter. We also reject Mr. Ciccone's claim that APS should pay interest on the  
 10 over billed amounts. The Commission has historically declined to order customers who had been  
 11 undercharged for their utility services to pay interest on the difference between the amounts they actually  
 12 paid and the amounts for which they should have been billed.<sup>4</sup> To remain consistent with the practice  
 13 in those cases, we will not order APS to pay interest on its over billings.

14 March 1993

15 Mr. Ciccone alleged that APS failed to reset his demand meter in March 1993, when the meter  
 16 registered demand of 4.0 kW. APS also billed Mr. Ciccone for demand of 4.0 kW in April 1993. These  
 17 two occasions where APS billed Mr. Ciccone for demand of 4.0 kW were the lowest demand readings  
 18 ever billed on Mr. Ciccone's account. APS's meter readings in March and April 1993 indicated nearly  
 19 identical usage of electricity (776 kWh in March, 773 kWh in April). Mr. Ciccone has not shown by a  
 20 preponderance of the evidence that APS failed to reset his demand meter in March 1993.

21 June 1993

22 Mr. Ciccone also alleged that APS failed to reset his demand meter in June 1993, when it  
 23 registered 8.0 kW demand. APS billed Mr. Ciccone for the same demand in July 1993, although his  
 24 electric usage increased from 2,036 to 2,620 during that period. We do not find that Mr. Ciccone has  
 25 established by the preponderance of the evidence that APS failed to reset his meter in June 1993.

26  
 27 \* See, e.g., In the Matter of Gold Coast Construction, Inc. Against Citizens Utilities  
 28 Company (Mohave Electric Division), Decision No. 58082, Nov. 12, 1992; Advantage Boats, Inc. vs.  
 Citizens Utilities Company, Decision No. 59101, May 23, 1995.

1 December 1993 - February 1994

2 From December 1993 to March 1994, APS billed Mr. Ciccone for demand of 7.0 kW. Mr.  
3 Ciccone alleges that this proves that APS failed to reset his meter from December 1993 to February 1994.  
4 The mere fact that APS billed for exactly the same demand for four consecutive months does not sustain  
5 Mr. Ciccone's burden of proof. We therefore cannot conclude that APS failed to reset Mr. Ciccone's  
6 meter during that time.

7 June - July 1994

8 Mr. Ciccone also alleges that APS failed to reset his demand meter in June and July 1994. APS  
9 billed Mr. Ciccone for demand of 9.0 kW in June, July and August 1994. Mr. Ciccone's electric usage  
10 increased by 33 percent in July from his usage in June, at the same time his demand remained constant.  
11 August's kWh usage was 23 percent higher than June's usage, yet the demand remained constant. We  
12 do not find the consistency in demand readings to substantiate Mr. Ciccone's claim that APS failed to  
13 reset his demand meter in June and July 1994.

14 August 1995

15 Mr. Ciccone further alleged that APS failed to reset his demand meter in August 1995, resulting  
16 in an over billing in September 1995. In August, APS billed Mr. Ciccone for demand of 11.3 kW. In  
17 September, APS billed Mr. Ciccone for demand of 11.2 kW.<sup>5</sup> In October 1995, APS credited Mr.  
18 Ciccone's account to adjust the September billing to reflect a demand of 10.5 kW. APS offered no  
19 explanation why it adjusted Mr. Ciccone's September bill. Apparently, APS recognized that it had failed  
20 to reset Mr. Ciccone's meter in August and adjusted the September bill accordingly.

21 APS rotates the seal colors installed on demand meters. Mr. Ciccone testified that in September  
22 1995, both before and after the scheduled meter reading on September 19, the seal on his meter was grey.  
23 APS installs grey seals in February, May, August and November. Initially, one would expect that the  
24 grey seal Mr. Ciccone observed in September had been installed after the meter was read and reset in  
25 August. APS's conduct, in adjusting the September billing, suggests that it was aware that the meter had  
26

27 <sup>5</sup> Mr. Ciccone indicated that in September 1995, the meter read between 11.2 and 11.3. Mr.  
28 Ciccone apparently assumes that the meter read the same in August 1995, and that the meter reader  
rounded that reading up to 11.3, but in September the meter reader rounded it down to 11.2.

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not been reset in August. If that is so, the grey seal must have been installed on the meter in May 1995.<sup>6</sup> We therefore find that APS failed to reset Mr. Ciccone's demand meter every month from June to August 1995.

Each month from May until August, Mr. Ciccone's peak demand was higher than it had been the prior month. Therefore, APS's failure to reset Mr. Ciccone's demand meter during these months did not result in over billings in July or August. In September, however, APS initially billed Mr. Ciccone for demand of 11.2, after it had billed for demand of 11.3 in August. In October, APS adjusted the September bill to reflect a demand of 10.5 kW. On its computer-generated estimate of Mr. Ciccone's demand, however, APS estimated that Mr. Ciccone's demand in September 1995 was 8.9 kW. Because APS offered no explanation of its use of 10.5 kW on the October adjustment, we find 8.9 kW to be the appropriate demand estimate for the September 1995 bill, because it is based on APS's estimation model which considers such factors as Mr. Ciccone's actual kWh used in September 1995, his previous months' demands and the peak demand of other customers with similar kWh usage. We will therefore order APS to credit Mr. Ciccone an additional \$19.22 to adjust the September 1995 billing to a demand component of 8.9 kW.

**Assurance of Future Accuracy**

Mr. Ciccone indicated in his Complaint that the primary relief he is seeking is the assurance that his demand meter is properly reset, without having to monitor APS's performance each month. APS's installation of the digital meter should provide such assurance. With the digital meter, APS is not able to obtain any demand reading unless it is also able to reset the demand meter. The resetting of the demand meter is automatic upon the meter reader's hand-held computer obtaining a reading. Therefore, APS would be unable to obtain the data necessary to generate a bill unless it also reset Mr. Ciccone's demand meter. APS's installation of the digital meter on Mr. Ciccone's premises should help rebuild his confidence in its billings after a history of failures to reset his demand meter.

• • • • •

<sup>6</sup> The grey seal could not have been on the meter since February 1995. The April billing had indicated a reading of 8.0 kW; the May billing indicated a demand reading of 5.4 kW. The meter reading could not have decreased from 8.0 kW in April to 5.4 kW in May unless the seal had been changed in April.

1 Having considered the entire record herein and being fully advised in the premises, the  
2 Commission finds, concludes, and orders that:

3 **FINDINGS OF FACT**

4 1. APS is engaged in the business of providing electric utility service to the public in  
5 Maricopa County, Arizona.

6 2. On March 18, 1996, Robert A. Ciccone filed a Complaint with the Commission against  
7 APS.

8 3. On April 12, 1996, APS filed its Answer to the Complaint.

9 4. The Commission issued a Procedural Order scheduling the hearing on this matter for May  
10 20, 1996.

11 5. The hearing was held as scheduled and Mr. Ciccone and APS both presented evidence.

12 6. APS failed to reset Mr. Ciccone's demand meter each month from August to December  
13 1992.

14 7. APS's failure to reset Mr. Ciccone's demand meter from August to December 1992  
15 resulted in over billings from September 1992 to January 1993 totaling an estimated \$100.06.

16 8. APS failed to reset Mr. Ciccone's demand meter each month from June to September  
17 1995.

18 9. In both July and August 1995, Mr. Ciccone's peak demand increased over his peak  
19 demand in the preceding months.

20 10. No over billing resulted in July and August 1995 from APS's failure to reset Mr.  
21 Ciccone's demand meter in June and July 1995.

22 11. APS's failure to reset Mr. Ciccone's demand meter in August 1995 resulted in an over  
23 billing in September 1995 of an estimated \$27.62.

24 12. In October 1995, APS credited Mr. Ciccone for \$8.40 as an adjustment to his September  
25 1995 bill.

26 13. APS has not credited Mr. Ciccone for the remaining \$19.22 estimated over billing on his  
27 September 1995 bill.

28 14. APS reset Mr. Ciccone's demand meter in early October 1995, after Mr. Ciccone

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complained about the failure to reset the meter in September 1995.

15. APS did not over bill Mr. Ciccone for demand in October 1995.

16. In October 1995, APS replaced Mr. Ciccone's analog meter with a digital meter.

17. The digital meter cannot be read by APS without automatically resetting the demand meter.

18. Due to a clock error, APS was unable to read and reset Mr. Ciccone's meter on January 19, 1996.

19. APS read Mr. Ciccone's meter on January 24, 1996 and reset his demand meter at that time.

20. APS issued a bill to Mr. Ciccone in January 1996 which did not indicate that it was based on a prorating of his consumption through January 24, 1996.

21. APS changed its policy to require its meter readers to set the clocks in their hand held computers based on the clock in its electric meter shop.

22. APS has agreed to refund \$653.00 to Mr. Ciccone.

**CONCLUSIONS OF LAW**

1. APS is a public service corporation within the meaning of Article XV of the Arizona Constitution and A.R.S. Sections 40-246.

2. The Commission has jurisdiction over APS and of the subject matter of the Complaint.

3. APS has agreed to refund \$653.00 to Mr. Ciccone.

4. APS should not pay interest on any amounts it refunds to customers due to over billings due to failures to reset customers' demand meters.

5. APS issued a bill to Mr. Ciccone in January 1996 which violated A.A.C. R14-2-210(A)(6).

6. Mr. Ciccone has failed to show by a preponderance of evidence that APS failed to reset his demand meter in January 1992, March 1993, June 1993, December 1993 to February 1994, June and July 1994, and February 1995.

...  
...



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1 SERVICE LIST FOR: ROBERT A. CICCONE vs. ARIZONA PUBLIC SERVICE CO.

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Utilities Division  
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF MARICOPA

10 AVIS READ, Individually and on Behalf	)	No. CV 2002-010760
11 of All Others Similarly Situated,	)	
12	)	<b>AFFIDAVIT OF JANET SMITH</b>
13	)	<b>IN SUPPORT OF APS'</b>
14	)	<b>RESPONSE TO MOTION FOR</b>
15	)	<b>CLASS CERTIFICATION</b>
16	)	
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19	)	
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24	)	
25	)	
26	)	

vs.

ARIZONA PUBLIC SERVICE  
COMPANY,

Defendant.

(Assigned to the Honorable Rebecca  
A. Albrecht)

JANET SMITH, being duly sworn, states as follows:

1. I am a Rate and Regulation Consultant in the Pricing Department at Arizona Public Service Company ("APS"). I have been employed by APS for 27 years, and I have held various positions with the Company.

2. On September 14, 1998, APS began using a new computer system, which is commonly referred to as "new CIS." Prior to September 14, 1998, APS was using a computer system commonly referred to as "old CIS."

1           3.       On November 30, 2000, I wrote an e-mail in which I stated, "As you  
2 know, the old [CIS] system did not estimate demands." (The e-mail is attached as  
3 Ex 2 to Barry Reed's Affidavit in Support of the Motion for Class Certification.) By  
4 itself, that statement technically is not correct. The old CIS system certainly did  
5 estimate demand. What I meant in my November 30, 2000 e-mail was that the old  
6 CIS system did not automatically estimate demand **and** generate a bill to the  
7 customer. Instead, the old CIS system generated a billing exception for that customer  
8 (which included a demand estimate) and a billing representative would then review  
9 the information and cause an estimated bill to be generated for the customer.  
10

11           4.       In my November 30, 2000 e-mail, I also stated, "When we first  
12 converted [the new CIS] there were numerous concerns that the demands being  
13 estimated by the system were unreasonable." I was referring in the e-mail to the  
14 demand estimates calculated by the old CIS, and my use of the term "unreasonable"  
15 was intended to mean that there were some concerns that demand estimates were  
16 either too high or too low, but mostly too low.  
17

18           5.       Under the old CIS, a billing representative reviewed every account for  
19 which a billing exception had been created for that particular month because demand  
20 had to be estimated. At that point, the billing representative could either: (1) use the  
21 estimate numbers calculated by the old CIS; or (2) if the CIS data appeared to be  
22 insufficient, manually calculate the consumption and/or demand estimates based on  
23 that customer's account history and peak demand of other customers with similar  
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1 kWh usage; and/or (3) request that a meter reader again attempt to obtain an actual  
2 meter read.

3           6.       In my November 30, 2000 e-mail, I stated, "The billing consultants and  
4 associates used various methods to estimate demands when needed (it varied  
5 depending on the person doing the estimating, not the situation)." When I made this  
6 statement, I was referring to the various methods set forth above in ¶ 5.

7  
8           7.       On September 14, 1998, the new CIS system became operational.  
9 Although the new CIS system has always been able to estimate consumption (kWh),  
10 at its inception and for approximately the next eight months, the new CIS was unable  
11 to estimate demand (kW). Thus, from September 14, 1998 through late March or  
12 early April 1999, if the new CIS did not have an actual read for the demand number,  
13 the system would create a billing exception for that account. As with the old CIS  
14 system, the billing exceptions caused a billing representative to review the account  
15 and calculate the required estimate. The billing representative could do so by  
16 manually calculating the estimates, or if the CIS data appeared to be insufficient,  
17 manually calculate the consumption and/or demand estimates based on that  
18 customer's account history and peak demand of other customers with similar kWh  
19 usage; and/or could request that a meter reader again attempt to obtain an actual read  
20 of the meter.  
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22

23           8.       In late March or early April 1999, however, the new CIS was  
24 programmed so that it could estimate demand (kW), as well as consumption. The  
25 new CIS system estimated demand - - which was also done by the old CIS - - using a  
26

1 load factor. At this point, the load factor was calculated using an average figure based  
2 on all customers in that particular rate class. The load factor was 45% for EC-1 rate  
3 customers (a particular type of demand rate account) and 50% for ECT-1R rate  
4 customers (a second type of demand rate account).

5  
6 9. Thus, as of late March or early April 1999, the new CIS estimated both  
7 consumption and demand and automatically sent out bills that contained estimates.  
8 The new CIS estimated "demand" (kW) based on the average load factor described in  
9 ¶ 8. Under certain circumstances, however, the new CIS generated a billing exception  
10 for bills that required estimates. For example, if the customer did not have a  
11 sufficient history from which to calculate consumption (kWh), or if the customer had  
12 received a bill that contains estimates for two consecutive months, the new CIS would  
13 generate a billing exception. Again, as described in ¶ 5 and 7 above, the billing  
14 exception required that account to be reviewed by a billing representative who  
15 manually calculated the bill in the manner set forth above, or requested that a meter  
16 reader attempt to obtain an actual read of the meter.  
17

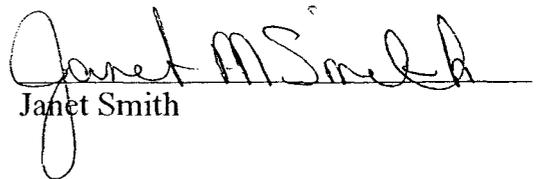
18 10. On June 18, 2002, I wrote an e-mail to Ravi Nair, which is attached as  
19 Ex. 5 to Mr. Reed's Affidavit in Support of the Motion for Class Certification. In the  
20 e-mail, I was discussing the demand estimation formula that went into effect in late  
21 March or early April 1999. In passing, I mentioned in the e-mail that we had "about  
22 20 minutes to come up with something . . ." This was not a serious comment by me; I  
23 was being facetious with a colleague and the comment was never intended to be taken  
24 literally as Plaintiffs' counsel are now seeking to do. We certainly took more than 20  
25  
26

1 minutes in determining the appropriate load factor to be used in calculating demand.

2 It was carefully considered and discussed before implementation. At the time I wrote  
3 the June 18, 2000 e-mail, as well as at the present time, I believed that the system  
4 used to estimate demand was fair to the customer.

5  
6 11. In my November 30, 2000 e-mail, I indicated that at a meeting held  
7 November 29, 2000, we learned that Billing Services was using various methods to  
8 estimate demands. The various methods referenced in the e-mail are the methods  
9 described above in ¶ 9. As explained above, they are all part of the same  
10 methodology for estimating demand when an actual meter read is not available. I  
11 realized after that e-mail that the "same method" of estimating that I was advocating  
12 in the e-mail was actually what was being done, even though different accounts might  
13 require different analyses depending on the individual account information available  
14 to the billing representative. It was never my intention to suggest that inconsistent or  
15 substantially different demand estimating methods or procedures were being used by  
16 APS.  
17

18 DATED this 27<sup>th</sup> day of February, 2004.

19   
20 Janet Smith  
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Read  
motions  
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13  
14 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
15 **IN AND FOR THE COUNTY OF MARICOPA**

16 AVIS READ; and,  
PAUL SCHAEFFER and LINDA SCHAEFFER,  
17 husband and wife; on Behalf of Themselves and All  
Others Similarly Situated,

18 Plaintiffs,

19 vs.

20 ARIZONA PUBLIC SERVICE COMPANY,

21 Defendant.

No: CV 2002-010760

**REPLY MEMORANDUM OF LAW  
IN SUPPORT OF MOTION FOR  
CLASS CERTIFICATION**

(Assigned to the Honorable  
Rebecca A. Albrecht)

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I. Introduction ..... 1

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    B. Defendant’s Fact Summary is Contradicted by Its Own Documents and Testimony,  
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## I. INTRODUCTION

Plaintiffs Avis Read and Paul and Linda Shaeffer submit this memorandum to briefly respond to the arguments raised by Defendant in its opposition to Plaintiffs' class certification motion. Defendant raises only three arguments in its brief:

- Having denied a stay after extensive briefing and argument in February, the Court should deem a stay to be appropriate in March.
- APS's latest version of the facts surrounding its adoption of its self-created, changed estimating procedures demonstrates that they were not changes at all, despite documents and testimony confirming that they were unapproved changes.
- Because, at this stage of the litigation, they control the customer billing records that would determine the amount each consumer would be harmed by APS's use of unapproved new estimating procedures, the class cannot be certified, since the Plaintiffs cannot show the extent of each consumer's harm from the records only APS has.

As the following will demonstrate, these arguments are, by turn, duplicative of a previously decided motion; a self-defeating summary of the common fact disputes that will determine liability and consequently mandate certification; and a mis-statement of the law separating common liability issues from individual damage issues in the class action certification context.

### A. Defendant's Latest Stay Argument Should Be Rejected.

While using the verb "defer" in lieu of the verb "stay", Defendant's argument that this Court should defer deciding this motion is simply a rehash of its argument for a stay. The Court has already decided this issue, and a stay is no more appropriate now than it was when the Court issued its Order on the subject on February 25, 2004.

### B. Defendant's Fact Summary is Contradicted by Its Own Documents and Testimony, and Merely Frames the Common Liability Issues Anyway

Defendant's latest version of the facts may be simply summarized:

1. Defendant's pre-1999 estimating procedures were consistent and approved by the Corporation Commission, even though Ms. Smith's records and testimony indicate the contrary.

1           2.     The change to a computer-driven automatic estimating procedure in 1999 that  
2                 determined the estimated bill by using a generic percentage load factor rather than the  
3                 previously used individual demand histories was not a change at all, although  
4                 Defendant's own documents say it was.

5           3.     The subsequent change to a lower generic percentage of load in 2002, which increased  
6                 the estimated bills of consumers compared to the previous, equally-unapproved formula,  
7                 was not really a change because: (a.) it was based on "market research" (footnote 3, pg.  
8                 4), and (b.) presumably, Defendant feels that its relegation to a page 4 footnote  
9                 somehow renders it inconsequential. Defendant thus urges that this change was not the  
10                unauthorized creation of new estimating procedures despite another document (Smith  
11                e-mail written at the time) flatly contradicting their claim, stating that it was, and  
12                conceding it was a price increase.

13           What actually occurred is summarized in the affidavit of Plaintiffs' expert, Dr. Mark S. Shirilau,  
14 P.E. In short, Defendant formerly used the particular customer's prior history to estimate demand. In  
15 1999, because it was easier for APS, it decided, without Commission approval, to change the load  
16 factors in its estimating formula to a generic percentage number, rather than the customer by customer  
17 estimates based upon account history it previously used and claims was approved by the Commission.  
18 As paragraph 7 of Dr. Shirilau's Affidavit makes clear, this change completely altered the outcome of  
19 every demand estimate. (See example cited at ¶7 from Defendant's own CIS Manual.)

20           In 2002 it lowered the percentage demand factor without Commission approval. As Dr. Shirilau  
21 points out, this gave APS a revenue increase, and customers higher estimated bills. (Affidavit of Dr.  
22 Shirilau, ¶9.)

23           Obviously, Plaintiffs assert that the trail of exhibits and Ms. Smith's own testimony establish  
24 that APS has been making up its own rates and procedures in violation of Arizona law, and that is not  
25 "much ado about nothing".<sup>1</sup> Plaintiffs' opening brief and Exhibits fully make that point. Defendant  
26

---

27           <sup>1</sup> This evaluation is pure posturing. It may be compared to the following statement by APS's  
28 counsel, Mr. Thomas L. Mumaw to the Arizona Corporation Commission on January 23, 2004:

1 does not dispute what happened, but argues that a change was not a real change in the load factor it used  
2 to determine demand requiring Commission approval.

3       Regardless of who is right about whether the changes are unapproved estimating procedure  
4 changes or “much ado about nothing”, the inquiry frames the litigation. Based upon the testimony and  
5 the documents, the Court or jury can determine whether Defendant has been using an unauthorized, and  
6 hence unlawful and deceptive estimating procedure for demand meters, since the initial change to the  
7 load factor methodology. Defendant’s factual assertions in its brief are ultimately self-defeating and  
8 support class certification, since they simply state the other side of the common class issues that control  
9 the outcome of the litigation. Liability turns on whether these were indeed changes, because Defendant  
10 never suggests they were authorized. If they were unauthorized, unapproved changes in estimating  
11 procedures, they affected every class member, since as Dr. Shirilau points out, they changed, and in the  
12 case of the 2002 action, definitely increased, the amount customers were billed. The only non-common  
13 issue is how much the changes cost consumers. Liability is a common and predominant question, even  
14 under Defendant’s version of the facts.

15       C.     Individual Issues As to How Much Defendant’s Use of Unapproved Procedures  
16             Damaged Each Class Member Do Not Defeat Class Certification as a Matter of  
               Law

17       Defendant’s sole Rule 23 argument, that not all class members may have been overcharged by  
18 the use of unapproved estimating procedures, and thus the class has individual claims, misses the point  
19 entirely.

20       It does so by re-defining Plaintiffs’ claims and re-writing Arizona statutory law to prohibit  
21 sending out unapproved, illegal bills only if that results in an overcharge that the customer can measure  
22 without access to Defendant’s records. This is simply a re-writing of the record and the statute. The  
23 entire class has been billed improperly, using twice-changed numbers for load in a demand estimating  
24 formula that the Corporation Commission has not approved. The statute is crystal clear that the  
25 violation occurs when any bill using an unapproved procedure is sent to a customer. The amount of

26

27       \_\_\_\_\_  
28       “But we do believe that this is the issue. And I have discussed this with counsel for other  
      utilities. This is an issue that we’re going to have to face and have to get resolved.”

1 the harm caused to the customer by Defendant's unlawful conduct in calculating the bill using an  
2 unapproved procedure is a matter of measuring the damage resulting. While the measure of damages  
3 is an individual issue, the case law is clear that that is not a reason to deny certification. The use of an  
4 unlawful procedure does not create uniform harm. It creates harm measured by the difference in the  
5 result when Defendant's computer is programmed with a Commission-approved formula, including an  
6 approved method for measuring load, and then a computer run is made of what the relevant bills should  
7 have demanded. These bills can then be compared to a computer run of the sums customers actually  
8 paid: Will the result vary from homeowner to homeowner? Of course. But that has nothing to do with  
9 liability for sending out unauthorized bills, it is simply the varying measure of the resulting harm. By  
10 arguing that each Plaintiff must prove harm in order to prove liability, Defendant is re-writing the  
11 statute to say that a utility can send out unauthorized bills at its pleasure, and is only in breach of the  
12 statute if the unauthorized bill results in an immediately demonstrable financial injury. That is  
13 nonsense. If the estimating procedure is not approved by the Commission, the bills are unlawful and  
14 every customer has a claim. This is what the statute says. All that is at issue then is the amount of the  
15 claim if Plaintiffs are right about the bills being unauthorized. If some customers have a zero damage  
16 claim, so be it. But that does not mean Defendant has not breached the statute, or that the customer is  
17 not protected by the statute and entitled to a proper bill, properly calculated, regardless of the outcome.

18 Defendant tries to force this square peg of an argument into a round hole by also re-writing the  
19 class definition. The class has been quite deliberately designed to include all customers who had their  
20 demand meters estimated during the class period. That is because every estimated bill sent to the class  
21 violated the statute. Defendant wants to first create a straw man class comprising of only those who  
22 can magically produce a corrected accounting before damage discovery, and then argue that under its  
23 new definition requiring advance proof of damage, there are individual fact questions. That is not the  
24 claim, and it is not how the class is defined.

25 Plaintiffs in this case simply seek an accounting and correction of the billing errors created by  
26 APS's use of an estimating methodology it created for itself, and did not have approved by the  
27 Commission.

28

1           The conduct and its illegality are common issues. The conduct is not really even in dispute.  
2 Only the damage, in the form of a measure of the proper estimates against the unapproved estimates,  
3 is an individual issue and that issue can be resolved to a certainty by using Defendant's own computer.

4           The fact that all class members have claims is demonstrated by looking at Defendant's changes  
5 in estimating procedures. The changes made in the load numbers used in the formula  $kWh = Demand$   
6 (Load X Hours) had to change the bill the customer received because it changed the key number in the  
7 formula, and, in the case of the 2002 change, it had the effect of increasing the consumer's bill. (See  
8 Affidavit of Dr. Shirilau). In 2002, Ms. Smith simply changed the load factors she used, and thereby  
9 increased APS's revenue. Thus, even assuming, *arguendo*, that the first unauthorized "Smith" formula  
10 was somehow proper, the second change in 2002 is still a blatant act by Defendant to increase electricity  
11 bills without the Commission's knowledge. That violates the statute as to all class members. The  
12 amount of the harm to any one class member is irrelevant at this stage, and will be irrelevant at trial,  
13 until the damage question is reached. This is not a liability class defined by the damages, it is a liability  
14 class defined by being subject to the statutory violation. It is not about proof of injury at this stage; it  
15 is about proof of being illegally billed. The class definition reflects that fact. The harm is in receiving  
16 an unlawfully calculated bill, and if the billing formula is proved before this Court or a jury to be  
17 unapproved, the consequences of that will then have to be addressed by mechanically calculating the  
18 effect on the class members and adjusting their accounts accordingly.

19           The trial of this matter could hardly be simpler, assuming that there is anything but damages left  
20 to try after a Rule 56 motion. Defendant's exact steps in creating its estimating procedures, and the  
21 actual procedure that resulted either were or were not approved by the Commission as a matter of fact,  
22 and are or are not lawful as a matter of reading the statute. If they were approved, Defendant prevails  
23 under the statute. If they were not approved, the Class is entitled to new bills for the months at issue,  
24 using the last Commission approved formula, and the individual outcomes will be what they will be.  
25 Defendant knows what it did bill and what it should have billed, if Plaintiffs are correct in asserting that  
26 the 1999 and 2002 changes in the load factors were unapproved and unlawful, the difference between  
27 the two must be calculated, at which point the entire class will have been treated fairly under the statute.

28

1 In short, once the Court is past the authorized versus unauthorized common issue, the case is  
2 simply a matter of doing the arithmetic necessary to recalculate the estimated bills if changes were  
3 unapproved.

4 "When monetary relief is sought, and data from each member is required to assess  
5 individual recovery entitlement, it is still possible in most cases for the class  
6 representative to develop and prove common guidelines or formulae that will apply to  
determine the measure of recovery for each individual proof of claim."

7 3 *Newberg On Class Actions* § 10.1 at 476 (4<sup>th</sup> ed. 2000)

8 This is what is at issue here. Once the statutory violation and the general entitlement to damages  
9 is established by showing that an estimated bill was sent and paid using an unlawful estimating  
10 procedure, the individual, mechanical determination of damage is no bar to certification. Certainly, in  
11 the context of a mass tort, where liability, causation, injury and damage are at issue, certification may  
12 not be possible. But in this case the Court is dealing with a single liability issue, and mechanically  
13 calculable damages that can be formulaically determined for each class member subject to the statutory  
14 harm of receiving and paying an unlawful bill. Where damages can be assessed mechanically,  
15 individualized claims for damages are not a barrier to class certification. See, Windham v. American  
16 Brands, Inc., 565 F.2d 59, 68 (4<sup>th</sup> Cir. 1977) (cited in Six Mexican Workers v. Arizona Citrus Growers,  
17 904 F.2d 1301, 1306 (9<sup>th</sup> Cir. 1990).

18 Not every class member will receive money, but every class member will receive a corrected  
19 bill using the correct estimating formula. Resolution of this case turns upon three elements, only one  
20 of which is individual, and that element, damages, is provable mechanically as to all class members,  
21 and need not be common..

22 If the 1999 and 2002 changes were (a.) changes, and (b.) unapproved (which is apparently not  
23 in dispute) every class member suffered harm by receiving an unlawful and improperly calculated bill.  
24 That entitles each class member to a corrected bill using the factors in Section 2a of the statute, and  
25 where there is a difference (which there will be in virtually every instance, particularly in light of the  
26 self-granted 2002 price increase), the amount of damage, (or the fact that there is no damage) resulting  
27 from the violation and the receipt of the unlawful bill will be established.

28

1 The simple fact is that try as it may, Defendant cannot avoid two simple truths: (1.) if they sent  
2 out unlawfully calculated bills, the issue must be addressed and corrected; and, (2.) if it is to be  
3 corrected for each customer, which it should be, this case is the best, most efficient and fairest way to  
4 correct the problem.

5 Liability is a question of whether the changes in the load factors (that Defendant concedes took  
6 place, and in the case of the 2002 price increase indisputably increased bills) should have been approved  
7 by the Commission before being used to calculate APS bills sent to consumers. If the answer to that  
8 common question is "no", this case is resolved. If the answer is "yes", corrected bills need to be  
9 prepared using an approved formula. At which point the case will be over. Either way this is a  
10 common question subject to common resolution, making it ideal for class treatment.

11 **II. CONCLUSION**

12 For all the reasons state in Plaintiffs' briefs and supporting documents, including the Affidavit  
13 of Dr. Mark S. Shirilau, this case should be certified to proceed as a class action, and Notice should be  
14 sent to the Class.

15 Respectfully submitted,

16 DATE: March 24, 2004

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3 this 14<sup>th</sup> day of March, 2004.

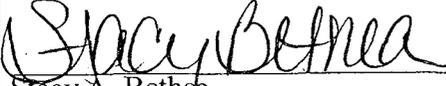
3 Clerk of the Court  
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6 Phoenix, AZ 85003

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7 by facsimile & U.S. Mail  
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13 **Attorney for Plaintiffs**

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

16 AVIS READ; and,  
17 PAUL SCHAEFFER and LINDA SCHAEFFER,  
18 husband and wife, On Behalf of Themselves and  
All Others Similarly Situated,

19 Plaintiffs,

20 vs.

21 ARIZONA PUBLIC SERVICE COMPANY,

22 Defendant.

Case No.: CV 2002-010760

**AFFIDAVIT OF**  
**DR. MARK S. SHIRILAU, P.E.**

23  
24  
25  
26  
27  
28

1 STATE OF CALIFORNIA )  
2 COUNTY OF ORANGE )SS.

3 I, Dr. Mark D. Shirilau, P.E., being first duly sworn upon oath, deposes and says:

4 1. I am the president and chief executive officer of Aloha Systems, Incorporated, an  
5 energy industry consulting and evaluation firm.

6 2. I have a doctorate degree in electric power systems engineering and a master's  
7 degree in business administration. Additional qualifications and background are set out in my  
8 appended curriculum vitae.

9 3. At the request of Plaintiffs' counsel, Barry Reed, I have reviewed numerous  
10 documents produced by APS in the course of this litigation; in particular, I have reviewed a  
11 series of emails exchanged by Arizona Public Service staff, focusing on estimating procedures  
12 for demand meters, as well as the "Affidavit of Tammy McLeod in Support of APS' Response  
13 to Motion for Class Certification."

14 4. The estimating procedures described by Tammy McLeod in Paragraph 15 of her  
15 affidavit materially changed the estimating procedures used by Arizona Public Service.

16 5. Under the old CIS computer system, Arizona Public Service used a formula for  
17 estimating demand which included an average load factor derived for the particular customer  
18 being estimated. That load factor was calculated based upon the individual customer's load  
19 factor history, including demand in the same month of the previous year. This approach was  
20 consistent with the intent of A.A.C. R14-2-210 A(2) because it made the estimated demand  
21 consistent with prior demand for that customer.

22 6. According to Tammy McLeod, under the 1999 change the new computer was to  
23 automatically estimate demand based upon a load factor that was "an average figure based on all  
24 customers in that particular rate class." It did not take the individual consumer's demand history  
25 into account. This was a fundamental change in the estimating procedure. It used a generic load  
26 factor for each consumer, depending upon a pre-determined classification, rather than the  
27 consumer's actual prior demand.

28

1           7.     In 1999, the formula used to estimate demand did not change, but the entire  
2 nature of the input used in the load factor part of the formula was changed by Arizona Public  
3 Service. The old system used the same concept of load factor, but the new system materially  
4 changed the number put into the "load factor" category of the formula. This resulted in a  
5 different estimate than would have occurred under the old system in nearly every case. In fact,  
6 the estimated demand of the sample calculation in the CIS User Manual (Page 5, Revised  
7 01/06/87), is 9.5 kW based upon a customer average load factor of 95.07%. Using the 35% and  
8 50% average load factor now applied to residential and nonresidential customers, the estimated  
9 demand for that same example would be 25.9 kW (residential) and 18.2 kW (nonresidential).

10           8.     In my opinion a generic load factor would be less accurate than one based upon  
11 the particular customer's pattern of load in prior months and years, making the change very  
12 significant.

13           9.     The 2002 change in the input into the load factor part of the formula also resulted  
14 in very different estimated energy bills. The lower percentage load factor used in the formula  
15 resulted in a higher demand being estimated for each customer. A reduction in the load factor  
16 used in the formula will always result in a higher demand being used in the estimated bill. This  
17 necessarily would increase overall revenue to Arizona Public Service from estimated demand  
18 bills, and increase the price of electricity in estimated demand bills compared to the 1998  
19 percentage load input into the formula.

20           10.    I have done no research into the financial effect of these changes and reach no  
21 conclusions on that question, except for my statement in Paragraph 9 above. The changes in the  
22 basis for the load factor used in the estimating formula are material and would change the  
23 estimated bills sent to customers. The 2002 change in load factor would tend to create higher  
24 bills.

25           11.    Because of the nature of demand readings, there is no way to accurately recapture  
26 the actual demand when the demand meter has not been reset, and thereby correct bills based  
27 upon actual demand. Because the demand meter is not reset when the meter is not read, when it  
28

1 is finally read it will actually read the peak demand during the entire period between the meter  
2 readings, not the peak demand for the billing month.

3 12. Reading demand when the meter has not been reset in a billing month is  
4 inherently inaccurate. For instance, if demand is not reset after the August reading cycle and the  
5 meter is not read until October, the bill resulting from the October reading will report the highest  
6 demand at any time during August, September and October, as the October demand. It is really  
7 an estimate, although the meter was "read," because there is no way of knowing when the peak  
8 demand was reached.

9 13. On "consumption only" meters, consumption can be recaptured and the later  
10 readings reconciled with the estimates. The only problem is that an over-estimate may result in  
11 Arizona Public Service holding money that rightfully belongs to the consumer. This "use of  
12 money" harm may not be significant to any single consumer, but may aggregate a large sum  
13 over multiple years of billing cycles.

14 14. In my opinion, the documents created by Janet Smith and Tammy McLeod reveal  
15 that Arizona Public Service made a material change to its estimating procedures in 1998, when it  
16 changed from customer-by-customer estimated demand based upon actual prior demand to a set  
17 percentage based upon customer classification. This change was made to make the automatic  
18 estimating process easier for Arizona Public Service. Because it materially altered amounts  
19 billed for estimated demand and estimated demand cannot be reconciled with subsequent actual  
20 reading of demand, this was a change that affected consumers' energy bills and their payments.

21 15. Janet Smith, in her June 18, 2002, email to Ravi Nair, acknowledges that the  
22 present system is not the "best" way to estimate demand when she states, "By the way, if we  
23 were designing from scratch, the best way of estimating a demand would be to calculate the  
24 customers load factor for the past 12 months and use that to determine the demand for the  
25 current month." What she describes as the "best" way is essentially the same as the way they  
26 estimated demand prior to the new CIS being implemented in 1998-1999.

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16. The 2002 modification of the percentage load used in the formula was effectively an increase in the cost of electricity on estimated bills and therefore materially changed the estimated bills received by and paid by consumers.

FURTHER THIS AFFIANT SAYETH NOT.

*Dr. Mark S. Shirilau*

Dr. Mark S. Shirilau, P.E.

Subscribed and sworn to before me on this 25<sup>th</sup> day of March 2004.

*D. K. Shah*  
Notary Public



My Commission Expires: June 22, 2004

1 The ORIGINAL and two (2) copies of  
2 the foregoing were filed by hand delivery  
3 this 20th day of March, 2004.

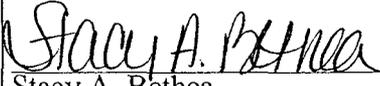
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27 Stacy A. Bethea

28

# Mark S. Shirilau, PhD, PE

---

## Primary Experience

1989–Present      President and CEO      Irvine, CA

### **Aloha Systems, Incorporated**

- Chief executive of engineering consulting and general contracting firm.
- Institutional, industrial, commercial, and residential energy efficiency
- Utility program research, measurement, and evaluation
- Assessment and evaluation of new and developing electrotechnologies
- Renewable energy supply and distributed generation assessments
- Electric service provider rate optimization
- Market research and consumer opinion studies
- Residential and commercial construction

1983–1989      Supervisor/Project Manager      Rosemead, CA

### **Southern California Edison Company**

- **Corporate Research and Development Department:** Technical and financial evaluation, assessment, and contracting of major projects for wind, solar, and other renewable energy power plants.
- **Residential Conservation Program:** Supervised staff of engineers and other professionals responsible for setting standards and evaluating technical aspects of residential conservation program on company-wide basis. Provided training and advanced assistance to division-based energy services representatives.
- **Customer Energy Services Division:** Designed, implemented, and managed major research projects in areas of residential, commercial, and industrial energy use and demand-side management, including project planning, design, contracting, field construction, engineering and econometric evaluation, management of consultants, preparation of final reports, and preparation of professional papers and oral presentations.
- **Residential Energy Usage Comparison Project:** Full responsibility for \$4,000,000 research project of SCE and EPRI.

1978–1983      Manager, Administrative Services      Santa Ana, CA

### **EECO Incorporated**

- Multifaceted responsibilities at medium-sized electronics manufacturer.
- Energy management and telecommunications
- Patent review and registration
- Corporate policy manual
- Security, facilities planning, and miscellaneous functions

**Teaching and  
other  
Experience**

2001–Present      Consultant      Sacramento, CA  
**Contractors State License Board**  
▪ Technical assistance developing electrical and general examinations.

2001–Present      Lecturer, Electronics      Glendora, CA  
**Citrus Community College**  
▪ Lecture and laboratory courses in electronics and electrical theory

1983–1991      Engineering Professor      Orange, CA  
**West Coast University**  
▪ Part-time instructor of upper division and graduate courses.  
▪ Generation, transmission, electromechanical devices, magnetic theory, control systems, measurement devices and strategies, R&D and project management, engineering economics, kinematics, power systems, economic design analysis, professional practices, ethics, mathematics, physics, and materials sciences courses.

1981–1982      Lecturer, Electronics      Santa Ana, CA  
**Rancho Santiago Community College**

1977–1978      Lecturer, Electrical Engineering      San Luis Obispo CA  
**California Polytechnic State University**

---

**Education**

1989      University of California      Irvine, CA  
**Ph.D., Electrical Engineering**  
▪ Electric power systems, generation, transmission, distribution, control, design, management and operations  
▪ Dissertation on integration of conservation and load management into system planning, DSM affects on overall system operation, and optimization of TOU rate structures for maximum customer, utility, and society benefit.

1985      Claremont School of Theology      Claremont, CA  
**M.A., Religion**  
▪ Seminary of the Episcopal Church

1980      University of California      Irvine, CA  
**M.S., Business Administration**  
▪ Business management, operations research, financial accounting

1978      Calif. Polytechnic State Univ.      San Luis Obispo, CA  
**Master of Engineering, Electric Power Systems**  
▪ Design and operation of transmission and distribution systems and power plants

1977      University of California      Irvine, CA  
**B.S., Electrical Engineering**  
▪ Power systems specialty, also civil and mechanical engineering coursework.

**Certifications  
and Licenses**

Registered professional electrical engineer  
California (E-11818)  
New York (080236)  
Texas (88014)  
Licensed general electrical contractor, (B, C-10, HIC, California #541443)  
Locksmith (California LCO-3045)  
Community college teaching credential, engineering  
Certified Thermographer  
Notary public  
Advanced open water diver (PADI)

**Organization  
Memberships  
(past and  
present)**

Association of Energy Services Professionals (AESP) [former national exec VP]  
Institute of Electrical and Electronics Engineers (IEEE) [senior member]  
Air Pollution Control Association  
American Society of Heating Refrigerating and Air-conditioning Engineers (ASHRAE)  
American Society of Safety Engineers (ASSE)  
Association of Energy Engineers (AEE)  
Association of Professional Energy Managers (APEM) [national corporate secretary]  
Demand-Side Management Society of AEE  
Eta Kappa Nu  
Heat Pump Council of Southern California [treasurer]  
Institute for the Advancement of Engineering  
International Association of Chiefs of Police (IACP)  
Mensa  
Power Engineering Society of IEEE  
UCI Alumni Association

**Boards of  
Directors  
(past and  
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AEA Credit Union  
AIDS Interfaith Network of Sonoma County  
Aloha Systems, Incorporated  
Association of Energy Services Professionals (AESP)  
Association of Professional Energy Managers (APEM)  
Ecumenical Catholic Church  
Ewcon Corporation  
Healing Spirit Press  
Heat Pump Council of Southern California  
Holy Apostles Seminary  
Outrider Trucking, Inc.  
Ryukendo Karate Institute  
Sweetwater Springs Water District

**Publications**

***Power 101: A Basic Introduction to Electric Utility Power*** (1998). Book helping residential and commercial customers in a deregulated electric market.  
"Adjusting End-Use Data for Time-of-Use Rates." Western States Load Research Group, Boise, ID., April 1990.  
"Applications of Electric Heat Pumps." *The Heat Pumper*, Vol. 2, Aug 1989.  
"Commercial Heat Pump Water Heating Applications." EPRI Water Heating Workshop, St. Louis, MO., June 1990.

"Complexities of Cost-Effectiveness, The" *The Heat Pumper*, Vol. 1, Aug 1988

"Computerized Data Collection for End-Use Experiments." *IEEE Computer Applications in Power*, Vol. 1, No. 1, Jan 1988.

"Design of a Utility competitive Assessment Experiment: The Residential Energy Usage Comparison Experiment." IEEE Power Engineering Society, San Francisco, CA., July 1987. *IEEE Transactions on Power Systems*, Vol 3, No. 3 (Aug 1988), pp. 1298-1305.

"Development of a Heat Pump Association." EPRI/EEI Meeting Customer Needs with Heat Pumps Conference, Atlanta, GA., Nov. 1989.

"End-Use Data Adjustments Under Time-of-Use Rates." Second Annual Conference on End-Use Load Information and Its Role in DSM, Irvine, CA, July 1990. (Santa Ana, CA.: Aloha Systems)

"End-Use Load Information for Effective Energy Management." IEEE Industrial Applications Society meeting, May 1991.

"Engineering and Econometric Design of a Utility Competitive Assessment Experiment, The: The Residential Energy Usage Comparison Project." 10th World Energy Engineering Congress, Atlanta, GA., Oct 1987. *Integration of Efficient Design Technologies*, pp. 453-458. (Atlanta, GA: AEE, 1988.)

"Heat Pump Water Heaters Benefit Laundromat Owners." (Long Beach, CA: Heat Pump Council of Southern California, Sept. 1988.)

"Integrating Market Research Information with End-Use Load Data for Analysis of Technologies' Acceptance and Efficiency." Demand-Side Management Strategies for the 90's, Cincinnati, OH, May 1989. (Palo Alto, CA.: EPRI CU-6367.)

Methodology for Integrating Time-of-Use Rates in Residential Demand-Side Planning, A. Doctoral dissertation, UC Irvine. (Santa Ana, CA.: Aloha Systems, 1989.)

"Preliminary Results of the EPRI/SCE REUC Project." Western States Load Research Group, Costa Mesa, CA., Sep 1989.

"Quantitative and Qualitative Comparisons of Induction, Resistance, and Natural Gas Residential Cooking." Proceedings of the 39th Annual International Appliance Technical Conference, pp. 355-366. (Madison, WI., May 1988.)

"Review of World-Wide Heat Pump Innovations: A Discussion of the 3rd IEA Heat Pump Conference." 13th World Energy Engineering Congress, Atlanta, GA., Oct. 1990.

"Trade Allies in Heat Pump Marketing." EPRI/EEI Meeting Customer Needs with Heat Pumps Conference, Atlanta, GA., Nov. 1989.

"Cost Effective Metering for End-Use Analysis" 11th National Energy Services Conference, New Orleans, LA., December 5, 2000.

"Low Cost Approach to Metering for End-Use Analysis" (With Mark S. Martinez, Southern California Edison). Western States Load Research Association Conference, Phoenix, AZ., October 27, 1999.

"Surfing the Pacific Intertie": What to Learn While Rolling Through a Blackout." Western States Load Research Association Conference, Fort Worth, TX., April 25, 2001.

"Stability of the Pacific Intertie": Public Testimony Regarding the System Disturbance of August 12, 1996. Testimony before the California Public Utilities Commission, San Francisco, CA., August 21, 1996.

"Scheduling Rotating Outages Within All of California", Public Commentary to the Public Utilities Commission, San Francisco, CA., May 26, 2001.

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Attorneys for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF MARICOPA

AVIS READ, Individually and on Behalf of All Others Similarly Situated,	)	No. CV 2002-010760
	)	
Plaintiffs,	)	<b>SUPPLEMENTAL</b>
	)	<b>MEMORANDUM OF</b>
	)	<b>DEFENDANT ARIZONA</b>
vs.	)	<b>PUBLIC SERVICE COMPANY</b>
	)	<b>("APS") REGARDING</b>
ARIZONA PUBLIC SERVICE COMPANY,	)	<b>PLAINTIFFS' MOTION FOR</b>
	)	<b>CLASS CERTIFICATION</b>
	)	
Defendant.	)	(Assigned to the Honorable
	)	Rebecca A. Albrecht)

This Supplemental Memorandum is submitted for two reasons: (1) to advise the Court of the current status of proceedings before the Arizona Corporation Commission ("ACC") regarding the Application filed by APS in October 2003 to have the ACC interpret, clarify and/or modify A.A.C. R14-2-210(A) ("Rule 210") and the impact of the recent Arizona Court of Appeals decision in the Phelps Dodge case, and (2) to inform the Court of the action that will be taken by APS in light of the new

4.4



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1 issues raised in Plaintiffs' reply memorandum in support of their Motion for Class  
2 Certification.

3 **I. The Status of APS's Application to the ACC.**

4 In October 2003, APS filed its Application with the ACC. In January 2004,  
5 the ACC referred the matter to its Process Standardization Working Group for further  
6 analysis and recommendations. As a result of discussions at the Working Group and  
7 as a result of the recent decision by the Arizona Court of Appeals in Phelps Dodge  
8 Corp. v. Arizona Electric Power Co-op, Inc., 418 Ariz. Adv. Rep. 10, 83 P.3d 573  
9 (App., Jan. 27, 2004), APS is in the process of preparing an amended and more  
10 detailed Application to have the ACC interpret, clarify, and/or modify A.A.C.  
11 R14-2-210(A). That amended Application by APS will be filed with the ACC  
12 shortly.  
13

14 Although there is no specific schedule for the ACC to consider APS's  
15 Application, APS will seek to have the ACC deal with the Application before lengthy  
16 rate hearings on other matters begin early this Summer.  
17

18 **II. Additional Developments in Phelps Dodge case.**

19 As we advised the Court in APS's Response to the Motion for Class  
20 Certification, the Phelps Dodge case referenced above is significant not only for the  
21 ACC's consideration of APS's Application to the ACC, but also for this Court's  
22 consideration of the issues in this lawsuit.  
23

24 After APS's Response was filed on February 27, 2004, a number of parties in  
25 the Phelps Dodge appeal filed motions for reconsideration. On March 15, 2004, the  
26

1 Arizona Court of Appeals denied the motions for reconsideration, but slightly  
2 modified its January 27, 2004 opinion. None of the March 15 revisions, however,  
3 changed the ruling by the Court of Appeals as it relates to this case.

4           As we previously advised the Court, the Court of Appeals decision in Phelps  
5 Dodge invalidated A.A.C. R14-2-1612 ("Rule 1612") -- the rule that provided for the  
6 Director of the Utility Division of the ACC to promulgate procedures for utilities to  
7 obtain ACC approval of their bill estimating procedures (in anticipation that, under  
8 deregulation, numerous new electric service providers would avail themselves of the  
9 opportunity to provide electric service in Arizona). Thus, not only has Rule 1612  
10 never been implemented (because the Director of the Utility Division never  
11 promulgated "procedures" for utilities to have their estimating procedures approved),  
12 but now the very rule itself has been declared invalid. Under these circumstances, the  
13 companion provision of Rule 210 requiring ACC approval of a utility's estimating  
14 procedures (also promulgated in 1998 as part of the deregulation package) would  
15 likewise seem to be invalid.

16           Now that the Motions for Reconsideration filed in the Phelps Dodge case have  
17 been resolved, the interpretation and intended application of Rule 210  
18 -- particularly as to incumbent utilities such as APS that had a long history of  
19 estimating practices prior to the Rules amendments -- must now be addressed by the  
20 ACC.

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**III. Plaintiffs' Reply Brief Squarely Raises Issues of Primary Jurisdiction of the ACC.**

Whatever may have been the case before, it is now clear from Plaintiffs' reply brief that Plaintiffs' claims in this lawsuit implicate the ACC's primary jurisdiction.<sup>1</sup> Until now, Plaintiffs have attempted to avoid a jurisdiction impediment to this litigation by vaguely contending that the core issue in the litigation was whether APS's estimated bills were "false and misleading" because they did not comply with approval procedures established by the ACC. For example, in their Motion for Class Certification, Plaintiffs generally contend that the principal "common issue" is "whether APS's estimating and billing practices were and/or remain to the present contrary to controlling State law and Regulations." (Motion at p. 11.) In their reply brief in support of class certification, however, Plaintiffs now contend that certification of Subclass A (i.e., demand-rate customers who received estimated bills) turns on whether changes to the load factor methodology used by APS "were unauthorized, unapproved changes in estimating procedures."<sup>2</sup> (Reply at p. 3.) In support of this contention, Plaintiffs attach the affidavit of an alleged expert -- who

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<sup>1</sup> APS indicated in its motion for stay that Plaintiff's claims may present primary jurisdiction issues, but APS stated that it was unnecessary for the Court to reach the issue at that point. Plaintiff's reply brief now brings that issue front and center.

<sup>2</sup> Plaintiffs apparently have taken this new tack because they recognize that the limited issue of whether the ACC must provide approval of APS's estimating methods (or whether the ACC has already done so) does not by itself establish liability to any class member and leaves unaddressed a number of individualized liability requirements (including fact of injury and damage). Thus, Plaintiffs seek to fill that gap by altering the thrust of their class certification arguments. Indeed, Plaintiffs do not even mention their proposed Subclass B in their reply, apparently conceding that class certification is not appropriate for Subclass B because individual issues plainly predominate as to those persons (i.e., persons who received estimated bills for more than three consecutive months).

1 was never previously disclosed -- who opines that the precise estimating procedure  
2 used by APS beginning in 1999 (allegedly involving use of different load factor  
3 elements) increased the amount of estimated bills.<sup>3</sup> As Plaintiffs go on to contend in  
4 their reply brief, the alleged common issue that Plaintiffs seek to have the Court  
5 determine is whether these estimated demand account bills were “unlawfully  
6 calculated” because APS allegedly used criteria contrary to that specified in Rule 210.  
7 (Reply at p. 5.) Such an analysis would be highly technical and would potentially  
8 invade the ACC’s exclusive province relating to rates.

10 In APS’s response to the Class Certification Motion, APS asked that the Court  
11 defer to the ACC concerning the proper application and interpretation of Rule 210.  
12 The position taken by Plaintiffs in their Reply brings this issue into even greater  
13 focus. Given the new position taken by the Plaintiffs’ Reply, we want to advise the  
14 Court that APS intends to file a motion to dismiss based on jurisdictional grounds --  
15 i.e., because these technical issues relating to bill estimating criteria and applicable  
16 load factors fall squarely within the expertise of the ACC, they should be deferred to  
17 the primary jurisdiction of the ACC. The jurisdictional issue raised in that motion to  
18 dismiss is directly relevant to APS’s argument that the Court should defer ruling on  
19 the Motion for Class Certification, and we will, of course, address these matters  
20 further during the April 9 hearing on Plaintiffs’ motion.

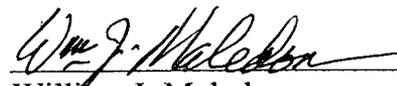
23 <sup>3</sup> Plaintiffs’ expert concedes that the estimating method used by APS until late  
24 March or early April 1999 “was consistent with the intent of A.A.C. R14-2-210A(2)  
25 because it made the estimated demand consistent with prior demand for that  
26 customer.” Shirilau Affidavit, ¶ 5. Thus, by their expert’s own admission, Plaintiffs  
have no cause of action for APS customers who received estimated bills prior to April  
1999, even though their proposed class includes customers who received estimated  
bills after September 1, 1998.

1 This is not to suggest that APS believes that the proposed class or classes are  
2 otherwise appropriate for certification. On the contrary, APS will demonstrate at the  
3 April 9 hearing on the Motion for Class Certification that Plaintiffs' legal arguments  
4 for certification are fundamentally wrong, that individual issues plainly predominate,  
5 and that certification of any class in this case would be inappropriate. It is not the  
6 purpose of this Supplemental Memorandum, however, to argue those issues in  
7 advance of the hearing on the class motion on April 9.  
8

9  
10 Dated this 6<sup>th</sup> day of April, 2004.

11  
12 OSBORN MALEDON, P.A.

13  
14  
15 By



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

16 AVIS READ; and,  
PAUL SCHAEFFER and LINDA SCHAEFFER,  
17 husband and wife; on Behalf of Themselves and All  
Others Similarly Situated,  
18  
19 Plaintiffs,

20 vs.  
ARIZONA PUBLIC SERVICE COMPANY,  
21  
22 Defendant.

No: CV 2002-010760  
**PLAINTIFFS' SUPPLEMENTAL  
MEMORANDUM IN FURTHER  
SUPPORT OF MOTION FOR  
CLASS CERTIFICATION**

(Assigned to the Honorable  
Rebecca A. Albrecht)

23 **I. INTRODUCTION**

24 Defendant has submitted a desperate, eleventh-hour "supplemental memorandum" attempting  
25 to usurp the last word, and to rescue an obviously hopeless position with respect to Plaintiffs' motion  
26 to certify this Class. As the following will demonstrate, its memorandum merely confirms what the  
27 prior briefing made obvious: Defendant has blatantly flaunted the requirement that it send out only bills  
28 that follow approved estimating procedures. Assuming, *arguendo*, that the methods it was using prior

1 to its 1998/99 switch to computer-generated automatic estimates were approved, discovery in this case  
2 has established, beyond any doubt, that Defendant subsequently made two highly material changes to  
3 its estimating procedures, failed to notify consumers of that fact, failed to have the changes approved  
4 by the ACC, and blithely sent false and unauthorized bills to its customers, representing them to be  
5 legitimate "estimates", while failing to disclose that they were completely different to prior estimates.  
6 It has no excuses, and in reality no defenses either, to the class certification motion or the claims at  
7 issue in this case. Those claims can be resolved with finality as to all APS customers who paid these  
8 bills, once the class is certified, through a Rule 56 motion.

9 Defendant's latest series of arguments are just variations on the same old theme of seeking to  
10 delay this action or divert it into the ACC. Defendant, yet again, attacks a duly enacted regulatory  
11 scheme; the jurisdiction that this Court plainly has over this issue; and the Court's prior rulings, because  
12 it cannot defend its conduct, or explain its own documents.

13 As the following will demonstrate, Defendant's argument that Plaintiffs have raised "new"  
14 claims in their motion to certify is absurd. The Amended Complaint, Plaintiffs' argument regarding  
15 Defendant's Motion to Stay, and Plaintiffs' motion to certify have presented a single consistent  
16 argument: Defendant changed its estimating procedures without Commission approval or notice to  
17 consumers and consequently sent out unlawful bills claiming sums of money from its customers that  
18 were not due, while representing that they were due, and then collected and kept the unlawful charges.  
19 Defendant's argument to the contrary is just its panic-driven response to the fact that Plaintiff's expert  
20 affidavit, countering Defendant's affidavits, nails down these facts beyond any dispute and points out  
21 the impropriety of this procedure. The tactic of calling every repetition by Plaintiffs of this same claim  
22 another novel and abrupt revelation, and then using that characterization as a peg on which to hang yet  
23 another attempt to argue that this Court lacks jurisdiction or should grant APS a stay, has reached the  
24 point of complete transparency. The Court has concurrent jurisdiction. It can and should certify this  
25 case to proceed as a class action, and promptly resolve it under Rule 56.

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1 A. Plaintiffs Have Made the Same Claims, Using the Same Arguments From the Commencement  
2 of this Action.

3 As described above, Defendant's claim that Plaintiffs' Reply Memorandum and accompanying  
4 Affidavit alter the basis and nature of their claims is ridiculous. It is merely a Defendant-invented  
5 initial predicate on which to hang yet another collateral attack on this Court's denial of its Motion to  
6 Stay. The attack collapses with the failure of the initial predicate.

7 Paragraphs 12-17 of Plaintiffs' Amended Complaint could hardly be clearer. These paragraphs  
8 state that:

9 12. APS has failed to make the arrangements necessary and required by  
10 State law and Regulation to read the electric meters of Plaintiffs and the  
11 members of the Class on a monthly basis, and has billed estimated sums  
12 for such use without following the procedures provided for in Arizona's  
13 Regulatory scheme, resulting in massive over-utilization of estimated,  
inaccurate bills at great cost and expense to consumers. APS has  
repeatedly estimated the consumption and demand in ways that are  
inconsistent with Arizona law and result in overcharges to consumers.

14 13. Due to the foregoing, APS has violated various laws, including Arizona  
Administrative Code R14-2-210 governing electrical utilities, which  
provides:

15 A. Frequency and estimated bills

16 1. Unless otherwise approved by the Commission, the  
17 utility or billing entity shall render a bill for each billing  
18 period to every customer in accordance with its  
applicable rate schedule and may offer billing options for  
19 the services rendered. Meter Readings shall be  
scheduled for periods of not less than 25 days Or more  
20 than 35 days without customer authorization. If the  
Utility or Meter Reading Service Provider changes a  
21 meter reading route or schedule resulting in a significant  
alteration of billing cycles, notice shall be given to the  
affected customers.

22 2. Each billing statement rendered by the utility or billing  
23 entity shall be computed on the actual usage during the  
24 billing cycle. If the utility or Meter Reading Service  
Provider is unable to obtain an actual reading, the utility  
25 or billing entity may estimate the consumption for the  
billing period giving consideration to the following  
26 factors where applicable:  
a. The customer's usage during the same month  
27 of the previous year.  
b. The amount of usage during the preceding month.

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3. Estimated bills will be issued only under the following conditions unless otherwise approved by the Commission:

- a. When extreme weather conditions, emergencies, or work stoppages prevent actual meter readings.
- b. Failure of a customer who reads his own meter to deliver his meter reading to the utility or Meter Reading Service provider in accordance with the requirements of the utility or Meter Reader Service Provider billing cycle.
- c. Provider is unable to obtain access to the customer's premises for the purpose of reading the meter, or in situations where the customer makes it unnecessarily difficult to gain access to the meter, that is, locked gates, blocked meters, vicious or dangerous animals. If the utility or Meter Reader Service Provider is unable to obtain an actual reading for these reasons, it shall undertake reasonable alternative to obtain a customer reading of the meter.
- d. Due to customer equipment failure, a 1-month estimation will be allowed. Failure to remedy the customer equipment condition will result in penalties for Meter Service Providers as imposed by the Commission.
- e. To facilitate timely billing for customers using load profiles.

4. After the 3<sup>rd</sup> consecutive month of estimating the customer's bill due to lack of meter access, the utility or Meter Reading Service Provider will attempt to secure an accurate reading of the meter. Failure on the part of the customer to comply with a reasonable request for meter access may lead to discontinuance fo service.

5. A utility or billing entity may not render a bill based on estimated usage if;

- a. The estimating procedures employed by the utility or billing entity have not been approved by the Commission.
- b. The billing would be the customer's 1<sup>st</sup> or final bill for service
- c. The customer is a direct-access customer requiring load data.
- d. The utility can obtain customer-supplied meter readings to determine usage.

6. When a utility or billing entity renders an estimated bill in accordance with these rules it shall:

- a. Maintain accurate records for the reasons therefore and efforts made to secure an actual reading;

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b. Clearly and conspicuously indicate that it is an estimated bill and note the reason for its estimation.

(emphasis added).

14. In contravention of the foregoing rules, APS has continued to render estimated bills to class members far beyond the three month limit without having in place any procedure to comply fully with Section 4 above or Section 5d above to obtain actual readings.

15. Additionally, despite the rule requiring APS to specify on the billing statement the reason for its estimation, APS has not abided by the rule consistently.

16. Further, the estimating procedures employed by APS pursuant to which APS rendered estimated bills, including estimated demand bills, have been created on an ad hoc basis by APS employees, without adequate ~~the~~ and approval by the public and the Arizona Corporation Commission. .  
(emphasis added).

17. APS's practices pertaining to meter reads have not complied with the binding State laws and Regulations, and its practices have been systematic and widespread, resulting in massive overcharges to its customers, and the unlawful mailing of unauthorized estimated bills.

(emphasis added).

At page 4 of its supplemental memorandum, Defendant argues that Plaintiffs' Reply Brief brings the question of whether the bills sent were the result of *ad hoc* procedural changes created by APS employees without public notice or Commission approval "front and center" in this litigation for the first time. That argument simply will not stand scrutiny in light of Paragraph 16 of the Amended Complaint which states that exact claim.

Further, when the Court actually decided the stay issue it had before it the following from Plaintiff's Memorandum in Opposition to the Motion to Stay:

...In fact, even those issues in this case that directly concern the Regulations are straightforward and well within the expertise and jurisdiction of this Court.

Contrary to APS's assertion that "the ACC has been well aware of [APS's estimation procedures]" (APS's Motion to Stay at pg. 5, lines 4-6), evidence discovered by Plaintiff clearly indicates that APS has ignored the Arizona law and Regulations, evaded the ACC, and employed various, unapproved methods of bill estimation, and now pleads for the ACC's involvement only as an escape hatch from this litigation. This fact is established by the documents produced by APS and by APS employees who have admitted that estimating and billing procedures employed by APS are unapproved, far from ideal, and created on an *ad hoc* basis:

I don't think load factors change that much. We are going to compare these numbers to some other numbers we have and see how much they have varied. That will give us a better idea of frequency, but I honestly don't think we will see much change. If we only change them when we

1 have a rate case, our last full blown case was 1988, so every 15-20 years.  
2 Hmm, we could have a new system by then.

3 By the way, if we were designing from scratch, the best way of  
4 estimating a demand would be to calculate the customers load factor for  
5 the past 12 months and use that to determine the demand for the current  
6 month. Since we didn't design from scratch, and had about 20 minutes  
7 to come up with something, we'll stick to the methodology we have  
8 now, with maybe some better number. (Emphasis added.)

9 Email from Janet M. Smith to Ravi Nair dated June 18, 2002. Attached as Exhibit A.  
10 See also, Email from Janet M. Smith to Jana Van Ness dated November 30, 2000,  
11 attached as Exhibit B:

12 I met with Lori and her group yesterday to discuss some estimating  
13 issues. One of the items raised was how to properly estimate a demand.  
14 After some discussion we arrived at what I believe is the best method so  
15 this is a heads up to you in case you are ever asked by the Commission.  
16 (Emphasis added.)

17 Again, the notion that Plaintiffs have suddenly brought the issue of *ad hoc*, unapproved changes  
18 in estimating procedure "front and center" is not supported by the record or by reality. Plaintiff has  
19 asserted from the very outset, and at every stage, that Defendant has been making up its own  
20 unapproved estimating procedures contrary to the Arizona law, and Ms. Smith has admitted as much.

21 In their initial brief supporting class certification, Plaintiffs again made the same central  
22 argument:

23 As a public service company, APS is required, by law, to seek approval of its  
24 rates, charges, and estimating procedures by the ACC. See A.R.S. § 40- 365. Also, any  
25 change in any rate, charge or service by APS is subject to a hearing and approval by the  
26 ACC. See A.R.S. § 40-361, *et seq.* In principal, this regulatory scheme should result  
27 in bills that are the product of uniform, fair, and governmentally and publicly approved  
28 standards. However, while APS has implemented a uniform mechanism for billing its  
customers, the record in this case reveals that APS has, to the extent possible without  
easily getting caught, taken the role of fashioning its charges and billing methods upon  
itself.

\* \* \*

At page 6 of their initial brief Plaintiffs stated as follows:

...From this bizarre arrangement, APS, in September 1998, changed its computer system  
to allow it to automatically estimate demand for APS' demand customers where no  
actual demand reading had been taken.

As Ms. Smith describes in her memo, she and her colleagues "decided" to  
program in a series of percentage "load factors" that would be determined by meter type.  
There was no mention of the Section 2(a) and 2(b) factors, and APS, through Ms. Smith,  
created them around, rather than through Commission approval. The only approval of  
the procedure was provided by "Jana and Cynthia" in a memo dated December 4, 2000,  
that apparently approves the use of the "Smith formula" for all demand estimates.

Incredibly, on June 19, 2002, Smith wrote a memo instructing the technical staff

1 at APS to change the load factors used to generate an estimated demand bill by changing  
2 the percentage load factors to be used from those she had initially set. See Exh. 4.  
3 Again, these changes were made without any Commission involvement.

4 The "Smith formula" was created *ad hoc*, internally, by APS. Indeed, in a later  
5 memo, Smith describes having created the procedure in "20 minutes" (See Smith E-  
6 mail, Exh. 5). Thus, since September 1998, Defendant has been regularly estimating  
7 demand under a formula that is completely unlawful under Section 5(a).

8 \* \* \*

9 With all this before it, APS can hardly have been astounded when Plaintiffs stated in their Reply Brief  
10 that:

11 What actually occurred is summarized in the affidavit of Plaintiffs' expert, Dr.  
12 Mark S. Shirilau, P.E. In short, Defendant formerly used the particular customer's prior  
13 history to estimate demand. In 1999, because it was easier for APS, it decided, without  
14 Commission approval, to change the load factors in its estimating formula to a generic  
15 percentage number, rather than the customer by customer estimates based upon account  
16 history it previously used and claims was approved by the Commission. As paragraph  
17 7 of Dr. Shirilau's Affidavit makes clear, this change completely altered the outcome  
18 of every demand estimate. (See example cited at ¶7 from Defendant's own CIS  
19 Manual.)

20 In 2002 it lowered the percentage demand factor without Commission approval.  
21 As Dr. Shirilau points out, this gave APS a revenue increase, and customers higher  
22 estimated bills. (Affidavit of Dr. Shirilau, ¶9.)

23 Obviously, Plaintiffs assert that the trail of exhibits and Ms. Smith's own  
24 testimony establish that APS has been making up its own rates and procedures in  
25 violation of Arizona law, and that is not "much ado about nothing". Plaintiffs' opening  
26 brief and Exhibits fully make that point.

27 In short, Defendant's entire predicate argument, that Plaintiff has suddenly pointed to the two  
28 changes in estimating procedures authored by Janet Smith, without Commission approval, as being at  
the core of this case, simply will not pass muster. Those claims have been "front and center" in the  
Amended Complaint, the Motion to Stay, and in every other pleading in this case that concerned the  
facts on which Plaintiffs rely and the legal authorities that follow from them. The Court has the same  
concurrent jurisdiction today that it has always had. Defendant's mere characterization of Plaintiffs'  
class certification claims as "novel" does not make them so. The record says otherwise.

B. Plaintiffs Have Made a Variety of Claims, Over Which This Court Has Jurisdiction, and As To  
Which It Already Denied a Stay, Each of Which is Based Upon Other Statutes.

While Defendant continues to characterize its conduct as being subject solely to the  
jurisdiction and judgment of the Commission, that is simply not the law. As Qwest Corp. v. Kelly, 204  
Ariz. 25, 33-34, 59 P.3d 789, 797-98 (Ap.. 2002) review denied (April 22, 2003) makes clear, the fact

1 that a utility is regulated does not render it immune to every other law. Again, reference to the actual  
2 record exposes Defendant's argument that the claims of unauthorized changes and fraudulent billing  
3 post-date the denial of the stay. Again, the Amended Complaint is revealing as to this issue:

4 50. In violation of A.R.S. §44-1522, Defendant deceived Plaintiffs and the  
5 Class through misstatements and dishonest course of business described in  
6 preceding paragraphs, including in particular the misrepresentation of the  
7 amounts owed by Plaintiffs and members of the Class for electricity service, and  
8 the mailing of false, unauthorized estimated bills contrary to controlling  
9 Regulations, and mailing of bills stating demand for particular months that APS  
10 knew was a pure guess or estimate, but represented as actual demand.

11 51. Defendant's conduct constitutes a series of unlawful practices through  
12 which statutory "merchandise," i.e., electric power, was sold, advertised, or  
13 both, to Plaintiffs and the Class within the meaning of A.R.S. §44-1522.

14 52. Because of the Defendant's unlawful conduct in violation of the Act,  
15 Plaintiffs and members of the Class overpaid APS for their electricity, and  
16 provided unlawful, involuntary interest free loans to APS.

17 \* \* \*

18 56. As a result of the illegal conduct described above and the relationship  
19 between the parties, Defendant has been, and continues to be, unjustly enriched  
20 at the expense of Plaintiffs and all others similarly situated. Specifically,  
21 Defendant has been, and continues to be, unjustly enriched by its continued  
22 practice of over-billing customers. Had Plaintiffs and other members of the  
23 Class known that they were being overcharged, they would not have paid the  
24 amount they were overbilled. Defendant will be unjustly enriched if it is  
25 allowed to retain these funds and not required to refund such funds to the people  
26 it wrongfully overbilled.

27 \* \* \*

28 65. Plaintiff, on behalf of herself and all others similarly situated, hereby  
incorporates by reference the allegations contained in the paragraphs within this  
Complaint as if fully set forth herein.

66. Plaintiff is a party to a contract between herself and APS in which APS  
agreed to provide electric services under certain terms and conditions based on  
set rates. Among the terms and conditions of its contracts are certain warranties  
made by APS.

67. Defendant APS covenants and warrants in its contract with Plaintiff that  
"APS operations are in compliance with all applicable regulations pursuant to  
the rules of electric competition. . . .". See Exhibit "C" attached hereto.

68. Defendant APS has breached such warranty by failing to comply with the  
Regulations that govern its billing and estimating procedures and practices.

69. As a result of the foregoing, Plaintiff and the other members of the Class  
have suffered, and will continue to suffer, harm.

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84. Defendant APS owes a duty to Plaintiffs and its customers to act reasonably and prudently in preparing bills for its services and to follow applicable laws and regulations governing its conduct.

85. By negligently implementing software, information and billing systems that have failed to follow Arizona law and Regulations have resulted in unjust, artificially-inflated bills, and are a result of a lack of reasonable care by APS in preparing such bills. Defendant APS has breached and continues to breach such duties.

86. Defendant APS's conduct was the factual and legal cause for such breach of duty.

87. As a result of the foregoing, Plaintiff and other members of the Class have suffered, and will continue to suffer harm.

As Qwest makes clear, the ACC does not have exclusive jurisdiction of claims such as these, merely because they arise out of the activities of a company that it regulates. These are separate causes of action that raise common, classwide liability issues as to which this Court has concurrent jurisdiction.

C. The Status of the APS Application to the ACC is Still Irrelevant.

This Court has denied Defendant's Motion to Stay, which was really little more than an attempted procedural end-run on Qwest, which gave this Court concurrent jurisdiction to hear cases of this type. APS's machinations at the Corporation Commission have no bearing on Qwest, or upon this Court's jurisdiction. To the contrary, proving Plaintiffs' point made at oral argument on the Motion to Stay, the Commission matter has gone precisely nowhere since the hearing, while this case has moved forward. Now Defendant is planning to start over again at the Commission with a new Application. This case is close to resolution on cross-motions for summary judgment. The people of Arizona will be best served by having these issues promptly resolved.

D. Nothing in Phelps-Dodge Affects the Case at Issue.

Defendant also asks the Court to make a huge intuitive leap and to "assume" the invalidity of duly enacted regulations that may or may not require Attorney General approval, and may or may not have received or will receive such approval. The regulations at issue in Phelps-Dodge are not at issue in this case. Defendant, remarkably, is asking the Court to disregard the law as it stands before it, and to speculate as to what it might be as a result of a case that nobody has brought. The Court should not

1 and cannot join Defendant in an analysis of what "seems" (Def.'s Supp. Brief at 3) or what the law  
2 could be in the future. Phelps-Dodge, its treatment by the Supreme Court, and its application to  
3 statutory and regulatory law not challenged in that case are all matters of pure speculation that have no  
4 bearing on the issues before this Court.

5 II. CONCLUSION

6 Defendant's Supplemental Memorandum is just another attempted end-run on concurrent  
7 jurisdiction. The motion to certify this class is ripe for decision, and Defendant's own arguments  
8 demonstrate that common issues entirely predominate. The motion should be granted.

9 Respectfully submitted,

10 DATE: April 7, 2004



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1 The ORIGINAL and one (1) copy of  
2 the foregoing were filed by hand delivery  
3 this 11<sup>th</sup> day of April, 2004.

3 Clerk of the Court  
4 MARICOPA COUNTY SUPERIOR COURT  
5 101 W. Jefferson  
6 Phoenix, AZ 85003

6 Copies of the foregoing were  
7 sent by hand delivery  
8 this 11<sup>th</sup> day of April, 2004 to:

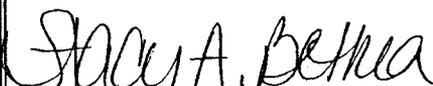
8 The Honorable Rebecca A. Albrecht  
9 MARICOPA COUNTY SUPERIOR COURT  
10 101 W. Jefferson, EBC-411  
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10 Copies of the foregoing were sent  
11 by facsimile & U.S. Mail  
12 this 11<sup>th</sup> day of April, 2004 to:

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28

# **EXHIBIT B**

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

Read  
order  
292.73

CV 2002-010760

05/26/2004

HONORABLE REBECCA A. ALBRECHT

CLERK OF THE COURT  
K. Ballard  
Deputy

FILED: 05/28/2004

AVIS READ

BARRY G REED

v.

ARIZONA PUBLIC SERVICE COMPANY

WILLIAM J MALEDON

JEFFREY M PROPER

RULING

The Motion for Class Certification has been under advisement. The Court has reviewed the memoranda filed, the legal file, the applicable case law, and Rules of Court. The Court has further considered the arguments of counsel.

The Plaintiff claims that because of unlawful estimating practices by the Defendant, the Plaintiffs have been inaccurately charged for electricity provided to them by the Defendant. Plaintiff asserts that the injury to each Plaintiff is the receipt of an unlawful bill. Some members of the prospective class according to the Plaintiff have a compensable injury in the form of an overcharge for power. Others will not have a compensable injury.

To be certified as a class action, the Plaintiff must meet the requirements of the Arizona Rules of Civil Procedure, Rule 23.

The Defendant does not challenge all of the prerequisites to a class action. Defendant challenges the class only as it relates to Rule 23(b)(3). Defendant asserts that the individual issues of liability, that is injury, in fact, and actual damages, predominate and that therefore the class certification should be denied.

The Court recognizes that Defendant re-urges its position that the Court should stay any ruling until such time as the Corporation Commission issues its rulings on the efficacy of the APS estimating system. However, the Court having previously denied that motion chooses to determine, assuming that the system violates the law, there is a viable class.

Docket Code 019

Form V000A

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APS05848

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2002-010760

05/26/2004

If the Court assumes that the Plaintiff prevails on that portion of the action, wherein the class acts as a private attorney general, and the acts of the Defendant are found to be unlawful, the Court must then turn to a determination of the damage for the individual Plaintiff members of the class, and it is here that the class runs into insurmountable problems. Each Plaintiff must demonstrate his or her damage for each period at issue. The damages will vary based on individual factors, none of which are shared by other members of the class. These individual factors overwhelm the common elements in this case.

IT IS ORDERED denying the Motion for Class Certification.

# **EXHIBIT C**

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2002-010760

06/29/2004

HONORABLE REBECCA A. ALBRECHT

CLERK OF THE COURT  
K. Ballard  
Deputy

FILED: 07/01/2004

AVIS READ

BARRY G REED

v.

ARIZONA PUBLIC SERVICE COMPANY

DEBRA A HILL

DAVID A RUBIN  
JEFFREY M PROPER

RULING

The Court has reviewed Plaintiffs' Motion for Reconsideration. The Court has further reviewed its prior rulings and the legal file.

Based on the matters presented to the Court, the Court declines to reconsider its prior rulings.

# **EXHIBIT D**

Meter 906893, 6702 E. McDonald, Phoenix, AZ

Billing Period	Days in Billing Cycle	Energy Use (kWh)	Demand (kW)	Meter Read Date	Bill Amount	Cost Per Day
9/21/98-10/21/98	29	3633	9.9	10/21/98	\$282.59	\$9.74
10/21/98-11/20/98	30	2900	9.7	11/20/98	\$195.26	\$6.51
11/20/98-12/22/98	32	3602	9.5	12/22/98	\$219.28	\$6.85
12/22/98-1/22/99	31	3184	8.6	1/22/99	\$197.07	\$6.35
1/22/99-2/19/99	28	2860	8.7	estimated <sup>1</sup>	\$186.02	\$6.64
2/19/99-3/19/99	28	3577	11.9	3/19/99	\$238.28	\$8.51
3/19/99-4/21/99	33	3356	10.2	estimated <sup>2</sup>	\$216.37	\$6.55
4/21/99-5/20/99	29	3622	11.0	estimated <sup>3</sup>	\$295.10	\$10.17
5/20/99-6/21/99	32	4148	12.0	estimated <sup>4</sup>	\$329.63	\$10.30
6/21/99-7/8/99	15	4416	23.6	7/8/99 <sup>5</sup>	\$333.91	\$22.26

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<sup>1</sup> Meter 906893 was read for the month ending January 22, 1999 -- kWh was 3184 and kW was 8.6. The meter was also read for the month ending March 22 -- kWh was 3577 and kW was 11.9. The February kWh estimate (2860) appears to be underestimated because the January kWh read (3184) and March kWh read (3577) are both higher than the kWh February estimate. In addition, the February kW estimate of 8.7 appears reasonable based on the January kW read of 8.6 and March kW read of 11.9.

In addition, the February 1999 estimates appear reasonable (and probably underestimated) based on Read's historical reads. In February 1996, the actual read was 3510 kWh and 10.4 kW, both of which are higher than the February 1999 estimates of 2860 kWh and 8.7 kW. In February 1998, the actual read was 3148 kWh and 10.8 kW, and again, both of these figures are higher than the February 1999 estimates.

<sup>2</sup> The April 1999 kWh and kW estimates also appear reasonable. Both the April 1999 kWh estimate (3356) and kW estimate (10.2) are lower than the March 1999 kWh read (3577) and kW read (11.9). Since April is typically hotter than March, one would expect both kWh and kW to be higher in April than March, but the APS April estimates are lower than the known March usage amounts.

The April 1999 estimates also appears reasonable based on Read's account history. Read's April 1996 and April 1997 reads were also estimated. However, Read's April 1998 actual read was 3148 kWh and 10.8 kW, compared to the April 1999 estimate of 3356 kWh and 10.2 kW.

<sup>3</sup> The May 1999 estimate also appears reasonable based on Read's historical usage. Read's May 1996 read was estimated. In May 1997, however, her actual read was 4353 kWh and 15.9 kW. In May 1998, her actual read was 2178 kWh and 8.4 kW. The May 1999 estimates are in the middle range of the May 1997 and May 1998 actual reads.

In addition, the May 1999 kWh estimate of 3622 is only slightly higher than the March 1999 kWh read of 3577, and the May 1999 kW estimate of 11 is lower than the March 1999 kW read of 11.9.

<sup>4</sup> The June 1999 estimates were 4148 kWh and 12 kW. In June 1996, Read's actual read was 5188 kWh and 20.2 kW. In June 1997, the actual read was 5511 kWh and 19.8 kW. In June 1998, the actual read was 3945 kWh and 11.9 kW. Based on the actual meter in June 1996, 1997 and 1998, it appears that APS probably underestimated Ms. Read's kWh and kW in June 1999.

<sup>5</sup> Ms. Read also claims that the actual meter read on July 8, 1999, must have been inaccurate (kWh of 4416 and kW of 23.6). However, Read's historical usage demonstrates that there is no reason to believe this actual reading was inaccurate.

Read's July 1996 and 1998 reads were estimated. In July 1997, her actual read was 4519 kWh and kW of 13.6. In addition, there have been months during the summer period in which Read consumed similar or even larger amounts of kWh and kW. In August 1996, the actual read amounts were 12,567 kWh and 26.6 kW. In September 1996, Read's meter read was 7600 kWh

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and 23.3 kW. Both kWh and kW in August and September 1996 are significantly higher than the July 1999 estimates.