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BEFORE THE ARIZONA CORPORATION

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COMMISSIONERS

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

IN THE MATTER OF THE APPLICATION OF
ARIZONA PUBLIC SERVICE COMPANY
FOR AUTHORIZATION TO ACQUIER OUT-
OF-STATE REVEWABLE RESOURCES.

DOCKET NO. E-01345A-05-0675

STAFF RESPONSE

INTRODUCTION AND SUMMARY

On October 7, 2005, the Chief Administrative Law Judge issued a Procedural Order in this docket. The Procedural Order was issued in response to a series of events that had occurred in this matter, including letters filed in the docket by Commissioners Mayes and Spitzer. The Procedural Order recited portions of the letters from each Commissioner. Specifically, the Procedural Order referenced Commissioner Mayes's letter indicating a request that Staff and any other Parties to this docket should evaluate bids rejected by APS, and indicating that APS had submitted certain confidential information that the Commissioner would like to be able to discuss in an open meeting. Commissioner Mayes requested that a Procedural Conference be scheduled in this docket as soon as possible. Commissioner Spitzer's letter indicated a concern for maintaining the confidentiality of sensitive information.

Subsequent to the issuance of the Procedural Order in this matter, Commissioner Mundell submitted a letter to the docket. Commissioner Mundell's letter also requested a Staff analysis of the rejected bids and indicated Commissioner Mundell's view that a Procedural Conference would be appropriate for the purpose of discussing the best means to maintain the confidentiality of the bids, while allowing for meaningful discussions among the Commissioners.

The October 7, 2005 Procedural Order directed that APS should make a filing consistent with its terms, and, if APS continued to believe that documents should remain confidential and to request

1 confidential treatment, that APS should submit a copy of such documents under seal. In addition, the
2 Procedural Order directed that Staff, and any other Party, should file responses to APS' filing no later
3 than October 17, 2005. APS having submitted a response to the Procedural Order on October 12,
4 2005, Staff hereby submits our Response to the APS filing.

5 In its response to the Procedural Order, APS continues to claim that certain information is and
6 should remain confidential. Specifically, APS asserts that documents which would allow the
7 calculation of APS' avoided cost should remain confidential. APS further asserts that the bids
8 received in response to the RFP should be held confidential. The basis for the claim is that APS, the
9 bidders, and ultimately APS' customers would be harmed if the commercially sensitive information
10 regarding APS' avoided cost calculations, or the third party proprietary information contained in the
11 bids themselves were made public.

12 APS describes its view of the manner in which the Commission might engage in discussions
13 of the matter. APS notes that the Commission is fully able to discuss the RFP process in general
14 terms, as well as to discuss the Commission's policies regarding renewable resources. APS then
15 indicates its agreement with Commissioner Spitzer that any discussion of specific confidential
16 information should be done in such a manner as to preserve the confidentiality of the information.
17 APS suggests that any Procedural Conference at which the confidential information would be
18 discussed should be limited to parties who have executed a protective agreement, and that the
19 Procedural Conference be held with appropriate restrictions to protect the confidential information.

20 Finally, APS notes that the Arizona Open Meeting Law, A.R.S. § 38-431, *et seq* requires that
21 Commission consideration of this matter occur at a public meeting. APS indicates that it does not
22 believe that confidential information should be disclosed at an Open Meeting, but offers its opinion
23 that Commission consideration of the confidential information may be possible in an Executive
24 Session, pursuant to A.R.S. § 38-431.03, relating to records that are exempt by law from public
25 disclosure.

26 **STAFF ANALYSIS OF CONFIDENTIALITY**

27 The first issue requiring discussion is whether the specific information that APS claims to be
28 confidential is properly protected from public disclosure. In general, Staff agrees with APS regarding

1 the protectability of both the information from which APS' avoided cost could be calculated and the
2 specific bids themselves. With respect to information from which APS' avoided cost could be
3 calculated, the analysis is simple and compelling. When APS or any other utility issues an RFP
4 seeking generation, bidders are competing against each other for the right to provide generation to the
5 utility. However, the utility would likely be deemed imprudent if it paid higher than its avoided cost
6 to acquire such generation. In any event, the utility's avoided cost provides the baseline against
7 which any such bids must be evaluated, and both the utility and its customers would be harmed if
8 bidders had access to the precise calculation.

9 Similarly, the specific bids should be protected from public disclosure. The bids contain
10 proprietary information that each bidder deems necessary for protection from public disclosure. The
11 APS response is clear that it is contractually bound to protect the confidentiality of the bids,
12 indicating that APS' primary interest in maintaining that confidentiality (beyond complying with its
13 contract) is to protect against tainted bids in future procurements. As to the bids, it would seem that
14 each individual bidder would have the ability to release the confidentiality as to its bid. Whether
15 APS would continue to assert a claim of confidentiality if one of the bidders specifically asked that its
16 bid be released to the public is a matter on which Staff can only speculate.

17 The appropriate legal standard to be applied is for the Administrative Law Judge to determine
18 whether the information claimed to be confidential is trade secret, proprietary, or whether the public
19 interest is served by maintaining confidentiality of the information. Staff believes that the specific
20 information meets that legal standard and should be protected.

21 **APPROPRIATE PROTECTIVE MEASURES**

22 APS correctly points out that the Commissioners may discuss the general circumstances
23 surrounding the procurement without any need to release the specific information to the public. Each
24 Commissioner, as well as the Administrative Law Judge, has had access to the information in
25 question. It seems likely that the Commission's discussion of whether to approve the APS
26 Application may proceed without the necessity of discussing the specific details of any of the bids.
27 The procurement process is subject to review and if APS has made an imprudent choice in selecting
28 generation assets, that choice could plainly be addressed in the context of a rate case when APS

1 sought recovery of costs incurred under the contract. If it appears on its face that APS has made an
2 imprudent choice, the Commission has the authority to reject the Application, pending consideration
3 of the appropriateness of the RFP process.

4 Regarding the impact of the Open Meeting Law on Commission consideration of this
5 Application, it is clear that any consideration, deliberation, or legal action regarding the APS
6 Application must occur in a meeting that is open to the public. APS indicates its view that the
7 Commission would be able to discuss the confidential information in an Executive Session, called
8 pursuant to A.R.S. § 38-431.03(A) (2). Unfortunately, the Legal Division is unable to agree with
9 APS' assessment of the Open Meeting Law in this regard.

10 There are two problems with the proposed use of an Executive Session to consider the
11 confidential information in this matter. First, it is Legal Division's opinion that this confidential
12 information may not be the type of information that is available for review under A.R.S. § 38-
13 431.03(A) (2). That statutory exception is designed to allow a public body to convene an Executive
14 Session to receive information that is protected by law from disclosure. In the current situation, the
15 information is confidential by virtue of its proprietary nature, or because the public interest dictates
16 that it be kept confidential. There is no statute providing confidential treatment to this information.

17 In addition, the Open Meeting Law expressly prohibits consideration, deliberation, taking or
18 proposing legal action in an Executive Session. Thus, even if the information met the terms of the
19 Executive Session exception, the Commission would be foreclosed from discussing it in an Executive
20 Session and limited to receiving the documents. Of course, in this case the Commissioners have each
21 already received access to all the information that is at issue and there is no purpose for an Executive
22 Session to serve.

23 Finally, the existence of the Open Meeting Law acts to severely limit the effectiveness of any
24 *in camera* process that might take place in connection with a Procedural Conference. While Staff
25 agrees with APS that the Administrative Law Judge could engage a Procedural Conference for an *in*
26 *camera* review of the documents in question, the Open Meeting Law would act to prevent
27 Commissioners from participating in the *in camera* proceeding, since that participation would require
28 compliance with the Open Meeting Law.

1 **CONCLUSION**

2 The Commission frequently processes Applications requiring consideration of confidential
3 information. The most common circumstance in which this occurs is special contracts that utilities
4 enter with their customers. In those cases, Commission Staff analyzes the circumstances and
5 provides Commissioners with both a public and a confidential version of our Staff Report.
6 Commissioners have access to the confidential information for purposes of their consideration of the
7 Application and the supporting Staff Report. At Open Meeting, Commissioners freely discuss the
8 relative merits of a given contract, but do so without disclosure of proprietary or other confidential
9 information. Staff believes similar processes should be employed in consideration of APS'
10 Application.

11 RESPECTFULLY SUBMITTED this 17th day of October, 2005.

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13 _____
14 Christopher C. Kempley
15 Chief Counsel, Legal Division
16 Arizona Corporation Commission
17 1200 West Washington Street
18 Phoenix, Arizona 85007
19 (602) 542-3402

16 Original and thirteen (13) copies
17 of the foregoing were filed this
18 17th day of October, 2005 with:

19 Docket Control
20 Arizona Corporation Commission
21 1200 West Washington Street
22 Phoenix, Arizona 85007

23 Copy of the foregoing mailed this
24 17th day of October, 2005 to:

25 Thomas L. Mumaw
26 Karilee S. Ramaley
27 Pinnacle West Capital Corp. Law Department
28 P.O. Box 53999, MS 8695
Phoenix, AZ 85004
Attorneys for Arizona Public Service Co.

27 
28 _____
Assistant to Christopher C. Kempley