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BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL

Chairman

JIM IRVIN

Commissioner

MARC SPITZER

Commissioner

Arizona Corporation Commission

DOCKETED

OCT 31 2002

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IN THE MATTER OF THE GENERIC PROCEEDINGS CONCERNING ELECTRIC RESTRUCTURING

DOCKET NO. E-00000A-02-0051

IN THE MATTER OF ARIZONA PUBLIC SERVICE COMPANY'S REQUEST FOR VARIANCE OF CERTAIN REQUIREMENTS OF A.A.C. 4-14-2-1606

DOCKET NO. E-01345A-01-0822

IN THE MATTER OF THE GENERIC PROCEEDING CONCERNING THE ARIZONA INDEPENDENT SCHEDULING ADMINISTRATOR

DOCKET NO. E-00000A-01-0630

ISSUES IN THE MATTER OF TUCSON ELECTRIC POWER COMPANY'S APPLICATION FOR A VARIANCE OF CERTAIN ELECTRIC COMPETITION RULES COMPLIANCE DATES.

DOCKET NO. E-01933A-02-0069

ARIZONA PUBLIC SERVICE COMPANY'S MOTION FOR PROTECTIVE ORDER IN TRACK B

Arizona Public Service Company ("APS" or "Company") hereby submits this Motion for Protective Order to prevent the disclosure of confidential operating and market-related information to Panda Gila River, L.P., ("Panda") and potentially other merchant power plant parties ("Merchant Intervenors") who are competitors of APS and prospective bidders in Track B. This Motion is submitted as a response to Panda's First Set of Data Requests to APS in Track B, which have requested, among other things,

1 information regarding APS' marginal generating costs, projected APS unit performance  
2 and costs, APS wholesale market price forecasts, and the Company's economic dispatch  
3 software and process.<sup>1</sup> A copy of the Data Request and APS' objections thereto are  
4 attached at Exhibit A and B, respectively.

5 Because APS will solicit purchases from Panda or other Merchant Intervenors in  
6 the competitive bidding process established in Track B and/or on a real-time or short-  
7 term basis outside Track B, (see Staff Report at 4), access by the Merchant Intervenors  
8 to such market and cost information would adversely affect bids submitted to APS. This  
9 fact and the competitively-sensitive nature of such information was specifically  
10 recognized by Staff in developing its Track B proposal, which provides that:

11 Price and cost forecasts for power supplies and fuel costs prepared by, or  
12 available to the utility, will not be made available to the bidders.

13 (Staff Report on Track B, at p. 13.) APS does not object to providing such information to  
14 Staff, the Independent Monitor, or RUCO, if requested, as they are not competitors of  
15 APS.

16 Therefore, APS respectfully requests that the Administrative Law Judge ("ALJ")  
17 enter an Order preventing disclosure of confidential cost and market-related information  
18 to the Merchant Intervenors in this proceeding. A proposed order is attached as Exhibit  
19 C. This Motion is supported by the following Memorandum of Points and Authorities  
20 and by the Affidavit of Tom Carlson, which is attached as Exhibit D.

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **I. THE COMMISSION SHOULD PROTECT THE BUYER'S**  
23 **CONFIDENTIAL AND COMPETITIVELY- SENSITIVE MARKET AND**  
24 **COST INFORMATION FROM DISCLOSURE TO THE SELLERS.**

25 The Commission clearly has the authority to protect confidential and

26 <sup>1</sup> Panda has also challenged certain other of APS' objections, which APS anticipates will be  
addressed separately from this Motion to the extent that Panda wishes to pursue them.

1 competitively-sensitive information of regulated public service corporations from  
2 disclosure to competitors in the Track B competitive bidding process. In Track B and in  
3 procurements in the short-term and real time markets, APS will be a buyer and the  
4 Merchant Intervenors will be sellers. Further, in the real time and short-term markets,  
5 APS will be procuring economy energy, which is energy that can be provided by a seller  
6 at a price less than the dispatch cost of APS' next merit-order generating unit.

7 APS is also a seller of energy on the competitive wholesale market. Such sales  
8 are based largely on the sort of marginal cost dispatch and price forecast information  
9 sought by Panda.

10 Clearly, if Panda is provided access to APS' wholesale power market forecasts  
11 (Data Request 1-18), it (the seller) will know what APS (the buyer) expects to be a  
12 reasonable price and this will affect the bids that Panda is willing to submit in Track B.  
13 Economy purchases are similar. If the sellers (such as Panda) know the costs of each  
14 APS unit and APS' economic dispatch process and model, they will know the generation  
15 price that APS is attempting to beat in the real time market and bids will be skewed  
16 towards that price, rather than reflecting the price that the generators would have offered  
17 not knowing APS' "price to beat." By analogy, it is similar to a buyer who is looking at a  
18 new home telling a prospective seller how high they can go to purchase the home before  
19 starting the negotiations. And, in the similar case of APS selling wholesale power, the  
20 release of this information is akin to a homeowner (the seller) telling prospective buyers  
21 the lowest price that the homeowner is willing to accept for their home—an action that  
22 would unquestionably taint the prices that buyers are willing to offer the seller.

23 The need to protect such competitively-sensitive market-related information is  
24 clearly embodied in the Staff Report on Track B, and in Staff's proposal for the  
25 competitive solicitation. That report provides that all forecasts, which are to be provided  
26 to Staff and the Independent Monitor, "will remain confidential ..." (Staff Report, at p.

1 15). The Staff Report also provides that price and cost information from the utilities  
2 “will not be made available to bidders.” (*Id.* at p. 13.) Further, Staff Report allows  
3 bidders to review “non-proprietary materials” produced by the utility not ‘all’ materials.  
4 (*Id.* at p. 9.)

5 Moreover, Panda’s alleged need for this competitively-sensitive information is by  
6 no means ripe. Panda’s argument as to why the pricing information is relevant depends  
7 on the Commission accepting their argument in Track B that the amount of competitive  
8 procurement must be more than proposed by the Staff Report and must include forward  
9 contracting for economy energy purchases. If the Commission rejects this threshold  
10 position and approves the Staff Report, the information that Panda is seeking relating to  
11 economy purchases and dispatch modeling would be moot. If the Commission were to  
12 accept Panda’s argument, the specific amount energy and capacity could be determined  
13 along with the Independent Monitor when APS’ needs assessment is revised. Even in  
14 this case, however, it would be necessary to protect this information from disclosure to  
15 potential bidders.

16 **II. THE RULES OF CIVIL PROCEDURE ALLOW THE COMMISSION TO**  
17 **PROTECT AGAINST THE DISCLOSURE OF COMPETITELY-**  
18 **SENSITIVE INFORMATION**

19 The need to limit discovery of competitively sensitive information is recognized  
20 under the Arizona Rule of Civil Procedure. Rule 26(c)(7) specifically provides for the  
21 protection against the disclosure of confidential information when managing discovery  
22 in a litigated proceeding. Ariz. R. Civ. P. 26(c)(7). The pertinent portions of Rule 26(c),  
23 Ariz. R. Civ. P., provide:

24 [T]he Court in which the action is pending . . . may make  
25 any order which justice requires to protect a party or person  
26 from annoyance, embarrassment, oppression, undue burden  
or expense, including one or more of the following: . . . (7)  
that a trade secret or other confidential research,  
development or commercial information not be disclosed or  
be disclosed only in a designated way. [Emphasis added.]

1           When the production of confidential information to a competitor may adversely  
2 affect the disclosing party, courts have invoked Rule 26(c) to prohibit or severely restrict  
3 disclosure. *See, e.g., Tonnemacher v. Sasak*, 155 F.R.D. 193, 194-95 (D. Ariz. 1994)  
4 (applying the equivalent federal rule); *Wang Lab v. CFR Assocs.*, 125 F.R.D. 10, 13 (D.  
5 Mass. 1989) (same).<sup>2</sup> The result with respect to the Track B process should be no  
6 different.

7           The Commission has incorporated Rule 26 by reference into the Commission's  
8 Rules of Practice and Procedure. A.A.C. R14-3-101(A). Thus, the ALJ has broad  
9 discretion to appropriately apply Rule 26(c)—including limiting disclosure only to the  
10 ALJ for *in camera* consideration. *See Ronson Corp. v. Liquifin Aktiengesellschaft*, 370  
11 F. Supp. 597, 600-01 (D.N.J. 1974) (limiting confidential commercial information to *in*  
12 *camera* inspection by judge). In this case, consistent with this authority and the  
13 discretion of the ALJ, disclosure of competitively-sensitive, market-related information  
14 should be limited to non-competitors such as Staff and RUCO. For the reasons discussed  
15 above, such a limitation is necessary to protect the integrity not only of the competitive  
16 bidding process in Track B, but also APS' future procurement from Merchant  
17 Intervenors in the real-time and short-term markets. Such a limitation is also consistent  
18 with the process that was developed in the Track B workshops and which is reflected in  
19 the current Staff Report.

### 20   **III. CONCLUSION.**

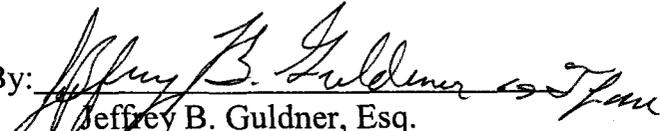
21           Given the adverse impacts to APS that will result if the disclosure of  
22 competitively-sensitive, market-related information to Merchant Intervenors is allowed,  
23 the ALJ should limit disclosure of such information only to Staff (including the  
24 Independent Monitor when appointed) and RUCO through a Protective Order.

25           <sup>2</sup> Although generally not bound by decisions, Arizona courts look to federal opinions for  
26 guidance. *See Cornet Stores v. Superior Court*, 108 Ariz. 84, 86 492 P.2d 1191, 1193 (1972).

1 Accordingly, APS respectfully requests that the Commission enter the form of Protective  
2 Order attached hereto.

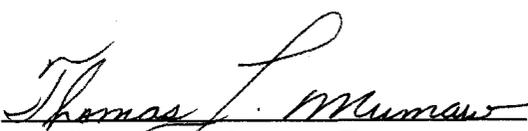
3 RESPECTFULLY SUBMITTED this 1st day of November 2002.

4 SNELL & WILMER

5  
6 By:   
7 Jeffrey B. Guldner, Esq.

8 and

9 PINNACLE WEST CAPITAL  
10 CORPORATION LAW DEPARTMENT

11  
12 By:   
13 Thomas L. Mumaw, Esq.  
14 Karilee Ramaley, Esq.

15 Attorneys for Arizona Public Service  
16 Company

17 The original and 10 copies of the foregoing were  
18 filed this 1st day of November, 2002 with:

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

23 Copies of the foregoing mailed, faxed or  
24 transmitted electronically this 1st  
25 day of November, 2002 to:

26 All parties of record.

  
Vicki DiCola  
1262813.1

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 WILLIAM A. MUNDELL

3 Chairman

4 JIM IRVIN

5 Commissioner

6 MARC SPITZER

7 Commissioner

8 IN THE MATTER OF THE GENERIC  
9 PROCEEDINGS CONCERNING ELECTRIC  
10 RESTRUCTURING

DOCKET NO. E-00000A-02-0051

11 IN THE MATTER OF ARIZONA PUBLIC  
12 SERVICE COMPANY'S REQUEST FOR  
13 VARIANCE OF CERTAIN REQUIREMENTS  
14 OF A.A.C. 4-14-2-1606

DOCKET NO. E-01345A-01-0822

15 IN THE MATTER OF THE GENERIC  
16 PROCEEDING CONCERNING THE  
17 ARIZONA INDEPENDENT SCHEDULING  
18 ADMINISTRATOR

DOCKET NO. E-00000A-01-0630

19 ISSUES IN THE MATTER OF TUCSON  
20 ELECTRIC POWER COMPANY'S  
21 APPLICATION FOR A VARIANCE OF  
22 CERTAIN ELECTRIC COMPETITION  
23 RULES COMPLIANCE DATES.

DOCKET NO. E-01933A-02-0069

**AFFIDAVIT OF  
THOMAS J. CARLSON**

24 STATE OF ARIZONA )  
25 County of Maricopa ) ss.

26 Thomas J. Carlson, being first duly sworn, upon oath, deposes and says:

1. I am the Head of Trading for Arizona Public Service Company ("APS" or "Company").

2. In that role, I am responsible for procuring purchase power and natural gas for APS, and also the marketing of surplus APS generation and natural gas. I have

1 over 10 years experience in commodity trading for APS, and am knowledgeable  
2 about wholesale power trading and general standards of confidentiality in the  
3 energy trading business.

4 3. I have reviewed Panda's First Set of Data Requests in the Track B  
5 Proceeding.

6 4. Question Nos. 1.2; 1.4(f); 1.6(a)(ix) to the extent not reported in FERC  
7 Form 1; 1.6(b) to the extent a response includes confidential pricing information;  
8 1.7(b) through (f); 1-13(d); 1-14(d); 1-18; and 1-21(c) all request the disclosure of  
9 competitively-sensitive information that I believe would adversely affect APS'  
10 ability to buy and sell power in the market, including procurements in the Track B  
11 competitive solicitation.

12 5. The competitively-sensitive information identified in Paragraph 4 is  
13 maintained in strictest confidence in the ordinary course of business.

14 6. Among other things, the request for wholesale market forecasts in Questions  
15 1.4(f) and 1.18 would provide competitors with confidential information on APS'  
16 price forecasts that would likely skew upward any offers to sell to APS towards  
17 those forecasts.

18 7. The dispatch information for APS units requested in Questions 1.2 and  
19 1.21(c) would provide sellers of economy energy to APS with information on the  
20 costs which APS is attempting to beat with a market purchase, which would cause  
21 prices to move higher and towards such costs rather than towards the price a seller  
22 would offer without knowing APS' dispatch costs and model.

23 8. The cost and performance information sought by Questions 1.6(a)(ix),  
24 1.6(b), 1.7(b)-(f), 1.13(d), and 1.14(d) would also give sellers competitive insight  
25 into APS costs, which would likely cause bids to sell to APS to be higher than if  
26 those costs were not known to the seller.

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9. The information described in paragraphs 4-8 would also allow competitors of APS for sales into the competitive wholesale market to undercut APS and reduce both the volume and margin of such sales, both of which would adversely affect APS customers.

10. The release of this information in discovery would be damaging to APS and would, I believe, cause APS to pay more for wholesale power than if such information was kept confidential.

11. None of the information requested by Panda is typically disclosed to competitors in the energy trading business.

Thom J. Carlson

SUBSCRIBED AND SWORN to before me this 31 day of October, 2002.

Norann Ascitto  
Notary Public

My Commission Expires:  
2/12/2006  
1263501.1

