

ORIGINAL <sup>05</sup>



0000035865

BEFORE THE ARIZONA CORPORATION COMMISSION

1  
2 WILLIAM A. MUNDELL  
Chairman  
3 JIM IRVIN  
Commissioner  
4 MARC SPITZER  
Commissioner  
5

2001 DEC 19 P 4: 26

AZ CORP COMMISSION  
DOCUMENT CONTROL

6 IN THE MATTER OF ARIZONA PUBLIC  
SERVICE COMPANY'S REQUEST FOR A  
7 VARIANCE OF CERTAIN REQUIREMENTS OF  
A.A.C. R14-2-1606  
8

DOCKET NO. E-01345A-01-0822

STAFF'S BRIEF IN COMPLIANCE  
WITH PROCEDURAL ORDER

9  
10 On December 4, 2001, the Chief Administrative Law Judge ("ALJ") of the Arizona  
11 Corporation Commission ("Commission") convened a procedural conference in order to discuss the  
12 scope of the issues implicated by the Application for Variance filed by Arizona Public Service  
13 Company ("APS"). APS contends that its application presents fairly narrow issues that are related  
14 entirely to A.A.C. R14-2-1606.B, the rule that APS has asked the Commission to waive. Some of the  
15 other parties, by contrast, contend that the application presents broader issues related to the electric  
16 competition rules as a whole and to APS' settlement agreement. In order both to establish  
17 appropriate procedural guidelines and to narrow the issues, the ALJ ordered the parties to provide  
18 briefs on the following two questions:

- 19 1. Does APS' application for a variance comply with the terms of A.A.C. R14-2-  
20 1614.C?  
21 2. What additional procedures, if any, should the Commission require in order to  
process this application?

22 Although Staff believes that APS' application complies with the elements of R14-2-1614.C,  
23 additional procedural safeguards are necessary to protect the due process rights of the parties to the  
24 APS settlement order and to inform the public of the implications of APS' application. Staff will  
25 address each question in turn.

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Arizona Corporation Commission

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1 **I. Does APS' application for a variance comply with the terms of A.A.C. R14-2-1614.C?**

2 A.A.C. R14-2-1614.C allows affected parties to apply to the Commission for a waiver or  
3 variance of the requirements of the electric competition rules. Specifically, Rule 1614.C requires an  
4 applicant to set forth why a proposed variation will serve the public interest. Some of the intervenors  
5 to this proceeding contend that APS' application is not really a request for a variance, but is instead a  
6 thinly disguised proposal to amend the rules. Staff disagrees with this contention.

7 APS' application asks the Commission to waive the requirements of A.A.C. R14-2-1606.B, a  
8 rule which requires APS to purchase all power for standard offer customers from the competitive  
9 market and to acquire at least fifty percent of that power through a competitive bid. APS contends  
10 that existing non-affiliated generators are not able to provide a sufficiently large block of power to  
11 allow APS to comply with Rule 1606.B. (APS' App. at 3). Accordingly, APS argues, it will either  
12 be unable to comply with Rule 1606.B or it will be able to comply only at great expense. Id.

13 Staff believes that APS' application meets the facial requirements of Rule 1614.C. It is clear  
14 that APS is required to comply with Rule 1606.B, and it is similarly clear that Rule 1614.C provides  
15 a vehicle by which APS may ask to be relieved of those obligations. APS, in its application, has  
16 alleged that its requested variance is in the public interest, claiming that a waiver of Rule 1606.B will  
17 promote both reliable service and lower prices. Staff ultimately may not agree with these  
18 conclusions; still, these allegations appear to satisfy the elements of Rule 1614.C, i.e., that a party is  
19 affected by the rules and that the requested variance will serve the public interest. Accordingly, APS'  
20 application "states a claim" for a variance.

21 Staff also believes that APS' application is not equivalent to a rulemaking docket. It is  
22 obvious that APS' application does not seek to eliminate the rule for all affected utilities, but instead  
23 merely seeks to obtain a waiver on its own behalf. Staff notes that the Commission has indicated that  
24 it intends to initiate a more general proceeding related to electric competition. Once that proceeding  
25 has begun, it may be desirable to consolidate APS' application with it. Nonetheless, APS'  
26 application, on its face, does not ask for amendments to the electric competition rules.

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1 **II. What additional procedural safeguards, if any, should the Commission adopt in order to**  
2 **process APS' application?**

3 If the Commission were to grant APS' application, it would not only have to grant APS a  
4 waiver from the requirements of Rule 1606.B, it would also have to amend Decision No. 61973, the  
5 Commission order that approved the APS settlement. Because this proceeding may potentially  
6 require the Commission to grant such an amendment, it is necessary to protect the due process rights  
7 of the parties to that earlier decision.

8 As APS points out in its application, it has already received a variance to Rule 1606.B:  
9 Decision No. 61973 provides APS a two year extension to comply with the open market purchase and  
10 competitive bid requirements of Rule 1606.B. (APS' App. at 5). Because Decision No. 61973 has  
11 already granted APS a variance from the terms of Rule 1606.B, any additional variations will require  
12 appropriate amendments to Decision No. 61973. In other words, Decision No. 61973 grants APS a  
13 two-year extension from the requirements of Rule 1606.B; in its current application, APS is seeking  
14 an indefinite extension from those requirements. If the Commission were to grant APS' current  
15 application, it would have to amend Decision No. 61973 accordingly.

16 Because APS' application implicates Decision No. 61973, Staff believes that it is appropriate  
17 for the Commission to require APS to provide notice to the parties to that decision. Certainly,  
18 Decision No. 61973 affects rates, and the current application similarly has the potential to affect  
19 rates. A customer's rates are subject to due process protections. See Residential Util. Consumer  
20 Office v. Arizona Corp. Comm'n, 199 Ariz. 588, 593, 20 P.3d 1169, 1174 (App. 2001).

21 Additionally, this application has broader implications that justify requiring APS to provide  
22 broad public notice.<sup>1</sup> This contract, if approved, would govern APS' power acquisition—and thereby  
23 customers' rates until at least 2015. In fact, the proposed contract provides three separate five-year  
24 renewal options. If approved, this contract could last for almost thirty years. In light of the potential  
25 repercussions of this matter, Staff believes that APS should be required to provide notice of its  
26 application to both the parties to its settlement order and its customers.

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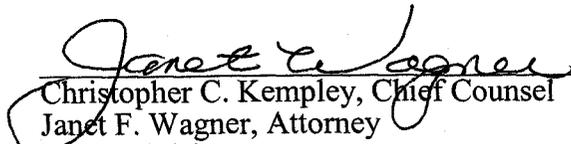
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<sup>1</sup> APS' application does not contain a service list; accordingly, Staff assumes that APS has not served its application upon any parties other than the Commission.

1 **III. Conclusion**

2 Staff may not ultimately agree with APS on the merits of its application; nonetheless, the  
3 application meets the facial elements of Rule 1614.C in a manner that at least "states a claim for  
4 which relief may be granted." APS is plainly incorrect, however, in its claim that its application does  
5 not seek to amend Decision No. 61973. Because it seeks additional variances to those already  
6 approved in that earlier decision, the Commission's approval of APS' application would plainly  
7 require it to amend Decision No. 61973 to conform. Because the APS application seeks to amend a  
8 prior decision and because that prior decision affects rates, the principles of due process require that  
9 the parties to that earlier decision be afforded notice. Finally, because the proposed variance and  
10 contract have such far-reaching implications, the Commission should require APS to provide notice  
11 of this proceeding to all of its customers.

12 RESPECTFULLY SUBMITTED this 19th day of December, 2001.

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