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Re: Arizona Public Service Company  
Docket No. E-01345A-01-0822

Dear Ms. Cole:

Enclosed for filing in the above-captioned proceeding are the original and ten (10) copies of the Brief on Procedural Issues and Requirements by Southwestern Power Group, II, L.L.C., Toltec Power Station, L.L.C. and Bowie Power Station, L.L.C. I have also enclosed two copies to be conformed and returned to our office in the enclosed self-addressed stamped envelope.

Please let me know if you have any questions, and thank you for your assistance.

Sincerely,

*Lawrence V. Robertson, Jr.*  
Lawrence V. Robertson, Jr.

LVR:cl  
enclosures

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**BEFORE THE ARIZONA CORPORATION COMMISSION**

IN THE MATTER OF THE ARIZONA ) Docket No. E-01345A-01-0822  
PUBLIC SERVICE COMPANY'S )  
REQUEST FOR A VARIANCE OF ) BRIEF ON PROCEDURAL ISSUES AND  
CERTAIN REQUIREMENTS OF A.C.C. ) REQUIREMENTS  
R14-2-1606 )  
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**I.**

**INTRODUCTION**

Pursuant to the Procedural Order issued on December 11, 2001 by the Chief Administrative Law Judge, Southwestern Power Group II, L.L.C. ("SWPG"), Toltec Power Station, L.L.C ("Toltec") and Bowie Power Station L.L.C. ("Bowie") hereby submit their brief

"addressing the appropriate procedural<sup>1</sup> mechanism for the Commission's consideration of this (APS's) requested variance and whether and what additional due process requirements are needed. ..." [Procedural Order at page 1, lines 25-27]

<sup>1</sup> As noted in the title, SWPG, Toltec and Bowie's brief is confined to a discussion of procedural matters. SWPG, Toltec and Bowie will address the merits of APS's Request for Variance, and related substantive issues, once the appropriate proceeding(s) for such purpose has/have been determined.

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II.

**DISCUSSION**

In the interest of brevity, SWPG, Toltec and Bowie hereby adopt and incorporate herein by reference the discussion and citation of authorities set forth in the legal brief being filed by the Arizona Competitive Power Alliance ("Alliance") pursuant to the above-cited portion of the December 11, 2001 Procedural Order. In addition, SWPG, Toltec and Bowie make the following observations.

A. **The Commission Lacks Authority To Grant The Variance On The Basis Cited and Relied Upon By APS.**

In its November 26, 2001 Reply to the November 16, 2001 Response of the Arizona Corporation Commission Staff, Arizona Public Service Company ("APS") expressly states that

APS sought only a variance to one subsection of one of the Arizona Corporation Commission's 17 electric competition rules . . . The Company's request is specifically authorized by A.A.C. R14-2-1614(C)" [APS Reply at page 2, lines 16-17 and 20-21, respectively.] [Emphasis added]

APS is in error, both factually and legally, in its assertions. As a consequence, its procedural posture is analogous to the proverbial saying that

". . . you can't get there from here. . ."

More specifically, as the Alliance's Brief and the Staff's November 16, 2001 Response discuss, and as several parties noted during oral remarks at the December 5, 2001 Procedural Conference, APS cannot achieve the underlying goal of its Request for Variance without (i) an amendment to the Settlement Agreement and Addendum and (ii) an amendment to or rescission of

1 the Commission's Decision No. 61973.<sup>2</sup> The granting of a variance alone will not suffice. Rather,  
2 APS must first negotiate the necessary amendment of the Settlement Agreement and Addendum with  
3 the signatory parties. Thereafter, if successful, it must seek a Commission decision approving the  
4 negotiated changes, and rescinding, altering or amending Decision No. 61973 pursuant to A.R.S. §  
5 40-252. Moreover, the opportunity for intervention and participation in such a proceeding must first  
6 be afforded to any person who might be "directly and substantially affected" by the proceeding and  
7 any resulting decision. [A.A.C. R14-3-105]  
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10 Thus, setting aside the question of whether the nature and effect of APS's request is  
11 consistent with the language and intent of the Commission's procedures for variations or exemptions  
12 from the Commission's Retail Electric Competition Rules, APS has quite simply failed to invoke  
13 and satisfy the requisite jurisdictional and procedural predicates to a realization of its goal.<sup>3</sup> Those  
14 are pre-requisites that cannot be "waived" or made the subject of a variance or exemption by either  
15 APS or the Commission. The signatory parties to the Settlement Agreement and the Addendum, and  
16 persons who could be directly and substantially affected by Commission approval of any amendment  
17 thereof, have certain legal rights which must be recognized and protected.  
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24 <sup>2</sup> In the prepared testimony filed on December 12, 2001, APS endeavors to suggest there is no linkage between  
25 Decision No. 61973 and the Addendum. However, it is clear that the Commission contemplated there would be an  
26 Addendum in the nature of that which was subsequently executed at the time it issued Decision No. 61973 approving  
27 the Settlement Agreement.

28 <sup>3</sup> That question is discussed in the Alliance's Brief; and SWPG, Toltec and Bowie reserve the right to address it further  
elsewhere, when substantive issues, as opposed to procedural, and arguments on the merits are under consideration.

1                   **B.     An A.R.S. § 40-252 Proceeding Represents An Appropriate Procedural**  
2                   **Mechanism For Consideration of APS's Request.**

3                   Given the fact that approval of APS's Request for Variance would require a Commission  
4                   decision rescinding, altering or amending Decision No. 61973, it follows as a matter of logic that  
5                   a proceeding conducted pursuant to A.R.S. § 40-252 is an appropriate procedural mechanism  
6                   through which APS's request could be addressed on its merits. The Commission's exercise of  
7                   discretion and jurisdiction under A.R.S. § 40-252 is governed by consideration of what course of  
8                   action would be in the "public interest." See, e.g. Arizona Corp. Commission v. Arizona Water Co.,  
9                   111 Ariz. 74, 523 P.2d 505 (1974); James P. Paul Water Co. v. Ariz. Corp. Com'n, 137 Ariz. 426,  
10                  671 P.2d 404 (1983). Clearly, the merits of APS's request and all ramifications that might flow from  
11                  a granting of the same could be examined within the context of the "public interest." Moreover, an  
12                  A.R.S. § 40-252 proceeding would provide an opportunity for recognition and protection of the  
13                  rights of persons who might be directly and substantially affected by the end result of such a  
14                  proceeding.

15                  However, such a proceeding would be premature unless and until APS has successfully  
16                  negotiated those amendments to the Settlement Agreement and Addendum which are integral to the  
17                  ultimate objectives underlying its Request for Variance. The consent of the signatory parties is a  
18                  prerequisite to such action, and consensual in nature. It cannot be bypassed or ignored. Nor can it  
19                  be compelled after the fact by a decision issued in a previously commenced proceeding conducted  
20                  pursuant to A.R.S. § 40-252. In the spirit of "first things first," the consent of the signatory parties  
21                  should precede the convening of an A.R.S. § 40-252 proceeding to consider APS's request.  
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1 Original and ten (10) copies  
2 hand-delivered this 19<sup>th</sup> day of  
3 December, 2001, to:

4 Docket Control  
5 Arizona Corporation Commission  
6 1200 W. Washington St.  
7 Phoenix, Arizona 85007

8 Copy of the foregoing  
9 sent via facsimile and mailed  
10 this 19<sup>th</sup> day of December, 2001 to:

11 Lynn Farmer  
12 Chief Administrative Law Judge  
13 Hearing Division  
14 Arizona Corporation Commission  
15 1200 W. Washington St.  
16 Phoenix, Arizona 85007

17 A copy of the of the foregoing  
18 was mailed on this 19<sup>th</sup> day of  
19 December, 2001, to:

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