



0000035885

RECEIVED

2002 FEB -4 P 4: 26

BEFORE THE ARIZONA CORPORATION COMMISSION

DOCKETED

AZ CORP COMMISSION
DOCUMENT CONTROL

FEB 04 2002

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

DOCKETED BY *nas*

E-01345A-

DOCKET NO. E-01365A-01-0822

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

PANDA'S RESPONSE TO ARIZONA
PUBLIC SERVICE COMPANY'S
SUPPLEMENTAL BRIEF ON THE
APPLICATION OF A.R.S. § 40-252 TO
THIS PROCEEDING

Panda Gila River, L.P. ("Panda") hereby responds to the Arizona Public Service Company's ("APS") Supplemental Brief on the Application of A.R.S. § 40-252 to this Proceeding.

I. APS's Premature Supplemental Brief Fails To Set Forth Any Basis For Reconsidering the ALJ's Anticipated Ruling To Treat APS's Request For A Variance As An A.R.S. § 40-252 Proceeding.

APS filed its Supplement Brief prior to a decision being issued by the Chief Administrative Law Judge ("ALJ") in an attempt to influence what APS speculates will be an unfavorable ruling. The brief was filed before APS, the Arizona Corporation Commission ("Commission") or any other party has learned the extent and impact of the ALJ's ruling. Consequently, APS's speculative brief is premature and should be rejected by the Commission.

As a basis for its need to file a supplemental brief, APS claims only that "the ALJ's proposed ruling frankly took APS by surprise." APS Supplemental Brief at 1. APS may be surprised that the ALJ did not express an intent to rule precisely as APS requested. However, APS should have considered that the ALJ would have adopted

1 one of the arguments set forth by another party. The Arizona Competitive Power
2 Alliance (“Alliance”) specifically argued that APS’s variance request would, if
3 approved, require an amendment to Decision No. 61973 and, therefore, the
4 appropriate procedure to effectuate such change is found in A.R.S. § 40-252 which
5 allows the Commission to rescind, alter or amend an earlier decision. *See* Alliance
6 Brief at 15-17 (A copy is attached hereto as Exhibit A and incorporated herein by this
7 reference).

8 Further, the ALJ’s anticipated ruling, that the APS request may require an
9 amendment to Decision No. 61973 and, therefore, the proper procedural method for
10 addressing the request includes compliance with A.R.S. § 40-252, is timely. There is
11 absolutely no reason why the Commission cannot or should not concurrently mandate
12 compliance with A.R.S. § 40-252 given the possibility that Decision No. 61973 must
13 be amended. Thus, in sum, APS’s “surprise” is nothing more than an expression of
14 its displeasure at a possible ruling that does not give APS precisely what it requested.

15 **II. Commission Precedent Does Not Obviate The Need To Seek Approval To**
16 **Amend The Electric Competition Rules Or The APS Settlement.**

17 APS erroneously contends that Decision No. 61973 authorizes variances
18 and/or amendments to the Electric Competition Rules and the APS Settlement
19 without Commission approval. Although the Commission rejected language in the
20 APS Settlement that it deemed to be too binding, Decision No. 61973 in no way
21 obviates the Commission approval process. In fact, Decision No. 61973 states, “**the**
22 **Commission** must be able to make rule changes/other future modifications that
23 become necessary over time.” Decision No. 61973 at 9 (emphasis added). The
24 Decision does not say the parties need to be able to change the rules or settlement.
25 APS’s claim that Decision No. 61973 allows changes to the Electric Competition
26 Rules and the APS Settlement without Commission approval is, therefore, incorrect.

1 APS also cites to Decision Nos. 63316 and 63364 as precedent for amending
2 the Electric Competition Rules without modifying Decision No. 61973. First,
3 whether or not Decision No. 61973 must be amended requires a case-by-case
4 analysis. Second, the fact that matters such as the amendment of the environmental
5 portfolio standard in Decision No. 63364 did not require amendment of Decision No.
6 61973, is irrelevant to the ALJ's ruling in the APS variance request. The
7 Commission's decision concerning the environmental portfolio standard, unlike
8 exempting APS from Rule 1606(B), was never referenced in or tied to the APS
9 Settlement. Therefore, the Commission's decisions in these matters do not provide
10 binding precedent.

11 Additionally, APS cites the fact that parties to the APS Settlement have not
12 alleged that Decision No. 61973 must be amended in order for APS's variance to be
13 approved. This fact, however, is meaningless. Decision No. 61973 is a decision of
14 the Commission that any person is entitled to rely upon. APS's suggestion that
15 persons other than parties to a particular matter, such as ratepayers, power producers
16 and others, cannot rely on Commission decisions has no merit.

17 Lastly, APS expresses concern that by invoking A.R.S. § 40-252, the
18 Commission may reopen the APS Settlement which in turn could threaten the
19 financial stability of APS. APS's scare tactic is nothing more than an attempt to limit
20 the scope of the Commission's decision to only those issues raised by APS regardless
21 of what is in the best interest of the other parties and the citizens of Arizona.
22 Obviously, in any decision reached by the Commission consideration should be given
23 to all relevant issues. However, to suggest that the Commission cannot and should
24 not consider all aspects of electric competition is unwise. In fact, the Commission has
25 already opened its generic docket specifically for the purpose of reevaluating electric
26

1 competition in Arizona. Therefore, the door to any uncertainty in the future of the
2 APS Settlement and the Electric Competition Rules has already been opened.

3 **III. Conclusion.**

4 For these reasons, Panda urges this Commission to reject the premature
5 Supplemental Brief of APS. Further, Panda requests that the ALJ issue a ruling
6 invoking A.R.S. § 40-252 and finding that the appropriate procedure to consider
7 APS's variance request includes the Commission's ability to rescind, alter or amend
8 Decision No. 61973.

9 RESPECTFULLY SUBMITTED this 4th day of February, 2002.

10 FENNEMORE CRAIG

11
12 BY: 

13 C. Webb Crockett

14 Jay L. Shapiro

15 Karen E. Errant

16 Attorneys for Panda Gila River, L.P.

17 **ORIGINAL +10 copies of the foregoing**
18 **filed this 4th day of February, 2002 with:**

19 Docket Control
20 ARIZONA CORPORATION COMMISSION
21 1200 West Washington
22 Phoenix, Arizona

23 **COPY delivered this day to:**

24 Lyn Farmer
25 Chief Administrative Law Judge
26 ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Chris Kempley
Chief Counsel
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona

Ernest Johnson
Utilities Director
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona

COPY mailed this day to:

Scott S. Wakefield
RUCO
2828 N. Central Ave., Ste. 1200
Phoenix, AZ 85004

Greg Patterson
245 West Roosevelt
Phoenix, AZ 85003
Arizona Competitive Power Alliance

Walter W. Meek, President
Arizona Utility Investors Association
2100 N. Central Ave., Ste. 210
Phoenix, AZ 85004

Lawrence V. Robertson, Jr.
MUNGER CHADWICK, PLC
333 North Wilmot, Ste. 300
Tucson, Arizona 85711
Southwestern Power Group, LLC
Toltec Power Station, LLC
Bowie Power Station, LLC
Sempra Energy Resources

1 Roger K. Ferland
2 QUARLES & BRADY STREICH LANG, LLP
3 Renaissance One
4 Two North Central
5 Phoenix, Arizona 85004-2391
6 PG&E National Energy Group

7 Steven J. Duffy
8 RIDGE & ISAACSON
9 3101 N. Central Ave., Ste. 1090
10 Phoenix, AZ 85012

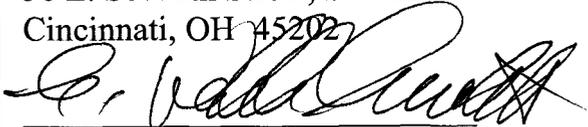
11 Steve Lavigne
12 Director of Regulatory Affairs
13 Duke Energy
14 4 Triad Center, Ste. 1000
15 Salt Lake City, UT 84180

16 Robert S. Lynch
17 Arizona Transmission Dependent Utility Group
18 340 E. Palm Lane, Ste. 140
19 Phoenix, AZ 85004-4529

20 Dennis L. Delaney
21 KR Saline & Associates
22 160 N. Pasadena, Ste. 101
23 Mesa, AZ 85201-6764

24 Thomas L. Mumaw
25 Jeffrey B. Guldner
26 SNELL & WILMER
One Arizona Center
Phoenix, AZ 85004
Arizona Public Service Company

Michael L. Kurtz
BORHM, KURTZ & LOWRY
36 E. Seventh Street, Ste. 2110
Cincinnati, OH 45202



EXHIBIT

A

1 BEFORE THE ARIZONA CORPORATION COMMISSION RECEIVED CWC
2 DEC 21 2001
3 ACTION _____

4 WILLIAM A. MUNDELL
5 CHAIRMAN
6 JIM IRVIN
7 COMMISSIONER
8 MARC SPITZER
9 COMMISSIONER

DOCKET NO. 3-01345A-01-0822

10 IN THE MATTER OF THE ARIZONA
11 PUBLIC SERVICE COMPANY'S
12 REQUEST FOR VARIANCE OF
13 CERTAIN REQUIREMENTS OF A.A.C.
14 R14-2-1606.

15 **BRIEF OF ARIZONA COMPETITIVE
16 POWER ALLIANCE ON THE PROPER
17 PROCEDURAL MECHANISM FOR
18 CONSIDERATION OF APS REQUEST
19 FOR VARIANCE**

20 **I. INTRODUCTION**

21 The Arizona Competitive Power Alliance ("Alliance")¹, through
22 undersigned counsel, hereby responds to the December 11, 2001 Procedural Order
23 of the Arizona Corporation Commission (the "Commission") that the parties to the
24 above-captioned proceeding file briefs "addressing the appropriate procedural
25 mechanism for the Commission's consideration of this requested variance and
26 whether and what additional due process requirements are needed." December 11,
2001, Procedural Order at p. 1.

On the eve of the commencement of wholesale competition in the State of
Arizona, Arizona Public Service Company ("APS") has suddenly declared that the
"volatile wholesale market" requires it to renege on the Settlement Agreement that
it signed, to unravel the longstanding regulation on which that Agreement is based,
to declare a state of emergency with regard to its power needs, and to ask this

¹ The Alliance consists of the following companies: Allegheny Energy Supply, Caithness Energy LLC, Calpine, Duke Energy North America, LLC, Gila Bend Partners LLC, Mirant Americas, Inc., Panda Energy International, Inc./Teco Power Services Corporation, PG&E National Energy Group, PPL Montana, LLC, Reliant Energy and Sempra Energy Resources Southwestern Power Group II, LLC.

1 Commission to bless a self-serving, self-dealing power purchase agreement of up
2 to 30 years' duration. The results of this request would be to foreclose
3 competition, to rob consumers of the benefits of that competition, to frustrate the
4 substantial investments made in the State of Arizona by numerous competitors
5 who relied on the State's restructuring initiatives, and to guarantee recovery to
6 Pinnacle West Capital Corporation ("PWCC"), on the ratepayers' backs, of a
7 purported billions of dollars in investment.

8
9 In short, as Commission Staff has accurately noted, "(T)he APS Request is
10 in contravention of every objective of the Commission's Electric Competition
11 Rules, as well as the APS settlement." Staff's Response, November 16, 2001 at p.
12 4. Indeed, a direct effect of granting the APS variance and approval of the
13 Purchase Power Agreement with its affiliate entity, PWCC, would be the de facto
14 repeal of a critical provision of the Electric Competition Rules. Under the Arizona
15 Administrative Procedure Act a rule cannot be repealed without a rulemaking.
16 ARS §41-1022. Thus, it would be legally improper to grant the variance APS has
17 requested in this proceeding. Moreover, to do so would breach the Settlement
18 Agreement and violate the Commission's Decision on which the Electric
19 Competition Rules are based. More importantly, it is simply bad public policy to
20 address issues that will have such industry-wide implications as well as direct
21 significance to every consumer of electricity in Arizona in an ad hoc variance
22 proceeding for a single company. Instead, the Commission should do as it has
23 done under similar circumstances in the past. It should open a generic
24 investigative docket to allow a full and fair consideration of these and the other
25 issues raised by the Intervenors to this proceeding and the Commissioners.
26

1 **II. THE CORPORATION COMMISSION CANNOT, AS A MATTER**
2 **OF LAW, AND SHOULD NOT, AS A MATTER OF PUBLIC**
3 **POLICY, GRANT THE RELIEF SOUGHT BY APS THROUGH THE**
4 **EXEMPTION PROVISIONS OF A.A.C. R14-2-1614.C.**

4 **A. The APS Exemption Request, If Granted, Would be a *De Facto***
5 **Repeal of A.A.C. R14-2-1606.B. and a Rule Cannot be Repealed**
6 **Through the Exemption Process**

7 Although APS styles its pleading as a partial variance, in reality APS is
8 seeking an exemption from the requirements of A.A.C. R14-2-1606.B. Granting
9 APS an exemption from the competitive bidding requirements, because of its
10 relative size as a utility distribution company (“UDC”) and its potential share of
11 the future long-term wholesale market, would so entirely undermine the economic
12 viability of that market that the competitive bidding process sought by A.A.C.
13 R14-2-1606.B could not be achieved. Indeed, granting the exemption to APS
14 would ensure that PWCC has practically all of the standard offer load requirements
15 under contract within APS’ service area.

16 At the outset it should be noted that A.A.C. R14-2-1606.B already has been
17 interpreted by APS to significantly restrict the size of the state’s wholesale power
18 market that must be obtained by competitive bidding. UDCs need only subject “at
19 least 50%” of their power purchases to competitive bidding and the competitive
20 bidding process is only required of “investor owned” UDCs such as APS.
21 Removing APS from what is already a limited market effectively eviscerates
22 wholesale competition in Arizona for up to thirty years.

23 Pinnacle West’s 2000 corporate Annual Report declares that “APS is
24 Arizona’s largest electric utility and provides retail and wholesale electric service
25 to the entire state with the exception of Tucson and about one-half of the Phoenix
26 area.” 2000 Annual Report, p. 19. In fact, APS serves about 45% of Arizona’s

1 population. APS retail sales for 2000 were 22.5 billion KWH (2000 Pinnacle West
2 Statistical Report, p. 84). Assuming a conservative three percent annual growth
3 rate, the annual retail sales for the first year of competitive bidding (2003) would
4 be as much as 24.6 billion KWH. Absent the exemption that APS is requesting
5 there would be 50% of that amount or 11.3 billion KWH subject to competitive
6 bidding in 2003. APS, however, is proposing to limit the amount of its market to
7 270 MW or 1.2 billion KWH. In other words, through its requested exemption
8 APS intends to eliminate 11.1 billion KWH from the competitive market in 2003
9 alone. This means an immediate reduction in the potential wholesale market of
10 2,500 MW or the total capacity of one or more powerplants.

11 Even these facts understate the impact of the elimination of APS as a
12 purchaser on the competitive market. The market contraction occurs at the most
13 inopportune time. When companies that have built or are building powerplants
14 need to begin recouping their investments, APS proposes to eliminate a large
15 percentage of the market on which they have relied in making those investments.
16 Moreover, under the APS proposed exemption the UDC portion of APS' business
17 will be an extremely limited purchaser in the competitive marketplace. However,
18 Pinnacle West, as a competitive generator of energy, is in no way prevented from
19 competing against the independent power providers for what is left of the market
20 APS has deserted. In view of the effect on market size of APS' exit there is no
21 viable wholesale market and the provisions of A.A.C. R14-2-1606.B that assume
22 such a market are effectively repealed.

23 Granting an exemption from competitive bidding to APS, the UDC with the
24 greatest resources and most sophisticated system for power purchases in Arizona
25 would establish a precedent for every other UDC in Arizona with its own affiliated
26

1 generation company. Other UDCs will inevitably seek similar exemptions, thus
2 destroying what remains of the competitive wholesale, in-state market. The
3 Commission would be hard-pressed to deny such requests without being subject to
4 charges of unlawful discrimination.

5 For example, Tucson Electric Power Company ("TEP") is subject to a very
6 similar Amended Settlement Agreement, Commission Opinion and Order and the
7 same minimum 50% competitive power purchase requirements in A.A.C. R14-2-
8 1606. B as APS. As with APS, TEP is proposing to significantly increase its
9 electric generation capacity by the addition of Units 3 and 4 to its Springerville
10 Powerplant. The factors cited by APS as justification for seeking an exemption
11 from the competitive bidding requirements and endorsement of an exclusive long
12 term wholesale contract with its affiliate generation entity are equally applicable to
13 TEP. Thus, there is every reason to believe that TEP will seek the same exemption
14 from competitive bidding as APS. In the case of TEP, using the same retail sales
15 data (from TEP's Form 10-K, Table 11) and adjustments for growth described
16 above, an exemption from the competitive bidding requirements would mean the
17 loss of 3.3 billion KWH from the wholesale market. While Salt River Project's
18 ("SRP") obligation to remain in the competitive market place is not driven by the
19 regulation from which APS seeks an exemption, SRP, with its own significant and
20 growing generation capacity, has every incentive to follow APS' lead in
21 attempting to obstruct the competitive wholesale market. Thus, granting APS the
22 exemption it seeks creates not a "slippery slope" but an avalanche that will bury
23 wholesale electric competition for the next thirty years before it has an opportunity
24 to provide substantial benefits to Arizona consumers of electricity. In fact,
25 because of the Settlement that APS now seeks to undermine, retail customers' bills
26

1 have been lowered by 4.5% and are slated to be lowered by an additional over 1%
2 per KWH annually through 2003.

3 Under A.R.S. §41-1022.A, the provisions of Article 3, Chapter 6, Title 41
4 of the Arizona Revised Statute are the exclusive procedures by which a rule may
5 be repealed. Citing language similar to that in A.R.S. §41-1022 under the federal
6 Administrative Procedure Act, Federal Courts of Appeal have consistently held
7 that actions or inactions by federal agencies that effectively repeal a rule must be
8 undertaken through the rulemaking process. EDF v. Gorsuch, 713 F.2d 802, 807,
9 808 (D.C. Cir. 1983) (Agency actions that prevent full implementation of agency's
10 rules amount to repeal of those rules and can only be effectuated through
11 rulemaking); NRDC v. EPA, 683 F.2d 752, 761 (3d Cir. 1982) (Indefinite
12 postponement of rule's effectiveness treated as de facto repeal of the rule and
13 requires rulemaking).

14 The APS request for an exemption would so undermine the wholesale
15 market for electric power in Arizona that the market is no longer viable. When
16 other potential purchasers from the wholesale market see an opportunity to avoid
17 competition by purchasing power from their own generation affiliates their
18 fiduciary duty as prudent corporate managers will be to adopt the same course of
19 action. The result will be not just a nonviable wholesale market but no market at
20 all. In other words, what APS seeks is not an exemption from A.A.C. R14-2-
21 1606.B but its repeal and repeal of a rule requires a rulemaking.

22 **B. Granting the Exemption Sought by APS Will Breach the**
23 **Settlement Agreement, Violate the Commission's Decision**
24 **Adopting that Agreement and the Commission's Commitment to**
25 **Uphold the Agreement in its Subsequent Decision-Making.**

26 The Agreement's signatories and the Commission in Decision No. 61973

1 found the Agreement to be in the public interest because it resulted in the
2 “functional separation APS’ power production and delivery functions.”
3 Agreement, p.1. See also Decision at p. 4. The APS exemption effectively
4 destroys this separation by allowing APS to enter into a 30-year purchase power
5 agreement with its own affiliate, PWCC.

6 As originally contemplated, UDCs would have been required to divest their
7 generation assets to a third party. This requirement was seen as necessary in order
8 to ensure a fully competitive market. However, with changes such as the
9 requirement for a code of conduct, the Commission allowed UDCs to divest
10 generation assets to an affiliate. Thus, APS’ request amounts to complete reversal
11 of the divestiture requirement.

12 Moreover, in its Decision, the Commission explicitly adopted the position
13 urged by NEV Southwest that if APS created an independent generation affiliate
14 that affiliate could participate in the competitive bidding process but would be
15 treated no differently than any other generating company. Under the Commission
16 rule all agreements affected by APS would have to be “arms-length” transactions
17 pursuant to a transparent, open bargaining process. As the Commission stated:

18 According to NEV Southwest, APS indicated that it intends
19 to establish a generation affiliate under Pinnacle West, not under
20 APS. Further, that APS intends to procure generation for standard
21 offer customers from the wholesale generation market as provided
22 for in the Electric Competition Rules. Additionally, it was NEV
23 Southwest’s understanding that the affiliate generation company
24 could bid for the APS standard offer load under an affiliate FERC
25 tariff, but there would be no automatic privilege outside of the
26 market bid. NEV Southwest supports the aforementioned concepts
and recommended they be explicitly stated in the Agreement.
We concur with NEV Southwest.

APS, in the Variance Request, indicated its intention to do exactly what the

1 Decision said it cannot do - - it will purchase power from its affiliate without
2 competitive bidding or an arms' length bargaining process.
3

4 Finally, the Addendum to the Settlement Agreement provides that "APS
5 shall procure generation for Standard Offer customers from the competitive market
6 as provided for in the Electric Competition Rules. An affiliated generation
7 company formed pursuant to this Section 4.1 may competitively bid for APS'
8 Standard Offer load, but enjoys no automatic privilege outside of the market bid on
9 account of its affiliation with APS." Addendum to Settlement at p. 3 (emphasis
10 supplied).

11 The phrase "as provided for in the Electric Competition Rules" meant
12 exactly that. Generation is to be obtained in the competitive market contemplated
13 by the rules when the Agreement became effective. Nothing in the language of the
14 Settlement Agreement or its Addendum suggests that the parties ever intended to
15 allow APS to escape the rules by seeking an exemption from competitive bidding.
16 Instead, the endorsement by the Commission in the second sentence of the
17 provision of a truly competitive bidding process would be meaningless if APS
18 were exempt from the bidding requirement and could purchase from its own
19 affiliate.

20 APS' apparent view that the parties to the Settlement Agreement always
21 assumed that APS' commitment to the Agreement and the Electric Competition
22 Rules was subject to later abrogation through the rule exemption process is
23 undermined by APS' own statements about the Agreement. In testimony during
24 the Settlement Agreement Hearing PWCC's President, Jack Davis, had the
25 following exchange with Tim Hogan, representing the Arizona Consumers
26 Council:

1 Mr. Hogan: So it's the company's intention to make the commission actually a
2 party to this (settlement) agreement and bound by its provisions upon approval by
the Commission, correct?

3 Mr. Davis: It's our intent, yes.

4
5 Mr. Hogan: So the intent of this agreement is to bind future Commissions to the
6 terms of this agreement?

7 Mr. Davis: Yes

8 Mr. Hogan: So you haven't discussed what the company would do in the event
9 that a future commission would choose to breach the terms of the agreement.

10 Mr. Davis: No, I have not done that. We are assuming that the Commission will
live up to its agreements.

11
12 Mr. Hogan: What I'm particularly interested in here is what if the Commission
13 was presented with a complaint by customers to lower rates? Would it be a breach
14 or inconsistent with the provisions of this agreement for the commission to
entertain that complaint?

15 Mr. Davis: Yes, as I read that statement, it would be inconsistent with the
16 provisions of this Agreement.

17 Transcript at pp. 345, 346.

18 Thus, in APS' mind, short of terminating the Agreement, the Commission
19 was strictly bound by its terms in no uncertain terms. The same belief by APS that
20 all parties to the Settlement Agreement must adhere strictly to the terms of the
21 Agreement is repeated on numerous occasions in Mr. Davis' testimony. Indeed, it
22 was APS' position that the terms of the Settlement Agreement superseded even
23 those in the Electric Competition Rules. For example, in later questioning by Mr.
24 Hogan there is the following exchange:

25 Mr. Hogan: So aside from what you've told us was the intention - - the current
26 intention to have that (competitive generation) affiliate be a subsidiary of Pinnacle

1 West, is there anything that would preclude that affiliate from being a subsidiary of
2 APS?

3 Mr. Davis: Not as presently written by the competition rules.

4 Mr. Hogan: Nor as contemplated by this agreement?

5 Mr. Davis: That's correct.

6 Mr. Hogan: And, in fact, even if the competition rules were amended to foreclose
7 that possibility, it could still be done under this agreement, couldn't it?

8 Mr. Davis: Yes, I believe it could be.

9 Transcript at p. 361.

10 It is readily apparent from APS' testimony that when the Settlement
11 Agreement was negotiated as well as during the various proceedings implementing
12 the Agreement that APS supported the Agreement and intended it and every other
13 party to be bound by its terms. Indeed, in its Post-Hearing Brief following the
14 Settlement Agreement hearing, APS vigorously attacked any party to the
15 Settlement Agreement that would contemplate doing exactly what APS is
16 attempting with its variance request.² According to APS:

17
18 As in any contract, the parties to the Settlement negotiated
19 provisions meant to ensure that its terms would not unilaterally
20 abrogated (e.g., Settlement at §3.5). Obviously, a Settlement has no
21 value if some parties can simply change the terms of the agreement
22 to the detriment of other parties whenever they feel like it. APS
23 Brief August 5, 1999 at p. 16.

24 Thus, APS' present attempt to be exempted from the terms of the

25 ² Another example is APS' comments on the Proposed Revisions to the Electric Competition Rules APS
26 declared: "APS does not oppose the long term objective of having structural and legal separation of
competitive generation from regulated aspects of the electric business. Similarly, the regulated entity
should neither subsidize nor show undue favoritism to the competitive generation affiliate." Letter to Roy
T. Williamson from Donald G. Robinson, July 6, 1998 at p. 2 (footnote omitted).

1 Settlement Agreement runs directly contrary to the intent of the parties as well as
2 APS' own clearly declared intent.³

3 Finally, it should be noted that previous attempts to obtain the relief sought
4 in this exemption request have been rejected by the Commission.

5 A.A.C. R14-2-1606.B, as initially drafted, would have allowed a UDC to
6 "modify any provisions of this subsection for good cause." Decision No. 61272,
7 Appendix A, p. 31 (December 11, 1998). In response to an objection from Calpine
8 that the language would allow circumvention of the objective of creating a
9 competitive market for electric power, the provision was dropped. See e.g.
10 Decision No. 61634, Appendix A., p. 69 (April 23, 1999); Comments of Calpine
11 Power Services (January 29, 1999).

12 In response to the argument that structural unbundling alone was sufficient
13 to guarantee competitiveness, Calpine and other IPPs pushed for the language in
14 A.A.C. R14-6-1606.B to prevent a UDC from doing exactly what APS is seeking
15 with its exemption – allowing a UDC to purchase 100% of its power "in the open
16 market" but without competitive bidding and from its own generation affiliate,
17 even though that affiliate's prices may not be the lowest. Calpine's Exceptions to
18 February 5, 1999 Recommendations of the Hearing Officer, February 17, 1999 at
19 pp. 3-5.

20 The most troubling evidence that APS is violating the clear intention of all
21 parties to the Settlement Agreement in seeking to be exempt from competitive
22 bidding is that it is asking the Commission to take action that the Settlement
23 Agreement attempts to prohibit it from taking.

24 _____
25 ³ Courts interpret a settlement agreement to which the Corporation Commission is a party just as they would
26 any other contract. The court attempt to discern what the parties intended when the agreement was
executed. See, e.g., U.S. West Communications, Inc. v. Arizona Corp. Comm'n, 185 Ariz. 277, 280, 915
P.2d 1232, 1235 (1996).

1 The Commission, in the Addendum to the Settlement Agreement, agreed
2 that “[A]ny future Commission order, rule or regulation shall be construed and
3 administered, in so far as possible, in a manner so as not to conflict with the
4 specific provisions of this Agreement, as approved by the Commission.” p. 4.
5 What APS is asking of the Commission is to grant an exemption from the specific
6 requirements of Section 5 (4.1)(3) of the very document in which this clear
7 language of intent is contained. In other words, APS is asking the Commission to
8 violate its commitment not to take action to undermine the Agreement even though
9 in its testimony on the Agreement APS asserted that the Commission must adhere
10 to the Agreement no matter what the circumstance.

11 C. When a Decision on a Waiver or Exemption Request Will Have
12 Broad Implications For an Entire Class of Similarly Situated
13 Parties, Applicable Law and Public Policy Favors That the
14 Request Be Considered By a Procedure Other Than Ad Hoc
15 Adjudication.

16 In its Response to the APS Variance Request, the Commission Staff
17 suggests that this proceeding be used to reexamine the fundamental facts and
18 principles on which the restructuring of the market for electricity in Arizona are
19 based. APS, in its Reply to the Staff position, asserts that this proceeding be
20 restricted to a list of only five issues. Even these five issues, however, necessitate
21 the consideration of several dozen corollary issues involving such matters as
22 stranded cost recovery and generation asset divestiture. In either case, however,
23 the issues to be considered go well beyond APS or its individual circumstances.
24 The possible resolution of these issues could directly affect every UDC, electric
25 generator and consumer of electricity in the State. In such a case the courts have
26 compelled federal and state administrative agencies to make decisions and

1 promulgate policy using rulemaking or rulemaking type proceedings rather than
2 the ad hoc approach of considering individual variances. The primary legal
3 treatise on state agency rulemaking lists six reasons that rulemaking or
4 rulemaking-type proceedings are preferable to individual adjudications as a means
5 of agency decision making. These include the fact that the legislative-type process
6 rather than a quasi-judicial process allows greater stakeholder participation, is a
7 more efficient use of agency resources and the decisions that result are more
8 accessible to the public and elected officials. According to the treatise's author,
9 Professor Bonfield, "As a general proposition, when an agency determines whether
10 to proceed by rule or by adjudication, it should use the process of rule making
11 except in cases where there is a danger that its utilization would frustrate the
12 effective accomplishment of an agency's functions." A.E. BONFIELD, STATE
13 ADMINISTRATIVE RULE MAKING, p. 114 (Little Brown & Company 1986).

14 Arizona courts have directly adopted the views of Professor Bonfield. See,
15 e.g., Anderson v. State, 135 Ariz. 578, 587, 663 P.2d 570, 578 (Ct. App. 1983);
16 Arizona Corp. Comm'n v. Palm Springs Utility Co., Inc., 24 Ariz.App. 124, 536
17 P.2d 245 (1975); State of Arizona ex rel Dandoy v. City of Phoenix, 133 Ariz. 334,
18 651 P.2d 862 (1982).

19 Rulemaking-type procedures have been particularly favored by the courts in
20 two instances.

21 First, when granting a waiver or exemption from a rule is likely to
22 encourage similar requests for the same waiver or exemption, the public interest is
23 better served by considering the issues raised by the waiver or exemption request
24 in a single rulemaking proceeding. Melcher v. F.C.C., 134 F.3d 1143, 1163-64
25 (D.C. Cir. 1998) ("Notice and comment procedures are especially suited to
26

1 determine legislative facts and policy of general, prospective applicability”); Turro
2 v. F.C.C., 859 F.2d 1498, 1500 (D.C. Cir. 1988). (It is preferable to address policy
3 concerns in a rulemaking proceeding and not in the contest of an ad hoc waiver
4 proceeding) Here there can be no doubt that a grant of the variance sought by APS
5 will result in TEP and other similarly situated companies seeking the same
6 variance.

7 A second instance in which a rulemaking-type proceeding is strongly
8 favored is when a substantial number of parties have relied upon a rule or policy
9 from which a variance or exemption is sought. Alaska Prof'l Hunters Ass'n, Inc.
10 v. F.A.A., 177 F.3d 1030, 1035, 1036 (D.C. Cir. 1998) (a change in policy of
11 longstanding that has been relied upon by affected parties requires a rulemaking);
12 Ford Motor Co. v. FTC, 673 F.2d 1008, 1009 (9th Cir. 1982) (agencies can use
13 individual, ad hoc adjudications when the impact of their decisions is relatively
14 limited, but must proceed by rulemaking if the effect of its action will be to
15 establish principles of widespread applicability).

16 Nine companies have obtained the Certificates of Environmental
17 Compatibility and the air quality operating permits necessary to build new electric
18 powerplants in Arizona. These plants alone represent over 10,000 MW of
19 additional power. See Revised Transmission Assessment at p. 40. All of these
20 powerplants are either built or are in the process of being built. Over a billion
21 dollars has been spent to date and several billion dollars will be spent before the
22 powerplants now under construction are completed. This investment will result in
23 more than enough power to serve the Arizona market as well as lower electric
24 prices for Arizona consumers. In addition, at least seven other companies have
25 announced plans to build either new powerplants or expand existing plants. All of
26

1 these actions were taken in reliance on the Electric Competition Rules and
2 specifically upon the existence of a viable market for competitively bid wholesale
3 power promised by the requirements of A.A.C. R14-2-1606.B. As has been noted
4 previously, the grant of an exemption to APS from the competitive bidding
5 requirements would destroy that market. Thus the proper procedure for
6 determining the issues raised by APS, Commission Staff and other interested
7 parties is the legislative-type, fact-finding proceeding used in rulemaking not an
8 individual adjudication of an individual exemption request.

9 **III. THERE ARE SEVERAL, MORE APPROPRIATE, PROCEDURAL**
10 **MECHANISMS AVAILABLE TO THE COMMISSION, APS, OR**
11 **ANY OTHER AFFECTED PARTY, FOR ACHIEVING THE ENDS**
12 **SOUGHT BY APS AND FOR EVALUATING THE CURRENT**
13 **STATE OF ELECTRIC COMPETITION IN ARIZONA.**

14 The Settlement Agreement and its Addendum is a contract and it cannot be
15 amended without the explicit consent of the parties to that contract. APS should
16 first negotiate changes to the Settlement Agreement with the parties to the
17 Agreement and then seek Commission approval of those changes. This procedure
18 is consistent with APS' position that in the case of a conflict the Agreement
19 governs both the Commissioner's Decision and the Electric Competition Rule.
20 After achieving amendments to the Settlement Agreement, APS can properly seek
21 an amendment to A.A.C. R14-2-1606.B through the rulemaking process. See
22 A.R.S. §41-1033.

23 In addition, APS must request the Commission's decision approving the
24 Settlement Agreement must be altered and seek approval of any amendments to
25 the Settlement Agreement from the Commission. The law establishes a specific,
26 separate procedure in A.R.S. §40-252 for rescinding, altering or amending

1 Commission decisions. This procedure must be followed if APS wishes to alter
2 the Commission decision approving the Settlement Agreement and seek approval
3 of a negotiated amendment to that Agreement.

4 Rather than deal with these issues in an ad hoc proceeding, the appropriate
5 procedural response to the APS Exemption Request is the same response the
6 Commission has had to past exemption requests - - an investigative docket in
7 which all interested parties can participate.

8 For example, Section 4.3 of the Settlement Agreement granted APS
9 exemptions from several statutes and Commission rules, including the affiliate
10 interest rules. Commission Staff recommended and the Commission in its
11 Decision approving the Settlement Agreement agreed to deny several of the
12 requested exemptions but decided not to act on the other exemptions until there
13 could be an industry-wide fact-finding proceeding. The Commission Staff stated
14 the logic behind this approach:
15
16

17 Staff continues to believe that it is important for the
18 Commission to consider the waivers and exemptions in detail, and in
19 an industry-wide proceeding, rather than approving them in this
20 proceeding. A review of the referenced statutes reveals that
21 approval of the waivers as requested would amount to waiving a
22 broad range of regulatory controls. It is Staff's view that such far-
23 reaching action should only be undertaken following serious
24 consideration and an examination of its effect on the entirety of the
25 restructured industry. Staff sees no detriment to any party from
26 adopting our recommendation, while approval of the waivers in this
decision may be irreversible.

Staff Exceptions to the Hearing Officers Order, September 7, 1999
at p. 4.

1 In making its recommendation, Staff relied upon the testimony of the
2 Acting Director of the Utilities Division, Ray T. Williamson, regarding the
3 Settlement Agreement. According to Mr. Williamson:

4 If the Commission chooses to allow these exemptions, it
5 should be after a complete analysis of the impact of its decision on
6 the development of a competitive market and all affected
7 participants. In addition, this exemption for APS and its affiliates
8 should not provide the vehicle for similar blanket exemptions by
9 other competitive service providers without the benefit of prior
10 analysis of the issues by the Staff and the Commission.

11 Direct Testimony of Ray T. Williamson, June 30, 1999 at p. 7.

12 The identical considerations that underlie Mr. Williamson's testimony and
13 that caused Commission Staff and the Commission not to act on APS' previous
14 request for an exemption from the Electric Competition Rules should apply with
15 equal force to this case. The issues that APS has raised and the relief it seeks go
16 directly to the heart of the structure for a competitive market for wholesale power
17 in Arizona. Issues that relate to the APS exemption request that have been raised
18 by Commission Staff and individual Commissioners should not be decided in a
19 proceeding intended to deal with particular facts as they apply to one company.
20 Rather, as the Commission has done before, it should only consider industry-wide
21 issues in an industry-wide proceeding structured so that all interested parties will
22 have an opportunity to participate. The result of such a proceeding may be a
23 rulemaking, amendment to the Settlement Agreement, or as the Alliance believes
24 is appropriate, a Plan of Administration that will describe how the Commission
25 expects APS to implement A.A.C. R14-2-1606.B.

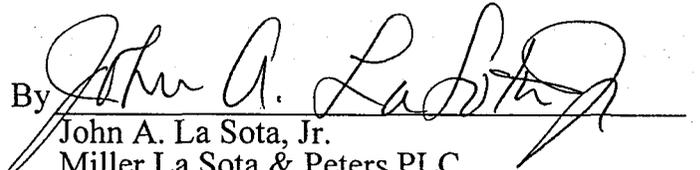
26 **IV. CONCLUSION.**

For the foregoing reasons, the Alliance urges this Commission (a) to

1 dismiss APS's request as legally improper; (b) immediately order APS to submit a
2 Plan of Administration to the Commission by which it will bid out its capacity,
3 energy, and ancillary needs in the manner and in accordance with the schedule
4 contemplated by A.A.C. R14-2-1606 and agreed to by APS in the Settlement
5 Agreement; and (c) should the Commission believe that legitimate issues have
6 been raised by the APS request and the response of the other parties to this
7 proceeding to that request, it should consider those issues in the context of a
8 workshop or generic fact-finding proceeding.

9 RESPECTFULLY SUBMITTED this 9th day of December, 2001.

10
11 ARIZONA COMPETITIVE ALLIANCE
12 245 West Roosevelt
13 Phoenix, AZ 85003

14 By 
15 John A. La Sota, Jr.
16 Miller La Sota & Peters PLC
17 5225 North Central Avenue #235
18 Phoenix, Arizona 85012
19 Attorney for the Intervenor

20 FENNEMORE CRAIG

21 By 
22 C. Webb Crockett
23 Jay L. Shapiro
24 Attorneys for Intervenors
25 Panda Gila River L.P.
26

1 Original and 10 copies of the
2 foregoing filed this 19th day
of December, 2001 with:

3 Docket Control
4 Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

5 Copy of the foregoing hand
6 delivered this 19th day of
December, 2001 to:

7 Lyn A. Farmer, Esq.
8 Chief Administrative Law Judge
Hearing Division
9 Arizona Corporation Commission
1200 West Washington Street
10 Phoenix, Arizona 85007

11 Christopher C. Kempley, Esq.
12 Legal Division
Arizona Corporation Commission
1200 West Washington Street
13 Phoenix, Arizona 85007

14 Ernest Johnson, Director
15 Utilities Division
Arizona Corporation Commission
1200 West Washington
16 Phoenix, Arizona 85007

17 Copy of the foregoing mailed
18 this 19th days of December, 2001,
to:

19 Thomas L. Mumaw, Esq.
20 Jeffrey B. Guldner, Esq.
Snell & Wilmer
21 One Arizona Center
Phoenix, Arizona 85004-2202
Attorneys for Arizona Public Service Company

22 Scott S. Wakefield, Chief Counsel
23 Residential Utility Consumer Office
2828 North Central Avenue, Suite 1200
24 Phoenix, Arizona 85004

25

26

- 1 Greg Patterson
Arizona Competitive Power Alliance
245 West Roosevelt
Phoenix, Arizona 85003
- 3 C. Webb Crockett, Esq.
4 Jay L. Shapiro, Esq.
Fennemore Craig
5 3003 North Central Avenue, Suite 2600
Phoenix, Arizona 85012-2913
6 Attorneys for Panda Gila River L.P.
and Reliant Resources, Inc.
- 7 Walter W. Meek, President
8 Arizona Utility Investors Association
2100 N. Central Avenue, Suite 210
9 Phoenix, Arizona 85004
- 10 Lawrence V. Robertson, Jr., Esq.
Munger, Chadwick PLC
11 333 N. Wilmot, Suite 300
Tucson, Arizona 85701
- 12 Robert S. Lynch
13 Attorney at Law
340 E. Palm Lane, Suite 140
14 Phoenix, Arizona 85004-4529
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26