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BEFORE THE ARIZONA CORPORATION COMMISSION P 4:07

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DOCKET NO. 3-01345A-01-0822

**ARIZONA COMPETITIVE POWER
ALLIANCE RESPONSE TO ARIZONA
PUBLIC SERVICE SUPPLEMENTAL
BRIEF ON APPLICABILITY OF A.R.S.
§ 40-252 TO THIS PROCEEDING**

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

The Commission's Chief Administrative Law Judge, at a January 31, 2002 procedural conference, stated that she would rule that the request by Arizona Public Service Company ("APS"), which asked that it be allowed an exemption from the wholesale competitive bidding requirements of A.A.C. R14-2-1606.B, was a request to alter or amend Commission Decision 61973 and as such was subject to the procedural requirements of A.R.S. § 40-252. In response, APS immediately filed a supplemental brief (the "Brief") in which it expressed "surprise" at the "legally improper ruling" and described the consequences of the ruling in somewhat apocalyptic terms.

Since it has consistently been the position of the Arizona Competitive Power Alliance ("Alliance") that the APS Request for Variance was actually a request to alter a Commission decision and was, therefore, subject to the requirements of A.R.S. § 40-252, we are compelled to respond to the APS Brief.

I. THE APS REQUEST FOR VARIANCE MUST BE HEARD UNDER A.R.S. § 40-252.

In our submission of December 19, 2001, we detailed the reasons why this proceeding must, as a matter of law, be conducted under A.R.S. 40-252 and should be

1 consolidated with what has become the Generic Docket (Docket No. E-00000A-02-
2 0051) created by the Procedural Order of January 22, 2002. A copy of our December
3 19, 2001 brief is attached to this response as Exhibit "A".¹

4 Quite simply, A.R.S. § 40-252 provides the sole procedural mechanism by
5 which a decision of the Commission can be altered or amended. The Commission
6 rule, A.A.C. R14-2-1614(C), only provides a means by which a party can seek an
7 exemption from certain of the Commission Electric Competition Rules; it does not and
8 cannot be used to circumvent the exclusive statutory procedure for amending a
9 Commission decision under A.R.S. § 40-252. Neither of the "prior Commission
10 precedents" cited by APS contradicts this view. Both involve variances that would not
11 compel the Commission to amend Decision No. 61973 or any other Commission
12 decision. Moreover, neither of the prior variance requests would have required the *de*
13 *facto* repeal of the rule from which an exemption was sought.

14 APS asserts that the parties to the Settlement Agreement always intended that
15 APS be able to escape its obligations under the Settlement Agreement by unilaterally
16 obtaining an exemption from the rule incorporating those obligations. APS has not,
17 however, cited a single piece of evidence for this characterization of the parties' intent.
18 The language of the Addendum to the Settlement Agreement, by its declaration that no
19 future Commission "order, rule or regulation" should be construed as conflicting with
20 the Settlement (Addendum at p. 4), expresses an opposite intent. Indeed, as we noted
21 in our brief, it was APS in its Post-Hearing Brief on the Settlement Agreement that
22 vigorously attacked any party to the Settlement who would seek to "unilaterally
23 abrogate" it. APS Brief August 5, 1999, at p 16.

24
25 ¹ In that brief we also note that granting the APS request would constitute a *de facto* repeal of the affected rule
26 that can only occur through a rulemaking and that would require an amendment to the Settlement Agreement,
which itself will require the consent of the parties to the Agreement.

1 **II. THE CONSEQUENCES OF HEARING THE APS VARIANCE**
2 **REQUEST UNDER A.R.S. § 40-252 ARE NEITHER UNFORTUNATE**
3 **NOR INAPPROPRIATE.**

4 **A. APS Is Not Procedurally Prejudiced By The Ruling.**

5 APS, in its Supplemental Brief, concedes that the procedures under A.R.S.
6 § 40-252 “are identical” to those the Commission would use to consider its variance
7 request. Brief, p. 2, lines 6,7. At the January 31, 2002 procedural hearing, counsel for
8 APS declared that the testimony it had filed in support of its variance request sufficed
9 for Commission consideration of that request under A.R.S. § 40-252. Thus, it is
10 difficult to see what possible procedural prejudice APS will suffer if this proceeding is
properly labeled.

11 **B. Neither APS Nor The Public Is Harmed By Proceeding Under**
12 **A.R.S. § 40-252.**

13 APS asserts that a finding that this proceeding is subject to A.R.S. § 40-252
14 could have a “severely negative financial impact on the Company” (Brief, p. 4, lines
15 7,8) because the financial markets could view the effect of such a finding as reopening
16 the Settlement Agreement.

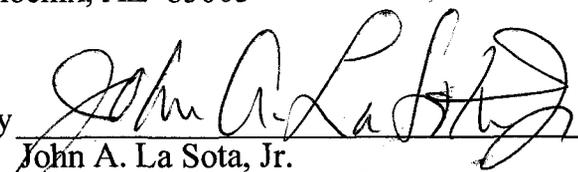
17 First, if such a financial impact were to occur, it should have already occurred.
18 The Commission’s decision to create a generic docket to discuss the “developing
19 issues in electric restructuring” and the questions posed by Chairman Mundell and
20 Commissioner Spitzer as a corollary to that decision suggest a scope of inquiry
21 potentially well beyond that suggested by the APS Variance Request, whether that
22 request is heard under A.R.S. § 40-252 or not.

23 Second, whatever negative economic consequences result from consideration of
24 the APS Variance Request flow not from the fact that the request is considered under
25 A.R.S. § 40-252, but because the granting of that request would destroy the wholesale
26 market for electric competition and thereby deny Arizona consumers the potential for

1 lower electric rates that will result from a competitive marketplace. In other words,
2 APS has no one but itself to blame if there are negative economic consequences to the
3 public as a result of its attempt to escape its commitments under the Settlement
4 Agreement.

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

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8 Record in Docket No. E-01365A-01-0822

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