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February 7, 2003

Commissioner Mike Gleason
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Re: **Your Letter of February 6, 2003**
Arizona-American CAP Utilization Application
Docket Nos. W-01656A-98-0577 and SW-02334A-98-0577

Dear Commissioner Gleason:

Thank you for your letter of February 6, 2003. It is not our intent to aggravate or prolong a very sensitive and serious matter. This response is submitted to provide the clarifications we read your letter as requesting.

LETTER vs. MOTION

In over thirty-five years of practice before the Commission, our firm has never been presented with the issue of requesting a Commissioner to recuse himself or herself from a matter. You can be assured that the letter of February 5, 2003 was not cavalierly drafted or submitted. We are retained by a client, the Sun City Taxpayers Association, that feels strongly the activities taken with regard to the very matter before the Commission constitute grounds that "might" question your impartiality on this particular matter. Three such activities have been shared with your legal counsel, Christopher Kempley. The letters of January 9, 2003, January 30, 2003 and February 6, 2003 all acknowledge your own concern that past actions and statements might adversely impact the integrity of the Commission's process warranting considerable reflection and legal counsel on your part. Our client, as well as the undersigned, respects your willingness to undertake such reflection and counsel.

The letter of February 5, 2003 expressly acknowledged that each Commissioner is entitled to a presumption of integrity and honesty and that the assurance contained in your January 30, 2003 letter that any decision in this matter would be based on the record evidence must be, and is, accepted at face value. Thus, contrary to the letter of February 6, 2003, we have at no time alleged you have pre-judged this case. However, our client requests you reconsider the decision on recusal and act to avoid even the appearance of pre-judgment.

Commissioner Mike Gleason

February 7, 2003

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In view of the foregoing, the recognition that the standard to "compel" disqualification is an "irrevocably closed mind" (*Havasu Heights Ranch and Development Corporation v. Desert Valley Wood Products, Inc.*, 167 Ariz. 383 (App. 1990)) and the fact that we located no Arizona case, statute or rule expressly authorizing the Commission to act on a motion for disqualification, we concluded the professional method to serve our client was by letter to you, rather than motion. In the absence of a clear procedure, enumerated by rule or statute, we deemed a motion to be both imprudent and unprofessional. Until such time as the Commission or the legislature direct otherwise, a formal motion for disqualification, when supported by the facts, is best addressed to the courts and not to the Commission.

REQUEST FOR DISCLOSURE

The letter of February 6, 2003 states that we fail to cite authority compelling discovery from an elected representative. To our knowledge, no such authority exists under the circumstances of this case. However, Canon 3 of the Code of Judicial Conduct was cited for guidance. Furthermore, A.R.S. § 38-503 (requiring disclosure of any substantial interest in a decision) and A.A.C. R14-3-113(D) (requiring disclosure of prohibited communications by a brief signed statement setting forth the substance of the communication and the circumstances under which it was made) represent a general policy of full disclosure.

The letter of February 6, 2003 characterizes the request for disclosure as tantamount to a fishing expedition, suggesting that the request encompassed disclosure of every time you engaged in conversation about a water issue. We apologize if the request for disclosure was unclear. The request is confined to those statements and activities, which you believe the parties, their lawyers (and in this instance, the public and your fellow Commissioners) might consider relevant to the question of disqualification. It is our client's belief that these are the same matters which you necessarily would have considered when reflecting on your past actions and statements in deciding whether to recuse yourself in the first instance. Our client deems disclosure of these matters on the record as the best way to inform the parties, the public and your fellow Commissioners of the past actions and statements that might be considered relevant to the question of disqualification. Communications with the parties on this particular matter appear to be within this request, since such communications would have been prohibited under A.A.C. R14-3-113 had you been a Commissioner. Further, actions furthering, or actively advocating, the specific project now pending before the Commission appear to fall into a category warranting disclosure. However, Canon 3 leaves it to the judge to determine what he or she believes the parties might consider relevant to the question of disqualification.

THE WHITE CASE

This matter is distinguishable from the *Republican Party of Minnesota v. White*, cited in the February 6, 2003 letter. In that case, the United States Supreme Court found a judicial Canon precluding a candidate for the judiciary from even commenting on pending matters to be violative of the First Amendment. Here, no one questions your right to express an opinion on this matter as a legislator, as a resident, or as a candidate for the Commission. The

issue is whether those prior actions and statements might reasonably call into question your impartiality on the matter and warrant your recusal now that the matter is before the Commission for decision.¹

CONCLUSION

We again express our thanks and the thanks of our client to you for seriously considering the concerns that have been expressed regarding your prior actions and statements. We recognize the difficulties presented by the issue. We appreciate your commitment to evaluating the record evidence and arguments openly and fairly in the event that you choose not to recuse yourself in this matter.

Very truly yours,



William P. Sullivan
Attorneys for
Sun City Taxpayers Association

WPS/tsg

cc: Docket Control (duplicate original plus 15 copies)
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Commissioner Jim Irvin
Commissioner William A. Mundell
Commissioner Jeff Hatch-Miller
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¹ We note that under Rule 28(C) of the Arizona Rules of Civil Appellate Procedure, the Memorandum Decision issued in *Enron v. the Arizona Corporation Commission* is not regarded as precedent except for establishing the defense of res judicata, collateral estoppel or the law of the case. None of these exceptions are applicable here.