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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

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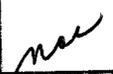
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ARIZONA CORPORATION COMMISSION  
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3 WILLIAM A. MUNDELL  
CHAIRMAN  
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5 MARC SPITZER  
COMMISSIONER  
6

DOCKETED BY 

7 IN THE MATTER OF THE APPLICATION OF  
8 THE ARIZONA ELECTRIC DIVISION OF  
9 CITIZENS COMMUNICATIONS COMPANY TO  
10 CHANGE THE CURRENT PURCHASED POWER  
11 AND FUEL ADJUSTMENT CLAUSE RATE, TO  
12 ESTABLISH A NEW PURCHASED POWER AND  
FUEL ADJUSTMENT CLAUSE BANK, AND TO  
REQUEST APPROVED GUIDELINES FOR THE  
RECOVERY OF COSTS INCURRED IN  
CONNECTION WITH ENERGY RISK  
MANAGEMENT INITIATIVES.

DOCKET NO. E-01032C-00-0751

**STAFF'S RESPONSE TO BROWN &  
BAIN'S REPLY IN SUPPORT OF  
THE NOTICE OF APPEARANCE OF  
SUBSTITUTE COUNSEL**

13 **I. INTRODUCTION**

14 This matter has a long and troubled procedural history, most of which is not directly relevant  
15 to the pending Objection to Notice of Appearance of Substitute Counsel. Nevertheless, a brief  
16 recitation of some parts of the procedural history will place this issue in context and perhaps serve as  
17 a gentle response to the unnecessary harsh rhetoric employed by Brown & Bain in its Reply to the  
18 Objection submitted on behalf of Mohave County and Santa Cruz County (the "Counties"), and  
19 joined by Staff and the Residential Utility Consumer Office ("RUCO").

20 At the time this case was initially filed, on September 28, 2000, the Arizona Electric Division  
21 of Citizens Communications ("Citizens" or "Applicant") was represented by in-house counsel. That  
22 initial application explained in some detail the disagreements between Citizens and Arizona Public  
23 Service Company ("APS"), Citizens' sole supplier of electricity. The initial application explained that  
24 billing disputes existed and were the subject of ongoing negotiation between Citizens and APS.

25 Subsequently, in December of 2000, Gallagher & Kennedy commenced representation of  
26 Citizens in this matter. Meanwhile, Citizens and APS continued negotiation and, as we have  
27 subsequently discovered, Citizens investigated the possibility of commencing litigation against APS.  
28

1 Citizens considered litigation against APS in either state or federal court, as well as contemplating  
2 action before the Federal Energy Regulatory Commission ("FERC"). As of today's date, no such  
3 proceedings have been commenced. However, representatives of Citizens have told us, in the  
4 Objections to Procedural Order and elsewhere, that those decisions were made based on advice of  
5 counsel, including Troutman Sanders, Wright & Talisman and Brown & Bain.

6 By now we all know the history of Brown & Bain's involvement in the proceeding. The  
7 existence of the relationship among Brown & Bain, Citizens and APS having placed customers in an  
8 untenable position, Brown & Bain was ultimately removed from the proceeding. Now, in a most  
9 unfortunate turn of events, Citizens has turned to a firm with a direct conflict of interest. Staff is  
10 hopeful that the focus of this case can be turned to the substantive issues raised by the application. In  
11 the meantime, we cannot ignore the problems caused by repeated unwise choices made by the  
12 Applicant. Those unwise choices have caused the procedural history of this matter to be much more  
13 complex than is desirable. Staff can only hope that this is the last chapter and that the substantive  
14 issues can be addressed soon.

## 15 **II. BROWN & BAIN HAS A CONFLICT OF INTEREST**

16 Staff is not interested in engaging in a lengthy dialogue about the nature of the conflict of  
17 interest presented in this case. The conflict of interest is readily observable. Brown & Bain advised  
18 Citizens in connection with Citizens' decision not to commence litigation against APS. That decision  
19 is one of the central issues presented by the application. Since Citizens has chosen to waive the  
20 attorney client privilege in this matter, it is indisputable that Brown & Bain, in particular Mr. Mais, is  
21 a potential witness in this matter.

22 Brown & Bain offers several explanations as to why it does not believe that it should be  
23 required to comply with the Rules of Professional Responsibility in this regard. None of them are  
24 persuasive. Nevertheless, in this Response, Staff will address some of the positions stated by Brown  
25 & Bain.

### 26 **A. MR. MAIS IS LIKELY TO BE A NECESSARY WITNESS**

27 Brown & Bain relies on its view that Mr. Mais is not a likely witness because he hasn't  
28 been deposed or noticed as a witness heretofore. What is ignored is much more than what is

1 addressed. First, impeachment witnesses are always subject to being called by any party at any time,  
2 even in administrative proceedings. It is possible, even likely, that occurrences at the hearing in this  
3 matter would cause a party or parties to desire testimony from Mr. Mais.

4 More importantly, Brown & Bain overlooks the comments to the Rule. The  
5 Comments discuss the reason for the rule, which revolve around differences in purpose between  
6 witnesses and lawyers. Witnesses are called upon to provide factual information, while lawyers  
7 ordinarily "...explain and comment on evidence given by others." The Comment notes that it may be  
8 difficult to distinguish whether a statement by a person who is acting in both roles is intended as  
9 proof or as an analysis of the proof. There can be no doubt that such a situation would obtain if Mr.  
10 Mais were to attempt to represent Citizens at the hearing in this case, where the decisions about  
11 pursuing litigation are at the core of the controversy. The Comment further notes that under ER 1.10,  
12 the disqualification of Mr. Mais acts to disqualify the firm.

13 **B. MR. MAIS IS NOT A WITNESS AS TO "TANGENTIAL" FACTS**

14 Brown & Bain attempts to parse out the legal advice on which Citizens has acted in  
15 such a way as to avoid the obvious conclusion that it has a conflict in this matter. The Brown & Bain  
16 Reply asserts that the legal advice given was limited to "...an analysis of the practical likelihood of  
17 Citizens getting prompt attention from an Arizona state or federal court." Reply at 10. The inference  
18 is that others were giving legal advice, Brown & Bain was merely describing the nature of the  
19 Arizona court system and the timing of its processes.

20 This argument is of no avail for at least two reasons. First, it is clear that others,  
21 including Citizens, did not see Brown & Bain's advice as being so limited. In its Brief on the  
22 Magruder Motion, Citizens specifically included Brown & Bain as one of the firms used in  
23 connection with Citizens' contractual disputes or negotiations with APS. Citizens Magruder Brief at  
24 3. The same assertion was made on Citizens' behalf in the Objection to Procedural Order. In fact, the  
25 Affidavit of L. Russell Mitten, submitted in this docket by Citizens on March 29, 2002, is even more  
26 direct. Mr. Mitten claims, at paragraph 7: "Citizens also sought advice regarding state law claims and  
27 the possibility of initiating an action against APS in the Arizona courts, but it sought that advice  
28 solely from the law firm of Brown & Bain". Mitten Affidavit at 2.

1           The other major reason that Brown & Bain's attempt to minimize its role in advising  
2 Citizens must fail is because it requires a factual determination. This claim by Brown & Bain  
3 illustrates the difficulty of the position that Citizens has imposed on the Commission. Citizens  
4 waived the attorney client privilege, opening up all of its attorney contacts and advice to discovery  
5 and use by the parties to this proceeding, as well as any others that might occur involving these facts.  
6 Then, having created that situation, Citizens wishes to pick and choose which parts of the attorney  
7 communications are relevant, how important they are, and whether they involve factual  
8 determinations. Even if the area in which Brown & Bain offered advice were limited to discussions  
9 about the nature of response to a claim from the Arizona courts, that advice certainly played a role in  
10 Citizens' decisions about when, where, and whether to commence litigation against APS. With the  
11 waiver of the privilege, the advice would appear to be open for discussion in the pending case. In  
12 fact, since Staff's view is that Citizens should be required to pursue such litigation, the full range of  
13 opinions on which the decision not to proceed was made would seem to be implicated issues in this  
14 proceeding.

### 15 **III. THE EXCEPTIONS TO RULE 3.7 DO NOT APPLY**

16           The potentially applicable exceptions to Rule 3.7 apply if the attorney is a witness to  
17 uncontested issues or if the disqualification of the attorney would work substantial hardship on the  
18 client. Under the circumstances, Staff cannot conceive that these exceptions could act to allow  
19 Brown & Bain to continue the representation.

20           First, the issues on which Mr. Mais is a potential witness can in no way be described as  
21 "uncontested". The bases on which Citizens decided, and continues to decide, to not pursue its  
22 claims against APS, are among the most hotly contested in this case. Mr. Mais tells us that "...the  
23 procedural aspects of Arizona state and federal court litigation on which he advised Citizens..." are  
24 not contested issues in the proceeding. Once again, the assertion proves Staff's point. These  
25 statements in the Brown & Bain Reply are given for evidentiary purposes. It is not possible to  
26 distinguish the legal argument from the factual representations where the attorney is both witness and  
27 advocate. As indicated above, it is Staff's position that the decision not to litigate was the wrong  
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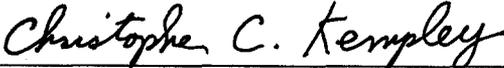
1 decision. Once the attorney client privilege was waived, all aspects of the basis for that decision  
2 became at issue in the proceeding.

3 Finally, Staff does not take lightly the difficulty that Citizens will face because of the need to  
4 seek independent counsel. It is unfortunate that Citizens has made choices which have caused this  
5 situation to occur. However, given the history of this case, which was filed in September 2000 and  
6 was delayed for many months at Citizens request and further delayed by Citizens failure to complete  
7 the Phase 3 audit of APS, Staff does not believe that this delay would constitute substantial hardship  
8 on Citizens.

9 **IV. CONCLUSION**

10 Staff declines to engage in the kind of inflammatory, rhetoric-based argument that Brown &  
11 Bain invites. The issues raised by the Counties' Objection are serious, and should be addressed  
12 seriously. After considering the ramifications of Brown & Bain representing Citizens in this matter,  
13 given their role in the factual issues that are in dispute, Staff joined in the Counties' Objection.  
14 Nothing stated in the Reply has changed that view. Brown & Bain would have been well advised to  
15 decline the representation. In the absence of Brown & Bain declining the representation, the  
16 Commission should foreclose it.

17 RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of May, 2002.

18  
19 

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27 The original and ten copies of the  
28 foregoing filed this 29<sup>th</sup> day of  
May, 2002, with:

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*Nancy Roe*

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