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BEFORE THE ARIZONA CORPORATION COMMISSION RECEIVED

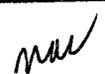
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2 WILLIAM A. MUNDELL, Arizona Corporation Commission
3 CHAIRMAN
4 JIM IRVIN, COMMISSIONER
5 MARC SPITZER, COMMISSIONER

2002 MAY 29 P 3:46

DOCKETED

AZ CORP COMMISSION
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MAY 29 2002

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
11 POWER AND FUEL ADJUSTMENT CLAUSE
12 RATE, TO 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

**THE COUNTIES' REPLY IN
FURTHER SUPPORT OF THEIR
OBJECTION TO NOTICE OF
APPEARANCE OF COUNSEL**

13
14 Mohave County and Santa Cruz County (the "Counties"), through
15 undersigned counsel, pursuant to the Procedural Order dated May 23, 2002,
16 hereby respectfully submit their reply to the "Citizens Communication
17 Company's Reply in Support of its Notice of Appearance of Substitute Counsel"
18 (the "Citizens Reply ") as follows:

19 **I. Introduction.**

20 The Counties object to Brown & Bain serving as Citizens' counsel in this
21 proceeding. Brown & Bain attorneys are witnesses to key events at issue in this
22 case. Communications between Brown & Bain and Citizens that normally would
23 not be admissible in this case will be used to examine Citizens' witnesses because
24 the attorney-client privilege has been waived.

25 The Arizona Rules of Supreme Court, Rule 42 (ER 3.7) states that a lawyer
26 should not be an advocate and a witness in the same case. The Citizens Reply is
a textbook example of the ethical dilemma that ER 3.7 seeks to avoid. The

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Citizens Reply is an inextricable mixture of advocacy and testimony by Citizens’ counsel. Problematically, the legal arguments put forth by Brown & Bain are lacking and the testimony contradicts Citizens’ prior statements in the record. As the Arizona Supreme Court warned:

The attorney who testifies diminishes his effectiveness as advocate as well as his effectiveness as a witness. Cottonwood Estates, Inc. v. Paradise Builders, Inc. 128 Ariz. 99, 102 624 P.2d 296, 299 (1981)

Citizens argues that it is the “victim” of the Counties’ Objection. See Citizens Reply at 3, lines 18-22. However, Citizens is only the victim of its own poor choices. Citizens, alone, took the extraordinary steps of (1) using its outside counsel as a rebuttal witness regarding the unresolved purchase power dispute with Arizona Public Service Company (“APS”); (2) waiving the attorney-client privilege in connection with the unresolved purchase power dispute; and (3) employing as its counsel for this proceeding, first, attorneys who had a conflict of interest and, now, the attorneys who rendered advice on Citizens’ state law claims against APS in connection with the purchase power dispute.

Ironically, Citizens is protesting the Counties’ attempt to ensure that none of the parties to this proceeding is prejudiced by the involvement of legal counsel whose opinions and statements are admissible and relevant evidence to a material issue in this case—the unresolved purchase power dispute with APS. The Counties have raised this issue now in order to avoid more substantial prejudice if the matter was unresolved and the hearing proceeded.

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Citizens argues that its counsel is not a witness in this case. Citizens' Reply at 9-11. However, none of the arguments set forth by Citizens makes sense. The unresolved purchase power dispute with APS is material to the determination of whether the purchase power costs were prudently incurred. The law firm of Brown & Bain did provide legal advice, both written and oral, to Citizens and its attorneys regarding state law claims that Citizens could assert against APS. See Citizens Reply at Exhibit A, para. 5. Attorneys from the law firm of Brown & Bain have direct and personal knowledge of what information (and opinions) were conveyed to Citizens. The attorney-client privilege has been waived. The communications, documents and opinions of Brown & Bain can (and will) be used in the examination of its client, Citizens. If live examination of Brown & Bain lawyers is necessary to clarify matters, the Counties will move the Commission to require them to testify.

Further, Brown & Bain has no legal support for its persistence in litigating this case where its previously privileged communications will be used to impeach its clients.¹ Indeed, none of the cases cited in the Citizens Reply addresses the extraordinary situation in this case—Citizens has waived the attorney-client privilege, provided the parties with attorney-client communications and filed the testimony of its outside counsel.

¹ In fact, as demonstrated below, the Citizens Reply may be used to impeach Citizens' witnesses about the prudence of its decision not to resolve the purchase power dispute.

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The Counties cited the Cottonwood and Security General cases in support of their Objection. Counties' Objection at 4-5. Citizens' only attempt to address those cases fails for incompleteness. Citizens, in a footnote, indicates that the Cottonwood case was issued under the prior Rules of Professional Conduct (a fact the Counties pointed out in their Objection). However, Citizens fails to recognize that the Arizona Court of Appeals favorably cited the Cottonwood case under the new Ethical Rules (a fact the Counties also cited in their Objection). See Counties' Objection at 4, n. 1. Citizens fails to cite any case that overturned or superceded the findings or holdings in the Cottonwood case. In fact, Citizens favorably cites selected portions of the Cottonwood, Security General and Sellers cases in the Citizens Reply. Citizens' attempt to rebut the legal standards cited by the Counties in Cottonwood is undermined by its own reliance upon the same cases that established the standards.

1. Proffer of Examination of Citizens' Witnesses.

By way of proffer, the Counties set forth the following scenario as only one line of questioning that exemplifies the ethical dilemma facing Citizens and Brown & Bain:

In the Citizens Reply, Brown & Bain has stated that it merely "provided advice to Citizens and its outside counsel regarding general procedural aspects of litigation in Arizona's state and federal courts, such as the civil docket backlog in those courts and the timetable for lawsuits filed here". Citizens Reply at 3.

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However, in an e-mail from Mr. Mais to Mr. Flynn dated April 21, 2001 (attached hereto as Exhibit "1"), Mr. Mais acknowledges receipt of "drafts of the complaint, preliminary injunction materials, the contract and related materials." Mr. Mais states further, "I have had an opportunity to at least review all of the materials that you sent, and I look forward to working with you, your firm and with Russ Mitten in this matter. Please call me when you get a chance to discuss your timetable for filing this action, **and any other issues that we need to address.....unless we can calculate how much Citizen's should have been (and should prospectively be) charged under the contract.**" More importantly, Mr. Mitten (Citizens' General Counsel) submitted a sworn statement in this proceeding as follows:

Citizens also **sought advice regarding state law claims** and the possibility of initiating an action against APS in Arizona courts, but **it sought that advice solely from the law firm of Brown & Bain.** Citizens Brief Re Magruder Motion to Recuse dated March 28, 2002 at Exhibit B (Affidavit of Russel L. Mitten) at 2; emphasis added.²

² For other Citizens' quotes regarding the role of Brown & Bain as legal counsel in the purchase power dispute see:

1. "In its contractual disputes or negotiations with PWC or APS, Citizens has used separate counsel including Troutman & Sanders, Wright & Talisman and Brown & Bain. Citizens specifically hired independent counsel for those matters." Citizens Brief Motion Re Magruder Motion to Recuse dated March 28, 2002 at 3; and
2. "Wright & Talisman suggested to Citizens that it would be useful to retain as local counsel a local lawyer familiar with the Arizona federal and state court system to advise us on procedural aspects of complex civil litigation in those fora, including such matters as the backlog of the civil docket in those courts, the degree of difficulty, in general, of obtaining preliminary injunctive relief in commercial litigation in such courts, **and other tactical and procedural issues** that would affect such a lawsuit and whether it could be resolved expeditiously;

1 Thus, by Citizens' admission, any advice it received regarding the Arizona
2 state law claims against APS, it received from Brown & Bain. The Counties, on
3 cross-examination, will ask Messrs. Breen, Flynn and Dabelstein whose
4 statements are correct—either Citizens, or Brown & Bain. If the Citizens
5 witnesses testify that the utility did not receive substantive legal advice from
6 Arizona counsel, then the testimony of Mr. Mitten that Citizens sought advice
7 regarding state law claims solely from Brown & Bain is false. If Citizens did seek
8 that advice from Brown & Bain, then the statements authored by Brown & Bain
9 in Citizens' Reply and Mr. Flynn's affidavit are false—and the Counties are
10 entitled to know the basis for the advice and the substance of the advice rendered.
11 Thus, the dilemma is, "How Citizens and Brown & Bain will deal with
12 contradictions between their statements?" Certainly, Citizens loses credibility
13 regardless of whether it is Citizens or Brown & Bain who have to rehabilitate
14 their story.

15 By way of example, the questioning of Mr. Dabelstein, a Citizens' Vice-
16 President, would proceed as follows:

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21 Citizens retained Joseph E. Mais, and the Phoenix firm of Brown & Bain,
22 P.A., to advise us on the topics discussed in paragraph 3. I understand that
23 Mr. Mais and Brown & Bain had previously represented Citizens in
24 litigation matters;

25 Mr. Mais and a Brown & Bain associate, **Brian Lake**, provided advice (**in**
26 **both written and oral form**) regarding the topics discussed in paragraph
3. Wright & Talisman did not ask Brown & Bain to opine regarding the
merits of Citizens' dispute with APS, or whether Citizens should bring a
lawsuit or regulatory action against APS." Citizens Reply at Exhibit A at
1; emphasis added.

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Q: Mr. Dablestein, is it your sworn testimony that Citizens acted prudently when it decided not to file a lawsuit with Arizona claims against APS regarding the purchase power dispute?

Q: In reaching the decision not to file a lawsuit against APS, did Citizens rely upon the advice of legal counsel?

Let me show you where Mr. Mitten said that legal advice regarding state law claims was sought solely from the law firm of Brown & Bain.

Q: Did Brown & Bain advise Citizens regarding the merits of the state law claims and whether or not Citizens would prevail?

Q: Are you aware that Brown & Bain stated in the Citizens Reply that it only provided advice regarding "general procedural aspects of litigation in Arizona's state and federal courts, such as the civil docket backlog in those courts and the timetable for lawsuits filed here".

Q: Now, Mr. Dabelstein, whose statements are correct here—Citizens or Brown & Bain?

Nobody wins when Citizens puts itself and its attorneys in this type of a situation.

What Citizens has persistently ignored, is that its ratepayers (including the Counties) have been, and will continued to be, directly affected by the choices and decisions that Citizens makes.³ The Counties believe that this is one reason why the Commission has stepped in to protect the integrity of this proceeding. It is also the reason why the Counties have intervened in this case and now object to Brown & Bain serving as Citizens' counsel.

³ The Counties maintain that Citizens' decision to waive the attorney-client privilege in this case is an imprudent decision that undermines the utility's ability to resolve the purchase power dispute with APS.

**ROSHKA HEYMAN &
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The Counties renew their request that Brown & Bain be disqualified from representing Citizens in this proceeding and that the Commission order Citizens to provide notice of appearance of substitute counsel that is able to represent it in this proceeding.

RESPECTFULLY SUBMITTED May 29, 2002.

Roshka Heyman & DeWulf, PLC

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ORIGINAL and 10 COPIES of the foregoing
Filed May 29, 2002 with:

Docket Control
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Phoenix, Arizona 85007

COPIES of the foregoing hand-delivered
May 29, 2002 to:

Chairman William A. Mundell
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18 COPIES of the foregoing mailed
19 May 29, 2002 to:

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PAUL FLYNN - Re:Citizens Communications Company

From: "Mais, Joseph " <Mais@brownbain.com>
To: ""PAUL FLYNN" " <FLYNN@wrightlaw.com>
Date: 4/21/2001 6:33 PM
Subject: Re:Citizens Communications Company
CC: ""rmitten@czn.com" " <rmitten@czn.com>, ""James MCMANUS" " <MCMANUS@wrightlaw.com>, ""ARNOLD PODGORSKY" " <Podgorsky@wrightlaw.com>, "Lake, Brian" <Lake@brownbain.com>

Dear Mr. Flynn:

Thank you for sending me drafts of the complaint, preliminary injunction materials, the contract and related materials. I have had an opportunity to at least review all of the materials you sent, and I look forward to working with you, your firm and with Russ Mitten in this matter.

Please call me when you get a chance to discuss your timetable for filing this action, and any other issues that we need to address. One issue that I think we should discuss is the potential effect on the motion for preliminary injunction of an Arizona statute, A.R.S. section 12-1802.5, that provides that "[a]n injunction will not be granted . . . [t]o prevent the breach of a contract, the performance of which would not be specifically enforced." There is little case law interpreting this statute, but its text suggests that we may not be entitled to injunctive relief unless we can calculate how much Citizen's should have been (and should prospectively be) charged under the contract.

Best regards,

Joe Mais