

REHEARING AUG 20 2002



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Arizona Corporation Commission

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AZ CORP COMMISSION  
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Attorneys for Citizens Communications Company

BEFORE THE ARIZONA CORPORATION COMMISSION

10 WILLIAM A. MUNDELL  
11 CHAIRMAN  
12 JIM IRVIN  
13 COMMISSIONER  
14 MARC SPITZER  
15 COMMISSIONER

DOCKET NO. E-01032C-00-0751

**CITIZENS COMMUNICATIONS  
COMPANY'S MOTION FOR  
RECONSIDERATION**

14 IN THE MATTER OF THE APPLICATION  
15 OF THE ARIZONA ELECTRIC DIVISION  
16 OF CITIZENS COMMUNICATIONS  
17 COMPANY TO CHANGE THE CURRENT  
18 PURCHASED POWER AND FUEL  
19 ADJUSTMENT CLAUSE RATE, TO  
20 ESTABLISH A NEW PURCHASED POWER  
21 AND FUEL ADJUSTMENT CLAUSE  
22 BANK, AND TO REQUEST APPROVED  
23 GUIDELINES FOR THE RECOVERY OF  
24 COSTS INCURRED IN CONNECTION  
25 WITH ENERGY RISK MANAGEMENT  
26 INITIATIVES.

23 By Procedural Order dated July 16, 2002 (the "Procedural Order"), the Administrative Law  
24 Judge disqualified Joseph Mais of Brown & Bain from appearing as counsel for Citizens  
25 Communications Company at the hearing on this matter, required Citizens to lodge its Objections to  
26 the Procedural Order by July 23, and stated that Citizens' Objections would be deemed denied if the  
27 Commission took no action by July 30. The Commission took no action with respect to the  
28 Procedural Order by July 30.

1 For the following reasons, Citizens now moves for rehearing of the Commission's Decision  
2 denying Citizens' Objections to the Procedural Order pursuant to A.R.S. § 40-253(A) which, for  
3 matters in which judicial review is by appeal, requires that a motion for rehearing be filed before an  
4 appeal of a Commission order can be taken:

5 First, the Procedural Order required that the Commission act to overturn it within one week  
6 after Citizens' objections were due and just two weeks after the Order issued. Those are half the  
7 periods authorized by the Administrative Code (see Ariz. Admin. Code R14-3-110(B) ("Any party  
8 to the proceeding may serve and file five copies of exceptions to the proposed order within ten days  
9 after service thereof.")). Citizens expedited its Objections, but shortening the Commission's time to  
10 review was unfairly prejudicial if, as Citizens is informed and believes, at least one of the  
11 Commissioners was unavailable during the one-week review period.

12 Second, as explained in the Objections, the Order was plainly wrong as a matter of law (the  
13 facts were undisputed) and constitutes a serious and highly prejudicial abuse of discretion:

- 14 • Although Ethical Rule 3.7 authorizes disqualification of a lawyer as an advocate at a  
15 hearing if "the lawyer is likely to be a necessary witness," Mais cannot be a witness at the  
16 hearing because a scheduling order in the case required testimony to be prefiling, no one  
17 submitted testimony from Mais, and no one has asked for a waiver of the prefiling  
18 requirement. Indeed, no one even expressed any interest in taking discovery from or  
19 regarding Mais until after the hearing was supposed to have been completed and after he  
20 was named as substitute lead counsel. Contrary to the ALJ's apparent assumption,  
21 Citizens is not "complain[ing] . . . that the attorneys who gave the advice are off-limits to  
22 discovery and cross examination" for any reason other than the fact that the time for  
23 discovery and prefiling testimony *had already passed* by the time the objectors suddenly  
24 professed an interest in Mais. To this day, nobody has ever even *attempted* "discovery  
25 and cross examination" of Mais or Brown & Bain, so Citizens has no occasion to  
26 "complain" about that.
- 27 • Even if Mais were likely to be a witness, he could not be a *necessary* witness because the  
28 undisputed evidence establishes that he did not provide substantive advice to Citizens,

1 and there are numerous alternative sources of evidence with respect to the limited  
2 procedural advice his firm gave, including the testimony of other lawyers (one of whom  
3 has already been named as a witness and from whom testimony on this subject was  
4 prefiled) and Brown & Bain's memorandum of advice.

- 5 • Even if Mais were a likely and necessary witness, his testimony would not be contested  
6 because neither the fact nor the reasonableness of his advice has been disputed. Rule  
7 37(a)(1) therefore exempts Mais from disqualification.
- 8 • Even if Mais were a likely and necessary witness, his disqualification would work a  
9 substantial hardship on Citizens, which has already had one lead counsel disqualified and  
10 is losing hundreds of thousands of dollars in carrying costs with each month of delay.  
11 Rule 3.7(a)(3) therefore exempts Mais from disqualification.

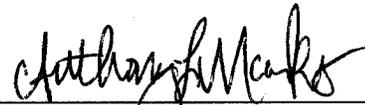
12 Citizens applies for rehearing to give the Commission a reasonable opportunity to correct the  
13 errors of fact and law in the Procedural Order, to reverse the Order, and to direct that Mais be  
14 allowed to appear at the hearing on this application. Citizens believes that the letter and spirit of  
15 A.R.S. § 40-253 suggest, if not require, that the Commission be given a reasonable opportunity to  
16 correct its Decision before Citizens seeks judicial review.

17 This Application for Rehearing is supported by Citizens' Objections to Procedural Order and  
18 Request for Full Commission Review dated July 22, 2002, and accompanying exhibits, a copy of  
19 which is attached and incorporated by reference.

20 Dated: July 31, 2002.

21 Respectfully submitted,

22 BROWN & BAIN, P.A.

23  
24 By 

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2 **July 31, 2002 with:**

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7 **Copy of the foregoing hand-delivered**  
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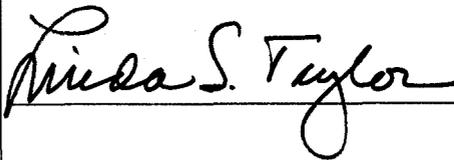
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BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL  
CHAIRMAN  
JIM IRVIN  
COMMISSIONER  
MARC SPITZER  
COMMISSIONER

DOCKET NO. E-01032C-00-0751

**CITIZENS' OBJECTIONS TO  
PROCEDURAL ORDER AND REQUEST  
FOR FULL COMMISSION REVIEW**

**Expedited Review Requested:**

**By order of the ALJ, these objections will be  
deemed denied if the Commission takes no  
action by July 30, 2002**

IN THE MATTER OF THE APPLICATION  
OF THE ARIZONA ELECTRIC DIVISION  
OF CITIZENS COMMUNICATIONS  
COMPANY TO CHANGE THE CURRENT  
PURCHASED POWER AND FUEL  
ADJUSTMENT CLAUSE 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.

Citizens Communications Company hereby objects to the Procedural Order of the Administrative Law Judge dated July 16, 2002 ("Order"), which disqualifies Joseph Mais of Brown & Bain from appearing as Citizens' counsel at the hearing on this application. For the reasons below, Citizens asks the Commission to take review, reverse the Order and direct that Mais be allowed to appear. *Expedited review is requested because the ALJ has ordered that these objections will be denied if the Commission takes no action by July 30, 2002.*

1 **Memorandum in Support of Objections**

2 For the second time in three months, the ALJ overseeing Citizens' PPFAC Application has  
3 disqualified Citizens' chosen counsel at the behest of Citizens' adversaries. Under Arizona law,  
4 "every litigant has the *right* to the counsel of its choice." *Sec. Gen. Life Ins. Co. v. Superior Court*,  
5 149 Ariz. 332, 335, 718 P.2d 985, 988 (1986). The Supreme Court has repeatedly cautioned that  
6 motions to disqualify opposing counsel are fraught with "obvious dangers," must be "view[ed] with  
7 suspicion," and granted "[o]nly in extreme circumstances." *Id.* at 335, 718 P.2d at 988; *Gomez v.*  
8 *Superior Court*, 149 Ariz. 223, 226, 717 P.2d 902, 905 (1986); *Alexander v. Superior Court*, 141  
9 Ariz. 157, 161, 685 P.2d 1309, 1313 (1984). Yet the Order (Tab A) marks the second implicit  
10 finding of such "extreme circumstances" in 90 days—a feat unprecedented in the 90 year history of  
11 reported law in this state.

12 In this instance, the ALJ has disqualified Mais of Brown & Bain (who replaced Citizens'  
13 original counsel, Michael Grant of Gallagher & Kennedy, after Gallagher & Kennedy was disqual-  
14 ified) because Mais' appearance supposedly would violate Ethical Rule 3.7(a) of the Arizona Rules  
15 of Professional Conduct. Rule 3.7(a) (Tab B) authorizes disqualification of a lawyer as an advocate  
16 at trial only where "*the lawyer is likely to be a necessary witness.*" Even then, disqualification is  
17 improper if "*the testimony relates to an uncontested issue*" or disqualification would "*work*  
18 *substantial hardship on the client.*" Here, the ALJ has disqualified Mais even though:

- 19
- 20 • **Mais is more than not *likely* to be a witness; he *cannot* be a witness at the hearing.**  
21 The procedural order in this case required testimony to be prefiled. The direct, rebuttal,  
22 surrebuttal and rejoinder testimony was completed and submitted many months ago, be-  
23 fore Mais appeared. No one submitted testimony from Mais. Indeed, no one even sought  
24 discovery from Mais. And no one has asked for a waiver of the prefiling requirement.
  - 25 • **Even if Mais had been named, he would not be a *necessary* witness.** Until Mais was  
26 named as substitute counsel, no one considered Mais to be a material witness, much less  
27 a necessary one. Citizens' opponents argue that Mais was involved in Citizens' analysis  
28 of Citizens' rights under its power supply agreement with APS and its decision to  
renegotiate with APS rather than sue APS. But the evidence was undisputed: Mais did



1 [Declaration of Paul M. Flynn ¶¶ 2-3 (filed May 22, 2002) (Tab C)] W&T and lead counsel Paul  
2 Flynn were experts on power supply contracts and FERC litigation, but they suggested retaining  
3 local Arizona counsel “to advise [W&T] on procedural aspects of complex civil litigation in  
4 [Arizona courts], including such matters as the backlog of the civil docket in those courts, the degree  
5 of difficulty, in general, of obtaining preliminary injunctive relief in commercial litigation in such  
6 courts, and other tactical and procedural issues that would affect such a lawsuit and whether it could  
7 be resolved expeditiously.” [Id. ¶ 3]

8 To address W&T’s queries, Citizens retained Mais, a Brown & Bain partner who has  
9 represented Citizens in complex litigation matters in Arizona and elsewhere for more than a decade.  
10 [Id. ¶ 4] Brown & Bain associate Brian Lake, who is uninvolved in the PPFAC proceeding, assisted  
11 Mais. [Id.] *W&T “did not ask Brown & Bain to opine regarding the merits of Citizens’ dispute  
12 with APS, or whether Citizens should bring a lawsuit or regulatory action against APS.”* [Id. ¶ 5]  
13 Nor did Brown & Bain advise about FERC issues. Its advice was strictly limited to procedural  
14 issues regarding litigation in Arizona courts. As W&T partner Flynn said in the rebuttal testimony  
15 that Citizens submitted in connection with the merits hearing in this proceeding:

16 [O]ur communications with Citizens’ local Arizona counsel high-  
17 lighted that civil litigation in the Arizona federal court would confront  
18 an extremely crowded docket and take several years at best. Local  
19 counsel also reinforced our conclusion that a preliminary injunction  
20 precluding APS’s interpretation of the contract—and thereby granting  
21 Citizen[s] relief from high charges during the pendency of the lengthy  
litigation—would be very difficult to obtain in this lawsuit, as it would  
be essentially a contract suit for which money damages are usually  
recognized as sufficient.

22 [Id. ¶ 6]

23 Contemporaneous documents unequivocally confirm Brown & Bain’s limited role. Both a  
24 four-page memorandum sent to Flynn (not Citizens) and Flynn’s handwritten notes of a telephone  
25 conversation with Mais demonstrate that *“Brown & Bain lawyers did not advise [Flynn], and to the  
26 best of [his] knowledge, did not advise Citizens, about the merits of Citizens’ dispute with APS.”*

27 [Id. ¶¶ 7-9 and Exs. 1 & 2 (Flynn’s contemporaneous handwritten notes of a conversation with Mais,  
28 and a memorandum from Mais and Lake to Flynn, respectively, reflecting advice)] Flynn is a wit-

1 ness in this proceeding, and is “capable of testifying about the advice . . . that Brown & Bain lawyers  
2 provided to *Wright & Talisman* and, through us, to Citizens.” [*Id.* ¶ 10 (emphasis added)]

3 In sum, as Flynn says in his submitted rebuttal testimony, Mais and Lake simply advised  
4 Citizens—through W&T—that “civil litigation in the Arizona federal district court would confront  
5 an extremely crowded docket and take several years at best . . . [and that a] preliminary injunction  
6 precluding APS’s interpretation of the contract—and thereby granting Citizen[s] relief from high  
7 charges during the pendency of the lengthy litigation—would be very difficult to obtain in this  
8 lawsuit, as it would be essentially a contract suit for which money damages are usually recognized as  
9 sufficient.” [Flynn rebuttal testimony (submitted March 1, 2002) at 9-10; *see also* Flynn Decl.  
10 Exs. 1 & 2] This innocuous and irrefutable input confirmed W&T’s existing belief that Citizens  
11 should try to resolve the dispute with APS without taking legal action (either at FERC or in Arizona  
12 court). Ultimately, Citizens chose to follow W&T’s recommendation and negotiated a new power  
13 supply agreement with APS.

14 Flynn’s role as a witness in *this* proceeding requires some elaboration, and the attached  
15 timeline (Tab D) graphically illustrates the following discussion. RUCO, Staff and the intervenors,  
16 including Santa Cruz and Mohave Counties (the “Counties”), suggested that Citizens should have  
17 litigated rather than renegotiated with APS. More precisely, RUCO’s expert contends that Citizens  
18 should have filed a complaint at FERC. [Rosen direct testimony (submitted Feb. 8, 2002) at 2]  
19 Staff’s expert is more vague, but says that Citizens “might have” “request[ed] that [FERC] assist in  
20 the resolution of the dispute” and “perhaps [taken] other steps which, presumably, might have  
21 included civil litigation. [L. Smith direct testimony (submitted Feb. 8, 2002) at 6] In an effort to  
22 explain why it did not take legal action, Citizens waived any attorney-client privilege relating to the  
23 advice provided by W&T and Brown & Bain and produced the documents generated in the course of  
24 that advice. That waiver occurred on February 5, 2002.

25 Citizens’ supplemental data response accompanying the documents stated that Brown & Bain  
26 was hired “to advise on the tactical considerations of proceeding with court litigation in Arizona.”  
27 [Tab E (also stating that Brown & Bain “raised concerns about the pace of civil cases in the Arizona  
28 courts, and about the prospects for obtaining preliminary injunctive relief”)] As discussed above,

1 Citizens submitted rebuttal testimony from Flynn on March 1, and in that testimony Flynn expressly  
2 discussed the role he and Brown & Bain played in advising Citizens.

3 After Citizens waived the privilege, produced the documents, provided a supplemental data  
4 request response, and submitted the testimony of Flynn, the parties and intervenors expressed  
5 absolutely *zero* interest in Mais or Brown & Bain. In fact, even though Citizens waived the privilege  
6 *seven weeks* before the scheduled hearing on the merits, no party or intervenor requested additional  
7 information or discovery targeted toward Mais or Brown & Bain before the scheduled hearing date.  
8 When the deadline for Staff and intervenors to submit all direct and surrebuttal testimony and  
9 exhibits passed on March 13, 2002, none of them submitted any evidence regarding Mais or Brown  
10 & Bain or suggested a need for additional time or information to decide whether to do so.<sup>1</sup>

11 The final prehearing conference was held on March 21 to settle the last details of the  
12 anticipated March 25 hearing. Nobody at that conference mentioned any possibility of testimony or  
13 evidence from Mais or Brown & Bain, or the possibility of extending any deadlines to add witnesses  
14 or take additional discovery.

15 The final prehearing conference also served as the oral argument on the motion that  
16 ultimately led to the disqualification of Citizens' original counsel, Gallagher & Kennedy, so the  
17 merits hearing that was scheduled on March 25 never took place. To this day, no hearing on the  
18 merits has been scheduled despite Citizens' repeated pleas that it be calendared.

19 The ALJ disqualified Gallagher & Kennedy in a procedural order dated April 18. That order  
20 became final by its terms April 30. Just two days later, Citizens filed a notice of appearance listing  
21 Mais and Brown & Bain as its counsel. The Counties—who, along with everyone else, had  
22 exhibited total apathy toward Brown & Bain and its role—objected on the grounds that Rule 3.7  
23 prohibited Brown & Bain's participation because "Mais is *already a witness* in this proceeding and  
24

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25 <sup>1</sup> The parties and intervenors certainly were aware of the significance of the testimony and  
26 evidence Citizens offered through Flynn's testimony. Staff submitted extensive surrebuttal testi-  
27 mony explicitly attempting to counter Flynn's testimony. [See L. Smith surrebuttal testimony at 1-2,  
28 5-7, 15-16 (Tab F)] For its part, the Counties threatened to "question *Mr. Flynn* [at the hearing]  
regarding the written legal opinion and draft documents that were prepared by his firm." [Mar. 12,  
2002 letter from Heyman (Counties' lawyer) to Grant (Citizens' former lawyer) (Tab G) (emphasis  
added)]

1 his role is likely to expand,” “[t]he *fact* is that Brown & Bain attorneys *are witnesses* in this case,”  
2 and Mais’ testimony was “an *integral part* of their examination of Citizens’ witnesses” (emphasis  
3 supplied). Staff and RUCO later joined the objection.

4 The Counties’ statements were simply untrue. Not only was Mais not “already a witness,”  
5 but the deadline under the procedural order for prefilng testimony had expired more than *eight*  
6 *weeks* earlier without any request for an extension. Furthermore, the “integral” testimony that Mais  
7 supposedly could provide was from a person in whom and on a subject in which neither the Counties  
8 nor anyone else had ever expressed any interest. Indeed, just a month earlier, on April 5, the Coun-  
9 ties had filed a “motion for findings of fact” (effectively a summary judgment motion) that focused  
10 on Citizens’ waiver of the attorney-client privilege. That motion repeatedly discussed Flynn’s  
11 advice and the fact that he was a witness and would be cross-examined. It even suggested (at 7 n.3)  
12 that “if Mr. Flynn is a witness, he and his firm will likely be disqualified from representing Citi-  
13 zens.” The motion mentioned Brown & Bain just once, in passing, and did not mention Mais at all.  
14 It certainly did not suggest that Mais was a witness or would have to be disqualified if he were.

15 After briefing and argument, the ALJ issued the Order disqualifying Mais (although not  
16 Brown & Bain as a whole). Citizens now files these timely objections.<sup>2</sup>

#### 17 Legal Argument

18 Everyone agrees that the governing legal authority is Ethical Rule 3.7 of the Arizona Rules of  
19 Professional Conduct. Rule 3.7 was carefully crafted by the American Bar Association to discour-  
20 age the tactical disqualification motions that so plagued its predecessor, Disciplinary Rule 5-102(A).  
21 *See Cannon Airways, Inc. v. Franklin Holdings Corp.*, 669 F. Supp. 96, 100 (D. Del. 1987) (“An  
22 important criticism of the [Disciplinary Rule 5-102(A) was] that it was susceptible to use as a tact-  
23 ical measure to disrupt an opposing party’s preparation for trial.”); *see also Chappell v. Cosgrove*,  
24 916 P.2d 836, 839 (N.M. 1996) (“[t]he American Bar Association responded to these abuses by  
25 adopting [Rule] 3.7”); Am. Bar Ass’n, *Annotated Model Rules of Prof’l Conduct* 364 (4th ed. 1999)

26  
27 <sup>2</sup> The Order shortens Citizens’ objection time to half the ten-day period required by the  
28 Administrative Code. To expedite consideration, Citizens is filing these objections even before the  
shortened deadline.

1 (“Rule 3.7 gives greater weight to the client’s own judgment regarding choice of counsel”).

2       When an opponent contends that another party’s lawyer must be disqualified because he or  
3 she has factual knowledge regarding the underlying dispute, Rule 3.7 prohibits the lawyer from  
4 serving as hearing counsel for a party if and only if the challenger proves that “the lawyer is likely to  
5 be a necessary witness.” Even then, the lawyer may appear if “the testimony relates to an uncon-  
6 tested issue” or “disqualification of the lawyer would work substantial hardship on the client.

7       In this case, Mais has not been listed as a witness, he would not be a *necessary* witness even  
8 if he had been named, no one has contested the fact or accuracy of his limited advice on procedural  
9 issues, and a second disqualification of lead counsel would work a substantial hardship on Citizens.

10       **A. Mais Is Not Likely to Be a Necessary Witness at the Merits Hearing**

11       Mais should not have been disqualified because he was never “likely” to be a witness, and  
12 his testimony certainly is not “necessary” to this proceeding.

13       **1. Mais Is Not A Likely Witness**

14       As discussed above, the deadline for prefiling testimony in this proceeding had long passed  
15 by the time the Counties moved to disqualify Mais. Mais’ identity and role had been known for  
16 months, yet no one had sought discovery from him and no one had submitted testimony from him.  
17 No one had indicated the slightest interest in calling him for cross-examination. That was hardly  
18 surprising: the major thrust of Citizens’ opponents has been that Citizens should have filed an action  
19 against APS at *FERC*, and Mais had nothing whatsoever to do with that decision. Even assuming  
20 the ALJ has the authority to allow the objectors to call Mais as a surprise and adverse rebuttal wit-  
21 ness at the hearing, no one other than counsel motivated by a desire to disqualify him would do so.

22       Discounting tactical gamesmanship, Mais is simply not likely to be a witness at the hearing.

23       **2. Mais Is Not a Necessary Witness.**

24       Even if Mais could be belatedly named, he certainly is not a “necessary” witness.

25       Consistent with the purpose of Rule 3.7 and its concern for strategic disqualifications, an  
26 unbroken line of authority defines “necessary” narrowly. “A necessary witness is not the same thing  
27 as the ‘best’ witness. If the evidence that would be offered by having an opposing attorney testify  
28 can be elicited through other means, then the attorney is not a necessary witness.” *Harter v. Univ. of*

1 *Indianapolis*, 5 F. Supp. 2d 657, 665 (S.D. Ind. 1998).

2 The Order ignores those “other means.” The advice given by Mais is fully reflected in the  
3 contemporaneous documents and in the testimony of Flynn. Mais cannot, therefore, be a “neces-  
4 sary” witness. See *Harter*, 5 F. Supp. 2d at 666 (refusing to disqualify lawyer; “There is a long  
5 paper trail in this case. [The lawyer] said what she said and wrote what she wrote. Her testimony is  
6 not necessary to prove that those communications occurred.”); *Horaist v. Doctor’s Hosp.*, 255 F.3d  
7 261, 267 (5th Cir. 2001) (same; “[e]ach item of information that [the lawyer] could provide is  
8 already available from another source”); *Isaacson v. Keck, Mahin & Cate*, 61 Fair Emp. Prac. Cas.  
9 (BNA) 1140, 1142-43 (N.D. Ill. 1993) (same; available testimony from other participants in same  
10 investigation and internal memoranda defeated “necessity”); *UFCW Health & Welfare Fund v.*  
11 *Darwin Lynch Adm’r, Inc.*, 781 F. Supp. 1067, 1071 (M.D. Pa. 1991) (same; available testimony  
12 from other witnesses defeated “necessity”); *Smithson v. USF&G Co.*, 411 S.E.2d 850, 856 (W. Va.  
13 1991) (same); *Humphrey ex rel. Minn. v. McLaren*, 402 N.W.2d 535, 541-42 (Minn. 1987) (same;  
14 no necessity “[i]f the lawyer’s testimony is . . . already contained in a document admissible as an  
15 exhibit” or can be elicited through “[o]ther people who were present at the various meetings”).

16 Indeed, before Mais was identified as Citizens’ hearing counsel, the Counties conceded that  
17 all they wanted to do was “question *Mr. Flynn* [at the hearing] regarding the written legal opinion  
18 and draft documents that were prepared by his firm.” [Mar. 12, 2002 letter from Heyman (Counties’  
19 lawyer) to Grant (Citizens’ former lawyer) (Tab G); see also Counties’ Objection at 2 (“the Counties  
20 will examine Citizens’ witnesses (including Messrs. Breen, Dabelstein and Flynn) regarding  
21 Mr. Mais’ letters [sic] and communications”)] If that was enough *before* Mais was identified as  
22 hearing counsel, why is it not enough *after*?

23 Even if testimony on Brown & Bain’s advice were “necessary,” that testimony certainly was  
24 not necessary *from Mais*. Lake, the other Brown & Bain lawyer who gave the advice, is *not* working  
25 on this matter. If anyone were genuinely interested, *Lake* could easily testify without the need to  
26 disqualify *Mais*. See *Spence v. Flynt*, 816 P.2d 771, 779 (Wyo. 1991) (affirming refusal to dis-  
27 qualify plaintiff’s counsel; defendant’s “own argument that other members of [plaintiff’s] firm can  
28 be called to testify to the matters to which [plaintiff’s trial counsel] can testify defeats the contention

1 that [trial counsel] is a necessary witness”); Rule 3.7(b) (disqualification of one lawyer is not  
2 imputed to the entire firm).

3 The only case the Order analyzes is *Security General Life Insurance v. Superior Court*, but  
4 that case confirms the ALJ’s error. In *Security General*, the plaintiff had listed an Arizona Depart-  
5 ment of Insurance employee as a witness in his case. 149 Ariz. at 333, 718 P.2d at 986. The defend-  
6 ant’s initial counsel left her law firm, and the case was reassigned to another lawyer in the same firm  
7 who had previously served as Director of Insurance. *Id.* (Not unlike the transfer of this matter from  
8 Gallagher & Kennedy to Brown & Bain.) The plaintiff moved to disqualify the defendant’s counsel  
9 on the grounds that the new counsel “needed to testify about the insurance department’s investi-  
10 gations into various [of the defendant’s] practices,” even though the plaintiff already had listed a  
11 witness on a similar subject, the former Director had only tangential personal knowledge, and the  
12 plaintiff had never before expressed interest in the substitute counsel. *Id.* (Again similar to the  
13 present facts, except that, unlike here, there is no clear indication in *Security General* that the time  
14 for naming additional witnesses had already passed.) Plaintiff further contended that his adversary’s  
15 counsel was the “number one” expert on the subject of Insurance Department investigations. *Id.*  
16 The trial court disqualified defense counsel, and the defendant filed a special action. *Id.* After a  
17 lengthy discussion of the strong judicial disfavor of the exact strategic maneuver that the Counties  
18 successfully made in these proceedings, the Arizona Supreme Court took special action jurisdiction  
19 and reversed the trial court’s Rule 3.7 disqualification of counsel, holding that the court abused its  
20 discretion because “there was no evidence to support the disqualification order.” *Id.* at 334-36, 718  
21 P.2d at 987-89.<sup>3</sup>

22 So too here. Although the Order essentially limits *Security General* to its facts by analyzing  
23 it as an expert case, that case is also a “necessity” case. The Arizona Supreme Court unequivocally  
24 embraced the uniformly accepted reading of Rule 3.7 when it held that one seeking to disqualify  
25 opposing counsel on the basis of Rule 3.7 must “show that [the lawyer’s testimony] could not be  
26

---

27 <sup>3</sup> In fact, in the history of Arizona state or federal courts, there is only one reported decision  
28 upholding the disqualification of a lawyer-witness applying Rule 3.7 or its predecessor. See  
*Cottonwood Estates, Inc. v. Paradise Builders, Inc.*, 128 Ariz. 99, 624 P.2d 296 (1981).

1 obtained from other witnesses.” *Id.* at 335, 718 P.2d at 988. The Court acknowledged that the  
2 former Director might be an “impressive expert witness,” but unless the proposed testimony was  
3 “unavailable elsewhere”—including from “a host of departmental employees, past and present”—his  
4 testimony did not meet the necessity standard, and disqualification was erroneous. *Id.* at 335-36,  
5 718 P.2d at 988-89.

6 The Order sidesteps that problem by asserting (at 6-7), without any explanation, that “Brown  
7 & Bain attorneys are the only persons who can provide underlying information regarding the legal  
8 advice they rendered on the purchase power litigation issue.” The Order accuses Citizens (at 7) of  
9 “having waived the attorney-client privilege” yet keeping “the attorneys who gave the advice . . .  
10 off-limits to discovery and cross-examination.” Both the factual premises of those statements and  
11 the Order’s legal conclusion are seriously flawed.

12 First, the “underlying information” is available and substantively incontrovertible.

- 13 • The memorandum of advice that Brown & Bain provided describes the “underlying  
14 information,” as do Flynn’s handwritten notes, and Flynn has avowed that he is “capable  
15 of testifying about the advice . . . that Brown & Bain lawyers provided to *Wright &*  
16 *Talisman* and, through us, to Citizens.” [Flynn Decl. ¶ 10 (emphasis added)] Although  
17 that avowal was and remains uncontroverted, the Order simply ignores it. Moreover, the  
18 information is available from the other Brown & Bain attorney, Lake. The “underlying  
19 information” cannot be “necessary” from *Mais* because it is available elsewhere.
- 20 • The “underlying information” is based on analysis about which no seasoned Arizona  
21 litigator would disagree. According to the Administrative Office of the U.S. Courts, the  
22 Arizona federal court had the second slowest civil docket among all 90+ federal districts  
23 in the United States for the fiscal year ending September 2000. [Tab H] Arizona state  
24 courts are not much faster in resolving complex civil disputes. And both federal and state  
25 courts here rarely grant interim injunctive relief in disputes over money, because the  
26 “irreparable harm” necessary to support such a finding is generally absent—certainly not  
27 in cases involving two sizeable companies. If there is a contrary view, the objectors have  
28 yet to identify it. The “underlying information” cannot be “necessary” because it is

1 undisputed. See Rule 3.7(a)(1) (disqualification inappropriate if “the [lawyer’s proposed]  
2 testimony relates to an uncontested issue”).<sup>4</sup>

3 Second, even if the “underlying information” were unavailable and debated here, it cannot  
4 justify disqualification because it is tangential. See, e.g., *Harter*, 5 F. Supp. 2d at 666 (“Questions  
5 about why [the lawyer] wrote what she wrote are at best only marginally relevant”); *Humphrey*, 402  
6 N.W.2d at 541 (“If the lawyer’s testimony is . . . quite peripheral, . . . ordinarily the lawyer is not a  
7 necessary witness and need not recuse as trial counsel.”); *S&S Hotel Ventures L.P. v. 777 S.H.*  
8 *Corp.*, 508 N.E.2d 647, 651 (N.Y. 1987) (“Testimony may be relevant and even highly useful but  
9 still not strictly necessary. A finding of necessity takes into account such factors as the significance  
10 of the matters . . . .”); *LeaseAmerica Corp. v. Stewart*, 876 P.2d 184, 191 (Kan. Ct. App. 1994)  
11 (reversing Rule 3.7 disqualification; necessity “will generally require that the opposing party demon-  
12 strate that the advocate’s testimony will be substantially useful to that party”) (citation omitted).

13 Third, Citizens did *not* put Mais and Brown & Bain “off-limits to discovery and cross-exam-  
14 ination.” Citizens’ opponents simply elected not to take discovery from Mais and showed no interest  
15 in cross-examining him until months after the original hearing date, when Mais was named as  
16 substitute counsel. The Order itself states (at 8) that “Citizens’ decision not to pursue litigation  
17 against APS regarding the purchase power dispute was placed at issue in this case many months  
18 ago.” Yet neither the Counties nor Staff nor RUCO nor any of the other intervenors (1) served data  
19 requests regarding Mais or his role; (2) asked to depose Mais or anyone else on the subject; or (3)

20  
21 <sup>4</sup> If the Order’s cryptic reference to “underlying information” means that Mais might have a  
22 slightly different perspective on what happened than reflected in the contemporaneous handwritten  
23 notes and memoranda or the testimony of other participants in the same events, the Order eviscerates  
24 the “necessity” rule. A former Insurance Director surely knows slightly different things (as either an  
25 expert or percipient witness) than “a host of departmental employees, past and present,” but he was  
26 not “necessary” in *Security General*. A memorandum’s author always has “underlying information”  
27 that is something less than 100% reflected in a document, but that did not make the lawyer  
28 “necessary” in *Harter* or *Isaacson*. One participant in a meeting or events obviously has a different  
perception of what happened than any other, but that did not make the lawyers “necessary” in  
*Chappell*, *Cannon Airways*, *Horaist*, *Smithson*, *Humphrey*, *Isaacson*, or *UFCW*. Courts consistently  
reject the suggestion that counsel is “necessary” merely because there is some nuance his or her  
opponent wants to probe, because if the law were otherwise, every person with any percipient  
knowledge would be “necessary,” and Rule 3.7’s attempt to stop tactical disqualifications would  
easily be thwarted.

1 stated any intention to call any Brown & Bain witness or to introduce any document written by  
2 Brown & Bain or reflecting its advice. They had ample opportunity to seek discovery regarding  
3 Mais' role, yet they did not do so and did not seek to extend discovery or postpone the hearing to do  
4 so. As their pre-filed testimony and their briefing on the Counties' "motion for findings" indicate,  
5 they properly focused on Flynn, who *did* advise Citizens on whether to renegotiate rather than  
6 litigate, who *has* submitted written testimony, and who *will* appear for cross-examination.

7 In short, the late-blooming interest in Mais and Brown & Bain is nothing but the kind of  
8 "tactical contrivance to trigger disqualification" that courts so deplore. *Sellers v. Superior Court*,  
9 154 Ariz. 281, 288, 742 P.2d 292, 299 (Ct. App. 1987) (reversing disqualification).

10 **B. Even If Mais Were Likely to Be a Necessary Witness,  
11 It Is Inappropriate to Disqualify Him**

12 Even where a lawyer is likely to be a necessary witness, Rule 3.7 provides that he still may  
13 represent his client at trial if "the testimony relates to an uncontested issue" or "disqualification of  
14 the lawyer would work substantial hardship on the client." Both exceptions apply.

15 **1. Any Testimony by Mais Would Be Uncontested**

16 If Mais were to testify, he would testify only on an undisputed point—that Brown & Bain  
17 advised W&T that Arizona courts typically take years to resolve complex civil litigation and  
18 preliminary injunctive relief was not likely. No one has ever disputed whether Brown & Bain in fact  
19 gave that advice, whether that advice was accurate, or whether W&T and Citizens could reasonably  
20 accept that advice. The ALJ concluded that Mais' advice and testimony would relate to a contested  
21 issue: whether to litigate the purchase power dispute with APS. But the *undisputed evidence* is that  
22 *Brown & Bain did not address that subject*. W&T advised on that subject, and that is why Flynn is  
23 a witness. Brown & Bain never evaluated or discussed the merits of Citizens' substantive position,  
24 the wisdom of filing suit at FERC, or the pros and cons of whether to file suit at all. [See Flynn  
25 Decl. ¶¶ 5, 7-9]

26 **2. Disqualifying Mais Would Work a Serious  
27 and Unjustified Hardship on Citizens**

28 Disqualifying Citizens' lead counsel for a second time would impose serious hardship on

1 Citizens and raise palpable due process concerns. Citizens turned to Mais after Gallagher &  
2 Kennedy was disqualified because Mais had represented Citizens in high stakes, complex litigation  
3 for years. Time was and is of the essence. Everyone agrees that Citizens actually spent over \$100  
4 million to purchase power for which it has not been reimbursed. The application for reimbursement  
5 has been pending for two years, and Citizens is incurring an estimated \$750,000 of carrying costs  
6 *every month*. Citizens cannot afford further delay, but neither can it risk going to trial for such large  
7 stakes without fully prepared counsel with whom it has a longstanding relationship.

8 The ALJ did not seem to doubt this, but essentially suggested that Citizens should have seen  
9 this coming because it hired a lawyer who had advised it in connection with the APS dispute. Citing  
10 the commentary to Rule 3.7, the ALJ observed (at 7) that it may be “relevant that one or both parties  
11 could reasonably foresee that the lawyer probably would be a witness.” But there was no reason for  
12 anyone to foresee that Mais would be a witness at the hearing. By the time Mais was named, the  
13 discovery had been taken, the written testimony had been submitted and nobody had shown the  
14 slightest interest in calling him to testify.

15 Finally, the ALJ suggested (at 7-8) that Citizens’ hardship “must be balanced against the  
16 need for opposing counsel to probe the reasonableness of the advice given by the Brown & Bain  
17 attorneys” and that “it should not have come as a surprise to Citizens that the opposing parties would  
18 seek to conduct discovery on, and perhaps cross-examine, all of the attorneys who rendered legal  
19 advice regarding the purchase power dispute litigation strategy.” Again, however, Citizens never  
20 tried to bar its opponents from “fully examin[ing] the underlying basis for the legal advice rendered  
21 regarding the Company’s litigation strategy” [Order at 8]. Staff, RUCO and the intervenors had  
22 every opportunity, for months, to take discovery from Mais and Brown & Bain. They chose not to.

### 23 **Conclusion**

24 According to the ALJ, Mais went from being someone that everybody knew about but  
25 nobody cared about on May 1, to being a *likely* and *necessary* witness on May 2—the day after his  
26 appearance as Citizens’ hearing counsel was announced. That makes no sense as a matter of fact or  
27 law. Facts are often disputed, and the law contains much more gray than black and white. But here  
28 there is no dispute of fact, and there are no shades of gray. No Arizona court or administrative body

1 has ordered disqualification in circumstances such as these.

2 To uphold the ALJ's Order would gravely prejudice Citizens and would unjustly reward  
3 blatant gamesmanship by its opponents. The Commission should immediately reverse the Order  
4 disqualifying Mais and direct the ALJ to act promptly on Citizens' request for a hearing date.

5 Dated: July 22, 2002.

6 Respectfully submitted,

7 BROWN & BAIN, P.A.

8  
9 By Anthony L. Marks / by DB  
10 Attorneys for Citizens Communications  
11 Company

12 **Original and ten copies filed**  
13 **July 22, 2002 with:**

14 Docket Control  
15 Arizona Corporation Commission  
16 1200 West Washington  
17 Phoenix, Arizona 85007

18 **Copy of the foregoing hand-delivered**  
19 **July 22, 2002 to:**

20 Chairman William Mundell  
21 Arizona Corporation Commission  
22 1200 West Washington  
23 Phoenix, Arizona 85007

24 Commissioner Jim Irvin  
25 Arizona Corporation Commission  
26 1200 West Washington  
27 Phoenix, Arizona 85007

28 Commissioner Mark Spitzer  
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1 Dwight Nodes  
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9 **Copy of the foregoing mailed**  
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A

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 WILLIAM A. MUNDELL  
CHAIRMAN  
3 JIM IRVIN  
COMMISSIONER  
4 MARC SPITZER  
COMMISSIONER  
5

DOCKET NO. E-01032C-00-0751

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

**PROCEDURAL ORDER**

11 **BY THE COMMISSION:**

12 On September 28, 2000, the Arizona Electric Division ("AED") of Citizens Communications  
13 Company ("Citizens") filed with the Arizona Corporation Commission ("Commission") an  
14 application to change the current purchased power and fuel adjustment clause rate ("PPFAC"), to  
15 establish a new PPFAC bank, and to begin accruing carrying charges and to request approved  
16 guidelines for the recovery of costs incurred in connection with energy risk management initiatives  
17 ("Application").

18 By Procedural Order issued April 18, 2002, the law firm of Gallagher & Kennedy was  
19 disqualified from representing Citizens in this matter. Citizens was directed file an appearance of  
20 substitute counsel as soon as practicable.

21 On May 2, 2002, the law firm of Brown & Bain, P.A. ("Brown & Bain") entered an  
22 appearance as counsel on behalf of Citizens.

23 On May 9, 2002, Mohave and Santa Cruz Counties ("Counties") filed an Objection to Notice  
24 of Appearance of Substitute Counsel. On May 14, 2002, Staff filed a Joinder in the Counties'  
25 objection to Brown & Bain's representation. On May 22, 2002, the Residential Utility Consumer  
26 Office ("RUCO") filed a joinder in the Counties' opposition to Brown & Bain's appearance as  
27 counsel for Citizens in this case.  
28

1 On May 22, 2002, Brown & Bain filed a Reply in Support of Its Notice of Appearance of  
2 Substitute Counsel.

3 Responses were filed on May 29, 2002 by the Counties, Staff, and RUCO.

4 On June 3, 2002, Brown & Bain filed a Surreply in Support of its Notice of Appearance of  
5 Substitute Counsel.

6 Pursuant to Procedural Order issued June 11, 2002, an oral argument was conducted on July  
7 2, 2002.

8 **Opposition to Brown & Bain's Representation**

9 The Counties contend that, because attorneys from Brown & Bain previously provided legal  
10 advice to Citizens with respect to its purchase power dispute with Arizona Public Service Company  
11 ("APS"), the entire Brown & Bain firm should be disqualified. According to the Counties, Joseph  
12 Mais and any other Brown & Bain attorney who provided advice to Citizens regarding the purchase  
13 power dispute are potential witnesses in this proceeding because Citizens previously waived the  
14 attorney-client privilege regarding that dispute. The Counties claim that Rule 42, Rules of the  
15 Arizona Supreme Court (Ethical Rule "ER" 3.7), prevents an attorney from appearing as an advocate  
16 in a proceeding in which the attorney is likely to be a necessary witness. ER 3.7 provides as follows:

- 17
- 18 (a) A lawyer shall not act as advocate at a trial in which the lawyer  
is likely to be a necessary witness except where:
- 19 (1) the testimony relates to an uncontested issue;
- 20 (2) the testimony relates to the nature and value of legal  
services rendered in the case; or
- 21 (3) disqualification of the lawyer would work substantial  
hardship on the client.
- 22 (b) A lawyer may act as an advocate in a trial in which another  
lawyer in the lawyer's firm is likely to be called as a witness  
23 unless precluded from doing so by ER 1.7<sup>1</sup> or ER 1.9<sup>2</sup>.
- 24

25 <sup>1</sup> ER 1.7(a) prohibits a lawyer from representing a client if that representation is directly adverse to another client, unless  
the lawyer reasonably believes the representation will not be adverse and both clients consent to the representation. ER  
26 1.7(b) provides that a lawyer may not represent a client if the representation may be materially limited by the lawyer's  
responsibilities to another client or to a third person, or by the lawyer's own interests, unless the lawyer reasonably  
27 believes the representation will not be adversely affected and the client consents after consultation.

28 <sup>2</sup> ER 1.9 provides that a lawyer who previously represented a client is prohibited from representing another person in the  
same or substantially related matter in which that person's interests are materially adverse to the interests of the former  
client, unless the former client consents.

1           The Counties assert that the comments to ER 3.7 support their opposition to Brown &-Bain's  
2 continued representation. The comments indicate that because a witness must testify on the basis of  
3 personal knowledge, while an advocate is expected to explain evidence given by others, it may not be  
4 clear if an advocate-witness is offering proof or an analysis of the proof. The Counties cite  
5 *Cottonwood Estates, Inc. v. Paradise Builders, Inc.*, 128 Ariz. 99 (1981), for the proposition that a  
6 lawyer should not be permitted to represent a client in a case where he may also be called as a  
7 witness. In *Cottonwood*, the Arizona Supreme Court upheld the trial court's decision to disqualify  
8 the defendant's attorney in a breach of contract case, where the plaintiff intended to call the  
9 defendant's attorney as a witness due to his personal knowledge regarding the defendant's assets and  
10 liabilities. The Counties claim that, although *Cottonwood* was decided prior to implementation of the  
11 current Rules of Professional Conduct, a subsequent case decided after enactment of the current Rules  
12 cited *Cottonwood* with approval. See, *Sellers v. Superior Court*, 154 Ariz. 289 (1987).

13           The Counties also cite *Security General Life Ins. Co. v. Superior Court*, 149 Ariz. 332 (1986)  
14 as supporting precedent. In *Security General*, the Arizona Supreme Court established a two-part  
15 criteria for establishing whether an attorney is a *necessary* witness pursuant to ER 3.7. The Court  
16 held that the proposed testimony must be relevant and material, and that the testimony must be  
17 unobtainable elsewhere. *Id.* at 335. The Counties argue that both prongs of the *Security General*  
18 case are met here because the purchase power dispute is a material issue in this case, and because  
19 Brown & Bain attorneys are the only persons who can provide underlying information regarding the  
20 assumptions they made, the analysis they undertook, and the advice they rendered.

21           The Counties also argue that the representation by a different Brown & Bain attorney (other  
22 than those who offered legal advice on the purchase power dispute) is not permissible. The Counties  
23 acknowledge that ER 3.7(b) permits representation by another member of the firm that will not  
24 appear as a witness, as long as such representation will not result in a conflict of interest or  
25 compromise the interests of a former client. However, the Counties contend that continued  
26 representation by the firm will create an unacceptable dilemma for an attorney who may be forced to  
27 choose between zealously representing his client or defending the testimony of his partner.

28           Finally, the Counties claim that Brown & Bain's disqualification will not cause a substantial

1 hardship for Citizens. The Counties assert that because there are no current deadlines in place, and no  
2 hearing date has been set, Citizens will not be prejudiced by having to select new counsel at this stage  
3 of the proceeding.

4 Staff agrees with the Counties' opposition to Brown & Bain's representation in this  
5 proceeding. Staff claims that the testimony and pleadings submitted in this case make it clear that  
6 Mr. Mais is a potential witness due to Citizens' waiver of the attorney-client privilege. Staff argues  
7 that Mr. Mais is not a witness just as to tangential facts but was involved, by Citizens' prior  
8 admission, in rendering advice regarding state law claims and the possibility and timing of initiating a  
9 lawsuit against APS. Staff concludes that, at a minimum, the Brown & Bain attorneys that gave legal  
10 advice regarding the purchase power dispute should be disqualified.

11 RUCO claims that it cannot take a position on disqualification until the Commission  
12 investigates and examines Mr. Mais under oath regarding his advice on the purchase power dispute.  
13 RUCO suggests that a preliminary hearing should be conducted to determine whether Citizens'  
14 communications with Mr. Mais contradict Company witness Flynn's pre-filed testimony.

15 Citizens' Response to the Request for Disqualification

16 Citizens contends that the proponents of disqualification bear a heavy burden to prove that the  
17 criteria set forth in ER 3.7 have been met. Citizens claims first that, contrary to the opposing parties'  
18 arguments, Mr. Mais is not a witness in this case because he was not noticed as a witness prior to the  
19 previously established March 13, 2002 deadline for filing testimony. In addition, Citizens asserts that  
20 no other party appeared interested in the testimony of Brown & Bain's attorneys until after the firm  
21 entered an appearance on behalf of Citizens. Citizens argues that this disinterest in Brown & Bain's  
22 prior legal advice shows that the opposing parties have contrived a conflict of interest to trigger  
23 disqualification.

24 Citizens also argues that Mr. Mais is not a *necessary* witness under ER 3.7. Citizens contends  
25 that the opposing parties' arguments fail to meet the criteria described in the *Security General* case  
26 because Mr. Mais' testimony is neither material nor unobtainable elsewhere. Citizens argues that  
27 Brown & Bain's previous legal advice was limited to rendering an opinion on the practical likelihood  
28 of getting prompt attention from an Arizona state or federal court, if the Company were to file a civil

1 lawsuit against APS. Thus, according to Citizens, Brown & Bain's earlier legal advice is tangential  
2 to the issues pending before the Commission in this proceeding. Citizens also contends that there are  
3 numerous sources of the identical evidence regarding Brown & Bain's earlier legal advice. Citizens  
4 asserts that the advice given by Mr. Mais is reflected in contemporaneous documents and the  
5 testimony of Mr. Flynn. As a result, Citizens argues that the incremental value of probing the  
6 underlying assumptions of Brown & Bain's advice is too remote to warrant imposing the penalty of  
7 denying Citizens its chosen counsel. As an alternative, Citizens offered that the co-author of the  
8 April 26, 2001 memorandum to Mr. Flynn (Brian Lake) could be called to testify regarding Brown &  
9 Bain's prior legal advice to Citizens.

10 The final argument raised by Citizens is that two of the exceptions to ER 3.7(a) apply in this  
11 case. Citizens claims that there is no "contested issue" at stake because Brown & Bain's earlier legal  
12 advice was limited to describing procedural aspects of Arizona state and federal litigation. Citizens  
13 also asserts that the opposing parties have understated the "hardship" that would be imposed by  
14 disqualifying Brown & Bain. Citizens contends that it would be deprived of its trusted, longstanding  
15 counsel, and that it would be difficult to find representation in this complex case because most large  
16 firms in Arizona would likely have some sort of conflict due to representation of Pinnacle West and  
17 its subsidiary companies, including APS.

### 18 Discussion and Conclusion

19 As stated in the April 18, 2002 Procedural Order issued in this case, "[t]he disqualification of  
20 an attorney or a firm from a proceeding is not a matter that the Commission takes lightly." The prior  
21 Procedural Order expressed concerns with avoiding "the perception of impropriety" and with  
22 ensuring that all parties are afforded "full due process." In order to protect the integrity of the  
23 Commission's process, the Procedural Order disqualified Citizens' prior counsel in this case because  
24 one of the firm's founding members served on the Board of Directors of Pinnacle West and APS at  
25 the time that Citizens was embroiled in a dispute with those companies regarding interpretation of the  
26 prior purchased power agreement.

27 Brown & Bain's representation of Citizens in this matter does not raise the same type of  
28 public policy concerns stated in the prior Procedural Order. However, the firm's representation raises

1 a different issue that requires interpretation of the Arizona Supreme Court's rules, specifically ER 3.7  
2 which addresses situations where a lawyer is required to appear as a witness.

3 *The Necessary Witness Standard*

4 As stated above, with certain exceptions ER 3.7 generally precludes a lawyer from  
5 representing a client at trial when the lawyer "is likely to be a necessary witness." Since Mr. Mais is  
6 apparently the only Brown & Bain attorney who rendered advice regarding the purchase power issue  
7 and is also representing Citizens in this proceeding, the threshold question that must be answered is  
8 whether Mr. Mais is a necessary witness in this case. The *Security General* case was cited by both  
9 sides of the dispute in support of their respective positions on this issue. As described above, the  
10 *Security General* definition of *necessity* requires that the proposed testimony must be "relevant and  
11 material" and that it must be "unobtainable elsewhere."

12 With respect to whether Mr. Mais' testimony would be relevant and material, the decision by  
13 Citizens whether to pursue litigation against APS is an issue in this case and Citizens, having waived  
14 the attorney-client privilege with respect to that issue, has opened up for litigation in this case the  
15 reasonableness of the legal advice given. As such, testimony by attorneys from Brown & Bain  
16 regarding legal advice given on the purchase power dispute would be relevant and material in this  
17 proceeding.

18 The more difficult question is whether the information that would be provided by Mr. Mais'  
19 testimony is "unobtainable elsewhere." In the *Security General* case, the Arizona Supreme Court  
20 determined that the plaintiff failed to show that the defendant attorney's testimony could not be  
21 obtained from other witnesses. *Security General* at 335. The Court found that the defendant's  
22 attorney, who had previously served as Director of the Arizona Departments of Insurance and  
23 Administration, had no personal knowledge regarding either the plaintiff or the defendant attorney's  
24 client that was unobtainable "from a host of departmental employees, past and present." *Id.*  
25 Accordingly, the Court vacated the trial court's disqualification of the defendant's law firm.

26 The facts presented in this case are significantly different. Here, although Citizens has  
27 presented the testimony of another firm's attorney regarding Brown & Bain's advice, as well as a  
28 memorandum prepared by Brown & Bain, Brown & Bain attorneys are the only persons who can

1 provide underlying information regarding the legal advice they rendered on the purchase-power  
2 litigation issue. Unlike the situation in *Security General*, where the plaintiff was attempting to elicit  
3 general expert opinion testimony from the defendant's counsel because of that attorney's employment  
4 background, in this case the Counties and Staff seek factual testimony regarding the basis of the legal  
5 advice given to Citizens. Citizens, having waived the attorney-client privilege with respect to that  
6 legal advice, should not now be heard to complain (subject to the exceptions discussed below) that  
7 the attorneys who gave the advice are off-limits to discovery and cross-examination. Because the  
8 underlying basis of the advice given by the Brown & Bain attorneys is not obtainable from any other  
9 source, the second prong of the *Security General* test is also met.

10 *Exceptions to the Necessary Witness Standard*

11 The next question to be considered is whether any of the ER 3.7(a) exceptions apply.  
12 Although Citizens contends any testimony by Brown & Bain lawyers would relate to an "uncontested  
13 issue," thereby invoking the ER 3.7(a)(1) exception, the issue of advice given regarding whether to  
14 litigate the purchase power dispute with APS is a contested issue in this case. Therefore, despite  
15 Citizens' claim that Brown & Bain gave only limited procedural advice on that issue, the firm's  
16 advice was not given regarding an uncontested issue. The exception in ER 3.7(a)(2), which relates to  
17 testimony regarding attorney fees, is clearly not relevant here.

18 The most subjective of the exceptions is ER 3.7(a)(3), which is invoked if disqualification  
19 would cause a "substantial hardship on the client." The Comments regarding this section indicate  
20 that "a balancing is required between the interests of the client and those of the opposing party" and  
21 that, in assessing hardship, "due regard must be given to the effect of disqualification on the lawyer's  
22 client." However, the Comments also state that "[I]t is relevant that one or both parties could  
23 reasonably foresee that the lawyer would probably be a witness (emphasis added)."

24 In this case, Citizens has alleged hardship to the extent that it will be deprived of its trusted  
25 counsel, the difficulty of Citizens finding acceptable replacement counsel, and due to additional  
26 delays in the case that will cause the Company to incur carrying charges associated with the PPFAC  
27 costs. However, the Company's alleged hardship must be balanced against the need for opposing  
28 counsel to probe the reasonableness of the advice given by the Brown & Bain attorneys, as well as the

1 integrity of the Commission's process.

2       As indicated in the Comments to ER 3.7 cited above, another factor that must be considered is  
3 whether both sides could or should have reasonably foreseen that the Brown & Bain attorneys who  
4 gave advice on the purchase power dispute were likely to be witnesses. Citizens' decision not to  
5 pursue litigation against APS regarding the purchase power dispute was placed at issue in this case  
6 many months ago. Indeed, the Company's legal strategy to waive the attorney-client privilege  
7 regarding that decision was directed at countering the opposing parties' claims that the issue should  
8 have been litigated. Thus, it should not have come as a surprise to Citizens that the opposing parties  
9 would seek to conduct discovery on, and perhaps cross-examine, all of the attorneys who rendered  
10 legal advice regarding the purchase power dispute litigation strategy. Weighing all of these factors,  
11 the potential hardship to Citizens is not sufficient to overcome the need to afford all parties the ability  
12 to fully examine the underlying basis for the legal advice rendered regarding the Company's litigation  
13 strategy against APS.

14       Pursuant to ER 3.7(a), and based on the information in the record as it currently exists, Mr.  
15 Mais and Mr. Lake are disqualified from representing Citizens in this proceeding due to the  
16 likelihood that one or both of those individuals may be necessary witnesses<sup>3</sup>.

17       Disqualification of Entire Firm

18       The final issue to be considered is whether the entire firm of Brown & Bain should be  
19 disqualified. As described above, ER 3.7(b) permits a lawyer to act as an advocate in a trial in which  
20 another lawyer in the same firm is likely to be a witness, unless prohibited from doing so due to a  
21 conflict of interest (ER 1.7) or where the interests of a former client would be compromised (ER 1.9).  
22 The Counties argue that the entire firm should be disqualified because the remaining attorneys in the  
23 firm could face the dilemma of having to decide whether to defend the client's interests or those of  
24 another member of the firm. At the oral argument, Staff indicated that it is opposed only to continued  
25 representation by attorneys for Brown & Bain who were involved in rendering advice regarding the  
26 purchase power dispute with APS.

27 \_\_\_\_\_

28 <sup>3</sup> Since Mr. Lake has not entered an appearance in this case, the disqualification technically applies at this time only to Mr. Mais.

1 As explained above, the issue presented by Brown & Bain's representation in this proceeding  
 2 does not raise the same type of public perception or appearance of impropriety concerns that were  
 3 discussed in the April 18, 2002 Procedural Order. Rather, the dispute before the Commission  
 4 involves a narrow issue created when an attorney representing a client may also be required to be a  
 5 witness in the case. Although Messrs. Mais or Lake may be necessary witnesses pursuant to ER  
 6 3.7(a), the Counties have not presented a sufficient basis for disqualification of the entire Brown &  
 7 Bain firm, pursuant to ER 3.7(b). The Counties' suggestion that the remaining attorneys may face an  
 8 uncomfortable dilemma if their partners are required to testify does not justify the blanket prohibition  
 9 that the Counties request. Absent a conflict under ER 1.7, or compromising a former client's interests  
 10 under ER 1.9, ER 3.7(b) permits other members of the firm who are not necessary witnesses to  
 11 continue to represent the client. Based on the existing record and information, and subject to the  
 12 specific disqualifications discussed above, the remainder of the law firm of Brown & Bain shall not  
 13 be disqualified from representing Citizens in this matter.

14 IT IS THEREFORE ORDERED that Joseph Mais and Brian Lake are disqualified from  
 15 representing Citizens in this proceeding pursuant to ER 3.7.

16 IT IS FURTHER ORDERED that any objections to this Procedural Order shall be filed by no  
 17 later than July 23, 2002.

18 IT IS FURTHER ORDERED that if the Commission takes no action regarding any such  
 19 objections by July 30, 2002, the objections will be deemed denied.

20 DATED this 16<sup>th</sup> day of July, 2002.

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 \_\_\_\_\_  
 DWIGHT D. NODES  
 ASSISTANT CHIEF ADMINISTRATIVE LAW JUDGE

Copies of the foregoing mailed/delivered  
this 16th day of July, 2002 to:

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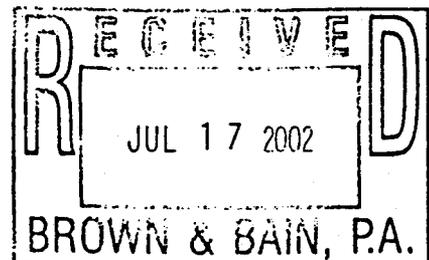
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By: *Debbi Person*  
Debbi Person  
Secretary to Dwight D. Nodes

DOCKET MEMO TO FOLLOW <sup>A73</sup>  
RECEIVED AND REVIEWED



**B**

**ER 3.7. Lawyer as Witness**

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of the legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by ER 1.7 or ER 1.9.

**Comment**

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has first hand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in ER 1.10 has no application to this aspect of the problem.

Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by ER 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the

representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to ER 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, ER 1.10 disqualifies the firm also.

### Code Comparison

DR 5-102(A) prohibited a lawyer, or the lawyer's firm, from serving as advocate if the lawyer "learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client." DR 5-102(B) provided that a lawyer, and the lawyer's firm, could continue representation if the "lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client . . . until it is apparent that his testimony is or may be prejudicial to his client." DR 5-101(B) permitted a lawyer to testify while representing a client: "(1) If the testimony will relate solely to an uncontested matter. (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony. (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client. (4) As to any matter if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

The exception stated in (a)(1) consolidates provisions of DR 5-101(B)(1) and (2). Testimony relating to a formality, referred to in DR 5-101(B)(2), in effect defines the phrase "uncontested issue," and is redundant.

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"[O]ur communications with Citizens' local Arizona counsel highlighted that civil litigation in the Arizona federal court would confront an extremely crowded docket and take several years at best. Local counsel also reinforced our conclusion that a preliminary injunction precluding APS's interpretation of the contract—and thereby granting Citizen[s] relief from high charges during the pendency of the lengthy litigation—would be very difficult to obtain in this lawsuit, as it would be essentially a contract suit for which money damages are usually recognized as sufficient."

7. Attached as Exhibit 1 are my handwritten notes of a telephone conversation with Mr. Mais. Those notes reflect discussions of the type mentioned in paragraph 3 and in my direct testimony.

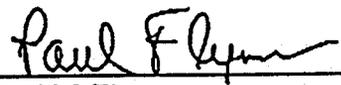
8. Attached as Exhibit 2 is an April 26, 2001 letter and accompanying memorandum. The memorandum (authored by Messrs. Mais and Lake) discusses topics of the type mentioned in paragraph 3 and in my rebuttal testimony.

9. The Brown & Bain lawyers did not advise me, and to the best of my knowledge, did not advise Citizens, about the merits of Citizens' dispute with APS.

10. If called to testify, I am capable of testifying about the advice, as described above, that Brown & Bain lawyers provided to Wright & Talisman and, through us, to Citizens, in Spring 2001.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this <sup>22<sup>nd</sup></sup> day of May, 2002.

  
Paul M. Flynn

**EXHIBIT 1**

Joe Mais

Arizona Edison vs  
So. Sierras Power Co

17 F. 2d 739 9th Cir  
1927

annotation under Arizona statute

the court reversed grant of P.I. in  
wholesale power contract breach

business litigation in court  
in terms of outside matters  
per Judge

grossly understated - too few judges

one of the slowest districts  
in country to bring a civil  
court to trial

Prescott has a lot of retirees  
and former military.

trial in one year would be  
considered expedited .....

complex civil trials take years

routine criminal trials  
push them out

state judiciary is not a bed,  
rather a mat

Rabitt got in pretty good judges

6-7 judges in special  
assignment - fast track  
for complex civil

State is 6 out of 7 jurors  
for a verdict  
court

Fed is unanimous of 12 jurors

would be faster in state court,  
still be a state case to resolve  
in within a year

win 270 days, file  
a certificate of readiness

complex case is 2-3 yrs  
resent special conferences

and state gets one from  
the state of judges!!

P.I. - success in state or if  
win less likely than fed

Brian Lake is number of  
-long of court... 4/25

will likely be going out in A2

**EXHIBIT 2**

APR 26 2001

**BROWN & BAIN, P.A.**  
Attorneys at Law

**JOSEPH E. MAIS**  
T(602) 351-8280  
F(602) 648-7180  
mais@brownbain.com

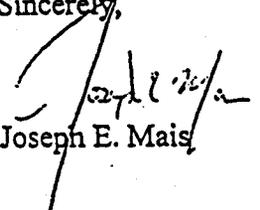
April 26, 2001

Citizens Communications Co. v. APS

Dear Mr. Flynn:

Per your request, attached is a short memorandum discussing possible procedures for seeking expedited discovery and an early trial date for a potential action against APS in Arizona District Court. Please feel free to contact me at the number listed above if you have any questions.

Sincerely,



Joseph E. Mais

Paul M. Flynn, Esq.  
Wright & Talisman, P.C.  
1200 G Street, N.W., Suite 600  
Washington, D.C. 20005-3802

FACSIMILE AND MAIL

JEM/bcl

Enclosures

MEMORANDUM FOR MR. FLYNN

Joseph E. Mais  
Brian C. Lake

April 26, 2001

Citizens Communications Co. v. APS  
Procedure for Seeking Expedited Trial

As you requested, we have considered ways in which we might be able to get a court to accelerate and set an early trial date for the proposed suit against APS in federal court in Arizona. Rather than filing a motion for preliminary injunction (which, in this case, we believe would be unsuccessful, and may prejudice and even delay the ultimate resolution of the case), we suggest that you consider filing along with the complaint a motion seeking (i) leave to file discovery under Rule 26(d) and (ii) an expedited Rule 16(b) scheduling conference at which Citizens would ask the court to adopt an accelerated discovery schedule and set an early trial date.

The Federal Rules of Civil Procedure provide that in the usual case, the court shall hold a scheduling conference and enter a scheduling order "within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant." Fed. R. Civ. P. 16(b). Rule 26(f) requires that the parties confer "at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)" to "develop a proposed discovery plan." And Rule 26(d) states that neither party may seek discovery until after the parties have conferred as required by Rule 26(f).

Rule 26(d) does permit discovery to proceed prior to the Rule 26(f) conference upon "order or agreement of the parties." Thus, Citizens could file, at the same time it files its complaint in federal court, a motion seeking leave to file discovery under Rule 26(d) and an expedited Rule 16(b) scheduling conference, together with a motion for expedited consideration.

Rule 16 of the Federal Rules of Civil Procedure gives the District Court broad case management authority under which it may issue a case scheduling order setting dates for

discovery, pretrial motions, conferences and trial. Rule 16 gives the judge "a wide range of tools" for managing cases, and "directs the judge to selectively apply those tools to tailor a case development plan that is directly responsive to the specific needs and circumstances of each individual case." MOORE'S FEDERAL PRACTICE 3d ed. § 16.03[2] (2000). Rule 16 also "empowers district courts to determine which categories of cases should be relieved from compliance with the general procedural or management prescriptions that apply to mainstream civil actions." *Id.* Citizens could argue that Rule 16's broad grant gives the court the authority to accelerate discovery and move up the trial date in this case.<sup>1</sup>

Of course, we would need to convince the court that it *should* expedite the proceedings in this case. Convincing the court to give our case priority in setting a trial date may not be an easy task. As we discussed previously, the federal courts in Arizona have a large backlog of cases, and Citizens' action is not based on a federal statute that specifically provides for scheduling priority. Each Arizona federal judge typically has his or her own set of guidelines regarding scheduling conferences that need to be taken into account as well.<sup>2</sup> However, 28 U.S.C. § 1657 does provide that the court "shall expedite the consideration" of "any other action if good cause therefor is shown." Citizens may argue that the dispute's substantial impact on a broad segment of the rate-paying public, the continuing nature and the monetary impact of APS's improper overbilling, and the current instability of the electric power markets all suggest that there is "good cause" to expedite this action. Furthermore, Citizens' complaint includes a request for declaratory judgment, which, under the Federal Rules, provides an additional reason for

---

<sup>1</sup> See MOORE'S FEDERAL PRACTICE 3d ed. § 16.13[2][c][i] (2000) ("Given the virtually limitless reach of this clause, courts are empowered to address in scheduling orders the entire range of issues that can come into play in the pretrial development of a civil case.")

<sup>2</sup> See attached Brown & Bain internal summary prepared as of December 1999. Also attached for your reference is an example of a scheduling order recently entered by the court, as well as a list of recent changes to the Arizona District Court's local rules relating to the filing of pleadings and motions.

expediting the action. See Fed. R. Civ. P. 57 (“The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.”).

We would note that Citizens could bring this action in Arizona Superior Court which, unlike federal court, provides that discovery requests can be served by the parties at any time. See Ariz. R. Civ. P. 26(d). In an action in state court, Citizens could therefore serve discovery requests on APS along with the complaint.<sup>3</sup> Arizona’s Rule 16(b) specifically provides that “upon written request of any party the court shall, or upon its own motion the court may, schedule a comprehensive pretrial conference,” at which the court may, among other things, “[d]etermine the desirability of special procedures for management of the case,” “[d]etermine whether any time limits or procedures set forth in the discovery rules or set forth in these Rules or Local Rules of Practice should be modified or suspended,” “[d]etermine a trial date,” and “[m]ake such other orders as the court deems appropriate.” The Arizona Rules contain no formal requirement that the parties meet and confer on discovery and scheduling issues prior to the pretrial scheduling conference.

Rule 2.2(a) of the Local Rules for Maricopa County Superior Courts lists several types of cases which will be preferred for trial, including “any case granted a preference by statute or other rule of court,” and “Hardship Civil cases.” “Preference by reason of hardship may be granted only upon motion to the court.” Maricopa County Local Rules, 2.2(c). Local Rule 2.2 further provides that “[a]ll cases entitled to a preference for trial by reason of statute, rule or order of court shall be set for trial at the earliest practicable date. All [such] civil cases . . . shall carry in its caption the following, or similar, notation: ‘Priority Case’ (citing rule number, order or section of statute).” Id. 2.2(d).

Citizens may argue that this action should be deemed a “Priority Case” under the court rule permitting expedited consideration of an action seeking declaratory judgment, see Ariz. R.

---

<sup>3</sup> A party must respond to a discovery request within 40 days of service of the request, or within 60 days of service of the complaint, whichever is longer. See Ariz. R. Civ. P. 34(b).

Civ. P. 57 ("The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."). In the alternative, Citizens may argue that the court should, pursuant to its Rule 16 authority, enter a scheduling order setting an early trial date and specifically classifying the action as a "Priority Case" under Local Rule 2.2.

Joseph E. Mais

/sjl

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D



E

**Citizens Communications  
Docket No. E-01032C-00-0751  
Arizona Corporation Commission's Fifth Set of Data Requests**

**Witness: Paul Flynn**

**Data Request No. LS 5.03 Supplemental:**

On p. 3 of the Amended Application Citizens describes "an in-depth legal analysis of the complex contract issues." Please provide all reports, correspondence, and other documents resulting from this analysis.

**Response:**

In December 2000, Citizens retained the law firm of Wright & Talisman, P.C. to evaluate and assist with Citizens' contract dispute with APS. In January 2001, Wright & Talisman prepared a legal memorandum assessing possible claims against APS, but noting the need for further development of those claims. A copy of that memorandum is attached. In March 2001, Wright & Talisman also prepared initial draft pleadings and affidavits for possible U.S. District Court litigation in Arizona and an associated memo on tactical considerations, Copies of which are attached. They also prepared talking points and other summaries of the main arguments in Citizens' favor, for possible use by Citizens in negotiating sessions with APS, copies of which are attached. Further developments in April 2001 cast substantial doubt on the strength of the previously identified claims and strategies. Wright & Talisman conducted interviews of several candidates that possibly could serve as an expert witness in support of Citizens in its dispute with APS. They found, however, that the former senior FERC staff members that could speak with the most authority on the topic did not support the contract interpretation in the January memo. Attached is correspondence between Wright & Talisman and one of these former FERC staff members. At about the same time, Citizens retained Brown & Bain as local Arizona Counsel, to advise on the tactical considerations of proceeding with court litigation in Arizona. As reflected in the attached notes and memoranda, they raised concerns about the pace of civil cases in the Arizona courts, and about the prospects for obtaining preliminary injunctive relief. These and other developments led Wright & Talisman to revise their earlier opinion about the prospects for success and to advise Citizens orally in the Spring of 2001 that it would be in their interests to seek a settlement with APS.

F

BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL

Chairman

JIM IRVIN

Commissioner

MARC SPITZER

Commissioner

IN THE MATTER OF THE APPLICATION OF  
THE ARIZONA ELECTRIC DIVISION OF  
CITIZENS COMMUNICATIONS COMPANY  
TO CHANGE THE CURRENT PURCHASED  
POWER AND FUEL ADJUSTMENT CLAUSE  
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

SURREBUTTAL TESTIMONY

OF

LEE SMITH

ON BEHALF OF

ARIZONA CORPORATION COMMISSION STAFF

March 13, 2002

1 I. INTRODUCTION

2

3 Q. What is your name and business address?

4 A. My name is Lee Smith, and I work for La Capra Associates, 333 Washington  
5 Street, Boston, Massachusetts.

6

7 Q. Did you file direct testimony in this Docket?

8 A. Yes. I filed direct testimony on February 8, 2002.

9

10 Q. What is the purpose of your rebuttal testimony in this docket?

11 A. My testimony rebuts arguments made in the rebuttal testimonies of Mr. Breen,  
12 Mr. Dabelstein, Mr. Flynn, and Mr. Avera. In addition, I will discuss updating  
13 the financial recommendations in my original testimony.

14

5 II. SUMMARY

16

17 Q. What were the central points of your original testimony?

18 A. I found that there were significant problems in the Old Contract that could result  
19 in Citizens' power costs rising if market prices increased. Testimony by me and  
20 Mr. Smith explained that Citizens should have known that market prices could  
21 rise significantly in the summer of 2000. However, I found that Citizens did not  
22 take appropriate steps to address these matters. In addition, although Citizens  
23 testified that it believed it had been overbilled under the Old Contract, it has not  
24 pursued two potential overbilling issues to the fullest. I recommended that  
25 Citizens not be allowed to collect the amount of dollars that could be disputed  
26 until it has made every effort to obtain relief from FERC or the courts, and that it  
27 not be allowed a carrying charge on this amount.

28

29

3

1 Q. Have Citizens' rebuttal testimonies demonstrated that it made every effort to  
2 resolve the interpretation of the SIC issue?

3 A. No. The "debate" over this issue continued from when Citizens first was rebilled  
4 in the summer of 1999 until the MOU of May 18, 2000, without resolution.  
5 Citizens did not take the issue to either FERC or the courts, leaving it in the  
6 position of continuing to pay bills based on what it believed to be an incorrect  
7 interpretation.

8  
9 Q. Has Citizens now provided more explanation as to why Citizens did not  
10 pursue this issue?

11 A. Mr. Flynn's testimony states that if Citizens lost the "'economic'... issue, it  
12 would lose its main line of defense against the high costs of power purchased..."  
13 (Rebuttal p.11). Mr. Flynn further indicates his opinion that "Litigation ....would  
14 not have provided any near-term relief and undoubtedly would have forced a  
15 deferral of any serious negotiating efforts" (Rebuttal p.18).

16  
17 Q. Do you agree with Mr. Flynn?

18 A. Not in this matter. I do not find that 'losing its line of defense' is a convincing  
19 argument. Since Citizens was being billed according to the highest interpretation  
20 of the contract, and had been for power purchased from 1998, I do not see how  
21 affirmation of that billing policy would have left it worse off. There is no  
22 evidence that the SIC interpretation issue was even "on the table" for negotiation  
23 between APS and Citizens after the summer of 2000. Citizens did not have any  
24 defense without appealing to FERC or the Courts.

25  
26 With regard to the effect on the negotiation of a new contract, as long as APS did  
27 not think its interpretation of the contract terms was being challenged, this  
28 interpretation would be what it would use as a basis of comparison to a new  
29 contract. In other words, if APS' interpretation was not challenged, APS would  
30 receive more revenue from the Old Contract. The more modifications to the  
31 contract reduced those revenues, the less attractive the modifications would be to

1 APS. If the interpretation was threatened, APS would have to consider the  
2 possibility that its revenues under the Old Contract might be less. If Citizens had  
3 petitioned FERC or the courts, that petition would seem to me to have been a  
4 bargaining chip. The experience of the summer before did not indicate that being  
5 the "good guys" provided any advantage at all to Citizens.  
6

7 **Q. Does Mr. Flynn's advice explain why Citizens did not act to resolve the SIC**  
8 **question prior to the summer of 2000, as you have recommended it should**  
9 **have?**

10 **A. No, it does not, because this advice was not provided until 2001. There is no**  
11 **evidence that the Company itself had significant doubts as to the efficacy of its**  
12 **argument prior to receiving this advice. In spite of its evident certainty that it was**  
13 **being overbilled, Citizens did not achieve the leverage through this issue that it**  
14 **could have, had it retained expert advice, such as it did in December 2000. The**  
15 **Company was being billed according to APS' interpretation, and there was no**  
16 **indication that this would change without more action on Citizens' part, such as**  
17 **engaging assistance and or actually filing a complaint with FERC or the court. As**  
18 **I indicated earlier, knowledge regarding its exposure could have been useful to**  
19 **Citizens. Lack of knowledge has had only a negative impact.**  
20

21 **Q. Did Citizens attempt to renegotiate the contract as soon as it became aware**  
22 **of the interpretation problem?**

23 **A. This is not clear. Mr. Breen's rebuttal testimony indicates that the Company was**  
24 **attempting to change the contract from late 1999. However, this was not evident**  
25 **from data responses provided previously. For instance, in response to Staff Data**  
26 **Request 7.05 (contained in Attachment S-3 to my testimony) regarding**  
27 **negotiations in the spring of 2000, discussions of alternative power supply**  
28 **arrangements are dated from April 27, 2000. This evidence indicates that earlier**  
29 **"negotiations" were primarily, if not entirely, disputes about the SIC definition.**  
30

1 Mr. Breen's rebuttal testimony objects to my characterization of Citizens' efforts  
2 to renegotiate as "very modest" (Rebuttal p.20) According to Mr. Breen there  
3 were "intense negotiations" between the companies, involving senior  
4 management. Mr. Breen's definition of "intense" may involve many phone calls  
5 or meetings, but I have not seen evidence that during the period prior to the  
6 summer of 2000 Citizens enlisted outside counsel or consultants who could have  
7 provided the kind of advice that was solicited in December of 2000 from the law  
8 firm of Wright & Talisman. I also note that the first written document fully  
9 expressing Citizens' opinion on the SIC issue appears to be the letter from Mr.  
10 Breen on March 7, 2001 (Staff Data Response 4.1, contained in Attachment S-3).  
11 This would suggest that the earlier "negotiations" did not involve a written  
12 statement of Citizens' position. This again does not appear to be a very effective  
13 form of negotiating. There is little evidence in this case regarding the efforts  
14 made by Citizens other than Mr. Breen's testimony.

15  
16 **Q. Does Mr. Avera also comment on the negotiations?**

17 **A. Yes. Mr. Avera says that Staff believed that "...if somehow the AED had**  
18 **negotiated harder APS would have changed its position." (Rebuttal p.19), which**  
19 **he finds an unrealistic position.**

20  
21 **Q. Did Mr. Avera correctly describe Staff's position? Did Staff expect that if**  
22 **Citizens had negotiated harder the results would have been different?**

23 **A. This is not an accurate description of Staff's position. The issue is more a matter**  
24 **of whether Citizens conducted effective negotiations and when it did so. Outside**  
25 **counsel and advisors would have provided a more effective team, that would have**  
26 **provided more leverage in negotiations, but they were not retained until well after**  
27 **the summer of 2000. It also appears that a serious effort to really renegotiate the**  
28 **contract, as opposed to just arguing about the SIC definition, did not begin until**  
29 **late April of 2000. Citizens gave up its right to challenge APS' Market Pricing**  
30 **Filing at FERC in return for an MOU that did not solve its problem; and Citizens**  
31 **evidently did so without advice of expert counsel.**

1 Q. Should Citizens have relied on these three facts as a guarantee that Schedule  
2 A might not be priced on the basis of the SIC/minimum bill computation?

3 A. In hindsight, it is clear that they were not a guarantee, since APS did begin  
4 charging Schedule A on this basis in August of 2000. However, even before the  
5 fact, these should not have been taken as providing any assurance of how  
6 Schedule A bills would be calculated in a high price market situation. The  
7 contract provided APS with the ability to charge on this basis. According to Mr.  
8 Flynn, the "unavoidable problem...was the language of Schedule A and the rate  
9 exhibit, which set forth minimum and maximum bounds for the stipulated rates,  
10 included SIC in the minimum charge..." In other words, the same language that  
11 led to the minimum bill computations for Schedules B and C was also contained  
12 in Schedule A. There were reasons why Schedule A bills might not have shown  
13 the minimum bill computation previously. Possibly market prices had not been  
14 high enough to make the minimum bill relevant for Schedule A previously.

15  
16 Q. Could Citizens have investigated this issue earlier?

17 A. Certainly. It appears that Mr. Flynn's advice on the subject was not requested or  
18 provided until December 2000. Citizens does not indicate that it either  
19 investigated this possibility that Schedule A had not been charged the minimum  
20 bill previously or that Citizens asked APS about whether Schedule A could be  
21 subject to the minimum billing provisions.

22  
23 **VII. WHY THE COMPANY DID NOT PURSUE THE SIC AND OTHER**  
24 **CONTRACT BILLING ISSUES SUBSEQUENT TO THE SUMMER OF**  
25 **2000**

26  
27 Q. Your testimony criticizes Citizens for not fully pursuing resolution of billing  
28 disputes based on two different disputes, and recommends that the Company  
29 not be allowed to collect an amount that it claims is in excess of its  
30 interpretation of what the contract allows it to be billed, until the Company

1 has fully pursued these issues. Has Citizens provided additional information  
2 about why it did not pursue the SIC billing issues?

3 A. With regard to billing disputes with APS, Citizens now has provided testimony by  
4 Mr. Paul Flynn regarding advice provided by his law firm. Mr. Flynn's firm was  
5 engaged in December 2000 to assist with the dispute concerning the Old Contract.  
6 Mr. Flynn opines that Citizens was prudent in negotiating new power supply to  
7 eliminate risk, "...rather than pursuing litigation that could provide no immediate  
8 relief from high costs, would take years to resolve, and ultimately was not likely  
9 to provide relief". (Rebuttal p. 5)

10  
11 Q. Did Mr. Flynn refer to any advice provided to Citizens prior to January  
12 2001?

13 A. No, he did not.

14  
15 Q. Did Mr. Flynn's testimony indicate any opinion about the prudence of  
16 challenging APS' billing practices under the Old Contract, now that a New  
17 Contract has been signed and is in operation?

18 A. No, it did not.

19  
20 **VIII. UPDATING PPFAC INFORMATION AND OTHER ISSUES**

21  
22 Q. In your original testimony, you recommended that Citizens be required to  
23 defer collection of \$49 million, representing the amount that Citizens  
24 believed it had been overbilled. You also suggested that the other issue on  
25 which it had an overbilling claim, related to the treatment of purchased  
26 power, would have been worth about \$20 million for the summer of 2000.  
27 Should these amounts be updated?

28 A. Yes, they should be updated. Mr. Rosen's testimony cites \$70 million for the  
29 amount that Citizens believed had been overcollected through May of 2001  
30 (Rosen Testimony p. 6) Once Citizens' total unrecovered bills are computed, the  
31 total disputed amount of \$70 million should be deferred for collection until this

G

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March 12, 2002

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Phoenix, Arizona 85004

Re. *Citizens Communication Company,*  
*A.C.C. Docket No E-01032-00-0751*  
*("Citizens PPFAC case")*

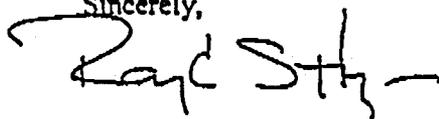
Dear Mike:

This will confirm our telephone conversation wherein we discussed the effect of Paul Flynn's rebuttal testimony on Citizen's claim to the attorney-client privilege. As a result of our conversation, it is my understanding that Citizens has waived the attorney-client privilege with regards to the subject matter and documents addressed in Mr. Flynn's testimony.

I indicated to you that it is likely that I will question Mr. Flynn regarding the written legal opinion and draft documents that were prepared by his firm. This may require me to introduce the documents into evidence at the hearing.

If I have misunderstood or misstated our conversation, please let me know.

Sincerely,



Raymond S. Heyman  
For the Firm

RSH/srs

Cc: John White, Esq.  
Holly Hawn, Esq.

H

**Table C-5.  
U.S. District Courts—Median Time Intervals From Filing to Disposition of Civil Cases  
Terminated, by District and Method of Disposition  
During the 12-Month Period Ending September 30, 2000**

Circuit and District	Total Cases			No Court Action			Court Action					
	Number of Cases	Median Time Interval in Months	Number of Cases	Median Time Interval in Months	Before Pretrial		During or After Pretrial		Trial			
					Number of Cases	Median Time Interval in Months	Number of Cases	Median Time Interval in Months	Number of Cases	Median Time Interval in Months		
<b>TOTAL</b>	179,360	8.2	32,350	7.9	122,508	7.8	19,474	13.6	5,028	20.1		
<b>1ST</b>												
DC	1,830	9.9	387	9.1	1,298	8.5	105	13.2	40	21.5		
ME	5,628	10.6	1,182	6.1	3,120	9.2	1,128	15.6	196	21.4		
MA	508	7.9	186	5.4	208	5.1	72	12.0	42	11.4		
NH	2,616	10.2	644	7.9	1,330	9.5	549	15.5	95	28.2		
RI	538	11.2	52	3.1	243	6.9	230	15.0	13	21.5		
PR	616	9.2	182	5.3	182	7.8	234	13.8	18	17.0		
	1,346	12.1	118	8.4	1,157	12.4	43	19.0	28	27.5		
<b>2ND</b>												
CT	23,059	8.0	4,279	9.7	15,075	5.8	3,096	15.3	609	27.6		
NY,N	2,508	12.9	1,523	12.4	854	11.3	44	24.0	87	30.2		
NY,E	1,513	11.1	309	7.4	744	8.4	409	17.8	51	27.4		
NY,S	5,436	10.1	635	6.8	3,647	9.2	997	16.4	157	31.4		
NY,W	11,828	5.2	1,700	10.4	8,309	3.6	1,542	13.2	277	23.8		
VT	1,397	10.8	54	3.5	1,224	9.8	95	19.7	24	42.0		
	377	7.9	58	6.4	297	7.8	9	-	13	17.0		
<b>3RD</b>												
DE	15,424	8.4	2,125	6.2	10,652	7.3	2,198	14.8	449	20.6		
NJ	560	10.9	25	4.6	441	9.3	65	17.0	29	25.0		
PA,E	5,040	8.0	575	5.3	2,678	5.3	1,871	14.4	116	25.0		
PA,M	5,798	7.8	649	4.3	4,738	7.8	242	9.9	169	16.4		
PA,W	1,415	8.9	144	4.5	1,146	7.5	66	18.0	59	19.8		
VI	2,182	9.7	675	9.2	1,292	7.4	141	24.3	74	25.8		
	429	13.2	57	30.0	357	11.8	13	14.0	2	-		
<b>4TH</b>												
MD	15,039	7.0	3,667	4.5	9,335	7.7	1,600	11.9	437	14.9		
NC,E	3,193	7.1	697	7.1	2,105	6.2	292	15.4	99	17.2		
NC,M	917	8.7	175	6.9	705	8.9	15	16.5	22	18.0		
NC,W	772	10.2	147	6.7	420	9.5	194	13.8	11	17.0		
SC	794	9.7	183	8.6	530	8.8	73	13.3	8	-		
VA,E	3,096	8.5	637	6.4	1,749	7.3	611	12.8	99	17.8		
VA,W	3,777	4.3	1,456	2.8	1,842	5.6	348	7.5	131	9.4		
WV,N	1,153	10.2	322	9.8	736	10.4	53	15.5	42	11.2		
WV,S	414	9.6	21	3.5	381	9.1	4	-	8	-		
	923	10.8	29	4.2	867	10.1	10	16.0	17	16.0		

Table C-5. (September 30, 2000—Continued)

Circuit and District	Total Cases			No Court Action			Court Action															
	Number of Cases	Median Time Interval In Months	Number of Cases	Median Time Interval In Months	Number of Cases	Median Time Interval In Months	Before Pretrial		During or After Pretrial		Trial											
							Number of Cases	Median Time Interval In Months	Number of Cases	Median Time Interval In Months	Number of Cases	Median Time Interval In Months										
5TH	19,832	9.8	2,998	9.2	14,130	9.4	2,051	12.4	653	18.9	LA,E	2,947	9.4	35	2.3	1,817	6.9	952	12.6	143	18.4	
LA,M	743	10.3	8	-	725	10.7	64	-	10	13.0	LA,W	1,622	10.1	522	10.4	967	9.8	64	17.4	69	23.2	
MS,N	779	10.9	99	5.4	451	10.1	181	13.3	48	17.0	MS,S	1,584	10.3	812	10.5	697	10.8	19	16.5	56	16.6	
TX,N	3,395	6.6	6	-	3,323	6.6	5	-	61	17.0	TX,E	2,659	24.3	182	9.5	2,211	27.2	200	11.9	66	17.0	
TX,S	4,306	9.5	796	8.9	2,798	8.6	591	11.4	121	18.2	TX,W	1,797	8.9	538	9.8	1,141	8.9	39	15.2	79	18.5	
6TH	17,366	9.3	3,173	7.8	11,047	7.0	2,664	14.1	482	21.1	KY,E	1,709	11.6	125	11.0	1,458	10.5	70	18.8	56	15.0	
KY,W	1,202	9.8	72	5.5	883	7.8	217	14.0	30	23.0	MI,E	3,503	9.7	1,409	6.5	971	7.3	1,041	13.9	82	19.0	
MI,W	840	7.0	30	3.3	777	7.2	17	16.0	16	19.0	OH,N	4,335	4.2	696	7.0	3,236	3.8	334	11.5	69	17.4	
OH,S	2,273	12.9	485	8.0	1,369	12.9	378	14.1	43	22.4	TN,E	1,467	11.5	171	7.6	1,467	8.2	604	16.7	87	29.7	
TN,M	1,077	9.6	21	1.7	1,009	8.1	4	-	43	29.5	TN,W	960	9.1	164	9.5	739	9.5	1	-	56	21.0	
7TH	15,055	6.0	2,450	5.8	10,114	5.2	2,132	12.9	359	21.2	IL,N	8,287	5.1	1,549	6.7	5,786	5.0	811	13.8	141	27.2	
IL,C	801	9.0	242	6.6	494	8.7	18	22.0	47	26.5	IL,S	798	8.0	53	3.0	684	3.2	30	21.0	31	18.4	
IN,N	1,483	7.2	99	3.6	629	3.2	697	11.0	58	17.8	IN,S	2,049	9.6	365	3.3	1,559	8.9	365	15.0	28	21.0	
WI,E	1,129	7.9	352	5.1	724	7.5	21	18.0	32	21.4	WI,W	508	4.0	58	2.3	238	2.4	190	7.4	22	9.8	
8TH	9,982	10.7	1,713	7.2	6,625	10.6	1,174	14.3	470	18.1	AR,E	1,546	11.8	382	11.7	1,068	10.3	26	10.0	70	17.0	
AR,W	871	7.9	11	8.5	813	7.9	3	-	44	12.8	IA,N	450	11.8	15	5.0	393	11.2	6	-	36	19.0	
IA,S	628	11.6	77	3.6	280	8.8	230	17.0	41	19.5	MN	2,120	12.6	369	4.1	953	16.1	740	12.6	58	20.0	
MO,E	1,550	10.2	360	11.0	1,109	9.5	5	-	76	18.2	MO,W	1,407	11.7	303	8.7	1,030	11.7	24	6.4	50	18.5	
NE	838	11.1	28	2.4	644	8.8	103	18.0	63	20.0	ND	281	9.0	90	6.9	172	9.0	7	-	12	18.5	
SD	291	11.2	78	10.2	163	9.0	30	22.4	20	18.0												

Table C-5. (September 30, 2000—Continued)

Circuit and District	Total Cases			No Court Action			Court Action					
	Number of Cases	Median Time Interval in Months	Number of Cases	Median Time Interval in Months	Before Pretrial		During or After Pretrial		Trial			
					Number of Cases	Median Time Interval in Months	Number of Cases	Median Time Interval in Months	Number of Cases	Median Time Interval in Months		
9TH	26,394	8.1	7,719	8.2	17,825	8.0	316	17.2	534	23.5		
AK	444	9.9	16	2.7	425	9.5	-	-	3	-		
AZ	1,902	10.7	453	9.8	1,393	11.4	7	-	49	33.0		
CA,N	4,151	8.1	1,829	8.4	2,222	8.5	31	25.0	69	25.5		
CA,E	1,767	9.4	461	8.1	1,252	9.0	9	-	45	26.0		
CA,C	8,306	7.5	3,421	8.0	4,725	6.8	42	23.0	118	19.4		
CA,S	1,897	7.5	95	4.1	1,773	7.9	1	-	28	25.0		
HI	888	11.3	530	11.1	322	9.4	7	-	29	29.0		
ID	448	11.3	26	4.3	355	10.2	49	21.0	18	25.0		
MT	569	10.0	114	7.5	309	9.2	128	16.3	18	23.0		
NV	1,611	8.1	216	4.1	1,350	8.2	15	13.0	30	31.0		
OR	1,643	8.7	185	6.5	1,388	8.4	6	-	64	19.3		
WA,E	420	9.0	63	9.0	339	9.4	4	-	14	19.0		
WA,W	2,271	8.5	292	5.8	1,919	8.1	14	9.0	46	16.5		
GUAM	36	12.0	9	-	26	14.5	-	-	1	-		
NMI	41	8.8	9	-	27	11.0	3	-	2	-		
10TH	8,419	9.7	810	5.7	5,886	8.4	1,417	11.0	306	18.3		
CO	1,944	9.2	53	3.6	1,587	8.8	217	19.1	87	27.5		
KS	1,165	10.8	284	7.0	646	8.0	187	16.5	48	17.5		
NM	1,210	10.7	54	5.5	880	9.1	237	11.3	39	17.0		
OK,N	813	9.9	25	4.3	730	9.0	21	15.3	37	14.0		
OK,E	442	7.3	103	4.3	269	7.9	44	8.5	26	9.4		
OK,W	1,443	6.6	235	4.6	627	5.3	543	8.5	38	11.7		
UT	1,021	10.6	13	4.6	997	10.8	-	-	11	26.0		
WY	381	10.2	43	2.0	150	61.4	168	8.1	20	12.0		
11TH	21,334	9.3	1,847	8.4	17,401	8.5	1,593	14.7	493	19.5		
AL,N	3,715	12.6	483	10.1	3,078	12.3	105	19.3	49	17.5		
AL,M	1,117	7.7	12	2.7	1,038	6.4	40	12.0	27	15.4		
AL,S	909	8.7	75	5.7	787	8.2	21	14.4	26	16.7		
FL,N	913	8.4	100	7.6	755	8.3	5	-	53	9.2		
FL,M	4,321	10.5	314	8.7	3,772	9.0	116	17.8	119	20.6		
FL,S	4,902	8.7	392	8.9	4,228	7.3	208	14.4	74	19.0		
GA,N	3,125	10.2	232	4.6	1,772	8.0	1,034	13.1	87	29.0		
GA,M	857	14.2	96	9.2	710	14.5	17	20.0	34	22.4		
GA,S	1,475	3.5	143	7.2	1,261	3.5	47	9.4	24	9.8		

NOTE: MEDIAN TIME INTERVALS COMPUTED ONLY IF 10 OR MORE CASES. THIS TABLE EXCLUDES LAND CONDEMNATIONS, PRISONER PETITIONS, DEPORTATION REVIEWS, RECOVERY OF OVERPAYMENTS, AND ENFORCEMENT OF JUDGMENTS. FOR FISCAL YEARS PRIOR TO 2000, THIS TABLE INCLUDED DATA ON RECOVERY OF OVERPAYMENTS AND ENFORCEMENT OF JUDGMENTS.