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BEFORE THE ARIZONA CORPORATION COMMISSION

- 3 FRANK WONDALL
- CHAIRMAN
- 4 JIM IRVIN
- 5 COMMISSIONER
- 6 MARC SPITZER
- 7 COMMISSIONER

Arizona Corporation Commission
DOCKETED

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AZ CORP COMMISSION
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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 AND COSTS INCURRED IN CONNECTION WITH ENERGY RISK MANAGEMENT INITIATIVES.

Docket No. E-01032C-00-0751

RESPONSE TO

"MOHAVE COUNTY AND SANTA CRUZ COUNTY MOTION FOR FINDINGS OF FACT; OR IN THE ALTERNATIVE, A STAY OF PROCEEDINGS"

AND OTHER MATTERS

10 APRIL 2002

8 **Part I – Response.**

9 The Counties Motion requests that the ACC enter three findings of fact about
10 Citizens Communications Company (CCC) and its Arizona Electric Division (AED). These
11 include findings that Citizens "has not established that purchased power costs charged by
12 Arizona Public Service Company ("APS") from May 2000 to May 2001 ("disputed purchase
13 power costs")" were prudently incurred " and that Citizens' decision to waive the attorney-
14 client and work product privilege ... is imprudent and contrary to the public interest." In
15 addition, that "Citizens' failure to establish that the disputed purchase power costs were
16 prudently incurred and its decision to waive the attorney-client privilege, the disputed
17 purchase power costs should not be charged to Citizens' ratepayers." These facts establish
18 that Citizens failed to act in a prudent manner concerning its power costs.

19 A recent General Accounting Office study *DOE Contractor Litigation Cost* reviewed
20 litigation, settlement and judgment costs and reimbursements and states "These costs are
21 not reimbursable if there is liability caused by the contractor's willful misconduct, lack of
22 good faith, or failure to exercise prudent business judgment. DOE has defined 'prudent

1 business judgment' as acting in the same manner as a prudent person in the conduct of a
2 competitive business."¹

3 A licensed public service company should not expect reimbursement from its
4 ratepayers for gross management failures to exercise *prudent business judgment*. Non-
5 reimbursable expenses are a shareholder liability.

6
7 **Part II –Other Matters.**

8 On 13 March 2002, I filed a Motion to recuse the firm of Gallagher & Kennedy (G&K)
9 due to a possible conflict of interest. This Motion has not been withdrawn or altered. During
10 my telephonic participation on 1 April, I suggested a possible solution for G&K: First, that
11 CCC and APS resolve their disputes, which may involve litigation. Then resume these
12 PPFAC Hearings to assess any PPFAC charges and if the new Citizens-APS agreement.
13 This sequence may avoid an appearance of conflict of interest.

14
15 **Part III – Recommendations.**

- 16
17 1. That the Commission deny CCC all compensation and reimbursements requested by
18 the Application, and various amendments and changes, unless:
- 19 a. All avenues have been exhausted to prevent any ratepayers charges or expenses
20 be used to cover for CCC's management's lack of *prudent business judgment*, and
 - 21 b. If CCC fails to make *prudent business judgment* decisions within the next ninety (90)
22 calendar days to proactively resolve all these disputed charges with APS including
23 starting possible litigation, then the Commission will
 - 24 i. Deny all parts of the Application and various amendments, including disapproval
25 of the new power supply agreement between CCC and APS, and
 - 26 ii. Commence a review AED's Certificate for Need and Necessity for possible
27 suspension and/or revocation based on CCC's past performance in this state.
- 28
29 2. That my prior Surrebuttal Recommendations of 13 March 2002 for this docket remain
30 unchanged for Issues 1 and 2, described therein.

31

¹ GAO Report GAO-02-418R, *Department of Energy: Contractor Litigation Costs*, March 8, 2002 at
<http://www.gao.gov/cgi-bin/getrpt?GAO-02-418R>, page 3 (copy Attached)

1
2
3 Respectfully submitted this 10th day of April, 2002.

4 MARSHALL MAGRUDER

5 By 
6 Marshall Magruder
7 PO Box 1267
8 Tubac, Arizona 85646
9

10 Attachment:

11 A – Page 3 of GAO Report GAO-02-418R, *Department of Energy: Contractor Litigation*
12 *Cost*, March 8, 2002.
13

ORIGINAL and 10 COPIES of the foregoing mailed this 11th day of April 2002, with:

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Please deliver copy to Judge Nodes and Mr. Kempley

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Enclosure I

Legal Basis for DOE Paying Litigation, Settlement, and Judgment Costs for Cases against Its Contractors

Federal Acquisition Regulation (48 C.F.R. 31.205-47) and DOE regulations (48 C.F.R. 970.5228-1) provide for the reimbursement of reasonable legal costs.

DOE has issued guidelines on what legal costs are reasonable.

Legal costs include attorney fees and other litigation costs, and costs of settlements and judgments.

These costs are not reimbursable if there is liability caused by the contractor's willful misconduct, lack of good faith, or failure to exercise prudent business judgment. DOE has defined "prudent business judgment" as acting in the same manner as a prudent person in the conduct of a competitive business. "Willful misconduct" and "lack of good faith" are determined on a case-by-case basis by DOE.