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**BEFORE THE ARIZONA CORPORATION COMMISSION**

Arizona Corporation Commission

**DOCKETED**

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AZ CORP COMMISSION  
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WILLIAM A. MUNDELL  
CHAIRMAN  
JIM IRVIN  
COMMISSIONER  
MARC SPITZER  
COMMISSIONER

DOCKETED BY	<i>[Signature]</i>
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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 OF COSTS INCURRED IN  
CONNECTION WITH ENERGY RISK  
MANAGEMENT INITIATIVES.

DOCKET NO. E-01032C-00-0751

**STAFF'S RESPONSE TO THE  
COUNTIES' MOTION FOR  
FINDINGS OF FACT**

Staff of the Utilities Division ("Staff") of the Arizona Corporation Commission ("Commission") hereby responds to the motion submitted by Mohave County and Santa Cruz County ("the Counties") for findings of fact; or in the alternative, a stay of proceedings. Staff supports the motion of the Counties against the Arizona Electric Division of Citizens Communications ("Citizens") and would echo the justifications discussed in the Counties' motion. Staff offers the following as further support for the Counties' motion.

Staff shares the concerns of the Counties in this case. Staff believes it was imprudent for Citizens to waive the attorney-client privilege with outside counsel, thereby divulging its strategy and perceived weaknesses regarding the purchase power dispute against Arizona Public Service Company ("APS"). Divulging outside counsel's tactical analysis of the purchase power dispute, admitting testimony of outside counsel at a hearing, and reinforcing outside counsel's testimony at a hearing will significantly diminish any chance of a successful outcome for Citizens before the Federal Energy Regulatory Commission ("FERC") or in court. This leaves Citizens' ratepayers further exposed and victimized by Citizens' imprudent actions. Furthermore, Staff agrees with the Counties that it stretches credibility for Citizens to suggest in its testimonies that purchase power costs it disputed

1 with APS were prudently incurred. Staff believes the Commission has the authority to enter the  
2 findings of fact the Counties are advocating against Citizens in accordance with Arizona law.

3 **I. CITIZENS' WAIVER OF ATTORNEY-CLIENT PRIVILEGE WAS IMPRUDENT**

4 Staff views the testimony of Mr. Paul Flynn of Wright & Talisman as attempting to rebut  
5 Staff's claim that Citizens should have pursued litigation against APS regarding the outstanding  
6 issues over the interpretation of the original 1995 Power Sales Agreement between APS and Citizens  
7 (hereinafter referred to as the "Old Contract"). Mr. Flynn details in his rebuttal testimony, why, in  
8 his opinion, litigation against APS would ultimately not be successful. To put that testimony forth in  
9 this case before the Commission, Citizens consciously chose to waive the attorney-client privilege  
10 without looking at alternatives or recognition of the consequences. Staff believes that Mr. Flynn's  
11 testimony would become a primary piece of evidence used against Citizens in any subsequent  
12 litigation against APS regarding the interpretation of the Old Contract. As a result, Citizens' waiver  
13 of attorney-client privilege is another imprudent action in a series of imprudent actions, which  
14 jeopardizes Citizens' chances of success against APS over the interpretation of the Old Contract.  
15 Staff would point out that Mr. Flynn's opinion of the relative weakness of Citizens' case against APS  
16 was not consistent. It appears that at some point in time Mr. Flynn and others believed that Citizens  
17 had a good chance of success against APS.

18 Clearly, the dispute between Citizens and APS regarding the Old Contract was to become an  
19 issue in this case as soon as the application was filed. It is the duty and obligation of the Commission  
20 under Article XV, section 3 of the Arizona Constitution to determine whether any rates are just and  
21 reasonable. Therefore, the Commission must review the prudence of Citizens' actions regarding the  
22 purchase power costs in this case. This includes examining whether Citizens should have pursued  
23 litigation against APS over the interpretation of the Old Contract rather than merely asking ratepayers  
24 to incur the costs. No party forced this issue on Citizens. The issue of whether costs were prudently  
25 incurred is always a key area of analysis for the Commission.

26 Despite the options available, Citizens chose to waive the attorney-client privilege in an  
27 attempt to buttress its argument that its purchase power costs were prudently incurred, despite the  
28 potentially fatal and permanent consequences of that choice. This includes the likelihood of Mr.

1 Flynn's testimony being used against Citizens in any subsequent proceeding the Commission orders  
2 Citizens to undertake against APS. Once privilege is waived, the information that was formerly  
3 subject to privilege is no longer protected. Bain v. Superior Court, 148 Ariz. 331, 333, 714 P.2d 824,  
4 826 (1986). In State Farm Mutual Automobile Insurance Co. v. Lee, 199 Ariz. 52, 59-60, 13 P.2d  
5 1169, 1176-77 (2000) cited in the Counties' motion, the Arizona Supreme Court states that privilege  
6 is not to be both a sword and a shield. Citizens is attempting to use Mr. Flynn's testimony as a sword  
7 against the claims of other parties in this case. Citizens will not be able to reassert the privilege as a  
8 shield in other proceedings. Mr. Flynn's testimony will become evidence.

9 Staff agrees with the Counties that Mr. Flynn's testimony in this case will expose Citizens and  
10 Mr. Flynn to impeachment at any subsequent proceeding regarding the Old Contract at FERC or any  
11 other forum. Citizens' decision to waive the attorney-client privilege leaves the Company in a  
12 significantly weaker position against APS, which is to the disadvantage of all parties involved in this  
13 proceeding. The Commission is left in the quagmire of ordering a remedy jeopardized by Citizens'  
14 actions in this case. Ordering the findings of fact the Counties are seeking preserves the opportunity  
15 for Citizens to successfully pursue litigation against APS. Furthermore, such an order will send the  
16 message that Citizens will not be rewarded for deliberately waiving the attorney-client privilege,  
17 when that conscious action leaves ratepayers more exposed to the purchase power costs. Therefore,  
18 Staff agrees with the Counties that the public interest would be sacrificed if Mr. Flynn were to testify  
19 and that remedial action is necessary.

20  
21 **II. CITIZENS' DISPUTE WITH APS CONCEDES THAT THE PURCHASE POWER  
COSTS INCURRED ARE IMPRUDENT**

22 Staff also shares the Counties' view that Citizens has not established that the purchase power  
23 costs were prudently incurred. In addition to what the Counties cite in their motion, Staff offers the  
24 testimony regarding the May 18, 2000 Memorandum of Understanding between Citizens and APS  
25 ("MOU") as additional support that the amount APS assessed against Citizens was excessive and that  
26 the option of litigation was never foreclosed. Mr. Sean Breen, in his rejoinder testimony, emphasized  
27 that it was APS who "reversed itself on key aspects of the agreed-upon terms in the MOU after it  
28 became aware of the magnitude of the impacts of the summer 2000." (See Breen Rejoinder Test. at

1 6). In fact, the whole point of the MOU was to resolve disputes between APS and Citizens over the  
2 interpretation of the Old Contract, which Citizens thought were successfully resolved in its favor. Id.  
3 However, per Mr. Breen's testimony, APS reneged on the MOU. Id. Furthermore, Citizens threatened  
4 to take regulatory action against APS if APS did not come to the table prior to negotiating the MOU.  
5 Id. at 4. The fact remains that Citizens disagreed with how APS interpreted the Old Contract, and  
6 never pursued litigation to resolve the issue. Furthermore, at this point, the option of litigation is not  
7 foreclosed. Because of the uncertainty regarding the costs assessed by APS against Citizens and how  
8 APS interprets the Old Contract, to state now that such purchased power costs were prudently  
9 occurred is not logical and not supported by the testimony of Citizens' own witnesses. Citizens has  
10 placed itself in the untenable position of arguing to the Commission that APS was right all along  
11 about the interpretation of the old contract. This is notwithstanding evidence that even APS  
12 recognized weakness in its position, as evidenced by the MOU and other evidence. Citizens is  
13 attempting to take the easiest route to recovering the money it does not believe it should have been  
14 billed in the first place. For ratepayers to incur these purchased power costs, under these  
15 circumstances, is simply nonsensical. Therefore, Staff supports the Counties' position on this issue  
16 as well.

17  
18 **III. THE COMMISSION HAS THE AUTHORITY TO ISSUE THE FINDINGS OF FACT  
ADVOCATED BY THE COUNTIES**

19 Staff believes that the Commission could make the findings of fact advocated by the Counties  
20 under A.R.S. §§ 40-202 and 40-203. Procedural due process requires that a party has the opportunity  
21 to be heard at a meaningful time and in a meaningful manner. Comeau v. Arizona State Bd. of Dental  
22 Examiners, 196 Ariz. 102, 106, 993 P.2d 1066, 1070 reconsideration denied, review denied (App.  
23 1999). Clearly, Citizens will be given ample opportunity to refute the Counties' claim before Judge  
24 Nodes and before the Commissioners at an Open Meeting, if Judge Nodes were to adopt the findings  
25 of fact the Counties advocate here. The procedure here is not being short-circuited in any way. While  
26 Citizens might argue that not allowing Mr. Flynn and other witnesses to testify is a denial of  
27 opportunity to be heard, there is no requirement that an evidentiary hearing be undertaken and A.A.C.  
28 R14-3-101(B) authorizes waiver of the Commission's procedural rules including that of a hearing, if

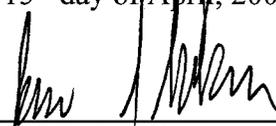
1 good cause is shown. Here, the issue is the potentially devastating effect of having Mr. Flynn testify  
2 at a hearing on any litigation against APS that the Commission orders Citizens to undertake. The  
3 testimonies of Citizens' own witnesses in their direct, rebuttal and rejoinder testimonies support the  
4 findings that the Counties propose as relief in this case.

5 Such a ruling by the Commission would be akin to ruling in favor on a motion for summary  
6 judgment. Under Arizona Rule of Civil Procedure 56(c), such judgment can be rendered if there is  
7 no material issue of fact based on all the materials of record and the moving party is entitled to a  
8 judgment as a matter of law. See also Giovanelli v. First Federal Sav. and Loan Ass'n of Phoenix,  
9 120 Ariz. 577, 581, 587 P.2d 763, 767 (App. 1978). Here, no party denies that Citizens disputes how  
10 APS was interpreting the Old Contract, that Citizens could have pursued and still could pursue  
11 litigation against APS but has chosen not to, and that Citizens has waived the attorney-client privilege  
12 regarding its legal theories and tactical assessment of litigation against APS regarding the Old  
13 Contract. These facts are evident in the testimonies filed by Citizens in this case. By those facts  
14 alone, the Commission can make the determination that Citizens acted imprudently and that all  
15 purchase power costs should not be passed through to ratepayers.

16 **IV. CONCLUSION.**

17 Staff would support the Counties' proposed findings of fact for all the reasons discussed by  
18 the Counties and by Staff. In the alternative, given the fact that waiver of the attorney-client privilege  
19 jeopardizes the likelihood of success for Citizens against APS, Staff would support a stay of  
20 proceedings, if the Counties' proposed finding of facts are not adopted.

21 RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of April, 2002.

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25 Christopher C. Kempley, Chief Counsel  
26 Jason D. Gellman, Attorney  
27 Legal Division  
28 Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007  
(602) 542-3402

1 The original and ten copies of the  
2 foregoing filed this 15<sup>th</sup> day of  
April, 2002, with:

3 Docket Control  
4 Arizona Corporation Commission  
5 1200 West Washington Street  
Phoenix, Arizona 85007

6 COPIES of the foregoing were mailed/  
7 this 15th day of April, 2002 to:

8 Michael M. Grant  
9 Todd C. Wiley  
10 GALLAGHER & KENNEDY  
11 2575 E. Camelback Road  
12 Phoenix, Arizona 85016-9225  
13 Attorneys for Citizens Communications Company

14 Daniel W. Pozefsky  
15 RUCO  
16 2828 N. Central Ave., Suite 1200  
17 Phoenix, Arizona 85004

18 John White  
19 Christine L. Nelson  
20 Deputy County Attorney  
21 P.O. Box 7000  
22 Kingman, Arizona 86402

23 Walter W. Meek  
24 AUIA  
25 2100 N. Central Ave., Suite 210  
26 Phoenix, Arizona 85004

27 Holly J. Hawn  
28 Santa Cruz Deputy County Attorney  
2150 N. Congress Drive, Ste. 201  
Nogales, AZ 85621

Raymond S. Heyman  
Michael W. Patten  
ROSHKA HEYMAN & DeWULF  
400 East Van Buren Street, Ste. 800  
Phoenix, AZ 85004  
Attorneys for Mohave and Santa Cruz Counties

28

1 Marshall Magruder  
2 Lucy Magruder  
3 P. O. Box 1267  
4 Tubac, AC 85646-1267

5 Jose L. Machado  
6 777 North Grand Avenue  
7 Nogales, AZ 85621  
8 Attorney for City of Nogales, AZ

9 L. Russell Mitten  
10 Citizens Communications Company  
11 3 High Ridge Park  
12 Stamford, CT 06905

13 *Nancy Roe*

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