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BEFORE THE ARIZONA CORPORATION COMMISSION

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WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

2002 APR 18 P 4:06

AZ CORP COMMISSION
DOCUMENT CONTROL

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

MOHAVE COUNTY AND SANTA
CRUZ COUNTY'S REPLY

Arizona Corporation Commission

DOCKETED

APR 18 2002

DOCKETED BY

Mohave County and Santa Cruz County (the "Counties") through undersigned counsel, hereby file their Reply in support of their Motion for Findings of Fact; or in the Alternative, a Stay of Proceedings (the "Counties' Motion"), as follows:

1. INTRODUCTION.

Commission Staff, RUCO, Mr. Marshall Magruder, AUIA and Citizens filed responses to the Counties' Motion. Only AUIA and Citizens oppose the Counties' Motion. However, all of the responding parties seem to agree that the Counties' proposed alternative form of relief (staying this proceeding until the purchase power dispute is resolved) is unacceptable. While the Counties are not prepared to rescind their request for alternative relief, the unity of opposition thereto underscores the dire circumstances that Citizens has created.

1 It appears to the Counties that the only generally acceptable way to resolve the
2 Counties' Motion is for the Commission to disallow the disputed purchase power costs and
3 permit Citizens to retain any of the disputed purchase power costs that it may recover from
4 APS. By so doing, the Commission will (a) strike an equitable balance between the rights
5 of Citizens' ratepayers and shareholders; and (b) hold Citizens' management accountable
6 for its actions in entering into the 1995 Power Sale Agreement and not resolving the
7 purchase power dispute.

8 This resolution will ensure that Citizens' ratepayers will not be forced to pay for
9 costs that Citizens cannot prove were prudently incurred. At the same time, Citizens will
10 now have adequate incentive to resolve the purchase power dispute because Citizens (and
11 its shareholders) will be permitted to retain any of the disputed costs that it recovers from
12 APS. To the extent that the decisions of Citizens' management have caused it to incur
13 purchase power costs under the 1995 Power Sale Agreement that Citizens cannot prove
14 were prudently incurred or cannot recover from APS, Citizens (and its shareholders) will
15 appropriately absorb those costs.

16
17 **2. THE CITIZENS' RESPONSE.**

18 Citizens' Response completely misses the mark. Citizens still does not realize that
19 it has the burden of proving that the purchase power costs were prudently incurred.
20 Citizens still does not understand that disputed purchase power costs cannot be deemed to
21 have been prudently incurred. Citizens still does not understand or acknowledge the
22 damage caused by its knowing waiver of the attorney-client privilege in this case. And,
23 Citizens still is looking to its ratepayers to shoulder all of the consequences of its
24

1 imprudent decisions.

2 The real value in the Citizens' Response is that it demonstrates that Citizens has no
3 defense to the Counties' Motion. Accordingly, the Counties' Motion should be granted.

4 **A. The factual basis for granting the Counties' Motion.**

5 Citizens claims that there is no factual basis for granting the Counties' Motion. But
6 Citizens fails to recognize that there is ample support for the Counties' Motion in the
7 direct, rebuttal and rejoinder testimony that it has already filed in this case. The Counties'
8 Motion cites to specific language in the pre-filed testimony as well as the Amended
9 Application and Citizens' responses to data requests to conclusively establish that the
10 purchase power dispute exists and is unresolved. See Counties' Motion at 3-5. Notably,
11 Citizens did not even attempt to dispute the Counties' evidence. Indeed, Citizens'
12 Response is void of any discussion of the language cited by the Counties.

13
14 Citizens also has failed to dispute the Counties' claim that it knowingly waived the
15 attorney-client privilege at a time when it knew that the Commission could order it to
16 resolve the purchase power dispute with APS. See Counties' Motion at 7, lines 11-14.
17 Instead, Citizens attempts to cast blame on the Commission Staff and RUCO for forcing it
18 to waive the privilege. Then, for good measure, it tries to deflect criticism by charging that
19 the Counties would have Citizens conceal the privileged information. Citizens ignores the
20 fact that the Counties suggested that if Citizens felt it was necessary to present Mr. Flynn's
21 testimony (a proposition that the Counties do not believe has merit), it could have done so
22 under seal or pursuant to a protective order. Counties' Motion at 9, line 23-26.

23
24 Citizens simply cannot present this Commission with evidence that the disputed

1 purchase power costs were prudently incurred. Citizens has failed to do so in its pre-filed
2 testimony and it failed to do so in Citizens' Response. Moreover, Citizens has failed to
3 provide any reasonable rationale for its decision to waive the attorney-client privilege. In
4 short, the Counties' Motion is firmly supported by the facts and should be granted.

5 **B. The legal basis for granting the Counties' Motion.**

6 Citizens argues that the Counties' Motion is similar to a motion for summary
7 judgment and that it would be improper for the Commission to enter the requested findings
8 without a hearing. Citizens' Response at 1-5. But, Citizens fails to cite to any case, order,
9 regulation, rule or statute to support its argument.

10
11 Citizens does cite Commission Decision No. 49438 for the proposition that
12 "Citizens is authorized to recover such undercollections after hearing and on order of the
13 Commission." Citizens' Response at 2, lines 18-21. However, the actual language of
14 Decision No. 48438 states, "The Commission shall conduct a formal proceeding for the
15 purpose of examining fuel and purchased power costs." (emphasis added.) This
16 Commission never stated that if Citizens failed to present any evidence of prudence in its
17 pre-filed testimony--or if Citizens' pre-filed testimony demonstrated on its face that it
18 acted imprudently--it had to proceed with a hearing on that issue. To the contrary, the
19 Commission's statutory authority permits the Commission to grant the Counties' Motion.

20 A.R.S. Sec. 40-202 states in part:

21
22 The commission may supervise and regulate every public service
23 corporation in the state and do all things, whether specifically
24 designated in this title or in addition thereto, necessary and
convenient in the exercise of that power and jurisdiction. (emphasis
added.)

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A.R.S. Sec. 40-203 also provides:

When the commission finds that the charges...demanded or collected by any public service corporation for any service, product or commodity...or that the practices or contracts, are unjust or insufficient, the commission shall determine and prescribe them by order.

See also Ariz. Const. Art 15, Sec. 3 (Commission has full power to prescribe just and reasonable rates and charges to be made by public service corporations).

Citizens notes that the Commission has adopted the Arizona Rules of Civil Procedure ("Ariz. Rules Civ. Pro.") and argues that the Counties' Motion is a dispositive motion that must be governed by those rules. Citizens' Response at 4. ftnt. 1. However, Citizens has ignored the provisions of A.A.C. R 14-3-101.B, which provide that the Commission may waive the application of the rules when not in conflict with law and not affecting the substantial interests of the parties. In this case, there is no conflict with law, as Citizens acknowledges that this motion is similar to a summary judgment. Citizens' interests will not be substantially affected because, unlike in a court case, Citizens has already filed its direct, rebuttal and rejoinder testimony with the Commission.

Even if the Ariz. Rules of Civ. Pro. did strictly apply to the Counties' Motion, the Commission would have a solid legal basis for granting the requested relief. Ariz. Rules of Civ. Pro., Rule 56 (c) states in part:

The judgment sought shall be rendered forthwith if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

1 As discussed, Citizens and the Counties do not dispute the material facts. Citizens,
2 in its pleadings, discovery responses and pre-filed testimony, admits that the purchase
3 power dispute is not resolved and that it knowingly waived the attorney-client privilege
4 when it knew the Commission could order it to resolve the dispute. However, Citizens'
5 Response now suggests that Citizens' witnesses "created" a material fact by having
6 presented contradictory testimony that the purchase power dispute is resolved. Citizens'
7 Response at 3, lines 12-18. Citizens' claim is factually and legally wrong. Citizens has not
8 and, in fact, cannot cite to any testimony, settlement agreement, or release to support its
9 new proposition that the purchase power dispute has been resolved. And, even if Citizens
10 could manufacture such evidence at this point in time, the law is clear that a party cannot
11 create a material fact by contradicting itself. Wright v. Hills, 161 Ariz. 583, 587, 780 P.2d
12 416, 419 (App. 1989) ("A party's affidavit which contradicts his own prior deposition
13 testimony should be disregarded on a motion for summary judgment"); UA Local 343 of
14 the United Association of Journeymen, etc. v. Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1473
15 (9th Cir. 1995 (Internal inconsistencies in a party's own testimony fail to create a genuine
16 material fact); and Radobenko v. Automated Equipment Corporation, 520 F. 2d 540, 543-
17 44 (9th Cir. 1975) (A party should not be allowed to create his own issue of fact by
18 contradicting his prior testimony). Thus, this Commission can determine, as a matter of
19 law, that (a) disputed purchase power costs cannot be deemed to be prudently incurred; and
20 (b) in this case Citizens failed to present evidence that the disputed purchase power costs
21 were prudently incurred. Citizens claims that the Counties have misstated the standard of
22 prudence. Citizens' Response at 5, line 5 to 7, line 18. The Counties believe that the
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1 prudence standard they cited is not materially different than that cited by Citizens.¹ See
2 Counties' Motion at 7, lines 14-19. Further, the Counties believe that under any of the
3 prudence standards cited by the parties, the outcome would be the same. It was not
4 reasonable for Citizens to leave unresolved the purchase power dispute. It was not
5 reasonable for Citizens to ask ratepayers to reimburse it for unresolved disputed purchase
6 power costs. And, it was not reasonable for Citizens to waive the attorney-client privilege.

7
8 Also, Citizens misunderstands the Counties' position on the failure to resolve the
9 purchase power dispute. Citizens needlessly argues that the Counties are second-guessing
10 the decision not to file a formal complaint with FERC or in court. Citizens' Response at 6,
11 line 15 to 7, line 18. The Counties' position is, and has always been, that because Citizens
12 failed to resolve the purchase power dispute by any means it cannot prove that those costs
13 are prudent.

14 The Counties have never focused solely on the fact that Citizens did not resolve the
15 purchase power dispute through litigation. The Counties' Motion points out that Citizens
16 has not resolved the purchase power dispute at all--not by litigation, arbitration, mediation
17 or negotiation. See Counties' Motion at 4, lines 5-8. As a result, Citizens cannot properly
18 claim that the disputed purchase power costs are prudent. Moreover, Citizens has
19 jeopardized its ability to ever favorably resolve that dispute by waiving the attorney-client
20 privilege in this docket.

21
22 _____
23 ¹ With regards to Citizens' claim that the definition of "prudently invested" should apply here, the
24 Counties merely note that purchase power costs are not "investments." Citizens' Response at 5, lines 11-
18. Any presumption of prudence that Citizens may claim, has been overcome by the undisputed clear and
convincing evidence in the Counties' Motion that Citizens did not act reasonably.

1 Citizens also displays a basic misunderstanding of the nature of the Counties’
2 Motion. Citizens’ Response erroneously states that the Counties request that the entire
3 proceeding be dismissed. Citizens Response at 1, lines 20-22; and 3, lines 3-7. Clearly, the
4 Counties have only requested that the Commission enter findings of fact that Citizens has
5 not demonstrated that the purchase power costs from May 2000 to May 2001 (defined in
6 the Counties’ Motion as the “disputed purchase power costs”) were prudent and, therefore,
7 should be disallowed. Counties’ Motion at 1, lines 17-24; and 11, lines 19-26 to 12, lines
8 1-2. The Counties have also requested that the Commission make a finding of fact that the
9 decision to waive the attorney-client privilege was imprudent. The Counties have not
10 requested any findings of fact on any remaining issues, such as the prudence of the 2001
11 Purchase Power Agreement or the costs associated therewith. In fact, the Counties believe
12 that these issues could be addressed at a hearing in this docket.

13
14 **C. The legal basis for granting the requested relief.**

15 The Counties’ Motion presented the Southern California Edison case in support of
16 the rationale that disallowing the collection of imprudent costs from ratepayers would
17 provide Citizens with a direct incentive to resolve the purchase power dispute. Counties’
18 Motion at 8, line 4 to 9, line 15. Citizens apparently concedes the relevance of Southern
19 California Edison as Citizens’ Response does not even address the case.

20 **3. THE AUIA RESPONSE.**

21 The AUIA Response argues that the Commission lacks the authority to grant the
22 Counties’ Motion. AUIA also contends that there is no evidence that a dispute ever
23 existed between Citizens and APS regarding purchase power costs, but that if such a
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1 dispute did exist, it has been resolved. AUIA Response at 3, lines 4-16.

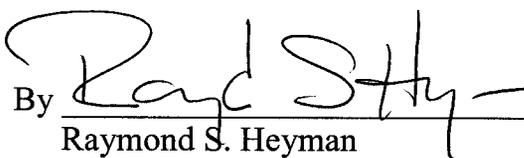
2 The Counties believe that the arguments of the AUIA and Citizens are similar in
3 theory. Consequently, the reply to Citizens' Response contained herein is incorporated in
4 the Counties' reply to the AUIA Response in all relevant aspects.

5 4. CONCLUSION.

6 The Counties' Motion is supported by the facts and law. Citizens has created its
7 own unique set of problems in this case. Its ratepayers should not be obligated to bear the
8 burden of those problems. The Counties believe that the most equitable way to resolve the
9 purchase power dispute as it pertains to Citizens' ratepayers is for the Commission to
10 disallow the disputed purchase power costs and permit Citizens to retain any of the
11 disputed purchase power costs that it may recover from APS.
12

13 RESPECTFULLY SUBMITTED this 18th day of April 2002

14 Roshka Heyman & DeWulf, PLC

15 By 

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- 2 Filed April 18, 2002, with:
- 3 Docket Control
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