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BEFORE THE ARIZONA CORPORATION COMMISSION RECEIVED

WILLIAM A. MUNDELL  
CHAIRMAN  
JAMES M. IRVIN  
COMMISSIONER  
MARC SPITZER  
COMMISSIONER

2002 APR 24 P 4: 49

AZ CORP COMMISSION  
DOCUMENT CONTROL

IN THE MATTER OF THE APPLICATION OF THE ) DOCKET NO.  
ARIZONA ELECTRIC DIVISION OF CITIZENS COM- ) E-01032C-00-0751  
MUNICATIONS COMPANY TO CHANGE THE CUR- )  
RENT 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 ALTERNATIVES.)

AUIA'S OBJECTIONS TO PROCEDURAL ORDER  
AND REQUEST FOR COMMISSION REVIEW

The Arizona Utility Investors Association (AUIA) hereby files its objections to the Procedural Order issued April 18, 2002, in the above captioned matter and respectfully requests that the Arizona Corporation Commission (Commission) review the Order *en banc* and reverse the disqualification of the law firm of Gallagher & Kennedy from representing Citizens Communications (Citizens or the Applicant) in this matter.

To put it plainly, if the Commission allows this unprecedented order to stand, it signals clearly to the business community and the legal profession that the Commission is more concerned about cosmetics than about the due process rights of the entities it regulates.

This decision stands for the proposition that regulated utilities in Arizona do not enjoy the same legal rights that are afforded to other citizens.

AUIA believes the Order of the Administrative Law Judge (ALJ) is based on errors of fact and legal analysis, as discussed below:

Arizona Corporation Commission

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DOCKETED BY [Signature]

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1 **1. The Magruder "Interest"**

2 In his discussion of the four-pronged test enumerated by the Arizona  
3 Supreme Court in the *Gomez* case (*Gomez v. Superior Court*, 149 Ariz. 223, 1986),  
4 ALJ Dwight Nodes asserted that "there is no evidence to suggest that Mr.  
5 (Marshall) Magruder's motion was intended to harass Citizens or that it was not  
6 made in good faith. (Order at P. 7)

7 We disagree vehemently and will demonstrate that Mr. Magruder's  
8 motion was made precisely for the purpose of harassing and weakening Citizens'  
9 position. Furthermore, the ALJ is wrong in describing Mr. Magruder as "a  
10 concerned member of the public" (Order at P.8). In fact, Mr. Magruder precisely  
11 fits the "most cynical citizen" standard enunciated in *United States Fire Ins. Co.*, 50  
12 F.3d at 1316.

13 Mr. Magruder is still seething over Line Siting Case No. 111, which  
14 involved siting a 345 kV transmission line through Santa Cruz County, a joint  
15 project of Citizens and Tucson Electric Power Co. (TEP) Although he was  
16 admonished to do so by Chief Administrative Law Judge Lyn Farmer, he will not  
17 let that case go.

18 Case 111 was one of the most contentious and emotional cases to come  
19 before the Line Siting Committee and the Commission in recent times. Mr.  
20 Magruder was an avid opponent of the project who was frustrated by the  
21 hearing process and complained repeatedly that the Committee and the  
22 Commission ignored his evidence and his objections.

23 Michael Grant of Gallagher & Kennedy represented Citizens in Case 111  
24 and often clashed with Mr. Magruder over procedural and evidentiary issues.

25 Citizens' first application to adjust its Purchased Power and Fuel  
26 Adjustment Clause (PPFAC) and recover an uncollected balance of \$54 million in  
27 its PPFAC bank was filed, with much attendant publicity, in September 2000.  
28 Mr. Magruder did not intervene.

29 Citizens' amended application, seeking recovery of an uncollected balance  
30 of \$87 million, with more attendant publicity, was filed in September 2001. Mr.  
31 Magruder did not intervene.

32 On December 12, 2001, the Commission completed its review of Case 111  
33 and approved an amended Certificate of Environmental Compatibility.

1 Less than 30 days after that decision, Mr. Magruder intervened in this case. His  
2 one-page request for intervention was devoted almost entirely to a discussion of  
3 the customer charges that would result from Case 111.

4 On January 31, Mr. Grant, representing Citizens, objected to Mr.  
5 Magruder's intervention because of the clear indication that he intended to raise  
6 issues in this proceeding regarding the transmission project.

7 In fact, in his response dated February 5, Mr. Magruder asserted that the  
8 two issues are linked and complained that "During the recent Case 111 Power  
9 Plant and Transmission Line Siting hearings, I was not permitted to discuss the  
10 rate impact of that project on Santa Cruz County residents."

11 On February 20, Chief ALJ Farmer granted intervention to Mr. Magruder  
12 with the admonition that his intervention "will not be allowed to broaden the  
13 issues in this matter."

14 But Mr. Magruder doesn't give up. In his so-called surrebuttal testimony,  
15 submitted March 13, he referred again to his experience in Case 111, saying, "I  
16 presented a series of questions that needed to be answered before information  
17 would be available by the committee to make a knowledgeable judgment and  
18 ultimate decision. I was prohibited, several times, by the Siting Committee  
19 Chairman from asking questions concerning 'rates' as this was not the subject of  
20 those hearings (emphasis added).

21 "During my Brief for the Commissioners, during Case 111 Review, I  
22 additionally presented information concerning 'rates' but the decisions did not  
23 appear to be influenced by that discussion. I am now trying for a third time to  
24 have 'rate' information considered for that transmission line project."

25 (Magruder Surrebuttal Testimony at P. 7)

26 Again, at the March 21 procedural conference in this matter, Mr.  
27 Magruder returned to the same theme, saying, "Judge Farmer, I tried to bring  
28 this point up during the Siting Committee hearings, and I was objected to by Mr.  
29 Grant because he said it should be brought up at a rate hearing, and that's why  
30 I'm bring it up at this time. So it has never been discussed, this additional rate or  
31 increase that's being passed on to the consumers in Santa Cruz County, and I  
32 don't know when it's going to be discussed if it's not discussed in this case."

33 (3/21 Tr., P. 14)

1           On March 13, Mr. Magruder also filed his motion requesting that the  
2 Commission order Gallagher & Kennedy to withdraw as counsel for Citizens,  
3 "due to a possible conflict of interest." His discussion concluded with these  
4 words, "Mr. Gallagher and his law firm does not appear to have been as active in  
5 pursuit of potential overcharging by APS during the period of May 2000 through  
6 May 2001, a period of rate increases considered abnormally high in the western  
7 United States. In addition, a new contract with higher rates was proposed as the  
8 solution. These inactions and actions by his firm may be due to an appearance of  
9 a conflict of interest (emphasis added)."

10           It was not "an appearance" of conflict that Mr. Magruder was concerned  
11 about. He had read the direct testimony submitted on February 8 by RUCO and  
12 Staff, which asserted that Citizens should have litigated its disagreement with  
13 APS. (4/1 Tr. P. 60) He thought he had caught Citizens and Gallagher &  
14 Kennedy red-handed. He thought he had found the smoking gun in Citizens'  
15 decision not to litigate.

16           Unfortunately, Mr. Magruder's facts were dead wrong and there was no  
17 smoking gun. Gallagher & Kennedy was not retained by Citizens from May 2000  
18 through May 2001 and had nothing to do with the APS contract dispute or the  
19 negotiated new contract.

20           During the procedural conference on March 21, Mr. Magruder learned of  
21 his error and he backed off. At an off-the-record meeting that day, the parties  
22 outlined the contents of two affidavits to be secured by Mr. Grant that were  
23 expected to resolve the conflict issues. Mr. Kempley asked Mr. Magruder  
24 whether this approach would satisfy his concerns. He said yes.

25           The next day, at a continuation of the procedural conference, Mr.  
26 Magruder told Judge Farmer that he was "satisfied" with Mr. Grant's efforts  
27 (3/22 Tr., P 10). However, by the time of the oral arguments on April 1, Mr.  
28 Magruder had changed position again with the notion that the case should be  
29 stayed until Citizens takes some unspecified action "to recover or reduce the  
30 payments to the appropriate level."

31           These were not the acts of "a concerned member of the public who is also  
32 an intervenor." (Order at P. 8) These are the acts of a person who was (a)  
33 frustrated by an adverse result in a previous case; (b) bent on reviving that case

1 through this proceeding; (c) angry at Citizens Communications and its  
2 attorneys; and (d) willing to use erroneous information to deprive Citizens of its  
3 choice of counsel.

4 In most respects, Mr. Magruder's behavior fits the first criterion cited by  
5 the court in *Gomez* and in that regard, the ALJ has erred in his application of that  
6 case. The Magruder motion was filed to harass Citizens and its counsel.

7 The ALJ notes the principle cited in *United States Fire Insurance Co.*: that a  
8 lawyer's behavior should not be governed by the standards imputed to the  
9 "most cynical members of the public." However, that would be the result if this  
10 Commission supports a conflict allegation from an intervenor based on palpably  
11 false information.

#### 12 **Other Gomez Elements**

13 The second criterion cited In *Gomez* is whether the party bringing the  
14 motion will be damaged if the motion is not granted. There is no allegation in  
15 the Order that Mr. Magruder will be damaged if the motion fails. Instead, the  
16 ALJ simply attributes an "everyman" persona to Mr. Magruder and assumes that  
17 he represents the public.

18 This implies the existence of some sort of class action motion to recuse,  
19 which in turn suggests that the mover need not be a party to the proceeding, that  
20 such a motion could be brought in the public's name by anyone who walks by  
21 the Commission's front door.

22 AUIA submits that this not what the court had in mind in articulating the  
23 elements of *Gomez*. We think the criterion is straight forward, requiring that a  
24 party to the proceeding who is familiar with the circumstances of the alleged  
25 conflict must demonstrate that he or she will be damaged.

26 And what of the damage inflicted by disqualification? The unwashed  
27 public will equate this result to a disciplinary action. They will assume that  
28 Gallagher & Kennedy did something unethical. They will also assume that there  
29 was collusion between Citizens and APS. Why else would you force a company  
30 to fire its lawyer?

31 The ALJ devotes considerable verbiage to the fourth criterion in *Gomez*,  
32 which posits that the possibility of public suspicion must outweigh any benefits  
33 accruing from continued representation. AUIA is constrained to say again, for

1 the record, that we do not believe that any potential consequence of an imagined  
2 conflict has been cited by the ALJ or any other party that trumps the Applicant's  
3 right to due process of law.

4 The ALJ notes Staff's argument that an objective observer could conclude  
5 that Citizens' decision to abandon litigation against APS reflects an agreement  
6 between them to avoid litigation and let ratepayers bear the PPFAC costs.  
7 (Order , P. 9)

8 Our response is that Staff's argument is immaterial. If that is a real  
9 perception, it will be borne by any law firm that represents Citizens in this case.  
10 And if it happened, Gallagher & Kennedy had no part in it. We all know that  
11 and facts must be allowed to intrude on this proceeding at some point.

12 The ALJ notes that the former director of the Mohave County Economic  
13 Development Authority also expressed concern in public comments about the  
14 lack of litigation. (Order, P. 8) We submit that this was not likely an immaculate  
15 revelation. He is probably capable of reading newspapers and filed testimony.

16 The ALJ asserts that ratepayers must have confidence in the fairness of the  
17 Commission's process since they are being asked to pay for the under-recovered  
18 PPFAC balance. (Order, P. 10). We agree, but we have not seen the factual or  
19 legal evidence of anything that impugns the Commission's process or that meets  
20 the requirement in *Gomez*.

21 If public suspicion is the measure here, AUIA is alarmed by the ALJ's  
22 comments regarding the direction of Gallagher & Kennedy's representation of  
23 Citizens. The ALJ expressed concern that the consent agreement between the  
24 law firm and APS restricts Gallagher & Kennedy to presenting a case that isn't  
25 adverse to APS. (Order, P. 10)

26 He writes, "For example, Gallagher & Kennedy is precluded by the  
27 consent agreement from pursuing a legal strategy that advocates litigation by  
28 Citizens against APS..." Under this restriction, the ALJ asserts, "Citizens will  
29 have been unable to build a record that will be helpful in subsequent  
30 proceedings against APS." (Order, P. 10)

31 We are compelled to point out that these decisions belong to the  
32 Applicant, not its lawyers. Citizens is certainly aware of the provisions of the  
33 consent agreement and approved its contents. What this language suggests is

1 that no law firm is acceptable that does not advocate and work toward some  
2 kind of legal conflict with APS.

3 Furthermore, to borrow from Staff's repertoire of suppositions, an  
4 objective observer could conclude that the Commission has already made up its  
5 mind to relegate Citizens' application to the vagaries of litigation.

6 **AUIA's "Concerns"**

7 In recounting various parties' support for disqualification, the ALJ noted  
8 that "even AUIA's representative initially expressed to Gallagher & Kennedy  
9 some of the same concerns raised in Mr. Magruder's Motion (See, March 21, 2002  
10 Tr. 34)" (Order, P. 9)<sup>1</sup>

11 These remarks, although accurately portrayed in the transcript, have been  
12 reported without context, which we will provide now.

13 When the Applicant's Rebuttal Testimony was submitted, AUIA's  
14 representative, Mr. Meek, reviewed the testimony of Paul Flynn, an attorney  
15 with Wright & Talisman. In describing the strategies that were considered for  
16 dealing with the APS contract dispute, Mr. Flynn noted that advice was solicited  
17 from unnamed local counsel.

18 Mr. Meek immediately called Mr. Grant for clarification because Mr. Meek  
19 believed that Gallagher & Kennedy had no involvement with the APS dispute  
20 and would have been disturbed to learn otherwise.

21 Mr. Grant confirmed that the reference was not to Gallagher & Kennedy  
22 but to Brown & Bain. Mr. Grant also explained generally that APS and Citizens  
23 had found it necessary to execute waivers to accommodate Gallagher &  
24 Kennedy's representation of APS and/or Pinnacle West on unrelated matters.

25 This discussion led Mr. Meek to inquire whether the waivers dealt in any  
26 way with Michael Gallagher's service on the Pinnacle West Board. Mr. Grant  
27 explained that Mr. Gallagher's position as a member of the Pinnacle West Board  
28 did not pose any conflict that required resolution.

29 ***State ex. rel. Corbin***

30 Commission Staff and the ALJ persist in turning this case on its head to  
31 justify disqualification of Gallagher & Kennedy. However, the facts of the case  
32 and the proposition it stands for are contrary to the circumstances here.

1 To repeat, in *State ex. rel. Corbin v. Arizona Corporation Commission*, 143  
2 Ariz. 219 (App. 1984), the facts were these: Tucson Electric Power Company had  
3 completed a rate case and was awaiting a recommended order, but it was slow in  
4 coming. A lawyer for TEP who was formerly a Commission consultant, drafted  
5 an order and gave it to the director of the Utilities Division who passed it on to  
6 the hearing officer who used it in preparing his order.

7 When this came to light, the Commission decided to remedy the matter by  
8 recusing the utilities director and the hearing officer but continuing to a  
9 conclusion of the rate case. Two intervenors, the Attorney General and the  
10 Arizona Center for Law in the Public Interest, appealed that decision, arguing  
11 that the only appropriate relief was for the Commission to dismiss the case and  
12 require TEP to refile. The Supreme Court found for the Commission.

13 As the ALJ says, Staff relies on this case "to support its assertion that the  
14 Commission has broad discretion to fashion remedies to ensure that its  
15 proceedings are not defiled or corrupted." (Order, P. 9)

16 AUIA doesn't disagree, but in *State ex. rel Corbin* the Commission's  
17 process was corrupted by its own employees acting contrary to its rules. Of  
18 course, the Commission should have the authority to clean its own house and to  
19 right such wrongs. The court determined that it has discretion to do so in a way  
20 that preserves due process for those under its regulation.

21 In this case, we have no defilement, no accusation of an actual conflict.  
22 There is no evidence that the Commission's process has been corrupted, only the  
23 unsupported fear that someone might think so. Here, the Commission proposes  
24 to deny due process, not preserve it. That is not what *Corbin* stands for.

## 25 Conclusion

26 AUIA submits that the legal and factual bases for this proposed Order are  
27 seriously flawed. The Order fails to meet the test for an appearance of conflict on  
28 three out of four criteria cited in the *Gomez v. Superior Court* and It fails to fit the  
29 facts or the principle enunciated in *State ex. rel. Corbin*.

30 This Order has its origins in an accusation brought by an intervenor with  
31 an axe to grind and who had his facts completely wrong.

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1 Most important, this Order would deny Citizens Communications due  
2 process and simple, fair treatment on two grounds. First, by preventing Citizens  
3 from being represented by legal counsel of its choice, and second, by the  
4 presumptive direction to Citizens about how it must conduct its case.

5 The Commission should reject this order and move on to consideration of  
6 the PPFAC application.

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8 RESPECTFULLY SUBMITTED, this 24<sup>th</sup> day of April, 2002,  
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12 \_\_\_\_\_  
13 WALTER W. MEEK, PRESIDENT

14  
15 **CERTIFICATE OF SERVICE**

16  
17 Original and ten (10) copies of the  
18 foregoing memorandum were filed  
19 this 24th day of April, 2002, with:  
20

21 Docket Control  
22 Arizona Corporation Commission  
23 1200 W. Washington Street  
24 Phoenix, AZ 85007

25  
26 Copies of the foregoing memorandum  
27 were hand-delivered this 24th day of  
28 April, 2002, to:  
29

30 Chairman William Mundell  
31 Commissioner Jim Irvin  
32 Commission Marc Spitzer  
33 Christopher Kempley, Esq., Legal Division  
34 Ernest Johnson, Esq., Utilities Division  
35 Dwight Nodes, Esq., Hearing Division  
36 Arizona Corporation Commission  
37 1200 W. Washington  
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40 Copies of the foregoing memorandum  
41 Were mailed this 24th day of April, 2002,  
42 to the following parties of record:  
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