



0000062513

**ORIGINAL**

BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

28

1  
2 JEFF HATCH-MILLER  
CHAIRMAN

2006 NOV -11 A 11:40

3 WILLIAM A. MUNDELL  
COMMISSIONER

Arizona Corporation Commission

DOCKETED

AZ CORP COMMISSION  
DOCUMENT CONTROL

4 MIKE GLEASON  
COMMISSIONER

NOV -1 2006

5 KRISTIN K. MAYES  
COMMISSIONER

DOCKETED BY



6 BARRY WONG  
COMMISSIONER

7  
8 IN THE MATTER OF THE APPLICATION OF  
9 ARIZONA PUBLIC SERVICE COMPANY  
10 FOR A HEARING TO DETERMINE THE  
11 FAIR VALUE OF THE UTILITY PROPERTY  
12 OF THE COMPANY FOR RATEMAKING  
13 PURPOSES, TO FIX A JUST AND  
14 REASONABLE RATE OF RETURN  
15 THEREON, TO APPROVE RATE  
16 SCHEDULES DESIGNED TO DEVELOP  
17 SUCH RETURN, AND TO AMEND  
18 DECISION NO. 67744

Docket No. E-01345A-05-0816

13 IN THE MATTER OF THE INQUIRY INTO  
14 THE FREQUENCY OF UNPLANNED  
15 OUTAGES DURING 2005 AT PALO VERDE  
16 NUCLEAR GENERATING STATION, THE  
17 CAUSES OF THE OUTAGES, THE  
18 PROCUREMENT OF REPLACEMENT  
19 POWER AND THE IMPACT OF THE  
20 OUTAGES ON ARIZONA PUBLIC SERVICE  
21 COMPANY'S CUSTOMERS.

Docket No. E-01345A-05-0826

18 IN THE MATTER OF THE AUDIT OF THE  
19 FUEL AND PURCHASED POWER  
20 PRACTICES AND COSTS OF THE  
21 ARIZONA PUBLIC SERVICE COMPANY.

Docket No. E-01345A-05-0827

**RUCO'S RESPONSE TO APS' MOTION TO PREVENT DISCLOSURE**

21 The Residential Utility Consumer Office ("RUCO") files this response to Arizona Public  
22 Service Company's ("APS") Motion to Prevent Disclosure of its Confidential Customer Study  
23 into the Public Record ("Motion"). RUCO can agree that the poll should not be publicly  
24 disclosed.

1 **BACKGROUND**

2 At the request of a Commissioner, APS has filed the results of a poll it conducted of its  
3 customers and community leaders regarding their attitudes about APS and certain issues  
4 relating to APS' regulatory circumstances. APS filed the poll results under seal, based on its  
5 claim that the material was confidential. On October 25, 2006, APS filed its Motion, outlining  
6 the basis for its claim that the poll results are confidential and should remain under seal.  
7 RUCO and other parties were asked to provide a response to APS' claim that the poll should  
8 remain confidential.

9  
10 **ANALYSIS**

11 The Commission's Rules provide that all hearings shall be open to the public.<sup>1</sup> Further,  
12 the public policy in Arizona is that public records are available for public inspection.<sup>2</sup> From  
13 these two premises flows the conclusion that the documents that make up the record on which  
14 the Commission bases its decision generally should be available for public review. However,  
15 the law recognizes that there are certain exceptions to this general rule.<sup>3</sup> Consistent with  
16 these requirements, the Commission limits access to elements of its proceedings when certain  
17 confidential information is at issue.<sup>4</sup>

18  
19  
20  
21  
22 <sup>1</sup> A.A.C. R14-3-109(V).

23 <sup>2</sup> A.R.S § 39-121.

24 <sup>3</sup> See, e.g. A.R.S. 41-1061(E)(7) (providing that certain privileged communications can be excluded from an administrative agency's record in a contested case); *Phoenix Newspapers v. Keegan*, 201 Ariz. 344, 351 ¶ 34, 35 P.3d 105, 112 (App. 2001) (trade secrets exempt from public records disclosure); *Carlson v. Pima County*, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984) ("where countervailing interests of confidentiality, privacy or the best interests of the state should be appropriately invoked to prevent inspection," disclosure should be refused).

<sup>4</sup> See, e.g. Transcript in this proceeding, Vol. XII, pg. 2414-15 (Chief Administrative Law Judge Farmer discussing possible procedure to allow for Commission discussion of confidential information).

1 Rule 26(c) of the Arizona Rules of Civil Procedure addresses the appropriate procedure  
2 to protect confidential information in discovery.<sup>5</sup> It provides that a party may seek an order  
3 protecting the disclosure of "a trade secret or other confidential research, development, or  
4 commercial information..."<sup>6</sup> The rule indicates that a party seeking confidentiality has the  
5 burden of showing good cause for the protective order.<sup>7</sup> Therefore, APS has the burden to  
6 establish that its poll should be protected from public disclosure.

7  
8 Consider the State's interest in efficiency of the rate case audit process

9 RUCO recognizes the importance of open government and the general rule that the  
10 basis for governmental action should be publicly available for review by the people. However,  
11 there is an important countervailing policy which the Commission should not lose sight of when  
12 determining whether a particular matter qualifies for confidential treatment.<sup>8</sup> RUCO and the  
13 Commission Staff are two state entities charged with analyzing utility rate applications  
14 submitted to the Commission. The effectiveness of their audit efforts is dependent on the  
15 timely provision of data from utilities in response to data requests. RUCO and utilities regularly  
16 enter into voluntary protective agreements to expedite the provision to RUCO of information  
17 that utilities have a good faith basis to claim is legally protected. Should RUCO believe it is  
18 necessary to provide such confidential material to the Commission to support RUCO's litigation  
19 position, RUCO is permitted to file that information under seal with the Commission. RUCO  
20 often is able to reach agreement with a utility as to how RUCO may present the information it

21  
22  
23 <sup>5</sup> Pursuant to A.A.C. R14-3-101(A), the Rules of Civil Procedure govern Commission proceedings in cases  
in which procedure is not otherwise established in law, or Commission rule or regulation.

24 <sup>6</sup> Arizona Rules of Civil Procedure Rule 26(c)(1).

<sup>7</sup> Arizona Rules of Civil Procedure Rule 26(c)(2).

<sup>8</sup> A state agency is permitted to consider the best interests of the state when balancing whether a public  
record should be exempted from public disclosure. See *Carlson v. Pima County*, 141 Ariz. 487, 491, 687 P.2d  
1242, 1246 (1984).

1 desires to disclose in a way that does not disclose confidential material. If such disclosure is  
2 not possible, RUCO presents the material under seal to the Commission.

3 The above-described procedure permits RUCO to have easy access to material that is  
4 necessary to conduct its audit, but does not burden the discovery process with disputes about  
5 whether allegedly confidential material qualifies for legal protection. Such discovery disputes  
6 can be time consuming, both for the parties and the Commission. Further, RUCO believes  
7 that, if the Commission took an unnecessarily narrow view of what qualified for confidentiality  
8 protection, the relatively free flow of information between the utilities and parties could dry up if  
9 utilities fear public disclosure of material for which they have a good faith argument of  
10 confidentiality. If the parties had a more difficult time obtaining the data necessary to fully audit  
11 a rate application, their ability to fully develop the record regarding appropriate adjustments  
12 would suffer, as would the Commission's ultimate decision based on that record. Finally,  
13 RUCO believes that the expeditious receipt of the data it requires is an important attribute of its  
14 current rate case audit process. In light of recent criticisms<sup>9</sup> of the length of time required to  
15 process a rate case, the Commission should consider carefully how its interpretation of the  
16 exceptions to the general rule of open access to records might impact the time to process a  
17 case. The Commission should avoid creating an environment that diverts Staff's and RUCO's  
18 resources away from their audit work during the period set aside for that purpose to argue  
19 whether particular materials should be provided in response to a discovery request.

20 Thus, in addition to weighing a utility's interest in maintaining confidentiality of material it  
21 supplies to the Commission, the Commission should also consider its own interest in having a  
22 discovery process that allows RUCO and the Commission Staff to efficiently obtain the

23 \_\_\_\_\_  
24 <sup>9</sup> RUCO is by no means suggesting that the Commission's existing time clock rules provide an  
unnecessarily lengthy period for RUCO to undertake its audit of a rate application, or that any criticisms of the  
Commission's time to process a rate case are valid.

1 materials necessary to undertake a rate case audit. A decision to maintain the confidentiality  
2 of material does not mean that the Commission cannot rely on that information in making its  
3 decision. The record in a proceeding may include both publicly disclosed material and  
4 confidential material filed under seal. The Commission may therefore base its decision on  
5 evidence in either the publicly-available portions or the confidential portions of the record.

6  
7 APS' poll is protectable as a trade secret

8 APS' Motion argues that its poll of customers and community leaders satisfies the  
9 statutory definition of a trade secret and is therefore subject to confidential treatment by the  
10 Commission. APS has met its burden to establish that the poll is a protectable trade secret.

11 Public records that reveal trade secrets can be protected from the otherwise required  
12 public disclosure.<sup>10</sup> APS correctly set forth the test for a trade secret in Arizona:

13 In general, information qualifies as a trade secret if: (1) it is secret and  
14 novel in nature; (2) it derives independent economic value from not being  
generally known; and (3) its holder takes reasonable steps to ensure secrecy.  
15 [citation omitted]<sup>11</sup>

16 At least one Arizona court has characterized the definition of trade secret as "rather  
17 expansive."<sup>12</sup> APS cited one case, from South Dakota, which recognized patron survey forms  
18 as being protected trade secret.<sup>13</sup> RUCO located a second case, from New York, with a  
19 similar conclusion,<sup>14</sup> and found no cases with a contrary holding.

20 RUCO believes that the reasoning in APS' Motion satisfies its burden to establish that  
21 its poll satisfies the broad definition of a trade secret. The poll collected information about

22 <sup>10</sup> *Phoenix Newspapers v. Keegan*, 201 Ariz. 344, 351 ¶¶ 34, 35 P.3d 105, 112 (App. 2001).

23 <sup>11</sup> APS Motion at 5.

24 <sup>12</sup> *See Enterprise Leasing v. Ehmke*, 197 Ariz. 144, 149 ¶¶ 14, 3 P.3d 1064, 1069 (App. 1999).

<sup>13</sup> APS Motion at 7, citing *Control, Inc. v. Morrow*, 489 N.W.2d 890 (S.D. 1992).

<sup>14</sup> *Bello v. State of N.Y. Dept. of Law*, 208 A.D.2d 832, 833, 617 N.Y.S.2d 856, 857 (N.Y. App. Div. 1994)  
(document digesting the results of customer surveys exempt from disclosure under state's Freedom of  
Information Law).

1 customers' and community leaders' attitudes toward the Company. Such a collection of  
2 information is a novel compilation of material that can have economic value to APS.<sup>15, 16</sup>  
3 Further, as evidenced by the affidavit of Edward Fox attached to the Motion, and the Motion  
4 itself, APS has taken reasonable efforts to protect the confidentiality of the poll.

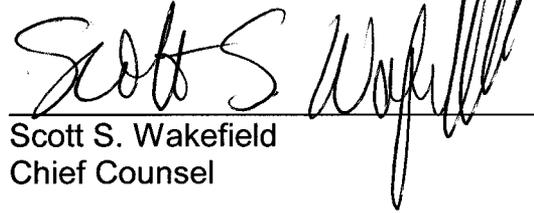
5  
6 **CONCLUSION**

7 RUCO believes that APS' poll of its customers and community leaders views meets the  
8 definition of a trade secret, and therefore the Commission should maintain its confidentiality. If  
9 it is necessary to discuss the poll, or admit it into the evidentiary record, any such discussion or  
10 admission should be under seal.

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24 <sup>15</sup> Notably, a trade secret needs only potential, as opposed to actual, economic value. See A.R.S. 44-401(4)(a).

<sup>16</sup> While the responses to the poll questions clearly have actual or potential economic value to APS, the economic value of the questions themselves is less obvious.

1 RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of November 2006.

2  
3  
4   
5  
6 Scott S. Wakefield  
7 Chief Counsel

8 AN ORIGINAL AND SEVENTEEN COPIES  
9 of the foregoing filed this 1<sup>st</sup> day  
10 of November 2006 with:

11 Docket Control  
12 Arizona Corporation Commission  
13 1200 West Washington  
14 Phoenix, Arizona 85007

15 COPIES of the foregoing hand delivered/  
16 mailed or \*emailed this 1<sup>st</sup> day of November 2006 to:

17 \*Lyn Farmer  
18 Chief Administrative Law Judge  
19 Hearing Division  
20 Arizona Corporation Commission  
21 1200 West Washington  
22 Phoenix, Arizona 85007

\*Deborah R. Scott  
Kimberly A. Grouse  
Snell & Wilmer L.L.P.  
400 East Van Buren  
Phoenix, Arizona 85004-2202

23 \*Christopher Kempley, Chief Counsel  
24 Legal Division  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, Arizona 85007

\*Barbara Klemstine  
\*Brian Brumfield  
Arizona Public Service  
P. O. Box 53999  
Mail Station 9708  
Phoenix, Arizona 85072-3999

\*Ernest Johnson, Director  
Utilities Division  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, Arizona 85007

\*Bill Murphy  
Murphy Consulting  
5401 N. 25<sup>th</sup> Street  
Phoenix, Arizona 85016

\*Thomas L. Mumaw  
\*Karilee S. Ramaley  
Pinnacle West Capital Corporation  
Law Department  
P. O. Box 53999  
Mail Station 8695  
Phoenix, Arizona 85072-3999

\*Douglas V. Fant  
Law Offices of Douglas V. Fant  
3655 W. Anthem Dr.  
Suite A-109 PMB 411  
Anthem, AZ 85086

1 \*Dan Austin  
Comverge, Inc.  
2 6509 W. Frye Road, Suite 4  
Chandler, AZ 85226  
3  
4 Jim Nelson  
12621 N. 17<sup>th</sup> Place  
Phoenix, AZ 85022  
5  
6 \*Michael W. Patten, Esq.  
\*Laura E. Sixkiller, Esq.  
7 \*J. Matthew Derstine, Esq.  
Roshka, DeWulf & Patten, PLC  
400 East Van Buren Street  
8 Suite 800  
Phoenix, Arizona 85004  
9  
10 \*Michelle Livengood, Esq.  
UniSource Energy Services  
One South Church Street, Suite 200  
11 Tucson, Arizona 85702  
12 \*Timothy M. Hogan  
Arizona Center for Law in the  
13 Public Interest  
202 E. McDowell Road, Suite 153  
14 Phoenix, AZ 85004  
15 \*Jeff Schlegel  
SWEEP Arizona Representative  
16 1167 W. Samalayuca Dr.  
Tucson, AZ 85704-3224  
17  
18 \*David Berry  
Western Resource Advocates  
P. O. Box 1064  
19 Scottsdale, AZ 85252-1064  
20  
21 \*Eric C. Guidry  
Western Resource Advocates  
2260 Baseline Road, Suite 200  
23 Boulder, Colorado 80302  
24  
Tracy Spoon, Executive Director  
Sun City Taxpayers Association  
12630 N. 103<sup>rd</sup> Avenue, Suite 144  
Sun City, AZ 85351

\*Walter W. Meek  
Arizona Utility Investors Association  
2100 N. Central Avenue, Suite 210  
Phoenix, Arizona 85004

\*The Kroger Co.  
1014 Vine Street, G-07  
Cincinnati, Ohio 45202

\*Michael L. Kurtz, Esq.  
\*Kurt J. Boehm, Esq.  
Boehm, Kurtz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, Ohio 45202

\*Robert W. Geake  
Vice President & General Counsel  
Arizona Water Company  
P. O. Box 29006  
Phoenix, AZ 85038-9006

\*Donna M. Bronski  
Deputy City Attorney  
3939 N. Drinkwater Blvd.  
Scottsdale, AZ 85251

\*C. Webb Crockett  
\*Patrick J. Black  
Fennemore Craig  
3003 N. Central Avenue, Suite 2600  
Phoenix, AZ 85012-2913

\*Greg Patterson, Director  
Arizona Competitive Power Alliance  
916 West Adams, Suite 3  
Phoenix, AZ 85007

George Bien-Willner  
3641 N. 39<sup>th</sup> Avenue  
Phoenix, AZ 85014

\*Lawrence V. Robertson, Jr.  
Munger Chadwick  
P. O. Box 1448  
Tubac, AZ 85646

1 \*Lieutenant Colonel Karen S. White  
Chief, Air Force Utility Litigation Team  
2 AFLSA/JACL-ULT  
139 Barnes Drive  
3 Tyndall AFB, FL 32403

4 \*Sean Seitz, President  
Arizona Solar Energy  
5 Industries Association  
3008 N. Civic Center Plaza  
6 Scottsdale, Arizona 85251

7 \*Michael M. Grant  
Gallagher & Kennedy, P.A.  
8 2575 East Camelback Road  
Phoenix, Arizona 85016-9225  
9

10 \*Jay I. Moyes, Esq.  
Moyes Storey Ltd.  
1850 N. Central Avenue, Suite 1100  
11 Phoenix, AZ 85004

12 \*Kenneth R. Saline, P. E.  
K.R. Saline & Assoc., PLC  
13 160 N. Pasadena, Suite 101  
Mesa, AZ 85201  
14

15 \*Andrew W. Bettwy  
\*Karen S. Haller  
Assistants General Counsel  
16 Legal Affairs Department  
Southwest Gas Corporation  
17 5241 Spring Mountain Road  
Las Vegas, Nevada 89150  
18

19 \*Debra S. Jacobson  
Director  
Government & State Regulatory  
20 Affairs  
Southwest Gas Corporation  
21 5241 Spring Mountain Road  
Las Vegas, Nevada 89150  
22

\*Amanda Ormond  
Interwest Energy Alliance  
7650 S. McClintock  
Suite 103-282  
Tempe, AZ 85284

David C. Kennedy  
Attorney at Law  
818 E. Osborn Road  
Suite 103  
Phoenix, Arizona 85014

Joseph Knauer, President  
Jewish Community of Sedona  
100 Meadowlark Drive  
P. O. Box 10242  
Sedona, AZ 86339

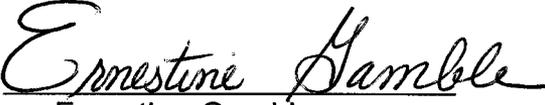
Tammie Woody  
10825 W. Laurie Lane  
Peoria, AZ 85345

Jon Poston  
AARP Electric Rate Project  
6733 East Dale Lane  
Cave Creek, AZ 85331

Coralette Hannon  
AARP Government Relations &  
Advocacy  
6705 Reedy Creek Road  
Charlotte, NC 282215

Michael F. Healy  
Morgan, Lewis & Bockius  
1111 Pennsylvania Avenue, NW  
Washington, DC 20004

Gary L. Nakarado  
24657 Foothills Drive N  
Golden, CO 80401

23  
24 By   
Ernestine Gamble