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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
DOCUMENT CONTROL

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COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MIKE GLEASON
KRISTIN K. MAYES
BARRY WONG

IN THE MATTER OF THE APPLICATION OF ARIZONA PUBLIC SERVICE COMPANY FOR A HEARING TO DETERMINE THE FAIR VALUE OF THE UTILITY PROPERTY OF THE COMPANY FOR RATEMAKING PURPOSES, TO FIX A JUST AND REASONABLE RATE OF RETURN THEREON, TO APPROVE RATE SCHEDULES DESIGNED TO DEVELOP SUCH RETURN, AND TO AMEND DECISION NO. 67744.	Docket No. E-01345A-05-0816 **ARIZONA PUBLIC SERVICE COMPANY'S MOTION TO PREVENT DISCLOSURE OF ITS CONFIDENTIAL CUSTOMER STUDY INTO THE PUBLIC RECORD**
IN THE MATTER OF THE INQUIRY INTO THE FREQUENCY OF UNPLANNED OUTAGES DURING 2005 AT PALO VERDE NUCLEAR GENERATING STATION, THE CAUSES OF THE OUTAGES, THE PROCUREMENT OF REPLACEMENT POWER AND THE IMPACT OF THE OUTAGES ON ARIZONA PUBLIC SERVICE COMPANY'S CUSTOMERS	Docket No. E-01345A-05-0826
IN THE MATTER OF THE AUDIT OF THE FUEL AND PURCHASED POWER PRACTICES AND COSTS OF THE ARIZONA PUBLIC SERVICE COMPANY	Docket No. E-01345A-05-0827

Arizona Corporation Commission
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Arizona Public Service Company ("APS" or "the Company") moves to maintain the confidentiality of a proprietary study (the "Study") that the Company disclosed at the request of Commissioner Mayes. The Study clearly qualifies as a legally protected document as it is both (1) a trade secret and (2) proprietary, confidential information of the Company. Thus, APS respectfully requests that the Study remain confidential and not be included in the public docket.

FACTUAL BACKGROUND

In July 2006, Pinnacle West Capital Corporation ("Pinnacle West"), APS' parent company, commissioned a third-party vendor to conduct a study regarding attitudes of APS customers and community leaders about APS and certain issues relating to APS' regulatory circumstances. *See* Affidavit of Edward Fox, **Exhibit A** hereto, ¶ 2. Pinnacle West paid $30,000 for the study. *Id.* The third-party vendor developed a protocol for conducting the Study: A number of APS customers and community leaders were asked a series of scripted questions and their responses were recorded. *Id.* ¶ 3. The third-party vendor conducted the study in late July and early August 2006. *Id.* ¶ 4. All responses were subsequently tabulated and analyzed according to various demographic criteria, including but not limited to the interviewee's age, gender, ethnicity, geographic location, etc. *Id.* ¶ 5. The third-party vendor returned the compiled study results to Pinnacle West and APS. *Id.* ¶ 6.

Pinnacle West and APS made every effort to protect the confidentiality of the Study. Circulation of the complete Study was limited to six Pinnacle West and APS employees. *Id.* Each of these individuals were instructed to maintain the confidentiality of the Study. *Id.* At a meeting held August 10, 2006, the results of the Study were discussed with a select group of eleven APS and Pinnacle West officers and employees. All people present at this meeting were instructed to maintain the confidentiality of the Study. *Id.* ¶ 7. Summaries of the Study were shared with

Pinnacle West and APS' advertising and public relations agencies, pursuant to the terms of written confidentiality agreements with those companies. *Id.* ¶ 8. Other than the people identified above, the Study was not distributed to third parties, nor did APS or Pinnacle West intend to share it with third parties. *Id.* ¶ 9.

During the course of the Hearing in this case, Commissioner Mayes learned of the Study and requested that it be disclosed. On October 17, 2006, APS produced the Study pursuant to a Protective Agreement executed by the Company and the Commission on April 26, 2006 (the "Agreement"), attached hereto as **Exhibit B**. When APS filed the Study, it expressly designated as Confidential Information "[t]he results of the poll and other pertinent information . . . pursuant to the executed Protective Agreement." *See* letter dated October 17, 2006, attached hereto as **Exhibit C**. Subsequently, on October 19, 2006, Commissioner Mayes requested on the record that the Study be docketed publicly. *See* 10/19/06 Transcript at 1189:9-16. When APS objected to the public docketing of the Study, Administrative Law Judge Lyn Farmer requested that APS submit a brief outlining the bases for maintaining the confidentiality of the Study. *See id.* at 1306:23-1307:25.

LEGAL ANALYSIS

I. The Protective Agreement Between APS and the Commission Governs Proposed Inclusion in the Public Record of the Study Designated by APS as "Confidential Information"

Under the Agreement, APS may designate as "Confidential Information" "all documents, data, information, studies" and other materials that the "Company claims to be a trade secret, or of a proprietary, confidential, or legally protected nature." *See* Ex. B, § 2. The Agreement binds everyone who receives the Confidential Information. Although "the information provided pursuant to this Protective Agreement [can] be disclosed to the Commission by any Commission signatory to this Agreement. . . . Such disclosure may be made only if the non-signatory is

provided with a copy of this Agreement ***and agrees to be bound by its terms***."[1] Ex. B, § 6 (emphasis added).

APS has the sole authority to make the initial confidentiality determination for all information it submits to the Commission. Ex. B, § 2. The Agreement requires the Company to have a good faith belief that the information is protected, but APS alone has the authority to make the original designation of material as protected. Ex. B, § 2. Any person who wishes to challenge APS' good faith designation of documents as Confidential Information must follow the procedures in the Agreement.

The Agreement establishes the procedures that must be followed before any designated "Confidential Information" can be released into the public record. *See* Ex. B, §§ 7 & 8. Specifically, APS must be provided with "five (5) business days written notice that information designated by Company as Confidential Information shall be subject to disclosure as a public record." Ex. B, § 7. Within five business days of receiving written notice, APS may institute "protective proceeding[s]" to prevent the proposed public disclosure. Ex. B, § 8. APS may institute protective proceedings by filing a motion with the Commission to preclude disclosure. *Id.* Staff then has the opportunity to respond to APS' motion before the Commission or ALJ rules. *Id.* Finally, "[n]otwithstanding any determination by the ALJ or the Commission that any Confidential Information provided pursuant to this Agreement should be made part of the public record . . . , public disclosure shall not occur for a period of five (5) calendar days so that the Company may seek judicial relief." *Id.* [2]

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[1] The Protective Agreement controls disclosures by individual Commissioners, even though none of them signed the Agreement, because no "Confidential Information" can be released to any non-signatory, including a Commissioner, until he or she agrees to be bound by the Agreement's terms. Ex. B, § 6.

[2] By submitting this memorandum, APS does not intend to waive, and does not waive, any of the requirements of the Protective Agreement, including but not limited to the requirement that APS be given a five-day notice in writing of a party's intent to publicly disclose information designated as "Confidential" under the Agreement.

II. APS Has Properly Designated the Study as "Confidential Information" Given That It Is a Legally Protected Trade Secret and Confidential, Proprietary Information of APS

A. The Study is a Trade Secret

Arizona has adopted the Uniform Trade Secrets Act. *See* A.R.S. § 44-401 et seq. Under the Arizona Trade Secrets Act, a trade secret is "information, including a compilation . . . that both":

> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means, by other persons who can obtain economic value from its disclosure or use.
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

A.R.S. § 44-401. In general, information qualifies as a trade secret if: (1) it is secret and novel in nature; (2) it derives independent economic value from not being generally known; and (3) its holder takes reasonable steps to ensure secrecy. *See Enterprise Leasing Co. v. Ehmke*, 197 Ariz. 144, 3 P.3d 1064 (App. 1999).

1. The Study Contains Secret and Novel Information

The hallmark of a trade secret is its secrecy. Thus, the subject matter must be secret and "it must be of such a nature that it would not occur to persons in the trade or business." *Id.* at 149, 3 P.3d at 1069. Moreover, "the information must be sufficiently novel such that it is not readily ascertainable . . . in the industry." *Id.* Although matters of public knowledge generally cannot be appropriated as "secret," a compilation of general concepts may amount to a trade secret when the owner has created an "effective, successful and valuable integration of those public elements such that the owner derives a competitive advantage from it." *Id.* Indeed, courts generally have recognized that a company's effort to collect and synthesize information in the public domain is sufficiently secret and novel to qualify as a trade secret. *See, e.g., Integrated Cash Mgmt. Servs., Inc. v. Digital Transactions, Inc.*, 920

F.2d 171, 174 (2d Cir. 1990)('a trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain"); *Picker Int'l Corp. v. Imaging Equip. Servs., Inc.,* 931 F.Supp. 18, 38 (D. Mass. 1995) ("A compilation of public information is protected if that information is, as a result of a business' efforts, combined in a unique way."); *ISC-Bunker Ramo Corp. v. Altech, Inc.,* 765 F. Supp. 1310, 1322 (N.D. Ill. 1990) ("[T]he effort of compiling useful information is, of itself, entitled to protection even if the information is otherwise generally known.").

In *Enterprise v. Ehmke*, the Arizona Court of Appeals recognized that a document created by Enterprise that compiled "several factors helpful to managing a successful branch office" was entitled to trade secret protection, even though it was "only a slight advance over common knowledge." *Enterprise*, 197 Ariz. at 150, 3 P.3d at 1070. The court recognized that, taken out of context, the information on the document appeared only to consist of general knowledge of persons in the industry. *Id.* Nevertheless, the compilation of information was an original product that provided Enterprise economic value in running the business, thus giving Enterprise a competitive advantage in the marketplace. *Id.*

Following these precedents, APS' Study is sufficiently "secret and novel" to qualify for trade secret protection. APS, along with its third-party contractor, compiled an original script of questions to gain insight into key constituents' attitudes toward the Company. These constituents' attitudes are not public knowledge; they are not available in trade journals, reference books, or published materials; and they are not known to outsiders who could obtain an economic benefit from the information. *See id.* Although another company could presumably obtain the same results from a survey by asking the same questions of the same people, the particular questions asked, the populations chosen for sampling and questioning, and the

analysis of the study responses are all valuable advances over public knowledge that make the Study proprietary to APS and qualify it for trade secret protection. Like the Enterprise document, APS' Study is an original product that provides economic value to APS, giving it a competitive advantage in the marketplace. *See id*; *cf. Centrol, Inc. v. Morrow*, 489 N.W.2d 890 (S.D. 1992) (recognizing that patron survey forms are a protected trade secret).

2. The Study Derives Economic Value from Not Being Generally Known

Without question, the APS Study "derives independent economic value, ***actual or potential***, from not being generally known" to other entities who "can obtain economic value from [the Study's] disclosure or use." A.R.S. § 44-401 (emphasis added); *see also Enterprise*, 197 Ariz. at 148, 3 P.3d 1068 (a trade secret "has the potential to be used in one's business and that gives one an opportunity to obtain an advantage over competitors who do not know of or use it").

APS has existing and potential competitors both within and outside of its service territory who could easily derive economic value from the Study. *See* A.R.S. §§ 30-801 et seq. (providing for electric power competition). There is most definitely competition between electric companies in different service areas on such measures as customer attraction, attention and satisfaction, and there could be competition within APS' service area under the Commission's retail competition rules. The fact that the Company has this competitive posture benefits APS customers in such areas as productivity, efficiency, operational excellence, and innovation. Moreover, a company's reputation is one of its most important assets. To the extent that research studies allow APS to protect and enhance its reputation and improve customer service by obtaining feedback and other information from customers, there is clear economic value that is unique to the Company and should be protected.

3. APS Has Taken Reasonable Precautions to Maintain the Secrecy of the Study

Finally, APS has taken reasonable precautions to maintain the secrecy of the Study. "[T]he most important factor in gaining trade-secret protection is demonstrating that the owner has taken such precautions as are reasonable under the circumstances to preserve the secrecy of the information." *Enterprise,* 197 Ariz. at 150, 3 P.3d at 1070. APS has limited disclosure of the Study to particular employees in need of the information to perform their duties and to the Commission. *See* Ex. A at ¶¶ 6-9. Similarly, each person who received the information at the Commission has signed the Protective Agreement limiting its disclosure.

Given the confidential and "novel" nature of the Study, the economic value of the Study to the Company, and APS' reasonable precautions to maintain the secrecy of the Study's results, the Study is a legally protected trade secret under Arizona law not subject to disclosure in the public record.

B. The Study is Confidential, Proprietary Information of APS That Warrants Protection From Public Disclosure

Assuming *arguendo* that the Study did not qualify as an APS trade secret, at a minimum it is confidential, proprietary information that should not be made part of the public record.

As recently as 2004 the Commission recognized the confidential nature of sales and marketing scripts in the telecommunications context. In 2004, the Commission was developing regulations for the implementation of Arizona's "Slamming and Cramming" rules. After extensive discussions with the effected telecommunications companies, the Commission agreed that the companies should be allowed to file their marketing and sales scripts ***under seal*** with the Commission. Ariz. Admin. Code § 14-2-2011(A). Through its requirement that the scripts be filed

under seal, the Commission recognized that marketing and sales scripts reveal proprietary marketing strategies and are inherently confidential.

Similarly, scripted consumer studies addressing consumer attitudes about a public utility may also reveal the utility's proprietary marketing and service strategies. Just as the telephone companies' scripts are submitted under seal and are not subject to public disclosure, so too the APS Study has been submitted under seal and should not be entered into the public domain.

The federal government has also recognized the need for state Commissions to protect the sensitive commercial information of electric companies as they examine the company's records. *See* 16 U.S.C. § 824(g)(2) (providing that a "state Commission" that examines the records or memoranda of an electric company that it regulates "shall not publicly disclose trade secrets or sensitive commercial information").

Thus, even apart from trade secret protection, there are legitimate business reasons why a study of the attitudes and opinions of APS customers and community leaders -- which informs the Company's customer service and communication decisions -- should not be made part of the public record.

C. Public Policy Dictates That This Confidential APS Study Not Be Publicly Disclosed

Without regard to the trade secret and proprietary nature of the Study in question, it would offend public policy for the Commission to order that the Study be made public. A company regulated by the Commission -- like any company -- has to have the ability to gather information in the marketplace (particularly from its customers) in order to inform its business decisions and improve its products or services. Such market or customer studies are a form of market intelligence and self-critical analysis that public policy encourages. Indeed, it is these same public policy

considerations that underlie the rule of evidence that prohibits discovery or use of a party's subsequent remedial measures following an accident or product failure or the gathering of information to prevent further occurrences. *See* Rules 407 of the Federal Rules of Evidence and the Arizona Rules of Evidence. *See also Jimenez v. Wal-Mart Stores, Inc.*, 206 Ariz. 424, 79 P.3d 673 (App. 2003).

Moreover, a company required to publicly disclose customer and community leader study information would certainly be chilled in conducting such studies for fear that any information critical of the company -- information that might otherwise be beneficial and useful in improving the company's products or services -- would be taken out of context and otherwise used to the detriment of the company and its shareholders. Indeed, it is hard to imagine that a company would conduct a potentially revealing or self-critical study of customers if the company knew that the study results would be made public. For these reasons alone, established public policy dictates that the Study -- which APS conducted with the full expectation that it would be kept confidential -- not be made public.

Nor is there any sound policy or regulatory reason for the Study to be made public. APS never sought to use the Study in this proceeding, did not conduct the Study for use in this proceeding, and has not relied on the Study in this proceeding. In addition, there has been no showing that the Study has any relevance to the issues in this proceeding. Nevertheless, the Commission and the other parties to this proceeding have been given access to the Study results subject to the terms of the Protective Agreement in compliance with the informal request by Commissioner Mayes. Designation of the Study as "Confidential" by APS does not unreasonably inhibit use of the Study to the extent that the Study is shown to be relevant to this proceeding. Until there has been a showing, however, that the Study has relevance to this proceeding and that there is a sufficient legal and factual basis for removing the

Study from the confidentiality protections of the Protective Agreement, the request for public disclosure is unwarranted. [3]

III. Conclusion

For the foregoing reasons, APS asks that its confidential customer Study not be released into the public record.

RESPECTFULLY SUBMITTED this 25th day of October, 2006.

Thomas L. Mumaw
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PINNACLE WEST CAPITAL CORP.
Law Department

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William J. Maledon
Ronda R. Fisk
OSBORN MALEDON, P.A.

Attorneys for Arizona Public Service Company

By _____
William J. Maledon

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[3] The governing principles that underlie Rule 26(c) of the Arizona Rules of Civil Procedure (and the comparable Rule of the Federal Rules of Civil Procedure) relating to protective orders with respect to confidential, proprietary information are the same as those discussed herein. The cases under those Rules that authorize and direct protection of trade secret or other confidential, proprietary business information are legion and stand squarely for the proposition that public policy and public confidence in the court would be undermined if such information were not protected from public disclosure. *See, e.g., Cornet Stores v. Superior Court*, 108 Ariz. 84, 492 P.2d 1191 (1972)(trial court correctly determined that a company's confidential employee information "should not be made public" and therefore properly entered protective order pursuant to Rule 26(c)).

ORIGINAL and 15 copies of the foregoing filed this 25th day of October, 2006, with:

Docket Control
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

AND copies of the foregoing mailed, faxed or transmitted electronically this 25th day of October, 2006, to:

All Parties of Record

Birdie Cobb

Birdie Cobb

EXHIBIT A

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MIKE GLEASON
KRISTIN K. MAYES
BARRY WONG

IN THE MATTER OF THE APPLICATION OF ARIZONA PUBLIC SERVICE COMPANY FOR A HEARING TO DETERMINE THE FAIR VALUE OF THE UTILITY PROPERTY OF THE COMPANY FOR RATEMAKING PURPOSES, TO FIX A JUST AND REASONABLE RATE OF RETURN THEREON, TO APPROVE RATE SCHEDULES DESIGNED TO DEVELOP SUCH RETURN, AND TO AMEND DECISION NO. 67744.	Docket No. E-01345A-05-0816 **AFFIDAVIT OF EDWARD FOX**
IN THE MATTER OF THE INQUIRY INTO THE FREQUENCY OF UNPLANNED OUTAGES DURING 2005 AT PALO VERDE NUCLEAR GENERATING STATION, THE CAUSES OF THE OUTAGES, THE PROCUREMENT OF REPLACEMENT POWER AND THE IMPACT OF THE OUTAGES ON ARIZONA PUBLIC SERVICE COMPANY'S CUSTOMERS	Docket No. E-01345A-05-0826
IN THE MATTER OF THE AUDIT OF THE FUEL AND PURCHASED POWER PRACTICES AND COSTS OF THE ARIZONA PUBLIC SERVICE COMPANY	Docket No. E-01345A-05-0827

I, EDWARD FOX, do hereby affirm and swear as follows:

1. I am the Vice President for the Arizona Public Service Company ("APS").

2. In July 2006, Pinnacle West Capital Corporation ("Pinnacle West"), APS' parent company, commissioned a third-party vendor to conduct a study regarding attitudes of APS customers and community leaders about APS and certain issues relating to APS' regulatory circumstances. Pinnacle West paid $30,000 for the study.

3. The third-party vendor developed a protocol for conducting the Study. A number of APS customers and community leaders were asked a series of scripted questions and their responses were recorded.

4. The third-party vendor conducted the study in late July and early August 2006.

5. All responses were subsequently tabulated and analyzed according to various demographic criteria, including but not limited to the interviewee's age, gender, ethnicity, geographic location, etc.

6. The third-party vendor returned the compiled study results to Pinnacle West and APS. Circulation of the complete Study was limited to six Pinnacle West and APS employees, including myself. At my direction, each of these individuals was instructed to maintain the confidentiality of the Study.

7. At a meeting held August 10, 2006, the results of the Study were discussed with a select group of eleven APS and Pinnacle West officers and employees. I instructed this group to maintain the confidentiality of the Study.

8. Summaries of the Study were shared with Pinnacle West and APS' advertising and public relations agencies, pursuant to the terms of written confidentiality agreements with those companies.

9. Other than the persons and companies identified above, the Study was not distributed to third parties, nor did APS or Pinnacle West intend to share it with third parties.

DATED this 25th day of October, 2006.

EDWARD FOX

SUBSCRIBED AND SWORN TO before me this 25th day of October, 2006.

Cynthia M. Crawford
Notary Public

My commission expires:

OFFICIAL SEAL
CYNTHIA M. CRAWFORD
NOTARY PUBLIC - STATE OF ARIZONA
MARICOPA COUNTY
My Comm. Expires March 21, 2010

EXHIBIT B

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

IN THE MATTER OF THE APPLICATION OF ARIZONA PUBLIC SERVICE COMPANY FOR A HEARING TO DETERMINE THE FAIR VALUE OF THE UTILITY PROPERTY OF THE COMPANY FOR RATEMAKING PURPOSES, TO FIX A JUST AND REASONABLE RATE OF RETURN THEREON, TO APPROVE RATE SCHEDULES DESIGNED TO DEVELOP SUCH RETURN AND TO AMEND DECISION NO. 67744.	Docket No. E-01345A-05-0816 PROTECTIVE AGREEMENT

The Arizona Corporation Commission Staff ("Staff") has requested access to certain documents, data, studies, and other materials, some of which Arizona Public Service Company ("Company") alleges may be of a proprietary, confidential, or legally protected nature ("Confidential Information").

In order to expedite the provision of information, Company, Staff, and any independent contracting consultants retained by Staff for this docket (cumulatively referred to herein as "the parties") agree as follows:

§1. **Non-Disclosure.** Except with the prior written consent of the party originally designating a document to be stamped as Confidential Information, or as hereinafter provided under this Agreement, no Confidential Information may be disclosed to any person. This requirement does not prohibit Staff from using and disclosing Confidential Information provided by Company in reports or documents that aggregate all information gathered from the parties to this docket, provided Company's individual disclosure is indiscernible from the aggregate report. In addition, where Confidential Information provided by Company is confidential solely as a result of either disclosing individual customer information, or disclosing specific prices, this Agreement shall not prohibit Staff

from the public disclosure of such information in an aggregated form, where no individual customer or specific individual price can be ascertained.

§2. **Designation of Confidential Information.** For purposes of this Agreement, all documents, data, information, studies and all other written, printed, transcribed, audio-taped, or video-taped materials furnished to Staff that Company claims to be a trade secret, or of a proprietary, confidential, or legally protected nature, shall be designated and referred to herein as "Confidential Information." Access to and review of Confidential Information shall be strictly controlled by the terms of this Agreement.

All Confidential Information provided to Staff pursuant to this Agreement shall be so marked by Company with a designation indicating its alleged trade secret, proprietary, confidential, or legally protected nature. The Company shall memorialize any Confidential Information disclosed verbally by Company in writing within five (5) business days of its verbal disclosure, and the writing shall be marked by the Company with the appropriate designation. Any Confidential Information disclosed verbally by Company shall be safeguarded by Staff and its contracting consultants only during the five (5) business day period during which memorialization may be provided. Company agrees that it will carefully consider the basis upon which any information is claimed to be trade secret, proprietary, confidential, or otherwise legally protected. Company shall designate as Confidential Information, only such information as it has a good faith basis for claiming to be legally protected. Where a part of a document, or only a part of an informational submittal may reasonably be considered to be trade secret, proprietary, confidential, or otherwise legally protected, Company shall only designate that part of such information submittal as Confidential Information under this Agreement. Information that is publicly available from any other source shall not be claimed as Confidential Information under this Agreement.

§3. **Performance Under Agreement Does Not Result in Waiver or Disclosure.** Execution of this Agreement by the parties and performance of their obligations hereunder shall not result in waiver of any claim, issue, or dispute concerning the trade secret, proprietary, confidential, or legally protected nature of the Confidential Information provided. Neither shall the limited provision of Confidential Information by Company pursuant to this Agreement, nor the limited

provision by Staff of Confidential Information pursuant to Section 6 of this Agreement constitute public disclosure of it.

§4. **Access to Confidential Information.** Prior to reviewing any Confidential Information, any Commission Staff member or independent contracting consultant shall first be required to read a copy of this Protective Agreement, and to certify by his/her signature on Exhibit A of this Agreement, that he/she has reviewed the same and has consented to be bound by its terms. Exhibit A of this Agreement shall contain the signatory's full name, business address, employer, and position with, or relationship to, the Arizona Corporation Commission ("Commission"). Upon execution, any and all Exhibits shall be promptly provided to counsel for Company.

§5. **Use of Confidential Information.** All persons who are signatories to this Agreement shall neither use nor disclose the Confidential Information for purposes of business or competition, or for any purposes other than those necessary for the disposition of this docket, including preparation for and the conduct of any administrative or legal proceeding. All persons entitled to review or afforded access to Confidential Information shall keep it secure as trade secret, confidential, or legally protected information in accordance with the purposes and intent of this Agreement.

§6. **Non-Signatories Entitled to Review.** The information provided pursuant to this Protective Agreement may be disclosed to other members of the Staff and to the Commission by any Commission signatory to this Agreement only to the extent that disclosure is necessary to the disposition of this docket. Such disclosure may be made only if the non-signatory is provided with a copy of this Agreement and agrees to be bound by its terms. This provision is not intended to preclude any party from providing confidential information under seal to either the Commission or a Commission Administrative Law Judge for the purposes of Paragraph 8 of this agreement or for any other purpose.

§7. **Disclosure of Information to the Public.** The Confidential Information provided pursuant to this Agreement shall not be disclosed, nor shall it be made a part of the public record in this docket, or in any other administrative or legal proceeding unless Staff provides Company five (5) business days written notice that information designated by Company as Confidential Information shall be subject to disclosure as a public record. Upon the expiration of five (5) business days from

the date written notice is received by Company, any Confidential Information identified in the notice as subject to disclosure shall become part of the public record in this docket, unless Company initiates a protective proceeding under the terms of this Agreement.

§8. **Protective Proceedings to Prevent Disclosure to the Public.** In the event that Company seeks to prevent public disclosure of Confidential Information pursuant to Paragraph 7 above, Company shall file within five (5) business days of receipt of Staff's written notice, a motion presenting the specific grounds upon which it claims that the Confidential Information should not be disclosed or should not be made a part of the public record. Staff shall have an opportunity to respond to the motion. Company's motion may be ruled upon by either the Commission or an assigned Commission Administrative Law Judge ("ALJ"). Company may provide to the Commission or the ALJ the Confidential Information referenced in the motion without waiver that the information should remain confidential under the terms of this Agreement. Any Confidential Information so provided shall be kept under seal for the purpose of permitting inspection by the Commission or the ALJ prior to ruling on the motion.

Notwithstanding any determination by the ALJ or the Commission that any Confidential Information provided pursuant to this Agreement should be made a part of the public record or otherwise disclosed, public disclosure shall not occur for a period of five (5) calendar days so that Company may seek judicial relief from the ALJ or the Commission's decision. Upon expiration of the five (5) day period, the Commission shall release the information to the public unless Company has received a stay or determination from a court of competent jurisdiction that the records, data, information, or study are proprietary and are not public records subject to disclosure under A.R.S. § 39-101 et seq.

§9. **Judicial Proceedings Related to Non-Party's Request for Disclosure.** Where the Commission, ALJ or Staff determines that disclosure is not appropriate, in any judicial action against the Commission and/or Commissioners by the party seeking disclosure of the information, unless specifically named, Company, as the real party in interest, shall join in the action as a co-defendant. Company also agrees to indemnify and hold the Commission harmless from any assessment of expenses, attorneys' fees, or damages under A.R.S. § 39-121.02 or any other law, resulting from

denial of access by the Commission to the information, data, records, or study subsequently found to be non-confidential.

In the event that the Commission becomes legally compelled (by deposition, interrogatory, request for documents, subpoena, civil investigative demand, or similar process) to disclose any of the Confidential Information, the Commission shall provide Company with prompt written notice of such requirement so that Company may seek an appropriate remedy and/or waive compliance. Company agrees that upon receipt of such notice, Company will either undertake to oppose disclosure of the Confidential Information or waive compliance with this Agreement. In the event that disclosure of the Confidential Information is ordered, the Commission agrees to furnish only that portion of the Confidential Information that is legally required.

§10. **No Preclusion of Evidentiary Objections.** In the event that disclosure of Confidential Information occurs, the provision of such information by Company pursuant to this Agreement shall not limit the right of Company to object to its relevance or admissibility in proceedings before the Commission.

§11. **Return of Confidential Information.** Upon the final disposition of any administrative or legal proceeding arising in or from this docket, within 90 days Company shall submit a written request for the return of all Confidential Information, copies thereof, and notes made by signatories to this Agreement. If such a request is not received within the stated 90 days, Staff shall destroy all Confidential Information, copies thereof, and notes made by signatories to this Agreement, or return to Company all Confidential Information, copies thereof, and notes made by signatories to this Agreement, following written notice to Company of Staff's intent to return.

§12. **No Admission of Privileged or Confidential Status.** By participating in this Agreement, Staff and its contracting consultants are neither admitting nor agreeing with Company that any of the materials or communications designated as Confidential Information are, either in fact or as a matter of law, a trade secret or of a proprietary, confidential, or legally protected nature.

§13. **Breach of Agreement.** Company, in any legal action or complaint it files in any court alleging breach of this Agreement shall, at the written request of the Commission, name the Arizona Corporation Commission as a Defendant therein.

§14. **Non-Termination**. The provisions of this Agreement shall not terminate at the conclusion of this proceeding.

DATED this 26th day of April 2006.

ARIZONA CORPORATION COMMISSION

By Christopher C. Kempley

Christopher C. Kempley, Chief Counsel
Janet Wagner, Senior Staff Attorney
Jason D. Gellman, Senior Staff Attorney
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ARIZONA PUBLIC SERVICE COMPANY

By Thomas L. Mumaw

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Phoenix, Arizona 85072-3999

EXHIBIT "A"

I have read the foregoing Protective Agreement dated _____, 2006, ***In The Matter Of The Application Of Arizona Public Service Company For A Hearing To Determine The Fair Value Of The Utility Property Of The Company For Ratemaking Purposes, To Fix A Just And Reasonable Rate Of Return Thereon, To Approve Rate Schedules Designed To Develop Such Return And To Amend Decision No. 67744 - Docket No. E-01345A-05-0816*** and agree to be bound by the terms and conditions of such Agreement.

_____
Name

_____
Signature

_____
Employer or Firm

_____
Business Address

_____
Position or relationship with the
Arizona Corporation Commission

_____
Date

EXHIBIT C

Brian Brumfield
Supervisor
Regulatory Affairs

Tel. 602-250-2708
Fax 602-250-3003
e-mail Brian.Brumfield@aps.com

Mail Station 9708
PO Box 53999
Phoenix, Arizona 85072-3999

October 17, 2006

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

RE: APS' RESPONSE TO COMMISSIONER MAYES REQUEST ON OCTOBER 10, 2006, IN THE APS RATE CASE HEARING (DOCKET NOS. E-01345A-05-0816, E-01345A-05-0826 AND E-01345A-05-0827)

Dear Sir or Madam:

On October 10, 2006, Commissioner Mayes requested that APS file in Docket certain information concerning the recent opinion poll conducted for APS.

The results of the poll and other pertinent information are confidential and therefore are being provided to the Commission, Staff and interested parties under seal pursuant to the executed Protective Agreement.

Sincerely,

Brian Brumfield
Supervisor
Regulatory Affairs

BB/dst

Cc: Parties of Record

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