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BEFORE THE ARIZONA CORPORATION COMMISSION

MAR 18 2002
AZ CORP COMMISSION
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WILLIAM A. MUNDELL
Chairman

JIM IRVIN
Commissioner

MARC SPITZER
Commissioner

IN THE MATTER OF THE GENERIC
PROCEEDINGS CONCERNING ELECTRIC
RESTRUCTURING

DOCKET NO. E-00000A-02-0051

IN THE MATTER OF ARIZONA PUBLIC
SERVICE COMPANY'S REQUEST FOR
VARIANCE OF CERTAIN REQUIREMENTS OF
A.A.C. 4-14-2-1606

DOCKET NO. E-01345A-01-0822

IN THE MATTER OF THE GENERIC
PROCEEDING CONCERNING THE ARIZONA
INDEPENDENT SCHEDULING
ADMINISTRATOR

DOCKET NO. E-00000A-01-0630

IN THE MATTER OF TUCSON ELECTRIC
POWER COMPANY'S APPLICATION FOR A
VARIANCE OF CERTAIN ELECTRIC POWER
COMPETITION RULES COMPLIANCE DATES

DOCKET NO. E-01933A-98-0471

ISSUES IN THE MATTER OF TUCSON
ELECTRIC POWER COMPANY'S
APPLICATION FOR A VARIANCE OF
CERTAIN ELECTRIC COMPETITION RULES
COMPLIANCE DATES.

DOCKET NO. E-01933A-02-0069

ANSWER OF PANDA GILA RIVER, L.P. TO
MOTION FOR PROTECTIVE ORDER

Arizona Corporation Commission

DOCKETED

MAR 18 2002

DOCKETED BY

1 Panda Gila River, L.P. ("Panda") hereby responds to the Motion for Protective
2 Order ("Motion") filed by Arizona Public Service Company ("APS") in the above-
3 captioned proceedings on March 13, 2002. APS asks that the Commission issue a
4 Protective Order quashing the subpoenas duces tecum and notices of deposition
5 ("Deposition Notices") served by Panda on APS on March 8, 2002. APS claims that a
6 Protective Order is reasonable because the depositions Panda has requested are
7 "unnecessary, unreasonable, oppressive, cumulative, and duplicative." Motion at 1.
8 Contrary to the parade of horrors presented by APS, Panda's request to take expert and
9 party witness depositions is consistent with the Commission's Rules, reasonable, and the
10 most efficient means to gather the information needed by Panda to prepare for the hearing
11 in this matter. Furthermore, Panda requested that depositions be scheduled, first
12 informally and later by the Deposition Notices, as soon as it became obvious that
13 depositions were necessary. Accordingly, the Commission should reject APS's attempts
14 to block reasonable attempts at discovery, and direct APS to make its witnesses available
15 for deposition as soon as reasonably practicable.
16

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **I. DEPOSITIONS BY ORAL EXAMINATION ARE CLEARLY PERMITTED**
19 **UNDER THE COMMISSION'S RULES AND ARIZONA LAW.**

20 APS claims that oral depositions "are exceedingly infrequent in matters before the
21 Commission" suggesting that Panda seeks discovery through extraordinary means.
22 Motion at 2. APS further argues that Panda's request is not consistent with the spirit of
23 the 1984 amendments to the Arizona Rules of Civil Procedure ("ARCP"), which APS
24 alleges "were intended (in part) to further limit the use of unnecessary and unnecessarily
25 burdensome and expensive discovery." Motion at 5. APS concludes that the
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1 Commission, therefore, should reject Panda's request.

2 Panda's request to depose APS's witnesses is entirely consistent with the
3 Commission's Rules and the Arizona Rules of Civil Procedure. The Commission's Rules
4 provide an unfettered right to take oral depositions of any witness. A.A.C. R14-3-109(P)
5 provides that "[t]he Commission, a Commissioner or any party to any proceeding before it
6 may cause the depositions of witnesses to be taken in the manner prescribed by law and of
7 the civil procedure for the Superior Court of the State of Arizona." The Rule does not
8 limit the right of *any* party to take the deposition of *any* witness at *any* time. Nor does
9 APS point to anything in the Commission's Rules to support its contention that Panda has
10 no right to take depositions.
11

12 The Rules of Civil Procedure further support Panda's right to take the requested
13 depositions. ARCP 30 states: "[a]fter commencement of the action, the testimony of
14 parties or any expert witnesses expected to be called may be taken by deposition upon oral
15 examination. Further, by its own terms ARCP 26 (b)(4) allows parties to seek discovery
16 from expert witnesses, who are, after all, not simply stating facts (which may be more
17 easily discovered through other means), but also stating opinions on the basis of their
18 unique knowledge, experience or expertise, opinions which are best examined through the
19 give-and-take of an oral deposition.
20

21 Tellingly, APS cites no Commission order or other Arizona precedent in which a
22 party to a Commission proceeding was precluded from taking the deposition of another
23 party's witness. APS refers to two instances where the Wyoming and South Dakota
24 Commissions quashed deposition notices, but both proceedings are factually
25 distinguishable and did not involve anything like the future of competitive markets for the
26 next thirty years.

1 The South Dakota proceeding was an administrative appeal from a Commission
2 order to show cause, and the Commission specifically noted that its preference for written
3 testimony over depositions was “designed to limit burdensome discovery *in*
4 *administrative appeals.*” *In the Matter of U.S. West Communications, Inc. and its Ability*
5 *to Serve South Dakota Customers*, 1998 S.D. PUC LEXIS 27 (emphasis added). It makes
6 perfect sense that a state commission would restrict use of depositions in an administrative
7 appeal of a previous order, where it would not restrict depositions before trial, as is the
8 case here.

9
10 The Wyoming proceeding involved a request for a deposition before scheduled
11 hearings. However, the party opposing the deposition in that case “*demonstrated . . . that*
12 *the discovery sought could have been obtained through sources that were more*
13 *convenient, less burdensome or less expensive,”* and that the party seeking the deposition
14 would not be prejudiced by prohibiting the requested deposition. *In the Matter of the*
15 *Application of WWC Holding Co., Inc. (Western Wireless) for Authority to be Designated*
16 *as an Eligible Telecommunications Carrier*, 1999 Wyo. PUC LEXIS 530 at [*8]
17 (emphasis added). Here, as explained below, APS has proved nothing, offering only a
18 bare allegation that Panda *could* have obtained the information it needs through several
19 rounds of data requests, even though the experience of Interveners in this proceeding
20 clearly indicates that APS has been non-responsive to data requests. *See, e.g.,* APS’s
21 objections to Alliance’s First Set of Data Requests, copy attached hereto at Tab 1.

22
23 Nor should the Commission deny Panda’s request pursuant to ARCP 26(b).
24 Plainly, the Rule allows a court to limit the “frequency or extent of use” of all allowed
25 discovery methods. However, it does not completely bar Panda from exercising its right
26 to seek reasonable discovery as APS would have the Commission conclude. Indeed, if

1 APS were correct, and a party cannot take depositions if it could *conceivably* obtain the
2 same information through numerous rounds of data requests (assuming, of course, that the
3 recipient of the data requests responds fully, responsively and on time), depositions would
4 *never* be permitted. This is clearly not the case, as the Commission's Rules explicitly
5 allow depositions, recognizing that depositions may clearly be used to obtain discovery.
6 It may well be true that oral depositions in Commission proceedings are unusual, even
7 rare, but such depositions are neither unheard of nor precluded by the rules, when, like
8 here, they are reasonable.

9
10 **II. QUASHING THE DEPOSITION NOTICES IS UNREASONABLE.**

11 **A. Depositions of APS's Expert Witnesses Are Not Unreasonably
12 Cumulative or Duplicative.**

13 APS asserts that Panda should be prevented from taking depositions because the
14 information sought is either already contained in APS's pre-filed written testimony or
15 obtainable through written data requests. Motion at 2-3. In this instance, data requests
16 and testimony are a poor substitute for oral depositions. It is true that many pertinent
17 questions can be answered in written testimony and in responses to data requests. It is,
18 however, difficult to cross-examine a piece of paper, and it is completely unfair and
19 ineffectual to force a party to wait until trial for the opportunity to examine its adversary's
20 witness, particularly when, as here, so many of the issues are a matter of expert opinion,
21 and where the basis for these opinions must be made known in advance of trial in order to
22 allow the examining party to prepare its case.

23 This case is proceeding on an accelerated schedule. In order for Panda to prepare
24 for the hearing, including filing its direct testimony by March 29, it must be allowed to
25 inquire into the basis for APS's contentions. On the basis of APS's intransigence in
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1 responding to discovery responses to date, however, unless Panda is allowed to depose
2 APS's witnesses, it will be precluded from doing so.

3 As is often the case, APS's written testimony raises far more questions than it
4 answers. For example, Jack Davis testified that the proposed Power Purchase Agreement
5 ("PPA") provides a better alternative than the competitive market, but he never adequately
6 explained which of APS's generating units would be used to deliver power under various
7 sets of assumptions, how future prices under the PPA would be determined, or what
8 measures APS undertook to determine what alternatives the competitive market could
9 provide. Dr. Hieronymus referred to certain California power contracts as comparable to
10 the PPA, but he never adequately explained his methodology for comparing the contracts
11 to the PPA. At best, APS's written testimony provides an outline of topics to be covered
12 by APS's witnesses, and not the information needed by Panda to prepare for the hearing.

13
14 Panda has also issued additional data requests. However, even if APS were to
15 respond fully, only through a deposition can Panda efficiently explore the foundation of
16 APS's answers in any detail, and follow up unresponsive answers with additional
17 questions. APS points to the *five* sets of data requests propounded by Commission Staff
18 as evidence that data requests provide necessary information. Motion at 4. If anything,
19 the fact that Staff was forced to issue five sets of data requests in the first place proves that
20 oral depositions would be a more effective way to proceed. The bulk of Staff's third set
21 of data requests, for example, are follow-up questions to Staff's first set of requests, and
22 were necessary because many of APS's answers to the first set were non-responsive.
23 Indeed, *all* of the Residential Utility Consumer Office's ("RUCO") second set of data
24 requests refer to answers provided in response to RUCO's first set of questions. Had
25 either Staff or RUCO taken the deposition of APS's experts, these sets-upon-sets of data
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1 requests may have been unnecessary.

2 Despite APS's claims, APS has not fully responded to Interveners' data requests.
3 For example, on January 2, 2002, the Arizona Competitive Power Alliance (the
4 "Alliance") asked APS for copies of all data request responses provided to Staff and
5 RUCO. APS provided certain of the responses on January 14, 2002, but other responses
6 have never been provided. APS objected to other questions, and thus Panda still does not
7 know, for instance, the operating characteristics of the generating units APS claims will
8 provide a clear advantage over competitive generation.

9 Even when APS did provide responses to data requests, however, such responses
10 oftentimes simply regurgitated APS's direct testimony. For example, when the Alliance
11 asked APS for the basis of Mr. Davis' claim that the PPA would have a "negligible effect"
12 on merchant generators, APS merely restated the unsupported allegations contained in Mr.
13 Davis' testimony that inspired the question in the first place. *Compare* Direct Testimony
14 of Jack Davis at 26-27 with APS's Response to Alliance Data Request 1.2, copy attached
15 at Tab 2. Furthermore, APS did not identify the person or persons responding to data
16 requests, but it appears that the experts themselves may have been only indirectly
17 involved in preparing the answers. *See, e.g.,* APS's Response to Data Requests 1.36, 1.37
18 and 1.66, copies attached at Tab 2. Compare this to an oral deposition, in which the
19 experts must themselves respond to questions, and in which the party taking the
20 deposition may seek additional explanation of non-responsive answers; it is clear that
21 written data requests, while a useful means of obtaining copies of documents, are an
22 inadequate substitute for deposition examination.
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B. Oral Depositions Are More Efficient Given the Compressed Schedule of This Proceeding, and Will Conserve Commission Resources in the Hearing.

APS claims that Panda should not be permitted to take depositions because Panda waited too long to seek depositions. Motion at 4-5. This allegation is completely unfounded. The ALJ's Procedural Order in this proceeding was issued February 8, 2002. Panda issued its Deposition Notices about a month later, after reviewing APS's non-responsive answers to data requests and lining up witnesses to counter APS's witnesses. Moreover, requesting depositions before the Procedural Order and before retaining its own witnesses would have been pointless, not only because APS would doubtless have objected on the grounds that those depositions were premature pending the entry of a hearing order, but because it would have made little sense to do so until Panda secured its own witnesses and reviewed APS's response to whatever discovery had been prepared.

The current procedural schedule provides Panda with only two more weeks to prepare and file its written testimony and six weeks before the hearing commences. This is not nearly enough time to ask all the necessary data requests, receive answers, respond to any objections and start the process again with follow-up questions. Thus, Panda's only recourse, if depositions are not permitted, will be to subject each of APS's witness to extensive cross-examination during the hearing, questioning that would likely be unnecessary had it been permitted to take depositions. Of course, in the alternative, if APS does not have time to make its witnesses available for deposition under the current schedule, the schedule can always be amended and the hearing date continued.

1 **C. Depositions Will Not Be Unduly Burdensome On APS, And Any**
2 **Burden Is Outweighed By The Importance Of The Issues In this Docket**
3 **And The Harm To Panda If Depositions Are Precluded.**

4 According to APS, requiring APS's witnesses to "sit through" a deposition would
5 be overly burdensome, and would subject each witness to a "mini-hearing." Motion at 4.
6 Panda respectfully disagrees. For one thing, a deposition may well eliminate numerous
7 lines of questioning at the hearing. Furthermore, any burden on APS's witness can easily
8 be dealt with by measures such as requiring payment of witnesses' expenses and
9 accommodating witnesses' schedules. In informal discussions preceding Panda's
10 Deposition Notices, Panda repeatedly informed APS that it would make reasonable
11 accommodation of APS' needs, including scheduling or payment of expenses. APS
12 refused to even discuss such matters, completely rejecting Panda's request.

13 In contrast, the harm to Panda in not taking such depositions would be great.
14 Panda would be required to spend significant time preparing additional data requests
15 seeking necessary information. Panda would also be deprived of examining APS's
16 witnesses concerning the unique knowledge that forms the basis of their opinions,
17 opinions which are best examined through the give-and-take of an oral deposition. In
18 short, precluding depositions in this proceeding would prevent Panda from adequately
19 preparing its case to counter the arguments made by APS, facing the loss of billions of
20 dollars in investment without adequate due process. Allowing reasonable depositions
21 would save the time of the Commission and all parties to this proceeding (including APS).

22 Finally, any possible burden on APS is clearly outweighed by the issues at stake in
23 this proceeding. Even ARCP Rule 26(b) recognizes that any limit on discovery must be
24 balanced against the needs of the case, the amount in controversy, limitations on the
25 parties' resources, and the importance of the issues at stake in the litigation. This
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proceeding is about nothing less than the future of wholesale electric competition in Arizona for the next thirty years. Panda and the other generator Interveners have invested, and will continue to invest, billions of dollars in Arizona to compete in the wholesale market. In addition, Arizona ratepayers face the loss of billions of dollars in excess rates if the Commission approves a PPA with rates above market levels. Given what is at stake in this proceeding, the so-called "burden" of an oral deposition is minimal, at best.

III. CONCLUSION.

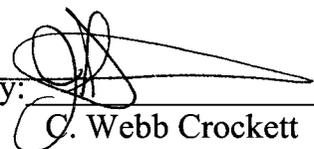
Panda's request to take the depositions of APS's witnesses is permitted under the Commission's Rules. In addition, depositions are the most efficient means for Panda to obtain the information it needs to prepare for hearing and the only way to avoid days of intensive cross-examination at the hearing in this proceeding. APS's claims of undue hardship are easily remedied by scheduling accommodations, and are significantly outweighed by the importance of this proceeding and the significant harm to Panda if depositions are precluded.

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RESPECTFULLY SUBMITTED this 18th day of March, 2002.

FENNEMORE CRAIG

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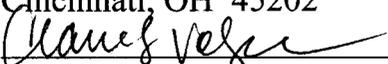
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January 9, 2002

VIA FACSIMILE AND MAIL

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Re: Data Requests of Arizona Competitive Power Alliance to Arizona Public Service Company dated January 3, 2002 in Docket No. E-01345A-01-0822

Dear Jack:

As I indicated in our phone conversations of last week, Arizona Public Service Company ("APS" or "Company") would object to certain of the questions contained in your First Set of Data Requests dated January 3, 2002, or alternatively, would object to providing the information requested by certain of the questions. Specifically, APS objects to the following:

- 1) As to Question 1.4, APS would object to providing any responses it may have received from providers because such information would be competitively sensitive and would give non-responding providers an unfair competitive advantage that would harm APS Standard Offer customers. However, in this specific instance, APS has received no such responses.
- 2) APS objects to Question 1.14 as overly broad and burdensome. "Any and all written materials" could encompass literally thousands of documents accumulated over several years. That being said, APS will provide sufficient available documentation to support Mr. Davis' statement.
- 3) APS objects to providing the written materials referenced in Question 1.20. These materials detail future projections of the fixed cost component of the Dedicated Energy Products and are competitively sensitive given the membership of the Alliance. APS will provide a narrative response to the Question that does not require the disclosure of competitively sensitive information.

John A. LaSota, Jr., Esq.
January 9, 2002
Page 2

- 4) APS would object to Question 1.35 to the extent it would have required APS to divulge any proprietary analyses of future market prices. Such proprietary analyses are competitively sensitive and could be utilized by the members of the Alliance to the competitive disadvantage of APS/PWCC/PWEC and of APS Standard Offer customers. However, in this specific instance, APS has no analyses of the type requested that do not appear in its direct testimony.
- 5) APS would object to Q. 1.51 as requiring APS to disclose confidential and competitively sensitive information concerning potential transactions that are neither before the Commission nor relevant to the proposed PPA. However, in this specific instance, APS has had no such discussions to date.
- 6) APS objects to Question 1.55 as calling for competitively sensitive information. Knowing the percent of power supplied under the proposed PPA from individual units would grant competitors of PWCC/PWEC/APS insight as to the marginal running costs of each such unit.
- 7) APS objects to Question 1.79 to the extent it requests disclosure of future market price projections by APS/PWCC/PWEC. Such projections are competitively sensitive and would greatly benefit competitors of APS/PWCC/PWEC and potentially prejudice Standard Offer customers of APS.
- 8) APS objects to Question 1.82 to the extent it requests disclosure of market price studies conducted by APS/PWCC/PWEC for the same reasons as set forth above. APS will provide a narrative response to the Question that does not require the disclosure of confidential or competitively sensitive information.
- 9) APS objects to Question 1.83 for the same reasons as stated above and further asserts that the names of its employees having the expertise identified by the Question are themselves both irrelevant and competitively sensitive information. APS will nevertheless attempt to respond to the Question using non-competitively sensitive information.
- 10) APS objects to Question 1.86 for the same reason as set forth in response to Question 1.83 but will likewise provide a narrative response using non-competitively sensitive information.
- 11) APS objects to Question 1.87 for the reasons set forth in response to Questions 1.20 and 1.57.
- 12) APS objects to Question 1.93 as burdensome and overly broad. APS will provide a copy of all written materials referenced in its responses or a website address for any

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LLP

John A. LaSota, Jr., Esq.
January 9, 2002
Page 3

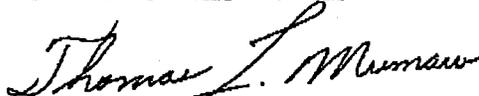
electronic materials so referenced. As to "any and all documents" . . . "which APS relies upon to respond to these requests," this would literally encompass a lifetime of professional experiences for those charged with responding to the Alliance's Questions, including counsel for the Company. Such a request cannot be reasonably or meaningfully complied with by APS.

13) APS objects to Question 1.94 to the extent it calls for the disclosure of responses or partial responses provided Staff and/or RUCO (or other parties, when and if applicable) under the terms of their respective confidentiality agreements with the Company. APS will provide all non-confidential responses and will also indicate when and if any additional confidential materials were provided to Staff and/or RUCO.

As I also indicated in our conversations, APS is doing its best to comply with your voluminous requests by the date indicated but is unable as of now to commit to completing its responses to the non-objectionable questions by January 14th. Thus, the Company reserves the right to request of the Alliance a reasonable extension of time as to such responses.

Very truly yours,

SNELL & WILMER LLP


Thomas L. Mumaw

Attorneys for Arizona Public Service Company

Enclosure

1119723.1

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ARIZONA COMPETITIVE POWER ALLIANCE'S FIRST
SET OF DATA REQUESTS – JANUARY 3, 2002
TO ARIZONA PUBLIC SERVICE COMPANY'S REQUEST
FOR A VARIANCE OF CERTAIN REQUIREMENTS
OF A.C.C. R14-2-1606 AND PURCHASE POWER AGREEMENT
DOCKET NO. E-01345A-01-0822

- 1.2 Please explain the basis for Mr. Davis' testimony (p.3) that the requested variance and proposed PPA will have a "negligible effect" on "the merchant generators that have intervened in this proceeding."

RESPONSE:

As was noted in Mr. Davis' testimony and that of the other APS witnesses, this observation is based primarily on the following considerations:

- 1) the relatively small part of the relevant market that APS Standard Offer customers represent;
- 2) the opportunities for non-PWEC generators to sell power to PWCC for APS permitted, even mandated, by the proposed PPA;
- 3) the continued existence of the Dedicated Units as competitors with the Merchant Intervenors absent their commitment to APS through the proposed PPA;
- 4) the inability of some Merchant Intervenors to access the APS system through available transmission; and,
- 5) the relatively greater attractiveness of the California and Nevada markets as evidenced by the facility siting decisions of most if not all the Merchant Intervenors.

As the Merchant Intervenors respond to the Company's discovery, APS may supplement this response.

ARIZONA COMPETITIVE POWER ALLIANCE'S FIRST
SET OF DATA REQUESTS – JANUARY 3, 2002
TO ARIZONA PUBLIC SERVICE COMPANY'S REQUEST
FOR A VARIANCE OF CERTAIN REQUIREMENTS
OF A.C.C. R14-2-1606 AND PURCHASE POWER AGREEMENT
DOCKET NO. E-01345A-01-0822

- 1.36 Please explain the basis for Dr. Landon's testimony (p. 7) that the PPA "offers an attractive level of reliability relative to other sources of supply."

RESPONSE:

The full quote from Dr. Landon's testimony at pages 6 and 7 is, "While prices under the PPA are subject to adjustment, they will be more stable than prices in competitive spot markets or prices based on short-term contracts. The portfolio-backed obligation to APS from Pinnacle West also offers an attractive level of reliability relative to other sources of supply." The remainder of Dr. Landon's testimony explains the bases for these assertions.

ARIZONA COMPETITIVE POWER ALLIANCE'S FIRST
SET OF DATA REQUESTS – JANUARY 3, 2002
TO ARIZONA PUBLIC SERVICE COMPANY'S REQUEST
FOR A VARIANCE OF CERTAIN REQUIREMENTS
OF A.C.C. R14-2-1606 AND PURCHASE POWER AGREEMENT
DOCKET NO. E-01345A-01-0822

- 1.37 Please state the basis for Dr. Landon's testimony (p. 9) that "market prices likely will rise over time to reflect the costs of new generation, which are likely to escalate." If Dr. Landon conducted or relied upon any studies or analysis to support his statement please identify who performed the study or analysis, and when the study or analysis was performed, and please provide copies of any such study or analysis.

RESPONSE:

Dr. Landon did not do or rely on any specific studies for this conclusion. He based his testimony on the belief that inflation will cause land, labor and capital costs to rise over time and that the best sites would be used first.

ARIZONA COMPETITIVE POWER ALLIANCE'S FIRST
SET OF DATA REQUESTS – JANUARY 3, 2002
TO ARIZONA PUBLIC SERVICE COMPANY'S REQUEST
FOR A VARIANCE OF CERTAIN REQUIREMENTS
OF A.C.C. R14-2-1606 AND PURCHASE POWER AGREEMENT
DOCKET NO. E-01345A-01-0822

- 1.66 Please state the basis for Dr. Hieronymus' belief (p. 7) that the bulk of the merchant capacity that is being built in Arizona was intended for the California market.

RESPONSE:

This is his professional opinion base *inter alia* on work with developers, the sites chosen for the facilities, the nature of the facilities, relative siting difficulties in Arizona and California, relative prices and supply-demand balances in California and Arizona, the relative size of the markets and the generation mix within those markets.