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AZ CORP COMMISSION
DOCUMENT CONTROL

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 PROCEEDINGS CONCERNING THE ARIZONA INDEPENDENT SCHEDULING ADMINISTRATOR

DOCKET NO. E-00000A-01-0630

IN THE MATTER OF TUCSON ELECTRIC 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

Arizona Corporation Commission

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Motion Of Panda Gila River L.P. To Compel Responses To Data Requests, Or, In The Alternative, To Strike Portions Of The Testimony Of Jack E. Davis, William H. Hieronymus and John H. Landon

Panda Gila River L.P. ("Panda") moves for an order compelling Arizona Public Service Company ("APS") to respond to certain Data Requests which seek materials underlying APS's Request for a Partial Variance ("Variance Request") and the supporting testimony.

Despite Panda's offer to enter into a Protective Agreement regarding distribution of the requested material, APS has refused to produce materials that back up, support or otherwise explain APS's witnesses' direct testimony, arguing that the materials are confidential.

Alternatively, if APS fails or refuses to produce the requested materials, Panda requests that the Commission strike the portions of APS's testimony and Variance Request for which supporting material has not been produced.

I. PROCEDURAL BACKGROUND

On October 18, 2001 APS filed its Variance Request and its request for approval of a proposed Power Purchase Agreement ("PPA") between APS and its affiliate, Pinnacle West Capital Corporation ("PWCC"). In support of the Variance Request, on November 30, 2001, APS submitted the testimony of Jack E. Davis ("Mr. Davis"), William H. Hieronymus ("Dr. Hieronymus") and John H. Landon ("Dr. Landon"). Each of the three witnesses present testimony regarding the ultimate issues in this case: whether granting the Variance Request and accepting the PPA is prudent and in the public interest. However, when it came time for APS to backup that testimony through the production of tangible data, APS balked.

II. MOTION TO COMPEL RESPONSE TO DATA REQUESTS

A. History of Data Requests

On March 14, 2002, Panda issued its Third Set of Data Requests to APS. The Data Requests sought materials about which the APS witnesses had testified, and which are necessary to verify APS's contention that the Variance Request and PPA are in the best interests of Standard Offer Service Customers. As an example, Data Request 3.1 requested that APS "[p]rovide copies of any workpapers or other materials supporting the testimony of Jack E. Davis, John H. Landon and William H. Hieronymus." This is a straightforward Data Request clearly within the scope of the Arizona Rules of Civil Procedure ("ARCP"), which allow parties

to “obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . .” Ariz. R. Civ. P. 26(b) (emphasis added). Rather than abide by the policy of full disclosure between the parties embodied in the ARCP¹ on March 21, 2002, APS objected to the Data Request “to the extent any such workpapers contain confidential materials.” (Letter from Thomas Mumaw dated March 21, 2002).² On March 26, 2002, APS provided answers to the Data Requests, and with respect to Data Request 3.1, purported to provide “non-privileged workpapers” but excluded “proprietary workpapers.” (APS Response to Panda’s Third Set of Data Requests, Request 3.1).³

Specifically, among the materials APS excluded were workpapers supporting Mr. Davis’ testimony regarding “detail on new generation investment; detail on generation from each of the units; EAF by unit; and detailed calculation of PPA cumulative cost savings vs. [Long Run Marginal Cost].” This information goes to the heart of Mr. Davis’ testimony as Mr. Davis testified as to the cumulative generation investment by APS (Davis Testimony at 4, 17), the reliability of APS generation vs. market alternatives (Davis Testimony at 19-21) and the alleged long run price advantage of the Dedicated Units over market alternatives (Davis Testimony at 24-25).

APS asserted a similar “confidentiality” objection to 27 other Data Requests or portions of Data Requests and refused to provide the relevant data. As another example, at page 25 of his testimony, Mr. Davis asserted that “based on a projected LRMC of between \$52 and

¹ See Cornet Stores v. Superior Court, 108 Ariz. 85, 86, 492 P.2d 1191, 1193 (1972) (“Cornet Stores”).

² Panda also issued a subpoena for the workpapers of Mr. Davis, Dr. Landon and Dr. Hieronymus as part of the deposition notices served on APS’s counsel on March 8, 2002. APS produced some of the workpapers of Dr. Landon at his April 9, 2002 deposition, but continues to maintain that it will not produce the bulk of its witnesses’ workpapers because they are confidential.

³ APS’s Response to Request 3.1 is hereto as Exhibit A.

\$60 per MWh, cumulative customer savings could be from over \$400 million to some \$1.5 billion [through 2007].” Data Request 3.3 requested:

Provide any studies, reports or analyses in the possession of APS, PWEC, PWEC or any affiliate thereof regarding the following:

- A. Forecasts of market prices for long-term contracts for delivery of capacity and energy in the APS control area for 2003 to 2033 (the possible term of the PPA)
- B. Projections of expected prices under an RFP or through bilateral, arm-length contracts with independent generators.

APS responded to the Data Request by objecting to it on the basis of confidentiality and merely cited Panda back to the very testimony about which Panda issued its Data Request in the first place.⁴ APS’s responses clearly are not consistent with the type of full disclosure that the ARCP contemplate.

In an effort to work out this discovery dispute, on April 11, 2002, after a review of the materials actually provided, counsel for Panda sent a letter to counsel for APS noting that APS had not identified “with any degree of specificity the nature of the confidential information or on what basis under Arizona law it considered the information confidential” (Letter from Jay Shapiro dated April 11, 2002, attached hereto as Exhibit B). Panda nevertheless provided a proposed protective agreement which would limit the disclosure of any material designated confidential by APS. (A copy of the proposed protective agreement is attached hereto as Exhibit C). On Friday April 12, 2002, counsel for Panda spoke with APS counsel and although APS counsel indicated that no additional documents would be produced, each agreed to take a fresh

⁴ See APS Response to Data Request 3.3, attached hereto as part of Exhibit A, stating “Mr. Davis, Dr. Landon and Dr. Hieronymus all have provided studies, etc. that are responsive to the question: 1) Davis Testimony @ 2-7; 24-25; 38; 2) Landon Testimony @ 4-10; 16-17; and 3) Hieronymus Testimony @ 5-6; 10; 12-20.”

look at the Data requests and the objections thereto to determine whether any compromise could be reached.

Panda in fact reviewed the Data Requests to which APS objected and on April 16, 2002 indicated to APS counsel that in order to compromise it would only pursue those Data Requests to which APS objected that directly related to APS's testimony. Panda did not have the opportunity to disclose the specific requests it would drop as part of its compromise as counsel for APS informed counsel for Panda that APS would not disclose any material it alleged to be confidential, even with a protective agreement in place. The only asserted reason given by APS counsel was that such confidential material would not be disclosed to a "direct competitor."⁵

B. Motion to Compel

As noted above, the Arizona Rules of Civil Procedure allow discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action . . ." Ariz. R. Civ. P. 26(b) (emphasis added). The rules define relevant matter as information that is "reasonably calculated to lead to the discovery of admissible evidence." *Id.* APS has not argued, nor can it argue, that the information sought by Panda is not relevant nor reasonably calculated to lead to admissible evidence. In fact, it appears as if APS seeks to secret the information precisely because of its relevance.

⁵ Counsel for APS also argued that Panda and other intervenors agreed not to seek such information in exchange for APS withdrawing certain Data Requests to intervenors. Counsel for Panda was involved in the conference call in which APS decided, of its own accord, to withdraw certain Data Requests and there was, in no way, any discussion, let alone agreement, that APS's withdrawal would be subject to a similar withdrawal by Panda. In fact, APS did not withdraw its Data Requests, but rather, required production of confidential documents that intervenors would introduce in the Variance proceeding. Given the magnitude of the issues before the Commission and the importance of the material sought by Panda in its Third Set of Data Requests, Panda would never have agreed to withdraw its Data Requests.

The Commission's decision on APS's Variance Request will likely have a profound economic effect on the parties involved. That decision should only be made after the parties and the Commission have all the facts before it. Panda has suggested that the appropriate manner for the Commission to ascertain the true difference between the PPA and what the competitive market can bring is to ask the competitive market through an RFP. If the Commission follows that road, the discovery may not be necessary, as an independent evaluator can evaluate the legitimacy of APS's assertion. If, however, the matter is addressed through a litigated RFP, this should happen only if the facts can be brought out through all parties having access to the material in APS's possession which either confirms or rebuts the assertions made by APS in the testimony presented by its witnesses.

APS's sole justification for failing to produce relevant material in compliance with the ARCP is that APS will not disclose material it deems confidential to a "direct competitor." First, it is unclear how APS views Panda as a "direct competitor" given that Panda is neither a retail supplier nor a distribution company. It appears as if APS is simply protecting its affiliates, PWEC and PWCC, which are competitors of Panda. Second, it is contrary to Arizona law to refuse to produce relevant materials sought in discovery merely on an assertion of confidentiality. The Arizona Supreme Court has held that a claim of confidentiality is not a proper objection to an otherwise proper interrogatory. See Cornet Stores, 492 P.2d at 1195. In Cornet Stores, the Arizona Supreme Court found that if an interrogatory calls for the production of information that is of a confidential nature that a party does not want in the public record, they should apply for a protective order. See id. As noted above, Panda has offered a draft protective agreement to APS and also has offered to modify the draft protective agreement in any way that APS deems necessary to protect its allegedly confidential information. APS has refused Panda's

offered protective agreement and indicated that it will not comply with the Data Requests under any circumstances. The draft protective agreement is attached hereto as Exhibit C.

In short, APS has provided no basis under Arizona law to support its refusal to disclose the information requested, particularly in light of the proposed protective agreement. Based on these factors, the Commission should enter an order compelling the production of the Data Requests, attached hereto as Exhibit D. This list represents Panda's voluntarily reduced list of materials for which an order compelling production is not only appropriate, but essential to the Commission's ability to rule on whether APS's Variance Request and PPA are, in fact, in the public interest. Even a cursory review reveals that the material requested is highly relevant to the matter before the Commission, likely to lead to admissible evidence and discoverable under the ARCP.

C. In The Alternative, Panda Moves To Strike Those Portions Of APS's Testimony For Which It Refuses To Produce Related and Relevant Information

Rule 37(b) of the Arizona Rules of Civil Procedure provides, in part, that a party failing to comply with an order to permit discovery may be subject to an order "prohibiting the party from introducing designated matters in evidence." Given the nature of this proceeding and the burden that APS carries to establish that its Variance Request is both prudent and in the public interest, the Commission should not hesitate to strike all testimony offered by APS witnesses that addresses matters for which APS has refused to provide supporting materials.⁶ It is not sufficient that APS has provided the material to some participants in this proceeding.⁷

⁶ See also ARCP Rule 37(c), which bars parties from using at trial information that is not disclosed in a timely fashion unless good cause is shown; Allstate Insurance Co., 182 Ariz. 284, 896 P.2d 254 (1995).

⁷ In a telephone conversation with Panda counsel on April 16, 2002, counsel for APS indicated that it has provided the supporting materials sought by Panda to Commission Staff and other intervenors. At the very least, APS should be required to provide the material it deems confidential to counsel for Panda. (footnote continued on next page)

Panda has invested over \$1 billion in the State of Arizona. The Variance requested by APS would significantly restrict the ability of Panda to use its asset to provide power to the consumers of Arizona. Neither Panda nor the Arizona consumers should be deprived of that opportunity simply on the unsubstantiated testimony of APS's witnesses.

The Commission should either require full disclosure, consistent with the ARCP, or strike the sections of APS's testimony for which APS refuses to provide adequate support.⁸ The majority of the testimony at issue relates to APS's support of its proposed PPA. Because APS will not provide back-up for its testimony in that regard, the Commission should strike all evidence regarding the PPA and summarily deny APS's request for approval.

D. Conclusion

APS has failed to produce any of the material that support, back up or explain large portions of its Variance Request and related direct testimony, contrary to the clear directive of the ARCP that all relevant material be produced if sought by an opposing party. APS's assertions of confidentiality are not sufficient grounds under Arizona law to deny Panda access to the supporting materials that it seeks in its Data Requests. Panda, therefore, respectfully requests that the Commission issue an order compelling APS to produce the material sought by Panda, or in the alternative, Panda requests that all portions of the Variance Request regarding

Accord, *Montgomery Elevator Co. v. Superior Court*, 135 Ariz. 432, 661 P.2d 1133 (1983) (holding that courts can deprive a party of representation at any part of a proceeding that is adversarial, especially those at which testimony or evidence is discovered, considered or take, only in extreme circumstances).

⁸ Alternatively, attached as Exhibit E is a list of testimony to be stricken if APS is not required to produce the requested materials that back up, support and explain the testimony submitted by APS's witnesses and the Variance Request.

the PPA and the related direct testimony be stricken and the request for approval of the PPA be summarily denied.

RESPECTFULLY SUBMITTED this 19th day of April, 2002.

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A

PANDA GILA RIVER L.P.'S THIRD SET OF
DATA REQUESTS – MARCH 14, 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

- 3.1. Provide copies of any workpapers or other materials supporting the testimony of Jack E. Davis, John H. Landon and William H. Hieronymus.

RESPONSE:

APS has previously objected to this Question to the extent such workpapers are confidential or privileged. Without waiver of such objection, non-privileged workpapers are provided. (Attachment Panda 3 Q.3.1)

This response excludes the following proprietary workpapers for each of the witnesses.

Landon:

Any proprietary work product or analyses done for other clients on which Mr. Landon may have relied on developing his opinions or statements.

Hieronymus:

Workpapers associated with the proprietary Levelized Cost/Fixed Charge Rate Calculator for Merchant Plant.

Davis:

Detail on new generation plant investments

Detail on generation from each of the units

EAF by unit

Detailed calculation of PPA cumulative cost savings vs. LRMC

PANDA GILA RIVER L.P.'S THIRD SET OF DATA REQUESTS - MARCH 14,2002
TO ARIZONA PUBLIC SERVICE COMPANY'S REQUEST FOR A VARIANCE OF
CERTAINN REQUIREMENTS OF A.C.C. R14-2-1606 AND PURCHASE POWER
AGREEMENT DOCKET NO. E-0 I 345A-0 1 -0822

- 3.3. Provide any studies, reports or analyses in the possession of A-PS, MEC, PWEC or any affiliate thereof regarding the following:
- a. Forecasts of market prices for long-term contracts for delivery of capacity and energy in the APS control area for 2003 to 2033 (the possible term of the PPA)
 - b. Projections of expected prices under an RFP or through bilateral, arm-length contracts with independent generators.

RESPONSE:

APS has previously objected to this question. Mr. Davis, Dr. Landon and Dr. Hieronymus all have provided studies, etc. that are responsive to the Question:

- 1) Davis Testimony @ 2-7; 24-25; 38;
- 2) Landon Testimony @ 4-10; 16-17; and
- 3) Hieronymus Testimony@ 5-6; 10; 12-20

See also Response to Question 3.47.

PHX/1293716.1/73262.005

B

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April 11, 2002

BY HAND DELIVERY

Thomas L. Mumaw
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**Re: APS's Request for a Variance, Docket No. E-01345A-01-0822;
APS's Response to Panda Gila River L.P.'s Third Set of Data Requests**

Dear Tom:

We have now had the opportunity to review APS's responses to Panda Gila River L.P.'s ("Panda") Third Set of Data Requests and, unfortunately, find your responses to be inadequate. We are interested in working with you to resolve the inadequacies in your responses without the need to file a Motion to Compel, but given the compressed schedule need to do so quickly.

Our primary concern relates to APS's Objection to Data Requests 3.1, 3.3, 3.4, 3.5, 3.6, 3.10, 3.12, 3.15, 3.17, 3.22, 3.23, 3.30, 3.32, 3.33, 3.34(d), 3.39, 3.40, 3.41, 3.44(f)(4-8), 3.45, 3.46, 3.50(d)-(h) and (k), 3.52(b) and (c), 3.56, 3.64, 3.75, 3.77 and 3.85 on the basis that the questions seek confidential information. APS did not identify with any degree of specificity the nature of the confidential information or on what basis under Arizona law it considered the information confidential. Nevertheless, in an attempt to resolve your objection, attached please find a proposed protective agreement which should allow for the release of the withheld information. It is our understanding from your prior statements that APS has already released confidential information to other parties to this proceeding once appropriate protective measures were put in place. To the extent that APS intends to maintain its refusal to provide documents on the basis of confidentiality, please immediately provide a list of each document withheld and the specific basis for your claim of confidentiality.

In addition to the general deficiency in the answers as a result of APS's assertion of confidentiality, APS's Response to Data Request 3.1 excludes certain work papers prepared or available to each of APS's witnesses on the basis that the work papers are "proprietary." We do

FENNEMORE CRAIG

BY HAND DELIVERY

April 11, 2002

Page 2

not believe your objection is well founded in either Arizona law or in the context of this case and, therefore, request that APS provide copies of the excluded materials immediately.

With regard to Data Request 3.10, in addition to the deficiency in APS's answer as a result of withholding allegedly confidential information, the response to subpart (g) is also deficient in that it provides no documents relating to the alternatives which are outlined in APS's answer. Please forward those documents immediately. In addition, it is unclear from the answer to subpart (h) whether there were additional companies with whom APS had discussions. Please state specifically whether the answer provided includes all companies with whom APS has had discussions within the past five years concerning negotiation of a long-term contract.

With regard to Data Request 3.36, subpart (c), we do not believe that the identification of information regarding Panda that Ms. Tripp has conveyed to APS is privileged under either the Attorney Client Privilege or the Work Product Doctrine. Any information Ms. Tripp had regarding Panda was as a result of a confidential relationship between Ms. Tripp and Panda. Her improper disclosure of such information to APS, if it occurred, carries with it no privilege. Obviously, this information is discoverable pursuant to Rule 26 and APS should immediately disclose the requested information.

Your response to Data Request 3.37 was non-responsive. The question asked what "action, if any, has APS taken to elicit offers for supply of capacity and energy outside Arizona?" Simply stating that PWCC/APS purchase power from the "market" does not respond to the question of what actions, if any, APS has taken elicit offers. Please respond to the question as posed.

With regard to Data Request 3.38, APS's answer to the initial question was non-responsive. The questions asked whether "APS, PWEC, PWCC, or any affiliate had ever done an RFP for any good or service?" While APS's response regarding the experience of Pinnacle West Marketing and Trading Employees was enlightening, it did not answer the basic question of whether APS, PWEC, PWCC or any affiliate had done an RFP for any good or service. Please answer the question as posed.

With regard to Data Request 3.63, APS's answer is non-responsive. The Data Request sought projections of APS load growth over the 30-year life of the PPA. The response indicated that APS has made no 30-year load projections. However, the Data Request seeks all load growth projections over the 30-year life of the PPA, not just those projections which project 30-year load growth. Please provide all documents responsive to the request as posed.

With regard to APS's Response to Data Request 3.68, the response does not appear inclusive of all documents requested in the Data Request. Specifically, the Data Request asked

FENNEMORE CRAIG

BY HAND DELIVERY

April 11, 2002

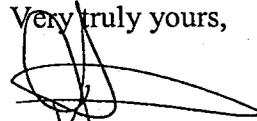
Page 3

for copies of any "studies, reports, analyses or other documents" but your response only referenced additional "studies." Please confirm whether APS has produced all documents responsive to the request.

APS's Response to Data Request 3.70 is non-responsive. Specifically, the Data Request asked APS to "identify all factors that make the Arizona market similar to the Pacific Northwest." While APS's response discussed generic exposure to market forces, the response did not provide any information regarding the similarity of the Arizona market to the Pacific Northwest. Please supplement the response immediately by answering the question as posed.

Please forward your supplementation of the above responses in the manner noted by noon, Tuesday, April 16, 2002 or we will have no choice but to contact the Administrative Law Judge in an effort to compel production by APS. Meanwhile, if you have questions regarding this matter please do not hesitate to contact me.

Very truly yours,



C. Webb Crockett
Jay L. Shapiro
Fennemore Craig, P.C/
Attorneys for Panda Gila River, L.P.

Larry F. Eisenstat
Frederick D. Ochsenhirt
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Attorneys for TPS GP, Inc., a general partner of
Panda Gila River, L.P.

JLS/mlh
Enclosure

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BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
Chairman
JIM IRVIN
Commissioner
MARC SPITZER
Commissioner

IN THE MATTER OF THE GENERIC PROCEEDINGS CONCERNING ELECTRIC RESTRUCTURING
IN THE MATTER OF ARIZONA PUBLIC SERVICE COMPANY'S REQUEST FOR VARIANCE OF CERTAIN REQUIREMENTS OF A.A.C. 4-14-2-1606
IN THE MATTER OF THE GENERIC PROCEEDINGS CONCERNING THE ARIZONA INDEPENDENT SCHEDULING ADMINISTRATOR
IN THE MATTER OF TUCSON ELECTRIC COMPANY'S APPLICATION FOR A VARIANCE OF CERTAIN ELECTRIC POWER COMPETITION RULES COMPLIANCE DATES
ISSUES IN THE MATTER OF TUCSON ELECTRIC POWER COMPANY'S APPLICATION FOR A VARIANCE OF CERTAIN ELECTRIC COMPETITION RULES COMPLIANCE DATES

DOCKET NO. E-00000A-02-0051

DOCKET NO. E-01345A-01-0822

DOCKET NO. E-00000A-01-0630

DOCKET NO. E-01933A-98-0471

DOCKET NO. E-01933A-02-0069

PROTECTIVE AGREEMENT

1. The Parties, as defined in Paragraph 3(a), after negotiations following the service and receipt of several requests for data, have agreed to the production of certain protected materials, which customarily are treated by the Parties as sensitive or proprietary, are not available to the public, and which, if disclosed freely, would subject the producing Party or its customers to risk of competitive disadvantage or other business

1 injury ("Protected Materials," as defined in Paragraph 3(b)). The Parties have agreed to
2 the production of Protected Materials on the condition that each Party maintain the
3 confidentiality of such Protected Materials.

4 2. This Protective Agreement memorializes the Parties' agreement regarding
5 the disclosure of Protected Materials and shall govern the use of all Protected Materials
6 produced by, or on behalf of, any Party. Notwithstanding any order terminating this
7 proceeding, this Protective Agreement shall remain in effect until specifically modified or
8 terminated by the Parties or by Presiding Administrative Law Judge ("ALJ") or the
9 Arizona Corporation Commission ("Commission").

10 3. Definitions -- For purposes of this Agreement:

11 (a) The term "Party" or "Parties" shall mean either Panda Gila River,
12 L.P. or Arizona Public Service Company, or both, where appropriate.

13 (b) The term "Protected Materials" means

14 (1) materials provided by a Party in response to data requests and
15 designated by such Party as protected;

16 (2) any information contained in or obtained from such designated
17 materials;

18 (3) notes of Protected Materials; and

19 (4) copies of Protected Materials. The Party producing the
20 Protected Materials shall physically mark them on each page as "PROTECTED
21 MATERIALS" or with words of similar import as long as the term "Protected Materials"
22 is included in that designation to indicate that they are Protected Materials.

23 (c) The term "Notes of Protected Materials" means memoranda,
24 handwritten notes, or any other form of information (including electronic form) which
25 copies or discloses materials described in Paragraph 3(b)(1). Notes of Protected Materials
26 are subject to the same restrictions provided in this order for Protected Materials except as

1 specifically provided in this Agreement.

2 (d) Protected Materials shall not include

3 (1) any information or document contained in the files of the
4 Commission, or any other federal or state agency, or any federal or state court, unless the
5 information or document has been determined to be protected by such agency or court, or

6 (2) information that is public knowledge, or which becomes
7 public knowledge, other than through disclosure in violation of this Protective Agreement.

8 (e) The term "Non-Disclosure Certificate" shall mean the certificate
9 annexed hereto by which the Parties and certain representatives and employees who have
10 been granted access to Protected Materials shall certify their understanding that such
11 access to Protected Materials is provided pursuant to the terms and restrictions of this
12 Protective Agreement, and that such Parties have read the Protective Agreement and agree
13 to be bound by it.

14 (f) The term "Reviewing Representative" shall mean a person who has
15 signed a Non-Disclosure Certificate and who is:

16 (1) an attorney retained by a Party for purposes of preparing for
17 the hearing in this proceeding presently scheduled to commence on or about April 29,
18 2002;

19 (2) attorneys, paralegals, and other employees associated for
20 purposes of this proceeding with an attorney described in (2);

21 (3) an expert or an employee of an expert retained by a Party for
22 the purpose of advising, preparing for or testifying in this proceeding; and

23 (4) employees or other representatives of Parties appearing in this
24 proceeding with significant responsibility for this docket.

25 4. Protected Materials shall be made available under the terms of this
26 Protective Agreement only to Parties and only through their Reviewing Representatives as

1 provided in Paragraphs 6, 7, and 8.

2 5. Protected Materials shall remain available to Parties until the later of the
3 date that an order terminating this proceeding becomes no longer subject to judicial
4 review, or the date that any other Commission proceeding relating to the Protected
5 Material is concluded and no longer subject to judicial review. If requested to do so in
6 writing after that date, a Party shall, within fifteen days of such request, return the
7 Protected Materials (excluding Notes of Protected Materials) to the Party that produced
8 them, or shall destroy the materials, except that copies of filings, official transcripts and
9 exhibits in this proceeding that contain Protected Materials. Notes of Protected Material
10 may be retained, provided they are maintained in such a way so as to ensure that the
11 Protected Material is kept confidential. Within such time period each Party, if requested
12 to do so, shall also submit to the producing Party an affidavit stating that, to the best of its
13 knowledge, all Protected Materials and all Notes of Protected Materials have been
14 returned or have been destroyed or will be maintained in such a way so as to ensure that
15 the Protected Material is kept confidential. To the extent Protected Materials are not
16 returned or destroyed, they shall remain subject to the Protective Agreement.

17 6. Protected Materials shall be treated as confidential by each Party and by the
18 Reviewing Representative in accordance with the certificate executed pursuant to
19 Paragraph 9. Protected Materials shall not be used except as necessary for the conduct of
20 this proceeding, nor shall they be disclosed in any manner to any person except a
21 Reviewing Representative who is engaged in the conduct of this proceeding and who
22 needs to know the information in order to carry out that person's responsibilities in this
23 proceeding. Reviewing Representatives may make copies of Protected Materials, but
24 such copies become Protected Materials. Reviewing Representatives may make notes of
25 Protected Materials, which shall be treated as Notes of Protected Materials if they disclose
26 the contents of Protected Materials.

1 7. If a Reviewing Representative's scope of employment includes the
2 marketing of energy, the direct supervision of any employee or employees whose duties
3 include the marketing of energy, the provision of consulting services to any person whose
4 duties include the marketing of energy, or the direct supervision of any employee or
5 employees whose duties include the marketing of energy, such Reviewing Representative
6 may not use information contained in any Protected Materials obtained through this
7 proceeding to give any Party or any competitor of any Party a commercial advantage.

8 8. A Reviewing Representative shall not be permitted to inspect, participate in
9 discussions regarding, or otherwise be permitted access to Protected Materials pursuant to
10 this Protective Agreement unless that Reviewing Representative has first executed a Non-
11 Disclosure Certificate, provided that if an attorney qualified as a Reviewing
12 Representative has executed such a certificate, the paralegals, secretarial and clerical
13 personnel under the attorney's instruction, supervision or control need not do so. If
14 requested, a copy of each Non-Disclosure Certificate shall be provided to counsel for the
15 Party asserting confidentiality prior to disclosure of any Protected Material to that
16 Reviewing Representative.

17 (a) Attorneys qualified as Reviewing Representatives are responsible for
18 ensuring that persons under their supervision or control comply with this Agreement.

19 9. Any Reviewing Representative may disclose Protected Materials to any
20 other Reviewing Representative as long as the disclosing Reviewing Representative and
21 the receiving Reviewing Representative both have executed a Non-Disclosure Certificate.
22 In the event that any Reviewing Representative to whom the Protected Materials are
23 disclosed ceases to be engaged in these proceedings, or is employed or retained for a
24 position whose occupant is not qualified to be a Reviewing Representative under
25 Paragraphs 3(d), access to Protected Materials by that person shall be terminated. Even if
26 no longer engaged in this proceeding, every person who has executed a Non-Disclosure

1 Certificate shall continue to be bound by the provisions of this Protective Agreement and
2 the certification.

3 10. Subject to Paragraph 15, the Parties will seek to have the ALJ resolve any
4 disputes arising under this Protective Agreement. Prior to presenting any dispute under
5 this Protective Agreement to the ALJ, the Parties shall use their best efforts to resolve it.
6 A Party that contests the designation of materials as protected shall notify the Party that
7 provided the Protected Materials by specifying in writing the materials whose designation
8 is contested. This Protective Agreement shall automatically cease to apply to such
9 materials five (5) business days after the notification is made unless the designator, within
10 said 5-day period, files a motion with the ALJ, with supporting affidavits, demonstrating
11 that the materials should continue to be protected. In any challenge to the designation of
12 materials as protected, the burden of proof shall be on the Party seeking protection. If the
13 ALJ finds that the materials at issue are not entitled to protection, the procedures of
14 Paragraph 15 shall apply.

15 11. If any Party desires to include, utilize or refer to any Protected Materials or
16 information derived therefrom in testimony or exhibits during the hearing in these
17 proceedings in such a manner that might require disclosure of such material to persons
18 other than reviewing representatives, such Party shall first notify both counsel for the
19 disclosing Party and the ALJ of such desire, identifying with particularity each of the
20 Protected Materials.

21 12. Nothing in this Protective Agreement shall be construed as precluding any
22 Party from objecting to the use of Protected Materials on any legal grounds.

23 13. Nothing in this Protective Agreement shall preclude any Party from
24 requesting that the ALJ, the Commission, or any other body having appropriate authority,
25 to find that this Protective Agreement should not apply to all or any materials previously
26 designated as Protected Materials pursuant to this Protective Agreement.

1 14. All Protected Materials filed with the Commission, the ALJ, or any other
2 judicial or administrative body, in support of, or as a part of, a motion, other pleading,
3 brief, or other document, shall be filed and served in sealed envelopes or other appropriate
4 containers bearing prominent markings indicating that the contents include Protected
5 Materials subject to this Protective Agreement.

6 15. If the ALJ finds at any time in the course of this proceeding that all or part
7 of the Protected Materials need not be protected, those materials shall, nevertheless, be
8 subject to the protection afforded by this Protective Agreement for three (3) business days
9 from the date of issuance of the ALJ's decision, and if the Party seeking protection files
10 an interlocutory appeal or requests that the issue be certified to the Commission, for an
11 additional seven (7) business days. Neither of the Parties waives its rights to seek
12 additional administrative or judicial remedies after the ALJ's decision respecting
13 Protected Materials or Reviewing Representatives, or the Commission's denial of any
14 appeal thereof.

15 16. Nothing in this Protective Agreement shall be deemed to preclude any Party
16 from independently seeking through discovery in any other administrative or judicial
17 proceeding information or materials produced in this proceeding under this Protective
18 Agreement.

19 17. None of the Parties waives the right to pursue any other legal or equitable
20 remedies that may be available in the event of actual or anticipated disclosure of Protected
21 Materials.

22 18. The contents of Protected Materials or any other form of information that
23 copies or discloses Protected Materials shall not be disclosed to anyone other than in
24 accordance with this Protective Agreement and shall be used only in connection with this
25 (these) proceeding(s). Any violation of this Protective Agreement and of any Non-
26 Disclosure Certificate executed hereunder shall constitute a violation of an order of the

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Commission.

Date:

SNELL & WILMER

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NON-DISCLOSURE CERTIFICATE

I hereby certify my understanding that access to Protected Materials is provided to me pursuant to the terms and restrictions of the Protective Agreement in this proceeding, that I have been given a copy of and have read the Protective Agreement, and that I agree to be bound by it. I understand that the contents of the Protected Materials, any notes or other memoranda, or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with that Protective Agreement. I acknowledge that a violation of this certificate constitutes a violation of an order of the Arizona Corporation Commission.

By: _____
Title: _____
Representing: _____
Date: _____

1288815/73262.005

D

EXHIBIT D TO MOTION TO COMPEL

- 3.1. Provide copies of any workpapers or other materials supporting the testimony of Jack E. Davis, John H. Landon and William H. Hieronymus.

- 3.3 Provide any studies, reports or analyses the possession of APS, PWEC, PWEC or any affiliate thereof regarding the following:
 - a. Forecasts of market prices for long-term contracts for delivery of capacity and energy in the APS control area for 2003 to 2033 (the possible term of the PPA)
 - b. Projections of expected prices under an RFP or through bilateral, arm-length contracts with independent generators.

- 3.10 Page 13 of the Request for a Partial Variance states, “[t]he PPA offers APS a flexible package of term, price stability, fuel diversity, performance incentives, and reliability features that are simply unobtainable from today’s wholesale market.”
 - a. Please provide all documents which pertain to offers to sell power to APS, other than that by APS Affiliates, which were relied upon by APS or witnesses to support this conclusion.
 - b. Please provide any and all contracts, studies and/or other material produced or reviewed by APS or its witnesses in formulating price benchmarks.
 - c. Please provide all contracts, studies or other material produced or reviewed by APS or its witnesses in formulating reliability benchmarks.
 - d. Please cite the specific sections of the PPA that ensure “price stability.”
 - e. Please cite the specific sections of the PPA that contain “performance incentives.”
 - f. Please cite the specific sections of the PPA that contain the “reliability features” referenced here.
 - g. Please provide all documents relating to power supply alternatives to the proposed PPA that the company reviewed to support this conclusion.

- h. Please name all companies with whom APS has had discussions within the past five years concerning the negotiation of a long term (i.e. greater than one year) agreement for APS to purchase power. Please state the time frame during which these meetings took place and the outcome of those discussions.
- i. Please provide all documents, work papers, studies, analysis or other material produced in relation to the meetings described in item h above.

3.12 Page one of the Request for a Partial Variance states, “[a]n examination of the current and likely future state of the volatile wholesale power market has led Arizona Public Service Company... to the inescapable conclusion that adherence to the competitive bidding requirements of the Electric Competition Rules will not produce the intended result of reliable retail electric service for Standard Offer customers at reasonable rates.” Please explain in detail how volatility in one year can justify a 30-year PPA? Please provide any and all documents, analysis, studies or other materials relied upon or produced by APS or its witnesses which examine the current and future state of the wholesale power market.

3.15 Page 11 of the Request for a Partial Variance states, “[a]t APS’s present system load factor for Standard Offer customers, these two price components would be approximately equivalent to a total per MWH price of \$48.00 in 2004.” Please provide copies of any and all documents, work papers, spreadsheets, studies, analyses and/or other materials relied upon or performed by the company or its witnesses that indicate how this \$48.00 MWH price was calculated.

3.17. Please provide copies of any and all documents, work papers, spreadsheets, studies, analyses and/or other materials relied upon or performed by the company or its witnesses that demonstrate the calculation of the Facilities Charge and the Base Fuel Charge. These papers should specify and itemize all projected expenses to be recovered through these charges for each of the Dedicated Units. Include depreciation schedules, projected Ancillary service and Off-System sales revenues, fuel price projections, transportation cost projections, environmental costs and load projections.

3.23. To the extent not otherwise provided in response to these data requests, please provide all data, calculations, reports, spreadsheet analyses, computer programs or other documents prepared by APS or at the direction of APS that were reviewed by Mr. Davis, Dr. Landon or Dr. Hieronymus, along with any

annotations or comments made thereto by Mr. Davis, Dr. Landon or Dr. Hieronymus.

- 3.30 Provide the following information for all generating units owned or controlled by APS, PWCC, PWEC or any affiliate thereof, by unit, for a period of not less than the last ten years:
- a. Planned outages, in hours for each year
 - b. Unplanned outages, in hours for each year
 - c. Availability factor
- 3.34 (d) Please provide all analyses, studies or other support, including all supporting documentation, relied upon by APS that demonstrate that the PPA's prices will not be higher than market rates for the next thirty years, the possible term of the PPA.
- 3.39. On page 18 of his testimony, Mr. Davis states that APS Marketing and Trading "supplements [APS's] existing resources with short-term purchases and reduces [APS's] financial exposure with hedging techniques." For the last ten years, please identify:
- a. Each hour when APS or its affiliates purchased spot market energy rather than run one of the Dedicated Units and the amount of each such purchase; and Each hour when APS or its affiliates purchased spot market energy rather than run one of the Dedicated Units and the amount of each such purchase; and
 - b. Each hour when APS purchased wholesale power when it was selling power from one of the Dedicated Units and the amount of each such purchase.
- 3.40. On page 24, Mr. Davis states, "[t]hird, the cost-of-service formula used to adjust prices under the PPA is a relatively stable and predictable factor that could decline as well as increase over time, but in either event would not fluctuate over the term of the PPA as much as will the cost of new gas-fired generators." Please state the basis for Mr. Davis' contention. Also, please provide copies of any and all documents, work papers, spreadsheets, studies, analyses and/or other materials

relied upon or performed by Mr. Davis that compare the cost-of-service under the PPA to the cost of a new gas-fired generator. Additionally, please provide copies of any and all documents, work papers, spreadsheets, studies, analyses and/or other materials relied upon or performed by Mr. Davis that compare the cost-of-service under the PPA to the cost of a new generator that is not gas-fired.

3.41 On page 24, Mr. Davis states, “[t]he cost-of-service formula used to adjust prices under the PPA is a relatively stable and predictable factor that could decline as well as increase over time.” Please confirm the following: if the cost of gas were to reach \$4 MMBtu and the company were to purchase 1,000 MMBtus for use in its dedicated units, PWCC would charge APS \$4,000 for procuring this fuel via the Base Fuel Charge, as adjusted through the Fuel and Purchased Power Adjustment. If this is not the case please explain what amount APS would be charged for this transaction and where that charge is specified in the PPA. If PWCC would not recover the entire charge from APS, please explain where PWCC would recover charges not recovered from APS. In addition, please provide a detailed explanation as to whether or not APS considered tolling agreements as a means of mitigating fuel price risk. If so, identify any such agreements, and if there are no such agreements, explain why not. Also, please provide copies of any agreements that APS did execute as well as any draft agreements that APS reviewed but did not execute and the reasons for having rejected these agreements.

3.44(f) (4)-(8). With respect to any potential Dedicated Unit not yet operational, please provide the following:

4. The capital costs of the facility
5. The heat rate of the facility
6. The projected fuel costs of the facility
7. The projected operations and maintenance costs of the facility
8. The current and environmental compliance costs of the facility

3.45 On page 17, Mr. Davis states that “in addition to the over \$1,000,000,000 in new generation investment, APS plans on spending at least \$1,000,000,000 on transmission and

distribution infrastructure in just the next four years.” Please provide the following:

- a. A list of all planned transmission investments for the next four years
- b. The cost of each project
- c. The constraint or other problem that each project was designed to alleviate
- d. Please state if the project would have been implemented absent the new generation facilities that APS, PWCC or PWEC have brought on line or are planning to bring on line within the next five years. Please explain why these projects would have been undertaken absent the new generation.

3.46 On page 25 Figure 5, Mr. Davis compares the PPA to the LRMC (long-run marginal cost) over the next 5 years. Please provide copies of any and all documents, work papers, spreadsheets, studies, analyses and/or other materials relied upon or performed by Mr. Davis which support this comparison, or upon which he otherwise relied in performing this comparison. Please state the long-run marginal cost of each of the Dedicated Units not yet in service as calculated via Mr. Davis’ method and provide copies of any and all documents, work papers, spreadsheets, studies, analyses and/or other materials relied upon or performed by Mr. Davis to support that calculation.

3.50 (d)-(h) and (k) On page 20, Mr. Davis states, “[t]he Dedicated Units are located throughout the state...this geographic diversity advantage makes them inherently more reliable resources than a collection of gas-fired power plants clustered around Palo Verde.” Please provide the following information with respect to the Dedicated Units;

- d. The current and projected capital costs of the facility
- e. The heat rate of the facility
- f. The current and projected fuel costs of the facility
- g. The current and projected operations and maintenance costs of the facility
- h. The current and projected environmental compliance costs of the facility

k. The year that the Company plans to retire the facility

3.56

On pages 28-29, Mr. Davis states that merchant intervenors are not siting their plants in Arizona to serve APS Standard Offer customers, and that the "siting of new power plants is primarily about land availability, fuel availability, the regulatory climate for the siting of power plants . . ." With respect to the new generation that PWEC plans to place into service within the next five years, please provide copies of any and all documents, work papers, spreadsheets, studies, analyses and/or other materials documenting the choice of site for these units and the reasons for selecting each such site.

3.85

On page 24 of his testimony Dr. Hieronymus contends that the Dedicated Units "are not candidates for cancellation." Please state the basis for this contention, and please provide all studies, reports or other analyses relied upon by Dr. Hieronymus in making this assertion. In addition, for each Dedicated Unit not currently in operation please provide:

- a. Name of unit;
- b. Scheduled date of completion;
- c. Total amount of "sunk" costs (as defined by Dr. Hieronymus on page 23); and
- d. Total amount of "to-go" costs (as defined by Dr. Hieronymus on page 23).

E

Portions of Testimony and Request for Variance to be Stricken in Lieu of Order
Compelling Production

Variance Request:

- Page 1
- Page 11
- Page 13

Testimony of Mr. Davis:

- Pages 4, lines 16 through 21, and page 17, lines 21 through 22.
- Page 14, lines 9 through 13.
- Page 18, lines 1 through 11.
- Pages 19-21.
- Page 20, lines
- Page 24, lines 4 through 8.
- Page 24, line 10, through-page 25, line 19, including figure 5.
- Page 28, line 28, through page 29, line 3.

Testimony of Dr. Landon:

- Page 6, lines 20 through 22.
- Page 9, 17-20.
- Page 12, lines 1 through 3.

Testimony of Dr. Hieronymus:

- Page 18, line 15, through page 20, line 2, and all related footnotes.