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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF THE APPLICATION OF TUCSON ELECTRIC POWER COMPANY FOR THE ESTABLISHMENT OF JUST AND REASONABLE RATES AND CHARGES DESIGNED TO REALIZE A REASONABLE RATE OF RETURN ON THE FAIR VALUE OF ITS OPERATIONS THROUGHOUT THE STATE OF ARIZONA	Docket No. E-01933A-07-0402
IN THE MATTER OF THE FILING BY TUCSON ELECTRIC POWER COMPANY TO AMEND DECISION NO. 62103.	Docket No. E-01933A-05-0650

MOTION TO STRIKE THE TESTIMONY OF THOMAS A. ZLAKET

The Residential Utility Consumer Office ("RUCO") respectfully moves the Arizona Corporation Commission ("Commission") to strike the testimony of Thomas A. Zlaket. The parties, through their filings in this matter, have provided sufficient evidence upon which the Commission can determine whether Tucson Electric Power ("TEP or the Company") has a sufficient claim to bring an action on the legal basis of breach of contract. Judge Zlaket's legal opinion as to the sufficiency of the Company's contract claim amounts to legal argument that is appropriate in closing briefs, and not as testimony. The Commission should not endorse a process which would require lawyers to cross-examine other lawyers on their opinions of the

law. Judge Zlaket's testimony will hinder the Commission's process and should be stricken from the record.

JUDGE ZLAKET'S TESTIMONY IS LEGAL OPINION AND SHOULD BE STRICKEN FROM THE RECORD.

Throughout this proceeding, the Company has made it clear that it would pursue a lawsuit against the Commission and seek damages for what the Company perceives as a breach by the Commission of the 1999 Settlement Agreement if the Commission were to "unilaterally change the contract, and order TEP back to cost of service,..."[1] Some of the parties, including RUCO, question the merit of TEP's claim. The record is complete with filings citing the factual and legal basis for the differing positions. For example, the direct testimony of Marylee Diaz Cortez, dated January 8, 2007, included a legal memorandum which addressed the legal issues involved in a contract claim by the Company against the Commission. The Company filed a legal memorandum on the same legal issues through its witness, James Pignatelli on August 18, 2006. Phelps Dodge and the Arizonans for Electric Choice and Competition also filed a legal memorandum through their witness, Kevin C. Higgins on January 7, 2007. In addition, Judge Zlaket identifies the multitude of other filings in this record that he reviewed which included arguments on this issue.[2] In short, all the legal and other arguments on this issue have been presented and are a part of the record.

The Company now attempts to further its case by offering the testimony of the former Chief Judge of the state's highest court to show how an Arizona court would be likely to respond to the Company's contract claim. While the testimony may be interesting, there is already one judge in this case who has been given the responsibility

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[1] See for example the Direct Testimony of James S. Pignatelli dated August 18, 2006 at 12.
[2] See Rebuttal Testimony of Thomas A. Zlaket dated April 1, 2008.

of deciding the issues based on the record. "Each courtroom comes equipped with a "legal expert," called a judge [.]" *United States v. Cross*, 113 F Supp.2d 1282, 1284-85 (S.D.Ind.2000) (quoting *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C.Cir.1997)(an attorney could not offer an expert opinion, based upon the law of Indiana, that video gaming devices of the type rented by a defendant's business to its customers were not illegal gambling devices.)).

The case law on the issue of the testimony of lawyers and Judges as expert witnesses goes both ways. While the Commission does not present a jury situation where such testimony is apt to cause confusion, courts often disregard expert testimony on questions of law. See Fed. R. Evid. 704; *RLJCS Enters., Inc. v. Professional Benefit Trust Multiple Employer Welfare Benefit Plan & Trust*, 487 F.3d 898, 901 (7th Circ. 2007)(citing *Bammerlin v. Navistar International Transportation Corp.*, 30 F.3d 898, 901 (7th Cir.1994), (the trial judge properly excluded expert reports that "conveyed legal rather than "expert" opinions.... Argument about the meaning of trust indentures, contracts, and mutual-to-stock conversions belongs in briefs, not in "experts' reports.") Likewise, Judge Zlaket's legal opinions[3] belong in the Company's Brief, not as testimony.

JUDGE ZLAKET'S TESTIMONY HINDERS THE COMMISSION'S PROCESS.

At the hearing in this matter, the cross-examination of Judge Zlaket would require one attorney to cross-examine another concerning Judge Zlaket's legal opinion. This exercise would likely be time consuming and, among other things, require the services of a court

[3] There is no question that Judge Zlaket is offering his opinion on the meaning of the contract although he claims that he was not asked to render an opinion as to whether a breach occurred.(See page 3 of Judge Zlaket's rebuttal testimony). For instance on pages 10-12, Judge Zlaket asks a series of Questions and Answers where he clearly attempts to interpret the meaning of the Settlement Agreement.

reporter. It would be a waste of the Commission's resources, counter-productive, and actually hinder the Commission's process. Moreover, the problem is exasperated should another party present a legal expert in an attempt to impeach Judge Zlaket's legal opinions. The Commission should not establish a precedent which wastes resources; this topic should be addressed in closing briefs.

Finally, it is quite possible that RUCO's concern is shared by "some" of the signatories. Section 20.1 of the proposed Settlement Agreement provides that some of the signatories would have opposed TEP's rebuttal testimony and filed motions to strike certain TEP testimony they deemed inappropriate. While this provision does not state who those signatories are and which rebuttal testimony they opposed there is the possibility that the concerns raised here by RUCO are shared with some of the signatories.

CONCLUSION

For the reasons stated above, RUCO recommends the Commission strike the rebuttal testimony of Thomas A. Zlaket.

RESPECTFULLY SUBMITTED this 1st day of July 2008

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