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BEFORE THE ARIZONA CORPORATION COMMISSION

AZ CORP COMMISSION
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1
2 WILLIAM A. MUNDELL
CHAIRMAN
3 JIM IRVIN
COMMISSIONER
4 MARC SPITZER
COMMISSIONER

5
6 IN THE MATTER OF THE APPLICATION
OF THE ARIZONA ELECTRIC DIVISION
7 OF CITIZENS COMMUNICATIONS
COMPANY TO CHANGE THE CURRENT
8 PURCHASED POWER AND FUEL
ADJUSTMENT CLAUSE RATE, TO
9 ESTABLISH A NEW PURCHASED POWER
AND FUEL ADJUSTMENT CLAUSE BANK,
10 AND TO REQUEST APPROVED
GUIDELINES FOR THE RECOVERY OF
11 COSTS INCURRED IN CONNECTION
WITH ENERGY RISK MANAGEMENT
12 INITIATIVES.

DOCKET NO. E-01032C-00-0751

**CITIZENS' BRIEF RE
MAGRUDER MOTION TO
RECUSE**

Arizona Corporation Commission

DOCKETED

MAR 28 2002

DOCKETED BY *me*

GALLAGHER & KENNEDY, P.A.
2575 EAST CAMELBACK ROAD
PHOENIX, ARIZONA 85016-9225
(602) 530-8000

13
14 The attempt to disqualify Gallagher & Kennedy (the "Firm") as counsel for Citizens
15 in the PPFAC proceeding is without either legal or factual basis. There is no evidence that
16 any conflict of interest exists and the evidence defies a finding of an appearance of any
17 impropriety. In fact, this record demonstrates that the Firm not only met but exceeded the
18 standards required of counsel and there are no public interest concerns that impact the
19 pending PPFAC docket. On this record, Citizens obviously should not be denied the
20 counsel of its choice. Disqualification at this late date also would severely prejudice
21 Citizens.
22

1 **I. BACKGROUND.**

2 This proceeding involves, inter alia, Citizens' request to recover amounts paid to
3 Arizona Public Service Company ("APS"), and subsequently, Pinnacle West Capital
4 Corporation ("PWC") above the base cost of purchased power pursuant to PPFAC
5 procedures authorized by the Commission. Citizens has a longstanding power supply
6 relationship with APS and, more recently, PWC. Neither APS nor PWC is a party to this
7 proceeding. Mr. Michael Gallagher, a founding member of the Firm, is a PWC and APS
8 Board Member.

9 The Firm commenced representation of Citizens after the original application was
10 filed in September 2000. Its Notice of Appearance was filed November 27, 2000. The
11 record reflects that the Firm has never represented either Citizens or APS/PWC in any
12 negotiations, contractual disputes or analysis of potential administrative or judicial
13 remedies concerning the 1995 PSA or the 2001 PSA. Citizens has been represented in
14 those matters by Wright & Talisman, Troutman Sanders and others. See Rebuttal and
15 Rejoinder testimonies of Msrs. Breen (Reb. pp. 15-16; Rej. pp. 3-6, 11-12) and Flynn
16 (Reb. pp. 3-19; Rej. pp. 1-8).

17 The affidavits of Mr. Gallagher (March 22/March 28), Ms. Smith (March 22) and
18 Ms. Papietro (March 26) demonstrate that the APS and PWC Boards and relevant
19 committees never voted on the power supply matters involving Citizens. Four "general
20 and informational" updates were provided to the Board. Mr. Gallagher does not recall
21 those updates nor making any comments or asking any questions about them. Further, Mr.
22 Gallagher has never discussed any APS or PWC Board matters with the Firm attorneys

1 representing Citizens in this matter and was not even aware of the Firm's representation of
2 Citizens in this matter prior to the Motion. Mr. Gallagher's affidavit as to those matters is
3 attached as Exhibit A.

4 **II. ARGUMENT.**

5 **A. The Underlying Record Does Not Support Disqualification.**

6 The Motion to Recuse must be rejected based on the undisputed factual record. The
7 only basis for the Motion is Mr. Gallagher's position on the PWC and APS Boards of
8 Directors. But there is no evidence or testimony that PWC, APS, Citizens or ratepayers
9 were prejudiced or harmed by Mr. Gallagher's position on those Boards. There is no
10 evidence that any confidential information was passed through Mr. Gallagher or that Mr.
11 Gallagher's position on the Boards somehow affected Citizens' decision making process.
12 Finally, there is no hint of any harm to ratepayers by virtue of Mr. Gallagher's position on
13 those Boards.

14 In order for the Commission to disqualify the Firm, it would have to ignore the
15 following undisputed facts:

- 16 • The Firm has not represented Citizens, PWC or APS in any of their
17 contractual disputes or negotiations.
- 18 • In its contractual disputes or negotiations with PWC or APS, Citizens has
19 used separate counsel including Troutman Sanders, Wright & Talisman
20 and Brown & Bain. Citizens specifically hired independent counsel for
21 those matters.

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- The key decisions concerning investigation and analysis by Citizens of its contractual rights were made months before the Firm's representation commenced (Mitten Affidavit; paragraphs 2, 3 and 4; Exhibit B).
- Because Mr. Gallagher is on the PWC and APS Boards of Directors, Firm policy precludes him from involvement in any matters concerning or affecting PWC or APS.
- In his position on the PWC and APS Boards, Mr. Gallagher was present for four general informational updates relating to Citizens. Mr. Gallagher does not recall those general updates.
- Mr. Gallagher never discussed those updates with any attorneys for the Firm.
- The PWC and APS Boards, or relevant committees, never voted and took no action on any Citizens Power Supply Matters.
- None of the issues involved in this PPFAC proceeding have been discussed with Mr. Gallagher.
- Until several days ago, Mr. Gallagher was not even aware of the Firm's representation of Citizens in the PPFAC docket.
- Although PWC and APS are not parties to this PPFAC proceeding, pursuant to ER 1.7 of the Rules of Professional Conduct, the Firm's representation was disclosed and consented to by Citizens, PWC and APS.

- 1 • Prior to filing of the Motion to Recuse, Citizens submitted pre-filed
2 testimony from Paul Flynn and Sean Breen, addressing Citizens contract
3 dealings with APS and PWC, Citizens' decision regarding whether to
4 pursue legal remedies against APS and PWC and confirming the Firm's
5 lack of involvement in those matters.
- 6 • Finally, the Firm's disqualification would cause substantial and
7 irreparable harm to Citizens. By contrast, there is absolutely no evidence
8 of any harm or prejudice to ratepayers or the public by the Firm's
9 continued representation in this docket.

10 There simply is no evidence that this PPFAC docket is jeopardized by Mr.
11 Gallagher's involvement on the PWC and APS Boards or the Firm's representation of
12 Citizens in this case. Nor is there any support for any argument that Citizens' decision to
13 pursue or not pursue APS and PWC in court or at FERC somehow was colored by Mr.
14 Gallagher's involvement on those Boards. Finally, the requirements of the Code of
15 Professional Responsibility were scrupulously adhered to for the benefit of, among other
16 things, public confidence in this process.

17 **B. Citizens Is Entitled To The Counsel Of Its Own Choice.**

18 At the core of this inquiry is Citizens' right and entitlement to counsel of its choice.
19 The ability to select counsel is an important part of our legal tradition. Denying a party
20 that ability requires compelling circumstances. Security General Life Ins. Co. v. Superior
21 Court, 149 Ariz. 332, 335, 718 P.2d 985, 988 (1986) ("importance of right to have counsel
22 of one's choice" demands "careful scrutiny" before disqualification). See also In re Estate

1 of Epstein, 680 N.Y.S.2d 655 (N.Y.App. 1998) (party's choice of counsel is substantive
2 right not to be taken away absent some overriding public interest); F.D.I.C. v. Amundson,
3 682 F. Supp. 981, 987 (D. Minn. 1988) ("decision to disqualify an attorney chosen by a
4 party to represent him in a lawsuit is of serious concern" and should only be done "where
5 the integrity of the adversary process is threatened"). Because of the importance assigned
6 to this right, anyone seeking disqualification has the burden to "show sufficient reason"
7 why disqualification is appropriate. Alexander v. Superior Court, 141 Ariz. 157, 161, 685
8 P.2d 1309, 1313 (1984). "Whenever possible the courts should endeavor to reach a
9 solution that is least burdensome upon the client or clients." Id. There is no reason to
10 disqualify in this case.

11 **C. No Conflict Of Interest Exists.**

12 ER 1.7 of the Rules of Professional Conduct provides the general rule governing
13 conflict of interest issues:

- 14 (a) A lawyer shall not represent a client if the representation of that client will be
15 directly adverse to another client, unless:
- 16 (1) the lawyer reasonably believes the representation will not adversely
17 affect the relationship with the other client; and
 - 18 (2) each client consents after consultation.
- 19 (b) A lawyer shall not represent a client if the representation of that client may
20 be materially limited by the lawyer's responsibilities to another client or to a
21 third person, or by his lawyer's own interests, unless:
- 22 (1) the lawyer reasonably believes the representation will not be
adversely affected; and
 - (2) the client consents after consultation.

20 As an initial matter, ER 1.7(a) is not implicated in this matter, as there is no directly
21 adverse relationship between APS, PWC and Citizens with respect to this PPFAC filing.

22 See Comment to ER 1.7 (paragraph (a) applies only when the representation of one client

1 would be directly adverse to another client). Similarly, ER 1.7(b) also does not apply for
2 the same reasons (See Comment to ER 1.7; “A possible conflict does not itself preclude
3 the representation” under paragraph b). However, to avoid even any possibility of conflict,
4 the Firm followed ER 1.7 procedures and undertook this representation on the
5 understanding it would not represent either Citizens or APS/PWC in the power supply
6 matters.

7 There is no conflict of interest in the Firm’s representation of Citizens in this
8 matter. As a PWC/APS Board and committee member, Mr. Gallagher did not vote on the
9 power supply contracts or potential disputes between APS and Citizens and he has no
10 knowledge of any of the power supply matters or the PPFAC proceeding. Pursuant to
11 Firm policy, Mr. Gallagher is prohibited from becoming involved in any matter in which
12 the Firm renders legal advice or representation concerning or affecting PWC or APS. The
13 Firm has not represented or advised Citizens, APS or PWC in any contract negotiation or
14 potential dispute. Finally, the Firm consulted with PWC, APS and Citizens regarding the
15 Firm’s representation of Citizens in the PPFAC proceeding and obtained the written
16 consent of each party for the representation.

17 During the March 22, 2002 conference, Chief ALJ Farmer asked the following
18 question: “Can you explain to me how it’s different to represent Citizens during
19 negotiations with APS and how is that different from defending Citizens in this case,
20 defending Citizens’ decision to ask the ratepayers to pay the charges and not seek recovery
21 from APS?” Staff counsel Mr. Kempley offered the following comment: “one of the
22 things that is of concern to Staff in analyzing this situation is the fact that Staff’s position

1 and to some extent RUCO's position stands for the proposition that Citizens should even
2 today be actively pursuing a dispute against APS with respect to these billings." See
3 March 22, 2002 Tr., pp. 29-30. The responses to both questions highlight the propriety of
4 the Firm's representation of Citizens in this case.

5 In response to ALJ Farmer, although it would be permissible with consent under the
6 Rules, the Firm's representation of Citizens in this PPFAC proceeding obviously involved
7 no direct conflict with APS or PWC. By contrast, if the Firm were to have represented
8 Citizens in negotiations for or analysis of litigation concerning the power supply contracts
9 with APS, that clearly would have been a directly adverse relationship. But, it still would
10 have been allowed with consent under the Rules. Unlike that hypothetical, the decisions
11 here regarding the power supply contracts or any possible administrative or litigation
12 options have been made by Citizens without any input by the Firm. The Firm had no role
13 in those matters. (Mitten Affidavit, Paragraphs 2, 3, 4 and 7; Exhibit B.)

14 That leads to the response to Mr. Kempley's stated concern--the Firm's
15 representation of Citizens in the pending PPFAC docket has no bearing on the Company's
16 decision to "actively pursu[e] a dispute against APS" now or in the past. As stated in the
17 pre-filed testimony, Citizens - based on input from experts, the Wright Talisman firm and
18 others - made those decisions without any involvement of the Firm. To the extent those
19 issues arise in this docket, Citizens and its other counsel - not the Firm - will explain and
20 fully justify the prudence of those decisions.

21 Some cases do stand for the proposition that when directly adverse parties are
22 involved, firms may be disqualified. But, the facts of this case stand in stark contrast to the

1 facts of those decisions. In such cases, disqualification of individual attorneys as well as
2 firms is warranted because attorneys “switch sides” during litigation – one day
3 representing a plaintiff and the next day joining the firm that represents the defendant –
4 and may bring confidential information about the litigation to the new firm. In those cases,
5 safeguards imposed by the firms do not overcome the taint from the prior representation.
6 See, e.g., Koch v. Koch Industries, 798 F. Supp. 1525 (D. Kan. 1992); Trustco Bank New
7 York v. Melino, 625 N.Y.S.2d 803 (1995); Petroleum Wholesale, Inc. v. McClellan, 751
8 S.W.2d 295 (Tex. App. 1988); Atasi Corp. v. Seagate Technology, 847 F.2d 826 (Fed. Cir.
9 1988).¹ Because of the confidential relationship at issue, those cases also involve
10 situations where one client objects to the representation because of an attorney’s prior
11 representation of that client. Here, not only has the Firm not represented APS, PWC or
12 Citizens in any Power Supply negotiations, but APS, PWC and Citizens all consented to
13 the Firm’s representation of Citizens in this PPFAC docket.

14 Petroleum Wholesale, Inc. demonstrates the dramatic difference between this case
15 and cases where firms are disqualified. In Petroleum Wholesale, Inc., an attorney who
16 worked at plaintiff’s firm and who participated in confidential discussions concerning case
17 strategy, strengths, weaknesses and settlement potential, accepted a position at the firm
18 representing defendant during the litigation. Id. at 296. In such a case, the use of a

19 _____
20 ¹ These cases were cited by ALJ Farmer during the Procedural Conference. In re Asbestos
21 Cases, 514 F. Supp. 914 (E.D. Va. 1981), also cited by the ALJ, was reversed on appeal on
22 the grounds that the government’s waiver of imputed disqualification overcame any taint
to the proceedings. Greitzer & Locks v. Johns-Manville Corp., 1982 U.S. App. 21211 (4th
Cir. 1982).

1 “Chinese Wall” to screen the individual attorney who had confidential knowledge of the
2 former and now directly adverse client was not sufficient to remove the taint of
3 impropriety. Id. at 301.

4 Unlike the attorney in Petroleum Wholesale, Inc., Mr. Gallagher has no actual
5 knowledge of the power supply agreements. Mr. Gallagher has never talked to any PWC,
6 APS, Citizens personnel or Firm attorneys about any of the power supply agreements or
7 matters involved in this PPFAC proceeding. The Firm’s screening protocols prevent Mr.
8 Gallagher from becoming involved in any matter in which the Firm renders legal advice or
9 representation concerning or affecting PWC or APS. Conversely, Firm attorneys had no
10 information to share concerning contractual disputes or negotiations because the Firm
11 expressly declined that representation and many of those events preceded its PPFAC
12 representation, in any event. Most importantly, there is no aggrieved party. APS and
13 PWC were consulted and consented regarding Citizens’ representation by the Firm in the
14 PPFAC proceeding.

15 No real or even perceived conflict exists. Citizens’ actions in relation to power
16 supply matters either occurred before the Firm began its representation or were reached on
17 the advice and analysis of others. The case Citizens has to present to the Commission on
18 this PPFAC filing simply has nothing to do with the Firm.

19 **D. There Is No Appearance Of Impropriety.**

20 Disqualification based on the appearance of impropriety will result only in the rarest
21 of cases. Gomez v. Superior Court, 149 Ariz. 223, 225, 717 P.2d 902, 904 (1986). In
22 Gomez, the Arizona Supreme Court acknowledged that unless there were facts showing a

1 violation of an ethical or disciplinary rule, the appearance of impropriety “should not be
2 used promiscuously as a convenient tool for disqualification.” Id., quoting Int. Elec. Corp.
3 v. Flanzer, 527 F.2d 1288, 1295 (2nd Cir. 1975). The Court also agreed that “when there is
4 no claim that the trial will be tainted, appearance of impropriety is simply too slender a
5 reed on which to rest a disqualification order except in the rarest of cases.” Id., quoting
6 Bd. of Education of New York City v. Nyquist, 590 F.2d 1241, 1247 (2nd Cir. 1979).

7 The factors at play when considering a motion for disqualification on the basis of
8 appearance of impropriety include: (1) whether the motion is made for the purpose of
9 harassing the defendant; (2) whether the party bringing the motion will be damaged in
10 some way if the motion is not granted; (3) whether there are any alternative solutions; and
11 (4) whether the possibility of public suspicion will outweigh any benefits that might accrue
12 due to continued representation. Gomez, 149 Ariz. at 226, 71 P.2d at 905, quoting
13 Alexander, 141 Ariz. at 165, 685 P.2d at 1317.

14 As in Gomez, while there is no reason to believe that the Motion to Recuse was
15 brought to harass, that will be the result if granted. Citizens is ready to proceed with the
16 PPFAC hearing. If it is forced to select new counsel unfamiliar with the case, it will cause
17 tremendous “inconvenience, delay and additional costs.” Id. Mr. Magruder will not be
18 damaged if the motion is not granted. Nor will public perception be harmed by the Firm’s
19 continued representation of Citizens in the PPFAC matter. Citizens will make precisely
20 the same presentation to the Commission regarding the PPFAC application regardless of
21 whether the Firm represents it. The steps already taken by the Firm to ensure that Mr.
22 Gallagher does not become involved and the Firm’s decision to not represent Citizens,

1 PWC or APS in the power supply matters are adequate alternative solutions to
2 disqualification. Id. Finally, there simply is no evidence to support any claim of an
3 appearance of impropriety.

4 Other jurisdictions similarly hold that the party seeking the disqualification must
5 present some indicia that identifiable improper conduct occurred before disqualification
6 will result due to the appearance of impropriety. See Bergeron v. Mackler, 623 A.2d 489,
7 494 (Conn. 1993) (appearance of impropriety, by itself, not sufficient to disqualify
8 attorney “in absence of any indication that the attorney’s representation risks violating the
9 Rules of Professional Conduct”); Nicholas v. Wilton Zoning Bd. of Appeals, 2001 Conn.
10 Super. LEXIS 2692 (2001); F.D.I.C. v. United States Fire Ins. Co., 50 F.3d 1304 (5th Cir.
11 1995) (“disqualification is unjustified without at least a reasonable possibility that some
12 identifiable impropriety actually occurred”); Petroleum Wholesale, Inc., 751 S.W.2d 295
13 (disqualification under the appearance of impropriety standard requires “reasonable
14 possibility of [a] specifically identifiable appearance of improper conduct”); F.D.I.C. v.
15 Amundson, 682 F. Supp. 981 (D. Minn. 1988) (must be a “reasonable possibility that some
16 specifically identifiable impropriety did in fact occur”). The attorney-client bond is too
17 important to shatter in the face of a lesser showing. Id. at 987.

18 In this case, there has been no violation of an ethical rule. Indeed, the Firm’s
19 actions not only met but exceeded all standards. The Motion to Recuse alleges that the
20 Firm was not “active in pursuit of potential overcharging by APS during the period of May
21 2000 through May 2001.” As stated, the Firm does not, and did not, represent Citizens
22 with respect to any disputes or negotiations with APS. The Motion to Recuse goes on to

1 allege that instead of seeking to recover potential overcharges from APS, Citizens instead
2 proposed a “new contract with higher rates,” and that this action “by [Mr. Gallagher’s]
3 firm may be due to an appearance of a conflict of interest.” That statement has no basis in
4 fact. The decision to enter the new contract was a thoughtful, careful and prudent one
5 made by Citizens based on the expert advice and counsel of professionals not employed by
6 the Firm. None of these facts creates an appearance of impropriety – indeed, the facts
7 demonstrate just the opposite.

8 Finally, there is no support for the proposition that even if Citizens and its counsel
9 complied with the applicable ethical rules, disqualification may still be warranted so that
10 the public may have a “good” perception of the proceeding. To the contrary, a subjective
11 concern that some in the public may hold a different view of the representation without
12 examining these facts cannot be acted upon. See United States Fire Ins. Co., 50 F.3d at
13 1316 (attorney’s conduct not “governed by standards which can be imputed only to the
14 most cynical members of the public”).

15 The Firm and Citizens bent over backwards to preserve the integrity of the PPFAC
16 docket and ensure that all ethical standards were upheld. There simply is no evidence to
17 the contrary. Disqualification of the Firm would not benefit the public interest and would
18 do nothing more than irreparably damage Citizens.

19 **E. On These Facts, Disqualification Would Be In Excess Of Commission**
20 **Authority.**

21 In this case, the Firm and its attorneys followed and exceeded the standards of the
22 ethical rules that govern their conduct. The Commission cannot attempt to regulate the

1 conduct of attorneys after the fact with an additional layer of ethical requirements - not
2 authorized by the Arizona Supreme Court. See Whiting Corp. v. White Machinery Corp.,
3 1979 U.S. Dist. LEXIS 7717 (N.D. Ill. 1979) (standard requires following of “readily
4 identifiable guidelines” so “to avoid overly broad and inconsistent applications”).

5 At pages 4-6 of the March 22 Supplement, we discussed the facts that the
6 Commission (1) is an agency of limited jurisdiction, (2) has no authority to apply
7 disqualification standards other than those adopted by the Supreme Court, and (3) if it
8 attempted to impose conditions on the practice other than those of the Supreme Court,
9 would improperly interfere with powers entrusted to the judiciary. This is not to say that
10 the Commission cannot regulate the conduct of those who appear before it. Its own rules
11 require conduct to conform to that expected in the Superior Court. R14-3-104(F)(1).

12 In this case, however, the conduct has conformed to and exceeded that standard.
13 The Commission may not now apply some different, previously unannounced standard.
14 To do so would violate its own rule, exceed its jurisdiction and unfairly require adherence
15 to policies unknown to and unknowable by anyone.

16 **F. Disqualification Will Cause Prejudice To Citizens.**

17 As demonstrated in the affidavit of L. Russell Mitten, Citizens’ Vice President and
18 General Counsel, which is attached as Exhibit B, disqualifying the Firm will severely
19 prejudice Citizens.² It will lose the counsel of its choosing days before the hearing on the
20 PPFAC is to begin. Thus, more than 15 months of counsel’s familiarity and expertise with

21 _____
22 ² A faxed version of the Affidavit is attached. The original will be filed upon receipt.

1 the substance and procedural history of this PPFAC matter will be useless to Citizens. It
2 will necessitate another delay of several weeks, if not, months before the matter can be
3 heard, in order to allow new attorneys time to prepare. It will result in needless, additional
4 attorneys fees and costs. The delay occasioned by disqualification also will cost Citizens
5 even more money in lost carrying charges on this massive undercollection. Conservatively,
6 those charges now are accruing at the rate of \$750,000 per month.

7 **III. CONCLUSION.**

8 The Motion to Recuse must be denied. This record affirmatively demonstrates
9 prejudice to no one and adherence to high professional standards by all concerned.

10 DATED this 28th day of March, 2002.

11 GALLAGHER & KENNEDY, P.A.

12
13 By: 
14 Michael M. Grant
15 Todd C. Wiley
16 2575 East Camelback Road
17 Phoenix, Arizona 85016-9225
18 Attorneys for Citizens Communications
19 Company

19 **ORIGINAL** and **TEN** copies filed this
20 28th day of March, 2002, with:

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

1 **COPY** of the foregoing hand-delivered
this 28th day of March, 2002 to:

2 Chairman William Mundell
3 Arizona Corporation Commission
1200 West Washington
4 Phoenix, AZ 85007

5 Commissioner Jim Irvin
6 Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007

7 Commissioner Marc Spitzer
8 Arizona Corporation Commission
1200 West Washington
9 Phoenix, AZ 85007

10 Lyn Farmer
Chief Administrative Law Judge
11 Hearing Division
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12 1200 W. Washington
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Michael W. Patten
2 Roshka Heyman & DeWulf, PLC
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Phoenix, Arizona 85004

4 **COPY** of the foregoing mailed and/or
5 faxed this 28th day of March, 2002, to:

6 Holly J. Hawn
Deputy County Attorney
7 Santa Cruz County Attorney's Office
2150 N. Congress Drive, Suite 201
8 Nogales, Arizona 85621

9 Jose L. Machado
City Attorney
10 777 North Grand Ave.
Nogales, Arizona 85621

11 Christine L. Nelson
12 John White
Mohave County Attorney's Office
13 P. O. Box 7000
Kingman, Arizona 86402-7000

14 Marshall and Lucy Magruder
15 Post Office Box 1267
Tubac, Arizona 85646-1267

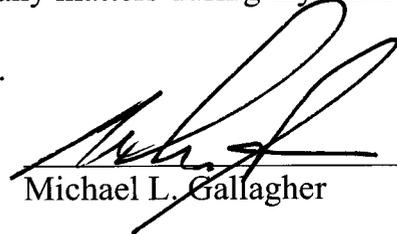
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EXHIBIT "A"

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- 5. Prior to March 21, 2002, I was not aware that Gallagher & Kennedy represented Citizens in the docket before the Arizona Corporation Commission (Docket No. E-01032C-00-0751).
- 6. In accordance with firm policy I do not discuss APS and/or PWC Board matters with attorneys at Gallagher & Kennedy. Specifically, I have never discussed any reports or discussions by the PWC and/or APS Board of Directors relating to Citizens in accordance with firm policy with Michael Grant or Todd Wiley.
- 7. Finally, I have never represented PWC or APS, or rendered legal advice to the companies, as an attorney in any matters during my tenure on the APS and/or PWC Boards of Directors.


 Michael L. Gallagher

SUBSCRIBED AND SWORN TO before me this 20th day of March 2002

by Michael L. Gallagher.


 Notary Public

My Commission Expires:

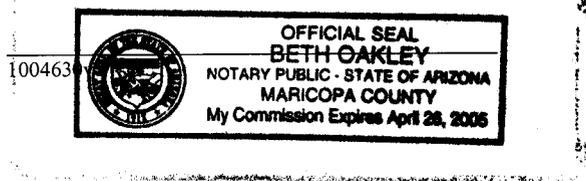


EXHIBIT "B"

AFFIDAVIT OF L. RUSSELL MITTEN

STATE OF CONNECTICUT)
)
County of Fairfield)

The undersigned affiant, being duly sworn on his oath, does hereby state the following:

1. My name is L. Russell Mitten and my business address is 3 High Ridge Park, Stamford, Connecticut 06905. I have been employed by Citizens Communications Company (formerly known as Citizens Utilities Company) ("Citizens") since July 1990. I currently serve as the company's Vice President – General Counsel and Secretary.

2. On September 28, 2000, Citizens' Arizona Electric Division filed an application with the Arizona Corporation Commission ("ACC") seeking approval (i) to change the Purchased Power and Fuel Adjustment Clause ("PPFAC") rate, (ii) to freeze and amortize over a period of three years the balance in the existing PPFAC Bank, (iii) to establish a new PPFAC Bank that would track power supply costs prospectively on a twelve-month rolling average basis, and (iv) to begin accruing carrying charges on the accumulated balance of over or under-recovered power supply costs (the "PPFAC Application"). That application, which was prepared and filed by Citizens' in-house legal counsel, was assigned Docket No. E-01032C-00-0751.

3. As stated in its application, during the summer of 2000 the AED experienced unprecedented increases in power supply costs – ranging from 50% to more than 160%. These cost increases were reflected in bills received from Arizona Public Service Company ("APS"), which provided power to the AED under a full-requirements Power Supply Agreement ("PSA") that the parties entered into in 1995.

4. To insure that it had been properly billed under the PSA, prior to filing its PPFAC Application the AED initiated a three-phase investigation of (i) all relevant billing data, (ii) the procedures used in computing the charges that were reflected in APS' bills to Citizens, and (iii) the generation resources used by APS to serve the AED's load. The initial phase of this investigation was completed by the AED prior to the filing of its application. The second and third phases were to be completed subsequent to that filing. In addition, the AED began a legal review of the PSA to determine if the increased power costs that had been billed by APS were consistent with its rights and obligations under that agreement.

5. In mid to late October 2000, I personally contacted Michael M. Grant, Esq., of the law firm of Gallagher & Kennedy, P.A., to request that he assume the role as lead counsel for the AED in processing and prosecuting its

PPFAC Application. During our initial conversation regarding his possible representation of the AED, Mr. Grant advised me that his firm had served in the past and was currently serving as counsel to APS or its affiliated companies on various legal matters. In addition, he advised me that one of his partners, Michael L. Gallagher, served on the board of directors of Pinnacle West Capital Corporation ("Pinnacle West"), APS' parent company. Because Citizens' interests under the PSA were potentially adverse to those of APS, Mr. Grant stated that he could not accept the assignment I had offered him until all possible conflict of interests issues had been fully addressed within his law firm and until all waivers required by the Code of Professional Responsibility had been obtained from APS and its affiliates. At that point, all discussions regarding Mr. Grant's representation of the AED in connection with its PPFAC application ceased pending resolution of the conflict of interests issues.

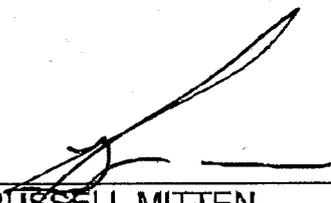
6. During the next few weeks Mr. Grant or other attorneys in his firm reviewed these conflict of interests issues, both within his law firm and with representatives of APS and its affiliates. Following that review, APS concluded that it would grant a conflict of interest waiver that would allow Mr. Grant and his law firm to represent Citizens and its affiliates, including the AED, both generally and with respect to matters where Citizens' interests may be adverse to those of APS and its affiliates (such as the PPFAC Application); provided, that neither Mr. Grant nor Gallagher & Kennedy would be allowed to act as counsel for Citizens or its affiliates (i) in any **legal action** directly adverse to APS or its affiliates or (ii) in any negotiation between Citizens and APS with respect to the PSA or any similar long term power supply agreement. Following his receipt of this waiver orally, Mr. Grant agreed to represent Citizens in the pending Commission proceeding involving the PPFAC Application and entered an appearance on behalf of the AED. The waiver was subsequently confirmed in writing by both Pinnacle West/APS and Citizens through their respective general counsels.

7. At no time has Citizens or the AED sought or received advice from Mr. Grant or any other lawyer at Gallagher & Kennedy regarding the interpretation of or any possible claims or causes of action arising from the PSA. Citizens did seek legal advice regarding potential claims and the possibility of taking legal action against APS at the Federal Energy Regulatory Commission or in the federal courts, but it sought that advice only from two Washington, DC, based law firms: Wright & Talisman, P. C., and Troutman Sanders, LLP. Citizens also sought advice regarding state law claims and the possibility of initiating an action against APS in the Arizona courts, but it sought that advice solely from the law firm of Brown & Bain.

8. Because Pinnacle West, on behalf of itself and its affiliates, has knowingly consented to Mr. Grant's representation of Citizens and the AED in a broad category of legal matters – which unquestionably includes the pending PPFAC Application – I believe it would be both unnecessary and unfair for the Commission to disqualify him from doing so. Applicable ethical rules governing

the practice of law in Arizona allow for current and former clients to grant conflict of interests waivers, provided the waiver is knowingly given "after consultation." Here, Pinnacle West and its affiliates have thoroughly considered all conflict of interests issues and, after consulting with knowledgeable and experienced legal counsel, have concluded that the waiver adequately serves and protects their respective interests.

9. Moreover, disqualifying Mr. Grant at this late date would be especially harmful and disadvantageous to Citizens. Mr. Grant has represented Citizens in the pending Commission proceeding for nearly a year and a half. During that time he has learned a great deal about the company's plight and he has been intimately involved in preparing and presenting Citizens' case. If the AED is forced to replace Mr. Grant, it will likely take several weeks to find a qualified replacement and allow that replacement adequate time to prepare for the upcoming hearing and the briefing schedule that will follow thereafter. All the while Citizens – and its shareholders – will be forced to absorb carrying costs, which the company estimates are approximately \$750,000 per month, on the existing PPFAC bank balance. In addition, because the AED must continue to purchase power to keep the lights and, as summer approaches, the air conditioners on within its service area, the balance of uncollected power costs in the PPFAC bank continues to grow. This is a burden the shareholders of Citizens should not be required to bear – especially when no legally recognized and protected interests would be jeopardized or conflicted if the case goes forward as scheduled. Principles of neither law nor equity mandate – or even warrant – the disqualification of Mr. Grant as Citizens' counsel or the delay in this proceeding that such a disqualification would occasion.



L. RUSSELL MITTEN
VICE PRESIDENT – GENERAL COUNSEL
& SECRETARY

SUBSCRIBED AND SWORN to before me
this 28th day of MARCH, 2002.



Notary Public

MILDRED L. HUDSON
NOTARY PUBLIC

1005098v MY COMMISSION EXPIRES MAY 31, 2004