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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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AZ CORP COMMISSION
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**IN THE MATTER OF THE
 CONSIDERATION PURSUANT TO A.R.S. §
 40-252, TO MODIFY DECISION NO. 67744
 RELATING TO THE SELF-BUILD OPTION**

DOCKET NO. E-01345A-07-0420

POST-HEARING BRIEF

In response to the request of the Administrative Law Judge, Arizona Public Service Company ("APS" or "Company") hereby submits its post-hearing brief in the above-captioned matter.

I. COMMISSION DECISION NO. 67744 SHOULD NOT BE MODIFIED

APS supports the "self-build" provisions of Arizona Corporation Commission ("Commission") Decision No. 67744 and the Settlement Agreement adopted by that Decision, which prohibits APS from pursuing any self-build option for long-term generation resources that has an in-service date prior to January 1, 2015, without the express authorization of the Commission.¹ It is the Company's position that the self-build

¹ Paragraph 74 of the Settlement Agreement, which addressed the self-build moratorium, reads as follows:

APS will not pursue any self-build option having an in-service date prior to January 1, 2015, unless expressly authorized by the Commission. For purposes of this Agreement, "self-build" does not include the acquisition of a generating unit or interest in a generating unit from a non-affiliated merchant or utility generator, the acquisition of temporary generation needed for system reliability, distributed generation of less than fifty MW per location, renewable resources, or the up-rating of APS generation, which up-rating shall not include the installation of new units.

In Decision No. 67744, the Commission modified the Settlement Agreement's definition of "self-build" to include "the acquisition of a generating unit or interest in a generating unit from any merchant or utility generator," and specified that the term "self-build" did not include the acquisition of temporary generation needed for system reliability, distributed generation of less than fifty MW per location, renewable resources, or up-rating of APS generation, which up-rating shall not include the installation of new units [pg. 25].

1 provisions, along with the recently adopted Recommended Best Practices for Procurement
2 (“Best Practices”), which were adopted by the Commission in Decision No. 70032 (Dec. 4,
3 2007), provide the opportunity for participants in the wholesale market to compete, while
4 maintaining the flexibility necessary for APS to acquire reliable cost-effective resources for
5 its customers. Decision No. 67744 adopted the Settlement Agreement, which was the result
6 of extensive negotiations between numerous parties, and the conditions associated with the
7 self-build provisions represent a reasonable and carefully balanced approach. The Best
8 Practices further clarify procurement practices that are implicit in self-build provisions of
9 Decision No. 67744. For these reasons, APS agrees with Commission Staff, the Residential
10 Utility Consumer Office (“RUCO”), and the Electric Generation Alliance (“EGA”)² that
11 modifications to Decision No. 67744 are unnecessary.

12 The Company opposes the position of Mesquite Power, L.L.C., Southwestern Power
13 Group II, L.L.C., and Bowie Power Station, L.L.C. (“Mesquite/SWPG/Bowie”) that the Best
14 Practices, which apply to all jurisdictional electric utilities, should be incorporated into
15 Decision No. 67744. There is no rational basis for the Commission to distinguish APS from
16 other Arizona electric utilities in regard to competitive procurement practices.

17 As a procedural matter, APS is proposing that the Commission adopt specific
18 timeframes for future self-build proceedings to further improve the efficiency of the review
19 and approval process, and to assure that the Company can acquire economical resources that
20 are necessary to provide for its customers’ electricity needs in a timely manner.

21 **II. COMMISSION’S BEST PRACTICES ADDRESSED UNRESOLVED**
22 **QUESTIONS**

23 In addition to the present Commission matter, the self-build provisions were relevant
24 in other Commission dockets: the APS rate case where the Settlement Agreement was
25 adopted;³ the matter where the Company first sought Commission self-build authorization to
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27 ² This was EGA’s final position, as presented in the evidentiary hearing. See Hr’g. Transcript: Trammel, pg.
28 66, lines 15-24.
³ Docket No. E-01345A-03-0437, which resulted in Decision No. 67744 (Apr. 7, 2005).

1 acquire additional generation resources in Yuma, Arizona⁴ (“Yuma Acquisition Docket”);
2 the APS rate case where the Commission ordered a docket be opened to consider modifying
3 Decision No. 67744, as it related to the self-build provisions;⁵ and the Commission
4 workshops addressing resource planning issues (“Competitive Procurement Workshops”).⁶
5 Pursuant to Decision No. 67744, Commission Staff held the Competitive Procurement
6 Workshops to develop a flexible, timely and fair competitive procurement process.⁷ These
7 workshops provided a robust Commission process, with numerous opportunities for
8 presentations, written comments and discussion.

9 Issues that had been raised in the Yuma Acquisition Docket were addressed in the
10 Competitive Procurement Workshops and substantially resolved in the Best Practices.⁸ As
11 described by the parties in this docket, Best Practices neither supplant nor supersede
12 Settlement Agreement provisions, and there are no conflicts or inconsistencies between self-
13 build provisions and Best Practices. Rather, Best Practices are an “overlay” or complement
14 to the Settlement Agreement, and provide information regarding future interpretation of
15 those provisions.⁹ The Best Practices addressed three key components: identification of
16 acceptable procurement methods for acquiring electricity; a preference for a Request for
17 Proposal (“RFP”) as the primary acquisition process; and the role of an independent monitor,
18 who would be utilized in all RFP processes for procurement of new generation resources.¹⁰

19 The Company testified that the Best Practices clarified the approach the Company will
20 use to test the market.¹¹ APS believes that the Best Practices provide a means for the
21 Commission, the customers and the bidders in the wholesale markets to be assured that the
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23 ⁴ Docket No. E-01345A-06-0464, which resulted in Decision No. 69400 (Aug. 29, 2005).

24 ⁵ Docket No. E-01345A-05-0816, which resulted in Decision No. 69663 (June 28, 2007).

25 ⁶ Docket No. E-00000E-05-0431, which resulted in Decision No. 70032 (Dec. 4, 2007).

26 ⁷ Competitive Procurement Workshops were held April 25, 2007, May 23, 2007 and July 13 2007, Docket No.
27 E-00000E-05-0431.

28 ⁸ See Hr’g. Transcript: Ahearn, pg. 167, line 11–pg. 168, line 1; Dinkel, pg. 96, lines 2-7; *see also* Keene
Direct Testimony, pg. 5, lines 23-25.

⁹ See Hr’g. Transcript: Keene, pg. 179, line 22–pg. 180, line 16; Ahearn, pg. 157, line 22–pg. 158, line 15;
Dinkel, pg. 106, lines 21-23.

¹⁰ See Hr’g. Transcript: Keene, pg. 177, lines 14-25.

¹¹ See Hr’g. Transcript: Dinkel, pg. 92, lines 14-18.

1 procedures for obtaining new resources are fair and transparent and result in the acquisition
2 of the best resources.¹² APS fully supports the Best Practices; they provide meaningful
3 guidance regarding procurement practices, and the Company intends to implement them in
4 its generation procurement activities.¹³

5 Commission Staff, RUCO, EGA and APS all contend that it is unnecessary to modify
6 Decision No. 67744 to incorporate Best Practices.¹⁴ The Company agrees with Staff's
7 position that the Best Practices should not be integrated into Decision No. 67744 because
8 proceedings regarding Resource Planning are currently underway, and it is anticipated that
9 the outcome will be a rulemaking that will include competitive procurement procedures,
10 although they may not be identical to Best Practices.¹⁵ If Best Practices were made
11 mandatory for APS now, the ultimate result may be that APS would have to comply with
12 requirements that were different from the rules required for other utilities.¹⁶ Even
13 Mesquite/SWPG/Bowie testified that if Best Practices were incorporated into rules for all
14 Arizona electric utilities subsequent to becoming mandatory for only APS, it would be a
15 "more complicated issue" and would "add another layer of complexity."¹⁷ The Company
16 agrees with Staff that it is desirable to have a uniform standard to govern procurement for all
17 electric utilities.¹⁸

18 Furthermore, as recognized by RUCO,¹⁹ it would be discriminatory to mandate that
19 APS must comply with Best Practices, when other jurisdictional electric utilities do not have
20 the same requirements. Under the Equal Protection Clause of the United States Constitution
21 and the Arizona Constitution,²⁰ public utilities' commissions may not discriminate against
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23 ¹² See Dinkel Direct Testimony, pg. 6, lines 23-26.

24 ¹³ See Dinkel Rebuttal Testimony, pg. 4, lines 2-6; Hr'g. Transcript: Dinkel, pg. 102, lines 1-5.

25 ¹⁴ See Keene Direct Testimony, pg. 6, lines 7-20; Ahearn Direct Testimony, pg. 5, lines 10-21; Hr'g.
26 Transcript: Trammell, pg. 66, lines 15-24.

27 ¹⁵ See Keene Rebuttal Testimony, pg. 3, lines 9-18.

28 ¹⁶ *Id.*

¹⁷ See Hr'g. Transcript: Roberts, pg. 44, line 22—pg. 46, line 5.

¹⁸ See Keene Rebuttal Testimony, pg. 3, lines 17-18.

¹⁹ See Hr'g. Transcript: Ahearn, pg. 154, line 19—pg. 155, line 5; pg. 171, lines 1-14.

²⁰ See *State v. Bonnewell*, 196 Ariz. 592, 596 (Ct. App. 1999) (stating that the effects of the equal protection clauses of the United States and the Arizona Constitutions are essentially the same).

1 electric utilities unless such discrimination is reasonable, not arbitrary, and rests upon some
2 ground of difference that has a fair and substantial relationship to the object of the rule, so
3 that similarly situated persons are treated alike.²¹ In other words, a public utilities
4 commission may not treat differently utilities that are in all *relevant* aspects alike.²²

5 At the Commission's evidentiary hearing in this matter, the only articulated reason for
6 making the Best Practices mandatory to APS alone was the existence of APS's self-build
7 moratorium.²³ APS does not dispute that it is differently situated from other utilities by
8 virtue of its self-build moratorium. The existence of this self-build moratorium, however,
9 does not provide a relevant or rational basis for the Commission to discriminate against APS
10 by making the Best Practices mandatory only to APS.

11 All jurisdictional electric utilities must engage in competitive procurement for power
12 from the market.²⁴ The Best Practices pertain to competitive procurement procedures, and
13 resulted from the Commission Staff's "intention to continue to facilitate competitive
14 wholesale market options for the acquisition of resources to serve electric customers."²⁵ As
15 a result, the Commission recommended that all Arizona electric utilities engaging in
16 competitive procurement implement these voluntary guidelines. In fact, counsel for
17 Mesquite/SWPG/Bowie stated that Best Practices "should be the primary means used by
18 *electric utilities* in obtaining their power resources. . . ."²⁶ Thus, the Best Practices constitute
19 a uniform procurement standard for all jurisdictional electric utilities, not just APS.²⁷ As
20 such, if the Best Practices are to become mandatory, they should be mandatory for all
21 electric utilities regulated by the Commission.

22 ²¹ See *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Old Dominion Power Co., Inc. v. State*
23 *Corp. Comm'n*, 228 Va. 528, 534 (1984).

24 ²² See, e.g., *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *Babbitt v. Pickrell*, 113 Ariz. 12, 14 (1976);
General Tel. Co. v. Public Utility Comm'n, 628 S.W.2d 832, 841 (Tex. App. 1982).

25 ²³ See Hr'g. Transcript: Robertson, pg. 20, lines 8-12 ("what distinguishes APS from the other electric utilities
is the existence of the self-build moratorium where it affirmatively undertook obligations that would relate to
its procurement of resources from the competitive market"); Roberts, pg. 41, lines 9-11 ("APS is already
26 differently situated from the other utilities because it agreed to the moratorium").

27 ²⁴ Decision No. 65154 (Sept. 10, 2002).

²⁵ Decision No. 70032 at 2 (Dec. 4, 2007).

28 ²⁶ See Hr'g. Transcript: Robertson, pg. 21, lines 6-9 (emphasis added).

²⁷ See Hr'g. Transcript: Roberts, pg. 32, line 19–pg. 33, line 3.

1 The existence of the self-build moratorium is not a rational basis for such
2 discrimination between APS and the other Arizona electric utilities regulated by the
3 Commission. In all relevant aspects relating to the Best Practices, APS and the other
4 Arizona electric utilities regulated by the Commission are alike. Therefore, to make the Best
5 Practices mandatory only to APS would violate the Equal Protection Clause of the United
6 States Constitution and the Arizona Constitution.

7 **III. SPECIFIC TIMEFRAME FOR APPROVING SELF-BUILD APPLICATION IS**
8 **BENEFICIAL**

9 The Company is recommending that the Commission adopt specific timeframes to
10 apply to the approval process for future filings where authority to self-build is sought.²⁸ This
11 proposal would provide regulatory certainty, which would allow the Company to more
12 efficiently manage the planning and procurement process for the benefit of its customers. As
13 a result, the Company could more effectively capitalize on market opportunities to acquire
14 the most preferable generation resources, which ultimately benefits APS's customers. The
15 merchant developer parties in this docket both testified that they supported the adoption of an
16 explicit timetable for Commission proceedings that consider a request for self-build
17 authorization.²⁹ As stated by counsel for EGA, both the utility and market participants are
18 best served if there is a measure of certainty and reliability with respect to the timing of the
19 proceedings.³⁰

20 Timing can materially affect the price of generation. Regardless of whether a bid is for
21 an existing or new facility, the length of the procurement schedule is a fundamental factor
22 affecting risk, because there is a greater exposure to such things as market changes,
23 commodity price movements, and inflation as time goes on.³¹ Bidders proposing to
24 construct new facilities generally will not make the significant investments needed to move
25 forward with a project without regulatory approval. EGA's witness testified that as an

26 ²⁸ It is significant to note that in applications for authority to self-build, APS is not seeking a finding of
27 prudence, as that would occur in a subsequent rate case.

28 ²⁹ See Hr'g. Transcript: Trammell, pg. 63, line 9–pg. 64, line 10; Roberts, pg. 36, lines 9-11.

³⁰ See Hr'g. Transcript: Moyes, pg. 24, lines 1-10.

³¹ See Dinkel Direct Testimony, pg. 5, lines 20-26.

1 independent power producer and merchant generator, the company must hold on to land
2 rights, permits, and cost quotations while awaiting regulatory approval, which is a pre-
3 requisite for obtaining financing.³² Mesquite/SWPG/Bowie's witness stated that uncertainty
4 and delay in approval could have a material impact on the cost of labor and material or
5 production timelines, among other things.³³

6 The Company believes that in the future, issues related to applications for authority to
7 self-build will be minimized because the Best Practices provide additional clarity regarding
8 competitive procurement solicitations. As a result, the process for regulatory approval could
9 be streamlined in those situations where there is a formal acknowledgment from the
10 independent monitor that the Company complied with the Best Practices. Conversely, if
11 there are situations where an independent monitor was not involved in the process, the
12 independent monitor identified material concerns regarding the process, or an intervening
13 bidder raised material issues, a more extensive proceeding may be required prior to obtaining
14 Commission approval.

15 To address the varied circumstances, the Company has proposed two different
16 timeframes for final regulatory approval: 90 days from filing to approval where the filing is
17 in compliance with Best Practices; and 180 days where more regulatory scrutiny is required.
18 While the Company has proposed what it believes to be reasonable timeframes, APS's
19 witness testified that, as opposed to proposing timeframes that were set in stone, its proposal
20 was intended to engage the parties in the discussion; ultimately, the Commission would
21 establish what it believed to be reasonable timeframes.³⁴ The timeframes APS proposed in
22 its initial testimony (*i.e.*, 90 and 180 days) are not as important as having a defined set of
23 procedures and an established timetable.

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27 ³² See Hr'g. Transcript: Trammell, pg. 63 line 9–pg. 64, line 2.

28 ³³ See Hr'g. Transcript: Roberts, pg. 36, lines 3-8.

³⁴ See Hr'g. Transcript: Dinkel, pg. 147, line 13–pg. 148, line 16.

1 Under either of the timeframes proposed, to assure that all interested parties have
2 notice of APS's request for authority to self-build, APS would provide copies of its
3 application to bidders with whom the Company was currently in negotiations, as well as all
4 parties of record in the Commission's Resource Planning docket,³⁵ the forum where the Best
5 Practices originated.³⁶ The Company's application would provide relevant information³⁷ for
6 interested parties to determine whether intervention in the matter is appropriate.

7 During the evidentiary hearing, there were some questions regarding what procedure
8 would be employed to identify whether the 90-day or 180-day period should apply in any
9 particular case. As a point of clarification, the Company submits that Staff could review the
10 Company's application and within a specific timeframe, either: (a) file a request for a
11 procedural order that identified a 90-day period for Commission approval; or (b) request a
12 procedural conference in those cases where further regulatory examination was anticipated.

13 **IV. CONCLUSION**

14 APS supports the self-build provisions in Decision No. 67744 and contends that
15 modifications to that Decision are unnecessary. Furthermore, APS contends that
16 incorporating Best Practices into Decision 67744 so they are mandatory for only APS would
17 be discriminatory. The Company believes that the Best Practices appropriately address a fair
18 and transparent process for competitive procurement and resolve substantive issues that
19 remained from the Yuma Acquisition Docket. APS has already committed to utilize those
20 guidelines in its procurement practices. To facilitate a timely resolution of future requests
21 for self-build authorization, the Company urges the Commission to adopt a timetable to
22 allow APS to maximize market opportunity for the benefit of its customers.

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24 ³⁵ Docket No. E-00000E-05-0431.

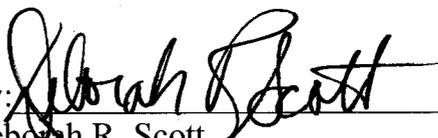
25 ³⁶ See Hr'g. Transcript: Dinkel, pg. 125, lines 18-23; pg. 149, lines 17-24.

26 ³⁷ Pursuant to the terms of the Settlement Agreement adopted by the Commission in Decision No. 67744, the
27 Company must provide detailed information regarding its analysis and determination that an exception to the
28 self-build limitation was necessary. See paragraph 75. Further, the Company intends to demonstrate how it
applied the Best Practices as part of future filing for self-build authority. See Hr'g. Transcript: Dinkel, pg. 101,
lines 23-25. Additionally, the Company testified that it is APS's practice to work with Staff in conjunction
with a filing, including providing detailed documentation and economic analysis to ensure that Staff has all the
information necessary for its timely analysis. See Hr'g. Transcript: Dinkel, pg. 144, line 8—pg. 145, line 12.

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RESPECTFULLY SUBMITTED this 31st day of March, 2008.

PINNACLE WEST CAPITAL CORPORATION
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