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DISTRICT OF COLUMBIA

OF COUNSEL TO
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March 31, 2008

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

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AZ CORP COMMISSION
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Re: 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

To Whom It May Concern:

Enclosed for filing in the above-referenced docket are the original and thirteen (13) copies of the Closing Brief on behalf of Mesquite Power, L.L.C., Southwestern Power Group II, L.L.C. and Bowie Power Station, L.L.C.

Thank you for your assistance with regard to this matter. Please let me know if you have any questions.

Sincerely,

Lawrence V. Robertson, Jr.

Arizona Corporation Commission
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BEFORE THE ARIZONA CORPORATION COMMISSION
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AZ CORP COMMISSION
DOCKET CONTROL

IN THE MATTER OF THE CONSIDERATION,) DOCKET NO. E-01345A-07-0420
PURSUANT TO A.R.S. § 40-252, TO MODIFY)
DECISION NO. 67744 RELATING TO THE) INTERVENORS CLOSING BRIEF
SELF-BUILD MORATORIUM.)

Pursuant to Chief Administrative Law Judge ("CALJ") Lyn Farmer's directive at the end of the public hearing in the above-captioned and above-docketed proceeding on February 20, 2008, Mesquite Power, L.L.C., Southwestern Power Group II, L.L.C. and Bowie Power Station, L.L.C. (collectively "Mesquite") hereby submit their Closing Brief.

I.

INTRODUCTION

The above-captioned and above-docketed proceeding was instituted on July 10, 2007 in response to Decision No. 69663, which was issued on June 28, 2007 in Docket No. E-01345A-05-0816 et al. In Decision No. 69663, the Commission directed its Hearing Division to conduct a proceeding pursuant to A.R.S. § 40-252, in order to consider modifying Decision No. 67744 as it related to the "self-build" moratorium approved by that decision in Docket No. E-01345A-05-0431. However, the Commission did not provide specific guidance as to what possible modification(s) it would like to be considered in this proceeding.

Mesquite believes that guidance in that regard is to be found by (i) examining the background to and purpose of the "self-build" moratorium, (ii) considering the Commission's experience in interpreting and applying the provisions of the "self-build" moratorium for the first time in Docket No. E-01345A-06-0464 ("Yuma RFP proceeding") and (iii) analyzing the Recommended Best Practices For Procurement ("Best Practices") adopted by the Commission

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1 on December 4, 2007 in Docket No. E-00000E-05-0431. Against this analytical background and
2 process, Mesquite believes it will become readily apparent that the paramount issue presented for
3 resolution in this proceeding is whether Decision No. 67744 should be modified to provide that
4 the Best Practices are mandatory as to Arizona Public Service Company ("APS") for the duration
5 of the "self-build" moratorium. For the reasons discussed in the following sections of this
6 Closing Brief, Mesquite believes that that question should be resolved in the affirmative.

7 II.

8 BACKGROUND AND PURPOSE OF "SELF-BUILD" MORATORIUM

9 On August 18, 2004 APS and twenty-two (22) other parties to Docket No. E-01345A-05-
10 0431 executed a Settlement Agreement ("Settlement Agreement") by means of which the
11 signatory parties therein proposed to settle APS' then pending 2003 rate case. The Settlement
12 Agreement was omnibus in nature, and the effectiveness of the same was conditioned upon
13 approval by the Commission. That approval was ultimately forthcoming in Decision No. 67744,
14 and it included certain modifications to the provisions of the Settlement Agreement.

15 Article IX of the Settlement Agreement pertains to the "Competitive Procurement of
16 Power," and it consists of Paragraphs 74 through 80. The "self-build" moratorium which is the
17 subject of the Commission directive in Decision No. 69963 initiating this proceeding is set forth
18 in Paragraph 74, which provides as follows in pertinent part:

19 "APS will not pursue any self-build option having an in-service
20 date prior to January 1, 2015, unless expressly authorized by the
21 Commission." [Settlement Agreement, Paragraph 74, page 16]

22 From the perspective of the parties to the settlement negotiations, the "self-build"
23 moratorium represented the quid pro quo for APS being allowed to acquire and include the
24 Arizona electric generating assets of Pinnacle West Energy Corporation ("PWEC") in rate base
25 and earn a rate of return thereon. In that regard, various parties to APS' 2003 rate case
26 (including Mesquite and the Arizona Competitive Power Alliance) had expressed concern prior
27 to reaching agreement on the "self-build" moratorium that APS' ownership and operation of the
28 PWEC assets would have an adverse impact on the competitive wholesale electric market in

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Arizona. As the following excerpts from Decision No. 67744 indicate, the Commission had a similar concern and undertook to address and resolve it.

“We generally agree that the self-build moratorium proposed in the [Settlement] Agreement is useful for addressing the potentially anti-competitive effects that may be associated with rate-basing the PWEC assets. However, to fully realize the benefits of the moratorium for that purpose, the moratorium should apply to the acquisition of a generating unit or interest in one from any merchant or utility generator, as well as to building new units. Accordingly, we will modify the definition of ‘self-build’ to include the acquisition of a generating unit or interest in a generating unit from any merchant or utility generator.” [Decision No. 67744, page 25, lines 13-19] [emphasis added]

* * *

“The self-build moratorium agreed to by APS is consistent with the Commission’s support for competitive wholesale electricity markets.” [Decision No. 67744, page 26, lines 8-9] [emphasis added]

* * *

“Our agreement to rate base the PWEC assets does not mean we are retreating from our commitment to encourage the development of competition, and we expect APS and its affiliates to fully comply with all the pro-competition requirements in the Settlement Agreement and other Commission decisions and rules.” [Decision No. 67744, page 34, lines 15-18] [emphasis added]

* * *

“We are modifying the 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 we will require APS to obtain the Commission’s expressed approval for APS’ acquisition of any generating facility or interest in a generating facility pursuant to a RFP or other competition solicitation issued before January 1, 2015.” [Decision No. 67744, page 38, line 25 – page 39, line 1] [emphasis added]

* * *

“The Settlement Agreement, with the modifications and additional provisions contained herein, resolves all matters raised by APS’ rate application in a manner that is just and reasonable, and

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promotes the public interest.” [Decision No. 67744, page 41, lines 4-6]

Thus, as may be noted from the foregoing, the purpose of the “self-build” moratorium, as modified by Decision No. 67744, was to offset or neutralize the anti-competitive effects which might otherwise arise from APS’ acquisition and operation of the PWEC generating assets in Arizona. The anticipated means by which that offset was to be achieved was by requiring that APS first look to the competitive market as the means by which to satisfy its increasing power resource needs during the time period covered by the “self-build” moratorium. However, as discussed in Section III below, within eighteen (18) months from the issuance of Decision No. 67744, it became apparent that there was serious disagreement between APS and several merchant generator signatories to the Settlement Agreement as to how the provisions of the “self-build” moratorium (and Article IX as a whole) were to be interpreted and applied in the context of a request by APS for an exception.

III.
THE YUMA RFP PROCEEDING EXPERIENCE

Docket No. E-01345A-06-0464 represented the first time the Commission had occasion to interpret and apply the provisions of the “self-build” moratorium (and Article IX as a whole). In referring to that proceeding, Mesquite does not intend to relitigate issues raised and arguments made therein. Rather, Mesquite believes that it was through that proceeding that the Commission, its Staff, APS and the merchant generators became aware that there were significant “gaps” in the language and structure of Decision No. 67744 and Article IX as to precisely (i) what behavior was to be required of APS incident to the conduct of competitive procurements, and (ii) what APS must demonstrate in order to qualify for an exception from the “self-build” moratorium.

For example, except for the limited circumstances covered by Paragraphs 78 and 80, the content of Article IX did not address the details of prospective competitive procurements conducted by APS, which would become subject to subsequent examination in the context of Paragraphs 75 (b) through 75 (d). In addition, Article IX did not articulate whether an

1 independent monitor was to be required in competitive procurement circumstances which did not
2 fall within the ambit of Paragraphs 78 (b) or 80, which was precisely the situation in the Yuma
3 RFP. In that instance, APS had internally developed a benchmark or reference cost, for the
4 purpose of evaluating purchased power and direct build bids received in response to its RFP,
5 using APS personnel who appeared to have had access to proprietary information received from
6 the competitive market. However, in the absence of an independent monitor, as would have been
7 required (under Paragraphs 78 (b) and 80) had the benchmark or cost reference been developed
8 in the form of a formal bid by PWEC or an APS affiliate, it was impossible for the Commission
9 to determine whether APS had or had not acted properly. Finally, neither Decision No. 67744 or
10 Article IX articulated or inferred how either (i) a balance is to be achieved between that initial
11 preference for the competitive market provided for by Paragraphs 74 and 75, and the prudence in
12 generating resource acquisitions required of APS by Paragraph 76, or (ii) conduct which
13 jeopardizes or precludes realization of the former is to be rectified.

14 **IV.**

15 **DECISION NO. 70032 AND THE BEST PRACTICES**

16 On December 4, 2007, the Commission issued Decision No. 70032 in which it adopted
17 the Best Practices, which had been recommended by the Commission's Staff in a November 6,
18 2007 Final Staff Report On Competitive Procurement Issues ("Staff Report"). As noted in both
19 Decision No. 70032 and the Staff Report, the Best Practices were developed through three (3)
20 workshops held on April 25, 2007, May 23, 2007 and July 13, 2007 pursuant to Decision No.
21 67744 and Paragraph 79 of the Settlement Agreement, which provided that

22 "…the Commission Staff will schedule workshops on resource
23 planning issues to focus on developing needed infrastructure and
24 developing a flexible, timely, and fair competitive procurement
25 process." [Decision No. 70032, page 1, lines 18-22; Staff Report,
26 Executive Summary, page 1; and Settlement Agreement, page 17]
[emphasis added]

27 The first of these workshops occurred approximately four (4) weeks after the Commission's
28 issuance of its Decision No. 69400 in the Yuma RFP proceeding; and, in several significant

1 respects the Best Practices address, albeit on a voluntary basis, several of the issues which were
2 highly contested in Docket No. E-01345A-06-0464. In fact, from the perspective of Mesquite, it
3 would be appropriate to characterize the Best Practices in part as “lessons learned from the
4 Yuma RFP proceeding.”

5 Illustrative of this proposition are the following excerpts from the Staff Report and
6 Decision No. 70032:

7 “Staff believes that in a state with such dynamic growth as
8 Arizona, it is essential to have a healthy wholesale market for
9 electricity...In order for that to occur, however, Staff believes that
10 merchants, developers, and other non-utility generators must have
11 confidence that the resource acquisition process is a fair,
12 transparent, and non-discriminating process.” [Staff Report, page
13 5, “General Observations”]

14 * * *

15 “Another item of discussion in the third workshop was the
16 Commission’s opening of a new docket pursuant to Decision No.
17 69663, which would require the Commission’s Hearing Division to
18 conduct a proceeding under A.R.S. § 40-252 to consider modifying
19 Decision No. 67744 related to APS’ self-build option. Although
20 some of the issues between this proceeding and the new proceeding
21 may overlap, Staff notes that this new proceeding will apply only
22 to APS rather than to all jurisdictional electric utilities. Therefore,
23 Staff recommends addressing procurement practices in the current
24 proceeding, with the understanding that the outcome of this
25 proceeding may provide some guidance for the [new docket
26 resulting from the] APS rate case.” [Staff Report, page 6]
27 [emphasis added]

28 * * *

“While utilities have a number of procurement options available,
Staff believes that a utility should look first to the market. When a
utility does look to the market, a request for proposals (“RFP”)
process should be the primary means by which utilities acquire
needed wholesale power resources.” [Staff Report, page 6]
[emphasis added]

* * *

“In most states with a regulatory requirement for competitive
bidding, an independent monitor or “evaluator” is always used.

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Other states use an evaluator when there is a likelihood that the utility itself will bid or its affiliate plans to bid in the process. Staff is persuaded that the utility is *always* a potential bidder, since it may be required to construct or develop the generation if none of the bids meets its benchmark price. Therefore, given the large amounts of money that are involved in developing, constructing, and operating generation projects, Staff believes that the cost of an independent monitor is relatively small by comparison, and a good means by which the Commission and bidders in the wholesale market can remain assured that the procedures for selecting new resources are fair, transparent, and result in the most economical resource being selected.” [Staff Report, page 9] [emphasis added]

* * *

“Utilities should seek to use an RFP as the primary acquisition process.” [Staff Report, page 10; Decision No. 70032, page 3, line 5.5] [emphasis added]

* * *

“An independent monitor should be used in all RFP processes for procurement of new resources.” [Staff Report, page 11; Decision No. 70032, page 3, lines 20.5-21.5] [emphasis added]

* * *

“One week prior to the deadline for submitting bids, the utility should provide the independent monitor with a copy of any bid proposal prepared by the utility or its affiliate, or any benchmark or reference cost the utility has developed against which to evaluate the bids. The independent monitor should take steps to secure the utility bid or benchmark price in a location not known or accessible to any of the bidders or the utility or its affiliate.” [Staff Report, page 11; Decision No. 70032, page 4, lines 3.5-6.5] [emphasis added]

The evidentiary record in this proceeding clearly indicates that all parties believe that Decision No. 70032 and the Best Practices therein adopted represent a very constructive action by the Commission with regard to the procurement of power resources by electric public service corporations in Arizona. However, as to APS and when examined within the context of the “self-build” moratorium approved by the Commission in Decision No. 67744, the Best Practices are not sufficient in and of themselves, because they are voluntary in nature. Accordingly, and for the reasons discussed in Section V below, Mesquite believes that Decision No. 67744 should

1 be modified to provide that the Best Practices shall be mandatory as to APS for purposes of the
2 “self-build” moratorium.

3
4 V.

5 **DECISION NO. 67744 SHOULD BE MODIFIED TO PROVIDE THAT THE**
6 **BEST PRACTICES SHALL BE MANDATORY AS TO APS**
7 **FOR PURPOSES OF THE ‘SELF-BUILD’ MORATORIUM**

8 A. The Best Practices Overlay Or Interface With The “Self-Build” Moratorium, and Are
9 Consistent With The Provisions Of Article IX Of The Settlement Agreement.

10 APS witness Patrick Dinkel testified in his Direct Testimony, Rebuttal Testimony and
11 during cross-examination that APS supports and intends to comply with the Best Practices, on a
12 voluntary basis, in connection with its conduct of future power resource procurements from the
13 competitive market;¹ and, in that regard, he provided an expansive definition of what he (and
14 APS) consider to be included within the term “competitive market,” as used in this context.² In
15 addition, he testified at length as to how the Best Practices either (i) directly overlapped or
16 interfaced with various provisions of Article IX of the Settlement Agreement, including
17 Paragraphs 75 (b) and (d), 78 (b) and 80, or (ii) provided guidance or clarification as to how the
18 “self-build” moratorium was to be interpreted and applied.³

19 Similarly, Commission Staff witness Barbara Keene testified as to the overlay or
20 interface between the Best Practices and the “self-build” moratorium in connection with the
21 interpretation and application of the provisions of Paragraph 75 (b) through (d);⁴ and, she
22 confirmed that the Best Practices are a result of the aforementioned workshops contemplated by
23 Paragraph 79 of the Settlement Agreement.⁵ In addition, and like Mr. Dinkel, she observed that
24 there were no inconsistencies or conflicts between the Best Practices and the provisions of

25 ¹ See, for example, Ex. APS-1, page 6, l. 18 – page 7, l. 3; Ex. APS-2, page 2, l. 23 – page 3, l. 3 and page 3, l. 24 –
26 page 4, l.5; Ex. APS-2, page 8, l. 17.5-21.5; Tr. 90, l. 22 – Tr. 91, l. 8; Tr. 95, l. 24 – Tr. 96, l. 11; Tr. 98, l. 21-23;
Tr. 108, l. 20 – Tr. 109, l. 4; Tr. 113, l. 8-13; Tr. 117, l. 6 – Tr. 118, l. 14; Tr. 120, l. 10-13; Tr. 142, l. 22 – Tr. 143,
l. 2; Tr. 148, l. 23 – Tr. 149, l. 1.

27 ² See, for example, Tr. 109, l. 5 – Tr. 111, l. 5; Tr. 111, l. 22 – Tr. 112, l. 3 and Tr. 112, l. 20 – Tr. 113, l. 4; Tr. 115,
l. 23 – Tr. 117, l. 5. Also, see Tr. 163, l. 6 – Tr. 164, l. 13 where RUCO witness Ahearn adopted a similar definition.

28 ³ See, for example, Tr. 91, l. 24 – Tr. 94, l. 20; Tr. 97, l. 4 – Tr. 98, l. 23; Tr. 99, l. 20 – Tr. 109, l. 4.

⁴ See Tr. 180, l. 24 – Tr. 181, l. 21

⁵ See Tr. 180, l. 17-23.

1 Article IX, as the following exchange between undersigned counsel for Mesquite and her readily
2 demonstrates:

3
4 "CROSS-EXAMINATION

5 BY MR. ROBERTSON:

6 Q. Ms. Keene, do you happen to have in front of you a copy
of the settlement agreement that was approved by Decision 67744?

7 A. Yes, I do.

8 Q. Okay. Let me have you turn to the Article 9 provisions of
that, which begin on page 16 of the settlement agreement and
9 continue on to the top part of page 18. And I would like to ask you
the same sort of question that I asked Mr. Dinkel earlier this
10 morning, and that would be for you to describe from the
perspective of the Commission Staff the nature of the interface or
11 interrelationship between the provisions of the self-build
moratorium and Article 9 as a whole and the Best Practices.

12 A. Well, first of all, I don't think there is any conflict between
Best Practices and what is in the settlement agreement. I would
consider it more like an overlay. It adds more to it.

13 Q. The Best Practices adds more to the Article 9 provisions;
14 is that your testimony?

15 A. Yes, it is.

16 Q. Okay. Are there any inconsistencies you see between the
Article 9 provisions and the Best Practices?

17 A. Not that I'm aware of. [Tr. 179, l. 15-Tr. 180, l. 16]
[emphasis added]

18 In that regard, her perception and opinion is particularly pertinent because of her role as the
19 Commission Staff member who drafted the Staff Report and the Best Practices which were the
20 subject of Decision No. 70032, and her familiarity with Decision No. 67744 and the provisions
21 of Article IX.

22 B. A Modification Of Decision No. 67744 To Require That The Best Practices Shall Be
23 Mandatory As To APS For Purposes Of The "Self-Build" Moratorium Would Not Be
24 Burdensome As To APS.

25 As discussed in Subsection V (A) above, APS has testified that it supports and intends to
26 comply with the Best Practices in connection with its conduct of future power resource
27 procurements from the competitive market. In addition, both APS and the Commission Staff
28 have testified as to how the Best Practices overlay or interface with the provisions of Article IX

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of the Settlement Agreement, and that there are no inconsistencies or conflicts between the Best Practices and Article IX. Moreover, the Commission’s Staff has testified that the Best Practices represent the work product of the workshops to develop

“...a flexible, timely, and fair competitive procurement process...”

which were contemplated and provided for by Paragraph 79 of the Settlement Agreement. Accordingly, a modification of Decision No. 67744 to require that the Best Practices shall be mandatory as to APS for purposes of the “self-build” moratorium would not be burdensome as to APS. To the contrary, mandatory compliance would be fully consistent with the spirit of what was intended by the “self-build” moratorium, which APS agreed to as the Settlement Agreement quid pro quo for it being allowed to acquire and rate base PWEC’s generating assets in Arizona.

C. A Modification Of Decision No. 67744 To Require That The Best Practices Shall Be Mandatory As To APS For Purposes Of The Self-Build Moratorium Would Not Be Discriminatory As To APS.

APS witness Dinkel, RUCO witness Stephen Ahearn and Commission Staff witness Barbara Keene endeavored to suggest that it would be discriminatory for the Commission to make compliance with the Best Practices mandatory as to APS, but voluntary as to other Arizona electric public service corporations, such as Tucson Electric Power Company,^{6 7 & 8} respectively. However, as Mr. Ahearn acknowledged during cross-examination, (i) the suggestion of discrimination assumes as a threshold predicate that the electric public service corporations in question “were similarly situated,”⁹ and (ii) APS is the only Arizona electric public service corporation which has agreed to a “self-build” moratorium such as the one provided for in Article IX of the Settlement Agreement and approved by the Commission in Decision No. 67744.¹⁰ Accordingly, a modification of Decision No. 67744 to require that the Best Practices shall be mandatory as to APS for purposes of the “self-build” moratorium would not be discriminatory as to APS.

⁶ See, for example, Ex. APS-2, page 5, l. 3-6.
⁷ See, for example, Ex. RUCO-2, page 3, l. 11-12; Tr. 154, l. 19-23.
⁸ See, for example, Ex. S-2, page 3, l. 15-18.
⁹ See, for example, Tr. 155, l. 14-Tr. 156, l. 9; and Tr. 170, l. 22-Tr. 171, l. 14.
¹⁰ See Tr. 171, l. 15-20. Also, see Tr. 40, l. 24 – Tr. 41, l. 17 (Roberts).

1 D. A Modification Of Decision No. 67744 To Require That The Best Practices Shall Be
2 Mandatory As To APS For Purposes Of The Self-Build Moratorium Would Be
3 Consistent With The "Public Interest."

4 In Decision No. 67744, the Commission stated that

5 "The "self-build" moratorium agreed to by APS is consistent with
6 the Commission's support for competitive wholesale electricity
7 markets"; [Decision No. 67744, page 26, lines 8-9] [emphasis
8 added] and

9 * * *

10 "The Settlement Agreement, with the modifications and additional
11 provisions contained herein...promotes the public interest."
12 [Decision No. 67744, page 41, lines 4-6] [emphasis added]

13 In the Staff Report containing the Best Practices, the Staff stated that, as a threshold predicate to
14 "a healthy wholesale market for electricity," it was necessary that

15 "...merchants, developers, and other non-utility generators must
16 have confidence that the resource acquisition process is a fair,
17 transparent, and non-discriminatory process." [Staff Report, page
18 5] [emphasis added]

19 In that regard, as Electric Generating Alliance ("EGA") witness Ben C. Trammel testified in
20 response to a series of questions posed by Chairman Gleason, the viability of a competitive
21 procurement process and the willingness of members of the competitive market to participate in
22 that process is directly contingent upon their perception as to the integrity and fairness of the
23 process:

24 " Q. Is the delineation of the monitor in the Best Practices
25 sufficient enough that you would be willing to compete [with APS]
26 with the present rules that the monitor has?

27 A. Under the current best procurement practices?

28 Q. Yes.

A. Those rules at this time are not sufficiently complete or
detailed enough for us to make that judgment. That is why we
believe that we would like to have an opportunity to explore these
further refinements in the IRP docket.

Q. So until we get the IRP docket, you are not -- you don't
want to compete then [with APS] for APS's building then?

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A. Well, I couldn't give you an outright answer because it's a collection of factors and assurances on how a specific solicitation is going to be conducted.

But I'm trying to be forthcoming in terms of generally how we make our decision as to whether or not we are going to compete or not. And when the odds are that someone [other than the utility] is going to get an award and we know how the award is going to be determined, then generally we decide to compete. If we think that the odds are stacked against us or our colleagues are winning an award, then generally we would choose to sit out." [Tr. 82, l. 1-23] [emphasis added]

The Yuma RFP proceeding cast a "cloud" over how APS conducted that particular power resource procurement. As RUCO witness Ahearn testified

"And it does make sense to me that participants in a process, you know, if we want to encourage their participation of the process, have to be made to believe that the process is a wholesome one. And as matter of first impression, this Yuma case led naturally to a lot of questions about, you know, what actually transpired.

I think the series of questions raised by the participants, the bidders, were ones that could have been expected, the ones that are sort of intuitive. And in the process of developing in through that hearing process, in the aftermath of Yuma, I think a lot of very interesting testimony was put on the record and I think that helped inform the Commission as they developed their Best Practices." [Tr. 167, l. 7-21] [emphasis added]¹¹

While APS, RUCO and the Commission Staff would like to believe that the prospect of a subsequent prudence review will sufficiently motivate APS to fully comply with the Best Practices,¹² and thereby assure prospective bidders from the competitive market in advance that future power resource procurements will be fair and transparent, such assurance cannot and should not be assumed by the Commission.

As RUCO witness Ahearn acknowledged during cross-examination, the prospect of a future prudence review of APS within the context of a rate case does not undo the harm to the

¹¹ In this regard, it should be noted that EGA witness Trammel testified that EGA did not own any generating assets in Arizona at the time of the Yuma RFP, and it did not participate in the Yuma RFP proceeding. Thus, his indication that EGA is not requesting that the Best Practices be made mandatory as to APS as of this point in time must be considered and weighed in the context of an absence of any actual experience upon the part of EGA with respect to what occurred in connection with the Yuma RFP. See Tr. 69, l. 14, - Tr. 70, l. 13.

¹² See, for example, Ex. APS-2, page 4, l. 3-5; Ex. RUCO-2, page 2, l. 18-20; Ex. S-1, page 6, l. 4-5; Tr. 182, l. 25 - Tr. 183, l. 14 and Tr. 184, l. 14-16.

1 competitive market that could result from a previous failure by APS to comply with the Best
2 Practices:

3 “And it does make sense to me that participants in a process, you
4 know, if we want to encourage their participation of the process,
5 have to be made to believe that the process is a wholesome one.”
6 [Tr. 167, l. 7-11] [emphasis added]

7 * * *

8 Q. You made a very important statement a moment ago in the
9 context of that last response, and that was the importance in your
10 view of bidders being able to believe in the integrity of the process;
11 do you recall that?

12 A. Yes, sir.

13 Q. Let me now direct your attention, again on page 2 of your
14 rebuttal testimony, to the statement that begins line 17 and read as
15 follows: “ACC Staff proposes an administrative type of the RFP
16 process through the utilization of a regime of the Best Practices,
17 with the backstop of cost disallowance in an after-the-fact prudence
18 determination as the ultimate discipline to utility self-dealing.”

19 Do you see that?

20 A. Yes, sir.

21 Q. Let me give you a hypothetical. Let’s assume that APS
22 has conducted an RFP and it turns out they did not adhere to the
23 Best Practices and there is an after-the-fact prudence determination
24 with the prospect of the cost disallowance; how does that address
25 the concerns of those bidders in that RFP who felt APS engaged in
26 self-dealing and they have not decided to deal with APS in the
27 future as a result of that? How does that after-the-fact prudence
28 determination address that problem?

A. It doesn’t.” [Tr. 168, l. 2-Tr. 169, l. 2] [emphasis added]

Moreover, as Commission Staff witness Keene acknowledged during cross-examination, this prospect is a matter which should be of concern to the Commission.

“ Q. Were you in the hearing room during my cross-examination of Mr. Ahearn a few moments ago?

A. Yes, I was.

Q. Did you hear his response to my question, how does the prospect of a prudence determination after the fact address bidders who were dissatisfied with the way APS conducted a given RFP?

MR. ROBERTSON: Would you reread that question, please.

(Requested portion of the record read.)

THE WITNESS: I'm afraid I don't recall his response.

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Q. BY MR. ROBERTSON: His response was it does not. Let me ask you against the background of that response, does Staff have any suggestion as to how to address that situation?

A. Well, I do think that the possibility of an after-the-fact prudence review could well affect APS's so that the issue does not arise.

Q. Other than that potential for affecting APS's behavior, do you believe the prospect of an after-the-fact prudence determination in any other way addresses what the adverse impact would be on bidders?

A. I can't think of anything right off. But I do think that it's not something minor. I think that the prospect of that prudence determination is a major factor, it most likely would affect APS's behavior.

Q. To the extent it did not and there were bidders who were dissatisfied with the way APS conducted an RFP, and that it had not complied with the Best Practices and thus they chose not to bid again in the future, do you think that is something that the Commission should be concerned about?

A. Yes." [Tr. 183, l. 15-Tr. 184, l. 23] [emphasis added]

Against this background, it is manifest that a modification of Decision No. 67744 requiring that the Best Practices shall be mandatory as to APS for purposes of the "self-build" moratorium is consistent with the public interest. Further, it is also required by it, if that "confidence" in the resource acquisition process on the part of "merchants, developers and other non-utility generators" discussed in the Staff Report is to be assured. In that regard, the following exchange between Chairman Gleason and Staff witness Keene is worth noting because of an unarticulated assumption upon which the ultimate conclusion reached between them is predicated.

"BY CHMN. GLEASON:

[Q.] Now, I will get into further legal trouble here. If the bidder complains to the Commission, the Commission really has no jurisdiction -- if the bidder is not a public service corporation, the Commission really has no jurisdiction over that bidder, is that correct, as you understand it?

A. That would be correct, not over the bidder but over APS.

Q. Yeah, well, we had jurisdiction over APS, but we have no jurisdiction over the bidder, so it would be very difficult for this Commission to satisfy the bidder since we have no jurisdiction over that entity. Is that --

A. Well, I was thinking like when a customer files a complaint against a utility, we might not have the - the

1 Commission might not have the jurisdiction over the customer, but
2 they have jurisdiction over the utility. It may force the utility to
3 provide some remedy to the customer or the bidder in this case.

4 Q. Okay. Thank you for that answer.” [Tr. 187, l. 22-Tr.
5 188, l. 15] [emphasis added]

6 The unarticulated assumption in the preceding exchange is that the Commission would
7 have authority (i) to institute an Order to Show Cause proceeding or entertain a complaint filed
8 by a bidder against APS, because of its failure to comply with the Best Practices, and (ii) to
9 impose a legal sanction against APS or fashion a remedy for the complaining bidder. However,
10 a serious legal question exists as to whether the Commission could pursue any of these courses
11 of action because APS failed to comply with the Best Practices, which at present are voluntary in
12 nature. Whereas, if the Best Practices were to be made mandatory as to APS for purposes of the
13 “self-build” moratorium, then the Commission clearly would have legal authority to pursue any
14 of the aforesaid courses of action because of a failure by APS to comply with the Best Practices;
15 and, APS would have added incentive to comply with the same in all respects.

16 E. Decision No. 67744 Can Be Modified In Such A Manner At This Time To Allow For
17 The Prospect of Future Changes To The Best Practices.

18 APS witness Dinkel and Commission Staff witness Keene have each suggested that the
19 Best Practices not be made mandatory pending further action by the Commission in Docket No.
20 E-00000E-05-0431 with regard to the subject of integrated resource planning¹³ & ¹⁴,
21 respectively. However, as Ms. Keene acknowledged during cross-examination, there is no
22 assurance at this time that the Commission will include the Best Practices within such integrated
23 resource planning rules as it might adopt, or that it would make the Best Practices mandatory.¹⁵
24 Meanwhile, pending a determination by the Commission in that regard, the risk to the integrity
25 and fairness of the competitive procurement process discussed in Section V (D) above would
26 remain.

27 As Mesquite witness Theodore E. Roberts noted during his testimony on redirect
28 examination, this hiatus and resulting uncertainty need not exist. More specifically, the

¹³ See, for example, Tr. Ex. APS-2, page 4, l. 7-20 and page 5, l. 3-6.

¹⁴ See, for example, Tr. Ex. S-1, page 6, l. 7-9; Ex. S-2, page 3, l. 11-18.

¹⁵ See Tr. 185, l. 1-Tr. 186, l. 12.

1 Commission could enter an order in this proceeding providing that the Best Practices shall be
2 mandatory to APS for purposes of the “self-build” moratorium “unless and until otherwise
3 ordered” by the Commission.¹⁶ A provision of that nature would immediately address the
4 potential for abuse of the “self-build” moratorium discussed in Subsection V (D) above, and
5 concurrently preserve for the Commission the latitude and flexibility to prospectively apply to
6 the “self-build” moratorium any future regulatory decisions which might affect the status or
7 nature of the Best Practices. Moreover, it would be consistent with Paragraph 80 of the
8 Settlement Agreement, which contemplates the possibility of subsequent Commission directives
9 superseding or supplementing APS’ Secondary Procurement Protocol.

10 F. Conclusion

11 For the reasons discussed in Subsections V (A) through V (E) above, Decision No. 67744
12 should be modified to provide that the Best Practices shall be mandatory as to APS for purposes
13 of the “self-build” moratorium.

14 VI.

15 **WITH MODIFICATION, APS’ PROPOSED BI-FURCATED OR “TWO-PATH”**
16 **APPROACH FOR PROCESSING AN APPLICATION FOR AN EXCEPTION**
17 **TO THE “SELF-BUILD” MORATORIUM IS REASONABLE**

18 APS has proposed that the Commission adopt a bi-furcated approach for processing an
19 application for an exception to the “self-build” moratorium.¹⁷ Mesquite believes that APS’
20 proposal is constructive, provided that the Commission includes two (2) procedural features
21 which APS has not suggested. First, APS should be required to provide notice to all persons and
22 entities who submitted proposals in response to the RFP then in question that APS has filed a
23 request pursuant to Paragraph 74 for an exception to the “self-build” moratorium; and, such
24 notice must be provided contemporaneously with APS’ filing of the request for an exception.
25 During cross-examination, APS witness Dinkel testified that APS would propose to notify “any
26 bidder that I’m [APS] still engaged in negotiations with,” but that APS was not proposing that all
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28 ¹⁶ See Tr. 55, l. 24-Tr. 57, l. 3.

¹⁷ See, for example, Ex. APS-1, page 7, l. 4-21; Ex. APS-2, page 9, l. 10.5-13.5; Tr. 133, l. 17-24.

1 persons or entities who had submitted proposals be provided notice of the request for an
2 extension.¹⁸ Mesquite firmly believes APS' position on the issue is indefensible, inasmuch as
3 bidders who were eliminated by APS from its "short list" may be the very type of bidder who
4 could identify the "material concerns" with the conduct of the RFP that APS' 180-day timeframe
5 or "path" is intended to address.¹⁹ Moreover, requiring APS to provide written notice to all
6 persons or entities who submitted bids in response to the RFP which is the subject of the
7 exception request would not impose an undue burden on APS, if any burden at all. Rather, it
8 would continue and reinforce that transparency and fairness which are central to the Best
9 Practices.

10 Second, the Commission should establish a procedure which affords recipients of such
11 notice the opportunity(ies) to (i) request intervention in the docket established to process APS'
12 exception request, (ii) submit comments during the period of time the Commission's Hearing
13 Division is determining which "path" or timeline and procedure shall be used for purposes of
14 processing and deciding APS' exception request, and (iii) appeal to the Commission the Hearing
15 Division's determination as to which "path" or timeline and procedure is to be used. During
16 cross-examination, APS witness Dinkel appeared to indicate that APS would not object to
17 persons or entities who became aware of an exception request (i) seeking intervention, and (ii)
18 submitting comments during the 30-day period in which the Commission's Hearing Division was
19 considering which timeline or "path" was appropriate for processing the exception request.²⁰
20 However, he took no position on the question of whether parties granted intervention should
21 have a right to appeal to the Commission the determination by the Commission's Hearing
22 Division as to which timeline or "path" is to be used.²¹ Given that one of APS' proposed
23 timelines or "paths" contemplates an evidentiary hearing on the merits of an exception request,
24 and the other does not, Mesquite submits that fundamental due process requires that an

25 ¹⁸ See, for example, Tr. 124, l. 16 – Tr. 125, l. 23.

26 ¹⁹ See Tr. 121, l. 24 – Tr. 123, l. 7 for APS witness Dinkel's perception of "material concern," which he defines as
27 "... any substantive issue that affects the specific direction [i.e. the subject of the
28 request for exception] the Company [APS] is looking to take." [Tr. 122, l. 23-
24]

²⁰ See, for example, Tr. 125, l. 24 – Tr. 126, l. 17; Tr. 128, l. 7 – Tr. 131, l. 15.

²¹ See Tr. 130, l. 14 – Tr. 132, l. 1 and Tr. 132, l. 24 – Tr. 133, l. 6.

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1 intervenor have the opportunity to request from the Commission itself a final ruling on the
2 process to be used.

3 Mesquite does not have a position on the question of whether APS' proposed 90-day and
4 180-day timelines are appropriate in connection with the two (2) "paths," or whether longer or no
5 time periods might be more appropriate, as suggested by the Commission's Staff.²²

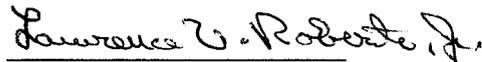
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VII.
CONCLUSION

For the reasons discussed in Sections II through VI above, the Commission should issue
an opinion and order in this proceeding modifying Decision No. 67744 so as to provide that the
Best Practices adopted in Decision No. 70032 shall be mandatory as to APS for purposes of the
"self-build" moratorium "unless and until otherwise ordered by the Commission."

Dated this 31st day of March 2008.

Respectfully submitted,



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Original and thirteen (13) copies of the
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of March 2008 to:

Docket Control Division
Arizona Corporation Commission
1200 West Washington Street
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A copy of the same served by e-mail or first
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²² See Ex. S-2, page 2, l. 7-11.

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