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Arizona Corporation Commission

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OCT 28 2009

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**IN THE MATTER OF THE SALE AND
TRANSITION BY ARIZONA PUBLIC
SERVICE TO ELECTRICAL DISTRICT
NO. 3 OF CERTAIN ELECTRICAL
FACILITIES IN PINAL COUNTY
PURSUANT TO A.R.S. § 40-285(A) AND
FOR DELETION FROM ITS
CERTIFICATE OF CONVENIENCE
AND NECESSITY CERTAIN AREAS OF
PINAL COUNTY**

DOCKET NO. E-01345A-08-0426

**JOINT RESPONSE OF ARIZONA
PUBLIC SERVICE COMPANY
AND
ELECTRICAL DISTRICT No. 3 OF
PINAL COUNTY IN OPPOSITION
TO MOTIONS OF PINAL ENERGY
TO INTERVENE OUT-OF-TIME
AND TO REOPEN RECORD**

Arizona Public Service Company ("APS") and Electrical District No. 3 of Pinal County ("ED3") submit this joint response, pursuant to Arizona Administrative Code ("AAC") R14-3-106(K), in opposition to the motions of Pinal Energy, LLC ("Pinal Energy") to intervene out of time and to reopen the record. Pinal Energy, an industrial customer currently served by ED3 and located within ED3's existing boundaries, (1) fails to offer any cause for its having failed to pursue intervention in a timely manner, (2) fails to state any facts tending to show that it is "directly and substantially affected by the proceedings" as required by AAC R14-3-105(A), and (3) fails to state any basis for its untimely request to reopen the administrative record, relying instead on unfounded and unadorned speculation concerning matters that are either already amply covered in the record, outside the scope of this proceeding or outside the Arizona Corporation Commission's ("Commission") jurisdiction. In fact, conspicuously absent from Pinal Energy's "Response" to Staff's opposition to its motions was *any* attempt to justify its failure to intervene by the March 2009 deadline, or its having waited instead to appear for the first time until six months after the close of hearings and several

1 months after the matter was first entertained by the Commission at an Open Meeting –
2 the primary points raised in Staff’s Response. For these reasons, Pinal Energy’s
3 motions must both be denied.

4 **A. Pinal Energy’s Untimely Motion to Intervene Should Be Denied**

5 Pinal Energy’s Motion to Intervene should be denied on two grounds. First,
6 Pinal Energy does not even attempt to show any reasonable cause for failing to seek
7 intervention until six months after the close of the hearing in this proceeding. The
8 Commission’s Rules of Practice and Procedure (“Rules”) require that an application to
9 intervene “shall be served and filed by an applicant at least five days before the
10 proceeding is called for hearing” (AAC R14-3-105(B)). Second, Pinal Energy’s
11 inexcusably belated motion fails to show that Pinal Energy is a person “directly and
12 substantially affected by the proceedings,” eligible to intervene under AAC R14-3-
13 105(A).

14 **1. Pinal Energy’s Motion to Intervene Is Inexcusably Untimely**

15 Pinal Energy’s sole basis for seeking to intervene over six months after the close
16 of the evidentiary hearing in this matter, held April 2, 2009, and during continued
17 Commission deliberations on a proposed Opinion and Order, is that it “only recently
18 became aware of this docket” – a point Pinal Energy did not even attempt to defend in
19 its October 26 “Response” to the Utilities Division of Arizona Corporation
20 Commission’s (“Staff”) opposition to its Motion to Intervene, notwithstanding Staff’s
21 direct refutation of this allegation. As Staff accurately described, ED3 and APS took
22 extraordinary measures to notify all affected customers of the transactions contemplated
23 in this docket. Commission-approved public notice of this proceeding was published in
24 two newspapers of general circulation in Pinal County, the *Maricopa Monitor* (on
25 February 27, 2009) and the *Casa Grande Dispatch* (on March 3, 2009). APS and ED3
26 made joint presentations on the proposed transaction under review in this proceeding to
27 the Maricopa City Council in July and October 2008. APS held publicly noticed town
28 meetings in Stanfield on October 23, 2008 and in Maricopa on October 28, 2008. ED3

1 continuously posted notice to its customers and a description of the proposed
2 transaction and realignment of service territories on its website concerning the proposed
3 transfer of facilities and realignment of service territories since the filing of APS's
4 Application and ED3's Motion to Intervene in August 2008.

5 The Commission's Rules require that motions to intervene be filed and served
6 "at least five days before the proceeding is called for hearing" (A.A.C. R14-3-105(B)),
7 and make no specific provision for intervening out of time. Looking to the resolution
8 of similar questions under the Arizona Rules of Civil Procedure (as required by A.A.C.
9 R14-3-216), Pinal Energy's Motion to Intervene out-of-time mentions no circumstances
10 amounting to excusable neglect, and states no basis on which the Commission could or
11 should excuse Pinal Energy's failure to seek intervenor status in a timely manner.
12 Intervention out of time typically requires both "a strong showing of entitlement" and
13 "justification for failure to seek intervention sooner." *See In re One Cessna 206*
14 *Aircraft*, 118 Ariz. 399, 401-402 (1978) and cases therein cited. Pinal Energy's motion
15 offers nothing remotely approaching the kind of showing required to justify its
16 proposed late intervention here. Accordingly, its motion should be denied.

17 **2. Pinal Energy Is Not "Directly and Substantially Affected"**

18 Pinal Energy is a customer of ED3 and has been throughout these proceedings.
19 It has never been a customer of APS and therefore is not one of the customers whose
20 transfer to ED3 is proposed in this matter. Pinal Energy's motions indicate that, like
21 many industrial customers, it would like a lower electric rate. The impact of the
22 wholesale power purchase agreement between APS and ED3 on ED3's rates, which is
23 the matter that Pinal Energy seeks to raise before the Commission if it is permitted to
24 intervene, is not at issue in this proceeding, nor should it be. As the Commission
25 summarized in *Desert Hills Water Co.*, Dec. No. 69575, Dkt. No. W-02124A-07-0212
26 (May 21, 2007) at ¶ 24, "the approval process is limited to the necessary hearings and
27 order to make sure that the transfer would not leave persons without service by the
28

1 utility or the municipality.” In no case should that process extend to Federal Regulatory
2 Energy Commission (“FERC”) regulated wholesale purchase power transactions.

3 Moreover, even if the matters that Pinal Energy proposes to raise were within the
4 appropriate scope of this proceeding, allowing those matters to be raised at this point
5 would “unduly broaden” the issues already taken up on the record in this proceeding, in
6 contravention of A.A.C. R14-3-105(B). For this reason as well, Pinal Energy’s
7 untimely motion to intervene should be denied.¹

8 **B. Pinal Energy’s Motion to Reopen the Record Lacks Merit**

9 Pinal Energy’s Motion to Reopen the Record seeks to expand the scope of this
10 proceeding to address five subjects (Pinal Energy Motion to Reopen at 2-4). As
11 discussed in detail below, these subjects are either already fully reviewed on the
12 existing record -- to which Pinal Energy’s motion makes no reference -- or generally
13 irrelevant to the issues raised in this proceeding.

14 1. Pinal Energy first asserts (Motion to Reopen at 2) that “[a]dditional
15 evidence is needed to evaluate (i) why ED3 agreed to a new [FERC-regulated
16 wholesale] power-supply agreement at the same time it sought [at the Arizona
17 Corporation Commission] to purchase APS assets and acquire APS customers; and (ii)
18 whether the new agreement motivated APS to make these sales and transfer its
19 jurisdictional customers.” Rather than submit two untimely motions to this
20 Commission, Pinal Energy should have reviewed APS’s publicly available filing with
21 FERC in FERC Docket No. ER08-514-000 (available on the FERC website), which
22 explains the circumstances leading up to the negotiation of the current power supply
23 arrangements between APS and ED3, and participated in the resolution of that
24 proceeding. Pinal Energy’s idle speculation concerning some imaginary, unexplained
25 *quid pro quo* for the proposal APS and ED3 have placed before the Commission is
26 unfounded.

27 _____
28 ¹ Of course, as a customer of ED3, Pinal Energy can raise its concerns to the Commission at the Open Meeting during which this matter will be discussed, if it chooses this time to do so.

1 2. Pinal Energy next asserts (Motion to Reopen at 2-3) that “[a]dditional
2 evidence is needed to evaluate the effect of the new APS Power Contract on ED3’s
3 largest customer and other large customers.” The record already contains ample
4 evidence concerning ED3’s power supply costs and its retail rates, notwithstanding that
5 the APS Power Contract with ED3 is the subject of a FERC proceeding that has already
6 been resolved and that will not be affected by the outcome of this proceeding.

7 3. Pinal Energy next asserts (Motion to Reopen at 3) that “[a]dditional
8 evidence is needed concerning the prudence of the [APS-ED3 wholesale power supply]
9 agreement and APS’s unwillingness to renegotiate its terms.” The reasonableness of
10 the sale of power to a political subdivision is a matter determined by FERC that has no
11 bearing on the proceeding before this Commission. Moreover, the rates in place under
12 the APS-ED3 agreement are considerably below those proposed by APS in its FERC
13 filing in FERC Docket No. ER08-514-000, demonstrating that the current wholesale
14 arrangement, entered into in February 2008, is the result of arm’s length negotiations
15 entirely unrelated to the transactions at issue in this docket, which transactions were
16 agreed-upon well before the current APS/ED3 wholesale power agreement came into
17 being.

18 4. Pinal Energy next asserts (Motion to Reopen at 3) that “[a]dditional
19 evidence is needed concerning the current and expected rate impact of the new APS
20 Power Contract on all of ED3’s current customers and all of those that would be
21 transferred from APS.” Rate impacts of ED3’s wholesale power supply on customers
22 who would be transferred from APS to ED3 in the event that the Commission approves
23 the proposed transaction in this proceeding have already been amply explored on the
24 record.

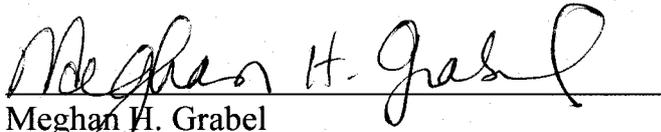
25 5. Finally, Pinal Energy asserts (Motion to Reopen at 3-4) that “additional
26 evidence is needed to allow the Commission to evaluate ED3’s present financial health
27 and determine whether it would be prudent to transfer APS’ customers to what may be
28 a financially troubled utility.” ED3’s “financial health” has been the subject of

1 extensive scrutiny during the hearings in this proceeding and was reviewed in detail by
2 Staff in its Staff Report in this proceeding. Pinal Energy offers no basis beyond bald
3 speculation for any further review of this subject.

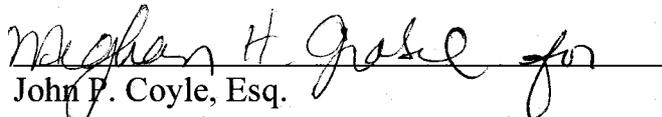
4 CONCLUSION

5 For the foregoing reasons, APS and ED3 request that the Commission deny Pinal
6 Energy's motion to intervene out-of-time and motion to reopen record in all respects
7 and with prejudice.

8 RESPECTFULLY SUBMITTED this 28th day of October, 2009.

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