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AZ CORP COMMISSION  
Arizona Corporation Commission

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IN THE MATTER OF THE GENERIC  
INVESTIGATION OF THE EX PARTE  
COMMUNICATION RULES

DOCKET NO. ACC-00000A-00-0030

COMMENTS OF ARIZONA PUBLIC  
SERVICE COMPANY

Arizona Public Service Company ("APS" or "Company") welcomes the opportunity to present to the Arizona Corporation Commission ("Commission") its preliminary observations and comments ("Comments") on A.A.C. R14-3-113. APS would state at the outset that any proposed change to this rule must meet each of two equally important criteria: 1) does it improve the flow of credible and relevant information to the Commission; and 2) does it preserve the integrity of the Commission's current hearing process and the associated due process rights accorded by that process?

These Comments are necessarily general in nature because the Commission's Procedural Order of February 9, 2000 did not indicate any specific suggested changes to this regulation, and APS is itself unaware of the background surrounding the "concerns/objectives" expressed in that Procedural Order (although it will respond to each such "concern/objective" in these Comments). Therefore, APS reserves its right to submit additional comments if and when such specific changes are proposed.

1 **I. INTRODUCTION**

2 A.A.C. R14-3-113 addresses "Unauthorized Communications" and nowhere even uses the  
3 term "ex parte." Nevertheless, the regulation is almost universally referred to and known as the  
4 "Ex Parte Rule," and thus APS will adopt this convention in its Comments.

5 A communication to a Commissioner, hearing officer, or decision-making Staff member  
6 has to meet three tests in order to be a prohibited "ex parte" communication. It must be "off the  
7 record." It must concern the "substantive merits." And it must be in a "contested proceeding."  
8 A.A.C. R14-3-113 (C) (1). Note that a communication that is not on the record can be "ex parte"  
9 even if the other parties are physically present. Note also that inquiries about procedural matters  
10 (scheduling, continuances, Staff assignments, hearing location, etc.) can be on an ex parte basis.  
11 Finally, the concept of "ex parte" communications is limited to what the Ex Parte Rule calls  
12 "contested proceedings," a distinction the significance of which will become apparent.

13 In evaluating the appropriateness of potential changes to the Ex Parte Rule, it is perhaps  
14 helpful to keep in mind the origin of the rule and the problem it was meant to address. The Ex  
15 Parte Rule was passed by the Commission in late 1985 and became effective January 3, 1986. It  
16 was in direct response to *State ex rel. Corbin v. Arizona Corporation Commission*, 143 Ariz. 219,  
17 693 P.2d 362 (App. 1984). *State ex rel. Corbin* held that a party's constitutional right to  
18 procedural due process, including the prohibition against ex parte communications, applied in  
19 rate case hearings. In doing so, the Court of Appeals expanded its earlier holding applying the  
20 constitutional ban on ex parte communications to a Commission proceeding involving the  
21 interpretation of a certificate of convenience and necessity. *See Western Gillette, Inc. v. Arizona*  
22 *Corporation Commission*, 121 Ariz. 541, 592 P.2d 375 (App. 1979).

23 In addition to constitutional due process concerns, ex parte communications raise issues  
24 under Article 6 of the Administrative Procedures Act ("APA"), which was specifically held to be  
25 applicable to the Commission in *State ex rel. Corbin*. All adjudicative decisions in a "contested  
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1 case" must be based solely on the record. A.R.S. § 41-1063. A "contested case" is:

2 any proceeding, including rate making, price fixing, and licensing,  
3 in which the legal rights, duties or privileges of a party are required  
4 or permitted to be determined by an administrative agency after the  
opportunity for an administrative hearing. [A.R.S. § 41-1001 (4)]

5 The term "record" is also defined by statute. In a "contested case," the "record" includes the  
6 following:

- 7 1. pleadings, motions, and interlocutory rulings;
- 8 2. evidence received or considered during hearing;
- 9 3. matters officially noticed prior to or during hearing;
- 10 4. objections, offers of proof, etc., made during hearing;
- 11 5. the hearing officer's recommended order; and
- 12 6. all staff memoranda provided either to the Commission or to the hearing  
officer in conjunction with the proceeding.

13 A.R.S. §§ 41-1061 and 41-1062. *See also* A.A.C. R14-3-109 (Z). This would appear to allow  
14 little room for ex parte communications unless they occurred before or during the hearing, thus  
15 permitting the communication in question to be subsequently noticed in accordance with the  
16 provisions of A.R.S. § 41-1062 (A) (3) and A.A.C. R14-3-109 (Z).

## 17 18 **II. "CONCERNS/OBJECTIVES" NOTED BY THE PROCEDURAL ORDER**

19 The Procedural Order of February 9, 2000 identified a list of nine "concerns/objectives"  
20 that have apparently spawned this investigation into the Ex Parte Rule. Some of these  
21 "concerns/objectives" can be easily resolved using the current language of the Ex Parte Rule,  
22 while others will prove more problematic. APS will therefore address each of the Procedural  
23 Order's stated "concerns/objectives."

24  
25 *Concern/Objective No. 1 - To protect and maintain the decision-making process of the*  
26 *Commission*

1           The Company certainly supports this objective. However, it believes this goal to be ill-  
2 served by weakening the existing Ex Parte Rule.

3  
4           *Concern/Objective No. 2 - To assure the preservation of the due process rights of all parties to*  
5           *Commission proceedings*

6           The best way to preserve the due process rights of parties is to discourage to the greatest  
7 degree possible all ex parte communications in “contested cases” – especially those that can not  
8 be properly noticed on the record during or prior to the evidentiary hearing.

9  
10           *Concern/Objective No. 3 - To maintain Commission Staff’s status as an independent party to*  
11           *Commission proceedings*

12           In the most literal sense, this is not a realistic objective . Staff is neither “independent”  
13 nor a “party” in the same sense as, say, an intervening customer or competitor of a utility. Staff  
14 works for the Commission and is an extension of that agency. Staff has no pecuniary or other  
15 recognized legal interest in the outcome of a Commission proceeding. It can not appeal any  
16 decision of the Commission. That being said, APS strongly supports a Staff that is free of  
17 political influence and capable of providing unbiased advice to the Commission. However,  
18 Staff’s “independence” is, in that sense, not dependent on the Ex Parte Rule.

19           The Company also believes that Staff is already treated as a “party” for purposes of the  
20 current Ex Parte Rule and should continue to enjoy such status. The particular source of an ex  
21 parte communication is not determinative of its prejudice to the due process rights of the other  
22 participants to a “contested case.”

23  
24           *Concern/Objective No. 4 - Provide for an opportunity to gather and discuss information in order*  
25           *to make an informed decision*

1           The Commission's rules already provide such an opportunity. It's called a hearing. In the  
2 following section of its Comments, APS will suggest codifying an existing practice that allows  
3 individual Commissioners and the Commission to gather information prior to the hearing itself.  
4 In addition, information gathered at or prior to and properly noticed at the hearing can be later  
5 discussed with the presiding hearing officer or even later during the Commission's Open Meeting  
6 deliberations on a particular matter. If all else fails, the hearing itself can always be reopened.  
7 But attempts by Commissioners to gather information outside the parameters of the Ex Parte Rule  
8 should not be encouraged.

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10 *Concern/Objective No. 5 - The Hearing Officer should establish whether or not the [Ex Parte]*  
11 *rule applies at the time the matter is set for hearing so that all the parties are aware of their*  
12 *obligations pursuant to Commission rule.*

13           The present Ex Parte Rule is crystal clear. The Rule applies when the matter has been set  
14 for hearing – not before and not after. A.A.C. R14-3-113 (B). Thus, there is no need for the  
15 hearing officer to “establish” anything in this regard.

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17 *Concern/Objective No. 6 - Establish clear time frames so that the parties know when the [E]x*  
18 *[P]arte Rule applies*

19           The Ex Parte Rule is already unambiguous on this point. See APS Comment to  
20 Concern/Objective No. 5.

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22 *Concern/Objective No. 7 - Allow ex parte communications on the record (by the filing of a letter*  
23 *outline matters discussed that would be docketed and sent to all parties) until sometime shortly*  
24 *before the matter is taken up by the full Commission*

25           As discussed in the next section of the Company's Comments, any such suggestion is  
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1 unnecessary in the majority of non-“contested cases” before the Commission. In “contested  
2 cases,” the above procedure is essentially what is called for at present under A.A.C. R14-3-113  
3 (D) (1). APS hastens to add that this docketed ex parte information can not considered by the  
4 Commission as “evidence” unless offered and accepted as such during the hearing. A.A.C. R14-  
5 3-109 (Z). Moreover, the current Ex Parte Rule’s procedures are intended to accommodate the  
6 occasional inadvertent ex parte contact – not circumvent the hearing process. APS is concerned  
7 that the use in the Procedural Order of the word “allow” is meant to imply that ex parte  
8 communications would to be sanctioned, even encouraged, in “contested cases,” APS believes  
9 this both unwise and fraught with significant due process concerns.

10  
11 *Concern/Objective No. 8 - Provide for a period of time in which any other party to a proceeding*  
12 *would have the opportunity to discuss items that have been taken up in an ex parte discussion that*  
13 *was held just prior to the close of the permissible ex parte window.*

14 APS has two concerns of its own here. First, there is an implication that there is no  
15 opportunity to “discuss” items taken up in a prior ex parte conversation if the first conversation  
16 were held earlier than “just prior to the close . . . .” At present, a party is always afforded the  
17 opportunity to contest an ex parte communication. See A.A.C. R14-3-113 (D) (2). Second, the  
18 concept of a “permissible ex parte window” suggests a legitimacy to such communications that  
19 APS finds disturbing when applied to “contested cases.”

20  
21 *Concern/Objective No. 9 - The [E]x [P]arte rule should not mandate [ex parte] meetings; instead*  
22 *it should be solely within the province of a Commissioner as to whether or not to meet. This*  
23 *would include requests to come in and discuss matters that were [previously] discussed between*  
24 *a Commissioner and another party.*

25 APS agrees that an Ex Parte Rule should not mandate ex parte communications, even as a  
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1 remedy to an earlier ex parte communications. Two wrongs do not make a right. However, when  
2 an ex parte communication is nevertheless received in the context of a “contested case,” the  
3 offended party must be given a fair opportunity to challenge such communication. This may be  
4 nothing more than an opportunity to respond on the record. In other instances, the offended party  
5 should be accorded the opportunity to cross-examine the offending party and to present formal  
6 rebuttal testimony.

### 7 **III. PROTECTING THE HEARING PROCESS FOR “CONTESTED CASES”**

8 In its Comments above, the Company has gone to great lengths to distinguish between  
9 contested adjudicative proceedings and the myriad of other matters that require Commission  
10 decision-making. Both of the Arizona judicial decisions discussed above dealt with Commission  
11 proceedings in which a hearing was held. This is also an explicit component of the definition of a  
12 “contested case” for purposes of the APA. *See* A.R.S. § 41-1001 (4). Similarly, the  
13 Commission’s own current Ex Parte Rule does not apply in cases decided by the Commission  
14 without a hearing. Even in those circumstances where a hearing is required, the existing  
15 Commission Ex Parte Rule clearly does not “kick in” until the hearing has actually been  
16 scheduled, which is usually some considerable time after the matter was filed and docketed. This  
17 permits ample opportunity for any off-record discussions to be properly noticed on the record.

18 In every instance, the obvious intent of the Courts, the Legislature and the Commission  
19 has been to preserve the sanctity and integrity of the public hearing process. It is only during  
20 these hearings that all parties are equally and contemporaneously afforded all the protections of  
21 procedural due process (opportunity to call witnesses, cross-examine opposing witnesses, object  
22 to improper evidence, proffer exhibits, etc.). If when confronted with a recommended order, the  
23 Commission believes that the hearing record is insufficient to allow it to make a reasoned  
24 decision in a “contested case,” the ultimate remedy is to reopen the hearing and take additional  
25 evidence – not attempt to supplement the existing record with ad hoc ex parte communications.  
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1           These same legal and policy considerations obviously do not apply in situations where  
2 there has neither been nor will there be an evidentiary hearing. Moreover, the Commission's Ex  
3 Parte Rule is, by its own terms, inapplicable to Commission rule making proceedings, and by  
4 virtue of A.A.C. R14-3-101, also inapplicable to general investigative matters such as the instant  
5 docket. In all these circumstances, the Commission is granted somewhat greater latitude to  
6 receive and utilize information through more informal processes. These would include what  
7 would, in a "contested case," be considered ex parte communications.

8           APS hopes that as the Commission begins to formulate its proposed changes, if any, to  
9 the current Ex Parte Rule, it appreciates and takes into consideration the full extent of its present  
10 ability to receive ex parte information under a wide variety of circumstances. Even in "contested  
11 cases" that have been set for hearing, APS suggests that the Commission may wish to formalize  
12 the practice begun by Chairman Kunasek of sending out Commissioner-initiated data requests to  
13 the parties prior to the hearing. This innovation has great potential for allowing an individual  
14 Commissioner to become well-briefed on potential issues in anticipation of the hearing itself and  
15 allowing for a more informed consideration of the record after the hearing. Individual  
16 Commissioners should also take full advantage of their unlimited access under the Ex Parte Rule  
17 to the presiding hearing officer, who even in their absence can inquire into areas of interest during  
18 the course of the hearing.

19           On the other hand, the Commission ought to be very cautious before making any change  
20 to the Ex Parte Rule that would have the unintended effect of undermining the integrity of the  
21 Commission's hearing process in "contested cases." This process has steadily evolved over the  
22 past twenty years out of the abuses and excesses of the late 70's and early 80's. The  
23 Commission's Hearing Division is well-respected by all who appear before it, and if given the  
24 opportunity, it can more than adequately develop and investigate any line of factual inquiry  
25 during the hearing that may be of interest to a specific Commissioner or the Commission.  
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IV. CONCLUSION

The Company hopes that these Comments have proven helpful in this early stage of the Commission's investigation into changes in the Ex Parte Rule. APS will be strongly supportive of any change that will aide the decision-making process so long as due process protections are not compromised. To that end, it anticipates and looks forward to a continuing participation in this docket as more specific proposals surface.

RESPECTFULLY SUBMITTED this 20th day of March, 2000.

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