



0000119645

Commission

BEFORE THE ARIZONA CORPORATI

RECEIVED

DOCKETED

CARL J. KUNASEK  
CHAIRMAN

JIM IRVIN  
COMMISSIONER

WILLIAM A. MUNDELL  
COMMISSIONER

1999 AUG -4 P 1:45

AUG 04 1999

AZ CORP COMMISSION  
DOCUMENT CONTROL

DOCKETED BY  
*Yem*

IN THE MATTER OF THE APPLICATION OF ) DOCKET NO. E-01345A-98-0473  
ARIZONA PUBLIC SERVICE COMPANY FOR )  
APPROVAL OF ITS STRANDED COST )  
RECOVERY. )

IN THE MATTER OF THE FILING OF ) DOCKET NO. E-01345A-97-0773  
ARIZONA PUBLIC SERVICE COMPANY OF )  
UNBUNDLED TARIFFS PURSUANT TO A.A.C. )  
R14-2-1602 et. seq. )

IN THE MATTER OF THE COMPETITION IN ) DOCKET NO. RE-00000C-94-0165  
THE PROVISION OF ELECTRIC SERVICES )  
THROUGHOUT THE STATE OF ARIZONA. ) **POST-HEARING BRIEF OF THE ARIZONA**  
 ) **TRANSMISSION DEPENDENT UTILITY GROUP**  
 )

Pursuant to Arizona Corporation Commission ("Commission") Procedural  
Order dated June 23, 1999, the Arizona Transmission Dependent Utility Group<sup>1</sup>  
("ATDUG"), by its undersigned counsel, herewith files its post-hearing brief  
and analysis regarding the proposed settlement. We incorporate by reference  
our prior comments on specific clarifications of the settlement that could be  
addressed in the Commission's order and urge their continued consideration.

In our opening statement, we suggested that the success of the  
settlement effort would rest on the flexibility of the parties to it,

<sup>1</sup> Aguila Irrigation District, Ak-Chin Indian Community, Buckeye Water  
Conservation and Drainage District, Central Arizona Water Conservation  
District, Electrical District No. 3, Electrical District No. 4, Electrical  
District No. 5, Electrical District No. 7, Electrical District No. 8,  
Harquahala Valley Power District, Maricopa County Municipal Water District  
No. 1, McMullen Valley Water Conservation and Drainage District, Roosevelt  
Irrigation District, City of Safford, Tonopah Irrigation District, Wellton-  
Mohawk Irrigation and Drainage District.

1 especially Arizona Public Service Company ("APS"), in acceding to adjustments  
2 that would be necessary to overcome infirmities and objections. That need  
3 for flexibility was demonstrated at the hearing. This brief addresses two  
4 significant legal barriers to successful completion of this process arising  
5 from the deficiencies of the settlement document and evidentiary gaps in the  
6 hearing record. We believe these barriers can be overcome if APS is willing  
7 to compromise. First, the brief will analyze whether the Commission can  
8 legally approve APS's proposed settlement as an exercise in finality.  
9 Second, we will analyze infirmities in the record that need to be addressed.

#### 10 LEGAL ANALYSIS OF THE PROPOSED APS SETTLEMENT

11 Under Arizona law, the Commission does not have the legal authority to  
12 approve the proposed APS settlement as drafted because (1) to do so would be  
13 an unconstitutional delegation of authority; and (2) there is insufficient  
14 evidence to support an approval/decision by the Commission.

15 Article XV of the Constitution of Arizona creates the Corporation  
16 Commission, and expressly grants them power and authority independent of the  
17 State legislature. In fact, in Arizona Corp. Commn. v. State ex rel. Woods,  
18 171 Ariz. 286, 830 P.2d 807 (1992), the Arizona Supreme Court referred to the  
19 Commission "... as a separate, popularly-elected branch of state government."  
20 Further, Section 3 of Article XV grants the Commission general authority and  
21 power to "...make reasonable rules, regulations, and orders, by which [public  
22 service corporations] shall be governed in the transaction of business within  
23 the State."

24 However, similar to other branches of government, the Commission does  
25 not have unrestrained authority to regulate as it wishes. Relevant to this

1 proceeding, the courts have interpreted Commission authority to be bound by  
2 two pertinent restraints. First, the Commission may not relinquish or  
3 delegate its constitutional responsibilities and authority. See: State v.  
4 Marana Plantations, 75 Ariz. 111, 252 P.2d 87 (1953). Second, a Commission  
5 decision must be supported by substantial evidence, not arbitrary, nor  
6 otherwise unlawful. See: Simms v. Round Valley Light & Power, 80 Ariz. 145,  
7 294 P.2d 378, 384 (1956). Because the APS settlement both (1) proposes to  
8 unconstitutionally delegate Commission authority by binding present and  
9 future Commissions, and (2) is not supported by the requisite substantial  
10 evidence, under Arizona law, the Commission does not have the legal authority  
11 to approve the proposed APS settlement as drafted.

12 I. THE COMMISSION DOES NOT HAVE THE LEGAL AUTHORITY TO APPROVE THE APS  
13 SETTLEMENT BECAUSE THE PROPOSAL FORFEITS THIS COMMISSION'S, AS WELL  
14 AS FUTURE COMMISSIONS', CONSTITUTIONAL OVERSIGHT AUTHORITY.

15 The Commission cannot legally approve the APS settlement due to the  
16 proposal's removal of governing law for implementation of the settlement, and  
17 the proposal's requirement to negate and/or transfer the Commissions' present  
18 and future constitutional duties and responsibilities. As stated by the  
19 Arizona Supreme Court, "It is fundamental that the legislative power thus  
20 entrusted cannot be relinquished nor delegated." State v. Marana  
21 Plantations, 75 Ariz. 111, 252 P.2d 87, 89 (1953); citing Tillotson v.  
22 Frohmler, 34 Ariz. 394, 271 P. 867; Hernandez v. Frohmler, 68 Ariz. 242,  
23 204 P.2d 854; and Loftus v. Russel, 69 Ariz. 245, 212 P.2d 91. Further, "It  
24 is a well established theory that a legislature may not delegate its  
25 authority to private persons over whom the legislature has no supervision or

1 control." Industrial Commission of Arizona v. C&D Pipeline, 125 Ariz. 64,  
2 607 P.2d 383 (1979). Neither can this Commission. The settlement's  
3 unequivocal intent is to expressly and blatantly side-step a "right of  
4 review" by the Commission.

5 The following analysis will examine the language of the settlement, and  
6 testimony given at the hearing, which supports the conclusion that the  
7 proposed APS settlement is constitutionally defective.

8 First, the intent to side-step Commission regulatory authority is  
9 evidenced by the testimony of Jack Davis. In referring to section 7.1, Mr.  
10 Davis said, "[T]his settlement would override what the rules would say."  
11 Testimony of Jack Davis, pg. 232, ln. 10. He then admitted that it applied  
12 to both present and future rules. Mr. Davis' reasoning for this was to  
13 provide "finality" to all the parties of the agreement. Testimony of Jack  
14 Davis, pg. 234, ln. 9. In essence, Mr. Davis confirmed that the settlement  
15 is proposing to block legislative function (ratemaking), including the  
16 Commission's constitutional oversight responsibility, in order that the  
17 parties to the agreement might have "finality."

18 Second, to the extent that the Commission retains regulatory authority  
19 over ongoing monopolistic services, it must retain regulatory oversight.  
20 Indeed, that is the sole reason regulated monopolies are tolerated in  
21 Arizona. See: Arizona Corporation Commission v. Arizona Water Company, 111  
22 Ariz. 74, 523 P.2d 505, 507 (1974); quoting Davis v. Arizona Corporation  
23 Commission, 96 Ariz. 215, 218, 393 P.2d 909, 911 (1964). Collection of  
24 stranded costs is a regulatory construct, in effect the regulatory tail  
25 wagging the competition dog. Public policy demands that this activity not

1 proceed on its own. The Commission must retain oversight concerning the  
2 collection of stranded costs. The dollars involved are huge. The  
3 methodology and process are educated guesswork. The APS-projected customer  
4 losses are not born out in practice anywhere else. The distribution of  
5 electricity remains a regulated service and collection of charges piggybacked  
6 on that service must also.

7 The principle is best illustrated in Industrial Commission of Arizona  
8 v. C&D Pipeline, 125 Ariz. 64, 607 P.2d 383 (1979), where the  
9 constitutionality of certain sections of the Arizona Public Works Act were  
10 questioned. Specifically, it was unclear whether the statute delegated  
11 authority to the Industrial Commission or to private groups. The court held  
12 that the delegation of authority was unlawful because the statute was bereft  
13 of any Commission discretion or oversight. Id., at 386. Citing, Baughn v.  
14 Gorrell & Riley, 311 Ky. 537, 224 S.W.2d 436 (1949) (holding that the statute  
15 would have been constitutionally defective were it not for the existence of  
16 discretion in the public agency).

17 The proposed settlement is in direct conflict with this statement of  
18 the law. In section 1.3 of the settlement, the parties recognize that it may  
19 become necessary to make modifications as circumstances require. However,  
20 rather than allowing the Commission to oversee or implement any modifications  
21 as is their constitutional responsibility, the settlement requires that the  
22 parties "address such matters in good faith." See also, section 7.8.

23 Moreover, in section 3.5, after requiring a Commission promise to  
24 effectively guarantee stranded and regulatory assets cost recovery, the  
25 settlement states, "Such promise by the Commission shall survive the

1 expiration of the Agreement and shall be specifically enforceable against  
2 this and any future Commission." This concept is broadened to cover the  
3 entire settlement agreement in section 7.1. Thus, no matter what the  
4 circumstance, present or future, the Commission may not change, modify,  
5 alter, or even seek to reopen this agreement, regardless of what is in the  
6 public's interest. This inherently contradicts the purpose of a popularly  
7 elected branch of government. In fact, APS's own witness, Dr. John Landon  
8 stated, "I don't think it's legally possible to close the door as to what  
9 some future Commission and some future regulated entity [relationship might  
10 occur]." Testimony of John H. Landon, pg. 555, ln. 23.

11 Adding insult to injury, section 6.2 states, "[T]he Commission shall  
12 [not] take or propose any action which would be inconsistent with the  
13 provisions of this Agreement." Further, this requirement is supported by  
14 Jack Davis' testimony. "No, we would not support reopening the settlement."  
15 Testimony of Jack Davis, pg. 277, ln. 13. "Yes, [if the Commission was  
16 presented with a complaint by customers to lower rates and then entertained  
17 that complaint], it would be inconsistent with the provisions of this  
18 agreement." Similar provisions are found in sections 2.8 and 4.2.

19 The intent of the settlement is clear. Regarding any issues which may  
20 arise in the implementation of this settlement, Commission oversight is not  
21 only discouraged, it is forbidden. The settlement proposes that the  
22 settlement parties (APS) will decide how implementation and modifications  
23 will take place. In that regard, the Commission, by approving the  
24 settlement, would forfeit its constitutional authority, thus transferring  
25 that authority to the settlement parties (APS).

1 In summary, the proposed settlement basically reads so as to say that  
2 APS will agree to certain "beneficial" terms so long as APS is exempt from  
3 statutes, orders, and rules which may affect implementation of the  
4 settlement. In addition, the Commission, current or future, cannot in any  
5 way change, alter, or modify this settlement, regardless of public interest.  
6 Thus, the combination of the improper vesting of legislative function in  
7 private parties with the denial of the Commission's right to review makes the  
8 proposed APS settlement an unconstitutional delegation of power and  
9 responsibility. Consequently, the Commission does not have the legal  
10 authority to approve the settlement as drafted.

11 II. THE COMMISSION DOES NOT HAVE THE LEGAL AUTHORITY TO APPROVE THE  
12 PROPOSED APS SETTLEMENT BECAUSE THE RECORD LACKS THE SUBSTANTIAL  
13 EVIDENCE NECESSARY TO SUPPORT SUCH A DECISION.

14 Legally, the Commission cannot approve the proposed APS settlement as  
15 drafted because such a decision would not be supported by substantial  
16 evidence. Under Arizona law, "[T]he courts cannot disturb the commission's  
17 ultimate conclusion or findings of fact in arriving at such conclusion when  
18 the same is supported by substantial evidence, is not arbitrary, or is not  
19 otherwise unlawful." Simms v. Round Valley Light & Power, 80 Ariz. 145, 155,  
20 294 P.2d 378, 384 (1956). Conversely, where a Commission decision is *not*  
21 supported by substantial evidence, then such a decision can and will be  
22 overruled by the courts. Moreover, if the Commission "refuses to consider  
23 *all the relevant factors*, the fair value of the properties cannot have been  
24 determined under our Constitution (emphasis added)." Arizona Corp. Comm. v.  
25 Arizona Water Co., 85 Ariz. 198, 202, 335 P.2d 412, 414 (1959) (vacating

1 Commission decisions on fair value where Commission did not consider all  
2 relevant factors). See also, City of Tucson v. Citizens Util. Water Co., 498  
3 P.2d 551 (1972) (holding Commission's determination to be arbitrary): Thus,  
4 a Commission decision cannot legally stand unless the decision is supported  
5 by substantial evidence, including a consideration of all relevant factors.  
6 In support of the proposed APS settlement, all parties seem content to rely  
7 on APS for raw statistical information, including the APS-generated figures  
8 used in the proposed recovery of stranded costs, rate reductions, and  
9 transfer of generation assets. Simply put, a settlement document is not a  
10 substitute for substantial evidence. Nor is cheerleader-style testimony an  
11 adequate record. The following analysis will review the facts on record,  
12 showing that the proposed settlement is not supported by substantial  
13 evidence, nor does it consider all relevant factors.

14 First, this proceeding is similar to City of Tucson v. Citizens Util.  
15 Water Co., 498 P.2d 551 (1972). In that case, the court stated the issue as  
16 "whether the ... court could, as a matter of law, find that there was no  
17 substantial evidence presented to the Commission which would justify the  
18 conclusion." Id., at 553. In its rationale, the court noted "[t]he  
19 Commission's determination is based solely on [the City's witness's]  
20 testimony." Id., at 555. Similarly, in our case, the entire record is  
21 replete with witnesses, both those for the settlement and those opposing the  
22 settlement, affirming the fact that they themselves did not perform any  
23 independent analysis, study, or audit of the APS-generated figures. In fact,  
24 Jack Davis, president of APS, stated that he was not aware of any other type  
25

1 of cost causation study performed, other than that done by APS. Rebuttal  
2 Testimony of Jack Davis, pg. 1070, ln. 18.

3 Further, the City of Tucson court stated, "[T]he determination made by  
4 [the City's witness] and adopted by the Commission had to reflect a  
5 consideration of all relevant factors." 498 P.2d at 555. Later concluding  
6 that since the Commission relied solely on the City's witness, ignoring input  
7 from Citizens, then "the evidence offered by [the City's witness] was not  
8 substantial in that he failed to consider all relevant factors." Id. Here,  
9 APS' witness Alan Propper admitted that the APS numbers were based on 1996  
10 data and included cost adjustments to 1998 but not revenue adjustments to  
11 match. That misstep alone is a missing relevant factor. Moreover, Mr.  
12 Propper was attempting to explain away APS' failure to use 1998 data, another  
13 missing relevant factor.

14 In addition, many competitors of APS were not involved in the  
15 negotiations of the settlement. It is more than simply coincidence that APS,  
16 after an attempt at settlement in November of 1998, in which consumers and  
17 competitors were involved in negotiations, failed or "forgot" to invite these  
18 parties to the negotiation table. Perhaps that is why neither Commission  
19 staff nor others were in a position to provide the critical analysis this  
20 record lacks. Faced with this same type of deficiency, the City of Tucson  
21 court held that "the Commission's determination of the fair value rate base  
22 was arbitrary and unsupported by the evidence." Id., at 556. On the current  
23 state of this record, the Commission should find that the APS proposed  
24 settlement, supported by only APS' own analysis, is unsupported by  
25 substantial evidence.

1 By contrast, the Simms v. Round Valley Light and Power case is helpful  
2 as a tool of comparison, and as an example. 80 Ariz. 145, 294 P.2d 398  
3 (1956). In that fair value rate case, it was noted that "[t]he accounting  
4 and engineering staff of the Commission made an investigation, including  
5 analysis of the books of the company." Id., at 148. Consequently,  
6 Commission staff submitted a fair value of \$127,017.08. The Company, after  
7 its own analysis, submitted the fair value as \$175,374.27. In contrast to  
8 this settlement, the company presented expert witness at trial stating the  
9 company estimate of \$175,374.27 is low, and should in truth be \$193,947. Id.  
10 Having before it both estimations, the Commission concluded "a fair figure  
11 lies somewhere between these limitations... in the sum of \$136,667.00." Id.,  
12 at 383. Because the Commission was presented with substantial evidence,  
13 presented with all relevant factors, the Arizona Supreme Court held, "We are  
14 unable to say ... that the Commission's finding of fair value is without  
15 substantial support in the evidence." Id., at 385.

16 APS takes the position that their calculation of stranded costs had  
17 already been approved by the Commission. Testimony of Jack Davis, pg. 341,  
18 ln. 9. If that were true, why had the Commission scheduled a hearing on the  
19 subject and delayed implementation of its Competition Rules until the  
20 stranded cost issues were settled?

21 In this proceeding, had the proposed APS settlement negotiations  
22 included competitors, in which they were encouraged to perform their own  
23 independent study and analysis of APS's figures, and such were entered in the  
24 instant record, then the Commission could make a determination based on  
25 substantial evidence, including a consideration of all relevant factors. Had

1 Commission staff done so, a like result could pertain. The record shows that  
2 did not happen. Thus, the Commission cannot legally approve the APS proposed  
3 settlement in that it lacks substantial evidence.

4 The same defect applies to the settlement provisions that require the  
5 Commission to make certain findings prefatory to APS seeking Exempt Wholesale  
6 Generator (EWG) status from the Federal Energy Regulatory Commission. There  
7 is no support in the record for APS' proposed findings and they cannot be  
8 made.

#### 9 CONCLUSION AND RECOMMENDATIONS

10 Because the proposed APS settlement delegates the Commission's  
11 constitutional authority, and the record lacks the necessary substantial  
12 evidence, including a consideration of all relevant factors, to support the  
13 settlement, the Commission does not have the legal authority to approve the  
14 proposed APS settlement as drafted. To address the cure, we recommend that:

15 1. The record remain open to allow staff to file a post-hearing report  
16 and independent analysis of the stranded cost numbers generated by APS using  
17 1998 revenue as well as cost data, with a reasonable time thereafter for  
18 comment by the parties to the proceeding;

19 2. APS stipulate to Commission oversight of the stranded cost  
20 collection process and related matters in the settlement to ensure protection  
21 of ratepayers;

22 3. The process of evaluating findings necessary for EWG status for a  
23 future affiliate be the subject of a separate proceeding in a new docket once  
24 the affiliate is formed; and  
25

1           4. The foregoing and other necessary clarifications be the subject of  
2 an order finally acting on the proposed settlement to which APS and the other  
3 parties to the settlement and intervenors have concurred on the record.

4           5. If APS fails to concur in this additional process, APS'  
5 inflexibility can only be rewarded by an order establishing a new hearing  
6 schedule for the stranded cost and unbundled tariff issues.

7           RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of August, 1999.

8  
9           ARIZONA TRANSMISSION DEPENDENT  
10           UTILITY GROUP

11           By 

12           Robert S. Lynch  
13           Attorney at Law  
14           340 E. Palm Lane, Suite 140  
15           Phoenix, Arizona 85004-4529

16           Original and 18 copies of the  
17           foregoing filed this 4<sup>th</sup> day  
18           of August, 1999 with:

19           Docket Control  
20           Arizona Corporation Commission  
21           1200 West Washington Street  
22           Phoenix, Arizona

23           Copies of the foregoing mailed  
24           this 4<sup>th</sup> day of August, 1999,  
25           to:

26           Service List for Docket No. E-01345A-98-0473

27             
28           \_\_\_\_\_