



0000120783

MUNGER CHADWICK, P.A.

ATTORNEYS AT LAW
A PROFESSIONAL LIMITED LIABILITY COMPANY
NATIONAL BANK PLAZA
333 NORTH WILMOT, SUITE 300
TUCSON, ARIZONA 85717
(520) 721-1900
FAX (520) 747-1550

JOHN F. MUNGER
MARK E. CHADWICK
MICHAEL S. GREEN
JOAN L. JAKEL

RECEIVED
AZ CORP COMMISSION
MAR 23 4 07 PM '98

OF COUNSEL
LAWRENCE V. ROBERTSON, JR.
ADMITTED TO PRACTICE IN:
ARIZONA, COLORADO, MONTANA,
NEVADA, TEXAS, WYOMING,
DISTRICT OF COLUMBIA

MICHAEL M. RACY
GOVERNMENT RELATIONS DIRECTOR
(NON-LAWYER)
DIRECT LINE: (520) 850-4646

PHOENIX APPOINTMENT ADDRESS:
5225 N. CENTRAL
SUITE 235
PHOENIX, ARIZONA 85012-1452
(602) 230-1850

DOCKET CONTROL

OF COUNSEL
MILLER, LA SOTA AND PETERS, P.L.C.
PHOENIX, ARIZONA

OF COUNSEL
OGARRIO Y DIAZ ABOGADOS
MEXICO, D.F., MEXICO
(LICENSED SOLELY IN MEXICO)

March 23, 1998

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

Attn: Ms. Carmen Madrid
Docket Control

Re: Docket No. RE-00000C-94-0165
Competition in the Provision of Electric Services
Throughout the State of Arizona

Dear Ms. Madrid:

Enclosed are the original and ten copies of the Arizona School Board Association's Reply Brief in the matter referenced above.

If you have any questions, please feel free to contact me at (520) 721-1900.

Sincerely,

Lawrence V. Robertson, Jr.

LVR: alk
Enclosures

Arizona Corporation Commission
DOCKETED

MAR 23 1998

DOCKETED BY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BEFORE THE ARIZONA CORPORATION COMMISSION

JIM IRVIN
COMMISSIONER – CHAIRMAN
RENZ D. JENNINGS
COMMISSIONER
CARL J. KUNASEK
COMMISSIONER

IN THE MATTER OF THE COMPETITION IN) DOCKET NO. RE-00000C-94-0165
THE PROVISION OF ELECTRIC SERVICES) REPLY BRIEF OF ARIZONA
THROUGHOUT THE STATE OF ARIZONA.) SCHOOL BOARDS ASSOCIATION

INTRODUCTION

Pursuant to the Chief Hearing Officer's directive, the Arizona School Boards Association ("ASBA") hereby submits its Reply Brief in connection with the "stranded cost" hearings recently concluded in the above-captioned proceeding. As requested by Mr. Rudibaugh, the discussion set forth below specifically addresses the issue identified in the Commission's December 1, 1997 Procedural Order and December 11, 1997 First Amended Procedural Order which is of substantial interest to ASBA. That issue is Issue No. 6, and the question of "who, if anyone, should be excluded from paying for stranded costs?"

DISCUSSION

Introduction:

As indicated in the pre-filed direct testimony [Exhibit No. ASBA-1] of its sponsoring witness, Mr. Broderick, and in its Initial Brief, ASBA is seeking a variance or exemption for its members from any "stranded costs" recovery procedures which may be adopted by the Commission as a result of the recently concluded "stranded costs" hearings. Based upon an examination of the Initial Briefs filed by other participants in those hearings, it appears that no

1 other party has addressed ASBA's specific request on the merits. Rather, it has been addressed
2 indirectly through general statements to the effect that all distribution customers of an Affected
3 Utility should bear the burden of "stranded costs" recovery, regardless of the source of their
4 generation service.
5

6 Based on the cross-examination of Mr. Broderick, ASBA assumes there are some specific
7 criticisms of its request yet to be articulated in writing. Inasmuch as Mr. Rudibaugh's directive
8 provides for all Reply Briefs to be filed simultaneously, ASBA will not have an opportunity to
9 respond to such criticisms and arguments as may appear in the Reply Briefs of other hearing
10 participants. Accordingly, in this Reply Brief it will endeavor to anticipate and respond to certain
11 criticisms based upon the cross-examination Mr. Broderick received.
12

13 Restatement of ASBA's Request and Rationale:

14 As noted above, ASBA is seeking a variance or exemption for its members from any
15 "stranded costs" recovery procedures which the Commission may adopt as a result of the recent
16 hearings. The authority upon which this request is predicated is A.A.C.R14-2-1615(C) of the
17 Commission's Electric Competition Rules. The factual bases for the request are (i) the "public
18 interest" nature and effect of the activities of ASBA's members, and (ii) the circumstances
19 surrounding public school financing in the state of Arizona. These have been addressed in some
20 detail in ASBA's Initial Brief and the testimony of Mr. Broderick.
21

22 As Mr. Broderick indicated, ASBA is not proposing that the economic effect of its
23 proposed variance or exemption be borne by other classes of rate-payers on Affected Utility
24 systems which serve ASBA members. Hence, there would not be any cost-shifting between or
25 within customer classifications. Rather, ASBA envisions that the economic burden resulting from
26 a grant of its request would be borne either by the Affected Utility in question or its shareholders.
27
28

1 [See, for example, Tr. 2774, line 25 - Tr. 2775, line 7; and Tr. 2789, lines 10-16.] ASBA's
2 preference is that the Affected Utility first look to the cost mitigation opportunities available to
3 it as a means for absorbing that economic effect, and it recommends that any Commission rule
4 on the subject so provide. In that regard, as Mr. Broderick testified, ASBA believes the potential
5 for such mitigation is substantial in relation to the relief proposed to be accorded to ASBA's
6 members. [See, for example, Tr. 2807, line 1 - Tr. 2808, line 14.] However, should mitigation
7 efforts not fully offset the economic effect of the variance or exemption, the remainder would
8 be borne by the Affected Utility's shareholders.
9

10
11 As further testified to by Mr. Broderick, ASBA's rationale in this latter regard is
12 attributable in part to property tax reductions experienced in recent years by Arizona's electric
13 utilities, which have been accompanied by related reductions in the revenue sources available to
14 Arizona's public schools. [See, for example, Tr. 2763, lines 11-19; and Tr. 2775, lines 4-12.]
15 In addition, ASBA believes that the Commission has the authority to provide that an Affected
16 Utility's shareholders will bear an economic cost of this nature, if the Commission concludes that
17 the "public interest" would be served thereby.¹
18

19 The "Entering Wedge" Argument:

20 Several of the hearing participants who cross-examined Mr. Broderick utilized the "where
21 do you draw the line" tactic. [See, for example, Tr. 2770, line 23 - Tr. 2771, line 13.] In other
22 words, where does the Commission draw the line on granting a variance or exemption from
23 "stranded costs" recovery responsibility once it grants ASBA's request? This is also known as
24

25
26 ¹ Illustrative of the array of powers available to the Commission in connection with "public
27 interest" considerations is the Commission Staff's observation that "the Commission's broad
28 constitutional ratemaking and classification authority provide the Commission the necessary
ability to require divestiture." [See Commission Staff's Initial Brief, page 10, lines 12-16.]

1 the "entering wedge" argument in opposition to a given proposal or proposition. Examples of
2 other types of potential applicants used during this cross-examination technique included
3 churches, synagogues, mosques, non-profit corporations and other charitable organizations, and
4 cities and towns.
5

6 Quite properly, Mr. Broderick did not attempt to draw such a line. [See, for example, Tr.
7 2766, lines 2-17; and Tr. 2773 lines 7-13.] That role is for the Commission to perform. But the
8 fact that such a line may need to be drawn at some future date, and the fact that serious thought
9 will be necessary as to when and where to draw that line, is not a credible basis for arguing that
10 a particular request for a variance or exemption should not be granted. Rather, that request
11 should be considered and ruled upon on the basis of its particular merits.
12

13 That is precisely what ASBA is asking the Commission to do in this instance. In that
14 regard, ASBA believes that it has identified the relevant authority and "public interest"
15 considerations to support a granting of its request. In addition, it would note that the economic
16 effect of such a grant upon the Affected Utilities and/or their respective shareholders is likely to
17 be moderate, given (i) the relatively numerically small customer base which ASBA's members
18 represent, and (ii) the fact that any "stranded costs" recovery period selected will span several
19 years.
20

21 The "Public" Versus "Private" School Distinction:

22 During the hearings, one participant asked Mr. Broderick whether private schools should
23 also be considered for exemption from "stranded costs" recovery. Mr. Broderick's initial response
24 was in the negative. [See Tr. 2830, line 1 - Tr. 2831, line 3.] However, upon further reflection
25 in response to a question from Commissioner Kunasek, he indicated he had not had an
26 opportunity to discuss that particular point with ASBA in advance of testifying. Hence, he was
27
28

1 unaware of ASBA's position. [See Tr. 2831, line 21 - Tr. 2832, line 17.]
2

3 ASBA would not object to a Commission decision to exempt private schools from
4 "stranded costs" recovery. In any event, it believes that deference to the Commission on that
5 question is appropriate. In that regard, ASBA would note that the funding sources and
6 circumstances of its members and private schools are not the same and would suggest such
7 differences be considered in connection with any decision on ASBA's request.²

8 The Illegal "Preference" Argument:
9

10 Counsel for one of the hearing participants endeavored to suggest during his cross-
11 examination of Mr. Broderick that ASBA's request in effect would constitute a "preference" in
12 violation of A.R.S. §40-334. [See Tr. 2790, line 17 - Tr. 2794, line 18.] Mr. Broderick's
13 response was to the effect that the treatment ASBA is proposing was analogous to an allocation
14 of a portion of the cost of service, which is a function frequently performed by the Commission
15 in a rate proceeding incident to a discharge of its jurisdictional authority. In Mr. Broderick's
16 view, there was nothing about ASBA's request that was "out of line" with traditional and
17 accepted ratemaking practice. [See Tr. 2795, lines 10-15.] In any event, that is a matter for the
18 Commission to resolve in connection with its consideration of ASBA's request. For, as A.R.S.
19 §40-334(c) provides: "The Commission may determine any question of fact arising under this
20 section."
21

22 Ultimately, the question of whether or not a grant of ASBA's request would constitute a
23 lawful exercise of the Commission's authority will require an analysis of the factual
24

25 ² In addition, and with reference to the preceding discussion of the "entering wedge"
26 argument, ASBA would also note that the funding sources and circumstances surrounding its
27 members differ significantly from those applicable to churches, synagogues, mosques, non-profit
28 corporations and other charitable organizations. They also differ substantially from a number of
other state agencies, and from cities and towns.

MUNGER CHADWICK, P.L.C.
ATTORNEYS AT LAW
NATIONAL BANK PLAZA
333 NORTH WILMOT, SUITE 300
TUCSON, ARIZONA 85711
(520) 721-1900

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

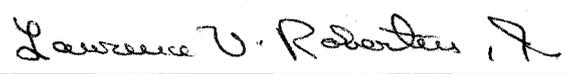
circumstances surrounding that request. ASBA submits that both traditional and charter public schools are in a class by themselves for purposes of consideration of and action upon its specific request.³ Thus, a grant of its request for a variance or exemption from "stranded costs" recovery would not result in an unlawful preference or advantage, nor an unreasonable discrimination. One or more other hearing participants may contend for a contrary finding. That is a matter for the Commission to resolve.

CONCLUSION

In view of the testimony presented by its sponsoring witness, and the discussion and arguments set forth in its Initial Brief and this Reply Brief, ASBA believes that its request for a variance or exemption from "stranded costs" recovery should be granted pursuant to A.A.C.R14-2-1615(C).

DATED: March 23, 1998

RESPECTFULLY SUBMITTED,



Lawrence V. Robertson, Jr.
MUNGER CHADWICK, P.L.C.
National Bank Plaza
333 N. Wilmot, Suite 300
Tucson, Arizona 85711
Attorney for Arizona School
Boards Association

³ As Mr. Broderick testified, both traditional and charter public schools are intended to be included in ASBA's request. [See Tr. 2830, lines 10-13.]

Certificate of Service

I hereby certify that I have this 23rd day of March, 1998, served the foregoing Reply Brief on the following parties or counsel of record in this proceeding who filed Initial Briefs, by mailing a copy thereof, properly addressed with first class postage prepaid to:

Betty Pruitt
Arizona Community Action Assoc.
202 E. McDowell Road, Suite 255
Phoenix, AZ 85004-4535

Bradley Carroll
Tucson Electric Power Company
Post Office Box 711
Tucson, AZ 85702

Craig Marks
Citizens Utilities Company
2901 N. Central Ave., Ste. 1660
Phoenix, AZ 85012

C. Webb Crockett
Fennemore Craig
3003 N. Central Ave., Ste. 2600
Phoenix, AZ 85012-2913

Robert S. Lynch
340 East Palm Lane, Suite 140
Phoenix, AZ 85004-4529

Paul Bullis, Chief Counsel
Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

Albert Sterman
Arizona Consumers Council
2849 East 8th Street
Tucson, AZ 85716

Michael Grant
Gallagher & Kennedy
2600 North Central Avenue
Phoenix, AZ 85004

Suzanne Dallimore
Attorney General's Office
1275 West Washington Street
Phoenix, AZ 85007

Lex Smith/Michael Patten
Brown & Bain PC
2901 North Central Avenue
Phoenix, AZ 85001-0400

Steve Wheeler/Thomas M. Mumaw
Snell & Wilmer
One Arizona Center
400 East Van Buren Street
Phoenix, AZ 85004-0001

William Sullivan
Martinez & Curtis PC
2716 North 7th Street
Phoenix, AZ 85006

Douglas Nelson
Douglas C. Nelson PC
7000 N. 16th St., Suite 120-307
Phoenix, AZ 85020

Barbara Klemstine
Arizona Public Service Company
Law Department, Station 9909
Post Office Box 53999
Phoenix, AZ 85072-3999

Teena Ingram Wolfe
RUCO
2828 North Central Avenue,
Suite 1200
Phoenix, AZ 85004

Walter W. Meek
Arizona Utility Investors
Association
2100 North Central Avenue,
Suite 210
Phoenix, AZ 85004

Rick Gilliam
Land and Water Fund of the
Rockies
2260 Baseline Road, Suite 200
Boulder, CO 80302

Norman J. Furuta
Department of the Navy
900 Commodore Drive, Bldg. 107
San Bruno, CA 94066-5006

Barbara Sherman
120 East McKellips Road
Tempe, AZ 85281

Loretta Humphrey
Principal City Attorney
Post Office Box 27210
Tucson, AZ 85726-7210

By: Lawrence V. Robertson, Jr.
Lawrence V. Robertson, Jr.