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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF THE APPLICATIONS OF ARIZONA PUBLIC SERVICE COMPANY FOR APPROVAL OF SCHOOLS AND GOVERNMENT RENEWABLE PROGRAM AND FOR APPROVAL OF ITS RENEWABLE ENERGY STANDARD AND TARIFF IMPLEMENTATION PLAN FOR 2011

DOCKET NO. E-01345A-10-0166
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ARIZONA PUBLIC SERVICE COMPANY'S COMMENTS RELATED TO THE COMMISSION'S PROPOSED REOPENING OF DECISION NO. 72022 PURSUANT TO A.R.S. § 40-252.

Pursuant to the Procedural Order issued in this matter on January 7, 2011, Arizona Public Service Company ("APS" or "Company") hereby submits written comments related to the Arizona Corporation Commission's ("Commission") proposed reopening of and modifications to Decision No. 72022 (December 10, 2010), the final decision rendered on APS's 2011 RES Implementation Plan.

APS strongly opposes reopening Decision No. 72022 for the purposes articulated at the January 4, 2011 Staff Open Meeting. As APS understands it, the Commission's proposed modifications are not in response to any change of conditions that has arisen since the final decision in this matter was entered or in consideration of any other new circumstance not contemplated when the Commission finally approved APS's 2011 RES Implementation Plan. Rather, the Commission seeks to reopen a final decision solely to effectuate a contemplated post-election change in Commission policy.

As the following Memorandum of Points and Authorities makes clear, such a purpose would misuse the authority entrusted the Commission under Section 40-252 and create tremendous uncertainty as to the finality of any Commission order, causing severe hardship to regulated entities, like APS, that are legally obligated to comply with the Commission's final decisions. Without a required showing of changed conditions or similar circumstance to justify the disturbance of a final order, a public service corporation would have little comfort that any Commission decision rendered is "final." Lacking such certainty, such companies would be immobilized as a matter of practice, unable to plan for (let alone finance) the future. The reopening of a final Commission decision solely in response to a policy shift impairs the public interest and is thus legally impermissible. The better course would be to consider the Commission's intended policy changes prospectively as part of APS's 2012 RES Implementation Plan, due to the Commission July 1 of this year – just a handful of months from now.

As will be explained by the witnesses that APS intends to present at hearing, the Company does not agree with every aspect of Decision No. 72022. Nevertheless, APS supports that Decision as a whole and sees no new circumstance that did not exist at the time the Decision was approved that would justify its reopening as in the public interest. Brief witness summaries for each of these witnesses are included with these comments.

MEMORANDUM OF POINTS AND AUTHORITIES

By statute, the Commission is vested with the power to "at any time, upon notice to the corporation affected, and after opportunity to be heard as upon a complaint, rescind, alter, or amend any decision made by it." *See* Ariz. Rev. Stat. § 40-252. While

broad, that power is not without judicially enforceable constraints. First, the Commission cannot modify any final Commission order without following a process that allows the affected corporation notice and the opportunity to be heard "as upon complaint" – language that invokes the procedural requirements specified in Arizona Revised Statute sections 40-246 through 40-249. As part of this required process, among other things, the affected corporation must have ten days of actual notice prior to a hearing and be offered the opportunity to present evidence (either in person or through an attorney), and the proceedings must be reported stenographically by a Commission-appointed court reporter. *See* Ariz. Rev. Stat. §§ 40-246 to -249.

The law also constrains the purpose for which the Commission may reopen a proceeding and modify a final order. Arizona courts have made clear that "the exercise of the Commission's power [pursuant to Section 40-252] requires showing *due cause* for such action – *an affirmative showing* that the public interest would thereby be benefited." *Ariz. Corp. Comm. v. Tucson Ins. and Bonding Agency*, 3 Ariz. App. 458, 463, 415 P.2d 472, 477 (Ct. App. 1966) (emphasis added). Given the public's clear interest in the finality of Commission decisions, the "public interest" analysis underpinning a proposed Section 40-252 amendment to a final order is much different from that at issue in the original proceeding. *See James P. Paul Water Company v. Ariz. Corp. Comm.*, 137 Ariz. 426, 430, 671 P.2d 404, 408 (1983) (vacating a Commission amendment to a Certificate of Convenience and Necessity ("CC&N") rendered under Section 40-252). To preserve the integrity of the Commission's final orders and out of respect for a corporation's need to act in reliance on Commission decisions, Section 40-

252 modifications must be made judiciously and only under appropriate circumstances, such as where conditions have changed since the original order or other circumstances exist that were not present in the proceedings which led to the order being modified. *See id.,* 137 Ariz. at 429, 671 P.2d at 407 (reopening a final CC&N decision is legally impermissible absent an evidentiary showing that the holder cannot supply service at reasonable cost to customers as contemplated at the time of the grant). *See also Application of Trico Electric Cooperative, Inc.* 92 Ariz. 373, 377 P.2d 309 (1962) (same).

The Arizona Supreme Court's discussion in *James P. Paul Water Company* well illustrates the fundamental principles underlying this rule. In that case, the Commission had granted James P. Paul Water Company ("Paul") a CC&N to serve various sections of Maricopa County, finding that such a grant served the public interest. *See id.*, 137 Ariz. at 428-29, 671 P.2d at 405-06. Pinnacle Paradise Water Company ("Pinnacle") petitioned the Commission under Section 40-252 to reopen the proceedings and modify the order so that Pinnacle could serve certain sections of the service territory that the Commission had granted to Paul. *Id.* The Commission held a hearing on the matter, and ultimately used its Section 40-252 authority to modify the Decision as Pinnacle had requested. *Id.*

Paul sued to set aside the Commission's Section 40-252 order, and ultimately prevailed before both the Arizona Court of Appeals and Arizona Supreme Court. *Id.* Although the Commission offered evidence purporting to show that Pinnacle would be able to serve the area better and at a lower cost to customers than Paul, the Court

rejected that showing as insufficient to warrant disruption of the prior order. *Id.*, 137 Ariz. at 430-31, 671 P.2d at 408-09. While such evidence might influence the public interest analysis in the first instance, it was not determinative on a reopening of that initial decision. *Id.* In the Section 40-252 public interest analysis, the Court indicated, other factors are paramount – each predicated on a company's need to be able to rely on the finality of Commission orders. *See id.*, 137 Ariz. at 429-30; 671 P.2d at 407-08 (citing several consequences detrimental to the public interest were Paul to lack confidence that the Commission's initial order would be upheld). For that reason, the Commission acted "beyond the scope of its authority" when it "treat[ed] cost as determinative of the public interest." *Id.* at 137 Ariz. at 431, 671 P.2d at 409. Thus, "because there was no evidentiary showing that Paul was unable or unwilling to provide service at reasonable rates the Commission was without legal authority to amend Paul's certificate as it did." *Id.*

The underlying principle of *James P. Paul Water* is clear and equally applicable in this proceeding: the public interest is best served through decisional finality, and the Commission cannot reopen a proceeding and modify a final order without affirmatively demonstrating that conditions have changed or other circumstances exist that are sufficiently important to trump that public need. This view accords requisite finality to orders of the Commission, while still affording the Commission ample authority to act in the public interest.

Similar constraints on a public utility commission's authority to reopen final decisions are prevalent in other jurisdictions, including in Pennsylvania, whose

jurisprudence has been specifically relied upon by the Arizona Supreme Court in the Section 40-252 context in light of the substantial identity of language between Section 40-252 and Pennsylvania's analogous public utilities commission statute.[1] *See Davis v. Ariz. Corp. Comm.*, 96 Ariz. 215, 393 P.2d 909, 911 (1964) (noting that the Pennsylvania statute "is essentially similar to § 40-252"). *See also Brinks, Inc. v. Pennsylvania Public Utility Commission*, 328 A.29 582, 584 (Commonwealth Ct. of Penn. 1974) (holding that "the proper function of a [petition to modify a final order] is to allow P.U.C. to reconsider a previous order in the light of newly discovered evidence or a change in circumstances" and that the Commission rightfully refused to reopen a final decision absent "the presence of new evidence or of a change of circumstances that would justify modification."); *Crooks v. Pennsylvania Public Utility Commission*, 276 A.2d 364, 366 (1971) (the P.U.C. has statutory authority to modify final orders "when the situation has changed"); *Beaver Valley Water Co. v. Penn. Pub. Util. Comm.*, 14 A.2d 205, 209 (Pa. Super. 1940) ("The grounds for [P.U.C.]'s reconsideration should be restricted to new matters and new or changed conditions set up in the joint petition, which had arisen since, and were not present in" the original proceeding).

Several other states with virtually identical statutes to Section 40-252 follow suit. *See, e.g., State ex rel. Utilities Commission v. North Carolina Gas Serv.*, 494 S.E.2d 621, 625 (N.C. App. 1998) (holding, under a statute that permits the public utility commission to "at any time upon notice to the public utility and to the other parties of

[1] The Pennsylvania statute, 66 P.S. § 703(g), reads as follows: "Rescission and amendment of orders. The commission may, at any time, after notice and opportunity to be heard as provided in this chapter, rescind or amend any order made by it. Any order rescinding or amending a prior order shall, when served upon the person, corporation, or municipal corporation affected and after notice thereof is given to the other parties to the proceedings, have the same effect as is herein provided for original orders."

record affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it," that "the rescission must be made only to a change of circumstances requiring it for the public interest"); *Chicago Housing Authority v. Illinois Commerce Comm'n,* 169 N.E.2d 268, 273 (Ill. 1960) (holding that a state statute allowing "the Commission . . . at any time, upon notice to the public utility affected, and after opportunity to be heard as provided as in the case of complaints, rescind, alter or amend any rule, regulation, order or decision made by it," can be used to rescind final orders upon a showing that "the old findings were erroneous, that circumstances have changed in the intervening period, or that an error of law was made"); *West Texas Utilities Co. v. Office of Public Utility Counsel*, 896 S.W.2d 261, 269 (Tex. App. 1995) (providing that a public utility commission statute vests the commission with continuing power to regulate, but holding that the "well-recognized regulatory concept of 'changed circumstances' [requires that] absent a showing of changed circumstances, the Commission is generally prohibited from revisiting its prior final orders.").

Such limitations on a public utility commission's ability to reopen proceedings and modify final decisions are founded on fundamental precepts of sound regulatory policy. In a cost-of-service regulated system, a public service corporation must comply with all Commission orders and regulations that are promulgated in the public interest. *See James P. Paul Water*, 137 Ariz. at 430, 671 P.2d at 408. A regulatory regime that requires compliance with Commission orders but that deprives a corporation from the

benefit of being able to rely on the reasonable finality thereof would render regulated corporations functionally paralyzed.

In this case, APS is required to comply with renewable energy-related obligations contained in the Commission's REST Rules and the recent APS Settlement Agreement, approved in Decision No. 71448 (December 30, 2009). Decision No. 72022 – the final order at issue in this proceeding – spells out how APS will work in 2011 towards achieving those obligations. As an APS witness will testify at the hearing on this matter, the Company has already committed more than $1 million to implement the initiatives approved in Decision No. 72022, much of which would be called into question were the Decision modified as proposed. More significantly, such a move would set a dangerous precedent that Commission orders are never truly "final," thus depriving the Company (and all other entities regulated by the Commission) of all certainty that actions APS has taken in this or any other context pursuant to a final Commission order will have the Commission's continuing support. That result is antithetical to the public interest. Such changes, instead, should be made prospectively in the course of regular Commission proceedings.

It would thus be a misuse of the Commission's discretion to use its Section 40-252 authority to reopen and modify a final order solely because the Commission decides to change a pre-established policy. *Cf. McCallister v. United States*, 3 Cl.Ct. 394 (1983) (holding that an agency's rescission of a prior order entered because the agency "decided to change its official mind" when a new official took the helm was an "ad hoc decision" that did not "deserv[e] judicial deference"); *Chapman v. El Paso Natural Gas*

Co., 204 F.2d 46, 53-54 (U.S. App. D.C. 1953) (holding that a Secretary of the Interior decision modifying prior final orders related to a pipeline's rights of way was improper, noting "[it] may well be appropriate for a licensing authority to reopen proceedings of this kind after final determination has been made in order to correct clerical errors or to modify rulings on the basis of newly discovered or supervening facts, but a decision may not be repudiated for the sole purpose of applying some new change in administrative policy"); *American Trucking Ass'ns , Inc. v. Frisco Transp. Co.,* 358 U.S. 133, 146 (1958) ("The power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful."); *Calvert County Planning Commission v. Howlin Realty Management, Inc.*, 772 A.2d 1209, 1223 (Md. App. 2001) ("An agency, including a planning commission, not otherwise constrained, may reconsider an action previously taken upon a showing that the original action was the product of fraud, surprise, mistake, or inadvertence, or that some new or different factual situation exists that justifies the different conclusion. What is not permitted is a 'mere change of mind' on the part of that agency.").

There is little doubt that the Commission has continuing regulatory supervision over those it regulates, and that there may be circumstances when the public interest requires reopening a final order. But there must be an end point in every proceeding at which the parties and the public may rely on a decision as being final and dispositive of the rights and issues involved. To reopen a final order for the single purpose of affecting a shift in Commission policy without a strong justification that warrants such a

disturbance would result in uncertainty of action for those, like APS, who must rely on Commission decisions. APS urges the Commission to consider a more viable, prospective path to achieve its policy objectives.

Finally, though beyond the confines of this single proceeding, APS must note its considerable concern with what appears to be an expansive interpretation of Section 40-252 in several recent proceedings, many of which risk exceeding what the law would countenance. APS cannot support such a practice; as described herein, the need for appropriate finality in Commission decisions is too important a principle to compromise.

BRIEF WITNESS SUMMARIES

APS will be presenting three witnesses who will provide sworn testimony:

1. **Jeffrey Guldner, Arizona Public Service Company, Vice President of Rates and Regulations.**

Mr. Guldner will testify regarding the regulatory policy and business need for certainty in final Commission Orders, and the detrimental impacts were the Commission to expansively use Section 40-252 to amend prior final orders without an intervening change of facts or circumstances. Mr. Guldner will also testify as to when, in his professional experience, the Commission has used a Section 40-252 proceeding, as well as the opportunity available to the Commission to consider whether to prospectively apply a new policy as part of APS's 2012 RES Implementation Plan, which will be filed by the Commission on July 1, 2011.

2. **Eran Mahrer, Arizona Public Service Company, Director of Renewable Energy Programs.**

Mr. Mahrer will testify that, although the Company does not agree with every aspect of Decision No. 72022, APS supports that Decision as a whole as in the public

interest and sees no new circumstances that did not exist at the time the Decision was approved that would justify its reopening. Mr. Mahrer will also address each of the following amendments that the Commission intends to reconsider, including: Pierce Proposed Amendment No. 1 (utility-ownership of a portion of the schools and government program installations); Pierce Proposed Amendment No. 3 (Marketing & Outreach budget and Research, Development, Commercialization & Integration budget), Newman Proposed Amendment No. 6 (Rapid Reservation incentive program); Mayes Proposed Amendment No. 2 (Feed-In Tariff programs); and Mayes Proposed Amendment No. 4 (water-energy nexus study and study regarding the impacts of increasing the Renewable Energy Standard).

3. Gary Marks, Humboldt Unified School District #22, Board President.

Mr. Marks will testify that rural schools will benefit from having the opportunity to consider solar facilities offered by APS, as well as third party vendors. He will address the challenges that the rural and economically challenged schools face and how the APS-owned facilities may best meet the needs of those schools.

RESPECTFULLY SUBMITTED this 13th day of January, 2011.

By: _____
Meghan H. Grabel
Deborah R. Scott
Attorneys for Arizona Public Service Company

ORIGINAL and thirteen (13) copies of the foregoing filed this 13th day of January, 2011, with:

Docket Control
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

COPY of the foregoing mailed/delivered this 13th day of January, 2011 to:

All Parties of Record.

Kim Cosme

Copy of the foregoing mailed/delivered this 13th day of January, 2011, to:

Court Rich
6613 N. Scottsdale Road, Ste. 200
Scottsdale, AZ 85250

Janice Alward
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

Steve Olea
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

Lyn Farmer
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

C. Webb Crockett
3003 N. Central Ave., Suite 2600
Phoenix, AZ 85012-2913

Scott S. Wakefield
Ridenour, Hienton & Lewis, P.L.L.C
201 N. Central Ave., Suite 3300
Phoenix, AZ 85004-1052