



0000123733

BEFORE THE ARIZONA CORPORATION CC

Arizona Corporation Commission

DOCKETED

FEB 11 2011

DOCKETED BY ne

COMMISSIONERS

GARY PIERCE - Chairman
BOB STUMP
SANDRA D. KENNEDY
PAUL NEWMAN
BRENDA BURNS

IN THE MATTER OF THE APPLICATION OF MCGRAW COMMUNICATIONS, INC. FOR APPROVAL OF A CERTIFICATE OF CONVENIENCE AND NECESSITY FOR RESOLD LOCAL EXCHANGE AND FACILITIES-BASED LOCAL EXCHANGE TELECOMMUNICATIONS SERVICES IN ARIZONA.

DOCKET NO. T-04219A-09-0270

DECISION NO. 72184

OPINION AND ORDER

DATE OF HEARING: November 19, 2010
PLACE OF HEARING: Phoenix, Arizona
ADMINISTRATIVE LAW JUDGE: Yvette B. Kinsey
APPEARANCES: Mr. Timothy Sabo, ROSHKA, DEWULF & PATTEN, on behalf of McGraw Communications, Inc.; and Ms. Ayesha Vohra, Staff Attorney, Legal Division, on behalf of the Utilities Division of the Arizona Corporation Commission.

BY THE COMMISSION:

This case concerns an application filed with the Arizona Corporation Commission ("Commission") by McGraw Communications, Inc. ("McGraw") requesting a Certificate of Convenience and Necessity ("CC&N") to provide resold local exchange and facilities-based local exchange telecommunications services in Arizona.

* * * * *

Having considered the entire record herein and being fully advised in the premises, the Commission finds, concludes, and orders that:

1 Administrative Law Judge Yvette B. Kinsey presided over all of the proceedings in this matter. The Recommended Opinion and Order was written by Administrative Law Judge Sarah N. Harpring.

FINDINGS OF FACT**Procedural History**

1
2
3 1. On May 29, 2009, McGraw filed with the Commission an application requesting a
4 CC&N to provide resold local exchange and facilities-based local exchange telecommunications
5 services in Arizona and petitioning to have its proposed services classified as competitive.

6 2. On June 15, 2009, Staff issued its First Set of Data Requests.

7 3. On September 15, 2009, McGraw filed responses to Staff's First Set of Data Requests,
8 including revised tariff pages.

9 4. On October 5, 2009, Staff issued its Second Set of Data Requests.

10 5. On April 21, 2010, McGraw filed responses to Staff's Second Set of Data Requests,
11 including a complete revised tariff.

12 6. On June 11, 2010, McGraw filed a copy of its Certificate of Good Standing issued by
13 the Commission on May 10, 2010, along with revised tariff pages.

14 7. On August 19, 2010, Staff issued a Staff Report, recommending approval of
15 McGraw's application, with conditions.

16 8. On August 30, 2010, a Procedural Order was issued scheduling a hearing to be held on
17 November 19, 2010, at the Commission's offices in Phoenix, Arizona, and establishing other
18 procedural requirements and deadlines.

19 9. On September 15, 2010, a Notice of Appearance was filed by McGraw's local
20 counsel.

21 10. On October 8, 2010, an Affidavit of Publication was filed, showing that public notice
22 of McGraw's application and the scheduled hearing had been published in *The Arizona Republic* on
23 September 20, 2010.

24 11. On November 1, 2010, McGraw filed a Request for Witness to Appear
25 Telephonically, explaining that its only witness for the hearing was located out of state.

26 12. On November 9, 2010, a Procedural Order was issued granting McGraw's Request for
27 Witness to Appear Telephonically.

28 13. On November 19, 2010, a full evidentiary hearing was held before a duly authorized

1 Administrative Law Judge of the Commission at the Commission's offices in Phoenix, Arizona.
2 McGraw and Staff appeared through counsel and presented evidence and testimony. McGraw
3 presented the telephonic testimony of Sadia Mendez, Manager of Regulatory Compliance for
4 McGraw, who participated from New York. Staff presented the testimony of Lori Morrison, Staff
5 Utilities Consultant. No members of the public attended to provide comment.

6 **Fitness and Properness to Obtain a CC&N**

7 14. McGraw is an S corporation, formed under the laws of New York, and privately held
8 by Francis X. Ahern, John Cunningham, and Jay Monaghan, who also serve as McGraw's directors
9 and, respectively, as its Chief Executive Officer, President, and Chief Service Officer/Secretary.
10 McGraw has one additional officer, Barbara Dunn, who serves as Chief Financial Officer/Chief
11 Operating Officer.

12 15. McGraw began operating in New York in 1996, providing long distance services and
13 some local services, and has since expanded its operations across the country, although most of its
14 customers still are based in the northeast. (Tr. at 9.) McGraw has approximately 1,200 medium-to-
15 large business customers, and no residential customers. (*Id.*) Ms. Mendez described McGraw as
16 "basically a reseller of all major carriers across the country" and testified that McGraw has
17 agreements with Verizon, Qwest, AT&T, Frontier, Level 3, and all of the major carriers. (*Id.*)

18 16. McGraw has been authorized to transact business in the State of Arizona since
19 October 29, 2003.

20 17. McGraw stated in its application that neither McGraw nor any of its officers, directors,
21 partners, or managers has been or is currently involved in any formal or informal complaint
22 proceedings pending before any state or federal regulatory commission, administrative agency, or law
23 enforcement agency. Staff also found no instances of any formal or informal complaint proceedings
24 involving McGraw or any of its officers, directors, or managers.

25 18. McGraw stated in its application that neither McGraw nor any of its officers, directors,
26 partners, or managers has been or is currently involved in any civil or criminal investigation or has
27 had judgment entered in any civil matter, judgment levied by any administrative or regulatory
28 agency, or been convicted of any criminal act within the last 10 years. Staff also found no instances

1 of any civil or criminal investigations, judgments levied by any administrative or regulatory agency,
2 or criminal convictions within the last 10 years involving McGraw or any of its officers, directors, or
3 managers.

4 19. McGraw stated that it has not had any application to provide service denied in any
5 state and that it has not had any of its authority to provide service revoked in any state. Staff also
6 found no instances of denial of an application or revocation of authority to provide service.

7 20. McGraw is authorized to provide interexchange telecommunications services in 44
8 states, including Arizona,² and the District of Columbia and is currently providing interexchange
9 services in most of those jurisdictions. (See Ex. A-1, Tr. at 8.) McGraw also is authorized to provide
10 local exchange telecommunications services in 28 states and the District of Columbia and is currently
11 providing local exchange services in most of those jurisdictions.³ (See Ex. A-1, Tr. at 8.)

12 21. Staff contacted the public utility commissions of California, Colorado, Indiana,
13 Michigan, New York, and Washington to verify that McGraw is authorized to provide service in
14 those jurisdictions and to inquire about complaints. All six commissions confirmed McGraw's
15 authorization to provide service and reported that they had received no complaints about McGraw.

16 22. McGraw is in good standing with the Commission's Corporations Division.

17 23. Staff's Consumer Services Section reported that no complaints were filed regarding
18 McGraw from January 1, 2006, through June 10, 2009.

19 24. Staff's search of the Federal Communications Commission's website revealed that
20 there have been no formal or informal complaint proceedings involving McGraw.

21 **Technical Capabilities**

22 25. McGraw's top four executives, combined, have more than 60 years of experience in
23 the telecommunications industry.

24 26. In its application, McGraw stated that it is a switchless reseller and that it intends to
25 resell services provided by Qwest, Sprint, and AT&T. McGraw stated that it does not currently have

26 ² In Decision No. 66906 (April 6, 2004), McGraw was granted a CC&N to provide competitive resold interexchange
27 telecommunications services, except local exchange services, within the State of Arizona. Official notice is taken of
28 Decision No. 66906.

³ North Carolina is the only state for which McGraw stated that it has local exchange authority but is not currently
providing local exchange services.

1 an operative resale agreement.⁴

2 27. McGraw intends initially to make its local exchange services available only to existing
3 customers in Arizona, with marketing done only through word-of-mouth. Additionally, McGraw
4 intends only to market to business customers. Ms. Mendez testified that McGraw has a number of
5 customers looking for services, most of whom are located in more urbanized areas of Arizona,
6 although there are some who are more spread out. (Tr. at 13.)

7 28. McGraw intends to begin local exchange service in Arizona as soon as possible after
8 receiving its CC&N and setting up an agreement with the incumbent local exchange carrier ("ILEC").
9 (Tr. at 16-17.)

10 29. McGraw has only one corporate office, located in New York City, and does not intend
11 to open any satellite offices. McGraw indicated that the costs of opening an office in Arizona could
12 not be justified at this time.

13 30. McGraw intends to provide customer service to its Arizona customers through a New
14 York-based customer service call center accessible through a toll-free number 24 hours per day,
15 seven days per week. McGraw's contracts with ILECs require the ILECs to send out repair personnel
16 when needed. (Tr. at 14-15.) After talking to its customer, McGraw arranges for the ILEC repair
17 personnel to go out. (Tr. at 15.) McGraw has electronic access to all of the ILECs operating systems,
18 pursuant to agreements, so that it can communicate with the ILECs directly for any trouble tickets
19 and follow up. (*Id.*)

20 31. Staff believes that McGraw possesses the technical capabilities to provide the services
21 for which it is requesting CC&N authority in Arizona.

22 **Financial Resources**

23 32. McGraw's balance sheet of December 31, 2008, shows total assets of \$5,556,092 and
24 equivalent total liabilities and stockholders' equity; net income of \$735,266; and retained earnings of
25 \$305,503.

26 33. McGraw projects total Arizona intrastate revenue of \$10,000 for the first 12 months of
27

28 ⁴ We understand this to mean that McGraw does not have an operative resale agreement concerning resale of local exchange service in Arizona.

1 service, with total intrastate operating expenses of \$8,000 for the same period.

2 34. McGraw projects a net book value of \$100 for all Arizona jurisdictional assets to be
3 used to provide telecommunications services to Arizona customers for the first 12 months of service.
4 Currently, McGraw has no Arizona jurisdictional assets. McGraw states that all of its assets are
5 centered in New York City.

6 35. Staff determined that McGraw has a fair value rate base ("FVRB") of \$0.

7 **Competitive Services/Proposed Rates**

8 36. In its application, McGraw petitioned to have its proposed services classified as
9 competitive, consistent with prior Commission decisions regarding such services.

10 37. Staff confirmed that McGraw would be providing local exchange service in areas in
11 which an ILEC and competitive local exchange carriers ("CLECs") are already providing services; in
12 which ILECs have the ability to offer the same services that McGraw intends to offer; in which many
13 CLECs and local exchange resellers also offer services substantially similar to those McGraw intends
14 to offer; in which new entrants must depend upon ILECs for interconnections, to terminate traffic to
15 customers, and to provide essential local exchange service elements until the new entrant's own
16 network is built; and in which ILECs have existing relationships with their customers and a virtual
17 monopoly in the local exchange market.

18 38. Staff recommends that McGraw's proposed services be classified as competitive
19 because there are alternatives to McGraw's services, McGraw will need to convince customers to
20 purchase its services, and McGraw has no ability to adversely affect the local exchange or
21 interexchange service markets.

22 39. McGraw's proposed rates are based upon wholesale rates provided by Qwest and,
23 McGraw asserts, are comparable to those charged by Qwest and by other CLECs. McGraw asserts
24 that the economics of the competitive market will ensure just and reasonable pricing.

25 40. Staff stated that because McGraw will initially be providing service in areas where an
26 ILEC and various CLECs and interexchange carriers are already providing telephone service,
27 McGraw will need to compete with those providers to obtain subscribers to its services and will not
28 be able to exert market power. As a result, Staff stated, the competitive process should result in rates

1 that are just and reasonable. Staff further stated that McGraw will be providing resold and facilities-
2 based local exchange services to business customers who typically negotiate contract rates through a
3 competitive process, with the ultimate rates provided on an individual case basis ("ICB") by
4 McGraw, but that business customers who do not need individualized offerings and do not require an
5 ICB contract to meet their needs will be able to purchase services at the rates contained in McGraw's
6 proposed tariff. Staff stated that McGraw's proposed local rates are for highly competitive services.
7 Staff reviewed the rates in McGraw's proposed tariff and determined that they are similar to those
8 charged by McGraw in other states and are similar to the tariffed rates for other providers' resold and
9 facilities-based local exchange services in Arizona and are just and reasonable.

10 41. In general, rates for competitive services are not set according to rate of return
11 regulation. While Staff considered the FVRB information submitted by McGraw, Staff did not
12 accord that information substantial weight in its analysis.

13 42. We find that McGraw's current FVRB is \$0 and that it is too small to be useful in an
14 analysis of McGraw's rates.

15 **Performance Bond/Irrevocable Sight Draft Letter of Credit**

16 43. McGraw does not offer prepaid services, does not collect deposits, and will not collect
17 advance payments.

18 44. Staff explained that the Commission's current practice regarding performance bond
19 and irrevocable sight draft letters of credit ("ISDLOC"), as applicable hereto, is to recommend a
20 \$25,000 performance bond/ISDLOC for resold local exchange services and a \$100,000 performance
21 bond/ISDLOC for facilities based local exchange services, with the amounts to be combined when
22 authority for both types of local exchange service is requested. Thus, Staff stated, the minimum
23 recommended amount for a performance bond/ISDLOC to be obtained by McGraw should be
24 \$125,000.

25 45. Staff further explained that the performance bond/ISDLOC should be filed with the
26 Commission's Business Office, with copies docketed, and that the Commission may draw on the
27 performance bond/ISDLOC on behalf of and for the sole benefit of McGraw's customers, if the
28 Commission finds, in its discretion, that McGraw is in default of its obligations arising from its

1 CC&N. Staff further stated that the Commission may use the performance bond/ISDLOC funds, as
2 appropriate, to protect McGraw's customers and the public interest and take any and all actions the
3 Commission deems necessary, in its discretion, including but not limited to returning prepayments or
4 deposits collected from McGraw's customers.

5 46. In its application, McGraw indicated that it is willing to post a performance bond in
6 the amount of \$125,000.

7 **Regulatory Requirements**

8 47. A.A.C. R14-2-1308(A) requires a local exchange carrier to make local number
9 portability available to facilitate the ability of a customer to switch between authorized local carriers
10 within a given wire center without changing the customer's telephone number and without
11 impairment of quality, functionality, reliability, or convenience of use.

12 48. A.A.C. R14-2-1204(A) requires all telecommunications service providers that
13 interconnect to the public switched network to provide funding for the Arizona Universal Service
14 Fund ("AUSF"). A.A.C. R14-2-1204(B)(3)(a) requires new telecommunications service providers
15 that begin providing basic local exchange service after April 26, 1996, to pay AUSF charges as
16 provided under A.A.C. R14-2-1204(B)(1) and those that begin providing toll service after April 26,
17 1996, to pay AUSF charges as provided under A.A.C. R14-2-1204(B)(2). A.A.C. R14-2-
18 1204(B)(3)(b) requires all other telecommunications service providers that interconnect to the public
19 switched network and begin providing telecommunications service after April 26, 1996, to make
20 written elections as to how they will be categorized for purposes of AUSF assessments.

21 49. Commission rules require McGraw to file a tariff for each competitive service that
22 states the maximum rate as well as the effective (actual) price that will be charged for the service.
23 Under A.A.C. R14-2-1109(A), the minimum rate for a service must not be lower than the total
24 service long-run incremental cost of providing the service. Any change to McGraw's effective price
25 for a service must comply with A.A.C. R14-2-1109, and any change to the maximum rate for a
26 service in McGraw's tariff must comply with A.A.C. R14-2-1110.

27 50. A.A.C. R14-2-1201(6)(d) requires that basic local exchange telephone service include
28 access to emergency services, including but not limited to emergency 911. McGraw indicated in its

1 application that it will provide all customers with 911 and E911 services, where available, and will
2 coordinate with ILECs and emergency service providers to provide these services.

3 51. A.A.C. R14-2-1901 et seq. establish requirements to protect Arizona consumers from
4 unauthorized carrier changes (“slamming”) and apply to each public service corporation providing
5 telecommunications services within the State of Arizona and over which the Commission has
6 jurisdiction.

7 52. A.A.C. R14-2-2001 et seq. establish requirements to protect Arizona consumers from
8 unauthorized carrier charges (“cramming”) and apply to each public service corporation providing
9 telecommunications services within the State of Arizona and over which the Commission has
10 jurisdiction.

11 53. A.A.C. R14-2-1107 requires a competitive telecommunications service provider to file
12 an application for authorization with the Commission before it discontinues service; the rule also
13 establishes customer notice requirements and other requirements related to discontinuance of service.

14 54. McGraw indicated in its application that its customers will be able to access
15 alternative toll service providers or resellers via 1+101XXXX access.

16 55. McGraw indicated in its application that its switch is fully equal access capable
17 pursuant to A.A.C. R14-2-1111(A).

18 **Staff’s Recommendations**

19 56. Staff recommends approval of McGraw’s application for a CC&N to provide resold
20 local exchange and facilities-based local exchange telecommunications services and further
21 recommends:

22 (a) That McGraw be required to comply with all Commission Rules, Orders, and
23 other requirements relevant to the provision of intrastate telecommunications services;

24 (b) That McGraw be required to make number portability available, in compliance
25 with federal laws, federal rules, and A.A.C. R14-2-1308(A);

26 (c) That McGraw be required to abide by the quality of service standards approved
27 by the Commission for Qwest in Docket No. T-01051B-93-0183 (Decision No. 59421), without
28

1 application of the penalties therein;⁵

2 (d) That McGraw be prohibited from barring access to alternative local exchange
3 service providers who wish to serve areas where McGraw is the only provider of local exchange
4 service facilities;

5 (e) That McGraw be required to provide all customers with 911 and E911 service,
6 where available, or to coordinate with ILECs and emergency service providers to provide 911 and
7 E911 service in accordance with A.A.C. R14-2-1201(6)(d) and 47 C.F.R. §§ 64.3001 and 64.3002;

8 (f) That McGraw be required to notify the Commission immediately upon
9 changes to McGraw's name, address, or telephone number;

10 (g) That McGraw be required to cooperate with Commission investigations,
11 including but not limited to those related to customer complaints;

12 (h) That McGraw be required to provide notice to both the Commission and its
13 customers, in accordance with A.A.C. R14-2-1107, in the event that McGraw desires to discontinue
14 and/or abandon its service area;⁶

15 (i) That McGraw be required to offer Caller ID with the capability to toggle
16 between blocking and unblocking the transmission of the telephone number at no charge;

17 (j) That McGraw be required to offer Last Call Return service that will not return
18 calls to telephone numbers that have the privacy indicator activated; and

19 (k) That McGraw be authorized to discount its rates and service charges to the
20 marginal cost of providing the services.

21 57. Staff further recommends that McGraw be ordered to comply with the following and
22 that its CC&N granted herein become null and void, after due process, if it fails to do so:

23 (a) McGraw shall, within 365 days from the date of an Order in this matter or 30
24 days prior to providing service, whichever comes first, docket conforming tariffs for each service

25 ⁵ Because the penalties developed in Decision No. 59421 were initiated to address Qwest's unsatisfactory level of
26 service, and McGraw does not have a similar history of service quality problems, Staff recommends that those penalties
27 not apply to McGraw. Staff added that the competitive market in which McGraw will operate should force McGraw to
28 provide a satisfactory level of service or risk losing its customers, which bolsters Staff's position that McGraw need not
be subjected to those penalties at this time.

⁶ Staff stated that failure to meet this requirement should result in forfeiture of McGraw's performance bond/ISDLOC.
(Staff Report at 2.)

1 within its CC&N.

2 (b) McGraw shall:

3 (i) Procure either a performance bond or an ISDLOC in the amount of
4 \$125,000;

5 (ii) Within 90 days of the effective date of a Decision in this matter or 10
6 days before McGraw's first customer is served under the CC&N
7 granted herein, whichever comes earlier, as a compliance item in this
8 docket, file the original performance bond/ISDLOC with the
9 Commission's Business Office and 13 copies of the performance
10 bond/ISDLOC with the Commission's Docket Control;

11 (iii) Ensure that the \$125,000 performance bond/ISDLOC remains in effect
12 until further Order of the Commission; and

13 (iv) Within 30 days of providing service in Arizona under the CC&N
14 granted herein, file with the Commission's Docket Control, as a
15 compliance item in this docket, notice that McGraw has started
16 providing such service in Arizona.

17 (c) McGraw shall comply with Commission rules addressing Universal Service in
18 Arizona by making the monthly AUSF payments required under A.A.C. R14-2-1204(B).

19 58. Ms. Mendez testified that McGraw agrees with each of the Staff recommendations
20 described in Findings of Fact Nos. 56 and 57. (Tr. at 11.)

21 **CONCLUSIONS OF LAW**

22 1. McGraw is a public service corporation within the meaning of Article XV of the
23 Arizona Constitution and A.R.S. §§ 40-281 and 40-282.

24 2. The Commission has jurisdiction over McGraw and the subject matter of the
25 application.

26 3. Notice of McGraw's application was given in accordance with the law.

27 4. A.R.S. § 40-282 allows a telecommunications company to file an application for a
28 CC&N to provide competitive telecommunications services.

1 performance bond or irrevocable sight draft letter of credit with the Commission's Docket Control.
2 McGraw Communications, Inc. shall ensure that the performance bond or irrevocable sight draft
3 letter of credit remains in effect until further Order of the Commission. The Commission may draw
4 on the performance bond or irrevocable sight draft letter of credit on behalf of and for the sole benefit
5 of McGraw Communications, Inc. customers, if the Commission finds, in its discretion, that McGraw
6 Communications, Inc. is in default of its obligations arising from its Certificate of Convenience and
7 Necessity. The Commission may use the performance bond or irrevocable sight draft letter of credit
8 funds, as appropriate, to protect McGraw Communications, Inc. customers and the public interest and
9 take any and all actions the Commission deems necessary, in its discretion, including but not limited
10 to returning prepayments or deposits collected from McGraw Communications, Inc. customers.

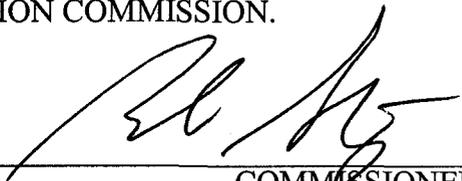
11 ...
12 ...
13 ...
14 ...
15 ...
16 ...
17 ...
18 ...
19 ...
20 ...
21 ...
22 ...
23 ...
24 ...
25 ...
26 ...
27 ...
28 ...

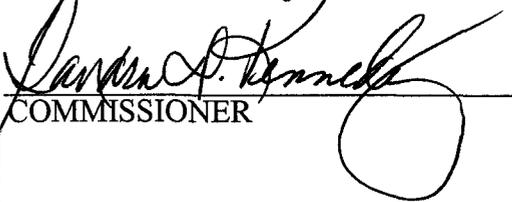
1 IT IS FURTHER ORDERED that if McGraw Communications, Inc. fails to meet the
2 conditions outlined in Findings of Fact No. 57 within the timeframes therein, the Certificate of
3 Convenience and Necessity conditionally granted herein shall be considered null and void after due
4 process.

5 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

6 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

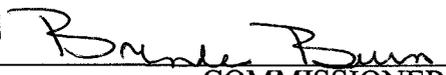
7
8
9 
CHAIRMAN


COMMISSIONER

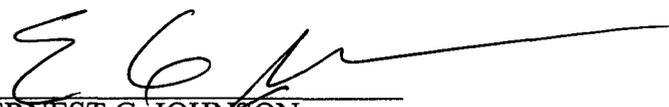
10
11 
COMMISSIONER

EXCUSED
COMM. NEWMAN

COMMISSIONER


COMMISSIONER

12
13 IN WITNESS WHEREOF, I, ERNEST G. JOHNSON,
14 Executive Director of the Arizona Corporation Commission,
15 have hereunto set my hand and caused the official seal of the
16 Commission to be affixed at the Capitol, in the City of Phoenix,
17 this 11th day of February, 2011.

18 
ERNEST G. JOHNSON
EXECUTIVE DIRECTOR

19 DISSENT _____

20
21 DISSENT _____

22
23
24
25
26
27
28

1 SERVICE LIST FOR:

MCGRAW COMMUNICATIONS, INC.

2 DOCKET NO.:

T-04219A-09-0270

3

4 Lance J.M. Steinhart
LANCE J.M. STEINHART, P.C.
1720 Windward Concourse, Suite 115
5 Alpharetta, GA 30005

6 Timothy Sabo
Michael W. Patten
7 ROSHKA DEWULF & PATTEN, PLC
One Arizona Center
8 400 East Van Buren Street, Suite 800
Phoenix, AZ 85004

9 Janice Alward, Chief Counsel
10 Legal Division
ARIZONA CORPORATION COMMISSION
11 1200 West Washington Street
Phoenix, AZ 85007

12 Steven M. Olea, Director
13 Utilities Division
ARIZONA CORPORATION COMMISSION
14 1200 West Washington Street
Phoenix, AZ 85007

15

16

17

18

19

20

21

22

23

24

25

26

27

28