



0000153007

Thomas Mumaw, AZ Bar No. 009223  
Melissa M. Krueger, AZ Bar No. 021176  
Pinnacle West Capital Corporation  
400 North 5<sup>th</sup> Street, MS 8695  
Phoenix, Arizona 85004  
Tel: (602) 250-3630  
Fax: (602) 250-3393  
E-Mail: [Thomas.Mumaw@pinnaclewest.com](mailto:Thomas.Mumaw@pinnaclewest.com)  
[Melissa.Krueger@pinnaclewest.com](mailto:Melissa.Krueger@pinnaclewest.com)

RECEIVED

2014 APR 24 P 3:47

AZ CORP COMMISSION  
DOCKET CONTROL

Attorneys for Arizona Public Service Company

ORIGINAL

**BEFORE THE ARIZONA CORPORATION COMMISSION****COMMISSIONERS**

Arizona Corporation Commission

DOCKETED

APR 24 2014

DOCKETED BY

BOB STUMP, Chairman  
GARY PIERCE  
BRENDA BURNS  
ROBERT L. BURNS  
SUSAN BITTER SMITH

WARREN WOODWARD,

Complainant,

v.

ARIZONA PUBLIC SERVICE  
COMPANY,

Respondent.

DOCKET NO. E-01345A-14-0113

**MOTION TO DISMISS****-AND-****ALTERNATIVELY APS'S ANSWER  
TO FORMAL COMPLAINT**

Respondent, Arizona Public Service Company ("APS" or "Company"), responds to the formal complaint ("Complaint") filed by Warren Woodward on April 1, 2014 (received by APS on April 4, 2014). APS moves to dismiss Mr. Woodward's Complaint in its entirety for failure to state any claims upon which relief can be granted. *See* Ariz. R. Civ. P. 12(b)(6) and A.A.C. R14-3-101(A). In the alternative, APS answers the allegations in the Complaint.

It is not entirely clear what claims Mr. Woodward is making or against whom, as certain statutes cited in the Complaint and certain allegations relate to the Commission's

1 powers, and not APS.<sup>1</sup> APS interprets the Complaint as attempting to assert a cause of  
2 action against APS for violation of Arizona's Consumer Fraud Act ("CFA"), A.R.S.  
3 § 44-1522, *et seq.* As discussed below, a claim for consumer fraud fails as a matter of  
4 law because APS did not make any statements in connection with the sale or  
5 advertisement of its product or services. Nor did Mr. Woodward rely upon or suffer any  
6 damage as a result of any APS statements. APS reserves the right to supplement or  
7 amend this motion and answer, if it is determined that Mr. Woodward is asserting  
8 additional undisclosed (or presently unknown) claims against APS.

### 9 MOTION TO DISMISS

#### 10 I. The Complaint Fails to State a Claim for Violation of the CFA.

11 To state a claim against APS for violation of the CFA, Mr. Woodward must  
12 allege that APS made a false promise or misrepresentation to him in connection with the  
13 sale or advertisement of merchandise and that he suffered damages as a result of relying  
14 on the false promise or misrepresentation. *See Sullivan v. Pulte Home Corp.*, 231 Ariz.  
15 53, 60, 290 P.3d 446, 453 (Ct. App. 2012) (listing elements of CFA claim and holding  
16 that plaintiff failed to state a viable claim against defendant); *Peery v. Hansen*, 120 Ariz.  
17 266, 269, 585 P.2d 574, 577 (Ct. App. 1978) (holding that damages are an essential  
18 element of a private claim under the CFA). Mr. Woodward cannot as a matter of law  
19 state a claim under the CFA because (i) the "Myth v. Fact" information sheet ("Fact  
20 Sheet") was not provided to Mr. Woodward (or any other APS customer) in connection  
21 with the sale or advertisement of merchandise, and (ii) he has not alleged (nor can he)  
22 that he relied upon the representations or was damaged by them in any way. Moreover,  
23 none of the statements made by APS about its automated meters, also known as AMI  
24 meters or smart meters, are false.

25 The Fact Sheet Mr. Woodward claims contains false statements is located in the  
26 Meter Information Center page on the APS website. *See* Declaration of Anne Garbayo

27 <sup>1</sup> In addition, the Complaint does not comply with either the pleading requirements of the Arizona  
28 Rules of Civil Procedure or the requirements for a formal complaint under the Arizona Administrative  
Code. *See, e.g.*, Ariz. R. Civ. P. 8(a) and (e) and A.A.C. R14-3-106, 107.

1 at ¶ 3, attached as Exhibit A. A copy of the Fact Sheet is attached as Exhibit B for the  
2 Judge's ease of reference. This Fact Sheet is made available to customers to inform  
3 them about APS's automated meters. See Exhibit A at ¶ 4 and 6. The statements made  
4 in the Fact Sheet, even if they were false (and they are not), do not relate to the sale or  
5 advertisement of APS's services or any merchandise. The Complaint also does not  
6 allege that it does. The Complaint does not allege when Mr. Woodward became aware  
7 of the Fact Sheet, how or why he received it and from whom, what action he took  
8 because of it or how he was damaged. Put simply, there is no allegation in the  
9 Complaint that the Fact Sheet has anything at all to do with the sale or advertising of  
10 APS's services.

11 APS sells electricity to customers, including Mr. Woodward. See Exhibit A at  
12 ¶ 5. The Fact Sheet is merely a means to inform APS customers about APS's standard  
13 meter, an automated meter. See Exhibit A at ¶ 6. The automated meter discussed in the  
14 Fact Sheet is used as a tool to measure electricity usage by APS customers. See Exhibit  
15 A at ¶ 7. A customer can receive electric service from APS without the use of an  
16 automated meter. See Exhibit A at ¶ 8. APS does not sell automated meters (or any  
17 meters) to its Customers. See Exhibit A at ¶ 9. Indeed, APS—not its customers—owns  
18 the billing meters APS places at customers' homes. See Exhibit A at ¶ 10. Customers  
19 do not and cannot purchase automated or any other type of meter from APS. See  
20 Exhibit A at ¶ 9. Because the Fact Sheet does not relate to the sale or advertisement of  
21 APS's services, the Complaint cannot as a matter of law state a claim under the CFA.

22 The Complaint also fails to state a claim because Mr. Woodward has not alleged  
23 that he has suffered any damages as a result of the claims in APS's Fact Sheet. The law  
24 requires that "before a private party may exert a claim under the [CFA], he must have  
25 been damaged by the prohibited practice." *Peery v. Hansen*, 120 Ariz. at 260, 585 P.2d  
26 577. Mr. Woodward makes vague claims of alleged "anecdotal over-billing" and  
27 mentions APS's proposed opt-out fee—that has not been adopted by the Commission.  
28 See Exhibit A at ¶ 14. Nowhere, however, does he allege that he has suffered any harm

1 due to the claims in the Fact Sheet. It is worth noting that Mr. Woodward does not have  
2 an automated meter installed at his home, and there is presently no charge to  
3 customers—such as Mr. Woodward—who have elected not to allow APS to install an  
4 automated meter at their residences. *See* Exhibit A at ¶ 13 and 14.

5 For the above reasons, the Complaint fails as a matter of law to state a claim upon  
6 which relief can be granted and is subject to dismissal pursuant to Ariz. R. Civ. P.  
7 12(b)(6).

### 8 **ALTERNATIVELY APS'S ANSWER TO COMPLAINT**

9 APS admits, denies and alleges further as follows. APS specifically denies any  
10 and all allegations not expressly admitted in this Answer.

### 11 **SPECIFIC RESPONSES TO ALLEGATIONS OF FORMAL COMPLAINT**

12 Mr. Woodward claims that APS's Fact Sheet regarding automated or smart  
13 meters is "misleading or an outright lie." *See* Compl. at 1 ¶ 13. APS denies that any  
14 statements in its Fact Sheet are misleading or untrue. The Complaint also alleges that  
15 APS has violated the CFA. APS denies that it has violated the CFA or any other rule,  
16 statute or law.

17 The four main statements that Mr. Woodward alleges are false or misleading are  
18 discussed below:

#### 19 **Allegation No. 1.**

20 **Mr. Woodward alleges that the Fact Sheet provided to APS customers is**  
21 **misleading and a violation of A.R.S. 44-1522, which discusses consumer fraud and**  
22 **unlawful practices.**

#### 23 **APS Response to Allegation No. 1**

24 APS denies that it has made any misleading statements to customers and denies that it  
25 has violated the CFA, A.R.S. § 44-1522. APS alleges that its Fact Sheet is accurate and  
26 provided to customers in an attempt to better inform customers about the automated  
27 meters being installed at their businesses and homes. APS does not sell automated  
28

1 meters to its customers, but uses automated meters to measure how much energy a  
2 customer uses.

3 **Allegation No. 2**

4 **Mr. Woodward alleges that APS is “taking the antenna/transceiver siting rights of**  
5 **property owners without compensating those property owners.” See Compl. at 2 ¶**  
6 **4.**

7 **APS Response to Allegation No. 2**

8 APS denies Allegation No. 2 and alleges that it cannot determine what Mr. Woodward is  
9 alleging in this statement, or to what “siting rights” he is alluding to in his Complaint.  
10 APS alleges that its automated meters do not have the capability of monitoring customer  
11 actions and do not store or transmit any personal identification information. The APS  
12 automated meters are used to measure how much energy a customer uses.

13 **Allegation No. 3**

14 **“APS’s claim that ‘[a]utomated meters are safe’ is unsubstantiated.”**

15 **APS Response to Allegation No. 3**

16 APS denies Allegation No. 3. APS alleges that there are numerous studies establishing  
17 the safety of its automated meters and has filed those studies in the Commission’s  
18 generic Docket No. E-00000C-11-0328. Indeed, research has established that APS’s  
19 automated meters transmit a smaller amount of radio frequency than most household  
20 appliances, such as cell phones, toasters, baby monitors, computers, etc.

21 **Allegation No. 4**

22 **“Smart meters are forced on people.” See Compl. at 4 ¶ 1.**

23 **APS Response to Allegation No. 4**

24 APS denies Allegation No. 4. APS alleges that it gives its customers the opportunity to  
25 elect not to have a smart meter installed at their home. Presently, there is no charge to  
26 customers for refusing a smart meter. As noted above, Mr. Woodward has elected not to  
27 have a smart meter installed at his home. Customers are notified in advance of the  
28 installation of an automated meter and are given sufficient time to respond and refuse

1 the installation. Even after installation of an automated meter, a customer can elect at no  
2 charge to have the automated meter removed and a non-automated meter installed.

3 **AFFIRMATIVE DEFENSES**

4 1. The Complaint fails to state a claim upon which relief can be granted.

5 2. At all times, APS acted in conformance with all applicable laws, rules and  
6 regulations.

7 3. APS asserts all applicable affirmative defenses contained in Rule 8(c).

8 4. Mr. Woodward's' claims may be barred by the applicable statute of  
9 limitations.

10 RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of April, 2014.

11 By: Melissa M. Krueger  
12 Thomas Mumaw  
13 Melissa M. Krueger  
14 Attorneys for Arizona Public Service  
Company

15 ORIGINAL of the foregoing filed  
16 this 24<sup>th</sup> day of April, 2014, with:

17 Docket Control  
18 Arizona Corporation Commission  
19 1200 West Washington Street  
Phoenix, Arizona 85007

1 COPY of the foregoing mailed/delivered this  
2 24th day of April, 2014 to:

3 Warren Woodward  
4 55 Ross Circle  
5 Sedona, Arizona 86336

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

6  
7 Janice Alward  
8 Legal Division  
9 Arizona Corporation Commission  
10 1200 W. Washington  
11 Phoenix, AZ 85007

Lyn Farmer  
Administrative Law Judge  
Arizona Corporation Commission  
1200 W. Washington  
Phoenix, AZ 85007

12 Stephani J. [Signature]

# EXHIBIT A



1 Thomas Mumaw, AZ Bar No. 009223  
2 Melissa M. Krueger, AZ Bar No. 021176  
3 Pinnacle West Capital Corporation  
4 400 North 5<sup>th</sup> Street, MS 8695  
5 Phoenix, Arizona 85004  
6 Tel: (602) 250-3630  
7 Fax: (602) 250-3393  
8 E-Mail: [Thomas.Mumaw@pinnaclewest.com](mailto:Thomas.Mumaw@pinnaclewest.com)  
9 [Melissa.Krueger@pinnaclewest.com](mailto:Melissa.Krueger@pinnaclewest.com)  
10 Attorneys for Arizona Public Service Company

11 **BEFORE THE ARIZONA CORPORATION COMMISSION**

12 **COMMISSIONERS**

13 BOB STUMP, Chairman  
14 GARY PIERCE  
15 BREND A BURNS  
16 ROBERT L. BURNS  
17 SUSAN BITTER SMITH

18 WARREN WOODWARD,  
19 Complainant,  
20 v.  
21 ARIZONA PUBLIC SERVICE  
22 COMPANY,  
23 Respondent.

DOCKET NO. E-01345A-14-0113

**DECLARATION IN SUPPORT OF  
MOTION TO DISMISS**

24 I, Anne Garbayo, declare as follows:

- 25 1. I am the AMI Project Coordinator for Arizona Public Service Company.
- 26 2. I have personal knowledge of the facts contained herein.
- 27 3. Attached to APS's Motion to Dismiss and Alternatively APS's Answer to  
28 Formal Complaint as Exhibit B is a true and correct copy of the Fact Sheet located in the  
Meter Information Center page on the APS website.
4. This Fact Sheet is made available to customers to inform them about  
APS's automated meters, sometimes referred to as AMI meters or smart meters.

- 1           5.     APS sells electricity to customers, including Warren Woodward.
- 2           6.     The Fact Sheet informs APS customers about APS's standard meter, an
- 3 automated meter.
- 4           7.     The automated meter discussed in the Fact Sheet is used as a tool to
- 5 measure electricity usage by APS customers.
- 6           8.     An APS residential customer does not need an automated meter to receive
- 7 service from APS.
- 8           9.     APS does not sell automated meters (or any meters) to its customers and
- 9 customers do not and cannot purchase automated or any other type of meter from APS.
- 10          10.    APS owns the billing meters APS places at customers' homes.
- 11          11.    Mr. Woodward does not have an automated meter installed at his home.
- 12          12.    There is presently no additional charge to customers who have elected not
- 13 to allow APS to install an automated meter at their residence.

14           I declare under penalty of perjury that the foregoing is true and correct. Executed

15 on this 24<sup>th</sup> day of April 2014.

16

17 By: \_\_\_\_\_

18 Anne Garbayo  
19 AMI Project Manager for Arizona Public  
20 Service Company  
21  
22  
23  
24  
25  
26  
27  
28

# **EXHIBIT B**



## Myth vs. Fact

Automated meters enable direct communication between the meter and APS, allowing an enhanced ability for customers to manage costs. The meters allow customers to know when and how much energy they are using, helping them make informed decisions about their energy usage.

While the technology is providing APS customers with better access to their usage information, the relative newness of the technology has resulted in some misinformation about what automated meters can and cannot do. Here are some of the myths and important facts about the APS automated meter program:

**Myth: Automated meters pose a safety risk to APS customers.**

**Fact:** Automated meters are safe. They use wireless technology to communicate information about electricity usage to APS. The meters transmit this information through radio frequency signals. Wireless automated meters result in much smaller levels of radio frequency than many existing common household electronic devices such as cell phones and microwave ovens. According to a study by the Electric Power Research Institute, a cell phone held against one's ear exposes someone to more than 1,000 times the radio frequency as an APS automated meter from a distance of 10 feet.

**Myth: APS will use automated meters to monitor the actions of its customers.**

**Fact:** Automated meters do not have this capability. Like the old mechanical meters, automated meters measure how much energy customers use, not how they use energy. The automated meter does not store or transmit any personal identification information. The automated meters give APS no indication of who our customers are, what they are doing, nor can they determine what appliances customers are using.

**Myth: The customer usage data that APS collects will be sold to others or will be accessible to outside parties.**

**Fact:** APS places the highest priority on the security of customer account information. We continue to work with meter vendors, electric utilities and governmental agencies to refine security standards and practices to ensure that security remains at the highest level. APS also has outside security firms audit and review our automated meter system to validate our security practices.

APS does not sell customer automated meter data. The usage data collected is intended for customers to make choices that enable them to pay the least amount possible for their electric service. APS considers all customer information to be confidential.

**Myth: The installation of automated meters results in higher costs to the customer.**

**Fact:** False. APS customer rates have not gone up due to the installation of automated meters. In fact, APS expects that over time the meter reading charge on the customer monthly statement will be reduced as the company's costs to read the meters are reduced. As always, it is 100 percent up to our customers to choose the service plan they use, no matter which meter is installed on their home or business. APS customer associates are always available to help our customers select the service plan that is best for their lifestyle.