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2015 SEP 17 A 11:00

September 17, 2015

AZ CORP COMMISSION
DOCKET CONTROL

Chairman Bitter Smith and Commissioners
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Arizona Corporation Commission

DOCKETED

SEP 17 2015

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Re: Campaign Contributions- Docket No. AU-00000A-15-0309

Dear Commissioners and Interested Parties:

The Alliance for Solar Choice has asked me to provide my legal opinion on the authority of the Arizona Corporation Commission to utilize its subpoena power in compelling Arizona Public Service ("APS") and/or its parent company, Pinnacle West Capital Corp. ("Pinnacle West"), to disclose its financial involvement in otherwise anonymous campaign expenditures directed at supporting candidates for seats on that Commission. Without intending or desiring to inject myself into an ongoing political debate, I have concluded that Arizona's Constitution and its implementing statutes clearly empower the Commission to request, and subpoena if necessary, such information from APS and/or Pinnacle West.

In addition, I do not believe that requiring such disclosure violates the free-speech rights provided by the First Amendment to the United States Constitution or Article Two, Section Six of the Arizona Constitution. In general, a government may require identification of an anonymous speaker when it narrowly tailors a disclosure requirement to a compelling government interest. Applying this standard, the United States Supreme Court has routinely upheld disclosure requirements regarding corporate political speech.¹

¹ See, e.g., *Citizen's United v. Fed. Election Comm'n*, 558 U.S. 310, 366-71 (2010); *Buckley v. Valeo*, 424 U.S. 1, 64, 66-7 (1976). It is true that the Court has acknowledged an exception to disclaimer and disclosure requirements where it is proven to a reasonable probability, in an "as applied" rather than a "facial" legal challenge, that a donor

The general reasons for allowing disclosure requirements apply to this matter. The Commission and its individual Commissioners have, or at least should have, a compelling interest in learning whether APS and or Pinnacle West made independent expenditures to influence the election of Commissioners, because such information reveals the potential bias of Commissioners who may have received support from these entities. Commissioners must be able to discover the relationships that their colleagues have with regulated entities and their parent companies because Commissioners engage in public deliberations having significant ramifications for Arizona citizens. Any connection between a regulated entity and a Commissioner provides context to that Commissioner's arguments, and the rest of the Commissioners deserve a chance to consider that context.

Moreover, the Commission and each Commissioner need this information to mitigate the appearance of impropriety that may result from ongoing speculation about the donations of regulated entities. In extreme cases, a Commissioner may have a duty to recuse himself from certain judicial or quasi-judicial proceedings related to that regulated entity.² The rest of the Commission will be unable to enforce that recusal obligation unless it knows of the contribution. And, even if the amount of APS's and/or Pinnacle West's expenditures does not create a legal obligation for recusal, any individual Commissioner may desire to be aware of the contribution so that he or she may take other steps to mitigate a potential appearance of impropriety.

The Commission has a compelling interest in such information. That interest is completely independent from any desire to censor speech, influence who speaks, or control what is said. And, the Commission cannot accomplish its twin objectives of assessing bias and avoiding the appearance of impropriety without accurate knowledge of a regulated entity's expenditures.

ANALYSIS

I. The Commission or any individual Commissioner may subpoena records from a public service corporation or its publicly traded parent company.

would be subjected to "threats, harassment or reprisals" from governmental officials or private parties, *see* 558 U.S. at 367-69, but there has been no such showing here.

² *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 885-87 (2009).

Arizona's Constitution grants a subpoena power to the Commission or any Commissioner.³ This subpoena power includes "power to inspect and investigate the property, books, papers, business, methods, and affairs" of a public service corporation or publicly traded company.⁴ Arizona's Constitution explicitly grants this power to both the Commission, as a whole, and "the several members thereof."⁵ Arizona statutes implementing that power similarly vest it in "[t]he commission, [and] each commissioner."⁶ Even if the Commissioners disagree among themselves regarding the advisability of issuing subpoenas, any individual Commissioner may subpoena the information without any need for a majority.

This subpoena power directly reaches APS as a "public service corporation."⁷ It also reaches Pinnacle West, APS's parent company, because Pinnacle West is publicly traded. Article 15, Section 4 applies the subpoena power to both public service corporations and "any corporation whose stock shall be offered for sale to the public." In prior litigation involving APS and the Commission, the Supreme Court of Arizona relied on the foregoing language to hold that the Commission may require reports from APS's parent company.⁸ APS remains under the control of a publicly traded parent, Pinnacle West. That parent company remains subject to the Commission's subpoena power.

³ *See*, Ariz. Const. Art. 15 Sec. 4 ("The corporation commission, and the several members thereof, shall have power to inspect and investigate the property, books, papers, business, methods, and affairs of any corporation whose stock shall be offered for sale to the public and of any public service corporation doing business within the state, and for the purpose of the commission, and of the several members thereof, shall have the power of a court of general jurisdiction to enforce the attendance of witnesses and the production of evidence by subpoena, attachment, and punishment, which said power shall extend throughout the state. Said commission shall have power to take testimony under commission or deposition either within or without the state."). An historical background of the Arizona Corporation Commission can be found in *Ariz. Corp. Comm'n. v. State ex rel Woods*, 171 Ariz. 286, 290-93, 830 P.2d 807, 811-14 (1992).

⁴ *Id.*

⁵ *Id.*

⁶ Arizona Revised Statutes ("A.R.S.") § 40-241(A).

⁷ Ariz. Const. Art. 15, sec. 4; *accord* A.R.S. § 40-241(A).

⁸ *Ariz. Pub. Serv. Co. v. Ariz. Corp. Comm'n*, 157 Ariz. 532, 760 P.2d 532 (1988)(the Commission clearly possesses power to "inspect and investigate.").

II. The Commission may exercise its power to subpoena documents related to political spending.

The United States Supreme Court regularly affirms compulsory disclosures of political spending. In *Citizen's United v. Federal Election Commission*, the United States Supreme Court explicitly held that “[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.”⁹ Renewing the high court’s longstanding approval of disclosure requirements, *Citizen's United* applied the traditional test for government actions limiting anonymous speech, requiring that there be a “substantial relation” between the disclosure requirement and a “sufficiently important” government interest.¹⁰

In the context of corporate political spending, *Citizen's United* held that the informative value of knowing a speaker’s identity, standing alone, justifies a disclosure requirement. The Court explained that “the public has an interest in knowing who is speaking about a candidate shortly before an election. . . . the informational interest alone is sufficient” to justify disclosure requirements.¹¹ The speaker’s identity is part of the context for any statement, and voters have a right to that context when they receive corporate political advocacy.

Disclosure requirements also reduce the potential for corporations to spend money on political speech in the hope of currying a *quid pro quo*. Disclosure requirements

deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate’s most generous supporters is better able to

⁹ 558 U.S. 310, 319 (2010).

¹⁰ *Id.* at 366; accord *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

¹¹ *Citizen's United*, 558 U.S. at 369. Arizona has affirmed disclosure requirements for political spending for reasons substantially similar to those articulated by the United States Supreme Court. *Comm. for Justice & Fairness v. Arizona Sec'y of State's Office*, 235 Ariz. 347, 360, 332 P.3d 94, 107 (App. 2014).

detect any post-election special favors that may be given in return.¹²

Justice Scalia summarized this point succinctly in *McConnell v. Federal Election Commission*, noting that disclosure of independent expenditures may reveal who is “‘in the pocket’ of so-called moneyed interests.”¹³

Individual Commissioners may use this information in the same way as ordinary voters, to evaluate the arguments of other Commissioners. The Commission is a deliberative body, and Commissioners make arguments in an attempt to persuade one another. In fact, Commissioners have debated and attempted to persuade each other regarding the policy implications of issuing a subpoena requesting the campaign spending information in question. As Commissioners deliberate that issue, they deserve to know which of their colleagues – if any – owes his or her position to APS. Putting it more generally, if one Commissioner advocates a position that may benefit a regulated entity, other Commissioners deserve to know how much that regulated entity spent in support of the advocate’s election. That information is part of the context for intelligent debate, and Commissioners deserve to know and understand that context so they may give it whatever weight it deserves.

The Commission also needs information regarding the political spending of regulated entities to consider potential recusals in proceedings involving parties responsible for that spending. The Due Process Clause of the United States Constitution requires that the Commission provide an impartial tribunal.¹⁴

Substantial campaign expenditures in favor of a Commissioner could create bias or an appearance of bias requiring that commissioner to recuse himself.¹⁵ The United States Supreme Court recently considered a case involving a party to litigation who spent about three million dollars on independent expenditures in support of an appellate judge’s election campaign.¹⁶ The party made those expenditures after losing a trial and while contemplating an appeal. By making those expenditures, he was able to influence which judge would consider his appeal. Regardless of the judge’s proclaimed belief that he could remain fair and impartial, the United States Supreme

¹² *Buckley*, 424 U.S. at 65.

¹³ 540 U.S. 93, 259 (Scalia, J. concurring in part and dissenting in part) (quoted in *Citizen’s United*, 558 U.S. at 370).

¹⁴ See, e.g., *Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995).

¹⁵ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 885 (2009).

¹⁶ See generally, *id.*

Court reversed the decision, explaining that the judge should have recused himself because of the appearance of impropriety created by those independent expenditures.¹⁷

In making that decision, the Supreme Court considered the raw amount of money spent electing the judge and the ratio of independent expenditures to those of the judge's campaign committee.¹⁸ The exorbitant amount of those expenditures and their disproportionate relationship to the judge's own campaign committee spending (3 to 1) compelled the judge to recuse himself.¹⁹

The Commission finds itself in a very similar situation as the result of APS's alleged largess in the 2014 elections. While the true source of the substantial campaign spending last cycle is technically unverified, it is commonly and widely presumed to be APS. It may actually be the case that the only way a Commissioner who benefitted from that exorbitant spending could be relieved of his duty to recuse himself would be by determining the true source of the funds.

Moreover, even if expenditures aren't great enough to *require* recusal, a Commissioner may use that knowledge to recuse himself on a discretionary basis. Expenditures over a certain level by a regulated entity may create the appearance of "judge shopping," and an individual Commissioner could preserve the Commission's credibility by recusing himself in appropriate instances. And, even if a subpoena were to eventually reveal that the amount of expenditures isn't great enough to merit recusal, the Commission may take less extreme measures to assure the public that it is acting impartially. Thus, it would again seem that the Commissioners would want and even need such information.

CONCLUSION

In summary, my considered opinion is that the Commission as a whole or any individual Commissioner may subpoena APS and Pinnacle West for records related to its independent expenditures. Arizona's Constitution grants this independent branch of government broad power to both monitor and regulate public service corporations and publicly traded corporations. And, free speech principles are not inimical to the cleansing power of sunlight in the political process. As the United States Supreme Court plainly said in *Citizens United*,

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

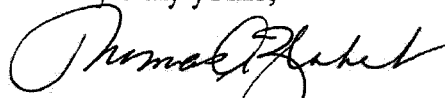
September 17, 2015

Page 7

The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.²⁰

I attach a copy of my CV in case it should be of value to anyone reading this letter. Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read "Thomas A. Zlaket". The signature is fluid and cursive, with the first name "Thomas" being the most prominent.

Thomas A. Zlaket

²⁰ 558 U.S. at 371(2010).

CURRICULUM VITAE

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CELL PHONE: (520) 861-3267
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DATE OF BIRTH: MAY 30, 1941

Education:

University of Notre Dame, South Bend, Indiana.
Bachelor of Arts (A.B.) in Political Science, 1962.

University of Arizona, Tucson, Arizona.
Bachelor of Laws (LL.B.), 1965.

University of Virginia, Charlottesville, Virginia.
Master of Laws (LL.M.) in Judicial Process, 2001.

Admitted to Practice Law:

- All Arizona state courts, September 25, 1965
- United States District Court, District of Arizona, July 27, 1967
- United States Court of Appeals, Ninth Circuit, July 9, 1969
- All California state courts, May 7, 1976

Judicial Experience:

- Judge Pro Tem (Part-time), Superior Court of the State of Arizona, Pima County, Arizona, 1983 - 1992.
- Associate Justice, Arizona Supreme Court, 1992 - 1996
- Vice Chief Justice, Arizona Supreme Court, 1996 - 1997
- Chief Justice, Arizona Supreme Court, 1997 - January 7, 2002.
- Associate Justice, Arizona Supreme Court, January 8, 2002 – April 30, 2002) (retirement date)
- Chief Judge, Tonto Apache Nation Tribal Appellate Court, 2005 – present
- Judge Pro Tem, San Carlos Apache Nation Tribal Court, 2012 – present.
- Judge, White Mountain Apache Nation Tribal Appellate Court, 2013 - present

Private Practice of Law:

- Leshner, Scruggs, Rucker, Kimble & Lindamood
3773 East Broadway Boulevard
Tucson, Arizona 85716
(Associate: 1965 - 1967; Partner: 1967 - 1968)
- Maud & Zlaket
177 North Church Avenue
Tucson, Arizona 85701
1968 – 1970 (Partner)
- Estes, Browning, Maud & Zlaket
Estes, Browning & Zlaket
Estes & Zlaket
177 North Church Avenue
Tucson, Arizona 85701
1970 – 1973 (Partner)
- Slutes, Estes, Zlaket, Sakrison & Wasley
Slutes, Zlaket, Sakrison & Wasley
Slutes, Browning Zlaket & Sakrison
33 North Stone Avenue
Tucson, Arizona 85701
1973 – 1982 (Partner)

- Zlaket & Zlaket, P.C.
2701 East Speedway Boulevard, Suite 200
Tucson, Arizona 85716
1982 – 1992 (Shareholder)
- Law Offices of Thomas A. Zlaket, P.L.L.C.
310 South Williams Boulevard, Suite 170
Tucson, Arizona 85711-4446
5/1/02 – present (Managing Member)
- Zlaket Law Offices, APC
550 West C Street
Suite 1690
San Diego, California 92101
1/15/15 – present (Member)

Professional Memberships:

State Bar of Arizona, 1965 to present:

- Board of Governors, 1980 - 90
 President, 1988 - 89
 President-Elect, 1987 - 88
 First Vice President, 1986 - 87
 Second Vice President, 1985 - 86
- Professionalism Task Force, 2003 - 06
- Injury and Wrongful Death Litigation Advisory Commission, 1990 - 92
- Committee on Professionalism, 1988 - 92
- Disciplinary Probable Cause Panelist, 1986 - 87
- Committee on Criminal Rules Revision, circa 1974 - 76
- Certified Specialist, Injury and Wrongful Death Litigation, 1991 - 92

Pima County Bar Association, 1965 to present:

- Board of Directors, 1969 - 70; and 1980 - 90
- Civil Practice Committee, 1985 - 90
- Medical - Legal Committee, 1980 - 85
(Chairman, circa 1984 - 85)
- Courthouse Committee, 1975 - 80
- Medical - Legal Screening Panel, 1968 - 75

State Bar of California, 1976 to present.

Maricopa County Bar Association, 1992 - 2003.

Fellow, American College of Trial Lawyers, 1982 - present

- Arizona State Chairman, 1991 - 92

Life Fellow, American Bar Foundation.

National Conference of Chief Justices, 1997 - 2002.

- Board of Directors, 1998 - 2001

Founding Fellow, Arizona Bar Foundation.

American Bar Association, 1966 - present.

- Arizona Delegate, ABA House of Delegates, 1990 - 92

American Board of Trial Advocates, 1972 - present

- National Executive Committee, 1982 - 85
- President, Tucson Chapter, 1981
- Secretary/Treasurer, Tucson Chapter, 1980

Defense Research Institute, 1970 - 82

- Arizona State Chairman, circa 1975 - 78

Tucson Defense Bar Association, 1970 - 82

- President, circa 1977 - 78

American Trial Lawyers Association, 1972 - 91

Arizona Trial Lawyers Association, 1985 – 91

American Judicature Society, circa 1968 - 80; 1992 – circa 2005

National Panel of Arbitrators, American Arbitration Association, circa 1975 – 91

Arizona Capital Representation Project Board of Directors, 2003 – 2012

- Honorary Board Member, 2012 - present

Federal Civil Justice Reform Act Advisory Committee for the District of Arizona,
1991 - 95

Arizona Supreme Court Commission on the Courts, 1988 - 90

Arizona Governor’s Task Force on Medical Liability Insurance Premiums, 1989 - 90

Arizona Supreme Court Committee on Medical Malpractice Rules of Procedure,
1989 - 92

Chairman, Arizona Supreme Court Committee on Civil Discovery Abuse, Cost &
Delay, 1990 - 92

Chairman, Arizona Supreme Court Commission on Technology, 1992 - 97

Arizona College of Trial Advocacy Executive Committee, 1986 - 2002

Teaching Faculty, Arizona College of Trial Advocacy (State Bar of Arizona), 1986,
2002, 2011

Teaching Faculty, National Institute of Trial Advocacy, Western Session, San Diego,

California, 1988

Teaching Faculty, Hastings College of Trial Advocacy, San Francisco, California,
circa 1978 - 80

Teaching Faculty, Pima County Bar Association Trial Advocacy Program, 1989 - 90

Lecturer-in-Law, University of Arizona College of Law, 1967 – 78.

Adjunct Associate Professor of Law, James E. Rogers College of Law at the
University of Arizona, 2003 - present

National Board of Directors, The Justice Management Institute, 2003 – 2013.

Lecturer at numerous continuing legal education seminars in Arizona and around the
United States from 1970 to the present, primarily on the subjects of ethics and
professionalism, civil litigation, and discovery abuse.

Chairman, Attorneys' Planning and Program Committee for the Arizona Judicial
Conference, 1990

University of Arizona Law College Association, 1975 - present.

- Board of Directors, 1990 – 2011
- Emeritus Director, 2011- present

University of Arizona James E. Rogers Law School Board of Visitors, 2001 - present

Arizona Law Review Association, 1986 - present

Co-chair, National Conference on Public Trust and Confidence in the Justice System,
Washington, D.C., May, 1999

Phi Delta Phi Legal Fraternity

- President, Pattee Inn, 1964 – 65

Student Bar Board of Governors, University of Arizona College of Law, 1963

Honors and Awards:

Arizona Law Lifetime Achievement Award, University of Arizona James E. Rogers College of Law (to be formally presented on October 22, 2015)

Special Award of Honor, State Bar of Arizona, June 26, 2015

2006 Public Service Award, Arizona Center for Law in the Public Interest

Thomas A. Zlaket Professionalism in Teaching Endowment, University of Arizona James E. Rogers College of Law, 2003

Honorary Doctor of Law Degree, University of Arizona, 2002

Distinguished Alumnus Award, University of Arizona James E. Rogers College of Law, 2002

Distinguished Service Award, Pima County Volunteer Lawyers Program, 2002

2001 National Center for State Courts' Reardon Award

State Bar of Arizona James A. Walsh Distinguished Jurist Award, June 15, 2001

American Judges Association 2000 Chief Justice Richard W. Holmes Award of Merit

State Bar of Arizona Award of Special Merit, June 16, 2000

University of Arizona Distinguished Citizen Award, February 21, 1998

American Board of Trial Advocates Civil Justice Award, April 1, 1992

Member of the Year Award, State Bar of Arizona, June 1991

Outstanding Graduate Award, University of Arizona College of Law, 1989

Arizona Supreme Court Certificate of Appreciation for Service on Board of Governors, 1988

State Bar of Arizona Award for Contribution to Continuing Legal Education, 1988

City of Tucson Copper Certificate for Service on Magistrate Selection Commission, 1982

Listed in three editions of “The Best Lawyers in America” before going on the bench in 1992, and again beginning with the 2007 edition each year to the present.

Listed among Top Attorneys in Arizona, 2007 – present, by Super Lawyers Publishing.

National Trial Lawyers Association, Top 100 Trial Lawyers, 2010 - 2013

Martindale-Hubbell AV rating.

Arizona Law Review, 1963 – 65.

- Editor-in-Chief, 1964 - 65
- Editorial Staff, 1963 - 64

National Moot Court Team, University of Arizona College of Law, 1964 - 65

- Regional Finalists, Albuquerque, New Mexico, 1965

Individual Moot Court Champion, University of Arizona College of Law, 1962 - 63, 1963 - 64, and 1964 - 65

Tucson Title Insurance Award, University of Arizona College of Law, 1965

Udall on Evidence Award, University of Arizona College of Law, 1965

AmJur Awards in Trust and Corporations, University of Arizona College of Law, 1964 – 65

Other Associations and Activities:

Member, University of Arizona Foundation National Leadership Council, 2011 – present

Member, Tucson Airport Authority, 2003 – present

Board of Directors, 2007 – present
Board of Directors Chairman-Elect, 2011
Board Chairman, 2012

Member, D-M 50, 2003 – present

Chair, Tucson Unified School District No. 1 Bond Oversight Committee, 2004 - 06
Member, 2006 - 07

Arizona Board of Trustees, The Nature Conservancy, 2004 - 2013

Board of Directors, Tucson Country Club, 2005 - 2009
President, 2007- 08

Tucson Conquistadores (Life Member) 1977 – 1992; 2002 – present.

- Board of Directors, 1981 - 84
- President, 1983 – 84

Arizona Academy, 1988 - present.

- Delegate, Arizona Town Hall on Civil Justice, 1988

City of Tucson Magistrate Selection Commission, 1997 - 82

Big Brothers of Tucson Board of Directors, circa 1970 - 75

St. Joseph's Hospital Community Advisory Committee, circa 1975 - 80

Exchange Club of Downtown Tucson, circa 1970 - 80

“Off the Record” Debate Society

- Board of Directors, 1991 - 93

Member, The Breakfast Club (of Tucson), 2004 – present

Notre Dame Ace Academies Board of Directors, 2010 - 14

Articles:

Casenote, 6 Arizona Law Review 156, "Second Mortgagee May Not Acquire Title to Mortgaged Property as Against First Mortgagee Through a Tax Deed — Moore vs. Crisp (Okla. 1963)."

President's Message, "Reviving Professionalism," Arizona Attorney, September 1988

President's Message, "God Bless Madison Avenue," Arizona Attorney, October 1988

President's Message, "Dispute Prevention," Arizona Attorney, November 1988

President's Message, "Paper Wars," Arizona Attorney, December 1988

President's Message, "A Town Hall View of Lawyers and Justice," Arizona Attorney, January 1989

President's Message, "Out of the Frying Pan . . .," Arizona Attorney, February 1989. (Republished in the ALI-ABA CLE Review, Vol. No. 6, March 10, 1989.)

President's Message, "A Learned Profession?," Arizona Attorney, March 1989

President's Message, "Don't Worry, Be Happy?," Arizona Attorney, April 1989

President's Message, "Letters... We get Letters," Arizona Attorney, May 1989

President's Message, "So Long, It's Been Good to Know You ...," Arizona Attorney, June 1989

"Encouraging Litigators to be Lawyers: Arizona's New Civil Rules", 25 Arizona State L. J. 1 (1993).

"Should Lawyers Be Required to Tell the Truth?" (unpublished) Masters Thesis, U of Virginia (2000).

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