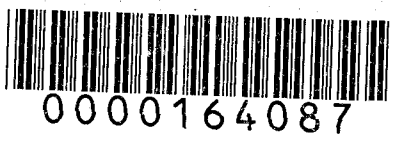

VIA FEDEX

September 25, 2015

Chairman Bitter Smith and Commissioners
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, AZ 85007

ORIGINAL

Re: Campaign Contributions - Docket AU-00000A-15-0309

Dear Commissioners and Interested Parties:

IO Data Centers, LLC ("IO") is pleased to submit this letter regarding the referenced docket, which concerns the campaign spending practices of public service corporations ("PSC") and other entities that appear before the Arizona Corporation Commission (the "Commission") on Commission elections. IO appreciates the Commission's focus on this issue, which we believe to be of critical importance to the State of Arizona given the unique role that the Commission plays in utility regulation.

Although some of the commentary in this docket has focused on whether or not the Commission has the authority to prohibit PSCs from making any political contributions or whether PSCs should voluntarily refrain from such contributions, IO takes no position on those issues. Instead, IO approaches the issue from a different perspective. IO submits that, as a threshold matter, the Commission has the authority—and, indeed, the obligation—to require the disclosure, by PSCs or other affiliated entities (*e.g.*, parents, subsidiaries), of their expenditures in Commission elections.[1] The Commission should exercise its authority in two ways: (1) issue a subpoena so that the Commission may inspect the books and records of PSCs to determine their spending activity (on Commission elections) in the last election cycle (2014); and (2) promulgate a rule that would require such disclosure by PSCs on an ongoing and prospective basis.

The stakes are high. Simply stated, under existing law, a regulated PSC can spend unlimited amounts of money, anonymously, to influence the election of the members of the very regulatory body that oversees the PSC. This situation—an unintended consequence of recent changes in the law—erodes public confidence in the Commission's process and decision-making and undermines the Commission's ability to fulfill its constitutionally imposed duty to protect "the public interest through regulation of [PSCs]"[2]. To discharge this critical duty, the Commission must be free from both actual and perceived conflicts of interest. And to determine the existence of those conflicts, both the Commission and the voters of Arizona require information about election spending by PSCs on Commission elections.

Legality and Utility of a Subpoena to Investigate Past PSC Election Spending

In this docket, some have argued (1) that a subpoena of a PSC's financial records to determine the extent of its expenditures in support of Commission candidates in the 2014 election might be unconstitutional and (2) that a subpoena would serve no practical purpose. IO respectfully disagrees with both assertions.

The first point was thoroughly addressed by the Honorable former Chief Justice Thomas A. Zlaket, in his letter docketed September 17, 2015. This letter provides detailed legal support for the conclusion that the Commission (or, in fact, any one of the individual Commissioners) unquestionably has the power to compel disclosure by PSCs of expenditures in support of Commission candidates without violating the First Amendment rights of such PSCs. In light of the quality and completeness of his analysis, IO submits that this question has been "asked and answered".

With regard to the second point, IO observes that disclosure of PSC campaign expenditures in the 2014 election cycle serves several practical purposes, including informing the public about which PSCs spent money in support of which Commissioners as well as ensuring public confidence in the integrity of the Commission's discharge of its vital constitutional duties, free from real or perceived conflicts of interest. More importantly, however, what practical purpose would be served by protecting such material information from public view?[3]

Utility of a Rule Requiring Prospective Disclosure by PSCs

The disclosure of PSC money in elections is not only desirable, it is required for this Commission to discharge effectively its duties without undue influence from the entities it regulates. The Arizona Constitution, as previously referenced, creates "a corporation commission . . . to be composed of five persons who shall be elected at the general election" for the regulation of public utilities.[4] State law clearly requires all elected officials to be free from conflicts of interest[5]. The combination of constitutionally granted authority in the Commission, which exercises its power through elected Commissioners, plus an elected Commission "provide[s] both effective regulation of PSCs and consumer protection against overreaching by those corporations."[6] The authors of the Arizona Constitution believed that popular election would insulate the Commission from PSCs' excessive "influence in the [state's] direction and control."[7] Recent case law, however, upends that objective allowing unlimited spending by corporations in support of or opposition to individual candidates.[8] The Commission must keep pace with these legal developments and adopt a rule that will give the Commission and the public it is required to serve visibility into election spending (on Commission elections) by the very PSCs that the Commission is charged with regulating.

Under the Arizona Constitution, the Commission has the authority to "exercise[ ] [an] executive, administrative function in adopting rules and regulations, [ ] **judicial**

jurisdiction in adjudicating grievances, and [ ] legislative power in ratemaking."[9] The breadth of the Commission's powers necessitates a regulatory regime in which both the Commission and the public at large have access to material information regarding the election of the Commission, including expenditures on Commission elections by the very PSCs that the Commission regulates.

Furthermore, it is a well-established principle that all government entities should avoid the appearance of impropriety, as well as actual or perceived conflicts of interest. That principle applies with full force to the Commission, which frequently acts in a quasi-judicial capacity. IO's concern is not purely academic. The influx of millions of dollars of "dark money" into recent Commission elections has called into question the very independence of the Commission.[10] These expenditures—and their impact on the election of Commissioners—also create the troubling possibility that certain litigants (those unable to spend at the same level as other litigants) appearing before the Commission are denied due process.[11] It is in the interest of each Commissioner—and each PSC—that the public has confidence in the integrity of both the Commission and each Commissioner.

The Commission currently has no mechanism in place to monitor conflicts of interest where a Commissioner sits in judgment of an entity whose expenditures were potentially a determining factor in the Commissioner's election. A rule requiring timely disclosure of PSC spending for or against Commission candidates will enable the Commission to evaluate such conflicts. And, importantly, such a rule will not impose any meaningful burden on PSCs as the rule would require disclosure of facts that the PSC already has collected. (The public and the Commission simply have no other way of obtaining this critical information). The rule proposed by IO would not only help to restore public trust in the Commission, it would allow the Commission to more adequately and fairly carry out its duties and protect the public interest, generally.

One of the theories offered in opposition to requiring prospective disclosure by a PSC is that it would be unfair to impose that requirement without imposing a similar requirement on other unregulated entities that appear before the Commission from time to time. This argument fails on its face. PSCs in Arizona occupy a unique status; they enjoy highly lucrative special benefits, such as the absence of competitors, protected financial returns, the privilege to engage in activity that otherwise would be deemed anticompetitive, and (allegedly lawful) exclusive service territories. These special privileges can only be granted lawfully to entities under the "active supervision" of this Commission—specifically, a PSC's rates, plans and other activities are subject to general review and formal approval by this Commission.[12] Other parties with business before the Commission do not enjoy any of these special privileges and are, in fact, prohibited by law from such activities.[13] For these reasons, the election spending activities of PSCs cannot be compared to similar activities by unregulated entities that enjoy no such benefits and require no such supervision.

The solution is clear: Regulated PSCs should be required to disclose their expenditures for and against candidates for the Commission. A disclosure regime would restore public trust in the Commission and allow the Commission to more effectively carry out its duties, including protecting the public interest generally. As Justice Louis D. Brandeis once famously wrote, "sunlight is . . . the best of disinfectants."[14]

We thank the Commission for its time and look forward to next steps in this critical docket.

Very truly yours,

DocuSigned by:
Anthony L. Wanger
3933AA4FE7E44CD...

IO Data Centers, LLC

End Notes

[1] We refer here to any expenditures by a PSC or other affiliated entities that advocate "for" or "against" the election of a candidate for the Commission.

[2] *Arizona Corp. Comm'n v. State ex rel. Wood,* 830 P.2d 807 (Ariz. 1992) (emphasis added) (citing Engelby, *infra* at 244-45; Leshy, *infra* at 90-91).

[3] It is worth noting that the topic at hand is public in all facets – namely whether or not to compel the public disclosure of the public activities of public service corporations in a public election of the public body that regulates it.

[4] Arizona Constitution, Article 15, Section 1.

[5] A.R.S. § 38-503.

[6] *Arizona Corp. Com'n v. State ex rel. Woods*, 830 P.2d 807 (Ariz. 1992) (*citing Records of the Arizona Constitutional Convention of 1910* at 612-15, 967-81; Deborah Scott Engelby, Comment, *The Corporation Commission: Preserving its Independence*, 20 Ariz. St. L. J. 251, 244-48 (1988)).

[7] *Woods, supra* (citing *Journal of the Constitutional Convention of Arizona* 435 (Cronin comp. 1925) (quoted in John D. Leshy, *The Making of the Arizona Constitution*, 20 Ariz. St. L.J. 1, 88 (1988))).

[8] *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

[9] *Woods, supra* (emphasis added).

[10] *See* Ronald J. Hansen, *3 Arizona Corporation Commission members hit with new bias complaints,* Arizona Republic (September 18, 2015) http://www.azcentral.com/story/money/business/energy/2015/09/18/3-arizona-corporation-commission-members-hit-new-bias-complaints/72362598/; Brandon Cheshire, *Net Metering and the Arizona Corporation Commission,* Arizona Capitol Times (August 27, 2015) http://azcapitoltimes.com/news/2015/08/27/net-metering-and-the-arizona-corporation-commission/.

[11] *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876, 882-87 (2009) ("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process'") (quoting *In re Murchison*, 349 U.S. 133 (1955)).

[12] For example, the maintenance and extension of a monopoly is illegal under both federal and Arizona law. Only regulated companies, which are "actively supervised" by an impartial government agency, may be exempt under such civil and criminal prohibitions. *See Parker v. Brown*, 317 U.S. 341 (1943). Without disclosure of who is involved in the election of such regulators, there can be no effective way to discern between valid expenditures by parties lawfully exempt from antitrust laws as opposed to expenditures made by others attempting to create or maintain monopolies in violation of law.

[13] 15 U.S.C. §§ 1-7; A.R.S. §§ 1401-1416.

[14] Justice Louis D. Brandeis, *What Publicity Can Do,* Harper's Weekly (1913).