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ORIGINAL

Arizona Corporation Commission

DOCKETED

SEP 17 2015

DOCKETED BY

Attorneys for Intervenors Renz Jennings, William Mundell, and Sunrun, Inc.,

BEFORE THE ARIZONA CORPORATION COMMISSION

SUSAN BITTER SMITH
CHAIRWOMAN

BOB BURNS
COMMISSIONER

TOM FORESE
COMMISSIONER

DOUG LITTLE
COMMISSIONER

BOB STUMP
COMMISSIONER

18) DOCKET NO. E-01345A-13-0248
19)
20) IN THE MATTER OF THE) APPLICATION FOR REHEARING OF
21) APPLICATION OF ARIZONA) DECISION NO. 75251 ON THE GROUND
22) PUBLIC SERVICE COMPANY FOR) THAT COMMISSIONERS TOM
23) APPROVAL OF NET METERING) FORESE AND DOUG LITTLE SHOULD
24) COST SHIFT SOLUTION.) HAVE RECUSED THEMSELVES OR
25)) BEEN DISQUALIFIED FROM
26)) CONSIDERING THE MATTER BEFORE
27)) THE COMMISSION

24 Pursuant to A.R.S. § 40-253, Intervenors Renz Jennings, William Mundell, and Sunrun,
25 Inc., ("Intervenors") apply for rehearing of Decision No. 75251, docketed on August 31, 2015.
26 Intervenors seek a rehearing because Commissioners Tom Forese and Doug Little should have
27 recused themselves or been disqualified from considering the matter before the Commission.
28

1 Recusal or disqualification is required because of (1) the extraordinary amount of funding
2 contributed to buttress Commissioners Forese and Little’s 2014 campaigns (and to thwart the
3 campaigns of their opponents), which achieved a significant and disproportionate influence in
4 the 2014 Commission races; and (2) the temporal connection between that spending and the
5 renewed filing by APS in this docket causes the probability of actual bias to rise to an
6 unconstitutional level and thereby renders participation by Commissioners Forese and Little as
7 arbiters of this matter violative of Intervenors’ rights to due process under the United States and
8 Arizona Constitutions and related law. Specifically, and as more fully set forth below,
9 Commissioners Forese and Little were the beneficiaries of \$3.2 million in election support that is
10 generally and objectively believed to have come from, on behalf of, or at the direction of,
11 Arizona Public Service (“APS”) or its parent company, Pinnacle West Capital Corporation
12 (“Pinnacle West”). As a result, the due process protections guaranteed by the United States and
13 Arizona Constitutions do not permit Commissioners Forese and Little to preside in their quasi-
14 judicial capacity and pass judgment on matters involving APS, the Commissioners’ presumptive
15 benefactor. For these reasons, reconsideration should be granted and Commissioners Forese and
16 Little should recuse themselves, or the Commission should disqualify them from participating in
17 the present proceeding.

18 **Factual Background**

19 **A. Background on the Pending Matter.**

20 On July 12, 2013, APS caused this docket to be opened by its filing of *In The Matter Of*
21 *The Application Of Arizona Public Service Company For Approval Of Net Metering Cost Shift*
22 *Solution* (the “APS Application”). The APS Application claimed that residential customers who
23 have “distributed generation” solar panels installed on their homes (“DG Customers”) receive
24 benefits from connection with the power grid, but do not pay their fair share of the costs of that
25 grid. [See Application, 7/12/2013 at 1]¹ On that basis, APS urged the Arizona Corporation
26 Commission (“ACC” or “Commission”) to revise the Net Metering mechanism to cease a
27 claimed “subsidy” that “shifts costs” from DG Customers to other APS customers, and that the

28 ¹ Unless otherwise stated, citations to record materials are to papers filed in this docket—No. E-01345A-13-0248.

1 ACC do so without waiting for the next APS rate case to review the Net Metering program. [*Id.*
2 at 4, 7-10, 15] By the time the final public hearing on the matter occurred, APS sought to have
3 the ACC adopt, using the previously created Lost Fixed Cost Recovery mechanism (“LFCR”), a
4 fee that would be applied only to DG Customers. [*See* APS Comments to Staff’s Report and
5 Recommended Order, 11/42013 at 2, 4-6] APS revealed it sought an increased fee of about
6 \$56.00 per month on average to be added to DG Customers’ power bills. [*Id.* at 4-6]

7 Concurrent with the APS effort, the Arizona Free Enterprise Club (“AFEC”), through its
8 Executive Director, Scott Mussi, entered the discussion. On October 28, 2013, Mr. Mussi
9 submitted a letter to Commissioner Stump in this very docket, setting out AFEC’s position on
10 this matter. [*See also* Combined Appendix of Evidence in Support of Intervenors’ Applications
11 for Rehearing of Decision 75251 (“Appendix”), exhibit 14] Specifically, the letter stated that
12 AFEC’s “position on the [Net Metering] program has been clear from the beginning: providing
13 credits to solar customers that is [*sic*] not based on the market costs of the power is an unfair
14 subsidy that is being paid for by non-solar ratepayers.” [*Id.* at ACC_AR0303] Further, Mr.
15 Mussi’s letter stated that AFEC disagreed with the ACC “staff’s recommendation that the
16 Commission should postpone action until the next rate case,” stating that the factually
17 unsupported “cost shift associated with Net Metering will only grow larger over the next several
18 years.” [*Id.*] AFEC’s letter by Mr. Mussi concluded that “[w]e respectfully request that you
19 move forward with this vital reform and look to end the hidden subsidies embedded in the Net
20 Metering program.” [*Id.*]

21 After APS and Scott Mussi on behalf of the AFEC argued to impose the \$56.00 fee
22 immediately and outside a full rate case, the ACC rejected the significant fee increase in a 3 to 2
23 decision, enacted a “compromise” fee of \$0.70 per kilowatt hour of panel capacity per month (on
24 average amounting to \$4.90 per month) on future DG Customers, and required APS to begin its
25 next rate case on June 1, 2015, at which time the issue submitted in this docket would be
26 examined.² [Decision No. 74202, 12/3/2013 at 29-30] That Order was entered on December 3,

27 _____
28 ² Subsequently, on August 21, 2014 (Decision No. 74702), APS successfully persuaded the ACC to postpone its
rate case; thereafter it then reopened this docket, on April 2, 2015, and, as described more fully in the body of this

1 2013, less than nine months before the August 26, 2014, primary election in which two seats on
2 the ACC would be contested, and less than a year before the November 4, 2014, general election
3 at which those two ACC seats would be filled.

4 **B. “Independent” Money Floods and Impacts the 2014 ACC Election.**

5 The race for the two ACC seats in the 2014 cycle included six candidates in the primary
6 election. In the Republican primary, two of the candidates, Republicans Doug Little and Tom
7 Forese, were supported by unprecedented expenditures of “independent money,” and two of the
8 candidates, Republicans Vernon Parker and Lucy Mason, were attacked by unprecedented
9 expenditures of “independent money.” From the very outset, media reports began attributing the
10 unprecedented expenditures to APS or Pinnacle West, both companies subject to ACC
11 oversight.³ Even the then Chairman of the Commission frequently was faced with, and
12 discussed, the likelihood that the funding source was APS. [Appendix, exhibit 2 at
13 ACC_AR0027-28; *see also* exhibit 2 at ACC_AR0093-94 (Commissioner Stump saying on
14 Facebook “[t]he only two ‘special interests’ that collectively spent ‘millions of dollars’ were
15 APS (Pinnacle West) and TUSK and its solar affiliates.”)] The amounts spent in support of
16 Forese and Little and in opposition to their opponents, primarily funded by AFEC and Save Our
17 Future Now (“SOFN”), are set forth in the table and associated campaign finance materials in
18 Appendix, exhibit 16.⁴ These organizations spent a total of \$1,712,133.32 on the ACC races in

19 Application, insists that the ACC must now determine to impose a fee on DG Customers and, because of the alleged
20 urgency, do so before the next APS rate case that had been deferred at APS’s insistence only eight months before.
[*See* Motion to Reset, 4/2/2015 (“Reset Application”)]

21 ³ The term “unprecedented” is not loosely used here. As demonstrated by the controversy that arose in the 2012
22 election cycle in which three ACC seats were contested, the expenditure of independent monies that are or may be
23 linked, even indirectly, to regulated utilities was viewed as highly unusual. In the 2012 ACC races, the Arizona
24 Chamber of Commerce and Industry contributed \$7,500 to election campaigns of the three successful ACC
25 candidates. [Appendix, exhibit 15] Significant concern arose from that contribution when it was revealed that two
26 of the donors to the Arizona Chamber’s campaign fund were two utilities regulated by the ACC: APS and Southwest
27 Gas Corporation. One news article describing the concerns raised by such “indirect” spending by regulated utilities
28 is found in the Appendix as exhibit 15. Commissioner Stump was reported to have said utilities should stay out of
political races involving regulators—“I agree with the policy not to get involved in (commission) races.” [*Id.* at
ACC_AR0307]

⁴The summary was created from records obtained from the Arizona Secretary of State concerning campaign
finances in the 2014 cycle. The Commission can take administrative notice of these materials. Ariz. Admin. Code §
R14-3-109(T).

1 the Republican primary. [Appendix, exhibit 16 at ACC_AR0342]⁵ After Little and Forese won
2 the Republican primary election, they received significant further support in the general election
3 through additional and unprecedented expenditure of money believed to be linked to APS, and
4 the two Democratic candidates, Sandra Kennedy and Jim Holway, were attacked by
5 unprecedented and objectively believed to be regulated utility-sourced expenditures, with
6 Kennedy the target of the bulk of the attacks. The amounts spent in the general election
7 supporting Forese and Little, and in opposition to Holway and Kennedy, are set forth in the table
8 and associated campaign finance materials in Appendix, exhibit 16, and amounted to a total of
9 \$1,473,993.96. In short, between June 11, 2014 and October 28, 2014, AFEC spent
10 \$453,257.47, and SOFN spent \$2,765,061.97 on the 2014 ACC elections, for a total of
11 \$3,218,319.44 during that five month period. [See Appendix, exhibit 16]

12 The amount the candidates spent in their own campaigns pales in comparison. Forese's
13 campaign spent only \$123,120.00 and \$146,430.00 in the primary and general elections while
14 Little's campaign spent only \$115,120.00 and \$145,453.32 in the primary and general elections.
15 [Id.] Even combining their efforts, the two candidates spent only \$238,240.00 in the primary,
16 and only \$291,883.32 in the general election. [Id.]

17 The apparent effect of the spending on the outcome of the elections is shown in detail on
18 the official canvas tables in Appendix, exhibit 16 at ACC_AR0313-14 and is summarized here.

19 The primary election vote count was:

Candidate:	Votes Received	Percent of Ballots Cast
Forese:	249,951	45.49%
Little:	250,193	45.54%
Mason:	199,821	36.34%
Parker:	163,773	29.81%

23 Total ballots cast: 549,423.

26 ⁵ Because only two candidates for the ACC were on the ballot in the Democratic Party primary, with two ACC
27 seats in contention, those candidates were "unopposed" in the Democratic Primary and so each drew only
28 \$16,095.83 in opposition spending from AFEC during the primary race, which is not counted in the total spent in the
Republican primary, but is included in the description of the total spending during the 2014 election cycle.
[Appendix, exhibit 16]

1 The general election vote count was:

2	Candidate:	Votes Received	Percent of Ballots Cast
3	Forese:	761,915	49.55%
4	Little:	766,864	49.87%
5	Holway:	557,963	36.28%
6	Kennedy:	576,482	37.49%
7	Total ballots cast: 1,537,671		

8 AFEC and SOFN are organizations claiming exemption from taxation under Section
9 501(c)(4) of the Internal Revenue Code. *See* 26 U.S.C. § 501(c)(4). Following the Supreme
10 Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010) corporations are free to
11 contribute unlimited amounts of money independently or to "independent expenditure"
12 committees to support or oppose candidates, although the majority opinion makes it clear that
13 nothing precludes a possible requirement that contributions be disclosed. *Citizens United*, 558
14 U.S. at 370 ("[t]he *First Amendment* protects political speech; and disclosure permits citizens
15 and shareholders to react to the speech of corporate entities in a proper way."). However, under
16 the current provisions of Section 501(c)(4), corporations (along with other contributors) may
17 make contributions to a "(c)(4)" without disclosure of the contributors' identities, giving rise to
18 the term "dark money."⁶

19 ⁶ The shield against transparency only survives as long as the (c)(4) benefiting from the contributions remains
20 qualified under Section 501(c)(4). Among other requirements, a (c)(4) must maintain certain campaign spending
21 proportions between "political" advocacy and "social welfare" spending. Specifically, this requirement obligates a
22 (c)(4) organization that conducts political campaigns to solicit and spend "social welfare" funds in at least as large
23 an amount as it spends on political activity. In other words, for every dollar raised and spent on political activity, a
24 (c)(4) that wishes to keep its donors anonymous must raise twice as much in funding as it seeks to spend on political
25 matters, and spend at least half the amount raised on "social welfare" spending. *See, e.g.*, 26 C.F.R. § 1.501(c)(4)-1
26 (organization's primary purpose must be social welfare and not political activity directed at candidates). This has
27 led to some peculiar circumstances, as with the recent controversy with the ASU Foundation, in which APS
28 contributed funds to the ASU Foundation, a 501(c)(3), that then contributed the funds to SOFN for "social welfare"
spending, which, as a result, facilitated "political" spending of an equal amount. [Appendix, exhibit 17 at
ACC_AR0370-71, 0379-84] Further, unlike a charity qualified under Section 501(c)(3) of the Internal Revenue
Code, a (c)(4) need not even be an incorporated entity, but, as it appears with SOFN, may be an unincorporated
association of one or more individuals or other organizations. *See* 26 U.S.C. § 501(c)(4) (no definition requiring
specific form of entity to qualify). As a result, as in this case with SOFN, very little need be disclosed in public
filings for an "unincorporated association," and so very little is known about the forces behind SOFN. [*See, e.g.*,
Appendix, exhibit 27 (SOFN audit response letter where SOFN discloses its campaign spending, but reveals nothing
about its membership or contributors)]

1 **C. Objectively Viewed, APS/Pinnacle West Funded AFEC and SOFN.**

2 It is widely believed throughout Arizona that SOFN and AFEC were funded by APS or
3 Pinnacle West. This overwhelming public perception, certainly a demonstration of the objective
4 “reasonableness” of that perception given its widely held nature and Pinnacle West’s refusal to
5 deny its role, is demonstrated in Appendix, exhibits 17-18. Exhibits 17-18 document, by limited
6 example, the significant and continuing press and social media discussion that the likely source
7 of contributions to AFEC and SOFN is Pinnacle West and/or APS. As previously noted, even
8 the then Chairman of the ACC was called upon to comment on the likelihood that APS was
9 “picking its own regulators” through such spending. [Appendix, exhibit 2 at ACC_AR0027
10 (Stump FB post about Channel 12 interview)] Representatives of Pinnacle West and APS have
11 remained publicly silent about the spending, instead repeating the companies’ statements that
12 they decline to comment. [See, e.g., Appendix, exhibit 17 at ACC_AR0378, ACC_AR0393,
13 ACC_AR0398, exhibit 18 at ACC_AR0464-65 and ACC_AR0466]⁷

14 Assuming for a moment that Commissioners Little and Forese have no information that is
15 not publicly available regarding the source of the funds that seeded SOFN and AFEC, an
16 objective observer could reasonably conclude that these Commissioners also believe, like the
17 public at large, that APS (via Pinnacle West) was the source of those funds. It would be
18 unreasonable for them to conclude otherwise. Tellingly, there is evidence to suggest that at least
19 Commissioner Little may even have direct knowledge that APS (via Pinnacle West) is the source
20 of the funds. [Appendix, exhibit 17 at ACC_AR0364 (Little cited as saying the money is coming
21 not from ratepayers but instead from Pinnacle West shareholders)]
22

23 ⁷Pinnacle West is a publicly traded corporation, with its stock traded on the New York Stock Exchange. It therefore
24 is subject to Arizona and federal securities laws. As a result, Pinnacle West’s public statements are subject to the
25 laws and rules set forth in and promulgated under the Securities Act of 1933 and the Securities Exchange Act of
26 1934. Pinnacle West is, accordingly, obligated to comply with Section 10(b) of the Securities Exchange Act of 1934
27 and Rule 10b-5, which states that Pinnacle West may not make misstatements of material fact regarding its
28 activities. It appears that, if Pinnacle West is the source of significant contributions to AFEC and/or SOFN,
Pinnacle West cannot deny having made such contributions to AFEC and SOFN because to do so would put the
company at risk for such a violation. If neither Pinnacle West nor APS (or their respective officers, directors or
significant shareholders) made the contributions at issue, it would seem that nothing would prevent them from
stating that fact.

1 Currently an investigation continues regarding the substance of possible discussions that
2 occurred between Scott Mussi, as the Executive Director of AFEC, and Commissioner Bob
3 Stump while the 2014 Corporation Commission races were under way. [See Appendix, exhibit
4 19 (including ACC_AR0496-99, ACC_AR0510-12, ACC_AR0519-22)] Further, there is
5 evidence that Commissioner Stump also engaged in discussions with then candidates Forese and
6 Little. [Id.] Accordingly, there is at least the appearance of high likelihood that Commissioners
7 Stump, Forese and Little have received information, true or false, about contributions by
8 Pinnacle West and/or APS (or affiliated officers, directors or others associated with their
9 interests) to AFEC and SOFN.

10 **D. The Message Was Clear and the Timing Foreseeable.**

11 Certainly the position that AFEC and SOFN supported was clear from their campaign
12 materials that began to appear only seven months after the ACC Decision 74202, issued in this
13 docket. Examples of the “independent” campaign material, and the consistent positions they
14 both took and sent to Arizona voters, are found at Appendix, exhibits 20 (for AFEC) and 21 (for
15 SOFN). Those materials, funded by AFEC and SOFN, demonstrate the substance of the issues
16 of interest to them, and specifically make clear that they support candidates who favor the
17 incumbent utilities and oppose those who would support solar applications in Arizona. For
18 example, one piece claims Parker, Mason, Holway, and Kennedy are purported to “support”
19 Barack Obama’s “energy plan,” states that “Parker and Mason have been supported by the
20 rooftop-solar industry,” and concludes that Net Metering “is an unfair subsidy that is being paid
21 for by non-solar ratepayers,” and that “[w]e ... look to end the hidden subsidies embedded in the
22 Net Metering program.” [Appendix, exhibit 20 at ACC_AR0524-25 (ellipsis in original)] The
23 temporal connection to the APS loss in this docket in November, 2014, reflected in Decision
24 74202, and the launch of these “independent” money campaigns, and their message consistent
25 with the APS position in this docket, is clear. [See Appendix, exhibit 22 at ACC_AR0544 (APS
26 timeline summary)]

27 Commissioners Forese and Little were sworn in to their Commission offices on January
28 5, 2015. Only four months after these two commissioners who were supported by these

1 unprecedented, likely APS-connected expenditures were sworn in, APS filed its Motion to Reset
2 in this docket seeking this time, a \$21.00 fee to be imposed on DG Customers, and that the
3 decision be made immediately rather than in its next rate case. [See Motion to Reset, 4/2/2015 at
4 4, 9-10] It was more than reasonably foreseeable, given the positions previously asserted by
5 APS, AFEC and Scott Mussi *in this very docket*, and the election of Forese and Little with the
6 significant and disproportionate influence provided by the campaign assistance at issue, that APS
7 would reassert those same positions again. Further, despite the companies' continuing public
8 "no comment" position, on May 20, 2015 Pinnacle West President and CEO, Donald Brandt,
9 gave a speech at the company's annual shareholder meeting. In that speech Mr. Brandt
10 acknowledged Pinnacle West had engaged in political spending in the 2014 election cycle.
11 [Appendix, exhibit 23] This statement further supports an objective and reasonable conclusion
12 and perception that Pinnacle West did fund AFEC and SOFN. This was not the first time the
13 company had spent independent money with respect to the matters in this very docket,
14 demonstrating the company's use of the techniques at issue here; of special note, in the first use
15 of such spending connected to this docket, Pinnacle West/APS originally and affirmatively
16 *denied* that it had made such expenditures. [Appendix, exhibit 25 at ACC_AR0558-9 (APS
17 denied funding); *see also* exhibit 25 at ACC_AR0565 (APS admits to funding)]

18 Because Commissioners Forese and Little benefitted from such unprecedented
19 independent campaign support (and unprecedented attacks on their opponents), because such
20 support (and opposition to their opponents) was so extremely large relative to the amount of
21 money spent in the election and the relative size compared to the candidates' own campaigns,
22 and because APS's initial loss and renewed application is so starkly connected temporally to
23 those expenditures that APS's renewed application was reasonably foreseeable, Commissioners
24 Forese and Little must recuse themselves, or be disqualified by the ACC, from participating in
25 this rehearing and in any ongoing proceeding in this docket or with respect to the substance of
26 the matter in this docket.

1 **Legal Argument**

2 **A. Rehearing is Necessary Based on New Information.**

3 As an initial matter, the objective appearance of a constitutionally impermissible level of
4 bias on the part of Commissioners Forese and Little has grown dramatically since the
5 Commission issued Decision No. 75251. New information has come to light that shows
6 Commissioners Forese and Little cannot, and should not, preside or have presided in their quasi-
7 judicial capacity over this matter. Since September 4, 2015, Commissioners Little and Forese
8 have authored and filed three letters in Docket No. AU-00000A-15-0309 to express their views
9 that APS should not have to disclose facts about the millions of dollars it, from an objective and
10 reasonable view, appears to have contributed to AFEC and SOFN to support their campaigns for
11 the Commission in 2014. [See Letter from Tom Forese, September 4, 2015; Letter from Doug
12 Little, September 8, 2015; Letter from Doug Little, September 11, 2015; all in Docket AU-
13 00000A-15-0309]

14 These newly filed letters are telling as to the level of constitutionally prohibited bias
15 attached to Commissioners Little and Forese. Both Commissioners are adamant that APS should
16 be permitted to spend unfettered amounts in support of these quasi-judicial officials and that
17 disclosure of that fact need not be pursued. [See *id.*] In his letter of September 11, 2015,
18 Commissioner Little goes so far as to suggest that he cannot even understand what purpose
19 would be served by discovering the source of the millions of dollars that helped elect him and
20 Commissioner Forese to office. [See Docket No. AU-00000A-15-0309, Letter from Doug Little,
21 September 11, 2015 at 1] Commissioner Little forcefully discourages his fellow Commissioners
22 from engaging in any investigation that would lead to discovery of the source of the funds.
23 These new letters, when combined with the facts and circumstances described herein lead to only
24 one conclusion: Rehearing should be granted and Commissioners Forese and Little should recuse
25 themselves and/or be disqualified from presiding over this matter.

26 **B. Due Process Requires Recusal and/or Disqualification.**

27 The law requires that the Commission (and the commissioners themselves) afford due
28 process to the parties who come before them. [See Application for Rehearing of Decision No.

1 75251 on the Ground that Commissioner Bob Stump Should Have Recused Himself or Been
2 Disqualified From Considering the Matters Before the Commission, 9/18/2015 at 11-13 (citing
3 due process law)] For this Application, the U.S. Supreme Court’s 2009 decision in *Caperton v.*
4 *A.T. Massey Coal Company*, 556 U.S. 868 (2009) provides the basis for asking, and ultimately
5 requiring, Commissioners Forese and Little to recuse themselves or otherwise be subject to
6 disqualification. In *Caperton*, the Court ruled that in certain circumstances, which, as will be
7 shown, were actually less extreme than those in this case, significant contributions to the election
8 of a decision maker should be viewed *objectively* as a source of “bias” (or potential bias)
9 requiring the official to recuse himself to uphold the constitutional obligations imposed by the
10 Due Process Clause of the Fourteenth Amendment.

11 A West Virginia jury found the Massey Coal Company liable for fraudulent
12 misrepresentation, concealment, and tortious interference with existing contractual relations and
13 awarded the owner of its competitor, Hugh Caperton, and his affiliated companies, \$50 million
14 in damages. Shortly after the jury trial and award were granted, West Virginia held its 2004
15 judicial elections. *Caperton*, 556 U.S. at 872-73.

16 Rather than support the incumbent justice seeking reelection, Don Blankenship, Massey’s
17 chairman and principal officer, supported Brent Benjamin, a new-comer candidate for the
18 Supreme Court, and did so with significant campaign spending. Based on Blankenship’s
19 political involvement, during the appeal process, Caperton moved to disqualify now-Justice
20 Benjamin under the Due Process Clause and the State’s Code of Judicial Conduct. Justice
21 Benjamin denied the motion, indicating that he found nothing showing bias for or against any
22 litigant. *Id.* at 874. The West Virginia Supreme Court then reversed the \$50 million verdict on a
23 3-2 decision. During the rehearing process, Justice Benjamin refused twice more to recuse
24 himself, although two other Justices did recuse themselves, one that previously had decided for,
25 and one that previously had decided against, Massey. With two “replacement” justices sitting on
26 the matter, the West Virginia Supreme Court once again reversed the jury verdict on a 3 to 2
27 decision. Four months later, Justice Benjamin filed a concurring opinion, defending the West
28 Virginia Supreme Court’s opinion and his recusal decision. *Id.* at 874-76. Caperton filed a *writ*

1 of *certiorari* with the Supreme Court, which granted review. *Id.* at 876. The Court reversed,
2 holding that due process required Justice Benjamin to be recused from the case. *Id.* at 890.

3 The Court assessed Justice Benjamin's efforts to examine whether he possessed a bias in
4 the matter and said "Justice Benjamin conducted a probing search into his actual motives and
5 inclinations; and he found none to be improper. We do not question his subjective findings of
6 impartiality and propriety. Nor do we determine whether there was actual bias." *Id.* at 882⁸
7 Instead, the Court held that the Due Process Clause requires recusal, regardless of the
8 determination of the lack of actual bias, where "the probability of actual bias on the part of the
9 judge or decision-maker is too high to be constitutionally tolerable," *Id.* at 877 (citing *Withrow*
10 *v. Larkin*, 421 U. S. 35, 47 (emphasis added)).⁹

11 The Court concluded that "the *Due Process Clause* has been implemented by objective
12 standards that do not require proof of actual bias." *Id.* at 883. Instead of a subjective
13 examination of the official's bias, the Court concerns itself with "whether, 'under a realistic
14 appraisal of the psychological tendencies and human weakness,' the interest 'poses such a risk of

15 ⁸ One important reason the Court seemed to be able to follow this path was that, in *Caperton*, there was no allegation
16 of a *quid pro quo* agreement. *Caperton*, 556 U.S. at 886. No such assurance can be asserted in this matter. There is
17 a significant ongoing investigation into the connections that were made during the election cycle involving Scott
18 Mussi, Commissioner Stump and then candidates Forese and Little. Until that investigation is completed, no
19 conclusions likely may be drawn on this element of this matter. Accordingly, a full public accounting of the
20 subjective bias, as was performed and disclosed by Justice Benjamin, should be undertaken by the Commission
and/or Commissioners Forese and Little. At minimum, discovery should be allowed to determine the source of
independent expenditures spent on the Forese and Little campaigns. Requests that various parties respond to
requests for information and, if necessary, the Commission issue subpoenas for this purpose, will follow this
Application.

21 ⁹ Lest one might think the law only applies to judges, the Commission acts in a judicial or at least a quasi-judicial
22 capacity. "The corporation commission in rendering its decision acts judicially." *Southern Pac. Co. v. Arizona*
23 *Corp. Comm'n*, 98 Ariz. 339, 346-347, 404 P.2d 692, 697 (Ariz. 1965). When the Commission exercises its power to
24 hold and adjudicate hearings in a "judicial or quasi-judicial" capacity, it is required to comply with the
25 Constitutional requirements of due process. *Arizona Public Service Co. v. Arizona Corp. Comm'n* 155 Ariz. 263,
271, 746 P.2d 4, 12 (Ariz. App. 1987), *aff'd in part, rev'd in part, Arizona Public Service Co. v. Arizona Corp.*
26 *Comm'n*, 157 Ariz. 532, 760 P.2d 532 (Ariz. 1988). Further, in the current docket, for example, the judicial rule
27 prohibiting *ex parte* communications applies, demonstrating the judicial concept that all the parties be treated fairly
28 and the arbiters maintain impartiality. See Ariz. Admin. Code § R14-3-113. The rule demonstrates the clear
message that in this docket, as in many others, the Commissioners are sitting in a quasi-judicial role. Commissioner
Bob Stump has acknowledged that the Commission acts in a quasi-judicial capacity. He said "[t]he Commission is a
quasi-judicial office." And, given the nature of the office, he suggested that for a Commissioner to attend a "pro-
APS political event would also be inappropriate." [Appendix, exhibit 2 at ACC_AR0093-94] Similarly, under
Caperton, it is inappropriate for Commissioners Forese and Little to sit in judgment on matters directly involving
their presumptive benefactor(s).

1 actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is
2 to be adequately implemented.” *Id.* at 883 (citing *Winthrow*, 421 U.S. at 47).

3 The Court then established the criteria on which the objective analysis of the risk of bias
4 exists: Specifically, the key metrics established by the Court, and the application of the
5 campaign spending noted by the Court were:

- 6 • **The total amount spent in the election:** Blankenship gave \$2.5 million to “And for the
7 Sake of the Kids,” a committee formed under Section 527 of the Internal Revenue Code
8 and Blankenship directly spent another \$500,000 through additional “independent
9 expenditures” on mailings, letters soliciting donations, and television and newspaper ads
10 all “supporting” Benjamin, which “eclipsed” the candidate campaign’s own spending.
11 *Caperton*, 556 U.S. at 873.
- 12 • **The contribution’s relative size in comparison to the total amount of money
13 contributed to the campaign:** Blankenship’s \$3 million was more than the total spent
14 by all of Benjamin’s other supporters and Blankenship’s \$3 million was more than three
15 times the total spent by Benjamin’s own committee. The Court noted that, according to
16 *Caperton*, Blankenship spent \$1 million more than the two candidates’ own campaign
17 committees. *Id.*
- 18 • **The apparent effect such contribution had on the outcome of the election:** Benjamin
19 won with a 53.3% to 46.7% margin, comprising approximately a 50,000 vote difference,
20 with the Court noting that it was not necessary to show the “contributions were a
21 necessary and sufficient cause” but merely recognize “the risk that Blankenship’s
22 influence engendered actual bias [was] sufficiently substantial.” *Id.* at 885.
- 23 • **There was a close temporal relationship between the campaign contributions,
24 Benjamin’s election and the pendency of the case:** *Caperton*’s case had been ruled on
25 at trial, was in the process of post-judgment motions and was going to be appealed to the
26 court to which Benjamin sought and was elected to office. “It was reasonably
27 foreseeable when the campaign contributions were made, that the pending case would be
28 before the newly elected justice.” *Id.* at 886.

23 **C. Application of *Caperton* to The Contributions Assisting Forese & Little.**

24 As shown in detail in the table at Appendix exhibit 16, in the 2014 ACC primary races,
25 the amount spent by AFEC and SOFN for Forese and Little, and against Parker and Mason,
26 totaled \$1,712,133.32, with an additional \$32,191.66 against Holway and Kennedy, for a
27 primary total of \$1,744,324.98. The amounts spent by Forese and Little’s own campaigns
28 totaled only \$238,240.00 in the primary. [Appendix, exhibit 16 at ACC_AR0342] Judging by

1 the first two elements of the *Caperton* analysis, the total amount spent in the primary election
2 and the relative spending comparison, the amounts spent by AFEC alone and, certainly when
3 combined with SOFN, “eclipsed” the spending by the campaigns of Forese and Little even when
4 combined. The expenditures by AFEC alone, as directed by Scott Mussi totaled \$453,257.47,
5 and the amounts by both AFEC and SOFN combined totaled \$1,744,324.98, which more than
6 meet the *Caperton* test. With respect to the “relative” spending comparison, AFEC’s primary
7 spending alone achieved a nearly 200% multiplier over the candidates’ combined primary
8 spending; and with SOFN, the two organizations’ spending achieved more than a 700%
9 multiplier over the candidates’ combined primary spending.¹⁰

10 In the general race, the amount spent by SOFN for Forese and Little and against Holway
11 and Kennedy totaled \$1,473,993.96. The amounts spent by Forese and Little’s own campaigns
12 totaled \$291,883.32. As in the primary, the first two *Caperton* tests easily were met and
13 exceeded. The amounts spent by SOFN for Forese and Little and in opposition to Holway and
14 Kennedy in the general election exceeds by 500% the amount spent by Forese and Little’s own
15 campaigns.

16 One might argue that it has not been conclusively established that Pinnacle West or APS,
17 Pinnacle West’s subsidiary that is the moving party in the docket, made the contributions to
18 AFEC or SOFN to support those organizations’ extreme dark money spending in the 2014 ACC
19 races. But *Caperton* does not require such a showing.

20 First, in *Caperton*, it was not the Massey Coal Company that made the expenditures in
21 question; it was Don Blankenship, the CEO of Massey, who made the expenditures. *Caperton*,
22 556 U.S. at 872. Further, the spending by AFEC alone in the primary exceeds the “extreme”
23

24 ¹⁰ One might argue that the amounts should be considered separately for Forese and Little, Parker and Mason, and
25 Holway and Kennedy, but even in those instances, the first two factors are clearly satisfied. Further, in most
26 instances, the campaigns of Forese and Little were coordinated, as were the campaigns of Parker and Mason and
27 Holway and Kennedy. Moreover, the support and attack materials issued by AFEC and SOFN were also
28 “combined” support and attack efforts to a great extent, so a combined assessment seems appropriate. On the other
hand, both Parker and Kennedy received significant additional attention in attack materials, but one likely could
determine that the attention was driven by initial polling that demonstrated the two were the more popular
candidates initially, who would, as a political matter, require greater negative attacks to assure their defeat.
Discovery, if allowed, likely would establish these facts.

1 circumstances demonstrated in *Caperton*, and it is clear that Scott Mussi established his interest
2 and that of AFEC in this very docket prior to the 2014 election. Having established the desired
3 positions, Scott Mussi, as Executive Director of AFEC, then directed the spending in question
4 thereafter. Those positions still stand in the pending Reset Application by APS in this very same
5 docket. Scott Mussi's positions in this docket and his control of the spending in question meets
6 the test established in *Caperton*. As that Court held: "We conclude that there is a serious risk of
7 actual bias—based on objective and reasonable perceptions—when a person with a personal
8 stake in a particular case has a significant and disproportionate influence in placing the judge on
9 the case by raising funds or directing the judge's election campaign when the case was pending
10 or imminent." *Id.* at 884. As it was in *Caperton*, it is here on a matter that began before the
11 election, and now continues immediately thereafter: Scott Mussi and AFEC made clear their
12 positions to be taken before the ACC. It is very clear what position Scott Mussi and AFEC
13 would expect the candidates they supported to take in this docket. Moreover, there is no reason
14 to exclude the AFEC spending in the primary that promoted Forese and Little from having its
15 likely continuing impact in the general election. AFEC's total spending in the 2014 ACC races
16 over a five month period was \$453,257.47. Furthermore, the spending by SOFN was consistent
17 with and parallel to the spending by AFEC. [*compare* Appendix, exhibits 20 and 21] Because
18 SOFN has not disclosed even who its decisions makers are, there is and should be significant
19 concern that the SOFN spending was completely coordinated with that of AFEC.

20 Moreover, this conclusion is significantly supported by the condition in which AFEC
21 appears to have found itself following the primary election. As described in detail in a letter
22 signed by former ACC candidates Vernon Parker and Lucy Mason on August 17, 2014, it
23 appears that AFEC may have exceeded its political spending cap in comparison with its social
24 welfare spending cap. [Appendix, exhibit 24] The letter from these then ACC candidates was in
25 the form of a complaint to the Arizona Attorney General's Office, with copies to Mr. Mussi and
26 AFEC's then legal counsel, describing the factual basis on which to draw that conclusion. It
27 appears that, with such allegations and the possibility that AFEC was at risk for no longer
28 qualifying for protection from disclosing its donors under Section 501(c)(4) of the Internal

1 Revenue Code, AFEC could not risk funding political efforts in the 2014 ACC general elections.
2 *See* note 5, *supra* at 6. Fortunately for Forese and Little’s campaigns, SOFN—APS’s objectively
3 apparent cohort in the support of Forese and Little and in the opposition to their opponents,
4 stepped in to undertake that effort.

5 Second, *Caperton* established that there need not be “actual” bias shown in the decision
6 maker; the Court in *Caperton* specifically concluded that it did not refute Justice Benjamin’s
7 subjective determination regarding actual bias. *Caperton*, 556 U.S. at 882. Instead, the Court
8 established that the “objective and reasonable perceptions” were the object of the inquiry. *Id.* at
9 884. In this case, there is significant, objective and reasonable public perception and concern
10 that APS and Pinnacle West made significant contributions to AFEC and SOFN for the purpose
11 of influencing and succeeding in the election of Forese and Little. [Appendix, exhibit 17
12 (including particularly at ACC_AR0361, ACC_AR0364 (Little and Forese comments on
13 spending), ACC_AR0405; exhibit 18 at ACC_AR0453-55; exhibit 2 at ACC_AR00094)]
14 Certainly it is also reasonable to conclude that Forese and Little have the same perception of
15 these issues even if they lack specific proof of the connection (although there is currently an
16 inference that they may have such proof themselves). In fact, it would be objectively
17 unreasonable for Little and Forese to conclude anything other than that APS and Pinnacle West
18 were the source of funds spent in the election on their behalf, given the public discussion and
19 perceptions and Don Brandt’s own statements. Added to this consideration is the essence of the
20 substantive message in the materials funded by AFEC and SOFN: Those materials are adamantly
21 opposed to the targets of APS’s current request in this docket—those that supply distributed
22 generation solar panels. As certainly would be expected of Forese and Little, anyone paying
23 attention to the “terms” on which support was granted by both AFEC and SOFN would
24 understand what would now be expected of him in deciding issues in this docket. Specifically,
25 Net Metering “is an unfair subsidy that is being paid for by non-solar ratepayers,” and that
26 “[w]e...look to end the hidden subsidies embedded in the Net Metering program.” [See
27 Appendix, exhibit 20 at ACC_AR0524-25] Accordingly, this series of circumstances meets the
28

1 objective standards in *Caperton* and so Forese and Little should recuse themselves or be
2 disqualified by the ACC from participating in this docket.

3 Third, *Caperton* established that it is the decision maker who must recuse himself when
4 objectively, and certainly if subjectively, he determines he is, or is determined to have been,
5 compromised in his ability to sit on a matter. In this instance, and at a minimum, Commissioners
6 Forese and Little have an obligation publicly to disclose their knowledge of the facts surrounding
7 the campaign expenditures, and their perceptions of them, what they know and why and when
8 they came to know such facts about the expenditures. If they claim subjectively to believe that
9 APS and Pinnacle West are not behind the funding of AFEC and SOFN, they should explain
10 how they could have arrived at a conclusion that is so at odds with the evidence and widely held,
11 objectively and reasonably achieved, public conclusion that APS and Pinnacle West funded
12 AFEC and SOFN. Whether or not the public is able to discern the “dots” connecting APS to the
13 AFEC and/or SOFN political spending does not end the inquiry. Because whether the greater
14 public has been provided such information does not mean that Forese and Little have not gained
15 such information.¹¹ Accordingly, Commissioners Forese and Little must both provide a full
16 accounting of their subjective knowledge, and a full statement of their perceptions of the sources
17 of the spending. Further and regardless of Commissioners Forese and Little’s subjective
18 knowledge, in these circumstances, with the objective and reasonable conclusion that APS and/or
19 Pinnacle West supplied the resources to AFEC and SOFN, the ACC has its own independent
20 obligation to examine this matter objectively and determine that the objective standards in
21 *Caperton* have been met. Certainly the “reasonable” person standard, as expressed by the public,
22 concludes that it has.

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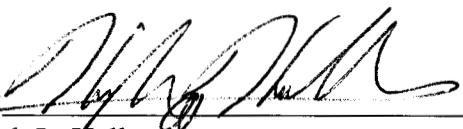
¹¹ The information has not been disclosed yet for at least three reasons: Except for Don Brandt’s statements,
25 Pinnacle West and APS have thus far refused to comment; AFEC and SOFN are shielded (for now) from the
26 obligation to disclose their donors; and the ACC has so far refused to exercise its authority under Article 15, Section
27 4 of the Arizona Constitution to require Pinnacle West, as a publicly traded corporation (and holding company of a
28 public service corporation), or APS, as a public service corporation, to disclose the information. Certainly,
precedent has been set for the ACC’s exercise of this authority, as evidenced by Commissioner Burns’ prior
information request on October 30, 2013 in this docket that APS disclose whether or not it had engaged in political
spending with respect to the matter advanced by it in this very docket. [Appendix, exhibit 25 at ACC_AR0561]

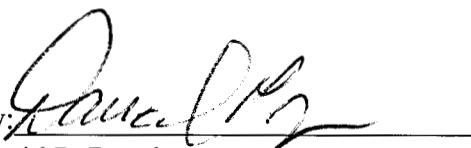
1 In addition, the ACC has within its power to obtain the information that some may argue
2 is lacking. Under its authority set forth in the Arizona Constitution, the ACC has the power to
3 demand that APS, as a public service corporation and parent of a public service corporation,
4 supply information on whether it contributed funds to AFEC and/or SOFN, and the ACC has the
5 power to demand that Pinnacle West, as a publicly traded corporation, supply information on
6 whether it contributed funds to AFEC and/or SOFN. Given the gravity of the issues now at
7 stake, including the integrity of the quasi-judicial process in this and other dockets, the ACC
8 should exercise its authority and sweep away the dark-money cloud that now engulfs the ACC,
9 its Commissioners and the important work that lies ahead for Arizona and its citizens.

10 **Conclusion**

11 Rehearing of Decision No. 75251 should be granted and Commissioners Forese and
12 Little should recuse themselves or be disqualified from adjudicating further proceedings
13 regarding this matter based on the information already publicly available and objectively
14 considered. If, however, the Commission believes further information is necessary, then it
15 should exercise its authority under Article 15, Section 4 of Arizona's Constitution with respect to
16 APS and Pinnacle West spending in the 2014 ACC election, or grant the opportunities for parties
17 to undertake discovery on the subject.

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19 RESPECTFULLY SUBMITTED this 17th day of September, 2015.

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