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ARIZONA INVESTMENT COUNCIL

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Arizona Corporation Commission
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Arizona Corporation Commission
Commissioners Wing
1200 W. Washington
Phoenix, Arizona 85007

a|i|c

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

Dear Members of the Commission and Interested Parties:

I write on behalf of Arizona Investment Council's Board of Directors in response to Thomas Zlaket's September 17 submission in this docket, written on behalf of The Alliance for Solar Choice ("TASC"). For the reasons described in the attached memorandum, we firmly disagree with both the legal analysis contained in the TASC letter and its conclusion that the Commission can and should use its subpoena power to investigate the rumored campaign finance spending of Arizona Public Service Company ("APS") or its parent Pinnacle West Capital Corporation on last year's election. For important legal and policy reasons, it should not.

To appreciate the purpose of the September 17 filing, it must be taken in its greater context. The Alliance for Solar Choice ("TASC") commissioned the legal analysis and had it filed the same day that lawyers for Sunrun Inc. ("Sunrun") filed two requests for rehearing in the APS "Grid Access Charge" docket. That is the docket in which the Commission recently voted to entertain a hearing on APS's request to increase the fixed costs collected from rooftop solar customers and credit the amount to non-rooftop solar customers. By way of context, Sunrun is not only a member of TASC but is its co-founder, in partnership with SolarCity. TASC has two co-chairs: Sunrun Vice President Bryan Miller and SolarCity Vice President John Stanton. *See* http://allianceforsolarchoice.com/about-us/. TASC is also reported as a subsidiary of SolarCity in SolarCity's securities filings. *See* SolarCity Form 10-K for the Fiscal Year ending 2014 at Exhibit 21.1, found at http://investors.solarcity.com/ secfiling.cfm ?filingID=1564590-15-897&CIK=1408356.

The accusations that TASC has levied against APS and any Arizona Corporation Commissioner who might disagree with the policy positions advocated by its membership are not unique to Arizona. Indeed, either through TASC or other 501(c) organizations, the large rooftop solar financing companies have mounted hard-handed political and legal campaigns

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nationwide against anyone who they believe might disagree with them on the merits. Take the following examples:

- In Wisconsin, the Public Utilities Commission voted to allow We Energies to increase its monthly fixed charge and slightly lower its energy charge so as to mitigate the rooftop solar to non-solar customer cost shift. TASC responded by accusing one of the Commissioners of bias based on statements she had made at a utility conference, and announcing plans to sue the Commission if she did not recuse herself. *See, e.g.*, http://www.jsonline.com/business/solar-group-calls-for-psc-commissioners-recusal-from-we-energies-case-b99397734z1-283911791.html.

- In Nevada, Governor Brian Sandoval negotiated a deal between the utilities and the solar industry that set a cap on how many distribution systems would be eligible for net metering. In July, NV Energy announced that it would meet the cap sooner than anticipated. Sunrun responded by accusing the Governor of "political cronyism" with NV Energy employees and filing a public records request with the Governor's office, seeking records of any emails, text or sms messages between any employee of Sandoval's administration and any employee of NV Energy in attempt to substantiate that accusation. *See, e.g.*, http://lasvegassun.com /news /2015/jul/21/solar-company-alleges-cronyism-among-sandoval-admi/.

- The Checks and Balances project – the "clean energy funded" entity with close ties to the solar industry, which has peppered the Arizona Corporation Commission with records requests – has launched similar "investigations" of Commissioners in Nevada, Florida, and California. In each of these instances, the Commissioners were accused of "regulatory capture" and made the subject of an "investigation" because they made public comments in support of utility-supported regulatory changes that would "smother the solar baby in its cradle." *See, e.g.*, http://checksandbalancesproject.org/checks-and-balances-project-launches-captured-regulators/.

By crying foul and seeking recusal of officials who might disagree with them, TASC and its members are doing exactly the kind of judge-shopping that they feign to protest. And as businesses that rely heavily on government and rate-embedded subsidies, these rooftop solar financing companies are highly motivated to do whatever it takes to preserve the status quo when it comes to the issues of net metering and utility rate design.

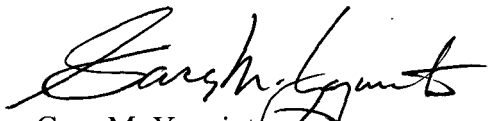
Of course, the Arizona Corporation Commission must maintain its integrity. That is critical to the people of Arizona and all businesses that the Commission regulates. But TASC's

submission to the Commission is not about protecting the Commission's integrity. It is part of a national strategy to eliminate the voices of any Commissioners who may disagree with their policy positions. Because the candidates who TASC supported during the 2014 election did not win, it now attempts to prevent the elected Commissioners from doing the job they were elected to do. This is not about the Commission's integrity. It is about politics and business. The Commission's integrity is best served by disregarding TASC's effort to disrupt the Commission and, instead, allow it to forge ahead with its important work.

The TASC strategy delays a conversation on the merits of the distributed generation-related cost shift, an issue that is important to public policy. AIC agrees with Bob Robb that "[t]he commission is a *quasi*-judicial body, not a fully judicial one. It is also, in part, a political and policy-making body. Those who run and win shouldn't be asked to step aside because of what others outside their control do during the election." See http://www.azcentral.com /story/opinion/op-ed/robertrobb/2015/09/22/robb-little-and-forese-shouldnt-step-down/72648502/.

AIC hopes that the Commissioners will proceed with APS's requests undeterred by speculation and threats, and continue with its critical public policy work.

Very truly yours,



Gary M. Yaquinto
President & CEO

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filed this 2nd day of October with
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A PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW

MEMORANDUM

TO: Arizona Corporation Commission

FROM: Mary O'Grady

DATE: September 28, 2015

RE: TASC Letter recommending compelled retroactive campaign finance disclosures from targeted businesses - Docket No. AU-00000A-15-0309

On September 17, 2015, Thomas Zlaket submitted a letter to the Arizona Corporation Commission on behalf of The Alliance for Solar Choice ("TASC), a trade group representing the interests of a few members of the rooftop solar industry ("the TASC Letter"). The TASC Letter opines that the law allows the Commission and its member Commissioners to use investigative powers to compel selected businesses to disclose information regarding money spent on political speech in past elections beyond what Arizona's campaign finance laws already require.

Osborn Maledon has been retained to analyze the position asserted in the TASC Letter and to opine on whether the Commission or individual Commissioners can use subpoena powers in the manner the TASC Letter proposes.

A careful analysis of Arizona and federal law shows that neither individual Commissioners acting on their own nor the Commission as a whole may use the Commission's compulsory investigative powers as suggested in the TASC Letter. A subpoena targeting selected entities for this purpose—not to root out suspected unlawful conduct but to retroactively expand campaign-finance disclosure rules—raises significant issues under Arizona law and the First Amendment.

In summary:

- Although Arizona law affords the Commission broad investigatory powers, those powers, like all government powers, have limits. The Commission's investigatory powers should be directed at subjects within the Commission's jurisdiction and related to its areas of responsibility. The investigation that TASC proposes concerns neither. The Commission

cannot use its investigatory powers to retroactively supplement or expand Arizona's campaign-finance laws.

- The use of Commission investigative authority as a campaign finance disclosure tool could not satisfy the "exacting scrutiny" courts apply to disclosure laws. Rather than promoting important government interests, the proposed selective targeting of some businesses "raises a red flag" and "can raise doubts about whether the government is in fact pursuing the interests it invokes, rather than disfavoring a particular speaker or viewpoint." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015) (internal quotation marks and citation omitted).

- The integrity of the Commission is, of course, extremely important, and many existing laws and rules are designed to protect and enhance the Commission's integrity. TASC's proposal supporting subpoenas targeting businesses rumored to have spent money on a previous Corporation Commission election encourages an atmosphere of distrust, suspicion, and threats of investigation. If more robust campaign-finance disclosure is needed, the solution is to enact legislation or regulations that change the rules in a prospective and evenhanded manner, not to selectively expand disclosures for particular businesses after an election is over.

I. Although broad, the Commission's investigatory powers have important limits.

The Arizona Corporation Commission's investigative powers are limited to inquiries related to the areas over which it has legal authority. Its principal obligation and power concerns ratemaking for public service corporations, *see generally Ariz. Corp. Com'n v. State ex rel. Woods*, 171 Ariz. 286, 294, 830 P.2d 807, 815 (1992), and it has some limited jurisdiction over corporations that issue securities. As is relevant here, the Arizona Constitution gives the Commission investigative authority in two sections of Article 15:

> Art. XV, § 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.

> Art. XV, § 13:
> All public service corporations and corporations whose stock shall be offered for sale to the public shall make such reports to the corporation commission, under oath, and provide such information concerning their acts and operations as may be required by law, or by the corporation commission.

Although the Commission's investigative authority appears broad from this text, the Arizona Supreme Court has long recognized that it has significant limits. In *Polaris International Metals Corp. v. Arizona Corporation Commission*, the Arizona Supreme Court held that the Commission exceeded its investigative authority by acting arbitrarily and unlawfully out of a desire to harass and intimidate a company rather than "gather appropriate information" related to the enforcement of securities laws. 133 Ariz. 500, 507, 652 P.2d 1023, 1030 (1982). The Commission was "empowered to investigate for purposes of enforcing the securities laws," but could not use its investigation powers to "determine on a basis other than compliance with the securities laws those persons or corporations who may conduct business in Arizona." *Id.* In other words, the Commission could investigate for purposes of ensuring compliance with the laws the Commission was charged with enforcing.

Applying that principle here, there is no basis to allow the Commission to use its investigative power to inquire into the political speech of a particular entity. Such an investigation does not relate to the Commission's regulatory functions; the Arizona Constitution and Arizona statutes do not assign the Commission any responsibility in the area of campaign finance regulation and disclosure. While the Commission might have the authority to inquire of Arizona Public Service as to whether ratepayers funded any election spending in the context of a rate case, the current inquiry has no apparent connection with the Commission's ratemaking function. Moreover, there is no suggestion whatsoever that any target of the recommended investigation has failed to comply with any campaign-finance law. (And if there were such an allegation, other agencies would be responsible for investigating.)

The TASC Letter advocates a compulsory investigation into lawful behavior. It is not an investigation to ensure that a business is complying with the law in an area over which the Commission has responsibility or an investigation that advances that Commission's rate-making function. Such an investigation would exceed the limits of the Commission's power and create a dangerous precedent regarding the use of the Commission's investigative authority.

II. A subpoena targeting selected businesses with retroactive campaign finance disclosure requirements implicates fundamental First Amendment rights.

The investigation that the TASC Letter envisions is also problematic because it implicates important First Amendment rights. "Disclaimer and disclosure requirements may burden the ability to speak." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366 (2010). Accordingly, courts subject election-related disclosure requirements "to 'exacting scrutiny,' which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id.* at 366-67 (internal quotation marks and citation omitted). Applying that test, the Court has held that disclosure requirements "could be justified based on a governmental interest in providing the electorate with information" to "help citizens make informed choices in the political marketplace," and to deter quid pro quo corruption. *Id.* at 367 (internal quotation marks, alterations, and citation omitted); *Buckley v. Valeo*, 424 U.S. 1, 67-68 (1976).

The campaign finance disclosure that TASC advocates here is completely different than the disclosure approved in *Citizens United.* In *Citizens United*, the Court held that a federal statute requiring disclosure for certain kinds of so-called "electioneering communications" was constitutional. *Id.* But the disclosure requirements that the Court approved were part of a campaign finance system that existed at the time the communications were made. The entity responsible for the communications in *Citizens United* sought judicial relief from the various campaign finance requirements that applied to its communications. *Id.* at 321.

Here, TASC advocates a subpoena from a single Commissioner or the Commission as a whole to require disclosure of "records related to [rumored] independent expenditures," even though Arizona's campaign finance laws do not require such disclosure.[1] TASC contends that any Commissioner can target a single business regulated by the Commission with a subpoena to confirm rumors of lawful spending in an election that is over. This is nothing like *Citizens United's* approval of a campaign finance disclosure law that generally applied prospectively to election-related spending.

TASC's rationale for this selective, retroactive expansion of campaign finance disclosure focuses on the Commission's integrity, but the Court has recognized that independent expenditures—dollars spent on political speech without coordination with any candidate's campaign—"do not give rise to corruption or the appearance of corruption" *Id.* at 357. The inquiry that TASC proposes cannot satisfy the "exacting scrutiny" test that justifies campaign finance disclosure requirements for several reasons.

A. Entity-specific, retroactive disclosure requirements cannot have a "substantial relation" to legitimate government interests.

The purpose of asking whether a restriction has a "substantial relation" to an important interest is to test whether the "requirement is narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced." *Buckley*, 424 U.S. at 81. Here, the proposed use of the Commission's general investigative powers does not bear a "substantial relation" to legitimate goals.

First, TASC's arguments suggest unlimited authority to investigate a regulated entity's lawful election-related spending and would give even a single Commissioner the power to expand the campaign finance disclosure requirements for a targeted corporation beyond the requirements in Arizona law. TASC purports to make the free speech rights of all companies regulated by the Commission subject to whatever disclosure requirements a single commissioner may desire at any time. The First Amendment rejects such standardless and vague burdens on speech. *See, e.g.*, *Comm. for Justice & Fairness v. Ariz. Sec'y of State*, 235 Ariz. 347, 360 ¶ 46,

[1] Arizona law requires disclosure of independent expenditures, *e.g.,* A.R.S. §§ 16-913, -914.02, 941(D). But, the contributors to an organization making an independent expenditure are disclosed under limited circumstances. *E.g.,* A.R.S. §§ 16-341.02(K). TASC's proposed subpoena appears to target a corporation that may have given money to an organization or organizations that made independent expenditures in a previous election and are not required by Arizona law to disclose their contributors.

332 P.3d 94, 107 (App. 2014) (upholding Arizona's disclosure statutes and noting that the risk of "speculative chilling effect" is minimal because the statutes are "neither overbroad nor vague").

Second, the fact that the investigative power would inquire into the speech activities of only certain targeted entities "raise[s] doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Williams-Yulee*, 135 at 1668 (upholding judicial campaign solicitation ban in part because it "applies evenhandedly . . . regardless of their viewpoint") (internal quotation marks and citation omitted).

The TASC Letter (at 4-5) ignores these flaws and instead assumes that a subpoena targeting a regulated entity rumored to have made expenditures to influence a previous Corporation Commission election would meet the "exacting scrutiny" test because the Supreme Court "regularly affirms compulsory disclosures of political spending." That assumption is not warranted. A Commissioner's ad-hoc, unchecked investigation based on speculation regarding a particular entity's political activity is simply not on the same constitutional footing as an even-handed, generally applicable set of prospective disclosure requirements.

B. Commissioner subpoenas would not serve the traditional important government interests that justify disclosure requirements.

Commission subpoenas targeting certain businesses rumored to have made substantial political expenditures would also fail to advance the interests that traditionally justify campaign-finance disclosures. The Supreme Court has recognized three justifications for reporting and disclosing campaign contributions and expenditures: (1) as a means of gathering data necessary to detect violations of contribution limits; (2) to deter actual quid pro quo corruption and avoid the appearance of corruption; and (3) to give the electorate useful information ahead of an election. *Buckley*, 424 U.S. at 67-68; *Citizens United*, 558 U.S. at 369. None of those interests justify TASC's proposed subpoena.

First, the proposed subpoena could not help detect violations of contribution limits because corporations are prohibited from making campaign contributions to candidates in Arizona, and, as a matter of First Amendment law, there are no limits to independent expenditures. The First Amendment precludes contribution limits on independent expenditures because they "do not pose dangers of real or apparent corruption." *Buckley,* 424 U.S. at 46; *see also Citizens United*, 558 at 360 (independent expenditures do not "lead to, or create the appearance of, *quid pro quo* corruption"). According the Supreme Court, there is "scant evidence that independent expenditures even ingratiate," and "[i]ngratiation and access . . . are not corruption." *Id* at 360.

Second, the interest of deterring quid pro quo arrangements would be of limited value here. Unknown, backward-looking subpoenas demanding information about past political speech would have little deterrence value. Any deterrent value would come from ***prospective*** rules that would guide an entity at the time it is deciding how and whether to make political expenditures. Retroactive disclosure requirements pose a real risk of chilling speech, because political spenders would no longer be able to rely on current law when making expenditure decisions. And a subpoena targeting rumored contributors to groups that made independent

expenditures is not aimed at corruption as a matter of law: under *Citizens United*, independent expenditures, "including those made by corporations, do not give rise to corruption or the appearance of corruption." *Id.*

Third, backward looking subpoenas issued long after an election could hardly provide voters with useful information for the election. Voters may be curious about political expenditures on previous elections, but satisfying that curiosity does not inform voters with information that will assist them in casting their votes. And that is the informational interest disclosure requirements serve.

C. TASC's proposed subpoenas do not protect the Commission's integrity.

Because the rationales that typically justify campaign finance disclosure requirements do not support the proposed subpoena, TASC (at 5-6) principally relies on concerns about Commission integrity as a justification for the subpoenas. The TASC letter contends that the information is needed for two related reasons: (1) because commissioners need to know the full "context" of a fellow commissioner's position; and (2) because the "Commission . . . needs information regarding the political spending of regulated entities to consider potential recusals." (TASC Letter at 5.)

As to the need for information to assess recusals, the TASC Letter misapplies the Supreme Court's decision in *Caperton*. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). In *Caperton*, after losing at trial and before appeal, the losing party to the case contributed millions to support the election of a judge who would be one of the judges on appeal to decide that specific case. 556 U.S. at 874-75. The identity and amount of the contributions at issue were a matter of factual record. Despite the contributions, the judge refused to recuse himself from deciding that case. *Id.* The Court held that the failure to recuse in those unique circumstances violated the other litigant's due process rights to a fair trial. *Id.* at 884-86.

The scenario before the Commission is very different. Significantly, *Caperton* did not approve of subpoenas or other mandated reporting from a third party to determine whether political spending occurred in a previous election. It relied on known facts concerning a litigant's campaign contributions and expenditures to assess a judge's recusal responsibility. The relief sought in *Caperton* is not directed at the speaker at all, and the remedy was based on actual, reported political expenditures, including direct contributions to a candidate, not rumor and speculation as is the case here. *See Citizens United*, 558 at 360.

In addition, the recusal in *Caperton* was an obligation of the judge with regard to a single case when the expenditure at issue was made during the pendency of the appeal, not a broad recusal that would essentially prevent one or more commissioners from doing the jobs they were elected to do based on speculation regarding independent political spending of a third party. TASC argues that the Commission's constitutional investigative power should be used to seek out facts to support its broad recusal argument. But *Caperton* provides no support for that inquiry. And, under the Supreme Court's reasoning governing political spending, concern for the Commission's integrity does not justify such an inquiry.

While the integrity of the Commission is critical, the sort of inquisition advocated by TASC is not only invasive of regulated business's free speech rights, it risks doing great harm to the Commission. Under TASC's rationale, a commissioner should issue subpoenas to determine the political spending activity of an entity any time "one Commissioner advocates a position that may benefit a regulated entity." (TASC Letter at 5.) But that would be true in almost every circumstance where the Commissioners debate a regulatory issue—stakeholders inevitably will stand to gain or lose depending on the ultimate decision of the Commission. Consequently, the TASC Letter promotes an atmosphere of perpetual inquisition into the political activity of regulated entities with something to gain or lose in proceedings before the Commission. Whatever benefit that added "context" supplies is outweighed by the prospect of frequent, divisive investigations that could impede the Commission's substantive work. That sort of regime burdens the free speech rights of regulated businesses without providing a clear benefit to the functioning of the Commission.

TASC's real concern seems to be that its "opposition" may have spent significant amounts of money influencing the election of some of the current Commissioners, and it wants to limit the ability of those Commissioners to do their jobs. That is no justification for subpoenas into what would be lawful corporate spending. As the Court said in *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014), "government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies." TASC's reasoning is even more strained when the lawful spending involves independent expenditures or contributions to others who made independent expenditures.

The analysis does not change in the context of a regulated utility. Regulated utilities enjoy the same First Amendment rights of other corporations. *Consol. Edison Co. of N.Y., v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 540 (1980). And, after *Citizens United*, a corporation's First Amendment right includes making independent expenditures to influence elections. Under the Supreme Court precedent, suspicion of lawful political spending by a corporation, even a regulated utility, in a previous election does not justify a government inquiry into the corporation.

The solution to concerns about Commission integrity is thoughtful, prospective policymaking, not retroactive investigations into rumors of lawful political speech. If the current balance struck by campaign finance laws, conflicts of interest laws, and other legal authority governing recusal is insufficient, then policymakers should consider adjustments to the disclosure rules that accommodate the many competing interests at stake. And whatever rules apply to campaign contributions and expenditures, they should apply prospectively to all, not in a discriminatory manner applied to a single business based on rumors of lawful spending in an election that already occurred.

III. Conclusion

In sum, the Commission's use of its compulsory investigatory power to retroactively expand campaign disclosures for select entities has no support in the First Amendment. Such a requirement must survive the "exacting scrutiny" courts apply to ensure that there is a sufficient relationship between the means used and the important governmental objective being served.

The means advocated by TASC —a standardless deployment of government power — do not adequately promote the interests that generally justify disclosure requirements. The retroactive use of government power to target specific speech does not serve the interests that legitimate campaign finance disclosure regulations are designed to achieve, and raises the possibility that the real motivation of the investigation is to censor a particular speaker or content. The use of compulsory government investigations to retroactively expand disclosure requirements only for certain parties is a dangerous tool ripe for abuse.

If more robust campaign-finance disclosure is needed, the solution is to enact legislation or regulations that change the rules in a prospective and evenhanded manner, not to selectively expand disclosures for particular businesses after an election is over.