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BEFORE THE ARIZONA CORPORATION COMMISSION

SUSAN BITTER SMITH	BOB BURNS	TOM FORESE
CHAIRWOMAN	COMMISSIONER	COMMISSIONER

DOUG LITTLE	BOB STUMP
COMMISSIONER	COMMISSIONER

IN THE MATTER OF THE APPLICATION OF ARIZONA PUBLIC SERVICE COMPANY FOR APPROVAL OF NET METERING COST SHIFT SOLUTION.	**DOCKET NO. E-01345A-13-0248** **RESPONSE TO ARIZONA PUBLIC SERVICE COMPANY'S MOTION TO AMEND "INTERLOCUTORY" ORDER**

Intervenors Renz Jennings and William Mundell ("Intervenors") respond to the motion by Arizona Public Service Company ("APS") dated September 25, 2015, to Amend Final Decision No. 75251 ("APS Motion"). Notwithstanding more than two pages of name-calling and vitriol introducing the APS Motion, the record continues to demonstrate that the Due Process Clauses of the 14th Amendment of the U.S. Constitution and the Arizona Constitution continue to be violated as long as this docket remains open with Commissioners Forese and Little participating while questions regarding APS's involvement in their election remain unresolved.

Contrary to APS's continuing divination regarding what the scope of this docket concerns and how the Commission will rule in APS's favor, the APS Motion does not alter the fact that

the due process issues raised by Intervenors' Application for Rehearing have not been addressed. It is the Commission, not APS, that must decide whether to continue this piecemeal approach to addressing policy outside of a full rate case, and it is each Commissioner who must determine whether to use the power granted them by the Arizona Constitution in Article 15, Section 4 to demand what Arizona citizens and APS ratepayers deserve to know: What role did APS and its parent company Pinnacle West Capital Corporation ("Pinnacle West") play, and what did they and ***their allies*** spend through Arizona Free Enterprise Club ("AFEC") and Save Our Future Now ("SOFN"), to influence the outcome of the 2014 Arizona Corporation Commission races and elect Commissioners Forese and Little?[1] The proof that answers these questions is uniquely in the hands of APS, Pinnacle West and their allies, including AFEC and SOFN, *and* that proof can be required to be produced by each and all of the ACC Commissioners under Article 15, Section 4 of the Arizona Constitution.[2] Until the proof is provided, the objective evidence clearly indicates the involvement of APS and Pinnacle West was so substantial that it reached levels that exceed those tolerated by the Due Process Clause under the standards established in *Caperton v. A.T. Massey Coal Company*, 556 U.S. 868 (2009); *see also* Ariz. Const. art. 2, § 4. The view that this objectively determined conclusion is sufficiently supported comes not from "allegations about rumor," as APS claims in its Motion; it is instead supported by the official

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[1] A.R.S. § 40-241 also grants the Commission and each Commissioner the authority to demand the information necessary to put this matter to rest.

[2] The continuing claim that requiring disclosure of campaign donors, even to a 501(c)(4) "independent" expenditure committee, somehow violates APS's or Pinnacle West's First Amendment "right" to free speech thoroughly has been shown to be legally baseless by the submittal in a related docket (No. AU-00000A-15-0309) by former Chief Justice Thomas Zlaket. Nothing in *Citizens United, Buckley v. Valeo* or any other source of law on the matter holds to the contrary. *See Citizens United v. FEC,* 558 U.S. 310 (2010), *Buckley v. Valeo,* 424 U.S. 1 (1976). The State of Arizona, and each Commissioner on behalf of the State and its citizens, has a compelling state interest to uphold in requiring the narrowly tailored obligation for regulated utilities to disclose any direct *or indirect* participation in Arizona elections, especially those for the Commission itself. The clearest example that the interest in disclosure is "compelling" is that it was placed, by the founders of the State of Arizona, as supported by Congressional enactment of the Arizona Enabling Act, in Arizona's own Constitution. *See* 36 U.S. Stat. 557, 568— 579.

statements by APS and Pinnacle West spokesmen and the very CEO of the organizations in his remarks to Pinnacle West shareholders.[3] It does not matter whether that intentionally-created conclusion has been cemented in Arizonans' minds by APS correctly or in the hope, falsely, of generating influence on Commissioners. The result is the same: The creation of the appearance of impropriety if Commissioners Forese and Little continue to sit in judgment of the issues brought forth in this docket. As the Court in *Caperton* already demonstrated, even if Commissioners Forese and Little believe they have not been influenced and subjectively can demonstrate they hold no bias, as each has claimed to do in letters dated October 2, 2015, filed in this docket, due process still requires they recuse themselves. *Caperton 421 U.S.* at 877. That the spending was "independent" of their campaigns or even was contrary to their wishes does not matter either. *See id.* at 884 (holding that the object of inquiry is not the subjective or even objective views of the decision maker, but rather the "objective and reasonable perceptions" of the public). Instead, recusal or disqualification is appropriate *and* required. Further, with this past election as the only significant violation of the 100-year history of the understanding that regulated utilities should not participate in Arizona Corporation Commission elections, swift action now by requiring disclosure to resolve this controversy may be the best hope for Arizona voters and rate payers to be free of monopoly influence in the selection of the Constitutionally-created commission seats in the upcoming election cycle.

Intervenors, who served as Commissioners themselves, stand before the Commission for the proposition that, for more than 100 years, regulated utilities properly have avoided participating, or even giving the appearance of participating, in the elections to select their own regulators. The Commission was established in Arizona's Constitution to provide protection of

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[3] If the facts were otherwise, and APS or Pinnacle West did not fund AFEC and/or SOFN to support their activities in the 2014 Commission race, one would think APS would say so now—in direct response to Intervenors' Application for Rehearing. But APS has not done that. Instead, it has filed its motion to amend, arguably in an effort to divert attention away from the Application for Rehearing and the reality that the fundamental question right now is *who the decision makers should be*—and on that question, the answer is that Commissioners Forese and Little should not participate—they should have recused themselves, but now having refused to do so, should be disqualified.

Arizona rate payers from the immense power granted to monopolies that operate in a protected business environment. Only with revelation in 2013 of inadvertent expenditures in the Commission races, followed by the unprecedented flood of "independent" funds into the 2014 Commission races, have Arizona rate payers faced the prospect that the monopolies the Commission is to regulate would now spend millions of dollars to influence those who elect the Commissioners who are to oversee those monopolies. Because the Commissioners are to provide independent, quasi-judicial service to Arizona, due process requires not, as fear mongers seem to suggest, that Commissioners Forese and Little resign or otherwise be removed from office; due process only requires that, like many judges concede on a regular basis, they should not participate in the matters with respect to which the due process concerns arise. In this case, they need to sit out participating in this docket.

APS does make a single effort to make a legal point in its Motion. APS claims that rehearing is not allowed on Decision No. 75251 because that decision is "interlocutory" and not "final." First, a party must exhaust "administrative" remedies before resorting to an appeal to the courts. In this instance, if Intervenors' Application for Rehearing had not been filed, one certainly would expect APS to claim Intervenors could not appeal from this docket on the issues set forth in the Application at a later time because they failed properly to exhaust their administrative remedies timely. See *Save Our Valley Assoc. v. Ariz. Corp. Comm'n*, 216 Ariz. 216, 165 P.3d 194 (2007) (appellant's appeal dismissed because appellant failed timely to file an application for rehearing with the Commission despite having filed a motion for reconsideration on the same matter); *see also Ariz. Corp Comm'n v. Superior Court*, 21 Ariz. App. 523, 521 P.2d 154 (Ariz. App. 1974) (holding that the time for appeal runs from the denial of a specific application for rehearing and not from the time of any other remaining applications in the same matter; a party loses its appellate right based on its own filing, not the filings of others).

Second, the APS Motion creates, apparently from whole cloth, the notion that a "final" order is not "final" unless "substantive rights" have been "decided." No such legal doctrine exists with respect to Commission orders, notwithstanding the inapposite legal authority cited in footnote 4 of the APS Motion. Specifically, for authority, APS cites ARS Section 40-253(A).

While that provision does state "[a]fter any final order or decision . . . ," the use of the words "any final" does not define what is required for a decision to be "final." The entry of the formal "Decision" No. 75251 following a five-month process completed by an Administrative Law Judge *and* the Commission, with formal testimony and briefing, the issuance of formal Findings of Fact and Conclusions of Law, all contained in a 27 page Order seem to meet the concept of "final" in any ordinary meaning of the word. Moreover, the provision does not say that to be "final" any "substantive rights" have to be "decided." Further, the case APS references, *Industrial Comm'n v. Superior Court*, 5 Ariz. App. 100, 423 P.2d 375 (1967), only discusses a denial by the superior court of a motion to dismiss, and concludes that such a denial is not a final judgment under A.R.S. Section 12-2101, which has nothing to do with Commission proceedings. The case merely reflects almost black letter law that denial of a motion to dismiss in a court does not amount to an appealable order.

Third, even assuming that, for an order to be "final" under the statute, "substantive rights" have to be decided, Decision 75251 did decide such rights. Decision 75251 contains recitations of the positions of the parties, including an intervenor's positon that the reset application included requests by APS that could not (and cannot) be decided in any setting other than a rate case; staff concluded that while the Commission could proceed without the rate case, it should not do so and importantly, the Commission decided:

> A proceeding with this scope can establish the cost of service [something APS is still asking for now] and the existence of and size of the alleged cost shift and determine to what extent the LFCR adjustor should be reset. While the LFCR mechanism may not be a long term solution to address the alleged lost fixed costs associated with DG solar adoption, it may offer an effective interim solution. While this issue can be further explored in APS' next rate case, that rate case will be filed June 2016 and will not be decided until over a year after that. Any resolution resulting from the rate case would likely not be in effect until over two years from today. We believe that is too long to wait to address the potential issues presented herein.

[Order 75251 at para. 164, p. 32]

Deciding to decide now, in the face of arguments to await APS's next rate case, including recommendations from staff, did address substantive issues—three Commissioners said that holding such decisions until APS's next (and self-delayed) rate case is too long a time to wait. Most important, in this regard, Decision 75251 is final on the notion that a hearing would be

held—the Commission could have adopted the staff position that no hearing would be held and all the issues in the reset application would be held over to a rate case. That concept by itself suggests finality—at least on that issue. That very fact has substantive implications and even now, APS's offer to "narrow" the hearing just selectively to determine "costs" is substantive because APS wants the creation of only certain findings of fact ("found" without the benefit of full information) that it then can take to the deferred rate case. APS is seeking substantive decisions one step at a time to delay the repeal of its current over-earning while using its monopoly to disadvantage its competitors. That a decision may be made outside a rate case, and without all the issues impacting cost of service that would be open to discussion in a rate case, arguably is *the* substantive question.

Conclusion

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

RESPECTFULLY SUBMITTED this 5th day of October, 2015.

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