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

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Arizona Corporation Commission
DOCKETED

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

Dear Commissioners and Interested Parties:

The October 2, 2015 letter from Gary Yaquinto on behalf of the Arizona Investment Council ("AIC") is a political statement to which I will not respond. I also do not see much value in offering an advocacy piece in reply to the September 28, 2015 memorandum ("AIC Memo") that accompanied Mr. Yaquinto's letter, or in repeating the contents of my September 17 letter. Attorney Mary O'Grady is entitled to her opinions, with which I obviously disagree.

I am compelled, however, to address what I consider to be incomplete and/or distorted citations to the case law. For example, in *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015), a lawyer running for elected judicial office was disciplined for personally soliciting campaign funds. The lawyer challenged the rule prohibiting such conduct on the basis of the First Amendment. The Supreme Court upheld the disciplinary sanctions, finding that the state had a compelling interest in preserving public trust and confidence in the judiciary. *Williams-Yulee* in no way supports the proposition for which the AIC memo cites it. If anything, it supports the opposite conclusion, *i.e.* that the Commission has a legitimate interest in securing public trust and confidence in their important quasi-judicial decisions by investigating reports of political contributions made to its members by regulated entities and their affiliates, thus facilitating appropriate recusals and avoiding the appearance of impropriety.

The AIC memo takes similar liberties with *Ariz. Corp. Com'n. v. State ex rel. Woods*, 171 Ariz. 286, 830 P.2d 807 (1992), in which a constitutional challenge to the Commission's investigatory powers over parent companies, subsidiaries, and other affiliates of regulated corporations was overruled. Citing a California case, the Arizona Supreme Court held that the "utility enterprise must be viewed as a whole without regard to the separate corporate entities." The AIC memo ignores the profound implications of this holding.

Moreover, *Arizona Public Service Co. v. Arizona Corp. Com'n*, 157 Ariz. 532, 760 P.2d 532 (1988) clearly demonstrates that the topical restriction advocated by AIC is incorrect. In that case, APS and its then parent company, AZP Group, Inc., resisted a Commission order requiring that the parent provide reports to the Commission regarding unregulated activity, including transactions with unregulated entities and other diversification matters. *Id.* at 533, 760 P.2d 533. The Supreme Court of Arizona affirmed the Commission's authority to monitor the non-regulated activities of APS's parent company over its objections.

Polaris Intern. Metals Corp. v. Ariz. Corp. Comm'n, 133 Ariz. 500, 652 P.2d 1023 (1982), upon which the AIC memo heavily relies, is in no way inconsistent with the foregoing principles or with the Commission's subpoena power – notwithstanding AIC's confusing and incomplete quotations from that opinion. *Polaris* held in 1982 that an investigation beginning in 1971 had lasted too long. *Id.* at 503, 652 P.2d at 1026. The Commission's investigation had dragged on for eight years. It included the seizing of records by search warrant, not just the obtaining of copies by subpoena. Moreover, a Commission employee had submitted a false affidavit to obtain the warrant. During the course of the investigation, Polaris investors had been "dragged away from their jobs by investigators" despite the investors telling "the investigators that they were not dissatisfied with their investments." *Id.*

The Commission's investigation continued even after criminal charges had been dismissed by a court and, eight years after it began, without the Commission ever giving those being investigated a hearing, or even listening to their side of the story. Worse still, Commission insiders had admitted on multiple occasions that the purpose was to drive Polaris out of Arizona.

The AIC memo presents this egregious case as if it creates some sort of topical restriction on the subject of a Commission investigation. To the contrary, *Polaris* stands for the common-sense proposition that the Commission cannot spend years employing abusive tactics and dragging utility shareholders away from their jobs as a form of harassment, which nobody has suggested in this docket. *Polaris* has no bearing on the Commission's power to issue a narrowly-tailored subpoena.

Next, we have *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). In a bewilderingly circuitous argument, AIC seems to contend that a *Caperton* recusal obligation cannot be proven without evidence that the Commission doesn't yet have; and that based on the lack of such evidence, the Commission cannot use its subpoena power to obtain it. But *Caperton* doesn't stand for anything like that, and AIC's argument is fundamentally flawed. If, as AIC contends, the Commission lacks sufficient information to decide whether *Caperton* requires recusal in a particular matter, there is no reason why the Commission should not use its constitutional subpoena power to gather that information and then decide the issue on facts, not speculation. Nothing in *Caperton* suggests otherwise.

Finally, AIC's citation to *Comm. For Justice & Fairness v. Ariz. Sec'y of State*, 235 Ariz. 347, 332 P.3d 94 (App. 2014) is stunningly misleading. In that case, a national organization financed television advertisements specifically attacking a candidate running for Arizona Attorney General. When confronted with its failure to register as a political committee under Arizona law, the organization responded with a

constitutional challenge to the state's registration and disclosure requirements. A trial judge held the laws unconstitutional. The Arizona Court of Appeals reversed, holding that registration and disclosure were "substantially related" to "sufficiently important" governmental interests, particularly the provision of information to aid in the evaluation of candidates and the "sources of a candidate's support;" as well as the deterrence of corruption and/or the appearance of corruption by exposing large contributions and expenditures. Thus, the holding in this case does not support the position espoused by AIC, but instead significantly undermines it.

I could go on, but will not. Further examples abound, most strikingly AIC's failure to directly address the plain language of *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), set forth in my earlier letter. The Supreme Court made clear in *Citizen's United* that compulsory disclosures of political spending are constitutionally permissible so long as there is a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest. To ignore that language is to completely distort the holding in the case. Remarkably, AIC's memo attempts to distinguish *Citizen's United* from the present situation, even though that judicial decision has been consistently cited for months by those who have publicly opposed any action by the Commission.

My point here is simply that it behooves the Commission and its attorneys to carefully scrutinize the legal authorities cited by AIC, in order to completely understand what those cases do, and do not, stand for. Anyone can extract small bits of language from a judicial decision that seemingly support a certain position, but do not fairly or accurately reflect the court's true holding in the context of the pertinent facts. During my 10 years on the Arizona Supreme Court and 50 years at the Bar, I have seen numerous examples of this practice.

Meanwhile, I stand by my original opinions. It seems to me that the Commission may have a compelling public interest in acquiring information regarding the past political spending of regulated utilities and their affiliated companies, especially with respect to the election of its own members. Its constitutional subpoena power is broad enough to reach such information. The Commissioners, or any number of them, may use this information to assure the public of the Commission's continuing ability to independently and impartially perform its constitutional functions, to administer potential recusals, to intelligently evaluate the objectivity of positions taken by fellow commissioners, and/or to assure themselves that spending in elections is not funded with ratepayer money.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Thomas A. Zlaket". The signature is written in black ink and is positioned above the printed name.

Thomas A. Zlaket