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0000167576

1 Hugh L. Hallman
2 AZ Bar No. 012164
3 Hallman & Affiliates, P.C.
4 2011 North Campo Alegre Road, Suite 100
5 Tempe, Arizona 85281
6 Direct: (480) 424-3900
7 hallmanlaw@pobox.com

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6 David P. Brooks
7 AZ Bar No. 012645
8 Spenser W. Call
9 AZ Bar No. 024131
10 Brooks & Affiliates, PLC
11 1515 North Greenfield Road, #101
12 Mesa, Arizona 85205
13 Direct: (480) 890-8195
14 dbrooks@brooksandaffiliates.com
15 scall@brooksandaffiliates.com

Arizona Corporation Commission
DOCKETED

JAN 29 2016

DOCKETED BY *JK*

Counsel for Renz Jennings and William Mundell

BEFORE THE ARIZONA CORPORATION COMMISSION

DOUG LITTLE
CHAIRMAN

BOB BURNS
COMMISSIONER

TOM FORESE
COMMISSIONER

BOB STUMP
COMMISSIONER

ANDY TOBIN
COMMISSIONER

REGARDING COMMISSION AND
COMMISSIONERS' SUBPOENA
POWERS

) DOCKET NO. AU-00000A-15-0309
)
) RESPONSE TO LETTERS BY DONALD
) E. BRANDT AS APS & PINNACLE
) WEST, MEMORANDUM BY MARY
) O'GRADY, AND MISCELLANEOUS
) OTHER SUBMISSIONS

INTRODUCTION

Renz Jennings and William Mundell (the "Interested Parties") provide the following information as former Commissioners of the Arizona Corporation Commission (the "Commission"). They respond to provide support that demonstrates, beyond question, that the Commission and each of its Commissioners possess the authority to demand disclosure, using subpoenas to require such disclosure if necessary, of the spending, if any, made by APS and/or

1 PinWest to influence the outcome of the 2014 (and any future) races for Commission seats. In
2 supplying this support, the Interested Parties specifically respond to (1) two letters submitted by
3 Donald E. Brandt on behalf of both Pinnacle West Capital Corporation (“PinWest”) and its wholly-
4 owned subsidiary and affiliated company, Arizona Public Service Company (“APS”), and dated,
5 respectively, October 23, 2015 (the “PinWest Letter”) and December 29, 2015 (the “APS Letter”);
6 and (2) the Memorandum authored by Mary O’Grady and dated September 28, 2015, and
7 submitted under cover of a letter by Gary M. Yaquinto, President and CEO of the Arizona
8 Investment Council (the “AIC”) and dated October 2, 2015 (the “AIC Memo”).

9 Each of the PinWest Letter, the APS Letter and the AIC Memo repeatedly raise the
10 argument that the Interested Parties and others who similarly seek disclosure of campaign
11 expenditures by regulated utilities and their affiliates in the prior and future Commission races
12 want to muffle, mute or halt the First Amendment free speech rights of regulated utilities and/or
13 their affiliated companies. *See* PinWest Letter at 1, APS Letter at 1, and AIC Memo at 3-4. *The*
14 *generic complaint—that the Interested Parties seek to halt speech even of APS and/or PinWest is*
15 *false and a strawman argument.*

16 The Interested Parties acknowledge that both of these large corporations have First
17 Amendment rights to participate in the political process, including making campaign contributions.
18 But they do not have the unfettered right to do so anonymously. The Interested Parties, like so
19 many Arizona voters and ratepayers, only seek transparency through disclosure. APS and PinWest
20 may spend as they like in such campaigns, within the bounds of Arizona and federal law, but they
21 may not continue to do so behind a veil of non-profit shell corporations and thinly sponsored
22 “associations.” Such secrecy is not mandated or protected by Arizona’s Constitution, Arizona
23 statutes or the Constitution and laws of the United States.

24 Rather, the United States Supreme Court has upheld disclosure obligations, saying:

25 “The *First Amendment* protects political speech; and *disclosure* permits
26 citizens and shareholders to react to the speech of corporate entities in a proper
27 way. This transparency enables the electorate to make informed decisions and
28 give proper weight to different speakers and messages.”

Citizens United v. FEC, 558 U.S. 310, 369 (2010) (emphasis added).

1 APS, PinWest and AIC then complain that seeking disclosure from APS and/or PinWest
2 impermissibly targets them or singles them out. APS Letter at 1, PinWest Letter at 1, AIC Memo
3 at 4. APS and PinWest are solely responsible for having now, perhaps alone, to face the
4 disinfecting shine of sunlight on their corporate expenditures to influence, directly or indirectly,
5 the election of their own regulators at the Commission. Over more than a year, APS and PinWest
6 chose to play the cheeky game of refusing to confirm or deny whether they were making such
7 expenditures.¹ They point to others' expenditures during the 2014 election cycle for Commission
8 seats as proof of their right to maintain silence and refuse to disclose. AIC at 2, 3-4, APS Letter
9 at 2-3. The rich irony of that defense comes from—and collapses because—the facts of the identity
10 of the contributors WAS disclosed, which is why APS and PinWest point to the expenditures in
11 the first place. So APS and PinWest have remained mute.

12 Or at least did so until the 2015 PinWest Annual Shareholders Meeting. At that meeting,
13 the APS CEO and the PinWest Chairman—in the form of one person—Donald E. Brandt, declared
14 that these companies had and would continue to exercise their First Amendment rights to speak in
15 political campaigns. See Exhibit 23 to the Interested Parties' Application for Rehearing of
16 Decision No. 75251 On the Ground That Commissioners Tom Forese and Doug Little Should
17 Have Recused Themselves or Been Disqualified From Considering the Matter Before the
18 Commission dated 9/17/2015 in docket E-01345A-13-0248 ("Caperton Brief"). Yet, and again,
19 nobody is denying that APS and PinWest currently may claim a First Amendment right to speak
20 in Commission elections, even to the point of spending millions of dollars to elect their own
21 regulators. Rather, the Interested Parties merely point out that, in the interest of dispelling the
22 appearance of impropriety, the appearance of corruption and possible *quid pro quo* arrangements,
23 and to provide voters and ratepayers the opportunity now and in the future to monitor

24
25 ¹ PinWest is a publicly traded corporation, with its stock traded on the New York Stock Exchange. It therefore is
26 subject to Arizona and federal securities laws. As a result, PinWest's public statements are subject to the laws and
27 rules set forth in and promulgated under the Securities Act of 1933 and the Securities Exchange Act of 1934. PinWest
28 is, accordingly, obligated to comply with Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, which
states that PinWest may not make misstatements of material fact regarding its activities. It appears that, if PinWest is
the source of significant contributions to Arizona Free Enterprise Club and/or Save Our Future Now, PinWest cannot
deny having made such contributions because to do so would put the company at risk for such a violation. If neither
PinWest 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 Commissioners' behavior in the light of the facts of such spending, the Commission and each
2 Commissioner is empowered to tear away the mask of anonymity in such spending.

3 IF expenditures were made, the public should know it. If expenditures were not made, the
4 public should know that too. In the absence of such disclosures, the Commission, each
5 Commissioner, and all the voters and ratepayers of Arizona are left to speculate about whether
6 Commissioners knew, now know or in the future may discover they were elected through
7 contributions by APS or PinWest, corporations they are to regulate. True or false, regardless, the
8 current status of uncertainty establishes exactly the environment that First Amendment case law
9 seeks to prevent by supporting, not denying, disclosure: The continuation of the appearance of
10 impropriety, the appearance of corruption, possible *quid pro quo* arrangements, and the inability
11 for Commissioners to address these issues and whether or when they may be required to disclose
12 conflicts of interest under Supreme Court case law.

13 Nothing in federal or state law precludes the Commission or any one of its Commissioners
14 from issuing AND enforcing a subpoena to require APS, PinWest, or any and every other similarly
15 situated corporation, from disclosing contributions made to influence, directly or indirectly, the
16 outcome of the Commission races, whether for 2014 or into the future. None. Not any Arizona
17 statutes, not any Arizona case law, no provision of the Arizona Constitution, not the First
18 Amendment, and certainly not any U.S. Supreme Court decision. To the contrary, all of these
19 sources of law support the clear and compelling (let alone sufficiently important) interest of the
20 Commission to seek such information for the directly related concern that the Commission and its
21 Commissioners carry out their Constitutionally mandated mission to regulate corporations and
22 thereby protect the interests of Arizona's citizens in a manner that is free of bias, free of the
23 appearance of impropriety, free of corruption, and avoid engaging in *quid pro quo* behavior. What
24 proof is available to support this conclusion? The following Memorandum. What proof is
25 available to demonstrate that the opponents to transparency are wrong? That they cannot cite any
26 legal precedence to support their conclusion.

27

28

1 **A. NOBODY SEEKS TO CURB APS’S RIGHT TO SPEAK.**

2 APS and PinWest and their allies repeatedly raise the First Amendment as their shield
3 against transparency. In his PinWest Letter, Mr. Brandt states that asking APS and PinWest not
4 to spend money in the upcoming Commission campaigns requires APS “to relinquish one means
5 of expression of [its] right” to “avail[] itself of all lawful means to make its views on issues
6 important to customers, employees and shareholders known....” PinWest Letter at 1. Mr. Brandt
7 claims that the request that PinWest and APS “refrain from exercising their First Amendment
8 rights is particularly problematic.” PinWest Letter at 2. The Interested Parties do NOT dispute
9 these claims.

10 In fact, even the Commission seems to concede this point as made by Commissioner Burns
11 in his letter to this docket dated November 30, 2015 (“Burns Letter”). Commissioner Burns wrote:

12 I recognize that both APS and Pinnacle West have a First Amendment right
13 to participate in elections, and it is not my intention to interfere with the
14 exercise of those rights. Intuitively, I understand that you have an interest
15 in supporting candidates who may agree with your views. However, in my
16 opinion, your support for any particular candidate should be open and
17 transparent.

18 Burns Letter at 1. Mr. Burns repeated this theme in the second paragraph of his most recent Notice
19 of Investigation to APS dated January 28, 2016, and filed in this docket (the “Notice of
20 Investigation”). To continue to raise such claims—that proponents of transparency seek to curb
21 the exercise of protected First Amendment speech—after the point has been conceded
22 demonstrates a desire to hide what really is at stake: Transparency. Such obfuscation is shown
23 when Mr. Brandt claimed that even to require APS and/or PinWest merely to disclose the “political
24 contributions that APS or its affiliates may have made out of shareholder profits would go beyond
25 what is required....and would impinge on APS’s First Amendment rights.” APS Letter at 1.

26 The effort to claim interference with APS’s and PinWest’s First Amendment rights was
27 also made by AIC. In the AIC Memo, it was claimed that any subpoena requiring disclosure of
28 spending in Commission campaigns, would be a “subpoena targeting [APS] with retroactive
campaign finance disclosure requirements” which “implicates fundamental First Amendment
rights.” AIC Memo at 3. That Memorandum concludes by claiming, incorrectly, that “the

1 Commission's use of its compulsory investigatory power.....has no support in the First
2 Amendment." *Id* at 7.

3 To be clear, the Interested Parties do not, nor does any Commissioner yet on record to the
4 Interested Parties' knowledge, advocate that APS and/or PinWest are not free to expend money on
5 political campaigns, even in Commission races, at least as long as such money is not treated as an
6 operating expense that is recoverable in utility rates. To the contrary, the Interested Parties, as
7 with many other like-minded citizens, only argue that such political spending by a regulated utility
8 and its affiliates should and, if required by the Commission or any Commissioner, *must* be
9 disclosed.

10 **B. COMMISSION SUBPOENAS REQUIRING CAMPAIGN SPENDING**
11 **DISCLOSURE DO NOT CURB FIRST AMENDMENT SPEECH.**

12 **1. The Commission And Each Commissioner Have the Power to Require**
13 **Disclosure from APS and PinWest.**

14 APS or PinWest continue to argue that the Commission does not have the power to require
15 disclosure of spending by APS and PinWest. See PinWest Letter and APS Letter. It is now well
16 established in case law and in this and several other dockets that the Commission and each
17 Commissioner have the power and authority to demand disclosure of spending by APS and its
18 parent company, PinWest. *See* Ariz. Const. Art. 15, § 4; A.R.S. § 40-241(A).² Further, it is now
19 well established law, through a case involving APS and its former parent company, AZP Group,
20 that PinWest is subject to that same power to require disclosure as APS. Yes, PinWest is a
21 publicly-traded corporation that is subject to disclosure obligations in its own right. *See* Ariz.
22 Const. Art.15, § 4. Moreover, PinWest is subject to the same, and arguably broader, disclosure
23 obligations than even APS because it is the parent and affiliated company of a public service
24 corporation, APS. This result has been clearly and long-ago established in *Arizona Public Service*
25 *Co. v. Arizona Corp. Com'n*, 157 Ariz. 532, 536, 760 P.2d 532, 536 (1988) (demonstrating that
26 publicly traded parent company is subject to Commission authority and disclosure rules).
27 Moreover, under this case, the Commission's disclosure authority applies *even to matters that are*

28 ² Retired Chief Justice Zlacket clearly laid out the authority that establishes the Commission's (or a Commissioner's)
power to subpoena the records of APS and PinWest. *See* Zlacket letter 9/17/2015.

1 *not otherwise regulated activities*, including transactions with publicly traded entities. *Id.* at 533,
2 536, and at 533, 536. This outcome was reached because APS's parent company is a publicly
3 traded entity that wholly owns APS, which is an affiliated, public service corporation and a
4 regulated monopoly utility. *Id.* Specifically, while currently the Notice of Investigation only
5 appears to seek information directly from APS, nothing would preclude the expansion of that
6 Notice of Investigation directly to require the same, similar or additional disclosures of PinWest
7 as those sought in the Notice of Investigation. *Id.*

8 **2. The First Amendment Supports Disclosure Here.**

9 As demonstrated above, the Arizona Constitution, Arizona statutes and Arizona case law
10 directly involving APS establish the Commission's and each Commissioner's authority to demand
11 disclosure of *any* information from APS and PinWest, including information from PinWest
12 regarding otherwise unregulated matters. Because of this legal construct, APS, PinWest and its
13 ally, AIC, try to argue, as they apparently now must, that APS and/or PinWest spending on
14 campaigns, and specifically spending for and against the campaigns of Commission candidates,
15 somehow must be treated differently and should not be subject to the clear authority the
16 Commission and each Commissioner has over all other APS and PinWest information. *See*
17 *PinWest Letter, APS Letter and AIC Memo.* To make their claims, these advocates for dark money
18 and hidden spending claim, as noted above, that the First Amendment precludes enforcement of
19 disclosure. Such a claim is not supported by any Constitutional authority, nor by any state or
20 federal statutes, nor by any Arizona or U.S. Supreme Court holding.

21 **a. Disclosure Does NOT "Single Out" APS or PinWest: They Created The Challenge**
22 **& Disclosure Provides the Solution.**

23 The advocates for darkness claim that requiring disclosure of campaign contributions that,
24 directly and indirectly, influenced the outcome of the 2014 Commission elections or those in the
25 future would "single out" APS or PinWest would be to act "arbitrarily and unlawfully out of a
26 desire to harass and intimidate a company rather than 'gather appropriate information.'" AIC
27 Memo at 3.

