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ORIGINAL

Court S. Rich, AZ Bar No. 021290
ROSE LAW GROUP pc
7144 E. Stetson Drive, Suite 300
Scottsdale, Arizona 85251
Email: CRich@RoseLawGroup.com
Direct: (480) 505-3937
Fax: (480) 505-3925
Attorney for Intervenor Energy Freedom Coalition of America

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AZ CORP COMMISSION
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BEFORE THE ARIZONA CORPORATION COMMISSION

DOUG LITTLE
CHAIRMAN

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COMMISSIONER

TOM FORESE
COMMISSIONER

ANDY TOBIN
COMMISSIONER

IN THE MATTER OF THE) DOCKET NO. E-01345A-11-0224
APPLICATION OF ARIZONA)
PUBLIC SERVICE COMPANY FOR) THE ENERGY FREEDOM COALITION
APPROVAL OF LOST FIXED COST) OF AMERICA'S MOTION FOR
RECOVERY MECHANISM) PROCEDURAL CONFERENCE

I. Legal Authority and Background

Pursuant to A.A.C. R14-3-108, the Energy Freedom Coalition of America ("EFCA") hereby moves for a Procedural Conference (the "Motion") in the above-captioned proceeding (the "Proceeding").¹ On January 15, 2016, Arizona Public Service ("APS") filed a new Application, requesting that the Arizona Corporation Commission (the "Commission") permit APS to use its Lost Fixed Cost Recovery ("LFCR") mechanism to collect \$46.4 million for the 12-month period commencing in March of 2016 (the "Application") (See Application, 2:11-13). This Application seeks to bring the total amount collected under the LFCR since its inception to approximately \$115.28 million. A Procedural Conference should be convened for the purpose of setting a hearing to review disputed issues of fact and law that the Application raises as set forth below. In the alternative, the Commission should issue a stay and refuse to process the Application until the Supreme Court issues a decision a key pending piece of litigation.

Arizona Corporation Commission
DOCKETED

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¹ Concurrent with this filing, EFCA has also filed an Application for Intervention in this Docket.

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1 The Arizona Court of Appeals recently issued a decision in *Residential Utility Consumer*
2 *Office (“RUCO”) v. Arizona Corp. Comm’n*, 238 Ariz. 8, 355 P.3d 610 (App. 2014), *cert. granted*
3 Feb. 9, 2016. In the *RUCO* decision, the Court considered the constitutionality of a system
4 improvement benefits (“SIB”) mechanism proposed by the Arizona Water Company (“AWC”)
5 and adopted by the Commission. *Id.* at ¶ 1. Similar to the LFCR, the SIB mechanism provided
6 for annual adjustments to the rates AWC charged its customers to recoup certain capital costs and
7 infrastructure replacement projects between rate cases. *Id.* at ¶¶ 14-15. Ultimately, the Court held
8 that the SIB mechanism violated the “Arizona Constitution’s mandate that the Commission
9 determine and use fair value when setting a monopolistic utility’s rates.” *Id.* at ¶ 50. It then vacated
10 the Commission’s adoption of the SIB mechanism. *Id.*

11 The LFCR has acted like a revenue snow ball for APS since its inception, with recoveries
12 growing year over year from \$5.08 million in year one, to \$25.3 million and then \$38.5 million in
13 years two and three respectively with the Application seeking an additional \$46.4 million recovery
14 in the program’s fourth year. (See Decisions 74994, 74394, and 73732). As set forth in greater
15 detail below, the *RUCO* decision casts substantial doubt on the constitutionality of the LFCR.
16 Therefore, the Commission should set a Procedural Conference for the purpose of setting an
17 evidentiary hearing on the Application or stay the Application pending the outcome of the Supreme
18 Court’s review of the *RUCO* decision.

19 **II. Legal Analysis**

20 In accordance with A.A.C. § R14-3-108(A), the Commission “may direct that a prehearing
21 conference [] be held for the purposes of formulating or simplifying the issues . . . and [address]
22 such other matters which may expedite orderly conduct and disposition of the proceedings or
23 settlements thereof.” Such action is appropriate in the Proceeding, where the *RUCO* decision has
24 cast the constitutionality of the LFCR mechanism into doubt. Accordingly, the Commission
25 should hold such a conference to set a hearing schedule to set forth a timeline and procedures for
26 formal review of the Application.

27 The Commission, as a State agency, is beholden to act in accordance with the Arizona
28 Constitution. See *Kilpatrick v. Superior Court In & For Maricopa Cnty.*, 105 Ariz. 413, 419, 466

1 P.2d 18, 24 (1970). (“The Constitution is, of course, the supreme law of the State”); *Polaris*
2 *Int’l Metals Corp. v. Arizona Corp. Comm’n*, 133 Ariz. 500, 506, 652 P.2d 1023, 1029 (1982)
3 (“Neither the federal nor state executive branch and its administrative agencies can expand their
4 powers beyond their constitutional or statutory limits”); *accord 3613 Ltd. v. Dep’t of Liquor*
5 *Licenses & Control*, 194 Ariz. 178, 183, ¶ 19, 978 P.2d 1282, 1287 (App. 1999). Specifically, the
6 Commission is charged by the State Constitution with prescribing “just and reasonable rates and
7 charges to be made and collected, by public service corporations within the state for service
8 rendered therein.” Ariz. Const. art. 15, § 3. “To achieve this, the Commission must first determine
9 the ‘fair value’ of a utility’s property and use this value as the utility’s rate base. The Commission
10 then must determine what the rate of return should be, and then apply that figure to the rate base
11 in order to establish just and reasonable tariffs.” *Scates v. Ariz. Corp. Comm’n*, 118 Ariz. 531,
12 534, 578 P.2d 612, 615 (App. 1978) (internal citations omitted); *accord US W. Communications,*
13 *Inc. v. Ariz. Corp. Comm’n*, 201 Ariz. 242, 245, ¶ 11, 34 P.3d 351, 354 (2001).

14 The *RUCO* decision specifically considered whether the SIB ratemaking mechanism,
15 which is substantially similar to the LFCR mechanism at issue here, complied with the
16 Commission’s constitutional obligation to determine whether the rates were just and reasonable.
17 The Court expressly recognized that “the question before us is not whether the SIB mechanism
18 represents prudent public policy. Our focus is on the propriety of that mechanism given the unique
19 and express provisions of our state constitution.” *RUCO* at ¶ 48. It then concluded that the SIB
20 mechanism did not comply with the “fair valuation” requirement and voided the Commission’s
21 adoption of it. *Id.* at ¶¶ 49-50.

22 The SIB mechanism and the LFCR are substantially similar mechanisms. Both
23 mechanisms act to allow a utility to increase rates and revenue in between standard rate cases.
24 Both provide for a new rate adoption only on the basis of the Commission’s review of information
25 that purports to justify the new rate. Both seek to effectuate the adoption of higher rates without
26 finding safe harbor in any long held exemptions to the constitutionally mandated rate-making
27 process. Both are subject to the constitutional mandate that the Commission prescribe “just and
28 reasonable” rates and charges. It is therefore reasonable to conclude that the Court’s *RUCO*

1 decision would apply with equal force in this context and render the LFCR mechanism
2 unconstitutional. *See, e.g., Rail N Ranch Corp. v. State*, 7 Ariz. App. 558, 559, 441 P.2d 786, 787
3 (1968) (“A formal opinion by an appellate court on the merits of the case in a certiorari or other
4 similar proceeding partakes of the nature of an appellate proceeding and the law stated therein is
5 conclusive as the law of the case on a subsequent appeal.”). In the event that the *RUCO* decision
6 applies with equal force to the LFCR mechanism, the Commission cannot proceed with approving
7 the Application or raising rates using the LFCR mechanism.

8 If the Commission proceeds with processing this Application, both it and APS risk being
9 subjected to a lawsuit and potential damages stemming from such unconstitutional acts.
10 “Normally, [] decisions in civil cases operate retroactively as well as prospectively.” *Lowing v.*
11 *Allstate Ins. Co.*, 176 Ariz. 101, 108, 859 P.2d 724, 731 (1993). Thus, the *RUCO* decision
12 invalidating mechanisms like the SIB applies to vacate the LFCR mechanism as well. Indeed,
13 APS may already be obligated to refund the approximately \$68.88 million already raised through
14 the unconstitutional LFCR mechanism, an issue that should be addressed in the hearing on this
15 matter. The most prudent course of action in light of the *RUCO* decision is for the Commission to
16 hold a formal evidentiary hearing to evaluate the legality of the LFCR.

17 It is true that the *RUCO* decision is being reviewed by the Supreme Court and could be
18 overturned. Accordingly, even if the Commission wishes to continue to work within the framework
19 of the LFCR mechanism, the most prudent course of action is to impose a stay until the Supreme
20 Court renders its decision on review. In fact, the Commission has done just this and issued stays
21 prohibiting the use of several approved SIB mechanisms whether they were subject to appeal or
22 not.² To engage in any additional action premised on a mechanism that is very likely
23 unconstitutional would be a violation of the Commission’s authority under the State Constitution
24 and constitute an inefficient use of the Commission’s resources.

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28 ² Note that the Commission recently stayed the enforcement of several previously adopted SIB mechanisms out of concern for the constitutionality of the mechanism. *See eg.* Docket No.s W-01445A-11-0310; W01445A-12-0348; SW-01427A-13-0042; W-01427A-13-0043

1 **III. Issues For Hearing**

2 The hearing set in this matter should evaluate, at a minimum, some of the following issues
3 and others:

- 4 1. Is the LFCR constitutional?
- 5 2. Does the LFCR meet the legal definition of a “surcharge?”
- 6 3. Is there a fair value determination associated with or required for the approval of the
7 Application?
- 8 4. What documentation is required to justify approval of the LFCR increase?
- 9 5. Is APS’s calculation used in support of its Application accurate?
- 10 6. How much money has been collected to date under the LFCR?
- 11 7. Must APS repay the monies collected from ratepayers to date under the LFCR?
- 12 8. Does the LFCR meet any of the exceptions to the constitutional requirement for a fair
13 value determination?
- 14 9. Is the LFCR an “automatic adjuster clause?”
- 15 10. Is the LFCR an “interim rate?”
- 16 11. Should a stay be issued on LFCR collections and the Application while the Supreme
17 Court considers the *RUCO* case?

18 **IV. Conclusion**

19 For the reasons set forth above, EFCA requests a Procedural Conference be set for the
20 purpose of setting a hearing on the Application or instituting a stay on processing the Application
21 until the Supreme Court issues its decision in the *RUCO* case.

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23 Respectfully submitted this 24th day of February, 2016. .

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27 Court S. Rich
28 Rose Law Group pc
 Attorney for Intervenor EFCA

1 **Original and 13 copies filed on**
2 **this 14th day of February, 2016 with:**

3 Docket Control
4 Arizona Corporation Commission
5 1200 W. Washington Street
6 Phoenix, Arizona 85007

7 Copy of the foregoing sent by electronic and regular mail to:

8 Janice Alward
9 AZ Corporation Commission
10 1200 W. Washington Street
11 Phoenix, Arizona 85007
12 jalward@azcc.gov

13 Dwight Nodes
14 AZ Corporation Commission
15 1200 W. Washington Street
16 Phoenix, Arizona 85007-2927
17 dnodes@azcc.gov

18 Thomas Broderick
19 AZ Corporation Commission
20 1200 W. Washington Street
21 Phoenix, Arizona 85007
22 tbroderick@azcc.gov

23 Daniel Pozefsky
24 RUCO
25 1110 W. Washington Street
26 Suite 220
27 Phoenix, Arizona 85007
28 dpozefsky@azruco.gov

Melissa Krueger
Pinnacle West Capital Corp.
400 N. 5th Street, MS 8695
Phoenix, Arizona 85004
Melissa.Krueger@pinnaclewest.com

Karen White
AFLOA/JACL-ULT
139 Barnes Drive
Tyndall AFB, Florida 32403

Samuel Miller
USAF Utility Law Field
Support Center
139 Barnes Avenue, Suite 1
Tyndall AFB, Florida 32403

Jody Kyler
36 E. 7th Street, Suite 1510
Cincinnati, Ohio 45202

Kurt Boehm
Boehm, Kurtz & Lowry
36 E. 7th Street, Suite 1510
Cincinnati, Ohio 45202

Steve Chriss
Wal-Mart Stores, Inc.
2001 S.E. 10th Street
Bentonville, Arkansas 72716

Timothy Hogan
514 W. Roosevelt
Phoenix, Arizona 85003

Nicholas Enoch
349 N. Fourth Ave.
Phoenix, Arizona 85003

Jay Moyes
Moyes Sellers & Hendricks
1850 N. Central Ave.;
Ste 1100
Phoenix, Arizona 85004

Jeffrey Crockett
One E. Washington Street
Suite 2400
Phoenix, Arizona 85004

Gary Yaquinto
2100 N. Central Ave.;
Ste 210
Phoenix, Arizona 85004

Scott Wakefield
201 N. Central Ave.;
Ste 3300
Phoenix, Arizona 85004

COASH & COASH
1802 N. 7th Street
Phoenix, Arizona 85006

Meghan Grabel
2929 N. Central Ave.;
Ste 2100
Phoenix, Arizona 85012

Michael Curtis
501 E. Thomas Road
Phoenix, Arizona 85012-3205

Robert Metli
2398 E. Camelback Rd.;
Ste 240
Phoenix, Arizona 85016

Cynthia Zwick
1940 E. Luke Avenue
Phoenix, Arizona 85016

C. Webb Crockett
Fennemore Craig, P.C.
2394 E. Camelback Rd.;
Ste 600
Phoenix, Arizona 85016

Greg Patterson
2398 E. Camelback Rd.;
Ste 240
Phoenix, Arizona 85016

Jennifer Cranston
Gallagher & Kennedy, P.A.
2575 E. Camelback Road
Phoenix, Arizona 85016-9225

John Moore, Jr.
7321 N. 16th Street
Phoenix, Arizona 85020

1 Craig Marks
10645 N. Tatum Blvd.
2 Suite 200-676
Phoenix, Arizona 85028

3 Thomas Loquvam
4 P.O. Box 53999, MS 8695
Phoenix, Arizona 85072

5 Douglas Fant
6 3655 W. Anthem Way -A-109
7 PMB 411
Anthem, Arizona 85086

8 Jeffrey Woner
9 K.R. Saline & Assoc. PLC
160 N. Pasadena, Suite 101
Mesa, Arizona 85201

10 David Berry
11 Western Resource Advocates
12 P.O. Box 1064
Scottsdale, Arizona 85252-
1064

13 Amanda Ormond
14 7650 S. McClintock, Suite 103-
282
15 Tempe, Arizona 85284

Barbara Wyllie-Pecora
14410 W. Gunsight Drive
Sun City West, Arizona 85375

Lawrence Robertson, Jr.
PO Box 1448
Tubac, Arizona 85646

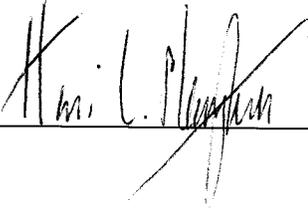
Bradley Carroll
88 E. Broadway Blvd.
MS HQE910
P.O. Box 711
Tucson, Arizona 85701

Jeff Schlegel
1167 W. Samalayuca Dr.
Tucson, Arizona 85704-3224

Laura Sanchez
P.O. Box 65623
Albuquerque, New Mexico
87103

Nellis Kennedy-Howard
Travis Ritchie
Sierra Club Environmental
Law Program
85 Second Street, 2nd Floor
San Francisco, CA 94105

Safeway, Inc.
Attn: Lissa Maldonado-Kiser
5918 Stoneridge Mall Road
Pleasanton, California 94588

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18
19 By: 
20
21
22
23
24
25
26
27
28