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Arizona Corporation Commission

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AZ CORP COMMISSION
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BEFORE THE ARIZONA CORPORATION COMMISSION

DOUG LITTLE
CHAIRMAN

BOB STUMP
COMMISSIONER

BOB BURNS
COMMISSIONER

TOM FORESE
COMMISSIONER

ANDY TOBIN
COMMISSIONER

IN THE MATTER OF THE)	DOCKET NO. E-04204A-15-0142
APPLICATION OF UNS ELECTRIC,)	
INC. FOR THE ESTABLISHMENT)	
OF JUST AND REASONABLE)	
RATES AND CHARGES DESIGNED)	MOTION TO STRIKE ARIZONA
TO REALIZE A REASONABLE)	PUBLIC SERVICE COMPANY'S
RATE OF RETURN ON THE FAIR)	SURREBUTTAL TESTIMONY OF
VALUE OF THE PROPERTIES OF)	ASHLEY C. BROWN AND COREY
UNS ELECTRIC, INC. DEVOTED TO)	WELCH AND MOTION TO CONTINUE
ITS OPERATIONS THROUGHOUT)	THE SURREBUTTAL TESTIMONY
THE STATE OF ARIZONA, AND)	
FOR RELATED APPROVALS.)	

The Alliance for Solar Choice ("TASC"), by and through its undersigned counsel, hereby makes its Motion to Strike Arizona Public Service Company's ("APS") Testimony of Ashley C. Brown ("Brown") and Corey Welch ("Welch") and Motion to Continue the Surrebuttal Testimony (the "Motion"). This Motion is being filed in accordance with A.A.C. R14-3-106(K) and Ariz. R. Civ. P. 12(f).¹ TASC hereby requests that the testimony and supporting materials of Brown and Welch be stricken from the record and that both Brown and Welch be prohibited from testifying at the hearing. Alternatively, TASC requests that the testimony of Brown and Welch be continued

¹ When procedure is not set forth in the Arizona Corporation Commission's orders, rules, regulations or in other law, the proceedings are governed by the Arizona Rules of Civil Procedure. See A.A.C. R14-3-101(A).

1 until the parties hereto are afforded an opportunity to engage in discovery of them and, as needed,
2 permit the parties to introduce additional witnesses to rebut Brown and Welch's testimony.

3 **I. Background.**

4 On June 22, 2015, Judge Rodda issued a Procedural Order that granted both APS and
5 TASC's applications to intervene in the above-captioned proceeding (the "Order"). *See* Order, p.
6 2, lns. 17-18. The Order also established various dates for disclosures to be made leading up to the
7 eventual hearing scheduled for March 1, 2016. *Id.* at p. 2, lns. 9-11.

8 Relevantly, Judge Rodda set two disclosure deadlines for all parties to disclose their expert
9 witnesses and proposed testimony – setting both direct and rebuttal deadlines. The parties all
10 disclosed proposed direct and rebuttal testimony in accordance with the Order. Surrebuttal and
11 rejoinder deadlines were also set forth in the Order. *Id.* at p. 3, lns. 4-9.

12 On February 23, 2016, APS filed its surrebuttal.² In its surrebuttal, APS listed for the first
13 time both Brown and Welch as expert witnesses to testify at the upcoming hearing. This disclosure
14 was supplemented by nearly 100-pages of newly introduced supporting materials. This disclosure
15 was made a mere one week prior to the commencement of the hearing.

16 The timing of the surrebuttal leaves both TASC and all other parties without time or ability
17 to sufficiently review the newly proposed testimony and no avenue for adequately responding to
18 the same.

19 **II. Analysis.**

20 Brown purportedly seeks to present evidence refuting testimony submitted by TASC expert
21 witness Mark Fulmer ("Fulmer"), Vote Solar expert witness Briana Kobor ("Kobor") and Western
22 Resource Advocates expert witness Ken Wilson ("Wilson"). Welch purports to present evidence
23 refuting testimony submitted by Kobor. Both Welch and Brown produced testimony and
24 supporting materials to refute direct testimony from the aforementioned parties that relates to the
25 impact of the proposed rates on the solar industry in Arizona.

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28 ² This surrebuttal deadline was adopted in an order dated February 19, 2016. The order moved the surrebuttal filing
deadline from February 19, 2016, to February 23, 2016.

1 Fulmer, Kobor and Wilson are all expert witnesses whose identities and proposed
2 testimony were disclosed in December, 2015. Additionally, it has been well-known throughout the
3 duration of this proceeding that these expert witnesses and their respective parties intended to
4 analyze the impact of the proposed rates on the solar industry. Accordingly, APS has had full
5 opportunity to vet the proposed testimony and supporting materials, conduct discovery of these
6 witnesses and prepare responses to such expert witness testimony. As a result of the timely
7 disclosure of Fulmer, Kobor and Wilson, APS has undoubtedly prepared a well-organized and
8 detailed response to their proposed testimony.

9 By waiting until a mere five-days prior to trial to introduce wholly new witnesses and
10 nearly one hundred pages of additional supporting materials in the *third round of testimony*, APS
11 has failed to afford the other parties the same opportunity to prepare for the hearing. The parties
12 hereto have no opportunity to conduct discovery, fully review, or develop a comprehensive
13 response to the newly-presented witnesses and supporting materials. Rather, the parties are now
14 afforded not even one full week to attempt to develop a new plan of action before the hearing
15 commences.

16 Undoubtedly, such tactics utilized by APS were intentional. Had APS wished to offer
17 wholly new expert witnesses to rebut the proposed testimony of Fulmer, Kobor and Wilson, they
18 should have done so by the rebuttal deadline of January 19, 2016, as set forth in the Order. Instead,
19 APS purposefully withheld the identity, testimony and supporting materials of their new witnesses
20 until the last possible moment, knowing full well that in so acting, no other party would have the
21 opportunity to engage in discovery or move to counter this newly-presented evidence. Such
22 behavior is even more egregious when considering all other parties, operating in good faith, agreed
23 to extend the deadline for submission of surrebuttal testimony until February 23, 2016 from its
24 original due date of February 19, 2016. The parties agreed to such an extension with the implicit
25 understanding that the surrebuttal testimony would not be used to prejudicially introduce wholly
26 new evidence and experts on the eve of trial. Additional evidence of APS' intentional obfuscation
27 of the new witnesses is found in the fact that APS admitted during earlier conferences, without
28 revealing expert identities or the nature of expert testimony, that it intended to present four

1 witnesses at the hearing. Surely, APS knew the identities and content of Brown and Welch
2 testimony at this time and inappropriately opted not to disclose them. Given the voluminous
3 amount of supporting materials and multiple pages of newly-submitted testimony included in APS'
4 surrebuttal, and the time needed to prepare and compile the same, it is clear Brown and Welch
5 were not last-second additions. Instead, APS purposefully and willfully withheld this testimony
6 and materials to ensure maximum advantage over the other parties hereto.

7 Arizona courts state that "trial by ambush [is] a tactic no longer countenanced in Arizona .
8 . . . Indeed, the underlying principle of our disclosure rules is the avoidance of undue delay or
9 surprise." *Wells v. Fell*, 231 Ariz. 525, 528, ¶¶ 12-13, 297 P.3d 931, 934 (App. 2013) (internal
10 citations and quotations omitted). APS has engaged in this exact type of unwarranted behavior by
11 including two additional witnesses and voluminous supporting materials at the last possible
12 moment. In so doing, all other parties are prejudiced by APS' last-minute disclosure as they now
13 lack the ability and opportunity to engage in discovery or fully develop a response or rebuttal to
14 this newly-introduced evidence. If this testimony and supporting evidence is permitted to be
15 considered at the hearing, APS will stand in a position to substantially benefit from its own bad
16 acts.

17 Accordingly, the testimony of Brown and Welch, as well as all supporting materials, should
18 be stricken from the record and neither Brown nor Welch should be permitted to testify at the
19 hearing. This is the only efficient means of protecting the due process rights of all parties hereto
20 to be free from the prejudice that would result by admitting this ambush testimony.

21 If the Motion to Strike is rejected, the testimony of these witnesses should be continued
22 until the parties hereto are given ample opportunity to engage in discovery and prepare and disclose
23 any rebuttal experts of their own on an as-needed basis. TASC specifically asks that, if the
24 forgoing Motion to Strike is rejected, APS's two new witnesses be prohibited from testifying at
25 their assigned time. Instead, they should be held out of the hearing and only permitted to testify
26 once TASC, and other interested parties, have had ample reasonable time to consider their
27 testimony and work with experts on responding thereto. At a minimum, Staff requests two months'

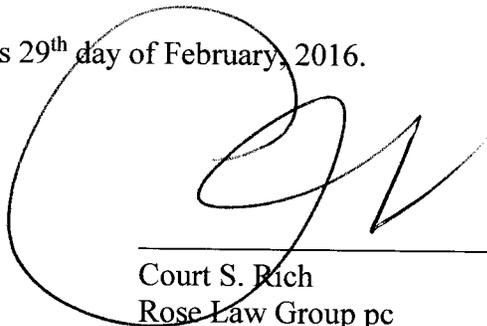
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1 time to prepare prior to hearing these witnesses and to sub it its own expert testimony in response
2 to the new witnesses and information.

3 **III. Conclusion.**

4 For the reasons stated above, TASC requests that the testimony and supporting materials
5 of Brown and Welch be stricken from the record and that both Brown and Welch be prohibited
6 from testifying at the hearing. If the forgoing is rejected, TASC requests that the testimony of
7 Brown and Welch be continued for a minimum of two months until the parties hereto are afforded
8 an opportunity to engage in discovery of them and, as needed, permit the parties to introduce
9 additional witnesses to rebut Brown and Welch's testimony. Any other outcome will reward APS
10 for this tactic and encourage parties to do the same on a going forward basis. In the interest of
11 fairness, TASC respectfully requests that this Motion to Strike be granted or the additional time
12 be granted as set forth here.

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14 Respectfully submitted this 29th day of February, 2016. ,

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18 _____
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1 **Original and 13 copies filed on**
2 **this 29th day of February, 2016 with:**

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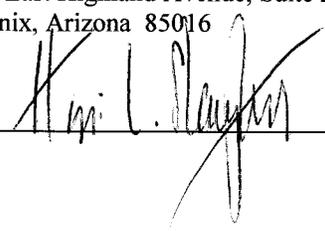
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