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14 Attorneys for Arizona Public Service Company

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Arizona Corporation Commission  
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**BEFORE THE ARIZONA CORPORATION COMMISSION**

COMMISSIONERS

DOUG LITTLE, Chairman  
 BOB STUMP  
 BOB BURNS  
 TOM FORESE  
 ANDY TOBIN

IN THE MATTER OF THE  
 APPLICATION OF ARIZONA PUBLIC  
 SERVICE COMPANY FOR A HEARING  
 TO DETERMINE THE FAIR VALUE OF  
 THE UTILITY PROPERTY OF THE  
 COMPANY FOR RATEMAKING  
 PURPOSES, TO FIX A JUST AND  
 REASONABLE RATE OF RETURN  
 THEREON, TO APPROVE RATE  
 SCHEDULES DESIGNED TO DEVELOP  
 SUCH RETURN.

DOCKET NO. E-01345A-16-0036

IN THE MATTER OF FUEL AND  
 PURCHASED POWER PROCUREMENT  
 AUDITS FOR ARIZONA PUBLIC  
 SERVICE COMPANY.

DOCKET NO. E-01345A-16-0123

**MOTION FOR PROCEDURAL CONFERENCE and INTERIM PROTECTIVE ORDER**

1 In a highly unusual move, the Energy Freedom Coalition of America has noticed  
2 the deposition of APS witness Barbara Lockwood without having first submitted a  
3 single data request pertaining to her direct testimony. APS requested that EFCA first  
4 seek discovery by less intrusive means, and if a deposition is still necessary, take Ms.  
5 Lockwood's deposition after rebuttal testimony is filed. Otherwise, any deposition that  
6 does occur would not concern the complete set of testimony—and the final substantive  
7 position—that APS will take into hearing. EFCA declined.

8 Early depositions in a highly complex rate case, with 15 APS witnesses and  
9 already over 25 intervenors, could quickly undermine the orderly gathering of  
10 information that parties need for the hearing. Accordingly, APS respectfully requests  
11 that the Presiding Officer set a procedural conference pursuant to Arizona  
12 Administrative Code R14-3-108 and Arizona Rule of Civil Procedure 26 to discuss and  
13 create a discovery plan, including guidance and limitations on the timing and scope of  
14 depositions, should they prove necessary. In the interim, APS respectfully requests the  
15 Presiding Officer grant a protective order to relieve APS from complying with EFCA's  
16 Notice of Deposition and presenting Ms. Lockwood on October 19, 2016.

### 17 **INTRODUCTION AND BACKGROUND**

18 On September 28, 2016, EFCA's counsel requested that APS check Ms.  
19 Lockwood's availability for a deposition on October 19th. APS responded by stating  
20 that Ms. Lockwood was unavailable on October 19th, and requested that EFCA defer  
21 early depositions and work with APS on managing discovery in a thoughtful and  
22 efficient way. APS offered to make Ms. Lockwood available for deposition after  
23 rebuttal testimony, particularly since consensus can often be reached through rebuttal  
24 testimony that might make depositions entirely unnecessary. APS also requested that  
25 EFCA pursue less burdensome discovery first. Correspondence between EFCA and  
26 APS is attached as Exhibit A.

1 EFCA responded by serving APS with a notice that EFCA intended to depose  
2 Ms. Lockwood on October 19th, stating only that it could not wait until rebuttal  
3 testimony in 2017 to take her deposition. EFCA's Notice of Deposition for Ms.  
4 Lockwood is attached as Exhibit B.

5 In its direct case, APS filed the direct testimony of 15 witnesses, and expects to  
6 file rebuttal testimony for many of those witnesses. As of today, APS's rate case has  
7 over 25 intervenors. In addition, APS has already received well over 500 data requests  
8 from 7 different parties, along with 116 data requests that the Company pre-filed with its  
9 application. APS conservatively estimates that 50 witnesses could file written testimony  
10 before the hearing is scheduled to start in March of 2017.

### 11 ARGUMENT

12 This proceeding is already a particularly complicated rate case, and those  
13 complications will only increase as each party begins to propound their discovery and  
14 file their testimony. If parties begin to take early depositions—a practice that virtually  
15 does not exist in Commission proceedings, likely because pre-filed testimony and near  
16 unlimited written discovery render depositions largely (if not entirely) unnecessary—  
17 this proceeding could quickly spiral out of control. Each party is permitted to, and many  
18 will feel the need to, actively participate in the early depositions. This could spawn even  
19 more depositions, all before rebuttal testimony. Yet parties often streamline their  
20 positions in rebuttal testimony, minimizing issues in controversy at the hearing. The  
21 result could be that the pre-rebuttal depositions become entirely superfluous, or parties  
22 request even more depositions after rebuttal testimony. The parties and the Commission  
23 would benefit from a reasonably crafted discovery plan to promote the efficient use of  
24 time and resources. APS additionally requests that the Commission issue an interim  
25 protective order to relieve Ms. Lockwood from having to appear on October 19, 2016  
26 until a reasonable discovery plan can be determined by the Presiding Officer.

27  
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1           **A. Reasonable limits on discovery reflect Commission practice of**  
2           **extensive pre-filed written testimony and near unlimited data**  
3           **requests.**

4           The purpose of discovery is to provide parties an opportunity to learn about an  
5           opponent's case and avoid surprises at trial. The goal of discovery in Commission  
6           proceedings and under the traditional rules of procedure are the same: facilitating the  
7           identification of issues, assisting in the efficient resolution of disputes, and avoiding trial  
8           from becoming a guessing game. *See Watts v. Superior Court In and For Maricopa*  
9           *County*, 87 Ariz. 1 (1959).

10          But there is no guessing game with Commission proceedings. Discovery under  
11          the traditional rules of civil procedure do not contemplate the Commission's practice of  
12          pre-filed testimony and unlimited data requests. The Arizona Rules of Civil Procedure  
13          provide strict limits on the amount of written discovery available to a party. For  
14          example, a party may not serve on any other party more than forty interrogatories. *See*  
15          *Ariz. R. Civ. P. 33.1(a)*. Additionally, a party cannot submit more than one request for  
16          production of documents and things, and that request cannot include more than ten  
17          distinct items or categories of items requested. *See Ariz. R. Civ. P. 34(b)*.

18          The Commission on the other hand, has very few limitations on data requests  
19          submitted by parties, such that parties can essentially propound unlimited written  
20          discovery. In fact, the first set of data requests APS received from Commission Staff  
21          alone contained 52 data requests—well over the number permitted under the rules of  
22          civil procedure for an entire case.

23          Moreover, pre-filed written testimony is the ultimate tool in identifying all issues  
24          for a hearing, and frankly renders depositions largely unnecessary. Indeed, in the four  
25          rate cases that have gone to hearing this year that have raised similar issues to this  
26          proceeding,<sup>1</sup> including the modernization of residential rate design, *not a single party*,  
27          EFCA included, took a single deposition. As demonstrated by parties' own conduct in

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28          <sup>1</sup> These rate cases were filed by UNS Electric Inc., Tucson Electric Power Company, Sulphur Springs  
Valley Electric Cooperative, and Trico Electric Cooperative. EFCA was a party in each.

1 these (and other) rate cases, the Commission's discovery process provides a more than  
2 adequate opportunity to identify issues and assist in the efficient resolution of disputes.

3 **B. The Presiding Officer should impose reasonable limitations for**  
4 **depositions and otherwise provide guidance on the discovery process.**

5 Ariz. R. Civ. P. 26(c) and (d) provide the Presiding Officer with the authority to  
6 impose reasonable limitations on the use, scope and timing of discovery, and to  
7 otherwise control the discovery process to prevent "annoyance, embarrassment,  
8 oppression or undue burden or expense." *See Arpaio v. Figueroa*, 229 Ariz. 444 (Ct.  
9 App. 2012). This proceeding and the numerous parties would benefit from reasonable  
10 limitations on discovery set by the Presiding Officer.

11 **1. The discovery rules contemplate that parties will first seek the**  
12 **information they need through less burdensome methods.**

13 APS requests that the Presiding Officer limit the use of depositions on the basis  
14 that there are less burdensome and intrusive discovery mechanisms available to EFCA.  
15 Parties participating in Commission proceedings routinely file data requests to elicit  
16 additional information and to help formulate their own positions. Indeed, to date, APS  
17 has received over 500 data requests from 7 different parties. APS expects to receive  
18 hundreds if not thousands more data requests before this case is concluded and is  
19 committed to answering those data requests in a timely manner. EFCA is well versed in  
20 the Commission's practice of sending data requests to elicit information. EFCA has  
21 submitted 3 sets of data requests to APS in this proceeding. Interestingly, however,  
22 EFCA has yet to send so much as a single question related to Ms. Lockwood's  
23 testimony. Instead, EFCA has chosen to use a more burdensome and intrusive, yet  
24 typically less productive, form of discovery by noticing her deposition.

25 EFCA's approach is inconsistent with the Arizona Rules of Civil Procedure, and  
26 does not reflect Commission discovery practices. Further, EFCA's pursuit of pre-  
27 rebuttal testimony depositions could risk a chaotic discovery process in which parties  
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1 “race to the bottom” by seeking early depositions to obtain testimony regarding their  
2 positions as early as possible.

3 Depositions are certainly permitted under appropriate circumstances. And the  
4 traditional rules permit the use of discovery tools in any sequence. But parties should  
5 also first seek the information they need through less burdensome means. “Requiring  
6 litigants to at least initially pursue less intrusive discovery before resorting to sweeping  
7 demands...[i]s also consistent with the mandate that the rules of civil procedure,  
8 including those relating to discovery, be construed to secure the just, speedy,  
9 inexpensive determination of every action.” *See American Family Mut. Ins. Co. v.*  
10 *Grant*, 222 Ariz. 507 (Ct. App. 2010).

11 It is not the barring of depositions that APS seeks, but the management of how  
12 and when they occur. Ariz. R. Civ. P. 26(b)(1)(C) empowers the Presiding Officer to  
13 limit the frequency or extent of discovery methods if the discovery sought “is  
14 unreasonably cumulative or duplicative, or obtainable from some other source that is  
15 either more convenient, less burdensome, or less expensive.” EFCA should be required  
16 to first seek the information it wants through filing data requests prior to noticing a  
17 deposition.

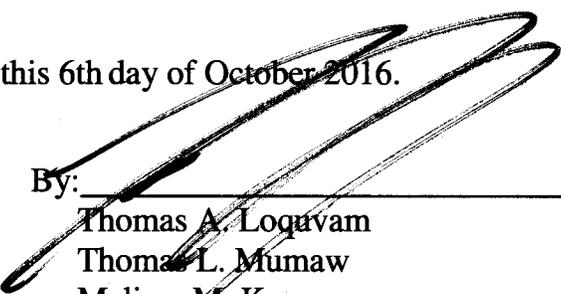
18 **2. The Presiding Officer should permit depositions, if necessary,**  
19 **only after the Company has had an opportunity to file its**  
**rebuttal testimony.**

20 If depositions of witnesses are proven necessary, APS believes that parties and  
21 the Commission would be better served if they were taken after the Company has had an  
22 opportunity to file rebuttal testimony. Party positions often change through the course  
23 of a case after an opportunity to review the pre-filed testimonies of other parties and  
24 finding areas of compromise. This process is conducive to judicial efficiency and  
25 fosters the opportunity to limit the contested issues at the hearing. EFCA has noticed  
26 the deposition of Ms. Lockwood with only her direct testimony filed. However, Ms.  
27 Lockwood may be one of the witnesses for which APS submits pre-filed rebuttal  
28



1 before resorting to depositions, as is contemplated by the rules of civil procedure, and is  
2 the courtesy and custom in Commission proceedings. In the meanwhile, APS  
3 respectfully requests that its Motion for Interim Protective Order be granted until an  
4 appropriate plan for discovery can be established.

5  
6 RESPECTFULLY SUBMITTED this 6th day of October 2016.

7  
8 By:   
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13 Attorneys for Arizona Public Service Company

14 ORIGINAL and thirteen (13) copies  
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16 October 2016, with:

17 Docket Control  
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# **EXHIBIT A**

## Loquvam, Thomas A

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**From:** Loquvam, Thomas A  
**Sent:** Thursday, September 29, 2016 4:00 PM  
**To:** Court Rich (CRich@roselawgroup.com)  
**Subject:** RE: follow up

Thanks, Court. And thank you for the call about the October 19 date. Barbara Lockwood has previously scheduled engagements on the 19th. Instead of immediately arranging a different date, however, I propose below a different approach below that recognizes the realities of administrative litigation. If at the end, deposing witnesses is the only way for your client to obtain the information it needs, then a deposition could proceed, and I'm sure we'll be able to coordinate a date that makes sense for everyone. APS is committed to working with EFCA throughout this proceeding to make discovery less burdensome and more efficient for everyone.

As you know, depositions are rare in litigation before the ACC. Instead of depositions, witnesses file extensive written testimony before the hearing and parties are permitted what essentially amounts to unlimited written discovery. Indeed, even though the recent UNS and TEP rate cases raised the same rate design issues that have drawn EFCA's interest in APS's rate case, EFCA did not notice any depositions in either rate case, and was apparently able to obtain the information it needed through reviewing pre-filed written testimony and issuing data requests.

Of course, depositions are permitted. But the discovery rules contemplate that parties will seek the information they need through less burdensome means first. Indeed, Arizona Rule of Civil Procedure 26(b)(1)(C)(i) empowers a court to limit the frequency or extent of discovery methods if the discovery sought "is unreasonably cumulative or duplicative, or obtainable from some other source that is either more convenient, less burdensome, or less expensive." And this rule does not even contemplate the extensive pre-filed testimony that occurs with ACC proceedings.

Moreover, as you know, depositions are generally limited to one per witness for a maximum of four hours. APS has only submitted direct testimony in this case, and Ms. Lockwood may be one of the witnesses for which APS submits pre-filed rebuttal testimony. At the hearing, witnesses of course adopt all of their pre-filed testimony, including direct and rebuttal. A deposition based on direct testimony only is of limited use at the hearing. Excepting the possibility of extenuating circumstances (such as emergencies or the unavailability of the information in another form), depositions conducted after pre-filed rebuttal testimony are the best practice.

This is particularly true since each party to a proceeding is permitted to attend a deposition and ask questions of a deponent. Having depositions before the full spectrum of a witness's testimony is available through rebuttal testimony could spawn days of depositions after direct testimony, and prompt motions for otherwise wasteful and avoidable deposition days after rebuttal. And this is for a single witness. The deposition framework set forth in the Arizona Rules of Civil Procedure does not contemplate proceedings in which a party like APS submits pre-filed testimony from 15 witnesses and the number of intervenors could reach 20, 30, or even more.

Accordingly, APS believes that it is appropriate for EFCA to pursue less burdensome and intrusive discovery mechanisms before resorting to depositions, as is contemplated by the rules of civil procedure, and is the courtesy and custom in ACC proceedings. It is only late September, and EFCA has not submitted any data requests to APS regarding Ms. Lockwood's direct testimony. Further, APS does not believe it is appropriate for any witness to be produced before the deadline for pre-filed rebuttal testimony.

That being said, it very well could be that EFCA needs to depose Ms. Lockwood before the hearing so that it can obtain any last bits of information regarding what she will say on the stand that is not included in her direct

testimony or her potential rebuttal testimony, or covered by one of the thousands of data requests responses that APS is sure to provide to the parties. If that is the case, and a deposition is the only way for EFCA to obtain the information it needs, then a deposition could occur. If you would like to reserve a deposition date in 2017 now, just as a placeholder to prevent calendaring complications later (I'd note that Ms. Lockwood is a particularly busy executive and is already scheduling meetings into November), we can do that and I'm happy to work on that with you.

Thanks again, Court. I look forward to resolving this issue in a mutually agreeable fashion.

---

**From:** Court Rich [mailto:CRich@roselawgroup.com]  
**Sent:** Thursday, September 29, 2016 12:59 PM  
**To:** Loquvam, Thomas A  
**Cc:** Hopi Slaughter  
**Subject:** follow up

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**USE CAUTION - EXTERNAL SENDER:(CRich@roselawgroup.com)**

**Do not click on links or open attachments that are not expected.**

For questions or concerns, please email the APS Cyber Defense Center team at [ACDC@apsc.com](mailto:ACDC@apsc.com) or contact the APS Helpdesk.

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Thomas,

I wanted to follow up regarding our discussion yesterday of Barbara Lockwood's availability for a deposition on October 19<sup>th</sup>. If I don't hear back by the end of the day today, I will go ahead and get the notice out just so we can reserve that date on everyone's schedule who might have an interest. Thanks Thomas.

## Court S. Rich



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# **EXHIBIT B**

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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONER

BOB BURNS  
COMMISSIONER

TOM FORESE  
COMMISSIONER

ANDY TOBIN  
COMMISSIONER

11  
12 **IN THE MATTER OF THE**  
13 **APPLICATION OF ARIZONA PUBLIC**  
14 **SERVICE COMPANY FOR A**  
15 **HEARING TO DETERMINE THE FAIR**  
16 **VALUE OF THE UTILITY PROPERTY**  
17 **OF THE COMPANY FOR**  
18 **RATEMAKING PURPOSES, TO FIX A**  
19 **JUST AND REASONABLE RATE OF**  
20 **RETURN THEREON, TO APPROVE**  
21 **RATE SCHEDULES DESIGNED TO**  
22 **DEVELOP SUCH RETURN.**

DOCKET NO. E-01345A-16-0036

Arizona Corporation Commission  
**DOCKETED**

OCT 03 2016

DOCKETED BY **R.A.**

19 **IN THE MATTER OF FUEL AND**  
20 **PURCHASED POWER**  
21 **PROCUREMENT AUDITS FOR**  
22 **ARIZONA PUBLIC SERVICE**  
23 **COMPANY.**

DOCKET NO. E-01345A-16-0123

**NOTICE OF DEPOSITION OF**  
**BARBARA D. LOCKWOOD**

24 **YOU ARE HEREBY NOTIFIED** that the deposition will be taken upon oral examination  
25 of the person whose name is stated below at the time and place stated before an officer authorized  
26 by law to administer oaths.

27 **PERSON TO BE EXAMINED:** Barbara D. Lockwood  
28 **DATE OF DEPOSITION:** October 19, 2016  
**TIME OF DEPOSITION:** 9:00 a.m.

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**PLACE OF DEPOSITION:**      **Rose Law Group pc**  
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**COURT REPORTER:**              **COASH & COASH**

**DATED** this 30<sup>th</sup> day of September, 2016.

/s/ Court S. Rich  
Court S. Rich  
Rose Law Group pc  
Attorney for EFCA

1 Original and 13 copies filed on  
2 the 3<sup>rd</sup> day of October, 2016 with:

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

7 *I hereby certify that I have this day served a copy of the foregoing document on all parties of  
8 record in this proceeding by regular or electronic mail to:*

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**From:** Ratecase  
**Sent:** Thursday, October 06, 2016 1:37 PM  
**Subject:** APS 2016 Rate Case Notice of Fourth Technical Conference  
**Attachments:** APS Notice of Fourth Technical Conference\_APS 2016 Rate Case-16-0036\_100616.pdf

Attached please find APS's Notice of the Fourth Technical Conference to be held on November 3, 2016 in the APS 2016 Rate Case matter. If you have any difficulty opening this document, please let me know.

Best Regards,



**THE APS RATE CASE TEAM**

## Shahan, Jamie

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**From:** Arizona Public Service Regulatory Department  
**Sent:** Thursday, October 06, 2016 1:37 PM  
**To:** Ahmad, Omay; Andreasen, Erinn A; Andrews, Ardyn W; Aycock, Kimarie L; Barela, Steve S; Barleycorn, Judith K; Baum, Shirley A; Benally, Linda J; Benavides, David L; Benavides, Francisca E; Bernosky, Gregory L; Blankenship, Elizabeth A; Bohannon, Kasey D; Bolden, Timothy F; Bordenkircher, Scott B; Brandt, Donald E; Bunnell, Alan L; Burke, Jeffrey; Carlson, Thomas J; Carnes, Kerri A; Chalmers, Michelle J; Coats, Kelley M; Cole, Brian W; Connolly, Sharon A; Constable, Adam; 'Dalton, Chalese'; Danner, Denise R; Dean, Traci L; Derstine, Stacy L; Dinkel, Patrick; Dolyniuk, Karen E; Downing, Edward; Dunning, Mary M; Easterly, Donna M; Edington, Randall; 'Eisen, Eileen'; Engel, Jennifer R; Evans, Danielle; Ewen, Peter M; Fahy, Richard M; Falck, David P; Flores, Mario; Freemyers, Tia; Froetscher, Daniel T; Fryer, Zachary J; Gagnon, Gaylord J; Geisler, Ted N; Geissler, Virginia M; Girardi, Kyle; Goodrich, Brent; Gotfried, Steven M; Green, Michael G; Gross, Damon R; Guldner, Jeff B; Hankins, Brian C; Hardy, Karen L; Hatfield, James R; Hatfield, John S; Hauert, Kelly M; Ho, Amanda; Hornburg, Joel; Johnson, Janice L; Johnson, Jeffrey W; Karem, Jordan; Kearns, Daniel A; Keys Nunes, Brandon; Kimbriel, Dianne; Koenes, Nancy; Krueger, Melissa M; La Benz, Jason C; Langbaum, Kevin; Latino, Emma L; Layton, Stefanie; Lehman, Michelle R; Locher, Michael L; Lockwood, Barbara D; 'Lofton, Lenora'; Loquvam, Thomas A; Lowe, Patrick; Lucas, John R; Majcher, Adam R; Malagon, Elisa M; Martin, Michael D; McCall III, Thomas E; McClain, Hart; McDonald Jr, James E; McFall, Elizabeth M; McGill, James T; McLeod, Tammy D; 'McMichael, Stephanie'; Mendoza, Jerardo; Miessner, Charles A; Morgan, Britney N; Morgan, Joel I; 'Mountain, Paul'; Mumaw, Thomas L; Murphy, Ashlee I; Nickloy, Lee R; Ochoa, Marissa; Omanovic, Rufad; Orr, Debra M; Pallissard Jr, Bernie P; Pittman, Hal; Rasmussen, Rose; Reed, Cynthia N; Ricciardi Jr, Joseph H; Rusert, Timothy B; Sadoski, Melissa L; Schelah, Michele K; Schenk, S Jenine; Schiavoni, Mark A; 'Shahan, Jamie'; Smith, Barbara G; Smith, Michelle R; Smith, Paul A; Snook, Leland; Spence, Kelly; Stewart, Anna; Stooks-Dermer, Traci L; Surovy, Christina S; Symchak, Jason R; Tafoya, Andres L; Tafoya, Robyn A; Taylor, Mikenzie; Tetlow, Jacob; Tewelis, Tony; Van, Nguyen T; Vega, Jennie A; Washington, Leticia L; Wendeborn, Lee; Wendt, Geoffrey; Wilde, James C; Wontor, James M; Yeager, Celina  
**Subject:** APS 2016 Rate Case Notice of Fourth Technical Conference

Attached please find APS's Notice of the Fourth Technical Conference delivered October 6, 2016, in the APS 2016 Rate Case matter. If you have any difficulty opening this document, please let me know.

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