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Arizona Corporation Commission

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Attorneys for Arizona Public Service Company

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

**RESPONSE TO EFCA'S
SUPPLEMENTAL STATEMENT OF
AUTHORITY**

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

DOCKET NO. E-01345A-16-0123

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1 Given the new argument raised in EFCA’s November 4, 2016 filing labeled a
2 “Supplemental Statement of Authority,” APS offers this brief response.

3 EFCA claims that in promulgating A.R.S. § 40-244, the legislature created an
4 independent right to a deposition in Commission proceedings. Without any supporting
5 statutory language or case law, EFCA further asserts that the Commission cannot
6 abrogate this right to a deposition in anyway. With this late filing, EFCA appears to be
7 arguing that the Presiding Officer has no discretion to proscribe—or even modify—
8 discovery in this proceeding. EFCA again exhibits a misunderstanding of discovery
9 rules in Commission proceedings, and also misreads the purpose of A.R.S. § 40-244.

10 Like many administrative statutes, A.R.S. § 40-244 merely puts into operation a
11 grant of authority given to the Commission by the Arizona Constitution. Article 15,
12 Section 4 provides that the Commission “shall have power to take testimony under
13 commission or deposition either within or without the state.”¹ As with several
14 constitutional provisions that “merely lay[] down general principles,” statutes (like
15 A.R.S. § 40-244) are needed to put constitutional grants of authority into operation.² In
16 *Miller*, the Arizona Supreme Court found that the recall provisions in Article 8 of
17 Arizona’s Constitution were self-executing because they provide “minute detail”
18 regarding how officials should be recalled, “even to the extent of providing the form of
19 petition for recall and the manner in which it shall be signed, and the form of the ballots
20 to be used....”³

21 By contrast, Article 15, Section 4 does not provide minute detail regarding how
22 the Commission’s authority to order depositions might function, except that the
23 depositions may occur “within or without the state.” A.R.S. § 40-244 fills this void and
24 provides guidance on how the Commission’s deposition authority operates. As a result,
25 A.R.S. § 40-244 is an operational statute. It does not, as EFCA argues, create an
26

27 ¹ See also Article 15, Section 3.

28 ² *Miller v. Wilson*, 59 Ariz. 403, 408, 129 P.2d 668, 670 (1942).

³ *Id.*

1 independent statutory (much less absolute) right to take depositions in Commission
2 proceedings.

3 Moreover, EFCA's interpretation of A.R.S. § 40-244 necessarily involves the
4 legislature limiting the Commission's constitutionally-granted authority. If A.R.S. § 40-
5 244 were read to preclude the Commission from exercising its deposition power in the
6 manner the Commission deemed fit (such as modifying the rights of parties to take
7 depositions), the legislature would be limiting the Commission's authority. Yet, the
8 Commission's power to order depositions (or to not order depositions) is granted by the
9 Arizona Constitution, and "power vested in the Commission by the Constitution cannot
10 be limited by statute."⁴ EFCA's interpretation fails under basic constitutional scrutiny.

11 Finally, A.R.S. § 40-244 only permits depositions "as in a court of record."
12 Assuming this phrase means "as provided for under the rules of civil procedure," the
13 Arizona Rules of Civil Procedure themselves can be modified by the judge presiding
14 over a civil action in appropriate circumstances. Arizona Rule of Civil Procedure
15 26(b)(1)(C) provides that a court can limit the use of otherwise permitted discovery
16 methods for several reasons, as discussed in APS's original Motion for Procedural
17 Conference and Protective Order. That the very rules EFCA demands be used without
18 modification *can be modified themselves* by a presiding officer or judge conclusively
19 disposes of EFCA's new argument regarding A.R.S. § 40-244.

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21 RESPECTFULLY SUBMITTED this 9th day of November 2016.

22
23 By: _____

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28 ⁴ See *Ariz. Corp. Comm'n v. Superior Court*, 105 Ariz. 56, 62, 459 P.2d 489, 495 (1969).

1 ORIGINAL and thirteen (13) copies
2 of the foregoing filed this 9th day of
3 November 2016, with:

4 Docket Control
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