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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS
TOM FORESE – CHAIRMAN
ROBERT BURNS
DOUG LITTLE
ANDY TOBIN
BOYD DUNN

Arizona Corporation Commission
DOCKETED
JUN 28 2017
DOCKETED BY

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 RETURN THEREON, TO APPROVE RATE SCHEDULES DESIGNED TO DEVELOP SUCH RETURN.	DOCKET NO. E-01345A-16-0036
	DOCKET NO. E-01345A-16-0123
IN THE MATTER OF FUEL AND PURCHASED POWER PROCUREMENT AUDITS FOR ARIZONA PUBLIC SERVICE COMPANY	**APPLICATION FOR REHEARING ON "INTERLOCUTORY ORDER" FILED JUNE 27, 2017**

Commissioner Robert Burns hereby applies and moves the Commission for a rehearing of all matters decided at the Staff Meeting of the Commission on June 20, 2017, and incorporated in the "Interlocutory Order" of the Commissioners approved at that meeting, and docketed in this case on June 27, 2017 (the "Order"). Commissioner Burns further applies and moves the Commission to immediately issue a final order vacating and rescinding the

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aforementioned Order and instead approving the motions made, and granting the relief requested by Commissioner Burns prior to and at the June 20, 2017 Staff Meeting.

Nothing in this application concedes that Commissioner Burns is required to exhaust administrative remedies, follow any particular procedures set forth in the statutes or rules governing the proceedings of the Commission, that the Commission has primary jurisdiction over any of the issues raised herein, or that Commissioner Burns is considered a party to these proceedings rather than a Commissioner acting with independent authority.[1] Commissioner Burns reserves all his objections to any arguments by APS, Pinnacle West, or the other Commissioners that he is required to exhaust or follow any particular administrative procedures before seeking relief against or in connection with the Order through the Courts, or that the Commission has primary jurisdiction over any of the issues raised herein.

Subject to the aforementioned objections, the bases for this application and motion include the following:

A. In approving and issuing the Order, the Commissioners have violated Arizona and federal law, violated the legal rights and authority of Commissioner Burns, exceeded their jurisdiction and authority, and acted in an arbitrary and capricious manner inconsistent with the law governing all issues addressed or decided in the Order. The other Commissioners have also abused any discretion they may have in connection with such matters. Commissioner Burns incorporates herein by reference all points, arguments and sources of law or precedent offered by Commissioner Burns in the following filings as specific justification and bases for this rehearing application:

1. The Emergency Motion of Commissioner Robert Burns to Compel Compliance with Investigatory Subpoenas (Expedited Ruling and

[1] Notably, the Order states that Commissioner Burns is not a party to these proceedings and infers that because of his position as a Commissioner rather than as a party to the rate case, his rights differ from those of a party before the Commission.

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Suspension and Continuance of Rate Case Proceedings Requested) filed in this docket on June 2, 2017;

2. The Emergency Motion of Commissioner Robert Burns for Relief (1) Confirming that the Administrative Law Judge Will Facilitate Calling and Questioning of Hearing Witnesses; and (2) Approval of his Counsel Participating in Questioning (Expedited Ruling and Suspension and Continuance of Hearing Requested) filed in this docket on April 26, 2017;

3. Commissioner Burns' Motion for Determination of Disqualification and for Stay of Proceedings Pending Full Investigation (Expedited Ruling Requested) filed in this docket on April 27, 2017;

4. The Emergency Renewed Motion of Commissioner Robert Burns for Relief Staying These Rate-Making Proceedings (Expedited Ruling Requested) filed in this docket on June 2, 2017; and

5. The Dissent Letter dated June 23, 2017.

The foregoing motions are hereafter referred to as the "Burns Motions". Commissioner Burns further incorporates fully by reference his comments and arguments made during the Staff Meeting on June 20, 2017, and in the letter he filed on June 20, 2017 in this case during a recess in the Staff Meeting. Without waiving any argument or position asserted in the referenced filings or comments, but seeking to bring as much additional detail and clarity to this request for rehearing as possible, Commissioner Burns asserts that among other reasons set forth in the Burns Motions, Commissioner Burns' comments and his letter dated June 20, 2017, Commissioner Burns contends as bases for this rehearing request that the Commissioners have exceeded their jurisdiction and authority, acted in an arbitrary and capricious manner, and abused their discretion in approving and entering the Order, for the following reasons:

- The Commissioners have violated Ariz.Const., art. XV, §§ 3,4 and A.R.S. § 40-241, the Arizona judicial precedent construing Commissioner investigatory

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powers under those or other constitutional and statutory provisions or principles, as well as other provisions of Arizona Revised Statutes, Title 40 concerning investigation of public service corporations and their affiliates and the enforcement of subpoenas including by contempt actions), by denying Commissioner Burns his rights to enforce his investigatory subpoenas filed and served in this matter, to take the deposition of Arizona Public Service Company ("APS") and Pinnacle West Capital Corporation ("Pinnacle West") CEO Donald Brandt, and to conduct all his desired investigatory efforts in this rate case pursuant to the investigatory subpoenas. Commissioner Burns has independent, individual rights and authorities to conduct the investigation he has initiated and that he desires to complete into the operations, conduct and finances of APS, Pinnacle West and their surrogates, proxies, consultants, lobbyists, representatives, marketing agents, or other agents. The other Commissioners have no right or authority to stop or limit Commissioner Burns' investigations, especially for the reasons set forth in the Order. Commissioner Burns has no obligation to seek the other Commissioners' permission or authorization to conduct those investigations, and they may take no actions to obstruct or impair his investigations.

- The Commissioners have violated Ariz.Const., art. XV, §§ 3,4 and A.R.S. § 40-241, the Arizona judicial precedent construing Commissioner investigatory and rate-setting powers under those or other constitutional and statutory provisions or principles, other provisions of Arizona Revised Statutes, Title 40 concerning investigation of public service corporations and their affiliates and the enforcement of subpoenas including by contempt actions), and the provisions of the Arizona constitution, Arizona statutes, and the Rules of the Commission governing Commission rate setting or policy making by denying Commissioner Burns his right to call all the witnesses and ask all the questions he has demanded in connection with the evidentiary hearing proceedings in this rate case, and he is

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entitled to the cooperation and assistance of the Administrative Law Judge in securing the attendance and questioning of such witnesses. Commissioner Burns has individual rights to call witnesses and conduct such questioning in the manner he proposed. The other Commissioners have no right or authority to stop or limit Commissioner Burns' calling or questioning of witnesses. He has no obligation to seek their permission or authorization for such matters, and they may take no actions to obstruct or impair his calling and questioning of witnesses.

- The Commissioners have violated Ariz.Const., art. XV, §§ 3,4, A.R.S. § 40-241, the Arizona judicial precedent construing Commissioner investigatory, rate setting and other policy-making powers under those or other constitutional and statutory provisions or principles, as well as other provisions of Arizona Revised Statutes, Title 40 concerning investigation of public service corporations and their affiliates, the Arizona law governing enforcement of Commission subpoenas including by contempt actions, the constitutional provisions, statutes, legal precedent and rules governing Corporation Commission rate setting or policy setting proceedings and procedures by finding that matters sought by Commissioner Burns via his investigatory subpoenas were not relevant, reasonably calculated to lead to the discovery of admissible evidence, and by any findings that his investigatory subpoenas were improperly or unduly ambiguous, overly or unduly broad, overly burdensome or otherwise defective or improper. The investigatory subpoenas seek information relevant to matters of legitimate concern to Commissioner Burns and the rest of the Commissioners in this rate setting proceeding and relevant to other matters within their authority and responsibility under law. They are also properly tailored to lead to discovery of relevant information, are not unduly burdensome, overly broad, ambiguous or otherwise objectionable under any rules of the Commission or other source of law.

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- The Commissioners have violated Ariz.Const., art. XV, §§ 3,4, A.R.S. § 40-241, the Arizona judicial precedent construing Commissioner investigatory, rate setting and other policy-making powers under those or other constitutional and statutory provisions or principles, as well as other provisions of Arizona Revised Statutes, Title 40 concerning investigation of public service corporations and their affiliates, the Arizona law governing enforcement of Commission subpoenas including by contempt actions, the constitutional provisions, statutes, legal precedent and rules governing Corporation Commission rate setting or policy setting proceedings and procedures by finding that Commissioner Burns sought information from his proposed and desired questioning of witnesses from APS and Pinnacle West in this case that were not relevant or were otherwise inappropriate or improper for questions at a rate setting evidentiary hearing. The witnesses Commissioner Burns requested possess relevant information and the questions he intended to ask of them were, as demonstrated by the questions he filed in this case, relevant to matters of legitimate concern to Commissioner Burns and the rest of the Commissioners in this rate setting proceeding and relevant to other matters within their authority and responsibility under law. They are also properly tailored to lead to discovery of relevant information, are not unduly burdensome, overly broad, ambiguous or otherwise objectionable under any rules of the Commission or other source of law.[2]

- The Commissioners erred in finding that Commissioner Burns somehow waived or limited his right to call witnesses and question them in this proceeding

[2] Given that APS has requested recovery of plant in service outside of the 2015 test year, and a majority of intervenors in this matter have agreed to permit the additional recovery of plant in service outside of the test year in the settlement agreement, the other Commissioners' conclusion that the subpoenas are seeking information that is forbidden, irrelevant, or unlikely to lead to the discovery of admissible evidence is clearly without merit. APS has included post-test year plant expenditures in its rate request, thus waiving its right to contend that the requested information should be limited solely to the test year of its choosing.

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because he did not appear for questioning on a given date. As the Commissioners know, prior to April 27, 2017, the Administrative Law Judge confirmed that she was not going to secure the attendance of the requested witnesses, and was not going to act on Commissioner Burns' requested questioning of such witnesses. Therefore, attendance at the hearing several days after the Administrative Law Judge's refusal to allow the calling and questioning of witnesses Commissioner Burns requested would have been futile. The futility of Commissioner Burns' attendance is further reinforced by Ms. Lockwood's subsequent and deficient responses to Commissioner Burns' written questions as required after the Administrative Law Judge's decision, and as explained more thoroughly in the Notice of Insufficiency of APS and Pinnacle West Responses to Commissioner Burns' Questions, filed on May 12, 2017, and incorporated by reference herein.

- The Commissioners have violated Ariz.Const., art. XV, §§ 3,4, A.R.S. § 40-241, the Arizona judicial precedent construing Commissioner investigatory, rate setting and other policy-making powers under those or other constitutional and statutory provisions or principles, as well as other provisions of Arizona Revised Statutes, Title 40 concerning investigation of public service corporations and their affiliates, the Arizona law governing enforcement of Commission subpoenas including by contempt actions, the constitutional provisions, statutes, legal precedent and rules governing Corporation Commission rate setting or policy setting proceedings and procedures by finding that Commissioner Burns lacks standing to seek any of the relief he has sought or to conduct the investigatory efforts and questioning of witnesses he has attempted. The issue of standing is not an appropriate inquiry or test in the manner in which it has been applied by the Commissioners. The Commissioners have applied a standard for standing that is inapplicable, inappropriate, inconsistent with and violative of the Arizona law from which Commissioner Burns derives his authorities, and

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inconsistent with the established precedent under Arizona law and federal constitutional law governing disqualification of government officials. To the extent any "standing" is required to take the actions and obtain the relief and enforcement Commissioner Burns seeks for his rights, he possesses sufficient standing both as a matter of his individual rights and constitutionally and statutorily delegated authorities and as a function of his obligation to protect the interests of consumers impacted by actions or omissions of APS, a regulated monopoly public service corporation. He also has standing as a result of his interests in a fair, impartial, objective Commission and fair, impartial, objective and legally compliant Commission processes, and his duties to assure the same for the citizens of Arizona, APS customers, and the parties to this rate proceeding.

- The Order asserts that Commissioner Burns' Motion to Stay is moot, declines to address the issues and arguments presented on the merits, yet simultaneously denies the Motion. To the extent, this Order denies Commissioner Burns' Motion to Stay, the other Commissioners have acted unlawfully, in violation of the due process clauses of the Arizona and United States constitutions, in violation of Commissioner Burns' rights under Article XV of the Arizona Constitution and the statutes governing the operations and authorities of the Commissioners, in violation of their duties to Arizona citizens, the parties to this rate proceeding, and APS consumers, in violation of the Arizona law governing public official conflicts or misconduct or disqualification, in excess of their authority and jurisdiction, arbitrarily and capriciously, and in an abuse of discretion.

- The other Commissioners have violated the due process requirements of the United States and Arizona constitutions, and the law governing conduct and conflicts of Arizona elected officials, by terminating, forbidding, and obstructing any investigation by Commissioner Burns, the Administrative Law Judge, or

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otherwise into the issues of Commissioner disqualification raised by Commissioner Burns.

- The other Commissioners have acted with improper conflicts of interest by terminating, forbidding, and obstructing any investigation by Commissioner Burns, the Administrative Law Judge, or otherwise into the issues of Commissioner disqualification raised by Commissioner Burns.
- The other Commissioners have violated Commissioner Burns' rights and authorities under Article XV of the Arizona Constitution and the due process clauses of the Arizona and United States constitutions by obstructing, limiting, and terminating his investigation into the disqualification issues concerning the other Commissioners.
- The other Commissioners have violated the rights and interests of APS customers and parties to the APS rate proceeding and Arizona citizens in general by obstructing, limiting, and terminating any further investigation into the disqualification issues concerning the other Commissioners.
- The other Commissioners have acted unlawfully, in violation of the due process clauses of the Arizona and United States constitutions, in violation of Commissioner Burns' rights under Article XV of the Arizona Constitution and the statutes governing the operations and authorities of the Commissioners, in violation of their duties to Arizona citizens, the parties to this rate proceeding, and APS consumers, in violation of the Arizona law governing public official conflicts or misconduct or disqualification, in excess of their authority and jurisdiction, arbitrarily and capriciously, and in abuse of discretion in all their actions taken through the Order on the disqualification issues, including, without limitation, by:
    - Determining their own disqualification;

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- Determining their own disqualification without evidence and fact-finding;
- Determining their own disqualification without a sufficient evidentiary basis;
- Refusing and failing to turn the investigation of the disqualification issues regarding themselves over to the Administrative Law Judge to pursue on an objective, impartial basis implementing full discovery and fact-finding;
- Applying incorrect and inapplicable standards for disqualification to determining their own disqualification;
- Refusing and/or failing to make public disclosure of matters demanded by Commissioner Burns, required by law, or necessary to allow for determination of the disqualification issues;
- Relying on factually deficient, conclusory self-serving pronouncements of a lack of bias as a basis for determining their own disqualification and obstructing and terminating any further investigation into the disqualification issues; and
- Ignoring the legal precedent, including United States Supreme Court decision, *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009) , that governs the disqualification issues.

- The other Commissioners have violated Ariz.Const., art. XV, §§ 3,4 and A.R.S. § 40-241, (as well as other provisions of Arizona Revised Statutes, Title 40 concerning investigation of public service corporations and their affiliates and the enforcement of subpoenas including by contempt actions), by denying Commissioner Burns' requests to open an investigation into Commissioner disqualification issues, and to continue

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his own investigation into Commissioner disqualification issues through the subpoenas to APS, Pinnacle West and appropriate depositions, including of Mr. Brandt.

6. That in approving and issuing the Order, the Commissioners have violated the constitutional, statutory and rule-based rights of Commissioner Burns to the relief requested in the Burns Motions.

7. That the Order utilizes misconstrued, irrelevant, and incorrect assertions of fact and relies on inapplicable or misapplied legal precedent and authority.

8. The rulings of the Order exceed the matters raised and relief requested in the Burns Motions that were noticed for the June 20, 2017 Staff Meeting. Moreover, the 27-page proposed order that became the subject of the Order was filed in the docket over one-hour after the meeting was noticed to begin. The proper action to have taken at the June 20, 2017 staff meeting would have been to rule on Commissioner Burns' Motions as proposed.

9. The Order is misidentified as an "interlocutory" order regarding discovery matters only, which is both inaccurate and legally inappropriate, and was intended to provide a misleading characterization in an effort to dissuade future judicial review and to provide APS and Pinnacle West additional procedural or exhaustion or primary jurisdiction arguments designed to violate Commissioner Burns' rights and to forestall judicial review and decision-making about those rights. Many of the issues raised, and the actions and relief requested, by Commissioner Burns had nothing to do with discovery, but instead involved his independent investigatory powers and rights as a Commissioner, or issues concerning disqualification and the investigation of facts related to disqualification of other Commissioners.

10. The Commissioners erred in failing to provide the disclosure Commissioner Burns demanded, (including at the June 20, 2017 Staff Meeting and in his letter filed in this docket on June 20, 2017), of facts and circumstances involving: 1)

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any knowledge the other Commissioners had or have concerning APS or Pinnacle West's financial contributions in support of Commissioner election races or against particular candidates for Corporation Commission office; 2) any knowledge or information they have concerning any communications between themselves, their campaigns, or their close associates or proxies and APS, Pinnacle West, or any officer, employee, director, proxy, affiliate, associate, representative, consultant, marketing professional, or other agent of APS, Pinnacle West or any entity or group or individual to whom APS or Pinnacle West provided financial support.; and 3) any interactions, coordination or cooperation between themselves, their campaigns, their close associates, or their proxies, agents or representatives and any officer, director, consultant, agent, representative, independent expenditure group, lobbyist, or other proxy, surrogate or agent of APS or Pinnacle West in connection with any funding of Corporation Commission election support efforts, or any efforts aimed against any candidate for a Corporation Commission seat. The Commissioners had, at a minimum, an obligation and duty to disclose all such information prior to any action or vote related to the disqualification issues, and they have violated their legal duties and the constitutional and other legal rights of Commissioner Burns, parties to this rate case, APS customers, and Arizonans in general, including the rights to fair, unbiased, objective Commissioners and to a lack of actual and even perceived or appearances of bias or influence of Commissioners by APS or Pinnacle West.

For all the foregoing reasons, and the reasons incorporated herein from the Burns Motions, Commissioner Burns' comments at the June 20, 2017 meeting, and Commissioner Burns' letter dated June 20, 2017, the Commissioners must grant this request and vacate the Order and instead implement a new order granting to Commissioner Burns all the relief and actions he has demanded in the Burns Motions and the motions he made at the June 20, 2017 Staff Meeting.

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DATED this 28th day of June, 2017.

COMMISSIONER ROBERT BURNS

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ORIGINAL and thirteen (13) copies of the foregoing filed in Docket Nos. E-01345A-16-0036 and E-01345A-16-0123 this 28th day of June, 2017 with:

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On this 28th day of June, 2017, the foregoing document was filed with Docket Control as a Correspondence From Commissioner, and copies of the foregoing were mailed on behalf of Bob Burns, Commissioner - A.C.C. to the following who have not consented to email service. On this date or as soon as possible thereafter, the Commission's eDocket program will automatically email a link to the foregoing to the following who have consented to email service.

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