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Arizona Corporation Commission

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Chairman Tom Forese
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, Arizona 85007

AUG 14 2017

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RE: Potential *ex parte* violation

Dear Mr. Chairman,

Today I learned of a potential violation of the *ex parte* communication rules related to the Arizona Public Service Company ("APS") rate case, which is scheduled to be heard at the open meeting on August 15, 2017. See Docket Nos. E-01345A-16-0036; E-01345A-16-0123.

According to Commissioner Burns's attorney, Bill Richards, Commissioner Burns personally met with and had significant communications with an attorney representing several intervenors in the APS rate case. According to Mr. Richards, during these communications Commissioner Burns discussed his ongoing dispute with APS. According to Mr. Richards, Commissioner Burns and his policy advisor, Angela Paton, also revealed substantial information about his legal needs and objectives, and discussed Commissioner Burns's legal strategy with respect to APS. According to Mr. Richards, there were also certain written communications provided by the attorney to Commissioner Burns regarding these issues.

It is my understanding that Commissioner Burns initiated these communications, to determine if the attorney representing the intervenors would or could represent Commissioner Burns in his litigation against APS, which has since been commenced in the Superior Court of Arizona, Maricopa County, Case No. CV2017-001831. It is also my understanding that these communications occurred in September 2016, and that these communications were not on the public record.

Arizona Administrative Code Rule R-14-3-113 prohibits certain communications to or from a Commissioner involved in the decision-making process, once a contested matter is set for a public hearing before the Commission. This is more commonly known as the Ex Parte Rule. The relevant portion of the rule provides:

Prohibitions.

1. No person shall make or cause to be made an oral or written communication, not on the public record, concerning the substantive

merits of a contested proceeding or siting hearing to a commissioner or commission employee involved in the decision-making process for that proceeding or siting hearing.

2. No commissioner or commission employee involved in the decision-making process of a contested proceeding or siting hearing shall request, entertain, or consider an unauthorized communication concerning the merits of the proceeding or siting hearing.

A.A.C. R14-3-113(C)(1)-(2).

The remedies for violations of the Ex Parte Rule are found in A.A.C. R14-3-113(D). A Commissioner must decline the receipt of a communication that would violate the Ex Parte Rule, and explain that all communications regarding the matter must be made on the public record. ***“If unsuccessful in preventing such communications, the recipient will advise the communicator that the communication will not be considered, a brief signed statement setting forth the substance of the communication and the circumstances under which it was made, will be prepared, and the statement will be filed in the public record of the case or proceeding.”*** A.A.C. R14-3-113(D)(1). Any person affected by an unauthorized communication has the opportunity to rebut any facts or contentions contained in the communication. A.A.C. R14-3-113(D)(2). Parties who make an unauthorized communication can also be required to show cause why their claims or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected based on the violation of the Ex Parte Rule. A.A.C. R14-3-113(D)(3).

Arizona courts have recognized the importance of the Ex Parte Rule and acknowledged that violations can result in a denial of a fair hearing. *See Western Gillette, Inc. v. ACC*, 121 Ariz. 541, 542-43, 592 P.2d 375, 376-77 (App. 1979) (“a ‘fair hearing’ is denied in quasi-judicial administrative proceedings when the finder of fact reaches his decision after ex parte communications from one side.”) (following *Morgan v. U.S.*, 304 U.S. 1, 58 S.Ct. 773 (1938)); *State of Arizona v. ACC*, 143 Ariz. 219, 226, 693 P.2d 362, 369 (App. 1984) (“it is apparent that a party’s right to due process is violated when the agency decision-maker improperly allows ex parte communications from one of the parties to the controversy.”). The Arizona Attorney General’s Agency Handbook likewise stresses the importance of honoring rules against *ex parte* communications. *See* Chapter 10, Section 10.9.4.4.

In the present matter, the Ex Parte Rule in the APS rate case went into effect on July 22, 2016, because that is when the APS rate case was originally set for public hearing. *See* Procedural Order, Docket No. E-01345A-16-0036, docketed 7/22/2016. As such, any communications to a Commissioner after July 22, 2016, that concern the substantive merits of the APS rate case, would likely violate the Ex Parte Rule.

If Mr. Richards’s representations are true, Commissioner Burns’s communications with intervenors in the APS rate case potentially violate the Ex Parte Rule. A review of Commissioner Burns’s First Amended Complaint in *Burns v. APS, et al.*, Case No. CV2017-001831, demonstrates that Commissioner Burns’s dispute with APS concerns the merits of the

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APS rate case. As such, communications about Commissioner Burns's objectives and strategy in the APS state-court litigation likely fall within the scope of matters concerning the merits of APS's rate case.

To date, the Legal Division is not aware of any signed statements filed in the APS rate case that set forth the substance of Commissioner Burns's communications described in this letter.

I will provide you any additional, relevant details as soon as I become aware of them.

Respectfully,



Andy M. Kvesic
Chief Counsel & Legal Division Director

Cc: Commissioner Doug Little
Commissioner Andy Tobin
Commissioner Boyd Dunn
Bill Richards, attorney for Commissioner Bob Burns
Ted Vogt, Executive Director
Dwight Nodes, Chief Administrative Law Judge