

SUPREME COURT OF ARIZONA

ROBERT BURNS,

Plaintiff/ Appellant,

v.

ARIZONA PUBLIC SERVICE
COMPANY, et al.,

Defendants/ Appellees.

Arizona Supreme Court
No. CV-21-0080-PR

Court of Appeals
Division One
No. 1 CA-CV 19-0183

Maricopa County
Superior Court
No. CV2017-001831

**DEFENDANTS/APPELLEES ARIZONA PUBLIC SERVICE COMPANY,
PINNACLE WEST CAPITAL CORPORATION,
AND DONALD BRANDT'S
RESPONSE TO PETITION FOR REVIEW AND APPENDIX**

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INTRODUCTION

This case does not merit the Court's review. Petitioner is former Corporation Commissioner Robert Burns, who wanted to compel compliance with subpoenas he issued nearly five years ago to Arizona Public Service Company and Pinnacle West Capital Corporation (collectively, "the Companies"). He issued the subpoenas in APS's 2016 rate case, which the Commission decided in August 2017.

In a 4-1 vote, the Arizona Corporation Commission declined to enforce the subpoenas. This defeat prompted Burns to sue the Companies, the Commission, and his fellow commissioners, seeking a declaratory judgment that he had a right to override the Commission's decision and obtain discovery into bias he alleged of his fellow commissioners. In a narrow and unanimous decision, the Court of Appeals held that the Commission's vote prevailed. *Burns v. Arizona Pub. Serv. Co.*, [250 Ariz. 607](#) (App. 2021) ("Opinion ¶ ___").

The Opinion is unlikely to impact future cases and there is *nothing* at stake in this case. The passage of time has mooted the case entirely. As for the merits, the Petition's contention that it presents issues of "first

impression” reflects the longshot arguments advanced by Burns, not a need for this Court’s intervention.

The Constitution vests the Commission, *as a body*, with authority to manage Commission proceedings, including the authority to pass rules governing the enforcement of subpoenas in Commission rate proceedings. The Commission’s performance of that role is in harmony with Article 15, Section 4, which gives authority to investigate public service corporations to the “Commission, and the several members thereof.” The Opinion does not “ignore” the Constitution. It reflects a straightforward application of Commission rules to Commission proceedings, entirely consistent with over 100 years of precedent.

This Court should deny the Petition.

RELEVANT FACTS*

I. APS files a rate case in 2016.

APS is a public service corporation; Pinnacle West is its parent company. The Arizona Constitution assigns the Commission the

* Selected record items cited are included in the Appendix attached to the end of this brief, cited by page numbers (e.g., APP001).

responsibility to set rates that public service corporations may charge. [Ariz. Const. art. 15, § 3](#). APS filed an application for new rates on June 1, 2016.

In a rate case, Commission Staff and intervenors review the utility's financial and related information, and may request additional information, including by subpoena. *See, e.g.,* [A.A.C. R14-3-109\(O\)](#). Following an evidentiary hearing before an ALJ and the Commission, the five-member Commission issues its final decision. Any dissatisfied party (or the attorney general) may seek judicial review of the Commission's decision. [A.R.S. §§ 40-254.01\(A\)](#).

II. Commissioner Burns issues subpoenas and a motion to compel compliance, which the Commission rejects 4-1.

In August 2016, Burns issued subpoenas to APS, Pinnacle West, and then-CEO Donald Brandt in the rate case. Burns sought information about political, charitable, and other expenditures made between 2011 and 2016. The subpoenas also ordered Brandt to appear for testimony. *See* IR-58 at ¶¶ 51-64 [[APP063-66](#)]. The Companies objected to the subpoenas in part. IR-78 at 6-7 [[APP083-84](#)]; IR-77 at 2 [[APP074](#)].

In June 2017, Burns filed a motion to compel with the Commission. IR-78 at 13 [[APP090](#)]. He also moved to suspend the rate case, contending he

should be allowed to investigate his fellow commissioners for bias, and asked the Commission to compel APS witnesses to appear for testimony. IR-78 at 12-14 [[APP089-91](#)]. None of the more than three dozen intervenors joined his motions.

The Commission voted 4-1 (Burns dissenting) to deny the motions. Among other things, the Commission concluded that the subpoenas sought information “irrelevant to the rate case.” IR-78 at 18-19, 26-27 [[APP095-96](#), [APP103-04](#)].

III. As Commissioner Burns presses his claims in court, the rate case concludes in a 29-party settlement approved by the Commission.

Following the Commission’s order, Burns sought a judgment from the superior court declaring that he could enforce his subpoenas without Commission oversight, and that other commissioners could not “stop or limit” his subpoenas. IR-58 at ¶¶ 132, 204-205 [[APP067](#), [APP068-70](#)]. In addition, he filed a special action in this Court, asking it to suspend the rate case. This Court declined jurisdiction. *See Order, Burns v. Ariz. Corp. Comm’n*, No. CV-17-0249-SA (Oct. 17, 2017).

Meanwhile, the rate case concluded. A super-majority of parties reached a settlement agreement. IR-92 at 7 [[APP107](#)]. After multiple

hearings (including an evidentiary hearing on the settlement), the Commission approved the settlement 4-1, with Burns dissenting again. IR-104 at 3 [[APP042](#)]. One party appealed regarding unrelated aspects of the Commission's decision; the Court of Appeals affirmed. *Woodward v. Ariz. Corp. Comm'n*, No. 1 CA-CC 17-0003, [2018 WL 6498615](#) (App. Dec. 11, 2018).

IV. The superior court dismisses the lawsuit. While on appeal, all involved commissioners leave the Commission and a new APS rate case proceeds.

In February and December 2018, the superior court dismissed Burns's first and second amended complaints. IR-104 [[APP040](#)]; IR-150 [[APP054](#)]. While his appeal was pending, Burns's term expired in January 2021. By that time, every commissioner who voted on his subpoenas had also left the Commission.

Meanwhile, the Commission's work continued. In October 2019, APS filed a new rate case. That case awaits a decision from a new slate of commissioners. *See* Commission Docket E-01345A-19-0236.

V. The Court of Appeals affirms in a unanimous opinion.

The Court of Appeals affirmed, reasoning that "although individual commissioners have the power to issue subpoenas, that power is not without limits when exercised as part of commission proceedings and is instead

subject to review and oversight by the Commission as a whole.” Opinion ¶ 21. The court concluded that it could not grant relief without “overturning the Commission’s vote and directly interfering in Commission operations.” *Id.* ¶ 23. This holding, however, applied only to the specific situation presented: subpoenas “issued during the course of a contested rate-making proceeding.” *Id.* ¶ 22. The Court also concluded that unlike interested parties, a dissenting commissioner could not challenge a decision of the Commission in court. *Id.* ¶¶ 24-26.

The Court also affirmed that Burns could not go to court to litigate the due process rights of parties before the Commission when those parties themselves had not sought judicial review. *Id.* ¶ 30.

Finally, the Court held that the superior court did not err when it dismissed his case without issuing declarations on various legal issues where it had sided with Burns before dismissing his case. *Id.* ¶ 34.

The Petition followed.

REASONS TO DENY REVIEW

I. The Court of Appeals decision is a narrow resolution with limited application to future cases.

Burns contends that his case presents a range of important questions of “first impression.” But that is the result of Burns’s highly unusual efforts, as a dissenting member of a multi-member body, to challenge in court the majority’s decision, and to demand that he have the power to investigate his colleagues for alleged bias when no party pursued any such challenge or raised any such objection. That no other commissioner in Arizona’s history has thought to tread such a path underscores the absence of any ongoing importance.

The Opinion below narrowly addresses the unique circumstances before it: when a single commissioner issues a subpoena in a contested rate case, the Commission’s decision to decline to compel compliance, in full accord with its rules governing subpoenas, is controlling. A dissenting commissioner cannot disregard the Commission’s rules, override the Commission’s decision, and enforce the subpoena by himself. Opinion ¶¶ 22-23.

There is no reason to think the issue decided here will recur anytime soon. If a subpoena were to issue in a future rate case, it is speculative whether the utility would object, whether the Commission would refuse to enforce it, and even more speculative whether the issuing commissioner would seek to override the Commission's determination or seek to investigate fellow commissioners for alleged bias.

Moreover, if and when there is ever a dispute over a commissioner's subpoena, any aggrieved party can appeal the Commission's decision. *See* [A.R.S. § 40-254\(A\)](#) (“[A]ny party in interest, or the attorney general on behalf of the state” may seek judicial review); [A.R.S. § 40-254.01\(A\)](#) (same for orders “relating to rate making or rate design”). This Court's intervention is not needed to address the Opinion's narrow holding arising from circumstances unlikely to recur.

II. A decision from this Court will not impact any current party or proceeding.

Relatedly, although the Court of Appeals opted to issue a decision despite mootness, Opinion ¶ 14, the lack of an existing controversy is an additional reason why this Court should decline further review.

At this point, history has overtaken the facts prompting the lawsuit. The case in which Burns issued his subpoena is over. He is now former-Commissioner Burns. He has no official capacity, no power to issue or enforce a subpoena, and no power to carry out his desired investigations, regardless of the outcome here. Pushing this case further into the hypothetical, the other commissioners Burns wanted to investigate are also now former commissioners.

Consequently, a decision from this Court would have no effect at all on the parties to this case. There is not “a present existing controversy which permits the court to adjudicate any present rights.” *Moore v. Bolin*, 70 Ariz. 354, 358 (1950) (affirming dismissal of constitutional claims); see also *Ariz. State Bd. of Dirs. for Junior Colls. v. Phoenix Union High Sch. Dist.*, 102 Ariz. 69, 73 (1967) (a court should grant declaratory relief “only when there is [a] justiciable issue between parties”). Any opinion from this Court would be purely advisory answers to hypothetical questions.

If the Court sees a need to address the meaning and scope of Article 15, Section 4, the Court should wait for a case where parties have an interest at stake beyond curiosity.

III. The Opinion is correct.

Lacking substantial arguments for discretionary jurisdiction, the bulk of the Petition focuses on the Opinion's merits. The Petition's criticism of the Opinion is unwarranted.

A. The Opinion correctly held that the Commission, not a single dissenting commissioner, has authority to decide if a subpoena will be enforced in a rate case.

The Court of Appeals concluded that, although individual commissioners may issue a subpoena, when that authority is "exercised as part of commission proceedings" it is "subject to review and oversight by the Commission as a whole." Opinion ¶ 21. When, as here, the Commission "votes not to pursue an investigation started by one of its elected members," the court would not "overturn[] the Commission's vote and directly interfer[e] in Commission operations." Opinion ¶ 23.

This holding is correct and is a straightforward application of the Constitution and rules governing Commission proceedings. The Constitution empowers the Commission to oversee its own proceedings. Most significantly, [Article 15, Section 3](#) grants the Commission (not individual commissioners) with "plenary" ratemaking authority, including "authority to make rules, regulations and orders" necessary to "exercise its

ratemaking powers.” *Johnson Utils., LLC v. Ariz. Corp. Comm’n*, [249 Ariz. 215, 221 ¶ 22](#) (2020) (discussing the Commission’s exclusive and plenary authority over ratemaking). In addition, under [Article 15, Section 6](#), the Commission has authority to establish the “rules and regulations to govern proceedings” before it.

The legislature has also authorized the Commission, as a body, to control its proceedings. See [A.R.S. § 40-102\(C\)](#) (stating that “[t]he act of a majority of the commissioners . . . shall be the act of the commission” and allowing the commission to delegate fact-finding to a single commissioner, subject to being “approved and confirmed by the commission”); [A.R.S. § 40-424\(A\)](#) (stating that non-compliance with a commission order is “contempt of the commission” which can be “fined by the commission”). These statutes, moreover, date back (with minimal revisions) to 1912, and so are “entitled to much weight” as evidence of the framers’ intent that the Commission govern its own proceedings. *Laird v. Sims*, [16 Ariz. 521, 528](#) (1915). The legislature has never given similar powers to single commissioners.

Using its constitutional authority, the Commission has established procedural rules, including a provision allowing the Commission to

“[q]uash [a] subpoena if it is unreasonable or oppressive.” A.A.C. R14-3-109(O). The Commission’s rules also apply the Rules of Civil Procedure in hearings, A.A.C. R14-3-101(A), including Rule 45. That rule allows the tribunal overseeing the case to quash, limit, or compel compliance with a subpoena. [Ariz. R. Civ. P. 45\(c\)\(6\)\(B\), \(e\)\(2\)](#). Ironically, Burns cited Rule 45 as one of the bases for his subpoenas when he issued them. *See* [APP113](#).

Thus, the Commission simply applied its rules when it voted 4-1 to decline to compel compliance with Burns’s subpoenas or his demands for witness testimony. IR-78 at 26-27 [[APP103-04](#)]. Burns’s position – that he may enforce his subpoenas without regard to the Commission’s contrary decision – is inconsistent with these authorities and the Commission’s constitutional prerogative to govern its own proceedings.

1. The Petition’s Article 15, Section 4 argument is waived and incorrect.

The Petition’s primary argument (at 9-10) is that the Opinion “ignores the plain language” of Article 15, Section 4. That section provides, in relevant part:

The corporation commission, and the several members thereof, shall have power to . . . investigate . . . any corporation whose stock shall be offered for sale to the public and of any public service corporation[,] . . . and for the purpose of the commission,

and of the several members thereof, shall have the power of a court of general jurisdiction to enforce the attendance of witnesses and the production of evidence by subpoena

[Ariz. Const. art. 15, § 4.](#)

As an initial matter, Burns waived this argument by never raising it in his Opening Brief on appeal. *See Webster v. Culbertson*, [158 Ariz. 159, 163](#) (1988) (issue not raised in opening brief is waived).

In any event, Section 4 does not empower a single commissioner to override the Commission. Rather, the power to issue and enforce subpoenas is granted “for the purpose of the commission, and of the several members thereof.” [Ariz. Const. art. 15, § 4.](#) When the Commission—*i.e.*, a majority of the “several members”—decides on a certain course of action in accordance with the Commission’s rules, nothing in Section 4’s text authorizes a lone dissenting commissioner to pursue contrary purposes.

The Petition’s textual argument fails to follow the rule that courts “must not interpret terms in isolation, but rather in their overall context.” *BSI Holdings, LLC v. Ariz. Dep’t of Transp.*, [244 Ariz. 17, 21 ¶ 19](#) (2018). The “overall context” of the relevant constitutional provisions enacted with Section 4 make clear that the Commission is empowered to control Commission proceedings. Section 3 gives the Commission (not a single

commissioner) “full power” over ratemaking, including authority to “make reasonable rules, regulations, and orders.” [Ariz. Const. art. 15, § 3](#). Section 6 authorizes the Commission (not a single commissioner) to adopt rules to govern its proceedings. The Petition’s unrestrained view of the words “and the several members thereof” does not make sense given the rest of Article 15 or the statutes enacted contemporaneously with the Constitution. *See supra* at 16.

Burns’s interpretation would also impair the Commission’s effectiveness. A single commissioner could derail the rate-setting process and leave the Commission procedurally powerless to maintain control over its own proceeding. Each individual commissioner could compel responses to their own idiosyncratic discovery demands, including the investigation of other commissioners as Burns sought, with no coordination, management, or dispute resolution role left for the Commission acting as a body. The framers did not intend such a destabilizing power to be held by one official elected to serve on a five-member commission that otherwise runs by majority rule.

Unsurprisingly, Burns cannot cite to a single case suggesting that the framers intended to include such a poison pill. To the contrary, the cases

cited in the Petition for a robust investigatory power merely affirm the authority of *the Commission*, not its individual members. See *Polaris Int'l Metals Corp. v. Ariz. Corp. Comm'n*, 133 Ariz. 500, 506 (1982) (addressing subpoena issued by Commission and holding that “[a]n appropriately empowered agency” can investigate) (emphasis added); *Carrington v. Ariz. Corp. Comm'n*, 199 Ariz. 303, 305 ¶ 8 (App. 2000) (same)); Pet. at 12 (citing *Carrington* and *Polaris*).

2. The Petition’s other arguments fail.

The Petition raises several other criticisms of the Opinion’s main holding. None of them justify this Court’s review.

First, the Petition faults the Opinion for relying on [Article 15, Section 6](#) (authorizing Commission rulemaking) and [A.A.C. § R14-3-109\(O\)](#) (the Commission’s rule regarding subpoenas in contested cases). Pet. at 10-11. The Opinion cited the rule as evidence that “the Commission has prescribed . . . that the Commission as a whole resolves objections to subpoenas.” Opinion ¶ 21.

The Opinion is correct. The framers saw no incompatibility between Section 4 and the Commission’s authority under Sections 3 and 6 to develop rules governing Commission proceedings, including rules governing the

enforcement of subpoenas. As the Opinion explains, the subpoenas at issue “were in fact issued during the course of a contested rate-making proceeding” and were therefore subject to the Commission’s rules governing those proceedings. Opinion ¶ 22. Whether the rules governing a commissioner’s subpoena would change “in a different context” is not before this Court. *Id.*

The Petition also argues (at 10) that the Opinion erred in relying on A.A.C. § R14-3-109(O) because that rule applies only to party subpoenas, not commissioner-issued subpoenas. However, the rule’s text is not restricted to party-generated subpoenas. It simply provides that subpoenas “may be issued upon application in writing.” [A.A.C. § R14-3-109\(O\)](#), and that “[t]he Commission” may “[q]uash the subpoena” or provide other relief. [A.A.C. § R14-3-109\(O\)\(1\)-\(2\)](#). Burns followed that procedure here when he filed a motion to compel with the Commission. His disagreement with the resulting decision is not a reason to throw out the rulebook.

Second, the Petition criticizes (at 13) the Opinion for having “ignored the rights bestowed on any elected official” to seek declaratory relief. But the Opinion did not question Burns’s right to *seek* declaratory relief. It just held that, on the merits, he was not entitled to receive any. This case does

not present any review-worthy argument related to an elected official's rights to a declaratory judgment in general.

Third, the Petition contends (at 11-12) that the Opinion “undermines” a commissioner’s duty to “protect consumers.” Burns’s individual policy aims are not a reason to depart from the Constitution. Indeed, the primary authority on which the Petition relies has been sharply criticized by this Court for doing just that. *Compare* Pet. at 11-12 (citing *Arizona Corporation Commission v. Woods*, 171 Ariz. 286 (1992), for proposition that “founders expected the ACC to provide[] consumer protection against” corporate overreach) *with Johnson Utilities*, 249 Ariz. at 226 ¶¶ 49-50 (stating that “*Woods*’ analysis of the framers’ intent is inaccurate” and overbroad).

In any case, Burns’s policy concerns are addressed by the robust rights of appeal applicable to any Commission decision under A.R.S. §§ 40-254(A) and 40-254.01(A). The Opinion does not disturb this longstanding availability of judicial review.

B. The Opinion correctly held that Burns lacks standing to seek disqualification of his fellow commissioners.

The Petition also challenges (at 14-15) the Opinion’s secondary holding that Burns lacks standing to raise due process challenges to a Commission

decision, such as a claim for disqualification for bias. *See* Opinion ¶¶ 27-30. The Opinion reasoned that “Burns has not established that anyone other than a party” could raise such a claim. Opinion ¶ 30.

The Opinion is correct, and the Petition does not directly contest the point. Pet. at 15. Instead, the Petition asserts (at 14-15) that Burns had “ample reason to be concerned” about the potential bias of other commissioners and thus had “authority to investigate or raise the obvious potential bias and disqualification issues for discussion.” But this just reiterates the failed argument that a single commissioner should be able to pursue an investigation regardless of the contrary vote of the Commission.

The Petition (at 14) raises the specter that Burns must be allowed to investigate because otherwise a single commissioner could witness outright bribery and have no recourse. This is a straw man. No one has contended that a commissioner could not investigate any range of issues, or use his place as an elected official to speak publicly or to urge an investigation by law enforcement when appropriate. The Opinion’s holding here is only that, in a contested rate case, the Commission may control which subpoenas are enforced and which are not.

Finally, the Opinion does not insulate due process violations from judicial review. If *any* of the dozens of interested parties to the proceeding believed their due process rights to an unbiased commissioner were violated, they could have raised the issue, including in an appeal under § 40-254 or § 40-254.01. No one did. The Opinion merely holds that Burns, as a dissenting decisionmaker, cannot litigate these parties' due process rights when the parties themselves have chosen not to raise any such claim.

CONCLUSION

The Court should deny the petition.

RESPECTFULLY SUBMITTED this 14th day of July, 2021.

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38.	ME: UNDER ADVISEMENT RULING [05/26/2017]	May. 30, 2017
39.	[PART 1 OF 3] NOTICE OF PENDING PROCEEDINGS BEFORE ARIZONA CORPORATION COMMISSION RELEVANT TO JULY 10, 2017, 1:30 P.M. STATUS CONFERENCE	Jul. 7, 2017
40.	[PART 2 OF 3] NOTICE OF PENDING PROCEEDINGS BEFORE ARIZONA CORPORATION COMMISSION RELEVANT TO JULY 10, 2017, 1:30 P.M. STATUS CONFERENCE	Jul. 7, 2017
41.	[PART 3 OF 3] NOTICE OF PENDING PROCEEDINGS BEFORE ARIZONA CORPORATION COMMISSION RELEVANT TO JULY 10, 2017, 1:30 P.M. STATUS CONFERENCE	Jul. 7, 2017
42.	[PART 1 OF 3] PLAINTIFF'S EMERGENCY MOTION TO AMEND COMPLAINT	Jul. 9, 2017
43.	[PART 2 OF 3] PLAINTIFF'S EMERGENCY MOTION TO AMEND COMPLAINT	Jul. 9, 2017
44.	[PART 3 OF 3] PLAINTIFF'S EMERGENCY MOTION TO AMEND COMPLAINT	Jul. 9, 2017
45.	ME: STATUS CONFERENCE SET [07/10/2017]	Jul. 11, 2017
46.	[PART 1 OF 2] NOTICE OF ERRATA REGARDING EXHIBIT A TO PLAINTIFF'S EMERGENCY MOTION TO AMEND COMPLAINT	Jul. 11, 2017
47.	[PART 2 OF 2] NOTICE OF ERRATA REGARDING EXHIBIT A TO PLAINTIFF'S EMERGENCY MOTION TO AMEND COMPLAINT	Jul. 11, 2017
48.	TOM FORESE'S MOTION TO INTERVENE FOR LIMITED PURPOSE TO OBJECT TO PLAINTIFF'S ATTEMPT TO NAME HIM AS A PARTY DEFENDANT	Jul. 18, 2017
49.	ME: ORAL ARGUMENT SET [07/19/2017]	Jul. 20, 2017
50.	SECOND NOTICE OF ERRATA RE: PROPOSED FIRST AMENDED COMPLAINT	Jul. 23, 2017
51.	RESPONSE TO TOM FORESE'S MOTION TO INTERVENE FOR LIMITED PURPOSE TO OBJECT TO PLAINTIFF'S ATTEMPT TO NAME HIM AS A PARTY DEFENDANT	Jul. 23, 2017
52.	DEFENDANTS' RESPONSE TO PLAINTIFFS' EMERGENCY MOTION TO AMEND COMPLAINT	Jul. 26, 2017



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No.	Document Name	Filed Date
53.	ME: RULING [07/28/2017]	Jul. 31, 2017
54.	REPLY IN SUPPORT OF MOTION FOR LEAVE TO AMEND COMPLAINT	Jul. 31, 2017
55.	REPLY TO PLAINTIFF ROBERT BURNS' RESPONSE TO TOM FORESE'S MOTION TO INTERVENE FOR LIMITED PURPOSE TO OBJECT TO PLAINTIFF'S ATTEMPT TO NAME HIM AS PARTY DEFENDANT	Aug. 1, 2017
56.	DEFENDANTS' NOTICE OF CLARIFICATION REGARDING QUESTION AT 8/2/17 ORAL ARGUMENT CONCERNING PREVIOUS LITIGATION	Aug. 2, 2017
57.	ME: MATTER UNDER ADVISEMENT [08/02/2017]	Aug. 3, 2017
58.	[PART 1 OF 2] FIRST AMENDED COMPLAINT	Aug. 4, 2017
59.	[PART 2 OF 2] FIRST AMENDED COMPLAINT	Aug. 4, 2017
60.	ME: UNDER ADVISEMENT RULING [08/03/2017]	Aug. 7, 2017
61.	AFFIDAVIT OF SERVICE	Aug. 9, 2017
62.	AFFIDAVIT OF SERVICE	Aug. 10, 2017
63.	AFFIDAVIT OF SERVICE	Aug. 10, 2017
64.	ME: STATUS CONFERENCE [08/10/2017]	Aug. 11, 2017
65.	ACCEPTANCE OF SERVICE	Aug. 11, 2017
66.	ACCEPTANCE OF SERVICE	Aug. 15, 2017
67.	NOTICE OF FILING OF ACCEPTANCE OF SERVICE FOR DEFENDANTS COMMISSIONER TOM FORESE AND COMMISSIONER BOYD DUNN	Aug. 15, 2017
68.	STIPULATION FOR EXTENSION OF DEFENDANTS' RESPONSE TO FIRST AMENDED COMPLAINT AND JOINT REQUEST FOR EXTENSION TO FILE JOINT REPORT AND PROPOSED SCHEDULING ORDER	Aug. 22, 2017
69.	NOTICE OF APPEARANCE OF COUNSEL FOR DEFENDANT ANDY TOBIN	Aug. 25, 2017
70.	NOTICE OF ASSOCIATION	Aug. 25, 2017



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No.	Document Name	Filed Date
71.	CREDIT MEMO	Aug. 28, 2017
72.	[PART 1 OF 2] JOINT MOTION TO STAY AND FOR EXPEDITED BRIEFING AND CONSIDERATION OF SAME FILED BY DEFENDANTS ARIZONA CORPORATION COMMISSIONERS TOM FORESE, DOUG LITTLE, ANDY TOBIN AND BOYD DUMM	Aug. 30, 2017
73.	[PART 2 OF 2] JOINT MOTION TO STAY AND FOR EXPEDITED BRIEFING AND CONSIDERATION OF SAME FILED BY DEFENDANTS ARIZONA CORPORATION COMMISSIONERS TOM FORESE, DOUG LITTLE, ANDY TOBIN AND BOYD DUMM	Aug. 30, 2017
74.	DEFENDANTS ARIZONA PUBLIC SERVICE, PINNACLE WEST CAPITAL CORPORATION AND DONALD BRANDT'S RESPONSE TO JOINT MOTION TO STAY AND FOR EXPEDITED BRIEFING AND CONSIDERATION OF SAME FILED BY DEFENDANTS ARIZONA CORPORATION COMMISSION AND COMMISSIONERS TOM...	Sep. 1, 2017
75.	JOINT MOTION TO DISMISS FOR LACK OF SUBJECT MATER(SIC) JURISDICTION(SIC) AND FOR FAILURE TO STATE A CLAIM FOR RELIEF	Sep. 6, 2017
76.	JOINT REPORT	Sep. 6, 2017
77.	[PART 1 OF 3] DEFENDANTS ARIZONA PUBLIC SERVICE COMPANY, PINNACLE WEST CAPITAL CORPORATION AND DONALD BRANDT'S MOTION TO DISMISS AMENDED COMPLAINT	Sep. 6, 2017
78.	[PART 2 OF 3] DEFENDANTS ARIZONA PUBLIC SERVICE COMPANY, PINNACLE WEST CAPITAL CORPORATION AND DONALD BRANDT'S MOTION TO DISMISS AMENDED COMPLAINT	Sep. 6, 2017
79.	[PART 3 OF 3] DEFENDANTS ARIZONA PUBLIC SERVICE COMPANY, PINNACLE WEST CAPITAL CORPORATION AND DONALD BRANDT'S MOTION TO DISMISS AMENDED COMPLAINT	Sep. 6, 2017
80.	PLAINTIFF'S RESPONSE TO JOINT MOTION TO STAY BRIEFING AND CONSIDERATION OF SAME FILED BY DEFENDANTS ARIZONA CORPORATION COMMISSION AND COMMISSIONER TOM FORESE , DOUG LITTE, ANDY TOBIN AND BOYD DUNN	Sep. 18, 2017
81.	RULE 7.1(G) NOTICE OF AGREEMENT TO FIRST EXTENSION OF RESPONSE AND REPLY TO APS, PINNACLE WEST AND DONALD BRANDT'S MOTION TO DISMISS AND STIPULATION TO ADDITIONAL PAGES FOR REPLY	Sep. 18, 2017



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No.	Document Name	Filed Date
82.	RULE 7.1(G) NOTICE OF AGREEMENT TO FIRST EXTENSION OF RESPONSE AND REPLY TO THE ARIZONA CORPORATION COMMISSION AND COMMISSIONER TOM FORESE , DOUG LITTE, ANDY TOBIN AND BOYD DUNN'S MOTION TO DISMISS AND STIPULATION TO ADDITIONAL PAGES FOR REPLY	Sep. 18, 2017
83.	REPLY IN SUPPORT OF JOINT MOTION TO STAY AND FOR EXPEDITED BRIEFING AND CONSIDERATION OF SAME	Sep. 20, 2017
84.	[PART 1 OF 2] PLAINTIFF'S RESPONSE TO DEFENDANTS ARIZONA PUBLIC SERVICE COMPANY, PINNACLE WEST CORPORATION AND DONALD BRANDT'S MOTION TO DISMISS AMENDED COMPLAINT	Sep. 20, 2017
85.	[PART 2 OF 2] PLAINTIFF'S RESPONSE TO DEFENDANTS ARIZONA PUBLIC SERVICE COMPANY, PINNACLE WEST CORPORATION AND DONALD BRANDT'S MOTION TO DISMISS AMENDED COMPLAINT	Sep. 20, 2017
86.	[PART 1 OF 2] RESPONSE IN OPPOSITION TO JOINT MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM FOR RELIEF	Sep. 21, 2017
87.	[PART 2 OF 2] RESPONSE IN OPPOSITION TO JOINT MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM FOR RELIEF	Sep. 21, 2017
88.	[PART 1 OF 3] NOTICE OF ERRATA REGARDING PLAINTIFF'S RESPONSE IN OPPOSITION TO JOINT MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM FOR RELIEF	Sep. 25, 2017
89.	[PART 2 OF 3] NOTICE OF ERRATA REGARDING PLAINTIFF'S RESPONSE IN OPPOSITION TO JOINT MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM FOR RELIEF	Sep. 25, 2017
90.	[PART 3 OF 3] NOTICE OF ERRATA REGARDING PLAINTIFF'S RESPONSE IN OPPOSITION TO JOINT MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM FOR RELIEF	Sep. 25, 2017
91.	[PART 1 OF 2] NOTICE OF ERRATA- CORRECT EXHIBIT 2 TO DEFENDANTS ARIZONA PUBLIC SERVICE COMPANY, PINNACLE WEST CAPITAL CORPORATION AND DONALD BRANDT'S MOTION TO DISMISS AMENDED COMPLAINT	Sep. 26, 2017
92.	[PART 2 OF 2] NOTICE OF ERRATA- CORRECT EXHIBIT 2 TO DEFENDANTS ARIZONA PUBLIC SERVICE COMPANY, PINNACLE WEST CAPITAL CORPORATION AND DONALD BRANDT'S MOTION TO DISMISS AMENDED COMPLAINT	Sep. 26, 2017



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No.	Document Name	Filed Date
93.	ME: STATUS CONFERENCE SET [09/27/2017]	Sep. 28, 2017
94.	REPLY IN SUPPORT OF JOINT MOTION TO DISMISS FOR LACK OF SUBJECT MATER(SIC) JURISDICTION AND FOR FAILURE TO STATE A CLAIM FOR RELIEF	Oct. 2, 2017
95.	DEFENDANTS ARIZONA PUBLIC SERVICE COMPANY, PINNACLE WEST CAPITAL CORPORATION AND DONALD BRANDT'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS AMENDED COMPLAINT	Oct. 2, 2017
96.	ORDER GRANTING STIPULATION TO ADDITIONAL PAGES FOR REPLY	Oct. 3, 2017
97.	ME: STATUS CONFERENCE [10/19/2017]	Oct. 20, 2017
98.	ME: ORAL ARGUMENT SET [10/23/2017]	Oct. 24, 2017
99.	ME: MATTER UNDER ADVISEMENT [12/19/2017]	Dec. 20, 2017
100.	NOTICE RE: NEW FACTUAL INFORMATION RELEVANT TO ARGUED MOTIONS TO DISMISS	Jan. 5, 2018
101.	[PART 1 OF 2] DEFENDANTS ARIZONA PUBLIC SERVICE COMPANY, PINNACLE WEST CAPITAL CORPORATION AND DONALD BRANDT'S RESPONSE TO COMMISSIONER BURNS' NOTICE RE: NEW FACTUAL INFORMATION	Jan. 10, 2018
102.	[PART 2 OF 2] DEFENDANTS ARIZONA PUBLIC SERVICE COMPANY, PINNACLE WEST CAPITAL CORPORATION AND DONALD BRANDT'S RESPONSE TO COMMISSIONER BURNS' NOTICE RE: NEW FACTUAL INFORMATION	Jan. 10, 2018
103.	JOINT JOINDER TO DEFENDANTS ARIZONA PUBLIC SERVICE COMPANY, PINNACLE WEST CAPITAL CORPORATION AND DONALD BRANDT'S RESPONSE TO COMMISSIONER BURN'S NOTICE RE: NEW FACTUAL INFORMATION	Jan. 16, 2018
104.	ME: UNDER ADVISEMENT RULING [02/15/2018]	Feb. 16, 2018
105.	NOTICE OF FILING OF PROPOSED JUDGMENT	Feb. 20, 2018
106.	PLAINTIFF'S RESPONSE AND OBJECTION TO NOTICE OF FILING OF PROPOSED JUDGMENT FILED BY THE ARIZONA CORPORATION COMMISSION	Mar. 6, 2018
107.	[PART 1 OF 2] PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT	Mar. 6, 2018



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No.	Document Name	Filed Date
108.	[PART 2 OF 2] PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT	Mar. 6, 2018
109.	REPLY IN SUPPORT OF PROPOSED FORM OF JUDGMENT	Mar. 19, 2018
110.	COMMISSION DEFENDANTS' JOINT RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT	Mar. 26, 2018
111.	[PART 1 OF 2] RESPONSE TO MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT	Mar. 26, 2018
112.	[PART 2 OF 2] RESPONSE TO MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT	Mar. 26, 2018
113.	RULE 7.1(G) NOTICE OF AGREEMENT TO FIRST EXTENSION OF TIME FOR PLAINTIFF TO REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT	Mar. 28, 2018
114.	NOTICE OF DISASSOCIATION OF ATTORNEYS FROM FIRM AND ASSOCIATION OF NEW COUNSEL WITHIN FIRM	Apr. 11, 2018
115.	NOTICE OF DISASSOCIATION OF ATTORNEY FROM FIRM	Apr. 11, 2018
116.	RULE 7.1(G) NOTICE OF AGREEMENT TO SECOND EXTENSION OF TIME FOR PLAINTIFF TO REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT	Apr. 11, 2018
117.	[PART 1 OF 3] REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT	Apr. 16, 2018
118.	[PART 2 OF 3] REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT	Apr. 16, 2018
119.	[PART 3 OF 3] REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT	Apr. 16, 2018
120.	ME: ORAL ARGUMENT SET [04/20/2018]	Apr. 23, 2018
121.	ME: HEARING [05/29/2018]	May. 30, 2018
122.	SECOND AMENDED COMPLAINT	Jun. 5, 2018
123.	NOTICE OF FILING AND SERVICE OF SECOND AMENDED COMPLAINT	Jun. 5, 2018
124.	NOTICE OF CHANGE OF ADDRESS OF COUNSEL	Jun. 14, 2018



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No.	Document Name	Filed Date
125.	[PART 1 OF 2] DEFENDANTS ARIZONA PUBLIC SERVICE COMPANY, PINNACLE WEST CAPITAL CORPORATION AND DONALD BRANDT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT	Jun. 25, 2018
126.	[PART 2 OF 2] DEFENDANTS ARIZONA PUBLIC SERVICE COMPANY, PINNACLE WEST CAPITAL CORPORATION AND DONALD BRANDT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT	Jun. 25, 2018
127.	RULE 7.1(G) NOTICE OF AGREEMENT TO FIRST EXTENSION OF TIME FOR PLAINTIFF TO FILE RESPONSE TO DEFENDANTS ARIZONA PUBLIC SERVICE COMPANY, PINNACLE WEST CAPITAL CORPORATION AND DONALD BRANDT'S MOTION DISMISS SECOND AMENDED COMPLAINT	Jul. 2, 2018
128.	DEFENDANTS ARIZONA CORPORATION COMMISSION AND COMMISSIONERS FORESE, LITTLE, TOBIN, AND DUNN'S MOTION TO DISMISS	Jul. 2, 2018
129.	RULE 7.1(G) NOTICE OF AGREEMENT TO FIRST EXTENSION OF TIME FOR PLAINTIFF TO FILE RESPONSE TO DEFENDANTS ARIZONA PUBLIC SERVICE COMPANY, PINNACLE WEST CAPITAL CORPORATION AND DONALD BRANDT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT	Jul. 16, 2018
130.	RULE 7.1(G) NOTICE OF AGREEMENT TO FIRST EXTENSION OF TIME FOR PLAINTIFF TO FILE RESPONSE TO DEFENDANTS ARIZONA PUBLIC SERVICE COMPANY, PINNACLE WEST CAPITAL CORPORATION AND DONALD BRANDT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT	Jul. 19, 2018
131.	[PART 1 OF 2] RESPONSE TO DEFENDANTS ARIZONA PUBLIC SERVICE COMPANY, PINNACLE WEST CAPITAL CORPORATION AND DONALD BRANDT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT	Jul. 30, 2018
132.	[PART 2 OF 2] RESPONSE TO DEFENDANTS ARIZONA PUBLIC SERVICE COMPANY, PINNACLE WEST CAPITAL CORPORATION AND DONALD BRANDT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT	Jul. 30, 2018
133.	[PART 1 OF 2] RESPONSE TO DEFENDANTS ARIZONA CORPORATION COMMISSION AND COMMISSIONERS FORESE, LITTLE, TOBIN, AND DUNN'S MOTION TO DISMISS	Jul. 30, 2018
134.	[PART 2 OF 2] RESPONSE TO DEFENDANTS ARIZONA CORPORATION COMMISSION AND COMMISSIONERS FORESE, LITTLE, TOBIN, AND DUNN'S MOTION TO DISMISS	Jul. 30, 2018
135.	NOTICE OF FIRST EXTENSION OF TIME TO FILE REPLY SUPPORTING MOTIONS TO DISMISS	Jul. 31, 2018



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No.	Document Name	Filed Date
136.	ME: ORAL ARGUMENT SET [08/03/2018]	Aug. 6, 2018
137.	ME: ORAL ARGUMENT RESET [08/09/2018]	Aug. 13, 2018
138.	NOTICE OF SECOND EXTENSION OF TIME TO FILE REPLY SUPPORTING MOTIONS TO DISMISS	Aug. 16, 2018
139.	REPLY BRIEF IN SUPPORT OF DEFENDANTS ARIZONA PUBLIC SERVICE COMPANY, PINNACLE WEST CAPITAL CORPORATION AND DONALD BRANDT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT	Aug. 20, 2018
140.	[PART 1 OF 2] NOTICE OF ERRATA: CORRECTED REPLY BRIEF	Aug. 21, 2018
141.	[PART 2 OF 2] NOTICE OF ERRATA: CORRECTED REPLY BRIEF	Aug. 21, 2018
142.	COMMISSION DEFENDANTS' REPLY MEMORANDUM SUPPORTING THEIR MOTION TO DISMISS THE SECOND AMENDED COMPLAINT	Aug. 27, 2018
143.	MOTION TO SUBSTITUTE COUNSEL OF RECORD	Aug. 28, 2018
144.	ORDER	Sep. 12, 2018
145.	PLAINTIFF'S EXPEDITED MOTION FOR COMMISSIONER ROBERT BURNS TO APPEAR TELEPHONICALLY FOR ORAL ARGUMENT SCHEDULED ON NOVEMBER 13, 2018	Nov. 5, 2018
146.	ORDER GRANTING MOTION FOR COMMISSIONER ROBERT BURNS TO APPEAR TELEPHONICALLY AT ORAL ARGUMENT SCHEDULED ON NOVEMBER 13, 2018	Nov. 7, 2018
147.	ME: ORDER SIGNED [11/07/2018]	Nov. 8, 2018
148.	ME: MATTER UNDER ADVISEMENT [11/13/2018]	Nov. 14, 2018
149.	NOTICE OF CHANGE OF LAW FIRM ADDRESS	Dec. 18, 2018
150.	ME: UNDER ADVISEMENT RULING [12/18/2018]	Dec. 19, 2018
151.	PLAINTIFF'S RESPONSE TO PROPOSED FORM OF JUDGMENT	Dec. 28, 2018
152.	ME: JUDGMENT SIGNED [01/16/2019]	Jan. 17, 2019
153.	JUDGMENT	Jan. 17, 2019
154.	NOTICE OF APPEAL OF PLAINTIFF COMMISSIONER ROBERT BURNS	Feb. 13, 2019



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No.	Document Name	Filed Date
155.	NOTICE OF ORDERING TRANSCRIPTS	Mar. 5, 2019
Record amended on Thursday, January 16, 2020 @ 9:49 AM		
156.	COURT OF APPEALS RECEIPT	Mar. 21, 2019
157.	ELECTRONIC INDEX OF RECORD	Mar. 21, 2019
158.	COURT OF APPEALS APPELLATE CLERK NOTICE	Mar. 21, 2019
159.	COURT OF APPEALS MEMORANDUM DATED 01/07/2020	Jan. 7, 2020

APPEAL COUNT: 1

RE: CASE: 1 CA-CV 19-0183

DUE DATE: 03/14/2019

CAPTION: BURNS VS. AZ PUBLIC SERVICE CO

EXHIBIT(S): NONE

LOCATION ONLY: NONE

SEALED DOCUMENT: NONE

DEPOSITION(S): NONE

TRANSCRIPT(S): NONE

COMPILED BY: ROCHFORDS on January 16, 2020; [2.5-17026.63]
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CERTIFICATION: I, JEFF FINE, Clerk of the Superior Court of Maricopa County, State of Arizona, do hereby certify that the above listed Index of Record, corresponding electronic documents, and items denoted to be transmitted manually constitute the record on appeal in the above-entitled action.



1 CA-CV 19-0183
BURNS VS. AZ PUBLIC SERVICE CO

AMENDED

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The bracketed [date] following the minute entry title is the date of the minute entry.

CONTACT INFO: Clerk of the Superior Court, Maricopa County, Appeals Unit, 175 W Madison Ave, Phoenix, AZ 85003; 602-372-5375

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-001831

02/15/2018

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
C. Mai
Deputy

ROBERT BURNS

WILLIAM A RICHARDS

v.

ARIZONA PUBLIC SERVICE COMPANY, et al. MARY R O'GRADY

DAVID J CANTELME
MARK D GOLDMAN
TIMOTHY A LASOTA
SARAH LYNN BARNES
BRIAN R BOOKER

UNDER ADVISEMENT RULING

The Court has considered the Joint Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim for Relief (“Commission Defendants' Motion”) filed by Defendants Arizona Corporation Commission (the “Commission” or the “ACC”) and Commissioners Tom Forese, Doug Little, Andy Tobin, and Boyd Dunn (the “Defendant Commissioners”) (the Commission and the Defendant Commissioners collectively, the “Commission Defendants”); the Response in Opposition to Joint Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim for Relief (“Response to Commission Defendants' Motion”) filed by Commissioner Robert Burns (“Commissioner Burns”) and attached as Exhibit 1 to the Notice of Errata Regarding Plaintiff's Response in Opposition to Joint Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim for Relief; the Reply in Support of Joint Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim for Relief (“Commission Defendants' Reply”) filed by the Commission Defendants; the Motion to Dismiss Amended Complaint (“Companies' Motion”) filed by Defendants Arizona Public Service Company (“APS”), Pinnacle West Capital

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Corporation (“Pinnacle West”) and Donald Brandt (APS, Pinnacle West and Donald Brandt collectively, the “Companies”) (the Companies and the Commission Defendants collectively, the “Defendants”); the filing entitled “Notice of Errata - - Correct Exhibit 2 to Defendants Arizona Public Service Company, Pinnacle West Capital Corporation and Donald Brandt's Motion to Dismiss Amended Complaint” filed by the Companies; the Response to Defendants Arizona Public Service Company, Pinnacle West Corporation and Donald Brandt's Motion to Dismiss Amended Complaint (“Response to Companies' Motion”) filed by Commissioner Burns and attached as Exhibit 1 to Notice of Errata Regarding Plaintiff's Response to Defendants Arizona Public Service Company, Pinnacle West Corporation, and Donald Brandt's Motion to Dismiss Amended Complaint; Defendants Arizona Public Service, Pinnacle West Capital Corporation and Donald Brandt's Reply in Support of Their Motion to Dismiss Amended Complaint (“Companies' Reply”); the authorities cited therein, and the arguments of counsel at the hearing on December 19, 2017.

In his First Amended Complaint (“FAC”), Commissioner Burns alleges, *inter alia*, that the Companies have used, and continue to use, funds to support particular candidates running for seats on the ACC; that these funds were generated from “fees collected by APS from its Arizona customers”; and that these funds were expended to secure the “goodwill” and “allegiance” of certain candidates in order to secure “favorable treatment of APS...in proceedings before the ACC.” FAC at ¶¶ 30, 34, 43-44, 48-49, 54. He alleges that “the use of ratepayer-generated funds...to fund political influence efforts” threatens to “create regulatory capture,” resulting in an “increase” in “the cost of utility services to APS’s customers” as “undue corporate utility influence” induces ACC members to “approv[e] unreasonable rate burdens for APS customers and/or disregard[] the financial...interests of such consumers.” *Id.* at ¶¶ 50, 53.

Citing the importance of “open and detailed disclosures” of the “contributions” made by the Companies in order to allow the ACC to determine “whether adjustments to APS rates” are appropriate to “avoid[] improper or unreasonable rate burdens being placed on APS customers,” Commissioner Burns alleges that he exercised his “constitutional and statutory authorit[y]” to “issue two subpoenas” (the “Subpoenas”) to gather documentary and testimonial evidence from the Companies. FAC at ¶¶ 51, 133, 134. He further alleges that “APS only partly complied with” the Subpoenas, and that the Companies “have refused to comply with the remainder of the Subpoenas.” *Id.* at ¶ 138. He alleges that he filed a motion before the ACC to compel compliance with the Subpoenas, asserting that other members of the ACC should recognize and uphold his “independent authority to issue and enforce his investigatory subpoenas,” but that the Defendant Commissioners “voted to deny” his motion, thereby “ostensibly den[ying] [him] any further right to pursue or enforce his investigatory subpoenas.” *Id.* at ¶¶ 169, 171, 173, 175. He alleges that the Defendant Commissioners, by their votes, thus “obstruct[ed]” his efforts to investigate “[t]he means...by which [the Companies] have attempted or may attempt to...capture the allegiance of

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or influence the attitudes and actions of ACC Commissioners or of candidates for such positions.” *Id.* at ¶¶ 125, 175.

Alleging that he “has an independent, individual right” as an elected member of the ACC to “pursue investigation using a subpoena and depositions” without being “required to seek or obtain the other Commissioners’ authorization,” and that the Commission Defendants’ “interference in his investigatory activities is both unauthorized and a violation of [his] constitutional and statutory rights,” Commissioner Burns seeks a declaration that “he is fully authorized and entitled to demand from” the Companies the documentary and testimonial evidence he seeks without being “required to obtain consent, approval, or authority from any of the other Commissioners” in order to do so. FAC at ¶¶ 179, 204-205.

The Companies and the Commission Defendants seek dismissal of the FAC. *See generally* Commission Defendants’ Motion; Companies’ Motion.

As Commissioner Burns correctly notes, a defendant seeking dismissal at this stage of the proceedings bears a “heavy” burden. Response to Commission Defendants’ Motion at p. 2. Case law is clear that, when considering a motion to dismiss a complaint for failure to state a claim, the Court must accept as true the facts alleged therein, *Coleman v. City of Mesa*, 230 Ariz. 352, 356, 284 P.3d 863, 867 (2012), and may not dismiss the complaint unless there is “no legal theory” under which the plaintiff could be entitled to relief. *Mirchandani v. BMO Harris Bank, N.A.*, 235 Ariz. 68, 70, 326 P.3d 335, 337 (App. 2014). *See also Fidelity Sec. Life Ins. Co. v. State, Dep’t of Ins.*, 191 Ariz. 222, 224, 954 P.2d 580, 582 (1998) (“In reviewing a trial court’s decision to dismiss a complaint for failure to state a claim, we assume as true the facts alleged in the complaint and will not affirm the dismissal unless satisfied as a matter of law that [the] plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof.”).

In support of their request that the FAC be dismissed, the Commission Defendants assert, first, that “this Court lacks subject matter jurisdiction because the [ACC] entered a final order in the rate case on August 15, 2017.” Commission Defendants’ Motion at p. 2. “[I]t is too late to grant any relief,” they contend, because the ACC has “made its final decision in the rate case”; “the entry of a final order in the rate case” renders “all discovery matters and disputes...moot.” *Id.* at pp. 5, 24.

The Commission Defendants’ assertion that they have mooted Commissioner Burns’s claims by approving “the final order in the rate case,” Commission Defendants’ Motion at p. 5, is contrary to the principle that, “[i]n general, a party cannot by its own voluntary conduct moot a case and deprive a court of jurisdiction.” *Workman v. Verde Wellness Ctr., Inc.*, 240 Ariz. 597, 603-04, 382 P.3d 812, 818-19 (App. 2016) (citation, internal quotations, and internal punctuation

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omitted). *See also Tom Mulcaire Contracting, LLC v. City of Cottonwood*, 227 Ariz. 533, 534, 537, 260 P.3d 1098, 1099, 1102 (App. 2011) (awarding fees to unsuccessful contractor who brought mandamus action challenging bidding process, despite city's attempt "intentionally to moot the case" by terminating contract previously awarded to successful bidder). Moreover, the order entered in the rate case cannot be considered "final" because, as Commissioner Burns correctly notes, "a rate-setting decision may be re-opened and vacated or modified at any time." Response to Commission Defendants' Motion at p. 17. *See also* A.R.S. § 40-252 ("The commission may at any time...rescind, alter or amend any order or decision made by it."); A.R.S. § 40-368(B) ("The commission may revoke its approval at any time and fix other rates and charges for the product or commodity or service..."); *Simms v. Round Valley Light & Power Co.*, 80 Ariz. 145, 147, 294 P.2d 378, 379 (1956) (after a hearing, commission "entered an order requiring the company to reduce its rate" and then, "upon petition of the company," held another hearing after which it "changed the original order in some respects").

In any event, the Commission's decision in the rate case has not rendered this dispute moot because, as Commissioner Burns correctly pointed out at Oral Argument on December 19th, his claims are based on a dispute over the scope of the constitutional and statutory authority enjoyed by individual ACC members. *See* FAC at ¶¶ 81, 82, 179, 185. The constitutional and statutory provisions on which Commissioner Burns bases his claims make no reference to the existence of an open rate case. *See* Ariz. Const., Art. XV, § 4 ("Article XV, § 4")¹; A.R.S. § 40-241(A)². Indeed, A.R.S. § 40-241(A) expressly provides that the authority granted therein may be exercised "at any time." While the scope of the power conferred by Article XV, § 4 and A.R.S. § 40-241(A) may be the subject of dispute, it cannot be seriously contended that those provisions are meaningless unless a rate case is open and pending before the ACC. The Court therefore rejects the Commission Defendants' assertion that the decision made by the Commission last August has rendered Commissioner Burns's claims moot.

¹ Article XV, § 4 of the Arizona Constitution provides, "The corporation commission, and the several members thereof, shall have power to inspect and investigate the property, books, papers, business, methods, and affairs of any corporation whose stock shall be offered for sale to the public and of any public service corporation doing business within the state, and for the purpose of the commission, and of the several members thereof, shall have the power of a court of general jurisdiction to enforce the attendance of witnesses and the production of evidence by subpoena, attachment, and punishment, which said power shall extend throughout the state. Said commission shall have power to take testimony under commission or deposition either within or without the state."

² A.R.S. § 40-241(A) provides, "The commission, each commissioner and person employed by the commission may, at any time, inspect the accounts, books, papers and documents of any public service corporation, and any of such persons who are authorized to administer oaths may examine under oath any officer, agent or employee of such corporation in relation to the business and affairs of the corporation."

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The Commission Defendants assert, next, that the FAC should be dismissed because Commissioner Burns “lacks legal capacity to file this lawsuit,” arguing that “[n]o statute and no constitutional provision confers capacity on him to do so.” Commission Defendants’ Motion at p. 23. On the contrary, the declaratory relief authorized by A.R.S. §§ 12-1831 *et seq.* has long been recognized as “an appropriate vehicle for resolving controversies as to the legality of acts of public officials,” *Rivera v. City of Douglas*, 132 Ariz. 117, 119, 644 P.2d 271, 273 (App. 1982), including disputes over the proper scope of the Commission’s investigatory powers. *See Polaris Int’l Metals Corp. v. Ariz. Corp. Comm’n*, 133 Ariz. 500, 506, 652 P.2d 1023, 1029 (1982). *See also Dobson v. State ex rel. Comm’n on Appellate Court Appointments*, 233 Ariz. 119, 121, 309 P.3d 1289, 1291 (2013) (action for declaratory as well as injunctive relief brought by four members of the Commission on Appellate Court Appointments against Commission and State); *Bd. of Supervisors of Maricopa Cnty. v. Woodall*, 120 Ariz. 379, 380-81, 586 P.2d 628, 629-30 (1978) (declaratory judgment action brought by three county supervisors against county attorney and board of supervisors’ clerk); *Romley v. Daughton*, 225 Ariz. 521, 523-24, 241 P.3d 518, 520-21 (App. 2010) (declaratory judgment action brought by county attorney against board of supervisors and its five members; board counterclaimed for declaratory relief).

Like the Commission Defendants, the Companies, too, contend that Commissioner Burns lacks authority to pursue his claims. In support of their contention, they argue, first, that A.R.S. § 40-241(A) entitles Commissioner Burns to no relief as to Pinnacle West because that statute, by its terms, applies only to “public service corporations,” and “Pinnacle West is not a ‘public service corporation’.” Companies’ Motion at p. 23. As Commissioner Burns correctly argues, however, publicly traded corporations fall within the scope of the investigatory authority conferred by Article XV, § 4, and Pinnacle West is “publicly traded.” Response to Companies’ Motion at p. 17. *See also* Article XV, § 4 (authorizing inspections of the “property, books, papers, business, methods, and affairs” not only of “any public service corporation doing business within the state,” but of “*any corporation whose stock shall be offered for sale to the public*”) (emphasis added). The fact that A.R.S. § 40-241(A), by its terms, applies only to “any public service corporation” does not, therefore, dispose of Commissioner Burns’s claim for relief as it relates to Pinnacle West.

The Companies go on to argue that, as a matter of law, Commissioner Burns lacks authority to obtain the information he seeks because the Subpoenas “encroach” on powers that are constitutionally entrusted to other branches of government. Companies’ Motion at p. 6. They argue that the Legislature is entrusted with authority to “regulat[e] political expenditures” of the sort that are the subject of the Subpoenas, and that the Subpoenas simultaneously usurp the authority of “the Secretary of State, Attorney General and...Clean Elections Commission” to “investigate alleged violations of the State’s campaign finance laws.” *Id.*

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The Court is not persuaded. Different agencies and branches of government frequently have overlapping authority and responsibilities that are not mutually exclusive. An act committed in violation of state statute may, for example, expose the wrongful actor to simultaneous proceedings initiated by multiple different government officers and agencies, including criminal proceedings initiated by the Attorney General or County Attorney, tax proceedings before the Department of Revenue (if the wrongful act was committed for financial gain), and, if the actor is a licensed professional, license revocation proceedings before the appropriate state agency. Likewise, an allegedly illegal act by a public official may simultaneously subject that official to criminal prosecution by Executive Branch officials and impeachment proceedings in the Legislature. The Court therefore rejects the Companies' assertion that the Legislature's authority under Ariz. Const. Art. VII, § 16 to enact statutes requiring public disclosure of campaign contributions, and the authority of the Secretary of State, Attorney General, and Clean Elections Commission to investigate campaign finance violations, somehow strip the Commission or any of its members of the authority conferred on them by Article XV, § 4 and A.R.S. § 40-241(A).

The Companies next assert that “[t]he Subpoenas violate the First Amendment,” and that failing to dismiss the FAC would therefore infringe on “Pinnacle West’s First Amendment rights.” Companies’ Motion at p. 15. Citing *Citizens United*³ for the proposition that “[c]orporations..., like individuals,” enjoy a First Amendment right to “contribute to the discussion, debate, and the dissemination of information and ideas,” the Companies assert that the FAC fails to “plead[] facts that would overcome a First Amendment defense.” *Id.* at pp. 15, 19 (internal quotations omitted). The Commission Defendants echo this argument, asserting that “[t]he United States Constitution allows a corporation to contribute as much money as it wants in the exercise of its First Amendment rights to free speech to advocate for or against a candidate for office so long as it does not coordinate its efforts with that candidate.” Commission Defendants’ Motion at p. 21.

The Companies go on to assert that the Subpoenas represent “uniquely pernicious” “[v]iewpoint discrimination” because they “are aimed at the Companies” based on “the Companies’ alleged choice to support the candidates they preferred.” Companies’ Motion at p. 17. Stating that “APS has already produced much of [the] information” sought by the Subpoenas “and will provide the rest - - if it is treated confidentially,” Companies’ Reply at p. 2 (emphasis in original), the Companies assert that Commissioner Burns’s unwillingness to treat the subpoenaed information as confidential makes it “clear” that his “true interest” is not in obtaining the information that is the subject of the Subpoenas, but “in discouraging APS and Pinnacle West from engaging in any political speech.” Companies’ Motion at p. 16.

³ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 343, 130 S.Ct. 876, 900 (2010).

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At this stage of the proceedings, the Court cannot consider unpled factual assertions, speculate about any party's state of mind, or attempt to divine any party's "true" motive. *Cf. Moretto v. Samaritan Health Syst.*, 190 Ariz. 343, 346, 947 P.2d 917, 920 (App. 1997) (motion to dismiss "should be granted only when a plaintiff has pled facts that reveal a legal bar to recovery"; "unpled facts [that] establish a legal bar to recovery" cannot be asserted in a motion to dismiss). On the contrary, the Court is limited to the facts as alleged in the FAC (which the Court must accept as true) and reasonable inferences that can be drawn in the plaintiff's favor from those facts. *Coleman*, 230 Ariz. at 356, 284 P.3d at 867. The Court cannot, therefore, indulge the Companies' allegation that Commissioner Burns's "true interest" is "in discouraging APS and Pinnacle West from engaging in any political speech," or otherwise find that this allegation entitles the Companies to relief.

Moreover, although the Companies rely heavily on *Citizens United*, nothing in that case suggests that the First Amendment offers blanket protection against the mandatory disclosure of political spending. On the contrary, *Citizens United* expressly recognizes that, while "[t]he First Amendment protects political speech," "disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way." 558 U.S. at 371, 130 S.Ct. at 916. Such "transparency," the *Citizens United* court observed, "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id. Accord Doe v. Reed*, 561 U.S. 186, 221, 228, 130 S.Ct. 2811, 2832-33, 2837 (2010) (Scalia, J., concurring) (rejecting assertion that "the First Amendment accords a right to anonymity in the performance of an act with governmental effect," and concluding that "[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed").

The Companies' First Amendment defense is not, in other words, a matter that the Court can resolve as a matter of law at this stage of the proceedings. Because "[a]s-applied challenges to contribution disclosure laws are fact-specific in nature," *Protectmarriage.com - Yes on 8 v. Bowen*, 752 F.3d 827, 840 (9th Cir. 2014), the Court cannot, at this point in the case, assess the merits of the Companies' contention that compliance with the Subpoenas would impose an unconstitutional burden on their First Amendment rights. *See also Voting for America, Inc. v. Steen*, 732 F.3d 382, 395 (5th Cir. 2013) (determining whether regulations unconstitutionally impact "core political speech" requires a "detailed, fact-specific analysis of [their] impact...").

Finally, the Commission Defendants and the Companies both argue that the FAC should be dismissed because it seeks declaratory relief to which Commissioner Burns is not entitled. They assert, first, that Commissioner Burns had no authority to issue the Subpoenas unilaterally, or to otherwise initiate investigations on his own authority. *See Commission Defendants' Motion* at p. 19 ("[A]n individual commissioner has no authority to act for or to bind the Commission, except to the extent the Commission has expressly delegated such authority to an individual commissioner. In [the] rate case, the Commission has delegated nothing to Commissioner Burns.

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Thus, his authority was limited to casting his vote on questions before the Commission.”); Companies’ Motion at pp. 19, 20 (“Members of the Commission enjoy the power to issue and enforce subpoenas under [Article XV, § 4] when they are acting as *representatives* of the Commission and exercising its delegated powers.”; “[I]f individual members had the powers asserted by Commissioner Burns, there would have been no need for [Article XV, § 4] to vest any power in the Commission as a body.”) (emphasis in original, internal punctuation omitted).

In the alternative, the Defendants contend that, even if individual commissioners possess the authority asserted by Commissioner Burns, such authority is nevertheless subject to review by the Commission as a whole. Commission Defendants’ Reply at pp. 14, 15 (“Whatever Commissioner Burns’s powers are, at some point...they must yield to the power of a majority of the Commission to manage that agency...Allowing an individual commissioner’s powers to trump those of the Commission invites chaos...”); Companies’ Motion at p. 19 (“Article 15, Section 4 does not give members of the Commission the power to disregard the Commission’s decision not to enforce a subpoena...Individual members do not have the right to *override* the Commission’s decision.”) (emphasis in original, internal punctuation omitted).

In response, Commissioner Burns asserts that Article XV, § 4 and A.R.S. § 40-241(A) do, in fact, confer “full investigatory powers” on individual ACC members, and that those powers are “not subject to being vetoed by the other commissioners.” Response to Commission Defendants’ Motion at pp. 12, 13.

Article XV, § 4 authorizes “[t]he corporation commission, *and the several members thereof*,” to “inspect and investigate” the financial affairs of certain corporations, and to compel the attendance of witnesses and the production of evidence by subpoena. The Court agrees with Commissioner Burns that the reference to “the several members” of the Commission evinces an intent to empower individual commissioners, not merely the Commission acting as a collective body, to conduct such inspections and investigations. If Article XV, § 4 were intended to authorize only collective action by the Commission, the reference to “the several members” would be superfluous, an interpretation that is to be avoided when construing a constitutional provision. *See Moore v. Valley Garden Ctr.*, 66 Ariz. 209, 211, 185 P.2d 998, 999 (1947) (“[I]t is a well settled law of construction of constitutions...that the courts must, if consonant with reason, interpret such instruments in a manner such as will give effect to each and every provision thereof.”).⁴

⁴ The use of the word “several” in Article XV, § 4 does not, as the Companies contend, *see* Companies’ Motion at p. 20, presuppose only collective action by Commission members. On the contrary, as Commissioner Burns persuasively argues, “[p]recedent near the time of Arizona statehood” establishes that the term “several” was “commonly used by legal writers” when discussing the “application of a concept, claim or rule” to individual members of a group. Response Docket Code 926 Form V000A Page 8

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A.R.S. § 40-241(A) similarly authorizes “each commissioner” to “inspect” the financial affairs “of any public service corporation.” Subsection B of that statute provides that “[a]ny person *other than a commissioner* or an officer of the commission demanding such inspection shall produce under the hand and seal of the commission his authority to make the inspection,” A.R.S. § 40-241(B) (emphasis added), thus making clear that a commissioner needs no authority to conduct an inspection of a public service corporation’s financial affairs other than the authority conferred by virtue of the office he or she holds.

The Court finds it plain that Article XV, § 4 and A.R.S. § 40-241(A) each authorize Commissioner Burns to seek information from the Companies by subpoena on his own authority, without the prior approval of the Commission as a whole, and therefore rejects the Defendants’ arguments to the contrary.

A different issue is presented, however, by the question of whether Commissioner Burns is entitled to enforce the Subpoenas unilaterally after the remaining ACC members have voted against doing so. A party on whom an investigatory subpoena has been served has, of course, the right to object to its validity and/or scope, and to have its objection heard and ruled upon before it must comply. *See, e.g., Carrington v. Ariz. Corp. Comm’n*, 199 Ariz. 303, 305, 18 P.3d 97, 99 (App. 2000) (“[A] party may resist the Commission’s subpoena on grounds” that include that “the subpoena seeks irrelevant information”). To hold that an objection to a subpoena is to be resolved solely by the individual commissioner who issued the subpoena in the first place would hardly comport with due process. *See Horne v. Polk*, 242 Ariz. 226, 231, 394 P.3d 651, 656 (2017) (“The right to a neutral adjudicator has long been recognized as a component of a fair process”; “[As] Blackstone observed,... it is unreasonable that any man should determine his own quarrel.”) (citation and internal quotations omitted). Indeed, Commissioner Burns does not contest this proposition. He asserts, instead, that when an objection is raised to a subpoena issued by an individual member of the Commission, that objection should be resolved neither by the commissioner who issued the subpoena nor by the Commission as a whole, but by a court. At Oral Argument on December 19, 2017, Commissioner Burns argued that a party who seeks to challenge the validity or scope of a subpoena issued by an individual Commission member

to Commission Defendants’ Motion at p. 14 n. 10. *See United States v. Press Publishing Co.*, 219 U.S. 1, 9, 31 S.Ct. 212, 214 (1911) (addressing circumstances in which state criminal statutes are enforceable on Native American reservations, the Court referred to “acts done on such reservations which are made criminal by the laws of the several states,” using the term “the laws of the several states” to refer not to the laws of all states, but to the laws of each state in which a reservation is located).

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“could go to the courts and say, ‘This exceeds the jurisdiction of this Commissioner. This is outside of his authority. And I want a declaration on that. I want an injunction’.”⁵

For a number of reasons, the Court agrees with the Companies and the Commission Defendants that authority to determine whether to enforce a subpoena issued by an individual Commission member, or whether to sustain an objection to such a subpoena, rests with the Commission, and not with a court.

First, as the Companies note, the Arizona Constitution confers authority on “the [C]ommission” to enact “rules and regulations to govern proceedings” before it. Companies’ Motion at p. 8, *quoting* Ariz. Const., Art. XV, § 6. The Commission has enacted a rule providing that objections to subpoenas are to be resolved by the Commission. Ariz. Admin. Code R14-3-109(O). To hold that the Commission as a body has no authority to resolve objections to subpoenas issued by individual members would be to deny effect to a rule enacted by the Commission pursuant to authority expressly granted to it by the Constitution.

Second, Arizona statute confers on the Commission as a whole, and not on an individual member, authority to issue contempt citations. A.R.S. § 40-424(A) (“If any corporation or person fails to observe or comply with any order, rule, or requirement of the commission or any commissioner, the corporation or person shall be in contempt of the commission and shall, after notice and hearing before the commission, *be fined by the commission...*”) (emphasis added). This statute supports the position of the Companies and the Commission Defendants that the Commission as a whole has authority to determine whether to compel compliance with an investigatory subpoena to which an objection has been made.

Third, A.R.S. § 40-102 explicitly states that investigations undertaken by individual members of the Commission are subject to the supervision and approval of the Commission as a whole. *See* A.R.S. § 40-102(C) (“Any investigation, inquiry or hearing may be undertaken or held by or before any commissioner designated by the commission for the purpose, and every finding, order or decision made by a commissioner so designated, *when approved and confirmed by the commission...*, shall be the finding, order or decision of the commission.”) (emphasis added).

Fourth, to look to a court to resolve disputes among ACC members about the proper scope of an investigation risks - - indeed, virtually *guarantees* - - undue judicial involvement in the day-to-day affairs of a separate and co-equal branch of government.

⁵ Commissioner Burns also acknowledged that “there certainly could be a role for the Commission to play in some of this,” *i.e.*, in resolving objections to a subpoena issued by an individual Commission member, but did not explain what he believes that role should be.

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No party questions the ACC's status as a separate and independent branch of government whose powers are derived directly from the Arizona Constitution. *See, e.g., Ariz. Corp. Comm'n v. State ex rel. Woods*, 171 Ariz. 286, 290, 830 P.2d 807, 811 (1992) ("The framers established the Commission as a separate, popularly-elected branch of state government."). As an independent branch of government, the ACC is entitled to deference from the other branches. *See Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 595, 208 P.3d 676, 684 (2009) (noting the "deference that we customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our Government") (citation and internal quotations omitted). The same considerations that require courts to act with caution when "asked, in effect, to referee disputes *between*" other branches of government, *Brewer v. Burns*, 222 Ariz. 234, 237, 213 P.3d 671, 674 (2009) (emphasis added), apply with even greater force when a court is asked to referee disputes *within* another branch.

As the Commission Defendants correctly argue, the Commission is constitutionally empowered to "exercise all powers which may be necessary or essential in connection with the performance of its duties," *Garvey v. Trew*, 64 Ariz. 342, 346, 170 P.2d 845, 848 (1946), including "full and exclusive power in the field of prescribing rates which cannot be interfered with by the courts, the legislature or the executive branch of state government." *Qwest Corp. v. Kelly*, 204 Ariz. 25, 30, 59 P.3d 789, 794 (App. 2002) (citation and internal quotations omitted). *See also* Commission Defendants' Motion at p. 8, *quoting Miller v. Ariz. Corp. Comm'n*, 227 Ariz. 21, 25, 251 P.3d 400, 404 (App. 2011) ("Under Article 15, Section 3, of the Arizona Constitution, the Commission possesses plenary power to set just and reasonable rates and charges collected by public service corporations.") (citation and internal quotations omitted). This "full and exclusive power" was conferred on the ACC precisely because the ACC is uniquely constituted to exercise this power effectively. *Woods*, 171 Ariz. at 291, 830 P.2d at 812 ("The framers...creat[ed] an elected commission with broad powers" because "[c]onstraints on legislators' time, the lack of information, and inadequate means of investigation limited the ability of legislatures to oversee public service corporations"). The Court therefore agrees with the Defendants that the Commission "is best situated to know what evidence is, and is not, relevant to its own decision-making in an area over which it has special expertise." Companies' Motion at p. 11.

Even if this Court had the expertise necessary to make informed decisions about what information should and should not be gathered and presented to Commission members for them to consider in the performance of their duties - - whether subpoenas for particular information should or should not issue, whether particular witnesses should or should not be summoned to testify - - the Court could not overrule the decision of a majority of the Commission about the proper scope of an ACC investigation without running afoul of the "separation of powers" principles that are at the heart of our system of government. *See Forty-Seventh Legislature of*

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State v. Napolitano, 213 Ariz. 482, 485-86, 143 P.3d 1023, 1026-27 (2006) (“Limiting the actions of each branch of government to those conferred upon it by the constitution is essential to maintaining the proper separation of powers.”). As Commissioner Burns himself notes, courts must “give the Commission ‘wide berth’ in conducting investigations.” Response to Companies’ Motion at p. 15, *quoting Carrington*, 199 Ariz. at 305, 18 P.3d at 99. The “wide berth” that courts must give to the Commission when it pursues an investigation is no narrower when, as here, the Commission decides to put an end to an investigation.

In his response to the Companies, Commissioner Burns analogizes the Commission’s “investigatory powers” to that of a grand jury. Response to Companies’ Motion at p. 15 n. 7, *citing Shelby Sch. v. Ariz. State Bd. of Educ.*, 192 Ariz. 156, 169, 962 P.2d 230, 243 (App. 1998). The analogy is an apt one, but it refutes, rather than supports, Commissioner Burns’s position. A single grand juror cannot act alone; a grand jury acts by majority vote. A.R.S. § 21-414(A).

In the FAC, Commissioner Burns implicitly accuses the Defendant Commissioners of acting in an arbitrary and capricious manner in refusing to enforce the Subpoenas, alleging that they identified “no factual basis for their assertions that compliance with the [Subpoenas] would not yield any relevant information” and that they are “overly broad [and] unduly burdensome.” FAC at ¶¶ 184, 187, 195, 198. *See City of Tucson v. Mills*, 114 Ariz. 107, 111, 559 P.2d 663, 667 (App. 1976) (administrative decision may be “set...aside as being arbitrary and capricious” if it “is unsupported by competent evidence”). In his responses to the Defendants’ Motions, Commissioner Burns makes this accusation explicit, arguing that the Defendant Commissioners “acted arbitrarily, capriciously and in violation of [his] constitutional and statutory rights” in refusing to enforce the Subpoenas. Response to Commission Defendants’ Motion at p. 3. *See also* Response to Companies’ Motion at p. 4 (“[E]ven assuming the ACC Defendants do have the right to veto and block a single commissioner’s investigatory efforts...the ACC Defendants were not authorized to veto or block Commissioner Burns based on reasons that are...arbitrary [and] capricious...”).

While case law recognizes that an ACC decision may be set aside if arbitrary or capricious, *see, e.g., Ariz. Water Co. v. Ariz. Corp. Comm’n*, 217 Ariz. 652, 659, 177 P.3d 1224, 1231 (App. 2008), Commissioner Burns’s attempt to challenge the ACC’s decision not to enforce his Subpoenas as “arbitrary and capricious” does not persuade the Court that his challenge is one appropriate for judicial relief. The Court is aware of no Arizona case setting aside, as arbitrary and capricious, a decision by the ACC *not* to act in a particular case. In the absence of such controlling authority, in light of the power granted to the Commission by statute and rule to determine the proper scope of Commission investigations, and pursuant to the “separation of powers” principles discussed above, the Court finds that Commissioner Burns is not entitled to his requested relief of a judicial declaration that the Defendant Commissioners had

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“no authority to stop [him] from” requiring the Companies to comply with the Subpoenas. FAC at ¶ 188.

In the FAC, Commissioner Burns alleges as follows:

The Arizona Corporation Commission is Arizona’s unique fourth branch of state government, whose elected members are delegated and imbued with a unique combination of Arizona’s sovereign executive, legislative and judicial powers.

* * *

The powers vested by Arizona’s framers in the Arizona Corporation Commission are, at least in part, “supreme” and may not be invaded by the other branches of government.

* * *

Given its unique position as a fourth branch of state government with designated executive, legislative and judicial powers, there are certain responsibilities and authorities and operations of the Arizona Corporation Commission and its individual Commissioners that are exclusive to the Commission and the office held by Commissioner Burns. As such, judicial intervention in such matters is barred by doctrines of separation of powers and concerning non-justiciable political questions established by the Constitution and law of the State of Arizona.

FAC at ¶¶ 67, 68, 100 (emphasis added). Commissioner Burns’s allegations on this point are entirely correct, and that is precisely why Commissioner Burns is *not* entitled to the declaration he seeks. Even if the ACC as a whole lacked authority by statute and rule to determine the proper scope of an ACC investigation, “separation of powers” principles would preclude judicial involvement in the Commission’s internal decision-making processes. The Court cannot assume oversight of an ACC investigation, nor can it second-guess a determination by a majority of the ACC as to the proper scope of any such investigation, without improperly usurping the authority constitutionally conferred on another branch of government. *See J.W. Hancock Enters., Inc. v. Ariz. State Registrar of Contractors*, 142 Ariz. 400, 406, 690 P.2d 119, 125 (App. 1984) (“Arizona courts have frequently stated that no branch may exercise the powers belonging to others.”). Even accepting the truth of the factual allegations in the FAC, therefore, the Court cannot issue the declaration Commissioner Burns seeks, *i.e.*, that he, as a single member of the

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Commission, “is fully authorized and entitled to” to investigate the financial affairs of the Companies over the opposition of his fellow Commission members. *See* FAC at ¶¶ 204-205.

Accordingly,

IT IS ORDERED granting the Joint Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim for Relief filed by Defendants Arizona Corporation Commission and Commissioners Tom Forese, Doug Little, Andy Tobin, and Boyd Dunn.

IT IS FURTHER ORDERED granting the Motion to Dismiss Amended Complaint filed by Defendants Arizona Public Service Company, Pinnacle West Capital Corporation, and Donald Brandt.

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12/18/2018

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
C. Avena
Deputy

ROBERT BURNS

WILLIAM A RICHARDS

v.

ARIZONA PUBLIC SERVICE COMPANY, et al. MARY R O'GRADY

DAVID J CANTELME
TIMOTHY A LASOTA
PAUL J VAPOREAN
JUDGE KILEY

MINUTE ENTRY

The Court has considered the Motion to Dismiss (“Commission Defendants’ Motion”) filed by Defendant Arizona Corporation Commission (the “Commission”) and Defendants Tom Forese, Doug Little, Andy Tobin, and Boyd Dunn (the “Defendant Commissioners”) (the Commission and the Defendant Commissioners collectively, the "Commission Defendants"); the Response to Defendants Arizona Corporation Commission and Commissioners Forese, Little, Tobin and Dunn’s Motion to Dismiss (“Response to Commission Defendants' Motion”) filed by Plaintiff Robert Burns (“Commissioner Burns”); the Reply Memorandum Supporting Their Motion to Dismiss the Second Amended Complaint (“Commission Defendants’ Reply”) filed by the Commission Defendants; the Motion to Dismiss Second Amended Complaint (“Companies’ Motion”) filed by Defendants Arizona Public Service Company (“APS”), Pinnacle West Capital Corporation (“Pinnacle West”) and Donald Brandt (APS, Pinnacle West and Donald Brandt collectively, the “Companies”) (the Companies and the Commission Defendants collectively, the “Defendants”); the Response to Defendants Arizona Public Service Company, Pinnacle West Corporation and Donald Brandt’s Motion to Dismiss Second Amended Complaint (“Response to Companies’ Motion”) filed by Commissioner Burns; the Corrected Reply Brief in Support of

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Defendants Arizona Public Service Company, Pinnacle West Capital Corporation and Donald Brandt's Motion to Dismiss Second Amended Complaint attached to the Notice of Errata: Corrected Reply Brief ("Companies' Reply") filed by the Companies; the authorities cited therein, and the arguments of counsel at the hearing on November 13, 2018.

The Court previously granted the Defendants' motions to dismiss Commissioner Burns's First Amended Complaint ("FAC"). *See generally* Minute Entry of February 15, 2018 at p. 14. In his Second Amended Complaint ("SAC"), Commissioner Burns asserts the same allegations and requests for relief that he asserted in his FAC, and adds an additional request for declaratory relief. Specifically, he requests "a full and final declaration of his rights and duties," as well as the "duties" of the Defendant Commissioners, with respect to his efforts to "investigate and expose" issues "involving" the "potential disqualification of the Defendant Commissioners" based on the "appearance of potential bias due to campaign support provided" to them by the Companies, and to have his request for relief regarding the potential disqualification of the Defendant Commissioners "heard and acted on by" the administrative law judge who is adjudicating a pending rate case (the "Rate Case") involving APS "without interference by any of the Defendant Commissioners." SAC at ¶¶ 228, 229(a), (b), and (e). In support of his requested relief, Commissioner Burns alleges that he "requested" that each of the Defendant Commissioners "voluntarily disclose their knowledge of and/or their or their campaign's relationships to any campaign financial support provided" by the Companies, but that the Defendant Commissioners "refused to honor that request." *Id.* at ¶ 176. Accordingly, he undertook to "investigate fully" and "present for full consideration and action the facts relevant to the campaign financial support" the Companies "provided in support of the campaigns of the Defendant Commissioners, or against the campaigns of any of their election opponents" in order to determine "whether the Defendant Commissioners should have been disqualified from taking any part in the quasi-adjudicatory proceedings" of the Rate Case. *Id.* at ¶¶ 170, 177. The Defendant Commissioners, he alleges, "took actions" that "obstructed" his "rights to obtain any investigation into the disqualification issues," "effectively preclud[ing] any investigation" into the "campaign support" the Companies provided to the Defendant Commissioners and the "potential" of that support to "creat[e] an appearance of bias mandating disqualification" of the Defendant Commissioners from the Rate Case. *Id.* at ¶¶ 170, 171. Asserting that "[i]t is not appropriate as a matter of due process law for a commissioner whose potential bias and disqualification are under question in a quasi-judicial adjudicatory proceeding to be allowed to sit in judgment and decide whether further investigation should be allowed into...whether...sufficient basis exists to force his or her disqualification," Commissioner Burns requests "a judicial ruling

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on whether” his “constitutional powers and duties” as a Commission member include the “right to have [an] investigation into the disqualification issues initiated and completed,” and to have “the disqualification issues fully aired and decided without interference or obstruction or even participation by” the Defendant Commissioners. *Id.* at ¶¶ 174, 180.

In support of their request that the SAC be dismissed, the Defendants assert, *inter alia*, that Commissioner Burns is not entitled to the relief he requests because no constitutional or statutory provision, nor any rule of the Commission, entitles him to unilaterally initiate and maintain an investigation into the potential bias of, or possible grounds for the disqualification of, his fellow Commission members. *See, e.g.*, Commission Defendants’ Motion at pp. 5, 7 (“Neither the Legislature by statute, nor the Commission by procedural rule, has provided any device for the disqualification of a commissioner,” or any mechanism for Commissioner Burns to institute an investigation of or otherwise seek “to disqualify a fellow commissioner.”). Although Commissioner Burns cites generally to Article XV of the Arizona Constitution and Title 40 to the Arizona Revised Statutes as authority for his requested relief, *see* SAC at ¶ 177, he identifies no specific provisions of either that confer on him the right to unilaterally initiate and pursue the investigation he seeks, and the Court is aware of none. On the contrary, A.R.S. § 40-102(C) makes clear that an investigation must be authorized by the Commission as a whole, not merely by a single Commission member.

As the source of his purported entitlement to investigate his fellow Commission members, Commissioner Burns also cites “the due process guarantees” of the Fifth and Fourteenth Amendments to the United States Constitution and Article II, § 4 of the Arizona Constitution. SAC at ¶ 177. As the Companies correctly assert, however, “no free-floating due process right” entitles Commissioner Burns to pursue such an investigation. Companies’ Reply at p. 1. *See also Singleton v. Cecil*, 155 F.3d 983, 987 (8th Cir. 1998) (“[T]he Fourteenth Amendment does not create any generalized free-floating right against depriving someone of ‘due process’ in the abstract.”).

In response, Commissioner Burns contends that his purported “rights as a statewide elected official” to “see that serious questions about his fellow Commissioners’ potential disqualification for risk of bias [are] investigated and addressed,” Response to Companies’ Motion at pp. 1-2, stem from due process principles guaranteeing the right to “adjudicatory decision-making” that is “free of risks of bias.” *Id.* at p. 7.

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The unbiased adjudication of disputes is, of course, one component of due process. *See, e.g., Pavlik v. Chinle Unified Sch. Dist. No. 24*, 195 Ariz. 148, 152, 985 P.2d 633, 637 (App. 1999) (“The right to a fair trial in a fair tribunal is, of course, intrinsic to due process.”) (citation and internal quotations omitted). As the Defendants correctly point out, however, such due process rights belong to the litigants to the dispute, not to members of the body adjudicating the dispute. *See Pavlik*, 195 Ariz. at 152, 985 P.2d at 637 (“Every person is entitled to receive a fair administrative hearing and have a decision rendered by an impartial decision-maker.”). *See also Matter of Zang*, 154 Ariz. 134, 136, 741 P.2d 267, 269 (1987) (“Under the due process clause of the fourteenth amendment, respondents were entitled to a fair hearing before an impartial tribunal.”). Case law has long held that parties to a case cannot assert the due process rights of non-parties. *See, e.g., Kerr v. Killian*, 197 Ariz. 213, 217, 3 P.3d 1133, 1137 (App. 2000) (holding that the Department of Revenue lacked standing to challenge the disputed award on the basis “that the procedure used to arrive at the award violated” the due process rights of non-party taxpayers; “The Department lacks standing to” challenge the award on this basis “because the right to due process asserted does not belong to the Department.”); *Bennett v. Napolitano*, 206 Ariz. 520, 526, 81 P.3d 311, 317 (2003) (holding that four legislators lacked standing to challenge governor’s exercise of line-item veto because they “have shown no injury to a private right or to themselves personally” and they “have not been authorized by their respective chambers” to assert claims on behalf of the Legislature as a whole). The Court therefore agrees with the Defendants that Commissioner Burns lacks standing to assert due process rights of the parties to the Rate Case to an unbiased adjudication. *See Commission Defendants’ Motion* at p. 10 (“A due-process right belongs to the parties, not to the Commissioners, and [Commissioner] Burns has no standing to advance a disqualification motion on behalf of parties who never wanted it or sought it.”); *Companies Motion* at p. 10 (“[N]one of the actual parties to the [R]ate [C]ase have asserted any due process arguments[.] No party adopted [Commissioner Burns’s] arguments regarding bias, made any request that a commissioner recuse himself, or even requested the information that he sought. Commissioner Burns...lacks third-party standing to enforce the due process rights of others.”).

Commissioner Burns insists that he is not seeking to assert the due process rights of others, but instead to assert claims based on “his own constitutional rights and duties as a statewide elected official” to “ensure that his agency’s adjudicatory decision-making is free of risks of bias by the Commissioners that would violate established due process requirements...” *Response to Companies’ Motion* at p. 7. As noted above, Commissioner Burns has cited no specific provision of constitution, statute, or Commission rule that entitles him to initiate or

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pursue an investigation of his fellow Commissioners. Commissioner Burns's commendable concern for the due process rights of litigants to the Rate Case does not confer standing on him to assert a due process claim on their behalf, as the Court of Appeals recognized when it rejected a similar argument in *Kerr*, holding that "[t]he Department's attempt to assume a protective role as to non-party taxpayers" did not confer standing on the Department to assert the due process rights of those non-parties. *Kerr*, 197 Ariz. at 217, 3 P.3d at 1137.

The Court finds that Commissioner Burns lacks standing to assert the due process rights of litigants to the Rate Case to an unbiased adjudicative process. And while the "standing" requirement may be waived in "rare case[s]," *Bennett*, 206 Ariz. at 527, 81 P.3d at 318, the Court finds that this is not such a case. Among other things, as the Arizona Supreme Court has held, waiver of the "standing" requirement is particularly inappropriate in cases, such as this one, that are essentially "political dispute[s]," disputes in which courts are reluctant to involve themselves in any event. *Id.* (declining to waive "standing" requirement in part based on the court's "reluctan[ce] to become the referee of a political dispute"). In the absence of any other constitutional or statutory authority for his requested relief - - and Commissioner Burns has identified none - - the Court agrees with the Defendants that Commissioner Burns is not entitled to a declaration that he has a due process right to initiate and pursue an investigation into potential grounds for the disqualification of his fellow Commission members from participation in the Rate Case.

In support of his requested relief, Commissioner Burns relies on *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S.Ct. 2252 (2009). In *Caperton*, the United States Supreme Court held that due process was violated when Justice Benjamin, a newly elected justice of the West Virginia Supreme Court, refused to recuse himself in an appeal filed by a coal company whose chairman was, by far, the single largest contributor to Justice Benjamin's election campaign, and then proceeded to cast the deciding vote to overturn a \$50 million damages award entered against the coal company. 556 U.S. at 886-87, 129 S.Ct. at 2265. Although Commissioner Burns asserts that *Caperton* stands for the proposition "that due process demands that agency decision-makers be free of the risk of potential bias toward a party in any quasi-adjudicatory proceeding," Response to Companies' Motion at p. 8, the holding of *Caperton* is not nearly this broad. *Caperton* addressed only the issue of *judicial* disqualification, and only "in the context of judicial elections." 556 U.S. at 881-82, 129 S.Ct. at 2262. Moreover, as the *Caperton* court emphasized, its holding that Justice Benjamin's refusal to recuse himself violated the appellee's due process rights was based on the "extraordinary situation" presented by the facts of that case,

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“facts” that were, the *Caperton* court emphasized, “extreme by any measure.” 556 U.S. at 887, 129 S.Ct. at 2265.

Since *Caperton* was decided, numerous courts have recognized the limited scope of its holding. *See, e.g., People v. Freeman*, 222 P.3d 177, 179, 185 (Cal. 2010) (finding no due process violation when criminal defendant was tried before a judge who had previously recused himself, the Court held that the case before it did not present the “extreme facts” that “rise to a due process violation under the standard set forth by *Caperton*”). *See also State v. Allen*, 778 N.W.2d 863, 929 (Wis. 2010) (Ziegler, J., concurring) (“To be clear, nowhere in *Caperton* does the majority state that anything less than this ‘perfect storm,’ created by those extreme and extraordinary facts coupled with the timing of the election and the parties' pending case, would be sufficient to constitute a due process violation.”). While the precise extent of *Caperton*'s reach are not entirely clear - - the dissent in *Caperton* queried whether the holding in that case “is somehow limited to financial support in judicial elections, or applies to judicial recusal questions more generally,” *Caperton*, 556 U.S. at 893, 129 S.Ct. at 2269 (Roberts, C.J., dissenting) - - the Court is aware of no authority for the proposition that *Caperton* applies outside the context of the disqualification of judicial officers. *See, e.g., U.S. Fidelity Ins. & Guar. Co. v. Mich. Catastrophic Claims Ass'n*, 773 N.W.2d 243, 246 (Mich. 2009) (Corrigan, J.) (“*Caperton* addressed the disqualification of a judge when a party alleges that the judge's interest in a case requires recusal under the Due Process Clause of the federal constitution.”). *Cf. Alabama Dep't of Pub. Safety v. Prince*, 34 So.3d 700, 706 (Ala.App. 2009) (“It is unclear whether the ‘probability of bias’ standard discussed in *Caperton* would apply to ALJs presiding over state administrative proceedings...”).

Even if *Caperton* were extended outside the judicial context, the *Caperton* court made clear that its holding was founded on its concern for “protect[ing] *the parties*' basic right to a fair trial in a fair tribunal.” 556 U.S. at 887, 129 S.Ct. at 2265-66 (emphasis added). Nothing in *Caperton* suggested that Justice Benjamin's refusal to recuse himself in any way implicated the due process rights of his fellow *West Virginia Supreme Court justices*. The Court therefore finds that *Caperton* provides no support for Commissioner Burns's request for relief with regard to his efforts to investigate possible grounds for disqualification of fellow members of the Commission. *See Reichert v. State ex rel. McCulloch*, 278 P.3d 455, 463-65 (Mont. 2012) (state legislators who intervened in appeal of injunction barring placement on ballot of referendum modifying judicial election laws asserted that *Caperton* required “all non-retiring [supreme court] justices” to recuse themselves because they “have an interest in the outcome of [the]

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case”; rejecting legislators’ argument, the Court stated that, while *Caperton* “protect[s] the parties’ basic right to a fair trial in a fair tribunal,” the “Legislators are not ‘parties’ to this action,” and the parties did not “express[] fairness concerns here”) (internal quotations omitted).

In support of his requested relief, Commissioner Burns also cites *Horne v. Polk*, 242 Ariz. 226, 394 P.3d 651 (2017); *Rouse v. Scottsdale Unified Sch. Dist. No. 48*, 156 Ariz. 369, 752 P.2d 22 (App. 1987); and *Western Gillette, Inc. v. Ariz. Corp. Comm’n*, 121 Ariz. 541, 592 P.2d 375 (App. 1979). See Response to Commission Defendants’ Motion at p. 5; Response to Companies’ Motion at p. 8. In recognizing that an adjudicator’s bias or appearance of bias may violate due process, the courts in those cases made clear that the due process rights at issue are those of the litigants. See *Horne*, 242 Ariz. at 230, 394 P.3d at 655 (“[W]here an agency head makes an initial determination of a legal violation, participates materially in prosecuting the case, and makes the final agency decision, the combination of functions in a single official violates an individual’s Fourteenth Amendment due process right to a neutral adjudication in appearance and reality.”) (emphasis added); *Rouse*, 156 Ariz. at 271, 752 P.2d at 24 (“[T]here are certain ‘fundamental’ procedural requisites which a person is entitled to receive at an administrative hearing which is quasi-judicial in nature. One is a decision by an impartial decision maker.”); *Western Gillette*, 121 Ariz. at 543, 592 P.2d at 377 (holding that Arizona’s Administrative Procedure Act “make[s] clear that in contested cases, all parties should have the opportunity to present evidence and argument on all issues involved, and that findings must be based exclusively on the evidence and on matters officially noticed.”). None of those cases support Commissioner Burns’s contention that he enjoys a due process right to pursue an investigation into the potential bias of his fellow Commissioner members or whether grounds exist to disqualify them from participating in the Rate Case.

Although the parties raise other arguments as well, the Court finds it unnecessary to address them. For the foregoing reasons, the Court finds that Commissioner Burns lacks standing to assert the due process rights of litigants to an unbiased adjudicative process, and that no other constitutional or statutory authority entitles him to initiate and maintain an investigation into potential grounds for disqualification of his fellow Commission members. The Court therefore holds that Commissioner Burns has failed to state a claim for declaratory relief. Accordingly,

IT IS ORDERED granting the Motion to Dismiss filed by Defendants Arizona Corporation Commission, Commissioner Tom Forese, Commissioner Doug Little, Commissioner Andy Tobin, and Commissioner Boyd Dunn.

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IT IS FURTHER ORDERED granting the Motion to Dismiss Second Amended Complaint filed by Defendants Arizona Public Service Company, Pinnacle West Capital Corporation and Donald Brandt.

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15 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

16 **IN AND FOR THE COUNTY OF MARICOPA**

17 COMMISSIONER ROBERT BURNS, a
18 member of the Arizona Corporation
19 Commission, in his official capacity,

20 Plaintiff,

21 v.

22 ARIZONA PUBLIC SERVICE COMPANY,
23 an Arizona public service corporation, and
24 PINNACLE WEST CAPITAL
25 CORPORATION, an Arizona corporation, and
26 DONALD BRANDT, an individual, the
27 ARIZONA CORPORATION COMMISSION,
28 and TOM FORESE, DOUG LITTLE, ANDY
TOBIN and BOYD DUNN, in their official
capacities as members of the Arizona
Corporation Commission,

Defendants.

Case No. CV2017-001831

**FIRST AMENDED COMPLAINT
(Declaratory Judgment)**

(Assigned to the Honorable Daniel Kiley)

Arizona Corporation Commissioner Robert Burns files this First Amended Complaint in his official capacity as an elected official of the State of Arizona seeking a final judgment in his favor and against the Defendants declaring Commissioner Burns' rights and authority as an elected Commissioner of the Arizona Corporation Commission (the "ACC") to enforce and compel full compliance with investigatory subpoenas he issued to Defendants Arizona Public

1 decisions approving unreasonable rate burdens for APS customers and/or disregarding the
2 financial and other interests of such consumers.

3 51. Without open and detailed disclosure concerning the contributions and payments
4 made by or for the benefit or financial well-being of APS, including all those contributions
5 ostensibly made through Pinnacle West, and without a detailed exposure of the process by which
6 such contributions and payments are made, or by which Pinnacle West and APS may threaten
7 to end such support, it is impossible for the elected Commissioners and their staff to assess
8 whether APS and Pinnacle West are properly categorizing such payments or contributions as
9 non-APS monies. It is also impossible for the elected Commissioners and their staff to assess
10 if, and precisely how, such payments or contributions contribute to or impact service rates passed
11 on to APS customers, and whether adjustments to APS rates, or further rules or regulations in
12 connection with such payments or contributions, could result in avoiding improper or
13 unreasonable rate burdens being placed on APS customers, reduction of consumer electric
14 service rates, a reduction in economic pressures for APS and Pinnacle West to try and increase
15 rates, or other positive economic outcomes for APS customers.

16 52. For instance, given the pressures on APS and Pinnacle West executives to increase
17 both their own personal income, as well as income per share and other economic performance
18 aspects of APS and Pinnacle West, it is possible that the reduction of millions of dollars in
19 ostensible charitable contributions, marketing costs, lobbying costs, campaign support or other
20 political activity costs, even on the Pinnacle West budget, would encourage or allow APS and
21 Pinnacle West executives to develop greater efficiencies in delivery of service and reduce costs
22 to customers without sacrificing their desired financial performance. Without full and detailed
23 disclosure regarding the types of financial contributions and payments referenced above, the
24 Commissioners and their staff cannot identify and work to implement such potentially critical
25 cost saving regulations benefitting Arizona consumers.

26 53. Moreover, without full, timely and detailed disclosures by APS and Pinnacle West
27 of the types of contributions and payments referenced above, the Corporation Commission and
28 its individual Commissioners are robbed of their ability to inform Arizona consumers and

1 stakeholders who can in turn use such information to advocate for themselves with
2 Commissioners, Commission staff or even APS or Pinnacle West officials in an effort to reduce
3 overall costs to consumers. Thus, the refusal of APS and Pinnacle West to provide such full,
4 timely and detailed disclosures are negatively impacting Commissioner Burns' ability to inform
5 constituents in the manner to which they are entitled and to provide them the type of information
6 Arizona's constitutional framers expected could be made available to them to protect them
7 against undue corporate utility influence in the rate setting and utility delivery process, waste of
8 resources driving costs to consumers higher, and even forced political speech.

9 54. Given Pinnacle West's and APS's admissions that most all of Pinnacle West's
10 business revenue and income comes from fees collected by APS from its Arizona customers,
11 the amounts being used by Pinnacle West and/or APS to make political, charitable, lobbying,
12 marketing or other similar contributions or payments as outline above are initially generated as
13 fees from APS customers. These facts create a material risk that APS and Pinnacle West have
14 or will enlist the assistance or compliance by the Corporation Commission in compelled political
15 speech in violation of the federal and state constitutions.

16 55. If, for example, APS insists on particular expense calculations or income targets
17 as part of its rate applications knowing or desiring particular levels of revenues or income for
18 use in political, lobbying, campaign, charitable or marketing type activities as described above,
19 then the rates being charged to APS customers may be set, in part, based on the need to and plan
20 to fund particular political speech selected and targeted by the executives of APS and Pinnacle
21 West. These circumstances create a real and palpable risk that the Commissioners will,
22 knowingly or unknowingly, impose costs on customers that are intended to support the political
23 speech activities of APS and Pinnacle West, including speech that the customers may not agree
24 with. Such compelled speech could result in violations of the constitutional rights of Arizona
25 consumers whose rights the Commissioners are elected and sworn to protect.

26 56. The Commissioners are unable to assess the risks of such compelled political
27 speech without full, timely and detailed disclosures of what contributions and payments APS or
28 Pinnacle West make, how such contributions are planned, determined and made, and how those

1 contributions and payments impact the amounts sought by APS in ratemaking or rate adjustment
2 proceedings before the Corporation Commission.

3 57. Without such full, timely and detailed disclosures the Commissioner are also
4 unable to assess, evaluate, and structure rate making procedures, standards or rules that are
5 needed to eliminate the risk of compelled political speech for Arizona's utility consumers.

6 58. Without such full, timely and detailed disclosures to the Commissioners, the
7 Commissioners are unable to provide the type of detailed information needed by Arizona utility
8 consumers to enable such consumers to advocate for themselves, challenge circumstances that
9 threaten to violate their constitutional rights against compelled political speech, and promote the
10 adoption of appropriate procedures, standards or rules to prevent such violations of their rights.

11 59. The type of political spending implicated by the "dark money" advertising in the
12 2014 campaigns of Defendants Forese and Little, if linked to APS or Pinnacle West, may be
13 sufficient to require disqualification of those Defendants from voting on any further matters
14 impacting APS, including its pending Rate Case.

15 60. The political spending by the "dark money" groups in the 2014 election both for
16 Defendants Forese and Little and against their opponents would be unlawful if there existed any
17 type of coordination between the groups contributing the funds for such efforts and the
18 candidates or campaigns. Such unlawful conduct could serve as grounds for mandatory
19 disqualification of Defendants Forese and Little from any further involvement with or votes
20 upon matters involving APS, including its pending Rate Case.

21 61. The type of political spending supported by Pinnacle West in the 2016 campaigns
22 of Defendants Tobin and Dunn may be sufficient to require disqualification of those Defendants
23 from voting on any further matters impacting APS, including its pending Rate Case.

24 62. The type of political spending supported by Pinnacle West in support of the 2016
25 election campaigns of Defendants Tobin and Dunn would be unlawful if there existed any type
26 of coordination between APS or Pinnacle West or their agents and the candidates or campaigns.
27 Such unlawful conduct could serve as grounds for mandatory disqualification of Defendants
28

1 Tobin and Dunn from any further involvement with or votes upon matters involving APS,
2 including its pending Rate Case.

3 63. The only way for Commissioner Burns, the other Commissioners, or the ACC
4 staff to assess whether there existed any unlawful or other cooperation or coordination between
5 APS, Pinnacle West, or their agents, consultants, proxies, donees or other representatives and
6 the Defendant Commissioners or their election campaigns in connection with any campaign-
7 related spending is to invoke the investigatory powers granted to the Commissioners by
8 Ariz.Const., art. XV, § 4 and A.R.S. § 40-241, or to question witnesses with relevant knowledge
9 in pending evidentiary proceedings before the ACC.

10 64. The campaign finance records kept by the Arizona Secretary of State for the 2016
11 ACC election campaigns of Commissioners Tobin and Dunn reflect that both campaigns
12 received contributions from James Norton. James Norton is an Arizona political consultant and
13 lobbyist who was recently indicted of federal crimes involving the bribery of another former
14 ACC Commissioner on behalf of the owner of a regulated utility company. Media reporting has
15 indicated that APS has been another recent client of Mr. Norton.

16 65. Without full disclosure and investigation of the full nature, extent and
17 circumstances surrounding any contributions by APS or Pinnacle West may have made to the
18 “dark money” campaign efforts for Defendants Forese and Little and against their opponents in
19 2014, Commissioner Burns and other interested persons are unable to assess and address the
20 disqualification issues involving Commissioners Forese and Little.

21 66. Without full disclosure and investigation of the full nature, extent and
22 circumstances surrounding any contributions by Pinnacle West supporting the 2016 campaign
23 efforts of Defendants Tobin and Dunn, Burns and other interested persons are unable to assess
24 and address the disqualification issues involving Commissioners Forese and Little.

25 **Commissioner Burns’ Authorities and Duties as a Commissioner**
26 **of the Arizona Corporation Commission**

27 67. The Arizona Corporation Commission is Arizona’s unique fourth branch of state
28 government, whose elected members are delegated and imbued with a unique combination of

1 of Arizona, including Ariz.Const., art. XV and A.R.S. § 40-241, to order the appearance and
2 take the testimony of officers of public service corporations, including APS, in relation to the
3 public service corporation's business and affairs.

4 131. Given the allegations set forth above, the inspections, testimony and investigations
5 Commissioner Burns is legally authorized to initiate and compel necessarily include obtaining
6 records, evidence and testimony related to the types of contributions and payments by APS and
7 Pinnacle West discussed above.

8 132. Commissioner Burns' rights and authorities as set forth in this Complaint are
9 individual rights and authorities and do not require the cooperation, acquiescence, compliance
10 or authorization of any other Commissioners or the Commission as a whole. The other
11 Commissioners have no legal authority to stop or limit the investigation, inspection of records
12 and taking of testimony initiated by Commissioner Burns on such topics.

13 **Commissioner Burns' Subpoenas to the APS Parties**

14 133. On August 25, 2016, Commissioner Burns issued two subpoenas in accordance
15 with his constitutional and statutory authorities. The first was to Defendant APS and Defendant
16 Brandt in his capacity as Chairman, President and Chief Executive Officer of APS and/or
17 Pinnacle West, and the second was to Pinnacle West and Defendant Brandt in his capacity as
18 Chairman, President and Chief Executive Officer of APS and/or Pinnacle West. A true and
19 correct copy of the subpoenas is attached to this Complaint as Exhibit 1.

20 134. The subpoenas sought production of documents, answers to written questions, and
21 to compel testimony by Defendant Brandt and others with relevant knowledge concerning the
22 subjects listed within the subpoenas.

23 135. Commissioner Burns originally filed the subpoenas in an administrative
24 ratemaking docket for APS at the Corporation Commission.

25 136. The subpoenas issued by Commissioner Burns to APS and Pinnacle West and Mr.
26 Brandt were and remain appropriate and lawful and authorized as part of the ratemaking process
27 pending before the Commission involving APS. Commissioner Burns was not required to obtain
28

1 information, records and testimony that relate to the ratemaking, corporate stability, corporate
2 wrongdoing, corporate overreaching, consumer interests, health and safety, compelled speech
3 and improper influence and disqualification issues over which the Commission is authorized
4 and responsible to regulate and for which each individual Commissioner is entitled to conduct
5 an investigation, including examinations of the books, records and agents of the regulated
6 monopoly, APS, and its affiliate, Pinnacle West.

7 202. Without the Court's confirmation that Commissioner Burns is fully authorized to
8 issue and demand full and timely compliance with the subpoenas by APS and Pinnacle West
9 and CEO Brandt, and that he is authorized to call and conduct the questioning of APS and
10 Pinnacle West witnesses he sought for the APS Rate Case evidentiary hearing, Commissioner
11 Burns' legal rights and authorities will be denied and the rights of Arizona citizens to the
12 operation of their Corporation Commission in accordance with its constitutional and statutory
13 powers shall be unlawfully impaired.

14 203. The respective rights of key elected state officials and of a regulated monopoly
15 and its affiliates and executives are therefore in dispute and need to be resolved.

16 204. As to questions involving his investigatory subpoenas, Commissioner Burns is
17 therefore entitled, including pursuant to the terms of the Arizona Uniform Declaratory
18 Judgments Act, A.R.S. § 12-1831, *et seq.*, to a full and final declaration of the following:

- 19 a. that he is fully authorized and entitled to demand from the Defendants to whom
20 the investigatory subpoenas are directed, individually and collectively, the full and
21 timely compliance with the subpoenas that are the subject of this action, and that
22 he is not required to obtain consent, approval, or authority from any of the other
23 Commissioners to enforce the subpoenas;
- 24 b. that the relevance standard the Defendants have asserted to claim that his
25 subpoenas are unenforceable for seeking irrelevant information is not the standard
26 applicable to ACC investigatory subpoenas under Arizona law;
- 27 c. that the appropriate standard for measuring what information may be sought
28 through an ACC investigatory subpoena is whether there could exist even a mere

1 suspicion that the information sought will adequately develop a factual basis
2 needed to determine if particular activities come within the ACC's jurisdiction or
3 not;

4 d. that the information sought by Commissioner Burns' investigatory subpoenas that
5 the Defendants have declared irrelevant actually meets both the true standard for
6 what sort of information may be sought by an ACC investigatory subpoena, but
7 also meets even higher standards for relevance, including the standard applied by
8 Rule 401, Ariz.R.Evid., concerning legitimate areas of ACC inquiry;

9 e. that discovery objections that a request for information is overly broad, unduly
10 burdensome, or not reasonably calculated to lead to the discovery of admissible
11 evidence are not applicable when considering the enforceability of an ACC
12 investigatory subpoena; and

13 f. that even if such discovery objections were potentially applicable, the requests of
14 the investigatory subpoenas that the Commissioner Defendants contend are overly
15 broad, unduly burdensome or not reasonably calculated to lead to the discovery of
16 admissible evidence are matters into which Commissioner Burns is entitled to
17 inquire, seek information directly relevant to legitimate areas of ACC inquiry, and
18 involve the type of scrutiny of records and information that a regulated monopoly
19 utility and its parent are expected to accept in return for the benefit of monopoly
20 status conferred by the state.

21 205. As to his demands to call and question APS and Pinnacle West witnesses,
22 Commissioner Burns is entitled, including pursuant to the terms of the Arizona Uniform
23 Declaratory Judgments Act, A.R.S. § 12-1831, *et seq.*, to a full and final declaration of the
24 following:

25 a. that he is fully authorized and entitled to demand and conduct the witness
26 questioning he had proposed to the ALJ in the APS Rate Case prior to any decision
27 being made in that case, and that he is not required to obtain consent, approval, or
28 authority from any of the other Commissioners to conduct such questioning;

- 1 b. that the relevance standard the Defendants have asserted to claim that
2 Commissioner Burns' proposed witness questioning is unauthorized for seeking
3 irrelevant information is not the standard applicable under Arizona law to such
4 questioning by a sitting commissioner during a rate case evidentiary hearing;
- 5 c. that the appropriate standard for measuring what information may be sought
6 through Commissioner witness questioning at an evidentiary hearing in a rate case
7 is whether there could exist even a mere suspicion that the information sought will
8 adequately develop a factual basis needed to determine if particular activities
9 come within the ACC's jurisdiction or not;
- 10 d. that the information sought by Commissioner Burns' proposed witness
11 questioning that the Defendants have declared irrelevant actually meets both the
12 true standard for what sort of information may be sought in such questioning, but
13 also meets even higher standards for relevance, including the standard applied by
14 Rule 401, Ariz.R.Evid., concerning legitimate areas of ACC inquiry;
- 15 e. that discovery objections that a request for information is overly broad, unduly
16 burdensome, or not reasonably calculated to lead to the discovery of admissible
17 evidence are not applicable when considering the questioning proposed by a
18 sitting Commissioner for the witnesses from a regulated utility and its parent at
19 their rate case evidentiary hearing; and
- 20 f. that even if such discovery objections were potentially applicable, the proposed
21 questioning that the Commissioner Defendants contend is overly broad or not
22 reasonably calculated to lead to the discovery of admissible evidence are matters
23 into which Commissioner Burns is entitled to inquire, seek information directly
24 relevant to legitimate areas of ACC inquiry, and involve the type of scrutiny of
25 records and information that a regulated monopoly utility and its parent are
26 expected to accept in return for the benefit of monopoly status conferred by the
27 state.
- 28

1 DATED this 4th day of August, 2017.

2 BASKIN RICHARDS PLC

3
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19 SUPERIOR COURT OF ARIZONA

20 MARICOPA COUNTY

21 ROBERT BURNS, a member of the Arizona
22 Corporation Commission, in his official capacity,

23 Plaintiff,

24 vs.

25 ARIZONA PUBLIC SERVICE COMPANY, an
26 Arizona public service corporation, and
27 PINNACLE WEST CAPITAL
28 CORPORATION, an Arizona corporation, and
DONALD BRANDT, an individual, and the
ARIZONA CORPORATION COMMISSION,
and TOM FORESE, DOUG LITTLE, ANDY
TOBIN, and BOYD DUNN, in their official
capacities as members of the Arizona
Corporation Commission,

Defendants.

No. CV2017-001831

**DEFENDANTS ARIZONA
PUBLIC SERVICE
COMPANY, PINNACLE
WEST CAPITAL
CORPORATION AND
DONALD BRANDT'S
MOTION TO DISMISS
AMENDED COMPLAINT**

(Assigned to the Hon. Daniel
Kiley)

Oral Argument Requested

1 The Arizona Corporation Commission (“Commission”) reasonably and correctly
2 refused to compel Arizona Public Service Company (“APS”) and its unregulated parent
3 company, Pinnacle West Capital Corporation (“Pinnacle West”), and their CEO Donald
4 Brandt (collectively, “the Companies”), to comply with subpoenas and a demand for
5 testimony made by Plaintiff Commissioner Robert Burns in APS’s rate case. The
6 Commission determined that the subpoenas and demand for testimony sought irrelevant
7 information and were unduly burdensome. Ex. 1 (Commission Order denying
8 Commissioner Burns’s motions) at 19.¹ Commissioner Burns, however, claims a
9 personal right, under Article 15, Section 4 of the Arizona Constitution, to override the
10 Commission’s determination. He insists that the Constitution makes each commissioner
11 a law unto himself, at least with regard to extracting, and then making public, information
12 from public companies doing business in Arizona. Commissioner Burns’s claimed power
13 would have sweeping consequences: a single commissioner could demand any
14 information, including information relating to a company’s First Amendment-protected
15 activities, and depose the CEO of any public company doing business in Arizona,
16 regardless of the relevance to any Commission proceeding. The Constitution does not
17 vest a single commissioner with such extravagant authority. Instead, the Commission has
18 the final word on whether to enforce subpoenas issued in Commission proceedings. The
19 Amended Complaint should be dismissed.

20 BACKGROUND

21 The subpoenas and this litigation are part of Commissioner Burns’s long-running
22 effort to extract information concerning APS and Pinnacle West’s constitutionally
23 protected political speech. During the 2014 election cycle, certain 501(c)(4) social
24 welfare organizations engaged in political speech concerning Commission elections. Am.
25

26 ¹ The Commission’s Order is discussed extensively in the Amended Complaint and thus is
27 properly before the Court on a motion to dismiss, and moreover, the Court may take judicial
28 notice of a Commission order. *Strategic Dev. & Const., Inc. v. 7th & Roosevelt Partners, LLC*,
224 Ariz. 60, 64 ¶¶ 12-14 (App. 2010).

1 Compl. ¶ 29. Those organizations had no legal obligation to reveal their donors, and did
2 not. Nevertheless, speculating that the Companies may have donated to those
3 organizations, *see* Am. Compl. ¶ 30, Commissioner Burns issued subpoenas demanding
4 disclosure of information including any political, lobbying, charitable, and advertising
5 expenditures made by APS or Pinnacle West for the years 2011-2016. He also demanded
6 the deposition of the APS and Pinnacle West CEO and sought to compel testimony from
7 a number of other employees of the Companies. Commissioner Burns stated his intent to
8 make public all information he received. *See* Am. Compl. Ex 1 at 1.

9 APS produced all responsive non-confidential documents in its possession and
10 agreed to produce all responsive confidential documents upon entry of a confidentiality
11 agreement. It also offered to make available for testimony an APS employee
12 knowledgeable about the topics identified in the subpoenas. Commissioner Burns refused
13 to enter a confidentiality agreement and insisted on deposing the CEO.

14 Commissioner Burns eventually sued, asking this Court to enforce his subpoenas.
15 The Companies moved to dismiss, arguing that Commissioner Burns was first required
16 to pursue administrative remedies before the Commission. The Court agreed and stayed
17 the case to allow Commissioner Burns to do so. 5/26/2017 Order, at 2.

18 In a 4-1 vote at a public meeting, with Commissioner Burns casting the sole
19 dissenting vote, the Commission declined to compel compliance. Am. Compl. ¶¶ 173-
20 76. By the same margin, the Commission denied Commissioner Burns's separate request
21 to question APS witnesses about the subjects identified in the subpoena. *Id.* The
22 Commission explained that the information sought was irrelevant to the rate case. *See*
23 Ex. 1. That is because, as the Commission found based on record evidence, APS did not
24 seek to recover from its customers any of the categories of expenses identified by the
25 subpoenas. APS's proposed rates are calculated based on its operating expenses from the
26 year 2015 only (known as the "test year"), and those operating expenses *excluded*
27 "charitable, political," and "lobbying expenditures," as well as any "marketing or
28

1 DATED this 6th day of September, 2017.

2 OSBORN MALEDON, P.A.

3
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24
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27
28

EXHIBIT 1

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

Arizona Corporation Commission

DOCKETED

3 TOM FORESE – Chairman
4 BOB BURNS
4 DOUG LITTLE
5 ANDY TOBIN
5 BOYD W. DUNN

JUN 27 2017

DOCKETED BY
GB

6
7 IN THE MATTER OF THE APPLICATION OF
8 ARIZONA PUBLIC SERVICE COMPANY FOR A
9 HEARING TO DETERMINE THE FAIR VALUE OF
10 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

DECISION NO. 76161

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

DOCKET NO. E-01345A-16-0123

INTERLOCUTORY ORDER
(Discovery Motions)

13
14 Special Open Meeting
14 June 20, 2017
15 Phoenix, Arizona

16 **BY THE COMMISSION:**

17 This issue concerns several pending motions offered by Commissioner Robert Burns
18 (“Commissioner Burns”) in the above-captioned Arizona Public Service Company’s (“APS”) application to determine the fair value of the utility property of the Company for ratemaking
19 purposes, to fix a just and reasonable rate of return thereon, and to approve rate schedules designed to
20 develop such return filed on June 1, 2016, with the Arizona Corporation Commission
21 (“Commission”), and consolidated with Docket No. E-01345A-16-0123 on August 1, 2016. These
22 motions (collectively, the “Motions”) include: (I) Commissioner Burns’ Motion for Determination of
23 Disqualification and for Stay of Proceedings Pending Full Investigation (April 27, 2017) (“Motion
24 for Disqualification”), (II) Emergency Motion of Commissioner Robert Burns to Compel Compliance
25 with Investigatory Subpoenas (June 2, 2017) (“Motion to Compel”), (III) Emergency Motion of
26 Commissioner Robert Burns for Relief (1) Confirming That the Administrative Law Judge Will
27
28

1 Facilitate Calling and Questioning of Hearing Witnesses; and (2) Approval of His Counsel
 2 Participating in Questioning (April 26, 2017) (“Motion to Question and Admit Counsel to
 3 Question”), and (IV) Emergency Renewed Motion of Commissioner Robert Burns for Relief Staying
 4 These Rate-Making Proceedings (June 2, 2017) (“Motion to Stay”).

5 Parties to this matter are APS, the Commission's Utilities Division (“Staff”), Richard Gayer,
 6 Patricia Ferré, Warren Woodward, IO Data Centers, LLC (“IO”), Freeport Minerals Corporation
 7 (Freeport”), Arizonans for Electric Choice and Competition (“AECC”), Sun City Home Owners
 8 Association (“Sun City I-IOA”), Western Resource Advocates (“WRA”), Arizona Investment
 9 Council (“AIC”); Arizona Utility Ratepayer Alliance (“AURA”); Property Owners and Residents
 10 Association of Sun City West (“PORA”), Arizona Solar Energy Industries Association (“AriSEIA”),
 11 Arizona School Boards Association (“ASBA”) and Arizona Association of School Business Officials
 12 (“AASBO”) (collectively “ASBA/AASBO”); Cynthia Zwick, Arizona Community Action
 13 Association (“ACAA”); Southwest Energy Efficiency Project (“SWEEP”); the Residential Utility
 14 Consumer Office (“RUCO”), Vote Solar; Electrical District Number Eight and McMullen Valley
 15 Water Conservation & Drainage District (collectively, “ED8/McMullen”), The Kroger Co.
 16 (“Kroger”), Tucson Electric Power Company (“TEP”); Pima County; Solar Energy Industries
 17 Association (“SEIA”), the Energy Freedom Coalition of America (“EFCA”), Wal-Mart Stores, Inc.
 18 and Sam's West, Inc. (collectively, “Walmart”); Local Unions 387 and 769 of the International
 19 Brotherhood of Electrical Workers, AFL-CIO (collectively, “the IBEW Locals”); Calcine Energy
 20 Solutions LLC (“Calcine Solutions”)(formerly Noble Energy Solutions, LLC), the Arizona
 21 Competitive Power Alliance (“the Alliance”), Electrical District Number Six, Pinal County, Arizona
 22 (“ED 6”), Electrical District Number Seven of the County of Maricopa, State of Arizona (“ED7”),
 23 Aguila Irrigation District (“AID”), Tonopah Initiation District (“TID”), Harquadijala Valley Power
 24 District (“I-IVPD”), and Maricopa County Municipal Water Conservation District Number One
 25 (“MWD”) (collectively, “Districts”), the Federal Executive Agencies (“FEA”), Constellation New
 26 Energy, Inc. (“CNE”), Direct Energy, Inc. (“Direct Energy”), AARP, the City of Sedona (“Sedona”);
 27 Arizona Solar Deployment Alliance (“ASDA”); the City of Coolidge (“Coolidge”), REP America

28

1 d/b/a ConservAmerica (“ConservAmerica”), and Granite Creek Power & Gas and Granite Creek
2 Farms LLC (collectively, “Granite Creek”).

3 **DISCUSSION**

4 **I. Background**

5 The Motions are the most recent development in a longstanding discovery dispute between
6 APS and Commissioner Burns. APS is a public service corporation principally engaged in furnishing
7 electricity in the state of Arizona. APS is the largest subsidiary of Pinnacle West Capital Corporation
8 and the largest electricity provider in Arizona serving more than 1.2 million customers in 11 of
9 Arizona's 15 counties. APS also generates, sells, and delivers electricity to wholesale customers in
10 the western United States. Commissioner Burns was first elected to the Arizona Corporation
11 Commission in 2012 and reelected to a second term in 2016. Commissioner Burns is one of five
12 statewide elected officials serving on the Commission. Staff and intervenors did not participate in
13 briefing the Motions.

14 **A. The Origins of Commissioner Burns’ Discovery Dispute with APS**

15 The conflict between Commissioner Burns and APS can be traced back to a 2015 generic
16 docket created by Commissioners Burns and Susan Bitter Smith¹ (“Commissioner Bitter Smith”) to
17 explore the campaign contribution practices of public service corporations in response to perceived
18 public “suspicion and mistrust” of the Commission.² Initially, these Commissioners asked public
19 service corporations and unregulated entities who appear before the Commission to voluntarily
20 refrain from directing independent expenditures at candidates for the Commission.³ Over the years,
21 Commissioner Burns has broadened the scope of this initial request and pursued the information from
22 APS through a variety of procedural avenues including generic dockets, APS’s Commission cases,
23 and civil proceedings. His most recent demand asks APS to produce information detailing its political
24 spending, campaign contributions, lobbying expenses, charitable contributions, marketing expenses,

25 _____
26 ¹ Susan Bitter Smith was Chair of the Commission at the time the above referenced docket was opened. For the
27 purposes of this Decision, and in the interest of clarity and continuity, only the current Chairman, Tom Forese, will be
28 identified as Chairman of the Commission. Former Chairpersons are identified as Commissioners.

² See Correspondence from Commissioner Burns to Outside Parties, Docket No. AU-00000A-15-0309 (Nov. 30, 2015).

³ *Id.*

1 and sponsorship costs for the years 2011 through 2016. Commissioner Burns insists this information
 2 is vital to resolving the APS rate case. The Motions are his latest effort to acquire the information
 3 from APS.

4 **B. Commissioner Burns' Initial Attempts to Collect Information from APS**

5 In response to Commissioners Burns and Bitter Smith's, APS filed a letter in the new generic
 6 docket objecting to the voluntary request as a violation of the Company's First Amendment rights. In
 7 its objection, Donald Brandt, CEO for Pinnacle West, ("Mr. Brandt") stated that "APS does not
 8 recover from customers the cost of any political contributions."⁴ Commissioner Burns replied to APS
 9 and demanded a "full report[] of any campaign contributions and indirect contributions to third-party
 10 organizations" made during the 2014 election cycle.⁵

11 Commissioners Burns and Bitter Smith were not the only voices heard on the issue. Chairman
 12 Tom Forese ("Chairman Forese") noted that any request to refrain from political contributions would
 13 "have severe implications to civil liberties."⁶ Commissioner Doug Little ("Commissioner Little")
 14 suggested that attempts to subpoena campaign finance records would have "constitutional and
 15 practical problems" and focusing on APS, while excluding other similarly situated entities, is
 16 "inherently unfair and would lead to an incomplete picture of what actually was going on in the 2014
 17 elections."⁷

18 Since 2015, Commissioner Burns has responded to APS's refusal to produce the information
 19 with increasing severity. In January 2016, Commissioner Burns decided "to broaden [his] inquiry to
 20 include funds expended on all political contributions, lobbying, and charitable contributions, *i.e.*, all
 21 donations made — either directly or indirectly — by APS or under APS's brand name for any
 22 purpose."⁸ At the April 2016 Open Meeting, Commissioner Burns stated "I am voting no on this item
 23 and will not support any further action items requested by APS with the exception of an item that
 24

25 ⁴ Mr. Brandt's Letters to Commissioner Burns, Docket No. AU-00000A-15-0309 (Oct. 23 and Dec. 30, 2015).

26 ⁵ Correspondence from Commissioner Burns to Outside Parties, Docket No. AU-00000A-15-0309 (Nov. 30, 2015).

27 ⁶ Correspondence from Chairman Forese, Docket No. AU-00000A-15-0309 (Sept. 4, 2015).

28 ⁷ Correspondence from Commissioner Little, Docket No. AU-00000A-15-0309 (Sept. 11, 2015).

⁸ Correspondence from Commissioner Burns, Docket No. AU-00000A-15-0309 (Jan. 28, 2016).

1 might have health or safety components until the Commission order that rests at the APS corporate
2 office is complied with in its entirety.”⁹

3 By the summer of 2016, Commissioner Burns sought out yet another route to the information
4 when he asked the Commission to authorize the retention of an attorney to conduct an investigation
5 into political contributions in Commission elections. He continued to be concerned with the
6 reputation of the Commission and believed an investigation was a way “to at least have some
7 information available for people out there to understand what’s going on [with this regulated
8 entity].”¹⁰ Commissioner Burns wanted to investigate “potential undue influence on the
9 Commissioners . . . in the future.”¹¹ When pressed for proof that an investigation was warranted,
10 Commissioner Burns could not point to any evidence, but argued that “a lot of people” told him that
11 it was “not a wild goose chase and that I should proceed.”¹² He urged the Commission to “[g]ive
12 [him] this investigator and I might be able to find that evidence.”¹³

13 His proposal was met with resistance from the rest of the Commission. Several
14 Commissioners felt Commissioner Burns had “been accusing [Chairman Forese and Commissioner
15 Little] of being under the undue influence of [APS].” Commissioner Burns responded stating, “that is
16 an absolute lie.”¹⁴ and he “did not challenge [the Commissioners’] integrity. [He] challenge the
17 integrity of APS.” He went on to say “[w]hen I speak to a group, I tell them that [Chairman Forese
18 and Commissioner Little] were unaware of where that money came from until after the election, just
19 like everybody else, that you had no [] knowledge of where that money was coming from.”¹⁵

23 ⁹ Open Mtg. Tr. at 12-13 (Item No. 27), Docket No. E-01345A-11-0224 (Apr. 12-13, 2016), available in Motion to
Quash, or, in the Alternative, to Decline to Hear (“Motion to Quash”) at Ex. J (Sept. 9, 2016).

24 ¹⁰ Staff Mtg. Tr. at 13-14, 19 (Item No. 3), Docket No. AU-00000E-16-0270 (Aug. 10, 2016), available in Motion to
Quash at Ex. L (Sept. 9, 2016).

25 ¹¹ *Id.* at 32.

26 ¹² *Id.* at 30.

27 ¹³ *Id.*

28 ¹⁴ *Id.* at 17.

¹⁵ *Id.* at 18-19.

1 Commissioner Burns believed “APS is the one that’s put the cloud over this Commission and over
2 [Commissioners’] candidacy” and not Chairman Forese and Commissioner Little.¹⁶

3 The Commissioners also raised legal concerns with pursuing his investigation. Commissioner
4 Bob Stump (“Commissioner Stump”) noted that it is legal for a utility spend dark money to affect the
5 outcome of an election. He stated, “it may not be nice. But to the best of my understanding, only
6 changing the law will prevent it from happening again. And as far as I know, there’s absolutely
7 nothing that we, as Commissioners, can do to prevent anyone from spending money in races for the
8 Commission, short of changing the law.”¹⁷ Commissioner Stump also questioned the logic
9 underpinning the investigation stating, “let’s say we prove that the utility spent it, fine. There’s still
10 no nexus to that spending to the character of [Chairman Forese and Commissioner Little] or any other
11 [C]ommissioners.”¹⁸ Commissioner Little worried that the investigation could infringe on APS’s
12 protected speech rights.¹⁹ Chairman Forese was concerned that there was a political motivation
13 behind the investigation.²⁰ The Commission ultimately declined to fund the investigation.

14 **C. The Subpoenas and Prehearing Rate Case Proceedings**

15 On August 25, 2016, Commissioner Burns issued two subpoenas commanding APS, Pinnacle
16 West, and Mr. Brandt to appear and provide testimony on October 6, 2016. The subpoenas further
17 ordered APS, Pinnacle West, and Mr. Brandt to produce documents and information including each
18 charitable contribution, political contribution, lobbying expenditure, marketing/advertising
19 expenditure, 501(c)(3) and 501(c)(4) expenditure made by APS or Pinnacle West for the years 2011
20 through 2016.²¹

21 APS responded to the subpoenas by producing “all nonconfidential documents in its
22 possession that are responsive to the subpoena” and agreed to “produce any remaining responsive
23 documents in its possession that are confidential after an appropriate confidentiality agreement is

24 ¹⁶ *Id.* at 30.

25 ¹⁷ *Id.* at 11.

26 ¹⁸ *Id.* at 44-45.

27 ¹⁹ *Id.* at 34.

28 ²⁰ *Id.* at 17.

²¹ Correspondence from Commissioner Burns, Attachment A (Aug. 25, 2016).

1 signed.”²² APS also filed a Motion to Quash, or, in the Alternative, to Decline to Hear (Sept. 9, 2016)
 2 in the docket and a Complaint for Declaratory Judgment in the Maricopa County Superior Court Case
 3 No. CV2016-014895 (“*APS v. Commissioner Burns*”).²³ APS and Commissioner Burns engaged in
 4 several months of negotiations, but could not reach a settlement.

5 At the close of 2016, the Pinnacle West Board adopted a revised political participation policy
 6 that expanded voluntary disclosure of political expenditures on a going-forward basis. In addition, the
 7 policy also requires annual disclosure from Pinnacle West of its “political contributions, payments to
 8 trade associations that may have been used for lobbying-related or other political activities,
 9 contributions to 501(c)(3) or 501(c)(4) organizations that may have used some of the proceeds for
 10 lobbying-related or political activities permitted by law, and independent political expenditures made
 11 by Pinnacle West.”²⁴

12 By February 2017, Commissioner Burns claims he still had not received a satisfactory
 13 response from APS so he changed tactics once again and opened a new docket entitled ‘Development
 14 of New Transparency and Disclosure Rules related to Financial Expenditures by Regulated
 15 Monopolies, Intervenor and other Stakeholders’ (“T&D”).²⁵ According to Commissioner Burns, the
 16 T&D docket would study and rectify “problems regarding financial contributions from regulated
 17 monopolies or other stakeholders who may appear before the [Commission] that may directly or
 18 indirectly benefit an ACC candidate, the sitting commissioner or key ACC staff.”²⁶ The subpoenas
 19 were refiled in the T&D docket and Commissioner Burns stated this latest investigation would
 20 include obtaining responses from APS.²⁷ In response, APS noticed a voluntary dismissal of *APS v.*
 21 *Commissioner Burns* on March 8, 2017 and filed a Renewed Motion to Quash on March 10, 2017.

22
 23
 24 _____
 25 ²² APS Ltr. to Commissioner Burns (Sept. 9, 2016).

26 ²³ *Id.* In addition to the Complaint, APS also filed an Application for Preliminary Injunction and an Application for
 27 Order to Show Cause in Maricopa County Case No. CV2016-014895.

28 ²⁴ Renewed Motion to Quash at 12 (Mar. 10, 2017).

²⁵ Correspondence from Commissioner Burns at 1, Docket No. RU-00000A-17-0035 (Feb. 7, 2017).

²⁶ *Id.*

²⁷ *Id.*

1 **D. *Commissioner Burns v. APS, Maricopa County Case No. CV2017-001831***

2 On March 9, 2017, Commissioner Burns filed a Complaint seeking declaratory relief against
3 APS in Maricopa County Superior Court Case No. CV2017-001831 (“*Commissioner Burns v. APS*”).
4 APS filed a Motion to Dismiss on the grounds that the Commission had primary jurisdiction and
5 Commissioner Burns failed to exhaust his administrative remedies. In his response, Commissioner
6 Burns argues that his sweeping constitutional authority to investigate and concerns over
7 Commissioner disqualification ensure the Complaint survives. The APS reply suggests that broad
8 sweeping authority still must be seeking relevant information and the exhaustion of administrative
9 remedies warrant dismissal. The Superior Court judge entered his Ruling that ordered a stay of the
10 proceedings and found Commissioner Burns had not exhausted his administrative remedies and was
11 required to file a Motion to Compel with the Commission before returning to his court.²⁸

12 **II. Procedural History**

13 On June 1, 2016, APS filed application to determine the fair value of the utility property of
14 the Company for ratemaking purposes, to fix a just and reasonable rate of return thereon, and to
15 approve rate schedules designed to develop such return.

16 On June 14, 2016, APS filed a Notice of Errata.

17 On June 23, 2016, APS filed its Second Notice of Errata.

18 On July 1, 2016, Staff issued a Letter of Sufficiency pursuant to Arizona Administrative Code
19 (“A.A.C.”) R14-2-103, classifying APS as a Class A utility.

20 On July 22, 2016, a Rate Case Procedural Order was issued setting the procedural schedule
21 and associated procedural deadlines for this matter, granting several interventions, and granting
22 several requests to receive service by email.

23 On August 1, 2016, a Procedural Order was issued granting Staff’s request to consolidate the
24 above-captioned dockets,²⁹ correcting typographical errors in the July 22, 2016 Rate Case Procedural
25 Order, granting interventions, and granting requests to receive service by email.

26
27
28 ²⁸ Correspondence from Commissioner Dunn, Ex. A (May 30, 2017).

²⁹ Docket No. E-01345A-16-0123 was opened on April 11, 2016.

1 On August 9, 2016, a Procedural Order was issued granting several interventions and
2 approved a consent to email service.

3 On August 25, 2016, Correspondence from Commissioner Bob Burns was filed in the docket.
4 The correspondence included subpoenas commanding production of documents and testimony from
5 APS, Pinnacle West Capital Corporation (“Pinnacle West”), and Mr. Brandt.

6 On September 9, 2016, APS filed correspondence regarding subpoenas dated August 25,
7 2016.

8 On September 9, 2016, APS filed a Motion to Sever.

9 On September 9, 2016, APS filed a Motion to Quash, or in the Alternative, to Decline to
10 Hear.

11 On September 12, 2016, APS filed correspondence objecting to the subpoenas.

12 On September 13, 2016, Correspondence from Commissioner Bob Burns was filed requesting
13 counsel be provided to defend him in *APS v. Commissioner Burns*, Maricopa County Superior Court
14 Case No. CV2016-012895.

15 On September 15, 2016, the Commission authorized Commissioner Burns to retain counsel to
16 defend him in the suit brought by APS.

17 On October 3, 2016, EFCA filed a Notice of Deposition of Barbara D. Lockwood.

18 On October 6, 2016, APS filed a Motion for Procedural Conference and Interim Protective
19 Order.

20 On October 12, 2016, EFCA filed its Response to Motion for Procedural Conference and
21 Interim Protective Order.

22 On October 14, 2016, a Procedural Order was issued granting APS's request for an interim
23 protective order regarding EFCA's October 3, 2016 Notice of Deposition, and setting a procedural
24 conference to be held on October 20, 2016 for the purpose of discussing discovery issues, including
25 but not limited to the deposition of APS witness Barbara D. Lockwood.

26 On November 17, 2016, a Procedural Order was issued granting intervention to AARP,
27 Sedona, and ASDA, granting requests for Service by Email, and setting procedural deadlines
28 regarding the deposition of APS witness Barbara Lockwood.

1 On November 23, 2016, a Procedural Order was issued granting intervention to Sunrun,
2 Coolidge, ConservAmerica, and Granite Creek.

3 On November 30, 2016, EFCA filed a Notice of Deposition of Barbara D. Lockwood. The
4 Notice indicated that EFCA and APS settled upon the date and time of the deposition, which will take
5 place on December 15, 2016, at 9:00 a.m.

6 On December 5, 2016, EFCA filed its Emergency Motion to Compel Production of Barbara
7 Lockwood Calendar in Advance of Lockwood Deposition.

8 On December 5, 2016, EFCA filed its Emergency Motion for Expedited Consideration
9 Regarding Emergency Motion to Compel Production of Barbara Lockwood Calendar in Advance of
10 Lockwood Deposition.

11 On December 7, 2016, APS filed its Response in Opposition to EFCA's Motion to Compel.

12 On December 7, 2016, APS filed its Motion to Compel.

13 On December 12, 2016, EFCA filed its Reply in Support of Emergency Motion to Compel
14 Production of Barbara Lockwood Calendar in Advance of Lockwood Deposition.

15 On December 29, 2016, APS filed its Notice of Intent of Revenue Requirement Settlement
16 Discussions.

17 On December 30, 2016, EFCA filed its Sur-Response to APS's Motion to Compel, Motion to
18 Strike Reply Brief; and Notice of Lodging Sur-Response.

19 On January 4, 2017, APS filed its Response to EFCA's Motion to Strike Reply Brief and
20 Notice of Lodging Sur-Response.

21 On January 5, 2017, APS filed a Motion for Protective Order.

22 On January 6, 2017, EFCA filed its Response to APS's Motion for Protective Order.

23 On January 6, 2017, EFCA filed its Emergency Motion for Expedited Consideration
24 Regarding EFCA's Response to APS's Motion for Protective Order.

25 On January 6, 2017, Staff filed its Notice of Time and Location for Settlement Discussions.

26 On January 13, 2017, a Procedural Order was issued denying Vote Solar's Motion to Strike;
27 and Granting APS's Motion for Protective Order in regard to EFCA's Notices of Deposition of APS
28 witnesses Leland R. Snook and Charles A. Miessner.

1 On January 18, 2017, EFCA filed its Motion for Reconsideration of the Approval of APS's
2 Motion for Protective Order.

3 On February 22, 2017, Commissioner Burns filed correspondence notifying the parties that he
4 had opened a new docket entitled, "Development of New Transparency and Disclosure Rules related
5 to Financial Expenditures by Regulated Monopolies, Intervenors and other Stakeholders" (Docket
6 No. RU-0000A-17-0035).

7 On March 1, 2017, Staff filed its Notice of Filing Settlement Term Sheet.

8 On March 9, 2017, Commissioner Burns filed a Complaint against APS with Maricopa
9 County Superior Court, *Commissioner Burns v. APS*, Case No. CV2017-001831.

10 On March 27, 2017, a Settlement Agreement was filed, signed by APS, Freeport, AECC,
11 RUCO, Sun City HOA, WRA, Vote Solar, ASBA, AASBO, AIC, AURA, PORA, AriSEIA, ACAA,
12 Kroger, SEIA, Calpine Solutions, CNE, Direct Energy, EFCA, the Alliance, Walmart, the IBEW
13 Locals, FEA, Sedona, ASDA, Granite Creek, Coolidge, ConservAmerica, and Staff.

14 On March 30, 2017, APS filed a Motion to Dismiss Commissioner Burns' Complaint in
15 *Commissioner Burns v. APS*.

16 On April 14, 2017, a Protective Order was issued to govern the treatment of the Joint Solar
17 Cooperation Agreement between APS and the solar parties. In general, the JSCA provides that its
18 signatories will refrain from seeking to undermine the Settlement Agreement through ballot
19 initiatives, legislation or advocacy at the Commission.

20 On April 18, 2017, Commissioner Burns filed his Response to the Motion to Dismiss in
21 *Commissioner Burns v. APS*.

22 On April 20, 2017, a Prehearing Conference was held to schedule witnesses and plan trial.
23 Commissioner Burns attended and notified the parties that he "will be submitting additional questions
24 to be answered by APS and will be advising the administrative law judge that I believe APS will need
25 to produce witnesses not currently listed to answer my additional questions." He indicated he "will be
26 present on [April 27, 2017]" to ask questions of APS witnesses.³⁰

27

28 ³⁰ Prehearing Conf. Tr. vol. I, 17, 43-44, 48, 52-53 (Apr. 20, 2017).

1 On April 21, 2017, Commissioner Burns filed a list of witnesses and subjects of testimony he
2 intended to question.

3 On April 24, 25, 26, 27, and 28, 2017, and May 1 and 2, 2017, the evidentiary hearing in this
4 matter was held before a duly authorized Administrative Law Judge of the Commissioners, at the
5 Commission's offices in Phoenix, Arizona.

6 On April 24, 2017, Commissioner Burns filed his Request for Questioning of APS and
7 Pinnacle West Witnesses.

8 On April 24, 2017, Mr. Bill Richards spoke "on behalf of Commissioner Robert Burns" to
9 discuss the questioning of APS witnesses.³¹

10 On April 24, 2017, Administrative Law Judge Jibilian instructed the parties that "[t]he
11 Hearing Division will be deferred to the Commission as a body for its consideration and determination
12 on the dispute. And to facilitate that process, I will ask that any motions by any party any comments
13 by any Commissioner or Commissioner representatives relating to the dispute between
14 Commissioners should be made in writing in this docket."³²

15 On April 26, 2017, Commissioner Burns filed his Motion to Question and Admit Counsel to
16 Question.

17 On April 26, 2017, APS filed its Objection to Commissioner Burns' Demand for Testimony.

18 On April 27, 2017, Commissioner Burns did not appear to question APS witnesses.³³

19 On April 28, 2017, Commissioner Burns filed his Motion for Disqualification.

20 On May 1, 2017, APS filed its Reply to Commissioner Burns' Response to the Motion to
21 Dismiss in *Commissioner Burns v. APS*.

22 On May 4, 2017, APS filed the Declaration of Barbara Lockwood to supplement her
23 testimony and respond to Commissioner Burns' April 24, 2017 questions.

24 On May 12, 2017, Commissioner Burns filed a Notice of Insufficiency of APS and Pinnacle
25 West Responses to Commissioner Burns' Questions.

26 _____
27 ³¹ Hr'g Tr. vol. I, 19-23 (April 24, 2017).

28 ³² Hr'g Tr. vol. I, 19 (Apr. 24, 2017).

³³ Hr'g Tr. vol. VII, 1315 (May 2, 2017).

1 On May 25, 2017, Maricopa County Superior Court Judge Kiley held oral argument on APS's
2 Motion to Dismiss in *Commissioner Burns v. APS*.

3 On May 30, 2017, a Ruling was issued in *Commissioner Burns v. APS* ordering a stay of the
4 proceedings for the Commission to consider a Motion to Compel.

5 On June 2, 2017, Commissioner Burns filed the Motion to Compel and Motion to Stay.

6 On June 15, 2017, APS filed its Opposition to the Motion to Compel and Motion to Stay.

7 Numerous public comments have been filed.

8 **III. Discovery Motions Filed by Commissioner Burns**

9 **A. Motion for Disqualification**

10 1. Summary of Briefing

11 The Motion for Disqualification requests an order suspending these proceedings, facilitating
12 an expeditious and thorough investigation, and requiring disqualification of any Commissioners
13 determined to be “disqualified under constitutional due process standards.”³⁴ Commissioner Burns
14 asserts that disqualification is necessary because independent expenditures were made on behalf of
15 Commissioners Forese and Little in the 2014 Commission elections. According to Commissioner
16 Burns, disqualification is warranted because Pinnacle West refuses to disclose its 2014 political
17 contributions.³⁵ He asserts that Pinnacle West admits it “may use our corporate funds to make
18 independent expenditures or to contribute to organizations engaged in lobbying or political campaign
19 activity or that make independent expenditures at the federal, state or local level, as permitted by
20 law”³⁶ and may have contributed to the independent expenditures Save Our Future Now and Arizona
21 Free Enterprise Club, both of which directed independent expenditure campaigns on behalf of
22 Chairman Forese and Commissioner Little.³⁷ In addition, Commissioner Burns also demands the
23 investigation and possible disqualification of Commissioners Andy Tobin (“Commissioner Tobin”)

24 _____
³⁴ Motion for Disqualification at 2.

25 ³⁵ Motion for Disqualification at 16.

26 ³⁶ Motion for Disqualification at 10.

27 ³⁷ Motion for Disqualification at 11-14. According to the Arizona Secretary of State’s website, independent
28 expenditures in the amounts of \$290,225 from Save Our Future Now and \$154,197 from Arizona Free Enterprise Club
were made on behalf of Chairman Forese. Independent expenditures in the amounts of \$291,725 from Save Our Future
Now and \$154,197 from Arizona Free Enterprise Club were made on behalf of Commissioner Little.

1 and Boyd Dunn (“Commissioner Dunn”) because independent expenditures from Arizona Coalition
 2 for Reliable Electricity, a group funded by Pinnacle West, were directed in support of their 2016
 3 Commission elections.³⁸ Commissioner Burns admits that Arizona Coalition for Reliable Electricity
 4 made contributions in the amount of \$1,324,469 on his behalf during the 2016 Commission election,
 5 but suggests it was “a crafty, manipulative scheme designed to potentially cast him as a hypocrite in
 6 the eyes of voters. . . .”³⁹ According to the Arizona Secretary of State’s website, independent
 7 expenditures in the amounts of \$1,065,383 from Save Our AZ Solar and \$13,697 from SolarCity
 8 Corporation were made on behalf of Commissioner Burns during the 2014 Commission election.
 9 SolarCity Corporation has been a party in prior Commission cases and a member of EFCA, an
 10 intervenor in the APS rate case.⁴⁰

11 The Motion for Disqualification is premised on Commissioner Burns’ belief that
 12 disqualification is necessary to protect the due process rights of the parties to the rate case. He relies
 13 on heavily on *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), as grounds for disqualifying
 14 his fellow Commissioners. Commissioner Burns asserts that the *Caperton* requires investigation and
 15 disqualification where the amount spent creates a “serious risk of actual bias.” 556 U.S. at 884.
 16 According to Commissioner Burns, a serious risk is present when there is a disparity between “the
 17 contribution’s relative size in comparison to the total amount of money contributed to the campaign,
 18 the total amount spent in the election, and the apparent effect that contribution had on the outcome of
 19 the election.” *Id.*

20 APS objected to the disqualification of Chairman Forese and Commissioners Little, Tobin,
 21 and Dunn.⁴¹ APS argues that Commissioner Burns has no standing to assert the due process rights of
 22 the parties to the rate case. It also distinguishes *Caperton* suggesting that the holding only applies to
 23

24 ³⁸ Motion for Disqualification at 21. According to the Arizona Secretary of State’s website, independent expenditures in
 25 the amount of \$1,324,468 were made by Arizona Coalition for Reliable Electricity, a group funded by Pinnacle West,
 made on behalf of Commissioners Tobin and Dunn during the 2016 Commission election.

26 ³⁹ *Id.*

27 ⁴⁰ SolarCity Corporation is the primary contributor to Save Our Solar AZ.

28 ⁴¹ Opposition of Arizona Public Service Company to Emergency Motion of Commissioner Robert Burns to Compel
 Compliance with Investigatory Subpoenas (“Opposition to Motion for Disqualification”) at 15-22, 34-37 (Jun. 15,
 2017).

1 judges, not commissioners engaged in ratemaking.⁴² *See Ariz. Corp. Comm'n v. Super. Ct.*, 107 Ariz.
 2 24, 26 (1971) (ratemaking and rulemaking are legislative acts); *Simms v. Round Valley Light &*
 3 *Power Co.*, 80 Ariz. 145, 154 (1956) (ratemaking requires legislative discretion). In lieu of *Caperton*,
 4 APS urges the Commission to adopt the principles in *Hortonville Joint School District v. Hortonville*
 5 *Education Association*, 426 U.S. 482, 488 (1976). In *Hortonville*, the Court held that due process for
 6 failing to provide “an independent, unbiased decisionmaker” was not offended when a matter has
 7 “significant governmental and public policy dimensions” and is not simply “an adjudicative
 8 decision.” *Id.*

9 Finally, APS asserts that disqualifying Chairman Forese and Commissioners Little, Tobin,
 10 and Dunn would eliminate the possibility of a quorum. In such cases, the Rule of Necessity prohibits
 11 disqualification and allows all Commissioners to adjudicate the APS rate case.

12 2. Resolution

13 Commissioner Burns has not demonstrated that disqualification of Chairman Forese and
 14 Commissioners Little, Tobin, and Dunn is required.⁴³ First, we agree that *Caperton v. A.T. Massey*
 15 *Coal Co.* is distinguishable and does not apply to the Commission while ratemaking. Second, the
 16 Rule of Necessity precludes disqualification in these circumstances. *See Ariz. Agency Handbook*, §
 17 10.9.4.3. (“If a majority of the total membership of a public body is disqualified, thereby making it
 18 impossible for the public body to convene a quorum to discuss or decide the matter, the disqualified
 19 members may disclose in the public record their reasons for disqualification and proceed to act as if
 20 they were not disqualified.” (citing A.R.S. § 38-508(B) and *Nider v. Homan*, 89 P.2d 136, 140 (Cal.
 21 App. 1939)).

22 Finally, Commissioner Burns lacks the standing necessary to disqualify or recuse his fellow
 23 Commissioners. Commissioner Burns pursues disqualification for the “protection of parties,”
 24 “consumers, the voters, and the public at large.”⁴⁴ This issue was addressed in *Kerr v. Killian*, 197

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 26 ⁴² *Id.* at 18-19.

27 ⁴³ Arizona has adopted a combination test for adjudicative officers acting in their legislative capacity. A movant
 demonstrates bias by showing an “irrevocably closed mind” or by “prejudgment of the specific facts that are at issue.”
Havasu Heights Ranch & Dev. Corp. v. Desert Valley Wood Prods. Inc., 167 Ariz. 383, 387 (App. 1990).

28 ⁴⁴ Motion for Disqualification at 23.

1 Ariz. 213 (App. 2000). The court held that the Arizona Department of Revenue “lacks standing to
 2 seek reversal on the basis of [inadequate notice to taxpayers] because the right to due process asserted
 3 does not belong to the Department.” *Id.* at 217. Like *Kerr*, Commissioner Burns is seeking to
 4 vindicate due process rights that belong to the parties. None of the parties to the rate case have come
 5 forward to say there is insufficient facts to proceed with ratemaking and Commissioner Burns has no
 6 standing to pursue disqualification.

7 We conclude, consistent with the discussion above, that it is just and reasonable and in the
 8 public interest to deny the Motion for Disqualification.

9 **B. Motion to Compel**

10 1. Summary of Briefing

11 The Motion to Compel asks the Commission to confirm that Commissioner Burns “has
 12 individual authority to issue and enforce the Subpoenas,” “that the remaining Commissioners will not
 13 act upon the objections against the Subpoenas,” and, in absence of the court order, “the Subpoenas
 14 are subject to immediate enforcement.”⁴⁵ He also asks for an order granting the Motion for
 15 Disqualification and the Motion to Question and Admit Counsel to Question.⁴⁶

16 Commissioner Burns argues that the Motion to Compel should be granted because the
 17 Commission cannot interfere with his individual right as a Commissioner to conduct investigations of
 18 a regulated utility and to inspect the books and records of both the utility and their affiliated
 19 companies. *See, e.g.* Ariz. Const., art. XV, §§ 3-4, A.R.S. § 40-241 (“each commissioner” may
 20 conduct inspections of corporate books or examinations under oath of corporate officials), *Ariz. Corp.*
 21 *Comm’n v. Ariz. ex rel. Woods*, 171 Ariz. 286, 290-291 (1992).⁴⁷ He relies upon the “broad
 22 investigatory powers” of a Commissioner.⁴⁸ Commissioner Burns asserts that *Carrington v. Arizona*
 23 *Corporation Commission*, 199 Ariz. 303, 305 (App. 2000), recognized that a Commissioner “can
 24

25 ⁴⁵ Motion to Compel at 2.

26 ⁴⁶ The Motion for Disqualification is discussed in § III(A), *supra*. The Motion to Question and Admit Counsel to
 27 Question is discussed below in § III(C).

28 ⁴⁷ Motion to Compel at 6.

⁴⁸ Motion to Compel at 7.

1 investigate merely on suspicion that the law is being violated, or even just because [he or she] wants
2 assurance that it is not.”⁴⁹ According to *Carrington*, “the Commission must be free without undue
3 interference or delay to conduct an investigation which will adequately develop a factual basis for a
4 determination as to whether particular activities come within the Commission's regulatory authority.”
5 199 Ariz. at 305.

6 The Motion to Compel also states that the subpoenas are relevant because “the information
7 sought is central to the Commission's rate-setting authorities. It will confirm the transfer of utility
8 customer revenues funding between APS and its parent, and just how Pinnacle West relies upon and
9 uses them for political influence activities, and will provide evidence critical to determining the
10 manner and extent to which APS's rate requests and rate settlement strategies and decisions,
11 including calculations and settlement decision-making for the pending request increase, are impacted
12 and influenced by Pinnacle West's political and other influence-peddling spending and objectives.”⁵⁰

13 Commissioner Burns also asserts the subpoenas do not violate the First Amendment because
14 “a compelling interest exists - and a subpoena will be enforced regardless of potential First
15 Amendment issues - where the agency seeking the information is conducting an investigation
16 pursuant to its statutory authority.”⁵¹ He distinguishes *Citizens United v. Federal Election*
17 *Commission*, 558 U.S. 310 (2010), stating an exception exists when the government requires
18 corporate disclosure. *Vt. Right to Life Comm., Inc. v. Sorrell*, 875 F.Supp. 376, 386 (D.Vt. 2012).

19 APS objects to the Motion to Compel, arguing that the subpoenas are not relevant to the rate
20 case, that Commissioner Burns lacks the authority to compel this information, the subpoenas violate
21 APS’s First Amendment rights, and the subpoenas are intended to harass APS. The Company relies
22 on the limiting language in *Carrington* to support its arguments on relevance and harassment. APS
23 argues the subpoenas are not relevant to the rate case because they seek information on expenditures
24 that were not included in APS’s test year expenditures. *See In re Sulphur Springs Valley Electric*

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26 ⁴⁹ *Id.* quoting *Carrington*, 199 Ariz. at 305 (internal citations omitted).

27 ⁵⁰ Motion to Compel at 8.

28 ⁵¹ Motion to Compel at 22, quoting *U.S. v. Inst. for Coll. Access & Success*, 27 F. Supp. ad 106, 115 (D.D.C. 2014)
(internal citations omitted).

1 *Coop. Inc.*, Decision 71274 at 7-11, Docket No. E-01575A-08-0328 (Sept. 8, 2009) (Commission
 2 disallowed expenditures for charitable contributions, sponsorships, gifts, meals, and entertainment);
 3 *In re Sunrise Water Co.*, Decision 71445 at 19-21, Docket No. W-02069A-08-0406 (Dec. 23, 2009)
 4 (Commission disallowed lobbying expenses because legislative activities have no direct benefit to
 5 ratepayers). APS did not include charitable, political, or lobbying expenditures in its test year
 6 expenses. Since these expenditures are not included in expenses, it believes this information is not
 7 relevant to ratemaking. In addition, APS further believes any request for information outside of the
 8 2015 test year is overbroad and unduly burdensome.

9 The objection also asserts the subpoenas violate APS's First Amendment rights granted in
 10 *Citizens United*. According to APS, in *Citizens United*, "the Supreme Court held that corporations
 11 have a First Amendment right to make independent political expenditures and that "[n]o sufficient
 12 governmental interest justifies limits' on such expenditures."⁵² 558 U.S. at 365. APS argues that
 13 Commissioner Burns fails to recognize that "although campaign expenditures that benefit *judges*
 14 could give rise to corruption or the appearance thereof, expenditures benefiting *legislators* could not.
 15 *Id.* at 357."⁵³

16 2. Resolution

17 The Commission finds that the limiting language in *Carrington* applies and the subpoenas are
 18 not relevant to APS's rate case. In *Carrington*, the court cabined in the sweeping power noted by
 19 Commissioner Burns, stating "the Commission may not act unreasonably and may not use its
 20 investigatory powers to harass, intimidate, or defame a business." *Carrington*, 199 Ariz. at 305
 21 (internal citations omitted). The Commission cannot issue a subpoena that is "not within its scope of
 22 authority." *Id.* It cannot enforce an "order that is too vague," or enforce a subpoena that "seeks
 23 irrelevant information," where the "investigation is being used for an improper purpose, such as to
 24 harass." *Id.* The subpoenas seek information that is irrelevant to the rate case and is not reasonably
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26
 27 _____
⁵² Opposition to Motion to Compel at 18.

28 ⁵³ *Id.*

1 calculated to lead to the discovery of admissible evidence.⁵⁴ The record supports a finding that
2 charitable, political, lobbying expenditures were not included in APS's test year expenses, and any
3 marketing or advertising expenditures claimed by APS were disallowed. The subpoenas are
4 overbroad and unduly burdensome in so much as they seek charitable, political, lobbying, marketing,
5 or advertising expenditures for the years 2011 through 2016. The rate case uses a test year of 2015,
6 anything requested outside of the test year is irrelevant.

7 Since the subpoenas are irrelevant, it is not necessary for the Commission to reach the issues
8 of (1) whether a Commissioner has the authority and jurisdiction to subpoena the information from
9 APS, Pinnacle West, and Mr. Brandt on these topics, (2) whether the subpoenas violate APS's First
10 Amendment rights under *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), (3)
11 whether the subpoenas constitute harassment, and (4) whether the threat of publication to third parties
12 defeats the subpoenas.

13 The Commission recognizes the importance of exploring the external influences on
14 Commissioners. Indeed, the issue will be explored in Commissioner Dunn's Code of Ethics docket,
15 but the Commission recognizes that rate cases and policy development are separate functions. While
16 they overlap in certain respects, Commissioner Burns' subpoenas blur the lines between ratemaking
17 and policymaking. If the Commission wishes to pursue information from a public service
18 corporation regarding their charitable, political, lobbying, marketing, and advertising expenditures it
19 must adopt lawful policy that was developed outside of a ratemaking docket and will protect the
20 rights of all parties involved. APS's rate case is not the appropriate place to develop or implement
21 such a policy.

22 We conclude, consistent with the discussion above, that it is just and reasonable and in the
23 public interest to deny the Motion to Compel.

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25
26
27 ⁵⁴ The Administrative Law Judge denied a separate motion to compel in this proceeding filed by EFCA for failing to
28 demonstrate relevance, for being overbroad, and for failing to demonstrate that the request is reasonably calculated to
obtain admissible evidence. *See* Procedural Order (Dec. 13, 2016).

1 **C. Motion to Question and Admit Counsel to Question**

2 1. Summary of Briefing

3 The Motion to Question and Admit Counsel to Question suggests “the [administrative law
4 judge’s] refusal to act on Commissioner Burns’ request to call witnesses and to assist in their
5 questioning is unconstitutional” and that Commissioner Burns can call his list of witnesses and utilize
6 his personal counsel to assist in the questioning those witnesses. Commissioner Burns announced his
7 intent to call a number of APS/Pinnacle West witnesses that were not scheduled to appear during the
8 Prehearing Conference. He instructed the parties that he would appear on April 27, 2017, to question
9 employees of APS/Pinnacle West including, Mr. Brandt; Denise Danner, Controller and Chief
10 Accounting Officer; James Hatfield, CFO, Robert Aiken, Vice President, Federal Affairs, Jessica
11 Pacheco, Vice President, State and Local Affairs; and, Barbara Lockwood, Vice President,
12 Regulation.⁵⁵ He also filed the Request of Commissioner Robert Burns for Questioning of APS and
13 Pinnacle West Witnesses (“Request for Witnesses”) that included several pages of topics and
14 questions for these witnesses.⁵⁶ These topics and questions seek the same information as the
15 subpoenas with minor revisions. Commissioner Burns sought witness testimony regarding the
16 political activities, marketing efforts, lobbying activities, charitable events, sponsorships, and civic
17 engagements of APS.⁵⁷ He wanted information about “forward-looking statements” like forecasting
18 and estimates for APS’s future revenue, earnings, net income, dividend, and return on equity.⁵⁸ He
19 also sought targeted information related to the disqualification of commissioners. For example,
20 Commissioner Burns intended to ask how decisions regarding campaign contributions were
21 determined and he wanted the identity of employees who have “ever met or communicated with any
22 of the Commissioners currently hold office the Arizona Corporation Commission.”⁵⁹ Despite his
23
24

25 ⁵⁵ Correspondence from Commissioner Burns (April 21, 2017).

26 ⁵⁶ Request for Witnesses (April 24, 2017); Prehr’g Conference Tr. 43-44 (Apr. 21).

27 ⁵⁷ *Id.* at 3.

28 ⁵⁸ *Id.* at 4.

⁵⁹ *Id.* at 7-9.

1 passion during the Prehearing Conference, Commissioner Burns never appeared to question the
2 witnesses on April 27, 2017, or any portion of the hearing.⁶⁰

3 In his Motion to Question and Admit Counsel to Question, Commissioner Burns again relies
4 on *Carrington* to allow him “wide berth” in calling and questioning witnesses from APS and
5 Pinnacle West.⁶¹ 199 Ariz. at 305. He also contends a majority vote of the Commission do not have
6 the authority to stop him from calling and questioning witnesses at the hearing.⁶² He derives this
7 conclusion from the Commission procedural rules that provide for hearings “to be held before one or
8 more Commissioners, one or more hearing officers, or any combination thereof,” and allow the
9 presiding officer or Commissioners to examine witnesses and take depositions. *See* Ariz. Admin.
10 Code R14-3-109(A), R14-3-109(G), R14-3-109(F); A.R.S. § 40-244(A). Commissioner Burns relies
11 on a policy argument to support his request to admit his personal counsel to question the witnesses.
12 He states that he needs counsel in order to ask “the necessary follow-up questions,” and this
13 assistance is very similar to the role of a Commission policy advisor during Open Meetings and Staff
14 Meetings.

15 In its Objection to Commissioner Burns’ Demand for Testimony, APS asks the Commission
16 to deny the motion on the grounds that APS has already responded and produced all information for
17 the requests that are relevant to the rate case, and any outstanding requests seek information that is
18 irrelevant to the issues in the rate case. APS suggests that the requests seeking information about
19 Pinnacle West are irrelevant because Pinnacle West is not the applicant or a party to the rate case.⁶³
20 Inquiries outside of the 2015 test year or related to charitable, political, or lobbying expenditures are
21 also irrelevant because they have not been claimed as expenses in the rate case.⁶⁴

22 APS also provided a detailed analysis of its responsive productions. Over the last few years,
23 APS has responded to Commissioner Burns’ information requests in seven different dockets

25 ⁶⁰ Hr’g Tr. vol. VII, 1315 (May 2, 2017).

26 ⁶¹ Motion to Question and Admit Counsel to Question at 4.

27 ⁶² *Id.* at 4.

28 ⁶³ Objection to Commissioner Burns’ Demand for Testimony at 5.

⁶⁴ *Id.* at 5-8.

1 including APS's net metering case, its prior rate case, Commissioner Burns' campaign contribution
 2 docket, the T&D docket, and the influence on electricity regulation in Arizona docket.⁶⁵ APS has
 3 produced information in response to Commissioner Burns' requests nine times in the last four years.⁶⁶
 4 Those productions included general ledgers, FERC accounts, political contributions, charitable
 5 donations, dues, advertising and lobbying expenditures.⁶⁷

6 2. Resolution

7 The Commission adopts and incorporates the preceding section regarding Resolution of the
 8 Motion to Compel, § III(B)(2), *supra*, into this Resolution of the Motion to Question and Admit
 9 Counsel to Question, § III(C)(2). Commissioner Burns admits "the purpose [of a hearing] is to get to
 10 the relevant facts, whether APS [or Commissioner Burns] likes them or not."⁶⁸ The evidence supports
 11 a finding that the questions contained in the Request for Witnesses are overly broad, irrelevant to the
 12 rate case, and not reasonably calculated to lead to the discovery of admissible evidence. APS has
 13 already produced nine separate responses to these issues and states that it has disclosed all responsive
 14 information that is relevant to the rate case. Commissioner Burns seeks information that is outside the
 15 2015 test year, that APS never claimed as part of their expenses (charitable giving, campaign
 16 contributions, and lobbying expenses), and that was disallowed (marketing and advertising
 17 expenditures). Commissioner Burns also failed to appear at the time he set for the questioning of
 18 these witnesses. For these reasons, the Motion to Question fails.

19 It is not necessary for the Commission to reach the merits of Commissioner Burns' request to
 20 Admit Counsel to Question. In light of the Commission's denial of the Motion to Question, the
 21 reasons to admit Commissioner Burns' counsel no longer exist, the issue is moot, and the
 22 Commission declines to address the merits of his request at this time.

23 We conclude, consistent with the discussion above, that it is just and reasonable and in the
 24 public interest to deny the Motion to Question and Admit Counsel to Question.

25 _____
 26 ⁶⁵ *Id.* at 3-4.

27 ⁶⁶ *Id.* at Ex. A.

28 ⁶⁷ *Id.*

⁶⁸ Motion to Question and Admit Counsel to Question at 9.

1 **D. Motion to Stay**

2 Commissioner Burns requests that the entire rate case be stayed until the investigation into
3 APS's records is completed. Furthermore, Commissioner Burns can always move to amend the
4 Decision under A.R.S. § 40-252 following the disposition of the rate case." Before "Given our
5 dispositions. We note that a stay would likely prolong the rate case proceedings beyond August 2017,
6 the deadline to complete the proceedings as prescribed in the Commission's rules.⁶⁹ Given our
7 dispositions on the Motion for Disqualification, Motion to Compel, and Motion to Question and
8 Admit Counsel to Question, the reasons for the stay no longer exist, the issue is moot, and the
9 Commission declines to address the merits of his request at this time.

10 We conclude, consistent with the discussion above, that it is just and reasonable and in the
11 public interest to deny the Motion to Stay.

12

13 * * * * *

14 Having considered the entire record and being fully advised in the premises, the Commission
15 finds, concludes, and orders that:

16 **FINDINGS OF FACT**

17 1. Commissioner Burns' believes that disqualification is necessary to protect the due
18 process rights of the parties to the rate case.

19 2. Commissioner Burns does not challenge the integrity of the Commissioners, he
20 challenges the integrity of APS.

21 3. He tells groups that Chairman Forese and Commissioner Little were unaware of where
22 the independent expenditure money from the 2014 election came from until after the election.

23 4. Commissioner Burns could not point to any evidence, but argued that "a lot of people"
24 told him that it was "not a wild goose chase and that I should proceed." He urged the Commission to
25 give this investigator a chance and he might be able to find that evidence.

26

27 ⁶⁹ See Ariz. Admin. Code R14-2-103(B)(11)(d) ("The Commission shall issue a final order that disposes of all issues
28 involved in all parts or phases of proceeding within [360 days] from the date that a filing is accepted" for Class A
utilities). APS's filing was accepted July 1, 2016 and the Company agreed to a 30 day stay of the proceedings to allow
a related docket to proceed.

1 5. Commissioner Burns admits that Arizona Coalition for Reliable Electricity made
2 contributions in the amount of \$1,324,469 on his behalf.

3 6. According to the Arizona Secretary of State's website, independent expenditures in
4 the amounts of \$1,065,383 from Save Our AZ Solar and \$13,697 from SolarCity Corporation were
5 made on behalf of Commissioner Burns during the 2014 Commission election. SolarCity Corporation
6 has been a party in prior Commission cases and a member of EFCA, an intervenor in the APS rate
7 case.

8 7. Disqualifying Chairman Forese and Commissioners Little, Tobin, and Dunn would
9 eliminate the possibility of a quorum.

10 8. None of the parties to the rate case have come forward to say there is insufficient facts
11 to proceed with ratemaking.

12 9. The issue of external influences on Commissioners will be explored in Commissioner
13 Dunn's Code of Ethics docket.

14 10. Inquiries outside of the 2015 test year or related to charitable, political, or lobbying
15 expenditures are also irrelevant because they have not been claimed as expenses in the rate case.

16 11. APS has already produced nine separate responses to these issues and states that it has
17 disclosed all responsive information that is relevant to the rate case.

18 12. Commissioner Burns seeks information that is outside the 2015 test year, that APS
19 never claimed as part of their expenses (charitable giving, campaign contributions, and lobbying
20 expenses), and that was disallowed (marketing and advertising expenditures).

21 13. Commissioner Burns announced his intent to call a number of APS/Pinnacle West
22 witnesses that were not scheduled to appear during the Prehearing Conference. He instructed the
23 parties that he would appear on April 27, 2017, to question employees of APS/Pinnacle West.

24 14. Commissioner Burns sought witness testimony regarding the political activities,
25 marketing efforts, lobbying activities, charitable events, sponsorships, and civic engagements of APS.

26 15. He wanted information about forward-looking statements like forecasting and
27 estimates for APS's future revenue, earnings, net income, dividend, and return on equity.

28

1 16. He also sought targeted information related to the disqualification of commissioners.
 2 For example, Commissioner Burns intended to ask how decisions regarding campaign contributions
 3 were determined and he wanted the identity of employees who have ever met or communicated with
 4 any of the Commissioners currently hold office the Arizona Corporation Commission.

5 17. Despite his passion during the Prehearing Conference, Commissioner Burns never
 6 appeared to question the witnesses on April 27, 2017, or any portion of the hearing.

7 18. Commissioner Burns states that he needs counsel in order to ask the necessary follow-
 8 up questions.

9 19. The reasons to admit Commissioner Burns' counsel no longer exist.

10 20. We note that a stay would likely prolong the rate case proceedings beyond August
 11 2017, the deadline to complete the proceedings as prescribed in the Commission's rules.

12 21. The reasons for the stay no longer exist.

13 CONCLUSIONS OF LAW

14 1. APS is a public service corporation within the meaning of Article XV of the Arizona
 15 Constitution and A.R.S. §§ 40-203, 40-204, 40-221, 40-250, 40-251, 40-361, and A.A.C. R14-2-801,
 16 *et seq.*

17 2. The Commission has jurisdiction over APS and the subject matter of its Application
 18 and the Motions filed as part of the Application proceedings.

19 3. Notice and an opportunity to be heard on the Motions was provided in accordance
 20 with the law.

21 4. Commissioner Burns is seeking to vindicate due process rights that belong to the
 22 parties.

23 5. Commissioner Burns lacks the standing necessary to disqualify or recuse his fellow
 24 Commissioners.

25 6. *Caperton v. A.T. Massey Coal Company*, 556 U.S. 868 (2009), is distinguishable and
 26 does not apply to the Commission while performing its legislative ratemaking function.

27 7. The Rule of Necessity prohibits disqualification and allows all Commissioners to
 28 adjudicate the APS rate case.

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Mr. Forese

CHAIRMAN FORESE

[Signature]
COMMISSIONER DUNN

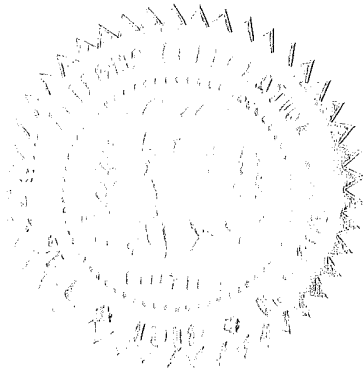
[Signature]

COMMISSIONER TOBIN

[Signature]
COMMISSIONER LITTLE

DISSENT

COMMISSIONER BURNS



IN WITNESS WHEREOF, I, TED VOGT, Executive Director of the Arizona Corporation Commission, have hereunto, set my hand and caused the official seal of this Commission to be affixed at the Capitol, in the City of Phoenix, this 27th day of JUNE, 2017.

[Signature]

TED VOGT
EXECUTIVE DIRECTOR

DISSENT: *[Signature]*

DISSENT: _____

CONCURRING: _____

COMMISSIONERS
TOM FORESE – Chairman
BOB BURNS
DOUG LITTLE
ANDY TOBIN
BOYD DUNN



BOB BURNS
Commissioner

ARIZONA CORPORATION COMMISSION

June 23, 2017

RE: APS Rate Case Dockets No. E-01345A-16-0036, E-01345A-16-0123

Dear Commissioners, Parties and Stakeholders:

I strongly dissent from this decision, and reiterate the positions I expressed in my earlier motions in this rate case, in my comments at the June 20, 2017 Staff Meeting, and in my letter docketed in this case on June 20, 2017. The analysis I have raised, the precedent, constitutional and statutory provisions I have cited, all establish that this decision is a violation of my legal rights, including my rights to conduct appropriate investigations regarding public service corporations and their affiliated companies, my rights to conduct investigations and obtain information relevant to this rate case proceeding, my rights to call and question witnesses in this proceeding, and my rights to personally investigate, and have investigated by others, issues involving the potential disqualification of other Commissioners. This decision is further a violation of the duties and limitations placed by relevant constitutional and statutory provisions on my fellow Commissioners. In sum, the decision exceeds the jurisdiction and authority of the Commissioners executing it, is arbitrary, capricious and an abuse of discretion. This action further constitutes a violation of my rights, as well as the interests and rights of parties to this rate case, APS customers, and Arizona citizens in general.

As mentioned in my June 20, 2017 letter responding to Commissioner Dunn's proposed "Interlocutory Order" upon which this decision is based, this decision goes far beyond the items that were noticed on the June 20, 2017 Commission Staff Open Meeting Agenda. It makes determinations and enters findings and orders that exceed the scope of the noticed agenda item and entirely misses the relief sought in my motions. It has prejudiced the rights of interested parties and the general public to participate in the relevant proceedings.

For these and all the reasons outlined at the June 20, 2017 Open Meeting and in my June 20, 2017 letter filed in this docket, I dissent.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert L. Burns".

Robert L. Burns
Commissioner

Decision No. 76161

APP105

COMMISSIONERS
TOM FORESE - Chairman
BOB BURNS
DOUG LITTLE
ANDY TOBIN
BOYD W. DUNN

OPEN MEETING ITEM



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ARIZONA CORPORATION COMMISSION

ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

2017 JUL 26 A 11:40

ORIGINAL

Arizona Corporation Commission

DOCKETED

DATE: JULY 26, 2017

DOCKET NO.: E-01345A-16-0036 AND E-01345A-16-0123

JUL 26 2017

TO ALL PARTIES:

DOCKETED BY

Enclosed please find the recommendation of Assistant Chief Administrative Law Judge Teena Jibilian. The recommendation has been filed in the form of an Opinion and Order on:

**ARIZONA PUBLIC SERVICE COMPANY
(RATES)**

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

AUGUST 4, 2017

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Open Meeting to be held on:

To Be Determined

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602) 542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

**TED VOGT
EXECUTIVE DIRECTOR**

1200 WEST WASHINGTON STREET, PHOENIX, ARIZONA 85007-2927 / 400 WEST CONGRESS STREET, TUCSON, ARIZONA 85701-1347

www.azcc.gov

This document is available in alternative formats by contacting Kacie Cannon, ADA Coordinator, voice phone number 602-542-3931, E-mail KCannon@azcc.gov.

APP106

1 **III. PARTIAL SETTLEMENT AGREEMENT**

2 **a. Overview**

3 On March 1, 2017, a Settlement Term Sheet was filed in the case, indicating that many, but not
4 all, parties to this case were in support of a Settlement Agreement, and outlining the terms. On March
5 27, 2017, the Settlement Agreement was filed. A copy of the signed Settlement Agreement, which was
6 admitted into evidence during the hearing in this proceeding as Hearing Exhibit A-29, is attached hereto
7 as Exhibit A.

8 **b. Settling Parties**

9 The parties to the Settlement Agreement are APS, AIC, the IBEW Locals, ConservAmerica,
10 ASDA, Vote Solar, EFCA, SEIA, AriSEIA, AURA, Freeport, AECC, Direct Energy, CNE, Calpine,
11 the Alliance, Walmart, Kroger, Granite Creek, FEA, Coolidge, WRA, ASBA, AASBO, SCHOA,
12 PORA, ACAA, RUCO, and Staff (“Settling Parties”).

13 **c. Non-Settling Parties**

14 Parties who did not sign the Settlement Agreement are Richard Gayer, Patricia Ferré, Warren
15 Woodward, IO, Cynthia Zwick (in her personal capacity), SWEEP, ED8/McMullen, the Districts,
16 AARP, and Sedona.⁶

17 **d. Bifurcation of Section 30 of the Settlement Agreement**

18 Pursuant to Commission Decision No. 74057 (April 30, 2015) and the Rate Case Procedural
19 Order in these dockets, issues related to APS’s Proposed Automated Meter Opt-Out Service Schedule
20 were addressed in this proceeding.

21 Section 30 of the Settlement Agreement provides:

22 30.1 The AMI Opt-Out program will be approved as proposed by APS except
23 the fees will be changed to reflect an upfront fee of \$50 to change out a
24 standard meter for a non-standard meter and monthly fee of \$5. See
25 Service Schedule 1, attached as Appendix M.

26 30.2 Changes to Schedule 1 are attached in Appendix M.

27 ⁶ IO appeared through counsel at the hearing but did not otherwise participate in the hearing or post-hearing briefing process
28 as a party. Patricia Ferré, Cynthia Zwick, and Sedona, who did not sign the Settlement Agreement, did not participate in
the hearing or post-hearing briefing process as parties.

1 IT IS FURTHER ORDERED that Arizona Public Service Company's proposed E-32 L and E-
 2 32 L TOU rates, along with the E-32 UFI program as proposed by Arizona Public Service Company
 3 in Hearing Exhibit APS-33 is hereby approved. The \$2 million cap on incentives for E-32 L TOU
 4 customers to install behind-the-meter battery storage facilities shall be re-assessed in Arizona Public
 5 Service Company's 2019 DSM filing. To assist the Commission in ascertaining whether a change to
 6 the E-32 UFI program is necessary in that DSM proceeding, and in future DSM proceedings, Arizona
 7 Public Service Company shall carefully compile data measuring penetration and associated peak
 8 reductions from battery storage installed pursuant to the E-32 UFI program, and from battery storage
 9 installed by E-32 L customers without the benefit of incentives, and shall make that data readily
 10 available to participants in its 2019 DSM proceeding and its future DSM proceedings, until the E-32
 11 UFI program has ended or the Commission orders otherwise.

12 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

13 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

14
15
16 CHAIRMAN FORESE

COMMISSIONER DUNN

17
18 COMMISSIONER TOBIN

COMMISSIONER LITTLE

COMMISSIONER BURNS

19 IN WITNESS WHEREOF, I, TED VOGT, Executive Director of
 20 the Arizona Corporation Commission, have hereunto set my
 21 hand and caused the official seal of the Commission to be affixed
 at the Capitol, in the City of Phoenix, this _____ day
 of _____ 2017.

22
23 _____
 24 TED VOGT
 EXECUTIVE DIRECTOR

25 DISSENT _____

26
27 DISSENT _____
 28 TJ/rt

1 SERVICE LIST FOR:

ARIZONA PUBLIC SERVICE COMPANY

2 DOCKET NO.:

E-01345A-16-0036 AND E-01345A-16-0123

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ORIGINAL



COMMISSIONERS
BOB BURNS - Chairman
ANDY TOBIN
BOYD DUNN
SANDRA D. KENNEDY
JUSTIN OLSON



ARIZONA CORPORATION COMMISSION

February 27, 2019
Arizona Corporation Commission

DOCKETED

FEB 27 2019

DOCKETED BY

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ARIZONA CORPORATION COMMISSION
FEB 27 P 2:12

Docket Control
Arizona Corporation Commission
1200 W Washington St.
Phoenix, AZ 85007

E-01345A-19-0043

Re: In the Matter of the Commission's Investigation into the Political Spending of Arizona Public Service Company and Its Affiliates, Including Pinnacle West Capital Corporation

Dear Commissioners, Interested Parties, and Stakeholders,

Transparency and disclosure are essential to the accountability of public service corporations, the Commissioners, and the Commission as a whole. We are opening this docket to request records from Arizona Public Services Company and its affiliates that pertain to Commission elections and Commission-related charitable donations.

This is a necessary step to assure all ratepayers, public service corporations, stakeholders, interested parties, and the public that the Commission operates with integrity. Indeed, "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371 (2010).

Today, we are writing to give Arizona Public Service Company the opportunity to voluntarily produce the material requested in the attached Subpoena Duces Tecum. This letter is in keeping with the Commission's normal process of requesting information from a public service corporation prior to compelling the utility through a subpoena.

The Subpoena Duces Tecum is well within the bounds of the Commission's jurisdiction. The scope is narrowly tailored to accomplish the goal of Commission transparency and does not unduly burden Arizona Public Service Company or its affiliates. This new docket is wholly separate from any other matter before the Commission and avoids previous relevancy concerns.

We request that APS provide all responsive material no later than March 31, 2019. If the company fails to comply by that deadline, we ask that this matter be placed on an upcoming staff meeting to consider and possibly vote on the attached Subpoena Duces Tecum.

Sincerely,

Commissioner Boyd Dunn

Chairman Robert "Bob" Burns

On this 27th day of February, 2019, the foregoing document was filed with Docket Control as a Correspondence From Commissioner, and copies of the foregoing were mailed on behalf of Boyd Dunn, Commissioner - A.C.C. & Bob Burns, Chairman - 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.

Robin Mitchell


ARIZONA CORPORATION COMMISSION
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Thomas Mumaw

Pinnacle West Capitol Corporation
PO Box 53999, M.S. 8695
Phoenix AZ 85072

By:  _____

Patrick Maloney
Deputy Policy Advisor

BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

BOB BURNS – Chairman
ANDY TOBIN
BOYD W. DUNN
SANDRA D. KENNEDY
JUSTIN OLSON

IN THE MATTER OF THE COMMISSION’S
INVESTIGATION INTO THE POLITICAL
SPENDING OF ARIZONA PUBLIC SERVICE
COMPANY AND ITS AFFILIATES,
INCLUDING PINNACLE WEST CAPITAL
CORPORATION

DOCKET NO.

ADMINISTRATIVE SUBPOENA

TO: **Custodian of Records
Arizona Public Service Company
400 North 5th Street
Phoenix, Arizona 85004**

YOU ARE HEREBY COMMANDED, pursuant to Arizona Constitution Article 15 § 4, A.R.S. §§ 40-241, 40-244, A.A.C. R14-2-801 *et seq.*, A.A.C. R14-3-109, and Ariz. R. Civ. P. 30 and 45, to produce and permit inspection, copying, testing or sampling for the following designated documents, electronically stored information or tangible things, or to permit the inspection of premises. *See Exhibit “A.”*

Place of Production or Inspection: Arizona Corporation Commission
ATTN: Robin Mitchell, General Counsel
1200 W. Washington Street
Phoenix, Arizona 85007

Date and Time of Production: February 27, 2019 at 2:00PM

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Persons with a disability may request a reasonable accommodation such as a sign language interpreter, as well as request this document in an alternative format, by contacting Kaci Cannon, Executive Assistant to the Executive Director, voice phone number 602-542-3931, e-mail kcannon@azcc.gov. Requests should be made as early as possible to allow time to arrange the accommodation.

Your Duties in Responding To This Administrative Subpoena

I. Exhaustion of Administrative Remedies: The doctrine of administrative remedies applies when a statute or rule establishes an administrative review procedure and determines when judicial review is available. The following provisions govern the procedure for responding and objecting to Commission administrative subpoenas and must be followed prior to seeking any available judicial remedies under Ariz. R. Civ. P. Rule 45.

Generally – the Commission’s Power to Inspect and Investigate. Pursuant to Ariz. Const. art. XV, § 4, the corporation commission, and the several members thereof, shall have power to inspect and investigate the property, books, papers, business, methods, and affairs of any corporation whose stock shall be offered for sale to the public and of any public service corporation doing business within the state, and for the purpose of the commission, and of the several members thereof, shall have the power of a court of general jurisdiction to enforce the attendance of witnesses and the production of evidence by subpoena, attachment, and punishment, which said power shall extend throughout the state. Said commission shall have power to take testimony under commission or deposition either within or without the state. Furthermore, pursuant to A.R.S. § 40-244(A), “[e]ach commissioner may administer oaths and certify to all official acts. The commission, or a commissioner, or any party, may take depositions as in a court of record.”

Commission Subpoenas. Pursuant to A.A.C. R14-3-109(O), subpoenas requiring the attendance of a witness from any place in the state of Arizona to any designated place of hearing for the purpose of taking testimony of such witnesses orally before the Commission may be issued upon application in writing. A subpoena may also command the person to whom it is directed to produce books, papers, documents or tangible things designated therein. The application for such subpoenas must specify, as clearly as possible, the books, waybills, papers, accounts or other documents desired.

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1 **Service.** If service of subpoena is made by an officer of the state or his deputy, such
2 service shall be evidenced by his return thereon. In case of failure to make service, the reasons for the
3 failure shall be stated on the original subpoena. In making service the original subpoena shall be
4 exhibited to the person served, shall be read to him if he is unable to read, and a copy thereof shall be
5 left with him. The original subpoena, bearing or accompanied by the required return, shall be returned
6 forthwith to the Commission. A.A.C. R14-3-109(O).

7 **Objections:** Per A.A.C. R14-3-109(O), the Commission or presiding officer, upon motion
8 made promptly and, in any event, at or before the time specified in the subpoena for compliance
9 therewith may:

- 10 1) Quash the subpoena if it is unreasonable or oppressive, or
- 11 2) Condition denial of the motion upon the advancement by the person in whose
12 behalf the subpoena is issued, of the reasonable cost of producing the books,
13 waybills, papers, accounts or other documents desired.

14 **Fees.** Witnesses who are summoned are entitled to the same fees as are paid for like
15 service in the courts of the state of Arizona, such fees to be paid by the party at whose instance the
16 witness is subpoenaed. A.A.C. R14-3-109(O). Pursuant to A.R.S. § 40-244(B), each witness who
17 appears by order of the commission or a commissioner shall receive for his attendance the same fees
18 allowed by law to a witness in civil actions, which shall be paid by the party at whose request the
19 witness is subpoenaed. The fees of a witness subpoenaed by the commission shall be paid from the
20 fund appropriated for the use of the commission as other expenses of the commission are paid. Any
21 witness subpoenaed, except one subpoenaed by the commission, may, at the time of service, demand
22 his mileage and one days attendance, and if not paid need not attend. A witness furnished free
23 transportation shall not receive mileage.

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accommodation.

1 **Depositions.** The Commission, a Commissioner, or any party to any proceeding before it may
2 cause the depositions of witnesses to be taken in the manner prescribed by law and of the civil
3 procedure for the Superior Court of the state of Arizona. A.A.C. R14-3-109(P).

4 * * *

5 **Your Duties in Responding To a Civil Subpoena**

6 **II. Judicial Remedies Available Under Ariz. R. Civ. P. 45:** Following the exhaustion of any
7 and all administrative remedies governing administrative subpoenas issued by the Commission and
8 barring any conflicting provisions in the statutes and rules governing administrative subpoenas issued
9 by the Commission, the following provisions govern a respondent's procedure for responding and
10 objecting to a subpoena, pursuant to Rule 45 of the Arizona Rules of Civil Procedure.

11 ***Attendance at a Trial.*** If this subpoena commands you to appear at a trial, you must appear at
12 the place, date and time designated in the subpoena unless you file a timely motion with the court and
13 the court quashes or modifies the subpoena. *See* Rule 45(b)(5) and Rule 45(e)(2) of the Arizona Rules
14 of Civil Procedure. *See also* "Your Right To Object To This Subpoena" section below. Unless a court
15 orders otherwise, you are required to travel to any part of the state to attend and give testimony at a
16 trial. *See* Rule 45(b)(3)(A) of the Arizona Rules of Civil Procedure.

17 ***Attendance at a Hearing or Deposition.*** If this subpoena commands you to appear at a hearing
18 or deposition, you must appear at the place, date and time designated in this subpoena unless either:
19 (1) you file a timely motion with the court and the court quashes or modifies the subpoena; or (2) you
20 are not a party or a party's officer and this subpoena commands you to travel to a place other than: (a)
21 the county where you reside or you transact business in person; or (b) the county where you were served
22 with the subpoena or within forty (40) miles from the place of service; or (c) such other convenient
23 place fixed by a court order. *See* Rule 45(b)(3)(B) and Rule 45(e)(2)(A)(ii) of the Arizona Rules of
24 Civil Procedure. *See also* "Your Right To Object To This Subpoena" section below.

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1 **Production of Documentary Evidence.** If this subpoena commands you to produce and permit
2 inspection, copying, testing, or sampling of designated documents, electronically stored information,
3 or tangible things, you must make the items available at the place, date, and time designated in this
4 subpoena, and in the case of electronically stored information, in the form or forms requested, unless
5 you provide a good faith written objection to the party or attorney who served the subpoena. You may
6 object to the production of electronically stored information from sources that you identify as not
7 reasonably accessible because of undue burden or expense, including sources that are unduly
8 burdensome or expensive to access because of the past good-faith operation of an electronic
9 information system or good-faith and consistent application of a document retention policy. See Rule
10 45(c)(2)(D) of the Arizona Rules of Civil Procedure. Other grounds for objection are described in the
11 "Your Right To Object To This Subpoena" section below. If this subpoena does not specify a form for
12 producing electronically stored information, you may produce it in native form or in another reasonably
13 usable form that will enable the receiving party to have the same ability to access, search, and display
14 the information as the responding person, but you need not produce the same electronically stored
15 information in more than one form. See Rule 45(c)(2)(B) and (C) of the Arizona Rules of Civil
16 Procedure.

17 If the subpoena commands you to produce documents, you have the duty to produce the
18 designated documents as they are kept by you in the usual course of business, or you may organize the
19 documents and label them to correspond with the categories set forth in the subpoena. See Rule 45(c)(4)
20 of the Arizona Rules of Civil Procedure.

21 **Inspection of Premises.** If the subpoena commands you to make certain premises available for
22 inspection, you must make the designated premises available for inspection on the date and time
23 designated in this subpoena unless you provide a good faith written objection to the party or attorney
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1 who served the subpoena. *See* Rule 45(c)(6) of the Arizona Rules of Civil Procedure. *See also* “Your
2 Right to Object to This Subpoena” section below.

3 **Combined Subpoena.** You should note that a command to produce certain designated
4 materials, or to permit the inspection of premises, *may* be combined with a command to appear at a
5 trial, hearing, or deposition. *See* Rule 45(b)(2) of the Arizona Rules of Civil Procedure. You do not,
6 however, need to appear in person at the place of production or inspection unless the
7 subpoena *also* states that you must appear for and give testimony at a hearing, trial or
8 deposition. *See* Rule 45(c)(3) of the Arizona Rules of Civil Procedure.

9 **Your Right To Object To This Subpoena**

10 **Generally.** If you have concerns or questions about this subpoena, you should first contact the
11 party or attorney who served the subpoena. The party or attorney serving the subpoena has a duty to
12 take reasonable steps to avoid imposing an undue burden or expense on you. The superior court
13 enforces this duty and may impose sanctions upon the party or attorney serving the subpoena if this
14 duty is breached. *See* Rule 45(e)(1) of the Arizona Rules of Civil Procedure. Unless otherwise ordered
15 by the court for good cause, the party seeking discovery from you must pay your reasonable expenses
16 incurred in responding to a subpoena seeking the production of documents, electronically stored
17 information, tangible things, or an inspection of premises. If you seek payment of expenses other than
18 routine clerical and per-page copying costs as allowed by A.R.S. § 12-351, you must object on the
19 grounds of undue burden to producing the materials without the subpoenaing party's payment, and send
20 an advance estimate of those expenses to the subpoenaing party, before the time specified for
21 compliance or within 14 days after the subpoena is served, whichever is earlier. You need not comply
22 with those parts of the subpoena that are the subject of the objection, unless the court orders you to do
23 so. The court may enter an order conditioning your response to the subpoena on payment of your
24 additional expenses, including ordering payment of those expenses in advance. *See* Rule 45(e)(1)(B).

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1 ***Procedure for Objecting to a Subpoena for Attendance at a Hearing, Trial or Deposition.*** If

2 you wish to object to a subpoena commanding your appearance at a hearing, trial or deposition, you
3 must file a motion to quash or modify the subpoena with the court to obtain a court order excusing you
4 from complying with this subpoena. *See* Rules 45(b)(5) and 45(e)(2) of the Arizona Rules of Civil
5 Procedure. The motion must be filed in the superior court of the county in which the case is pending or
6 in the superior court of the county from which the subpoena was issued. *See* Rule 45(e)(2)(A) and (B)
7 of the Arizona Rules of Civil Procedure. The motion must be filed before the time specified for
8 compliance or within 14 days after the subpoena is served, whichever is earlier. *See* Rule 45(e)(2)(D)
9 of the Arizona Rules of Civil Procedure. You must send a copy of any motion to quash or modify the
10 subpoena to the party or attorney who served the subpoena. *See* Rule 45(e)(2)(E) of the Arizona Rules
11 of Civil Procedure. Even if you file such a motion, you must still attend and testify at the date, time,
12 and place specified in the subpoena, unless excused from doing so--by the party or attorney serving the
13 subpoena or by a court order--before the date and time specified for your appearance. *See* Rule 45(b)(5)
14 of the Arizona Rules of Civil Procedure.

15 The court *must* quash or modify a subpoena:

16 (1) if the subpoena does not provide a reasonable time for compliance;

17 (2) unless the subpoena commands your attendance at a trial, if you are not a party or a party's
18 officer and if the subpoena commands you to travel to a place other than: (a) the county where you
19 reside or transact business in person; (b) the county where you were served with a subpoena, or within
20 forty (40) miles from the place of service; or (c) such other convenient place fixed by a court order; or

21 (3) if the subpoena requires disclosure of privileged or other protected matter, if no exception
22 or waiver applies; or

23 (4) if the subpoena subjects you to undue burden.

24 *See* Rule 45(e)(2)(A) of the Arizona Rules of Civil Procedure.

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1 The court *may* quash or modify a subpoena:

2 (1) if the subpoena requires you to disclose a trade secret or other confidential research,
3 development or commercial information;

4 (2) if you are an unretained expert and the subpoena requires you to disclose your opinion or
5 information resulting from your study that you have not been requested by any party to give on matters
6 that are specific to the dispute;

7 (3) if you are not a party or a party's officer and the subpoena would require you to incur
8 substantial travel expense; or

9 (4) if the court determines that justice requires the subpoena to be quashed or modified.

10 *See* Rule 45(e)(2)(B) of the Arizona Rules of Civil Procedure.

11 In these last four circumstances, a court may, instead of quashing or modifying a subpoena,
12 order your appearance or order the production of material under specified conditions if: (1) the serving
13 party or attorney shows a substantial need for the testimony or material that cannot be otherwise met
14 without undue hardship; and (2) if your travel expenses or the expenses resulting from the production
15 are at issue, the court ensures that you will be reasonably compensated. *See* Rule 45(e)(2)(C) of the
16 Arizona Rules of Civil Procedure.

17 ***Procedure for Objecting to Subpoena for Production of Documentary Evidence.*** If you wish
18 to object to a subpoena commanding you to produce documents, electronically stored information or
19 tangible items, or to permit the inspection of premises, you may send a good faith written objection to
20 the party or attorney serving the subpoena that objects to: (1) producing, inspecting, copying, testing,
21 or sampling any or all of the materials designated in the subpoena; (2) inspecting the premises; or (3)
22 producing electronically stored information in the form or forms requested or from sources that are not
23 reasonably accessible because of undue burden or expense, the good-faith routine operation of an
24 electronic information system, or the good-faith and consistent application of a document retention

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1 policy. You also may object on the ground that the subpoena seeks the production of materials that that
2 have already been produced in the action or that are available from parties to the action. *See* Rule
3 45(e)(1)(A). If you seek payment of expenses other than routine clerical and per-page copying costs as
4 allowed by A.R.S. § 12-351, you must object on the grounds of undue burden to producing the materials
5 without the subpoenaing party's payment, and provide an advance estimate of those additional
6 expenses. You must send your written objection to the party or attorney who served the subpoena
7 before the time specified for compliance or within 14 days after the subpoena is served, whichever is
8 earlier. *See* Rule 45(c)(6)(A)(i) and (ii) of the Arizona Rules of Civil Procedure.

9 If you object because you claim the information requested is privileged, protected, or subject to
10 protection as trial preparation material, you must express the objection clearly, and identify in writing
11 the information, document, or electronically stored information withheld and describe the nature of that
12 information, document, or electronically stored information in a manner that--without revealing
13 information that is itself privileged or protected--will enable the demanding party to assess the
14 claim. *See* Rules 26(b)(6)(A) and 45(c)(5)(A) of the Arizona Rules of Civil Procedure. You may object
15 to providing the information required by Rule 26(b)(6)(A) if providing the information would impose
16 an undue burden or expense.

17 If you object to the subpoena in writing, you do not need to comply with the subpoena until a
18 court orders you to do so. It will be up to the party or attorney serving the subpoena to first personally
19 consult with you and engage in good faith efforts to resolve your objection and, if the objection cannot
20 be resolved, to seek an order from the court to compel you to provide the documents or inspection
21 requested, after providing notice to you. *See* Rule 45(c)(6)(B) and (C) of the Arizona Rules of Civil
22 Procedure.

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1 If you are not a party to the litigation, or a party's officer, the court will issue an order to protect
2 you from any significant expense resulting from the inspection and copying commanded. *See* Rule
3 45(c)(6)(B) of the Arizona Rules of Civil Procedure.

4 Instead of sending a written objection to the party or attorney who served the subpoena, you
5 also have the option of raising your objections in a motion to quash or modify the subpoena, or through
6 a motion for protective order. *See* Rule 45(c)(6)(B) and (e)(2) of the Arizona Rules for Civil Procedure.
7 The procedure and grounds for doing so are described in the section above entitled "Procedure for
8 Objecting to a Subpoena for Attendance at a Hearing, Trial or Deposition."

9 If the subpoena *also* commands your attendance at a hearing, trial or deposition, sending a
10 written objection to the party or attorney who served the subpoena does not suspend or modify your
11 obligation to attend and give testimony at the date, time and place specified in the subpoena. *See* Rule
12 45(c)(6)(A)(iii) of the Arizona Rules of Civil Procedure. If you wish to object to the portion of this
13 subpoena requiring your attendance at a hearing, trial or deposition, you must file a motion to quash or
14 modify the subpoena as described in the section above entitled "Procedure for Objecting to a Subpoena
15 for Attendance at a Hearing, Trial or Deposition." *See* Rule 45(b)(5) and 45(c)(6)(A)(iii) of the Arizona
16 Rules of Civil Procedure. Even if you file such a motion, you must still attend and testify at the date,
17 time, and place specified in the subpoena, unless excused from doing so--by the party or attorney
18 serving the subpoena or by a court order--before the date and time specified for your
19 appearance. *See* Rule 45(b)(5) of the Arizona Rules of Civil Procedure.

20 **DISOBEDIENCE OF THIS SUBPOENA** constitutes contempt of the Arizona Corporation
21 Commission and may subject you to further proceedings and penalties under law, pursuant to
22 A.R.S. § 40-424.
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BY THE ORDER OF THE ARIZONA CORPORATION COMMISSION

CHAIRMAN BURNS

COMMISSIONER DUNN

COMMISSIONER TOBIN

COMMISSIONER KENNEDY

COMMISSIONER OLSON

IN WITNESS WHEREOF, I, MATTHEW J. NEUBERT,
Executive Director of the Arizona Corporation Commission,
have hereunto, set my hand and caused the official seal of this
Commission to be affixed at the Capitol, in the City of Phoenix,
this _____ day of _____, 2019.

MATTHEW J. NEUBERT
EXECUTIVE DIRECTOR

DISSENT: _____

DISSENT: _____

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1 **Exhibit "A" to Subpoena Duces Tecum**¹

2 From January 1, 2011, to present, produce all documents, records books, and any other papers, whether
3 stored on electronic media or otherwise, responsive to the following categories:

- 4 1. Any and all documents, correspondence, including but not limited to emails, records, notes,
5 memoranda, electronically stored information, or tangible things in the custody or control of
6 Arizona Public Service Company, its employees, directors, agents, designees, parent
7 companies, holding companies, subsidiaries, associates, and/or affiliates, including Pinnacle
8 West Capital Corporation, relating to any contribution, expenditure, or other attempt to
9 influence the outcome or result of an Arizona Corporation Commission election.²
- 10 2. Any and all written correspondence, including but not limited to e-mails, letters, facsimile, text
11 messages, and voice transcriptions, between the following: (1) an Arizona Corporation
12 Commissioner; and (2) Arizona Public Service Company, its employees, directors, agents,
13 designees, parent companies, holding companies, subsidiaries, associates, and/or affiliates,
14 including Pinnacle West Capital Corporation, that relate to any and all solicitations for, or
15 contributions to a 26 U.S.C. § 501(c)(3) organization that occurred during the above mentioned
16 Arizona Corporation Commissioner's term on the Commission.³

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19 ¹ For the purposes Exhibit A, the terms "affiliate," "entity," "holding company," and "subsidiary"
20 have the same meaning as such terms under A.A.C. R14-2-801 *et seq.*

21 ² For the purposes of Request 1, the terms "contribution" and "expenditure" have the same meaning
22 as such terms have under A.R.S. § 16-901 *et seq.* In addition, the term "influence" shall mean
23 supporting or opposing a candidate for nomination or election to public office or the recall of a public
24 officer and supporting or opposing the circulation of a petition for the recall of a public officer in any
25 manner that is not impartial or neutral. *See e.g.* A.R.S. §§ 16-192(H)(2) & 16-901 *et seq.*

26 ³ For the purposes of Request 2, the term contribution has the same meaning as such term has under
27 United States Internal Revenue Publication 526.

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