ARIZONA COURT OF APPEALS

DIVISION ONE

Warren Woodward APPELLANT, v. Arizona Corporation Commission, Bob Burns, Tom Forese, Doug Little, Susan Smith, & Bob Stump APPELLEES.	CA-CV 15-0825 Superior Court Case # LC2015-000274

APPELLANT'S REPLY BRIEF

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APPELLEES' BOGUS STATEMENT OF THE CASE

Largely irrelevant information and some fraudulent material is presented in Appellees' Statement of the Case.

Note that, in his Opening Brief, Appellant began *his* Statement of the Case with the April 30, 2015 filing of Arizona Corporation Commission (ACC) Decision # 75047. Any previous date is largely irrelevant to this case since April 30, 2015 was the filing date of the ACC Decision that ultimately led to this action in the Court of Appeals. Appellant has previously pointed out in his Opening Brief that Appellees have misleadingly attempted to frame his Application for Rehearing of ACC Decision # 75047 as an "additional" or "second" Application to ACC Decision # 74871. It isn't, but Appellees have continued that ploy throughout their Answering Brief anyway.

In their Statement of the Case, Appellees have basically admitted to violating A.R.S § 40-253. Appellees stated, "On January 22, 2015, the Commission granted rehearing for the limited purpose of further consideration of the rehearing request." Yet according to A.R.S § 40-253, Appellees do not get to delay a rehearing by inventing the trick of granting it for "the limited purpose of further consideration." A.R.S § 40-253 is clear. It states in no uncertain terms, "If the commission grants the application, the commission shall promptly hear the

matter and determine it within twenty days after final submission." Appellees' January 22, 2015 action was only the beginning of a series of illegal delaying tactics which resulted in Appellant filing his Notice of Appeal in Superior Court.

At the heart of Appellant's Application for Rehearing of ACC Decision # 75047, and his subsequent appeal to both Superior Court and now the Court of Appeals, are A.R.S. § § 40-253 & 40-254 and *State ex rel. Church v. Arizona Corp. Commission*, 94 Ariz. 107 (Ariz. 1963) which clarifies those statutes.

Most importantly, *Church* states:

> A.R.S. § 40-253 governs the procedure on application for rehearing before the corporation commission. By its terms it contemplates judicial review following rehearing. A.R.S. § 40-254 governs the procedure for obtaining judicial review and, significantly, sets brief time limits within which the action may be brought, answer made, and preparation for trial completed. A.R.S. § 40-255, in further expression of the legislature's intent that judicial review be expeditiously obtained, gives such actions precedence over other civil matters except election actions. **Read together, these sections indicate speed, not delay, is the legislative mandate where judicial review is sought of action by the commission.** (*Church*, 94 Ariz. 111. Appellant's emphasis)

In other words, Appellees do not get to postpone an action brought under A.R.S. § 40-253 – which is what they did by the stalling tricks they admitted to in their Answering Brief. One such trick was the so-called "interlocutory order" mentioned above.

By the way, the so-called interlocutory "rehearing for the limited purpose

of further consideration of the rehearing request" that Appellees say occurred January 22, 2015 **was never docketed at the time it was made.** Anyone searching in ACC docket # E-01345A-13-0069 will not find it because it's not there. It was only referenced over three months later on April 30, 2015 in ACC Decision # 75047 (see Exhibit B of Appellant's Opening Brief). If it's not in the docket, how can it be part of the record or even part of the Decision? Yet Appellees refer to it as some sort of milestone indicating the alleged timeliness of their response to Appellant's Application for Rehearing. This is just one example of Appellees' consistent disregard for law and proper procedure, and a major reason Appellant filed his Application for Rehearing of ACC Decision # 75047 in the first place. Appellant's subsequent Notice of Appeal to Superior Court had nothing to do with ratemaking as Appellees alleged in section C of their Answering Brief (pp. 21-3). Appellant's filing had everything to do with Appellees' multiple violations of A.R.S. § 40-253 and other laws, as well as Appellees' baldfaced lying in the Findings of Fact of ACC Decision # 75047 (see Appellant's Notice of Appeal, I # 2). Appellees have perpetuated that lying in their Answering Brief to this Court.

Appellees' next sentence in their Statement of the Case is a lie: "The Commission considered the matter at two subsequent open meetings." No, in

actual fact the Commission "considered the matter" at staff meetings, *not* open meetings, and not much 'considering' was done at either meeting, less than three minutes of public discussion at one and only about fourteen minutes at the other.

According to the ACC website, "*Open Meetings are regularly scheduled forums where Commissioners make decisions*" (italics in original). Thus, "open meetings" coupled with the word, "considered," creates a false impression of deep deliberation. Appellant has been to ACC staff meetings. They are different than open meetings which is why they are named differently and categorized differently at the ACC website (see Exhibit A). They are hardly "forums." The public is seldom invited to talk at any of them. The staff meetings usually seem to involve minor ACC business that can be handled without a lot of discussion or time.

At the first subsequent staff meeting (held March 2, 2015), much of the discussion was about whether the next meeting in which the matter was to be discussed should be an open meeting or a staff meeting (see the discussion transcript at Exhibit B). So there really *is* a difference between the two types of meetings that Appellees themselves recognize. As such, Appellees lied by saying the meetings were open meetings. By the way, Appellees told this very same lie in ACC Decision # 75047 (see FOF # 15). Appellant called them out for it in his

Application for Rehearing of that Decision (see *Non-Fact # 15 – Yet more flat out lying,* p. 12, Exhibit 1 of I # 2). Yet incorrigibly, Appellees have repeated the lie in their Answering Brief.

Appellees' next two sentences in their Statement of the Case are remarkable for several reasons. Appellees wrote:

> On April 30, 2015, the Commission granted relief on rehearing, thereby rescinding its earlier order that had authorized APS's proposed metering rates. The Commission also stayed APS's application until the filing of APS's next full rate case.

Recall that just two sentences prior Appellees also claimed to have granted rehearing, only in that sentence the granting occurred January 22, 2015. How many times do Appellees get to grant rehearing? Such continuous granting is not in keeping with either A.R.S. § 40-253 or the "speed" called for by *Church* – nor is shunting the rehearing (that by law is supposed to occur within 20 days) to a rate case in the indeterminate future. At ¶ 18 in that April 30, 2015 ACC Decision # 75047, Appellees stated, "It is our understanding that APS intends to file a general rate case within the next 18-24 months." So again, Appellees knew full well that they were not meeting A.R.S. § 40-253's legal requirement of a rehearing within 20 days. Furthermore, a rate case is not a rehearing. A.R.S. § 40-253 calls for a ***rehearing*** within 20 days, not a *rate case* within 20 days. 'Staying APS's application' sounds very "official" and legal-like

but it is *not* the remedy prescribed by A.R.S. § 40-253; that remedy is a rehearing within 20 days.

Note that Appellees next sentence is a perpetuation of the "second application" ploy: "On May12, 2015, Mr. Woodward filed a second application for rehearing." No, on May 12, 2015, Mr. Woodward filed one application for rehearing of ACC Decision # 75047, not a second.

So, Appellees are off to a bad start in their Answering Brief but it only gets worse from there.

APPELLEES' FRAUDULENT STATEMENT OF FACTS

In their Statement of Facts, Appellees have presented a great deal of irrelevant information and misinformation. Some of it is outright lying and deception.

This case is about jurisdiction, not the history of "smart" meters in Arizona, or even the history of Appellant's legal struggles with the ACC. As such, Appellant is hesitant to even address Appellees' largely nonsensical and off-topic ramblings, some of which is obvious "smart" meter propaganda, and some of which is outright lying. On the other hand, Appellant feels compelled to set the record straight because Appellees' serial lying, along with Appellees' multiple violations of A.R.S. § 40-253, were the two main reasons Appellant filed an

Application for Rehearing of Decision # 75047 – which ultimately led to this appeal. Again, Appellant's filing had nothing to do with ratemaking as Appellees alleged in section C of their Answering Brief.

In the Appendix of their Answering Brief, Appellees have included two blatant "smart" meter propaganda pieces to which they refer via footnotes in their Statement of Facts. The first piece, *The Smart Grid: the Complexities and Importance of Data Privacy and Security,* was written by a couple of utility lawyers, one of whom is on the board of directors of Pepco Holdings, a subsidiary of Exelon, the largest regulated utility in the U.S. with approximately ten million customers and lots and lots of "smart" meters. In short, the authors are not independent, objective experts but rather they are conflicted, interested parties (see Exhibit C).

The other piece Appellees chose to include in their Appendix and use as a reference was an unsigned article from 2009 put out by Wolters Kluwer Law & Business. Wolters Kluwer Law & Business is a sort of glorified "Cliff Notes" for lawyers too lazy to do their own homework. Wolters Kluwer are <u>*not*</u> an authority on the subject of the "smart" grid. Besides, since 2009 the glowing promise of the misnamed "smart" grid has been been betrayed by reality. That reality is health issues, massive recalls due to fires, privacy invasions, over-

billing, interference with and damage to household appliances and electronics, trespass on and theft of private property, increased grid cyber-insecurity (susceptibility to hacking causing major outages), and rate increases due to "smart" meter obsolescence in five to seven years plus the astronomical costs of other "smart" grid equipment, maintenance and data storage, and etc. Despite the promises of great savings, customers have only seen rate increases wherever the "smart" grid is installed. Rates have *not* decreased anywhere in the world as a result of the "smart" grid. (For a detailed and documented overview of the entire "smart" grid situation, see Exhibit 1 at I # 2)

Appellees stated: "The automated features of the meters also permit the Company to reduce costs by reducing the number of visits to customer premises." (AB, p. 4) Then, as "proof" of that statement, Appellees footnote to the Wolters Kluwer article. Appellees' statement is actually misleading, a fallacy. The overall costs of the "smart" grid are astronomical. In ACC Decision # 69736 some of those costs were listed.

> Costs of AMI can include the costs for the meters, meter installation, a Meter Data Management System, data management labor, communications, back office software and servers, the integration of the AMI system to other systems, repairs to customer equipment, and other associated costs.
> (Exhibit D, ACC Decision # 69736, p. 5, line 25)

"Other associated costs" include: Field equipment such as routers and towers

(basically APS has had to build their own cellular network), plus upgrades to the power lines, plus whatever APS is paying Verizon to move the data where APS's communications network services are inadequate. Then add in the ongoing costs – operating and maintaining the network, storing the data, cyber-security costs, and the fact that "smart" meters and the rest of the "smart" grid equipment require electricity to run whereas analog meters do not. Then there's the much, much shorter lifespan that "smart" meters have. Testifying October 21, 2015 before a joint hearing of the U.S. House Subcommittee on Energy and the U.S. House Subcommittee on Research and Technology, Bennett Gaines, Senior Vice President, Corporate Services and Chief Information Officer of FirstEnergy (one of the nation's largest investor owned utilities with 6 million customers) said this about "smart" meters: "These devices have a life of between 5 to 7 years." (See him say it at 1:40:56 in the hearing's video minutes, here: https://science.house.gov/legislation/hearings/subcommittee-energy-and-subcommittee-research-and-technology-hearing .) So, reducing costs "by reducing the number of visits to customer premises" is a ruse.

Appellees stated: "A number of individuals have alleged that smart meters invade customer privacy and injure human health due to the effects of radio frequency ("RF") transmissions and may compromise the security of AMI

meter-transmitted data." (AB, p. 4) Appellees are lying by half-truth. Appellees have been told repeatedly by Appellant (and many others) that there are many more additional harmful consequences of "smart" meters, yet Appellees have persisted in ignoring those issues. Appellees seem afraid to acknowledge such serious issues as massive recalls due to fires, "smart" meter related fires in Arizona, over-billing, interference with and damage to household appliances and electronics, trespass on and theft of private private property (APS has no easement for a telecom system), increased grid cyber-insecurity (susceptibility to hacking causing major outages), and rate increases due to the astronomical costs of the "smart" grid. (again, see Exhibit 1 at I # 2).

Appellees stated: "The Commission subsequently asked the Arizona Department of Health Services ("ADHS") to conduct a study of the potential health effects of exposure to radio frequencies emitted by smart meters." (AB, p. 5) But what Appellees did not state is that there was no written agreement between the ADHS and the ACC for the "smart" meter study. Indeed, emails Appellant obtained via a public records request show that Appellees improperly influenced the study even before its start was voted for by the Commission, and also while it was being researched and written. (That whole story may be found starting on page 4 of Exhibit B in Exhibit 1 at I # 2.)

Appellees stated: "As part of its study, ADHS reviewed the relevant literature and, together with the Arizona Radiation Regulatory Agency ("ARRA"), conducted a random sampling of APS's smart meters to determine whether they comply with standards established by the Federal Communications Commission." (AB, p. 5) Appellees are lying again. Appellees have been told repeatedly, there are no "standards established by the Federal Communications Commission." There are "guidelines." This is no small matter of semantics as has been explained repeatedly to Appellees (see *Commission Fantasy – The commissioners try to hide in FCC Fantasy Land,* p. 21 of Exhibit A in Exhibit 1 of I # 2, and *Non-Fact # 9 – More lying, and more lying by half-truth*, p. 11 of Exhibit 1, I # 2).

Additionally, the ADHS study was a total fraud. There were numerous instances of data cherry picking, misrepresentations of scientific studies by omitting relevant and key material (sometimes it was so blatant that studies would say one thing but ADHS reported another), simple and basic concepts were misreported or not grasped at all, and the measuring instrument used by the ARRA was a piece of cheap, inaccurate junk completely unsuited for a serious scientific study (see Appellant's YouTube video, *Video Exposé - The ADHS "Smart" Meter Study Is Grossly Inaccurate*, and Appellant's full report on the ADHS study, *A Pattern of Incompetence and Fraud*, Exhibit C in Exhibit 1 at I #

2).

Appellees stated: "... ADHS concluded that smart meters have not been shown to be injurious to human health." (AB, p. 5) Another outright lie by Appellees. In actual fact, ADHS concluded that, "*Exposure to electric meters (AMI and AMR) is not likely to harm the health of the public*" (p. 29 of the ADHS study, italics in original; see Exhibit E). There is a big difference between "not shown to be injurious" and "not likely to harm." "Not shown to be injurious" is conclusive. "Not likely to harm" means that harm *is in fact* a possibility. Additionally, it is noteworthy that ADHS did not find the meters "safe." "Safe" is the word used in all the relevant statutes by which the ACC is meant to protect the public from harm regarding the electrical equipment used by the companies the ACC regulates. "Not likely to harm" is *not* the measure by which equipment is to be evaluated. "Safe" is. Of all their lies, Appellees should be particularly ashamed of that one.

Appellees stated: "ADHS also concluded that, based on the results of the field test, APS's smart meters fall within federal guidelines." (AB, p. 5) Because of the gross inaccuracy of the measuring equipment used, that statement cannot be trusted as true. Via a public records request, Appellant received the work sheets of the field test. Measurements of some analog meters were taken as a

control. ARRA's measuring equipment was so inaccurate that the work sheets show analog meters transmitting microwaves, an absolute impossibility since the analog meters tested did not have microwave transmitters! (One such work sheet may be seen at Exhibit F).

Next, Appellees stated:

> While the generic docket was still pending, APS filed an application to establish "opt-out" rates, *i.e.,* rates to recover the costs associated with customer requests to retain analog meters. By this point in time, APS had mostly completed its transition from analog meters to smart meters. Some customers, however, continued to request analog meters, and APS has acceded to these customer requests. According to APS, this continued deployment of analog meters creates costs that APS is not recovering, in part because the use of analog meters requires manual meter reading that would otherwise be avoided.
> (AB, pp. 5 & 6)

Several things are wrong and fraudulent with the above. First of all, the last sentence is particularly problematic since it is footnoted to Finding of Fact # 7 in an ACC Decision that has been rescinded. Appellees should know better than to attempt to use a rescinded decision as an authority. Additionally, that Finding of Fact # 7 has been thoroughly debunked by Appellant. What it purports is <u>*not*</u> a Fact (see *Estimated Costs – No, just APS winging some numbers at the wall and hoping some stick*, p. 10, Exhibit A in Exhibit 1 at I # 2). Additionally, Appellees have not truthfully represented that Finding of Fact in their sentence anyway.

Note that, in the above, Appellees state "According to APS …." Yet if one follows the footnote to the rescinded Decision there is different language. There it says "Staff recognizes that there are costs …," not APS. In short, Appellees simply cannot be trusted to represent the truth at any time.

Furthermore, the notion that "this continued deployment of analog meters creates costs that APS is not recovering" is another lie. Note that, at the start of Appellees' Statement of Facts, Appellees referenced the Congressional Energy Independence and Security Act of 2007 ("EISA"). That was a misleading deception to make it seem as though "smart" meters were mandated by Congress. It would have been much more accurate for Appellees to reference the Congressional Energy Policy Act of 2005 and the ACC's own 2007 Decision # 69736 (Exhibit D) which is noticeably absent from Appellees' fraudulent "smart" meter history.

In the Energy Policy Act of 2005, Section 1252, the word used repeatedly with regard to "smart" meters is "request". Electric utilities were to provide "smart" meters to those customers *who request them*. "Smart" meters were to be an "*opt in*" program – and even then only if state regulatory agencies found such a program "appropriate."

The ACC's 2007 Decision # 69736 is entitled "IN THE MATTER OF

SMART METERING REQUIREMENTS OF SECTION 1252 OF THE ENERGY POLICY ACT OF 2005." That Decision actually quotes the relevant Energy Policy Act wording Appellant just mentioned above. Note the word, "requesting."

> "(C) Each electric utility subject to subparagraph (A) shall provide each customer **requesting** a time-based rate with a time-based meter capable of enabling the utility and customer to offer and receive such rate, respectively."
> (Exhibit D, pp. 3 & 8. Appellant's emphasis)

The above quote actually appears *twice* in the nine page ACC Decision.

Additionally in that Decision, the following is found under the heading "TIME-BASED METERING AND COMMUNICATIONS." Note the phrase "upon customer request".

> "Within 18 months of Commission adoption of this standard, each electric distribution utility shall offer to appropriate customer classes, and provide individual customers **upon customer request**, a time-based rate schedule under which the rate charged by the electric utility varies during different time periods and reflects the variance, if any, in the utility's costs of generating and purchasing electricity at the wholesale level."
> (Exhibit D, p. 7, Appellant's emphasis)

So, since "smart" meters are voluntary by both federal and state law, there can be no costs whatsoever associated with refusing one. To be charged for refusing one would be like getting a bill from an airline company for not flying.

Continuing their deception, Appellees have at least twice used footnotes that in no way support the sentence to which the footnote corresponds.

Appellees wrote on page 5 of their Answering Brief: "ADHS also concluded that, based on the results of the field test, APS's smart meters fall within federal guidelines." The footnote at that sentence takes the reader to this:

> On March 22, 2013, Arizona Public Service Company ("APS" or "Company") filed an application requesting approval of its Automated Meter Opt-Out Service Schedule. APS reports that it has now almost completely deployed Advanced Metering Infrastructure ("AMI") meters or "smart" meters in its service territory. Several groups of APS customers have raised concerns to the Commission and APS regarding the health effects of radio frequency ("W3 transmissions and the security of AMI meter-transmitted data. These customers have requested the ability to retain non- transmitting analog meters, and this Opt-Out Schedule is intended for those customers.
> (ACC Decision # 74871, Exhibit C of Appellant's Opening Brief, p. 1, FOF 2)

Appellees wrote on page 7 of their Answering Brief: "At the open meeting, the Commission heard public comment as well as arguments from all of the parties, including Mr. Woodward." The footnote at that sentence takes the reader to this:

> 10. The first alternative would function as APS requests in its application. Meter reading would occur on a monthly basis, the charge associated with reading the meter would be commensurate with the cost estimates APS has provided, less $1.00, which is already embedded in the base rates all customers on the E-12 rate schedule already pay for meter reading. (The E-12 rate schedule is required for customers joining the Opt-Out program.) Customers selecting this option would pay $20 per month.
>
> Alternative 2: Self-Reading

> 11. The self-reading option would reduce the costs customers pay for meter reading by permitting them to read meters themselves, thereby reducing the number of APS meter reader trips to the home and corresponding travel costs. Under this option, customers would read their analog meter and fill out a post card indicating monthly usage, and then submit that card to APS by a specified date every month. Every fourth month, an APS meter reader would conduct an on-site reading to ensure accuracy. This option would only require on-site meter reading once every four months, so Staff estimates a corresponding reduction in costs for APS of 75% over its proposed monthly reading charge. Thus, customers selecting this option would pay $5 per month.
> (ACC Decision #74871, Exhibit C of Appellant's Opening Brief, p. 4, FOFs 10 & 11)

Appellant does not exaggerate when he says Appellees cannot be trusted to represent truth. Appellees' bogus footnotes are just more proof of that.

Appellees stated: “Mr. Woodward intervened in APS’s opt-out rate proceeding. He opposed the Company’s rate request, alleging concerns about customer privacy and about the potential health effects of smart meters.” (AB, p. 6) More lying by half truth. Yes, Mr. Woodward alleged those concerns, but also many, many more (see I # 2).

Word tricks abound in these two sentences found on page 9 of Appellees' Answering Brief:

> On May 12, 2015, Mr. Woodward filed a second Application for Rehearing, focusing this time on Commission Decision No. 75047, the order that had granted relief on rehearing. On June 25, 2015, he filed a Notice of Appeal in Maricopa County Superior Court, almost

sixty days after Decision No. 75047 had been entered.

First there is the perpetuation of Appellees' bogus "second Application" ploy. And no, Mr. Woodward was not "focusing this time Commission Decision No. 75047." Mr. Woodward *actually filed* an Application for Rehearing of Decision # 75047 – one Application, not a "second." And yes, the Notice of Appeal in Superior Court *was* filed "almost 60 days after 75047 was filed." But that is irrelevant and misleading because June 1, 2015 is the date from which Appellant had thirty days to file (see page 7 of Appellant's Opening Brief). It is noteworthy that June 1, 2015 is a date conspicuously absent from Appellees' entire Answering Brief.

There are more lies, half-truths and deceptions that pervade Appellees' repetitive Statement of Facts. However, as stated previously, it's all irrelevant material that does not involve the jurisdiction issue which, as Appellant presented it in his Opening Brief, is actually quite simple.

Appellant reminds the Court that Appellees' grossly dishonest and deceptive Statement of Facts was the work of three supposedly professional lawyers (and who knows how many paralegals). As such, they should all be ashamed of themselves for disrespecting both the Public and the Court with such blatant lying.

For the detailed and documented whole truth about the history of "smart" meters in Arizona, Appellant recommends his Notice of Appeal at I # 2. Appellant is not paid to lie, or paid to do anything except be retired.

APPELLEES' DELUSIVE ISSUES PRESENTED

There is only one issue for review. Appellant stated it in his Opening Brief. Appellees' "Issues Presented" are nothing but arguments disguised as questions.

APPELLEES' FALLACIOUS ARGUMENTS

Appellant has discussed Appellees' bogus January 22, 2015 "interlocutory" stalling trick. Another "interlocutory" stalling trick was ACC Decision #75047 itself, whereby Appellees have so far stalled off a rehearing for a year! According to A.R.S. § 40-253, the rehearing was supposed to take place within twenty days.

Remarkably, Appellees have now leveraged their lawlessness, their multiple violations of A.R.S. § 40-253, into phony "reasons" why Appellant's appeal should be dismissed. Appellees claim that:

> **A. Decision No. 75047 Is A Non-Final, Interlocutory Order Over Which The Superior Court Lacks Jurisdiction For Purposes Of Appeal.**
> (AB, p. 17. Emphasis in original)

Also, on page 20 of their Answering Brief, Appellees claim that:

> Judicial review of Decision No. 75047, which is a non-final,

> interlocutory order, serves no purpose, and will instead interfere with the Commission's examination of these issues in APS's next rate case.

So, Appellees illegally delay a rehearing, then claim that any judicial review will interfere with their "examination." Appellees make similar claims elsewhere in their Answering Brief. In their argument III(B) on page 18 of their Answering Brief, Appellees claim that their stalling makes this case "not ripe for judicial review." And they add:

> … the Commission concluded that the matter would benefit from the "type of comprehensive review that is conducted in a general rate case." The Commission stated that
>
> > [w]e believe that our consideration of this matter will be aided by the full spectrum of information that is included in a general rate case.
>
> (AB, p.18)

If the Commission really believed that, then why did they vote on the matter just four months prior to making the above statement? At that time, the Commission actually boasted (in ACC Decision #74871) that they had "fully considered these matters" (Exhibit C of Appellant's Opening Brief, p.7, line 22). Four months later they decide they really didn't 'fully consider these matters?' Additionally, if the Commission truly thought a rate case was a better venue, then it would have rejected APS's tariff filing from the start and told APS to wait for their next rate case. What Appellees have written, then, about now needing a

"comprehensive review" and "the full spectrum of information" is simply not believable. It is just more stalling and rationalization of that stalling.

Docket # E-00000C-11-0328, the so-called "Generic Docket for the Investigation of Smart Meters," was opened August 29, 2011, over a year and a half *before* APS's filing. During that year and a half (and to the present), scores of people filed comments in that docket expressing their various problems with, and complaints about, "smart" meters. They provided many hundreds of pages of evidence for same. Additionally, two all-day "smart" meter ACC workshop meetings were held before APS filed. Both meetings were packed with people complaining and providing evidence about all aspects of "smart" meters. People who could not be there in person phoned in their complaints and problems.

So Appellants had o*ver a year and a half* of complaints and evidence about all manner of "smart" meter issues. Then APS filed on March 22, 2013. Then Appellants had *over two more years* of complaints and evidence about all manner of "smart" meter issues. But only after Appellant applied for a rehearing on January 5, 2015 of ACC Decision # 74871 did Appellees come to the sudden realization that "these issues would benefit from the type of comprehensive review that is conducted in a general rate case?" Not believable! Appellees wrote about being "aided by the full spectrum of information." Appellees had almost

four years worth of full spectrum information! I and many others have buried the ACC in all manner of information. Appellees had enough information to say grace over about two and a half years ago. Then Appellees commissioned a study by the Arizona Department of Health Services that took over a year and that did ***not*** find "smart" meters to be safe. So Appellees have in fact had "the full spectrum of information," and it is obvious that Appellees are not being honest by implying that they have not.

Indeed, at least one of the Appellees has publicly tipped his hand that the "comprehensive review" and "full spectrum of information" excuse is a ruse. A September 26, 2015 Arizona Republic newspaper article (Exhibit G) reported that:

> [Robert] Burns was uncharacteristically blunt when asked about that decision [# 75047] last week. Normally commissioners won't discuss an upcoming decision so as to avoid the appearance of bias. But Burns said rescinding the fee shouldn't be counted as much of a victory for Woodward.
>
> "That's not the end of the story," Burns said. "It causes a delay, possibly, but I don't know that it affects the final decision."

Further leveraging their violations of A.R.S. 40-253 into phony "reasons" why Appellant's appeal should be dismissed, Appellees claim in section III(B) of their Answering Brief that:

> There are no "irremediable adverse consequences" that flow from

> the Commission's interlocutory order, and therefore delayed judicial review will not cause a hardship to Mr. Woodward.
> (AB, p. 21)

As if repeating that lie will make it the truth, in section III(B) there are two more times Appellees say Appellant won't suffer hardship or be harmed:

> First, **Mr. Woodward will not suffer any hardship** if judicial review does not occur at this time. Decision No. 75047 rescinded the opt-out rates and stayed APS's application until APS's next full rate case, which is to be filed on June 1, 2016. Thus, the Commission's order serves to preserve the *status quo* until these matters can be addressed in an upcoming proceeding. Mr. Woodward will be able to fully participate in that case and present his arguments for Commission consideration. In the interim, APS will continue to provide analog meters at no charge. Thus, **Mr. Woodward is not prejudiced or harmed** if judicial review does not immediately occur.
> (AB, p.19 & 20. Appellant's emphasis)

So Appellees are essentially saying it's OK to violate A.R.S. § 40-253 and *Church* if no one is "harmed."

Appellant asserts he *is* in fact harmed, however. There is more to life than money, and just because "APS will continue to provide analog meters at no charge" does not mean Appellant is not harmed. Appellant is harmed by being deprived of the right to the "speed, not delay" that is mandated by *Church*. Appellant is harmed by Appellees' violation of his rights under A.R.S § 40-253, and by wasting his time in a runaround of illegal stalling tactics – and time *is* money. (For the full runaround story and details of Appellees' multiple

violations of A.R.S. § 40-253 see *ACC Lawlessness Started Before Their Decision Was Made*, p. 2 of Exhibit 1 at I # 2)

Writing of APS's upcoming rate case, Appellees stated that "... Mr. Woodward will be able to fully participate in that case and present his arguments for Commission consideration." Appellant has already been 'presenting his arguments for Commission consideration' since 2011. Appellant is extremely harmed by having to present them some more, this time not in the rehearing called for by law, but buried in something as complex as a multi-billion dollar rate case. Appellant believes that Appellees are attempting to wear him down with their runaround and illegal delaying tactics – that's harm.

It needs to be pointed out that Appellees' delays in violation of A.R.S. § 40-253 were a conscious and open conspiracy on their behalf. Via a Public Records Request, Plaintiff acquired January 20th, 2015 emails between Appellee Susan Smith and her Policy Advisor, Laurie Woodall, an attorney. An intervenor in ACC docket # E-01345A-13-0069 wanted some information about the January 22, 2015 staff meeting in which her Application for Rehearing of ACC Decision # 74871 (along with Appellant's) was an agenda item. Laurie Woodall unabashedly wrote "the purpose of the agenda item is to consider extending the time limits for us to make a decision" (see Exhibit B at I # 18). Of course, there

is no provision in A.R.S. § 40-253 to extend time limits.

Additional evidence of Appellees' conscious and open conspiracy to violate A.R.S. § 40-253, and Appellant's rights therein, is found in the audio minutes of the April 13, 2015 ACC staff meeting at which ACC Decision # 75047 was made. It is clear Appellees somehow expected they could substitute a rate case in the indeterminate future for the legally required rehearing within twenty days – and get away with it. Appellees invented their own three relief options for Appellant (none of them being the relief requested by Appellant), then chose among them. Complying with A.R.S. § 40-253's twenty day time frame for a rehearing was *not* among those relief options, and complying with A.R.S. § 40-253 was never even mentioned by Defendants. At the April 13, 2015 ACC staff meeting, ACC Legal's Janice Alward described the option the Appellees unanimously voted for thus:

> "It's an Interlocutory Order, um, um, an intermediate decision, that would abrogate and rescind the decision that the Commission made in December and simply indicate that this, from the Commission's point of view, would be most helpful for them to consider these matters in the rate case, where they could consider them, um, more fully."
> (ACC Staff Meetings Audio Archives, April 13, 2015, at 1:6:36)

Note that Appellees consciously and willfully picked the option that "from the Commission's point of view, would be most helpful for them." Appellees did

not pick the option required by law. A transcript of the April 13, 2015 ACC staff meeting discussion of this issue can be found at I # 18, Exhibit A. The transcript is remarkable in that at no time were the ACC's obligations under A.R.S. § 40-253 mentioned or discussed.

In his Opening Brief, Appellant dealt with much of Appellees' bizarre interpretation of *Church* and will not be repeating that here. However, in section II of their Argument, it needs to be pointed out that Appellees have continued to misconstrue and misapply the *Church* opinion.

The *Church* case involved two ACC decisions. The plaintiff did not like the first decision and got a rehearing which was then followed by a second ACC decision made with only minor changes to the first one. In the *Church* case, the plaintiff sought rehearing of the first decision, but *failed* to seek rehearing of the second decision. When the case reached the Arizona Supreme Court, that Court forgave and excused plaintiff's *failure* to seek rehearing because there was very little difference between the two decisions. In other words, the plaintiff was concerned mostly with the first decision.

In Appellant's case, Appellant *cannot* be concerned with the first decision because it was rescinded and so no longer actually exists. Unlike the plaintiff in *Church*, Appellant did <u>*not*</u> fail to seek reconsideration of the second decision. So

Appellant's case involves only a second ACC decision, whereas *Church* basically involved the first ACC decision. In short, Appellees do not seem to know the difference between apples and oranges. Furthermore, that second ACC decision involved in Appellant's case no longer involved rates since those were rescinded. So, once again, Appellant's case does not involved ratemaking as asserted by Appellees.

At page 15 of the Answering Brief, Appellees stated:

> Mr. Woodward argues that the *Church* case is not dispositive because, unlike this case, it involved circumstances where the original Commission order was affirmed, except in minor detail. Contrary to this contention, *Church* specifically considered whether it is necessary to file another application for rehearing after each new "final order":
>
> > By repeatedly granting the application, and then issuing a new "final order" affirming its previous ruling, the commission could endlessly delay the judicial review afforded by A.R.S. Section 40-254. Other possible rules are equally subject to criticism. If a second rehearing were required whenever the order following the first rehearing "substantially modified" the original order, aggrieved parties having no guideline as to whether a modification is "substantial" or "minor," would feel compelled to apply for a second rehearing in every instance.
> > (*Church*, 94 Ariz. at 111, 382 P.2d at 224)

Above, Appellees have pointed out that "... *Church* specifically considered whether it is necessary to file another application for rehearing after each new

“final order.”” Now, note that *Church* considers “If a second rehearing were required ….” If something is not "necessary" or not "required", it is *not* thereby prohibited. The plaintiff in *Church* failed to follow the letter of the law, but the Court forgave and excused his error. In Appellant's case, Appellant *did* follow the letter of the law, so Appellant does *not* need any such forgiveness. Appellant should not be punished for obeying the law.

CONCLUSION

Appellant requests that the Court of Appeals reject Appellees' thoroughly dishonest Answering Brief, and reverse the Superior Court's dismissal. Appellant further requests that, in doing so, the Court of Appeals also order that a different Superior Court Judge continue to hear Appellant's case.

Dated this 11th day of April, 2016.

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