

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 MIKE GLEASON  
CHAIRMAN

3 WILLIAM A. MUNDELL  
COMMISSIONER

4 JEFF HATCH-MILLER  
COMMISSIONER

5 KRISTIN K. MAYES  
COMMISSIONER

6 GARY PIERCE  
COMMISSIONER

7  
8 IN THE MATTER OF THE APPLICATION OF  
9 TUCSON ELECTRIC POWER COMPANY  
10 FOR THE ESTABLISHMENT OF JUST AND  
11 REASONABLE RATES AND CHARGES  
12 DESIGNED TO REALIZE A REASONABLE  
13 RATE OF RETURN ON THE FAIR VALUE  
14 OF ITS OPERATIONS THROUGHOUT THE  
15 STATE OF ARIZONA

Docket No. E-01933A-07-0402

12  
13 IN THE MATTER OF THE FILING BY  
14 TUCSON ELECTRIC POWER COMPANY  
15 TO AMEND DECISION NO. 62103.

Docket No. E-01933A-05-0650

16 **MOTION TO STRIKE THE  
17 TESTIMONY OF THOMAS A. ZLAKET**

18 The Residential Utility Consumer Office ("RUCO") respectfully moves the Arizona  
19 Corporation Commission ("Commission") to strike the testimony of Thomas A. Zlaket. The  
20 parties, through their filings in this matter, have provided sufficient evidence upon which the  
21 Commission can determine whether Tucson Electric Power ("TEP or the Company") has a  
22 sufficient claim to bring an action on the legal basis of breach of contract. Judge Zlaket's legal  
23 opinion as to the sufficiency of the Company's contract claim amounts to legal argument that is  
24 appropriate in closing briefs, and not as testimony. The Commission should not endorse a  
process which would require lawyers to cross-examine other lawyers on their opinions of the

1 law. Judge Zlaket's testimony will hinder the Commission's process and should be stricken  
2 from the record.

3 **JUDGE ZLAKET'S TESTIMONY IS LEGAL OPINION AND SHOULD BE STRICKEN FROM**  
4 **THE RECORD.**

5 Throughout this proceeding, the Company has made it clear that it would pursue a  
6 lawsuit against the Commission and seek damages for what the Company perceives as a  
7 breach by the Commission of the 1999 Settlement Agreement if the Commission were to  
8 "unilaterally change the contract, and order TEP back to cost of service..."<sup>1</sup> Some of the  
9 parties, including RUCO, question the merit of TEP's claim. The record is complete with  
10 filings citing the factual and legal basis for the differing positions. For example, the direct  
11 testimony of Marylee Diaz Cortez, dated January 8, 2007, included a legal memorandum  
12 which addressed the legal issues involved in a contract claim by the Company against the  
13 Commission. The Company filed a legal memorandum on the same legal issues through  
14 its witness, James Pignatelli on August 18, 2006. Phelps Dodge and the Arizonans for  
15 Electric Choice and Competition also filed a legal memorandum through their witness,  
16 Kevin C. Higgins on January 7, 2007. In addition, Judge Zlaket identifies the multitude of  
17 other filings in this record that he reviewed which included arguments on this issue.<sup>2</sup> In  
18 short, all the legal and other arguments on this issue have been presented and are a part  
19 of the record.

20 The Company now attempts to further its case by offering the testimony of the  
21 former Chief Judge of the state's highest court to show how an Arizona court would be  
22 likely to respond to the Company's contract claim. While the testimony may be  
23 interesting, there is already one judge in this case who has been given the responsibility

24 \_\_\_\_\_  
<sup>1</sup> See for example the Direct Testimony of James S. Pignatelli dated August 18, 2006 at 12.

<sup>2</sup> See Rebuttal Testimony of Thomas A. Zlaket dated April 1, 2008.

1 of deciding the issues based on the record. “Each courtroom comes equipped with a  
2 “legal expert,” called a judge [.]” *United States v. Cross*, 113 F Supp.2d 1282, 1284-85  
3 (S.D.Ind.2000) (quoting *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207,  
4 1213 (D.C.Cir.1997)(an attorney could not offer an expert opinion, based upon the law of  
5 Indiana, that video gaming devices of the type rented by a defendant’s business to its  
6 customers were not illegal gambling devices.)).

7 The case law on the issue of the testimony of lawyers and Judges as expert  
8 witnesses goes both ways. While the Commission does not present a jury situation  
9 where such testimony is apt to cause confusion, courts often disregard expert testimony  
10 on questions of law. See Fed. R. Evid. 704; *RLJCS Enters., Inc. v. Professional Benefit Trust*  
11 *Multiple Employer Welfare Benefit Plan & Trust*, 487 F.3d 898, 901 (7<sup>th</sup> Circ. 2007)(citing  
12 *Bammerlin v. Navistar International Transportation Corp.*, 30 F.3d 898, 901 (7<sup>th</sup> Cir.1994), (the  
13 trial judge properly excluded expert reports that “conveyed legal rather than “expert”  
14 opinions.... Argument about the meaning of trust indentures, contracts, and mutual-to-stock  
15 conversions belongs in briefs, not in “experts' reports.”) Likewise, Judge Zlaket’s legal  
16 opinions<sup>3</sup> belong in the Company’s Brief, not as testimony.

17 **JUDGE ZLAKET’S TESTIMONY HINDERS THE COMMISSION’S PROCESS.**

18 At the hearing in this matter, the cross-examination of Judge Zlaket would require one  
19 attorney to cross-examine another concerning Judge Zlaket’s legal opinion. This exercise  
20 would likely be time consuming and, among other things, require the services of a court  
21  
22  
23

24 <sup>3</sup> There is no question that Judge Zlaket is offering his opinion on the meaning of the contract although he  
claims that he was not asked to render an opinion as to whether a breach occurred.(See page 3 of Judge Zlaket’s  
rebuttal testimony). For instance on pages 10-12, Judge Zlaket asks a series of Questions and Answers where  
he clearly attempts to interpret the meaning of the Settlement Agreement.

1 reporter. It would be a waste of the Commission's resources, counter-productive, and actually  
2 hinder the Commission's process. Moreover, the problem is exasperated should another party  
3 present a legal expert in an attempt to impeach Judge Zlaket's legal opinions. The  
4 Commission should not establish a precedent which wastes resources; this topic should be  
5 addressed in closing briefs.

6 Finally, it is quite possible that RUCO's concern is shared by "some" of the signatories.  
7 Section 20.1 of the proposed Settlement Agreement provides that some of the signatories  
8 would have opposed TEP's rebuttal testimony and filed motions to strike certain TEP testimony  
9 they deemed inappropriate. While this provision does not state who those signatories are and  
10 which rebuttal testimony they opposed there is the possibility that the concerns raised here by  
11 RUCO are shared with some of the signatories.

## 12 **CONCLUSION**

13 For the reasons stated above, RUCO recommends the Commission strike the  
14 rebuttal testimony of Thomas A. Zlaket.

15  
16 RESPECTFULLY SUBMITTED this 1st day of July 2008

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18  
19 \_\_\_\_\_  
Daniel W. Pozefsky  
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20  
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