

# **CONSENT AGREEMENT**

## **CV2021-002829**

*STATE OF ARIZONA, ex rel. MARK BRONOVICH, ATTORNEY GENERAL*

v

*ARIZONA PUBLIC SERVICE COMPANY*

02.26.21 2:03pm.  
S. Motzer, Deputy

**COPY**

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13 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
14 **IN AND FOR THE COUNTY OF MARICOPA**

15 STATE OF ARIZONA, *ex rel.* MARK  
16 BRNOVICH, Attorney General,  
17 Plaintiff,  
18 v.  
19 ARIZONA PUBLIC SERVICE COMPANY,  
20 an Arizona corporation,  
21 Defendant.

Case No.: CV2021-002829

**CONSENT AGREEMENT**

(Assigned to the Hon. Andrew Russell)

22  
23 The State of Arizona, *ex rel.* Mark Brnovich, the Attorney General (the "State"), filed a  
24 Complaint and Arizona Public Service Company ("APS") has waived service of the  
25 Complaint, has been advised of the right to a trial in this matter, and has waived the same. APS  
26 admits the jurisdiction of this Court over the subject matter and parties for purposes of this  
27 Complaint and Consent Agreement only, stipulates that this Court may enter this Consent  
28 ...

1 Agreement and acknowledges that this Court shall retain jurisdiction for the purpose of  
2 enforcing this Consent Agreement.

3 The parties enter into this Consent Agreement without trial or adjudication of any issue  
4 of fact or law and without admission or finding of any violations of any law. APS neither  
5 admits nor denies the Factual Background below or any of the allegations in the State's  
6 Complaint. APS, not out of any admission of liability, wrongdoing or violation, has consented  
7 and stipulated to entry of this Consent Agreement to compromise an inquiry by the Arizona  
8 Attorney General's Office. This Consent Agreement is entered into solely for the purposes of  
9 settlement and to avoid incurring costs associated with litigation.

#### 10 PARTIES

11 1. The State is authorized to bring this action under A.R.S. §§ 44-1521 to -1534.

12 2. APS is a public service corporation, with its principal place of business in  
13 Phoenix, Arizona.

14 3. This Court has jurisdiction over the Complaint and the parties necessary for the  
15 Court to enter this Consent Agreement and any orders hereafter appropriate pursuant to A.R.S.  
16 § 44-1528 and this Consent Agreement. APS consents to this Court's jurisdiction over this  
17 matter solely to allow it to be compromised and resolved. APS does not concede that this  
18 Court would have jurisdiction over a contested action.

19 4. Venue is proper in Maricopa County pursuant to A.R.S. § 12-401(17).

#### 20 FACTUAL BACKGROUND

21 5. APS is the largest electric provider in Arizona, and serves more than 1.1 million  
22 residential customers, in 11 of Arizona's 15 counties. As a public service corporation, APS is  
23 regulated by the Arizona Corporation Commission ("Commission").

24 6. The Arizona Attorney General, when having reasonable cause, is vested with the  
25 authority to investigate and adjudicate alleged unlawful practices pursuant to A.R.S. § 44-1521  
26 *et seq.* and the Attorney General's authority is in addition to all other causes of action,  
27 remedies and penalties available to the State.

28 ...

1           7.     On August 18, 2017, the Commission approved new rates for APS customers  
2 (“2017 Rate Case Decision”). The 2017 Rate Case Decision approved changes to the design  
3 of APS’s residential rates. Although a rate increase took effect immediately after the 2017  
4 Rate Case Decision, approximately 1.1 million residential customers were to be moved to new  
5 rate plans by May 1, 2018.

6           8.     APS proposed in its 2017 Rate Case to switch customers to the new plan that  
7 could potentially cost individual customers the least amount of money. Eventually, the term  
8 “most economical plan” was used to identify the plan that would have cost a customer the least  
9 amount of money based on a customer’s historical usage, if sufficient historical usage data was  
10 available. The 2017 Rate Case Decision ultimately required that APS transition each  
11 residential customer to his or her “most like plan” (i.e., the plan most like the customer’s  
12 existing plan) and move the customer to a different plan only if the customer affirmatively  
13 chose to change plans.

14           9.     As part of this transition of a million-plus customers to new rate plans, the 2017  
15 Rate Case Decision also required that APS develop a Customer Education and Outreach  
16 Program (“CEOP”), seek ongoing stakeholder input including Commission Staff, and spend  
17 \$5,000,000 on that effort. The CEOP was submitted to the Commission for review and  
18 approval. The Commission staff filed its approval of the CEOP in March 2018.

19           10.    The purpose of the CEOP was to educate customers about rate plan options so  
20 they could make choices that suited their preferences. The CEOP also was designed to  
21 identify a customer’s “Most Economical Plan” based on the customer’s historical usage. It  
22 also sought to educate customers regarding how to maximize savings on the rate plans and  
23 how to understand which rate a customer would be transitioned to if the customer did not  
24 proactively choose another rate plan.

25           11.    The CEOP included multiple contacts with customers, including personalized  
26 letters, emails, bill inserts, and phone calls. There was an on-line tool that was intended to  
27 help customers evaluate the various plan options, information on utility bills, a mobile unit that  
28 ...

1 provided in-person assistance, and customer service representatives who were available to  
2 answer people's questions by phone.

3 12. APS's education and outreach efforts have continued since the 2017 Rate Case  
4 Decision, with Commission oversight. Since the initial transition in early 2018, there have  
5 been ongoing communications with customers to educate them about the different rate plans  
6 and about opportunities for potential savings by changing to different plans.

7 13. Despite the outreach and education efforts, customers reported confusion about  
8 the plan options, and some issues arose in implementing the CEOP that caused concern at the  
9 Commission and the Attorney General's Office.

10 14. In November 2019, APS learned that there had been an error relating to the Plan  
11 Comparison Tool (the "Tool") from February 2019 to November 2019. Once this error was  
12 discovered, APS immediately discontinued using the Tool. The error did not affect customer  
13 billing; it affected only the accuracy of the information comparing rates using the Tool for  
14 certain customers.

15 15. APS provided refunds to customers who may have made rate-selection decisions  
16 based on faulty information from the Tool and provided corrected plan comparison  
17 information to customers that were provided with inaccurate plan recommendations using the  
18 Tool.

19 16. A new plan comparison tool subsequently was launched on January 29, 2020.

20 17. In addition, the Attorney General's investigation revealed that some customers  
21 may have been affected by a data error that impacted some letters recommending the Saver  
22 Choice plan as the most economical plan for some customers in late 2017 (the "2017 Letters").  
23 In particular, the 2017 Letters included rate recommendations and estimated cost savings that  
24 were calculated using an incorrect rate schedule for the Saver Choice plan. The incorrect  
25 schedule applied the super-off-peak winter delivery charge to all winter hours rather than  
26 super-off-peak hours only, resulting in an approximate \$0.02 per kWh lower estimate for  
27 winter non-super-off-peak hours. This issue did not affect any customer bills and did not  
28 affect subsequent rate plan recommendation communications to customers. Some customers

1 who received the 2017 Letters chose to move to the Saver Choice plan before or without  
2 receiving an updated plan recommendation during the rate migration process in 2018.

3 18. APS has made improvements to its education and outreach efforts. For instance,  
4 since March 2020, monthly bill statements have informed residential customers if the customer  
5 is not on the customer's most economical plan.

6 19. In December 2019, the Attorney General's Office issued a Civil Investigative  
7 Demand about the Tool error and followed with other inquiries related to the implementation  
8 of the CEOP. APS responded promptly to the Attorney General's inquiry and fully cooperated  
9 with the investigation.

10 20. APS denies that there was any violation of law. Nevertheless, to bring closure to  
11 the issue in a manner that will benefit APS customers, APS enters into this Consent  
12 Agreement providing \$24,000,000 in restitution to (i) APS customers who were not on their  
13 most economical plans as of their March 2020 billing date and who could potentially have  
14 saved an estimated \$120 or more per year based on their own historical usage within the  
15 previous twelve months, and (ii) APS customers who may have been affected by the data error  
16 in the 2017 Letters.

### 17 ALLEGATIONS

18 21. From February to November 2019, the Tool did not provide certain APS  
19 customers with accurate information about the rate plans.

20 22. As a result of the Tool error, for a period of time in 2019, certain APS customers  
21 who used the Tool did not receive accurate information on which to base their decisions  
22 regarding a rate plan. Upon discovery of the Tool error, APS promptly addressed the problem  
23 and provided refunds to customers who may have been impacted.

24 23. The State alleges that APS's communications to its customers regarding their  
25 rate plans did not inform customers adequately regarding the benefits of switching to their  
26 most economical plan. In addition, some APS customers may have been impacted by the data  
27 error in the 2017 Letters.

28 ...



RESTITUTION

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2       29. In addition to amounts that may have been previously remitted by APS to its  
3 customers for restitution prior to these proceedings, APS shall authorize and provide  
4 restitution totaling \$24,000,000. This amount includes \$20,700,000 for customers who were  
5 not on their most economical plan as of their March 2020 billing date and who could  
6 potentially have saved an estimated \$120 or more per year based on their own historical usage  
7 within the previous twelve months. This also includes \$3,300,000 for APS customers who  
8 may have been affected by the 2017 Letters. A customer may have been affected by the 2017  
9 Letters if, after receiving a 2017 Letter, the customer chose to move to the Saver Choice plan  
10 before or without receiving an updated plan recommendation during the rate migration process  
11 in 2018.

12       30. APS will distribute the restitution amount of \$20,700,000 (and additional  
13 amounts, if any, as described in ¶ 31) on a per capita basis. That is, all customers eligible for a  
14 payment will receive an equal one-time payment. Customers will be eligible for this payment  
15 if they were not on their most economical plan as of their March 2020 billing date and could  
16 potentially have saved an estimated \$120 or more per year based on their own historical usage  
17 within the previous twelve months.

18       31. APS will distribute the restitution amount of \$3,300,000 to customers who may  
19 have been affected by the 2017 Letters. If the total amount paid to customers affected by the  
20 2017 Letters is less than \$3,300,000, then any unpaid amounts will be added to the sum of  
21 money and distributed as described in ¶ 30. This calculation will be performed prior to the  
22 distribution of the \$20,700,000 described in ¶ 30.

23       32. APS shall make all payments to customers within 120 calendar days of the date  
24 of this Order. "Payments" may include credits to customer accounts if those customers still  
25 have active APS accounts with APS at the time the credit is issued. APS shall include with  
26 any payments to APS customers pursuant to this Consent Agreement a letter from the Attorney  
27 General's Office regarding the restitution payment, the contents of which shall be agreed to by  
28 the Attorney General's Office and APS, with reasonable good-faith efforts. If, after making



1 reasonable, good-faith attempts to make all payments to all former customers, APS has not  
2 paid all of the \$24,000,000, APS shall, on or before 240 calendar days of the date of this  
3 Order, pay any unpaid amounts to the State, to be deposited in the Consumer Protection-  
4 Consumer Fraud Revolving Fund established by A.R.S. § 44-1531.01, and used for the  
5 purposes set forth therein.

6 33. The State alleges that the payments described in ¶ 30 and ¶ 31 constitute  
7 restitution pursuant to A.R.S. § 44-1528(A)(2). Although APS has authorized restitution for  
8 certain customers who were not on their most economical plans, APS denies that such  
9 payments constitute restitution for any unlawful practice pursuant to A.R.S. § 44-1528(A)(2).

#### 10 MATERIAL BREACH

11 34. In the event of a material breach of this Consent Agreement, in addition to all  
12 other remedies available under Arizona law and the penalties specifically provided under  
13 A.R.S. § 44-1532, the State may, in its sole discretion, reopen proceedings and continue with  
14 this case as though this Consent Agreement had not been entered.

15 35. Before initiating any proceeding to enforce this Consent Agreement or reopen  
16 proceedings, the party considering enforcement shall provide at least 60 calendar days written  
17 notice to the other party to provide it a reasonable opportunity to cure any alleged breach.

#### 18 GENERAL PROVISIONS

19 36. This Consent Agreement is not and shall not in any event be used as an  
20 admission or evidence of any alleged wrongdoing or liability by APS in any other civil,  
21 criminal, or administrative court, administrative agency, or other tribunal anywhere in the  
22 United States.

23 37. Nothing in this Consent Agreement shall be construed as an approval by the  
24 Attorney General, the Court, or the State of Arizona of APS's past, present, or future conduct.  
25 APS shall not represent or imply that the Attorney General, the Court, or the State of Arizona  
26 has approved or approves of any of APS's actions or any of APS's past, present, or future  
27 business practices. This paragraph shall not apply to limit or prohibit APS from asserting that

28 ...

1 the Commission approved or approves of APS's actions or any of APS's past, present, or  
2 future business practices.

3 38. This Consent Agreement represents the entire agreement between the parties,  
4 and there are no representations, agreements, arrangements, or understandings, oral or written,  
5 between the parties relating to the subject matter of this Consent Agreement which are not  
6 fully expressed herein or attached hereto.

7 39. If any portion of this Consent Agreement is held invalid by operation of law, the  
8 remaining terms thereof shall not be affected and shall remain in full force and effect.

9 40. Jurisdiction is retained by this Court for the purpose of entertaining an  
10 application by the State for the enforcement of this Consent Agreement.

11 41. This Consent Agreement is the result of a compromise and settlement agreement  
12 between the parties. Only the State, through its Attorney General, or APS may seek  
13 enforcement of this Consent Agreement. Nothing herein is intended to create a right of action,  
14 private or otherwise, by other parties.

15 42. Within 30 calendar days of the entry of the Consent Agreement, APS shall pay  
16 to the Arizona Attorney General's Office for attorneys' fees and costs incurred in this matter  
17 the amount of \$200,000, to be deposited in the Consumer Protection – Consumer Fraud  
18 Revolving Fund pursuant to A.R.S. § 44-1531.01 and used for the purposes set forth therein.

19 43. APS also shall pay a total of \$550,000 to educate residents about the Arizona  
20 Attorney General Office's consumer protection and community outreach awareness and  
21 prevention programs. APS shall make payments at the sole and unfettered direction of the  
22 Arizona Attorney General's Office for 14 months following the entry of the Consent  
23 Agreement or the expenditure of the \$550,000, whichever comes first.

24 44. The effective date of this Consent Agreement is the date that it is entered by the  
25 Court.

26 45. This Consent Agreement may be executed by the parties in counterparts and be  
27 delivered by facsimile or electronic transmission, or a copy thereof, such constituting an  
28 original counterpart hereof, all of which together will constitute one and the same document.

1           46. This Consent Agreement resolves any and all Arizona Consumer Fraud Act,  
2 A.R.S. §§ 44-1521 to -1534, claims by the Attorney General's Office against APS or its agents  
3 relating to the 2017 Rate Case Decision—including but not limited to Commission Docket  
4 Nos. E-01345A-16-0036, E-01345A-16-0123, E-01345A-18-0002, and E-01345A-19-0003.  
5 As of the date of the filing of this proposed Consent Agreement, the Attorney General's Office  
6 is not aware of any other ongoing or pending investigation into APS or its agents related to the  
7 2017 Rate Case Decision.

8           47. As no further matters remain pending, this is a final judgment entered pursuant  
9 to Ariz. R. Civ. P. 54(c).

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DATED this 26<sup>th</sup> day of February, 2021

  
\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT



ARIZONA PUBLIC SERVICE COMPANY



By: Robert E. Smith, Senior Vice  
President and General Counsel  
Arizona Public Service Company

APPROVED AS TO FORM AND CONTENT

MARK BRNOVICH  
Attorney General

DENTONS US LLP



By: Rebecca Salisbury  
Jennifer Bonham  
Assistant Attorneys General  
*Attorneys for the State of Arizona*



By: Paul K. Charlton  
*Attorneys for Defendant*

THE FOREGOING has been electronically  
filed this 22<sup>nd</sup> day of February, 2021.

COPY of the foregoing mailed/e-served through  
AZTurboCourt this 22<sup>nd</sup> day of February, 2021, to:

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*/s/Marie Elena Cobb*