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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF THE
GENERIC PROCEEDING
CONCERNING ELECTRIC
RESTRUCTURING ISSUES.

DOCKET NO. E-00000A-02-0051

IN THE MATTER OF ARIZONA
PUBLIC SERVICE COMPANY'S
REQUEST FOR A VARIANCE OF
CERTAIN REQUIREMENTS OF
A.A.C. R14-2-1606.

DOCKET NO. E-01345A-01-0822

IN THE MATTER OF THE
GENERIC PROCEEDING
CONCERNING THE ARIZONA
INDEPENDENT SCHEDULING
ADMINISTRATOR.

DOCKET NO. E-00000A-01-0630

IN THE MATTER OF TUCSON
ELECTRIC POWER COMPANY'S
APPLICATION FOR A VARIANCE
OF CERTAIN ELECTRIC
COMPETITION RULES
COMPLIANCE DATES.

DOCKET NO. E-01933A-02-0069

Arizona Corporation Commission
DOCKETED

MAR 11 2005

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**RESPONSE OF THE ARIZONA INDEPENDENT
SCHEDULING ADMINISTRATOR ASSOCIATION**

The Arizona Independent Scheduling Administrator Association ("Az
ISA"), pursuant to the Procedural Order issued February 18, 2005, hereby submits
its response to the "Supplemental Filing and Request for Official Notice,"
("Supplemental Filing") of Arizona Electric Power Cooperative, Inc. ("AEP
CO"),
submitted February 2, 2005 in the above-captioned consolidated dockets.

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Background

In its Supplemental Filing, AEPCO requests that the Arizona Corporation Commission (“ACC”) take official notice of the Arizona Court of Appeals’ January 25, 2005 mandate issued in *Phelps Dodge Corporation, et al., v. AEPCO, et al.*, 207 Ariz. 95, 83 P.3d 573 (2004). Further, AEPCO states that one of the issues involved in this appeal was whether the ACC had authority to promulgate certain portions of the Electric Competition Rules (“Rules”), specifically, subsections (C) - (J) of R14-2-1609, Transmission and Distribution Access which directed utilities subject to the ACC’s jurisdiction to form an independent scheduling administrator with specified characteristics and to seek approval from the Federal Energy Regulatory Commission (“FERC”) for the operation of such an entity. The Court of Appeals held that the ACC lacked authority to promulgate these Rules and such Rules were therefore invalid. Based on that finding, AEPCO urges the ACC to find that this proceeding, with respect to the issues raised in Docket No. E-00000A-01-0630 regarding the continuation of the Az ISA and whether the subject utilities had complied with their responsibilities associated with the Az ISA, “is now moot.”

By Order issued February 18, 2005, Administrative Law Judge Wolfe requested that all interested parties submit responses to this filing by March 11, 2005.

Az ISA Response

Az ISA does not agree that the issuance of a Court of Appeals decision finding that a portion of the Rules are invalid renders the issues raised in Docket

1 No. E-00000A-01-0630 moot. The implication of AEPCO's assertion is that such
2 invalidation somehow affects the legal status of the Az ISA. However, Az ISA
3 respectfully submits that the Court of Appeals' decision has no affect whatsoever
4 upon the legal status of the Az ISA as a FERC-regulated entity operating
5 exclusively under a FERC-approved tariff.
6

7 Indeed, at the time the FERC first approved the Az ISA tariff, FERC was
8 aware that there was ongoing litigation before the Arizona courts concerning the
9 validity of portions of these Rules. However, FERC specifically found that the
10 Az ISA had an independent right to seek FERC approval of its tariff, regardless of
11 the continued validity of the Rules.¹ Therefore, contrary to the implication of the
12 AEPCO filing, a Court of Appeals' finding regarding the Rules has no impact on
13 the legal status of the Az ISA and the issues raised in Docket No. E-0000A-01-
14 0630 remain extant.
15

16 Further, the Court of Appeals' finding has no impact on either the
17 continued economic viability of the organization or lessen in any way, in our
18 organization's opinion, the continued public benefits associated with maintaining
19 strong ACC support of the Az ISA. In the year 2000, when the Az ISA was first
20 authorized by FERC, the expectation was that a regional transmission
21 organization ("RTO") would soon be operating in the Southwest and that this
22 RTO would thereafter assume the Az ISA's role in monitoring and facilitating
23 retail electric competition in the state through the administration of the Az ISA's
24 Protocols Manual ("PM"). However, this transition to an RTO has not yet
25 occurred.
26

27 ¹ At the request of the Az ISA's Executive Director, Az ISA's FERC counsel rendered a legal
28 opinion on this precise issue, a copy of which is appended hereto and incorporated by reference
herein.

1 The obligations of the states' two largest regulated utilities, Arizona
2 Public Service Company ("APS") and Tucson Electric Power Company ("TEP"),
3 to continue to support the Az ISA, to comply with the PM, and to fund the
4 activities of this organization, are not affected by the Court of Appeals'
5 invalidation of a portion of the Rules. Indeed, APS and TEP representatives were
6 working closely with other interested stakeholders and the ACC staff to develop
7 the PM and the framework for the organization that eventually became the Az
8 ISA well before any such Rules were ever promulgated by the ACC. In addition,
9 in 1999, APS and TEP entered into settlement agreements approved by the ACC
10 which each contain commitments by the respective utilities to support the Az ISA.
11 The continued effectiveness of these settlement commitments is not affected by
12 the invalidation of a portion of the Rules.

13 That both APS and TEP have a legal obligation to support the Az ISA
14 regardless of the continued effectiveness of the Rules is also important from a
15 funding perspective. These two utilities currently provide 90% of the annual
16 funding for this organization, which by its Board's instructions, is operating in a
17 significantly streamlined mode to mirror the continued low level of retail electric
18 market activity in the state.²

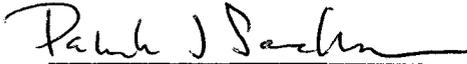
19 In addition to the legal obligations associated with these settlement
20 agreements, both APS and TEP have entered into Az ISA - TP Agreements which
21 are included as part of the Az ISA Tariff.³ Section 3.02 thereof obligates APS

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27 ² The balance of the funding is currently provided by AEPSCO and UNS Electric, Inc. (formerly
Citizens Utilities).

28 ³ These agreements are designated as Original Service Agreement Nos. 1 and 3, Arizona
Independent Scheduling Administrator Assoc., FERC Electric Tariff, Original Volume 1, and

1 and TEP each to “perform all obligations and responsibilities assigned to it
2 pursuant to the [Az ISA] Bylaws, the PM⁴ and this Agreement, including,
3 without limitation, the obligation to make any payments when due.” Finally, both
4 APS and TEP have incorporated the PM as part of their Open Access
5 Transmission Tariffs (“OATTs”) on file with the FERC⁵ and pursuant to Section
6 7 of their respective Az ISA - TP Agreements, are obligated to revise their OATT
7 to reflect any changes to the PM that may be approved by the Az ISA Board and
8 accepted by the FERC.
9

10 Respectfully submitted,

11 

12 Patrick J. Sanderson
13 Acting Executive Director

14 Arizona Independent Scheduling
15 Administrator Association

16
17 Dated: March 11, 2005

18 Attachment
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25 were accepted by the FERC by letter order issued July 10, 2001 in Docket No. ER00-3583-003.

26 ⁴ Section 2.06 of the APS and TEP AZ ISA - TP Agreements specifically notes that the PM is
“made effective consistent with the Federal Power Act (“FPA”) and FERC’s regulations.”

27 ⁵ APS’s filing to add the PM to its OATT was accepted by the FERC by letter order issued Sept. 4,
28 2001 in Docket No. ER01-173-003. TEP’s filing to add the PM to its OATT was accepted by the
FERC by letter order issued Sept. 4, 2001 in Docket No. ER01-208-003.

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MEMORANDUM

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FROM: Barbara S. Jost

DATE: February 10, 2004

RE: *Phelps Dodge Corp. v. Arizona Electric Power Cooperative, Inc.*, No. 1 CA-CV 01-0068, 2004 WL 117253 (Ariz. Ct. App. Jan. 27, 2004).

On January 27, 2004, the Arizona Court of Appeals ("Court"), on appeal from a prior order of the Arizona Superior Court,¹ found that certain portions of the Arizona Corporation Commission's ("ACC's") Electric Competition Rules were invalid because the ACC lacked constitutional or legislative authority to promulgate such rules. *Phelps Dodge Corp. v. Arizona Electric Power Cooperative, Inc.*, No. 1 CA-CV 01-0068, 2004 WL 117253 (Ariz. Ct. App. Jan. 27, 2004). The ACC regulations found invalid by the Court included Subsections (C)-(J) of R14-2-1609, Transmission and Distribution Access. These rules directed utilities subject to the ACC's jurisdiction to form an independent scheduling administrator with specified characteristics and to seek approval from the Federal Energy Regulatory Commission ("FERC" or "Commission") for the operations of such an entity (hereinafter "ACC Rules").

In accordance with your request, this memorandum addresses whether this Court's finding that these rules are invalid has any impact upon the status of the Arizona Independent Scheduling Administrator Association ("Az ISA") as a FERC-regulated entity under the Federal Power Act. As discussed below, we conclude that the Court's invalidation of such rules has no direct impact upon the Az ISA's status at the Commission. At the time the FERC approved the Az ISA tariff, it was aware of the fact that there was ongoing litigation concerning the validity of these rules. The FERC found that the Az ISA had an independent right to seek FERC approval of its tariff regardless of the continued validity of the ACC Rules.

¹ *Tucson Electric Power Company v. Arizona Corporation Commission*, Nos. CV97-03748 (Consolidated) (Ariz. Sup. Ct. Nov. 27, 2000) (hereinafter "Superior Court decision").

On September 1, 2000, in Docket No. ER00-3583-000, the Az ISA filed its proposed tariff with the FERC. Shortly thereafter, the Arizona Districts² filed a motion to reject, which among other things, argued that this tariff filing should be rejected because the Arizona courts have determined that the ACC Rules were invalid.³ In support, Arizona Districts appended to their pleading the Superior Court decision. In its November 30, 2000 order generally approving the Az ISA tariff filing, the FERC denied the Arizona Districts' motion and found that "[the Az ISA] has an independent right to seek Commission approval of its proposed tariff under the Federal Power Act, even without the challenged Arizona Commission rules."⁴

The Arizona Districts sought rehearing of this finding, arguing that the Superior Court decision should preclude the Commission from approving the Az ISA tariff and that the FERC's finding that the Az ISA has an "independent right" to seek approval of its filing under the Federal Power Act "also appears to be flawed." Further, Arizona Districts contended that the ACC Rules "are clearly integral to the formation and operation of the Az ISA and that the vacating of these rules by the Superior Court "has a direct impact on the AZ ISA and cannot be separated from the issue of the AZ ISA's continued existence."⁵ In its order on rehearing, the FERC denied rehearing on this point, relying again on the principle that the Az ISA has an independent right to seek Commission approval of its tariff regardless of the outcome of the Arizona litigation and regardless of the continued validity of the ACC Rules.⁶

The Arizona Districts did not file a petition for review of this order.⁷ Accordingly, in accordance with Section 313(a) of the Federal Power Act, these orders and the findings contained therein are now final. As a result, there is clear FERC precedent that the Az ISA tariff is not dependent on the validity of the ACC Rules. If someone were to ask the FERC to revoke the Az ISA tariff because of the Court decision, it is likely FERC would determine that further litigation on this issue is barred by the principle of *res judicata*, which prevents the relitigation of an issue that was previously litigated.⁸ Accordingly, we conclude that the Court's finding that the ACC Rules are invalid has no direct impact on the AZ ISA's status before the FERC.

² Twelve electric and irrigation districts which engage in wholesale electric operations and serve loads in Arizona.

³ *Arizona Independent Scheduling Administrator Association*, Docket No. ER00-3583-000, "Joint Motion of the Arizona Districts To Intervene, Protest and Motion To Reject The AISAA Filing," filed Sep. 22, 2000.

⁴ *Arizona Independent Scheduling Administrator Association*, 93 FERC ¶ 61,231 at 61,760 (2000).

⁵ *Arizona Independent Scheduling Administrator Association*, Docket Nos. ER00-3583-001, *et al.*, "Request For Rehearing and Clarification of the Arizona Districts," filed Dec. 29, 2000.

⁶ *Arizona Independent Scheduling Administrator Association*, 94 FERC ¶ 61,302 at 62,118 (2001).

⁷ Several other parties petitioned for review of the FERC orders which petitions were subsequently withdrawn.

⁸ See *Kings River Conservation District*, 32 FERC ¶ 61,021 (1985).