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BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
Chairman
JIM. IRVIN
Commissioner
MARC SPITZER
Commissioner

IN THE MATTER OF THE APPLICATION
OF PDM ENERGY, L.L.C., FOR A
CERTIFICATE OF CONVENIENCE AND
NECESSITY TO PROVIDE COMPETITIVE
RETAIL ELECTRIC SERVICES AS AN
ELECTRIC SERVICE PROVIDER
PURSUANT TO A.A.C. R-14-2-1601 *ET SEQ.*

DOCKET NO. E-03869A-00-0268

**APPLICATION FOR REHEARING AND
REQUEST FOR STAY OF DECISION
NO. 63869 OF TRICO ELECTRIC
COOPERATIVE, INC.**

TRICO ELECTRIC COOPERATIVE, INC., an Arizona nonprofit corporation ("Trico"), a party in the above proceedings, pursuant to A.R.S. §40-253 submits to the Commission this Application For Rehearing and Request for Stay of Decision No. 63869 entered and dated July 25, 2001 ("Decision"), and of the whole thereof, on the grounds that the Decision is unlawful, unreasonable, unjust, unconstitutional, in excess of the Commission's jurisdiction, arbitrary, capricious and an abuse of the Commission's discretion for the following reasons and upon the following grounds:

1. The Decision is not supported by any substantial evidence.
2. The Decision is unconstitutional by granting the Application of PDM Energy, L.L.C. ("PDM") for a Certificate of Convenience and Necessity ("CC&N") as an Electric Service

1 Provider ("ESP") as defined in A.A.C. R14-2-1601, et seq., as amended, the Retail Electric
2 Competition Rules ("Rules") to provide competitive retail electric services as an electric service
3 provider as defined in the Rules, and by issuing to PDM a CC&N to supply such Competitive
4 Services, as set forth in the Decision, for each and all of the following reasons:

5 A. The Decision violates Article XV, Sections 3 and 14 of the Arizona
6 Constitution by authorizing PDM to charge rates which are not based on the fair value of the
7 property of PSCs devoted to the public use, nor on a just and reasonable rate of return on such fair
8 value nor on a rate design which will produce just and reasonable rates based thereon.

9 B. The Decision violates Article XV, Section 3 of the Arizona constitution by
10 delegating to PDM the authority to determine the rates PDM will charge customers and by
11 permitting PDM to charge what are ostensibly "market-determined rates." The Constitution
12 requires the Commission to prescribe the rates to be charged by PDM which cannot be delegated
13 to PDM, the market or anyone else.

14 C. The Decision violates Article XV, Section 3 of the Arizona Constitution by
15 authorizing PDM as an aggregator or self-aggregators, as those terms are defined in the Rules, to
16 prescribe classes to be used by PDM. The Constitution requires the Commission to prescribe
17 classifications to be used by PDM and this duty cannot be delegated to PDM or anyone else.

18 D. The Decision violates Article XV, Sections 3 and 12 of the Arizona
19 Constitution by authorizing PDM as an aggregator or self-aggregators to discriminate in charges
20 made to customers that receive a like or contemporaneous service.

21 E. The Decision violates Article XV, Sections 2 and 3 of the Arizona
22 Constitution which requires that all corporations or entities such as PDM having a similar
23 function other than municipal corporations furnishing electricity for light, fuel or power shall be
24 deemed PSCs by creating a new type of certificate of convenience and necessity ("CC&N") for
25 ESPs, including PDM, who have not been issued CC&Ns by the Commission pursuant to A.R.S.
26 §§40-281, et seq., as have Trico and the other Affected Utilities. Only one type of CC&N is

1 permitted by said Sections and the only power or jurisdiction granted by such Section 3 of the
2 Arizona Constitution to the Commission with respect to classes of PSCs is to prescribe just and
3 reasonable classifications to be used by PSCs and not the power and jurisdiction to prescribe just
4 and reasonable classes of PSCs.

5 F. The Decision unlawfully permits PDM to charge interim rates.

6 3. The Decision violates Article IV and Article XV, Section 6 of the Arizona
7 Constitution by purporting to give the Commission the right to exercise legislative powers
8 expressly or impliedly reserved to the Legislature by the Arizona Constitution.

9 4. The Decision is unconstitutional in violation of the just compensation provisions
10 of the Fifth Amendment as incorporated into the Due Process Clause of the Fourteenth
11 Amendment of the United States Constitution and Article II, Section 4 of the Arizona
12 Constitution and Article II, Section 17 of the Arizona Constitution by breaching the contract and
13 exclusive regulatory compact between the State of Arizona and Trico.

14 5. The Decision breaches the contract and regulatory compact between the State of
15 Arizona and Trico by denying Trico the exclusive right to sell electricity and related services in
16 its certificated areas pursuant to its CC&Ns and is unconstitutional in violation of Article II,
17 Section 17, Article III and Article VI, Section 1 of the Arizona Constitution which require that
18 when vested property rights are taken or damaged for public or private use, the State must, before
19 such taking or damage, pay on behalf of the owner of the property or property rights taken or
20 damaged just compensation either (i) into court, secured by a bond as may be fixed by the court
21 or (ii) into the State treasury on such terms and conditions as are provided by statute.

22 6. The Decision is unconstitutional, in excess of the jurisdiction of the Commission
23 and in violation of Article II, Section 17, Article III and Article VI, Section 1 of the Arizona
24 Constitution in that:

1 A. The issue of just compensation to be paid Trico for the breach of the
2 contract and the regulatory compact with the State of Arizona is an issue to be determined by the
3 courts, not the Commission, and the Decision fails to provide for just compensation by the courts.

4 B. The Decision places unconstitutional restrictions, burdens and limitations
5 on the right of Trico to obtain just compensation for the breach of the contract and the regulatory
6 compact with the State of Arizona and the loss of, and damage to, its vested property rights.

7 7. The Decision is unconstitutional and in violation of Article I, Section 10, Clause 1
8 of the United States Constitution and Article II, Section 25 of the Arizona Constitution in that it
9 impairs the obligation of contracts:

10 A. Between the State of Arizona and Trico, which has been issued certificates
11 of convenience and necessity by the Commission pursuant to A.R.S. §§40-281, *et seq.*, which are
12 in full force and effect, and

13 B. Between Arizona Electric Power Cooperative, Inc. ("AEPCO") and its
14 Class A Members, including Trico, which contracts are all-requirements wholesale power
15 contracts requiring such Class A Members to purchase all of their electricity from AEPCO.

16 C. Between Trico and its members as they have agreed to purchase all of their
17 electricity and related services from Trico.

18 8. The Decision is unconstitutional, exceeds the jurisdiction of the Commission and
19 violates the just compensation provisions of the United States and Arizona Constitutions by
20 confiscating the property of Trico.

21 9. The Decision violates the Supremacy Clause of Article VI of the United States
22 Constitution, Article II, Section 3 of the Arizona Constitution, and the Rural Electrification Act of
23 1936, as amended, United States Code Annotated, Title 7, Chapter 31, Subchapters I and III ("RE
24 Act") by reason of:

25 A. Loans made by the United States pursuant to the RE Act to AEPCO and to
26 Trico which are secured by utility realty mortgages and security agreements based upon the all-

1 requirements wholesale power contract between AEPCO and Trico are placed in jeopardy by the
2 Decision.

3 B. The frustration of the objectives and means of the RE Act by permitting the
4 benefits of the RE Act to be enjoyed by those not intended to be beneficiaries of the Act, such as
5 ESPs who are permitted to use or access the distribution facilities of Trico without its consent, to
6 the detriment of the Act's true beneficiaries who are those being financed by the RE Act's
7 programs.

8 10. The Decision violates the Due Process Clauses of each of the Fourteenth
9 Amendment of the United States Constitution and Article II, Section 4 of the Arizona
10 Constitution for each of the following reasons:

11 A. The Decision unlawfully amends and/or deprives Trico of the benefits of
12 prior decisions of the Commission in its certification, finance, ratemaking and other orders
13 without notice and an opportunity to be heard as required by A.R.S. §40-252.

14 B. The Decision is contrary to accepted judicial construction of A.R.S. §40-
15 252, as set forth in decisions of the Arizona Supreme Court, as the Decision permits competitive
16 encroachment into Trico's territory without the showing of inability or unwillingness of Trico to
17 serve required by law.

18 C. The Decision places an irrational condition on the amendment of Trico's
19 CC&N by conditioning the amendment upon final resolution of stranded cost issues for Trico,
20 which cannot be determined until the actual start and operation of competition within its
21 certificated area.

22 11. The Decision violates the Equal Protection Clauses of the Fourteenth Amendment
23 of the United States Constitution and Article II, Section 13 of the Arizona Constitution by
24 burdening Trico with unlawful discriminatory restrictions and requirements which are not made
25 applicable to PDM although both Trico and PDM are PSCs such as:
26

1 Original and 10 copies of the foregoing
filed this 10 day of August, 2001, with:

2 Docket Control
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5 Copy of the foregoing mailed this
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