

REHEARING SEP 04 2001



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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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IN THE MATTER 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. R14-2-  
1601.

DOCKET NO. E-03869A-00-0268

**AEPCO'S APPLICATION FOR  
REHEARING AND REQUEST  
FOR STAY OF DECISION NO.  
63869**

GALLAGHER & KENNEDY, P.A.  
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Arizona Electric Power Cooperative, Inc. ("AEPCO"), a party to these proceedings, pursuant to A.R.S. § 40-253, submits this Application for Rehearing and Request for Stay of Decision No. 63869 entered and docketed July 25, 2001 (the "Decision") 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 substantial evidence.
2. The Decision unconstitutionally grants the Application of PDM Energy, L.L.C. ("PDM") for a Certificate of Convenience and Necessity ("CC&N") to provide competitive retail electric services as an electric service provider as defined in A.A.C. R14-2-1601, et seq., as amended, the Retail Electric Competition Rules

1 (“Rules”), and issues to PDM a CC&N to supply Competitive Services, as defined in the  
2 Rules, which CC&N includes authorization to provide service in conflict with the  
3 CC&Ns issued by the Commission to AEPCO and other Affected Utilities as electric  
4 Public Service Corporations (“PSC”) for each and all of the following reasons:

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

9           B.     The Decision violates Article XV, Section 3 of the Arizona  
10 Constitution by delegating to PDM the authority to determine the rates PDM will charge  
11 customers and by permitting PDM to charge “market-determined rates.” The  
12 Constitution directs the Commission to prescribe the rates to be charged by PDM--a duty  
13 that cannot be delegated to PDM, the market or anyone else.

14           C.     The Decision violates Article XV, Section 3 of the Arizona  
15 Constitution by authorizing PDM or aggregators/self-aggregators, as such term is defined  
16 in the Rules, to prescribe classes to be used by PDM. The Constitution directs the  
17 Commission to prescribe classifications to be used by PDM, a duty that cannot be  
18 delegated to PDM or anyone else.

19           D.     The Decision violates Article XV, Sections 3 and 12 of the  
20 Arizona Constitution by authorizing PDM or aggregators to discriminate in charges made  
21 to customers which receive a like or contemporaneous service.

22           E.     The Decision unlawfully and illegally permits PDM to charge  
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1 interim rates.

2           3.     The Decision violates the Arizona Constitution by purporting to give  
3 the Commission the right to exercise legislative powers expressly or impliedly reserved  
4 to the Legislature.

5           4.     The Decision violates the just compensation provisions of the Fifth  
6 Amendment as incorporated into the Due Process Clause of the Fourteenth Amendment  
7 of the United States Constitution and Article II, Section 4 and Article II, Section 17 of the  
8 Arizona Constitution by breaching the regulatory compact between the State of Arizona,  
9 AEPCO and other Affected Utilities.

10           5.     The Decision breaches the regulatory compact between the State of  
11 Arizona, AEPCO and other Affected Utilities by denying AEPCO and others the  
12 exclusive right to sell electricity and related services pursuant to their CC&Ns and  
13 violates Article II, Section 17, Article III and Article VI, Section 1 of the Arizona  
14 Constitution which requires that when vested property rights are taken or damaged for  
15 public or private use, the State must, before such taking or damage, pay the owner,  
16 including AEPCO, just compensation either (i) into court, secured by a bond as may be  
17 fixed by the court or (ii) into the State treasury on such terms and conditions as are  
18 provided by statute.

19           6.     The Decision is unconstitutional, in excess of the jurisdiction of the  
20 Commission and in violation of Article II, Section 17, Article III and Article VI, Section  
21 1 of the Arizona Constitution in that:

22           A.     The issue of just compensation to be paid AEPCO and other  
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1 Affected Utilities for the breach of the contract and the regulatory compact with the State  
2 of Arizona is an issue to be determined by the courts, not the Commission.

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

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

11 A. Between the State of Arizona, AEPCO and other Affected  
12 Utilities, and

13 B. Between AEPCO and its Class A Members which contracts  
14 are all-requirements wholesale power contracts requiring AEPCO's Class A Members to  
15 purchase all of their electricity from AEPCO.

16 8. The Decision is unconstitutional, exceeds the jurisdiction of the  
17 Commission and violates the just compensation provisions of the United States and  
18 Arizona Constitutions by confiscating the property of AEPCO and other Affected  
19 Utilities.

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

1                   A.     Impairment of loans made by the United States pursuant to  
2 the RE Act to AEPCO and to its Class A Members which are secured in part based upon  
3 the all-requirements wholesale power contracts between AEPCO and its Class A  
4 Members.

5                   B.     Frustration of the objectives of the RE Act by permitting the  
6 benefits of the RE Act to be enjoyed by those not intended to be beneficiaries of the Act,  
7 such as ESPs and meter service providers who are permitted to use or access the facilities  
8 of AEPCO and its Class A Members without their consent, to the detriment of the Act's  
9 beneficiaries.

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

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

17                   B.     The Decision is contrary to accepted judicial construction of  
18 A.R.S. § 40-252 in that it amends AEPCO's and others' CC&Ns without any showing of  
19 inability or unwillingness of AEPCO and others to serve as required by law.  
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21                   11.    The Decision violates the Equal Protection Clauses of the Fourteenth  
22 Amendment of the United States Constitution and Article II, Section 13 of the Arizona  
23 Constitution by burdening AEPCO and other Affected Utilities with unlawful  
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1 discriminatory restrictions and requirements which are not made applicable to PDM.

2           12. The Decision deprives AEPCO and other Affected Utilities of the  
3 value of their CC&Ns which are severely damaged or taken by the Decision.

4           13. The Decision is unlawful, unconstitutional and exceeds the  
5 jurisdiction of the Commission in ordering use or access of facilities of AEPCO by PDM  
6 without the consent of AEPCO.

7           14. The Decision is unlawful and in excess of the jurisdiction of the  
8 Commission by violating the provisions of A.R.S. § 40-334, which prohibits  
9 discrimination between persons, localities or classes of service as to rates, charges,  
10 services or facilities.

11           15. The Decision is unlawful, unconstitutional and exceeds the  
12 jurisdiction of the Commission in failing to comply with A.R.S. § 41-1044, et seq.

13           16. The Decision is unlawful, unconstitutional and exceeds the  
14 jurisdiction of the Commission by usurping the management and ownership prerogatives  
15 of Affected Utilities, including AEPCO.

16           17. The Decision is unlawful, unconstitutional and exceeds the  
17 jurisdiction of the Commission by exceeding the Commission's proper scope of authority  
18 and jurisdiction to implement electric competition under Arizona statutes, including  
19 A.R.S. § 40-202, et seq.

20           18. The Decision is unlawful, unconstitutional and exceeds the  
21 jurisdiction of the Commission in that the Rules unlawfully and improperly delegate  
22 certain powers of the Commission to other persons or entities.  
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19. AEPCO joins in the Applications for Rehearing and Requests for Stay of Decision No. 63869 filed by Trico Electric Cooperative and Sulphur Springs Valley Electric Cooperative, Inc., and incorporates such arguments and filings by reference.

WHEREFORE, having fully stated its Application for Rehearing and Request for Stay, AEPCO respectfully requests that the Commission enter its Order granting this Application and staying the Decision.

DATED this 13 day of August, 2001.

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