

EXCEPTION



0000036115

BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

DOCKETED

WILLIAM A. MUNDELL

Chairman

JIM IRVIN

Commissioner

MARC SPITZER

Commissioner

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IN THE MATTER OF THE GENERIC PROCEEDINGS CONCERNING ELECTRIC RESTRUCTURING.

DOCKET NO. E-00000A-02-0051

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

DOCKET NO. E-01345-01-0822

IN THE MATTER OF THE GENERIC PROCEEDINGS 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

IN THE MATTER OF THE APPLICATION OF TUCSON ELECTRIC POWER COMPANY FOR APPROVAL OF ITS STRANDED COST RECOVERY

DOCKET NO. E-01933A-98-0471

HGC'S EXCEPTIONS TO THE RECOMMENDED ANALYSIS, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE ADMINISTRATIVE LAW JUDGE

The undersigned, on behalf of Harquahala Generating Company, LLC ("HGC"), hereby submits its exceptions to the recommended form of Opinion and Order filed by the Administrative Law Judge on July 23, 2002 in the above-captioned proceeding.

1 **I. GENERAL COMMENTS.**

2 HGC is generally supportive of the analysis and findings of the Administrative
3 Law Judge that underpin the recommended Order. They are prudent, thoughtful and
4 supported by the evidence and testimony on the docket of this proceeding. HGC is
5 particularly supportive of the recommendation that the issues in dispute be resolved by
6 consensus among the parties and that the creation of an Electric Competition
7 Advisory Group, if it is sufficiently representative of all interests, can be a significant step
8 toward facilitating communication and avoid unnecessary conflicts.

9 **II. SPECIFIC EXCEPTIONS.**

10 **A. Indefinite Stay of A.A.C. R14-2-1606(B).**

11 Finding of Fact 36 and the second provision of the Order indefinitely stays A.A.C.
12 R14-2-1606(B). Such a stay in the context of the Track A proceeding is a bad idea.

13 The appropriateness of staying the requirement for competitive procurement, how
14 the stay should be structured and for how long are all Track B issues. There was nothing
15 in the notice of the Track A process to suggest that a stay of the competitive procurement
16 process was a Track A issue and it was never addressed adequately as such in the Track A
17 proceeding. Had HGC known that this action was contemplated in Track A, it would
18 have structured its testimony and strategy accordingly and we suspect other participants in
19 Track A would also have changed their tactics.

20 Second, an indefinite stay could be legally defective without a rulemaking. An
21 indefinite stay of a rule has been treated by several federal courts as a *de facto* repeal of
22 the rule and as such it can only be effectuated through the rulemaking process.

23 Finally, an indefinite stay of the competitive procurement process is not good
24 public policy. If it is the Commission's goal to force compromise and a consensus
25 resolution of the issues in Tracks A and B, it would be a mistake to remove deadlines that
26

1 are the only effective means to keep the parties' collective "feet to the fire" to force
2 negotiation and solutions. Without the impetus of legally enforceable deadlines, certain
3 parties will view it as being in their best interest to stall or create barriers to resolution.
4 HGC believes that if there is to be a stay of A.A.C. R14-2-1606(B), it should only occur
5 after the Track B proceeding has run its course and it should be of definite and short
6 duration. For example, a stay of the rule until July 1, 2003 might be workable and, should
7 that date provide insufficient relief, it can be extended.

8 **B. Consideration of the Transfer of PWEC's Assets.**

9 HGC strongly supports the Administrative Law Judge's analysis of the transfer of
10 Pinnacle West Energy Company's (PWEC") generation assets to APS that is contained on
11 Page 25, lines 23 through 27 and Finding of Fact 43 (page 30, lines 12 through 15). The
12 transfer issue is not ripe for consideration under Track A. It was not the subject of notice
13 under the Track A proceeding, and there is not sufficient evidence on the record on which
14 to base a determination. Indeed, on the basis of the evidence that is on the record, the
15 APS proposal must be rejected. However, if APS or PWEC wants a full consideration of
16 reverse divestiture of its generation assets, it should separately petition for such
17 consideration.

18 **C. Schedule for Implementation of Track B Competitive Solicitation.**

19 There is a need to clarify the third, fourth and fifth provisions in the recommended
20 form of Order (page 31, lines 27, 28; page 32, lines 1 through 10).

21 As written, it could be implied that the resolution of the issues in Track B cannot
22 be implemented without a rulemaking. Clearly, that is not the intent of the Administrative
23 Law Judge nor is it consistent with the implementation schedule already established for
24 Track B. HGC would suggest that the three provisions be clarified as follows:
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26

1 IT IS FURTHER ORDERED that upon implementation of the
2 outcome of Track B pursuant to the schedule prescribed by the June 20,
3 2002 First Procedural Order on Track B Issues, APS shall acquire, . . .

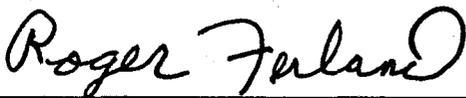
4 IT IS FURTHER ORDERED that upon implementation of the
5 outcome of Track B pursuant to the schedule prescribed by the June 20,
6 2002 First Procedural Order on Track B Issues, TEP shall acquire, . . .

7 IT IS FURTHER ORDERED that Staff shall open a rulemaking to
8 review the Retail Electric Competition Rules in light of our decisions
9 herein. ~~and to address issues resolved in Track B, and to amend A.A.C.~~
10 ~~R14-2-1615(A) and A.A.C. R14-2-1606(B).~~ This rulemaking may, if
11 necessary, address the implementation of actions required by the results of
12 the Track B proceeding and amendments to A.A.C. R14-2-1615(A) and
13 A.A.C. R14-2-1606(B).

14 As we noted in HGC's General Comments, it is critical to structure the findings
15 and Order in a manner that limits the necessity for rulemaking to only those issues and
16 procedures that can only be effectuated through rulemaking.

17 RESPECTFULLY SUBMITTED this 1st day of August, 2002.

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1 **ORIGINAL** and 18 **COPIES** filed August 1, 2002 with:

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23 All parties of record on the service list for Consolidated Docket Nos.:
24 E-00000A-01-0051;
25 E-1345A-01-0822;
26 E-00000A-01-0630;
E-01933A-02-0069; and
E-01933A-98-0471