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EXCEPTION

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BEFORE THE ARIZONA CORPORATION COMMISSION
Arizona Corporation Commission

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AZ CORP COMMISSION
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IN THE MATTER OF THE GENERIC PROCEEDINGS CONCERNING ELECTRIC RESTRUCTURING ISSUES.	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-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
IN THE MATTER OF THE APPLICATION OF TUCSON ELECTRIC POWER COMPANY FOR APPROVAL OF ITS STRANDED COST RECOVERY.	DOCKET NO. E-1933A-98-0471 TUCSON ELECTRIC POWER COMPANY'S EXCEPTIONS TO RECOMMENDED OPINION AND ORDER (TRACK A)

19
20 Tucson Electric Power Company ("TEP") hereby submits its exceptions to the
21 Recommended Opinion and Order issued July 23, 2002, in the "Track A proceeding" held
22 in the consolidated dockets referenced above, as follows:

23
24 **I. INTRODUCTION.**

25 TEP, throughout the Track A proceeding, urged the Commission to issue a clear
26 and definitive answer to the seminal issue in electric competition, which is:
27

1 Is the timing right for retail electric competition to be implemented
2 in Arizona or should the Commission first require that the wholesale
3 generation market be further developed? (TEP Post-Hearing Brief at
4 2.)

5 The Commission's answer to the seminal issue will provide all interested parties
6 with the direction that they need to properly plan for the immediate and long-term future.
7 Indeed, throughout these consolidated dockets parties have requested clear direction from
8 the Commission for the benefit of the incumbent utilities, merchant power builders,
9 consumers and financial markets.

10 TEP is pleased that the Recommended Opinion and Order takes a step towards
11 answering the seminal issue by making several findings of fact relative to the wholesale
12 and retail markets, such as (a) "the wholesale market faltered, the new competitors have
13 failed to materialize, and incumbent utilities have not lost customers in any meaningful
14 number"; and (b) "competition and its benefits have not materialized for Arizona's small
15 retail customers" (Recommended Opinion and Order at 28-29). However, as discussed
16 more fully in these exceptions, the Recommended Order and Opinion does not provide a
17 complete answer to the seminal issue. Thus, the certainty that the parties have sought
18 remains elusive.

19 TEP believes that, based upon the evidence in the record of the Track A proceeding,
20 the Commission should order a stay of all the Electric Competition Rules and that a new
21 rulemaking docket should review all of the Electric Competition Rules. Again, while the
22 Recommended Opinion and Order moves in this direction by proposing (a) to stay some of
23 the Electric Competition Rules; and (b) to open a new rulemaking docket to review some
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1 of the Electric Competition Rules, it does not go far enough. All of the Electric
2 Competition Rules should be stayed and scrutinized by the Commission.

3 However, in the event that the Commission determines that it is not in the public
4 interest to stay all of the Electric Competition Rules at this time, TEP recommends, in the
5 alternative, that independent of the scope of the stay issued by the Commission, the final
6 order should provide that the new rulemaking docket will examine all of the Electric
7 Competition Rules.

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9 **II. EXCEPTIONS.**

10 **EXCEPTION NO. 1:**

11
12 **THE ORDERING PARAGRAPHS SHOULD INCLUDE A STAY OF ALL**
13 **THE ELECTRIC COMPETITION RULES AND PROVIDE THAT THE**
14 **NEW RULEMAKING DOCKET IS TO REVIEW ALL OF THE ELECTRIC**
15 **COMPETITION RULES.**

16 The Recommended Opinion and Order set forth the following Findings of Fact
17 regarding the state of wholesale and retail electric markets¹:

- 18 16. The wholesale market applicable to Arizona is poorly
19 structured and susceptible to possible malfunction and
20 manipulation.
- 21 22. Asset transfers should not be permitted unless the transfer
22 will serve the public interest.
- 23 23. Asset transfers will promote competition, and thereby serve
24 the public interest, as long as the wholesale market is
25 workably competitive.

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27 ¹ TEP's citation of these Findings of Fact is for demonstrative purposes and is not a waiver
of any position that TEP has taken in this case.

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- 24. Absent conditions in place to address market structure concerns, generation asset transfers are not in the public interest.
- 25. The wholesale market is not currently workably competitive; therefore, reliance on that market will not result in just and reasonable rates for captive customers.
- 26. The FERC has not yet defined or implemented an effective regulatory and oversight approach for competitive energy markets, so assurance is lacking that wholesale electricity prices are just and reasonable.
- 28. At the time that the Commission approved the Electric Competition Rules and the Settlement Agreements, the parties thought that retail competition was imminent and that the wholesale market would be competitive; that a significant number of retail competitors would be entering the market; and that customers would leave the incumbent utility and purchase power from the new competitors.
- 29. Contrary to the parties' expectations and assumptions, the wholesale market has faltered, the new competitors have failed to materialize, and incumbent utilities have not lost customers in any meaningful number.
- 30. The competitive conditions that formed the basis of the Settlement Agreement and the adoption of the Retail Electric Competition Rules have not occurred as expected.
- 31. Competition and its benefits have not materialized for Arizona's small retail customers.
- 35. A.A.C. R14-2-1615 (A) should be stayed and Decision Nos. 61973 and 62103 should be modified to stay the transfer provisions until we can conclude that the wholesale market is workably competitive, until at least July 1, 2004, at which time we will reassess the appropriateness and timing of divestiture.
- 36. A.A.C. R14-2-1606 (B) should be stayed and Decision Nos. 61973 and 62103 should be modified to stay the requirement that 100 percent of power purchased for

1 Standard Offer Service shall be acquired from the
2 competitive market, with at least 50 percent through a
3 competitive bid process; but effective upon implementation
4 of the outcome of Track B, we will require APS and TEP to
5 acquire, at a minimum, any required power that cannot be
6 produced from its own existing assets, through the
7 competitive procurement process as developed in the Track
8 B proceeding. The amount of power, the timing, and the
9 form of procurement shall be determined in the Track B
10 proceeding.

11 The Conclusions of Law corresponding to these Findings of Fact state:

- 12 6. The evidence presented in this proceeding demonstrates that,
13 at this time, pursuant to Article 15, §3 of the Arizona
14 Constitution and A.R.S. §§ 40-361, -321, and -331, the public
15 interest requires the suspension of the time deadline
16 requirements of A.A.C. R14-2-1606 (B), as amended by
17 Decision Nos. 61973 and 62103, pending a Decision in these
18 dockets on the Track B issues.
- 19 7. The evidence presented in this proceeding demonstrates that,
20 at this time, pursuant to Article 15, §3 of the Arizona
21 Constitution and A.R.S. §§ 40-361, -321, and -331, the public
22 interest requires the suspension of the time deadline
23 requirements of A.A.C. R14-2-1615 (A), as amended by
24 Decision Nos. 61973 and 62103, and further, to prohibit the
25 transfer of generation assets, pending a Commission
26 determination that it is in the public interest for the transfer of
27 generation assets to take place.
8. The evidence presented in this proceeding demonstrates that,
at this time, pursuant to Article 15, §3 of the Arizona
Constitution and A.R.S. §§ 40-361 the public interest requires
the suspension of A.A.C. R14-2-1611 (A)'s applicability to
APS and TEP's captive customers.

Based upon these Findings of Fact and Conclusions of Law, the Commission could
stay all of the Electric Competition Rules and open a rulemaking docket to review, amend
or repeal all of the rules. Indeed, the Recommended Opinion and Order does not offer any

1 Findings of Fact identifying benefits of electric competition, to date, in Arizona.
2 Nevertheless, the ordering paragraphs of the Recommended Opinion and Order exclude
3 key aspects of the Electric Competition Rules from review and potential reform. The
4 applicable ordering paragraphs from the Recommended Opinion and Order limit the stay
5 to A.A.C. R14-2-1615 (A) and A.A.C. R14-2-1606 (B) as follows:
6

7 IT IS THEREFORE ORDERED that A.A.C. R14-2-1615 (A) is
8 hereby stayed and Decision Nos. 61973 and 62103 are modified to
9 stay the transfer provisions until the Commission concludes that the
10 wholesale market is workably competitive, until at least July 1,
2004, at which time we will reassess the appropriateness and timing
of divestiture.

11 IT IS FURTHER ORDERED that A.A.C. R14-2-1606 (B) is stayed
12 and Decision Nos. 61973 and 62103 are modified to stay the
13 requirement that 100 percent of power purchased for Standard Offer
14 Service shall be acquired from the competitive market, with at least
50 percent through a competitive bid process.

15 The proposed new rulemaking proceeding is limited only to issues
16 addressed in the Track A and Track B proceedings, as follows:

17 IT IS FURTHER ORDERED that Staff shall open a rulemaking to
18 review the Retail Electric Competition Rules in light of our
19 decisions herein and to address issues resolved in Track B, and to
20 amend A.A.C. R14-2-1615 (A) and A.A.C. R14-2-1606 (B).²

21 There is ample evidence in the record of this case to stay and review other
22 provisions of the Electric Competition Rules. For example, TEP presented undisputed
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24 ² As a separate matter, TEP notes that the Recommended Opinion and Order discusses a
25 stay of A.A.C. R14-2-1611(A) (see Recommended Opinion and Order at 26) and concludes that
26 such a stay is in the public interest. However, the Recommend Opinion and Order does not order
27 that a stay of R14-2-1611(A) be issued. In the event that the Commission does not order a stay of
all the Electric Competition Rules, as requested by TEP in these exceptions, then TEP requests
that the ordering paragraphs of the Recommended Opinion and Order include a stay of R14-2-
1611(A).

1 evidence that, if retail electric competition is to proceed, it should only include customers
2 with a load of 3MW or more, for now.

3 Mr. Pignatelli testified that there are only two (2) Energy Service Providers
4 (“ESPs”) doing business in the TEP service territory--both of which are owned by
5 incumbent Arizona utilities. (TEP-1 at 7-8) Mr. Pignatelli also testified that it is unlikely
6 that any ESPs would commence residential retail electric service in the State because (a)
7 retail electric competition is not functioning in the western states; and (b) it would be
8 virtually impossible to base a profitable ESP business plan on Arizona alone. (TEP-1 at 8-
9 9). Mr. DeConcini indicated that TEP sold its ESP. (TEP-3 at 10-11; Tr. at 668-669) Mr.
10 DeConcini also stated that there still would be benefits to customers with loads of 3 MW
11 or less, such as allowing them to benefit from TEP’s reduced and capped rates as Standard
12 Offer customers. (TEP-3 at 11) However, TEP does hold out hope for the future and as
13 Mr. Pignatelli stated, if competition begins to take hold in Arizona, these customers can be
14 phased in. Mr. Pignatelli testified:

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19 Because there is no real competition for Residential customers, and
20 customers (Commercial and Industrial) with loads under 3 MW, I
21 would propose that these two classifications of customers be
22 excluded from electric competition. As time passes and electric
23 competition matures, some or all of these customers may eventually
24 be included within the scope of competition. (TEP 1 at 14; see also
25 Tr. at 662) (TEP Post-Hearing Brief at 8).

26 The Recommended Opinion and Order’s findings of fact recognize the underlying
27 foundation support for the TEP 3 MW proposal (see Findings of Fact 29; and 30), but there
is no provision for the direct access provisions of the Electric Competition Rules to be

1 stayed or reviewed. Consequently, based upon the evidence in the record of this
2 proceeding, the scope of the ordering paragraphs in the Recommended Opinion and Order
3 should be broadened to include a stay and review of the direct access (and all other)
4 provisions of the Electric Competition Rules.

5
6 TEP believes that a stay of all of the Electric Competition Rules and the
7 implementation of a rulemaking docket devoted to all of the rules will allow the
8 Commission the time and ability to reach decisions and issue orders that are not influenced
9 by deadlines and time frames that may no longer be in the public interest. Again, in the
10 alternative, if the Commission determines that it is not in the public interest to stay all of
11 the Electric Competition Rules at this time, TEP recommends that the Commission order
12 that the proposed new rulemaking docket addresses all of the Electric Competition Rules,
13 not just those that pertain to the Track A and Track B proceedings.

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16 **EXCEPTION NO. 2:**

17 **THERE IS NO BASIS FOR THE TEP CODE OF CONDUCT TO BE**
18 **AMENDED AND FILED WITH THE COMMISSION WITHIN SIXTY (60)**
19 **DAYS OF A FINAL COMMISSION ORDER.**

20 The Recommended Opinion and Order provides that TEP shall submit
21 modifications as recommended by Staff to its Code of Conduct, within sixty (60) days of
22 the effective date of the Commission's final order. (Recommended Opinion and Order at
23 32.)

24 However, a review of the record of the Track A proceeding reveals that there was
25 no evidence presented that TEP's current Code of Conduct was inadequate or that there
26 has been any incident of non-compliance by TEP or any of its affiliates. Moreover, to
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1 order TEP to file a Code of Conduct within sixty (60) days of the effective date of the
2 Commission's final order is not what the Staff (or any party) had recommended and is not
3 supported by the evidence in the record.

4 In its Post-Hearing Brief, Staff merely recommended "**In order to transfer its**
5 **assets**, a utility should file a market power study, a market mitigation plan, and a proposed
6 code of conduct. It may be feasible for the Commission to consider these items in a
7 consolidated proceeding." (Staff Post-Hearing Brief at 5; emphasis added; see also Id. at
8 9). Staff also indicated that, "The proposed code of conduct should the address the issues
9 raised in Staff witness Keene's testimony (Keene Direct, Ex. S-11 at 8)". (Staff Post-
10 Hearing Brief at 9)

11 During the course of the Track A proceeding, Staff moderated its position regarding
12 the need for a revised Code of Conduct. (see Corrections to Testimony of Barbara Keene
13 dated June 14, 2002). While Staff witness Keene listed a series of items that should be
14 included in a Code of Conduct, there was no evidence that TEP's Code of Conduct does
15 not already address those items. Staff's only specific recommendation was in regard to
16 arm's length transactions as follows, "Staff recommends that the same representative
17 should not appear on both sides of a transaction". (Keene Direct, Ex. S-11 at 8)

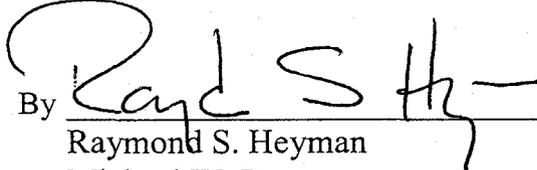
18 It is clear from the Staff Post-Hearing Brief that Staff's position now is that a
19 revised Code of Conduct only needs to be filed in connection with a utility's proposed
20 transfer of assets. However, the Recommended Opinion and Order proposes that the
21 provision of the Electric Competition Rules that authorizes the transfer of assets should be
22 stayed.

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TEP believes that if the Recommended Opinion and Order is to conform to the evidence in the record, then there is no need for the filing of a new TEP Code of Conduct. If the Recommended Opinion and Order is to be consistent with Staff's position, then a Code of Conduct would only be filed in connection with a request to transfer assets. In any event, the Commission should not adopt the Recommended Opinion and Order's current proposal that TEP shall submit modifications as recommended by Staff to its Code of Conduct, within sixty (60) days of the effective date of the Commission's final order.

Respectfully submitted this 1st day of August 2002.

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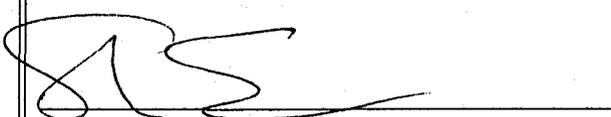
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