



BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

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AZ CORP COMMISSION  
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IN THE MATTER OF THE FILING BY TUCSON )	DOCKET NO. E-01933A-05-0650
ELECTRIC POWER COMPANY TO AMEND )	
DECISION NO. 62103. )	
)	<b>TUCSON ELECTRIC POWER</b>
)	<b>COMPANY'S EXCEPTIONS TO</b>
)	<b>THE RECOMMENDED OPINION</b>
)	<b>AND ORDER</b>

Tucson Electric Power Company ("TEP" or the "Company"), through undersigned counsel, respectfully submits its Exceptions to the Recommended Opinion and Order issued by the Presiding Administrative Law Judge on January 30, 2006 ("Recommended Order") regarding TEP's Motion to Amend Decision No. 62103 (the "Motion to Amend"). These exceptions include TEP's proposed amendment to the Recommended Order attached hereto as Exhibit "A".

**I. PRELIMINARY STATEMENT.**

TEP takes exception to the Recommended Order because it (1) fails to resolve the ongoing uncertainty over how the Commission interprets the 1999 Settlement Agreement's treatment of TEP's generation rates beginning in 2009; (2) violates A.R.S. §40-252 and TEP's right to due process by failing to take any evidence on the need to immediately resolve the current uncertainty regarding 2009 generation rates; (3) erroneously finds that TEP does not seek to charge market-based rates in 2009; and (4) mistakenly directs TEP to file a rate case in September 2007 as the procedure for resolving the uncertainty over 2009 generation rates despite the fact that there is no certainty that the dispute over 2009 rates can or will be resolved before 2009.

**II. THE RECOMMENDED ORDER.**

The Recommended Order denies the Motion to Amend, yet it makes a number of key findings that appear to compel either granting the Motion to Amend or establishing a procedural framework for taking evidence on the issues presented by the Motion before rendering a decision.

1 These key findings include the following:

- 2 (1) There is a fundamental disagreement between the parties to  
3 the 1999 Settlement Agreement about what is to happen to  
4 generation rates after the rate freeze expires on December  
5 31, 2008; [Recommended Order, Findings of Fact (“FOF”)  
6 ¶ 37]
- 7 (2) The 1999 Settlement Agreement and the Order that  
8 approves and modifies the 1999 Settlement Agreement are  
9 silent as to the intent of the parties and the Commission  
10 concerning Standard Offer rates after 2008. Determining  
11 the intent of the parties to the 1999 Settlement Agreement  
12 would require a hearing; [FOF ¶ 38]
- 13 (3) Circumstances surrounding the electric industry have  
14 changed greatly since the Commission issued Decision  
15 62103. At the time the 1999 Settlement Agreement was  
16 entered into, it was anticipated that TEP would be required  
17 to divest itself of its generation assets, and would be  
18 required to obtain generation on the open market.  
19 Subsequently, because a reliable wholesale power market  
20 never developed in Arizona, the Commission issued the  
21 Track A Order which granted TEP a waiver from the  
22 [Electric Competition Rules’ requirements] to divest its  
23 generation assets and stayed the requirement to purchase  
24 100 percent of power for Standard Offer service from the  
25 competitive market. In addition, the Arizona Court of  
26 Appeals in the *Phelps Dodge* case invalidated a number of  
27 the Electric Competition Rules. [FOF ¶ 39]

19 Despite these findings, the Recommended Order goes on to find that “[e]ven if we believe  
20 that it is in the public interest to amend Decision No. 62103, we concur with Staff that TEP’s  
21 request is premature.” [FOF ¶ 49] The Recommended Order denies the Motion to Amend outright  
22 while ordering TEP to file a “rate case” in September 2007 at which time it can “make whatever  
23 proposals regarding rates that it believes are prudent and may attempt to negotiate another  
24 settlement.” [FOF ¶ 49]

### 25 III. OVERVIEW OF EXCEPTIONS.

26 The overriding problem with the Recommended Order is that TEP is being forced to  
27 continue to perform under the 1999 Settlement while the Recommended Order declines to rule on

1 whether other parties – including the Commission itself – must continue to abide by the terms of  
2 the 1999 Settlement Agreement and permit TEP to charge market-based generation rates after  
3 2008. TEP’s adherence is no trivial matter. For example, it has accelerated amortization or  
4 depreciation of more than \$450 million of assets, and it has complied with the rate freeze, despite  
5 an annual revenue deficiency of \$112 million, as shown in the 2004 rate review docket. Given  
6 that the Recommended Order denies the Motion to Amend and refuses to even initiate a  
7 proceeding to work towards a resolution of the acknowledged dispute until the 2007 – 2009  
8 timeframe, it is essential that the Commission promptly declare its interpretation of the 1999  
9 Settlement Agreement concerning the treatment of generation rates beginning in 2009. If the  
10 Commission believes that the 1999 Settlement Agreement is no longer in effect based upon its  
11 Track A order as well as the Arizona Court of Appeals decision in *Phelps Dodge Corp. v. Arizona*  
12 *Elec. Power Co-op, Inc.*, 207 Ariz. 85, 83 P.3d 573 (Ct. App 204), then TEP is entitled to know  
13 that now so it can seek immediate rate increases and other appropriate relief.

14 Another significant failing of the Recommended Order is the erroneous finding that there  
15 is no prejudice to TEP in having to wait until 2007 for the Commission to even begin a year-long  
16 or longer rate case to consider how rates will be set for 2009 without taking any evidence or  
17 testimony on this issue. [FOF ¶ 45] TEP requested that the Commission clarify the status of the  
18 1999 Settlement Agreement on several occasions in several dockets:

- 19 (1) In the AISA docket (ACC Docket No. E-00000A-02-0051, et al);
- 20 (2) In the 2004 Rate Review (ACC Docket No. E-01933A-04-0408);
- 21 (3) And in this docket.

22 But time after time TEP has been turned away without a ruling on the merits.

23 TEP sought this important determination because of the impact that decision will have on  
24 TEP, its customers, investors and shareholders. Despite this, the Recommended Order concludes  
25 that TEP would not be prejudiced if the Commission waited another year before considering the  
26 issue. Further, the only consideration of these matters allowed by the Recommended Order is a  
27 lengthy rate case. The unique and important issues raised in the Motion to Amend would be  
lumped in with the myriad of other complex rate case issues. The failure to take evidence and

1 convene a hearing to consider TEP's Motion to Amend and the impact of further delay is  
2 impractical, and also violates Section 40-252's mandate of a "hearing as upon a complaint".

3 Further, the Recommended Order finds that TEP would prefer the compromise proposed in  
4 the Motion to Amend over market-based rates in 2009. [FOF ¶ 45] This is incorrect. TEP has  
5 maintained throughout this and prior proceedings that under the terms of the 1999 Settlement  
6 Agreement, TEP is entitled to charge market-based rates for its standard offer generation service  
7 when the rate freeze expires after 2008. TEP has performed and managed its operations under the  
8 1999 Settlement Agreement based upon that very assumption and belief – that it would be entitled  
9 to charge market-based rates beginning in 2009 using the MGC established by the Settlement  
10 Agreement. TEP only proposed modifying the 1999 Settlement Agreement to avoid a significant  
11 rate increase for its customers in 2009, to give the parties more time to resolve their dispute over  
12 the 1999 Settlement Agreement, and to allow the Commission more time to resolve the  
13 uncertainty with the Electric Competition Rules. The compromise proposed in the Motion to  
14 Amend was a short-term solution not an indication that TEP would prefer to return to cost of  
15 service ratemaking for generation. This is the very type of evidence that the Commission should  
16 have before it, but did not because no hearing was held.

17 In addition, the Recommended Order's proposed solution of simply waiting to have TEP  
18 file a new rate case in 2007 does not provide any certainty that there will be a resolution of the  
19 long-standing disagreement over 2009 rates before 2009 actually arrives. Meanwhile, TEP will  
20 continue to suffer from continuous under-earnings as established by the 2004 Rate Review. The  
21 resolution of the current disagreement over the proper interpretation of the 1999 Settlement  
22 Agreement will not be easy or quick, and waiting until 2007 to start the process will not make it  
23 any easier or faster. Instead, delaying the resolution of post-2008 generation rates only further  
24 entrenches the parties in their positions and creates further uncertainty for TEP and its customers.  
25 More importantly, waiting until 2007 to start the resolution process may not provide the parties  
26 with sufficient time to resolve the dispute and reach an agreement before 2009 rates go into effect.  
27 At a minimum, the Commission should allow TEP to file a rate case in the fall of 2006 to allow

1 the parties to start the process of resolving how TEP's rates will be determined in 2009.

2 Finally, the Recommended Order directs TEP to file a rate case without explanation of  
3 whether TEP is to file a full rate case or a case limited to transmission and distribution rates.  
4 [FOF ¶ 48] If the Commission intends that TEP file a full rate case, then it may be tacitly ruling  
5 that TEP's standard offer generation rates will be based on cost of service and not market-based  
6 rates. Accordingly, TEP requests that, the Recommended Order be further amended to clarify the  
7 Commission's intent with regard to any "rate case" that TEP is directed to file.

8 **IV. EXCEPTIONS.**

9 **A. TEP and its Customers Are Entitled to Certainty as to How the Commission**  
10 **Interprets the 1999 Settlement Agreement.**

11 The principal failing of the Recommended Order is that it acknowledges a "fundamental  
12 disagreement" over how TEP's rates will be determined in 2009, but refuses to address or initiate  
13 a proceeding to resolve the dispute until 2007. [FOF ¶¶ 37, 44, 48] In effect, the Recommended  
14 Order forces TEP to continue to perform under the 1999 Settlement Agreement and provide its  
15 customers with all the concessions and benefits accorded under the 1999 Settlement Agreement  
16 without any assurance that the Commission will honor the terms of the Settlement Agreement and  
17 allow TEP to charge market-based rates in 2009.

18 This situation is inequitable and a breach of TEP's rights under the 1999 Settlement  
19 Agreement. The 1999 Settlement Agreement is a contract to which TEP, the Commission and  
20 various others are parties. Like any other party, the Commission must honor its contracts. *See US*  
21 *West Communications v. Arizona Corp. Comm'n*, 185 Ariz. 277, 280-81, 915 P.2d 1232, 1235-36  
22 (Ct. App. 1996). A contracting party is entitled to expect that the other party will not only perform  
23 its duties under the contract when the time for performance comes, but will do nothing  
24 substantially to impair this expectation before that time comes. *See* Restatement (Second) of  
25 Contracts, Introductory Note, Ch. 10, Topic 3 (1981). Further, under basic contract principles, "a  
26 contract imposes an obligation on each party that the other's expectation of receiving due  
27 performance will not be impaired." *See* Restatement (Second) of Contracts § 251.

1 Here, the ability to charge market-based rates was a key part of the bargained for exchange  
2 under the 1999 Settlement Agreement and that TEP intends to charge market-based rates starting  
3 in 2009. At the same time, Staff and parties to the 1999 Settlement Agreement have declared their  
4 belief that TEP should not be entitled to charge market-based rates in 2009. Despite this open  
5 disagreement over a key provision of the 1999 Settlement Agreement, the Recommended Order  
6 refuses to provide TEP with any form of assurance that the Commission will honor the terms of  
7 the 1999 Settlement Agreement and allow TEP to charge market-based rates. Instead, the  
8 Recommended Order delays any consideration of the methodology for determining TEP's 2009  
9 generation rates for more than a year while TEP, to its current detriment, is required to continue to  
10 perform under the 1999 Settlement. Not only is this result inequitable, it is a breach of TEP's  
11 rights under the contract. See Restatement (Second) of Contracts § 251.

12 The 2004 Rate Review filing established that TEP is under-earning. TEP presented  
13 evidence of a \$112 million annual revenue deficiency. The Commission has still not issued a final  
14 order in that case. If the Commission believes the 1999 Settlement Agreement terminated because  
15 of the Track A order and *Phelps Dodge*, then the rate freeze is no longer in effect, and TEP is  
16 entitled to receive an immediate rate increase in the 2004 rate review docket, or file a new rate  
17 case at once, or contest the Commission's interpretation in an appropriate forum. No more recent  
18 test year data, evidence or findings are required for the Commission to finally state how it  
19 interprets the 1999 Settlement Agreement and what framework it intends to use in establishing  
20 generation rates for TEP after 2008. TEP is undeniably prejudiced by being forced to continue to  
21 operate under the rate freeze while Staff and various parties contend that the provisions that permit  
22 TEP to charge market-based rates in 2009 are invalid.

23 In the face of the current dispute over how rates must be set under the 1999 Settlement and  
24 TEP's repeated requests for assurances from the Commission on how rates will be set in 2009, the  
25 Recommended Order cannot simply find that the issue is premature and put it off for another year.  
26 As indicated above, TEP previously sought such a determination through its Motion for  
27 Declaratory Order in connection with its 2004 Rate Review and in the AISA Docket. In the 2004

1 Rate Review, the ALJ took no action on the Motion for Declaratory Order but at the same time  
2 suggested that TEP file a motion pursuant to A.R.S. §40-252 seeking to clarify and amend the  
3 1999 Settlement Agreement which TEP has done here. In the AISA Docket, there has been no  
4 action on the Motion for Declaratory Order but a recent Recommended Opinion and Order  
5 concerning the continuation of the AISA surprisingly states that if TEP is concerned over the  
6 continued validity of any terms of the 1999 Settlement Agreement based upon invalidated AISA-  
7 related rules, “appropriate Commission action will be taken if the Commission receives a specific  
8 request regarding Decision No. 62103 from a party to that Decision.” [Recommended Opinion and  
9 Order dated January 31, 2006, p. 16] The Recommended Order in the AISA Docket is surprising  
10 given that the Recommended Order in this docket finds that there is no reason for the Commission  
11 to address the issue now. Specific requests for a determination from the Commission have been  
12 made on several occasions in several dockets. It is now time for the Commission to render its  
13 decision.

14 **B. Recommended Order Denies TEP Due Process.**

15 TEP requested that Decision No. 62103 be amended pursuant to A.R.S. §40-252 to resolve  
16 the disagreement over what will happen with TEP’s generation rates after the rate freeze expires at  
17 the end of 2008. The Motion contends that the dispute must be decided now because TEP is  
18 performing under the 1999 Settlement Agreement and operating its business with the expectation  
19 that it will be entitled to charge market-based generation rates in 2009 in accordance with the 1999  
20 Settlement Agreement.

21 In response to the Motion to Amend, the Recommended Order correctly finds that “[t]here  
22 is a fundamental disagreement between the parties to the 1999 Settlement Agreement about what  
23 is to happen to generation rates after the rate moratorium expires December 31, 2008” and  
24 “[d]etermining the intent of the parties will require a hearing.” [FOF ¶¶ 37 and 38] But rather  
25 than structure a proceeding and set a hearing to allow TEP and the other parties to present  
26 evidence on the need to immediately address the disagreement as well as other issues raised in  
27 complying with the 1999 Settlement, the Recommended Order simply denies the Motion to

1 Amend and again defers consideration of the issues until 2007. [FOF ¶ 48]

2 This decision to deny TEP's Motion to Amend without taking any evidence of any kind  
3 violates A.R.S. §40-252 and TEP's due process rights.<sup>1</sup> Under A.R.S. §40-252, TEP is entitled to  
4 introduce evidence at a hearing on the need to resolve the current uncertainty regarding the status  
5 and effect of the 1999 Settlement Agreement now, and to have an impartial ruling on that  
6 evidence. When the Commission exercises a judicial or quasijudicial function, as it is doing here,  
7 due process of law requires that there be a hearing at which a party may introduce evidence before  
8 a decision. *See Southern Pacific Co. v. Arizona Corp. Comm'n*, 98 Ariz. 339, 347-48, 404 P.2d  
9 692, 697-98 (1965) (citation omitted); *see also APS v. Arizona Corp. Comm'n*, 155 Ariz. 263, 271,  
10 746 P.2d 4, 12 (Ct. App. 1987), *overruled in part on other grounds*, 157 Ariz. 532, 760 P.2d 532  
11 (1988) (citing *Southern Pacific*).

12 In this instance, the Commission is clearly acting in a judicial or quasijudicial manner. It  
13 is being asked to resolve a conflict relating to rates and the Commission's ruling will directly  
14 affect the public. *See State ex rel. Corbin v. Arizona Corp. Comm'n*, 174 Ariz. 216, 218, 848 P.2d  
15 301, 303 (Ct. App. 1992) ("It exercises its executive, administrative function in adopting rules and  
16 regulations, its judicial jurisdiction in adjudicating grievances, and its legislative power in  
17 ratemaking"); *State ex rel. Corbin v. Arizona Corp. Comm'n*, 143 Ariz. 219, 223-24, 693 P.2d  
18 362, 366-67 (Ct. App. 1984). Accordingly, the Commission cannot deny TEP's Motion to Amend  
19 and delay resolution of the acknowledged disagreement over 2009 rates without allowing TEP to  
20 present evidence on the following issues:

- 21 (1) whether the Motion to Amend is in the public interest;  
22 (2) the meaning of the 1999 Settlement Agreement;  
23 (3) whether current test year data is needed; and  
24 (4) whether TEP is prejudiced by delay.

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27 <sup>1</sup> Two examples of the Commission following the hearing requirements of A.R.S. §40-252 are the proceedings in the  
APS Docket Nos. E-01045A-03-0437/E-01345A-05-0526 in which the Commission specifically convened a separate  
40-252 hearing during the Open Meeting on January 24<sup>th</sup> and 25<sup>th</sup> and the § 40-252 proceeding that was ordered by  
Decision No. 65743, the Track "B" Decision, concerning the continuation of the AISA.

1 And having refused to permit TEP to present such evidence, the Recommended Order is in  
2 violation of A.R.S. §40-252.

3 **C. Finding that TEP Does Not Seek to Charge Market Rates is in Error.**

4 At the heart of the Motion to Amend is the question of whether TEP's generation rates will  
5 be market-based or cost-based when the rate freeze expires at the end of 2008. The 1999  
6 Settlement Agreement resolved numerous issues and disputes related to the transition to electric  
7 generation competition. TEP has steadfastly maintained in this and prior proceedings that under  
8 the 1999 Settlement Agreement generation rates will automatically be market-based in 2009 using  
9 the MGC established by the 1999 Settlement Agreement. [See Motion for Declaratory Order  
10 dated May 4, 2005; See also Motion to Amend and Reply in Support of Motion to Amend.]

11 In consideration for market-based generation rates beginning in 2009, TEP agreed to  
12 significant economic burdens under the 1999 Settlement Agreement including: (1) two rate  
13 decreases, (2) a rate freeze through December 31, 2008, (3) unbundled rates, (4) accelerated  
14 amortization of assets, (5) opening its service territory to competition, (6) agreeing to modify its  
15 exclusive CC&N; and (7) dismissing appeals of Commission actions. TEP undertook each of  
16 these actions in good faith and in reliance upon the benefit it would receive by having its standard  
17 offer generation rates determined by the MGC after the rate freeze expired at the end of 2008.

18 Although there was and is no guarantee that TEP will be able to profitably earn a return  
19 through market-based rates, it is the ability to charge market-based rates after 2008 that provides  
20 economic symmetry to the 1999 Settlement Agreement. The opportunity to charge market-based  
21 rates was a key tenet (and in fact, a *quid pro quo*) upon which TEP relied, in agreeing to take the  
22 actions that have provided direct benefits for TEP's customers, at the utility's expense<sup>2</sup>. TEP has  
23 steadfastly maintained that it would be inequitable for the Commission – in 2009, after TEP has  
24 provided all of the enumerated benefits to customers – to reverse course and force TEP back to  
25 calculating its standard offer generation rates on a traditional cost-of-service basis. [See Motion  
26

27 <sup>2</sup> These actions include a rate freeze, which based upon the 2004 Rate Review filings, has resulted in TEP under earning approximately \$112 million, as well as the accelerated amortization of \$450 million of TEP assets.

1 for Declaratory Order, p5; Motion to Amend, p. 2; Reply in Support of Motion to Amend, pp. 4-  
2 6]

3 TEP's position before the Commission is directly at odds with the finding of the  
4 Recommended Order that "even if TEP is correct in its belief that it would be entitled to charge  
5 market rates in 2009, it appears from its comments in this proceeding, and as evidenced by its  
6 filing its Motion to Amend, that it prefers a different result." [FOF ¶. 45] TEP believes that it is  
7 entitled to charge market-based rates beginning in 2009 and TEP's proposal to amend the  
8 Settlement Agreement was presented only as a means of preventing customers from experiencing  
9 an immediate rate increase in 2009 while giving the parties more time to work through the current  
10 dispute over how TEP's standard offer rates will be determined after 2008. The Recommended  
11 Order misreads the compromise embodied in the Motion to Amend. The compromise amendment  
12 was not an indication that TEP was not interested in receiving the benefits that were accorded it  
13 under the 1999 Settlement. Instead, the compromise in the Motion to Amend was simply that --  
14 an attempt to reach a short-term compromise that would provide price stability to TEP customers  
15 while at the same time providing the Company with some protection for incremental sales volume.

16 **D. The Recommended Order Fails to Resolve Uncertainty and Allow Sufficient**  
17 **Time to Resolve Dispute Over 2009 Rates.**

18 Finally, the Recommended Order does nothing to resolve the current uncertainty as to  
19 future rates and the methodology that will be used to set rates. Instead, the Recommended Order  
20 requires that TEP file a rate case in 2007 and suggests that the open disagreement over what is to  
21 happen with generation rates in 2009 and whether TEP's compromise proposal is in the public  
22 interest can all be determined at that time. [FOF ¶¶ 48 and 49] The obvious problem with the  
23 Recommended Order is that given the history of rate cases before this Commission and the  
24 difficult issues presented by the interpretation of the 1999 Settlement Agreement, filing a rate case  
25 in September 2007 does not ensure that the various issues will be resolved before the rate freeze  
26 expires. Even if the 2007 rate case filing is processed promptly, including the resolution of the  
27 dispute over the 1999 Settlement Agreement, it does not provide TEP adequate time to

1 appropriately manage its generation resources and plan for any new rate methodology with any  
2 reasonable certainty. What happens with future generation rates significantly impacts how TEP  
3 manages its generation resources today. TEP's hedging strategy with regard to power and gas  
4 purchases, as well as its ability to plan for and enter into contracts for the sale of power are all  
5 impacted by future generation rates.

6 While the Recommended Order justifies further delaying the resolution of these important  
7 issues on an asserted lack of meaningful "Test Year" data, the Order's rationale is suspect in light  
8 of past rate and settlement proceedings in which the test year data was years removed from the  
9 effective date of the new rates. For example, the 1999 Settlement Agreement rates were based on  
10 1994 rates that were in turn based on 1993 test year data. Here, TEP seeks to reach a short-term  
11 compromise for 2009 through 2010 based on 2003 test year data submitted in connection with its  
12 2004 Rate Review filing. This proposal was made in the spirit of compromise, despite TEP's  
13 clear right to market-based generation rates after 2008. If the Commission is not inclined to  
14 consider the compromise, then no test year data is needed to determine the meaning of the 1999  
15 Settlement Agreement.

16 Finally, because the rate freeze expires at the end of 2008, the Commission cannot wait  
17 until September 2007 to address the issues presented by the 1999 Settlement Agreement. That is  
18 too late. At a minimum, the Recommended Order should be amended to require that TEP file a  
19 rate case in 2006 and at the same time, establish a procedural framework for addressing the current  
20 dispute over the proper interpretation of the 1999 Settlement Agreement. Further, the  
21 Recommended Order needs to clarify whether TEP is being directed to file a full rate case or a  
22 case limited to transmission and distribution rates. [FOF ¶ 48] If the Commission intends that  
23 TEP file a full rate case, then it may be tacitly ruling that TEP's standard offer generation rates  
24 will be based on cost of service and not market-based rates. Accordingly, TEP requests that the  
25 Recommended Order be further amended to clarify the Commissions intent with regard to any  
26 "rate case" that TEP is directed to file.

27

1 **V. CONCLUSION.**

2 TEP respectfully submits that the public interest is best served by amending Decision No.  
3 62103 (and the terms of the 1999 Settlement Agreement) now to clarify and amend the 1999  
4 Settlement Agreement in accordance with the Motion to Amend to provide TEP and its customers  
5 with certainty as to the future of electric rates as well as the regulatory treatment of present and  
6 future generation resources, rather than waiting to address the issue in connection with a 2007 rate  
7 case with no certainty that a suitable resolution can be reached before the rate freeze expires at the  
8 end of 2008. To that end, the Commission should conduct a hearing under A.R.S. §40-252 now to  
9 address whether the public interest would be served by amending the 1999 Settlement Agreement  
10 and, if so, whether TEP's proposal regarding amendment of the 1999 Settlement Agreement is in  
11 the public interest while the parties continue to work through the dispute over how rates will  
12 continue to be set under the 1999 Settlement Agreement.<sup>3</sup>

13 If the Commission agrees that a hearing should be held concerning TEP's Motion to  
14 Amend, TEP respectfully submits the proposed language attached hereto as Exhibit A to amend  
15 the Recommended Order.

16 Alternatively, if the Commission is inclined to deny the Motion to Amend, then it should  
17 declare now how it interprets the 1999 Settlement, making clear the methodology it will use to  
18 establish rates in 2009 and whether TEP may charge market-based rates when the rate freeze  
19 expires at the end of 2008.

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<sup>3</sup> This is consistent with the stated views of at least two Commissioners who indicated that the process should begin immediately.

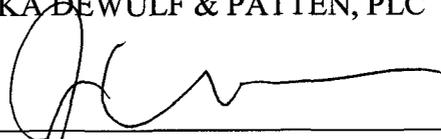
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RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of February 2006.

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**EXHIBIT**

**"A"**

## Exhibit A

### TEP'S PROPOSED AMENDMENT TO RECOMMENDED OPINION AND ORDER

- (1) **Page 11, lines 1-3: DELETE** all of current Finding of Fact No. 42 and **INSERT** as in its place: “The meaning of Decision No. 62103 and the 1999 Settlement Agreement, and their effect on rates after 2008, is currently in dispute. We believe that this dispute should be resolved as soon as possible.”
  
- (2) **Page 11, lines 9-16: DELETE** all of current Finding of Fact No. 44 and **INSERT** the following in its place:  
  
“TEP filed Exceptions to the Recommended Opinion and Order. In its Exceptions, TEP argues that it has repeatedly raised the issue of the proper interpretation of Decision No. 62103 and the 1999 Settlement Agreement, but has not yet received a ruling on the merits. TEP argues that it has remained steadfast in contending that Decision No. 62103 and the 1999 Settlement Agreement give it the right to charge market-based rates for generation under the MGC after 2008. TEP argues that it, and its customers, deserve certainty, and that this dispute should be resolved as soon as possible. TEP suggests that we conduct a hearing pursuant to A.R.S. § 40-252 to consider the Motion to Amend.”
  
- (3) **Page 11, lines 17-23: DELETE** all of current Finding of Fact No. 45 and **INSERT** the following in its place: “We agree with TEP that resolving this dispute as soon as possible is in the public interest.”

- (4) **Page 12, lines 1-17: DELETE** all of current Findings of Fact Nos. 47 through 50 and **INSERT** the following as Finding of Fact No. 47: “We agree that a hearing should be held under A.R.S. § 40-252 to consider amending Decision No. 62103 and the 1999 Settlement Agreement. The hearing will include consideration of the proposals outlined in TEP’s Motion to Amend. Accordingly, we direct the Hearing Division to schedule a hearing to consider amending Decision No. 62103.
- (5) **Page 12, lines 1-17: INSERT** the following as Finding of Fact No. 48: “The Hearing Division shall establish a procedural schedule in this matter. The schedule should allow for an expeditious but complete review of these matters. We encourage the parties to meet and confer during this process to resolve any issues to which the parties might stipulate.”
- (6) **Page 12, lines 18-20: RENUMBER** Finding of Fact No. 51.
- (7) **Page 12, line 26-27: DELETE** current Conclusion of Law No. 4 and **INSERT** the following in its place: “It is in the public interest to conduct a hearing under A.R.S. § 40-252 to consider the matters discussed herein including TEP’s Motion to Amend.”
- (8) **Page 13, lines 2-6: DELETE** first two ordering paragraphs and **INSERT** the following in their place: “IT IS THEREFORE ORDERED that the Hearing Division shall conduct further proceedings in accordance with the discussion herein.”