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EXCEPTION

BEFORE THE ARIZONA CORPORATION

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2006 FEB -9 P 3:16

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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 THE GENERIC
PROCEEDINGS CONCERNING THE
ARIZONA INDEPENDENT SCHEDULING
ADMINISTRATOR

Docket No. E-00000A-01-0630

TUCSON ELECTRIC POWER COMPANY'S EXCEPTIONS TO THE RECOMMENDED OPINION AND ORDER

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 February 9, 2006 (the "Recommended Order") regarding the authority for and need to continue the operation of the Arizona Independent Scheduling Administrator ("AISA").

I. CONTINUATION OF AISA.

Following the Court of Appeals decision in *Phelps Dodge Corporation, et al. v. AEPCO, et al.*, 207 Ariz. 95, 83 P.3d 573 (2004), the parties in this docket were asked to provide recommendations regarding the effect of the *Phelps Dodge* decision on the AISA proceedings. In its response, TEP stated its position that *Phelps Dodge* rendered the provisions of Rule 1609 that provide for the creation of the AISA invalid and unenforceable. [See TEP Response to AISA Procedural Order dated March 16, 2005 ("TEP Response") at 2].

1 Notwithstanding TEP’s view, the Recommended Order finds that while *Phelps Dodge* may
2 have rendered the AISA provisions of Rule 1609 invalid or unenforceable as a rule requirement,
3 the ruling came after AISA was formed and had its tariff approved by FERC, and does not negate
4 the independent existence of the AISA. [Recommended Opinion and Order (“ROO”) at 14 – 15]
5 Further, although there is no retail electric competition in Arizona at the present time, the
6 Recommended Order finds that the AISA “currently provides the important public benefit of
7 keeping the possibility of retail access available to Arizona consumers at a minimal cost, by
8 providing potential competitors with the necessary assurance that they will have fair and equitable
9 access to transmission until an RTO is formed and approved by FERC to take over that function.”
10 [ROO at 15] Based upon these findings, the Recommended Order concludes that the AISA should
11 be maintained in its current downsized mode pending Commission review of the Retail Electric
12 Competition Rules. [ROO at 18]

13 In responding to the Recommended Order, TEP reiterates that the AISA provisions of Rule
14 1609 are invalid. However, TEP remains committed to electric competition, as required by the
15 TEP 1999 Settlement Agreement, and will continue to abide by its obligation to support the AISA
16 as required by the TEP 1999 Settlement Agreement. But TEP is concerned that the Commission is
17 enforcing those provisions of the TEP 1999 Settlement Agreement that burden TEP – like the
18 AISA – while declining to state whether it will abide by those provisions of the Settlement
19 Agreement that benefit TEP – like market-based generation rates after 2008. Either TEP should
20 receive the full benefit of its bargain or it should be relieved of its obligations under the TEP 1999
21 Settlement Agreement.

22 **II. VALIDITY OF AISA PROVISIONS OF 1999 SETTLEMENT.**

23 Aside from the issue of the continued viability and need for the AISA, TEP’s Response
24 also stated the Company’s concern about the impact of *Phelps Dodge* on its duties and
25 responsibilities under the TEP 1999 Settlement Agreement. According to TEP’s Response:

26 The current state of affairs calls into question the status of Sections 4.2
27 and 9.1 of the TEP 1999 Settlement Agreement and TEP’s duties and

1 responsibilities in connection therewith. TEP believes that, in light of the
2 Phelps Dodge case, it is appropriate for the Commission to provide notice
3 of the steps it will take, if any, regarding (i) the AISA-related Electric
4 Competition Rules; and (ii) any terms of settlement agreements (such as
5 the TEP 1999 Settlement Agreement) that are based upon the invalidated
6 AISA related rules.

7 [TEP Response at 2-3]

8 Responding to TEP's concerns and request that the Commission provide notice and
9 guidance on the current status of the Electric Competition Rules and the validity of the TEP 1999
10 Settlement, the Recommended Order states that Staff's review of the Electric Competition Rules is
11 ongoing and the outcome of that proceeding is unknown, and parties wishing to submit comments
12 on that proceeding should make their filing in the rulemaking docket. [ROO at 16] Regarding the
13 term of the TEP 1999 Settlement Agreement, the Recommended Order goes on to state that
14 "appropriate Commission action will be taken if the Commission receives a specific request
15 regarding Decision No. 62103 from a party to that Decision." [Id.]

16 This statement concerning Decision No. 62103 is perplexing given that TEP has requested
17 that the Commission clarify the status of the TEP 1999 Settlement Agreement on several
18 occasions in several dockets. In May 2005, TEP filed a Motion for Declaratory Order and Request
19 for Procedural Conference (the "Motion for Declaratory Order") in connection with its 2004 Rate
20 Review, Docket No. E-01933A-04-0408 (the "2004 Rate Review"), and at the same time filed the
21 Motion for Declaratory Order in the generic restructuring dockets, Docket No. E-00000A-02-
22 0051, et al. (the "AISA Docket"). The Motion for Declaratory Order sought a determination of
23 the continued validity of the TEP 1999 Settlement Agreement and the methodology the
24 Commission will apply to determine TEP's rates for generation service beginning in 2009.
25 However, after Staff and other parties filed opposition to the Motion for Declaratory Order in the
26 2004 Rate Review, the Administrative Law Judge issued a procedural order taking no action on
27 the Motion, but suggesting that TEP instead seek to reopen Decision No. 62103 pursuant to A.R.S.
§40-252 to clarify Decision No. 62103 and the TEP 1999 Settlement Agreement. [See June 10,
2005 Procedural Order in 2004 Rate Review at 5] Accordingly, TEP filed the Motion to Amend

1 Decision No. 62103 in Docket No. E-01933A-05-0650 (the “Motion to Amend” Docket) in
2 September 2005 seeking: (i) to amend the TEP 1999 Settlement Agreement with a short-term
3 compromise solution to the current dispute over how rates will be set after the rate freeze expires
4 in 2008 and (ii) a determination on whether TEP will be entitled to charge market based rates in
5 accord with the TEP 1999 Settlement Agreement in the wake of *Phelps Dodge* and other decisions
6 that call into question the viability of the Electric Competition Rules on which the TEP 1999
7 Settlement Agreement was based. On January 30, 2006 – one day prior to the entry of the
8 Recommended Order in this docket – the Presiding Administrative Law Judge in the Motion to
9 Amend Docket issued a recommended opinion and order finding that, although there is a
10 fundamental disagreement between the parties to the TEP 1999 Settlement Agreement regarding
11 generation rates after the rate freeze expires on December 31, 2008 and the necessity of a hearing
12 to determine the intent of the parties to the TEP 1999 Settlement Agreement, TEP’s request for a
13 determination on the status of the TEP 1999 Settlement Agreement is “premature.” [See
14 Recommended Opinion and Order (Motion to Amend Docket), dated January 30, 2006, Findings
15 of Fact, ¶¶ 37, 38, and 44]

16 Simply put, the language of the Recommended Order in this Docket that “appropriate
17 Commission action will be taken if the Commission receives a specific request regarding Decision
18 No. 62103” makes little sense in light of (i) TEP’s efforts to have the Commission address the
19 validity of its TEP 1999 Settlement Agreement on several occasions and in several dockets and (ii)
20 the recent recommended opinion and order in the Motion to Amend Docket finding that there is no
21 reason for the Commission to address the issue now. TEP has made specific requests for a
22 determination from the Commission on several occasions in several dockets. This Recommended
23 Order presents a plain example of why this Commission should resolve the dispute over the
24 interpretation of the TEP 1999 Settlement Agreement. If the Commission believes that TEP’s
25 generation rates will not be market-based beginning in 2009, then there is no need for the AISA
26 and TEP should be relieved of its obligations under the 1999 Settlement Agreement regarding the
27 AISA. It is time for the Commission to render its decision and let TEP know where it stands.

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1 **III. CONCLUSION.**

2 Notwithstanding the statements in the Recommended Order, TEP has made several
3 specific requests for Commission action and determinations on the validity of TEP's 1999
4 Settlement Agreement in this and other dockets. The Commission should take action to resolve
5 this inconsistency.

6 RESPECTFULLY SUBMITTED this 9th day of February, 2006.

7 ROSHKA DEWULF & PATTEN, PLC

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