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BEFORE THE ARIZONA CORPORATION COMMISSION

7 IN THE MATTER OF COMPETITION) 8 IN THE PROVISION OF ELECTRIC) 9 SERVICES THROUGHOUT THE) 10 STATE OF ARIZONA) _____)	DOCKET No. U-0000-94-165 SRP'S COMMENTS ON PROPOSED RULE - RETAIL ELECTRIC COMPETITION
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12 SRP has previously filed extensive comments in this proceeding that identify major legal,
 13 technical and equitable issues raised by the proposed rules to restructure the electric industry. These
 14 problems have not been effectively addressed or adequately resolved by the Commission's latest version
 15 of the rules. To avoid needless repetition, SRP incorporates by reference herein its September 12, 1996
 16 comments and exhibits filed in this proceeding and simply points out the following:

17 **1. The Commission's Rules Do Not Give All Customers In This State The Right To**
 18 **Choose Their Electric Energy Provider.**

19 SRP believes that all Arizona residents deserve the opportunity to choose their electric
 20 energy provider and participate in the retail electric competitive market. The proposed rules do not
 21 provide this opportunity because they effectively preclude customers of SRP and other municipal
 22 entities, approximately 650,000-700,000 residents and business consumers, from choosing their electric
 23 energy provider, *and* because they attempt to exclude municipal entities, including SRP, directly or
 24 indirectly, from offering competitively priced electric energy to other customers throughout Arizona.
 25 Such a plan does not constitute a real choice for the residents of this State, but demonstrates a
 26 protectionist attitude on the part of the Commission.

1 **2. The Commission's Proposed Regulation Of Political Subdivisions And Municipal**
2 **Corporations Is Unconstitutional.**

3 The Commission's proposal to exclude SRP and other municipal entities, which operate
4 electric utilities, from a truly competitive electric market ignores the express Constitutional limitations
5 on the Commission's authority. The Arizona Constitution specifically states that the Commission has no
6 jurisdiction over municipal corporations. Ariz. Const. Art. 15, §§ 2, 3. Courts have consistently upheld
7 this constitutional prohibition against Commission jurisdiction over municipal corporations. See, e.g.,
8 City of Mesa v. Salt River Project Agricultural Improvement & Power District, 92 Ariz. 91, 373 P.2d
9 722 (1962); City of Phoenix v. Wright, 52 Ariz. 227, 80 P.2d 390 (1938).

10 As an agricultural improvement district, SRP is constitutionally a "political subdivision
11 of the State, and vested with all rights, privileges and benefits, and entitled to the immunities and
12 exemptions granted municipalities". Ariz. Const. Art. 13, § 7. Like other such municipal entities, SRP
13 is not and cannot be subject to the jurisdiction of the Commission. City of Mesa v. Salt River Project
14 Agricultural Improvement & Power District, *supra*; Rubenstein Construction Co. v. Salt River Project
15 Agricultural Improvement & Power District, 76 Ariz. 402, 265 P.2d 455 (1954).

16 Despite these Constitutional prohibitions, the Commission's current proposal subtly
17 attempts to unlawfully regulate municipal entities by trying to dictate what they *cannot* do – that is,
18 offer choice of electric energy providers to their own customers and the customers of other electric
19 utilities. See Proposed Rule 14-2-1611(A). The Commission has no authority to place such restrictions
20 on municipal entities.

21 The Commission's proposed solutions to total exclusion of municipal entities from the
22 competitive electric energy market also violate the Constitution. See Proposed Rules 14-2-1611 (C) and
23 (D). The Commission cannot simply refer the matter to the Legislature to handle, because the
24 Legislature itself is not empowered to unilaterally change the Arizona Constitution to expand the
25 Commission jurisdiction to cover Constitutionally excluded municipal entities. See Rural/Metro Corp.
26 v. Arizona Corporation Commission, 129 Ariz. 116, 118, 629 P.2d 83, 85 (1981); American Bus Lines,

1 Inc. v. Arizona Corporation Commission, 129 Ariz. 595, 599, 633 P.2d 404, 408 (1981); Menderson V.
2 City of Phoenix, 51 Ariz. 280, 285, 76 P.2d 321 (1938).

3 Even more questionable is the Commission's proposal, the "Unanimous Consent
4 Provision," to let municipal entities and other political subdivisions like SRP compete *if* all of the
5 investor-owned utilities in the State, who are "Affected Utilities," agree in writing to allow it. Not only
6 is this Unanimous Consent Provision plainly inequitable, by permitting a few competitors to dictate
7 terms of competition, and administratively cumbersome, but more importantly it is constitutionally
8 defective. Simply put: the Commission has no authority to leave or delegate to others what it cannot
9 legally do itself. The Arizona Constitution cannot be unilaterally modified upon the written agreement
10 of some of the State's other electric utilities.

11 The Unanimous Consent Provision is patently unconstitutional because even if the
12 Commission had the authority to regulate municipal entities, the provision would: (1) effectively divest
13 the Commission of its rule-making authority by allowing the Affected Utilities to perform a gatekeeper
14 function, and (2) delegate authority to a group over which the Commission has no supervision or control
15 in this context. A delegation of power to a private entity in any form violates due process if it permits an
16 arbitrary exercise of the delegated power. Washington v. Seattle Title Trust Co. v. Roberge, 278 U.S.
17 116, 117-23, 49 S. Ct. 50, 50-52 (1928).

18 The Unanimous Consent Provision grants unfettered discretion to the Affected Utilities
19 to give or deny their consent, without any process for Commission or judicial review. The Commission
20 would therefore be bound by even an arbitrary or capricious decision of an Affected Utility to deny its
21 consent. Thus, the Commission's delegation of unfettered authority is equivalent to a violation of due
22 process.

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1 **3. There Are Solutions That Constitutionally Provide Choice For All Arizona**
2 **Electric Customers.**

3 There is no need for the Commission to propose a plan for partial restructuring of the
4 electric industry that violates the Arizona Constitution.¹

5 A solution to the problem is the use of intergovernmental agreements. A.R.S. 11-951, et
6 seq. The Commission and the appropriate regulatory bodies of SRP and other governmental utilities
7 could negotiate and implement agreements that provide for reciprocal retail electric energy competition
8 within the service area boundaries of their respective regulated entities. See, e.g., Garvey v. Trew, 64
9 Ariz. 342, 170 P.2d 845 (1946); A.R.S. §40-105(C)(3). This would allow implementation of retail
10 competition throughout the State's utility industry and coordinated schedules and terms under which all
11 Arizona customers could enjoy the benefits of retail electric energy competition. Such a framework
12 would maintain the integrity of Arizona's Constitution and provide choice to more than just a select
13 group of Arizona electric customers. See Exhibit A to these comments setting forth a revised R14-2-
14 1611 that authorizes intergovernmental agreements between the Commission and other governmental
15 entities.

16 In 1968, the Arizona Legislature passed legislation authorizing "intergovernmental
17 agreements" between public agencies. A.R.S. §§ 11-951 through 11-954. The statute broadly defines
18 "public agency" to include:

19 [T]he federal government or any federal department or agency, Indian tribe,
20 this state, any other state, all departments, agencies, boards and commissions
21 of this state or any other state, counties, school districts, cities, towns, all
22 municipal corporations, and any other political subdivisions of this state or
23 any other state.

24
25 ¹ SRP's proposal to create an affiliate to participate in retail electric energy competition outside SRP's
26 service area is part of the solution. The affiliate would not be a municipal entity. It would be a private
corporation and, as such, would be subject to all Commission rules and regulations, and compete under
the same terms and conditions as other electric utilities in the State.

1 A.R.S. § 11-951. The statute authorizes two or more public agencies to jointly contract for services or to
2 jointly exercise any powers common to the contracting agencies and to agree upon joint or cooperative
3 action. A.R.S. § 11-952. It also specifies how proposed intergovernmental agreements shall be
4 approved, as well as what provisions certain agreements must contain.

5 The Commission, acting through its Executive Secretary, has the express statutory
6 authority to enter into intergovernmental agreements relating to Commission activities and operations.
7 A.R.S. § 40-105(C)(3). The Arizona Supreme Court also has acknowledged the Commission's power to
8 contract with other agencies to assist it in fulfilling its constitutional duties, including the power to
9 contract with the Federal Power Commission (now Federal Energy Regulatory Commission) for
10 assistance in ascertaining the fair value of the property of public service corporations. Garvey v. Trew,
11 supra.

12 **4. The Commission's Proposal Has Failed To Adequately Address Numerous**
13 **Practical, Technical And Reliability Issues.**

14 Throughout this process, SRP has continually stated that any plan for restructuring of
15 the electricity industry must consider and resolve the many economic, social, financial, technical,
16 operational, system planning and environmental issues associated with such a change. Failure to do so
17 results in an industry structure that may have unintended negative consequences for consumers. The
18 Commission's current plan leaves many such issues unresolved. These issues must be adequately
19 discussed and resolved before adoption of the proposed rules.

20 Unresolved issues include:

21 a) Stranded Investment

22 As the electric industry evolves towards an environment characterized by
23 customer choice, one of the critical issues still to be addressed is the recovery of stranded investment.

24 Stranded investments are those costs related to generation assets and obligations
25 approved for inclusion in rates that become uneconomic as a result of a competitive generation market.
26 They include the costs of generation facilities, generation-related regulatory assets and above-market

1 fuel contracts. Stranded investment should also include the costs of implementing the transition to retail
2 choice.

3 The Commission's plan does not adequately resolve the issue of recovery of
4 stranded investment. The restructuring of the electric industry in California has shown that this issue can
5 be addressed to the satisfaction of all stakeholders. The Commission should seek to do the same before
6 adoption of the proposed rules. The failure of the proposed rule to adequately address recovery of
7 stranded investment will impair the ability of utilities to provide required services (such as distribution
8 service) and will negatively impact customers who choose not to participate in the competitive market.

9 b) System Reliability

10 As this summer's experiences have shown, the reliability of the electrical
11 system is essential to the well-being of Arizona businesses and residents. Restructuring the electricity
12 industry will change the players who deal with the electrical system, and the way in which it operates,
13 yet the Commission's proposal fails to adequately address reliability issues raised by restructuring.

14 To maintain system reliability, careful attention must be paid to the impact that
15 the introduction of retail choice will have on the electrical system. Based on these impacts, reliability
16 standards and practices should be established by National Electric Reliability Council ("NERC") and
17 the Western Systems Coordinating Council ("WSCC") to ensure the reliability of the electrical system
18 in a retail choice environment, and these standards must be incorporated into any proposed rules. In
19 addition, multi-state compacts must be entered into to ensure enforceability of reliability rules on out-of-
20 state players.

21 c) Obligation to Serve

22 The Commission's proposed rule requires standard offer tariffs for bundled
23 service within a certificated area until "the commission determines that competition has been
24 substantially implemented for a particular class of customers." The rule is silent regarding any
25 obligation to serve. If the rule intends to eliminate the obligation to serve, it should do so explicitly, not
26 by inference, and state what, if anything, will replace the obligation to serve.

1 Moreover, the rule could harm smaller customers if utilities are required to
2 maintain sufficient resources for larger, more sophisticated customers who may switch between standard
3 and competitive service on a periodic basis to minimize their electricity costs. Any program
4 implementing retail competition must ensure an appropriate balance between the obligation to provide
5 generation and backup service and the costs that are borne by smaller customers who choose standard
6 offer service.

7 d) Availability of Real Time Pricing Information

8 Moving to a competitive environment for providing electricity and the
9 “unbundling of services” means generation will be separated from other services. Some mechanism,
10 such as a clearinghouse, needs to inform customers what prices other customers are being charged for
11 various electric services, as well as for generation itself. Such a mechanism would foster consistent
12 generation pricing and develop a truly competitive marketplace for different types and combinations of
13 electric services.

14 e) Out-of-State Utilities and Reciprocity

15 The proposed rules also fail to address reciprocity issues relating to out-of-state
16 utilities intending to compete and sell energy to customers within Arizona. Arizona utilities will be at a
17 severe competitive disadvantage if out-of-state utilities, or their affiliates, are allowed to compete for
18 retail customers in Arizona without reciprocally opening up their own service areas to sales by Arizona
19 utilities. The Commission should provide for the negotiation of multi-state compacts addressing
20 reciprocity issues.

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1 Respectfully submitted this 8 day of November, 1996.

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Exhibit A

R14-2-1611 In-State Reciprocity

If an Arizona political subdivision or municipal corporation has an existing service territory, then such territory shall be deemed to be open to competition for Arizona Electric Service Providers if the political subdivision or municipality has entered into an intergovernmental agreement with the Commission that establishes the terms and conditions for separate pricing for retail electric energy competition, provides a procedure for bill complaints arising therefrom, and provides for reciprocity with Affected Utilities.

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