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IN THE MATTER OF THE FILING BY
TUCSON ELECTRIC POWER COMPANY
TO AMEND DECISION NO. 62103.

Docket No. E-01933A-05-0650

**RUCO'S RESPONSE TO TUCSON ELECTRIC POWER COMPANY'S
PROPOSED RECOMMENDED OPINION AND ORDER**

The Residential Utility Consumer Office ("RUCO") provides this response to Tucson Electric Power Company's ("TEP" or the "Company") Submission of Proposed Recommended Opinion and Order.

BACKGROUND

Between 1996 and 1999, the Arizona Corporation Commission ("Commission") adopted various versions of its Electric Competition Rules (the "Rules") to transition the electric industry in Arizona from a regulated to a competitive environment. In 1999, TEP, RUCO, Arizonans for Electric Choice and Competition ("AECC") and the Arizona Community Action Association entered into a Settlement Agreement to settle various matters related to TEP, including TEP's application for stranded cost recovery and the establishment of unbundled tariffs. The Commission approved the Settlement Agreement with modifications in Decision No. 62103.

1 The Settlement Agreement required TEP to transfer its generation assets to a subsidiary by
2 December 31, 2002 and to acquire power for Standard Offer customers as required by the
3 Rules. The Settlement Agreement also provided for a rate freeze through December 31, 2008.
4 The frozen rates included TEP's stranded cost recovery, which was further broken down into a
5 fixed charge (Fixed CTC) and a variable charge (Floating CTC). The Fixed CTC is a fixed per-
6 kWh charge, and it terminates when it yields a total of \$450 million, or on December 31, 2008,
7 whichever occurs first. The Floating CTC is computed using a Market Generation Credit
8 ("MGC") methodology based on market-index futures prices. The Settlement Agreement also
9 provided for a review of TEP's rates in 2004, although rates could only be decreased or remain
10 the same as a result of that proceeding.

11 In 2002, the Commission issued Decision No. 65154 ("Track A Order") modifying
12 portions of Decision No. 62103. Specifically, Decision No. 65154 modified Decision No. 62103
13 and required TEP to cancel any plans to divest interests in any of its generation assets. In
14 2003 the Commission adopted Decision No. 65743 ("Track B Order"), establishing certain
15 requirements for utilities to acquire power for Standard Offer customer from the wholesale
16 market.

17 In 2004, the Arizona Court of Appeals issued a decision in *Phelps Dodge Corp. v.*
18 *Arizona Elec. Power Co-op, Inc.*, 207 Ariz. 95, 83 P.3d 573 (Ct. App. 2004) ("*Phelps Dodge*"),
19 in which it invalidated certain of the Rules.

20 In 2005, TEP filed a Motion for Declaratory Order, seeking clarification of whether TEP
21 would be entitled to charge market-indexed Standard Offer rates beginning in 2009. The
22 Commission's Utilities Division ("Staff"), RUCO and other parties opposed the motion. The
23 Commission's Administrative Law Judge issued a procedural order suggesting that TEP raise
24 the matter as a request to amend Decision No. 62103. TEP then filed a Motion to Amend

1 Decision No. 62103, seeking resolution of the dispute over whether TEP is entitled to charge
2 market-index rates under Decision No. 62103 and the 1999 Settlement Agreement.

3 In April 2006, the Commission issued Decision No. 68669, in which it held the disputed
4 terms of the Settlement Agreement should be resolved as soon as possible.¹ To that end, the
5 Commission ordered that a hearing be held to consider amending Decision No. 62103. The
6 Commission found that the hearing should, at a minimum, address (a) the viability of the 1999
7 Settlement Agreement in light of the Track A and B Orders and *Phelps Dodge* (including
8 parties' views on whether TEP will be able to charge market-based rates or cost-of-service
9 rates after 2008) (hereinafter referred to as the "Core Question"), (b) the alternative proposals
10 TEP had outlined in its Motion to Amend, and (c) Demand-Side Management ("DSM"),
11 Renewable Energy Standards ("RES") and Time-of-Use ("TOU") tariffs. Testimony was filed
12 on the various issues, and a hearing was scheduled to begin in February 2007. Prior to the
13 hearing commencing, TEP and Staff filed a joint request to continue the hearing to allow
14 parties to participate in settlement discussions. The hearing date was continued, and parties
15 held settlement discussions but did not reach a settlement. A hearing on the issues outlined in
16 Decision No. 68669 was held from March 6-9, 2007.

17 During the course of the March 2007 hearing, TEP offered to put forward a procedural
18 proposal that would permit TEP to file additional information on the various proposals it had
19 made (including a new "hybrid proposal" it offered at the March 2007 hearing) (collectively, the
20 "Rate Proposals"), and would defer a Commission decision on the issues litigated in the March
21 2007 hearing until after such a filing was made and parties had an opportunity to again
22 determine whether a settlement was possible. The Rate Proposals would be filed in a
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24 ¹ Decision No. 68669 at Finding of Fact Nos. 42, 45.

1 separate docket (the "Rate Proposals Docket"). On March 16, 2007, TEP filed its procedural
2 proposal in the form of a proposed Recommended Opinion and Order ("ROO").

3 As discussed below, RUCO recommends that the Commission reject TEP's proposed
4 procedural framework and instead address the Core Question at this time (following the filing
5 of closing briefs), based on the record developed in the March 2007 hearing. If the
6 Commission nonetheless declines to answer the Core Question at this time pending further
7 development of a record on TEP's alternative proposals, RUCO believes that TEP's proposed
8 ROO is inadequate to provide customers and the parties the protections necessary in the
9 forthcoming proceeding.

10
11 **I. THE COMMISSION SHOULD NOT ADOPT THE PROCEDURE OF THE ROO AND**
12 **INSTEAD SHOULD ANSWER THE CORE QUESTION OF WHAT THE SETTLEMENT**
AGREEMENT REQUIRES.

13 The March 2007 hearing took evidence on the Core Question, as well on TEP's
14 proposed alternative frameworks for setting its rates in 2009 and its DSM, RES and TOU
15 proposals. TEP's proposed procedure to file additional information may be helpful for the
16 evaluation of its various Rate Proposals. But the record necessary to determine what, if
17 anything, the Settlement Agreement requires regarding rates in 2009, and the impacts of Track
18 A, Track B and *Phelps Dodge* on any such requirements, has already been fully developed in
19 the course of the recent hearing. The interpretation of what the Settlement Agreement means
20 is not dependent on the rate impacts that would result from that interpretation.² Once the
21 Commission addresses the Core Question and indicates what it believes the Settlement
22 Agreement requires, it can undertake whatever proceeding it might feel necessary based on

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24 ² Tr. at 445-46 (Higgins); at 682 (Ileo).

1 that resolution, including determining whether a modification of that requirement is appropriate.
2 Thus, the Commission can consider rate impacts of TEP's alternative rate structures in a future
3 proceeding, if it desires to know those impacts, after it has provided guidance on the meaning
4 of the Settlement Agreement.

5 While it is understandable that the Commission would desire to know the rate impacts of
6 the compromise positions TEP has proposed, the Commission should not lose sight of the fact
7 that some of the rate impacts of those alternatives are essentially a "premium" that would be
8 paid to TEP in recognition that the Commission did not adopt TEP's primary position that
9 Standard Offer rates be determined based solely on the MGC. For instance, TEP projects that
10 there would be a 26% increase in rates from its "cost-of-service with regulatory asset"
11 alternative.³ Of that 26% rate increase, 22% is attributable to the "damages" TEP claims it
12 would be due because the Commission did not allow its rates to be based exclusively on the
13 MGC.⁴ Likewise, TEP's phase-in to market proposal allows TEP to continue collecting the 9.3
14 mils/kWh of Fixed CTC even after the full \$450 million to be collected through the Fixed CTC
15 has been collected. The additional \$80 million that TEP would collect between approximately
16 June and December 2008 would represent a premium to TEP for the Commission not adopting
17 TEP's primary position. Further, TEP's hybrid proposal would apparently allow TEP to hold
18 several of its coal-fired plants outside of its cost-of-service rate base. Customers would then
19 pay higher rates because the replacement energy would be from higher-cost market
20 resources, while TEP would be free to sell the output of the low-cost coal plants at market
21 rates that are based on higher-priced gas-fired resources.

22
23 ³ As discussed at the hearing, RUCO and other parties dispute TEP's projection of the resulting rate
increase.

24 ⁴ Exhibit RUCO-6 (copy of DR 2.08).

1 Three parties (TEP, RUCO and AECC) have already briefed the issue of what the
2 Settlement Agreement required in the first instance, and what impact Track A, Track B and
3 *Phelps Dodge* might have had on the Settlement Agreement. Closing briefs on the recently-
4 held hearing will allow the remaining parties to indicate their positions on the Core Question.
5 No additional factual inquiry is necessary for the Commission to address the Core Question.
6 Thus, it should resolve that question now, rather than wait for additional information on other
7 issues.

8 Delay in answering the Core Question is not without cost. TEP is making decisions now
9 about whether and how it may need to acquire additional power to serve its Standard Offer
10 customers.⁵ Forcing TEP to wait to negotiate contracts to acquire such power gives sellers
11 increased leverage.⁶ The sellers' increased leverage will likely result in higher rates paid by
12 TEP, and ultimately by its customers, for such resources.

13 The Commission has already concluded that it is in the public interest to resolve the
14 dispute over what the Settlement Agreement provides as soon as possible.⁷ Since there is no
15 additional record necessary to address the Core Question, and because unnecessary delay
16 can result in increased costs to customers, the Commission should resolve the dispute after
17 the filing of closing briefs on the recently-held hearing. The Commission should not delay
18 addressing the Core Question for fear of the Company's threatened litigation if it does not
19 agree with the Commission's resolution. If the Commission rejects TEP's claim that the
20 Settlement Agreement required Standard Offer rates to be based on the MGC methodology in
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23 ⁵ Exh. TEP-1 at 6 (Pignatelli Direct).

24 ⁶ *Id.*

⁷ Decision No. 68669 at Finding of Fact Nos. 42, 45.

1 2009, it would be on sound legal ground in doing so.⁸ Further, the appellate courts would
2 grant deference to the Commission's interpretation of the requirements of Decision No.
3 62103.⁹

4
5 **II. IF THE COMMISSION DECLINES TO ANSWER THE CORE QUESTION BASED ON**
6 **THE CURRENT RECORD AND INSTEAD DESIRES A FULL RECORD ON ALTERNATIVE**
7 **OUTCOMES, THE ROO IS A PROBLEMATIC DEVICE TO ACCOMPLISH THAT RESULT.**

8 If the Commission nevertheless declines to answer the Core Question at this time, and
9 instead desires that the record be developed further on possible alternative outcomes, it
10 should not adopt the ROO, as it includes a number of problematic terms that would not
11 adequately protect the interest of customers and parties.

12 **A. The ROO does not adequately compensate customers for the continued**
13 **collection of 9.3 mils/kWh after the Fixed CTC is fully collected.**

14 No party disputes that the Settlement Agreement requires that the Fixed CTC, which
15 collects 9.3 mils/kWh, terminates after it collects \$450 million of stranded costs. TEP
16 anticipates that the Fixed CTC will fully collect the \$450 million in approximately May
17 2008. However, the ROO provides that customers' rates would not be decreased at that time.¹⁰
18 The continued collection of 9.3 mils/kWh would permit TEP to collect approximately \$80 million
19 of additional revenue over the period June to December 2008.

21 ⁸ See Staff's legal analysis contained in its October 12, 2005 Response to TEP's Motion to Amend
22 Decision No. 625103, at 4-6; RUCO's Legal Brief, attached to Exh. RUCO-8 (TEP did not bargain for
23 market-indexed Standard Offer retail rates, but even if one believed TEP did, the Commission reserved
the right to modify the Settlement Agreement; *Phelps Dodge* subsequently declared market-indexed rates
unconstitutional); and AECC's Legal Brief, attached to Exh. PD/AECC-1.

24 ⁹ *Grand Canyon Trust v. Ariz. Corp. Comm'n*, 210 Ariz. 30, 35-36 ¶ 20, 107 P.3d 356, 361-62 (App. 2005)
(courts grant deference to the Commission's interpretation of its own prior orders).

¹⁰ ROO Finding of Fact Nos. 49-51.

1 The ROO indicates, at Finding of Fact No. 49, that the parties agree that the potential
2 for a rate decrease to be followed by a potential rate increase is not desirable and not in the
3 public interest. RUCO disputes this proposed finding. RUCO does not believe it is in the
4 public interest to require customer to pay additional \$80 million in rates over seven months
5 merely to minimize the potential increase that would be required later, regardless of whether
6 customers are later compensated for their overpayments.

7 The ROO provides some discussion of a possible "true-up" of the additional revenue
8 customers would pay as a result of the continued collection of the 9.3 mil/kWh.¹¹ However, the
9 proposed "true-up" is inadequate to protect customers, for several reasons.

10 First, while the ROO discusses a true-up mechanism in the Findings of Fact, it contains
11 no ordering paragraphs adopting the mechanism, or any other provision for true-up. Second,
12 the ROO defines the "True-up Revenue" (the revenue subject to possible true-up) too
13 narrowly. TEP's proposal apparently anticipates that the proceeding on its Rate Case
14 Proposals would likely be completed by the end of the 2008. Thus, only revenue collected
15 before the end of 2008 is included in the ROO's definition of "True-up Revenue." However, if
16 the proceeding were not concluded until 2009, the additional 9.3 mils collected during 2009
17 would not be eligible for true-up. There is no reason to limit the "True-up Revenue" to revenue
18 collected in before December 31, 2008. Instead, customers should be compensated for all the
19 incremental revenue they pay as a result of holding rates stable until the conclusion of the
20 Rate Proposal Docket, regardless of when the Rate Proposal Docket is completed.

21 The third shortcoming of the ROO's true-up mechanism is that it only provides for true-
22 up in a few narrow circumstances, it does not provide complete true-up in all those

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24 ¹¹ ROO Finding of Fact No. 51.

1 circumstances, and it makes no provision for true-up in other circumstances. The first scenario
2 in which the ROO would provide for a true-up is if the Commission were to determine that
3 TEP's rates would be based on the MGC methodology in 2009. In that case, the ROO
4 provides for a credit to Standard Offer customers over a period of 24 months to compensate
5 them for the over-paid True-up Revenue. However, the ROO makes no provision for interest
6 on the amounts customers would have advanced to TEP. Further, the ROO calls for
7 repayment to customers over too long of a period. Though customers would have overpaid
8 TEP approximately \$80 million over a seven-month period, the ROO would "refund" that
9 amount to customers over 24 months. There is no reason TEP should have the benefit of
10 holding customers' funds for such a disproportionate amount of time.

11 The second scenario for which the ROO provides a true-up is if both of two criteria are
12 met: the Commission determines that 2009 rates will be set based on any method other than
13 the MGC methodology, and the Commission orders that rates be decreased.¹² If both criteria
14 are met, the ROO allows a pro-rating of the True-up Revenue, rather than a full refund of its to
15 customers. Like the first true-up scenario, the ROO provides that any such true-up be repaid
16 to customers over a 24 month period. There is no need to pro-rate the amount of the True-up
17 Revenue that would be repaid to customers. Instead, customers should be repaid the full
18 amount of any overpayment, with interest and over a period equal to the time over which they
19 paid it to TEP.

20 There is a third scenario, for which the ROO provides no true-up. That scenario would
21 include any situation other than those described in the first and second scenarios. For
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23 ¹² The ROO does not indicate to what rate the new rates would be compared to determine if there was a
24 decrease—the rates TEP would be collecting, including the 9.3 mills, or the rate TEP would otherwise
have been collecting but for the continued collection of the Fixed CTC amount.

1 instance, if the Commission determined that TEP's rates in 2009 should be set based on cost-
2 of-service, but that a rate increase were in order beginning January 1, 2009, TEP would
3 provide no true-up. As a result, TEP would be allowed to retain additional revenues for service
4 provided prior to January 1, 2009 above those revenues provided for in the 1999 Settlement
5 Agreement. Regardless of what the Commission might conclude about what 2009 rates will
6 be, no party disputes that the 1999 Settlement Agreement provides that no rate increase can
7 be effective before 2009. Thus, the failure of the true-up mechanism (in both the second and
8 the third scenarios) to provide complete compensation is contrary to the undisputed
9 requirement of the Settlement Agreement that no rate increase be implemented before 2009.
10 If the Commission were to permit TEP to continue to collect the 9.3 mils/kWh after the Fixed
11 CTC is fully collected, it should adopt a true-up mechanism that guarantees customers will be
12 fully compensated for their overpayment, with interest and over the same amount of time
13 during which they overpaid.

14 In addition, the ROO's provision to hold rates constant until the Rate Proposals Docket
15 is concluded uses an inappropriate device to achieve a fixed rate. The ROO would increase
16 the MGC by the same amount that the Fixed CTC would decrease.¹³ However, the Company
17 disagrees with several other parties over the purpose of the MGC (whether it is an element
18 used to compute the unbundled Standard Offer Rate, or whether it is merely a mechanism to
19 compute stranded cost recovery via the Floating CTC). There is no reason to create any
20 additional confusion about the purpose of the MGC by modifying it after the Fixed CTC
21 expires. Instead, if the Commission desires to hold rates constant pending the outcome of the
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24 ¹³ ROO Finding of Fact No. 50.

1 Rate Proposals Docket, it should order that any continued collection of the 9.3 mills be
2 considered a deferred liability for later crediting back to customers.

3
4 **B. The Commission should not characterize the proposed procedure as a
5 furtherance of settlement discussions.**

6 The ROO characterizes TEP's procedural proposal, including its Rate Proposals, as
7 being presented to further settlement discussions among the parties.¹⁴ RUCO objects to the
8 characterization of the status of this proceeding as a continuation of settlement discussions,
9 and specifically objects to the statement in Finding of Fact 54 that "Intervenors [which would
10 include RUCO] also agree that the Rate Proposals is being presented to further settlement
11 discussions between the parties." The Parties have already explored the possibility of
12 settlement of the Core Question and other matters raised in the current proceeding, and those
13 efforts have failed. As discussed above, RUCO believes that the record is now complete
14 regarding the original intention of the Settlement Agreement, and the Commission should now
15 rule on the Core Question before it.

16 In addition, the characterization of the docket as still being in the mode of settlement
17 discussions could create a procedural difficulty down the road. Even if TEP, RUCO, AECC,
18 Staff and the other parties to the recent hearing were to reach an agreement about how this
19 matter should be resolved after fully analyzing the Rate Proposals, the Commission would
20 require a hearing on any such settlement. If the Commission then rejected that settlement,
21 there would not be adequate time to undertake the full hearing process necessary before the
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24 ¹⁴ ROO Finding of Fact Nos. 48, 53, 54.

1 end of 2008. The procedural schedule necessary to resolve the Rate Proposal Docket by the
2 end of 2008 would not include sufficient time for the Commission to undertake two hearings—
3 one on a settlement, and another on the litigation positions of the parties. The Commission
4 should avoid putting itself in the position of feeling constrained to accept a settlement that it
5 might not otherwise desire, merely because the delay caused by the settlement hearing
6 resulted in inadequate time to hear the fully litigated case.

7
8 **C. The ROO's attempt to preserve parties' rights during the delay in resolving this
9 matter is legally insufficient.**

10 The ROO includes Findings of Fact and an ordering paragraph indicating that all parties'
11 rights to positions with respect to the 1999 Settlement Agreement and Decision No. 62103 are
12 reserved.¹⁵ However, the Commission does not have the authority to declare that RUCO's (or
13 other parties') rights are reserved with respect to parties other than the Commission. Thus, if
14 the Commission adopted the ROO, the Commission's order would not preserve RUCO's rights
15 as to other non-Commission parties. For example, if AECC were to subsequently claim that
16 RUCO took a position in the Rate Proposal Docket that AECC believed constituted a breach of
17 RUCO's obligations under the Settlement Agreement, the Commission's statement that
18 RUCO's rights were reserved would not adequately reserve RUCO's rights vis-à-vis AECC in
19 proceedings in another forum. Further, the Commission's statement of a reservation of rights
20 likely would not reserve the Commission's rights vis-à-vis parties other than TEP, the only
21 party to the 1999 Settlement Agreement that is regulated by the Commission. The

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24 ¹⁵ ROO Finding of Fact Nos. 53, 54, and pg. 15, lines 7-9.

1 Commission cannot effectively declare by fiat that parties' rights are reserved in non-
2 Commission forums vis-à-vis other parties that are not subject to the Commission's jurisdiction.

3
4 **D. The language of the ROO suggests a pre-determination of outcomes in the Rate Proposal Docket.**

5 RUCO objects to several provisions in the ROO that would suggest that the
6 Commission has pre-determined outcomes in the contemplated Rate Proposal Docket. First,
7 the ROO suggests that the Commission would be limited to adopting one of the resolutions
8 that TEP would be proposing in its Rate Proposals. For example, in Finding of Fact No. 39,
9 the ROO characterizes the filings that TEP would make as "be[ing] used to evaluate TEP's
10 various proposals for amending the 1999 Settlement Agreement and Decision No. 62103."
11 This language suggests that parties would not be free to propose, and the Commission would
12 not be free to adopt, other resolutions (e.g. a cost of service rate that does not include TEP's
13 requested regulatory asset). Likewise, Finding of Fact No. 52 indicates that if TEP's DSM and
14 renewable energy proposals are not adopted in a separate docket, they could be addressed "in
15 connection with the adoption of one of TEP's proposals for amending the 1999 Settlement
16 Agreement in this proceeding." Again, this language appears to limit the Commission to
17 addressing the issue in the Rate Case Docket only in conjunction with the adoption of one of
18 TEP's proposals. One could argue that if the Commission adopted the ROO, that it was
19 limiting itself to only addressing the DSM and renewable energy issues in the Rate Case
20 Docket if it fully adopted one of TEP's Rate Proposals.

21 Second, the ROO foreshadows how the Commission would resolve the Core Questions
22 in several instances. For example, Finding of Fact No. 43 suggests that "when the Floating
23 CTC expires" rates will be "determined solely by the MGC." Also, Finding of Fact No. 44 states
24

1 that TEP's Cost-of-Service proposal would result in a "reversion" to cost-of-service ratemaking.
2 The questions of what, if anything, the 1999 Settlement Agreement requires regarding rates in
3 2009, and whether the current rates established in 1999 are based on the MGC or on cost-of-
4 service, are the principal issues in dispute in this proceeding. If the Commission intends to
5 defer resolution of those questions, it should not adopt an Order that implies a particular
6 resolution of those matters at this time.

7 Third, the ROO inappropriately characterizes the Company's ECAC proposal as having
8 a benefit that RUCO disputes—namely protecting customers from market volatility.¹⁶ To the
9 contrary, RUCO believes that the ECAC would increase the level of volatility customers would
10 experience, because the ECAC is designed to track fluctuations in market prices generally,
11 rather than the actual costs TEP would incur to serve Standard Offer customers. If the
12 Commission desires to adopt an Order that defers resolution on proposals until a later date, it
13 should avoid characterizing aspects of TEP's proposals as being either positive or negative at
14 this time.

15
16 **E. The ROO inappropriately suggests that the Commission might approve DSM and
renewable energy cost recovery without complying with constitutional requirements.**

17
18 The ROO provides that the Commission might approve cost recovery for DSM and
19 renewable energy expenditures in proceedings separate from the Rate Proposal Docket.¹⁷ It
20 appears that the Rate Proposal Docket would likely include sufficient information on which the
21 Commission could make findings of fair value. However, it does not appear that the separate
22 dockets to consider DSM and renewable energy would include sufficient data on which the

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24 ¹⁶ ROO Finding of Fact No. 44.

¹⁷ ROO Finding of Fact No. 52 and pg. 15, lines 1-6.

1 Commission could make such findings.¹⁸ While RUCO is supportive of cost-effective DSM and
2 renewable energy programs, it recognizes the constitutional constraint that prohibits the
3 Commission from adopting a cost-recovery mechanism for these programs without evaluating
4 all of TEP's rates together, and based on a finding of fair value¹⁹. The Commission has not
5 established any adjustor mechanisms for TEP to recover these costs, and it cannot create any
6 such adjustor mechanisms outside of a rate case. Therefore, the Commission should not
7 adopt an Order implying that it might create such cost recovery mechanisms in a proceeding
8 that would not include the data necessary to make a fair value finding.

9
10 **F. The ROO mischaracterizes RUCO's position about the desirability of a full rate
11 case.**

12 The ROO's Finding of Fact Nos. 36 and 47 indicate that RUCO believes that a rate case
13 filing is necessary to fully evaluate TEP's Rate Proposals. To the contrary, RUCO has only
14 suggested that the Commission could not approve the Company's ECAC, DSM, renewable
15 energy or TOU proposals outside of a rate case.²⁰ RUCO has not suggested that a full rate
16 case is necessary to resolve the Core Question, or to reject TEP's alternative proposals.

17 **CONCLUSION**

18 The Commission has already declared that the public interest requires that the dispute
19 over what, if anything, the 1999 Settlement Agreement requires regarding rates in 2009 should
20

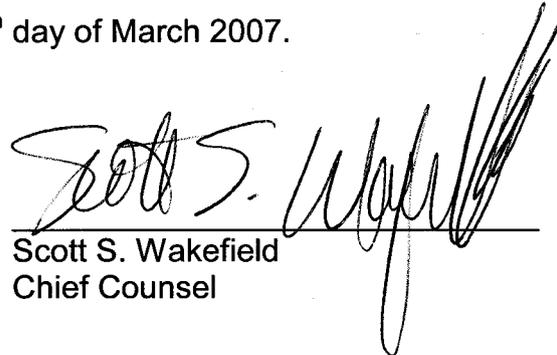
21
22 ¹⁸ Further, the Commission would likely want to avoid making a finding of fair value in a separate docket
23 which would be followed, in a relatively short time period, by resolution of the Rate Proposals Docket
24 which likely would also include a fair value finding based on more extensive data, as the potential for
conflicting findings of fair value could be problematic.

¹⁹ See *Scates v. Ariz. Corp. Comm'n*, 118 Ariz. 531, 578 P.2d 612 (App. 1978).

²⁰ See *Resid. Util. Consumer Off. v. Ariz. Corp. Comm'n*, 199 Ariz. 588, 593, ¶21, 20 P.3d 1169, 1174 (App. 2001).

1 be resolved as soon as possible. That question has been fully addressed in the recent hearing
2 (although closing briefs have not yet been filed). The additional filings and hearing
3 contemplated by the ROO would not add one iota to the record about what the provisions of
4 the 1999 Settlement Agreement meant in 1999, or whether the Track A, Track B or *Phelps*
5 *Dodge* decisions have modified the Settlement Agreement. Fear of litigation is no reason for
6 publicly elected officials to shirk their duty to make important, albeit sometimes difficult,
7 decisions. Therefore, the Commission should address the Core Question at this time, rather
8 than further delaying the matter while a record is developed on other issues. However, if the
9 Commission declines to address the Core Question at this time, it should not adopt the ROO
10 as the device to permit the matter to be delayed, as the ROO contains many problematic
11 provisions.

12
13 RESPECTFULLY SUBMITTED this 28th day of March 2007.

14
15 
16 Scott S. Wakefield
17 Chief Counsel

18
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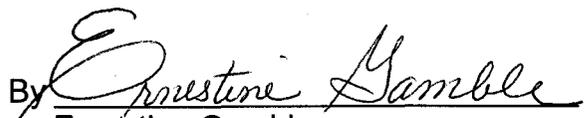
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