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EXCEPTION

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BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

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)**

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

I. INTRODUCTION.

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

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

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

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

TEP believes that, based upon the evidence in the record of the Track A proceeding, the Commission should order a stay of all the Electric Competition Rules and that a new rulemaking docket should review all of the Electric Competition Rules. Again, while the Recommended Opinion and Order moves in this direction by proposing (a) to stay some of the Electric Competition Rules; and (b) to open a new rulemaking docket to review some

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of the Electric Competition Rules, it does not go far enough. All of the Electric Competition Rules should be stayed and scrutinized by the Commission.

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

II. EXCEPTIONS.

EXCEPTION NO. 1:

THE ORDERING PARAGRAPHS SHOULD INCLUDE A STAY OF ALL THE ELECTRIC COMPETITION RULES AND PROVIDE THAT THE NEW RULEMAKING DOCKET IS TO REVIEW ALL OF THE ELECTRIC COMPETION RULES.

The Recommended Opinion and Order set forth the following Findings of Fact regarding the state of wholesale and retail electric markets[1]:

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

[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

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

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

6. 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, -321, and -331, the public interest requires the suspension of the time deadline requirements of A.A.C. R14-2-1606 (B), as amended by Decision Nos. 61973 and 62103, pending a Decision in these dockets on the Track B issues.

7. 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, -321, and -331, the public interest requires the suspension of the time deadline requirements of A.A.C. R14-2-1615 (A), as amended by Decision Nos. 61973 and 62103, and further, to prohibit the transfer of generation assets, pending a Commission determination that it is in the public interest for the transfer of 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

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

> IT IS THEREFORE ORDERED that A.A.C. R14-2-1615 (A) is hereby stayed and Decision Nos. 61973 and 62103 are modified to stay the transfer provisions until the Commission concludes 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.
>
> IT IS FURTHER ORDERED that A.A.C. R14-2-1606 (B) is stayed and Decision Nos. 61973 and 62103 are modified to stay the requirement that 100 percent of power purchased for Standard Offer Service shall be acquired from the competitive market, with at least 50 percent through a competitive bid process.

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

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

There is ample evidence in the record of this case to stay and review other provisions of the Electric Competition Rules. For example, TEP presented undisputed

[2] As a separate matter, TEP notes that the Recommended Opinion and Order discusses a stay of A.A.C. R14-2-1611(A) (see Recommended Opinion and Order at 26) and concludes that such a stay is in the public interest. However, the Recommend Opinion and Order does not order 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).

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

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

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

The Recommended Opinion and Order's findings of fact recognize the underlying 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

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

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

EXCEPTION NO. 2:

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

The Recommended Opinion and Order provides 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. (Recommended Opinion and Order at 32.)

However, a review of the record of the Track A proceeding reveals that there was no evidence presented that TEP's current Code of Conduct was inadequate or that there has been any incident of non-compliance by TEP or any of its affiliates. Moreover, to

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order TEP to file a Code of Conduct within sixty (60) days of the effective date of the Commission's final order is not what the Staff (or any party) had recommended and is not supported by the evidence in the record.

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

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

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