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BEFORE THE ARIZONA CORPORATION CC

AZ CORP COMMISSION

DEC 20 4 20 PM '96

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RENZ D. JENNINGS
CHAIRMAN
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COMMISSIONER
CARL J. KUNASEK
COMMISSIONER

IN THE MATTER OF THE COMPETITION
IN THE PROVISIONS OF ELECTRIC
SERVICES THROUGHOUT THE STATE
OF ARIZONA

DOCKET NO. U-0000-94-165

NOTICE OF FILING EXCEPTIONS
OF CITIZENS UTILITIES COMPANY

Citizens Utilities Company hereby provides notice of filing its Exceptions in the above-referenced docket.

DATED: December 20, 1996

Respectfully submitted,

Arizona Corporation Commission
DOCKETED

DEC 20 1996

DOCKETED BY [Signature]

Beth Ann Burns
Beth Ann Burns
Associate General Counsel
Citizens Utilities Company
2901 N. Central Avenue, Suite 1660
Phoenix, Arizona 85012

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1 Original and ten copies of the foregoing
filed this December 20, 1996 with:

2 Docket Control Division
3 Arizona Corporation Commission
4 1200 West Washington Street
Phoenix, Arizona 85007

5
6 Copies of the foregoing mailed or hand
delivered this December 20, 1996 to:

7 Vicki G. Sandler
8 Arizona Public Service Company
9 Law Department Sta. 9829
P.O. Box 53999
Phoenix, AZ 85072-3999

10 Steven M. Wheeler and Thomas L. Mumaw
11 Snell & Wilmer
12 One Arizona Center
400 E. Van Buren
Phoenix, AZ 85004-0001

13 C. Webb Crocket
14 Fennemore Craig
15 Two North Central Ave.
Suite 2200
Phoenix, AZ 85004-2390

16 Steven Glaser and David Lamoreaux
17 Tucson Electric Power Company
220 W. 6th Street
Tucson, AZ 85701

18 Diane M. Evans
19 Salt River Project
20 PAB 300
P.O. Box 52025
Phoenix, AZ 85072-2025

21 Greg Patterson
22 Director
23 Residential Utility Consumer Office
2828 North Central, Suite 1200
Phoenix, AZ 85012

24 Michael M. Grant
25 Johnston Maynard Grant & Parker
3200 North Central Ave., Suite 2300
26 Phoenix, AZ 85012

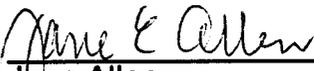
27

28

1 Patricia Cooper
Arizona Electric Power Cooperative Inc.
2 P.O. Box 670
Benson, AZ 85602

3 Paul A. Bullis
4 Chief Counsel
Arizona Corporation Commission
5 1200 West Washington Street
Phoenix, Arizona 85007

6 Gary Yaquinto
7 Director, Utilities Division
Arizona Corporation Commission
8 1200 West Washington Street
Phoenix, Arizona 85007

9
10 
11 Jane Allen
Administrative Assistant

12
13
14
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1 will be invalid because their promulgation violates the rulemaking procedures mandated by
2 statute. The Arizona Administrative Procedure Act, A.R.S. §41-1001, *et seq.* (1996), contains
3 detailed procedures designed to ensure that regulations promulgated by administrative
4 agencies are the result of a measured and deliberative process in which all interested parties
5 are provided the opportunity to participate and the Commission is able to fully and fairly
6 consider all parties' views. The Commission's failure to adhere to these requirements
7 renders the proposed rules void and of no effect. A.R.S. §41-1030(A) (1996) clearly states
8 that "[a] rule is invalid unless adopted and approved in substantial compliance with
9 [provisions of the APA]."

10 First, the proposed rules are invalid because the Commission failed to provide the
11 additional notice and opportunity for comments required by statute in response to the
12 substantial amendment to the provisions of the rules affecting political subdivisions,
13 municipalities and other electric utilities not subject to the Commission's jurisdiction. A.R.S.
14 § 41-1025(A) (1996) provides that the Commission may not adopt a rule that is substantially
15 different from the proposed rule contained in the notice of proposed rule adoption. Where
16 amendments to the proposed rule are substantial, the amended rule must be published in the
17 *Arizona Administrative Register* and the Commission must allow for additional public
18 comment.¹ A.R.S. §§41-1022(D); 41-1023(B); 41-1025(A).

19 With regard to the application of the rules to non-jurisdictional electric utilities such as
20 political subdivisions or municipalities, the amendments to the proposed rules are substantial
21 and require that the Commission republish the proposed rules in the *Arizona Administrative*
22 *Register* and allow at least thirty days for interested parties to file additional written

23
24 ¹ While the governing statute does not specifically define "substantial," it lists
25 the following factors to be considered in determining whether amendments to a proposed
26 rule require that the rule be subject to additional notice and comment: (1) the extent to
27 which all persona affected by the adopted rule should have understood that the
28 published proposed rule would affect their interests; (2) the extent to which the subject
matter of the adopted rule or the issues determined by that rule are different from the
subject matter or issues involved in the published proposed rule; and (3) the extent to
which the effects of the adopted rule differ from the effects of the published proposed
rule if it had been adopted instead. A.R.S. § 41-1025(B).

1 | comments. In the proposed rules, the Commission acknowledged that its jurisdiction does
2 | not extend to Arizona political subdivisions and municipal corporations (non-jurisdictional
3 | utilities) and that it is without authority to require these non-jurisdictional entities to comply
4 | fully with the proposed rules. See A.A.C. R14-2-1611. As a result, the rules originally
5 | published provided that: (a) the service territories of non-jurisdictional utilities shall not be
6 | open to competition and such utilities may not compete for sales in Affected Utilities' service
7 | territories, (b) jurisdictional utilities that are not Affected Utilities may participate voluntarily
8 | in the competitive market if such utilities open their own service territories to competition and
9 | obtain a CC&N, and (c) non-jurisdictional utilities may participate voluntarily in the competitive
10 | market if such utilities open their own service territories to competition, agree to all of the
11 | requirements of the proposed rules (other than the requirement that they obtain a CC&N),
12 | if adequate enforcement mechanisms can be established, and if all Affected Utilities consent
13 | in writing. In addition, the proposed rules stated that the Commission will examine the need
14 | for additional legislation to address the role of non-jurisdictional utilities in a competitive
15 | market. A.A.C. R14-2-1611(D).

16 | As amended in the Proposed Order, however, the Commission appears to have
17 | resolved these jurisdictional questions in a manner that is strikingly different from the rules
18 | originally published. The rules now proposed provide that a non-jurisdictional Arizona electric
19 | utility is required merely to file a statement with the Commission indicating that it will open
20 | its service territory to competing sellers "in a manner similar to the provisions of this Article,"
21 | rather than under the specific provisions of the Commission's rules. Further, the proposed
22 | rules have abandoned the prior provision requiring that adequate enforcement mechanisms
23 | be established, substituting instead language incorporating by reference certain of the
24 | Commission's procedural rules for acting upon complaints. Moreover, the proposed rules
25 | eliminate the previous requirement that Affected Utilities consent to the specific mechanisms
26 | to be used to extend the proposals for restructured services to include non-jurisdictional
27 | utilities. The proposed rules also include a new section which states that if the non-
28 | jurisdictional utility is an Arizona political subdivision or a municipal corporation, the existing

1 service territory for that utility shall be deemed open to competition if the utility has entered
2 into an intergovernmental agreement with the Commission.

3 These amendments to the proposed rules have sweeping impact on every aspect of
4 the rules and upon the most basic questions of the scope of the Commission's jurisdiction
5 and the matter of how -- and upon which utilities -- the proposed rules may be applied. In
6 Arizona, non-jurisdictional utilities account for a substantial share of the potential market for
7 retail competition. (Salt River Project, for example, is the second-largest electric provider in
8 the state.) The scope of the Commission's jurisdiction and the legal bases for the imposition
9 of the proposed rules upon non-jurisdictional utilities have been highly contentious issues
10 involving complex legal and policy issues. Previously, the Commission correctly
11 acknowledged that it had been unable to resolve many of the questions concerning the
12 application of the proposed rules to non-jurisdictional utilities and that legislation might well
13 be required to resolve fully these difficult legal and policy issues.² As a result, the proposed
14 rules' sudden resolution of these issues is a substantial and dramatic change from the
15 published version of the rules. This mandates additional public comment. Citizens'
16 additional concerns regarding the language concerning in-state reciprocity that appears for
17 the first time in the proposed rules are set forth below.

18 Second, the proposed rules are invalid because the Commission failed to adequately
19 consider interested parties' comments. A.R.S. § 41-1024(C) specifies that "[b]efore the
20 adoption of a rule, an agency shall consider the written submissions, the oral submissions
21 or any memorandum summarizing the oral submissions, the economic, small business and
22 consumer impact statement." Further, A.R.S. § 41-1036 requires that the Commission, at the
23 time it adopts a rule, issue a concise explanatory statement containing: (1) an indication of
24 any change between the text of the proposed rule contained in the notice of proposed rule
25 adoption and the text of the rule as finally adopted, with the reasons for any change, and (2)

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27 ² See, e.g., Memorandum from Utilities Division to Commission
28 Accompanying Commission Staff's Proposed Rule on Electric Industry Restructuring at
4 (October 1, 1996); Transcript of Commission October 8, 1996 Special Open Meeting
Working Session at 44-54.

1 an evaluation of the arguments for and against the rule, including a response to comments
2 received on the proposed rule and any supplemental notices. The statute also specifies that
3 only the reasons contained in the concise explanatory statement or the preamble may be
4 used by any party as justifications for the adoption of the rule in any proceeding in which its
5 validity is at issue.

6 With regard to Citizens' comments on the published version of the rules, the
7 explanatory statement accompanying the rules now proposed fails to meet the statutory
8 standards requiring that the Commission "evaluat[e] . . . the arguments for and against the
9 rule, including a response to comments received on the proposed rule." Instead, as Citizens
10 demonstrates in detail in the discussion below addressing the specific issues raised in its
11 prior comments, the Commission's explanatory statement is little more than a selective
12 restatement of the reply comments of Staff, and is wholly lacking the independent
13 "evaluation" called for by the governing statute. This failure to adequately consider and
14 evaluate the comments submitted in response to the published rules invalidates the proposed
15 rules now before the Commission.

16 The Commission's failure to act independently of its Staff is a significant concern for
17 Citizens. It appears that the same individuals who authored Staff's November 27, 1996
18 responses to comments also filed the December 13, 1996 Proposed Order containing what
19 purports to be Commission's determination with regard to the comments it received on the
20 rules. The failure of the explanatory statement accompanying the proposed rules to
21 demonstrate that the Commission adequately addressed or evaluated the arguments
22 presented by Citizens and other interested parties contravenes the statutorily-prescribed
23 standards for Commission rules and renders the proposed rules invalid.

24 II. THE PROPOSED RULES ARE IMPERMISSIBLY VAGUE

25 In Citizens' November 8, 1996 comments, the Company explained that while the
26 proposed rules were designed to bring about a dramatic change in the structure and
27 operation of the electric utility industry -- requiring Affected Utilities to make available all of
28 their retail demand for competitive generation supply not later than January 1, 2003 -- the

1 rules were little more than a "skeletal framework" which fails to provide sufficient detail to
2 enable Affected Utilities to conform to the rules. (Comments at 2-3.) As Citizens comments
3 made clear, the Commission's approach, which deferred resolution of essential issues and
4 failed to provide sufficient detail of its regulatory requirements, violated basic principles of due
5 process. (*Id.* at 6-7.) As a result, Citizens urged the Commission to re-cast the rules as a
6 statement of policy. (*Id.* at 7-8.)

7 The explanatory statement accompanying the Proposed Order, at page 39, states that
8 because the proposed rules "set up a process" for future consideration of stranded cost
9 recovery, the rules create "an objective standard which the Commission must follow" and
10 "give the utility an opportunity to know what the law is so it can plan ahead." In so holding,
11 however, the statement fails to acknowledge that the proposed rules do not contain the
12 standards required to give this "process" the level of detail and predictability required by due
13 process. For example, the proposed rules assign to a working group the task of developing
14 recommendations for the analysis and recovery of stranded costs, and identify factors to be
15 considered by the working group in preparing its recommendations. Once these
16 recommendations are received by the Commission, however, it is required only to consider
17 them and may chose to take any action it elects with regard to stranded cost recovery. See
18 A.A.C. R14-2-1607. While this aspect of the rules clearly "sets up a process," it cannot be
19 claimed that this process specifies "an objective standard which the Commission must follow",
20 as claimed in the Explanatory Statement. It is not a credible claim that the procedural
21 mechanism which provides for a forum, but which does not specify how or by what standard
22 issues will be addressed in that forum, satisfies due process requirements.³ The proposed

23
24 ³ In its November 8 comments (at 6), Citizens explained that due process
requires that:

25 An act must be complete in all its terms when it leaves the
26 legislature; so that those charged with the administration of such act
27 are amenable to the courts for failure to put it into effect or for its
28 maladministration, and so that everyone may know by reading the
law what his rights are and how it shall operate when put into
execution; and the court cannot supply material and essential

1 rules, therefore, violate due process and are invalid.

2 **III. THE PROPOSED RULES IMPROPERLY DEFER**
3 **AS PREMATURE ISSUES CONCERNING**
4 **STRANDED COSTS AND FAIL TO RECOGNIZE**
5 **THAT AFFECTED UTILITIES SHOULD BE**
6 **PROVIDED A REASONABLE OPPORTUNITY FOR**
7 **STRANDED COST RECOVERY.**

8 In its November 8, 1996 comments, at pages 12-24. Citizens established that utilities
9 are entitled to a reasonable opportunity to fully recover their stranded costs and that
10 disallowance of stranded cost recovery violates the regulatory compact and may amount to
11 an unconstitutional taking. In addition, Citizens demonstrated that the Commission lacks
12 authority to bar recovery through rates of the costs of power purchase contracts. (*Id.* at 24-
13 27.) The Explanatory Statement indicates that despite the long-standing regulatory regime
14 governing Arizona utilities, "no such contract has been formed," and dismisses as premature
15 commenters' claims that denying utilities a reasonable opportunity for stranded cost recovery
16 is a taking. These responses are ill-founded and do not adequately address the issues
17 raised in Citizens' comments.

18 **A. THE PROPOSED RULES FAIL TO ADEQUATELY ADDRESS CITIZENS' PRIOR**
19 **COMMENTS CONCERNING THE REGULATORY COMPACT**

20 Citizens' November 8, 1996 comments supported the definition of stranded costs,
21 noting that the proposed rules correctly provided that costs attributable to the change from
22 "traditional regulation" and "the introduction of competition" by the Commission should be
23 recoverable by Affected Utilities. (Comments at 13-14.) As Citizens noted, one of the bases
24 for this cost recovery is the so-called "regulatory compact" pursuant to which public utilities
25 are obligated to serve all customers within a defined service territory and are restricted to
26 charging just and reasonable rates for that service in exchange for a right to recover their
27 costs together with a reasonable return of their investment. *See, e.g., New England Coalition*

28 _____
omissions.

State Compensation Fund v. De La Fuente, 18 Ariz. App. 246, 501 P.2d 422, 251-52
(Ariz. App. 1972) (quoting 82 C.J.S. Statutes § 64 (1953)). The amended rule clearly
falls far short of this standard.

1 | *on Nuclear Pollution v. Nuclear Regulatory Comm'n*, 727 F.2d 1127, 1130 (D.C. Cir. 1984)
2 | ("the very nature of government rate regulation" is "a compact whereby the utility surrenders
3 | its freedom to charge what the market will bear in exchange for the state's assurance of
4 | adequate profits"). In addition, the Company's comments outlined the specific statutory
5 | bases for this regulatory compact and demonstrated that the provisions of Arizona law
6 | mandating utilities to provide safe and adequate service at just and reasonable rates clearly
7 | established the regulatory compact. (See Comments at 14-15.)

8 | The Commission should reject the attempt in the Explanatory Statement to disavow
9 | the regulatory compact. The Explanatory Statement indicates that no regulatory company
10 | exists and argues that, absent a clear indication that the legislature intends to be bound,
11 | there is no regulatory compact, with citation to *National Railroad Passenger Corp. v.*
12 | *Atchison, Topeka and Santa Fe Railroad Co.*, 470 U.S. 451 (1985) (Explanatory Statement
13 | at 35-36.). This argument misses the point. In *National Railroad*, a group of railroads
14 | challenged on due process grounds an amendment to the Rail Passenger Service Act which
15 | required the railroads to reimburse Amtrak for the cost of certain passenger services. They
16 | argued that the Act constituted a binding contract between the United States and the
17 | railroads and that the amendment, therefore, impaired an obligation of the United States
18 | under that contract. In that case, the Supreme Court held that the Act did not constitute a
19 | contract and denied the railroads' claim. Unlike *National Railroad*, Citizens does not assert
20 | that the Commission is barred by a regulatory compact from implementing the proposed
21 | rules. Rather, Citizens' position is simply that it should be provided a reasonable opportunity
22 | to recover stranded costs that result from Commission actions that change the existing
23 | regulatory regime and that denial of that opportunity violates the regulatory compact.

24 | To the extent the Explanatory Statement characterizes parties' comments concerning
25 | the regulatory compact to be grounds solely to foreclose implementation of the rules, that
26 | response fails to address the central point of Citizens' November 8, 1996 comments. In
27 | those comments, Citizens explained that:

28 | To the extent that the Commission's proposed rule would put utilities at risk to

1 underrecover stranded costs, the proposed rule would violate this regulatory
2 compact. In reliance on the continuing obligation to serve, Citizens, like other
3 utilities, made substantial investments in physical assets and entered into long-
4 term contracts with wholesale power suppliers in order to continue to meet its
5 public service obligations. Investors were willing to underwrite these long-term
6 investments in reliance upon the existing regulatory regime which provided
7 Citizens the ability to recover its costs, and earn a reasonable return on its
8 investment, through the collection of Commission-prescribed just and
9 reasonable rates. A change in regulatory policy that has the effect of
10 preventing Citizens from recovering the costs it incurred in reliance on the
11 continuation of the pre-existing regulatory policy would violate this long-standing
12 regulatory compact.

13 Comments at 16. Similarly, the Explanatory Statement fails to address the closely-analogous
14 decision in *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996), where the Supreme Court
15 held that the government was responsible financially to a regulated business for the
16 economic injury that resulted from a change in regulatory policy. (*Id.* at 16-17).

17 The central tenet of Citizens' comments has not been addressed by the Explanatory
18 Statement. As Citizens has clearly shown, in recognition of the long-term investments made
19 by public utilities in reliance upon the continuation of the regulatory compact, abrupt changes
20 in regulatory policy violate the regulatory compact in a manner that requires that the affected
21 entity be compensated for its resulting injury. Having ordered or sanctioned substantial
22 investments by utilities upon the understanding that such investments would be recoverable
23 through rates, the Commission may not now repudiate its obligation to provide the utilities
24 a reasonable opportunity to recoup such investments and/or contractual commitments.

25 **B. THE PROPOSED RULES IMPROPERLY DISMISS AS PREMATURE CLAIMS**
26 **ADDRESSING THE STANDARDS TO BE APPLIED FOR STRANDED COST**
27 **RECOVERY**

28 Citizens' November 8, 1996 comments established that the implementation of retail
access without a reasonable opportunity for full stranded cost recovery will constitute an
unconstitutional regulatory taking. (Comments at 18-24). The Explanatory Statement does
not address the merits of Citizens' comments, but chooses instead to dismiss such concerns
as premature. (Explanatory Statement at 40-41). According to the Explanatory Statement,
the proposed rules merely set forth a process to allow for the recovery of stranded costs, and
are not determinative of parties' rights. (*Id.* at 41).

1 Side-stepping the legal bases for stranded cost recovery in the Explanatory Statement
2 is clear error. Citizens' comments, as well as the comments of other parties, provided a
3 detailed discussion of the legal and policy grounds that would govern claims for stranded cost
4 recovery. These comments concluded that the implementation of the Commission's
5 proposed rules without a reasonable opportunity to recover fully the stranded costs that flow
6 from the move to a more competitive marketplace for energy services will put utilities at risk
7 for underrecovery of their costs of service and would deny utilities the ability to earn a return
8 on their investment. These comments also established that the adoption of rates that would
9 fall short of these constitutional requirements would constitute the confiscation of the utilities'
10 property. To the extent that the Commission fails to address these concerns in the
11 Explanatory Statement, it has failed to fully "evaluat[e] . . . the arguments for and against
12 the rule, including a response to comments received on the proposed rule" thereby
13 invalidating the proposed rules.

14 Further, The claim in the Explanatory Statement that the proposed rules do not
15 prescribe a standard to be applied with regard to stranded cost recovery cannot be reconciled
16 with claim, in response to commenters' due process challenges, that the proposed rule "sets
17 forth an objective standard which the Commission must follow [in determining a utility's
18 stranded cost]." (Explanatory Statement at 39.) It cannot be both ways; either the proposed
19 rules do not promulgate a standard, in which case the response to commenters' due process
20 arguments is without merit, or the proposed rules do establish a standard, which requires the
21 Commission to respond to the specific comments addressing that standard. Plainly, this
22 discrepancy in position cannot be sustained.

23 **C. THE PROPOSED RULES FAIL TO RESPOND TO CITIZENS' SHOWING THAT**
24 **STATE REGULATORY AGENCIES MAY NOT BAR RECOVERY THROUGH RATES**
25 **OF THE COSTS OF A WHOLESALE PURCHASED POWER CONTRACT**
26 **APPROVED BY THE FEDERAL ENERGY REGULATORY COMMISSION**

27 As Citizens noted in its November 8, 1996 comments, it has only limited generation
28 assets and must rely on purchased power contracts to meet virtually all of its energy and
capacity requirements. These wholesale power contracts to which Citizens is a party are

1 subject to federal regulation and are priced at rates approved by the Federal Energy
2 Regulatory Commission ("FERC"). As a result, state regulatory commissions have no
3 jurisdiction over such sales or the rates paid by Citizens or other Affected Utilities that
4 purchase power at wholesale in the interstate market. As a result of this preemptive effect,
5 state regulatory commissions must allow for full recovery through retail rates of costs incurred
6 by the payment of FERC-approved wholesale rates. See *Nantahala Power & Light Co. v.*
7 *Thornburg*, 476 U.S. 953 (1986). (Comments at 25-28.)

8 The Explanatory Statement accompanying the proposed rules does not address this
9 portion of Citizens' comments. This omission is significant because the application of the
10 filed rate doctrine, which operates independently of the constitutional prohibitions against
11 uncompensated takings discussed above, requires the Commission to enable Citizens and
12 other comparable Affected Utilities to continue to recover through retail rates the costs of
13 wholesale purchased power contracts. As a result, any approach to stranded cost recovery
14 that would deny Citizens' full recovery of these wholesale purchased power contract costs
15 will be invalid.

16 **IV. THE PROPOSED RULE FAILS TO ENSURE THAT**
17 **REVENUES FROM COLLATERAL SERVICES ARE**
18 **NOT IMPROPERLY ALLOCATED TO OFFSET**
19 **STRANDED COSTS.**

20 A.A.C. R14-2-1607(A) of the proposed rules states that "Affected Utilities shall take
21 every feasible, cost-effective measure to mitigate or offset Stranded Costs by means such
22 as expanding wholesale or retail markets, or offering a wider scope of services for profit,
23 among others," Citizens' prior comments in this proceeding urged the Commission to clarify
24 that rule to ensure that the revenues from services unrelated to the incurrence of stranded
25 costs are not diverted to offset recoverable stranded costs. While Citizens agrees that utilities
26 should take reasonable steps to mitigate stranded costs, the synonymous use of the term
27 "offset" is inappropriate and appears to suggest that revenues derived from other aspects of
28 Affected Utilities' operations, including aspects that bear no direct relation to the incurrence
of stranded costs, should be used to reduce stranded costs. (Comments at 28-31.)

1 The Explanatory Statement does not respond to Citizens' comments and simply
2 restates Staff's prior position on mitigation. (Explanatory Statement at 45-46.) Citizens again
3 urges the Commission to clarify the rule to ensure that revenues from collateral services are
4 not improperly allocated to offset stranded costs. As Citizens noted in its prior comments,
5 the responsibility for stranded costs does not fit into the claim/counterclaim configuration
6 associated with offsets because utilities' stranded costs are the result of legal and regulatory
7 changes, rather than conduct on the part of utilities or their customers that would give rise
8 to offsetting claims by one against the other. Further, both the doctrines of mitigation and
9 offset distinguish collateral source payments, holding that payments from other sources,
10 independent of and collateral to the breaching party, received by the injured party are not to
11 be used to diminish the injured party's damages. Finally, the use of incremental revenues
12 as an offset to stranded costs may deny Affected Utilities a reasonable opportunity to recover
13 their stranded costs. To the extent that collateral source revenues are used to reduce
14 eligible stranded costs, utilities will be prevented from seeking recovery of such costs, which,
15 in the absence of offset, could have been recovered.

16 **V. THE COMMISSION SHOULD AMEND THE**
17 **PROPOSED RULES TO MAINTAIN A LEVEL**
18 **PLAYING FIELD WITH REGARD TO AFFECTED**
UTILITIES AND UTILITIES NOT SUBJECT TO THE
COMMISSION'S JURISDICTION.

19 As discussed in Section II, supra, the proposed rules are substantially different from
20 the rules published with regard to the treatment of Arizona political subdivisions and
21 municipal corporations and other Electric Service Providers that are outside the Commission's
22 jurisdiction (non-jurisdictional utilities). In its prior comments, Citizens stated that the
23 framework set out in the rules represented a reasonable approach to issues presented by
24 utilities not subject to the Commission's jurisdiction, and that the Commission should
25 implement the move to competition in a manner that does not provide an unfair benefit to
26 parties outside its jurisdiction.

27 The amended language contained in the proposed rules, however, raises a host of
28 new concerns and appears to resolve few of the difficult issues concerning the application

1 of the rules to non-jurisdictional utilities. For example, the rules originally left for future
2 determination the selection of a viable enforcement mechanism to be applied to non-
3 jurisdictional utilities, and provided that such utilities would not be able to participate in the
4 competitive market until such enforcement mechanism had been adopted and agreed to by
5 Affected Utilities. The proposed rules abandon this approach, and permit non-jurisdictional
6 utilities to participate in the competitive market without any provisions for enforcing the
7 Commission's rules. Indeed, it appears that Commission has not yet resolved whether it or
8 some other party has the authority to enforce the Commission's rules with respect to non-
9 jurisdictional utilities. See Explanatory Statement at 53 ("there must be an objective party
10 who can resolve disputes over whether electric service providers have fair, nondiscriminatory
11 access to SRP's distribution system. If the Commission does not have the authority, some
12 other party must take on this responsibility; other electric service providers may also want to
13 be involved in the creation of this independent party.")

14 The proposed rules would open the door to non-jurisdictional utilities offering new
15 services in a competitive market without any means of ensuring that such utilities comply with
16 the same rules applicable to Affected Utilities. As Citizens explained in its prior comments
17 (at 32), the Company's overriding concern is that the Commission implement the move to
18 competition in a manner that does not provide an unfair benefit to parties outside its
19 jurisdiction, which may seek to take advantage of the benefits of a more competitive market
20 without adhering fully to the obligations imposed by the proposed rules. To this end, Citizens
21 supported the Commission's determination that a condition of any non-jurisdictional utility's
22 ability to compete for sales in the service territory of an Affected Utility is the agreement by
23 the non-jurisdictional utility to comply with all other applicable aspects of the proposed rules
24 and the development of an appropriate enforcement mechanism. As Citizens noted, only
25 where there is such enforceable reciprocity will jurisdictional and non-jurisdictional utilities be
26 able to compete on equal footing.

27 Further, the proposed rules also substantially amend the specific regulatory
28 requirements imposed on non-jurisdictional utilities. While the rules originally required non-

1 jurisdictional utilities to "agree to all the requirements of this Article other than any
2 requirement to obtain a Certificate of Convenience and Necessity" as a condition of
3 participation in the competitive market, the proposed rules no longer apply the same
4 provisions to non-jurisdictional utilities. Rather, the proposed rules state that a
5 nonjurisdictional utility must only open its service territory to competing sellers "in a manner
6 similar to the provisions of this Article" (emphasis added). The Explanatory Statement offers
7 no explanation for this move away from the requirements of the proposed rules for non-
8 jurisdictional utilities. Moreover, the Explanatory Statement does not provide any guidance
9 concerning the degree of similarity required for compliance with the proposed rules.

10 In addition, the Explanatory Statement fails to address several of Citizens' concerns
11 regarding the need for a level playing field for jurisdictional and non-jurisdictional utilities. In
12 its general response to certain legal issues, the Explanatory Statement argues that certain
13 differences that justify different treatment of Affected Utilities and other entities under the
14 amended rule. (Explanatory Statement at 40.) This response does not address several
15 aspects of the proposed rules for which there is no apparent basis for the different treatment
16 of jurisdictional and non-jurisdictional utilities, as follows:

- 17 1. The proposed rules require Affected Utilities to file Standard Offer Tariffs and
18 unbundled service tariffs for service at cost-based rates, while stating that
19 "market determined rates for competitively provided service from Electric
20 Service Providers shall be deemed just and reasonable."
- 21 2. The proposed rules require Affected Utilities to maintain accounting records in
22 accordance with FERC uniform system of accounts while imposing no
23 comparable requirement on Electric Service Providers.
- 24 3. The proposed rules permit Electric Service Providers to file contracts that are
25 not available to the public while imposing public filing requirements on
26 comparable contracts entered into by Affected Utilities.

27 Citizens' urges the Commission to revisit these provisions of the proposed rules to ensure
28 that the rules maintain a level playing field for all participants in the competitive market.

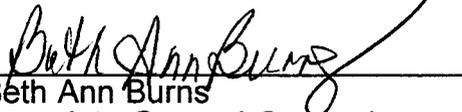
VI. CONCLUSION.

Citizens continues to support the transition to a more competitive market for energy
services. However, as detailed above, Citizens is concerned that the proposed rules are

1 procedurally deficient and fail to address many of the most important issues raised by the
2 prior comments and by the transition to competition. Accordingly, Citizens urges the
3 Commission to revisit the proposed rules and to adopt the specific recommendations
4 contained in these exceptions.

5 **DATED:** December 20, 1996

6 Respectfully submitted,

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8 
9 Beth Ann Burns
10 Associate General Counsel
11 Citizens Utilities Company
12 2901 N. Central Avenue, Suite 1660
13 Phoenix, Arizona 85012

14
15 Original and ten copies of the foregoing
16 filed this December 20, 1996 with:

16 Docket Control Division
17 Arizona Corporation Commission
18 1200 West Washington Street
19 Phoenix, Arizona 85007

20 Copies of the foregoing mailed or hand
21 delivered this December 20, 1996 to:

20 Vicki G. Sandler
21 Arizona Public Service Company
22 Law Department Sta. 9829
23 P.O. Box 53999
24 Phoenix, AZ 85072-3999

23 Steven M. Wheeler and Thomas L. Mumaw
24 Snell & Wilmer
25 One Arizona Center
26 400 E. Van Buren
27 Phoenix, AZ 85004-0001

26 C. Webb Crocket
27 Fennemore Craig
28 Two North Central Ave.
Suite 2200
Phoenix, AZ 85004-2390

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19
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21
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23
24
25
26
27
28

Steven Glaser and David Lamoreaux
Tucson Electric Power Company
220 W. 6th Street
Tucson, AZ 85701

Diane M. Evans
Salt River Project
PAB 300
P.O. Box 52025
Phoenix, AZ 85072-2025

Greg Patterson
Director
Residential Utility Consumer Office
2828 North Central, Suite 1200
Phoenix, AZ 85012

Michael M. Grant
Johnston Maynard Grant & Parker
3200 North Central Ave., Suite 2300
Phoenix, AZ 85012

Patricia Cooper
Arizona Electric Power Cooperative Inc.
P.O. Box 670
Benson, AZ 85602

Paul A. Bullis
Chief Counsel
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Gary Yaquinto
Director, Utilities Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Jerry Rudibaugh
Chief Hearing Officer
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007



Jane Allen
Administrative Assistant