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Arizona Corporation Commission

THE ARIZONA CORPORATION COMMISSION

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Commissioner

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IN THE MATTER OF COMPETITION )  
IN THE PROVISION OF ELECTRIC )  
SERVICES THROUGHOUT THE STATE )  
OF ARIZONA )

DOCKET NO. U-0000-94-165

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**APPLICATION FOR REHEARING/RECONSIDERATION  
BY  
ARIZONA PUBLIC SERVICE COMPANY**

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Arizona Public Service Company ("APS" or "Company")  
hereby submits its Application for Rehearing and/or  
Reconsideration ("Application") of Decision No. 59943 (December 26,  
1996). In Decision No. 59943, the Arizona Corporation Commission  
("Commission") approved proposed regulations ("Proposed Rules") on  
the provision of competitive electric services within parts, but  
not all of Arizona.

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The Proposed Rules, and therefore Decision No. 59943, are  
unreasonable and unlawful for each of the many reasons set forth  
herein. APS therefore respectfully requests that the Commission  
promptly repeal the Proposed Rules, while at the very same time  
maintaining its leadership position by establishing a timely and  
comprehensive procedural schedule for evidentiary hearings on the  
many critical issues left unresolved by the Proposed Rules, to be

1 followed by a Commission-proposed legislative package and finally  
2 redrafted Commission regulations governing the critical transition  
3 to a competitively-focused electric service industry in this  
4 state.

#### 6 I. INTRODUCTION

7 APS fully supports efforts to provide greater choices to  
8 Arizona electric consumers and to substitute market incentives for  
9 traditional regulation of the electric utility industry. A  
10 completely competitive and market-driven electric generation  
11 market is certainly possible by the year 2003, as contemplated by  
12 the Proposed Rules. It may also still be possible to begin that  
13 process for hundreds of thousands of Arizona consumers as early as  
14 1999, although achieving such an ambitious goal will require that  
15 the Commission begin immediately with a well-conceived program,  
16 but this time with all critical issues resolved, a workable  
17 transition plan in place, and questions about the Commission's  
18 legal authority answered.

19 As APS will discuss in this Application, the Proposed  
20 Rules are not, as they are sometimes described, "better than  
21 nothing." In fact, they are far worse than nothing and cannot be  
22 salvaged by any amount of amending or by any subsequent orders  
23 interpreting the Proposed Rules or granting waivers thereto. The  
24 Commission must postpone its final rulemaking until after it has  
25 obtained the necessary legal authority. Because it is unlikely  
26 that such authority can be enacted before the 1998 Legislative

1 session, the Commission has the balance of 1997 to conduct its  
2 investigation and hold the evidentiary hearings required to  
3 resolve the issues concerning the nature and scope of competition  
4 - where and by whom and for what services; compensation for  
5 stranded costs; reliability - who's responsible and who pays;  
6 market structure; economic impact on state and local governments,  
7 small businesses and residential consumers (especially in rural  
8 areas); service unbundling; etc. However, to get everything done  
9 which must be done before the end of 1998 necessitates that the  
10 Commission begin with the right process now and not waste another  
11 day on the Proposed Rules.

12 Many of the issues raised in the Company's Application  
13 have been discussed in great detail in the previous comments and  
14 pleadings filed in this Docket. The Company would incorporate  
15 that discussion by reference herein - most specifically APS's:

- 16 1) June 27, 1996 Response to Commission Staff;
- 17 2) September 12, 1996 Comments on the first draft of  
18 the Proposed Rules;
- 19 3) October 7, 1996 Exceptions to Order establishing  
20 rulemaking docket;
- 21 4) November 8 and 27 Comments on the Proposed Rules;  
22 and,
- 23 5) December 20, 1996 Exceptions to Order adopting  
24 Proposed Rules.

23 . . . .  
24 . . . .  
25 . . . .  
26 . . . .

1           II. THE COMMISSION HAS NO AUTHORITY TO REQUIRE OR EVEN  
2                    AUTHORIZE RETAIL COMPETITION BETWEEN ELECTRIC  
3                    UTILITIES IN THE PROPOSED RULES

4           A.    The State's policy of regulated monopoly cannot be  
5                    unilaterally changed by the Commission

6           It is beyond question that the historic and existing  
7           regulatory scheme in Arizona as to electric utilities is one of  
8           regulated monopoly. It is equally beyond question that this  
9           fundamental public policy was created by the Legislature and can  
10           only be modified or abandoned by the Legislature. The Commission  
11           itself sought from the Legislature and was granted the right to  
12           allow competition in the telecommunications industry. See A.R.S.  
13           § 40-281(D). However, attempts by the Commission to introduce  
14           competition in, for example, radio paging prior to the  
15           aforementioned legislative change were soundly rejected by Arizona  
16           courts.

17           Lest it be argued that the Arizona Supreme Court's  
18           expansive reading of the Commission's rate making powers in  
19           *Arizona Corporation Commission v. State, ex rel. Woods*, 171 Ariz.  
20           286, 830 P.2d 807 (1992) has effectively overruled decades of  
21           earlier cases and allows the Commission to exercise heretofore  
22           legislative powers with regard to CC&Ns, APS would draw the  
23           Commission's attention to the most recent judicial pronouncement  
24           on the issue in a decision rendered after the Supreme Court's  
25           opinion in *Woods*:

26           The concept of regulated monopoly arose from the  
          Legislature in granting the Commission the authority  
          to issue certificates of public convenience and

1 necessity to public service corporations . . .

2 That it was the legislative creation of certificates  
3 of convenience and necessity that gave rise to the  
4 concept of "regulated monopoly" was made abundantly  
5 clear by *Corporation Commission v. People's Freight*  
6 *Lines, Inc.*, supra [*Mountain States Telephone & Tele-*  
7 *graph Company v. Arizona Corporation Commission*, 132  
8 Ariz. 109, 644 P.2d 263 (App. 1982).]

9 \* \* \* \*

10 Issuing certificates of convenience and necessity  
11 is far from a plenary power of the Commission. It is  
12 a legislative power delegated to the Commission subject  
13 to restrictions as the Legislature deems appropriate.  
14 [Emphasis supplied.]

15 *Tonto Creek Estates v. Arizona Corporation Commission*,  
16 177 Ariz.49, 56, 864 Ariz. 1081, 1088 (App. 1993).

17 APS has previously provided the Commission with  
18 innumerable additional citations on this point and will not burden  
19 this pleading with yet another recitation of this irrefutable  
20 legal authority. APS hereby specifically incorporates by reference  
21 its Comments dated September 12, 1996, at pages 3-6.

22 **B. The Commission cannot subsequently obtain  
23 Legislative authority for the Proposed Rules**

24 Both in Decision No. 59943 at page 38 and in certain  
25 comments from Staff and even the Commissioners, it has been  
26 suggested that, while APS and the other "Affected Utilities" might  
27 well be correct in their concerns over the lack of statutory  
28 authority, the Commission can simply go to the Legislature later  
29 and obtain the requisite authority for the Proposed Rules. Aside  
30 from questions of whether this will prove as easily done as said,  
31 any subsequent legislation would not validate the Proposed Rules.

1 In Arizona, an agency cannot pass regulations and then obtain the  
2 legislative authority to support them. The rule of law in Arizona  
3 is a simple one - legislation first, agency rules second. *Swift &*  
4 *Company v. State Tax Commission*, 105 Ariz. 226, 230, 462 P.2d 775,  
5 779 (1969); *Kennecott Copper Corp. v. Industrial Commission of*  
6 *Arizona*, 115 Ariz. 184, 564 P.2d 407 (1977).

7 The fact that Commission rulemaking necessarily ought to  
8 come at the end of the restructuring process, not the beginning,  
9 does not mean the Commission should surrender its leadership  
10 position on the restructuring of the electric industry. It will  
11 be the Commission's factual record and the subsequent legislative  
12 initiatives springing therefrom that will drive this process. The  
13 Commission's experience with the Proposed Rules shows that once  
14 the Commission knows what it wants to do and has the authority to  
15 do it, the actual rulemaking can be done rather quickly.

16 **III. THE PROPOSED RULES VIOLATE THE DUE PROCESS**  
17 **RIGHTS OF "AFFECTED UTILITIES"**

18 **A. "Affected Utilities" have the right to notice and**  
19 **hearing before the exclusive nature of their CC&N's**  
20 **can be altered by the Commission**

21 The Commission can only alter a previously granted CC&N  
22 through compliance with A.R.S. § 40-252, which specifically  
23 requires an evidentiary hearing prior to any Commission action.<sup>1</sup>

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24 <sup>1</sup> Commission Staff has attempted to argue that the Proposed Rules do not actually  
25 amend or alter the nature of APS' CC&N because they do not certificate any specific  
26 competitor to serve within APS' service territory. Such an argument is specious.  
A.A.C. R14-2-1602 and 1604 clearly purport to transform the essential essence of the  
Company's CC&N from regulated monopoly to one in which APS is just one of a potentially  
infinite number of authorized competitors.

1 Even aside from A.R.S. § 40-252, APS would be entitled to a full  
2 evidentiary hearing prior to consideration of the Proposed Rules  
3 by virtue of A.R.S. § 41-1061. That statute is applicable to any  
4 "contested case." A.R.S. § 41-1001(5) defines "contested case" as  
5 any case concerning (among other things) "licensing." The term  
6 "licensing" is itself defined to include a CC&N. A.R.S. § 41-  
7 1001(12).

8           The Commission's own procedural regulations also support  
9 the kind of full evidentiary hearing required by both statute and  
10 Arizona judicial decisions. Specifically, A.A.C. R14-3-104(A)  
11 grants parties the right to present testimony and cross-examine  
12 opposing witnesses. A.A.C. R14-3-109(F) requires that all  
13 testimony presented to the Commission be under oath. Both of  
14 these concepts are integral aspects of evidentiary hearings.

15           APS has repeatedly urged that there be full evidentiary  
16 hearings in this docket prior to any attempted rulemaking. This  
17 is not only sound policy - a policy followed in other  
18 jurisdictions considering industry restructuring - but is required  
19 by Arizona law, including the Commission's own regulations. After  
20 the fact hearings simply will not satisfy procedural due process.  
21 Thus, the vague promises of such hearings in the Proposed Rules do  
22 not rectify the Constitutional deficiencies of the Proposed Rules.

23           **B. Decision No. 59943 was passed in violation of**  
24           **Commission Rules and Arizona Statutes requiring that**  
25           **there be a Hearing Officer's Recommended Decision**  
26           **for the Commission's consideration in addition to**  
              **any Proposed Orders from the parties**

A.A.C. R14-3-110 requires that in all proceedings in

1 which a Hearing Officer is appointed, there must be a  
2 recommendation from such Hearing Officer to the Commission. The  
3 same Rules also allows parties to submit their own Proposed  
4 Orders, but this in no way relieves the Hearing Officer of the  
5 responsibility to submit an independent recommendation. A.R.S.  
6 § 41-1023(E) imposes a similar requirement for rulemaking  
7 proceedings.

8  
9 **C. The Proposed Rules violate the substantive due  
process rights of "Affected Utilities"**

10 The Proposed Rules are impermissibly vague and therefore,  
11 violate the substantive due process rights of those affected,  
12 including APS. An agency rule is overly vague if it fails to  
13 provide for or give fair warning as to how it will be interpreted  
14 or enforced or if it grants discretionary powers to the agency  
15 without standards to guide and limit that discretion.

16 The Proposed Rules violate the above standards in at  
17 least three (3) respects. First, the criteria under A.A.C. R14-2-  
18 1604 by which APS and other "Affected Utilities" are to "phase-in"  
19 competitive choice to some but not all customers in 1999 and 2001  
20 are so vague as to be virtually non-existent. Second, the nature  
21 of APS' continuing obligations (if any) to customers eligible for  
22 competitive choice under the "standard offer" provisions of A.A.C.  
23 R14-2-1606 is left to mere speculation and conjecture. Third, the  
24 "mitigation" requirement of A.A.C. R14-2-1607 is worded so broadly  
25 as to provide absolutely no guidance as to the scope and nature of  
26 activities that must be undertaken by "Affected Utilities" to

1 satisfy such requirement and how any such purported "failure" to  
2 mitigate might affect the "Affected Utility's" recovery of  
3 "stranded costs."

4

5 **IV. THE PROPOSED RULES REPRESENT AN UNCOMPENSATED "TAKING"**

6 Although the Proposed Rules provide assurance of full  
7 recovery of "stranded costs," they do not address compensation for  
8 the "taking" of the exclusive nature of the Company's CC&N. This  
9 right of "exclusivity" is "property" under Arizona law and  
10 requires separate compensation if taken by government. *Arizona*  
11 *Water Company v. City of Yuma*, 7 Ariz. App. 53, 436 P.2d 147  
12 (1968) The Proposed Rules make no provision for such  
13 compensation, create no mechanism by which compensation can be  
14 determined, and do not include the CC&N's value in determining  
15 "stranded costs" recoverable under the Proposed Rules.

16

17 **V. THE PROPOSED RULES IMPAIR THE VESTED CONTRACT  
RIGHTS OF "AFFECTED UTILITIES"**

18 The Supreme Court's characterization of a CC&N as a  
19 "contract" in *Application of Trico Electric Cooperative, Inc.*, 92  
20 Ariz. 373, 377 P.2d 309 (1962) cannot be dismissed as mere dicta.  
21 The notion of a regulatory contract was essential to the Court's  
22 conclusion that the Commission was under a mandatory duty to  
23 protect Trico Electric Cooperative from competition with Tucson  
24 Gas & Electric Company (now Tucson Electric Power Company).

25 Commission Staff contends that regulatory policies, such  
26 as "regulated monopoly," can always be changed. However, the fact

1 that the Legislature may seek to alter the policy of regulated  
2 monopoly prospectively does not affect the validity of the State's  
3 prior agreements with "Affected Utilities" any more than would a  
4 Legislative modification of the current policy on state contract  
5 procurement (say, from one of competitive bidding to one of  
6 individual negotiation) affect the legality of contracts  
7 previously entered into by the State.

8  
9 **VI. THE PROPOSED RULES DENY "AFFECTED UTILITIES"  
EQUAL PROTECTION OF THE LAW**

10 The Proposed Rules clearly discriminate against "Affected  
11 Utilities", especially investor-owned utilities such as the  
12 Company, in each of the following ways:

13 1) they are required to allow direct competition  
14 in their service areas while other similarly  
15 situated PSC's (e.g., Garkane Power Association,  
Columbus Electric Cooperative, Dixie-Escalante  
Rural Electric Association) are not;

16 2) investor-owned PSC's are given no opportunity  
17 to avoid application of the Proposed Rules while co-  
operatively-owned PSC's are expressly granted such  
18 a right under A.A.C. R14-2-1604; and,

19 3) new "electric service providers" are not  
20 subject to the same regulatory requirements for the  
21 identical service as are "Affected Utilities." See  
22 A.A.C. R14-2-1606 ["Affected Utilities" required to  
provide "standard offer" and various unbundled  
23 services at regulated rates, while other "electric  
service providers" are under no such obligation, and  
if the latter nevertheless choose to provide these  
same services, they can do so at market rates].

24 The Proposed Rules give no explanation or justification for the  
25 disparate treatment of certain PSC's and, in particular, investor-  
26 owned PSC's such as the Company.

1  
2                   **VII. THE PROPOSED RULES ARE IN VIOLATION OF THE ARIZONA  
ADMINISTRATIVE PROCEDURE ACT ("APA")**

3                   **A. The Economic Impact Statement is inadequate**

4                   The Commission is required to prepare an economic impact  
5 statement ("EIS") pursuant to A.R.S. § 41-1057(2). As noted in  
6 APS's comments of November 27, 1996, the "analysis" performed by  
7 Commission Staff in support of the Proposed Rules was woefully  
8 inadequate in every significant respect. In fact, Mr. Elliot D.  
9 Pollack of Elliot D. Pollack and Company (a noted Arizona economic  
10 consulting firm) concluded that the EIS provided the Commission no  
11 meaningful information about the possibly significant economic  
12 impact of retail electric competition and that it failed to meet  
13 any of the statutory requirements under A.R.S. § 41-1055.

14                   **B. The Proposed Rules have not been reviewed and  
15 certified by the Attorney General**

16                   A.R.S. § 41-1044 (Attorney General certification of  
17 agency rules), is expressly applicable to the Commission. See  
18 A.R.S. § 41-1057(2). The judicially-created exemption to this  
19 requirement is limited solely to regulations passed under the  
20 Commission's rate making powers. *State v. Arizona Corporation*  
21 *Commission*, 174 Ariz. 216, 848 P.2d 301. (Ct. App. 1992). Although  
22 certain of the Proposed Rules do refer to rate making, they  
23 neither set any specific rate nor establish procedures by which  
24 rates may be determined. Moreover, the heart of the Proposed  
25 Rules is the granting of competitive certificates of convenience  
26 and necessity - something the Arizona Courts have repeatedly held

1 is not an exercise of the Commission's rate making power under the  
2 Arizona Constitution.

3  
4 **C. The Proposed Rules are substantially  
different from those noticed to the public**

5 Under A.R.S. § 41-1025:

6 An agency may not adopt a rule that is  
7 substantially different from the proposed rule  
8 contained in the notice of proposed rule  
adoption or a supplemental notice filed with  
the secretary of state pursuant to § 41-1022.

9 As can be seen from a review of pages 21 and 22 of Decision  
10 No. 59943, A.A.C. R14-2-1611 (In-State Reciprocity) is vastly  
11 different from that version of the rule published on November 1,  
12 1996. Commitments made by the Commission (in old Subsection C) to  
13 seek legislation allowing public power entities (e.g., municipal  
14 utilities) and "Affected Utilities" to compete on fair and equal  
15 terms in each other's service territories are now abandoned.  
16 Certain protections to consumers and the right of "Affected  
17 Utilities" to prevent unfair competition from such public power  
18 entities, both of which were embodied in the former Subsection D  
19 of R14-2-1611, have now been eliminated. Finally, a whole new  
20 Subsection D has been added allowing some manner of ill-defined  
21 and unspecified "intergovernmental agreement" to supplant  
22 otherwise applicable portions of the Proposed Rules.

23  
24 **D. The Proposed Rules' Concise Explanatory Statement  
is inadequate**

25 A.R.S. § 41-1036 requires that a Concise Explanatory  
26 Statement ("CES") accompany all adopted agency rules. The CES is

1 the only basis upon which a court can rely to uphold an adopted  
2 rule. A.R.S. § 41-1036(B). The CES must include an evaluation  
3 (not just a discussion) of all the arguments for and against a  
4 proposed rule and a response to all comments received. A.R.S.  
5 § 41-1036(A)(2). The CES in this proceeding was cursory at best  
6 and failed to address most of the "Affected Utilities" comments -  
7 especially those filed November 27, 1996, relative to reliability,  
8 market structure, cost/benefits, and economic impact.

9  
10 **E. Decision No. 59943 fails to adequately explain  
the basis for its findings and conclusions**

11 As APS has previously noted, any proceeding affecting a  
12 CC&N is "adjudicatory" under the APA. See Section III.A., *infra*.  
13 In such proceedings, both fundamental notions of due process as  
14 well as A.R.S. § 41-1063 require that the Commission fully explain  
15 the basis for its findings and conclusions. Decision No. 59943 at  
16 no time finds or concludes that requiring phased-in retail  
17 competition, mandating solar portfolios, or any other specific  
18 aspect of the Proposed Rules is just, reasonable or lawful - let  
19 alone provides a reasoned explanation or justification for any  
20 such finding or conclusion.

21  
22 **VIII. THE PROPOSED RULES ARE INCONSISTENT  
WITH THE RATE REDUCTION AGREEMENT**

23 Paragraph 6 of the Rate Reduction Agreement between APS  
24 and Commission Staff, approved by the Commission in Decision No.  
25 59601 (April 24, 1996), prohibits any party from seeking to change  
26 rates, except as permitted by the Agreement, before July 2, 1999.

1 However, the Proposed Rules (e.g., R14-2-1604) do precisely that  
2 (change rates) for some 20% of the Company's retail load beginning  
3 January 1, 1999.

4  
5 **IX. THE PROPOSED RULES CREATE AN UNLAWFUL OBLIGATION TO SERVE**

6 *James P. Paul Water Company v. Arizona Corporation*  
7 *Commission*, 137 Ariz. 426, 671 P.2d 404 (1983) and *Tonto Creek*  
8 *Estates v. Arizona Corporation Commission*, 177 Ariz. 49, 864 P.2d  
9 1081 (Ct. App. 1993) clearly established that the traditional  
10 utility obligation to serve is legally dependent upon the  
11 concomitant exclusive right to serve. In other words, if there  
12 are no exclusive service rights, there can be no exclusive service  
13 obligations. Yet in A.A.C. R14-2-1606, APS is clearly obliged to  
14 provide services for which it has no exclusive rights (e.g.,  
15 billing and collection, meter reading, etc.) and for which other  
16 "electric service providers" have no similar obligation.

17  
18 **X. RULE R14-2-1609 OF THE PROPOSED RULES**  
19 **UNLAWFULLY INTERFERES WITH THE MANAGEMENT OF**  
20 **"AFFECTED UTILITIES" AND IS OTHERWISE**  
21 **ARBITRARY AND UNREASONABLE**

22 A.A.C. R14-2-1609 requires that, beginning in 1999, a  
23 specified percentage of "total retail energy sold competitively"  
24 by "any company selling electricity under the provisions of this  
25 Article" must come from "new solar resources." It also purports  
26 to require a penalty on non-complying sellers (or on their  
customers - the rule is not clear). The application of this rule  
to incumbent "Affected Utilities" puts such "Affected Utilities"

1 under a tremendous disadvantage relative to new entrants who can  
2 pick and chose potential customers in Arizona and arbitrarily  
3 assign whatever renewable resources they have in other states  
4 (e.g., California) to sales in Arizona so as to meet this  
5 Commission requirement. "Affected Utilities" will, on the other  
6 hand, have to commit real incremental resources in order to be in  
7 full compliance with the rule.

8           Even if applied solely to non-"Affected Utilities" or  
9 only to retail sales by "Affected Utilities" outside their present  
10 service areas, the percentages of renewables required by the  
11 regulation are purely arbitrary. There has been no evidence that  
12 they can be acquired cost effectively. There has been no evidence  
13 that such a requirement will in even the smallest way speed the  
14 eventual commercialization of solar technologies or measurably  
15 improve the environment. There has been no evidence that this  
16 requirement will protect Arizona consumers from fluctuations in  
17 fuel prices. Finally, there is absolutely no authority cited for  
18 the proposition that the Commission can specifically dictate the  
19 investment decisions of PSC's, let alone require that generation  
20 portfolios reflect specific technologies whether or not such  
21 portfolios satisfy present Commission regulations under A.A.C.  
22 R14-2-701, *et seq.*

23           APS is and will remain a leader in the promotion of cost-  
24 effective solar technologies and solar applications. That is why  
25 the Company, unlike every other adverse commentator on the  
26 Proposed Rules, proposed a less expensive and more effective

1 alternative proposal - one that will actually result in new solar  
2 construction in Arizona and for Arizona consumers, and which will  
3 avoid the enforcement problems inherent with any quota system such  
4 as the solar portfolio.

5  
6 **XI. THE PROPOSED RULES ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE  
AND ARE ARBITRARY, CAPRICIOUS, AND AN ABUSE OF DISCRETION**

7           Because there were no evidentiary hearings in this  
8 Docket, the Commission literally had no evidence upon which to  
9 base its decision. Moreover, the overwhelming body of comments  
10 included in the "record" advocated rejecting or at least  
11 significantly modifying the Proposed Rules. These included  
12 comments by independent and nationally recognized experts (as  
13 contrasted to the obviously self-serving comments of power  
14 marketers, large industrial customers, energy management  
15 consultants, etc.) with years of "hands on" experience in actually  
16 designing and implementing electric industry restructuring and in  
17 assessing the likely economic impact of public policy changes.  
18 Their verdict was unanimous. The Proposed Rules: lack factual  
19 basis; are dangerously ambiguous; create expensive, arbitrary and  
20 ill-conceived mandates on "electric service providers," especially  
21 "Affected Utilities" such as APS; and arbitrarily fail to address,  
22 let alone resolve, critical issues such as reliability, obligation  
23 to serve, market structure, and compensation of "Affected  
24 Utilities."

25           These failings in the Proposed Rules do not represent  
26 inadvertent oversights. APS and numerous other parties repeatedly

1 called upon the Commission to investigate and resolve all the  
2 above critical issues before proceeding with the Proposed Rules.  
3 Thus, the Commission's actions in ignoring them must be deemed  
4 arbitrary and capricious.

5  
6 **XII. THE PROPOSED RULES WOULD INVADE THE  
EXCLUSIVE JURISDICTION OF FERC**

7 FERC has made the following statement in its "Notice of  
8 Proposed Rulemaking promoting Wholesale Competition Through Open  
9 Access Non-discriminatory Transmission Services by Public  
10 Utilities"<sup>2</sup> regarding jurisdiction over what it calls "buy-sell"  
11 transactions of the type envisioned by A.A.C. R14-2-1604.:

12 Finally, we address a specific type of retail service  
13 that we believe to be "bundled" retail service in name  
14 only: a so-called "buy-sell" transaction in which an end  
15 user arranges for the purchase of generation from a  
16 third-party supplier and a public utility transmits that  
17 energy in interstate commerce and re-sells it as part of  
18 a "bundled" retail sale to the end user. We have  
19 determined that in these types of transactions the retail  
20 "bundled" sale is actually the functional equivalent of  
21 two unbundled retail sales: (1) a voluntary sale of  
22 unbundled transmission at retail in interstate commerce,  
23 subject to our exclusive jurisdiction; and (2) a sale of  
24 unbundled generation at retail, subject to the state's  
25 jurisdiction. . . . For these types of sales, public  
26 utilities will have to provide the voluntary retail  
transmission component of the sale under a FERC-filed  
tariff consistent with the substantive requirements of  
this proposed rule.

22 Thus the assumption in the Proposed Rules that the Commission  
23 would retain jurisdiction over "buy-through" transactions is  
24 misplaced.

25 \_\_\_\_\_  
26 <sup>2</sup> Docket No. RM95-8-000 (March 29, 1995) at pages 99-100. This position was  
affirmed in the Commission's Order No. 888 issued April 24, 1996 in Section IV.I.

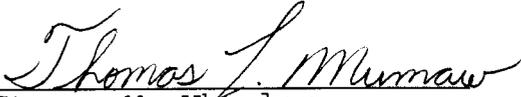
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XIII. CONCLUSION

The Proposed Rules clearly exceed the Commission's authority in many respects. They are procedurally invalid and effectively confiscate a vested property right without providing for any, let alone, adequate compensation. They purport to unilaterally invalidate binding regulatory compacts between APS and the State. Finally, they impose arbitrary, unreasonable and discriminatory requirements on APS and other "Affected Utilities." The Commission should seek their prompt repeal, *en toto*, and begin the process of introducing competitive forces and choices in a reasoned, comprehensive, well-planned and lawful fashion - beginning with a comprehensive procedural schedule for hearings, legislation, and revised rulemaking.

RESPECTFULLY SUBMITTED this 10th day of January, 1997.

SNELL & WILMER L.L.P.

By   
Steven M. Wheeler  
Thomas L. Mumaw

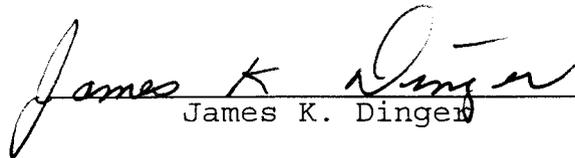
and

Herbert I. Zinn  
Senior Attorney  
Arizona Public Service Company

Attorneys for Arizona Public  
Service Company

CERTIFICATE OF SERVICE

The original and ten (10) copies of the foregoing document were filed with the Arizona Corporation Commission on this 10th day of January, 1997, and service was completed by mailing or hand-delivering a copy of the foregoing document this 10th day of January, 1997 to all parties of record herein.

  
James K. Dinger

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Arizona Corporation Commission

**DOCKETED**

**BEFORE THE ARIZONA CORPORATION COMMISSION**

**JAN 13 1997**

RECEIVED  
AZ CORP COMMISSION

JAN 13 10 50 AM '97

CARL J. KUNASEK  
CHAIRMAN  
JAMES M. IRVIN  
COMMISSIONER  
RENZ D. JENNINGS  
COMMISSIONER

DOCKETED BY 

DOCUMENT CONTROL

IN THE MATTER OF THE COMPETITION IN ) DOCKET NO. U-0000-94-165  
THE PROVISION OF ELECTRIC SERVICES )  
THROUGHOUT THE STATE OF ARIZONA. ) **INTERNATIONAL BROTHERHOOD**  
 ) **OF ELECTRICAL WORKERS #1116**  
 ) **EXCEPTION TO PROPOSED ORDER**  
 ) **ADOPTING RULES ON ELECTRIC**  
 ) **INDUSTRY RESTRUCTURING**

International Brotherhood of Electrical Workers ("I.B.E.W." or "Union"), pursuant to A.R.S. 40-253 and A.C.C. R14-3-111, hereby moves the Arizona Corporation Commission ('Commission') to:

1. Reconsider Decision No. 59943 (December 26, 1996) ("Decision") which adopted Proposed Rules on Retail Electric Competition (R14-2-1601, et seq.) ("Rules"); and
2. Stay the enforcement of the Rules pending their amendment (or repeal) by the Commission or the Courts, because the Rules will otherwise be effective notwithstanding a reconsideration or appeal.

This requested relief is in the best interest of the public and is fair and equitable to all concerned parties, consumers, utilities and the Commission--because it provides a meaningful opportunity to review the Rules, the manner in which they were adopted and their impact, without unnecessarily subjecting the state of Arizona to their unwanted consequences. Further, in order to achieve the Commission's stated objective of moving the electric industry to competition, this relief will open a window of opportunity for the parties to jointly develop the legal and technical details that are lacking in the regulatory "framework" that is now in place. Such a process, which has been successfully conducted in other states, (but was not followed in Arizona), will protect the welfare of the consumer, the financial stability of the "Affected Utilities" and meet the Commission's stated objective of bringing retail competition to Arizona in a well thought out and carefully constructed manner.

The International Brotherhood of Electrical Workers ("I.B.E.W.") believes the Commission will have one more opportunity to examine the following areas of concern with the Rules, prior to their enforcement:

a) **System Reliability:** To ensure that all citizens of Arizona (and the Southwest) continue to receive safe, reliable and economic electric service.

b) **Economic Impact to Arizona:** To determine and if possible, minimize the cost of potential lost revenues and taxes to the state.

c) **Stranded Cost:** To recognize changes to the "Regulatory Compact" and related financial consequences to the "Affected Utilities" and their employees.

d) **Level Playing Field:** To thoroughly study and implement retail competition in a fair and equitable manner, whereby all parties abide by the same rules.

As previously stated in our "EXCEPTION TO PROPOSED ORDER ADOPTING RULES ON ELECTRIC INDUSTRY RESTRUCTURING"- the International Brotherhood Electrical Workers represents 8,000 workers in the State of Arizona. I.B.E.W. members are employed in physical, technical, clerical and administrative positions, many bearing front line responsibility for the safe and reliable operation and maintenance of electric generating units, transmission lines, networks, and electrical distribution systems throughout the State. In addition, 3,000 I.B.E.W. members are employed by Contractors providing construction and maintenance services to the industry.

All 8,000 members and their families are consumers dependent on clean, safe, affordable and reliable electrical power in every aspect of their work and personal lives, and they have a vital interest in these proceedings. As employees and consumers, we are genuinely concerned with, and actively involved in State regulatory activity, as the electric power industry undergoes various shifts, changing from a highly regulated and relatively stable industry, to a more diversified and competitive one. Our members understand that change is inevitable, and neither they nor the I.B.E.W. oppose the introduction of necessary efficiencies, to a more competitive environment.

Therefore, we are asking that the Commission consider our, "EXCEPTIONS TO THE RULES AS ADOPTED ON ELECTRIC INDUSTRY RESTRUCTURING", and direct that all of the critical and vital issues be resolved between all of the interested parties, lest we regret the devastating outcome of this decision for the State of Arizona.

RESPECTFULLY SUBMITTED this 10th day of January, 1997.

INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS #1116

By: Ryle J. Carl III  
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Tucson, Arizona 85716

**Original and ten copies of the foregoing  
filed this 10th day of January, 1997, with:**

Docket Control  
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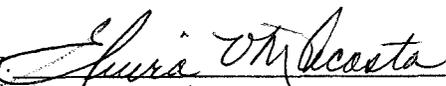
**Copies of the foregoing mailed  
this 10th day of January, 1997, to:**

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Renz D. Jennings, Commission  
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