



0000071324

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January 13, 1997

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Arizona Corporation Commission  
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FEDERAL EXPRESS

Arizona Corporation Commission  
**DOCKETED**

JAN 14 1997

Re: Trico Electric Cooperative, Inc.  
Docket No. U-0000-94-165

DOCKETED BY 

Ladies/Gentlemen:

Enclosed please find original and ten copies the Application for Rehearing and Request for Stay of Trico Electric Cooperative, Inc. which we are transmitting to you for filing in the above docket.

Very truly yours,

O'CONNOR CAVANAGH MOLLOY JONES

Russell E. Jones

REJ/cw  
Enclosures

cc: Trico Electric Cooperative, Inc.

2/3/97 21

Arizona Corporation Commission

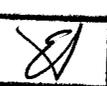
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BEFORE THE ARIZONA CORPORATION COMMISSION JAN 11 8 13 PM '97

JAN 14 1997

1 CARL J. KUNASEK  
2 CHAIRMAN  
3 RENZ D. JENNINGS  
4 COMMISSIONER  
5 JIM IRVIN  
6 COMMISSIONER

DOCKETED BY 

DOCUMENT CONTROL

5 IN THE MATTER OF COMPETITION ) DOCKET NO. U-0000-94-165  
6 IN THE PROVISION OF ELECTRIC )  
7 SERVICES THROUGHOUT THE STATE ) APPLICATION FOR  
8 OF ARIZONA ) REHEARING AND REQUEST  
9 ) FOR STAY OF TRICO  
10 ) ELECTRIC COOPERATIVE,  
11 ) INC.

9 TRICO ELECTRIC COOPERATIVE, INC., an Arizona nonprofit corporation,  
10 whose Post Office address is Post Office Box 35970, Tucson, Arizona 85740  
11 ("Applicant"), a party in the above proceedings which has been issued certificates of  
12 convenience and necessity as an electric public service corporation by the Arizona  
13 Corporation Commission ("Commission"), which are in full force and effect,  
14 pursuant to A.R.S. §40-253 submits to the Commission this Application For  
15 Rehearing and Request for Stay of Decision No. 59943 entered and dated  
16 December 26, 1996, including Appendices A (the adopted Rules A.A.C. R14-2-1601  
17 through R14-2-1616, in A.A.C. Title 14, Chapter 2, Article 16), B and C (collectively,  
18 "Decision"), and of the whole thereof, on the grounds that the Decision is unlawful,  
19 unreasonable, unjust, unconstitutional, in excess of the Commission's jurisdiction,  
20 unwarranted, arbitrary, capricious and an abuse of the Commission's discretion:

21 A. Upon the grounds and for the reasons set forth in the following  
22 documents, each of which are incorporated herein by this reference as it fully set  
23 forth herein, and each of which is on file in the above Docket:

- 24 1. The letter of Arizona Electric Power Cooperative, Inc. ("AEPSCO")  
25 of April 18, 1995 to Commission Attorney Janice Alward.  
26

- 1                   2.     The Comments of AEPCO dated June 28, 1996.
- 2                   3.     The Comments of Applicant dated June 28, 1996.
- 3                   4.     The Comments of Applicant dated September 11, 1996.
- 4                   5.     The Comments of AEPCO on the Draft Rules dated  
5                   September 12, 1996.
- 6                   6.     The Comments of the Rural Utilities Service, an agency of the  
7                   United States Department of Agriculture, dated September 12, 1996.
- 8                   7.     The Comments of the National Rural Electric Cooperative  
9                   Association dated September 11, 1996.
- 10                  8.     The Comments of the National Rural Utilities Cooperative  
11                  Finance Corporation filed September 11, 1996.
- 12                  9.     Exceptions to Proposed Staff Order of AEPCO, Duncan Valley  
13                  Electric Cooperative ("Duncan"), Graham County Electric Cooperative  
14                  ("Graham"), Sulphur Springs Electric Cooperative ("Sulphur Springs") and  
15                  Trico Electric Cooperative dated October 7, 1996.
- 16                  10.    The AEPCO, Duncan, Graham and Sulphur Springs Comments  
17                  on Proposed Rules dated November 8, 1996.
- 18                  11.    The Comments of Applicant dated November 8, 1996.
- 19                  12.    The Comments of Arizona Public Service Company ("APS") on  
20                  Proposed Retail Electric Access Rules dated November 8, 1996.
- 21                  13.    The testimony of Messrs. Pollack, Barker, Landon and  
22                  Hieronymus which were attached to the APS' Supplemental and Reply  
23                  Comments dated November 27, 1996.
- 24                  14.    Section IV concerning legal issues, pages 22 and 34, of the First  
25                  Set of Comments on Proposed Rule Regarding Retail Electric Competition on  
26                  behalf of Tucson Electric Power Company dated November 8, 1996.

1           15. Comments of the National Rural Electric Cooperative  
2 Association dated December 3, 1996.

3           16. The Exceptions of APS to Staff's Proposed Order dated  
4 December 20, 1996.

5           B. Not in limitation of the foregoing, for the following reasons and upon  
6 the following grounds:

7           1. The Decision is unconstitutional in violation of Article XV,  
8 Sections 2, 3 and 14 of the Arizona Constitution which Sections do not permit rates  
9 of electric public service corporations ("such corporations") to be set at market  
10 determined rates for competitively provided electric services as provided in the  
11 Decision in A.A.C. R14-2-1612A and which Sections require that the Commission  
12 prescribe just and reasonable rates of electric public service corporations after first  
13 determining the fair value of such corporations' property devoted to the public use,  
14 then determining what is a just and reasonable rate of return on such fair value.

15           2. The Decision is unconstitutional and in excess of the  
16 Commission's jurisdiction in violation of Article XV of the Arizona Constitution  
17 which does not permit electric public service corporations to prescribe, fix or set  
18 their own rates, whether market determined rates for competitively provided  
19 electric service or otherwise, and which does require that the Commission prescribe  
20 just and reasonable rates for electric public service corporations.

21           3. The Decision is unconstitutional, in excess of the jurisdiction of  
22 the Commission and in violation of Article XV, Section 2 of the Arizona  
23 Constitution which requires that all corporations other than municipal furnishing  
24 electricity for light, fuel or power shall be deemed public service corporations:

25           A. By attempting to give electric service suppliers who have not  
26 been issued certificates of convenience and necessity by the Commission

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pursuant to A.R.S. §§40-281, *et seq.* as electric public service corporations the same rights and powers to sell electricity as electric public service corporations issued certificates of convenience and necessity pursuant to such Sections.

B. By creating a new type of certificate of convenience and necessity not authorized by the Legislature pursuant to Article XV, Section 6 of the Arizona Constitution for electric service suppliers who have not been issued certificates of convenience and necessity by this Commission pursuant to A.R.S. §§40-281, *et seq.*

C. By not requiring all suppliers of electricity to charge rates and charges by the constitutionally mandated system based on a just and reasonable rate of return on the fair value of the property of such suppliers of electricity devoted to the public use.

4. The Decision is unconstitutional, in excess of the jurisdiction of the Commission and is in violation of Article IV and Article XV, Section 6 of the Arizona Constitution and the legislative powers expressly or impliedly reserved to the Legislature by the Arizona Constitution.

5. The Decision is unconstitutional in violation of the just compensation provisions of the Fifth Amendment of the United States Constitution and Article II, Section 17 of the Arizona Constitution and as incorporated into the Due Process Clauses of the Fourteenth Amendment of the United States Constitution and Article II, Section 4 of the Arizona Constitution by breaching the contract and the regulatory compact between the State of Arizona and its electric public service corporations including Applicant to whom the Commission has issued certificates of convenience and necessity.

6. The Decision breaches the contract and regulatory compact between the State of Arizona and each of its electric public service corporations

1 which have been issued certificates of convenience and necessity by the  
2 Commission, including Applicant, by denying such corporations the exclusive right  
3 to sell electricity in their respective certificated areas and is unconstitutional in  
4 violation of Article II, Section 17, Article III and Article VI, Section 1 of the Arizona  
5 Constitution which require that when the vested property rights of such  
6 corporations have been taken or damaged for public or private use, the State must,  
7 before such taking or damaging, pay just compensation (i) into court for such  
8 corporations, secured by a bond as may be fixed by the court or (ii) into the State  
9 treasury for such corporations on such terms and conditions as are provided by  
10 statute.

11 7. The Decision is unconstitutional, in excess of the jurisdiction of  
12 the Commission and in violation of Article II, Section 17, Article III and Article VI,  
13 Section 1 of the Arizona Constitution in that:

14 A. The issue of just compensation to be paid electric public service  
15 corporations for the breach of the contract and the regulatory compact  
16 between the State of Arizona and such corporations by denying such  
17 corporations their exclusive rights to serve electricity to consumers in their  
18 respective certificated areas is an issue to be determined by the courts, not the  
19 Commission.

20 B. The Decision places unconstitutional restrictions, burdens and  
21 limitations on the right of electric public service corporations to obtain just  
22 compensation for the breach of the contract and the regulatory compact  
23 between the State of Arizona and such corporations.

24 8. The Decision is unconstitutional and in violation of Article I,  
25 Section 10, Clause 1 of the United States Constitution and Article II, Section 25 of the  
26 Arizona Constitution in that it impairs the obligations of contracts:

1           A. Between the State of Arizona and its electric public service  
2 corporations, including Applicant, who have been issued certificates of  
3 convenience and necessity by the Commission pursuant to A.R.S. §§40-281, *et*  
4 *seq.*, and are denied their exclusive right to sell electricity in their respective  
5 certificated areas, and

6           B. Between AEPCO and its Class A Members, including Applicant,  
7 which contracts are all requirements wholesale power contracts requiring  
8 such Class A Members to purchase all of their wholesale electricity from  
9 AEPCO.

10           9. The Decision is unconstitutional, in excess of the jurisdiction of  
11 the Commission and in violation of the just compensation provisions of the United  
12 States and Arizona Constitutions by confiscating the property of electric public  
13 service corporations, including Applicant.

14           10. The Decision is unconstitutional as an attempt by the  
15 Commission to establish as a public policy of the State of Arizona retail competition  
16 in the electric utility industry rather than regulated monopoly for such industry as  
17 has been the public policy of the State of Arizona since statehood, and the  
18 Commission is without jurisdiction, power or authority granted by the Constitution  
19 or the statutes of the State of Arizona or otherwise to change the public policy of the  
20 State of Arizona to permit retail competition in the electric industry.

21           11. The Decision is unconstitutional in violation of the Supremacy  
22 Clause of Article VI of the United States Constitution, Article 11, Section 3 of the  
23 Arizona Constitution, and the Rural Electrification Act of 1936, as amended, United  
24 States Code Annotated, Title 7, Chapter 31, Subchapters I and III ("RE Act") by reason  
25 of:  
26

1           A.    Loans made by the United States pursuant to the RE Act to  
2           AEPCO and to Applicant which are secured by utility realty mortgage and  
3           security agreements based upon the all requirements wholesale power  
4           contract between AEPCO and the Applicant, which loans are placed in  
5           jeopardy by the Decision by subjecting AEPCO and Applicant to defaulting on  
6           their respective loans to them made by the United States as secured by such  
7           utility realty mortgages and security agreements.

8           B.    The frustration of the RE Act by diverting the benefits of the RE  
9           Act from those intended by the RE Act to be beneficiaries to others such as  
10          electric service providers who are not intended to be beneficiaries of the RE  
11          Act and who are permitted to use the distribution facilities of the Applicant  
12          without its consent by the Decision.

13          C.    By subjecting Applicant to the loss of its income tax exemptions  
14          from the United States and Arizona, which tax exemptions are based upon  
15          the public policy of such governments for nonprofit corporations of the  
16          nature of Applicant.

17    By reason of the foregoing, the RE Act preempts the Commission pursuant to the  
18    Decision from requiring Applicant to make its distribution facilities available to  
19    electric service providers or others as set forth in the Decision, from requiring  
20    Applicant to breach its all requirements wholesale power contract with AEPCO and  
21    denying Applicant the exclusive right to sell electricity in its certificated areas.

22           12.   The Decision is unconstitutional in that there is no jurisdiction,  
23    power or authority granted to the Commission in either the Arizona Constitution  
24    or the statutes of Arizona or otherwise to adopt the Rules set forth in the Decision  
25    which purport to grant the Commission unconstitutional ratemaking authority and  
26    non-ratemaking authority.

1           13.    The Decision is unconstitutional, exceeds the jurisdiction of the  
2 Commission and violates the Due Process Clauses of each of the Fourteenth  
3 Amendment of the United States Constitution and Article II, Section 4 of the  
4 Arizona Constitution for each of the following reasons:

5           A.    The Decision is impermissibly vague, postponing for the future  
6 the determination of substantial rights of electric public service corporations,  
7 including Applicant.

8           B.    The Decision fails to give fair warning to electric public service  
9 corporations, including Applicant, of future determinations to be made by the  
10 Commission which substantially affect the rights of such corporations and  
11 lacks standards to restrict the discretion of the Commission in making such  
12 determinations and otherwise.

13           C.    The Decision provides for uncertainty with respect to certificates  
14 of convenience and necessity issued to electric public service corporations  
15 pursuant to A.R.S. §40-281 and those proposed to be issued to electric service  
16 providers pursuant to A.A.C. R14-2-1603.

17           D.    The Decision permits the confiscation of the property and vested  
18 property rights of electric public service corporations, including Applicant  
19 without providing just compensation as contemplated by the United States  
20 and Arizona Constitutions.

21           E.    The Decision deprives the electric public service corporations  
22 including Applicant of the benefits of the finality of prior decisions of the  
23 Commission in their respective ratemaking cases.

24           F.    The Decision deprives electric public service corporations  
25 including Applicant of the value of their respective certificates of  
26

1 convenience and necessity which are severely damaged or taken by the  
2 Decision.

3 G. The Decision requires each electric public service corporation  
4 owning a distribution system including Applicant to grant suppliers of  
5 electricity the right to use such system without the consent of such  
6 corporations thus constituting a taking or damaging of the property of such  
7 corporation without just compensation.

8 H. The Decision violates A.R.S. §40-252 by failing to provide  
9 Applicant with notice and an opportunity to be heard prior to the  
10 amendment of its certificates of convenience and necessity which grant  
11 Applicant the exclusive right to serve customers in its certificated areas when  
12 Applicant is ready, willing and able to furnish such customers satisfactory  
13 electric services at rates approved by the Commission that are just and  
14 reasonable.

15 14. The Decision violates the equal protection provisions of the 14th  
16 Amendment of the United States Constitution and Article II, Section 13 of the  
17 Arizona Constitution in that it does not provide equal treatment of all electric  
18 public service corporations and electric service providers in the State of Arizona and  
19 it is unconstitutionally impermissible pursuant to Article XV, Section 2 of the  
20 Arizona Constitution and otherwise to provide a different classification of such  
21 corporations and providers insofar as the Rules adopted by the Decision are  
22 concerned.

23 15. The Decision is unconstitutional and exceeds the jurisdiction of  
24 the Commission in ordering joint use of facilities of electric public service  
25 corporations including Applicant by other providers of electricity without the  
26 consent of such corporations when such joint use can only be mandated by the

1 Legislature, either directly by statute or indirectly by delegating its authority to the  
2 Commission to order such joint use pursuant to Article XV, Section 6 of the  
3 Arizona Constitution.

4 16. The Decision is in excess of the jurisdiction of the Commission  
5 by impermissibly interfering with the internal management and operations of  
6 Applicant.

7 17. The Decision violates the requirements of the Administrative  
8 Procedure Act, A.R.S., Title 41, Chapter 6, including but not limited to the  
9 provisions of A.R.S. §§41-1025, 41-1044 and 41-1057.

10 18. The manner in which the Rules were adopted in the Decision  
11 violates the requirements of the Administrative Procedure Act including but not  
12 limited to A.R.S. §§41-1022, 41-1025, 41-1044 and 441-1057.

13 19. The Decision and in particular A.A.C. R14-2-1612 violates the  
14 provisions of A.R.S. §§40-203, 40-250, 40-251, 40-252, 40-334, 40-361, 40-365 and 40-367,  
15 each of which was duly enacted by the Arizona Legislature pursuant to Article XV,  
16 Section 6 of the Arizona Constitution and constitutes a valid delegation of power  
17 and authority to the Commission in that the Decision permits the sale of electricity  
18 by others than Applicant, in its certificated areas and permits the sale of electricity by  
19 rates fixed by such others or by market determined rates rather than rates prescribed  
20 by the Commission which are contrary to such statutes.

21 20. The entire Decision, which is based entirely upon the validity of  
22 A.A.C. R14-2-1612 is unconstitutional, in excess of the Commission's jurisdiction  
23 and otherwise invalid inasmuch as A.A.C. R14-2-1612 is unconstitutional, in excess  
24 of the Commission's jurisdiction and otherwise invalid.

25 WHEREFORE, having fully stated its Application for Rehearing and Request  
26 for Stay, Applicant respectfully requests that the Commission enter its Order

1 granting the Application for Rehearing and staying the Decision, and the whole  
2 thereof, including but not limited to the Rules therein adopted pending resolution  
3 of the issues set forth herein.

4 DATED this 13th day of January, 1997.

5 O'CONNOR CAVANAGH MOLLOY JONES  
6 33 N. Stone Ave., Suite 2100  
7 P.O. Box 2268  
8 Tucson, Arizona 85702

9 By   
10 Attorneys for Applicant TRICO ELECTRIC  
11 COOPERATIVE, INC.

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**PROOF OF SERVICE**

I hereby certify that I have delivered by Federal Express on January 14, 1997,  
the original and ten (10) copies of the foregoing document for filing to:

Docket Control  
Arizona Corporation Commission  
1200 W. Washington St.  
Phoenix, AZ 85007

Further, I have this day served the foregoing document on all parties of  
record in this proceeding by mailing a copy thereof, properly addressed with first  
class postage prepaid.

DATED at Tucson, Arizona this 13 day of January, 1997.



Secretary to Russell E. Jones

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- |    |   |   |
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| 2  |   |   |
| 3  |   |   |
| 4  | General Manager   | Charles Huggins   |
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| 8  |   | Phoenix, AZ 85002   |
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