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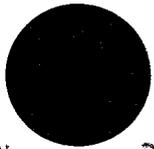
Arizona Corporation Commission

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THE ARIZONA CORPORATION COMMISSION

JAN 15 1997

AZ CORP COMMISSION



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 6 IN THE MATTER OF COMPETITION
 IN THE PROVISION OF ELECTRIC
 7 SERVICES THROUGHOUT THE
 STATE OF ARIZONA.

DOCKET NO. U-0000-94-165

RUCO'S MOTION FOR RECONSIDERATION

8

9 The RESIDENTIAL UTILITY CONSUMER OFFICE ("RUCO"), pursuant to
 10 A.R.S. section 40-253 and A.A.C. R14-3-111, hereby moves the Arizona Corporation
 11 Commission ("Commission") to reconsider Decision No. 59943 (December 26, 1996) which
 12 adopted Proposed Rules on Retail Electric Competition for the State of Arizona ("Proposed
 13 Rules").

14 Next, RUCO would request: 1) that the Commission establish a schedule for
 15 evidentiary hearings to remedy the procedural and substantive deficiencies in the Rules as
 16 explained in RUCO's Memorandum of Points and Authorities; and 2) issue a notice of
 17 proposed rulemaking, pursuant to the Arizona Procedures Act ("APA"), to amend or replace
 18 the Proposed Rules.

19 Last, many of the issues raised in the above-captioned matter have been discussed
 20 in detail in the previous comments filed in this docket. RUCO would incorporate that
 21 discussion by reference herein. Specifically RUCO's: 1) June 28, 1996 Response to
 22 Commission Staff; 2) September 12, 1996 Comments on the first draft of the Proposed
 23 Rules; 3) October 7, 1996 Exceptions to Order establishing rulemaking docket; 4) November
 24 8 and 27 Comments on the Proposed Rules; and, December 20, 1996 Exceptions to Order
 25 adopting Proposed Rules.

26 This Motion is supported by RUCO's Memorandum of Points and Authorities as
 27 follows:

28

1 It's important to focus on this reliability issue...Some people feel that the free
2 market works everything out. But we don't want to leave this one to the free
3 market to see if they will design in reliability. This is a sober wake-up call.
4 It's time to get the fundamentals correct. Nobody wants an unreliable system.
5 I want to make sure the utilities are doing what they should under council
6 guidelines - or if the guidelines should be changed. Id. [Emphasis Added]

7 RUCO believes rules that open the gates to electric competition in Arizona must also
8 include a fundamentally sound plan to deal with the impact of competition on "system
9 reliability" before the rules are given the force and effect of law. To do otherwise is to
10 leave the task of redesigning "system reliability" to the free market - and a roll of the dice.

11 Second, Proposed Rule R14-2-1607 calls for a "working group" to examine how
12 competition impacts "stranded costs". Under the rule, the Commission at its discretion, will
13 work out the reliability issues at a later time. This is unacceptable. RUCO believes that
14 unless fundamentally sound rules are adopted concerning "stranded costs", residential
15 electric ratepayers will be at risk of bearing an unfair burden of these costs. Large
16 industrial and commercial customers have much greater market power than residential
17 customers, therefore, logic dictates that the affected utilities will have greater incentive to
18 pass the cost onto residential ratepayers, rather than risk losing their large customers to
19 competitors. Also, the affected utilities have greater incentive to pass the cost onto
20 residential ratepayers rather than onto their shareholders.

21 Third, the Commission failed to certify the Proposed Rule with the Arizona Attorney
22 General pursuant to the Arizona Procedures Act ("APA") and State Statute. Consequently,
23 RUCO believes that the Rule should be submitted to the Attorney General for certification.

24 Last, the concept of regulated monopoly is a creation of the legislature and cannot
25 be unilaterally altered by the Commission. The Commission should seek from the
26 legislature the right to allow competition in the electric utility industry.

1 **II. LEGAL ARGUMENT**

2 **A. Introduction**

3 RUCO requests that the Commission reconsider its decision to adopt the Proposed
4 Rules. The Proposed Rules contain substantive and procedural deficiencies which need to
5 be addressed before the Proposed Rules are adopted. RUCO would request: 1) that the
6 Commission establish a schedule for evidentiary hearings to remedy the procedural and
7 substantive deficiencies in the Rules as explained in RUCO's Memorandum of Points and
8 Authorities; and 2) issue a notice of proposed rulemaking, pursuant to the Arizona
9 Procedures Act ("APA"), to amend or replace the Proposed Rules.

10 **B. The Proposed Rules are vague, therefore, they violate the substantive due process**
11 **rights of residential electric ratepayers.**

12 The Commission should reconsider its adoption of Proposed Rule R14-2-1613
13 (Service Quality, Consumer Protection, Safety, and Billing Requirements) and Proposed
14 Rule R14-2-1607 (Recovery of Stranded Cost of Affected Utilities). The Proposed Rules
15 are vague. The Proposed Rules, therefore, violate the substantive due process rights of
16 residential electric ratepayers.

17 The federal constitution provides that no State shall "deprive any person of life,
18 liberty, or property, without due process of law." U.S. Const. amend XIV. Likewise, the
19 state constitution provides that "No person shall be deprived of life, liberty, or property
20 without due process of law". Ariz. Const. art II, section 4. A law is unconstitutionally vague
21 if it fails to give "a person of ordinary intelligence a reasonable opportunity to know what
22 is prohibited, so that he may act accordingly or if it allows for arbitrary and discriminatory
23 enforcement by failing to provide an objective standard for those who are charged with
24 enforcing or applying the law." In re Maricopa County Juvenile Action No. JS-5209 and No.
25 JS-4963, 143 Ariz. 178, 183, 692 P.2d 1027, 1032 (App. 1984); Grayned v. City of Rockford,
26 408 U.S. 104, 92 S. Ct. 2294, 33 L.Ed.2d 222 (1972). The "general rules and regulations of
27 an administrative board or commission, have the effect of law and are binding on the
28

1 Commission and must be followed by it so long as they are in force and effect." Gibbons
2 v. Arizona Corporation Commission, 95 Ariz. 343, 347, 390 P.2d 582 (1964); Tucson
3 Warehouse & Transfer Co. v. Al's Transfer, Inc., 77 Ariz. 323, 271 P.2d 477.

4 The Proposed Rules are merely a "loose framework" of what the force and effect of
5 what the finished rule will be at a later date. A rule is defined as "an established standard,
6 guide, or regulation. Precept attaching a definite detailed legal consequence to a definite
7 detailed state of facts". Blacks Law Dictionary, (5th ed. 1979). Proposed Rule R14-2-1613
8 calls for a "working group" to examine how competition impacts "system reliability".
9 Proposed Rule R14-2-1607 calls for a "working group" to examine how competition impacts
10 "stranded costs". Under the rules, the Commission at its discretion, is authorized to work
11 out "system reliability" and "stranded cost" issues at a later time. The Proposed Rules,
12 therefore, fail to give a person of ordinary intelligence a reasonable opportunity to
13 determine the consequences of the rule and its effects on his/her electric service reliability
14 and the cost of his/her electric service. Moreover, the Proposed Rules "loose framework"
15 design fails to provide an objective standard by which the Commission will be charged with
16 enforcing or applying the rule.

17 In conclusion, the Proposed Rules grant the Commission the legal power to
18 arbitrarily and discriminately enforce the Rules. The Proposed Rules, therefore, are
19 unconstitutionally vague.

20 C. The Commission failed to comply with the Arizona Administrative Procedures Act
21 in developing the Rule.

22 The Commission failed to certify the Proposed Rule with the Arizona Attorney
23 General pursuant to the APA and A.R.S. section 41-1044 and A.R.S. section 41-1057.
24 Specifically, A.R.S. section 41-1044 requires that a Rule adopted by the Commission "shall
25 not be filed with the secretary of state unless the attorney general approves the adopted rule
26 as:

- 1 1. To form.
- 2 2. Clear, concise and understandable.
- 3 3. Within the power of the agency to adopt and within the enacted legislative
- 4 standards.
- 5 4. Adopted in compliance with the appropriate procedures."

6 The Commission has no regulatory authority except that connected to its ratemaking power.
7 Corporation Comm'n v. Pacific Greyhound Lines, 54 Ariz. 159, 94 P.2d 443 (1939). In
8 Arizona Corporation Commission v. Woods, 171 Ariz. 286, 830 P.2d 807 (1992) the Arizona
9 Supreme Court held that rules adopted by the Commission which are ratemaking in nature
10 do not require certification by the Attorney General. In arriving at this determination the
11 Court in Woods reasoned that it "must give deference to the Commission's determination
12 of what regulation is reasonably necessary for effective ratemaking." Id at 294. The
13 Commission's Proposed Rule, in the present case, is distinguishable from Woods. Although
14 certain of the Proposed Rules do refer to ratemaking, the overriding purpose of the
15 Proposed Rules is the granting of competitive certificates of convenience and necessity.
16 Moreover, the Proposed Rules neither set any specific rate nor establish procedures by
17 which rates are to be determined. Therefore, what regulation is reasonably necessary for
18 effective ratemaking is not contemplated in the Proposed Rule. RUCO believes that it
19 is improbable that Woods could have contemplated a Commission rule, regarding the matter
20 of competition in the provision of electric services throughout the state of Arizona, should
21 not be subject to the check and balance of the State Attorney General of Arizona. The
22 Proposed Rule, therefore, should be submitted to the Attorney General for certification.

23 D. The concept of "regulated monopoly" is a creation of the Legislature and cannot be
24 unilaterally altered by the Commission.

25 The concept of regulated monopoly is a creation of the legislature and cannot be
26 unilaterally altered by the Commission. In Corporation Commission v. Pacific Greyhound
27 Lines, 54 Ariz. 159, 176-177 (1939) the Court ruled that:

1 ...under the direct language of the Constitution and the police power of
2 inherent in the legislative authority, the paramount power to make all rules
3 and regulations governing public serve corporations not specifically and
4 expressly given to the commission by some provision of the Constitution, rests
5 in the legislature, and it may, therefore, either exercise such powers directly
6 or delegate them to the commission upon such terms and limitations as its
7 thinks proper.

8 Although the jurisdiction of the Commission to regulate rates charged by public service
9 corporations is derived from the Arizona Constitution. Ariz. Const. art. 15 sections 2 and
10 3. The constitution is silent as to the concept of "regulated monopoly." Mountain States
11 Telephone and Telegraph Company v Arizona Corporation Commission, 132 Ariz. 109, 114,
12 644 P.2d 263 (1982). In Mountain States, the Court ruled that "the concept the regulated
13 monopoly arose from the legislature in granting to the Commission the authority to issue
14 certificates of convenience and necessity to public service corporations." Supra. Moreover,
15 the issuing of certificates of convenience is not a plenary power of the Commission, but
16 rather, it is a "legislative power delegated to the Commission subject to restrictions as the
17 legislature deems appropriate." Tonto Creek Estates v. Arizona Corporation Commission,
18 177 Ariz. 49, 56, 864 P.2d 1081, 1088 (App. 1993). Therefore, the concept of regulated
19 monopoly is a creation of the Legislature and cannot be unilaterally altered by the
20 Commission. The Commission should seek from the legislature the right to allow
21 competition in the electric utility industry.

22 III. CONCLUSION

23 For the reasons stated above, RUCO respectfully requests that the Commission
24 reconsider its adoption of Proposed Rules. Next, RUCO would request: 1) that the
25 Commission establish a schedule for evidentiary hearings to remedy the procedural and
26 substantive deficiencies in the Rules as explained in RUCO's Memorandum of Points and
27 Authorities; and 2) issue a notice of proposed rulemaking, pursuant to the APA, to amend
28 or replace the Rules.

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RESPECTFULLY SUBMITTED this 15th day of January, 1997.


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AN ORIGINAL AND TEN COPIES of the foregoing filed this 15th day of January, 1997 with:

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