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Arizona Corporation Commission  
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BEFORE THE ARIZONA CORPORATION COMMISSION

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

DOCKET No. U-0000-94-165

CONSUMERS' OBJECTION TO RUCO'S  
REQUEST FOR EVIDENTIARY HEARING  
AND PROCEDURAL ORDER

ASARCO, Incorporated, Cyprus Climax Metals Corporation,  
and ENRON Corp. (collectively referred to herein as the  
"Consumers"), hereby oppose the Request for Evidentiary Hearing  
and Procedural Order filed on October 30, 1997, by Residential  
Utility Consumer Office's ("RUCO"). It is respectfully requested  
that the Arizona Corporation Commission (the "Commission") deny  
RUCO's Request on the basis that an evidentiary hearing is  
unnecessary and unwarranted.

RUCO's request is one which attempts to blur the line  
between two of the Commission's very separate and distinct  
functions. The Commission is vested with duties and powers in  
four distinct arenas: judicial, legislative, administrative and  
executive. It exercises its executive and administrative function  
in adopting rules and regulations, its judicial jurisdiction in  
adjudicating grievances, and its legislative power in ratemaking.  
The Commission's legislative power goes beyond strictly setting  
rates and extends to enactment of the rules and regulations that  
are reasonably necessary steps in ratemaking. Ethington v. Wright,  
66 Ariz. 382, 189 P.2d 209 (1948).

In distinguishing between legislative and judicial  
functions, the United States Supreme Court in Prentis v. Atlantic  
Coast Line Co., 211 U.S. 210, 29 S.Ct. 67 (1908) speaking of the

1 distinctions between judicial and legislative acts of the Virginia  
2 State Corporation Commission, said:

3 "A judicial inquiry investigates, declares, and  
4 enforces liabilities as they stand on present or past  
5 facts and under laws supposed to already exist. That  
6 is its purpose and end. Legislation, on the other  
7 hand, looks to the future and changes existing  
8 conditions by making a new rule, to be applied  
9 thereafter to all or some part of those subject to  
10 its power. The establishment of a rate is the making  
11 of a rule for the future, and therefore is an act  
12 legislative, not judicial, in kind \* \* \*." (emphasis  
13 added)

14 211 U.S. at 226, 29 S.Ct. at 69. This distinction between  
15 legislative and judicial functions is equally applicable to  
16 Arizona because the Arizona Constitutional provisions providing  
17 for the Commission are based, in part, upon the similar Virginia  
18 provisions. State v. Tucson Gas, Elec. Light & Power, 15 Ariz.  
19 294, 300, 138 P. at 783, 786 (1914). The Commission had the  
20 authority to promulgate the Retail Electric Competition Rules,  
21 A.A.C. R14-201601 through R14-2-1616 (the "Rules"), under its  
22 constitutionally granted legislative ratemaking power, it is not a  
23 part of its judicial power. See Arizona Corp. Comm'n v. State ex  
24 rel Woods, 171 Ariz. 286, 830 P.2d 807 (1992). It is this  
25 legislative act, the adoption of the Rules, that RUCO now seeks to  
26 subject to evidentiary hearings. This would be inappropriate.

27 A review of the issues RUCO requests be subject to the  
28 evidentiary hearing reveal that RUCO is trying to relegate far-  
reaching public policy decisions to a determination based upon  
narrow, fact-specific presentations by interested parties' paid  
experts. For instance, who will serve as the provider of last  
resort in the competitive system is a policy decision, not a fact  
question. Similarly, whether stranded costs should be shared by

1 investors and customers is a policy decision, not a fact question.  
2 This is also the case with whether customer rates must be  
3 unbundled in a revenue-neutral-manner and whether a rate cap will  
4 be set. Likewise, the determination of whether an Independent  
5 System Operator ("ISO") is the appropriate way to safeguard  
6 reliability. On each of these issues the interested parties,  
7 consumers and Commission Staff have already submitted their legal,  
8 factual, and, in many instances, their experts' opinions. Nothing  
9 but delay is to be gained from further submissions and hearings.  
10 It is submitted that gaining a delay of competition is one purpose  
11 for the requested hearings as is evidenced by the second issue  
12 listed in RUCO's motion: "Is January 1, 1999, a feasible "start  
13 date" for competition?"<sup>1</sup> (Motion at page 3)

14 An evidentiary hearing is completely unnecessary for  
15 the Commission to complete its legislative act of implementing  
16 competition in Arizona. Evidentiary hearings are done only in the  
17 performance of judicial proceedings and determinations. Granting  
18 such hearings in the legislative arena would serve to give those  
19 that oppose the implementation of competition in the generation  
20 market another arrow in their quiver to argue that the Commissions  
21 Rules, since based upon a formal evidentiary hearing, are subject  
22 to standard judicial review, thereby lessening the Commission's  
23 legislative autonomy in this arena. If the request for a hearing  
24 is granted, it will simply delay implementation of competition and  
25 broaden the limited scope of review which may be made of the

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26 <sup>1</sup> The Commission should note that the only other parties who have  
27 suggested evidentiary hearings are the utilities. See footnote 1 in  
28 RUCO's Motion. It is the Utilities that have much to gain by the  
delay in the implementation of competition which would be caused by  
evidentiary hearings.

1 Commission's Rules. Neither of these results is in the best  
2 interests of the public, those consumers of electricity who are  
3 the patrons of the public service companies now asking for the  
4 hearings.

5           The Commission has the exclusive power to exercise the  
6 duties given it by the Arizona Constitution in Article 15, § 3.  
7 State v. Tucson Gas, Electric Light and Power Co., 15 Ariz. 294,  
8 138 P. 781 (1914). The fundamental tenet guiding the Commission  
9 in the execution and performance of its duties and activities is  
10 that the Commission is required to use its powers to regulate  
11 public service corporations in the public interest. Southern P.  
12 Co. v. Arizona Corp. Comm'n, 98 Ariz. 339, 342, 404 P.2d 692, 694  
13 (1965). It was long ago established that "[t]he Commission was  
14 not designed to protect public service corporations and their  
15 management but, rather, was established to protect our citizens  
16 from the results of speculation, mismanagement, and abuse of  
17 power." Arizona Corp. Comm'n v. State ex rel Woods, 171 Ariz. at  
18 296, 830 P.2d at 817. Accordingly, the Commission must look to  
19 what is best for the public interest in the implementation of  
20 competition in Arizona. The results of that inquiry dictate that  
21 the Commission move forward with its present schedule to implement  
22 competition under the existing Rules and timetables.

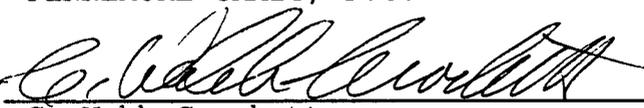
23           All interested parties, including RUCO, have had ample  
24 opportunity to submit reports, evidence and legal positions to the  
25 Commission. Indeed, mountains of paper have been submitted on the  
26 very issues RUCO now suggests need to be considered through  
27 lengthy and arduous evidentiary hearings. Study groups and  
28 committees have met. Interested parties have caucused. Reports

1 have been written, responses and rebuttal have been served. The  
2 Commission has spoken. The Rules should now be closed and the  
3 interested parties and consumers should move forward as the  
4 Commission has ordered.<sup>2</sup> There will be a time and place for the  
5 necessary factual determinations to be made for which an  
6 evidentiary hearing will be appropriate, i.e., the amount of a  
7 utility's stranded costs. Now is not that time.

8 For all of the foregoing reasons, it is respectfully  
9 requested that the Commission deny the request for evidentiary  
10 hearings.

11 DATED this 13th day of November, 1997.

12 FENNEMORE CRAIG, P.C.

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28 <sup>2</sup> The Commission has reopened the Rules for a very limited purpose of  
considering possible modifications to a limited portion of the Rules.  
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1 ORIGINAL AND TEN COPIES  
2 of the foregoing hand-delivered  
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