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BEFORE THE ARIZONA CORPORATION COMMISSION
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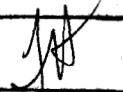
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IN THE MATTER OF COMPETITION IN THE
PROVISION OF ELECTRIC SERVICES
THROUGHOUT THE STATE OF ARIZONA

DOCKET NO. U-0000-94-165

**RUCO'S RESPONSE TO
OBJECTIONS TO RUCO'S
REQUEST FOR EVIDENTIARY
HEARING AND PROCEDURAL ORDER**

On October 30, 1997, the Residential Utility Consumer Office ("RUCO") filed a Request for Evidentiary Hearing and Procedural Order with the Arizona Corporation Commission ("Commission"). On November 13, 1997, ASARCO Incorporated ("ASARCO"), Cyprus Climax Metals Corp. ("Cyprus"), and ENRON Corp. ("ENRON") jointly filed an objection to RUCO's October 30 Request. Also on November 13, 1997, ECC filed objections to RUCO's October 30 Request. This Response addresses both sets of objections.

Introduction

Although the Commission has been dealing with deregulation in the telecommunications industry for several years, electric industry restructuring presents the Commission with unprecedented issues both substantively and procedurally. Procedurally, unlike telecommunications industry deregulation, Congress has issued no federal law that directs the process of the implementation of retail electric competition. Substantively, while telecommunications and electricity are both utility industries, electric restructuring differs from telecommunications deregulation in that electric power is an indispensable product in a way that telephone service is not. In Arizona, lack of telephone service poses a major inconvenience; lack of electricity is life threatening. Life can go on, to a certain extent, without telephones.

1 Without electricity, business, traffic, climate control, and life support systems come to a
2 complete stop.

3 Implementation of of retail electric competition is an unprecedented change that calls for
4 an adaptation of traditional regulatory law to the new regulatory environment. Propitiously, the
5 Retail Electric Competition Rules ("Rules") embody a mechanism for this.¹ RUCO believes that
6 while the Commission is not required by law to hold evidentiary hearings on modifications to the
7 Rules proposed by the various interested parties affected by the Rules, the Commission does
8 have the authority to order such evidentiary hearings, and that it is in the best interest of all
9 electric consumers that such hearings be held.

10 **Evidentiary Hearings on Non-Consensus Issues Are In the Best Interest of the Public.**
11

12 RUCO is in full agreement with ASARCO, Cyprus and ENRON that "the Commission must
13 look to what is best for the public interest in the implementation of competition in Arizona."
14 (ASARCO, Cyprus and ENRON Objection at 4.) Electric restructuring will require major changes
15 in the industry in order to preserve the safety and reliability that consumers currently depend
16 upon. The electric restructuring process is technical and complicated. The Commission lacks
17 guiding precedent in this groundbreaking territory. The Rules reflect foresight of these unique
18 aspects of the electric restructuring process in that the framework of the Rules allows for expert
19 guidance and input into this important rulemaking process.² While the working groups have
20 identified factual issues in dispute among the participants, RUCO believes that it is in the best
21 interest of the public to insure that the Commission have access to the factual assertions of all
22 the various interests by means of an on-the-record proceeding so that it may best resolve those
23 disputes of fact that are material to the Rules.
24

25 ¹A.A.C. R14-2-1601 et seq. The Rules as drafted contemplate further action to be taken by the
26 Commission after evaluation of the working group reports. See, e.g., A.A.C. R14-2-1607(F) ("The Commission
27 shall consider the recommendations and decide what actions, if any, to take based on the recommendations.").

28 ²As required by the Rules, working groups comprised of stakeholder representatives have met under the
direction of Utilities Division Staff personnel, who have prepared Reports from the working groups.

1 As retail electric competition becomes a reality, the Commission has a duty to ensure that
2 consumers can continue their current reliance on the integrity of our electric service delivery
3 system. The Commission also has a duty to ensure that residential consumers will not bear a
4 disproportionate share of the costs of the transition to competition. RUCO believes that the
5 Commission can best fulfill its duties to electric consumers by holding evidentiary hearings on
6 non-consensus issues in the Rules. RUCO's requested evidentiary hearings would not require
7 the Commission to deviate from its contemplated schedule.³

8 **The Commission's Constitutional Rulemaking Authority Includes the Power to Hold**
9 **Evidentiary Hearings.**

10 ASARCO, Cyprus and ENRON assert that by holding evidentiary hearings in a
11 rulemaking proceeding, the Commission would inappropriately be exercising its judicial power.
12 This is simply not the case. The Commission's legislative ratemaking power extends to
13 enactment of the rules and regulations that are reasonable necessary steps in ratemaking, and
14 the Commission may exercise all powers which may be necessary or essential in connection
15 with the performance of its duties. *Arizona Corp. Comm'n v. State ex rel Woods*, 171 Ariz. 286,
16 294, 830 P.2d 807, 815 (1992). The Commission's legislative authority gives it the discretion
17 to hold legislative-type evidentiary factfinding hearings.

18 The Commission's electric restructuring rulemaking decisions involve very important
19 policy decisions. It is true that normally, Commission rules reflecting policy decisions need not
20 be based on specific factual findings by the Commission. The Retail Electric Competition Rules
21 present a very special circumstance, however. Here, broad questions of policy are interfused
22 with relatively specific technical fact issues. It is RUCO's position that these special technical
23 fact issues cannot be adequately ventilated under general rulemaking procedures.

24 Evidentiary hearings are proper when disputed questions of fact that bear on policy
25 questions can be resolved by taking evidence. See Kenneth C. Davis, *Administrative Law of*

26
27 ³On August 29, 1997 the Commission unanimously ordered that the Rules docket be reopened. Decision
28 No. 60351 at 3. The Commission at that time contemplated that the Hearing Division could issue procedural
orders establishing hearings regarding any aspect of electric competition. *Id.* at 4.

1 the Eighties § 12:10, at 333 (1989). Fairness dictates that the Commission should exercise its
2 discretionary legislative authority to implement evidentiary hearings in which all stakeholders
3 are allowed the right of cross examination. It has been stated in the context of a rulemaking that
4 "a right of cross examination, consistent with time limitations, might well extend to particular
5 cases of need, on critical points where the general procedure proved inadequate . . ." *Int'l*
6 *Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 631 (D.C.Cir. 1973).⁴ The electric restructuring
7 rules, because they involve regulations concerning the means of instituting competitive practices
8 in a formerly regulated environment, present a particular case of need for evidentiary hearings
9 with a right of cross examination. RUCO's Request for Evidentiary Hearing enumerated several
10 material factual issues which can be resolved by taking evidence. (Request at 3.)

11 **Implementation of Evidentiary Hearings Should Not Delay the Start Date For Competition.**

12 RUCO believes that residential consumers will ultimately benefit from an orderly transition
13 to a truly competitive electric industry, and agrees with ASARCO, Cyprus and ENRON that the
14 Commission should move forward with its present schedule to implement competition. RUCO
15 maintains that there is room in the present schedule for timely evidentiary hearings which will
16 not delay the start date of competition in Arizona.

17 Consumers and suppliers alike will benefit from a timely, well-informed rulemaking
18 process. RUCO believes that rather than delaying competition, timely administered evidentiary
19 hearings will promote efficiency in the transition to competition, and will bring about a truly
20 competitive environment sooner than if the Commission were to forego a thorough factfinding
21 process before closing the rulemaking process. RUCO believes that with an expedited
22 procedural schedule, evidentiary hearings could be completed during the first quarter of 1998.

23 RUCO does not wish to delay the start date of competition in Arizona. The key to
24 successful implementation of competition for residential electric consumers is adequate
25

26
27 ⁴ One approach would be to submit written cross-examination questions in advance to the hearing officer
28 for screening to avoid irrelevance and repetition and to aid in scheduling and allocation of available time among
the various participants and interests. The court in *Int'l Harvester* approved this administrative technique as
reasonable and comporting with basic fairness.

1 consumer education, which should begin at least six months before competition begins.
2 Therefore it is in the best interest of residential consumers for the Rules to be finalized as soon
3 as possible so that the customer education process can begin soon enough to be effective.
4 The sooner factfinding hearings are completed and the resulting final Rules are promulgated,
5 the sooner the vital process of consumer education can begin.

6
7 **Evidentiary Hearings Will Reduce, Not Increase, the Threat of Delay of Competition
Through Litigation.**

8 Contrary to ASARCO, Cyprus and ENRON's assertion, hearings will not "lessen the
9 Commission's legislative autonomy." On-the-record hearings will not subject the Rules to a
10 broadened scope of judicial review. On the contrary, having opposing viewpoints subjected to
11 cross examination on the record will assure that the Commission's ultimate decision is supported
12 by substantial evidence. Rather than opening the Rules to collateral attack, as both the ECC
13 and the ASARCO, Cyprus, and ENRON Objections suggest, if the Commission bases its
14 decision on such substantial evidence, it is highly unlikely that a court would entertain the
15 possibility of replacing the Commission's judgment with its own. See *Talley v. Paradise*
16 *Memorial Gardens, Inc.*, 107 Ariz. 585, 587-88, 491 P.2d 439 (1971).

17
18 **Evidentiary Hearings Need Not Address the Authority of the Commission to Adopt the
Rules.**

19 ASARCO, Cyprus and ENRON claim that RUCO seeks to subject the Commission's
20 adoption of the Rules to evidentiary hearings. (ASARCO, Cyprus and ENRON Objection at 2.)
21 This assertion constitutes a gross mischaracterization of RUCO's Request. Nowhere in RUCO's
22 Request does RUCO in any fashion dispute the Commission's authority to promulgate the Rules
23 under its legislative ratemaking powers. RUCO's Request asks only that the Hearing Division
24 establish hearings in order to aid the Commission in resolving unsettled aspects of how the
25 electric restructuring process will proceed within the framework of the Rules. The Commission
26
27
28

1 has already contemplated the necessity of such evidentiary hearings, and RUCO is merely
2 asking that such evidentiary hearings be ordered.⁵

3

4 **Conclusion**

5 The Commission's legislative ratemaking powers include the discretionary authority to
6 conduct evidentiary hearings in connection with rulemaking. Evidentiary hearings should not
7 cause any procedural delay in implementation of the Rules. RUCO hopes that the Commission
8 will order a short deadline by which all evidence must be received on disputed factual issues
9 in order to facilitate timely decisions. Rather than delaying implementation of the Rules, a
10 speedy and efficient hearing process will actually speed the implementation of true electric
11 industry competition in Arizona.

12 RESPECTFULLY SUBMITTED this 21st day of November, 1997.

13

14


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⁵In August of 1997, based on the working group discussions that had taken place at the time, Commission Utilities Staff requested "that the Commission direct the Hearing Division to produce procedural orders to establish hearings, evidentiary or otherwise, regarding any aspect of electric competition that is necessary and appropriate." Decision No. 60351 at 3. The Commission concluded that Staff's recommendations were reasonable and should be unanimously adopted. *Id.* at 3.

27

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