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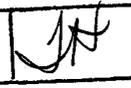
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Arizona Corporation Commission

DOCKETED

DEC 19 1997

DOCKETED BY 

Attorneys for: Salt River Project

BEFORE THE ARIZONA CORPORATION COMMISSION

11 JIM IRVIN
12 COMMISSIONER-CHAIRMAN
13 RENZ D. JENNINGS
14 COMMISSIONER
15 CARL J. KUNASEK
16 COMMISSIONER

16 IN THE MATTTTER OF THE COMPETITION) DOCKET NO. U-0000-94-165
17 IN THE PROVISION OF ELECTRIC)
18 SERVICES THROUGHOUT THE STATE OF) SRP'S OBJECTION TO PROCEDURAL
19 ARIZONA.) ORDERS AND REQUEST FOR NEW A
20) NEW PROCEDURAL ORDER

SRP's Request

21 SRP has not sought intervention in the adjudicatory phase of this docket created by the
22 recent procedural orders.¹ SRP does not accept intervention, and is not a party to this
23 adjudicatory phase. While SRP has a strong interest in continuing its participation in the
24

25 _____
26 ¹ SRP specifically refers to the Procedural Order dated December 1, 1997 and the First Amended Procedural Order dated December 11, 1997.

1 Commission's rule making process, it is not appropriate for SRP to be involved in a quasi-judicial
2 proceeding before the Commission.

3 SRP requests that the procedural orders be amended to restructure this docket as a
4 legislative proceeding. By changing the process back to one of rule making, the Commission will
5 achieve full participation by all interested parties, including SRP.

6 SRP's interest in these proceedings is to further the statewide debate over the appropriate
7 means and methods to transition to a competitive electric market. While SRP is not regulated by
8 the Commission, it is important that the various parties, regulated and non-regulated freely
9 express their views. The result will thus be better reasoned and will lead to statewide
10 coordination of the transition and competitive process.

11 On the other hand, it is not appropriate for SRP to involve itself in adjudicatory
12 proceedings before the Commission, especially where the process involves specific data and
13 information of the regulated public service corporations. It is quite likely that the proceedings will
14 mix rule making with the process of producing and considering specific numbers and projections
15 of the various utilities, in an adversarial format.

16 Also, SRP suggests that an adjudicatory format imposes a chilling effect on broad
17 participation in the rule making process. SRP believes that in a legislative process, there should
18 be no restrictions on participation, no requirement that participants be represented by lawyers, no
19 requirement of pre-filed sworn testimony, no discovery, and no cross examination. Those
20 participants without sufficient resources will simply be shut out.

21 SRP requests that the procedural order be modified so that further refinement of the rules
22 take place through a legislative process. In this process, the parties should have the freedom to
23 introduce any information, statements or suggestions which would tend to assist in the rule
24 making process, without a great deal of restriction.

1 If the Commission wishes to begin an adjudicatory process to determine specific stranded
2 cost issues, the Commission should open a separate docket for this purpose. This docket could
3 begin as a single docket, or could proceed utility-by-utility.

4 **SRP's Request is Consistent with the Commission's Own Assertions**

5 The Commission itself has asserted, in the Court of Appeals, that this docket is rule
6 making, and it is not an evidentiary proceeding. In fact, the Commission has extolled the virtues
7 of the open process, and has stated that an evidentiary process would be contrary to the practices
8 of the Commission, and would not be "desirable".

9 Specifically, in its March 24, 1997, Response To Motion To Dismiss in *Arizona Electric*
10 *Power Cooperative, Inc. v. Arizona Corporation Commission*, No. 1 CA-CC 97-0009, the
11 Commission stated:

12 Decision No. 59943 [adopting the competition rules] promulgates rules pursuant to the
13 Commission's executive, administrative authority. *See Arizona Corporation Commission*
14 *v. State ex rel. Woods*, 171 Ariz. 286, 289, 830 P.2d 807, 810 (1992). The Commission
15 encouraged the public to comment on any issue and through any medium which *the public*
16 deemed appropriate. The Commission does not require the public to comment on rules
17 pursuant to an evidentiary standard in the sense that a court may limit or admit testimony
18 or documents in a trial. An evidentiary hearing, in the judicial sense, is not a practicable or
19 desirable rule-making procedure.

20 SRP requests that the Commission follow its own specific rules and representations.

21 **SRP's Request is Consistent with the Administrative Procedures Act**

22 The Administrative Procedure Act, A.R.S. § 41-1001 *et seq.*, applies to this rule making
23 process, by the Commission's own judicial admission. The APA distinguishes between rule
24 making and contested cases:

25 "Contested case" means any proceeding, including rate making, price fixing and licensing,
26 in which the legal rights, duties or privileges of a party are required or permitted by law to
be determined by an agency after an opportunity for an administrative hearing.

"Rule" means an agency statement of general applicability that implements, interprets or
prescribes law or policy, or describes the procedure or practice requirements of an agency.

1 Rule includes prescribing fees or the amendment or repeal of a prior rule but does not
2 include intra-agency memoranda that are not delegation agreements.

3 "Rule making" means the process for formulation and adoption of a rule.

4 A.R.S. § 41-1001, subparts (5), (18), and (19).

5 The APA sets forth very different requirements for rule making proceedings and contested
6 cases. Article 3 (A.R.S. § 41-1021 *et seq.*) of the APA sets out the procedures for rule making.

7 Among the procedures are:

- 8 • Informal meetings to discuss the proposed rule making action
- 9 • Solicitation of comments, suggested language or other input
- 10 • Opportunity to submit comments, suggested language or other input
- 11 • Opportunity for oral comment
- 12 • Proceedings open to the public
- 13 • A presentation of a summary memorandum by the presiding officer

14 A.R.S. § 41-1023.

15 The APA procedures for a contested case are quite different. These procedures include:

- 16 • Proceedings conducted in a hearing format
- 17 • A right to be represented by counsel
- 18 • Presentation of evidence
- 19 • Judicial notice of facts
- 20 • Testimony under oath
- 21 • Subpoena power to compel attendance of witnesses and document production
- 22 • Pre-hearing depositions and subpoenas
- 23 • A right to conduct cross-examination

24 A.R.S. § 41-1062. Clearly, the procedural orders have created a proceeding which is inconsistent
25 with rule making under the APA.

1 Conclusion

2 In conclusion, SRP requests that these rule making proceedings be conducted according
3 to the Commission's own policies and the requirements of law. Specifically, SRP requests that
4 the procedural orders be modified to reflect the procedures appropriate to rule making. Until that
5 time, SRP does not accept intervention in this phase of this docket, and is not a party.

6 DATED this 19th day of December, 1997

7 JENNINGS STROUSS & SALMON, P.L.C.

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9
10 By 

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13 IMPROVEMENT AND POWER DISTRICT

14 By Jane D. Alfano
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