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OF COUNSEL TO
MUNGER CHADWICK, P.L.C.

November 30, 2007

Docket Control
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Arizona Corporation Commission
DOCKETED
DEC -3 2007

DOCKETED BY
nr

Re: Sempra Energy Solutions LLC
Docket No. E-03964A-06-0168

To Whom It May Concern:

Enclosed for filing in the above-referenced docketed proceeding are the original and thirteen (13) copies of a Motion To Strike Testimony ("Motion") on behalf of Sempra Energy Solutions LLC.

Also enclosed are two (2) additional copies of the Motion. I would appreciate it if you would "filed" stamp the same and return them to me in the enclosed addressed and prepaid envelope.

Please let me know if you have any questions. Thank you for your assistance.

Sincerely,

Angela R. Trujillo

Secretary

Lawrence V. Robertson, Jr.

1 expand the issues in this proceeding far beyond what is necessary to address and decide SES'
2 Application. Indeed, NWEK/RUCO are, in effect, asking the Commission to rule on the
3 question of whether there should be retail direct access available in Arizona at all. The
4 postulation of that question ignores the express language of A.R.S. §§ 40-207 and 40-208. More
5 specifically, Arizona law already provides for retail direct access and thus, the penumbra of
6 issues raised in the NWEK/RUCO testimony are clearly beyond the scope of SES' application,
7 are irrelevant and should not be made a part of the record in this proceeding.

8 SES is aware that the assigned Administrative Law Judge ("ALJ") has issued a
9 Procedural Order designating January 14, 2008 as the date whereby objections to pre-filed
10 testimony are to be submitted. However, in the interest of timely addressing the issues and
11 conserving the resources of the Commission, Staff, Intervenors and SES, SES believes it is
12 prudent to file the instant motion at this stage of the proceeding. Accordingly, SES respectfully
13 requests that the assigned ALJ issue a ruling as soon as is practicable in order to minimize the
14 burden on all parties in preparing responsive testimony, since one or more parties may otherwise
15 intend to respond to the NWEK/RUCO testimony that is the subject of this motion.

16 II. ARGUMENT

17 A. The NWEK/RUCO Testimony does not Address the SES Application at all

18 In its Application as amended, SES requests relief in the form of a CC&N to provide
19 competitive electric generation service to Arizona retail customers. SES' request was made in
20 conformance with A.R.S. §40-208, which provides that the service territories of Arizona's
21 incumbent electric utility companies are to be open to competition in the provision of such
22 service by "any electric supplier that obtains a certificate from the commission pursuant to section
23 40-207 or any public power entity." In turn, A.R.S. § 40-207 requires electricity suppliers to
24 obtain a CC&N from the Commission before offering electricity for sale to retail customers, and
25 SES has specifically sought such authority under A.R.S. §§ 40-201 through 40-203, 40-207, 40-
26 281 et seq., and A.A.C. R14-2-202.

1 NWEC/RUCO have each either offered no opinion, or only a cursory opinion, on the
2 merits of SES' application.² For example, the Fox-Penner testimony does not mention SES at
3 all. The Graves testimony provides a short statement that SES "appears to be well qualified," but
4 provides no analysis of SES' qualifications or the aforementioned core issues. The Ahearn
5 testimony indicates that it "is in no way meant to comment upon the fitness of the applicant for
6 this or any other license or permit issued by the Commission, now or in the future." By failing to
7 address the three (3) core issues, the NWEC/RUCO testimony is of no probative value to the
8 Commission.

9 The NWEC/RUCO testimony might be of value to this record if the issues it addressed
10 were related in some way to issues within the scope of the proceeding. However, the breadth of
11 issues discussed in the testimony is so broad and general in nature, as well as in conflict with
12 existing Arizona law, that its admission conceivably could deprive SES, and perhaps other
13 affected parties, of due process of law

14 **B. The NWEC/RUCO Testimony Addresses Issues that are Either Beyond the Scope of**
15 **SES' Application or Irrelevant, and Should be Stricken**

16 In contrast to addressing SES' fitness to provide direct access service to Arizona retail
17 consumers as an ESP and the rates to be charged therefore, the NWEC/RUCO testimony would
18 divert the issues in this proceeding to address (i) whether retail direct access is good for Arizona
19 as a matter of public policy, (ii) the broad design of a retail choice program, including the design
20 of default Standard Offer Service, (iii) customer price risk, (iv) recovery of stranded generation
21 costs by incumbent utilities, (v) expanded regulatory oversight, and (vi) a survey of experiences
22 to date with direct access in the United States. While any of these issues might have some
23 relevance to the design and implementation of a retail choice program *ab initio*, the facts are that
24 (i) Arizona has already opened its doors to retail choice by an act of the Legislature, (ii) the
25 Commission already has experience in evaluating the qualifications of prospective ESPs, and
26

27 ² See Ahearn testimony at 1:21-2:2, Graves testimony at 7:2-4. The Fox-Penner testimony makes no mention of SES
28 at all, save for the caption. Despite the fact that the NWEC/RUCO testimony can be read at various points as
expressing some measure of support for the SES application, SES nonetheless urges the assigned ALJ to strike the
NWEC/RUCO testimony in its entirety.

1 (iii) the provision of Standard Offer Service and recovery of stranded generation costs have
2 already been provided for in prior decisions of the Commission. There is neither a requirement
3 nor a need to revisit these issues in order to grant a CC&N to SES. In fact, aside from the issues
4 of SES' fitness to receive an ESP CC&N and the reasonableness of its proposed rates and
5 conditions of service, the other issue in this proceeding is whether the Commission can comply
6 with the *Phelps Dodge* decision incident to considering and acting upon SES' amended
7 Application. In the *Phelps Dodge* decision, the Arizona Court of Appeals concluded that the
8 Commission had failed to determine a "fair value" rate base for ESPs in its prior CC&N
9 decisions for ESPs, and had failed to utilize that value in setting ESP rates.

10 The Fox-Penner testimony provides a survey of retail choice in nineteen (19) states and
11 the District of Columbia, including a number of observations about pricing and market structure
12 that are unrelated to SES' application. In fact, the testimony appears to be completely generic in
13 nature, such that it could be filed in practically any jurisdiction and proceeding. Nowhere does
14 the Fox-Penner testimony address SES' proposed rates, the determination of "fair value" for
15 SES' Arizona assets, or how the Commission should make use of any such fair value
16 determination in the course of reviewing SES' application. It is solely an academic work that
17 summarizes Dr. Fox-Penner's prior publications.³ SES does not take any position at this time on
18 the substance of the Fox-Penner testimony, but reiterates that the issues discussed therein are (i)
19 irrelevant to SES' Amended Application, (ii) outside the scope of the instant proceeding, and (iii)
20 therefore should be stricken.

21 The Graves testimony starts with a false assumption, namely, that direct access has been
22 canceled in Arizona.⁴ From this premise, the Graves testimony goes on to offer a comprehensive
23 review of what it considers to be the critical design elements of a retail choice program. In
24 particular, the Graves testimony urges the Commission to address five (5) issues before ruling on
25 SES' application. Significantly, it does so (i) without appearing to give any consideration to the
26 fact that the Commission in fact conducted a lengthy rulemaking on retail choice some time ago,

27 ³ Dr. Fox-Penner concedes as much in the fourth question and answer on page 1 of his testimony.

28 ⁴ Graves testimony at 3:11-12 referring to "Arizona's readiness to reinstitute retail electric competition." [emphasis added]

1 and (ii) without referring to any changed circumstances or other condition that might necessitate
2 the Commission revisiting the issues or modifying the rules relating to retail choice.

3 The five (5) issues addressed in the Graves testimony are (i) setting goals and
4 expectations, (ii) the design of default Standard Offer Service, (iii) “efficient pricing” for some
5 portion of end-use demand, (iv) resource pricing and stranded cost recovery, and (v) procedures
6 for assessing the technical and financial capabilities of prospective ESPs and clarifying the
7 Commission’s ongoing monitoring of ESPs and consumer protection responsibilities. However,
8 there is no linkage between these five (5) issues and SES’ Amended Application. To the
9 contrary, in addressing the merits of SES’ Amended Application, the Graves testimony offered
10 only the following:

11 “Q. How do these concerns relate to the SEMPRA [sic]
12 application?

13 A. The SEMPRA [sic] application would reinstate retail
14 access to Arizona. The applicant itself appears to be very well
15 qualified and should be a welcome participant in a properly
16 structured setting for retail access to occur. However, many of
17 these important aspects of designing a viable program of retail
18 choice have not been adequately considered. Given the
19 widespread frustration that has been experienced elsewhere with
20 retail access – so much so that many states are considering
21 rescinding it – it would seem prudent for Arizona to be more
22 methodical about laying the foundation for this complex, but
23 potentially beneficial market arrangement. Each of these issues is
24 discussed below in corresponding sections of the balance of my
25 testimony.”⁵

26 From the answer, one can readily ascertain that the testimony does not relate to the SES’
27 Amended Application at all. Rather, it is an invitation for the Commission to open an entirely
28 new broad-based rulemaking to consider retail choice *ab initio*. This is both inapposite and
ignores the Commission’s previous consideration of such matters. There is no requirement or
need for the Commission to undertake a new rulemaking at this time, as the Graves testimony
implicitly requests. Moreover, competing expert projections of market impacts and market
conditions are no substitute for real life experience. The Commission will be in a much stronger

⁵ Graves testimony at 7:1-11 [emphases added].

1 position to evaluate market effects of retail choice once there are actually certificated ESPs doing
2 business in the State.

3 Furthermore, the first of the five (5) Graves' issues is so broadly worded that it has no
4 practical value in this proceeding. If the Legislature or the Commission wishes to further refine
5 or revisit the goals and expectations of retail choice, either is free to do so and may initiate an
6 appropriate course of action. However, the present statutory and regulatory goals and
7 expectations constitute no barrier to the issuance of an ESP CC&N to SES, and therefore need
8 not be re-examined in this proceeding.

9 As to the second issue, Standard Offer Service, that service is available pursuant to
10 A.A.C. R14-2-1606 through the affected Utility Distribution Company ("UDC") on rates and
11 terms set by the Commission and embodied in the UDC's tariffs.

12 The third issue, "efficient pricing" through exposure of end-use customers to some
13 measure of short-term pricing may be a worthy goal in economic theory, but is generally
14 antithetical to a regulator's desire to protect customers from high prices as much as possible. In
15 any event, existing mechanisms such as the recently approved fuel and purchased power adjuster
16 mechanism of Arizona Public Service Company ("APS") perform this role, and further
17 consideration of such a mechanism can take place in other proceedings before the Commission,
18 such as the current general rate case for Tucson Electric Power Company ("TEP").

19 The fourth issue, recovery of utility stranded costs, was addressed when the Commission
20 issued A.A.C. 14-2-1607, and both APS and TEP have either recovered those costs already or
21 soon will. This issue is thus moot.

22 The last issue, procedures for assessing ESP technical and financial capability and
23 clarifying the Commission's role in the ongoing monitoring of ESPs and of the retail markets, is
24 also moot. More specifically, the previously granted ESP CC&Ns were invalidated because of
25 the Commission's failure to determine and take into account the "fair market" value of the ESPs'
26 Arizona assets, and not because the Commission lacked the authority, competence or criteria to
27 perform such a task. SES filed the Amended Application under A.R.S. §§ 40-201 through 40-
28 203, 40-207, 40-281 et seq., and A.A.C. R14-2-202, which are the provisions applicable to the

1 issuance of a CC&N to an electric public service corporation. In its consideration of SES'
2 Application under these authorities, the Commission is fully capable of delineating its oversight
3 role and both determining and applying the relevant constitutional, statutory and regulatory
4 criteria to SES. There is simply no reason for the Commission to undertake a rulemaking at this
5 time in order to develop new criteria governing the granting of CC&Ns for ESPs. The issuance
6 of CC&Ns is part of the Commission's ongoing constitutional and statutory duties, and it is fully
7 equipped to perform that task under the authorities cited and its prior experience in considering
8 applications for CC&Ns, including those for ESPs.

9 In its Motion to Intervene filed on July 20, 2007, NWEAC characterized SES' application
10 and the Staff recommendation to grant the application as "begin[ning] retail competition again"
11 and indicated that it intended to "raise issues that are appropriate" to the CC&N and the
12 "resumption of competition in Arizona."⁶ However, even when read in a light favorable to the
13 basis upon which NWEAC requested intervention, the NWEAC testimony raises issues that are
14 unnecessary to the consideration of SES' Amended Application and well beyond the scope of
15 that Amended Application. Those issues have either already been decided or addressed by the
16 Legislature and the Commission, or are in the nature of a general rulemaking and beyond what is
17 necessary to consider in granting a CC&N to SES. In addition, NWEAC fails to address at all the
18 issues of SES' technical and financial competence and the justness and reasonableness of SES'
19 proposed rates and conditions of service. Therefore, the NWEAC testimony should be stricken in
20 its entirety.

21 NWEAC will still have the opportunity to participate in this proceeding through cross-
22 examination of the witnesses for parties who have filed testimony thus far. In addition, it will
23 have the opportunity to file rebuttal testimony that raises appropriate issues at such time as the
24 Assigned ALJ may direct in response to the Staff's recently-filed Motion to Continue. NWEAC
25 will therefore not be prejudiced by the granting of SES' Motion to Strike Testimony.

26 With regard to the Ahearn (or RUCO) testimony, it suffers from the same defects
27 respecting the issues it raises. More specifically, Mr. Ahearn offers testimony "from a public
28

⁶ NWEAC Motion to Intervene dated July 20, 2007 at 2:7-8 and 2:11-12 [emphases added].

1 policy perspective only and ... the concept of retail electric competition generally.”⁷ Mr.
2 Ahearn’s testimony is best summarized by its statement that “RUCO believes the time is beyond
3 ripe for the Commission to end once and for all the regulatory equivocation with respect to retail
4 competition in the state of Arizona.”⁸ As discussed above, the public policy of the State of
5 Arizona, as expressed by the Legislature, is that “a competitive market shall exist in the sale of
6 electric generation service.” Further in that regard, the Legislature has directed the Commission
7 to implement such competition by (i) opening the service territories of the existing electric public
8 service corporations to competition from competitive suppliers and (ii) establishing reasonable
9 requirements for certificating and regulating ESPs. In short, the Ahearn testimony raises issues
10 that are beyond the Commission’s jurisdiction and authority to rescind as a matter of law and
11 public policy.

12 Like NVEC, RUCO will not be prejudiced by the granting of SES’ motion because it
13 will have an opportunity to file appropriate rebuttal testimony at such time(s) as the ALJ may
14 direct in her ruling responding to Staff’s Motion to Continue. Therefore, the Ahearn testimony,
15 which also fails to address SES’ Amended Application and raises issues the Commission has no
16 power to address and resolve, should be stricken as well.

17 III. CONCLUSION

18 The central issue before the Commission in this proceeding is whether SES satisfies the
19 applicable criteria so as to be awarded a CC&N to provide competitive retail electric service to
20 Arizona customers who elect to receive that service. Incident to deciding that question, the
21 Commission must also (i) determine and consider the “fair value” of SES’ assets dedicated to
22 providing service in Arizona, and (ii) whether SES’ proposed rates and conditions of service are
23 reasonable. In their testimony, NVEC/RUCO do not address these core issues at all. Rather,
24 they attempt to raise issues that are either irrelevant to this proceeding or unnecessary to be
25 decided incident to making a decision on SES’ application. NVEC in particular goes far beyond
26 the scope of the proceeding by suggesting that the Commission needs to revisit a host of issues
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28 ⁷ Ahearn testimony at 1:19-21. [emphasis added]

⁸ Id. at 2:20-22.

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1 that it has already considered and decided. RUCO asks the Commission to repeal Arizona's law
2 authorizing retail choice – something the Commission lacks the power to do.

3 For the reasons stated above, the Commission should strike the NWEC/RUCO testimony
4 in its entirety and provide such further direction as is necessary to expediently consider SES'
5 Amended Application.
6

7 Dated this 30th of November 2007

8 Respectfully submitted,
9 Lawrence V. Robertson, Jr.

10 and

11 Theodore Roberts
12 Attorneys for Sempra Energy Solutions, L.L.C.

13 By: Lawrence V. Robertson, Jr.
14 Lawrence V. Robertson, Jr.

15 The original and thirteen (13) copies of
16 the foregoing Motion To Strike are being mailed
17 for filing this 30th day of November 2007 to:

18 Docket Control
19 Arizona Corporation Commission
20 1200 West Washington Street
21 Phoenix, Arizona 85007

22 A copy of the foregoing
23 Motion to Strike also is being emailed
24 or mailed this 30th day of November 2007 to:

25 Teena Wolfe, Administrative Law Judge
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