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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF THE APPLICATION OF SEMPRA ENERGY SOLUTIONS FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY FOR COMPETITIVE RETAIL ELECTRIC SERVICES

DOCKET NO. E-03964A-06-0168

RESPONSE TO SEMPRA ENERGY SOLUTIONS MOTION TO STRIKE TESTIMONY

INTRODUCTION

Air Liquide Industrial U.S. LP ("Air Liquide") hereby files this Response to Sempra Energy Solutions, L.L.C.'s ("SES") Motion to Strike Testimony ("Motion"), filed in the above-captioned matter on November 30, 2007. Air Liquide supports SES's Motion, which accurately demonstrates how the direct testimonies filed on behalf of New West Energy Corporation ("NWEC") and the Residential Utility Consumer Office ("RUCO") fail to address at all the three core issues to be resolved by the Commission in this matter.

As further discussed below, Air Liquide asserts that because the NWEC/RUCO testimonies attempt to broaden the scope of these proceedings to include issues that: (1) the Commission has no authority to address or decide in this proceeding, and (2) the Commission has already addressed in various *other* proceedings[1], they are inappropriate and should be stricken from the record.

[1] In addition to regulatory proceedings, the Commission has also participated in the development of wholesale and retail electric restructuring in Arizona through its legislative agenda and several court cases.

ARGUMENT

I. The Public Policy of the State of Arizona Is That A Competitive Market Shall Exist in the Sale of Electric Generation Service.

A.R.S. § 40-207 clearly authorizes the Commission to adopt rules necessary to govern the licensing of electricity suppliers offering electricity for sale to retail customers. Equally clear is that service territories established by a certificate of convenience and necessity ("CC&N") shall be open to electric generation service competition for all retail electric customers for any electricity supplier that has obtained a CC&N pursuant to A.R.S. § 40-207. *See* A.R.S. § 40-208. The Commission has already established rules and issued a number of Commission orders that collectively govern the provision of both wholesale and retail electric competition, which Arizona's legislative and judicial branches have left largely intact for approximately eight (8) years.

In their direct testimonies, both NWEC and RUCO call into question the basic premise that retail electric competition will ultimately provide benefits to Arizona consumers. However, this proceeding is not the proper venue to (once again) raise these concerns. As set forth in SES's Motion, the only issues to address in this proceeding are whether SES satisfies the statutory, regulatory and legal criteria to warrant it being granted a CC&N, and if so, under what terms and conditions. As addressed in more detail below, the public policy debate over retail electric competition has already occurred, resulting in the adoption of laws and rules to foster its development. Therefore, in order to reverse the state policy favoring the state of retail electric competition at this juncture, NWEC and RUCO must affect both legislative and regulatory change due to the overlapping jurisdiction of the state Legislature and the Commission over electricity and competition. In both instances, however, the state public policy embracing retail electric competition has been confirmed in statute, as well as Commission orders and decisions.

II. The Issues Raised by NWEC and RUCO Have Already Been Addressed in Other Commission Proceedings Related to Electric Restructuring.

There is no question that the issues of retail electric competition and stranded cost recovery have been addressed by the Commission, debated among interested stakeholders and litigated between parties since the Retail Electric Competition Rules ("Rules") were first enacted on December 26, 1996, in Decision No. 59943. On January 22, 2002, the Commission opened Docket No. E-00000A-02-0051[2] (*In the Matter of the Generic Proceedings Concerning the Matter of Electric Restructuring Issues*) in order to address several key issues related to electric restructuring, including the development of a retail electric market and the recovery of stranded costs for affected utilities. There have been four subsequent decisions rendered by the Commission related to the generic docket; Decision No. 65154 (September 10, 2002), Decision No. 65743 (March 14, 2003), Decision No. 68485 (February 23, 2006) and Decision No. 68741 (June 5, 2006)[3]. For purposes of this Response, only Decision No. 65154 and Decision No. 68485 are relevant.

A. Decision No. 65154 – Track A Order

The Track A Order afforded the Commission its first opportunity to address several key issues related to electric restructuring as applied to Arizona Public Service Company ("APS"), including market power, divestiture, code of conduct/affiliate transactions, Commission jurisdiction, and miscellaneous issues. Retail electric competition fell under the "miscellaneous" category, and the Commission directed its Staff to form an Electric Competition Advisory Group ("ECAG") to "facilitate communication and information sharing among Staff, stakeholders and market participants relating to events in the wholesale and retail marketplace and *impediments* to competition." [Emphasis added] *See*

[2] Though there have been several Commission decisions and orders that relate either directly or indirectly to the development of Arizona's electric utility industry as it exists today, it is important to recognize that more esoteric public policy matters such as the state of retail competition have been addressed in the generic docket.

[3] RUCO was a party to all of these proceedings.

December 30, 2002, memorandum from Ernest G. Johnson to interested parties.

If NWEC and RUCO seek to convince the Commission that the public interest warrants the elimination of retail competition, the proper venue is the generic docket. It appears that both NWEC and RUCO have not pursued this option, perhaps because they are under the erroneous belief that granting SES a certificate of convenience and necessity ("CC&N") as an electric service provider ("ESP") will somehow change the current state of Arizona law or the Commission's policies concerning retail electric competition. Commission Decision No. 68485 (February 23, 2006) unequivocally demonstrates that, in fact, the SES application in this docket is consistent with the Commission's current policy of facilitating the development of retail electric markets in Arizona.

B. Decision No. 68485

On March 14, 2003, the Commission issued Decision No. 65743 ("Track B"), in which it directed Commission Staff to file an update to the November 2001 Staff Report concerning the Arizona Independent Scheduling Administrator ("AISA")[4]. The Commission also directed its Hearing Division to notice a proceeding, pursuant to A.R.S. §40-252, concerning the continuation or possible abolition of the AISA. The AISA is a principal component for the continued development of retail electric competition in Arizona until the implementation of a regional transmission organization ("RTO") to handle non-discriminatory transmission access in the market. Several parties participated in these proceedings, including RUCO.

On February 2, 2005, Arizona Electric Power Cooperative ("AEPCO") docketed a Supplemental Filing and Request for Official Notice, requesting that the Commission take official notice of the Arizona Court of Appeals' January 25, 2005 mandate in *Phelps Dodge Corporation, et al. v. AEPCO, et al.*, 207 Ariz. 95, 83 P.3d 573 (2004)("*Phelps Dodge*"). In an attempt to cripple and perhaps even eliminate the development of retail

[4] Docket No. E-00000A-01-0630

electric competition in Arizona, AEPCO specifically requested that the Commission render the AISA proceeding moot due to the *Phelps Dodge* decision. Although several parties responded directly to AEPCO's supplemental filing, RUCO did not. RUCO instead chose to file exceptions to the recommended opinion and order – exceptions that contain many of the same public policy arguments echoed in the direct testimony of RUCO's witness filed in this proceeding. Clearly, RUCO is aware that the proper forum to address public policy issues relating to retail electric competition is the generic docket (which was consolidated with the AISA generic docket on February 8, 2002).

In Decision No. 68485, the Commission flatly rejected RUCO's position and those wishing to eliminate retail electric competition. The Commission concluded that:

> We find that Phelps Dodge has no impact on the continued economic viability of the AISA, and that it does not reduce the continued public benefit associated with maintaining Commission support of the AISA at its current level of operations. The AISA currently provides the *important public benefit of keeping the possibility of retail access available to Arizona consumers* at a minimal cost, by providing potential competitors with the necessary assurance that they will have fair and equitable access to transmission until an TRO is formed and approved by FERC to take over that function. [Emphasis added]. Decision No. 68485 at p. 15.

The Commission has already determined that keeping the possibility of retail access available to Arizona consumers is an important public benefit. No party, including RUCO, filed a request for rehearing of the order, and the NWEC/RUCO direct testimonies filed in this proceeding represent an unlawful collateral attack on Decision No. 68485.[5] SES seeks to change the "possibility" of retail access into "reality" consistent with the Commission's rules and regulations, the requirements of A.R.S. §§ 40-207 and 40-208 and Arizona law.

[5] The parties may request that the Commission revisit the matter of retail electric competition through an A.R.S. § 40-252 hearing, which is required to overturn several decisions and orders no longer subject to judicial review.

CONCLUSION

As a retail consumer of electricity, Air Liquide welcomes the opportunity to choose a competitive electric supplier over Standard Offer Service provided by incumbent utilities. The Commission has had several opportunities over the past five (5) years to amend the Rules, or otherwise issue orders and decisions that would make retail electric competition unattainable. Instead, the Commission has made every attempt to keep the possibility of retail electric competition alive, so that one day it will become a reality as envisioned when the Rules were first enacted. SES's application represents a major step toward that reality, and this proceeding should not be used by opponents to debate or re-litigate the merits of retail electric competition.[6] Based on the discussion above and the content of SES's Motion, Air Liquide respectfully requests that the Commission strike NWEC's and RUCO's testimony in its entirety.

RESPECTFULLY SUBMITTED this 7th day of December 2007.

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[6] Air Liquide requests that the Commission take administrative notice of the pending application of PDM Energy for a CC&N to become an ESP in Arizona. Docket No. E-03869A-06-0470.

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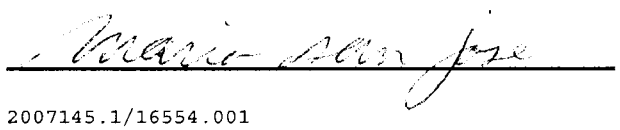

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