



ORIGINAL

EXCEPTION

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MIKE GLEASON, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

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

**AIR LIQUIDE INDUSTRIAL U.S.
LP AND SEMpra ENERGY
SOLUTIONS LLC'S JOINT
EXCEPTIONS TO THE
RECOMMENDED OPINION AND
ORDER**

AIR LIQUIDE INDUSTRIAL U.S. LP

AND

SEMpra ENERGY SOLUTIONS LLC'S

JOINT EXCEPTIONS TO RECOMMENDED OPINION AND ORDER

Arizona Corporation Commission

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1 Public Service Company (“APS”) customers, a rate freeze through 2008 for Tucson
2 Electric Power Company (“TEP”) customers and an immediate 5.4% rate decrease for
3 Salt River Project (“SRP”) customers beginning in 1999. While the Commission has kept
4 close guard over the State’s transition to wholesale electric competition by developing
5 what can best be described as a hybrid model, it has time and again left intact a proper
6 regulatory framework for the continued development of retail competition.

7 Even after the Arizona Court of Appeals invalidated portions of the Retail Electric
8 Competition Rules (“Rules”), the Commission took no action to alter, modify or rescind
9 previous decisions that constitute a framework for the implementation of direct access
10 service through the issuance of certificates of convenience and necessity (“CC&N”) to
11 qualified electric service providers (“ESPs”). Therefore, on March 16, 2006 – nearly two
12 and a half years ago – Sempra filed an application with the Commission requesting the
13 issuance of a competitive CC&N to provide direct access service as an ESP.

14 Since the initial filing, New West², the Residential Utility Consumer Office
15 (“RUCO”), the Arizona Investment Council (“AIC”) and Commission Staff have argued
16 that the Commission should consider, debate and “resolve” broad policy issues that, Air
17 Liquide and Sempra assert: (1) have already been addressed by the Commission; (2) are
18 being addressed in separate proceedings; or (3) can be addressed in the context of granting
19 a competitive CC&N to Sempra. The suggestion that only large industrial and
20 commercial customers will benefit from direct access, to the detriment of residential rate
21 payers, presupposes that the Commission will allow the retail market to develop in a
22 manner that reserves customer choice for a limited few. This simply has not been the
23 case.

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26 ² Ironically, New West is the competitive electric service provider affiliate of SRP, and has participated in competitive electricity markets in California.

1 Besides the rate reductions and rate freeze previously mentioned, both residential
2 and commercial customers now enjoy access to specific programs designed to increase
3 customer choice (e.g. distributed generation and net-metering rules) in retail markets.
4 Likewise, the development of demand side management principles and time-of-use rate
5 schedules allow retail customers choices even within a regulated environment – one that
6 compliments the Commission’s external policies governing retail competition.

7 All customer classes in Arizona have paid affected utilities their stranded cost
8 recovery and transition costs surcharges³, and should now enjoy some of the direct
9 benefits that retail competition was intended to bring to consumers. Air Liquide and
10 Sempra respectfully urge the Commission to once again reaffirm its commitment to the
11 development and sustainability of direct access service in this proceeding, while
12 recognizing that it can continue to regulate, modify and shape such retail markets through
13 the issuance of a CC&N to Sempra under conditions necessary to serve the public interest.

14 DISCUSSION

15 The Commission should reject the recommendation contained in the ROO to
16 suspend Sempra’s application, based upon the following two core principles; (1) that
17 previous Commission decisions and orders, as well as Arizona statutes and Arizona court
18 decisions concerning the Rules, establish a regulatory framework for the provision of
19 direct access service; and (2) the issues raised by New West and other parties opposing a
20 hearing on Sempra’s application apply equally to other Commission programs relating to
21 customer choice and retail competition, and have been, or will be addressed in separate
22 proceedings without harm to the public interest.

23 **I. Granting Sempra a CC&N to Offer Direct Access Service is Consistent with** 24 **the Existing Regulatory Framework Governing Retail Electric Competition.**

25 The framework for direct access service deployed by the Commission was the

26 ³ Ratepayers will likely be required to pay TEP its Implementation Cost Recovery Asset if a settlement agreement is approved by the Commission in current rate case proceedings. Docket Nos. E-1933A-07-0402; E-1933A-05-0650.

1 product of years of public input and review. Rebuttal Testimony of Kevin C. Higgins
2 (“Higgins Rebuttal”) at 5-6. In addition, the State legislature passed statutes to open
3 monopoly service areas to retail competition in the generation of electricity, incorporating
4 public power entities such as SRP into the state’s restructuring efforts to bring retail
5 choice to consumers.⁴ As a result of this process, Arizona has been able to avoid the
6 negative impacts experienced in other states when they restructured their markets. *Id.* at
7 6. To examine the state’s regulatory framework that currently governs the provision of
8 direct access services, it is necessary to review the applicable Commission orders
9 regarding competition, existing Arizona statutes, and one Arizona court decision on the
10 validity of the Rules – actions that New West and other parties contend create such a
11 fractured system of regulation to warrant a suspension of direct access. Air Liquide and
12 Sempra submit that this position is not supported by the evidence, based on a thorough
13 analysis that should have been presented in the ROO.

14 A. Decision No. 65154 (September 10, 2002)

15 Decision No. 65154 (“the Track A Decision”) halted the divestiture of generation
16 assets by local incumbent utilities, but did nothing to repeal or otherwise reverse the
17 development of electric retail competition in Arizona. In its Motion, New West argued
18 that with the Track A Decision, the Commission “left open for further consideration most
19 of the issues raised by the Commissioners and the parties in the Track A process” – a
20 position adopted by the ROO. ROO at 10. In support of its argument, New West cited
21 two paragraphs from the discussion portion of the Track A Decision devoted to
22 *divestiture*. *Id.* at 6. When read in context, it is clear that the Commission was not
23 addressing retail competition, but rather the development of wholesale competition in
24

25 ⁴ A.R.S. § 40-202.B states in pertinent part that “It is the public policy of this state that a competitive market shall
26 exist in the sale of electric generation service.” *See also* A.R.S. § 40-207 and § 40-208. Indeed, the legislature
passed a comprehensive set of statutes to govern retail competition for public power entities such as SRP. A.R.S. §
30-801 *et al.*

1 Arizona. New West omitted the following instructive paragraph that gives context to the
2 two paragraphs cited in the Motion:

3 It is clear that the parties expected benefits from retail competition, yet
4 there is no active retail competition, so actual benefits are still unknown. It
5 is said that consumers will benefit from wholesale competition, but not
6 without the proper market structure and regulatory framework that will
7 support it. It was anticipated at the time that APS and TEP divested, ESPs
8 would be providing direct access to retail customers. In actuality, no retail
9 competition exists; market power is held by incumbent utilities; no RTO is
10 in effect; transmission constraints exist that potentially exacerbate market
11 abuse; the GAO has issued a negative report on FERC's ability to manage
12 competitive markets; both TEP and APS recognize a problem – one wants
13 to postpone its divestiture while the other is affected by its parent's and
14 affiliates' adverse financial considerations; proposed new generation may
15 be cancelled if it is not able to find a market; more protections are needed
16 against self-dealing and inappropriate affiliate transactions; and
17 investigations are going on into market manipulations. *Contrary to what
18 APS argues, these changes relate to the question of divestiture, especially
19 to our willingness to transfer our ratemaking jurisdiction over generation
20 assets to FERC, given its recent history regulating the wholesale market
21 and the conclusions contained in the recent GAO report. [emphasis added]*

22 Track A Decision at 23.

23 The Commission then states immediately afterwards in its order that “due to
24 circumstances outside our control or the control of any party, and in order to protect the
25 public interest, we must take further action to regulate the transition to competition.” *Id.*
26 The Commission was addressing wholesale competition and divestiture. The only
discussion found in the Track A Decision related to retail competition and direct access is
FOF No. 44, which states that “The continued availability of retail direct access is not an
issue in this proceeding and there is insufficient evidence in the record to make a
determination on this issue.” *Id.* at 31. Clearly, the Track A Decision left untouched
issues related to retail competition and direct access.

Next, New West suggested that the Electric Competition Advisory Group

1 (“ECAG”) was formed and charged by the Commission to address several issues,
2 including retail competition, and issue formal recommendations. Motion at 7. However,
3 the record in the Track A proceeding proves otherwise. The Track A Order merely adopts
4 Staff’s recommendation concerning the ECAG, and nothing more. In its Closing Brief
5 (July 10, 2002), Staff writes:

6 Through its ordinary duties, Commission Staff communicates with industry
7 participants and monitors the industry in an informal manner. However, a
8 more formal approach toward facilitating communication and information
9 sharing has not been established. Staff therefore recommends that the
10 Commission form an Electric Competition Advisory Group *for purposes of*
facilitating communication and the sharing of information among Staff,
stakeholders and market participants. [emphasis added]

11 Staff Closing Brief at 15.

12 Facilitating communication and the sharing of information is far different than
13 issuing formal recommendations on policy considerations related to retail competition. It
14 is clear that the ECAG was not intended to address “unresolved” issues related to direct
15 access and retail competition, despite what New West would have this Commission
16 believe. Additionally, while the Track A Decision directs Commission Staff to
17 “immediately” open a rulemaking to, among other things, review the Rules, Staff’s failure
18 to open such a docket cannot be interpreted to mean that direct access is therefore no
19 longer the public policy of the Commission. The Commission recognized that in order to
20 change the regulatory scheme, the Rules might require formal modification. Absent such
21 change, the Rules – as they exist today – must be interpreted in light of the Commission’s
22 original intent, which was to develop electric retail markets to increase consumer choice
23 in the generation of electricity.

24 B. Decision No. 68485 (February 23, 2006)

25 In Decision No. 68485, the Commission reaffirmed its commitment to the
26 development of retail markets and direct access as the part of the regulatory scheme in

1 light of legal developments concerning the Rules. The Commission found that the
2 Arizona Independent Scheduling Administrator (“AISA”) “provides the important public
3 benefit of *keeping the possibility of retail access available to Arizona consumers* at a
4 minimal cost, by providing potential competitors with the necessary assurance that they
5 will have fair and equitable access to transmission until an RTO is formed and approved
6 by FERC to take over that function.” [emphasis added] Decision 68485 at. 15. It is clear
7 that Commission was reiterating its support of retail competition despite the Arizona
8 Court of Appeals decision in *Phelps Dodge Corp. v. Ariz. Elec. Power Coop.*, 207 Ariz.
9 95, 83 P.3d 573 (App. 2004). *See also* Decision 68485 at FOF ¶ 15 [“The AISA Board
10 has responded to the current lack of retail direct access activity in Arizona by downsizing
11 the AISA to the minimum size practicable that still retains the critical mass needed to stay
12 intact. This approach appropriately keeps the option of direct access available to Arizona
13 consumers, to be utilized as the opportunity to shop improves.”] How can the opportunity
14 to shop improve if the Commission is unwilling to even consider a CC&N application
15 such as Sempra’s?

16 The study referred to by New West, and further referenced in the ROO, relates to
17 the issue of the Commission’s continued support of the AISA – not direct access or retail
18 competition – as a matter of public policy⁵. *Id.* at 18. Staff’s failure to file the required
19 report is irrelevant to this particular proceeding, as all parties in the AISA proceeding
20 recognized that direct access service can still be facilitated with the secondary
21 procurement protocols already established by the FERC, as well as Open Access
22 Transmission Tariffs of incumbent utilities.

23 C. *Phelps Dodge Decision*

24 The *Phelps Dodge* decision left intact the ability of the Commission to continue
25

26 ⁵ The issues in that proceeding centered on continued funding by local utilities of a governing body that, by all intents and purposes, is subsumed by the transmission protocols the AISA had already established in filings with the FERC.

1 implementation of direct access through the issuance of CC&Ns to prospective ESPs. In
2 this proceeding, New West attacked the underlying premise that retail competition and
3 direct access are still the public policy of the state through vague references to the *Phelps*
4 *Dodge* decision and the “major holes” left by that decision which have not been
5 addressed. ROO at 8. However, the Commission should reject this argument on similar
6 grounds to its rejection of the Arizona Electric Power Cooperative’s argument in the
7 AISA matter: “*Phelps Dodge* does not preclude Commission support for the continuance
8 of the AISA as a matter of public policy.” Decision 68485 at 18. Likewise, *Phelps*
9 *Dodge* should not preclude Commission support for direct access as a matter of public
10 policy.

11 Even the *Phelps Dodge* court recognized that invalidating a portion of the Rules
12 did not remove the Commission’s ability to issue CC&Ns for ESPs; it merely clarified
13 that when setting a range of permissible rates and charges, the Commission is required to
14 ascertain fair value. *Phelps Dodge* at 106, 584. Therefore, there is no legal impediment
15 based on *Phelps Dodge* that would limit the Commission from considering Sempra’s
16 application. Furthermore, any approval would allow Sempra to provide service under the
17 currently-approved tariffs of APS, TEP and SRP, each of which provides customers the
18 option of direct access service.

19 **II. The “Unresolved” Issues Raised by New West Have, for the Most Part, Been**
20 **Addressed and Resolved in Other Proceedings Before the Commission, or by**
21 **Statute, and in any Event are Broad in Nature, Applying Equally to Other**
22 **Forms of Retail Competition and Consumer Choice With Which the**
Commission Has Moved Forward, Nonetheless.

23 Sempra filed its application on March 16, 2006. Since that time, the Commission
24 has, among other things: (1) made distributed generation more available to Arizona
25 consumers through net-metering rules and oversight of Renewable Energy Standard Tariff
26

1 (“REST”) implementation plans and related decisions⁶, (2) adopted rules that require
2 incumbent utilities to seek and award competitive bids for renewable generation⁷, (3)
3 required utilities to collect and fund demand side management programs, and (4) looked
4 into implementing a more robust system of time-of-use rates⁸.

5 These are a few examples of the Commission’s continued efforts to regulate the
6 transition to competition in the electric industry, and many of these programs raise similar
7 questions to the ones raised by New West and the other parties. For instance, what impact
8 will distributed generation, demand side management and time-of-use programs have on
9 an incumbent utility’s ability to develop integrated resource planning objectives, or their
10 ability to recover fixed costs? Will third-party providers of solar distributed generation be
11 able to cherry pick from those non-residential customers with rooftops sufficiently large
12 enough to make such projects economically viable? Similarly, how will the
13 implementation of demand side management programs affect an incumbent utility’s
14 ability to provide adequate demand response? Despite these “unresolved” questions, the
15 Commission has nevertheless moved forward with implementing its REST rules, net-
16 metering and distributed generation programs, or demand side management and time-of-
17 use initiatives.

18 Perhaps one reason the Commission continues moving forward with developing
19 competitive retail markets in Arizona is that many of the “unresolved” questions have
20 already been debated, considered and resolved in previous Commission proceedings or
21 through legislative acts.

- 22 • In 1997, several working groups submitted detailed reports to the Commission and
23 the Joint Legislative Committee regarding retail access schedules, taxes, stranded
24 cost recovery, consumer protections and open service territories.

25 ⁶ Decision No. 69877 (August 8, 2007); Decision No. 70194 (March 20, 2008); Decision No. 69663 (June 28, 2007).

26 ⁷ Decision No. 69127 (November 14, 2006) - Renewable Energy Standard and Tariff Rules.

⁸ Docket No. E-01345A-07-0448 (Inquiry into APS Time of Use Rates). APS has proposed new time-of-use rates in its current rate application. See Docket No. E-01345A-08-0172.

- 1 • In 1998, HB 2663 was enacted and affirmed the Commission’s authority to require
2 open territories to retail competition, extending also to municipal and other
3 publicly owned utilities. Amendments to A.R.S. § 40-202.B included provisions
4 concerning Provider of Last Resort requirements (also addressed by A.A.C. R14-
5 2-1606.A).
- 6 • In 1998, the Commission approved final rules for restructuring, including the
7 original solar portfolio standards.
- 8 • In 1999, the Commission approved two settlement agreements (APS and TEP), as
9 well as four options for stranded cost recovery upon the advent of competition.
- 10 • On September 29, 1999, the Commission finalized the Rules in Decision No.
11 61969.

12 Parties opposed to moving forward with Sempra’s application argued that the
13 Rules are “stale” and that intervening events since 2000 have raised several issues related
14 to electric retail competition that require resolution. ROO at 7-8. However, whenever
15 presented with the opportunity to “resolve” such issues or repeal the Rules, the
16 Commission has each time refused to do away with retail competition, as these Exceptions
17 demonstrate. As the ROO notes, several Commission decisions regarding electric
18 restructuring have been issued in Docket No. E-00000A-02-0051 (In the Matter of the
19 Generic Proceeding Concerning Electric Restructuring Issues). ROO at fn. 3. This
20 generic proceeding represents a forum that the Commission and interested may utilize to
21 address the policy concerns expressed by other parties in this proceeding without
22 disturbing direct access service opportunities for Arizona consumers. Furthermore, open
23 docket such as Docket No. E-00000E-05-0431 (In the Matter of the Generic Investigation
24 into Resource Planning) allows the Commission to address how direct access service, as
25 well as several other programs approved by the Commission, will affect incumbent
26 utilities’ resource planning goals. Direct access service – just like other mechanisms that
have been approved and, in most cases, implemented by the Commission – allows
Arizona consumers yet another opportunity to manage power costs, provided that entities

1 such as Sempra are given an opportunity to participate in the retail electric market.

2 In light of all the proceedings that have, or continue to, address questions regarding
3 the implementation of electric retail competition in Arizona, the issuance of a competitive
4 CC&N can be conditioned to ameliorate what the Commission may determine to be
5 potential adverse impacts to the public interest if direct access service offerings are left
6 unchecked. Direct Testimony of Staff Witness Geoffrey C. Crandall at 32. Precedent can
7 be found in how the Commission first addressed the implementation of wholesale
8 competition in Arizona.

9 On December 5, 2009, the Commission granted one of the first new Certificates of
10 Environmental Compatibility (“CEC”) for the construction of a natural-gas fired power
11 plant to Mesquite Power, LLC in Decision No. 63232⁹. The CEC was granted subject to
12 ten (10) conditions. Nearly eighteen months later on May 1, 2001, the Commission
13 granted a CEC to SRP for the expansion of its Santan Generating Station, subject to thirty-
14 four (34) conditions. This more than three-fold increase in conditions illustrate the
15 evolution of regulatory controls employed by the Commission to protect Arizona residents
16 and the environment in the development of the competitive electric wholesale markets,
17 and provides an example of how the Commission might similarly approach its public
18 interest function while fostering competitive electric retail markets, and the availability
19 direct access service, in Arizona.

20 Air Liquide and Sempra urge the Commission to move forward with the
21 implementation of direct access, and to continue processing Sempra’s application to
22 determine whether it is a fit and proper entity to provide retail electric services to Arizona
23 consumers, and upon what conditions granting such a CC&N will serve the public
24 interest.

25 ///

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⁹ Docket No. L-00000S-00-0101.

1 CONCLUSION

2 Sempra's application comes at a time when the benefits of electric retail
3 competition and customer choice can begin to accrue to Arizona consumers after years of
4 paying costs to hopefully one day realize such benefits. As currently structured, the
5 regulatory framework for electric retail competition does not limit these benefits only to
6 large industrial or commercial consumers as some might suggest; it provides all
7 consumers the *opportunity* to: (1) lower electricity prices through access to lower cost
8 power in competitive wholesale markets where generators can compete on price and
9 performance; (2) encourage innovation in generating technologies, grid management, use
10 of information technology and new products and services for consumers; and (3) see
11 improvement in the environment through displacement of power with power generated
12 from cleaner fuels, including various types of renewable generation.

13 However, it will be difficult to realize these benefits without parties willing to offer
14 such services. Indeed, third-party providers (i.e. electric service providers) willing to
15 finance projects and sell the electric output are currently marketing solar rooftop
16 applications to both residential and non-residential customers in APS' service territory –
17 without any requirement to obtain a CC&N. Is direct access service any different? Why
18 should Sempra be prohibited from seeking to participate in Arizona's retail market when
19 other entities are taking advantage of the opportunity to provide consumers choice in the
20 generation of their electricity? Any decision to suspend Sempra's application proceeding
21 is likely to discourage other market players, including those willing to offer new and
22 innovated services, from participating in Arizona's competitive retail market for some
23 time. Air Liquide and Sempra assert that postponing a decision that may result in an
24 *opportunity* to reduce power costs and increase consumer choice is not in the public
25 interest, and that Sempra's application should be processed and evaluated on its own
26 merits.

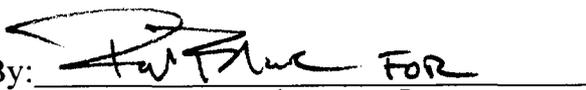
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RESPECTFULLY SUBMITTED this 21st day of August 2008.

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