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IN THE MATTER OF THE FORMAL COMPLAINT
OF SULPHUR SPRINGS VALLEY ELECTRIC
COOPERATIVE, INC. AGAINST ARIZONA
ELECTRIC POWER COOPERATIVE, INC.

Docket Nos. E-01575A-08-0358
E-01773A-08-0358

**MOTION FOR
SUMMARY JUDGMENT**

Pursuant to A.A.C. R14-3-101(A) and Rule 56, Ariz. R. Civ. P., the Arizona Electric Power Cooperative, Inc. ("AEPCO") requests that the Commission enter its Order granting AEPCO summary judgment on the complaint of Sulphur Springs Valley Electric Cooperative, Inc. ("SSVEC") dated July 15, 2008 (the "Complaint").

INTRODUCTION

In July 2004, AEPCO filed its first Application for rate relief in a decade. AEPCO's Application included a request for Commission authorization of a Fuel and Purchased Power Clause Adjustor ("FPPCA"). The intent of the FPPCA was to allow AEPCO to recover or refund to its Class A member distribution cooperatives increases or decreases in the costs of fuel and purchased power without the need to file a full rate case.

SSVEC intervened in the rate case. It did not throughout the many months of case processing suggest, as it does now, that "AEPCO must first allocate...costs to each member

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1 class” in administering the FPPCA.¹ It also did not recommend, as it does now, that the
2 Commission should establish “separate rate classes for ARMs and PRMs.”²

3 In fact, SSVEC said absolutely nothing about FPPCA issues from its intervention in the
4 case through entry of the rate decision. It offered no testimony, no exhibits, no opening
5 statement, no examination, no closing brief, no exceptions to the Recommended Opinion and
6 Order (“ROO”) and no application for rehearing of Decision No. 68071 (the “Rate Case
7 Decision”) about any FPPCA issue.³

8 AEPCO and Utilities Division Staff (“Staff”) did discuss and agree on the details of an
9 FPPCA which the Commission ordered be instituted.⁴ None of those details required separate
10 ARM and PRM cost allocations as SSVEC now asserts are required.

11 Under Findings 34 and 37 of the Rate Case Decision, AEPCO’s FPPCA must do four
12 things:

- 13 (1) compare the rolling 12-month average of current fuel and purchased power costs
14 to the test year’s base cost;
- 15 (2) apply the rate determined to member bills as a kWh charge;
- 16 (3) provide for semi-annual resets of the adjustor rate with certain documentation
17 to support changes; and
- 18 (4) maintain a separate base cost of power for ARMs and PRMs.

19 The FPPCA in AEPCO’s ARM tariff and PRM schedule complies with each of those
20 requirements.

21

22 ¹ Complaint, ¶ 9.

23 ² Complaint, ¶ 10. “ARM” means all-requirements member and “PRM” means partial-requirements member.

24 ³ Mohave Electric Cooperative, Inc. (“MEC”) intervened in the rate case as well, but also raised no issues concerning the design of the FPPCA.

⁴ Fifth Ordering Paragraph, p. 16, Rate Case Decision.

1 SSVEC's Complaint poses two questions on the FPPCA: (1) what did the Rate Case
2 Decision require and (2) what did AEPCO do? There is no genuine issue of material fact as to
3 either issue or AEPCO's compliance with the Rate Case Decision. It is entitled to judgment on
4 the Complaint as a matter of law. SSVEC's Complaint is also barred by the doctrine of *res*
5 *judicata*; it is an impermissible collateral attack on Commission orders; and it violates the two-
6 year statute of limitations for bringing such complaints stated in A.R.S. § 40-248.

7 This Motion is supported by the accompanying Memorandum of Points and Authorities
8 and the separately filed Statement of Facts ("SOF"), which is incorporated herein by reference.

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I. FACTUAL BACKGROUND.**

11 SSVEC's Complaint alleges that the FPPCA portions of the Rate Case Decision
12 "established separate rate classes for ARMs and PRMs" and requires AEPCO to "first allocate
13 fuel and purchased power costs to each member class" in calculating the FPPCA.⁵ It concludes
14 by asking that the Commission find "AEPCO has violated the Rate Decision by not properly
15 tracking and allocating fuel and purchased power costs to the PRM and ARM classes."⁶

16 The record, however, conclusively demonstrates that AEPCO did not propose, Staff did
17 not suggest, no party including SSVEC argued for, the Administrative Law Judge did not
18 recommend and, most importantly, the Commission did not order an FPPCA which allocates fuel
19 and purchased power costs to each member class.⁷

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22 ⁵ Complaint, ¶¶ 10 and 9.

23 ⁶ Complaint, p. 7, ¶ A.

24 ⁷ Pursuant to A.A.C. R14-3-109.T and U, AEPCO requests that the Commission take official notice of the matters filed in the Rate Case Docket, No. E-01773A-04-0528 and in the Efficacy Application Docket commenced on January 30, 2006, No. E-01773A-06-0047.

1 In fact, no party, including SSVEC, mentioned anything other than the all-in, average
2 cost recovery clause which AEPCO has used for more than three years. The FPPCA discussed
3 throughout the case and approved by the Commission allocates all fuel and purchased power
4 costs to all ARM and PRM members. SOF, ¶¶ 6 and 7. At AEPCO's suggestion and Staff's
5 agreement, the only purchased power costs which are specifically allocated to the ARM and not
6 the PRM class are the capacity and wheeling charges associated with the summer peaking Panda
7 Gila River purchase contract. The reasons for that exclusion were the facts that (1) PRM MEC⁸
8 had chosen not to participate in that contract and (2) the capacity and wheeling charges had been
9 excluded as well from MEC's fixed charge and O&M rate.⁹ *Id.*

10 On July 23, 2004, AEPCO filed its Application for rate relief. It included a request that
11 the Commission approve a "fuel and purchased energy adjustor which will allow AEPCO either
12 to recover from or refund to its members changes in its fuel and purchased energy costs."
13 (Emphasis supplied.) SOF, ¶ 1. From its Application through briefing to the filing of the
14 Commission-approved ARM tariff and PRM schedule, AEPCO never suggested an FPPCA
15 which separately tracks and allocates fuel and purchased power costs to the PRM and ARM
16 classes. For example:

- 17 • Manager of Financial Services Gary Pierson's Direct Testimony, filed with the
18 Application, discussed recovery of costs from the "Class A Members" collectively.
19 He described no separate cost tracking or allocation system involving the PRM and
20 ARM sub-classes. SOF, ¶¶ 1 and 2. The FPPCA pools all of AEPCO's fuel and
21 purchased power costs incurred in generating or acquiring the energy the Class A
22

23 ⁸ At the time of the rate case, only MEC was a PRM. SSVEC became a PRM on January 1, 2008.

24 ⁹ Pierson Rebuttal Testimony, p. 6.

1 members collectively need and involves no sub-assignments of costs to the ARM and
2 PRM classes based on their hourly, daily or monthly demands. SOF, *Id.*

- 3 • The proposed ARM tariff (“Tariff”) and PRM schedule (“Schedule”) were filed as
4 Exhibit DCM-3 to Chief Financial Officer Dirk Minson’s rebuttal testimony. The
5 FPPCA sections of the Tariff and Schedule do not include any provision for
6 separately tracking and allocating costs to the PRM and ARM classes. SOF, ¶ 6. The
7 Tariff and Schedule do state a slightly higher fuel base for ARMs, which Mr. Pierson
8 explained is to exclude the capacity and wheeling charges of the Panda Gila River
9 purchased power contract from the PRM base cost primarily because PRM member
10 MEC elected not to participate in that contract. SOF, *Id.*
- 11 • AEPCO’s closing brief contained no recommendation for separate tracking and
12 allocation of fuel and purchased power costs to the PRM and ARM classes under the
13 FPPCA. SOF, ¶ 12.
- 14 • Following entry of the Rate Case Decision, AEPCO filed on August 31, 2005 the
15 ARM Tariff and PRM Schedule which were approved as being in compliance with
16 the Rate Case Decision on September 27, 2005. SOF, ¶ 17 and its Exhibit C. They
17 have no provision for separate tracking and allocation of costs to the PRM and ARM
18 classes. They do comply with each of the four requirements for the FPPCA stated in
19 the Rate Case Decision, i.e., the adjustor rate is calculated on a rolling 12-month
20 average; the rate is applied to member bills as a kWh charge; the rate is reset semi-
21 annually with documentation to support changes; and separate base costs of power of
22 \$0.01687 and \$0.01603 are stated for ARM and PRM members, respectively. SOF,
23 ¶¶ 17, 18 and its Exhibit C.

1 Similarly, Staff never recommended an FPPCA which had separate ARM and PRM
2 classes or which, as alleged by SSVEC, required separate tracking and allocation of costs to the
3 PRM and ARM classes. Staff witness Barbara Keene's direct testimony thoroughly described
4 features and conditions of the FPPCA. In eight pages of testimony, she identified all RUS cost
5 accounts and other costs which would be included for recovery in the clause. She recommended
6 a balancing or bank account. Ms. Keene also described at some length monthly reporting
7 requirements. But, she never suggested that the FPPCA should track and allocate "costs to the
8 PRM and ARM classes" as alleged in the Complaint. SOF, ¶ 4 and its Exhibit A.

9 Indeed, in sharp contrast to SSVEC's assertion, Appendix 1 to Ms. Keene's surrebuttal
10 testimony expressly allocated all test year fuel and purchased power costs, including Panda Gila
11 River contract energy costs, to all ARM and PRM members. SOF, ¶ 7 and its Exhibit B.
12 Ms. Keene agreed with Mr. Pierson's suggestion that the capacity and wheeling costs, but not the
13 energy costs, should be deducted from PRM MEC's base cost because it was not participating in
14 that contract. That led to the slight differential in PRM and ARM base costs—about .8 of a
15 mill—which Ms. Keene recommended. SOF, *Id.* Finally, Staff's closing brief contained no
16 recommendation that "in order to calculate the FPPCA, AEPCO must first allocate fuel and
17 purchased power costs to each member class" or that "separate rate classes [should be
18 established] for ARMS and PRMs" as alleged in the Complaint. SOF, ¶ 11.

19 SSVEC was an intervenor in the rate case.¹⁰ SOF, ¶ 3. SSVEC filed no testimony, made
20 no opening statement, questioned no witness on FPPCA issues, filed no closing brief, submitted
21 no exceptions to the ROO and filed no Application for Rehearing of the Rate Case Decision on

22 _____
23 ¹⁰ PRM MEC also intervened and participated in the rate case. However, MEC did not file any testimony; did not
24 discuss at hearing the FPPCA; did file a brief which included no FPPCA or cost allocation issues; and, while it did
file exceptions to the ROO on five issues, none concerned the structure of or allocations concerning the FPPCA.
SOF, ¶¶ 3, 5, 8, 9, 10 and 14.

1 any issue, including without limitation, the FPPCA. SOF, ¶¶ 5, 8, 9, 10, 14 and 16. The rate
2 case record is completely devoid of any suggestion by SSVEC that “[i]n order to calculate the
3 FPPCA, AEPCO must first allocate fuel and purchased power costs to each member class (ARM
4 and PRM)” or that the Commission’s decision should establish “separate rate classes for ARMs
5 and PRMs.”¹¹

6 On June 27, 2005, the ROO was issued and on August 17, 2005, the Rate Case Decision
7 was issued. Neither contain any language, finding or ordering paragraph that in administering
8 the FPPCA (a) “AEPCO must first allocate fuel and purchased power costs to each member
9 class”; (b) AEPCO should establish “separate rate classes for ARMS and PRMs”; or (c) AEPCO
10 should separately track and allocate “fuel and purchased power costs to the PRM and ARM
11 classes” as alleged in the Complaint. SOF, ¶¶ 13 and 15. No party filed an Application for
12 Rehearing of the Rate Case Decision.

13 On August 31, 2005, AEPCO filed the ARM Tariff and the PRM Schedule which
14 included the FPPCA approved in the Rate Case Decision. Both were approved as in compliance
15 with the Rate Case Decision on September 27, 2005. SOF, ¶¶ 17, 18 and its Exhibit C.

16 Specifically, the ARM Tariff and PRM FPPCA include each of the four requirements on
17 the structure and administration of the FPPCA stated in Findings 34 and 37 of the Rate Case
18 Decision:

19 (1) The FPPCA computes “the Power Cost Adjustor rate...based upon a rolling
20 twelve month average” of fuel and purchased power costs;

21 (2) The FPPCA applies the rate determined to member bills as a kWh charge;

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¹¹ Complaint, ¶¶ 9 and 10.

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1 (3) The FPPCA provides for semi-annual resets with certain filed documentation to
2 support changes in the adjustor rates; and

3 (4) The FPPCA maintains a separate base cost of power for ARMs and PRMs of
4 \$0.01687/kWh and \$0.01603/kWh, respectively.¹²

5 SOF, *Id.* For convenience, the three pages of the Rate Case Decision containing FPPCA
6 Findings 34-37 with highlights as to the four FPPCA requirements are attached to this Motion as
7 Exhibit A.

8 Another docket is directly relevant to the issues presented by the Complaint and also
9 supports dismissal of the Complaint. Because of dramatic increases in the costs of fuel and
10 purchased power in the fall of 2005, on January 30, 2006, pursuant to the process authorized in
11 Finding 36 of the Rate Case Decision, AEPCO filed an Efficacy Application to accelerate
12 implementation of the initial FPPCA adjustors.¹³ As required by Finding 34 of the Rate Case
13 Decision, a revised tariff and schedule were filed with the request, as well as calculations
14 supporting the new rates. SOF, ¶ 19 and its Exhibit D.

15 This was the first time calculations were filed which showed how the ARM and PRM
16 adjustors would be determined. They are the same basic calculations used to develop FPPCA
17 adjustors since that time. The calculations did not “allocate fuel and purchased power costs to
18 each member class” nor did they establish “separate rate classes for ARMs and PRMs” as
19 SSVEC now maintains in its Complaint are required. SSVEC participated in that Efficacy
20 Application docket. It filed an objection to a portion of AEPCO’s request, but SSVEC never

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22 ¹² AEPCO has also complied with the monthly reporting obligations concerning the FPPCA which are stated in
Finding 35.

23 ¹³ AEPCO requests that the Commission take official notice of the matters filed in this Docket No. E-01773A-06-
0047.

1 objected to AEPCO's calculations on any of the allocation grounds it states in the Complaint.
2 SOF, ¶ 21.

3 On March 1, 2006, Staff filed its report recommending acceleration and approval of the
4 adjustors. It stated that it had analyzed AEPCO's work papers, monthly FPPCA reports and
5 bank balance information and concluded AEPCO's calculations appeared "to be in conformance
6 with the provisions" of the Rate Case Decision. *Id.*, ¶ 20. Further, PRM MEC filed comments
7 stating that "[a]fter extensive analysis by Mohave consultants who confirmed the accuracy of the
8 data used [in the AEPCO calculations] . . . Mohave supports . . . AEPCO's request." *Id.*, ¶ 22.

9 On March 23, 2006, the Commission approved AEPCO's request for April 1, 2006
10 implementation of the ARM and PRM adjustors noting that AEPCO's "calculation of the
11 adjustor rates . . . appears to be in conformance with the provisions set forth in" the Rate Case
12 Decision. *Id.*, ¶ 23. No party filed an Application for Rehearing or otherwise sought review of
13 the Commission's Decision No. 68594. *Id.*, ¶ 24.

14 On August 30, 2006, February 27, 2007 and August 28, 2007, AEPCO filed revised
15 adjustor rates using the same calculation methodology to change the PRM and ARM adjustors.
16 *Id.*, ¶ 25. SSVEC filed no objection to the method or calculations used to develop those
17 adjustors. *Id.*, ¶ 25.

18 Finally, on March 28, 2008, in response to an AEPCO efficacy filing requesting that the
19 bank amortization method be changed, SSVEC requested that AEPCO should have to perform
20 additional work "to adequately and reasonably assign . . . costs to the individual members of the
21 two rate classes." *Id.*, ¶ 28. SSVEC, however, did not allege that AEPCO was administering the
22 FPPCA incorrectly based on the Rate Case Decision. Rather, it based its request for "additional
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1 work” on SSVEC’s belief that “the PRMs are inappropriately and unfairly assigned . . . costs
2 attributable to ARMs.” *Id.*

3 AEPCO replied to SSVEC’s position stating that it was a collateral attack on the Rate
4 Case Decision. SOF, ¶ 29. On May 16, 2008, the Commission granted AEPCO’s efficacy
5 request and took no action on SSVEC’s request for “additional work” on the FPPCA
6 calculations. Finding 44 of Decision No. 70354 noted Staff’s conclusion that SSVEC’s cost
7 allocation issues “could more appropriately be addressed in a rate case in which all interested
8 parties could participate. *Id.*, ¶ 30.

9 On July 15, 2008, almost three years after entry of the Rate Case Decision and more than
10 two years after the Commission approved AEPCO’s calculations concerning and implementation
11 of the FPPCA, SSVEC filed the Complaint. It alleges for the first time that AEPCO’s FPPCA
12 calculations were “prohibited by the Rate Decision.” *Id.*, ¶ 31.

13 **II. LEGAL ANALYSIS.**

14 **A. Standard of Review.**

15 Summary judgment in actions before the Commission, as in other Arizona legal
16 proceedings, is appropriate where there are no genuine questions of material fact and the moving
17 party is entitled to judgment as a matter of law. A.A.C. R14-3-101(A); Rule 56, Ariz. R. Civ. P.;
18 *see also Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); and *Lingel v.*
19 *Olbin*, 198 Ariz. 249, 252 ¶ 5, 8 P.3d 1163, 1166 (App. 2000).

20 **B. There Is No Genuine Issue of Material Fact as to AEPCO's Complete** 21 **Compliance With the FPPCA Provisions of the Rate Case Decision.**

22 In order to proceed on its Complaint against AEPCO under A.R.S. § 40-246.A, SSVEC
23 must state “genuine questions of material fact” that AEPCO has violated the Rate Case Decision.

1 Similarly, in order to proceed on its Complaint under A.R.S. § 40-248.A, it must allege
2 circumstances that indicate AEPCO has violated the Rate Case Decision, because a rate—such as
3 the FPPCA adjustor rates involved here—cannot be “excessive or discriminatory” if it is
4 consistent with the rates authorized in the Rate Case Decision. As these facts demonstrate in
5 three separate but complementary ways, SSVEC simply cannot meet that burden.

6 First, AEPCO’s Tariff and Schedule compared against the requirements of the Rate Case
7 Decision affirmatively demonstrate full and complete compliance with each of the FPPCA
8 mandates of the Rate Case Decision. Its Fifth Ordering Paragraph at page 16 instructs AEPCO
9 to “amend its tariffs to include a Fuel and Purchased Power Cost Adjustor as described herein.”

10 As indicated on the relevant pages of the Rate Case Decision which are attached as
11 Exhibit A to this Motion, the Tariff and Schedule which the Commission approved as being in
12 compliance on September 27, 2005¹⁴ comply with each of its requirements:

13 1. Rate Case Decision Requirement: The FPPCA should be “calculated by
14 comparing the rolling 12-month average of actual fuel and purchased power costs to the base
15 cost established in this rate case.” (Finding 34.) Tariff and Schedule Compliance: “AEPCO
16 shall compute the Power Cost Adjustor Rate as specified herein based upon a rolling twelve-
17 month average...” (Tariff, p. 3 and Schedule, p. 2; Exhibit C to the SOF.)

18 2. Rate Case Decision Requirement: “The rate would be applied to the member bills
19 as a kilowatt-hour charge.” (Finding 34.) Tariff and Schedule Compliance: The factor F in the
20 FPPCA formula is stated as “Power Cost Adjustor Rate in dollars per kWh, rounded to the
21 nearest one-thousandth of a cent.” (Tariff, p. 2 and Schedule, p. 1, *Id.*)

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¹⁴ The Tariff and Schedule are Exhibit C to the SOF.

1 3. Rate Case Decision Requirement: “[T]he adjustor rate, initially set at zero, would
2 be reset semi-annually...AEP[CO] would submit a publicly available report, with a revised tariff,
3 that shows the calculation of the new rate...on September 1 and March 1...” (Finding 34.) Tariff
4 and Schedule Compliance: “AEPCO shall...file on September 1 or March 1...(1) calculations
5 supporting the revised Adjustor Rate...and (2) a Tariff [Schedule] reflecting the revised Adjustor
6 Rate with the Commission...” (Tariff, p. 3 and Schedule, p. 2, *Id.*)

7 4. Rate Case Decision Requirement: “[T]he base cost of power for full-
8 requirements customers should be set at \$0.01687 per kWh and...the base cost of power for
9 partial-requirements customers should be set at \$0.01603 per kWh.” (Finding 37.) Tariff and
10 Schedule Compliance: $F = (PC + BA) - \$0.01687$ and $F = (PC + BA) - \$0.01603$. (Tariff, p. 2
11 and Schedule, p. 1, *Id.*)

12 In order to move forward on its Complaint, SSVEC must demonstrate that it has raised a
13 genuine issue of material fact on Rate Case Decision compliance. As the foregoing
14 demonstrates, SSVEC has not. AEPCO initially filed and has since implemented an FPPCA
15 which fully meets the FPPCA elements of the Rate Case Decision.

16 Second, PRM MEC, Utilities Division Staff and the Commission have all stated that
17 AEPCO’s FPPCA calculations, work papers and/or monthly reports comply with the Rate Case
18 Decision’s requirements. Further, SSVEC, when that issue was first raised more than two years
19 ago, did not object to or raise any concern about AEPCO’s cost allocation methodologies.

20 AEPCO made its first filing of calculations supporting the ARM and PRM adustor rates
21 authorized by the Commission in January of 2006. Those calculations did not “allocate fuel and
22 purchased power costs to each member class” as SSVEC incorrectly alleges in its Complaint is
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1 required. They did, as Staff and AEPCO had agreed, differentiate the capacity and wheeling
2 charges of the Panda Gila River contract away from the PRM class.

3 On March 1, 2006, Staff stated that, after analysis of the filing, work papers and monthly
4 FPPCA reports, AEPCO's calculations appear "to be in conformance with the provisions" of the
5 Rate Case Decision. On March 2, 2006, SSVEC—represented by the same firm which filed this
6 Complaint on its behalf—objected to a portion of AEPCO's request. SSVEC, however, raised
7 absolutely no concern about AEPCO's calculations on any cost allocation grounds. On
8 March 10, 2006, MEC's filed comments indicated its consultants have, "after extensive
9 analysis," confirmed the accuracy of the data used in the AEPCO calculations. Finally, in
10 Finding 10 of Decision No. 68594, the Commission approved early implementation, noting that
11 AEPCO's "calculation of the adjustor rates...appears to be in conformance with the provisions
12 set forth in" the Rate Case Decision. No party, including SSVEC, filed an application for
13 rehearing of Decision No. 68594. SOF, ¶¶ 19-24.

14 SSVEC can't move forward on its Complaint. In addition to having no genuine issue of
15 material fact as to any non-compliance with the Rate Case Decision, SSVEC's own inactions,
16 other parties' affirmative statements and the Commission's unchallenged, express findings
17 demonstrate that AEPCO has completely complied with, and correctly implemented the FPPCA
18 authorized in, the Rate Case Decision.

19 Third and finally, SSVEC's deafening silence on any of the issues raised in its Complaint
20 throughout the months-long processing of the 2004 rate case independently corroborates the fact
21 that (1) there is no genuine issue of fact on SSVEC's belatedly alleged FPPCA issues and
22 (2) AEPCO is entitled to judgment as a matter of law.

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1 AEPCO has hydro allocations, coal and natural gas units at Apache Station, a myriad of
2 purchased power contracts and an economy sales market which it constantly evaluates to
3 economically dispatch electricity 24 hours a day, 365 days a year so as to meet the power and
4 energy demands of, *inter alia*, its eight Class A and B members. The cost allocation issues
5 which SSVEC raises in its Complaint are complex. AEPCO, each of AEPCO's members, the
6 members inside each class, the Staff, the Administrative Law Judge and last, but certainly not
7 least, the Commission itself would have innumerable questions, concerns and views on, among
8 other things, the policy considerations and factual concerns as to whether and how to identify the
9 fuel and purchased power cost causers, allocate such costs, correctly structure the clause and
10 police its administration. These and other complexities are undoubtedly why Staff has taken the
11 position, which it re-articulated at the Procedural Conference on this matter, that SSVEC's cost
12 allocation issues "could more appropriately be addressed in a rate case in which all interested
13 parties could participate." SOF, ¶ 30.

14 Notwithstanding this issue's considerable complexity and controversy, SSVEC asks this
15 Commission to accept the position that, despite not raising these cost allocation issues in its filed
16 testimony (it submitted none), not discussing them in opening statement (it made none), not
17 arguing the issues in a closing brief (it filed none) and not submitting the issues in either
18 exceptions to the ROO or an application for rehearing of the Rate Case Decision (it lodged
19 neither), AEPCO nonetheless has violated the Rate Case Decision "by not properly tracking and
20 allocating fuel and purchased power costs to the PRM and ARM classes pursuant to the FPPCA"
21 on an issue SSVEC never argued. Complaint, p. 7, ll. 15-17.

22 SSVEC's position would require a level of clairvoyance bordering on the mystic, which
23 neither AEPCO nor its counsel, nor any other party, the Staff, the Administrative Law Judge and
24

1 the Commission possess. SSVEC's position clearly does not state anything even remotely
2 approximating a genuine issue of material fact.

3 The requirements of the Rate Case Decision and AEPCO's compliance with each
4 requirement; the statements of MEC, the Staff and the Commission confirming AEPCO's
5 appropriate implementation of the FPPCA; and SSVEC's utter silence on any of these cost
6 allocation issues throughout the year-plus history of the 2004 rate case each confirm that the
7 Complaint states no genuine issue of material fact. AEPCO is entitled to an Order dismissing the
8 Complaint as a matter of law.

9 **C. The Doctrine of *Res Judicata* Bars SSVEC's Complaint.**

10 The Rate Case Decision expressly addressed the question of how costs would be
11 allocated between ARMs and PRMs, i.e., the treatment of Panda Gila River contract costs
12 specifically. Further, Decision No. 68594 (the "Efficacy Decision") in the spring of 2006
13 directly involved the issue of whether AEPCO's FPPCA implementation and calculations were
14 correct and appropriate. SSVEC's failure to challenge either decision is an active bar to its
15 current Complaint. Because once final, Commission decisions are entitled to *res judicata*
16 preclusive effect not only as to issues which were raised, but as to all issues which could have
17 been raised. *Tucson Warehouse & Transfer Co. v. Al's Transfer, Inc.*, 77 Ariz. 323, 326, 271
18 P.2d 477, 478 (1954) (holding that Corporation Commission orders are conclusive unless judicial
19 review procedure is followed); *see also, e.g., Kentucky West Virginia Gas Co. v. Pennsylvania*
20 *Pub. Util. Comm'n*, 721 F. Supp. 710, 714 (M.D. Pa. 1989) (noting that Pennsylvania gives *res*
21 *judicata* effect to Public Utility Commission decisions).

22 Because SSVEC could have raised, but either neglected or chose not to raise, the issues it
23 now states in its Complaint in those prior proceedings, it is barred by *res judicata* from doing so

1 now. *See Hoff v. City of Mesa*, 86 Ariz. 259, 261, 344 P.2d 1013, 1014 (1959) (“[T]he doctrine
2 of res judicata is that an existing final judgment rendered upon the merits . . . is conclusive as to
3 every point decided therein and *also as to every point raised by the record which could have*
4 *been decided . . .*” (emphasis added)); *see also Munoz v. Central Telephone Co.-Nevada*,
5 175 Fed. Appx. 803, 804 (9th Cir. 2006) (“The district court properly concluded this action is
6 barred by res judicata because [plaintiff] raised, *or could have raised*, these claims in prior
7 administrative proceedings against Sprint before the Public Utilities Commission of Nevada.”
8 (emphasis added)).

9 SSVEC attempts to dodge the preclusive effect of the Rate Case and Efficacy Decisions
10 through vague allegations that AEPCO’s cost allocation methodology “is prohibited by the Rate
11 Decision.” Complaint, ¶ 13. Notably, however, SSVEC does not, because it cannot, cite a single
12 section of the Rate Case Decision that AEPCO has violated. Instead, the Complaint makes
13 vague allegations that AEPCO’s Commission-approved implementation of the FPPCA
14 “violate[s] the inherent spirit and intent of the Commission’s Rate Decision and, therefore,
15 constitutes non-compliance with the Rate Decision.” Complaint, ¶ 29. Vague arguments about
16 “spirit” or “intent” don’t succeed given the plain language of both decisions.

17 **D. A.R.S. § 40-252 Also Bars SSVEC’s Collateral Attack on the Decisions.**

18 SSVEC’s attempt, years after the fact, to change the fuel and purchased power cost
19 assessment methodology approved and then confirmed by the Commission is also a prohibited
20 collateral attack on both the Rate Case and Efficacy Decisions. A.R.S. § 40-252 bars the
21 Complaint. *See Tucson Warehouse & Transfer*, 77 Ariz. at 326, 271 P.2d at 478 (holding that
22 Commission decisions are conclusive and thus immune from subsequent collateral attacks).

1 Section 40-252 bars collateral attacks on the previous Commission orders approving AEPCO's
2 implementation of the FPPCA.

3 **E. The Two-Year Statute of Limitations in A.R.S. § 40-248 for Actions to**
4 **Recover Excessive Rate Charges Bars SSVEC's Claims.**

5 Finally, SSVEC's Complaint is also barred by the two-year statute of limitations in
6 A.R.S. § 40-248 for actions claiming "excessive or discriminatory charges." The statute requires
7 such actions to be "filed with the commission within two years from the time the cause of action
8 accrues." *See also Brooks v. Sulphur Springs Valley Elec. Coop.*, 951 F.2d 1050, 1055 (D. Ariz.
9 1991).

10 AEPCO has been administering the FPPCA to allocate costs to its members, without the
11 allocations as SSVEC maintains in its Complaint are required, at least since the Efficacy
12 Decision was entered in early 2006. That proceeding, in which SSVEC participated, specifically
13 addressed the issue of whether AEPCO's calculations and implementation of the FPPCA were
14 correct. The Efficacy Decision was entered on March 23, 2006. SSVEC clearly knew, at least at
15 that date, that AEPCO's FPPCA procedures were not consistent with its current theories.
16 Without waiver of the *res judicata* and collateral attack arguments stated above, that means, at a
17 minimum, SSVEC's Complaint is barred because it was not filed until July 15, 2008—more than
18 two years after conclusion of that proceeding in March of 2006.

19 **III. CONCLUSION.**

20 Although it never raised the issue with the Commission while it was an ARM, having
21 recently become a PRM, it is clear that SSVEC is now unhappy with the way costs are allocated
22 under the FPPCA. Its newly articulated distress, however, can only be considered in a new rate
23 case which, as required by the Rate Case Decision, must be filed in any event by July 1 of next
24

1 year. That proceeding will allow all parties—not just SSVEC—a full and fair opportunity to
2 debate the merits and demerits of various cost allocation and rate design issues.

3 Equally clear is the fact that SSVEC's Complaint presents no genuine issue of material
4 fact; is precluded by *res judicata* and A.R.S. § 40-252; and is also barred by the statute of
5 limitations contained in A.R.S. § 40-248. AEPCO is entitled to summary judgment on and
6 dismissal of the Complaint as a matter of law.

7 RESPECTFULLY SUBMITTED this 1st day of October, 2008.

8 GALLAGHER & KENNEDY, P.A.

9
10 By 

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16 **Original and 13 copies** filed this
17 1st day of October, 2008, with:

18 Docket Control
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21 Phoenix, Arizona 85007

22 **Copies** of the foregoing hand-delivered
23 this 1st day of October, 2008, to:

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EXHIBIT A

1 approach in an effort to minimize the immediate impact on rate payers.

2 30. AEPCO and Staff agreed on the rates to be implemented to achieve the revenue
3 requirement. The schedule of proposed rates is attached hereto as Exhibit A. We find that a revenue
4 requirement of \$152,279,043, is fair and reasonable, and that it is in the public interest that the
5 revenue increase be phased in over two years as set forth in Exhibit A.

6 31. Mohave recommends that AEPCO file a rate case six months after Sulphur Springs
7 has completed a full year as a partial requirements member.

8 32. Mohave's recommendation that AEPCO file a rate application after a full year of
9 operating data after Sulphur Springs has become a partial requirements member is well-founded.
10 Sulphur Springs is one of AEPCO's largest members and its change of status may have significant
11 impact on AEPCO's revenues. Thus, we will adopt Mohave's recommendation, and require AEPCO
12 to file a rate case six months after Sulphur Springs has completed a full calendar year as a partial
13 requirement member. By specifying "calendar year" AEPCO can match its Test year with its fiscal
14 year.

15 33. Staff and AEPCO agree that an adjusted original cost rate base of \$189,637,810 is fair
16 and reasonable. No party objected to Staff's rate base adjustments. Based on the evidence, we
17 concur that Staff's adjustments to rate base are reasonable and should be adopted. AEPCO waived a
18 reconstruction cost new rate base and thus, its original cost rate base is the equivalent of its fair value
19 rate base.

20 34. Staff and AEPCO also agree that a Fuel and Purchased Power Cost Adjustor
21 ("FPPCA") should be established for AEPCO. Staff explained that the FPPA would track changes in
22 the cost of fuel for AEPCO's generating units and power purchased from others and would be
23 1 calculated by comparing the rolling 12-month average of actual fuel and purchased power costs to the
24 base cost established in this rate case. 2 The rate would be applied to the member bills as a kilowatt-
25 hour charge. Whether AEPCO's distribution cooperative members could pass additional FPPCA
26 charges on to end-users would depend on whether they had purchased power adjuster clauses in their
27 tariffs. Under Staff's proposal, 3 the adjustor rate, initially set at zero, would be reset semi-annually on
28 October 1, 2006, and April 1, 2007, and thereafter on October 1 and April 1 of each subsequent year.

3, cont.

1 AEP would submit a publicly available report, with a revised tariff, that shows the calculation of the
2 new rate on September 1, 2006 and March 1, 2007, and thereafter on September 1 and March 1 of
3 each subsequent year. The adjustor rate would become effective with billings for October and April
4 unless suspended by the Commission. AEPCO accepted all of Staff's recommendations on clause
5 administration and reporting as set forth in Ms. Keene's direct testimony.

6 35. With respect to the FPPCA, Staff further recommends:

- 7 a. The FPPCA will expire in five years unless extended by the
8 Commission;
- 9 b. The Commission or Staff will have the right to review the prudence of
10 fuel and power purchases at any time;
- 11 c. The Commission or Staff will have the right to review any calculations
12 associated with the FPPCA at any time;
- 13 d. Any costs flowed through the FPPCA are subject to refund if the
14 Commission determines that the costs are imprudent;
- 15 e. AEPCO will file monthly reports with Staff's Compliance Section
16 detailing all calculations relating to the FPPCA and containing the nine
17 minimum requirements specified in Ms. Keene's Direct Testimony (Ex.
18 S-7);
- 19 f. AEPCO will file additional monthly reports regarding its generating
20 units, power purchases, and fuel purchases. The report will comply
21 with the minimum requirements specified in Ms. Keene's Direct
22 Testimony.

23 36. AEPCO's fuel and purchased power expenses amounted to almost one-half of
24 AEPCO's total expenses for the adjusted 2003 test year. AEPCO asserted that the volatility was a
25 primary reason AEPCO suffered a margin loss in the Test Year. We recognize that the FPPCA is
26 intended to allow timely recovery of increases in fuel and purchased power costs, or to allow the
27 refund of any decreases, without the time and expense of a full rate proceeding. We also note that no
28 party objected to Staff's recommendations for the FPPCA. However, we are concerned with the

1 possibility that AEPCO's recovery of fuel and purchased power costs under Staff's proposed FPPCA
2 may nonetheless be outpaced by the rate of future fuel and purchased power cost increases.
3 Therefore, we will approve the FPPCA on the terms agreed to by the parties, but in so doing, we will
4 attach an additional condition allowing AEPCO to request the Commission to review the efficacy of
5 the FPPCA when AEPCO submits any semi-annual FPPCA report as required elsewhere in this
6 Decision.

7 37. Staff agrees with AEPCO that a separate base cost of power be established for full-
8 requirements and partial-requirements customers. ⁴ Staff recommends that the base cost of power for
9 full-requirements customers should be set at \$0.01687 per kWh and that the base cost of power for
10 partial-requirements customers should be set at \$0.01603 per kWh. AEPCO agreed with Staff's
11 recommended rates.

12 38. As part of this proceeding AEPCO requested the approval of revised depreciation
13 rates. The lower depreciation rates are based upon a study and would lower costs in the Test Year by
14 slightly more than \$1.47 million. Staff agreed that the revised depreciation rates, as shown on
15 Exhibit DCM-1 of Dirk Minson's Direct Testimony (Ex. AEPCO-1) should be approved.

16 39. Staff recommends that the Commission approve a Demand Side Management (DSM)
17 adjustor.

18 40. AEPCO does not agree that as a wholesale generator, AEPCO should engage in DSM
19 programs. The parties have agreed to reserve the issue of the specific DSM requirements for AEPCO
20 to the pending DSM rulemaking docket (Docket No. RE-00000C-05-0230). (Staff Brief at 6)
21 AEPCO agrees with Staff that the Commission should approve a DSM adjustor mechanism.

22 41. Mohave recommends that the Commission provide that in any DSM requirement, that
23 each distribution cooperative be responsible for its own program and not be subject to AEPCO's
24 direction.

25 42. We find that it is reasonable to determine AEPCO's obligations with respect to
26 specific DSM programs in the DSM rulemaking docket, but that in anticipation of the adoption of
27 those rules and the potential that AEPCO may engage in DSM programs, approving a DSM adjustor
28 mechanism at this time is reasonable.