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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION  
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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

REPLY IN SUPPORT OF  
AEPKO'S MOTION FOR  
SUMMARY JUDGMENT

Arizona Electric Power Cooperative, Inc. ("AEPKO") submits this reply in support of its Motion for Summary Judgment. While Sulphur Springs Valley Electric Cooperative, Inc. ("SSVEC") has extensively narrowed the scope of its Complaint on response, it still has not stated any genuine issue of material fact on the sole issue to which it has retreated. AEPKO is entitled to summary judgment in its favor.<sup>1</sup>

I. INTRODUCTION.

SSVEC's Complaint painted—with an exceptionally broad and belated brush—alleged wrongs which AEPKO had committed in administering the FPPCA. For example, it inaccurately charged that the Rate Case Decision required AEPKO generally to allocate purchased power and fuel costs separately to the all-requirements ("ARM") and partial-requirements ("PRM") member classes.<sup>2</sup> It also incorrectly stated that the Rate Case Decision established separate rate classes for ARMs and PRMs for purchased power and fuel costs.<sup>3</sup> The Complaint alleged that AEPKO

<sup>1</sup> Mohave Electric Cooperative, Inc. ("MEC") filed comments supportive of the SSVEC response, basically echoing the SSVEC arguments which are addressed by this reply.

<sup>2</sup> Complaint, ¶ 9.

<sup>3</sup> Complaint, ¶ 10.

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1 had violated the Rate Case Decision by not properly tracking and allocating fuel and purchased  
2 power costs through the FPPCA.<sup>4</sup>

3 To rebut these sweepingly inaccurate allegations, AEPCO was forced methodically to  
4 walk through roughly four years of regulatory history to demonstrate that SSVEC's allegations  
5 about what the Rate Case Decision required were simply wrong. The Motion established that the  
6 Rate Case Decision did not, as alleged by SSVEC, require AEPCO generally to allocate fuel and  
7 purchased power costs to each member class. It also did not establish separate rate classes for  
8 ARMs and PRMs.

9 Instead, what the Rate Case Decision required was that all fuel<sup>5</sup> and purchased power  
10 costs be assigned to and recovered from all members through the FPPCA. The single, and very  
11 narrow, exception was the assignment of the capacity and wheeling charges, but not the energy  
12 charges, of the summer peaking Panda Gila River purchased power contract ("Panda Contract")  
13 to only the ARMs. AEPCO suggested that lone exception because (1) PRM MEC did not  
14 participate in the Panda Contract and (2) those costs (capacity and wheeling charges) had been  
15 excluded in calculating MEC's fixed charge and O&M rates.

16 In its response, SSVEC had no choice but to agree with AEPCO's analysis. Its response  
17 contains absolutely no discussion of fuel expenses, no discussion of separate allocations of most  
18 purchased power charges and no allegations that the FPPCA requires differentiated allocations of  
19 fuel and purchased power expenses generally to individual members or separate rate classes.

20 In fact, SSVEC's response shrinks its Complaint to a single, discrete issue: the treatment  
21 of the costs of a single contract with Powerex Corp. ("Powerex Contract")—one of three summer

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22 <sup>4</sup> Complaint, ¶ A, p. 7.

23 <sup>5</sup> At page 2 of its Comments, MEC wrongly asserts that AEPCO is "shifting the recovery of significant fuel costs"  
24 from the ARMs to PRMs. There is no record citation for this position and it is categorically incorrect. No fuel cost  
assignments whatsoever were discussed by Mr. Pierson or Ms. Keene.

1 peaking purchased power agreements<sup>6</sup> which replaced the Panda Contract upon its expiration.  
2 The Powerex Contract, in which the PRMs are not participating, has an energy charge but no  
3 capacity charge. Therefore, as required by the Rate Case Decision, AEPCO assigns the Powerex  
4 Contract energy charges to all members.

5 SSVEC, however, thinks that the energy charges of the Powerex Contract “are more akin  
6 to a capacity charge” in differentiating between ARM and PRM adjustor rates. Therefore,  
7 SSVEC “believes” that all Powerex energy charges should be excluded from PRM FPPCA  
8 calculations.<sup>7</sup>

9 But SSVEC’s thoughts, hunches and beliefs don’t create a genuine issue of material fact.  
10 They don’t change the fact that AEPCO is assigning all FPPCA costs, including the Powerex  
11 charges, strictly in accordance with the Rate Case Decision. They also don’t change the fact that  
12 if SSVEC wanted to argue different treatments for what it thinks are different kinds of contracts,  
13 it should have done so in the rate case. In short, they dictate no other conclusion than that  
14 AEPCO is entitled to judgment on SSVEC’s Complaint as a matter of law.

15 **II. SSVEC ADMITS THAT AEPCO IS CORRECTLY ASSIGNING COSTS**  
16 **THROUGH THE FPPCA IN ACCORDANCE WITH THE RATE CASE**  
17 **DECISION.**

18 In order to move forward on its Complaint, SSVEC must prove that, under  
19 A.R.S. § 40-246, AEPCO has violated the Rate Case Decision or, under A.R.S. § 40-248,  
20 AEPCO has imposed an excessive or discriminatory charge on SSVEC in relation to the FPPCA.  
21 SSVEC does not raise any question of material fact as to either, because it concedes that AEPCO

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22  
23 <sup>6</sup> The other two are the Griffith Energy Project Contract (“Griffith”) and the South Point Energy Center, L.L.C.  
Contract (“South Point”).

24 <sup>7</sup> SSVEC’s Response to AEPCO’s Motion for Summary Judgment (“SSVEC Response”), p. 6, ll. 3-4 and 10-11.

1 is handling the costs associated with the Powerex Contract exactly as the Rate Case Decision  
2 required.

3 First, SSVEC agrees that AEPCO is required to assign away from the PRMs the capacity  
4 and wheeling, but not the energy charges, of summer peaking agreements like Powerex in which  
5 PRMs do not participate. Its consultant's affidavit states:

6 The Panda Contract served as the impetus for distinguishing between the ARM  
7 and the PRM adjustor rates. As part of Decision No. 68071, the Commission  
8 approved AEPCO's request to exclude the Panda Contract's capacity and  
9 wheeling (but not energy) charges from the PRM adjustor rate under the FPPCA  
because only the ARMs participated in the Panda Contract. The PRM Adjustor  
rate is lower than the ARM adjustor rate as a result.<sup>8</sup>

10 Second, SSVEC agrees that the Griffith, South Point, and Powerex contracts have  
11 replaced the Panda Contract. It further agrees that AEPCO is correctly handling costs associated  
12 with the Griffith and South Point agreements:

13 The Panda Contract has expired, and AEPCO now purchases summer  
14 peaking power under the Griffith, Southpoint, and Powerex Contracts. Similar to  
the Panda Contract, none of the PRMs participated in these multi-year power  
agreements.

15 \* \* \*

16 As was done with the Panda Contract, AEPCO excluded capacity and  
17 wheeling charges from the PRM adjustor rate for both the Griffith and Southpoint  
Contracts as the PRMs have no allocated capacity.<sup>9</sup>

18 Third, SSVEC agrees that the Powerex Contract does not have a capacity charge: "The  
19 Powerex Contract only includes one energy-based (\$/megawatt-hour) rate."<sup>10</sup> Thus, under the  
20 Rate Case Decision, there is no Powerex capacity charge to be assigned only to the ARM  
21

22 <sup>8</sup> SSVEC's Controverting Statement of Facts in Support of Response to AEPCO's Motion for Summary Judgment  
Exhibit 2, Affidavit of David Brian ("Brian Affidavit"), ¶ 5.

23 <sup>9</sup> Brian Affidavit, ¶¶ 7, 9.

24 <sup>10</sup> Brian Affidavit, ¶ 15.

1 members. There are, however, Powerex energy charges which are required to be assigned to all  
2 members, including the PRMs.

3 Finally, SSVEC agrees that the Powerex energy charges, as required by the Rate Case  
4 Decision, are being assigned to both the ARM and PRM members: “The entire cost of the  
5 Powerex Contract is included in the FPPCA costs spread across the ARM and PRM pool.”<sup>11</sup>

6 Therefore, SSVEC agrees that AEPCO is handling the costs associated with these three  
7 summer peaking agreements precisely as the Commission ordered. Contract capacity and  
8 El Paso wheeling charges<sup>12</sup> are allocated only to the ARMs, while energy charges associated  
9 with the three contracts are assigned to all members. If AEPCO handled the costs some other  
10 way as both SSVEC and MEC argue it should,<sup>13</sup> then AEPCO would, in fact, violate the Rate  
11 Case Decision.

12 At pages 5-6 of its response, SSVEC maintains that all of the Powerex Contract’s energy  
13 charges should be assigned away from the PRMs because they are “more akin to a capacity  
14 charge” and “SSVEC believes that the Powerex Contract itself is a capacity contract that should  
15 be excluded in its entirety.”<sup>14</sup> The fatal flaw in SSVEC’s position is that treatment is directly  
16 contrary to what the Rate Case Decision specified for energy charge assignment.

17 The issue is not what SSVEC thinks the energy charges are “like.” Both SSVEC and  
18 MEC could have, but did not, discuss alternate contract types in the rate case. They could have,  
19 but did not, offer different ways of treating what they thought might be different costs.

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21 <sup>11</sup> Brian Affidavit, ¶ 17.

22 <sup>12</sup> “The South Point and Griffith contracts have capacity charges associated with them which are excluded, while the  
Powerex Contract does not have a capacity charge to exclude. El Paso wheeling charges at Westwing continue to be  
excluded as well.” (AEPCO’s Response to SSVEC Data Request 2.3, Exhibit E to Brian Affidavit (emphasis  
supplied).)

23 <sup>13</sup> MEC Comments, p. 2.

24 <sup>14</sup> SSVEC Response, p. 6, ll. 3 and 10-11.

1 The only questions that can be raised and answered in this proceeding are, “What does  
2 the Rate Case Decision require?” and, “What has AEPCO done?” The answer to both questions  
3 is that AEPCO is complying with the Rate Case Decision requirements for allocating summer  
4 peaking agreement costs. Thus, AEPCO is neither violating the Rate Case Decision under  
5 A.R.S. § 40-246 nor imposing excessive or discriminatory charges under A.R.S. § 40-248.  
6 There is no genuine issue of material fact and SSVEC’s complaint inquiry cannot go forward.<sup>15</sup>

7 Although irrelevant to this complaint proceeding and the issue of whether the FPPCA is  
8 being administered correctly, AEPCO does want to refute SSVEC and MEC’s incorrect assertion  
9 that the Powerex Contract provides no benefits to the PRMs.<sup>16</sup> Depending upon market,  
10 operational and other conditions which affect AEPCO’s hourly power resources, the Powerex  
11 Contract provides benefits to all AEPCO members, including the PRMs. The simplest, but  
12 certainly not the only, example is times when the natural gas to be burned in units at Apache  
13 Power Station in which SSVEC and MEC do participate results in a higher energy cost than the  
14 Powerex energy charges. The megawatts purchased under the Powerex Contract will lower  
15 SSVEC and MEC’s energy costs and the costs of their members.

16 SSVEC and MEC have their thoughts on FPPCA issues and want, impermissibly, to  
17 reopen and rethink the last rate case. AEPCO, its other members, other parties, the  
18 Commission’s Staff, the Administrative Law Judge and the Commission undoubtedly will have  
19 varying opinions on those FPPCA issues, including allocations. As Commission Staff stated at  
20 the Procedural Conference in this matter, the appropriate place to have those discussions and

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23 <sup>15</sup> See *Complaint of Williams*, 1994 WL 932490, at \*5, 20 Tex. P.U.C. Bull. 10 (Tex. P.U.C. 1994) (noting that  
“full-blown rate case” is remedy for “material change of conditions” since last rate-setting proceeding).

24 <sup>16</sup> SSVEC Response, p. 5, l. 24-p. 6, l. 1 and MEC Comments, p. 2, ll. 8-11.

1 afford interested parties an opportunity to present their views on FPPCA issues is the rate case  
2 next year, not this complaint proceeding.

3 **III. SSVEC'S NEWLY FOUND POSITION ON THE POWEREX AGREEMENT IS A**  
4 **COLLATERAL ATTACK ON THE RATE CASE DECISION.**

5 By advocating that the energy costs of the Powerex Contract should be assigned away  
6 from the PRMs, SSVEC is collaterally attacking the Rate Case Decision. At AEPCO's  
7 suggestion and with Staff's agreement, the Commission affirmatively addressed how summer  
8 peaking agreement energy charges would be handled through the FPPCA in the Rate Case  
9 Decision. All energy charges are assigned to all members.

10 SSVEC wants to reopen that record and argue a different treatment for the Powerex  
11 Contract energy charges. That is the classic definition of a collateral attack: an attempt to evade  
12 or alter a previously entered judgment in a subsequent proceeding.<sup>17</sup>

13 This proceeding is not a new rate case, although AEPCO will shortly file one in which  
14 these issues could be addressed. It also is not a proceeding under A.R.S. § 40-252 to rescind,  
15 alter or amend the prior order. *See Schwamm v. Superior Court*, 4 Ariz. App. 480, 483, 421 P.2d  
16 913, 916 (1966) (distinguishing between collateral and direct attacks on a judgment). It is a  
17 complaint proceeding which SSVEC simply cannot maintain because, in truth, it is a collateral  
18 assault on a final Commission order.

19 At page 7 of its response, SSVEC argues that it's not asking "the Commission to review,  
20 change, or modify the rates and charges approved" in the Rate Case Decision. But, that is  
21 exactly what SSVEC is asking. The Commission concluded that energy charges of summer  
22 peaking contracts were to be assigned to all members, not just the ARMs. In direct opposition,

23 <sup>17</sup> *Lucus v. Ruckman*, 287 P.2d 68, 72 (N.M. 1955) (defining collateral attack as "an attempt to avoid, defeat, or  
24 evade [a judgment], or deny its force and effect, in some incidental proceeding").

1 SSVEC now wants the Commission to order that all Powerex energy costs should be assigned  
2 only to the ARMs. SSVEC's protestations notwithstanding, that is the textbook definition of a  
3 collateral attack.<sup>18</sup>

4 **IV. THE DOCTRINE OF *RES JUDICATA* ALSO PRECLUDES SSVEC'S NEWLY  
5 FOUND POWEREX POSITION.**

6 *Res judicata* also bars SSVEC's untimely attempt to rewrite the FPPCA rules because  
7 SSVEC (and MEC) could have raised the issue in the rate case but failed to do so. Unless  
8 appealed, rate case decisions are final, binding on all parties and have *res judicata* preclusive  
9 effect.<sup>19</sup> SSVEC was aware of its imminent change to PRM status throughout the rate case, yet  
10 never said anything about any FPPCA issue, including how to treat summer peaking contract  
11 charges. If SSVEC wanted to discuss what it thinks are different kinds of summer contracts or  
12 how charges might be handled differently, the time to do that was when AEPCO raised the issue  
13 and Staff agreed to AEPCO's recommendations. SSVEC didn't do so then and cannot do so  
14 now.

15 Claims which could have been raised in a prior proceeding are barred from being brought  
16 in subsequent proceedings like this complaint action.<sup>20</sup> *See Application of Texas-New Mexico*  
17 *Power Co.*, 1992 WL 814105, at \*23, Tex. P.U.C. Bull. 89 (Tex. P.U.C. 1992) (noting that in  
18 order to find a change in circumstances so as to review and reopen a previously final order, the  
19 cited changes "must not constitute issues which might have been raised in the prior hearing"  
20 (citing *Westheimer Indep. Sch. Dist. v. Brockett*, 567 S.W.2d 780, 787 (Tex. 1978))); *see also*

21 <sup>18</sup> As for its comment that Staff stated at the May Open Meeting that SSVEC should file a complaint, that is correct  
22 as to Staff's procedural statement, but it does not change Staff's substantive position, then and now, that this issue  
23 should be addressed in the next rate case.

24 <sup>19</sup> Motion for Summary Judgment, pp. 15-16.

<sup>20</sup> The principle that claims that could have been raised in a prior proceeding cannot be raised in a subsequent  
proceeding is "well established by the cases," but the specific legal theory cited can vary; it is "sometimes on a  
theory of *res judicata* and sometimes on a theory of waiver or estoppel." *In re R & C Petroleum, Inc.*, 236 B.R. 355,  
361 (Bankr. E.D. Tex 1999) (citing *Kane v. Magna Mixer Co.*, 71 F.3d 555, 562 (6th Cir. 1995)).

1 *American Sleek Craft, Inc. v. Nescher*, 131 B.R. 991, 1000 (D. Ariz. 1991) (holding that party  
2 who failed to voice a claim when it “should reasonably have been voiced” was estopped from  
3 raising claim in subsequent proceeding).

4 SSVEC and MEC said absolutely nothing about this (or any other) FPPCA issue when  
5 AEPCO raised it and suggested a cost treatment method which Staff agreed with in the rate case.  
6 The Commission then ordered that treatment through its adoption of the different ARM/PRM  
7 base power costs. The parties knew that the Panda Contract would expire. If SSVEC or MEC  
8 wanted to discuss different contract forms which might take its place and/or how fuel, capacity,  
9 energy, wheeling or any other kinds of charges might be assigned, the time to do that was then.  
10 The attempt to do it now, by this Complaint, is prohibited.

11 **V. GIVEN SSVEC’S SEA CHANGE ON THE SCOPE OF ITS COMPLAINT,**  
12 **AEPCO WITHDRAWS ITS POSITION THAT THE COMPLAINT IS BARRED**  
13 **BY THE TWO-YEAR STATUTE OF LIMITATIONS.**

14 As explained previously, given the expansive scope of the Complaint’s allegations  
15 regarding the FPPCA and its cost allocation requirements, AEPCO believed that SSVEC was  
16 broadly attacking the FPPCA’s basic tenets which were formulated in the August 2005 Rate  
17 Case Decision and then confirmed in the March 2006 Efficacy Decision.<sup>21</sup> Because SSVEC’s  
18 Complaint was not filed until July of 2008—more than two years after the Efficacy Decision—it  
19 is prohibited by the two-year statute of limitations in A.R.S. § 40-248 if that is SSVEC’s  
20 position.

21 However, given the fact that SSVEC has now collapsed its allegations to the single issue  
22 of energy cost treatment of the Powerex Contract—a contract which did not take effect until  
23 2007—AEPCO withdraws that argument. However, it does so on the understanding that, should

24 <sup>21</sup> Motion for Summary Judgment, p. 17.

1 SSVEC's Complaint once again magically expand to include general allegations regarding  
2 AEPCO's implementation of the FPPCA, it will re-argue the position.

3 **VI. SSVEC IS NOT ENTITLED TO MORE DISCOVERY.**

4 SSVEC's final argument is that summary judgment in AEPCO's favor is inappropriate  
5 until some undefined future time when SSVEC has completed discovery. But, SSVEC cannot  
6 point to any specific factual inquiry that would prevent summary judgment in AEPCO's favor.  
7 Rather, SSVEC vaguely speculates that "discovery is not complete," it "continues to submit data  
8 requests" and SSVEC is "still determining" whether to depose AEPCO personnel.<sup>22</sup>

9 SSVEC's "fishing trip" assertions are simply inadequate. AEPCO has fully responded to  
10 three sets of SSVEC data requests and has assured SSVEC that no other contracts are relevant to  
11 this issue.<sup>23</sup> "The mere hope or speculation that the discovery process will uncover evidence  
12 sufficient to defeat a motion for summary judgment is an insufficient basis for denying the  
13 motion." *Camoia v. Custom Computer Specialists, Inc.*, 843 N.Y.S. 2d 467, 468 (App. Div.  
14 2007).

15 SSVEC has "failed to offer an evidentiary basis for their claim that discovery may lead to  
16 relevant evidence, and [it] failed to show that facts essential to justify opposition to the motion  
17 were exclusively within [AEPCO's] knowledge." *Id.*; *see also Margolis v. Ryan*, 140 F.3d 850,  
18 853-54 (9th Cir. 1998). "A party may not defeat a motion for summary judgment by merely  
19 restating conclusory allegations and amplifying them only with speculation about what discovery  
20 might uncover." *In re Worldcom, Inc.*, 361 B.R. 697, 715 (Bankr. S.D.N.Y. 2007).

21 SSVEC's desire to engage in a further discovery expedition based on rank speculation  
22 that it may find some fact relevant to AEPCO's Motion cannot prevent summary judgment in

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23 <sup>22</sup> Response, p. 10.

24 <sup>23</sup> Brian Affidavit, Exhibit E, Response 2.3(g).

1 AEPCO's favor. *Bastin v. Fed. Nat'l Mortgage Ass'n*, 104 F.3d 1392, 1396 (D.C. Cir. 1997)  
2 (affirming summary judgment).

3 **VII. CONCLUSION.**

4 SSVEC has collapsed the broad allegations of its Complaint to a single issue: the  
5 allocation of Powerex Contract energy costs. SSVEC, however, cannot point to any provision of  
6 the Rate Case Decision that AEPCO has violated. To the contrary, SSVEC agrees that AEPCO  
7 is handling Powerex energy charges precisely as it should.

8 The Rate Case Decision provided that energy costs be assessed to all members.  
9 Correspondingly, AEPCO has assessed the energy costs of its summer peaking contracts to all  
10 members for several years. SSVEC's arguments as to what it "believes" the Powerex Contract is  
11 "like" or "akin to" are irrelevant given those undisputed facts and the history and finality of the  
12 Rate Case Decision.

13 A new formulation of how summer peaking agreement costs are assessed to PRMs is an  
14 appropriate discussion topic for AEPCO's next rate case in 2009. But, that issue in this  
15 proceeding is an impermissible collateral attack on the Rate Case Decision. Because there are no  
16 questions of material fact regarding AEPCO's compliance, AEPCO requests that the  
17 Commission enter summary judgment in its favor and dismiss SSVEC's Complaint with  
18 prejudice.

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RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of November, 2008.

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