

**ORIGINAL**



0000093221

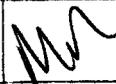
**BEFORE THE ARIZONA CORPORATION COMMISSION  
RECEIVED**

KRISTIN K. MAYES  
CHAIRMAN  
GARY PIERCE  
COMMISSIONER  
SANDRA D. KENNEDY  
COMMISSIONER  
PAUL NEWMAN  
COMMISSIONER  
BOB STUMP  
COMMISSIONER

2009 JAN 30 A 9:19  
AZ CORP COMMISSION  
DOCKET CONTROL

Arizona Corporation Commission  
**DOCKETED**

JAN 30 2009

DOCKETED BY 

IN THE MATTER OF THE GENERIC  
PROCEEDING CONCERNING ELECTRIC  
RESTRUCTURING ISSUES

Docket No. E-00000A-02-0051  
E-00000A-01-0630

**RUCO'S COMMENTS REGARDING  
RETAIL ELECTRIC COMPETITION IN ARIZONA**

The Residential Utility Consumer Office ("RUCO") submits these comments on the question of whether retail competition is in the public interest in Arizona at the current time. RUCO appreciates the opportunity to make its comments for the Commission's consideration.

**HISTORICAL OVERVIEW**

In 1910 the citizens of the Territory of Arizona elected fifty-two delegates to draft a constitution for the soon-to-be state. Most of those delegates were sympathetic to what was then called the "Progressive" agenda. Progressivism was a bi-partisan national reform movement that emerged in the late 1890's. The Progressives believed that government had become hopelessly corrupted and was inordinately influenced by monopolistic corporations, trusts and wealthy individuals. They advocated sweeping structural changes to give ordinary citizens greater political rights.

1 In many respects, the Constitution of 1910 was quite traditional and it borrowed  
2 heavily from such obvious sources as the U. S. Constitution and the constitutions of sister  
3 states. However, in other respects the 1910 Constitution was original and even radical. It  
4 was arguably the most Progressive constitution of its day and included several provisions  
5 that were considered radical such as the secret ballot, the direct primary, the initiative, the  
6 referendum and the recall. It was in this same spirit that the framers created an elected  
7 Corporation Commission with sweeping regulatory powers to oversee the railroads and  
8 other public service corporations.

9 Interestingly, Article 14 § 15 of the Arizona Constitution expressly outlaws  
10 monopolies. The language of that section begins: "Monopolies and trusts shall never be  
11 allowed in this State..." The section goes on to make it unlawful for any combination of  
12 companies "... to fix prices, limit the production or regulate the transportation of any  
13 product or commodity." Arizona courts, however, have made it clear that the Corporation  
14 Commission may grant a monopoly if it is authorized to do so by constitution and statutes.  
15 (See *Cochise Sanitary Services, Inc. v. Corporation Commission* (App 1966) 2 Ariz.App  
16 559, 410 P.2d 677) Article 15 § 3 of the Constitution provides that authorization and states  
17 in part: "The Corporation Commission shall have full power to, and shall, prescribe just and  
18 reasonable rates and charges to be made and collected, by public service corporations  
19 within the State for service rendered therein, and make reasonable rules, regulations, and  
20 orders, by which such corporations shall be governed in the transaction of business within  
21 the State..."

22 From its beginnings, the State of Arizona has contemplated having a Corporation  
23 Commission that would regulate the activities of public service corporations in the absence  
24 of a competitive marketplace. While many conditions have changed since the framers  
established the Commission, the Progressive idea that public service corporations are  
unique and that, while market forces routinely provide positive benefits to the public, in

1 those critical areas in which public service corporations provide essential services, their  
2 activities should continue to be overseen in a manner that provides adequate protection for  
3 the public.

4 In a more modern era, the Commission has taken care in adopting Rules to protect  
5 residential customers from harms posed by competitive retail electric service (e.g.  
6 slamming, ESP's dropping customers, and affiliate abuses). Even after the Track A  
7 decision, utilities are required, pursuant to the Track B process, to obtain only a portion of  
8 the power for standard offer customers from the wholesale market. The goals of the Track  
9 B process, as expressed in Decision No. 65743, is to "provide ratepayers with reliable  
10 power at the lowest cost while furthering the Commission's goal of encouraging the  
11 development of a vibrant wholesale generation market in Arizona." (Decision No. 65743,  
12 pg. 16.) Track A and Track B both signaled a significant attempt in Arizona to, at the very  
13 least, slow down progress on the future of retail competition.

14 That progress was further slowed, if not permanently stopped, by the Arizona Court  
15 of Appeals in the case of *Phelps Dodge*. In 2004, the Arizona Court of Appeals made it  
16 clear that pure market-based pricing is an unconstitutional abandonment of the  
17 Commission's obligation to insure rates are just and reasonable. See *Phelps Dodge v.*  
18 *Ariz. Electric Power Cooperative*, 207 Ariz. 95, 83 P.3d 573, (App. 2004). *Phelps Dodge*  
19 considered whether the unbundled generation service from the electric service providers  
20 could be solely market-based when distribution and transmission services would continue  
21 to be provided by the UDC at cost-based rates. The Court of Appeals concluded that the  
22 rule providing for fully market-determined rates for competitive services could not be validly  
23 applied "under any set of circumstances."

24 Since *Phelps* the viability of retail competition in Arizona, from a legal standpoint  
remains in serious doubt. While it has only recently been tested in the *Sempra* CC&N

1 application, it appears certain that the Commission will have to overcome significant legal  
2 obstacles before retail competition in Arizona can be implemented.

### 3 **DISCUSSION**

4 The question of whether retail competition in the electricity industry in Arizona is  
5 appropriate at this time should not be conflated with larger questions of whether  
6 "competition" generically is "good" as an end in and of itself or whether "regulation"  
7 generically is inherently "bad" and abusive of the free market underpinnings of our national  
8 economic philosophy. The question more specifically is whether retail competition in this  
9 industry in this State at this time can deliver on the promises Americans expect of truly  
10 competitive markets, e.g., lower prices, choices from among a greater variety of service  
11 offerings and innovation—all delivered in a non-discriminatory manner without  
12 compromising service reliability of this most vital of modern industries and without  
13 imperiling the Constitutional requirement of our Commission to regulate monopolies in a  
14 manner that guarantees just and reasonable rates.

15 RUCO has consistently asserted (beginning with the April 14, 2003 letter to Director  
16 Ernest Johnson re: Issues List for Electric Competition Advisory Group) that the  
17 experiment of designing market structures for monopoly industries is, in essence, a tricky  
18 business that introduces risk and uncertainty into a previously well-understood system  
19 governed by the traditional Compact between regulators and the regulated.

20 More pointed RUCO comments occasioned by *Sempra* will not be re-iterated here;  
21 however, RUCO stands by its position with respect to the concerns raised in that matter,  
22 and we incorporate them by reference herein. Moreover, RUCO suggests that the record  
23 in the *Sempra* matter was sufficiently well developed by other participants (see especially  
24 testimonies of witnesses for New West Energy and ACC Staff) that Arizona regulators and

1 Commission utility regulatory staff can rely on it both as a sort of cautionary tale and for  
2 guidance in this docket.

3 RUCO has signaled in a recent Commission discussion about the Arizona Public  
4 Service Company's option to self-build generation that it has fewer continuing concerns  
5 about the wholesale end of the business, although we have signaled some unease about  
6 how unregulated generation entities can contribute to the accomplishment of Commission  
7 and/or Legislatively-directed societal objectives and about how there may need to be more  
8 careful oversight of competitive bidding processes to assure non-interference from  
9 incumbent utilities and robust participation from qualified bidders in the future. With those  
10 relatively minor caveats about open wholesale-related questions, these comments attempt  
11 to respond exclusively to the retail competitive question(s) posed in this docket.

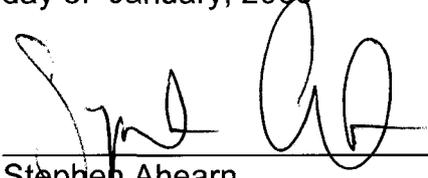
## 12 **CONCLUSION**

13 RUCO's consistent cautions about retail electric competition in Arizona  
14 notwithstanding, there can be no doubt that the very threat of competition to traditional  
15 vertically integrated utilities beginning in the mid-'90's did serve to rationalize the  
16 incumbent utilities in the industry. Payrolls and headcount were reduced and operations  
17 and overhead costs were streamlined, giving rise to more competitive, leaner-and-meaner  
18 incumbent utilities that were able to agree to rate cuts, rate freezes and rate increase  
19 moratoriums of varying lengths as a *quid pro quo* with regulators as we all embarked on  
20 the experiment with "deregulation." Indeed, this very bargain can legitimately be seen to be  
21 a proximate cause for the ultimate and serial failures of competition nationwide, as have  
22 become manifest and increasingly obvious in so many jurisdictions, including California,  
23 Illinois, Michigan, Connecticut, Maryland, Texas and Pennsylvania. To return to the point,  
24 the mere threat of competition improved utility operations in this country in general, and  
this state in particular. RUCO stipulates to that effect without equivocation.

1           However, RUCO has also consistently made the case that Arizona citizens and  
2 business owners alike expect the Corporation Commission to utilize effectively its  
3 Constitutional mandate to act as a sort of proxy for the non-existent competitors in the  
4 monopoly electric utility industry. We also explicitly recognize and encourage the  
5 tempering and salutary effects of real competition where it really exists, or where it could  
6 be made to exist or where it might potentially in the future come to exist of its own future  
7 merit. To that end, RUCO will again support its earlier policy with respect to the Arizona  
8 Independent Scheduling Administrator (AISA)—specifically, that it should be retained as a  
9 sort of rear-guard protection against the potential abuse of monopoly incumbent utilities in  
10 an uncertain future.

11           Finally, with a new Administration in Washington and new leadership at FERC,  
12 there has been conveyed an increasingly stark message that federal policy is unlikely to  
13 continue to support the sort of market-based structural approach that held sway under  
14 Chairman Kelliher, to say nothing about how the Bulk Power System is to be directed and  
15 whether prudent engineering practices will once again prevail over economic philosophies.  
16 Indeed, it is immediately clear that other prerogatives are gaining ascendance, themselves  
17 potentially presenting Arizona with an accompany set of different problems to solve or  
18 avoid, such as whether and how to construct a “national highway system” for renewable  
19 resources and the degree to which the Nation should be encouraging and relying on  
20 energy efficiency as a primary resource. RUCO suggests that these new realities militate  
21 against a near-term need for Arizona to implement a retail-friendly regime, but we also  
22 acknowledge that in this time of transition, we should husband all the tools of potential  
23 value that are available to us, including the AISA.  
24

1 RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of January, 2009

2 

3 \_\_\_\_\_  
4 Stephen Ahearn  
5 Director  
6 Residential Utility Consumer Office

7 AN ORIGINAL AND FIFTEEN COPIES  
8 of the foregoing filed this 30<sup>th</sup> day  
9 of January, 2009 with:

10 Docket Control  
11 Arizona Corporation Commission  
12 1200 West Washington  
13 Phoenix, Arizona 85007

14 COPIES of the foregoing hand delivered/  
15 Mailed/\*emailed this 30<sup>th</sup> day of January, 2009 to:

16  
17  
18  
19  
20  
21  
22  
23  
24

1 Lyn Farmer  
Chief Administrative Law Judge  
2 Hearing Division  
Arizona Corporation Commission  
3 1200 West Washington  
Phoenix, Arizona 85007  
4  
5 Janice Alward, Chief Counsel  
Legal Division  
Arizona Corporation Commission  
6 1200 West Washington  
Phoenix, Arizona 85007  
7  
8 Ernest Johnson, Director  
Utilities Division  
Arizona Corporation Commission  
9 1200 West Washington  
Phoenix, Arizona 85007  
10  
11 \*Michael A. Curtis  
\*William P. Sullivan  
\*Ian D. Quinn  
12 Curtis, Goodwin, Sullivan, Udall &  
Schwab, PLC  
13 501 E. Thomas Road  
Phoenix, AZ 85012-3205  
14  
15 \*Jay I. Moyes, Esq.  
Moyes Sellers & Sims  
1850 N. Central Avenue, Suite 1100  
16 Phoenix, AZ 85004  
17 \*Kenneth C. Sundlof, Jr., Esq.  
Jennings, Strouss & Salmon, P.L.C.  
18 201 E. Washington Street, 11<sup>th</sup> Floor  
Phoenix, AZ 85004-2385  
19  
20 \*Kelly J. Barr, Esq.  
\*Jana Brandt  
Salt River Project Agricultural  
21 Improvement & Power District  
Regulatory Affairs & Contracts, PAB 221  
22 P. O. Box 52025  
Phoenix, AZ 85072-2025  
23  
24

\*Russell E. Jones  
Waterfall Economidis Caldwell  
Hanshaw & Villamana, P.C.  
5210 E. Williams Circle #800  
Tucson, AZ 85711

Dimitrios J. Loloudakis  
Energy Management Superintendent  
Metro Facilities & Energy Management  
Office  
2631 S. 22<sup>nd</sup> Avenue  
Phoenix, AZ 85009

\*William D. Baker  
Ellis & Baker, P.C.  
7301 North 16<sup>th</sup> Street, Suite 102  
Phoenix, AZ 85020-5266

\*C. Webb Crockett  
\*Patrick J. Black  
Fennemore Craig, P.C.  
3003 N. Central Avenue, Suite 2600  
Phoenix, Arizona 85012-2913

\*Kevin C. Higgins, Principal  
Energy Strategies, LLC  
215 South State Street, Suite 200  
Salt Lake City, UT 84111

\*John Wallace  
Grand Canyon State Electric  
Cooperative Association, Inc.  
120 N. 44<sup>th</sup> Street, Suite 100  
Phoenix, AZ 85034

\*Craig Goodman  
\*Stacey Rantala  
National Energy Marketers Association  
3333 K Street, NW, Suite 110  
Washington, DC 20007

\*Philip J. Dion  
\*Michelle Livengood  
UniSource Energy Company  
One South Church Avenue, Suite 2003  
Tucson, AZ 85701

1 \*Dave Couture  
UniSource Energy Company  
2 One South Church Avenue, Suite 200  
Tucson, Arizona 85701  
3  
4 \*Michael W. Patten  
\*Jason D. Gellman  
\*Timothy J. Sabo  
5 Roshka DeWulf & Patten, PLC  
400 East Van Buren, Suite 800  
6 Phoenix, AZ 85007  
7 \*Michael M. Grant  
Gallagher & Kennedy, P.A.  
8 2575 E. Camelback Road  
Phoenix, AZ 85016-9225  
9  
10 \*Lawrence V. Robertson, Jr.  
P. O. Box 1448  
2247 E. Frontage Road  
11 Tubac, Arizona 85646  
12 \*Robert S. Lynch  
\*Jeri Kishiyama Auther  
13 Robert S. Lynch & Associates  
340 E. Palm Lane, Suite 140  
14 Phoenix, AZ 85004-4603  
15 \*Peter Q. Nyce, Jr.  
General Attorney, Regulatory Law Office  
16 Office of the Judge Advocate General  
Department of the Army  
17 901 North Stuart Street, Room 713  
Arlington, VA 22203-1837  
18  
19 \*Dan Neidlinger  
Neidlinger & Assoc.  
3020 N. 17<sup>th</sup> Drive  
20 Phoenix, Arizona 85015  
21 \*Christopher Hitchcock  
Law Offices of Christopher Hitchcock,  
22 P.L.C.  
One Copper Queen Plaza  
23 P. O. Box AT  
Bisbee, Arizona 85603-0115  
24

\*Gary Yaquinto  
Arizona Investment Council  
2100 N. Central Avenue, suite 210  
Phoenix, Arizona 85004

\*David Berry  
Western Resource Advocates  
PO Box 1064  
Scottsdale, AZ 85252-1064

\*Thomas L. Mumaw  
\*Deborah R. Scott  
Pinnacle West Capital Corporation  
P. O. Box 53999, MS 9708  
Phoenix, AZ 85072

\*Leland R. Snook  
\*Jeff Johnson  
Arizona Public Service Company  
P. O. Box 53999, MS 9708  
Phoenix, AZ 85072

\*Vicki Sandler  
Interim Executive Director  
AzISA  
14402 S. Canyon Drive  
Phoenix, Arizona 85048

By   
Ernestine Gamble