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MEMORANDUM

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TO: Docket Control

FROM: Deborah R. Scott *Barbara W. Jacke*
Director *for*
Utilities Division

AZ CORP COMMISSION
DOCUMENT CONTROL

DATE: March 15, 2001

RE: IN THE MATTER OF THE NOTICE OF PROPOSED RULEMAKING FOR THE ENVIRONMENTAL PORTFOLIO STANDARD (DOCKET NO. RE-00000C-00-0377)

On February 8, 2001, the Commission entered Decision No. 63364, adopting the Environmental Portfolio Standard Rules. Five parties to the docket filed timely applications for rehearing and reconsideration of Decision No. 63364. On March 9, 2001, the Commission granted the applications for rehearing to provide Staff an opportunity to review the requests and prepare recommendations to the Commission for its consideration and possible action. The attached Staff Report reflects Staff's recommendations.

DRS/RTW/bk

Originator: Ray T. Williamson

Attachment: Original and Ten Copies

Arizona Corporation Commission

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STAFF REPORT

Staff's Recommendations Regarding Requests for Reconsideration of Environmental Portfolio Standard Rules

(Docket No. RE-00000C-00-0377)

1. INTRODUCTION.

On February 8, 2001, the Commission entered Decision No. 63364, adopting the Environmental Portfolio Standard Rules. Five parties to the docket filed timely applications for rehearing and reconsideration of Decision No. 63364. On March 9, 2001, the Commission granted the applications for rehearing to provide Staff an opportunity to review the requests and prepare recommendations to the Commission for its consideration and possible action. This Staff Report reflects Staff's recommendations.

Staff has reviewed all of the applications. Staff finds that most of the arguments included in the requests for rehearing of Decision No. 63364 concern issues that have been argued to and addressed by the Commission in this and previous dockets. However, Staff has identified certain specific matters that it believes merit Commission reconsideration. These specific matters are discussed below with Staff's recommendations for Commission action to modify Decision No. 63364 to reflect limited changes to Decision No. 63364 and the Environmental Portfolio Standard Rules.

2. APS'S REQUEST TO CLARIFY R14-2-1618.F.

The first matter Staff believes merits reconsideration is Arizona Public Service Company's (APS's) request to clarify an unintentional discrepancy between two sections of the rules. In R14-2-1618.C.3.a, a Load-Serving Entity that financed or paid for a qualifying technology would be able to claim an extra credit multiplier. However, R14-2-1618.F provides that qualifying resources located on the consumer's premises shall count toward the portfolio requirement of the Load-Serving Entity serving the customer. These two rule provisions appear to be in conflict. The intent of the rules was to reward Load-Serving Entities that financed or paid for customer premise systems. The wording discrepancy could be construed to discourage customer premises systems by giving the portfolio requirement credit to the customer's current Load-Serving Entity, even if it had not financed or paid for the qualifying system.

APS has suggested that R14-2-1618.F be modified as follows:

Photovoltaic or solar thermal electric resources that are located on a consumer's premises shall count toward the Environmental Portfolio Standard applicable to the current Load-Serving Entity serving that consumer unless a different Load-Serving Entity is entitled to receive credit for such resources under the provisions of R14-2-1618.C.3.a.

After Staff's review of this matter, Staff agrees with APS' request to modify the language of R14-2-1618.F as proposed above. Further, Staff believes that this is a non-substantive change

that merely clarifies an apparent discrepancy in rule wording. Staff recommends that the Commission adopt APS' language change to R14-2-1618.F.

APS also requested that the Commission change the language of R14-2-1618.M to remove an in-state requirement for alternative technology choices for meeting the Portfolio requirements. Staff does not agree with this change. The provisions of R14-2-1618.M are merely permissive options to meet the Portfolio requirements. They do not mandate the use of only Arizona technologies to meet the standard, in as much as the standard can be met under other rule provisions.

3. AEPCO's Request for Rehearing and Stay of the Rules.

Arizona Electric Power Cooperative (AEPCO) based its request for reconsideration and stay of Decision No. 63346 on a wide range of alleged legal challenges to the Commission's authority to promulgate and adopt the Environmental Portfolio Standard Rules. Staff does not agree with AEPCO's legal challenges to the rules because the rules are within the Commission's broad powers founded both in the Arizona Constitution and in Title 40 of the Arizona Revised Statutes.

However, the Environmental Portfolio Standard Rules have a far reaching significance in promoting the public interests of both public service corporations and their customers. As a consequence, Staff believes that participants' active cooperation in achieving the Portfolio goals is in the public interest as well. It was from that viewpoint that Staff considered AEPCO's request for rehearing, and centered its review on whether to recommend that the Commission provide AEPCO and its member cooperatives another opportunity to work with Staff and the Commission to accomplish mutual goals within the context of the Environmental Standard Portfolio Rules.

In brief summary of AEPCO's relevant filings in this docket concerning its cooperative status, AEPCO alleged that the Rural Utilities Service (RUS) requirements would preclude AEPCO's financing and purchase of Portfolio resources. For this and other reasons, AEPCO requested that cooperative participation in the Portfolio Standard be limited and suggested in its previously filed exceptions that a special rule be adopted to limit their participation.

Staff responded and the Commission agreed at the Open Meeting in which the Commission adopted the Portfolio Rules in Decision No. 63346, that a new rule provision was unnecessary. The Commission's rules provide the cooperatives an opportunity to seek a waiver of any rule requirement. To date, no Portfolio Rule waiver applications by AEPCO or its member cooperatives have been filed at the Commission.

Staff realizes that AEPCO and its member cooperatives may have different concerns than other Load-Serving Entities because of their unique status as customer-owned cooperatives. After the Commission granted the requests for rehearing of Decision No. 63346, Staff members met with AEPCO representatives. The discussion included whether AEPCO's proposed plan for reorganization provided for the portfolio requirements and whether AEPCO would seek a waiver of RUS requirements it alleges preclude the cooperatives from full participation in the Environmental Portfolio Standard Rules. AEPCO's response was that it is still developing its plan.

In light of the above, Staff believes that it would be appropriate to allow a reasonable amount of time for AEPCO and other cooperatives to develop a plan to meet their Portfolio requirements. Any cooperative-proposed plan that varies from the Portfolio Rules could be submitted with a request for a waiver. In addition, Staff believes that it would be appropriate for both Staff and AEPCO representatives to work together and meet with RUS officials to discuss and achieve mutual goals.

Therefore, Staff recommends that the Commission modify Decision No. 63346 to stay the Environmental Portfolio Standard Rules as applied to the cooperatives for 180 days. Staff proposes the following language to modify Decision No. 63346 and implement the stay provisions to apply only to cooperatives.

Affected Utilities, which are nonprofit, member-owned cooperatives are exempt, at their own election, from compliance with the Environmental Portfolio Standard Rules, including the portfolio percentage requirements set forth in R14-2-1618.B for a period of 180 days from the effective date of this order. Cooperatives electing exemption status shall file a notice in this docket within 30 days of the effective date of this order. Notwithstanding their exemption from compliance with the Environmental Portfolio Standard Rules, the exempt cooperatives may, at their own option, collect the Environmental Portfolio Surcharge authorized by R14-2-1618.A.2 and apply the proceeds so collected toward meeting the Environmental Portfolio percentage at the 180-day exemption period expiration, unless the exemption period is extended by the timely filing of a plan or by order of the Commission.

On or before the expiration of the 180-day exemption period, exempt cooperatives shall file for Commission consideration a plan for meeting their portfolio requirements. In the alternative, a cooperative may file a request stating good cause why the exemption period should be extended. The timely filing of a plan or request for extension shall extend the exemption period until the Commission considers and acts upon the plan or the request.

Staff also recommends that the Commission order representatives of the exempt cooperatives to meet with Staff, RUS's representatives and other appropriate federal agencies to discuss these matters to achieve mutual goals within the context of the Environmental Portfolio Standard Rules.

Staff's recommendations to modify Decision No. 63364 do not change the rules' language, but modify the Decision adopting the rules to provide for the stay as described above. Therefore, this modification to Decision No. 63346 is not a substantive change to the rules.

4. Requests Related to Reconsideration of Deficiency Payments in R14-2-1618.E.

Several requests for reconsideration concerned opposition to the deficiency payments, and related matters, under R14-2-1618.E that may be imposed by the Commission against Load-Serving Entities at some future time, but no earlier than 2004, for failure to meet the portfolio requirements.

Staff believes the Commission has the power to impose such deficiency payments and take other actions provided for in this rule. However, adoption of deficiency payment provisions does not appear to be essential to the effectiveness of the Portfolio Rules at this time because the imposition of deficiency payments will not be effective earlier than 2004. Similarly, the discretionary setting aside of contracts for deficiencies in Portfolio requirements will not be effective until 2004. In addition, the rule now provides for prospective modification of the Portfolio requirements by the Environmental Portfolio Cost Evaluation Working Group as the basis for the deficiency payments or other actions under 1618.E to assure Portfolio standards are met.

In light of the potential for future modification of the rules as presently provided in the rules themselves, Staff agrees with the requests that the Commission reconsider adoption of specific deficiency rule provisions that will not be imposed until 2004. Notwithstanding Staff's agreement that the Commission should reconsider the adoption of R14-2-1618.E at this time, Staff believes the Commission may consider this matter at a later time and also direct the Environmental Portfolio Cost Evaluation Working Group to make specific recommendations to the Commission. Staff also notes, as do the requests, even without a specific rule provision concerning deficiency payments, the Commission's orders and rules are enforceable by general statutory penalty provisions for violations of their provisions.

Therefore, Staff recommends that the Commission delete section R14-2-1618.E from the rules. Staff also recommends that R14-2-1601.39, which is a definition related to the deficiency payment, also be deleted. The deletion of language in the Portfolio Rules related to deficiency provisions is not a substantive change to the rules. The Commission's rules related to deficiency provisions were discretionary and prospective. The Commission is not mandated to adopt deficiency provisions, and is free to reconsider these matters at a later time.

5. Conclusion.

Requests for rehearing filed by Sulphur Springs Valley Electric Cooperative, the parties collectively referred to as AECC (Phelps Dodge Corporation, ASARCO, and Arizonans for Electric Choice and Competition), and the Residential Utility Consumer Office reflected alleged legal challenges to the rules similar to those made by AEPCO in its application. As stated above, Staff does not believe these alleged legal challenges compel modification of Decision No. 63346 or the rules adopted in the Decision.

Staff recommends that the Commission modify Decision No. 63346 and the Environmental Portfolio Standard Rules as discussed above. As for all other matters raised in the five applications for rehearing or reconsideration filed in this docket, Staff recommends that they be denied by the Commission.