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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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Arizona Corporation Commission

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FEB 23 2010

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IN THE MATTER OF THE SALE AND
TRANSITION BY ARIZONA PUBLIC SERVICE
TO ELECTRICAL DISTRICT NO. 3 OF CERTAIN
ELECTRICAL FACILITIES IN PINAL COUNTY
PURSUANT TO A.R.S. § 40-285(A) AND FOR
DELETION FROM ITS CERTIFICATE OF
CONVENIENCE AND NECESSITY CERTAIN
AREAS OF PINAL COUNTY.

DOCKET NO. E-01345A-08-0426

PROCEDURAL ORDER

BY THE COMMISSION:

On June 8, 2009, the Arizona Corporation Commission's ("Commission") Hearing Division filed a Recommended Opinion and Order ("ROO") in the above-captioned matter, which was scheduled for discussion at the Commission's June 23 and 24, 2009, Regular Open Meeting. The Commission did not take final action on the matter during its June 2009 Open Meeting.

On October 2, 2009, Electrical District No. 3 ("ED3") filed a Motion to Admit Late-Filed Exhibits, and attached a Rider for Low Income and Medical Assistance Supplemental to All Residential Price Plans (Ex ED3-21); Resolution No. 2009-06 of the Board of Directors of ED3, adopting an Amended Renewable Energy Policy (Ex ED3-22); and a Term Sheet for Agreement between Arizona Public Service Company ("APS") and ED-3 for Retail Energy Efficiency Program Sharing. (Ex ED3-23)

On October 14, 2009, Pinal Energy LLC ("Pinal Energy") filed a Motion to Intervene in this matter and a Motion to Reopen the Record. Pinal Energy owns and operates an ethanol production facility in ED3's service area. Pinal Energy claims that its rates increased after APS and ED3 announced their proposed transfer and that as part of its evaluation of the proposed transfer, the Commission did not evaluate whether APS received additional consideration in the form of higher power revenue from ED3.

1 On October 19, 2009, the Commission's Utilities Division ("Staff") filed a Response to
2 ED3's Motion to Admit the Late-filed Exhibits, stating that Staff believes the additional steps taken
3 by ED3 address some of the larger concerns raised at the June 23, 2009, Open Meeting and that Staff
4 continues to support approval of the application.

5 On October 22, 2009, Staff filed a Response to Pinal Energy's Motion to Intervene. Staff
6 stated that APS provided notice of the proceeding by publishing notice in the *Maricopa Monitor* on
7 February 27, 2009 and in the *Casa Grande Dispatch* on March 3, 2009, and mailing it to each
8 customer affected by the transfer as well as property owners in the transfer area. Staff noted there
9 were additional mailings and public meetings concerning the transfer. Further, Staff noted that Pinal
10 Energy is not an APS customer that will be transferred to ED3 as part of the transaction. Staff argues
11 the Motion to Intervene is too late and granting the Motion would unduly broaden the issues. Staff
12 noted the Procedural Order in this matter provided that all requests to intervene must be filed by
13 March 18, 2009, but that Staff found it even more troublesome that intervention is being sought after
14 the hearing has concluded and a ROO issued.

15 On October 26, 2009, APS and ED3 filed a Joint Response to Pinal Energy's Motions. They
16 opposed intervention and reopening the record on the grounds that Pinal Energy failed to offer any
17 cause for its having failed to pursue intervention in a timely manner; failed to state any facts tending
18 to show that it is directly and substantially affected by the proceedings; and failed to state any basis
19 for its untimely request to reopen the administrative record.

20 On October 26, 2009, Pinal Energy filed a Response to Staff that claims that ED3 is suffering
21 from a "perfect storm" caused by escalating APS rates and the down-turn in the economy and is
22 struggling to pay its bills, and the Commission should reconsider whether it is in the public interest to
23 transfer APS customers to ED3.

24 On November 5, 2009, Pinal Energy filed a Reply to APS and ED3 stating that Pinal Energy
25 did not receive notice of the application, and further, that neither the notice nor the application,
26 disclosed that a fundamental part of the transaction was a new electricity requirements contract
27 between APS and ED3.

28

1 By Procedural Order dated January 6, 2010, a Procedural Conference was set to commence on
2 January 21, 2010, for the purpose of receiving procedural recommendations and oral argument from
3 the parties with respect to the post-hearing filings and events.

4 On January 21, 2010, the City of Maricopa (the "City" or "Maricopa"), a customer of ED3,
5 filed a Motion to Intervene.

6 The January 21, 2010, Procedural Conference convened as scheduled, with APS, ED3, Staff,
7 Pinal Energy and the City of Maricopa appearing through counsel.

8 As a follow-up to the January 21, 2010 Procedural Conference, on February 4, 2010, APS
9 filed copies of its January 2008 application at FERC to increase wholesale rates charged to ED3, and
10 Contract No. 89695 between APS and ED3, as late-filed exhibits.

11 Pinal Energy claims that it was unaware of the proceeding to sell assets and transfer
12 customers from APS to ED3, until the matter reached the Commission's Open Meeting, and
13 consequently, did not request intervention earlier.¹ The precipitating factor for Pinal Energy's
14 interest in this docket was escalating power costs, which it attributes to the 2008 wholesale power
15 agreement between APS and ED3. Pinal Energy suggests that there is a connection between the
16 renegotiated wholesale power contract and the current application, and the Commission should look
17 into the power requirements contract and consider conditioning the proposed sale and transfer on rate
18 relief for ED3's customers. Pinal Energy asserted that if the energy contract was a quid pro quo for
19 the sale of assets, or the two transactions are somehow linked, then the public notice of the proposed
20 sale was inadequate, which would warrant granting Pinal Energy's intervention and re-opening the
21 docket. In addition, Pinal Energy alleges that ED3's financial condition is precarious and suggests
22 that transferring customers from APS to ED3 would not be in the public interest.

23 The City, on the other hand, concedes that it had adequate notice of the proposed sale, as ED3
24 made a presentation to the City's counsel. However, the City states that its citizens have complained
25 of rising ED3 electric rates, and the City decided to see if its involvement in the pending docket could
26 help the citizens of Maricopa with their power rates.²

27 _____
28 ¹ Transcript of January 21, 2010 Procedural Conference ("Tr.") at 8.

² Tr. at 16.

1 APS argued that the requests to intervene are directly contrary to the requirements of A.A.C.
2 R14-3-105, because: (1) the requesting intervenors are not directly and substantially affected by the
3 proposed sale and transfer since there is no link between the power supply contract and the proposed
4 sale;³ (2) the request is months after any reasonable deadline for intervention, as it comes seven
5 months after the deadline in the Procedural Order, four and one-half months after the ROO was
6 issued, and four months after the Commission first considered the matter at Open Meeting; and (3)
7 allowing intervention and reopening the proceeding would unduly broaden the issues presented
8 without justification as there is no connection between the cost of the power supply contract and the
9 proposed sale and transfer.⁴ APS argued that ED3's rates are going to remain the same no matter
10 what happens in the current docket and the Commission does not have authority over the wholesale
11 contract between APS and ED3.⁵

12 ED3 concurs with APS, and argues that to allow Pinal Energy or the City to intervene at this
13 point in the proceeding would require both a strong showing of entitlement to intervene as well as a
14 strong justification for the failure to seek intervention earlier. ED3 asserts the timing of the sale and
15 transfer application and the power supply contract indicate that there is no connection between the
16 two. Furthermore, ED3 has negotiated two modifications of the contract since it was entered into and
17 all the rate comparisons utilized in the sale and transfer proceeding were based on the rates in effect
18 under the 2008 contract. ED3 states there is no substance to Pinal Energy's allegations that ED3's
19 financial condition is perilous. In addition, ED3 claims that the wholesale power contract with APS
20 and the settlement agreement for the sale of assets were approved by ED3's Board in conformance
21 with Open Meeting laws.

22 Staff argued that if there were ever an instance in which intervention should not be granted,
23 this is the case because the request is long beyond the deadline established in the Procedural Order
24 and by Commission rules. Staff believes that notice of the proceeding was adequate and that the
25 parties took extraordinary steps to inform the community. Staff also notes that as an existing ED3
26 customer, Pinal Energy is not affected by the sale and transfer, and Staff agreed that the Commission

27 ³ Tr. at 18-20.

28 ⁴ Tr. at 22.

⁵ Tr. at 23.

1 cannot alter the power contract as part of this docket.⁶ Staff continues to support the sale and
2 transfer.

3 Intervention at the Commission is generally governed by A.A.C. R14-3-105 which provides
4 as follows:

- 5 A. Intervention. Persons other than the original parties to the
6 proceedings, *who are directly and substantially affected by the*
7 *proceedings*, shall secure an order from the Commission or presiding
8 officer granting leave to intervene before being allowed to participate.
- 9 B. Application. An Application for leave to intervene shall be in writing
10 and must state the basis for the application. Such application shall be
11 served and filed by an applicant at least five days before the
12 proceeding is called for hearing. *No application for leave to intervene*
13 *shall be granted where by so doing the issues theretofore presented*
14 *will be unduly broadened*, except upon leave of the Commission first
15 had and received. Upon the granting of an application to intervene by
16 the Commission or the presiding officer, the intervening person shall
17 thereafter be designated an "Intervenor".
- 18 C. Other appearances. Notwithstanding the provisions of subsections
19 R14-3-105(A) and R14-3-105(B), any consumer or prospective
20 consumer may appear at any proceeding and make a statement on his
21 own behalf, at a time designated by the Commission or presiding
22 officer. A person so appearing shall not be deemed a party to the
23 proceedings. . . . (emphasis added).

24 In this case, the Procedural Order dated February 10, 2009, which set the matter for hearing,
25 established the deadline to intervene as March 18, 2009.

26 The hearing in this matter convened on April 2, 2009. The ROO was issued on June 8, 2009,
27 and the matter was noticed for, and discussed at, the Commission's June 23, 2009, Open Meeting.

28 Pinal Energy did not file its Motion to Intervene and Motion to Reopen the Record until
October 14, 2009. Maricopa did not file its Motion to Intervene until January 21, 2010.

As existing customers of ED3, Pinal Energy and Maricopa have not demonstrated that they
are directly affected by ED3's acquisition of APS' assets and the transfer of APS customers to ED3.
Neither Pinal Energy nor Maricopa have provided even a remote connection between the 2008
wholesale contract and the proposed transfer. Neither agreement contains a reference to the other,
and the timing of the applications does not support the allegations of a connection. One is a

⁶ Tr. at 34-36.

1 wholesale power contract, while the application before the Commission is an attempt to resolve long-
2 existing operational problems. Moreover, the Commission does not have authority over the
3 wholesale agreement between APS and ED3, nor does it have authority over ED3's retail rates.

4 The requests to intervene by Pinal Energy and the City of Maricopa were filed substantially
5 later than any reasonable deadline for intervention. If these entities had demonstrated a direct and
6 substantial interest in the proceeding and had also shown how notice was inadequate or fraudulent,
7 re-opening the record might be justified. However, neither applicant has shown any link between the
8 alleged increase in their electric power costs and the transaction before the Commission in this
9 docket. The timing of the transactions indicates that there is no link between the two contracts. APS
10 and ED3 negotiated an agreement for the transfer of APS assets to ED3 in March 2002, and filed the
11 agreement with the Commission on April 15, 2002. At that time, Staff believed that the agreement
12 did not go far enough in resolving the operational problems associated with the overlapping service
13 areas and APS voluntarily withdrew the agreement. The parties' continued negotiations resulted in
14 the application now before the Commission, which was filed on August 11, 2008. The settlement of
15 the wholesale power agreement went into effect in February 2008. The transfer of assets was in the
16 works for years prior to the new wholesale power agreement. ED3's Board approved both
17 agreements pursuant to the Open Meetings laws. Both Pinal Energy and Maricopa had the
18 opportunity to become involved in either transaction at the time they were being considered. Neither
19 Pinal Energy nor the City have shown that notice of this proceeding was inadequate or inaccurate.

20 For the reasons set forth above, the late-filed requests to intervene are denied.

21 The pleadings filed and statements made by Pinal Energy and the City of Maricopa at the
22 January 21, 2010, Procedural Conference will be treated as public comment. A revised ROO will be
23 prepared to reflect the filings that have been made in this docket since the first ROO was issued on
24 June 8, 2009, for consideration at a future Open Meeting of the Commission. At the discretion of the
25 Commission, Pinal Energy and Maricopa may have an additional opportunity to offer public
26 comment at that Open Meeting.

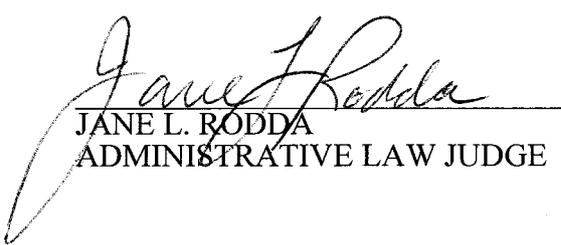
27 IT IS THEREFORE ORDERED that the Motions to Intervene filed by Pinal Energy and the
28 City of Maricopa are hereby denied.

1 IT IS FURTHER ORDERED that Pinal Energy's Motion to Re-Open the Record is denied.

2 IT IS FURTHER ORDERED that if not already filed, the parties shall file an updated rate
3 comparison exhibit as discussed in the January 6, 2010, Procedural Order and at the January 21,
4 2010, Procedural Conference, by March 5, 2010.

5 IT IS FURTHER ORDERED that the Presiding Officer may rescind, alter, amend, or waive
6 any portion of this Procedural Order either by subsequent Procedural Order or by ruling at hearing.

7 DATED this 22nd day of February, 2010.

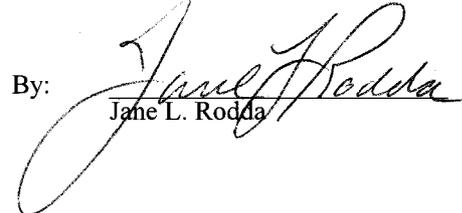
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10 
11 JANE L. RODDA
12 ADMINISTRATIVE LAW JUDGE

11 Copies of the foregoing mailed/delivered
12 this 22nd day of February, 2010 to:

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