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**BEFORE THE ARIZONA CORPORATION COMMISSION**

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JIM IRVIN  
Commissioner - Chairman  
RENZ D. JENNINGS  
Commissioner  
CARL J. KUNASEK  
Commissioner

IN THE MATTER OF THE APPLICATION  
OF TUCSON ELECTRIC POWER  
COMPANY FOR APPROVAL OF ITS PLAN  
FOR STRANDED COST RECOVERY

DOCKET NO. E-01933A-98-0471

IN THE MATTER OF THE FILING OF  
TUCSON ELECTRIC POWER COMPANY  
OF UNBUNDLED TARIFFS PURSUANT TO  
A.A.C. R14-2-1601 et seq.

DOCKET NO. E-01933A-97-0772

IN THE MATTER OF THE APPLICATION  
OF ARIZONA PUBLIC SERVICE  
COMPANY FOR APPROVAL OF ITS PLAN  
FOR STRANDED COST RECOVERY

DOCKET NO. E-01345A-98-0473

IN THE MATTER OF THE FILING OF  
ARIZONA PUBLIC SERVICE COMPANY  
OF UNBUNDLED TARIFFS PURSUANT TO  
A.A.C. R14-2-1601 et seq.

DOCKET NO. E-01345A-97-0773

IN THE MATTER OF COMPETITION IN  
THE PROVISION OF ELECTRIC SERVICES  
THROUGHOUT THE STATE OF ARIZONA.

DOCKET NO. RE-00000C-94-0165

**AECC'S APPLICATION FOR  
REHEARING OF DECISION NO. 61259**

ASARCO Incorporated, Cyprus Climax Metals Company, Inc., Enron Corp. and Arizonans  
for Electric Choice and Competition (collectively, the "AECC") hereby apply for a rehearing of  
Decision 61259 (Nov. 25, 1998) pursuant to A.R.S. § 40-253(A) and A.A.C. R14-3-111. Given the  
importance of this proceeding to the AECC and the State of Arizona generally, AECC respectfully

1 submits that the Arizona Corporation Commission (“the Commission”) should modify its decision  
2 to allow the parties to this proceeding a reasonable amount of time within which to review and  
3 analyze the agreements made between the Commission and the electric utilities and to prepare for  
4 the hearing on this matter, which is currently set to commence on December 3, 1998, at 8:00 a.m.  
5 Such relief is necessary in order to prevent the violation of the AECC’s constitutional rights and to  
6 ensure that the proceedings comport with basic due process requirements, including a fair hearing.

7           **A.       Procedural Background.**

8                       On December 26, 1996, the Commission issued Decision No. 59943 approving new  
9 rules to govern the restructuring of the electric utility industry within Arizona. See A.A.C. R14-2-  
10 203 through R14-2-211 and R14-2-1601 through R14-2-1616 (“Electric Competition Rules”). The  
11 Electric Competition Rules provide for the development of a competitive market for the generation  
12 of electric power sold to consumers, which will result in lower prices, better service, more choices  
13 and increased innovation. See Decision No. 60977 (June 22, 1998) at 5. Unfortunately, the  
14 transition from Arizona’s traditional regulatory approach, under which electric utilities have been  
15 regulated as monopolies, to a competitive market has proven to be extraordinarily difficult. One of  
16 the most significant issues is the recovery of the electric utilities’ claimed “stranded costs,” which,  
17 put simply, consist of the difference between market-based prices and the regulated cost of power.  
18 Stranded costs include assets relating to power generation, purchased power contracts and fuel  
19 generation contracts.<sup>1</sup>

20                       Under the Electric Competition Rules, electric utilities providing retail service  
21 within Arizona (known as “Affected Utilities”) were required to file tariffs for “unbundled service”  
22 by December 31, 1997. As this term implies, “unbundled service” is defined as “electric service  
23 elements provided and priced separately, including, but not limited to, such service elements as  
24 generation, transmission, distribution, metering, meter reading, billing and collection and ancillary

25 \_\_\_\_\_  
26 <sup>1</sup> A more comprehensive definition of the term “stranded costs” is found at A.A.C. R14-2-1601(39)  
(emergency amendment effective August 10, 1998).

1 services.” A.A.C. R14-2-1601(43) (emergency amendment). See also A.A.C. R14-2-1606(D).  
2 (emergency amendment) (requirement to file unbundled service tariffs). The two Affected Utilities  
3 that are the focus of the instant Application for Rehearing, Arizona Public Service Company  
4 (“APS”) and Tucson Electric Power Company (“TEP”), have filed unbundled tariffs. See Docket  
5 No. E-01345A-97-0773 (APS) and Docket No. E-01933A-97-0772 (TEP).

6 On December 1, 1997, a procedural order was issued setting an evidentiary hearing  
7 on generic issues relating to Affected Utilities’ stranded costs. Following a 13-day evidentiary  
8 hearing and the submission of extensive post-hearing briefs by the parties, the Commission issued  
9 Decision No. 60977, which was intended to govern stranded cost recovery. In this decision, the  
10 Commission issued several critical orders, including:

- 11 (1) Requiring each Affected Utility (including APS and TEP) to file its choice  
12 of options for stranded cost recovery.
- 13 (2) Ordering each Affected Utility to file an implementation plan with its  
14 stranded cost option containing the details for its plan, including its  
15 estimated stranded costs separated into generation-related assets and other  
16 regulatory assets.
- 17 (3) Allowing all other parties to the proceeding to file comments within 30 days  
18 of each Affected Utility filing its implementation plan. Notably, each party  
19 was given the right to request an evidentiary hearing on the implementation  
20 plans.
- 21 (4) Ordering the Director of the Utilities Division to submit amendments to the  
22 Electric Competition Rules, on an emergency basis, to make them consistent  
23 with the decision.

24 Decision No. 60977 at 23-24.<sup>2</sup>

25 On August 21, 1998, APS and TEP filed their plans for the recovery of stranded  
26 costs pursuant to Decision No. 60977, causing two additional dockets to be opened, Docket No. E-  
01345A-98-0473 (APS) and Docket No. E-01933A-98-0471 (TEP). After these implementation  
plans were filed, numerous parties filed comments on them and, in addition, requested that the

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<sup>2</sup> APS, TEP and the State of Arizona have appealed Decision No. 60977. Those appeals are presently pending.

1 Commission conduct an evidentiary hearing, as permitted by Decision No. 60977, including the  
2 AECC. In addition, on September 21, 1998, the Commission staff ("Staff") formally filed  
3 comments and a suggested procedure for future proceedings concerning the implementation plans,  
4 under which the Staff would review all of the parties' comments and prepare a formal report  
5 containing an analysis and evaluation of the plans and recommendations concerning the parties'  
6 various proposals. This report was to have been filed by November 13, 1998.

7 In the meantime, "closed door" negotiations were apparently taking place between  
8 APS, TEP and senior Commission employees. These negotiations apparently commenced  
9 sometime during the summer, and continued through October. According to responses provided by  
10 the Staff to data requests that were served by the State of Arizona, the Executive Secretary, the  
11 Director of Utilities, the Chief of the Accounting and Rates Section, and the Chief Counsel were  
12 among the Staff employees who were involved in the negotiations. A copy of the data request  
13 response provided by the Staff is attached hereto at Tab A.<sup>3</sup>

14 The other parties to the pending proceedings were excluded from the negotiations  
15 because, according to Staff, the involvement of additional parties "would have lengthened the  
16 negotiations and made reaching a settlement more difficult." Staff Response to State of Arizona's  
17 Data Request 49 (copy attached at Tab A). From time to time, Commissioners were updated by  
18 Staff on the status of the negotiations. Staff Response to State of Arizona's Data Request 52 (copy  
19 attached at Tab A). Thus, the Commissioners were kept informed of the status of agreements by  
20 Staff.

21 On November 4, 1998, the Executive Secretary executed separate agreements  
22 between the Commission and APS and TEP. These agreements purport to determine many of the

23  
24 <sup>3</sup> In addition, also in response to the State of Arizona's data requests, the Staff produced copies of certain  
25 confidentiality agreements made between APS and TEP and the Commission preventing public disclosure  
26 of documents, data, studies and other materials provided in connection with the negotiations. The  
Commission employees listed above executed these confidentiality agreements, as did other Commission  
employees.

1 disputed issues relating to the introduction of competition, including the recovery of stranded costs  
2 by APS and TEP and both utilities' unbundled tariff filings. On the following day, November 5,  
3 1998, Staff filed a Request for Procedural Order, requesting that an evidentiary hearing on the  
4 agreements commence on November 20, 1998, with all parties being required to file testimony or  
5 comments on the agreements on or before November 17, 1998. The filing of this request  
6 immediately touched off a firestorm, as Staff's proposed schedule would not allow the parties an  
7 opportunity to thoroughly analyze the impact of the agreements with the utilities, conduct discovery  
8 and obtain additional data and information, prepare detailed testimony and comments, and prepare  
9 for an evidentiary hearing that will involve perhaps the most significant issues to be decided by the  
10 Commission since it came into existence.<sup>4</sup>

11           The Commission's Chief Hearing Officer recognized that serious constitutional  
12 violations would occur if the Staff and the utilities were allowed to force a decision without a  
13 reasonable opportunity for discovery and a full and impartial hearing on the propriety of the  
14 agreements. First, in a procedural order issued on November 6, 1998, the Chief Hearing Officer  
15 ordered all parties to the above dockets to respond to Staff's Request for Procedural Order by  
16 November 10. In addition, he ordered Staff and the two utilities to immediately schedule public  
17 comment sessions so that the public would be aware of the agreements, and ordered Staff and the  
18 two utilities to make every effort to respond to written discovery request within 24 hours of receipt.  
19 Subsequently, eight parties filed objections to Staff's Request for Procedural Order, the State of  
20 Arizona, the AECC, RUCO, Illinova Energy Partners, Calpine Power Services, Citizens Utilities  
21 Company, Arizona Electric Power Cooperative, and the U.S. Department of Defense. In a  
22 procedural order issued on November 13, 1998, the Chief Hearing Officer, having reviewed all of  
23 the objections, stated:

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<sup>4</sup> In order to increase the pressure on the Commission to approve the agreements, Staff and the utilities  
26 agreed that both agreements would be deemed withdrawn if they were modified in any respect and were  
not adopted according to their terms by the Commission by November 25, 1998.

1 We concur with all the Responses that Staff's proposed procedural  
2 schedule does not provide adequate time to analyze the Proposed  
3 Agreements. It also conflicts with previous statements made by  
4 Commissioners that interested parties would have an opportunity to  
5 fully analyze any Proposed Agreement. At the same time, we are  
6 cognizant that the Commission's self-imposed January 1, 1999  
7 deadline is rapidly approaching. We have attempted to balance these  
8 competing concerns in the procedural schedule set forth hereafter.

9 Procedural Order (Nov. 13, 1998) at 4. The Chief Hearing Officer went on to order Staff, APS and  
10 TEP to file written testimony in support of the agreements by November 20, 1998. All other parties  
11 were required to file testimony, comments or disagreements by no later than November 30, 1998,  
12 following which Staff, APS and TEP would file responsive testimony by no later than December 4,  
13 1998. The Chief Hearing Officer declined to set a hearing date at that time.

14 On November 17, 1998, Staff filed its Request for Reconsideration and  
15 Modification of Procedural Order, arguing that the already compressed procedural schedule should  
16 be further compressed. Notably, no particular reason was provided for Staff's request. Five parties  
17 filed responses to Staff's Request for Reconsideration. TEP supported Staff's request. The AECC,  
18 State of Arizona, RUCO and Arizona Electric Power Cooperative opposed Staff's request. In  
19 addition, the State of Arizona filed a motion for a continuance arguing that Staff's proposed  
20 schedule constituted a "rush to judgment" and would deny the parties due process. The State  
21 argued that the agreements are extremely complex and would, if approved, have far-reaching  
22 economic effects. Moreover, the agreements would effectively amend, modify or waive key  
23 provisions of the Electric Competition Rules. The State proposed a less hectic schedule, under  
24 which discovery would proceed over the following six weeks, with the hearing commencing in  
25 February.

26 Once again, the Chief Hearing Officer attempted to provide some protection to the  
rights of the other parties to the proceedings. In a procedural order issued on November 24, 1998,  
the Chief Hearing Officer summarized the objections filed by numerous parties to Staff's Request  
for Reconsideration and concluded that Staff's schedule "does in fact prejudice the rights of other

1 parties as well as the Commission. As pointed out by some of the intervenors, their short time  
2 frame to file comments and testimony already encompass the Thanksgiving holiday. As a result,  
3 we find Staff's proposal to further shorten the time frame does prejudice the rights of other parties."  
4 Procedural Order (Nov. 24, 1998) at 3. The Chief Hearing Officer further stated:

5 To rush these complex matters to a conclusion without a thorough  
6 review would not be in the public interest. In order to provide any  
7 meaningful opportunity to prepare for a hearing, it is imperative that  
8 Staff, TEP and APS provide all of their direct responsive testimony  
9 in a formal question and answer format. We also agree with the  
10 various intervenors that there must be at least a minimum of time  
11 between filing of responsive testimony and commencement of  
12 hearing. The intervenors as well as the Commission need an  
13 opportunity to read and digest the testimony. Weighing the  
14 Commission's interest in starting competition on January 1, 1999  
15 against the parties' due process rights and the public interest, we find  
16 that the earliest a hearing can commence is December 7, 1998. This  
17 will also enable a pre-hearing conference to be held on December 4,  
18 1998 in order to schedule witnesses and discuss other procedural  
19 matters.

20 Id. at 4. Based on these concerns about due process and fundamental fairness to the parties, the  
21 Chief Hearing Officer formally set the commencement of the hearing on the agreements for  
22 December 7, 1998. In addition, he ordered Staff, APS and TEP to file their responsive testimony  
23 (in formal question and answer format) by noon on December 3, 1998 and to cause such testimony  
24 to be delivered on the day of filing to all parties. In addition, the Chief Hearing Officer set a pre-  
25 hearing conference for December 4, 1998, to address the scheduling of witnesses and other  
26 procedural issues.

27 In the meantime, on November 23, 1998 -- the same day as argument on Staff's  
28 Motion for Reconsideration, the Executive Secretary issued notice of a Special Open Meeting to be  
29 held on November 25, 1998. The Executive Secretary also prepared a memorandum summarizing  
30 the matters to be considered at the Special Open Meeting (copy attached at Tab B). In this  
31 memorandum, the Executive Secretary recommended that the Commission override the Chief  
32 Hearing Officer. Specifically, the Executive Secretary stated:

33

1 On November 5, 1998, Staff filed a Request for Procedural Order to  
2 govern the Settlement Agreements between Staff and Tucson  
3 Electric Power Company ("TEP") and Staff and Arizona Public  
4 Service Company ("APS") . . . . On November 13, 1998, a  
5 Procedural Order was issued establishing filing dates for intervenors  
6 as well as Staff, TEP and APS. On November 17, 1998, Staff filed a  
7 Request for Reconsideration and Modification of Procedural Order.  
8 On November 18, 19 and 20, Responses and/or Objections to Staff's  
9 Request for Reconsideration were submitted by the Attorney  
10 General's Office, Arizona Electric Power cooperative [*sic*], the  
11 Residential Utility Consumer Office and Arizonans for Electric  
12 Choice and Competition.

13 Thereafter, on November 24, 1998, a Procedural Order was issued,  
14 finding that, other than the proposal to shorten the time frames for  
15 Staff, TEP and APS to file responsive testimony, the remaining  
16 proposals in Staff's Request for Reconsideration and Modification  
17 should be denied. That Procedural Order directed that a hearing  
18 commence on December 7, 1998. Upon review and consideration, it  
19 is the Executive Secretary's recommendation that the procedural  
20 schedule as requested in Staff's Request for Reconsideration and  
21 Modification of Procedural Order be approved.

22 Memorandum at 2.<sup>5</sup> As discussed above, the Executive Secretary participated in the negotiations  
23 and discussed the status of the negotiations with individual Commissioners.

24 At the Special Open Meeting, two of the Commissioners voted to override the Chief  
25 Hearing Officer, ignoring his concerns about ensuring that the parties have a reasonable opportunity  
26 to analyze the agreements and prepare for the hearing. Specifically, the Commissioners ordered:

- 27 (1) The evidentiary hearing on the propriety of the agreements  
28 will commence on December 3, 1998.
- 29 (2) The hearing will be at 8:00 a.m. each day, including  
30 Saturday, December 5, 1998, and shall continue until 8:00  
31 p.m. each day.
- 32 (3) All parties other than Staff, APS and TEP must file their  
33 testimony regarding the agreements by noon on November  
34 30, 1998.

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35 <sup>5</sup> One of the other matters that was considered at the November 25 Special Open Meeting was a motion  
36 to continue filed by Staff on several consolidated dockets dealing with telecommunications issues.  
Ironically, as to those matters, the Executive Secretary recommended approval of Staff's motion to  
continue "[i]n order to provide a full opportunity for responses to discovery and a full and fair  
consideration of the proposed settlement." Memorandum at 1.

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- (4) Staff, APS and TEP must file their responsive testimony by 4:00 p.m. on December 2, 1998, i.e., 14 hours prior to the commencement of the hearing. This testimony may be "narrative" form, and may be expanded orally during the hearing.

Decision No. 61259 at 2. The Commissioners ignored the objections filed by the AECC and other parties, as well as the State of Arizona's motion to continue.

**B. Legal Argument.**

It is well established that the Commission, when determining whether to adjust rates and charges for service, issue a certificate of convenience and necessity or otherwise decide the rights of parties to a proceeding, acts in a quasi-judicial capacity and must comply with basic due process requirements. In effect, the Commission acts like a court of law, and not like an executive agency or a legislative body. These due process requirements were recently summarized by the Arizona Court of Appeals as follows:

[T]here must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order.

A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a *quasi-judicial* character. The requirement of a "full hearing" has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The "hearing" is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The "hearing" is the hearing of evidence and argument.

State ex rel. Corbin v. Arizona Corp. Com'n, 143 Ariz. 219, 224, 693 P.2d 362, 367 (App. 1984),

1 quoting Morgan v. United States, 298 U.S. 468, 480-81 (1936) (emphasis in original).

2           In State ex rel. Corbin, improper communications took place between TEP, the  
3 Director of Utilities and the Hearing Officer during the pendency of an application for rate  
4 increases, which violated the other parties' right to a full and fair hearing and corrupted the  
5 decision-making process. In support of its discussion regarding the quasi-judicial nature of  
6 Commission decision-making and the application of basic due process requirements to that process,  
7 the court relied on Western Gillette, Inc. v. Arizona Corp. Com'n., 121 Ariz. 541, 592 P.2d 375  
8 (App. 1979), which also involved improper communications between a party and employees of the  
9 Commission. The Court of Appeals held that these communications tainted the proceeding and  
10 required that the Commission's decision be set aside. The court stated:

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12           The participation in the actual decision making process by only one  
13 party to a controversy is inimical to the notions of fairness which  
14 underlie the due process of law. The United States Supreme Court  
15 has categorically stated that a "fair hearing" is denied in quasi-  
judicial administrative proceedings when the finder of fact reaches  
his decision after ex parte communications from one side. In  
condemning such a practice, the Court stated:

16           . . . [I]n administrative proceedings of a quasi-judicial character the  
17 liberty and the property of the citizen shall be protected by the  
18 rudimentary requirements of fair play. These demand "a fair and  
19 open hearing," essential alike to the legal validity of the  
20 administrative regulation and to the maintenance of public  
confidence in the value and soundness of this important  
governmental process. . . . The requirements of fairness are not  
exhausted in the taking or consideration of evidence, but extend to  
the concluding parts of the procedure as well as to the beginning and  
intermediate steps.

21 121 Ariz. at 542-43, 592 P.2d at 376-77, quoting Morgan, supra (citations omitted).

22           Arizona courts have repeatedly held in other contexts that proceedings before the  
23 Commission are governed by basic due process requirements, including notice and the  
24 opportunity for a full and fair hearing. See, e.g., Gibbons v. Arizona Corp. Com'n., 95 Ariz. 343,  
25 390 P.2d 582 (1964) ("the law requires adequate notice of proceedings to persons whose interests  
26

1 are affected thereby, and requires full opportunity to be heard”); Application of Trico Electric  
2 Coop., 92 Ariz. 373, 377 P.2d 309 (1962) (“the rescission or revocation of all or a portion of a  
3 certificate of public convenience and necessity requires strict compliance with the procedural  
4 prerequisites of notice and hearing”); Walker v. DeConcini, 86 Ariz. 143, 341 P.2d 933 (1959)  
5 (Commission decision void and subject to collateral attack where Commissioners failed to attend  
6 evidentiary hearing or have transcript prepared, but instead relied on hearing officer); Tonto  
7 Creek Estate v. Arizona Corp. Com’n., 177 Ariz. 49, 864 P.2d 1081 (App. 1993) (Commission  
8 decision amending or modifying prior decision void for lack of jurisdiction when affected parties  
9 not given proper notice and opportunity to be heard); Sulger v. Arizona Corp. Com’n., 5 Ariz.  
10 App. 69, 423 P.2d 145 (1967) (failure of Commission to disclose grounds for complaint violated  
11 due process requirements by preventing fair hearing).

12           In this case, the adoption of Staff’s extremely compressed procedural schedule  
13 does not allow the parties a reasonable opportunity to analyze the agreements and to obtain data  
14 and background information through discovery and prepare pre-filed testimony by November 30.  
15 In addition, the parties have been given only 14 hours to review and analyze the responsive  
16 testimony filed by Staff and the two utilities. Their responsive testimony is due by 4:00 p.m. on  
17 December 2, while the hearing begins at 8:00 a.m. the following day. Moreover, Staff and the  
18 utilities have been allowed to present their testimony in “narrative” form and may expand their  
19 testimony orally during the hearing, precluding full notice of their positions and argument in  
20 advance of the hearing. AECC respectfully submits that no court of law would schedule pre-trial  
21 discovery and the trial of a complex matter involving some 40 parties in this fashion. Indeed, the  
22 agency’s Chief Hearing Officer recognized that Staff’s schedule would, if adopted, violate basic  
23 notions of due process and fair play.

24           In short, by proceeding in this manner, the Commission will violate the rights of  
25 the AECC and the other parties to a full and impartial hearing, rendering the Commission’s  
26 decision void and subject to collateral attack. In view of the significance of the issues involved,

1 the Commission's rush to enter an order that will be void on constitutional due process grounds  
2 by December 10, 1998, makes no sense, particularly when relatively short extensions of the  
3 deadlines and a more reasonable hearing schedule will ameliorate these due process violations.

4 **C. Conclusion and Relief Requested**

5 The Commission has disregarded fundamental notions of fairness by allowing the  
6 parties to this proceeding no time to evaluate and analyze the agreements which the Commission  
7 has negotiated with the two largest private electric utilities in Arizona. Moreover, the parties will  
8 not have a reasonable opportunity to prepare for the hearing, which will be conducted in  
9 unnecessarily hurried fashion. The Commission's Chief Hearing Officer recognized that by  
10 proceeding in this manner, the Commission will be acting improperly and will violate the rights  
11 of the parties to a full and fair hearing on the propriety of the agreements. Until these due  
12 process violations are addressed, this proceeding must not go forward. For the reasons set forth  
13 here and above, Decision No. 61259 should immediately be vacated by the Commissioners.

14 RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of November, 1998.

15 FENNEMORE CRAIG, P.C.

16  
17 By   
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25 Arizonans for Electric Choice and Competition  
26

1 ORIGINAL AND TEN COPIES  
of the foregoing hand-delivered  
2 this 30<sup>th</sup> day of November, 1998, to:

3 Arizona Corporation Commission  
Docket Control  
4 1200 West Washington Street  
Phoenix, Arizona 85007

5 TWO COPIES OF THE FOREGOING  
6 hand-delivered this 30<sup>th</sup> day  
of November, 1998 to:

7 Jerry Rudibaugh, Chief Hearing Officer  
8 Hearing Division  
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9 1200 West Washington  
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10 COPY OF THE FOREGOING  
11 hand-delivered this 30<sup>th</sup> day  
of November, 1998 to:

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ARIZONA CORPORATION COMMISSION  
STAFF'S RESPONSES TO FIRST SET OF DATA REQUESTS  
DOCKET NOS. E-01933-98-0471, E-01933A-97-0772  
E-01345A-98-473, E-01345A-97-0773 and RE-00000C-94-0165

41. Identify every person who attended any meeting, formal or informal, concerning the Agreement.

**RESPONSE:** Staff objects to this request on the grounds that it is vague, ambiguous and overbroad. Notwithstanding the foregoing, the following Staff members attended internal discussions and/or negotiating sessions regarding the Settlement Agreements: Jack Rose, Ray Williamson, Sheryl Hubbard, John Wallace, Paul Bullis, Christopher Kempley, Janice Alward, Janet Wagner, Constance Fitzsimmons, and Elizabeth Bentley. The following Staff consultants attended such meetings: Richard LaCapra and Lee Smith of LaCapra & Associates, and Ted Myers and Riley Rohrer of R.W.Beck. In addition, Tom Broderick, Scott Gutting and Kevin Higgins occasionally attended Staff discussions.

**RESPONDENT:** Ray Williamson

ARIZONA CORPORATION COMMISSION  
STAFF'S RESPONSES TO FIRST SET OF DATA REQUESTS  
DOCKET NOS. E-01933-98-0471, E-01933A-97-0772  
E-01345A-98-473, E-01345A-97-0773 and RE-00000C-94-0165

52. State whether any person employed by, or serving as an agent, attorney, consultant or lobbyist for Staff, TEP or APS has, at any time, communicated with any Commissioner concerning the Agreements. If so, identify the communication and state what was said and by whom.

**RESPONSE:** From time to time, Commissioners were updated by Staff on the status of the negotiations. These updates were provided primarily by Jack Rose, Ray Williamson and Paul Bullis.

**RESPONDENT:** Ray Williamson

ARIZONA CORPORATION COMMISSION  
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E-01345A-98-473, E-01345A-97-0773 and RE-00000C-94-0165

49. State your understanding as to why the Attorney General was excluded from the Settlement discussions regarding the Agreements.

**RESPONSE:** The Settlement Agreements are bilateral agreements between Staff and APS, and Staff and TEP. Staff believes that attempting to bring additional parties such as the Attorney General into the negotiations would have lengthened the negotiations and made reaching a settlement much more difficult. Staff has requested a procedural order setting this matter for a hearing to enable all parties including the Attorney General an opportunity to present their comments, criticism and/or support for the Settlement Agreements, and to cross-examine witness in that regard.

**RESPONDENT:** Ray Williamson

ARIZONA CORPORATION COMMISSION  
STAFF'S RESPONSES TO FIRST SET OF DATA REQUESTS  
DOCKET NOS. E-01933-98-0471, E-01933A-97-0772  
E-01345A-98-473, E-01345A-97-0773 and RE-00000C-94-0165

53. State your understanding of whether Arizona State open meeting laws apply to the communications that gave rise to the Agreements. Identify any legal opinion or research in your possession, or control on this question.

**RESPONSE:** It is Staff's understanding that the open meeting laws do not apply to the discussions that gave rise to the Agreements. No written opinion was requested or provided on this issue. Staff does believe that the Agreements will be considered and acted on at an open meeting.

**RESPONDENT:** Ray Williamson

ARIZONA CORPORATION COMMISSION  
STAFF'S RESPONSES TO FIRST SET OF DATA REQUESTS  
DOCKET NOS. E-01933-98-0471, E-01933A-97-0772  
E-01345A-98-473, E-01345A-97-0773 and RE-00000C-94-0165

54. Admit that the Agreements purport to bind future Commissioners or to limit their authority in changing the manner of stranded cost recovery provided for in the Agreements.

**RESPONSE:** Admit that the Agreements, assuming they are approved by the Commission, are intended to create a binding contractual relationship between the Commission and APS and TEP regarding the manner of stranded cost recovery.

**RESPONDENT:** Ray Williamson

ARIZONA CORPORATION COMMISSION  
STAFF'S RESPONSES TO FIRST SET OF DATA REQUESTS  
DOCKET NOS. E-01933-98-0471, E-01933A-97-0772  
E-01345A-98-473, E-01345A-97-0773 and RE-00000C-94-0165

55. Admit that it is your intention to argue, in collateral and subsequent legal proceedings that, if the Agreements are adopted by the Commission, all parties' legal and equitable claims will be moot or resolved, and/or that the parties will be collaterally estopped from asserting those claims in other forums.

**RESPONSE:** Admit that the Agreements require APS and TEP to dismiss with prejudice pending litigation regarding electric competition, and admit that collateral attacks on Commission decisions are prohibited under A.R.S. Section 40-252, and admit that the Commission's adoption of the Settlement Agreements is within the Commission's jurisdiction and discretion and will provide a fair and reasonable resolution of all issues addressed therein.

**RESPONDENT:** Ray Williamson

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MEMORANDUM

RECEIVED  
AZ CLIP COMMISSION

TO: THE COMMISSION

FROM: Executive Secretary

Nov 25 9 11 AM '98

DATE: November 24, 1998

DOCUMENT CONTROL

RE: U S WEST Communications, Inc. (T-01051B-97-0024)  
Navajo Communications Company (T-02115-97-0041)  
Citizens Utilities Company (Mohave County) (T-01032-97-0042)  
Citizens Communications of the White Mountains (T-03213-97-0043)  
Applications to revise network services tariffs (Public Access Line Service)  
Arizona Public Service Company (E-01345A-97-0773)  
Filing of Unbundled Tariffs pursuant to A.A.C. R14-2-1601 et seq.  
Arizona Public Service Company (E-01345A-98-0473)  
Application for Approval of its Plan for Stranded Cost Recovery  
Tucson Electric Power Company (E-01933A-97-0772)  
Filing of Unbundled Tariffs pursuant to A.A.C. R14-2-1601 et seq.  
Tucson Electric Power Company (E-01933A-98-0471)  
Application for Approval of its Plan for Stranded Cost Recovery  
In the Matter of Competition in the Provision of Electric Service(RE-00000C-94-165)

On November 16, 1998, a Procedural Order was issued relating to the consolidated matters in Docket Nos. T-01051B-97-0024, T-02115-97-0041, T-01032-97-0042 and T-03213A-97-0043, the Public Access Line matters. That Procedural Order established a series of procedural dates culminating in a hearing on November 30, 1998, for the purpose of considering the Settlement Agreement submitted in these matters.

Thereafter, on November 23, 1998, as a result of their inability to meet the requisite deadlines, Utilities Division Staff ("Staff") submitted a Motion to Continue the procedural dates established by the referenced procedural order. In order to provide a full opportunity for responses to discovery and a full and fair consideration of the proposed settlement, it is appropriate that the procedural dates established by the November 16, 1998 Procedural Order be continued for two weeks.

U S WEST submitted a Response to Staff's Motion to Continue on November 24, 1998. Due to the unavailability of U S WEST's witness, an additional one week delay will provide additional time for review of the testimony submitted by Staff and APA. Upon review and consideration, it is the Executive Secretary's recommendation that all procedural dates should be delayed for three weeks and the hearing should commence on December 21, 1998.

On November 5, 1998, Staff filed a Request for Procedural Order to govern the Settlement Agreements between Staff and Tucson Electric Power Company ("TEP") and Staff and Arizona Public Service Company ("APS") regarding outstanding issues in docket numbers E-01933A-98-0471, E-01933A-97-0772, E-01345A-98-0473, E-01345A-97-0773 and RE-00000C-94-165. On November 13, 1998, a Procedural Order was issued establishing filing dates for intervenors as well as Staff, TEP and APS. On November 17, 1998, Staff filed a Request for Reconsideration and Modification of Procedural Order. On November 18, 19 and 20, Responses and/or Objections to Staff's Request for Reconsideration were submitted by the Attorney General's Office, Arizona Electric Power cooperative, the Residential Utility Consumer Office and Arizonans for Electric Choice and Competition.

Thereafter, on November 24, 1998, a Procedural Order was issued, finding that, other than the proposal to shorten the time frames for Staff, TEP and APS to file responsive testimony, the remaining proposals in Staff's Request for Reconsideration and Modification should be denied. That Procedural Order directed that a hearing commence on December 7, 1998. Upon review and consideration, it is the Executive Secretary's recommendation that the procedural schedule as requested in Staff's Request for Reconsideration and Modification of Procedural Order be approved.

Finally, Docket No. RE-00000C-94-165 encompasses the Commission's pending adoption of rules for the transition to retail electric competition in Arizona. On August 10, 1998, in Decision No. 61071, the Commission adopted certain modifications to A.A.C. R14-2-1601 et seq., on an emergency basis. Subsequent to the adoption of the emergency rule amendments, the Commission began proceedings to adopt the emergency rule changes on a permanent basis. On October 2, 1998, the Staff of the Commission filed its reply to the written comments submitted by other parties related to the specific changes to the rules, including certain specific recommendations for rule changes.

In addition, on November 24, 1998, Staff submitted additional comments, resulting from comments raised at public comment sessions held by the Commission and issues that arose during the course of pending CC&N proceedings. Staff's additional comments included additional recommendations, with specific language suggested for rule modification, as well as language to reflect the Secretary of State's request for format conformance with that office's standards. Upon review and consideration, the Executive Secretary recommends that the Commission mandate a recommended order approving final rules for adoption be issued by December 4, 1998.



Jack Rose  
Executive Secretary