



05

BEFORE

0000112727

ION RECEIVED

1
2 CARL J. KUNASEK
CHAIRMAN
3 JIM IRVIN
COMMISSIONER
4 WILLIAM A. MUNDELL
COMMISSIONER

Arizona Corporation Commission 1999 AUG 30 P 3: 01

DOCKETED

ORIGINAL AUG 30 1999

AZ CORP COMMISSION DOCUMENT CONTROL

5 IN THE MATTER OF THE APPLICATION OF
6 TUCSON ELECTRIC POWER COMPANY FOR
7 APPROVAL OF ITS STRANDED COST
8 RECOVERY AND FOR RELATED APPROVALS,
9 AUTHORIZATIONS AND WAIVERS.

DOCKETED BY)
DOCKET NO. E-01933A-98-0471
[Signature]

10 IN THE MATTER OF THE FILING OF TUCSON
11 ELECTRIC POWER COMPANY OF UNBUNDLED
12 TARIFFS PURSUANT TO A.A.C. R14-2-1602
et seq.

DOCKET NO. E-01933A-97-0772

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

DOCKET NO. RE-00000C-94-0165

M-S-R AND SCPPA POST-HEARING BRIEF AND RESTATED REQUEST FOR RELIEF

16 M-S-R Public Power Agency (M-S-R) and the Southern California Public
17 Power Authority (SCPPA), by their undersigned counsel, respectfully submit
18 this Post-hearing Brief and Revised Request for Relief.

19 Tucson Electric Power Company (TEP) lodged a proposed form of order
20 with the Arizona Corporation Commission (Commission) in this proceeding.
21 After conclusion of the hearing, TEP filed an amended Settlement Agreement
22 but has not filed a revised Proposed Form of Order. M-S-R and SCPPA have
23 previously proposed additional language for the Proposed Form of Order. For
24 purposes of Post-hearing Briefs and to avoid surprise, we have assumed that
25 the draft order lodged is the order under consideration.

Based on the record in this proceeding, especially the testimony at the
hearing and our exhibits, M-S-R and SCPPA now restate their request that the
following specific additions be made to the said Proposed Form of Order

1 lodged with the Commission by TEP pursuant to its Notice of Filing dated July
2 13, 1999:

3 1. Add to Finding of Fact No. 9 the following quote from the revised
4 Settlement Agreement:

5 "(xii) On or before December 31, 2002, TEP shall transfer its
6 generation and other assets deemed to be competitive (as defined in the
7 Electric Competition Rules) to a subsidiary of TEP, at market value."

8 2. Add to Finding of Fact No. 18 the following:

9 "The terms and conditions of the Settlement Agreement, when
10 implemented, are not intended to interfere with, prevent or deter the ongoing
11 performance of existing contractual obligations by TEP, including agreements
12 with M-S-R and SCPPA."

13 3. Add to Conclusions of Law No. 7 the following:

14 "The approval of the Settlement Agreement, including the divestiture of
15 TEP's generation and other assets deemed to be competitive (as defined in the
16 Electric Competition Rules) to a subsidiary of TEP, at market value, is not
17 intended to interfere with, prevent or deter the ongoing performance of
18 existing contractual obligations by TEP."

19 MEMORANDUM OF POINTS AND AUTHORITIES

20 The first Finding of Fact requested is a direct quote from the
21 Settlement Agreement which is carried forward verbatim in the revised
22 Settlement Agreement. It is a commitment that TEP is making based on its
23 understanding of what the final Electric Competition Rules will provide when
24 adopted. TEP has agreed to take this action and has carried forward other
25 statements of fact from the Settlement Agreement to its proposed order.

1 Adding this statement merely confirms the commitment TEP has made in the
2 Settlement Agreement but does so directly in the order.

3 The second Finding of Fact requested has been agreed to by TEP. Both
4 in answers to interrogatories, which were admitted into evidence in the
5 proceeding and in direct testimony by its President, James S. Pignatelli, TEP
6 has admitted that its Settlement Agreement is not intended to interfere with
7 its existing contractual relationships. Indeed, Mr. Pignatelli testified
8 that the exact language proposed herein was a true statement of TEP's intent
9 with regard to the Settlement Agreement. Transcript of Testimony of TEP
10 Hearing, Volume 1, 8/11/99, pp. 47-50, attached.

11 Likewise, Mr. Pignatelli stated that TEP had no objection whatsoever to
12 the language proposed here for the additional Conclusion of Law when shown
13 the exact same language at the hearing. Ibid.

14 Additionally, TEP's statements concerning its intent to honor its
15 contracts are quite explicit in its responses to interrogatories. M-S-R/SCPPA
16 Exhibit 2, admitted at p. 263 of the Transcript.

17 In his cross-examination of M-S-R/SCPPA witness Alan L. Hockenson, TEP
18 counsel Brad Carroll raised a question about whether protection against
19 interference with contracts should not be a matter of general application by
20 the Commission and in the Electric Competition Rules (Transcript, p. 261).
21 To the extent one might imply that such a suggestion meant that the proffered
22 language concerning intent was better found in competition rules than in an
23 order approving a settlement agreement, that inference would be misplaced for
24 two reasons. First, the suspended Electric Competition Rules currently do
25 not have, nor is there any proposal to insert, provisions with regard to

1 protection of existing contractual relationships. Second, even if that were
2 the case, both the original Settlement Agreement and the revised Settlement
3 Agreement would control on this subject, regardless of what the Rules
4 provided, because of the following provision:

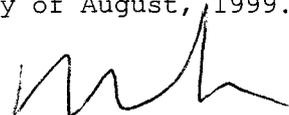
5 "14.3 To the extent that any provision of this Settlement Agreement is
6 inconsistent with any existing or future Commission order, rule or regulation
7 or is inconsistent with the Electric Competition Rules as now existing or as
8 may be amended in the future, the provisions of this Settlement Agreement
9 shall control and the approval of this Settlement Agreement by the Commission
10 shall be deemed to constitute a Commission-approved variation or exemption to
11 any conflicting provision of the Electric Competition Rules."

12 It is obvious that the place where this subject must be addressed and
13 can be addressed now is the order approving any settlement on this subject.
14 That will be the controlling document concerning future actions by TEP and
15 that is where this subject needs to be addressed.

16 RELIEF REQUESTED

17 For all the reasons stated above and on the record as it has been
18 developed, M-S-R and SPPA respectfully request that the above-quoted
19 Findings of Fact and Conclusion of Law be included in any order approving the
20 revised Settlement Agreement.

21 RESPECTFULLY SUBMITTED this 30th day of August, 1999.

22 By 

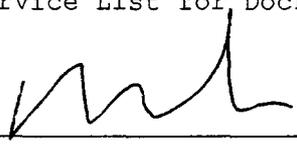
23 Robert S. Lynch
24 Attorney at Law
25 340 E. Palm Lane Suite 140
Phoenix, AZ 85004-4529
Attorney for M-S-R Public Power Agency
and Southern California Public Power
Authority

1 Original and 18 copies of the
2 foregoing filed this 30th day
of August, 1999 with:

3 Docket Control
4 Arizona Corporation Commission
5 1200 West Washington Street
6 Phoenix, Arizona

7 Copies of the foregoing mailed
8 this 30th day of August, 1999,
9 to:

10 Service List for Docket No. E-01933A-98-0471

11 
12 _____

13
14
15
16
17
18
19
20
21
22
23
24
25

Page 45

- (1) **Q.** If I were to ask you the questions contained
(2) in that document today, would the answers to those
(3) questions be the same?
(4) **A.** Yes, they would.
(5) **Q.** Do you have any corrections or modifications
(6) to that direct testimony?
(7) **A.** Yes, I have two minor corrections.
(8) On Page 7, Line 10, it currently reads:
(9) "Yes, in order to avoid accounting losses." I would
(10) strike "losses" and replace that with "write-offs."
(11) The remainder stays the same.
(12) And on Page 15, Line 19, insert at the end
(13) of -- after the word "conduct," a comma, and insert
(14) the words "the condition is unnecessary."
(15) Those would be the only corrections that I
(16) would make.
(17) **Q.** With those changes, do you adopt this
(18) testimony as your sworn testimony here today?
(19) **A.** Yes, I do.
(20) **MR. CARROLL:** With that, Your Honor, I would
(21) move for the admission of TEP Exhibits 1 and 2 and
(22) tender the witness for cross-examination.
(23) **HEARING OFFICER RUDIBAUGH:** Any objections?
(24) *(No response.)*
(25) **HEARING OFFICER RUDIBAUGH:** Hearing none,

Page 46

- (1) it's so admitted, Exhibits 1 and 2.
(2) And let's start first of all with AECC, any
(3) questions?
(4) **MR. SHAPIRO:** No questions.
(5) **HEARING OFFICER RUDIBAUGH:** RUCO?
(6) **MR. WAKEFIELD:** No questions.
(7) **HEARING OFFICER RUDIBAUGH:** DOD?
(8) **MR. NYCE:** No questions.
(9) **HEARING OFFICER RUDIBAUGH:** New West Energy.
(10) **MR. SUNDLOF:** Just a couple questions.
(11)

CROSS-EXAMINATION

- (12)
(13)
(14) **Q.** (BY MR. SUNDLOF) Good morning, Mr.
(15) Pignatelli. I'm Kenneth Sundlof.
(16) In your direct testimony, you make a
(17) reference to Enron being a representative of ESPs.
(18) You're not suggesting that Enron had any authority
(19) from New West Energy to represent its interests?
(20) **A.** No, I'm not implying that at all.
(21) **Q.** Also in your direct testimony, you make
(22) several statements that prices that are proposed in
(23) your Exhibit 1 and in the settlement agreement are
(24) cost based. Do you believe them to be cost-based
(25) prices?

Page 47

- (1) **A.** Yes, I do.
(2) **Q.** Ms. Kissinger and Mr. Bentley also make a
(3) statement in their rebuttal testimony that the prices
(4) contained in your Exhibit 1 are cost based, and you
(5) would support their testimony, also?
(6) **A.** Yes, I would.
(7) **MR. SUNDLOF:** I have no further questions.
(8) Thank you.
(9) **THE WITNESS:** Thank you.
(10) **HEARING OFFICER RUDIBAUGH:** M-S-R/Southern
(11) California PPA.
(12)
(13) CROSS-EXAMINATION
(14)
(15) **Q.** (BY MR. LYNCH) Mr. Pignatelli, I'm Bob
(16) Lynch, representing M-S-R and SCPA here today. Good
(17) morning.
(18) **A.** Good morning, sir.
(19) **Q.** I will try to be very brief. In your
(20) rebuttal testimony, you mention our concerns about
(21) contracts.
(22) **HEARING OFFICER RUDIBAUGH:** Let me interrupt
(23) you. If you would, since this witness will be back on
(24) rebuttal later on, I would ask that any questions on
(25) rebuttal, that you would hold them for that time.

Page 48

- (1) **MR. CARROLL:** Your Honor, if it would speed
(2) things along, Mr. Lynch has a very, very narrow issue.
(3) I don't have any objection if he just wants to cover
(4) that quickly now and get it over with.
(5) **HEARING OFFICER RUDIBAUGH:** You want to get
(6) it over with? Anyone else have any objections?
(7) *(No response.)*
(8) **HEARING OFFICER RUDIBAUGH:** With that, please
(9) continue.
(10) **MR. LYNCH:** Thank you, Mr. Hearing Officer.
(11) **Q.** (BY MR. LYNCH) We have in this proceeding
(12) raised the issue of a concern over additional existing
(13) contracts that M-S-R and SCPA have with Tucson
(14) Electric involving the San Juan generating station.
(15) In your rebuttal testimony, you state that you believe
(16) that the settlement agreement will not impair your
(17) ability to continue to perform your existing
(18) contracts, that if something untoward comes up, that
(19) you will then negotiate with the parties involved.
(20) That remains your testimony, does it not?
(21) **A.** That's correct. There's no intention that
(22) any action which we take here would cause an issue
(23) with regard to the service with M-S-R or SCPA.
(24) **Q.** We have filed a revised request that
(25) additions to the proposed form of order, not

Page 49

- (1) suggestions that the settlement document itself, be
(2) changed. Have you been shown that document?
(3) **A.** Briefly, yes.
(4) **Q.** And --
(5) May I approach?
(6) **HEARING OFFICER RUDIBAUGH:** Yes.
(7) **Q.** (BY MR. LYNCH) Let me show you a copy of the
(8) document to refresh your recollection. And I want to
(9) call your attention to specific language that we have
(10) suggested on Page 2 of the document, the alternative
(11) language with regard to intent.
(12) Do you have any objection if that were -- if
(13) this language were inserted into the order if the
(14) Commission chose to do so?
(15) **A.** No, I would not, as long as it is the
(16) language that references our intent. Actually, we
(17) cannot adjudicate with FERC or bind FERC or anything
(18) of this nature, but as long as it refers to our
(19) intent, as I stated, it is not our intent that any
(20) action that we take here interferes with any of those
(21) contracts or the service under those contracts, and we
(22) would be amenable to adopting that language if it is
(23) so offered.
(24) **Q.** And calling your attention -- for the record,
(25) let me reference that this is Page 2 of this revised

Page 50

- (1) request, Lines 10 through 13; is that correct?
(2) **A.** That's correct.
(3) **Q.** Now, turning your attention to Lines 21
(4) through 25 on Page 2, this is again the alternative
(5) conclusion of law language expressing intent. Would
(6) you have any objection to that if the Commission chose
(7) to include it in the approval order?
(8) **A.** I would not have any objection to the
(9) language as so stated on Page 2, Lines 21 to 25.
(10) **MR. LYNCH:** That's all I have, Mr. Rudibaugh.
(11) **HEARING OFFICER RUDIBAUGH:** Thank you.
(12) Let's go next to PG&E/Enron.
(13)
(14) CROSS-EXAMINATION
(15)
(16) **Q.** (BY MR. ROBERTSON) Mr. Pignatelli, good
(17) morning. My name is Larry Robertson, and I'm counsel
(18) for PG&E Energy Services Corporation.
(19) **A.** Good morning.
(20) **Q.** I notice from your prefiled direct testimony
(21) that you are chairman of the board, president, and
(22) chief executive officer of both Tucson Electric Power
(23) Company and its parent corporation; is that not
(24) correct?
(25) **A.** That is correct.

Page 51

- (1) **Q.** Would that make you the policy witness in
(2) this proceeding?
(3) **A.** That is correct, sir.
(4) **Q.** Let me ask you a question. If the
(5) Commission, for whatever reason, should decide not to
(6) approve the proposed settlement agreement to which
(7) Tucson Electric Power is a party and instead decided
(8) to pursue the current rulemaking proceedings that
(9) would produce retail electric competition rules, would
(10) your company be prepared to participate actively in
(11) those proceedings until they were brought to a
(12) resolution and rules were issued?
(13) **A.** Yes, we would participate actively.
(14) **MR. ROBERTSON:** That's all I have. Thank
(15) you.
(16) **HEARING OFFICER RUDIBAUGH:** Let's go next to
(17) Commonwealth.
(18)
(19) CROSS-EXAMINATION
(20)
(21) **Q.** (BY MR. NELSON) Good morning. I'm Doug
(22) Nelson, appearing on behalf of Commonwealth.
(23) **A.** Good morning, Doug.
(24) **Q.** I'm wondering at the outset, if this
(25) settlement is approved and if the market really

Page 52

- (1) doesn't develop, what would you suggest the Commission
(2) might do?
(3) **A.** Look for more creative ESPs, efficient ESPs.
(4) We believe that the market -- excuse me, the approach
(5) as defined here provides the best opportunity for the
(6) market to open, based on our experience throughout the
(7) United States.
(8) **Q.** Were you ever involved with New Energy --
(9) excuse me, NEV?
(10) **A.** Yes, I was.
(11) **Q.** New Energy Ventures, I guess it is. And it's
(12) recently been sold?
(13) **A.** That's correct.
(14) **Q.** Now, has NEV participated in any residential
(15) markets anywhere?
(16) **A.** That is not their focus.
(17) **Q.** Did they explore the California residential
(18) market at anytime?
(19) **A.** I'd like to expand a little bit. Even though
(20) it is not their focus, they have participated in New
(21) York residential. I believe they're participating in
(22) New Jersey residential. They participated actively in
(23) California, but that was on commercial and industrial.
(24) **Q.** Do you know why they didn't pursue the
(25) residential market in California?