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2004 JAN 12 P 12 23

AZ CORP COMMISSION
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Arizona Corporation Commission
DOCKETED

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JAN 12 2004

DOCKETED BY

BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER, Chairman
WILLIAM MUNDELL, Commissioner
JEFF HATCH-MILLER, Commissioner
MIKE GLEASON, Commissioner
KRISTIN K. MAYES, Commissioner

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

DOCKET NO. RE-00000-94-0165

IN THE MATTER OF THE STRANDED
COST FILING AND REQUEST FOR A
WAIVER OF CERTAIN PORTIONS OF THE
RULES FILED BY TRICO ELECTRIC
COOPERATIVE, INC.

DOCKET NO. E-01461A-98-0466

IN THE MATTER OF THE STRANDED
COST FILING AND REQUEST FOR A
WAIVER OF CERTAIN PORTIONS OF THE
RULES FILED BY MOHAVE ELECTRIC
COOPERATIVE, INC.

DOCKET NO. E-01750A-98-0467

IN THE MATTER OF THE STRANDED
COST FILING AND REQUEST FOR A
WAIVER OF CERTAIN PORTIONS OF THE
RULES FILED BY GRAHAM COUNTY
ELECTRIC COOPERATIVE, INC.

DOCKET NO. E-01749A-98-0468

IN THE MATTER OF THE STRANDED
COST FILING AND REQUEST FOR A
WAIVER OF CERTAIN PORTIONS OF THE
RULES FILED BY DUNCAN VALLEY
ELECTRIC COOPERATIVE, INC.

DOCKET NO. E-01703A-98-0469

1 IN THE MATTER OF THE STRANDED
2 COST FILING AND REQUEST FOR A
3 WAIVER OF CERTAIN PORTIONS OF THE
4 RULES FILED BY SULPHUR SPRINGS
5 VALLEY ELECTRIC COOPERATIVE, INC.

DOCKET NO. E-01575A-98-0472

**TRICO'S RESPONSE TO THE
APPLICATION OF PHELPS DODGE,
ASARCO AND AECC FOR THE
SCHEDULING OF THE DISTRIBUTION
COOPERATIVES' STRANDED COSTS
HEARING**

6 TRICO ELECTRIC COOPERATIVE, INC. ("Trico") joins with Duncan and Graham in
7 opposing the request by Phelps Dodge, ASARCO and AECC for the scheduling of the
8 Distribution Cooperatives' Stranded Cost Hearing ("Duncan's and Graham's Response") and
9 supplements that Response as set forth herein. Trico also accepts and uses here all defined words
10 and phrases set forth in Duncan's and Graham's Response in this Response.

11 Attached hereto are designated Findings of Fact, Conclusions of Law and Ordering
12 Paragraphs in the Commission's Decision No. 65154 issued September 10, 2002, which reaffirm
13 the statements and arguments and Duncan's and Graham's Response.

14 In addition, Duncan, Graham, Trico, Sulphur Springs Valley Electric Cooperative, Inc.
15 ("Sulphur") and their wholesale supplier, Arizona Electric Power Cooperative, Inc. ("collectively,
16 "Cooperatives"), pursuant to A.R.S. §§ 40-253 and 40-254, duly appealed to the Superior Court
17 of the State of Arizona in and for the County of Maricopa ("Superior Court") the Commission's
18 Decision No. 59943 issued December 26, 1996, adopting the Retail Electric Competition Rules
19 ("Rules"). Thereafter, when the Commission entered Decisions amending the Rules, the
20 Cooperatives duly appealed to the Superior Court from each of such decisions. Phelps Dodge
21 intervened and actively participated in those proceedings and appeals. Pursuant to cross-motions
22 for summary judgment, on November 28, 2000, the Superior Court entered its Judgment setting
23 aside all of the decisions of the Commission initially issuing and amending the Rules and all of
24 the decisions of the Commission granting Certificates of Convenience and Necessity to Electric
25 Service Providers. In December 2000, the Commission appealed, and in January 2001, the
26

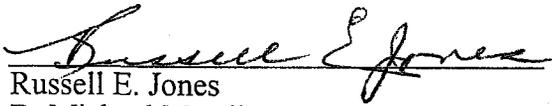
1 Cooperatives cross appealed to Division One of the Court of Appeals from the Superior Court's
2 Judgment. Oral arguments in the pending appeal occurred on February 7, 2002. To date, the Court
3 of Appeals has not issued its decision.

4 In the pending appeals in which Phelps Dodge has actively participated with the
5 Commission, the Cooperatives have raised numerous constitutional and statutory issues directed
6 to the essential provisions of the Rules including, but not limited to, Sections 3, 12 and 14 of
7 Article XV and Section 17 of Article II of the Arizona Constitution, which is Arizona's just
8 compensation provision. Among such essential provisions challenged by the Cooperatives is the
9 constitutionality of the entire administrative stranded cost process. Also before Division One in
10 the pending appeal are fundamental questions concerning the power of the Commission to open
11 to competition the territories of the same cooperatives whose territories are the object of Phelps
12 Dodge's pending application without first complying with Section 17, Article II. Phelps Dodge
13 both briefed and argued the appeal. To grant its current application may constitute an invasion of
14 the appellate courts' jurisdiction and impair the judicial appellate process, violating the
15 Cooperatives' rights under Section 17, Article II of our state constitution.

16 Unless the Commission takes the position that it should prejudge the Arizona appellate
17 courts on such issues, it will be extremely unfair to the distribution cooperatives to require them
18 to comply with the provisions of the Rules should the appellate courts ultimately find key aspects
19 of the Rules to be wholly or partially unlawful.

20 RESPECTFULLY SUBMITTED this 7th day of January, 2004.

21 WATERFALL ECONOMIDIS CALDWELL
22 HANSHAW & VILLAMANA, P.C.

23
24 By 
25 Russell E. Jones
26 D. Michael Mandig
Attorneys for Trico Electric Cooperative, Inc.

EXCERPTS FROM COMMISSION DECISION 65154

The wholesale market application to Arizona is poorly structured and susceptible to possible malfunction and manipulation. *Finding No. 16.*

The wholesale market is not currently workably competitive; therefore, reliance on that market without recognizing its current uncertainty and limitations will not result in just and reasonable rates for captive customers. *Finding No. 25.*

The FERC has not yet defined or implemented an effective regulatory and oversight approach for competitive energy markets, so assurance is lacking that wholesale electricity prices are just and reasonable. *Finding No. 26.*

At the time that the Commission approved the Electric Competition Rules and the Settlement Agreements, the parties thought that retail competition was imminent and that the wholesale market would be competitive; that a significant number of retail competitors would be entering the market; and that customers would leave the incumbent utility and purchase power from the new competitors. *Finding No. 28.*

Contrary to the parties' expectations and assumptions, the wholesale market has faltered, the new competitors have failed to materialize, and incumbent utilities have not lost customers in any meaningful number. *Finding No. 29.*

The competitive conditions that formed the basis of the Settlement Agreement and the adoption of the Retail Electric Competition Rules have not occurred as expected. *Finding No. 30.*

A rulemaking proceeding to review the Retail Electric Competition Rules in light of our decisions herein and to address issues resolved in Track B, and to amend A.A.C. R14-2-1615(A), A.A.C. R14-2-1606(B), and A.A.C. R14-2-1611(A) should be initiated immediately. *Conclusion No. 10.*

IT IS FURTHER ORDERED that Staff shall open a rulemaking to review the Retail Electric Competition Rules in light of our decisions herein and to address issues resolved in Track B, and to amend A.A.C. R14-2-1615(A), A.A.C. R14-2-1606(B), and A.A.C. R14-2-1611(A). *7th Ordering paragraph.*

1 Copy of the foregoing delivered the 9th day
of January, 2004, to:

2
3 Jane L. Rodda
4 Administrative Law Judge
5 Hearing Division
6 Arizona Corporation Commission
7 400 West Congress
8 Tucson, AZ 85701-1347

9 ORIGINAL and 23 COPIES of the
10 foregoing mailed this 9th day of January,
11 2004, to:

12 Arizona Corporation Commission
13 Docket Control
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15 Phoenix, AZ 85007

16 COPY of the foregoing mailed this 9th day
17 of January, 2004, to:

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