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BEFORE THE ARIZONA CORPORATION COMMISSION

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

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

DOCKET NO. RE-00000C-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

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Arizona Corporation Commission
DOCKETED

JAN 20 2004

DOCKETED BY

1 IN THE MATTER OF THE STRANDED
2 COST FILING AND REQUEST FOR A
3 WAIVER OF CERTAIN PORTIONS OF
4 THE RULES FILED BY SULPHUR
5 SPRINGS VALLEY ELECTRIC
6 COOPERATIVE, INC.
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8

DOCKET NO. E- 01575A-98-0472

**REPLY OF PHELPS DODGE
MINING COMPANY, SUCCESSOR
IN INTEREST TO CYPRUS CLIMAX
METALS COMPANY, ASARCO INC.
AND ARIZONANS FOR ELECTRIC
CHOICE AND COMPETITION, ON
REQUEST FOR THE SCHEDULING
OF A HEARING TO DETERMINE
THE STRANDED COSTS OF THE
DISTRIBUTION COOPERATIVES
AND TO OPEN THEIR SERVICE
TERRITORIES TO COMPETITION**

9 Phelps Dodge Mining Company, Successor in Interest to Cyprus Climax Metals
10 Company, ASARCO Incorporated, and Arizonans for Electric Choice and Competition
11 (collectively "AECC"), hereby files this Reply to the Responses of Duncan Valley
12 Electric Cooperative, Inc. ("Duncan"), Graham County Electric Cooperative, Inc.
13 ("Graham"), Sulphur Springs Valley Electric Cooperative, Inc. ("SSVEC") and Trico
14 Electric Cooperative, Inc. ("Trico") (collectively "Distribution Cooperatives") in the
15 above-referenced matter.

16 The Distribution Cooperatives attack AECC's Motion on both public policy and
17 legal grounds using three basic arguments: 1) that the time is not ripe for a determination
18 of their stranded costs because retail competition does not exist in Arizona, and the cost of
19 compliance would not bear any meaningful results; 2) that the Electric Competition
20 Advisory Group ("ECAG") created by the Track A Order (Decision No. 65154,
21 September 10, 2002) ("Order") will ultimately recommend revisions to or the elimination
22 of the Retail Electric Competition Rules ("Rules"); and 3) that the Arizona Corporation
23 Commission ("Commission") would be prejudging the Arizona appellate court by
24 requiring the Cooperatives to comply with certain provisions in the Rules. For the reasons
25 set forth hereafter, it is clear that the Distribution Cooperatives have failed to provide any
26 compelling reason why a Commission stranded cost determination should not be made at

1 compelling reason why a Commission stranded cost determination should not be made at
2 this time, or why their service territories should not be opened to competition in the near
3 future.

4 1. Commission Public Policy Supports the Development of Retail Competition

5 In their Response, Duncan and Graham assert “the TEP, APS and SRP territories
6 remain open to competition. But, no direct access transactions are occurring and no
7 interest has been expressed since the first few hundred transactions...” Contrary to this
8 assertion, both Constellation NewEnergy, Inc. and Strategic Energy, L.L.C. have
9 intervened in the Arizona Public Service (“APS”) rate application with the expressed
10 desire to serve retail customers within the state.¹ They are also active participants in the
11 ECAG. Furthermore, an over-abundance of new generation sources available in Arizona²
12 makes direct access a viable option for retail consumers that wish to take advantage of a
13 wholesale power market in need of customers.

14 The lack of retail competition in the APS, TEP and SRP territories is largely the
15 result of inadequate shopping credits. However, in addition to the excess generation
16 capacity, the Competition Transition Charge (“CTC”) in these markets is ending, and two
17 of the three utilities (APS, SRP) have recently proposed rate increases. The abundance of
18 electric service providers qualified to conduct transactions in Arizona makes direct access
19 a viable alternative. Therefore, it is reasonable to conclude that direct access transactions
20 in the Distribution Cooperative’s service territories will be successful and will result in
21 cost savings for consumers.

22 The cost to implement retail competition, identified by the Distribution
23 Cooperatives through their participation in the Process Standardization Work Group is not
24 at issue in these proceedings. The Commission has already made a public determination

25 ¹ There are other Electric Service Providers currently authorized to conduct business in Arizona through CC&Ns
approved by the Commission.

26 ² Roughly 8,000 Mw of new capacity will have been added by 2005 in Arizona.

1 that retail competition can provide benefits to Arizona's residential and commercial
2 ratepayers. See Decision No. 59943 (December 26, 1996). In an effort to cast the policy
3 as having been changed, Trico's Response provides excerpts from the Commission's
4 Track A Order in support of the concept that the competitive market cannot support either
5 retail or wholesale competition. See attachment to Trico Response. These excerpts are
6 taken out of context and are inconsistent with the express language of the Order, which
7 specifically states:

8 Although TEP made a recommendation concerning changing
9 the availability of Retail Competition, this was not an issue
10 the Commissioners agreed to be decided in Track A, and
11 there is insufficient evidence in the record to make a
12 determination on this issue. Accordingly, we will not modify
the direct access provisions of the Retail Electric Competition
Rules at this time. See Order at p. 26.

13 The language is clear – the policies and rules governing retail competition remain
14 unchanged, thus preserving the ability of retail consumers to seek competitive power in
15 those service territories where direct access is allowed. By its Motion, AECC merely
16 seeks to open the Distribution Cooperative's service territories consistent with the
17 Commission's current policy expressed in its Track A Order, as well as the Commission's
18 continued reluctance to abolish direct access.³

19 Timing is always critical, and the Distribution Cooperatives rely heavily upon the
20 ECAG workshops and future rulemaking docket in questioning the ripeness of AECC's
21 Motion. The Distribution Cooperatives assert that any rulemaking process to amend the
22 Rules is premature, given their appeal of Decision No. 59943 pending before the Court of
23 Appeals. See April 14, 2003 Comments to ECAG; Court of Appeals, Division One, 1CA-
24 CV 01-0068. Essentially, they argue that the Commission should wait until the courts

25 _____
26 ³ Despite several attempts by utilities, the Commission has declined to eliminate the Arizona Independent Scheduling
Administrator ("AISA"), which facilitates direct access transactions.

1 make a final resolution on the validity of the Rules before moving forward, contrary to the
2 provisions of A.R.S. § 40-254(F), which provides that:

3 Except as provided by this section no court of this state shall
4 have jurisdiction to enjoin, restrain, suspend, delay or review
5 any order or decision of the commission, or to enjoin, restrain
6 or interfere with the commission in the performance of its
7 official duties, and the rules, orders or decrees fixed by the
8 commission shall remain in force pending the decision of the
9 courts, but a writ of mandamus shall lie from the supreme
10 court to the commission in cases authorized by law.

11 Moreover, since the Commission has suspended Arizona Electric Power
12 Cooperative's ("AEPCO") annual re-setting process of its CTC, AECC's Motion is
13 appropriate given AEPCO's continued over collection of competition transitions costs.
14 AEPCO's last CTC rate was set at zero, even though the methodology previously applied
15 calculated a negative CTC, resulting in an over-recovery of AEPCO's competition
16 transition costs. This outcome was based on Decision No. 62758 (July 27, 2000), which
17 unfortunately prohibits a negative CTC for AEPCO.

18 Activating the Distribution Cooperative's stranded cost dockets will not be unduly
19 prejudicial as Duncan and Graham claim. The Commission can schedule hearings so that
20 implementation of direct access can coincide with changes to retail competition, if any, as
21 a result of the Commission's upcoming rulemaking docket. For example, assume that the
22 Rules are modified in a manner that keeps the basic structure of retail competition intact.
23 The time and process involved in re-activating the stranded cost dockets and opening the
24 Distribution Cooperatives' service territories would prohibit AECC members and other
25 retail consumers from pursuing direct access opportunities during a critical period of time
26 when merchant generators and electric service providers alike may be looking to secure
longer-term power contracts. As noted herein, it is a buyer's market for electricity.

1 Duncan and Graham suggest that “Depending on the scope of the Rules’ review,
2 the Commission may act on broader suggestions to suspend or greatly restrict direct retail
3 access.” This assertion is purely speculative, and is not a sound reason for precluding the
4 Commission from implementing its policies and procedures. AECC asserts that the
5 Commission may choose to do nothing – as it has done in the past when given an
6 opportunity to do so – to restrict direct retail access. In this scenario, addressing the
7 stranded cost issues now gives Arizona consumers the greatest window of opportunity to
8 take advantage of direct access transactions once the new Rules, even if amended, are in
9 place.

10 2. The Commission Has Jurisdiction to Move Forward with Competition

11 The Distribution Cooperatives’ “friendly” reminder of its ongoing litigation with
12 the Commission is merely a red herring designed to thwart the Commission from moving
13 forward with competition. While the Commission should not ignore the historical
14 litigation strategy employed by the Distribution Cooperatives and AEPCO as they
15 continue to avoid competition in their service territories, the Commission should also not
16 ignore the fact that despite its initial adoption of the Rules approximately seven (7) years
17 ago, the Distribution Cooperatives’ service territories still remain closed to competition.

18 In its April 14, 2003 Comments to the ECAG, Trico writes “Trico reserves all of its
19 rights in the issues it has asserted in the pending appeal...The Appeal will decide the
20 validity of the Retail Electric Competition Rules (“Rules”) or several of the basic
21 provisions thereof. Therefore, Trico urges the Staff and the Commission that they should
22 not subject the participants in the Rules process to devote very substantial amounts of time
23 and money in any generic proceeding pertaining to amendments to the Rules.” This runs
24 contrary to Duncan and Graham’s insistence to allow the Rules process and ECAG
25 workshops to conclude before addressing the Distribution Cooperatives’ stranded cost
26 issues. It is likely that any outcome of the Rules process that does not satisfy the

1 Distribution Cooperatives' own agendas will be answered with more litigation, and then
2 the argument – as it essentially is now – will be to wait for the appeals process to conclude
3 before moving forward with stranded cost determinations.

4 Article XV, Section 17 of the Arizona Constitution states:

5 Nothing herein shall be construed as denying to public service
6 corporations the right of appeal to the courts of the State from
7 the rules, regulations, orders or decrees fixed by the
8 Corporation Commission, but the rules, regulations, orders, or
9 decrees so fixed shall remain in force pending the decision of
10 the courts.

11 Despite the fact that the Distribution Cooperatives have raised in court proceedings
12 issues directed at the Rules and related Commission decisions, as well as questions
13 regarding the Commission's power to move the electric industry towards competitive
14 markets, the Commission has continued to implement public policy using the Rules as a
15 foundation. Perhaps it is because Judge Campbell's ruling at the Superior Court level
16 relates more to technical and procedural aspects of the Rules (e.g. certification by the
17 Attorney General) rather than an indictment of the regulatory scheme adopted therein.
18 Nevertheless, moving forward with a determination of the Distribution Cooperatives'
19 stranded costs, and opening up their territories to direct access, is wholly consistent with
20 previous Commission decisions that pertain to, or reference, retail competition. Thus,
21 requiring them "to comply with the provisions of the Rules" is no less fair to the
22 Distribution Cooperatives than to those affected utilities whose territories are open to
23 direct access, and who are operating under the auspices of the Rules.

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1 **CONCLUSION**

2 The public policy and jurisdictional issues raised, and the on-going litigation strategy
3 employed, by the Distribution Cooperatives should not deter the Commission from moving
4 forward with implementation of A.A.C. R14-2-1607.D. The condition contained in the
5 Commission's prior procedural order which delayed the stranded cost proceedings has been
6 fulfilled, and there is no reason to justify their continued suspension, especially since the
7 prospect for direct access opportunities has improved. AECC's Motion to schedule hearings
8 to determine the Distribution Cooperatives' stranded costs and to open their service
9 territories to competition is consistent with, and will further, the Commission's public
10 interest goals. For the reason's stated herein, AECC respectfully requests that the
11 Commission grant the Motion.

12 RESPECTFULLY SUBMITTED this January 20, 2004.

13 FENNEMORE CRAIG

14
15 By 

16 C. Webb Crockett
17 Attorneys for Phelps Dodge Mining Company,
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19 **ORIGINAL and 23 COPIES**
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