

REHEARING 9/27/98



0000121279

RECEIVED  
AZ CORP COMMISSION

AUG 27 2 10 PM '98

Arizona Corporation Commission  
DOCKETED

AUG 27 1998

DOCKETED BY [Signature]

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

LAW OFFICES  
**O'CONNOR CAVANAGH MOLLOY JONES**  
SBN00212400  
33 NORTH STONE AVENUE - SUITE 2100  
TUCSON, ARIZONA 85701-1621  
(520) 622-3531

Russell E. Jones, SBN 000549  
Attorneys for Trico Electric Cooperative, Inc.

BEFORE THE ARIZONA CORPORATION COMMISSION

JAMES M. IRVIN  
Chairman  
RENZ D. JENNINGS  
Commissioner  
CARL J. KUNASEK  
Commissioner

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

Docket No. RE-00000C-94-0165

**APPLICATION FOR REHEARING AND  
REQUEST FOR STAY OF TRICO  
ELECTRIC COOPERATIVE, INC.**

TRICO ELECTRIC COOPERATIVE, INC., an Arizona nonprofit corporation, whose Post Office address is Post Office Box 35970, Tucson, Arizona 85740 ("Applicant" or "Trico"), a party in the above proceedings which has been issued certificates of convenience and necessity as an electric public service corporation by the Arizona Corporation Commission ("Commission"), which are in full force and effect, pursuant to A.R.S. §40-253 submits to the Commission this Application For Rehearing and Request for Stay of Decision No. 61071 entered and dated August 10, 1998, including Attachment A (the Amended Rules A.A.C. R14-2-203, 204, 208 through 211 and in A.A.C. Title 14, Chapter 2, Article 16: R14-2-1601 and R14-2-1603 through R14-2-1618) and Impact Statement (collectively, "Decision"), and of the whole thereof, on the grounds that the Decision is unlawful, unreasonable, unjust, unconstitutional, in excess of the

1 Commission's jurisdiction, arbitrary, capricious and an abuse of the Commission's discretion for  
2 the following reasons and upon the following grounds:

3 1. The Decision is not supported by any evidence.

4 2. The Decision is unconstitutional in violation of Article XV, Sections 2, 3 and 14 of  
5 the Arizona Constitution by permitting rates of electric public service corporations ("PSCs") to be  
6 set at market determined rates for competitively provided electric services as provided in the  
7 Decision in A.A.C. R14-2-1612A and E rather than the fair value of the property of PSCs devoted  
8 to the public use, a just and reasonable rate of return on such fair value and a rate design which  
9 will produce just and reasonable rates based thereon and by delegating to Electric Service  
10 Providers as defined in A.A.C. R14-2-1601(15) and the market the Commission's power and  
11 obligation to prescribe just and reasonable rates.

12 3. The Decision is unconstitutional and in excess of the Commission's jurisdiction in  
13 violation of Article XV, Sections 3 and 12 of the Arizona Constitution which require that the  
14 Commission, and not PSCs or aggregators or self-aggregators, as defined in A.A.C. R14-2-  
15 1601(2) and A.A.C. R14-2-1601(36), respectively, to prescribe classes of PSCs and prohibits  
16 discrimination within such classes.

17 4. The Decision is unconstitutional, in excess of the jurisdiction of the Commission  
18 and in violation of Article XV, Section 2 of the Arizona Constitution which requires that all  
19 corporations other than municipal furnishing electricity for light, fuel or power shall be deemed  
20 PSCs:

21 A. By attempting to give Electric Service Suppliers who have not been issued  
22 certificates of convenience and necessity by the Commission pursuant to A.R.S. §§40-  
23 281, *et seq.*, as electric public service corporations the same rights and powers to sell  
24 electricity as PSCs issued certificates of convenience and necessity pursuant to such  
25 statutes.  
26

1           B. By creating a new type of certificate of convenience and necessity for  
2 Electric Service Suppliers who have not been issued certificates of convenience and  
3 necessity by this Commission pursuant to A.R.S. §§40-281, *et seq.*, when only one type is  
4 permitted by Article XV, Section 2.

5           C. By not requiring all suppliers of electricity to charge rates and charges by  
6 the constitutionally mandated system based on a just and reasonable rate of return on the  
7 fair value of the property of such suppliers of electricity devoted to the public use.

8           5. The Decision is unconstitutional, in excess of the jurisdiction of the Commission  
9 and is in violation of Article IV and Article XV, Section 6 of the Arizona Constitution and the  
10 legislative powers expressly or impliedly reserved to the Legislature by the Arizona Constitution.

11           6. The Decision is unconstitutional in violation of the just compensation provisions  
12 of the Fifth Amendment of the United States Constitution and Article II, Section 17 of the  
13 Arizona Constitution and as incorporated into the Due Process Clauses of the Fourteenth  
14 Amendment of the United States Constitution and Article II, Section 4 of the Arizona  
15 Constitution by breaching the contract and the regulatory compact between the State of Arizona  
16 and PSCs, including Applicant, to whom the Commission has issued certificates of convenience  
17 and necessity.

18           7. The Decision breaches the contract and regulatory compact between the State of  
19 Arizona and Trico by denying the exclusive right to sell electricity in its certificated areas and is  
20 unconstitutional in violation of Article II, Section 17, Article III and Article VI, Section 1 of the  
21 Arizona Constitution which require that when vested property rights of PSCs are taken or  
22 damaged for public or private use, the State must, before such taking or damage, pay just  
23 compensation (i) into court, secured by a bond as may be fixed by the court or (ii) into the State  
24 treasury on such terms and conditions as are provided by statute.

1           8.       The Decision is unconstitutional, in excess of the jurisdiction of the Commission  
2 and in violation of Article II, Section 17, Article III and Article VI, Section 1 of the Arizona  
3 Constitution in that:

4           A.       The issue of just compensation to be paid Trico for the breach of the  
5 contract and the regulatory compact with the State of Arizona is an issue to be determined  
6 by the courts, not the Commission.

7           B.       The Decision places unconstitutional restrictions, burdens and limitations  
8 on the right of Trico to obtain just compensation for the breach of the contract and the  
9 regulatory compact with the State of Arizona and the loss of, and damage to, its vested  
10 property rights.

11          9.       The Decision is unconstitutional and in violation of Article I, Section 10, Clause 1  
12 of the United States Constitution and Article II, Section 25 of the Arizona Constitution in that it  
13 impairs the obligations of contracts:

14          A.       Between the State of Arizona and Trico, which has been issued certificates  
15 of convenience and necessity by the Commission pursuant to A.R.S. §§40-281, *et seq.*,  
16 and

17          B.       Between Arizona Electric Power Cooperative, Inc. ("AEPCO") and its  
18 Class A Members, including Trico, which contracts are all requirements wholesale power  
19 contracts requiring such Class A Members to purchase all of their electricity from  
20 AEPCO.

21          10.       The Decision is unconstitutional, exceeds the jurisdiction of the Commission and  
22 violates the just compensation provisions of the United States and Arizona Constitutions by  
23 confiscating the property of Trico.

24          11.       The Decision violates the Supremacy Clause of Article VI of the United States  
25 Constitution, Article II, Section 3 of the Arizona Constitution, and the Rural Electrification Act of  
26

1 1936, as amended, United States Code Annotated, Title 7, Chapter 31, Subchapters I and III ("RE  
2 Act") by reason of:

3 A. Loans made by the United States pursuant to the RE Act to AEPCO and to  
4 Trico which are secured by utility realty mortgages and security agreements based upon  
5 the all requirements wholesale power contract between AEPCO and Trico are placed in  
6 jeopardy by the Decision.

7 B. The frustration of the RE Act by diverting the benefits of the RE Act from  
8 those intended by the RE Act to be beneficiaries to others such as Electric Service  
9 Providers who are not intended to be beneficiaries of the RE Act and who are permitted to  
10 use or access the distribution facilities of Trico without its consent.

11 12. The Decision is unconstitutional, exceeds the jurisdiction of the Commission and  
12 violates the Due Process Clauses of each of the Fourteenth Amendment of the United States  
13 Constitution and Article II, Section 4 of the Arizona Constitution for each of the following  
14 reasons:

15 A. The Decision is so vague and ambiguous that it is unintelligible and  
16 unenforceable and postpones for the future the determination of Trico's substantial and  
17 vested property rights without establishing standards to govern such determinations.

18 B. The Decision fails to give fair warning to Trico of future determinations to  
19 be made by the Commission which substantially affect its rights and lacks standards to  
20 restrict the discretion of the Commission in making such determinations.

21 C. The Decision creates uncertainty with respect to the certificates of  
22 convenience and necessity issued to Trico pursuant to A.R.S. §40-281 and those proposed  
23 to be issued to Electric Service Providers pursuant to A.A.C. R14-2-1603.

24 D. The Decision confiscates the property and vested property rights of Trico,  
25 without providing just compensation as contemplated by the United States and Arizona  
26 Constitutions.

1 E. The Decision unlawfully amends and/or deprives Trico of the benefits of  
2 prior decisions of the Commission in its certification, finance, ratemaking and other orders  
3 without notice and an opportunity to be heard as required by A.R.S. § 40-252.

4 F. The Decision deprives Trico of the value of its respective certificates of  
5 convenience and necessity which is severely damaged or taken by the Decision.

6 G. The Decision violates A.R.S. §40-252 by failing to provide Trico with  
7 notice and an opportunity to be heard prior to the amendment of its certificates of  
8 convenience and necessity.

9 13. The Decision violates the equal protection provisions of the Fourteenth  
10 Amendment of the United States Constitution and Article II, Section 13 of the Arizona  
11 Constitution in that it does not provide equal treatment of all PSCs in the State of Arizona, and in  
12 particular subjects the PSCs who have been issued certificates of convenience and necessity  
13 pursuant to A.R.S. §§40-281, *et seq.* to substantial and unconstitutional burdens and detriments  
14 not imposed upon Electric Service Providers issued certificates of convenience and necessity  
15 pursuant to R14-2-1603.

16 14. The Decision is unlawful, unconstitutional and exceeds the jurisdiction of the  
17 Commission in ordering use or access of facilities of PSCs, including Trico, by other providers of  
18 electricity without the consent of the PSCs.

19 15. The Decision is unlawful and exceeds the jurisdiction of the Commission by  
20 impermissibly interfering with the internal management and operations of Trico.

21 16. The Decision is unlawful and exceeds the jurisdiction of the Commission by  
22 requiring that all competitive generation services shall be separated from Affected Utilities after  
23 January 1, 2001.

24 17. The Decision is unlawful and exceeds the Commission's jurisdiction in that it  
25 restricts Affected Utilities from providing competitive services as defined in the Rules.  
26

1           18.     The Decision is unlawful and unconstitutional as a prohibited bill of attainder in  
2 violation of Article II, Section 25 of the Arizona Constitution and Article I, Section 10 of the  
3 United States Constitution.

4           19.     The Decision is unconstitutional in that it prohibits PSCs who have been issued  
5 certificates of convenience and necessary pursuant to A.R.S. §§40-281, *et seq.*, from selling  
6 electricity and other services competitively outside their certificated areas when Electric Service  
7 Providers who have not been issued certificates of convenience and necessity pursuant to A.R.S.  
8 §§40-281, *et seq.* are granted the right to sell electricity and other services competitively  
9 anywhere in the State of Arizona.

10          20.     The Decision is unconstitutional in that it treats the assets of PSCs as if they were  
11 assets owned by the Commission.

12          21.     The Decision is unlawful and exceeds the Commission's jurisdiction in that  
13 several provisions conflict with HB 2663, Chapter 209 of the 1998 Session Laws, including but  
14 not limited to the Decision's provisions as to the provider of last resort obligations, competitive  
15 phasing requirements and when certain services such as metering, meter reading, billing and  
16 collection may be offered competitively.

17          22.     The Decision impermissibly delegates without controlling standards to others  
18 powers which must be exercised by the Commission.

19          23.     The Decision is unlawful, unconstitutional and exceeds the jurisdiction of the  
20 Commission by exercising legislative and judicial powers not granted to it by the Arizona  
21 Constitution, including but not limited to its stranded cost provisions, its solar water heater rebate  
22 program, its solar electric fund, its forced divestiture and competitive service restrictions and its  
23 affiliated transaction requirements in A.A.C. R14-2-1607, 1608, 1609, 1616 and 1617,  
24 respectively.

25          24.     The Decision is in excess of the jurisdiction of the Commission by requiring  
26 Affected Utilities, including Trico, to take every reasonable cost-effective measure to mitigate or

1 offset Stranded Cost by means such as expanding wholesale or retail markets, or offering a wider  
2 scope of services for profit, among others.

3 25. The provisions of the Decision pertaining to Stranded Cost is in conflict with the  
4 Commission's Decision No. 60977 entered January 22, 1998.

5 26. The Decision deprives Trico of just compensation pursuant to the Fifth  
6 Amendment and the due process clause of the Fourteenth Amendment of the United States  
7 Constitution and Article II, Sections 4 and 17 of the Arizona Constitution by making inadequate  
8 and arbitrary allowance for, and placing unreasonable restrictions on, the recovery of stranded  
9 costs.

10 27. A.A.C. R14-2-210.E is unlawful and unconstitutional in prescribing statutes of  
11 limitations which are an exercise of legislative powers reserved solely to the legislature pursuant  
12 to Articles III and IV of the Arizona Constitution and unjustly discriminates between the statute  
13 of limitations for underbilling by PSCs as distinguished from overbilling by PSCs.

14 28. Both the manner in which the Decision was adopted and the Decision itself violate  
15 the requirements of the Administrative Procedure Act, A.R.S., Title 41, Chapter 6, including but  
16 not limited to the provisions of A.R.S. §§41-1025, 41-1026, 41-1044 and 41-1057, and its failure  
17 to adopt as a rule all Commission statements of general applicability that implement, interpret or  
18 prescribe law or policy or describe the procedure or practice requirements of the Commission  
19 concerning the subject matter of the Decision.

20 29. The Decision and in particular A.A.C. R14-2-1612 violates the provisions of  
21 A.R.S. §§40-203, 40-250, 40-251, 40-252, 40-334, 40-361, 40-365 and 40-367, by permitting the  
22 sale of electricity by Electric Service Providers or by market determined rates rather than rates  
23 prescribed by the Commission and permits aggregators or self aggregators to designate classes of  
24 consumers of Affected Utilities rather than the Commission prescribing such classes, all of which  
25 are contrary to such statutes.  
26

LAW OFFICES  
O'CONNOR CAVANAGH MOLLOY JONES  
33 NORTH STONE AVENUE - SUITE 2100  
TUCSON, ARIZONA 85701-1621  
(520) 622-3531

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

30. The entire Decision, which is based upon the delegation of the Commission's rate setting power to others and the basing of rates on the "market" rather than fair value is unconstitutional, in excess of the Commission's jurisdiction and otherwise invalid.

WHEREFORE, having fully stated its Application for Rehearing and Request for Stay, Trico respectfully requests that the Commission enter its Order granting this Application for Rehearing and staying the Decision, and the whole thereof, including but not limited to the Amended Rules therein adopted pending repeal of the Rules and resolution of the issues set forth herein.

DATED this 27th day of August, 1998.

O'CONNOR CAVANAGH MOLLOY JONES

By:   
Russell E. Jones  
Attorneys for Trico Electric Cooperative, Inc.

1 Original and 10 copies of the foregoing  
2 document filed this 27 day of  
August, 1998, with

3 Docket Control  
4 Arizona Corporation Commission  
1200 W. Washington  
Phoenix, Arizona 85007

5 Copy of the foregoing document mailed  
6 this 27 day of August, 1998, to:

7 Michael A. Curtis  
8 Martinez & Curtis, P.C.  
2712 North 7th Street  
9 Phoenix, Arizona 85006

10 Mr. Walter W. Meek  
AUIA  
2100 N. Central Avenue, Suite 210  
11 Phoenix, Arizona 85004

12 Norman J. Furuta  
Department of the Navy  
900 Commodore Drive, Building 107  
13 P.O. Box 272 (Attn. Code 90C)  
San Bruno, California 94066-7020

14 Lex J. Smith, Esq.  
15 Brown & Bain, P.A.  
2901 N. Central Avenue  
16 P.O. Box 400  
Phoenix, Arizona 85001-0400

17 Bradley Carroll, Esq.  
Tucson Electric Power  
18 Legal Department  
220 West Sixth Street  
19 P.O. Box 711  
Tucson, Arizona 85002-0711

20 Douglas C. Nelson, Esq.  
21 Law Offices of Douglas C. Nelson  
7000 North 16th Street  
22 Suite 120-307  
Phoenix, Arizona 85020-5547

23 Mr. Ken Saline  
24 K.R. Saline & Associates  
160 North Pasadena, Suite 101  
25 Mesa, Arizona 85201

C. Webb Crockett  
Fennemore Craig  
3003 N. Central Ave., Suite 2600  
Phoenix, Arizona 85012

Mr. Sam DeFrawl  
Department of the Navy  
Naval Facilities Engineering Command  
Navy Rate Intervention  
901 M Street SE  
Building 212  
Washington, DC 20374

Robert S. Lynch, Esq.  
340 East Palm Lane, Suite 140  
Phoenix, Arizona 85004

Ms. Barbara Klemstein  
Arizona Public Service  
Station 9909  
P.O. Box 53999  
Phoenix, Arizona 85072

Lawrence V. Robertson, Esq.  
Munger Chadwick P.L.C.  
333 N. Wilmot, Suite 300  
Tucson, Arizona 85722

Craig Marks, Esq.  
Citizens Utilities Company  
2901 N. Central Ave., Suite 1660  
Phoenix, Arizona 85012-2736

Suzanne Dallimore, Esq.  
Office of the Attorney General  
1275 West Washington  
Phoenix, Arizona 85007

- 1 Steven Wheeler, Esq.  
2 Thomas L. Mumaw, Esq.  
3 Snell & Wilmer  
4 One Arizona Center  
5 400 East Van Buren  
6 Phoenix, Arizona 85004-0001
- 7 Jesse Sears, Esq.  
8 Office of the City Attorney  
9 City of Phoenix  
10 200 W. Washington St., Suite 1300  
11 Phoenix, Arizona 85003
- 12 Christopher Hitchcock, Esq.  
13 Hitchcock, Hicks & Conlogue  
14 Copper Queen Plaza  
15 P.O. Box 87  
16 Bisbee, AZ 85603-0087
- 17 Andrew Bettwy, Esq.  
18 Southwest Gas Corporation  
19 5241 Spring Mountain Road  
20 Las Vegas, Nevada 89102
- 21 Mr. Terry Ross  
22 CEFD  
23 P.O. Box 288  
24 Franktown, Colorado 80116
- 25 Paul Bullis, Esq.  
26 Legal Division  
Arizona Corporation Commission  
1200 W. Washington  
Phoenix, Arizona 85007
- Mr. Vinnie Hunt  
City of Tucson  
Department of Operations  
4004 South Park Avenue  
Tucson, Arizona 85714
- Ms. Elizabeth Furkins  
IBEW  
750 South Tucson Boulevard  
Tucson, Arizona 85716
- Mr. Carl Dabelstein  
2211 East Edna Avenue  
Phoenix, Arizona 85022
- Michael M. Grant, Esq.  
Gallagher & Kennedy  
2600 N. Central Ave.  
Phoenix, AZ 85004-3020
- Myron L. Scott, Esq.  
1628 E. Southern Ave., Suite 9-328  
Tempe, Arizona 85282
- Barbara R. Goldberg, Esq.  
Office of the City Attorney  
City of Scottsdale  
3939 N. Civic Center Blvd.  
Scottsdale, Arizona 85281
- Mr. Phyllis Rowe  
Arizona Consumers Council  
P.O. Box 1288  
Phoenix, Arizona 85011
- Mr. Michael K. Block  
The Goldwater Institute  
201 North Central Avenue  
Phoenix, Arizona 85004
- Mr. Ray Williamson  
Acting Director  
Utilities Division  
Arizona Corporation Commission  
1200 W. Washington  
Phoenix, Arizona 85007
- Greg Patterson, Esq.  
RUCO  
2828 N. Central Ave., Suite 1200  
Phoenix, Arizona 85004
- Ms. Betty Pruitt  
ACAA  
2627 North 3rd St., Suite 2  
Phoenix, Arizona 85004
- Thomas W. Pickrell, Esq.  
Arizona School Board Association  
2100 North Central Avenue  
Phoenix, Arizona 85004
- Mr. Rick Gilliam  
Land and Water Fund of the Rockies  
2260 Baseline Road, Suite 200  
Boulder, Colorado 85302

  
\_\_\_\_\_