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REHEARING 11/4/99

BEFORE THE ARIZONA CORPORATION COMMISSION

CARL J. KUNASEK  
Chairman  
JAMES M. IRVIN  
Commissioner  
WILLIAM A. MUNDELL  
Commissioner

Arizona Corporation Commission

DOCKETED

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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

**APPLICATION FOR REHEARING AND  
REQUEST FOR STAY OF DECISION  
NO. 61969 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 ("CC&N") as an electric public service corporation ("PSC") 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. 61969 dated and entered September 29, 1999, including Appendix A thereto (the modification of the Revised Rules A.A.C. R14-2-201 through R14-2-212 and A.A.C. Title 14, Chapter 2,

1 Article 16: R14-2-1601 through R14-2-1617 ("Rules"), as published in the Arizona  
2 Administrative Register on May 14, 1999) and Appendix B (the Concise Explanatory Statement  
3 for the Proposed Modifications) (collectively, "Decision"), and of the whole thereof, on the  
4 grounds that the Decision is unlawful, unreasonable, unjust, unconstitutional, in excess of the  
5 Commission's jurisdiction, arbitrary, capricious and an abuse of the Commission's discretion for  
6 the following reasons and upon the following grounds:  
7

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

9 2. The Decision violates Article XV, Sections 3 and 14 of the Arizona Constitution  
10 by authorizing ESPs to charge rates which are not based on the fair value of the property of PSCs  
11 devoted to the public use, nor on a just and reasonable rate of return on such fair value nor on a  
12 rate design which will produce just and reasonable rates based thereon.

13 3. The Decision violates Article XV, Section 3 of the Arizona Constitution by  
14 delegating to ESPs the authority to determine the rates ESPs will charge customers and by  
15 permitting ESPs to charge what are ostensibly "market-determined rates." The Arizona  
16 Constitution requires the Commission to prescribe the rates to be charged by ESPs which cannot  
17 be delegated to an ESP, the market or anyone else.

18 4. The Decision violates Article XV, Section 3 of the Arizona Constitution by  
19 authorizing ESPs, aggregators or self aggregators, as those terms are defined in the Rules, to  
20 prescribe classes to be used by ESPs. The Constitution requires the Commission to prescribe  
21 classifications to be used by ESPs and this duty cannot be delegated to ESPs or anyone else.  
22

23 5. The Decision violates Article XV, Sections 3 and 12 of the Arizona Constitution  
24 by authorizing ESPs, aggregators or self aggregators to discriminate in charges made to  
25  
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1 customers who are within classes of customers prescribed by the Commission that receive a like  
2 or contemporaneous service.

3           6.       The Decision violates Article XV, Sections 2 and 3 of the Arizona Constitution  
4 which requires that all corporations other than municipal furnishing electricity for light, fuel or  
5 power shall be deemed PSCs by creating a new type of CC&N for ESPs who have not been  
6 issued CC&Ns by the Commission pursuant to A.R.S. §§40-281, *et seq.*, as have Trico and the  
7 other Affected Utilities. Only one type of CC&N is permitted by said Sections for each industry  
8 and the only power or jurisdiction granted by such Section 3 of the Arizona Constitution to the  
9 Commission with respect to classes of PSCs is to prescribe just and reasonable classifications to  
10 be used by PSCs and not the power and jurisdiction to prescribe just and reasonable classes of  
11 PSCs.  
12

13           7.       The Decision violates Article IV and Article XV, Section 6 of the Arizona  
14 Constitution by purporting to give the Commission the right to exercise legislative powers  
15 expressly or impliedly reserved to the Legislature by the Arizona Constitution.  
16

17           8.       The Decision is unconstitutional in violation of the just compensation provisions  
18 of the Fifth Amendment as incorporated into the Due Process Clause of the Fourteenth  
19 Amendment of the United States Constitution and Article II, Section 4 of the Arizona  
20 Constitution and Article II, Section 17 of the Arizona Constitution by breaching the contract and  
21 exclusive regulatory compact between the State of Arizona and Trico.  
22

23           9.       The Decision breaches the contract and regulatory compact between the State of  
24 Arizona and Trico by denying Trico the exclusive right to sell electricity and related services in  
25 its certificated areas pursuant to its CC&Ns and is unconstitutional in violation of Article II,  
26

1 Section 17, Article III and Article VI, Section 1 of the Arizona Constitution which require that  
2 when vested property rights are taken or damaged for public or private use, the State must, before  
3 such taking or damage, pay on behalf of the owner of the property or property rights taken or  
4 damaged just compensation either (i) into court, secured by a bond as may be fixed by the court  
5 or (ii) into the State treasury on such terms and conditions as are provided by statute.  
6

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

10 A. The issue of just compensation to be paid Trico for the breach of the  
11 contract and the regulatory compact with the State of Arizona is an issue to be determined by the  
12 courts, not the Commission, and the Decision fails to provide for just compensation by the courts.  
13

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

17 11. The Decision is unconstitutional and in violation of Article I, Section 10, Clause 1  
18 of the United States Constitution and Article II, Section 25 of the Arizona Constitution in that it  
19 impairs the obligation of contracts:

20 A. Between the State of Arizona and Trico, which has been issued certificates  
21 of convenience and necessity by the Commission pursuant to A.R.S. §§40-281, *et seq.*, which are  
22 in full force and effect, and  
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1           B.     Between Arizona Electric Power Cooperative, Inc. ("AEPCO") and its  
2 Class A Members, including Trico, which contracts are all-requirements wholesale power  
3 contracts requiring such Class A Members to purchase all of their electricity from AEPCO.

4           C.     Between Trico and its members as such members have agreed to purchase  
5 all of their electricity from Trico.

6  
7           12.    The Decision is unconstitutional, exceeds the jurisdiction of the Commission and  
8 violates the just compensation provisions of the United States and Arizona Constitutions by  
9 confiscating the property of Trico.

10          13.    The Decision violates the Supremacy Clause of Article VI of the United States  
11 Constitution, Article II, Section 3 of the Arizona Constitution, and the Rural Electrification Act of  
12 1936, as amended, United States Code Annotated, Title 7, Chapter 31, Subchapters I and III ("RE  
13 Act") by reason of:

14  
15           A.     Loans made by the United States pursuant to the RE Act to AEPCO and to  
16 Trico which are secured by utility realty mortgages and security agreements based upon the all-  
17 requirements wholesale power contract between AEPCO and Trico are placed in jeopardy by the  
18 Decision.

19           B.     The frustration of the objectives and means of the RE Act by permitting the  
20 benefits of the RE Act to be enjoyed by those not intended to be beneficiaries of the Act, such as  
21 ESPs and meter service providers who are permitted to use or access the distribution facilities of  
22 Trico without its consent, to the detriment of the Act's true beneficiaries who are those being  
23 financed by the RE Act's programs.

1           14.    The Decision violates the Due Process Clauses of each of the Fourteenth  
2 Amendment of the United States Constitution and Article II, Section 4 of the Arizona  
3 Constitution for each of the following reasons:

4                   A.    The Decision unlawfully amends and/or deprives Trico of the benefits of  
5 prior decisions of the Commission in its certification, finance, ratemaking and other orders  
6 without notice and an opportunity to be heard as required by A.R.S. §40-252.  
7

8                   B.    The Decision is contrary to accepted judicial construction of A.R.S. §40-  
9 252, as set forth in decisions of the Arizona Supreme Court, as the Decision permits competitive  
10 encroachment into Trico's territory without the showing of inability or unwillingness of Trico to  
11 serve as required by law.

12                   C.    The Decision places an irrational condition on the amendment of Trico's  
13 CC&N by conditioning the amendment upon final resolution of stranded cost issues for Trico,  
14 which cannot be determined until the actual start and operation of competition within its  
15 certificated area.  
16

17           15.    The Decision violates the Equal Protection Clauses of the Fourteenth Amendment  
18 of the United States Constitution and Article II, Section 13 of the Arizona Constitution by  
19 burdening Trico with unlawful discriminatory restrictions and requirements which are not made  
20 applicable to ESPs although both Trico and ESPs are PSCs such as:

21                   A.    Trico is required to comply with A.R.S. §40-281, 40-282 and other  
22 regulatory statutes, whereas ESPs are not.  
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24                   B.    Trico is required to serve electricity within its certificated areas, whereas  
25 ESPs are not.  
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C. Trico is required to be a Provider of Last Resort, whereas ESPs are not.

D. Trico as a Utility Distribution Company, as defined by the Rules, has the obligation to assure that adequate transmission import capability is available to meet the load requirements of all of Trico's distribution customers , including those served with electricity by ESPs, whereas ESPs are not.

E. The Decision and Rules require Utility Distribution Companies which include Trico to unbundle their electric service and provide rates for each unbundled service which shall reflect the cost of providing the services and such rates cannot be downwardly flexible without Commission approval whereas ESPs are not required to base their rates on costs and their rates can be adjusted downward without Commission approval so long as they are not less than their marginal costs.

16. The Decision is unlawful, unconstitutional and exceeds the jurisdiction of the Commission in ordering use or access of facilities of Trico by ESPs without the consent of Trico.

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

18. The Decision is unlawful and exceeds the jurisdiction of the Commission by violating the provisions of A.R.S. §40-334, which prohibits discrimination between persons, localities or classes of service as to rates, charges, services or facilities.

19. The Decision is unlawful and exceeds the jurisdiction of the Commission by requiring, with certain exceptions, that all competitive generation services shall be separated from Affected Utilities by January 1, 2001.

1           20.    The Decision is unlawful and exceeds the Commission's jurisdiction in that it  
2 restricts Affected Utilities from providing competitive services as defined in the Rules pursuant to  
3 the CC&Ns of the Affected Utilities, including Trico.

4           21.    The Decision is unconstitutional in that it prohibits PSCs who have been issued  
5 CC&Ns pursuant to A.R.S. §§40-281, *et seq.*, from selling electricity and other services  
6 competitively outside their certificated areas when ESPs who have not been issued CC&Ns  
7 pursuant to A.R.S. §§40-281, *et seq.* are granted the right to sell electricity and other services  
8 competitively anywhere in the State of Arizona, except in the service territories of foreign  
9 cooperatives and municipal corporations or political subdivisions of the State of Arizona who do  
10 not elect Reciprocity pursuant to R14-2-1611.

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

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

18           24.    The Decision is unlawful, unconstitutional and exceeds the jurisdiction of the  
19 Commission by exercising legislative and judicial powers not granted to it by the Arizona  
20 Constitution, including but not limited to its stranded cost provisions, its forced divestiture and  
21 competitive service restrictions and its code of conduct requirements in A.A.C. R14-2-1607, 1615  
22 and 1616, respectively.  
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1           25.    The Decision deprives Trico of just compensation pursuant to the Fifth  
2 Amendment as incorporated into the due process clause of the Fourteenth Amendment of the  
3 United States Constitution and Article II, Sections 4 and 17 of the Arizona Constitution by  
4 making inadequate and arbitrary allowance for, and placing unreasonable restrictions on, the  
5 recovery of stranded costs.

6  
7           26.    A.A.C. R14-2-210.E.3 is unlawful and unconstitutional in prescribing statutes of  
8 limitations in violation of Article XVIII, Section 6 of the Arizona Constitution and which are an  
9 exercise of legislative powers reserved solely to the Legislature pursuant to Articles III and IV of  
10 the Arizona Constitution and unjustly discriminates between the statute of limitations for  
11 underbilling by PSCs as distinguished from overbilling by PSCs.

12           27.    Both the manner in which the Decision was adopted, including but not limited to  
13 the failure of the Commission to submit the Rules to the Arizona Attorney General for review and  
14 action pursuant to A.R.S. §41-1044, and the Decision itself violate the requirements of the  
15 Administrative Procedure Act, A.R.S., Title 41, Chapter 6, including but not limited to the  
16 provisions of A.R.S. §§41-1025, 41-1026, 41-1030, 41-1044 and 41-1057.

17  
18           28.    The Decision and in particular A.A.C. R14-2-1611 violates the provisions of  
19 A.R.S. §§40-203, 40-250, 40-251, 40-252, 40-334, 40-361, 40-365 and 40-367, by permitting the  
20 sale of electricity at rates established by ESPs or by market determined rates rather than rates  
21 prescribed by the Commission and permits ESPs, aggregators or self aggregators to designate  
22 classes of consumers of Affected Utilities rather than the Commission prescribing such classes,  
23 all of which are contrary to such statutes.

1           29.    The Decision and Rules exceed the jurisdiction of the Commission as to each and  
2 all of the following:

3                   A.    There is no provision for stranded costs for distribution utilities such as  
4 Trico when in all likelihood such distribution utilities will suffer damage or losses from stranded  
5 costs after the Rules are implemented.

6                   B.    The Decision and Rules require Utility Distribution Companies including  
7 Trico to assure that adequate transmission import capability is available to meet the load  
8 requirements of all of their distribution customers including those served with electricity by ESPs  
9 when Trico is not engaged in the electric transmission business.

10           30.    The Decision and Rules violate the freedom of speech provision of the First  
11 Amendment of the United States Constitution by requiring Trico to submit a Code of Conduct to  
12 the Commission that must contain policies to eliminate joint advertising and joint marketing with  
13 an electric cooperative issued a CC&N as an ESP in which Trico is a member.

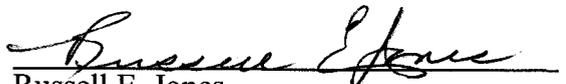
14           31.    The Decision and Rules violate Sections 3 and 14 of Article XV of the Arizona  
15 Constitution and A.R.S. §§40-250, 40-251 and 40-367 by requiring Trico to file a report by  
16 November 1, 1999 detailing a rate reduction of 3%-5% to all Standard Offer customers whose  
17 rates remain regulated pursuant to the Decision and Rules.

18                   WHEREFORE, having fully stated its Application for Rehearing and Request for Stay,  
19 Trico respectfully requests that the Commission enter its Order granting this Application for  
20 Rehearing and staying the Decision, and the whole thereof, including but not limited to the Rules  
21 therein adopted pending repeal of the Rules and resolution of the issues set forth herein.  
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DATED this 15th day of October, 1999.

WATERFALL ECONOMIDIS CALDWELL  
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Original and 10 copies of the foregoing document  
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