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BEFORE THE ARIZONA CORPORATIC

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JIM IRVIN
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Commissioner

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IN THE MATTER OF THE COMPETITION IN THE PROVISION OF ELECTRIC SERVICES THROUGHOUT THE STATE OF ARIZONA	)	DOCKET NO. RE-00000C-94-0165 **GRAHAM COUNTY ELECTRIC COOPERATIVE, INC'S APPLICATION FOR REHEARING AND REQUEST FOR STAY OF DECISION OF 61969**

Arizona Corporation Commission
DOCKETED
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Pursuant to A.R.S. § 40-253, Graham County Electric Cooperative, Inc. ("Graham") submits this Application for Rehearing and Request for Stay of Decision No. 61969, dated September 29, 1999, including Appendix A (modifications and changes to the Commission's "Electric Competition Rules" codified at A.A.C. R14-2-201 through R14-2-212 and A.A.C. R14-2-1601 through R14-2-1617) and Appendix B (the Commission's "Concise Explanatory Statement" of the changes to the Rules). Graham bases this Application for Rehearing and Request for Stay on the grounds and for the reasons set forth in Arizona Electric Power Cooperative, Inc's Application for Rehearing and Request for Stay which is attached hereto and incorporated herein.

WHEREFORE, Graham respectfully requests that the Commission enter its Order granting this Application for Rehearing and staying Decision No. 61969.

RESPECTFULLY SUBMITTED this 19th day of October, 1999.

GALLAGHER & KENNEDY, P.A.

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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF THE COMPETITION IN THE PROVISION OF ELECTRIC SERVICES THROUGHOUT THE STATE OF ARIZONA	)	DOCKET NO. RE-00000C-94-0165 **ARIZONA ELECTRIC POWER COOPERATIVE, INC.'S APPLICATION FOR REHEARING AND REQUEST FOR STAY OF DECISION NO. 61969**

Pursuant to A.R.S. § 40-253, Arizona Electric Power Cooperative, Inc. ("AEPCO") submits this Application for Rehearing and Request for Stay of Decision No. 61969 dated September 29, 1999, including its Appendix A (modifications and changes to the Commission's "Electric Competition Rules" codified at A.A.C. R14-2-201 through R14-2-212 and A.A.C. R14-2-1601 through R14-2-1617) and its Appendix B (the Commission's "Concise Explanatory Statement" of the changes to the Rules). Decision No. 61969 and its appendices are referred to collectively as the "Decision."

I. BRIEF STATEMENT OF THE APPLICATION

The Decision is unlawful, unreasonable, unjust, unconstitutional, in excess of the Commission's jurisdiction, arbitrary, capricious and an abuse of the Commission's discretion for the reasons and upon the grounds set forth below. AEPCO already has discussed the fundamental flaws and problems with the Commission's Electric Competition Rules in numerous previous documents filed with the Commission. AEPCO hereby incorporates its previous filings in this docket.

The Decision exhibits the same legal and factual flaws as the three preceding versions of the Electric Competition Rules. Simply put, the Commission has cast aside governing Arizona constitutional provisions, statutes and case law. It has overreached its authorized governmental powers.

AEPCO and its Class A Member Cooperatives have a unique interest in these electric competition issues.[1] The Cooperatives only exist to assure a safe, reliable and economical supply of electricity for their rural owners. AEPCO and the Cooperatives have no stockholders. They are customer owned and customer run. The Cooperatives don't operate for profit. Their principal financial goal is to recoup the cost of providing electricity to their customer owners. With respect to the Decision, the Cooperatives are concerned that its vast restructuring of the electric industry will result in higher costs and lower quality service for the majority of their customer owners. As importantly, absent necessary constitutional authorizations for the Electric Competition Rules, the Decision sets the industry, the Cooperatives and the consuming public adrift on a sea of uncertainty.

II. THE DECISION AND RULES ARE SUBSTANTIVELY AND PROCEDURALLY FLAWED.

The Decision and the Commission's apparently final Electric Competition Rules are unconstitutional, unlawful, unreasonable, in excess of the Commission's jurisdiction, arbitrary, capricious, an abuse of the Commission's discretion and exceed the Commission's jurisdiction upon the grounds and for the reasons set forth below.

The Commission's Decision must be reviewed consistent with the following standards. The Commission can exercise only those powers that can be derived from a strict

[1] The Cooperatives consist of AEPCO, Duncan Valley Electric Cooperative, Inc., Graham County Electric Cooperative, Inc., Mohave Electric Cooperative, Inc., Sulphur Springs Electric Cooperative, Inc. and Trico Electric Cooperative, Inc.

construction of the Arizona Constitution and implementing statutes. The Commission can't enact rules contrary to Arizona's Constitution or statutes. Further, the Commission doesn't have the power to manage or direct the internal business affairs of public service corporations--including the Cooperatives. And the Commission can't act arbitrarily, capriciously, unreasonably or in excess of its jurisdiction and powers. Finally, the Commission must comply with procedural and substantive due process safeguards.

As set forth below, the Decision violates all of these guiding principles:

1. The Decision – in particular R14-2-1611 - violates Article XV, Sections 2, 3 and 14 of the Arizona Constitution by permitting rates of electric public service corporations (PSCs) to be set at market determined rates rather than basing those rates on fair value and by delegating to providers and the market the Commission's power to prescribe just and reasonable rates. The Decision delegates to PSCs the power to prescribe rates based on "competitive market" conditions. The Decision further dictates that rates and prices set by a competitive market are just and reasonable. But, the Arizona Constitution mandates that the Commission prescribe "just and reasonable" utility rates based on the fair value of a utility's property. As such, the Decision violates Article XV, Sections 2, 3 and 14 of the Arizona Constitution by unlawfully delegating the Commission's constitutional obligation to "prescribe" just and reasonable rates to PSCs. Further, the Decision violates Article XV, Section 14 by authorizing the Commission and/or PSCs to set rates in a competitive market without any determination of the fair value of the utility's property.

2. The Decision violates Article XV, Sections 3 and 12 of the Arizona Constitution by authorizing electric service providers (ESPs), aggregators or self-aggregators to prescribe classes to be used by ESPs. The Constitution requires the Commission to prescribe classifications to be used by ESPs and that duty can't be delegated to ESPs or anyone else by the Commission.

3. The Decision also violates Article XV, Sections 3 and 12 of the Arizona Constitution by authorizing ESPs, aggregators or self-aggregators to discriminate in charges made to customers who are within a class of customers which receive a like or contemporaneous service.

4. The Decision is unconstitutional, in excess of the jurisdiction of the Commission and violates Article IV and Article XV, Section 6 of the Arizona Constitution by purporting to exercise legislative powers expressly or impliedly reserved to the Legislature by the Arizona Constitution.

5. The Decision is unconstitutional and violates the just compensation provisions of the Fifth Amendment of the United States Constitution and Article II, Section 17 of the Arizona Constitution and as incorporated into the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article II, Section 4 of the Arizona Constitution by breaching the regulatory compact between the State of Arizona and PSCs including AEPCO and the Cooperatives to whom the Commission has issued certificates of convenience and necessity (CC&N's).

6. The Decision unlawfully breaches the regulatory compact between the State of Arizona and AEPCO and the Cooperatives by denying AEPCO and the Cooperatives the exclusive right to sell electricity to their members and violates Article II, Section 17, Article III and Article VI, Section 1 of the Arizona Constitution which require, inter alia, that when vested property rights are taken or damaged for public or private use, the State must, before such taking or damage, pay just compensation (i) into court, secured by a bond as may be fixed by the court or (ii) into the State treasury on such terms and conditions as are provided by statute.

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

A. The issue of just compensation to be paid PSCs, including AEPCO and the Cooperatives, for the breach of the regulatory compact with the State of Arizona is an issue to be determined by the courts, not the Commission.

B. The Decision places unconstitutional restrictions, burdens and limitations on the right of PSCs, including AEPCO and the Cooperatives, to obtain just compensation for the breach of the regulatory compact with the State of Arizona and the loss of and damage to their vested property rights.

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

A. Between the State of Arizona and PSCs, including AEPCO and the Cooperatives, which have been issued CC&N's by the Commission pursuant to A.R.S. § 40-281, et seq.; and

B. Between AEPCO and its Class A Members which contacts are all requirements wholesale power contracts requiring such Class A Members to purchase all of their electricity from AEPCO.

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

A. Loans made by the United States pursuant to the RE Act to AEPCO and the Cooperatives which are secured by utility realty mortgages and security agreements based upon the

all requirements wholesale power contracts between AEPCO and its members are placed in jeopardy by the Decision.

B. The frustration of the RE Act by diverting the benefits of the RE Act from those intended to be its beneficiaries to others such as ESPs who are not intended to be beneficiaries of the RE Act but who are permitted to use the facilities of AEPCO and the Cooperatives without their consent.

C. The frustration of the objectives and means of the RE Act by permitting the benefits of the RE Act to be enjoyed by those not intended to be beneficiaries of the Act, such as ESPs and meter service providers who are permitted to use or access the facilities of AEPCO and other Cooperatives without consent and to the detriment of the RE Act's beneficiaries.

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

A. The Decision is impermissibly vague, postponing for the future the determination of AEPCO's and the Cooperatives' substantial and vested rights without establishing standards to govern such determinations.

B. The Decision fails to give fair warning to AEPCO and the Cooperatives of future determinations to be made by the Commission which substantially affect its rights and lacks standards to restrict and/or guide the discretion of the Commission in making such determinations.

C. The Decision creates uncertainty with respect to the CC&N's issued to AEPCO, the Cooperatives and other Affected Utilities in relation to those CCN's issued to ESP's under the Rules.

D. The Decision unlawfully amends and/or deprives AEPCO and the Cooperatives of the benefits of prior certification, finance, ratemaking and other orders without notice and an opportunity to be heard as required by A.R.S. § 40-252.

E. The Decision deprives AEPCO and the Cooperatives of the value of their CC&N's which are severely damaged or taken by the Decision.

F. The Decision violates A.R.S. § 40-252 by failing to provide AEPCO and the Cooperatives with meaningful notice and opportunity to be heard prior to the amendment of their CC&N's.

G. The Decision violates and is contrary to accepted judicial construction of A.R.S. § 40-252 (as set forth in decisions of the appellate courts) by permitting competitive encroachment into AEPCO's and the Cooperatives' service territories without any showing of their inability or unwillingness to serve as required by law.

11. The Decision violates the equal protection provisions of the 14th Amendment of the United States Constitution and Article II, Section 13 of the Arizona Constitution in that it does not provide equal treatment of all PSCs in the State of Arizona and in particular subjects PSCs who have been issued CC&N's to substantial and different burdens not imposed upon competitive providers, including, but not limited to, the following burdens:

A. AEPCO and the Cooperatives are required to provide electricity to certain customers within the Class A members' service area but ESPs are not.

B. AEPCO and the Cooperatives are required to be providers of last resort but ESPs are not.

C. AEPCO and the Cooperatives have the obligation to ensure that adequate transmission import capability is available to meet the load requirements of all distribution customers but ESPs are not.

D. The Decision requires AEPCO and the Cooperatives to unbundle electric service and provide rates for each unbundled service which reflect the cost of providing such service while ESPs are not required to base their rates on costs.

12. The Decision is not supported by substantial evidence.

13. The Decision is unlawful and exceeds the Commission's jurisdiction because it conflicts with HB 2663, Chapter 209 of the 1998 Session Laws, including, but not limited to, its prohibitions against Affected Utilities providing Competitive Services, its Code of Conduct restrictions and when certain services such as metering, meter reading, billing and collection may be offered competitively. HB 2663 became effective on August 21, 1998 and the Decision impermissibly conflicts with numerous provisions and mandates in HB 2663.[2]

14. The Decision impermissibly delegates to others, without controlling standards, powers which must be exercised by the Commission.

15. The Decision is unlawful, unconstitutional and exceeds the jurisdiction of the Commission by exercising general lawmaking and judicial powers which the Commission does not possess including, but not limited to, its stranded cost provisions at R14-2-1607, its competitive service restrictions at R14-2-1615 and its code of conduct requirements at R14-2-1616.

16. The Decision is unconstitutional, in excess of the jurisdiction of the Commission and in violation of Article XV, Section 2 of the Arizona Constitution which requires that all corporations (other than municipalities) furnishing electricity for light, fuel or power shall be deemed PSCs:

A. By creating a new type of certificate of convenience and necessity (CC&N) for electric service providers who have not been issued CC&N's by this Commission pursuant to Ariz. Rev. Stat. § 40-281, et seq. as have AEPCO and the Cooperatives. The Decision purports to

[2] The Cooperatives also maintain that HB 2663 is flawed and unconstitutional in several respects. But, assuming arguendo that HB 2663 is valid, the Commission can exercise only those powers that can be derived from a strict construction of implementing statutes, including HB 2663.

give the Commission the power to prescribe types of CC&Ns and types of PSCs. Under Section 2 of the Arizona Constitution and Ariz. Rev. Stat. § 40-281, et seq., only one type of CC&N is permitted per industry and the only power given to the Commission is to prescribe just and reasonable classifications to be used by PSCs. The Commission does not have the power or jurisdiction to prescribe classes of PSCs or CC&Ns.

B. By not requiring all suppliers of electricity to charge rates by the constitutionally mandated system based on the fair value of a PSC's property.

17. The Decision is unconstitutional, exceeds the jurisdiction of the Commission and violates the just compensation provisions of the United States and Arizona Constitutions by confiscating the property of PSCs, including AEPCO and the Cooperatives. The United States Constitution and the Arizona Constitution require that private property cannot be taken, damaged or confiscated for public purposes without due process of law and payment of just compensation. In connection with the regulation of PSCs, Arizona law mandates that the Commission cannot take or confiscate AEPCO's and the Cooperatives' property, or deprive AEPCO and the Cooperatives of their vested property rights, for public use without just compensation. The Decision deprives AEPCO and the other Cooperatives of the following, but not limited to, vested property rights: (1) to provide exclusive generation, distribution and/or transmission service to its Class A members or in their service territories; (2) to re-coup their investments and costs incurred in developing, building and maintaining generation, distribution and transmission facilities for public use; and (3) to occupy, use and operate their generation, transmission and distribution facilities.

18. The Decision unlawfully deprives AEPCO and the Cooperatives of full recovery on AEPCO's and the Cooperatives' investments in generation, transmission and distribution facilities. The Decision contains no lawful provisions for just compensation to AEPCO and the other

Cooperatives for the permanent deprivation, occupation, taking and/or infringement of their property rights. The Decision violates AEPCO's and the Cooperatives' constitutional rights to have a court and jury determine just and fair compensation prior to implementation of electric competition by giving the Commission the power and authority to determine just compensation for AEPCO's and the Cooperatives' lost property rights and interests. The Decision also places unconstitutional restrictions, burdens and limitations on AEPCO's and the Cooperatives' abilities and rights to obtain just compensation for the breach of the contract and regulatory compact between AEPCO, the Cooperatives and the State of Arizona and the loss of and/or damage to AEPCO's and the Cooperatives' vested property rights.

19. The Decision is unlawful and exceeds the jurisdiction of the Commission by ordering use of AEPCO's and the Cooperatives' facilities by other providers of electricity without the consent of AEPCO and the Cooperatives.

20. The Decision is unlawful and exceeds the jurisdiction of the Commission by impermissibly interfering with the internal management and operations of AEPCO and the Cooperatives.

21. The Decision is unlawful and exceeds the Commission's jurisdiction in that it restricts AEPCO and the Cooperatives from providing individually and jointly competitive services as defined in the Rules.

22. The Decision is unconstitutional, unlawful and exceeds the Commission's jurisdiction in that it prohibits AEPCO and the Cooperatives from selling electricity and other services competitively outside their certificate areas when ESPs are granted the right to sell electricity and other services competitively anywhere in the State of Arizona.

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

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

24. The Decision prevents Affected Utilities including AEPCO and the Cooperatives from receiving just compensation pursuant to Amendment V and the due process clause of Amendment XIV of the United States Constitution and Article II, Sections 4 and 17 of the Arizona Constitution by making inadequate and arbitrary allowance for and placing unreasonable restrictions on the recovery of stranded costs.

25. Both the manner in which the Decision was adopted and the Decision itself violates the requirements of the Administrative Procedure Act including but not limited to the provisions of Ariz. Rev. Stat. §§ 41-1026, 41-1044 and 41-1057. In particular, the Decision ignores the requirements of A.R.S. § 41-1044 that non rate-making portions of the Rules be submitted to the Attorney General for certification.

26. The Decision violates the provisions of Ariz. Rev Stat. §§ 40-203, 40-250, 40-251, 40-252, 40-334, 40-361, 40-365 and 40-367 by permitting the sale of electricity at rates fixed by providers or by the market rather than at rates prescribed by the Commission and permits ESPs and aggregators to designate classes of consumers rather than the Commission.

27. In violation of Article XV of Arizona's Constitution, the Decision does not provide for the prescribing of rates sufficient to allow Affected Utilities, including AEPCO and its Class A members, a reasonable rate of return on the fair value of their property devoted to public use.

28. The Decision's limitations and restrictions on full stranded cost recovery is unsupported by and contrary to the record, prior Commission decisions and applicable Arizona

statutes and laws, is beyond the Commission's jurisdiction and assumes to the Commission the power of eminent domain which the Commission does not possess.

III. CONCLUSION.

WHEREFORE, having fully stated its Application for Rehearing and Request for Stay, AEPCO respectfully requests that the Commission enter its Order granting this Application for Rehearing and staying Decision No. 61969.

RESPECTFULLY SUBMITTED this 19th day of October, 1999.

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