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REHEARING 11/8/99



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BEFORE THE ARIZONA CORPORATION COMMISSION ✓

OCT 19 9:26

CARL J. KUNASEK
Chairman

JIM IRVIN
Commissioner

WILLIAM A. MUNDELL
Commissioner Arizona Corporation Commission

AZ CORP COMMISSION
INVESTMENT SECTION

DOCKETED

OCT 19 1999

IN THE MATTER OF COMPETITION IN) DOCKET NO. RE-00000C-94-0165
THE PROVISION OF ELECTRIC)
SERVICES THROUGHOUT THE STATE) APPLICATION FOR REHEARING
OF ARIZONA.)

Pursuant to A.R.S. § 40-253, the Arizona Consumers Council applies for rehearing of Decision No. 61969 in this matter on the following grounds:

1. The Electric Competition Rules, A.A.C. R14-2-1601 *et seq.*, attempt to establish the framework for the introduction of retail electric competition in Arizona. In so doing, the Rules have unconstitutionally abdicated the Commission's ratemaking duties under Article 15 of the Arizona Constitution to the competitive market.

Article 15, section 3 of the Arizona Constitution provides that:

The Corporation Commission shall have full power to, and shall, prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected, by public service corporations within the state for service rendered therein ...

By virtue of this section and judicial decisions interpreting it, the Commission has sole and exclusive authority to determine rates and charges for public service corporations. Although the Electric Competition Rules continue to regard electric service providers as public service corporations, the Rules unlawfully dispense with the requirement that the Corporation

1 Commission independently determine that rates are just and reasonable for those providers.

2 Instead, A.A.C. R14-2-1601(A) provides that:

3 Market determined rates for competitive services as defined in
4 R14-2-1601 shall be deemed to be just and reasonable.

5 Competitive services include electric generation service. The Commission itself has previously
6 determined just and reasonable rates for such service. Through the Retail Electric Competition
7 Rules, the Commission has delegated its sole and exclusive responsibility for establishing just
8 and reasonable rates to the competitive market. The Commission is prohibited from doing so by
9 the constitutional command that directs it, not the competitive market, to establish rates that are
10 just and reasonable.

11 2. The same rule, A.A.C. R14-2-1611(A), also violates Article 15, section 14 of the Arizona
12 Constitution which requires that the Commission, to aid it in its determination of just and
13 reasonable rates, ascertain the fair value of the public service corporation's property committed
14 to providing the regulated service. If rates that are competitively determined in the market are
15 deemed to be just and reasonable, that determination precludes the use of fair value in
16 establishing the rates as required by the Arizona Constitution.

17 The Commission is directed by the Arizona Constitution to ascertain the fair value of
18 utilities' property not as an end in itself but to aid the Commission in establishing just and
19 reasonable rates. The meaning of the constitutional provision was established long ago in *Sims*
20 *v. Round Valley Light & Power Co.*, 80 Ariz.145, 294 P.2d 378 (1956). Moreover, the
21 Commission's obligation to find and use fair value in determining rates that are just and
22 reasonable is not dependent upon whether the regulatory framework is one of regulated
23 monopoly or competition. *Mountain States Telephone & Telegraph Co. v. Arizona Corp.*
24 *Comm'n*, 132 Ariz. 109, 644 P.2d 263 (1982). The obligation to ascertain fair value and actually
25

1 use it in determining rates arises independently out of the Constitution regardless of the
2 regulatory framework.

3 A.A.C. R14-2-1611(A) substitutes a new standard for determination of rates that are just
4 and reasonable in place of the constitutional standard. Under that rule, rates determined in a
5 competitive market are deemed to be just and reasonable and, therefore, the Commission has
6 actually prohibited itself from following the constitutional mandate that it ascertain fair value
7 and derive just and reasonable rates based upon that determination. The Commission cannot
8 unilaterally dispense with portions of the Constitution that it finds inconvenient or cumbersome.
9 It needs the consent of the people of Arizona in order to allow rates to be determined by the
10 competitive market and not independently determined by the Commission itself. Unless and
11 until the people of Arizona change the Constitution, the Commission is powerless to change it
12 through these rules.

14 3. Article 15, section 12 of the Arizona Constitution prohibits rate discrimination within
15 classes of customers. However, the Electric Competition Rules explicitly condone rate
16 discrimination by allowing rates to be determined in the competitive market. A.A.C. R14-2-
17 1611(A). According to that rule, any rate that has been competitively determined is deemed to
18 be just and reasonable. Therefore, two identical customers that are provided electric generation
19 service by the same provider can be paying different rates so long as the rates have been
20 determined by the competitive market. Such a result is flatly contrary to the clear requirements
21 of Article 15, section 12 that rates be determined on a nondiscriminatory basis within customer
22 classes.

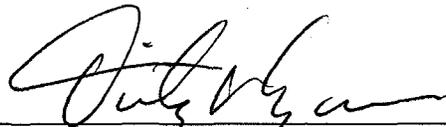
24 4. The portion of the rules that address non-ratemaking matters are void until those rules
25 have been submitted to the Attorney General's office for certification and have been so certified

1 pursuant to A.R.S. § 41-1044. The only rule that specifically addresses rates is A.A.C. R14-2-
2 1611. That is the only rule that the Commission can legitimately claim is not subject to
3 certification by the Attorney General. As a result, the remaining rules are invalid and any action
4 taken by the Commission pursuant to those rules without prior certification are likewise invalid.

5 A.R.S. § 41-1030(A).

6 Respectfully submitted this 19th day of October, 1999.

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8 ARIZONA CENTER FOR LAW IN THE
9 PUBLIC INTEREST

10 By 

11 Timothy M. Hogan
12 Attorneys for Arizona Consumers Council
13 202 E. McDowell Rd., Suite 153
14 Phoenix, Arizona 85004
(602) 258-8850
FAX – (602) 258-8757

15 COPY of the foregoing
16 mailed this 19th day of
17 October, 1999, to:

18 Distribution list for:
19 Docket Nos. RE-00000C-94-0165

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