

EXCEPTION



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BEFORE THE ARIZONA CORPORATION C

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7 CARL J. KUNASEK
8 COMMISSIONER

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11 IN THE MATTER OF COMPETITION)
12 IN THE PROVISION OF ELECTRIC)
13 SERVICES THROUGHOUT THE)
14 STATE OF ARIZONA)

DOCKET NO. RE-00000C-94-0165

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**EXCEPTIONS OF ARIZONA PUBLIC SERVICE COMPANY
TO THE RECOMMENDED ORDER OF DECEMBER 4, 1998 ON THE
COMMISSION'S AMENDED ELECTRIC COMPETITION RULES**

Arizona Public Service Company ("APS" or "Company") hereby submits its Exceptions to the Recommended Opinion and Order dated December 4, 1998 ("Recommended Order") in the above captioned matter. Such Recommended Order adopts permanent amendments to the original electric competition rules, which were enacted at the end of 1996 ("Electric Competition Rules"). These amended Electric Competition Rules ("Amended Rules") largely confirm amendments to the Electric Competition Rules adopted on an "emergency" basis by Decision No. 61071 (August 10, 1998).

Neither the Amended Rules nor for that matter the original Electric Competition Rules can be practically implemented at this time because of the circumstances described below, namely a Supreme Court Justice's stay of proceedings on the APS and Tucson Electric Power Company ("TEP") Settlement Agreements. Therefore, the Arizona Corporation Commission ("Commission") should defer consideration of the Amended Rules and reopen the proceedings to properly align the various provisions and time schedules of the Amended Rules with the realities of current circumstances.

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1 The indefinite stay of Commission proceedings to consider the APS and TEP Settlement
2 Agreements obtained by the Arizona Attorney General and various consumer groups is the latest
3 and most unexpected complication in the long struggle to devise a reasonable set of Electric
4 Competition Rules and to implement those Rules by January 1, 1999. Implicit in such stay was
5 the concern that the Commission was moving too quickly to implement competition and that
6 absent unanimous agreement of the parties (virtually an impossibility given the nature of the issues
7 involved), each issue on the road to competition would have decided only after extensive
8 additional debate. The stay has ended any remaining chance of starting competition on 1/1/99 and
9 given the number of unresolved issues and the concern expressed in the stay over the procedures
10 necessary to resolve such issues, the delay in implementing competition could be substantial.
11 This, in turn, will necessitate a fundamental reevaluation of the Electric Competition Rules
12 themselves, regardless of which set of amendments thereto are eventually to be considered by the
13 Commission.

14 Since early December of 1995, more than a year before the Commission's passage of
15 Decision No. 59943 (December 26, 1996), APS has publicly stated and consistently maintained
16 that the Commission needed to resolve numerous issues prior to the introduction of retail electric
17 competition. These included unbundled tariffs, market structure, reliability, jurisdictional
18 boundaries between the Commission's jurisdiction and that of the Federal Energy Regulatory
19 Commission ("FERC"), the status and regulation of "must run" generation, etc. Indeed, APS'
20 inability to submit unbundled tariffs on December 31, 1997 was premised on the lack of any
21 consensus as to how these issues were to be resolved and the lack of any scheduled Commission
22 proceeding to resolve them. Although APS did make a filing on February 13, 1998, in the
23 Company's transmittal letter, it made no pretence that any of these issues had been addressed by
24 the Commission:

25 Although none of the issues identified in the Company's letter of December 31st
26 have been resolved, APS has subsequently attempted to "fill in the gaps" necessary to
comply with at least the spirit of the above-cited regulations. [*Id.* at 1.

1 With the failure of the APS and TEP Settlements, the Commission still has been unable to
2 decide any of these issues as they affect the Company, and therefore competition by 1/1/99 is
3 impossible to implement. A symbolic opening of a portion of the Arizona market is a futile
4 gesture at best and heightens the frustration and perceived disadvantage of those customers of APS
5 and TEP who, through no fault of either themselves or the utilities involved, are not able to take
6 advantage of competitive choices.

7 APS has just as consistently maintained that the Electric Competition Rules were
8 themselves significantly deficient due to numerous ambiguities and inconsistencies in the
9 definition and use of key terms, internal inconsistencies in the substance of the Electric
10 Competition Rules, and the lack of constitutional authority to impose many elements of the
11 electric industry restructuring called for by the Electric Competition Rules.

12 The Amended Rules adopted by the Recommended Order, as well as the Recommended
13 Order itself, are unjust, unreasonable and unlawful for the reasons set forth below and should be
14 modified accordingly. Significantly, the Recommended Order is not, nor does its purport to be,
15 the actual recommendation of the two presiding hearing officers, as is required by A.A.C. R14-3-
16 110, and thus is not even properly before the Commission for final consideration..

17
18 **I. THE COMMISSION SHOULD REOPEN THIS RULEMAKING PROCEEDING IN**
19 **LIGHT OF THE SUPREME COURT'S STAY OF COMMISSION ACTION ON**
20 **THE APS AND TUCSON ELECTRIC POWER COMPANY SETTLEMENT**
21 **AGREEMENTS**

22 All the various versions of the Electric Competition Rules anticipated that various actions
23 would be completed well before January 1, 1999. Perhaps the more obvious of these are the
24 certification by the Commission of competitors and the approval of unbundled tariffs under which
25 those customers choosing direct access can take service. The recent APS and TEP Settlement
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1 Agreements would have allowed these preconditions to competition to be met prior to 1/1/99.¹
2 Due to the recent indefinite stay on the Commission's consideration of these two settlements,
3 which was obtained by the Arizona Attorney General and various consumer groups, the entire
4 underpinning of the Electric Competition Rules, and most certainly the timing of competition's
5 introduction, has been called into question.

6 APS urges the Commission to reopen these rulemaking proceedings to take additional
7 public and industry comments in view of the inability of the Commission to act on the APS and
8 TEP Settlement Agreements prior to 1/1/99. In addition, the Commission should stay the
9 effectiveness of the Electric Competition Rules, including the Emergency Amendments (at least as
10 applied to APS and TEP), until after the Special Action filed by the Attorney General is either
11 dismissed or the current Supreme Court stay is dissolved by the full Court and until the many
12 issues addressed by these two settlements are finally resolved such that competition can be more
13 than a legal fiction. This delay, although regrettable and in no way the fault of the Company, is
14 now inevitable and should be acknowledged by the Commission.

15
16 **II. THE AMENDED RULES ARE NOT SIGNIFICANTLY DIFFERENT FROM**
17 **THE EMERGENCY AMENDMENTS AND THEREFORE APS' PREVIOUS**
18 **COMMENTS THEREON ARE STILL VALID**

19 With the exception of the Staff's proposed amendments of November 24, 1998, which for
20 the most part are "housekeeping" amendments to satisfy the requirements of the Secretary of State,
21 the Amended Rules are essentially the same as the Emergency Amendments to the original
22 Electric Competition Rules. Staff's unsupported assertions that this or that provision of the
23 Electric Competition Rules is not ambiguous or internally inconsistent are belied by the fact that
24 commentator after commentator find them to be so. To the extent that the Amended Rules do not

25 ¹ In addition to approving unbundled tariffs, these agreements would have led to the timely
26 certification of APS Energy Services and New Energy Ventures, which along with PG&E would
have allowed competition to begin with at least three authorized competitors.

1 address the concerns raised by the Company in its Application for Rehearing and/or
2 Reconsideration of Decision No. 61071, which Application is hereby incorporated by reference,
3 APS urges the Commission to take whatever time is necessary to amend the Recommended Order
4 consistent with those prior comments.

5
6 **III. THE AMENDED RULES RAISE NEW ISSUES UPON WHICH APS HAS NOT**
7 **HAD AN OPPORTUNITY TO COMMENT OR WHICH DO NOT REFLECT**
8 **STAFF'S POSITION IN THE PG&E ENERGY SERVICES, INC.,**
9 **CERTIFICATION PROCEEDING AND IN THE COMPANY'S SCHEDULE 10**
10 **PROCEEDING**

11 This part of the Company's Exceptions is a combination of new comments based on Staff
12 revisions to the Emergency Amendments or upon positions taken by Staff and/or the Commission
13 in subsequent proceedings which are inconsistent with language in the Electric Competition Rules,
14 either as originally passed or as subsequently amended. Also, the continued passage of time has
15 mooted several more provisions of these Rules. The Company's comments are presented in
16 Attachment 1 and are arranged sequentially, without attempting to prioritize them by importance.

17 **IV. THE RECOMMENDED ORDER DOES NOT COMPLY WITH A.A.C. R14-3-110**

18 A.A.C. R14-3-110 (B) requires that in all proceedings heard by a Hearing Officer, the
19 Hearing Officer is obligated to submit to the Commission his or her "recommendation...unless
20 otherwise ordered by the Commission." The Commission can thereafter accept, reject or modify
21 that recommendation. However, the Procedural Order accompanying the Recommended Order
22 clearly indicates that the attached Opinion and Order was not, in any meaningful sense, the
23 "recommendation" of either of the Presiding Hearing Officers, but was instead an Opinion and
24 Order that the Hearing Division believed was ordered by Decision No. 61257 (November 25,
25 1998).

26 Although A.A.C. R14-3-110 (B) does purport to allow the Commission to bypass the
Recommended Order requirement, APS believes that Decision No. 61257 neither authorized or

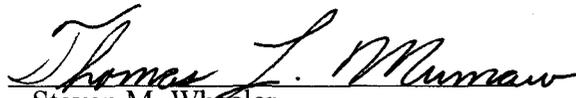
1 directed such a procedural "shortcut." Decision No. 61257 addressed only the timing of the
2 issuance by the Presiding Officers of a Recommended Order and did not dictate that a
3 Recommended Opinion and Order be issued that was not, in fact, their recommendation. The
4 Commission should direct that the Hearing Division complete its analysis of the record, including
5 any new comments submitted, and thereafter forward a new Recommended Order, which is in fact
6 the impartial recommendation of the presiding officers in this matter.

7
8 **V. CONCLUSION**

9 The Recommended Order is deficient in numerous respects, as are the Amended Rules.
10 APS has suggested numerous amendments that will greatly clarify, simplify, and improve the
11 operation of the Electric Competition Rules. However, even with the amendments suggested by
12 the Company herein, the Supreme Court stay obtained by the Attorney General and certain
13 consumer groups makes implementation of the Amended Rules impossible at the present time and
14 perhaps for some time to come. In light of the Court's action, the Commission should reopen this
15 docket, seek additional public comments from all affected parties on the Electric Competition
16 Rules and stay the effectiveness of the current competition regulations until both the Attorney
17 General's Special Action is dismissed and/or the Supreme Court stay on Commission
18 consideration of the APS and TEP Settlements is lifted and the unresolved issues from such
19 Settlements are finally determined. Only then can competition be made a practical reality and not
20 just another meaningless set of government regulations.

21 RESPECTFULLY SUBMITTED this 9th day of December, 1998.

22 SNELL & WILMER L.L.P.

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24 
25 Steven M. Wheeler
26 Thomas L. Mumaw

Attorneys for Arizona Public Service Company

ATTACHMENT 1

A.A.C. R14-2-1601(10):

This amendment defines Direct Access Service Request (“DASR”) as including requests by the end-user. Staff’s changes to the Company’s proposed Schedule 10, which were adopted by the Commission, eliminate the possibility of a direct access request by a customer. Thus, the words “or the customer” should be deleted from the end of the proposed definition to avoid confusion on this point.

A.A.C. R14-2-1601(22):

Delete words “or aggregators” from the end of this definition. “Aggregators” is defined [A.A.C. R14-2-1601(2)] such that they are ESPs. Thus, they can not be both included and excluded from the definition of “Load Serving Entity.”

A.A.C. R-14-2-1601 (29):

Place a comma after “Standard Offer [S]ervice.” Otherwise, the sentence has a completely different meaning.

A.A.C. R-14-2-1603(A):

Delete words “and self-aggregators are required to negotiate a Service Acquisition Agreement consistent with subsection G(6).” As noted above, Staff’s and the Commission’s previous changes to the Company’s Schedule 10 effectively eliminate the concept of self-aggregation, and thus there is no need or this language.

A.A.C. R14-2-1604(A):

The language in the second full sentence to this amendment (allowing 180 days from the filing of the DASR to the initiation of competitive service) is inconsistent with prior actions of this Commission and is intended to benefit only special contract customers at the expense of all other potentially eligible customers. Because the proposed language conflicts with the specific and controlling provisions of Schedule 10 approved by this Commission, it is likely to lead to

1 unnecessary confusion and controversy. For example, Cyprus Climax Metals (“Cyprus”) has a
2 special contract with APS that expires May 1, 1999. But for the approval of Schedule 10, this
3 amendment could require APS to reserve some 10-15% of its otherwise eligible load for Cyprus,
4 and would make a mockery of the concept “first-come, first served.” The “180 days” should be
5 replaced by “60 days”, which is what the Staff recommended and the Commission approved in the
6 Company’s recent Schedule 10 filing.

7 A.A.C. R14-2-1604(A)(1):

8 Add “single premise” after “non-coincident.” This makes paragraph 1 consistent with the
9 language in A.A.C. R14-2-1604(A)(2).

10 A.A.C. R14-2-1604(A)(3); 1604(B)(4); 1604(C); 1607(D); and 1610(H):

11 These provisions all contain filing dates that have already passed (and thus are moot) and
12 which are not especially necessary in order to understand other provisions of the Amended Rules.
13 APS suggests that they be deleted.

14 A.A.C. R14-2-1605(B):

15 The last sentence is redundant. *See* A.A.C. R14-2-1601(2) and (15).

16 A.A.C. R14-2-1606(D):

17 Delete the colon and add the following sentence after the word “rules”: “such tariffs may
18 combine one or more competitive services within any other competitive service.” This is
19 consistent with the Staff’s position in the PG&E certification proceeding.

20 A.A.C. R14-2-1606(H)(2):

21 This provision is totally inconsistent with Staff’s position in the PG&E proceeding,
22 excepting as to distribution and other non-competitive services. The following language should be
23 substituted: “The unbundled rates for Non-Competitive Services shall reflect the costs of
24 providing the services.”

25 A.A.C. R14-2-1607(G):

26 Add word “tariffed” before “rate treatment” and after “current” and before “rates.” This

1 would clarify that special contract customers are not automatically entitled to special benefits even
2 after the expiration of their contracts.

3 A.A.C. R14-2-1616(B):

4 This amendment still fails to address “information services,” which Staff agreed in the
5 PG&E proceeding has no commonly agreed upon definition. APS is still required to provide this
6 service under Rule 1606(D) but at the same time prohibited from providing it under 1616(B). The
7 solution to this internal contradiction is to delete all but the first sentence of Rule 1616(B) and to
8 delete “by these rules or” from that first sentence, as well as deleting Rule 1606(D)(6).

9 APS also opposes being required to provide any competitive services. Providing and
10 reading direct access meters as well as providing combined billing will require a very significant
11 new up front investment in both equipment and personnel. It makes no sense to require UDCs to
12 make this investment if they are to be effectively out of these businesses in two years (sooner if
13 two competitors are authorized). Moreover, the portion of this regulation allowing the customer to
14 chose combined billing is inconsistent with Staff’s position, as adopted by the Commission, in the
15 APS Schedule 10 proceeding, wherein it was decided that the ESP determined which of the
16 available billing options would be employed.

17 The fifth sentence of A.A.C. R14-2-1616 (B) should be changed to read as follows:

18 Notwithstanding any other provision of this Article, Affected Utilities and
19 Utility Distribution Companies may provide, if requested by an Electric Service
20 Provider, metering, meter reading, billing, and collection services within their service
territories under tariffs complying with the requirements of R14-2-1606 and R14-2-1612
for other competitive services.

21 The balance of proposed subsection (B) should then be eliminated.

22 A.A.C. R14-2-1618(B):

23 In the PG&E proceeding, Staff agreed that a “Load Serving Entity” only had to disclose
24 information reasonably available to it and that with regard to (B)(4)-(6), a “don’t know” would
25 comply with this provision. Therefore, the words, “to the extent reasonably available to the Load
26 Serving Entity,” should be added after the word “that”, and an additional sentence added that

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states: "If the Load Serving Entity does not know with reasonable accuracy the information listed above, it shall so indicate in its consumer information label."

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CERTIFICATE OF SERVICE

The original and ten (10) copies of the foregoing document were filed with the Arizona Corporation Commission on this 9th day of December, 1998, and service was completed by mailing or hand-delivering a copy of the foregoing document this 9th day of December, 1998, to all parties of record herein.


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