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BEFORE THE ARIZONA CORPORATION COMMISSION

DOCKETED

DEC 31 1998

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

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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. 61272 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. 61272 entered and dated December 11, 1998, including Attachment A thereto (the Amended Rules A.A.C. R14-2-203, R14-2-204, R14-2-208 through R14-2-211 and A.A.C. Title 14, Chapter 2, Article 16: R14-2-1601 and R14-2-1603 through R14-2-1618), Attachment B thereto (the Economic Small Business and Consumer Impact Statement) and Attachment C thereto (the Concise Explanatory Statement)

1 (collectively, "Decision"), and of the whole thereof, on the grounds that the Decision is unlawful,
2 unreasonable, unjust, unconstitutional, in excess of the Commission's jurisdiction, arbitrary,
3 capricious and an abuse of the Commission's discretion for the following reasons and upon the
4 following grounds:

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

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

14 3. The Decision is unconstitutional and in excess of the Commission's jurisdiction in
15 violation of Article XV, Sections 3 and 12 of the Arizona Constitution by permitting ESPs,
16 aggregators or self-aggregators, as defined in A.A.C. R14-2-1601(2) and A.A.C. R14-2-1601(36),
17 respectively, to prescribe classes to be used by PSCs rather than the Commission and by
18 permitting discrimination within classes of PSCs when said Sections require the Commission to
19 prescribe classes used by PSCs and prohibit discrimination within such classes.

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

24 A. By creating a new type of certificate of convenience and necessity
25 ("CC&N") for ESPs who have not been issued CC&Ns by the Commission pursuant to
26 A.R.S. §§40-281, *et seq.*, when only one type of CC&N is permitted by said Section and

1 when the only power or jurisdiction granted by the Arizona Constitution to the
2 Commission with respect to classes of PSCs is to prescribe just and reasonable
3 classifications to be used by PSCs as set forth in Article XV, Section 3 of the Arizona
4 Constitution and not the power and jurisdiction to prescribe just and reasonable classes of
5 PSCs.

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

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

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

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

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

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

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

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

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

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

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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 to Trico which are secured by utility realty mortgages and security agreements based upon the all requirements wholesale power contract between AEPCO and Trico 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 by the RE Act to be beneficiaries thereof to others such as ESPs who are not intended to be beneficiaries of the RE Act and who are permitted to use or access the distribution facilities of Trico without its consent.

12. The Decision is unconstitutional, exceeds the jurisdiction of the Commission and violates the Due Process Clauses of each 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 so vague and ambiguous that it is unintelligible and unenforceable and postpones for the future the determination of Trico’s substantial and vested property rights without establishing standards to govern such determinations.

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

C. The Decision creates uncertainty with respect to the CC&Ns issued to Trico pursuant to A.R.S. §40-281 and those proposed to be issued to ESPs pursuant to A.A.C. R14-2-1603.

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

4 E. 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 F. The Decision deprives Trico of the value of its respective CC&Ns which is
8 severely damaged or taken by the Decision.

9 G. The Decision violates A.R.S. §40-252 by failing to provide Trico with
10 notice and an opportunity to be heard prior to the amendment of its CC&Ns.

11 H. The Decision violates the interpretation of A.R.S. §40-252 as it pertains to
12 the public interest with respect to existing CC&Ns of PSCs as set forth in decisions of the
13 Arizona Supreme Court, which interpretations are part of said statute.

14 13. The Decision violates the equal protection provisions of the Fourteenth
15 Amendment of the United States Constitution and Article II, Section 13 of the Arizona
16 Constitution in that it does not provide equal treatment of all PSCs in the State of Arizona, and in
17 particular subjects the PSCs who have been issued CC&Ns pursuant to A.R.S. §§40-281, *et seq.*
18 to substantial and unconstitutional burdens and detriments not imposed upon ESPs issued CC&Ns
19 pursuant to R14-2-1603.

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

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

25 16. The Decision is unconstitutional in that it treats the assets of PSCs as if they were
26 assets owned by the Commission.

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

4 18. The Decision is unlawful and exceeds the Commission's jurisdiction in that it
5 restricts Affected Utilities from providing competitive services as defined in the Rules pursuant
6 to, or based upon, the existing CC&Ns of the Affected Utilities, including Trico.

7 19. The Decision is unlawful and unconstitutional as a prohibited bill of attainder in
8 violation of Article II, Section 25 of the Arizona Constitution and Article I, Section 10 of the
9 United States Constitution.

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

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

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

24 23. The Decision is unlawful, unconstitutional and exceeds the jurisdiction of the
25 Commission by exercising legislative and judicial powers not granted to it by the Arizona
26 Constitution, including but not limited to its stranded cost provisions, its solar water heater rebate

1 program, its solar electric fund, its forced divestiture and competitive service restrictions and its
2 affiliated transaction requirements in A.A.C. R14-2-1607, 1608, 1609, 1616 and 1617,
3 respectively.

4 24. The Decision is in excess of the jurisdiction of the Commission by requiring
5 Affected Utilities, including Trico, to take every reasonable cost-effective measure to mitigate or
6 offset Stranded Cost by means such as expanding wholesale or retail markets, or offering a wider
7 scope of services for profit, among others.

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

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

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

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

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Copy of the foregoing document mailed
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Distribution list for
Docket No. RE-00000C-94-0165

Carol Watson

Secretary to Russell E. Jones