REHEARING 1/19/99

0000122302

BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED
AZ CORP COMMISSION
DEC 31 4 29 PM '98
DOCUMENT CONTROL

Arizona Corporation Commission
DOCKETED
DEC 31 1998
DOCKETED BY

JIM IRVIN
Commissioner-Chairman
RENZ D. JENNINGS
Commissioner
CARL J. KUNASEK
Commissioner

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 NO. 61272**

Graham County Electric Cooperative, Inc. ("Graham"), pursuant to A.R.S. §40-253, submits this Application for Rehearing and Request for Stay of Decision No. 61272 dated December 11, 1998 and the Amended Rules which are its Appendix A (the "Decision"). 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, having fully stated its Application, Graham requests that the Commission enter its Order granting its Application for Rehearing and Request for Stay.

RESPECTFULLY SUBMITTED this 31st day of December, 1998.

GALLAGHER & KENNEDY, P.A.

By Michael M. Grant

Michael M. Grant
2600 North Central Avenue
Phoenix, Arizona 85004-3020
Attorneys for Graham County Electric Cooperative, Inc.

GALLAGHER & KENNEDY
A PROFESSIONAL ASSOCIATION
2600 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004-3020
(602) 530-8000

Original and ten (10) copies
of the foregoing document filed
this 31st day of December, 1998, with:

Docket Control
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

#673072 v1 - Graham Application

GALLAGHER & KENNEDY
A PROFESSIONAL ASSOCIATION
2600 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004-3020
(602) 530-8000

BEFORE THE ARIZONA CORPORATION COMMISSION

JIM IRVIN
Commissioner-Chairman
RENZ D. JENNINGS
Commissioner
CARL J. KUNASEK
Commissioner

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. 61272**

Arizona Electric Power Cooperative, Inc. ("AEPCO"), pursuant to A.R.S. §40-253 submits this Application for Rehearing and Request for Stay of Decision No. 61272 entered December 11, 1998, including the Amended Rules ("Amended Rules") which are its Appendix A (collectively, the "Decision").

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 in AEPCO's comments dated September 18, 1998, and July 6, 1998, copies of which are attached hereto and incorporated herein and, as to stranded cost issues, for the reasons and upon the grounds set forth in AEPCO's Application for Rehearing of Decision No. 60977 dated July 10, 1998, the provisions of which are incorporated herein.

A stay of the Decision will allow the Commission to accomplish several objectives. First and foremost, a reopening of the rulemaking docket will allow this Commission to correct substantial due process violations which led to issuance of the Decision. It is clear from the face of the Decision that Decision No. 61257 interrupted and, in fact, subverted the ability of all parties to make meaningful comments on the Amended Rules as required by the Administrative Procedure

GALLAGHER & KENNEDY
A PROFESSIONAL ASSOCIATION
2600 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004-3020
(602) 530-8000

Act, A.R.S. §41-1021, et seq.[1] As a result, the Rules adopted in the Decision considered only the additional comments of Staff filed on November 24, 1998. This procedure violated all other parties' rights to have their comments fully and fairly evaluated. If the Commission does not grant a stay of the Decision, allow all parties the opportunity meaningfully to comment on the Rules and purge this procedural taint from the record, the Rules will face certain reversal by the Courts.

Second, a stay of the Decision will afford the Commission its first opportunity to consider these Rules carefully. These Rules' amendments were brought forward in haste on an emergency basis in late June. At that time, parties were given almost no opportunity to analyze and comment on them. In little more than a month, they had been adopted by Decision No. 61071 on an emergency basis. This same flawed product was then immediately renoticed for permanent adoption. As explained previously, this permanent process afforded the parties no better opportunity to provide reasoned analysis on the many inconsistencies and inadequacies in the Rules' amendments. A stay of the Decision will afford the Commission that opportunity for the first time.

Third, a Rules' stay and reconsideration will allow the Commission time to develop and implement a rational and uniform statewide electric competition plan. Several key issues have not been addressed over the past two years. No stranded cost determinations have been made; only some unbundled rates have been approved; important scheduling administrator and transmission protocol matters are either incomplete or unresolved. A stay of the rules will allow time to complete these tasks and harmonize the Rules' provisions with the results of utility specific and generic proceedings.

Finally, a stay will allow the Commission an opportunity to correct substantial problems in the Rules. Some of the most egregious flaws are summarized briefly as follows:

- R14-2-1606.B requires Utility Distribution Companies to serve Standard Offer customers through a competitive bid process. In

[1] See, for example, Decision No. 61257 and the Decision's Findings of Fact Nos. 7, 8 and 9.

GALLAGHER & KENNEDY
A PROFESSIONAL ASSOCIATION
2600 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004-3020
(602) 530-8000

addition to impairing the obligation of contracts and forcing AEPCO's distribution cooperatives to breach their all requirements contracts, this provision impermissibly interferes with internal utility management and, as explained by many commentors, will increase rather than decrease costs to serve standard offer customers in the future.

- The Amended Rules unlawfully conflict in several respects with HB 2663. For example, R14-2-1606 requires Utility Distribution Companies to serve as providers of last result for all customers, whereas the legislation limits that service only for smaller consumers whose annual usage is 100,000 kW hours or less. Not only does this and other conflicts with the electric competition legislation render the Rules unlawful, these provisions also increase costs.

- The Amended Rules exceed the Commission's jurisdiction in several respects. For example, the Commission has no authority to establish the solar water heater rebate and solar portfolio standard programs in R14-2-1608 and R14-2-1609.

- Finally, unlawfully, unnecessarily and discriminatorily, the Amended Rules establish punitive affiliated service delivery requirements only on Affected Utilities in R14-2-1616 and R14-2-1617. There has been no showing that any of these requirements are necessary and, once again, these requirements will increase costs both to competitive and standard offer customers.

In short, a stay of the Decision and re-examination of the Amended rules will allow the parties and Commission the time to develop a lawful uniform approach to electric competition.

Additionally, 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 following reasons and upon the following grounds:

1. The Decision is not supported by any evidence.

2. The Decision is unlawful and exceeds the Commission's jurisdiction in that several of its provisions conflict with HB 2663, Chapter 209 of the 1998 Session Laws, including but not limited to the Decision's provisions as to provider of last resort obligations, competitive phasing

GALLAGHER & KENNEDY
A PROFESSIONAL ASSOCIATION
2600 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004-3020
(602) 530-8000

requirements and when certain services such as metering, meter reading, billing and collection may be offered competitively.

3. The Decision violates the provisions of the Administrative Procedure Act, A.R.S. §41-1001 et seq., in that it failed to follow its requirements and fails to adopt as a rule all Commission statements of general applicability that implement, interpret or prescribe law or policy or describe the procedure or practice requirements of the Commission concerning the subject matter of the Decision.

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

5. 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 solar water heater rebate program at R14-2-1608, its solar portfolio and electric fund provisions at R14-2-1609, its forced divestiture and competitive service restrictions at R14-2-1616 and its affiliate transaction requirements at R14-2-1617.

6. The Decision is unlawful in that numerous of its provisions are so vague and ambiguous that they are unintelligible and unenforceable.

7. The Decision 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.

8. The Decision is unconstitutional and exceeds the Commission's jurisdiction in violation of Article XV, Sections 3 and 12 of the Arizona Constitution which require that the Commission, not PSCs or aggregators as defined in R14-2-1601(2), prescribe classes of consumers.

GALLAGHER & KENNEDY
A PROFESSIONAL ASSOCIATION
2600 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004-3020
(602) 530-8000

9. 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 municipal furnishing electricity for light, fuel or power shall be deemed PSCs:

A. By creating a new type of certificate of convenience and necessity for electric service suppliers who have not been issued certificates of convenience and necessity by this Commission pursuant to A.R.S. §40-281, et seq., when only one type is permitted by Article XV, Section 2.

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

10. 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.

11. The Decision is unconstitutional and violates the provisions of the Fifth Amendment of the United States Constitution, Article II, Section 17 of the Arizona Constitution and Article II, Section 4 of the Arizona Constitution by breaching the regulatory compact between the State of Arizona and PSCs including AEPCO to whom the Commission has issued certificates of convenience and necessity.

12. The Decision breaches the regulatory compact between the State of Arizona and AEPCO by denying AEPCO the exclusive right to sell electricity to its 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

GALLAGHER & KENNEDY
A PROFESSIONAL ASSOCIATION
2600 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004-3020
(602) 530-8000

be fixed by the court or (ii) into the State treasury on such terms and conditions as are provided by statute.

13. 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, 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, 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.

14. 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, which have been issued certificates of convenience and necessity 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.

15. 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.

GALLAGHER & KENNEDY
A PROFESSIONAL ASSOCIATION
2600 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004-3020
(602) 530-8000

16. 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 which are secured by utility realty mortgages and security agreements based upon the all requirements wholesale power contract 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 electric service providers who are not intended to be beneficiaries of the RE Act and who are permitted to use the facilities of PSCs, including AEPCO, without their consent.

17. 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 substantial and vested rights without establishing standards to govern such determinations.

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

GALLAGHER & KENNEDY
A PROFESSIONAL ASSOCIATION
2600 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004-3020
(602) 530-8000

C. The Decision creates uncertainty with respect to the certificate of convenience and necessity issued to AEPCO in relation to those certificates proposed to be issued to electric service providers pursuant to A.A.C. R14-2-1603.

D. The Decision confiscates the property and vested property rights of AEPCO without providing just compensation as required by the United States and Arizona Constitutions.

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

F. The Decision deprives AEPCO of the value of its certificate of convenience and necessity which is severely damaged or taken by the Decision.

G. The Decision violates A.R.S. §40-252 by failing to provide AEPCO with notice and an opportunity to be heard prior to the amendment of its certificate of convenience and necessity.

18. 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 certificates of convenience and necessity pursuant to A.R.S. §40-281, et seq., to substantial and different burdens not imposed upon competitive providers.

19. The Decision is unlawful and exceeds the jurisdiction of the Commission in ordering use of facilities of PSCs, including AEPCO, by other providers of electricity without the consent of those PSCs.

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

GALLAGHER & KENNEDY
A PROFESSIONAL ASSOCIATION
2600 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004-3020
(602) 530-8000

21. The Decision is unlawful and exceeds the jurisdiction of the Commission by requiring that all competitive generation assets and competitive services shall be divested from Affected Utilities before January 1, 2001.

22. The Decision is unlawful and exceeds the Commission's jurisdiction in that it restricts Affected Utilities including AEPCO from providing competitive services as defined in the Rules.

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 is unconstitutional in that it prohibits PSCs who have been issued certificates from selling electricity and other services competitively outside their certificated areas when electric service providers who have not been issued certificates are granted the right to sell electricity and other services competitively anywhere in the State of Arizona.

25. The provisions of the Decision pertaining to Stranded Costs are in conflict with the Commission's Decision No. 60977 entered June 22, 1998.

26. The Decision deprives Affected Utilities including AEPCO of 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.

27. Both the manner in which the Decision was adopted and the Decision itself violates the requirements of the Administrative Procedure Act, A.R.S., Title 41, Chapter 6, A.R.S. §41-1021, et seq.

GALLAGHER & KENNEDY
A PROFESSIONAL ASSOCIATION
2600 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004-3020
(602) 530-8000

28. The Decision and in particular A.A.C. R14-2-1612 violate the provisions of A.R.S. §§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 aggregators to designate classes of consumers of Affected Utilities rather than the Commission determining classes of customers - all of which are contrary to such statutes.

29. The entire Decision, which is premised upon the delegation of the Commission's rate setting power to others and the basing of rates on the "market" not fair value, is unconstitutional, in excess of the Commission's jurisdiction and otherwise invalid.

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 the Decision and the Rules pending resolution of the issues set forth herein.

RESPECTFULLY SUBMITTED this 31st day of December, 1998.

GALLAGHER & KENNEDY, P.A.

By Michael M. Grant

Michael M. Grant
2600 North Central Avenue
Phoenix, Arizona 85004-3020
Attorneys for Arizona Electric Power Cooperative, Inc.

Original and ten (10) copies
of the foregoing document filed
this 31st day of December, 1998, with:

Docket Control
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

L. Hill

#671089 v1 - Application for Rehearing

GALLAGHER & KENNEDY
A PROFESSIONAL ASSOCIATION
2600 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004-3020
(602) 530-8000

GALLAGHER & KENNEDY
A PROFESSIONAL ASSOCIATION

MICHAEL M. GRANT
ATTORNEY
DIRECT LINE
(602) 530-8291

2600 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004-3020
(602) 530-8000
FAX: (602) 257-9459

July 6, 1998

Jul 6 3 40 PM '98

Mr. Ray Williamson
Acting Director
Utilities Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Re: Arizona Electric Power Cooperative, Inc.'s ("AEPCO's") Comments on the First Draft of Proposed Revisions of the Retail Electric Competition Rules (R14-2-1601 et seq.) ("Rules Amendments"); Docket No. RE-00000C-94-0165

Dear Mr. Williamson:

We received the 43 pages of Rules Amendments, more than 20 pages of which contain new material on several subjects never previously discussed, late Friday afternoon, June 26, 1998. We immediately forwarded them to AEPCO and representatives of its member distribution cooperatives, but of course the materials did not arrive until Monday, June 29, 1998. Given the fact that last week was a holiday week and other factors, several key personnel necessary to review and evaluate the Rules Amendments were not available for that purpose.

The Rules Amendments propose an even more sweeping and comprehensive restructuring of Arizona's electric utility industry than the Electric Competition Rules. They cover subjects ranging over (1) timing and level of competition introduction, (2) the complicated subject of aggregation of multiple loads, (3) a brand new residential phase-in program, (4) provider of last resort obligations, (5) continuation of the obligation to serve standard offer power at regulated rates, (6) a mandatory method of acquiring power to serve those standard offer customers, (7) extensive re-write of the Solar Portfolio Standard, (8) Independent System Operator/Independent Scheduling Administrator transmission requirements, (9) extensive new requirements concerning metering, meter reading, billing and collection, (10) required divestiture of billions of dollars of utility assets, (11) presumptive and punitive standards concerning the separate delivery of competitive and regulated service and (12) five pages of completely new consumer information disclosure requirements. Yet, the Amended

Rules are accompanied by no citation of source material, no explanation of rationale for a proposed course of action, no analysis of possible alternatives - in short, no contextual material which would afford the reader any basis upon which to comment intelligently on their series of preordained mandates.

In a docket replete with unreasonable demands and outrageous time constraints, the Staff request that comments on the Amended Rules be prepared and delivered in less than five working days is breathtaking even by these standards. The Administrative Procedure Act ("APA") standards of public rule making, notice and adoption in A.R.S. §41-1021 et seq. exist for several very valid reasons. Once adopted, the rules have the force and effect of law. Thus, the APA requires each agency, including the Commission, to follow a deliberative process which will allow the public and interested parties a meaningful opportunity for consideration of rules and comment thereon. The process currently being followed allows neither.

If it is the Commission's intention to assert that these Amended Rules are necessary as an emergency measure pursuant to A.R.S. §41-1026, the Commission certainly cannot meet the requirements of that statute. The Commission first adopted the Electric Competition Rules more than 18 months ago. Its working groups reported to the Commission many months ago in September and October of 1997. There is nothing critical to the public health, safety or welfare in implementing retail electric competition on January 1, 1999 and, in any event, any inability to promulgate these rules through normal procedures by that date has been created by the Commission's delay or inaction. Finally, on their face, many of the Amended Rules are not even required for more than two years, thus completely negating any argument that they must be adopted on an emergency basis in violation of the APA's requirements. (See, for example, R14-2-1606.B and F; major portions of R14-2-1609; R14-2-1616; R14-2-1617).

Given the time constraints, these comments, of necessity, will not be as thorough and thoughtful as they could be. As importantly, they will not be as responsive or as helpful as they could be. Attached as Exhibit A are additional comments directed to specific Amended Rules raising questions, identifying problems and suggesting potential solutions. The balance of this correspondence will be devoted to several major areas which are of greatest concern to AEPCO and its member distribution cooperatives (collectively "the Cooperatives").

R14-2-1606.F

As the Commission is aware, AEPCO and each of its Class A members are parties to an all-requirements wholesale power contract, the current term of which extends through the year 2020. These all-requirements contracts require the members to purchase and AEPCO to supply all of the power requirements of the distribution cooperatives. AEPCO is required to supply and the distribution cooperatives are required to purchase the electricity at rates sufficient to meet AEPCO's reasonable operating costs, its mortgage requirements and other legal obligations. These all-requirements contracts form the primary security for AEPCO's roughly quarter billion dollar mortgage with the Federal Government as administered by the Rural Utilities Service ("RUS").

The current Electric Competition Rules impair the obligations of these contracts, imperil the security of this mortgage and frustrate the purpose of the Rural Electrification Act of 1936 ("RE Act"). If the Commission adopts the provision in R14-2-1606.F that power purchased by a distribution cooperative to serve standard offer customers shall only be acquired through competitive bid, the Cooperatives will simply have no options left. They will be forced to move promptly to state and/or federal court to enjoin the Amended Rules as, among other things, an unlawful confiscation of the Cooperatives' vested property rights, an impairment of their contractual obligations and an impermissible state interference with and frustration of the Federal RE Act. The Cooperatives have forwarded to RUS the Rules Amendments. Based upon preliminary conversations, it is highly likely that the RUS either independently or jointly will also seek similar relief.

The Cooperatives suggest two alternatives. First, simply strike R14-2-1606.F. It is not scheduled to take effect until January 1, 2001, some 30 months from now. There is absolutely no reason why the Commission must leap at this moment, based upon no evidence, testimony nor market experience, to the conclusion that the most cost effective way to serve the standard offer customer will be by competitive bid two and a half years from now. Second, alternatively amend the section so that it does not apply to nonprofit, member owned distribution cooperatives.

R14-2-1616

This rule would require all Affected Utilities either to divest generation assets prior to January 1, 2001, or transfer competitive assets to a separate corporate affiliate by that date. In addition, it establishes an irrebuttable presumption that an Affected Utility shall not provide competitive services. The

Commission has received no evidence, taken no testimony and performed no analysis on the wisdom, cost efficacy, market impacts, nuances, discrimination and unfairness involved in such blanket mandates and prohibitions.

The problems inherent in this proposal are too numerous to recount. For example, the prohibition against an Affected Utility providing competitive services will deprive both the competitive and the standard offer customer of the economies of scale associated with coordination of the activities and will increase costs for both. The requirement that only Arizona utilities conduct business in this straight-jacketed fashion without similar requirements being imposed on other states' utilities which deliver service as electric service providers in Arizona are inherently discriminatory and will have the effect of impeding, not advancing, a competitive marketplace. Finally, placing to one side that such requirements greatly exceed the Commission's jurisdiction, they are remedies in search of problems which do not now and perhaps never will exist.

Once again, the Cooperatives suggest that these problems may be avoided by simply striking in its entirety R14-2-1616. Several months before competition even begins is no time to be guessing about what may be an appropriate and adequate delivery system for competitive and regulated services in 2001.

R14-2-1617

This Rule consists of four pages of very detailed requirements concerning separation and restrictions between and among an Affected Utility and its affiliates. It suffers from many of the same infirmities outlined previously.

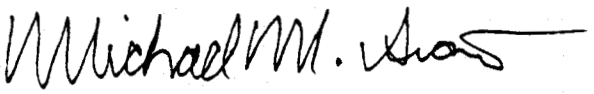
In addition, as it pertains to customer owned Cooperatives, its provisions are completely unworkable, exceedingly costly, punitive, discriminatory and would increase costs substantially. For example, Graham has three part-time meter readers. Forming a separate corporation and placing one of them in it will be a silly and incidentally very lonely requirement. It also conflicts with the new provisions of A.R.S. §§10-2057.A.4 and A.R.S. §10-2127.A.5 of HB 2663 which specifically authorize joint marketing and other activities among Cooperatives so as to enable them to compete more effectively in the electric energy market. The presumptive prices which may be charged among an Affected Utility and its affiliates as set forth at R14-2-1617.A.7 are unsupported by any record evidence or other study and select pricing standards (such as 5% of direct labor costs) from thin air.

The provisions obviously exceed the Commission's jurisdiction. As our Supreme Court noted in Williams v. Pipe Trades, 100 Ariz. 14, 18, 409 P.2d 720, 723 (1966): "The Commission has the power to supervise and regulate public utilities as it finds them. It has nothing to do with creating or bringing them into existence."

The Cooperatives would suggest that these problems may be avoided by striking R14-2-1617. Particularly in light of the facts that no record has been developed to guide Commission decisions in this area nor has competition yet begun to demonstrate any problem that needs to be addressed, it is simply unnecessary and unwise for the Commission to promulgate such an extensive set of requirements at this time. Alternatively, the Commission could consider a rule that would require not only Affected Utilities, but also Electric Service Providers to file prior to January 1, 2000, a plan/code of conduct to regulate affiliate transactions specifically tailored to that Affected Utility or Electric Service Provider. Such a plan would be subject to approval by the Commission and input from other interested parties.

The Amended Rules suffer from a wide variety of additional infirmities, factual and legal. They conflict with HB 2663 in many respects. We cannot possibly fully describe the difficulties and fashion adequate solutions in the time allowed. Thus, we offer all of these comments without waiver of the Cooperatives' rights, previous positions and ability to comment further.

Very truly yours,



By
Michael M. Grant

Original and 10 copies
filed with Docket Control

cc: All Parties of Record

0546514

PRELIMINARY COMMENTS, SUGGESTIONS AND QUESTIONS ON CERTAIN AMENDED RULES

R14-2-1601

R14-2-1601.8. Add "which remain unpaid after the due date" at the end of the definition.

R14-2-1601.9 and 30. Add "as it relates to metering transformers" at the end of the definitions on distribution and transmission primary voltage.

R14-2-1601.14. As written, the definition seems to mix financial and physical concepts. To clarify, add the words "the generation of" after "contract rights to".

R14-2-1601.15. The definition of "Installed Adequate Reserve" does not seem to be used in the Amended Rules.

R14-2-1601.16. The definition of "Load-serving Entity" should be changed to "an ESP, Affected Utility or UDC, excluding a meter service or meter reading provider."

R14-2-1601.22. Add the words "to enable parties to engage in transmission transactions" at the end of the sentence.

R14-2-1601.23. Add the words "to provide system reliability" at the end of the sentence.

R14-2-1601.28. Placing to one side various problems with this definition including its preference for divestiture, the definition for "Stranded Cost" should be expanded to include one time costs incurred by Affected Utilities for changes to infrastructure required as a result of the rules. These costs may include new communications facilities, substation or line metering, computer hardware and software as well as other expenses. The CTC should include all costs incurred as a result of the ACC's competition orders. California allows utilities to establish memorandum accounts to keep track of the costs that are incurred as a result of the restructuring.

R14-2-1602

The time has passed for this filing and the reference should be deleted. Other rules do, however, reference this rule.

R14-2-1603

R14-2-1603.A. The purpose of striking this language is unclear. Does it mean that each Affected Utility will have to re-apply for a CC&N for its own territory? If so, that seems

EXHIBIT A

redundant and unnecessary. Also, Affected Utilities have certificated rights to provide service in their territories which can't be altered without compliance with A.R.S. §40-252. The language should be retained.

R14-2-1603.F.5. Absent some specification of public interest criteria, this standard is too vague to be effectively argued or enforced.

R14-2-1603.G. There is no subparagraph 7.

R14-2-1604

R14-2-1604.B. Delete the words "Groups of". It is confusing and redundant in relation to aggregation. The 40 kW should be based on an annual average, not a one month peak.

R14-2-1604.C. The relationship between the residential phase-in program and the other implementation requirements is confusing. Is the residential program supposed to be in addition to the 1 MW loads and the aggregated 40 kW loads or included to reach 20%? Load profiling should not be used. The Standard Offer Customer will be burdened with losses and diversion costs if actual demand and energy is not billed. Also, the September 15, 1998 filing requirements and January 1, 1999 implementation date are simply not achievable. We would suggest a July 1, 1999 filing date and January 1, 2000 implementation. Finally, AEPCO has no residential consumers so add the words "where applicable" after "Each Affected Utility".

R14-2-1604.D. We are not certain what "aggregation in a manner consistent with R14-2-1604(B) means. In any event, there are no "possible mechanisms" other than a full rate hearing based on fair value. Given the extensive regulatory and other costs being created, additional rate reductions are extremely unlikely. While we appreciate the political value of such a statement, we recommend deletion because it misleads the consumer.

R14-2-1604.F. Precisely how do these customers count toward the 1 MW and aggregated loads? Do you take the customers full load or the full load net the PV supply? Add the words "pursuant to R14-2-1604(B) and (C)" at the end of the first sentence and strike the second sentence because the minimum requirements no longer exist.

R14-2-1605

R14-2-1605.B. Ancillary services are not required by the FERC to be monopoly services.

R14-2-1606

R14-2-1606.A and B. Paragraph B conflicts with Paragraph A. Paragraph A calls for the potential phase out of standard offer service, but Paragraph B requires UDC's to offer standard offer service after 2001.

R14-2-1606.C.2 and 3. It is confiscatory to state that rates will not increase when costs will increase as load is lost to competitive sales. It is also contradictory and confiscatory to state that rates shall reflect the cost of providing the service and, at the same time, cap them.

R14-2-1606.C. This paragraph should be lettered "D". Subparagraphs 4, 5 and 8 should be stricken because they are FERC jurisdictional.

R14-2-1606.G. Customer data probably will not be available by both demand and energy component. The sentence should read "...shall release in a timely and useful manner that customers' demand and energy data (if available) for the most recent 12 month period (if available)..."

R14-2-1606.I. Add the words "or the Rural Utilities Service" after Federal Energy Regulatory Commission.

R14-2-1606.J. Delete the section.

R14-2-1607

AEPCO has already extensively discussed stranded cost issues in the recently completed docket. The primary problem with these changes is the requirement of R14-2-1607.D that a filing be made on or before August 24, 1998. Distribution cooperatives will have no way of knowing what their metering, meter reading, billing and collection related stranded costs may be until after competition is well underway.

R14-2-1608

R14-2-1608.A. Fossil plant decommissioning costs should be added. Throughout the Rule, "or UDC" should be added after "Affected Utility" and paragraph D should be deleted.

R-14-2-1609

The Solar Resource Portfolio continues to suffer from the same problems outlined on original rule adoption, i.e. it is antithetical to market choice, extremely expensive and exceeds the Commission's jurisdiction. As to the changes proposed here, there are several undefined terms such as green pricing, net metering and

net billing program. The early extra credit multiplier provisions of paragraph C seem targeted toward a possible Enron Arizona project and are classic special interest provisions. Staff cannot "develop additional standards, as needed" without ACC authorization. The Commission obviously has no jurisdiction to establish the Solar Electric Fund in paragraph G and move either its proceeds or equipment purchased to various public entities in the state. The calculation, reporting, monitoring and regulatory burdens associated with these requirements are enormous - both for the Commission and utilities. We recommend striking R14-2-1609 in its entirety.

R14-2-1610

Generally, we note that transmission is a FERC regulated issue and most of these provisions are in conflict with that agency's jurisdiction. For example, paragraph I's assertion of ACC jurisdiction over must-run units is directly at odds with FERC's exclusive jurisdiction. See, for example, the recent decision In re Duke Energy Moss Landing LLC, et al., 83 FERC ¶61, 318 (issued June 25, 1998). We have previously commented on ISA/ISO related issues in the May 22, 1998 letter to Mr. Williamson.

Briefly, as to some specific issues on the Amended Rules:

1. The final sentence of paragraph A should be stricken because rights to transmission transfer capability currently exist and are assigned to both wholesale and retail load.

2. The establishment of an ISA/ISO by certain Affected utilities will do little to "provide non-discriminatory retail access" because the Affected Utilities control only about a third of the transmission capability in this state.

3. All Affected Utilities do not own or control transmission facilities; yet they are required to file with FERC for approval. Add the words "with Arizona transmission facilities" to clarify.

4. Paragraph D's requirement of a proposed ISA implementation plan by September 1 is unworkable given the complexity of the issues. Also, the ISA concept is new to FERC; none currently exists nor have there been any filings for one. We recommend deletion of paragraphs C and D.

5. Also delete paragraphs F and I because of FERC jurisdiction.

R14-2-1611

Time has not permitted a detailed analysis, but portions of this Rule may no longer be needed or are in conflict with HB 2663.

R14-2-1612

Paragraphs D through I are missing or mislabeled.

R14-2-1613

We have identified the following problems/issues in the time available:

1. As to paragraph C, "slammed" is an undefined vernacular term. How will "deceit or deceptive practices" be proved?

2. As to paragraph D, ESP's do not have a "system." A better term might be "customers." Further, what is a "large portion"?

3. As to paragraph I:

   (2) If the meter is owned by the customer, can a meter test be required?

   (4) Who will be responsible for assigning the Universal Node Identifier number statewide?

   (5) Is the UIG currently in place? The Commission may not delegate its rule making authority to another group, in any event.

   (6) To the best of our knowledge, the EDI and procedures mentioned here do not currently exist. Also, options besides the Internet are more efficient and secure.

   (7) Metering should be time of use rather than hourly. However, for <u>billing</u> purposes, this will produce much more data than necessary with corresponding cost increases for collection, storage, etc. of this unnecessary data.

   (9) The Commission should be aware that many of the latest meters are highly unreliable. The customer should not own the meter. Customer ownership but utility or ESP control raises many issues including responsibility for

maintenance, meter standards, meter repair and testing.

(11) Distribution CT's and PT's should only be owned by the utility. If ESP's own the distribution CT's and PT's, adequate insurance provision must be made for damages and losses and, if the ESP is not local, adequate provision for installation, maintenance, repair and replacement must also be made.

(14) What is the Metering Committee? Again, the Commission can't promulgate rules that don't establish fixed standards and/or delegate to other entities its rule making power. The same comment applies to items (15) and (16).

4. As to paragraph M, the utilities' unbundled tariffs will have to be approved by the Commission by at least October 1 to allow re-programming to comply with this requirement.

R14-2-1614

Generally, the reports outlined in this rule are very burdensome and will increase costs, regulatory burdens and responsibilities. In particular, subparagraph A.10. will be an administrative and logistical nightmare. For example, as to the fuel source characteristics of purchased power, they will be unknown to the purchasing entity, especially in out of state, economy or brokered transactions. They also change constantly. This same comment and problems pertain to R14-2-1618.C as well. Subparagraph A.10 may be improved slightly by adding "average annual" after "calculate the" and "in Arizona" after "resources used."

R14-2-1618

Information disclosure standards may be necessary, but they should be given careful thought. Realistically, this section is not needed until the introduction of widespread competition more than two years from now. We recommend deferral and further study of this subject.

R14-2-210

R14-2-210.B.1. Each meter at a customer's premises will be considered separately for billing purposes and the readings of two or more meters will not be combined unless otherwise provided for in the utility's tariffs, but will this be affected by aggregation?

R14-2-210.D.5. We have no idea what this sentence means.

R14-2-210.E.1.b. Delete the last sentence. It does not fit the first part of the paragraph.

R14-2-210.E.3. Who will resolve questions on overbilling? Is the utility responsible for the meter that is owned by the customer? If the meter is found to be in error and it is owned by the ESP or his representative, who will figure the refund on the error?

R14-2-210.F. Depending on who does the billing and who accepts the payments, how will the ESP notify the utility doing the collections that there is a bad check or vice versa? Also, it actually takes two weeks for the bank to send notice of a bad check so by then the account will be subject to disconnect and late charges as well as bad check charges.

0548191/10421-0004

GALLAGHER & KENNEDY
A PROFESSIONAL ASSOCIATION

MICHAEL M. GRANT
ATTORNEY
DIRECT LINE
(602) 530-8291

2600 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004-3020
(602) 530-8000
FAX: (602) 257-9459

A.C.C. - DOCKET CONTROL
RECEIVED

SEP 18 1998

DOCUMENTS ARE SUBJECT TO
REVIEW BEFORE ACCEPTANCE
AS A DOCKETED ITEM.

September 18, 1998

Chairman-Commissioner Jim Irvin
Commissioner Renz D. Jennings
Commissioner Carl K. Kunasek
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Re: Arizona Electric Power Cooperative, Inc., Duncan Valley Electric Cooperative, Inc. and Graham County Electric Cooperative, Inc. Comments on Amended Electric Competition Rules; Docket No. RE-00000C-94-0165

Dear Commissioners:

Pursuant to the Procedural Order dated August 11, 1998, Arizona Electric Power Cooperative, Inc., Duncan Valley Electric Cooperative, Inc. and Graham County Electric Cooperative, Inc. (the "Cooperatives") submit these comments on the Proposed Rules. Because the Proposed Rules are the same as the Amended Rules which were adopted on an emergency basis by Decision No. 61071, the Cooperatives incorporate by reference (i) the written comments of Arizona Electric Power Cooperative, Inc. dated July 6, 1998 and (ii) the Cooperatives' Applications for Rehearing of Decision No. 61071 dated August 27, 1998.

Without waiver, but in addition to the issues raised in those materials, the Cooperatives note the following:

- **R14-2-1601.** The Reliability Work Group has continued to work on must-run generating and scheduling coordinator issues. We believe the following definitional changes at R14-2-1601.27 and .35 reflect current consensus thinking:

  27. "Must-Run Generating Units" are those units that are required to run to maintain system reliability and meet load requirements, voltage requirements, system stability and contingencies to meet load on certain portions of the interconnected transmission grid.

35. "Scheduling Coordinator" means an entity that provides schedules for power transactions over transmission or distribution systems to the party responsible for the operation and control of the transmission grid, such as a Control Area Operator/Transmission Owner, Independent Scheduling Administrator or Independent System Operator.

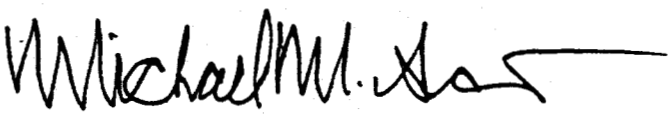
- **R14-2-1613.H**. This subsection requires ESPs to give at least five days notice to their customers of scheduled return to the Standard Offer. Notice should also be given to the affected UDC so it is aware the load is returning and can begin to make necessary arrangements. After the words "to their customer" add "and to the appropriate Utility Distribution Company."

- **R14-2-1616**. The Cooperatives suggest that the January 1, 1999 date in subsection B be changed to "January 1, 2001" to conform this subsection with the date in subsection A.

- **R14-2-1618**. The Cooperatives appreciate the Commission's addition of subsection A to R14-2-1618 on disclosure of information. However, the phrase "R14-2-1618 is a placeholder" may be confusing. To clarify, the Cooperatives suggest deletion of R14-2-1618 until the tracking mechanism referred to is developed by the Western Conference of Public Service Commissioners.

Thank you for your consideration of these comments.

Very truly yours,



By
Michael M. Grant

Original and 10 copies
filed with Docket Control

0563978/10421-0013