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1 Attorney For

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Sulphur Springs Valley Electric Cooperative, inc.

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**CHRISTOPHER HITCHCOCK**  
**STATE BAR NO. 004523**

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**BEFORE THE ARIZONA CORPORATION COMMISSION**

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JIM IRVIN

DOCKETED

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Commissioner - Chairman

DEC 31 1998

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RENZ D. JENNINGS

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Commissioner

CARL J. KUNASEK

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Commissioner

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IN THE MATTER OF THE COMPETITION )

DOCKET NO. RE-00000C-94-0165

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IN THE PROVISION OF ELECTRIC SERVICES )

14

THROUGHOUT THE STATE OF ARIZONA )

**SULPHUR SPRINGS VALLEY**

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ELECTRIC COOPERATIVE,

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INC.'S APPLICATION FOR

REHEARING AND REQUEST FOR

STAY OF DECISION NO. 61272

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SULPHUR SPRINGS VALLEY ELECTRIC COOPERATIVE, INC. ("SSVEC"),

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pursuant to A.R.S. §40-253 submits this Application for Rehearing and Request for Stay of

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Decision No. 61272 entered December 11, 1998, including the Amended Rules ("Amended

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Rules") which are its Appendix A (collectively, the "Decision").

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The Decision is unlawful, unreasonable, unjust, unconstitutional, in excess of the

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Commission's jurisdiction, arbitrary, capricious and an abuse of the Commission's discretion for

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the reasons and upon the grounds set forth in SSVEC's comments dated September 18, 1998, a

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copy of which is attached hereto and incorporated herein and, as to stranded cost issues for the

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reasons and upon the grounds set forth SSVEC's Application to Rehearing of Decision No.

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60977, dated July 9, 1998, the provisions of which are incorporated herein by reference.

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 requirements and when certain services such as metering, meter reading, billing and collection may be offered competitively;
3. The Decision violated 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.

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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.

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:

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- 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 the 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 SSVEC to whom the Commission has issued certificates of convenience and necessity.

12. The Decision breaches the regulatory compact between the State of Arizona and SSVEC by denying SSVEC 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

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bond as may 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 SSVEC, 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 SSVEC, 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 SSVEC, 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, including SSVEC, which contracts are all requirements wholesale power contracts requiring such

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Class A Members to purchase all of their electricity from AEPCO.

C. Between SSVEC and its members as they have agreed to purchase all of their electricity from SSVEC.

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 SSVEC.

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, including SSVEC, 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 SSVEC, without their consent.

C. Loans made by the United States pursuant to the RE Act to SSVEC which

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are secured by utility realty mortgages and security agreements based upon the bylaws contract between SSVEC and its owners/members are placed in jeopardy by the Decision.

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 impermissible vague, postponing for the future the determination of SSVEC's substantial and vested rights without establishing standards to govern such determinations.
- B. The Decision fails to give fair warning to SSVEC 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.
- C. The Decision creates uncertainty with respect to the certificate of convenience and necessity issued to SSVEC 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 SSVEC without providing just compensation as required by the United States and Arizona Constitutions.

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E. The Decision unlawfully amends and/or deprives SSVEC 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 SSVEC 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 SSVEC 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 or 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 issued certificates of convenience and necessity pursuant to R14-2-1603.

19. The Decision is unlawful and exceeds the jurisdiction of the Commission in ordering use of facilities of PSCs, including SSVEC, 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 operation of SSVEC.

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21. The Decision is unlawful and exceeds the jurisdiction of the Commission by requiring that all competitive generation assets and competitive service 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 SSVEC 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 I, 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 SSVEC 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.

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27. Both the manner in which the Decision was adopted and the Decision itself violate the requirements of the Administrative Procedure Act, A.R.S., Title 41, Chapter 6, including but not limited to the provisions of A.R.S. §§102 et seq.

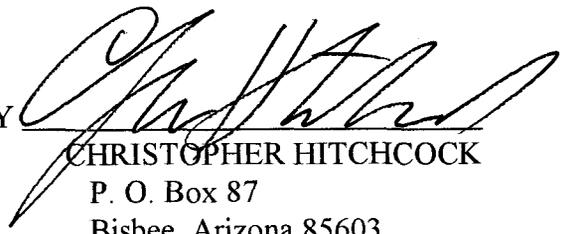
28. The Decision and in particular A.A.C. R14-2-1612 violates the provisions of A.R.S. 40-203, 40-250, 40-251, 40-252, 40-334, 40-361, 40-365 and 40-367 by permitting the sale of electricity at rates fixed by providers or by the market rather than at rates prescribed by the Commission and permits aggregators 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, SSVEC respectfully requests that the Commission enter its Order granting this Application for Rehearing and staying the Decision pending resolution of the issues set forth herein.

RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of December, 1998.

HITCHCOCK, HICKS & CONLOGUE

BY   
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ORIGINAL and ten (10) copies of  
the foregoing filed this 31<sup>st</sup>  
day of December, 1998, with:

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

Copy of the foregoing mailed this  
31<sup>st</sup> day of December, 1998, to:

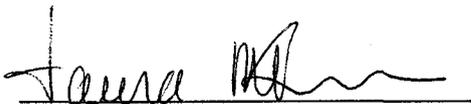
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All other parties listed on the docket.

  
Laura M. Room

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LAW OFFICES OF FRED SUTTER	1913
SUTTER, ROCHE & GENTRY	1928
GENTRY & GENTRY	1949
GENTRY, McNULTY & KIMBLE	1955
GENTRY, McNULTY & DESENS	1979
DESENS & HITCHCOCK	1986

September 18, 1998

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

Re: Sulphur Springs Valley Electric Cooperative (SSVEC)  
Comments on Amended Electric Completion Rules;  
Docket No. RE-00000C-94-0165

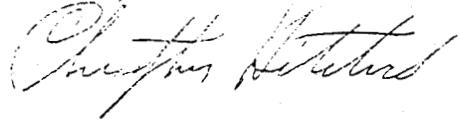
Dear Commissioners:

Pursuant to the Procedural Order dated August 11, 1998, Sulphur Springs Valley Electric Cooperative (SSVEC) submits 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, SSVEC incorporated by reference (i) the written comments of Arizona Electric Power Cooperative, Inc. Dated July 6, 1998 and (ii) SSVEC's Application for Rehearing of Decision No. 61071 dated August 27, 1998.

Sincerely,

HITCHCOCK, HICKS & CONLOGUE

By



Christopher Hitchcock

CH:lmr  
Enclosure (10 copies)

**EXHIBIT "A"**