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Arizona Corporation Commission

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ARIZONA CORPORATION COMMISSION

COMMISSIONER JIM IRVIN

Decision No. 61311, dated January 11, 1999

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Dissenting Opinion

Decision No. 61311, which stays Arizona's Retail Electric Competition Rules, is being justified as action, "consistent with the public interest and due process," based upon the argument that the Commission has "failed to adequately address the issues necessary to begin implementing competition in the electric industry in a timely or consistent manner."

Such a view not only ignores the procedural history established in adopting the Rules, but also fails to recognize; 1) hundreds of working group meetings involving business, government and consumer representatives who presented their findings, viewpoints and recommendations to the Commission over the past four years; 2) nearly three weeks of exhaustive hearings, over thirty witnesses and hundreds of pages of written testimony, given in February 1998, on the issue of stranded investment alone; and 3) numerous revisions of the Rules based not only on staff and working group recommendations, but general and specific individual comments submitted by stakeholders participating in the process outlined above.

Instead, the majority embraces Arizona Supreme Court Vice Chief Justice Charles E. Jones' justification for effectively killing the proposed agreements with Arizona Public Service (APS) and Tuscon Electric Power (TEP), and misapplies his reasoning – that due

process requires, "sufficient time to prepare, evaluate, and present the evidence" – to the procedures followed in adopting the Rules. Vice Chief Justice Jones narrowly tailored his decision to deal, "solely with the insufficiency of advance notice of the proposed December 3 hearing before the Corporation Commission," and as such, makes no determination as to the authority of the Commission to adopt rules necessary to implement competition (see attached: Page 2, Supplemental Order dated December 4, 1998). Decision No's. 61272 and 61309 were a result of a lengthy, highly complex and open process. This decision not only extends the timeline, but essentially closes the discussion from those stakeholders and parties whose budgets cannot afford the expensive attorneys and expert witnesses more hearings and further analysis will cost. All options have been considered during the last four years, and with competing interests covering the entire spectrum of perspectives, all stakeholders cannot have all issues resolved to complete satisfaction. Endless political wrangling is not going to benefit consumers, and at some point, the process has to end.

While I fail to recognize what public interest has been gained by this decision, I recognize what the public has lost in the past month. First and foremost, the countless hours committed by Commission staff, business and industry representatives, as well as consumer groups, have yet to bear results for consumers and taxpayers. Also, the proposed agreements with APS and TEP would have collectively given ratepayers an additional immediate rate cut, while adding market generation credits and capping stranded cost recovery figures. Meanwhile, SRP customers are enjoying a 5.4% rate decrease as SRP's market affiliate gains valuable experience elsewhere. As the

Commission now decides to revisit the Rules, any proposed changes will be minimal at best, absent a complete reversal of policy.

Some have questioned the success of electric competition in other states, intimating that because of the shortfalls and miscomings experienced in those areas, the urgency surrounding implementation of our own competition rules is not warranted. I can only hope that Decision No. 61311, which has toppled Arizona from the forefront in tackling and addressing the complex issue of deregulation, does not signal its end. Not only has the Arizona Supreme Court upheld our authority to advance the policies of consumer choice and competition, but the Arizona state legislature has recognized ACC authority as well. Several electric utility companies unsuccessfully challenged the Commission's authority to proceed with such policy, and it is vital that subsequent Commission action does not give rise to further litigation.

As a result, I believe that the decision to reconsider Decision No. 61272 and vacate Decision No. 61309 is an improper method of staying the Rules. Continuity of government is important for stability within our society. But what message is sent to investors, businesses and consumers - both within and outside the state - when the rules and laws governing competition can be changed overnight by the outcome of an election? Will this Commission rewrite its rules after the next election? And finally, what legal ramifications can we expect from staying already adopted rules?

Commission Staff has performed admirably in gathering information from all interested parties and working to incorporate their views, so much so that it was willing to "contravene" the Hearing Division's August 11, 1998, Procedural Order in submitting additional changes to the Rules. Unlike the characterization implied by the Order, such

proposed changes were made as a result of public comment sessions, issues raised during the course of Certificate of Convenience and Necessity proceedings, as well as modifications requested directly by the Secretary of State. It is unfortunate that this decision reflects poorly on the Commissioners' trust and reliance in Staff's input and recommendations, and to the extent that more scrutiny and analysis will be needed as a result of the stay, I encourage Staff to continue and exhibit the professional manner in which they have conducted themselves throughout this process.

Nobody questions the fact that restructuring Arizona's electric marketplace is a highly complex and continually evolving proposition. As such, there are issues that will never be resolved until rules are in place and mechanisms adopted to allow this Commission a flexible response to inevitable contingencies. As a proponent of competition, I strongly oppose a decision that delays competition's entrance into our state indefinitely, knowing that the sooner we can implement rules, the sooner we can disseminate consumer education, allow for a phase-in / transition periods and provide training when needed. If we wait too much longer, adopting another state's plan won't address the unique problems and conditions facing Arizona in the new millennium. For this reason, as well as those already expressed above, I respectfully dissent.

clarify the parties' understanding of the purpose and scope of the court's stay order dated December 1, 1998:

IT IS ORDERED:

1. The December 1 stay deals solely with the insufficiency of advance notice of the proposed December 3 hearing before the Corporation Commission.

2. The notice period of four business days as provided by the Corporation Commission's Procedural Order of November 25 is unduly restrictive and violates constitutional due process rights of electric customers as asserted by the Attorney General.

3. The stay order does not prevent the establishment of a new hearing date before the Corporation Commission, either by mutual agreement of the parties or by order of the Commission, subject to reasonable notice. However, the parties are entitled to a reasonable and adequate period of time in which to gather, evaluate, and prepare evidence for presentation at the Commission hearing.

4. The court does not pass judgment in this proceeding on the merits or the substance of the proposed settlement agreements with Arizona Public Service Company and Tucson Electric Power Company.

DATED this 4th day of December, 1998.



Charles E. Jones
Vice Chief Justice

TO: