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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

DOCKETED

CARL J. KUNASEK
Chairman
JAMES M. IRVIN
Commissioner
WILLIAM A. MUNDELL
Commissioner

DOCKETED *[Signature]*

Docket No. E-03665A-98-0681

IN THE MATTER OF THE APPLICATION
OF SIERRA SOUTHWEST ELECTRIC
POWER COOPERATIVE SERVICES, INC.
FOR A CERTIFICATE OF CONVENIENCE
AND NECESSITY TO PROVIDE
COMPETITIVE RETAIL ELECTRIC
SERVICES AS AN ELECTRIC SERVICE
PROVIDER PURSUANT TO A.A.C. R-14-2-
1601 ET SEQ.

**APPLICATION FOR REHEARING AND
REQUEST FOR STAY OF DECISION
NO. 61932 OF TRICO ELECTRIC
COOPERATIVE, INC.**

TRICO ELECTRIC COOPERATIVE, INC., an Arizona nonprofit corporation ("Trico"), a party in the above proceedings, pursuant to A.R.S. §40-253 submits to the Commission this Application For Rehearing and Request for Stay of Decision No. 61932 entered and dated August 27, 1999 ("Decision"), and of the whole thereof, on the grounds that 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:

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

2. The Decision is unconstitutional by granting the Application of Sierra Southwest Electric Power Cooperative Services, Inc. ("SSWEPCO") for a Certificate of Convenience and Necessity ("CC&N") to provide competitive retail electric services as an Electric Service Provider ("ESP") as defined in A.A.C. R14-2-1601, et seq., as amended, the Retail Electric Competition Rules ("Rules") to supply Competitive Services, as defined in the Rules on a statewide basis, which statewide basis includes all of the areas described in the CC&Ns issued by the Commission to Trico as an electric public service corporation ("PSC") for each and all of the following reasons:

A. The Decision violates Article XV, Sections 3 and 14 of the Arizona Constitution by authorizing SSWEPCO to charge rates which are not based on the fair value of the property of PSCs devoted to the public use, nor on a just and reasonable rate of return on such fair value nor on a rate design which will produce just and reasonable rates based thereon.

B. The Decision violates Article XV, Section 3 of the Arizona Constitution by delegating to SSWEPCO the authority to determine the rates SSWEPCO will charge customers and by permitting SSWEPCO to charge what are ostensibly "market-determined rates." The Constitution requires the Commission to prescribe the rates to be charged by SSWEPCO which cannot be delegated to SSWEPCO, the market or anyone else.

C. The Decision violates Article XV, Section 3 of the Arizona Constitution by authorizing SSWEPCO or aggregators, as those terms are defined in the Rules, to prescribe classes to be used by SSWEPCO. The Constitution requires the Commission to prescribe

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1 classifications to be used by SSWEPCO and this duty cannot be delegated to SSWEPCO or
2 anyone else.

3 D. The Decision violates Article XV, Sections 3 and 12 of the Arizona
4 Constitution by authorizing SSWEPCO or aggregators to discriminate in charges made to
5 customers that receive a like or contemporaneous service.
6

7 E. The Decision violates Article XV, Sections 2 and 3 of the Arizona
8 Constitution which requires that all corporations other than municipal furnishing electricity for
9 light, fuel or power shall be deemed PSCs by creating a new type of CC&N for ESPs, including
10 SSWEPCO, who have not been issued CC&Ns by the Commission pursuant to A.R.S. §§40-281,
11 *et seq.*, as have Trico and the other Affected Utilities. Only one type of CC&N is permitted by
12 said Sections and the only power or jurisdiction granted by such Section 3 of the Arizona
13 Constitution to the Commission with respect to classes of PSCs is to prescribe just and reasonable
14 classifications to be used by PSCs and not the power and jurisdiction to prescribe just and
15 reasonable classes of PSCs.
16

17 3. The Decision violates Article IV and Article XV, Section 6 of the Arizona
18 Constitution by purporting to give the Commission the right to exercise legislative powers
19 expressly or impliedly reserved to the Legislature by the Arizona Constitution.
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21 4. The Decision is unconstitutional in violation of the just compensation provisions
22 of the Fifth Amendment as incorporated into the Due Process Clause of the Fourteenth
23 Amendment of the United States Constitution and Article II, Section 4 of the Arizona
24 Constitution and Article II, Section 17 of the Arizona Constitution by breaching the contract and
25 exclusive regulatory compact between the State of Arizona and Trico.
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1 5. The Decision breaches the contract and regulatory compact between the State of
2 Arizona and Trico by denying Trico the exclusive right to sell electricity and related services in
3 its certificated areas pursuant to its CC&Ns and is unconstitutional in violation of Article II,
4 Section 17, Article III and Article VI, Section 1 of the Arizona Constitution which require that
5 when vested property rights are taken or damaged for public or private use, the State must, before
6 such taking or damage, pay on behalf of the owner of the property or property rights taken or
7 damaged just compensation either (i) into court, secured by a bond as may be fixed by the court
8 or (ii) into the State treasury on such terms and conditions as are provided by statute.

9
10 6. The Decision is unconstitutional, in excess of the jurisdiction of the Commission
11 and in violation of Article II, Section 17, Article III and Article VI, Section 1 of the Arizona
12 Constitution in that:

13 A. The issue of just compensation to be paid Trico for the breach of the
14 contract and the regulatory compact with the State of Arizona is an issue to be determined by the
15 courts, not the Commission, and the Decision fails to provide for just compensation by the courts.

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

19
20 7. The Decision is unconstitutional and in violation of Article I, Section 10, Clause 1
21 of the United States Constitution and Article II, Section 25 of the Arizona Constitution in that it
22 impairs the obligation of contracts:
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1 A. Between the State of Arizona and Trico, which has been issued certificates
2 of convenience and necessity by the Commission pursuant to A.R.S. §§40-281, *et seq.*, which are
3 in full force and effect, and

4 B. Between Arizona Electric Power Cooperative, Inc. ("AEPCO") and its
5 Class A Members, including Trico, which contracts are all-requirements wholesale power
6 contracts requiring such Class A Members to purchase all of their electricity from AEPCO.
7

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

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

13 9. The Decision violates the Supremacy Clause of Article VI of the United States
14 Constitution, Article II, Section 3 of the Arizona Constitution, and the Rural Electrification Act of
15 1936, as amended, United States Code Annotated, Title 7, Chapter 31, Subchapters I and III ("RE
16 Act") by reason of:

17 A. Loans made by the United States pursuant to the RE Act to AEPCO and to
18 Trico which are secured by utility realty mortgages and security agreements based upon the all-
19 requirements wholesale power contract between AEPCO and Trico are placed in jeopardy by the
20 Decision.
21

22 B. The frustration of the objectives and means of the RE Act by permitting the
23 benefits of the RE Act to be enjoyed by those not intended to be beneficiaries of the Act, such as
24 ESPs and meter service providers who are permitted to use or access the distribution facilities of
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1 Trico without its consent, to the detriment of the Act's true beneficiaries who are those being
2 financed by the RE Act's programs.

3 10. The Decision violates the Due Process Clauses of each of the Fourteenth
4 Amendment of the United States Constitution and Article II, Section 4 of the Arizona
5 Constitution for each of the following reasons:

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

9 B. The Decision is contrary to accepted judicial construction of A.R.S. §40-
10 252, as set forth in decisions of the Arizona Supreme Court, as the Decision permits competitive
11 encroachment into Trico's territory without the showing of inability or unwillingness of Trico to
12 serve required by law.

13 C. The Decision places an irrational condition on the amendment of Trico's
14 CC&N by conditioning the amendment upon final resolution of stranded cost issues for Trico,
15 which cannot be determined until the actual start and operation of competition within its
16 certificated area.

17 11. The Decision unlawfully restricts Trico from providing Competitive Services, as
18 defined in the Rules, pursuant to, or based upon, the existing CC&Ns of Trico.

19 12. The Decision is unconstitutional in that it prohibits Trico, who has been issued
20 CC&Ns pursuant to A.R.S. §§40-281, *et seq.*, from selling electricity and other services
21 competitively outside its certificated areas when SSWEPCO, who has not been issued CC&Ns
22 pursuant to A.R.S. §§40-281, *et seq.*, is granted the right to sell electricity and other services
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1 competitively anywhere in the State of Arizona, except in the service territories of municipal
2 corporations or political subdivisions of the State of Arizona who do not elect Reciprocity
3 pursuant to A.A.C. R14-2-1611.

4 13. The Decision violates the Equal Protection Clauses of the Fourteenth Amendment
5 of the United States Constitution and Article II, Section 13 of the Arizona Constitution by
6 burdening Trico with unlawful discriminatory restrictions and requirements which are not made
7 applicable to SSWEPCO although both Trico and SSWEPCO are PSCs such as:
8

9 A. Trico is required to comply with A.R.S. §40-281, 40-282 and other
10 regulatory statutes, whereas SSWEPCO is not;

11 B. Trico is required to serve electricity within its certificated areas, whereas
12 SSWEPCO is not;

13 C. Trico is required to be a Provider of Last Resort, whereas SSWEPCO is
14 not.
15

16 14. The Decision deprives Trico of the value of its respective CC&Ns which are
17 severely damaged or taken by the Decision.

18 15. The Decision is unlawful, unconstitutional and exceeds the jurisdiction of the
19 Commission in ordering use or access of facilities of Trico by SSWEPCO without the consent of
20 Trico.
21

22 16. The Decision is unlawful and exceeds the jurisdiction of the Commission by
23 impermissibly interfering with the internal management and operations of Trico.
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17. The Decision is unlawful and exceeds the jurisdiction of the Commission by violating the provisions of A.R.S. §40-334, which prohibits discrimination between persons, localities or classes of service as to rates, charges, services or facilities.

18. The maximum rate of \$25 per kWh for electric Competitive Service as filed by SSWEPCO when the average cost of a kWh is approximately \$.03 to \$.05 is so unreasonable that it is meaningless and does not comply with the Rules for the issuance of a CC&N to an ESP such as SSWEPCO.

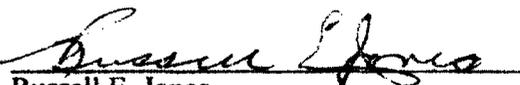
19. The public policy of the State of Arizona with respect to rates, charges and classifications to be used by PSCs is established by the applicable provisions of Article XV of the Arizona Constitution and neither the Commission nor the Legislature has the jurisdiction to change such public policy.

20. The Decision fails to give the Affected Utilities, including Trico, a hearing with respect to respect to any competitive residential electric tariff that SSWEPCO may file in the future.

WHEREFORE, having fully stated its Application for Rehearing and Request for Stay, Trico respectfully requests that the Commission enter its Order granting this Application for Rehearing and this Request for Staying the Decision, and the whole thereof.

DATED this 15th day of September, 1999.

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