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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

GARY PIERCE, Chairman  
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Arizona Corporation Commission

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IN THE MATTER OF THE APPLICATION OF  
MOHAVE ELECTRIC COOPERATIVE, INC.  
FOR APPROVAL OF A WASTE-TO-ENERGY  
FACILITY AS A PILOT PROGRAM UNDER  
THE RENEWABLE ENERGY RULES OR, IN  
THE ALTERNATIVE, FOR A LIMITED  
WAIVER.

DOCKET NO. E-01750A-10-0453

**STAFF'S OPENING BRIEF**

The Utilities Division Staff ("Staff") of the Arizona Corporation Commission ("Commission") hereby submits its opening brief in the rehearing of the above-captioned matter as directed by Administrative Law Judge Jibilian on December 1, 2011.<sup>1</sup>

**I. INTRODUCTION.**

This matter is presently before the Commission on a rehearing of Decision No. 72500.<sup>2</sup> In that decision, the Commission issued an order that: (1) granted Mohave Electric Cooperative, Inc.'s ("MEC") application to recognize energy purchased at the proposed waste-to-energy ("WTE") facility as a pilot program pursuant to A.A.C. R14-2-1802(D); (2) determined that 90 percent of the total kWhs of energy derived from the proposed WTE facility be considered as being produced by an Eligible Renewable Energy Resource; and (3) directed MEC to file reports relating to the percent of energy that comes from biogenic material in the proposed WTE facility, the municipal solid waste ("MSW") categorical composition breakdowns, and the air quality monitoring results.<sup>3</sup>

In this rehearing, Staff maintains the position that it advocated in its Memorandum and Proposed Order filed on May 10, 2011 ("Staff Report"). In that regard, Staff continues to

<sup>1</sup> Tr. at 379, Vol. III.

<sup>2</sup> The rehearing of this matter convened before Administrative Law Judge Jibilian for public comment on November 28, 2011, and for an evidentiary hearing which took place November 29 through December 1, 2011.

<sup>3</sup> Dec. No. 72500, Findings of Fact ¶¶ 30-33, Docket No. E-01750A-10-0453 (July 25, 2011).

1 recommend that the Commission issue an order: (1) granting a waiver of A.A.C. R14-2-1802(A) to  
2 the limited extent necessary to recognize the proposed WTE facility as an “Eligible Renewable  
3 Energy Resource” on an experimental basis such that energy produced at the facility may count for  
4 “Renewable Energy Credits” (“RECs”) under A.A.C. R14-2-1803 and be eligible to satisfy the  
5 annual renewable energy requirements established by A.A.C. R14-2-1804; and (2) recognizing that  
6 only 75 percent of the total kWhs of energy derived from the proposed WTE facility be considered as  
7 being produced by an Eligible Renewable Energy Resource.<sup>4</sup> In the alternative, Staff submits that  
8 Decision No. 72500 should be affirmed in its entirety because the record supports the Commission’s  
9 decision and the Sierra Club – Grand Canyon Chapter (“Sierra Club”) has failed to provide sufficient  
10 justification for disturbing that decision.

11 **II. STAFF RECOMMENDS THAT THE COMMISSION GRANT A WAIVER OF A.A.C.**  
12 **R14-2-1802(A).**

13 Although Staff acknowledges that MEC’s application could also be approved under a pilot  
14 program,<sup>5</sup> Staff continues to recommend that the Commission grant a waiver of A.A.C. R14-2-  
15 1802(A) in order to recognize the proposed WTE facility as an “Eligible Renewable Energy  
16 Resource” on an experimental basis such that the energy produced at the proposed WTE facility  
17 would qualify for RECs and be eligible to satisfy the annual renewable energy requirements.<sup>6</sup>  
18 Specifically, Staff believes that approving MEC’s application under a waiver is more appropriate  
19 than under a pilot program because the composition of MSW is not 100 percent biogenic.

20 Under the pilot provision of the Renewable Energy Standard and Tariff (“REST”) rules, a  
21 Renewable Energy Resource must be utilized with the pilot technology.<sup>7</sup> A Renewable Energy  
22 Resource is defined as “an energy resource that is replaced rapidly by a natural, ongoing process and  
23

24 \_\_\_\_\_  
25 <sup>4</sup> Staff also continues to support its recommendation that MEC be ordered to file reports relating to  
26 the percent of energy that comes from biogenic material in the proposed WTE facility, the MSW  
27 categorical composition breakdowns, and the air quality monitoring results which the Commission  
ultimately adopted in Decision No. 72500.

28 <sup>5</sup> See Section IV.A., *infra*.

<sup>6</sup> Ex. S-1 at 2.

<sup>7</sup> A.A.C. R14-2-1802(D).

1 that is not nuclear or fossil fuel.”<sup>8</sup> Staff believes that only the biogenic portion of MSW meets the  
2 definition of a Renewable Energy Resource under A.A.C. R14-2-1801(O).<sup>9</sup> Accordingly, Staff  
3 believes that approving MEC’s application under a waiver is more appropriate than a pilot program  
4 because less than 100 percent of MSW can be defined as a Renewable Energy Resource under  
5 A.A.C. R14-2-1801(O).<sup>10</sup>

6 **A. Good Cause Exists for the Commission to Grant the Waiver.**

7 Pursuant to A.A.C. R14-2-1816(A), “[t]he Commission may waive compliance with any  
8 provision of [the REST rules] for good cause.”<sup>11</sup> Staff,<sup>12</sup> MEC,<sup>13</sup> and Sierra Club<sup>14</sup> all agree that it is  
9 within the Commission’s discretion to determine whether MEC has demonstrated good cause for a  
10 waiver.

11 Staff believes good cause exists to grant a waiver for three important reasons. First, a  
12 significant portion of MSW can be categorized as biogenic or renewable.<sup>15</sup> It is important to note  
13 that Staff is recommending that only the renewable portion of the energy produced by the MSW  
14 should be eligible for renewable energy credits under A.A.C. R14-2-1803.<sup>16</sup> Second, Staff believes,  
15 based on the data currently available, that the potential benefits of the proposed WTE facility  
16 outweigh the potential consequences.<sup>17</sup> The potential benefits of the proposed WTE technology  
17 become even more evident when compared to the alternative of landfilling the MSW.<sup>18</sup> Third, the  
18 proposed WTE facility would help diversify MEC’s energy resource portfolio and reduce reliance on  
19 fossil fuel based generation.<sup>19</sup> Staff believes that the potential benefits associated with WTE  
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22 <sup>8</sup> A.A.C. R14-2-1801(O).

23 <sup>9</sup> Ex. S-1 at 11.

24 <sup>10</sup> *Id.*

25 <sup>11</sup> A.A.C. R14-2-1816(A) (emphasis added).

26 <sup>12</sup> Ex. S-1 at 7.

27 <sup>13</sup> Ex. A-3 at 2.

28 <sup>14</sup> Tr. at 131, Vol. I.

<sup>15</sup> Ex. S-1 at 8.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Tr. at 308, Vol. II.

1 technology merit exploring that technology further on an experimental basis by allowing only a  
2 portion of the energy produced by the proposed WTE facility to qualify for RECs.<sup>20</sup>

3 Sierra Club argues that both MEC and Staff have failed to articulate any sufficient basis for  
4 demonstrating good cause for a waiver.<sup>21</sup> Specifically, Sierra Club asserts that good cause does not  
5 exist because MEC has not “set forth [facts] as to why MEC cannot comply with the renewable  
6 energy standard requirements in the absence of a waiver.”<sup>22</sup> In this regard, Sierra Club suggests that  
7 the scope of the waiver provision is limited to those circumstances where a regulated utility is unable  
8 to comply with the renewable energy standard requirements in the absence of a waiver. However,  
9 Sierra Club interprets the scope of the waiver provision too narrowly.

10 Although Staff believes that an inability to comply with the REST rules may suggest good  
11 cause for requesting a waiver, it is not the only reason for the waiver provision.<sup>23</sup> The express  
12 language of the waiver provision provides that the Commission may waive compliance with *any*  
13 provision of the REST rules, which necessarily includes A.A.C. R14-2-1802(A).<sup>24</sup> Therefore, Sierra  
14 Club is misguided in arguing that the Company must demonstrate the efforts it has made to comply  
15 with the renewable energy standard rules in order to qualify for a waiver.<sup>25</sup>

16 **B. Staff’s Recommended Waiver is Appropriate Because it Addresses a**  
17 **Fundamental Reason Behind the Enactment of the REST Rules.**

18 Staff notes, with importance, that the Arizona Court of Appeals recently held that the REST  
19 rules were promulgated pursuant to the Commission’s plenary and exclusive ratemaking authority  
20 and that “[p]rophylactic measures designed to prevent adverse effects on ratepayers due to a failure to  
21 diversify electrical energy sources fall within the Commission’s power ‘to lock the barn door before  
22 the horse escapes.’”<sup>26</sup> As stated previously, MEC acknowledges that output from the proposed WTE  
23 facility would help diversify its energy resource portfolio and reduce reliance on fossil fuel based

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25 <sup>20</sup> Ex. S-1 at 8.

26 <sup>21</sup> Ex. SC-8 at 4.

27 <sup>22</sup> Ex. SC-8 at 4.

28 <sup>23</sup> Ex. S-1 at 7.

<sup>24</sup> A.A.C. R14-2-1816(A) (emphasis added).

<sup>25</sup> Exh. SC-8 at 4.

<sup>26</sup> *Miller v. Arizona Corp. Com’n*, 227 Ariz. 21, ¶31, 251 P.3d 400, 408 (App. 2011).

1 generation.<sup>27</sup> Accordingly, the Commission's grant of a waiver in this instance is appropriate because  
2 the waiver would be addressing a fundamental reason for enacting the REST rules, namely the  
3 diversification of energy sources.

4 **III. STAFF RECOMMENDS THAT ONLY 75 PERCENT OF THE ENERGY**  
5 **PRODUCED AT THE PROPOSED WTE FACILITY SHOULD QUALIFY FOR**  
6 **RENEWABLE ENERGY CREDITS.**

7 Staff continues to recommend that only 75 percent of the total kWhs of energy derived from  
8 the proposed WTE facility be considered as being produced by an Eligible Renewable Energy  
9 Resource.<sup>28</sup> In reaching this recommendation, Staff examined the composition of a local MSW  
10 sample from the City of Glendale Materials Recovery Facility that was provided by MEC and  
11 compared the results of that local MSW sample to the national average.<sup>29</sup> Staff determined that the  
12 biogenic portion of the local MSW sample contributed approximately 91 percent of the total energy  
13 output which was higher than the national average of 60 to 75 percent.<sup>30</sup> Staff's recommendation of  
14 75 percent therefore provides a reasonable compromise between the local MSW sample provided by  
15 MEC and the national average.<sup>31</sup>

16 Sierra Club disputes Staff's analysis and argues that the biogenic content of the actual MSW  
17 used by the proposed WTE facility will likely be less than 82 percent.<sup>32</sup> In support of this contention,  
18 Sierra Club submits a 2003 study that analyzed the composition of MSW in the City of Phoenix.<sup>33</sup>

19 Staff believes that Sierra Club's dispute regarding the expected biogenic composition of  
20 MSW is irrelevant because Staff's recommendation to recognize 75 percent of the total energy output  
21 is only a starting point. In the event that the biogenic portion of the actual MSW used by the  
22 proposed WTE facility contributes a higher or lower percentage of energy output than 75 percent,  
23 Staff notes that the parties can apply to the Commission to increase or decrease that percentage  
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25 <sup>27</sup> Tr. at 308, Vol. II.

26 <sup>28</sup> Tr. at 432, 441, Vol. III.

27 <sup>29</sup> *Id.* at 433.

28 <sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Ex. SC-8 at 9.

<sup>33</sup> Ex. SC-9.

1 commensurate with the actual renewable, or biogenic, content of the energy produced at the WTE  
2 facility.<sup>34</sup>

3 **IV. IN THE ALTERNATIVE, STAFF BELIEVES THE COMMISSION SHOULD**  
4 **AFFIRM DECISION NO. 72500 IN ITS ENTIRETY.**

5 In this rehearing, Sierra Club has failed to show that the Commission erred in its findings of  
6 fact or conclusions of law as set forth in Decision No. 72500. Although Sierra Club submitted  
7 additional testimony and exhibits during the rehearing, Sierra Club did not raise new issues beyond  
8 those issues that the Commission previously considered when it issued Decision No. 72500.<sup>35</sup>  
9 Therefore, in the event that the Commission does not adopt Staff's recommendations set forth in  
10 Sections II and III, *supra*, Staff believes that the Commission should affirm Decision No. 72500 in its  
11 entirety.

12 **A. The Evidence Supports a Finding that the WTE Facility will Generate Electricity**  
13 **Using a "Renewable Energy Resource."**

14 In Decision No. 72500, the Commission approved MEC's application as a pilot program, but  
15 recognized that Staff's recommendation that the Commission grant a waiver of R14-2-1802(A)  
16 provided an independent basis upon which to approve the application.<sup>36</sup> Although Staff believes this  
17 application should be approved by granting a waiver according to Staff's recommendation, Staff  
18 acknowledges that it would also be appropriate for the Commission to approve this application under  
19 a pilot program.<sup>37</sup> In this regard, Staff believes that the proposed WTE facility could qualify as a  
20 pilot program because the biogenic portion of the MSW that will ultimately be used at the proposed  
21 WTE facility constitutes a Renewable Energy Resource within the meaning of A.A.C. R14-2-  
22 1801(O).<sup>38</sup> Accordingly, the Commission's decision to approve MEC's application as a pilot  
23 program is supported by the record.

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26 <sup>34</sup> Tr. at 407-408, 434-35, Vol. III.

27 <sup>35</sup> Tr. at 129-30, Vol. I.

28 <sup>36</sup> Dec. No. 72500, Finding of Fact ¶ 29, Docket No. E-01750A-10-0453.

<sup>37</sup> Tr. at 128-129, Vol. II, Open Mtg.

<sup>38</sup> Ex. S-1 at 5-6, 10-11; Tr. at 441, Vol. III.

1           **B. The Evidence Supports a Finding that 90 Percent of the Energy Produced at the**  
2           **Proposed Facility Should Qualify for Renewable Energy Credits.**

3           In Decision No. 72500, the Commission determined that 90 percent of the energy produced at  
4 the proposed WTE facility should qualify for RECs. Although Staff believes that only 75 percent of  
5 the energy produced at the proposed WTE facility should qualify for RECs, Staff acknowledges that  
6 the record supports the Commission's 90 percent renewable energy figure.<sup>39</sup> Specifically, the  
7 Commission's 90 percent renewable figure is supported by the local MSW sample from the City of  
8 Glendale Materials Recovery Facility provided by MEC which reveals that the biogenic portion of  
9 that sample contributed approximately 91 percent of the total energy output.<sup>40</sup> Accordingly, the  
10 Commission's decision to recognize 90 percent of the kWhs generated by the proposed WTE facility  
11 as biogenic and being produced by an Eligible Renewable Energy Resource is supported by the  
12 record.

13           **V. CONCLUSION.**

14           For the foregoing reasons, Staff continues to recommend the positions that it originally  
15 advanced in the Staff Report. In the alternative, Staff believes that Decision No. 72500 should be  
16 affirmed in its entirety because that decision is properly supported by the record.

17           RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of January, 2012.

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28           <sup>39</sup> Tr. at 435, Vol. III.

<sup>40</sup> Ex. S-2 at 3.

1 Original and thirteen (13) copies  
2 of the foregoing were filed this  
3 10<sup>th</sup> day of January, 2012 with:

3 Docket Control  
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