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12 **BEFORE THE ARIZONA CORPORATION COMMISSION**

13 IN THE MATTER OF THE
14 APPLICATION OF TUCSON ELECTRIC
15 POWER COMPANY FOR APPROVAL OF
16 ITS 2012 RENEWABLE ENERGY
17 STANDARD IMPLEMENTATION PLAN
18 AND DISTRIBUTED ENERGY
19 ADMINISTRATIVE PLAN AND REQUEST
20 FOR RESET OF RENEWABLE ENERGY
21 ADJUSTOR

DOCKET NO. E-01933A-11-0269

**REPLY TO TUCSON ELECTRIC
POWER COMPANY'S RESPONSE TO
REQUEST FOR REHEARING OF
DECISION NO. 72736**

22 **INTRODUCTION**

23 Freeport-McMoRan Copper & Gold, Inc. ("Freeport-McMoRan") and Arizonans
24 for Electric Choice and Competition ("AECC") hereby submits this Reply to Tucson
25 Electric Power Company's ("TEP") Response to AECC's Request for Rehearing of
26 Decision No. 72736 (January 13, 2012) (the "Decision").

In its Response, TEP makes two basic arguments to AECC's Request for Rehearing of the "Decision". The first argument is that "...the Commission decided that it was in the public interest to provide \$3,000,000 in additional production-based incentive ("PBI") funding for non-residential distributable generation ("DG") projects beyond what TEP needed to comply with the REST Rules."¹ The second argument is that ... "the

¹ TEP Response at Page 1, lines 16-19.

1 increased DG results in *decreased* kWh sales by TEP. Therefore, the Decision also
2 provided that TEP should be allowed to recover its lost fixed cost revenues associated
3 with DG projects funded by the PBI Legacy Cost budget.”²

4 Neither argument is supported by the facts in this proceeding, the Arizona
5 Constitution, the Arizona Statutes or Arizona Case Law. Addressing the first argument,
6 TEP argues that “... the REST Rules created a ‘dip’ in the non-residential DG
7 requirements. That ‘dip’ could jeopardize significant portions of the DG industry in
8 Southern Arizona.”³ TEP then argues that “This \$3,000,000 PBI Legacy Cost budget is
9 intended to smooth out a dip in incentive funding for non-residential DG projects and to
10 ‘avoid an undue decline in industry activity with accompanying layoffs.’”⁴

11 TEP does not site any Arizona Constitutional provision, Arizona Statute or Arizona
12 Case Law to support the proposition that the Arizona Corporation Commission
13 (“Commission”) has a duty to avoid an undue decline in industry activity with the
14 accompanying layoffs to save the commercial solar industry. To the contrary, it is the
15 Commission’s duty to establish just and reasonable rates and charges for rate payers.
16 Requiring ratepayers to provide funds so that TEP can over-comply with the REST
17 requirements does not appear to be “just” nor “reasonable.” If TEP chooses to go beyond
18 the requirements, the cost should be born by TEP shareholders. In essence, TEP is willing
19 to enjoy the accolades and praise inherent with exceeding renewable and DG initiatives,
20 but only if its shareholders do not have to pay the cost for such overcompliance.

21 TEP’s second argument is that “... the increased DG results in *decreased* kWh
22 sales by TEP. Therefore, the Decision also provided that TEP should be allowed to
23 recover its lost fixed cost revenues associated with DG projects funded by the PBI Legacy
24

25 ² TEP Response at Page 1, lines 21-23.

26 ³ TEP Response at Page 2, lines 17-19.

⁴ TEP Response at Page 1, lines 19-21.

1 Cost budget.”⁵

2 TEP argues that “... contrary to AECC’s assertion, TEP will not be ‘effectively’
3 increasing its base rates nor will TEP be receiving an ‘unauthorized rate increase’ under
4 the Decision.”⁶ In spite of TEP’s argument, the Decision results in an increase in rates to
5 TEP rate payers outside a rate case and TEP will be receiving an “unauthorized rate
6 increase”.

7 DISCUSSION

8 1. The Provision Allowing Recovery of Lost Revenue Violates Arizona Law.

9 Fixed cost recovery occurs through base rates. The fixed cost recovery true up that
10 the Commission approved in the Decision effectively increases base rates; simply shifting
11 the recovery to a PBI Legacy Cost budget does not change the nature or substance of the
12 rate increase being requested. There was no record established concerning the recovery of
13 lost revenue. In fact, according to Staff, only about \$960,000 of the \$3,000,000 in
14 authorized recovery would be used to address lost kWh sales from the installation of
15 approximately 8 megawatts of DG.⁷ And according to Mr. Huber, the funds are to help
16 TEP with overcompliance, and would not be available until the systems are actually
17 drawing and avoiding electricity that would otherwise be purchased from TEP.⁸ Clearly,
18 the lost revenue would not occur as a result of TEP’s overcompliance until sometime in
19 the future. This is decoupling, and decoupling mechanisms should be established in a rate
20 case proceeding.⁹

21 The recovery of lost revenue resulting from DG deployment invokes the concept of
22 decoupling - an issue that is currently being addressed in other pending Commission
23

24 ⁵ TEP Response at Page 1, lines 21-23.

25 ⁶ TEP Response at Page 2, lines 11-12.

26 ⁷ Tr. at 206, lines 1-4.

⁸ Tr. at 201, lines 17-24.

⁹ Commission Policy Statement.

1 docket. The Commission's own Policy Statement regarding utility Disincentives to
2 Energy Efficiency and Decoupled Rate Structures recognizes that any such mechanism
3 must be addressed within the context of a general rate case proceeding. The
4 Commission's Policy Statement provides as follows:

5 A utility may file a proposal for decoupling or alternative mechanisms for
6 addressing utility financial disincentives to energy efficiency, including
7 revenue per customer decoupling, in its next general rate case. A utility
8 filing such a proposal should address this policy statement in its filing and
9 should use this policy statement as a guideline in development of its
10 proposal.

11 A decoupling mechanism not addressed in the context of a general rate case
12 involves the adjusting of rates outside the context of a general rate case. Under Arizona
13 Law, any changes in rates or charges must be considered in the context of a general rate
14 case with some exceptions, one of which is an adjustment clause. TEP has argued that the
15 inclusion of recovery of lost revenues is covered by the REST surcharge adjustor.¹⁰
16 However, that argument ignores the requirements of *Scates v. Arizona Corporation*
17 *Commission*, 118 Ariz. 531, 578 P.2d 612 (Ct. App. 1978) which provides:

18 The automatic adjustment clause is a device to permit rates to adjust
19 automatically, either up or down, in relation to fluctuations in certain,
20 narrowly defined, operating expenses. ... Such clauses usually embody a
21 formula established during a rate hearing to permit adjustment of rates in
22 the future to reflect changes in specific operating costs, such as the
23 wholesale cost of gas or electricity." *Id.* at 535, 578 P.2d at 616.

24 In addition to the lack of any facts supporting the inclusion of the calculation of lost
25 revenues resulting from decreased kWh sales associated with DG projects when the
26 Commission approved TEP's REST surcharge adjustor, there was no evidence presented
as to the impact weather conditions, economic conditions, or utility power outages may

¹⁰ TEP Response at Page 4, lines 3-6.

1 have on revenues. Changes in “specific operating costs” or “revenue per customer
2 decoupling” were never addressed when the Commission approved TEP’s REST
3 surcharge adjustor. Also there was no evidence of the impact of increased revenues that
4 might result from an increase in growth of customers or increase customer usage of
5 electricity.

6 **2. 2008 Rate Case Settlement Agreement.**

7 As set forth by several parties during the December 20, 2011 Open Meeting, no
8 one really knows what impact the installation of new commercial DG will have on TEP’s
9 revenue requirement. Therefore, if the Decision did *not* include the recovery of lost
10 revenue, the Commission would still be unable to determine whether there was lost
11 revenue (from the annual amount authorized in its last rate case) until TEP’s next rate
12 proceeding.¹¹ Either way, by allowing such recovery at this time, TEP is given the
13 presumption that there will be lost revenues, which TEP can begin collecting now.

14 TEP argues that there will be no increase in base rates. However, during the Open
15 Meeting, a TEP representative stated that calculation of the cost recovery number was
16 based on a ‘blended average from the various commercial non-fuel portion of the electric
17 rate for those customers.’ Translation – a blended average of base rates.¹²

18 **3. Prior Commission Decisions and Policy.**

19 TEP argues that the Decision is not contrary to prior Commission decisions and
20 policies, but merely addressed a novel circumstance; what it should do to incent or
21 facilitate overcompliance with the REST rules in order to avoid harming the solar industry
22 or TEP.¹³ AECC reiterates that the Commission was not established to protect the solar
23 industry – it was established to, among other things, ensure just and reasonable rates.

24
25 ¹¹ Tr. at 207, lines 13-25 to 208, lines 1-8.

26 ¹² In fact, Staff has not done any analysis to determine what the ‘real’ number is. Tr. at 211, lines 10-11.

¹³ TEP Response at Page 5, lines 4-7.

1 However, with respect to the recovery of lost revenue and TEP's assertion that such
2 authorized recovery is not contrary to prior Commission decisions OR policy, the Open
3 Meeting transcript suggests otherwise:

4 GRAY: Several years in the past, TEP and UNS had requested lost
5 revenues and the Commission denied that. I'm not aware to this point that
6 lost revenue of this sort has been granted through any RES plan. So I
7 believe it would be a change in policy, and it could potentially cause
significant additional costs to go through the REST budget.¹⁴

8 OLEA: Mr. Chairman, Commissioner Newman, I think that Mr. Gray has
9 stated that this is a new policy, if the Commission adopts this, where I don't
10 believe that lost revenues or lost fixed cost revenues have been addressed in
REST proceedings before. So that will be something new.¹⁵

11 OLEA: Yes, then for the second piece that could also tap into the \$3
12 million was for the part that they were above compliance then, they would
13 get to recover the lost revenue also from the \$3 million. So that's the
14 second piece of this, also. All right? And that's the part where, if the
Commission did that, that would be a new policy that we've never done
before, because that would also tap into the \$3 million.¹⁶

15 TEP suggests that because it's previous REST order (Decision No. 70233) did not
16 include the issue of overcompliance with the REST standards, the Decision cannot be
17 contrary. However, in both instances, TEP asked for recovery of lost fixed revenue.
18 Whether or not the request was the result of overcompliance is immaterial; recovering lost
19 fixed revenue was denied in Decision No. 70233, and improperly approved in Decision
20 No. 72736.

21 In so far as TEP's argument that failure to include the lost revenues associated with
22 DG projects resulting from a decrease in kWh sales "would be confiscatory and, therefore,
23 unconstitutional unless there was a way to recapture those lost revenues."¹⁷ The issue of
24

14 Tr. at 199, line 8.

15 Tr. at 200, lines 14-19.

16 Tr. at 207, lines 13-20.

17 TEP's Response at Page 3, line 5.

1 changes in costs and revenues is intended to be addressed by the filing of a general rate
2 case. TEP agreed in its prior rate case not to file a new rate case until July 1, 2012. In
3 discussing the "new policy" of allowing TEP to recover lost revenues, Mr. Olea stated as
4 a reminder to the Commissioners, "... if you're concerned that lost revenue, if you recall,
5 TEP has a stay out provision, but they're going to be filing a rate case next year."¹⁸ TEP's
6 argument does not constitute a basis to permit the adjustment of rates to recover lost
7 revenues outside of a general rate case.

8 **CONCLUSION**

9 For the reasons stated herein, Freeport McMoRan and AECC again request that the
10 Commission grant the Request For Rehearing, and amend the Decision to deny TEP's
11 request for recovery of lost revenue in this proceeding.

12 RESPECTFULLY SUBMITTED this 9th day of April, 2012.

13 FENNEMORE CRAIG, P.C.

14
15 By: 

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19 **ORIGINAL** and 13 copies filed
20 this 9th day of April, 2012 with:

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26 ¹⁸ Tr. at 207, lines 21-24.

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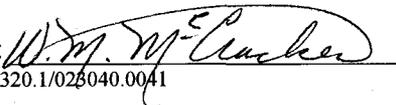
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