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BEFORE THE ARIZONA CORPORATION COMMISSION

7 BOB STUMP, CHAIRMAN
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Arizona Corporation Commission

DOCKETED

JUL 15 2013

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10 IN THE MATTER OF THE
11 COMMISSION'S INQUIRY INTO
12 RETAIL ELECTRIC COMPETITION.

Docket No. E-00000W-13-0135

**INITIAL COMMENTS OF ARIZONA
CENTER FOR LAW IN THE PUBLIC
INTEREST**

15 The Arizona Center for Law in the Public Interest ("Center") submits these
16 comments in response to the questions posed in the letter to stakeholders dated May 23,
17 2013.

18 At the present time, the Center is limiting its comments to question No. 13. The
19 Center's comments are intended to provide a general legal framework by which to
20 evaluate any specific proposal.

21 Question 13 asks:

22 Is retail electric competition viable in light of the Court of Appeals'
23 decision in *Phelps Dodge Corp. v. Arizona Electric Power Coop. Ariz*
24 *ELEC Power Coop.*, 207 Ariz. 95, 83 P.3d 573 (App. 2004)? Are there
25 other legal impediments to the transition to and/or implementation of
retail electric competition?

1 The Arizona Constitution imposes significant requirements on the Commission
2 related to the establishment of rates. The *Phelps Dodge* decision addressed two of these
3 requirements: The duty to find fair value and the duty to establish rates that are just and
4 reasonable.

5 I. Fair Value

6 While the *Phelps Dodge* case was pending, the Arizona Supreme Court issued its
7 decision in *U.S. West Communications, Inc. v. Arizona Corp. Comm'n.*, 201 Ariz. 242, 34
8 P.3d 351 (2001) ("U.S. West II"). In *U.S. West II*, the court held that Article 15, § 14 of
9 the Arizona Constitution imposed on the Commission the affirmative duty to determine
10 fair value and that the duty was not conditioned on market structure or subject to the
11 Commission's discretion. However, the court refused to rigidly link the fair value
12 determination to the establishment of rates.

13 *Phelps Dodge* noted that the court in *U.S. West II* did not say that fair value should
14 play no role in rate setting in a competitive environment. Indeed, the *U.S. West II* court
15 concluded that fair value should be considered in rate setting in a competitive
16 environment, although the Commission has broad discretion in determining the weight to
17 be given that factor in any particular case.

18 II. Just and Reasonable Rates

19 The Court in *Phelps Dodge* additionally determined that the Commission's rule
20 that deemed market rates to be "just and reasonable" prevents the Commission from fully
21 performing its duties and therefore violates Article 15, § 3. According to the Court, the
22 Commission may not abdicate its constitutional responsibility to set just and reasonable
23 rates by allowing competitive market forces alone to do so. Assuming a customer
24 chooses an electric service provider because of its lower rates, the Commission's rule
25 would have allowed the ESP to increase its rates "within the approved range without
regard to consumer fairness or a fair return, possibly counting on some consumers'

1 natural reluctance to constantly monitor rates, discover abuses, and then switch services.”

2 *Phelps Dodge*, 207 Ariz. at 108, 83 P.3d at 586, ¶ 34. Importantly, the Court held that
3 “the constitution charges the Commission, not consumers themselves, with the duty to
4 discover and remedy such potential overreaching by public service corporations.” *Id.*

5 The Court observed that the potential for overreaching was exemplified by the
6 Commission’s approval of a wide range of rates for an ESP. The potential for abuse in
7 pricing within a virtually unrestricted range of rates was apparent to the court and could
8 only be avoided by having the Commission, rather than the market alone, set just and
9 reasonable rates. Additionally, the Commission’s rule prevented the Commission from
10 granting consumers relief for any market-determined rates challenged as excessive.

11 Because market-determined rates were deemed just and reasonable under the rule,
12 consumers would be unable to successfully contend otherwise. “In effect, the market,
13 rather than the Commission would serve to adjudicate claims of excessive rates.” *Id.*, ¶
14 36.

15 Conversely, allowing the market to set the ESP’s rates also abdicated the
16 Commission’s responsibility to insure that such rates are fair to the ESPs themselves.
17 The Court in *Phelps Dodge* noted that an ESP could set its rates low in order to attract
18 customers “possibly denying itself a fair return and causing it to cut costs or raise charges
19 elsewhere to compensate.” *Id.*, ¶ 37. The Court noted that such measures could
20 potentially affect service to the detriment of the consuming public.

21 The Court also held that allowing the market to determine rates that are just and
22 reasonable effectively abandons utilization of the fair value finding that is required by
23 Article 15, § 14 in setting rates.

24 The Court in *Phelps Dodge* also addressed the argument that the Commission
25 must prescribe a single rate rather than a range of rates. The Court determined that
nothing in the plain language of the Constitution requires the Commission to prescribe a

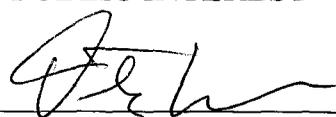
1 single rate rather than a range of rates. The Court held that assuming the Commission
2 establishes a range of rates that is "just and reasonable," the Commission does not violate
3 Article 15, § 3 by permitting competitive market forces to set specific rates within that
4 approved range.

5 III. Conclusion

6 Once the Corporation Commission has complied with its constitutional duties to
7 find fair value and establish just and reasonable rates, it might be difficult to describe
8 what's left as competition. Given the significant legal constraints imposed on
9 establishing retail electric competition, the proper analysis is whether the benefits from
10 the limited competition allowed by the Constitution outweigh the significant costs to
11 consumers that may be generated if competition is established.

12 RESPECTFULLY SUBMITTED this 15th day of July, 2013.

13 ARIZONA CENTER FOR LAW IN
14 THE PUBLIC INTEREST

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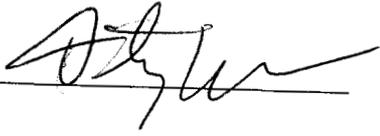
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