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 AZ CORP COMMISSION  
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Arizona Corporation Commission  
**DOCKETED**

OCT 15 2013

10 Attorneys for Freeport-McMoRan Copper & Gold Inc.  
 11 and Arizonans for Electric Choice and Competition

DOCKETED BY 

**BEFORE THE ARIZONA CORPORATION COMMISSION**

12 IN THE MATTER OF THE  
 13 COMMISSION'S INQUIRY INTO RETAIL  
 14 ELECTRIC COMPETITION

DOCKET NO. E-00000W-13-0135

**FREEPORT-MCMORAN COPPER  
 & GOLD INC. AND ARIZONANS  
 FOR ELECTRIC CHOICE AND  
 COMPETITION APPLICATION  
 FOR REHEARING**

15 Pursuant to A.R.S. §40-253 and A.A.C. R14-3-111, Freeport-McMoRan Copper  
 16 & Gold, Inc. and Arizonans for Electric Choice and Competition (collectively, "AECC")  
 17 hereby submits this Application for Rehearing ("Application") in the above-captioned  
 18 docket.

**INTRODUCTION**

19 On September 24, 2013, the Arizona Corporation Commission's ("Commission")  
 20 Executive Director issued a memorandum in the above-captioned docket directing the  
 21 Hearing Division's Docket Control to close the docket, based on a vote of the  
 22 Commission during a Staff Open Meeting held on September 11, 2013. For purposes of  
 23 this Application, AECC considers the September 24, 2013 memorandum as the "Order"  
 24 absent a written decision of the Commission explaining in detail why it chose to  
 25 abruptly close the debate on whether electric retail competition could be, and should be,  
 26

1 implemented in light of the Court of Appeals decision in *Phelps Dodge v. Arizona Elec.*  
2 *Power Coop.*, 207 Ariz. 95, 83 P. 3d 573 (App. 2004)(hereinafter “*Phelps Dodge*”).

3 Absent a written order, AECC has prepared an unofficial transcript of the  
4 September 11, 2013 Staff Open Meeting, attached hereto as Exhibit A. It appears that  
5 the Commission’s decision is based on a legal determination that “the threshold  
6 constitutional impediments to moving toward competitive market driven retail electric  
7 competition is because Phelps Dodge says market rates are not constitutional, that the  
8 Commission must use fair value.”<sup>1</sup> AECC contends this conclusion is a  
9 misinterpretation of the law, and respectfully requests that the Commission reconsider  
10 its decision based on the arguments presented below. In the alternative, AECC requests  
11 that the Commission issue a written order detailing why there are constitutional  
12 impediments barring the implementation of retail competition in Arizona, and why the  
13 Retail Electric Competition Rules (“Rules”) cannot be amended to comport with the  
14 requirements set forth in *Phelps Dodge*.

## 15 DISCUSSION

### 16 **I. The Phelps Dodge Decision.**

#### 17 A. Legal Principles

18 The *Phelps Dodge* decision stands for the following legal principles:

- 19 1. Even though Rule R14-2-1611(A), which allowed the market alone to  
20 determine rates, was declared unconstitutional, the remaining rules can be  
21 applied in a manner consistent with the Constitution.

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24 <sup>1</sup> While the Commission might consider the issues of divestiture and RTO/ISO/AzISA participation as constitutional  
25 impediments as well, this was not clear from the discussion. Several parties have argued, like AECC, that divestiture  
26 is not mandatory for retail competition (in fact, APS and TEP received waivers from this requirement). Furthermore,  
RTOs (or similar transmission organizations) are federally implemented by the Federal Energy Regulatory  
Commission.

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- a. “We have no difficulty concluding that the Rules are independent of R14-2-1611(A) and are enforceable standing alone.”<sup>2</sup>
  - b. “...we are persuaded that remand to the Commission with instructions to submit the invalid rules to the attorney general is more appropriate than vacating the entirety of the decisions approving the Rules.”<sup>3</sup>
2. “Article 15, Section 14 is self-executing as it affirmatively requires the Commission to determine fair value in setting rates, and a rule is therefore not needed to impose this requirement.”<sup>4</sup>
  3. “Although no rule specifically requires the Commission to determine and consider fair value, that omission does not invalidate the Rules in their entirety, as the superior court ruled.”<sup>5</sup>
  4. “..the Rules empower the Commission to gather sufficient information to make the fair value determination...”<sup>6</sup>
  5. “Nothing in the plain language of Article 15, Section 3 requires the Commission to prescribe a single rate rather than a range of rates.”<sup>7</sup>
  6. “...assuming the Commission establishes a range of rates that is “just and reasonable,” the Commission does not violate Article 15, Section 3, by permitting competitive market forces to set specific rates within that approved range.”<sup>8</sup>
  7. “No reason appears why the Commission must repeat the process of crafting rules rather than simply allowing it to now submit the invalid provisions to the attorney general for the review required under the APA.”<sup>9</sup>

B. Analysis of Fair Value Finding Requirement

Grand Canyon State Electric Cooperative Association (“GCSECA”) and Arizona

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<sup>2</sup> *Phelps Dodge* at 207 Ariz. 95, 110, 83 P.3d 573, 588  
<sup>3</sup> *Id.* at 126, 604  
<sup>4</sup> *Id.* at 110, 588  
<sup>5</sup> *Id.*  
<sup>6</sup> *Id.*  
<sup>7</sup> *Id.* at 109, 587  
<sup>8</sup> *Id.*  
<sup>9</sup> *Id.* at 126, 604.

1 Investment Council (“AIC”) argue that the Commission is required to find fair value and  
2 use fair value in setting rates. Implicit in the argument of GCSECA and AIC is a  
3 requirement that the Commission must set the rate in large part on the basis of the fair  
4 value finding. This argument, which appears to have been adopted by the  
5 Commission,<sup>10</sup> ignores specific language in the *Phelps Dodge* decision, which states:

6           “...the Commission should consider fair value when setting  
7           rates within a competitive market, although the Commission  
8           has **broad discretion in determining the weight to be given**  
9           that factor in any particular case: [584, 106 (emphasis added)]

10 Moreover, “the fair value provision in the Constitution is self-executing” and “a Rule is  
11 not required to impose the requirement.” As such, the court in *Phelps Dodge* did nothing  
12 to render the remainder of the Rules invalid by severing A.C.C. R14-2-1611(A). In fact,  
13 the court found that “The Rules empower the Commission to gather sufficient  
14 information to make the fair value determination.”

15           By focusing on the constitutional requirement for the Commission to make a fair  
16 value determination, GCSECA and AIC – and now the Commission – erroneously  
17 concluded that “fair value ratemaking is inherently antithetical to the concept of rates  
18 established by a competitive market.” This conclusion ignores the power of the  
19 Commission to consider fair value at the time it considers an Energy Service Provider’s  
20 (“ESP”) application for a Certificate of Convenience and Necessity (“CC&N”), yet use  
21 its broad discretion in determining what weight fair value should be given “when setting

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22 <sup>10</sup> Transcription:

23 “Alward: Chairman, Commissioners, Phelps Dodge is clear that when the Commission sets just and reasonable rates  
24 it must use the fair value constitutional provision in a meaningful way. And I think Phelps Dodge goes on to indicate  
25 that a competitive market rate is not just and reasonable.”

25 “Alward: Chairman, Commissioners, I think to say it another way, I think the threshold constitutional impediments to  
26 moving toward competitive market driven retail electric competition because Phelps Dodge says market rates are not  
constitutional, that the Commission must use fair value.”

1 rates within a competitive market.”

2 C. Range of Rates

3 GCSECA and AIC have argued that the Commission cannot set a broad range of  
4 rates within which the competitive market place can operate. Although the *Phelps*  
5 *Dodge* case did not define the word “broad”, GCSECA and AIC have defined the word  
6 to mean “open-ended.” There is no discussion in the *Phelps Dodge* decision of an open-  
7 ended rate. The decision does, however, state that the Commission may establish a  
8 range of rates in setting just and reasonable rates.<sup>11</sup>

9 It is of interest to note that during the *Phelps Dodge* case, GCSECA argued that  
10 Article 15, Section 3 of the Arizona Constitution requires the Commission to prescribe a  
11 single rate rather than a range of rates. The Court rejected GCSECA’s argument then,  
12 stating that:

13 “Nothing in the plain language of Article 15, Section 3 requires the  
14 Commission to prescribe a single rate rather than a range of rates.”

15  
16 The Court then found that:

17 “Consequently, assuming the Commission establishes a range of  
18 rates that is “just and reasonable”, the Commission does not violate  
19 Article 15, Section 3 by permitting competitive market forces to set  
rates within that approved range.”<sup>12</sup>

20 Furthermore, the authority to prescribe a range of rates is consistent with the analysis  
21 provided by the Arizona Center for Law in the Public Interest (“ACLPI”). In reviewing  
22 the *Phelps Dodge* decision on the narrow issues of fair value and just and reasonable  
23 rates, ACLPI notes that “The Court held that assuming the Commission establishes a  
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25 <sup>11</sup> In fact A.R.S. 40-368 provides for a “sliding scale of charges.”

26 <sup>12</sup> *Phelps Dodge* at 207 Ariz. 95, 109, 83 P.3d 573, 587

1 range of rates that is “just and reasonable,” the Commission does not violate Article 15,  
2 § 3 by permitting competitive market forces to set specific rates within that approved  
3 range.” See ACLPI Comments at 4, ln. 1-4. This conclusion is in direct conflict with  
4 the legal conclusions made during the September 11, 2013 Staff Open Meeting.

5 D. Monopoly Service and the Electric Competition Act of 1998

6 Salt River Project contends that the Arizona Constitution mandates a system of  
7 regulation which is inapposite to “de-regulation,” and that the Electric Competition Act  
8 of 1998 (“EAct”) is outdated and no longer applicable. SRP is incorrect on both  
9 counts.

10 SRP’s notion that a competitive market is antithetical to Arizona’s mandated  
11 system of regulation (just and reasonable rates) implies a regulatory scheme centered  
12 around monopolies, and completely ignores the fact that competitive forces in the  
13 telecommunications industry are already being used in Arizona to ensure just and  
14 reasonable rates. In *The Mountain States Telephone and Telegraph Company v. Arizona*  
15 *Corporation Commission*, 132 Ariz. 109, 113, 644 P.2d 263, 276, the court held that:

16 The constitutional provision which granted this authority [to prescribe just and  
17 reasonable rates] and hence jurisdiction is silent as to any concepts of  
18 “regulated monopoly.” The concept of the regulated monopoly arose from the  
19 legislature in granting the Commission the authority to issue certificates of  
convenience and necessity to public service corporations.”

20 To imply that regulated monopoly electric service is a constitutional mandate is simply  
21 unsupported by Arizona case law. In fact, the EAct states otherwise, and permitting  
22 electric generation service prices to be established “in a competitive market” comes with  
23 it the requirement in A.R.S. §40-207 for the Commission to issue CC&Ns to electric  
24 service providers, and the discretion to impose conditions together with the Rules, which  
25 the *Phelps Dodge* court found sufficient to make a fair value determination. Again, it  
26

1 appears that the Commission has adopted the general concept that “market rates are not  
2 constitutional” when in fact, *Phelps Dodge* specifically states that market rates can be  
3 just and reasonable, as long as the range of rates approved are just and reasonable  
4 themselves.

5 E. The Rules

6 The electric competition Rules which the *Phelps Dodge* decision hold to be  
7 invalid by the Court did not eliminate the remaining regulatory framework, which can  
8 govern electric retail competition. The Rules that were invalidated by the *Phelps Dodge*  
9 decision (because they were not submitted to the Arizona Attorney General for  
10 certification under the APA) are not indispensable to the reinstatement of retail electric  
11 competition because most, if not all, of the subject matter covered by the Rules that were  
12 invalidated are covered by Arizona law and the General Rules of the Commission.  
13 Furthermore, there is no time limit within which the Commission must submit Rules for  
14 certification by the Attorney General. Finally, the APA does not require the  
15 Commission to conduct any evidentiary hearing before promulgating rules.

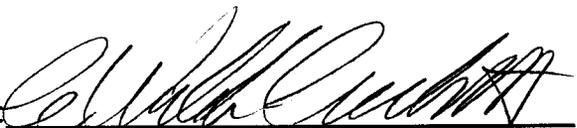
16 CONCLUSION

17 For the reasons set forth herein, AECC asserts that the *Phelps Dodge* decision  
18 does not create constitutional impediments to the implementation of electric retail  
19 markets in Arizona, and urges the Commission to reconsider its decision to pre-maturely  
20 end the debate and its consideration of electric retail competition in this proceeding. It is  
21 improper for the Commission to close the docket and effectively reject electric retail  
22 competition without a formal opinion and order explaining the factual and legal basis for  
23 not moving forward in accordance with A.R.S. §§ 40-202(B) and 40-207(B). Therefore,  
24 in the alternative, AECC requests that the Commission issue a written order explaining  
25 why the *Phelps Dodge* decision bars the Commission from implementing market rates  
26 and developing a competitive electric retail market in Arizona, despite the fact that a

1 competitive market exists in the area of telecommunication services, with providers  
2 offering a range of rates that do not violate the Arizona Constitution..

3 RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of October, 2013.

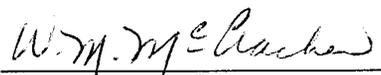
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**EXHIBIT A**

ACC Meeting – September 11, 2013  
(Unofficial Transcript of Audio Recording)

Chairman: All right, good afternoon. Thanks everybody. Welcome to the staff meeting. Let's jump right in and take up item number one. Commissioner Burns on commission discussion. Possible vote etcetera concerning a letter to VP in support of the technical work groups proposed by the bart alternatives. Commissioner Burns?

Burns: Thank you Mr. Chairman. I know that we weighed in earlier on, on this issue and had an opportunity to attend a presentation in Sedona by the so-called TWIG proponents or the people that were involved in that negotiation and it seemed to make sense, at least to me, that they had put together a pretty good proposal. Obviously has to be approved yet by the Department of Environmental Quality. I believe maybe some other federal agency as well, but since we did weigh in earlier I thought at least we did talk about it a little bit and maybe weigh in once more and support their efforts. I know there are some that aren't in agreement necessarily, but I haven't really heard an alternative, so I think it would, I believe anyway, it would be good for us to maybe make our position known.

Chairman: Commissioner Bitter Smith.

Bitter Smith: Mr. Chairman, I would just commend Commissioner Burns for putting it on the agenda. It's such a great idea. I wish I had thought of it. But I didn't, so I think you and I attended the field hearing on this issue and heard a little bit of a different opinion but really in a minority point of view and heard I think the reasons why we should weigh in and support. So I would certainly support your motion.

Chairman: Yeah, I would echo those comments and obviously if any commissioner is not comfortable signing as in year's past, they don't have to, and I was privileged to speak at the field hearing and appreciate Congressman Gosar's leadership in making it happen and the rest of our well, the rest of our Republican delegation as well. And I mention that this is probably the best deal possible, a very imperfect one, but in light of the alternatives probably the best we could do. So, I'll look at this letter and we'll look forward to signing it.

Burns: And to that point, Mr. Chairman, I think the letter should come out of your office obviously so.

Chairman: Yeah, well whoever wishes to sign it can sign it, yeah. But I appreciate your putting this on the agenda Commissioner Burns. Anybody else have any thoughts?

? [Inaudible]

Chairman: Okay. [laughter]

? [Inaudible]

Chairman: About most anything. I mean it has to be noticed of course.

? [Inaudible]

Chairman: Okay. Well you don't have to sign the letter. You know. Free will.

? [Inaudible]

Chairman: Yeah. Sure. Just I think thoughts.

? [Inaudible]

Chairman: Sure. Vote to include dissenting thoughts. [laughter]

? [Inaudible]

Chairman: Right. Right. Okay, well let's, I guess we'll do a roll call on that then. You've heard the motion. Madame Secretary, will you call the roll?

Secretary: [Calls Roll]

Chairman: Aye. By your vote of five ayes, amazingly zero nays, some people just quiet, you have decided to weigh in positively on this issue. Okay. Next step, number two, Commission discussion consideration possible vote concerning for the process and potential next steps related to the Commission's inquiry into electric retail competition including matters reflected in Commissioner Bob Burns September 3<sup>rd</sup>, 2013 letter to the Docket. And, I'm going to suggest we go into executive session to receive legal advice. So all of those in favor, say aye.

Response: Aye.

Chairman: All opposed.

? [nothing]

Chairman: Okay, great. See you all later.

### **EXECUTIVE SESSION**

Chairman: All right, welcome back everybody. Thanks for your patience. Ms. Alward I had a couple of legal questions, which I think can probably merit yes or no responses, although you obviously respond as you please needless to say. Without, in your opinion, without a constitutional change, does Phelps Dodge preclude a successful attempt to reach a competitive marketplace market?

Alward: It's my view that Phelps Dodge is clear when it refers to the Constitutional impediments, namely market rates as a threshold problem with moving toward a competitive rate setting market.

Chairman: And on the issue of divestiture, is it your opinion the Commission lacks the Constitutional authority in that area?

Alward: Phelps Dodge indicates that the Commission lacks Constitutional and/or statutory authority. I think the opinion indicates that the utilities agree to the divestiture in light of the strand it cost provision that the opinion also indicates that the Commission lacks authority either statutory or Constitutional to mandate the divestiture.

Chairman: Colleagues, any questions for Ms. Alward? I might have a couple more. Commissioner Burns.

Brenda Burns: Well, we're in executive session and we can't, we won't discuss that so it's hard to know what else to say other than there are differing opinions and of course, I highly respect our legal division, but we did have a meeting last week and certainly there were some areas of agreement and some areas of disagreement, and some options or I think what might be called work-around options for some of those potential impediments that we haven't fully explored but that has been put out there from other attorneys who do believe they would stand up in court. So, differing opinions. So we appreciate you nonetheless.

Chairman: Ah, Ms. Alward, can you touch upon the issue of fair value and how that relates to Phelps Dodge as well.

Alward: Chairman, Commissioners, Phelps Dodge is clear that when the Commission sets just and reasonable rates it must use the fair value constitutional provision in a meaningful way. And I think Phelps Dodge goes on to indicate that a competitive market rate is not just and reasonable.

Chairman: And could you touch upon the issue of the munies and the SRP and how that relates and any potentially competitive environment?

Alward: Well, our Commission's jurisdiction is over public service corporations, and I don't believe that without some statutory or constitutional change that if the Commission wanted to implement statewide competition, it could do so without those changes, and so in effect, you would be able to address competition among our public service corporations albeit under the constraints of Phelps Dodge, but you wouldn't be able to include SRP, the irrigation districts, the munies, and the electric districts under the Commission's requirements.

Chairman: Ah, Commissioner Pierce, did you have a question or?

Pierce: Well, and that answers some of it I am concerned about what the size and scope an RTO would need really to be and held that and then I have a map in my office

of all those RTOs that I, right, all those organizations that manage the wires and I have maps of how they the different areas they take in and how those compliment each other, so I, it seems to me it would be difficult without SRP in that RTO to actually function, but more so, I think there's other issues about all of the folks in the RTO have roughly the same peak time and to how run an efficient RTO, but that's not. I want to keep this to the legal side, but you're saying that, well what about the coops? We could draw those into an RTO, correct?

Alward: Right now, Phelps Dodge indicates that we did not have the authority to mandate the AISA and membership by the co-authority utility.

Pierce: And I thought....

Alward: And there was some issue as to how far we could go in having the AISA direct or control.

Pierce: Okay. And I meant to, And that's one we didn't ask him in the exec session I don't think on the coops. Right. And I didn't – okay, so there could be a legal drawback for them as well?

Alward: For any, any public service corporation which includes the cooperative to join the Commission's authority to mandate membership.

Pierce: Anyone that's not an investor of a utility we have [Inaudible]

Alward: Both the investor owns utilities and the cooperative. We could not, under Phelps Dodge there is an issue as to whether we could mandate membership in an AISA. So, that could be then extended to mandate a membership to an RTO.

Pierce: Right. Thanks.

Chairman: Commissioner Bitter Smith, did you have any questions?

Bitter Smith: Again, so that probably in simple language your advice is that this conversation is not a conversation the Commission can have but rather the conversation has to have with a potential change to the Constitution, that's as clear as it gets.

Alward: Chairman, Commissioners, I think to say it another way, I think the threshold constitutional impediments to moving toward competitive market driven retail electric competition because Phelps Dodge says market rates are not constitutional, that the Commission must use fair value.

Chairman: Mr. Bob Burns. I saw you reaching for the mike.

Burns: Yeah, well Mr. Chairman and I don't know if I really have a question or maybe they'll question out of this, but if the, if the fact that the Phelps Dodge creates a legal impediment that we can't get around in order to go to what was being referred to as retail competition, it's still, in my mind, does not prevent us from

continuing to study the existing model and look for improvements in that model which might include some element of competition at some level. I don't know that. I'm just saying that there might be an opportunity to do that. And so, I guess what I'm saying is that in spite of the advice that the Phelps Dodge creates an impediment that requires a constitution and/or statutory changes that should not be a shut-down in my mind, of this issue. I think we need to continue to look at this. There are, there are a number of people, people, a number of companies out there who have power to sell, if you will. And so, there may be an advantage to the consumers of this state if they are given the opportunity to sell that power. One way or another. So, my position is that we need to continue to look at this.

Chairman: And Mr. Olea, can I ask you a policy question? We are all aware that there's about 6,000 megawatts in merchant power basically sitting there. This of course relates to issues of transmission and export and such, and could you touch upon potential policy solutions to deal with the issue above and beyond potentially having to, dealing with it in a context of a competitive marketplace. The fact that there is so much power sitting out there, could you appraise this as some of our options in that regard?

Olea: Mr. Chairman and Commissioners, this is Steve Olea for Staff. I think this goes to what Commissioner Bob Burns has talked about, about if you don't look at retail competition the way you're looking at it right now that you could continue to look at other ways to do something. And at least sitting her thinking, there's probably many ways you could do that. One, is in the last APS rate case, you had the AG1 rate. You could look at doing something like that for all utilities. You could look at expanding that in the next rate case for APS. You could look at in all rate cases for electric companies for them to offer different types of rates. And I think right now you know we talk about time and use rates and that type of thing. There's all kinds of different rates that they could come up with that would give customers more choice. So, there are other things as was stated by Commissioner Bob Burns that you could, that even if you don't go to a strict retail competition model, you could still do other things within the regular cost of service model where you still have jurisdiction over all the utilities, but have them offer and do different things for different customer types that you could then look at in a rate case and make a conscious decision in that rate case of this is what we're going to do for this customer class, or that customer class, or all customer classes. But you would do it within each individual rate case, still have jurisdiction over there all that, and still you know, offer all those different options. Again, and to go back to your original question, that comes because right now we do have power that's available. At least we do today. Ten years from now, you know, 12 years from now, who knows what that's going to be, but even without that you still might want to have all these different options for the different, all of the different customer classes for all the different utilities. And then that way you could design it individually for the utilities because you may want to do something for one type for APS that would not apply to Sulphur Springs or to another coop, but you would look at that individual area, how it served and see

what options work best for each so you continue doing exactly what was said by Commissioner Bob Burns.

Chairman: Okay, Commissioner Brenda Burns.

Brenda Burns: Ah, thank you Mr. Chairman. A few things. First of all, I did not anticipate, I guess I should have read it, as broad as it's written that we would be discussing potentially ending this debate on constitutional grounds or I would have come in more prepared with all the information that I had from last week. But, but having said that, one of the discussions that the proponent said was that certainly yes, fair value would be considered and that a rate range, a rate range was agreed by both sides that a rate range was doable. So there were areas of agreement. There were areas of disagreement. I simply tried to negotiate, see what we could agree and disagree on and try to move forward and have been trying to look at it from a very methodical fashion to see where we should, could or shouldn't go in this entire debate. One thing that has, one of my many, many things that have come to mind as I have been looking at this is the innovations that are discussed. You know? The proponents say if we do this there could be so many innovations. But it does occur to me that there are a lot of innovations out there anyway. Perhaps they could get spurred under a competitive model. I'm not sure, but some of the things that I look is, you know, right now. Right now there's nothing to keep a Wal-Mart or any big industrial plant if they find it economically feasible, they could put on ah, you know, let's say that tomorrow batteries, or you could say store your power that you don't use from solar or something. I mean I don't know how far we are away from those kind of innovations. If it became economically feasible, that or the bloom box or these other different things we hear about, could be things that big industrial areas might say you know, we're going to supply our own power and we've got all the backup we need and we don't need the grid and there are gone. And if they do that, and that could happen I guess in six months, a year or 20 years. I'm not sure when those kind of things would or could occur, if that happens, nobody is going to, I mean they are not going to be, you talk about a cost shift. They are just going to be gone. Okay? If that happens. Those are things that I think are in our future. I'm not sure how much they are in our near or long-term future, but those are things the Commission certainly needs to be looking at. I have one of the questions that has come to mind as we've been going through this and we're preparing for another round of sort of debates and discussions next week and then others in October on a variety of issues that we have found to be of disagreement and of discussion. All great discussions during this entire process. You know, the micro grid. I mean one of the questions that I've been asking is can HOA's, if we get these micro grids working good, can an HOA just say if we're all members and we're all paying for it and we own it, can we provide our own power without being regulated? That's an area that I think we should be looking at as well and what does that do to the grid? And we're always talking about when someone leaves the grid, we've got, everybody's got a cost shift. Everybody else has to pick it up. What do we do with that? So, these are changing times and you know, the constitutional legal issue debate will continue. Perhaps there are some areas that we can't, they are what they are, and

would require constitutional change and others that would provide a work-around. But, certainly, we do need to recognize that we are in a time of change and that it is in our future and some things are really going to need to change in the future of electricity and delivery. It's not going to keep staying the same. And I felt this was a great opportunity to discuss those things and would hate to see us pull the plug right now. Thank you.

Chairman Commissioner Bitter Smith.

Bitter Smith: Mr. Chairman and Ms. Alward, given the comments of Commissioners Burns, I don't know if that's the right grammatical, but and your very concise legal advice, would your recommendation be that the commission discontinue this docket and then presumably open up other dockets to talk about the issues that concern Bob Burns and Brenda Burns suggested, could that be done in the context of this docket? How could the Commission proceed to talk about potential changes that are within the parameters of the Constitution?

Alward: Chairman, Commissioners. I'm not sure that's precisely legal advice. I think that if the Commission wants to send a signal that the retail electric competition has met some threshold impediments that would be my view that the clearest way to signal would be to close the docket and then open up other dockets or docket that could explore other ways of managing with what I think is, could be viewed as a restructuring or move toward restructuring and incorporate some of the ideas that Commissioner Bob Burns has brought out and Commissioner Brenda Burns has brought out and the questions that the Chairman asked of Steve Olea.

Chairman: Ms. Alward, in your legal opinion, a Constitutional amendment is the only way to avoid our, the Commission continuing to butt its head as it were up against Phelps Dodge.

Alward: Chairman, I don't know if I'd say it that way, but I thinking the Commission would face substantial legal challenges related to the very clear language of Phelps Dodge that raises the barrier of fair value requirement in a meaningful way when you set rates under your constitutional Section 3 authority. I think Phelps Dodge says market rates in and of itself are not constitutional. --- [long pause] Should we go to the next line?

Chairman: [laughter] Okay, Commissioner Pierce. We're all pondering.

Pierce: And I would make a motion. I just don't know that I concluded everything that people would want to say. I tend to keep it a little bit simple. And maybe too simple. But I would make a motion that, if I can read my own handwriting, in light of the legal advice from our attorney, I make a motion that the Commission close its docket on retail competition and await full Constitutional authority before any further examination just as the Commission would on any proposal which comes before it. Now, that would be my motion. The thing about other dockets and that sort of thing you know I recognize that. And hopefully there

would be dockets that would open with the intent that we open those and that there were, and that we're going to be, there will be further Constitutional approval before we actually take them up. Because then we would be treading the same ground or locking the same ground as before. But, that's my motion.

Chairman: Okay. Ah, sure. All right. I don't know if [Inaudible] – I don't want to...

Bob Burns: Well, Mr. Chairman, if we're going to have a motion and a vote, I would offer a substitute which would include Commissioner Pierce's language but with the additional language that we do open up another docket at some docket or dockets at some near future time, after we've had a chance to determine title, subject, whatever, ah, for that docket.

Chairman: Okay. Ah, needless to say we don't need to vote on the substitute. I, yeah. Okay. Why don't we vote on,

? [Inaudible]

Chairman: Yeah, let's, sure, okay. Let's do.

Bre. Burns: Just to say Mr. Chairman that I think the vote is premature. I appreciate the advice and all but having sat through this last week, I believe this is premature. I appreciate the addition that the substitute is better to me than the original, but I'm going to be voting no for the underlying reasons.

Chairman: And I want to make it clear that I personally appreciate the work you've done and with the workshops and the clarification that certainly occurred as a result, and certainly clarified my views legally speaking on the issue. So I want to commend you for that as well. All right, let's do roll call on that. Madame Secretary.

Pierce: I just want to make sure that the motion is my language and then his language then it becomes the Burns and Burns motion. I vote Aye.

Chairman: Okay.

Secretary: Commissioner Bitter Smith?

Bitter Smith: Mr. Chairman, I too want to say thank you to Commissioner Burns. I have a transcript I still am going to read on my desk, from the hearing on Friday and I think there'll be an opportunity to have some other discussions about some of the bloom boxes and AGI rights are the things that might be interesting and a possibility for our future in Arizona, but I also vote AYE.

Secretary: Commissioner Bob Burns.

Bob Burns: Well, since I offered the substitute, I'm kind of stuck, but I'm not necessarily in strong favor of closing up the current docket, but with the opportunity to open another docket or dockets, I'll vote AYE.

Secretary: Commissioner Brenda Burns.

Bre. Burns: No.

Secretary: Chairman Stump.

Chairman: Well, I vote AYE strictly on the legal arguments that I have heard and I would echo much of what Commissioner Bob Burns has said and I want to re-emphasize that, that it's my vote is strictly on the threshold, Constitutional impediment as I see it and others see in light of the legal advice I've received. So by your vote of four AYES and one NAY, you have voted to close the docket and open up dockets on issues relating to the potentially innovative policy decisions that we'll be exploring. All right. Thanks everybody. Let's move on to Item Three: Commission discussing consideration and possible vote concerning reopening Docket No. WS02987A etcetera pursuant to A.R.S. 40-252 for purposes of considering whether to modify and Commission's decision etcetera, etcetera.

? [Inaudible]

-----END OF DISCUSSION ON RETAIL COMPETITION-----