BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

SUSAN BITTER SMITH - CHAIRMAN
BOB STUMP
BOB BURNS
DOUG LITTLE
TOM FORESE

IN THE MATTER OF TUCSON ELECTRIC POWER COMPANY, INC. FOR (1) APPROVAL OF A NET METERING TARIFF AND (2) PARTIAL WAIVER OF THE NET METERING RULES.

DOCKET NO. E-01933A-15-0100

STAFF'S REPLY BRIEF

The Utilities Division ("Staff") of the Arizona Corporation Commission ("Commission") hereby files its response discussing whether the actions requested by Tucson Electric Power Company's ("TEP" or "Company") March 25, 2015, Application in this Docket should be considered in a rate case proceeding. As directed by the Administrative Law Judge ("ALJ") in the April 28, 2015, Procedural Order, the parties filed initial briefs by May 15, 2015. The parties were further directed to file any response briefs by May 29, 2015. Staff continues to assert that the issues raised by TEP should be addressed in its next rate case.

I. BACKGROUND.

On May 15, 2015, eight of the parties that were granted intervention filed initial briefs in response to the ALJ's April 28, 2015, procedural order. Of the eight parties that filed initial briefs, five of the parties recommend that the issues be addressed in the Company's next rate case, two of the parties assert that the issues can be addressed outside of a rate case, and one party seeks to enforce the settlement agreement that TEP entered into in its last rate case. In particular, both TEP and the Residential Utility Consumer Office ("RUCO") argue that the relief the Company is seeking can and should be addressed outside of a rate case.[1] Mr. Koch, The Alliance for Solar Choice ("TASC"), The Arizona Solar Deployment Alliance ("ASDA"), Vote Solar, and Staff, primarily and

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[1] TEP Initial Br. at 6; RUCO Interim Solution Br. at 1("RUCO's Brief).

to varying degrees believe the issues raised by the Company are best addressed within a rate case.[2] The Arizona Solar Energy Industry Association ("ARISEIA") moved to dismiss the application and have the Commission order TEP to comply with the settlement agreement that it entered into in its last rate case.[3]

II. THE ISSUES RAISED BY THE PARTIES DO NOT PREVENT THE COMMISSION FROM ADDRESSING THE ISSUES RAISED BY TEP IN ITS APPLICATION.

A. The Commission May Lawfully Process TEP's Application Outside Of A Rate Case.

TASC argues that TEP's Application attempts unconstitutional single-issue rate making. Citing to *Scates v. Arizona Corporation Commission*, TASC asserts that the Commission is required to determine the "fair value" of a utility's property and use that value as the utility's rate base, and then determine what the rate of return should be and then apply that figure to the rate base in order to establish just and reasonable tariffs.[4] TASC claims that TEP's Application seeks to unconstitutionally bypass these constitutional requirements.

TEP, on the other hand, asserts that because the initial net metering tariffs and the periodic annual avoided cost resets are done outside of a rate case, that any change to its tariff can also be done outside of a rate case. The Company argues that such actions are not inconsistent with the legal requirements of *Scates*.[5] The rationale asserted by TEP is that the relief sought does not impact its fair value or result in an increase in its authorized rate of return. Similarly, RUCO asserts that if, in fact, TEP's proposal does not adjust the rate base or the rate of return, then the Company's proposed tariff would not create any fair value issues. RUCO claims that a revenue neutral proposal which simply shifts costs within the residential rate class would not violate the requirement to find fair value.

Staff agrees with RUCO and TEP that the Commission is not required to address the issues raised by TEP's Application in a rate case, but for different reasons. Further, Staff disagrees with

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[2] Koch Initial Br. at 3; TASC Br. at 1; ASDA's Br. at 1, Vote Solar Support of Dismissal Br. at 1; Staff's Mot. to Dismiss at 1.

[3] ARISEIA's Combined Initial Br.; Motion to Dismiss, and Mot. to Enforce Settlement Agreement Br. at 4 ("ARISEIA's Brief").

[4] TASC Br. at 4, 188 Ariz. 531, 578 P.2d 612 (App. 1978)

[5] 188 Ariz. 531, 578 P.2d 612 (App. 1978).

TASC's determination that the Commission is prohibited from engaging in rate making absent a rate case. The holding in *Scates* is contrary to what any of these parties are asserting. The holding is much narrower. A distilled view of that case criticized the Commission for increasing rates without any consideration of the impact:

> We . . . hold that the Commission was without authority to increase the rate without any consideration of the overall impact of that rate increase upon the return of . . . [the utility], and without, as specifically required by our law, a determination of . . . [the utility's] rate base.[6]

The *Scates* Court determined that the Commission had violated Arizona's constitutional provisions regarding ratemaking by setting rates without any consideration of the utility's rate base and without any inquiry into the effect of the increase upon the utility's rate of return.

The Court, however, was careful to make clear that a full rate case is not required for every rate change. As the Court specifically stated,

> [t]here may be exceptional situations in which the Commission may authorize partial rate increases without requiring entirely new submissions. We do not decide in this case, for example, whether the Commission could have referred to previous submissions with some updating or whether it could have accepted summary financial information.[7]

In short, Arizona cases establish that, subject to certain exceptions, the Commission is required to consider the "fair value" of a Company's rate base whenever it changes rates.[8] The requirement to determine fair value, however, is *not* the same as requiring a full rate case.[9] The Commission could move forward with the processing of this Application without violating the holding in *Scates*. Staff, nonetheless, believes that these issues should be addressed in the Company's next rate case.

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[6] *Id.* at 537, 578 P.2d at 618.

[7] *Id.*

[8] *See, US West Commc'n, Inc. v. Ariz. Corp. Comm'n,* 201 Ariz. 242, 34 P.3d 351 (2001); *Simms v. Round Valley Power & Light Co.,* 80 Ariz. 145, 294 P.2d 378 (1956).

[9] *See, e.g.,* Decision No. 74202 at 26-27, Docket No. E-01345A-13-0248.

B. The Settlement Agreement From TEP's Last Rate Case Is Not A Barrier To Addressing The Issues Raised In This Application.

TASC and ARISEIA argue, in part, that TEP is prohibited from seeking additional relief from the Commission regarding the under-recovery of fixed costs in its Application because TEP raised the same exact issue in the Company's last rate case. More specifically, TASC and ARISEIA assert that it is a violation of TEP's 2012 Settlement Agreement that the Company entered into because it is seeking to relitigate the same issue within the context of this Application.[10] TASC raised five points in support of its assertion that TEP is prohibited from seeking relief through this Application due to the Settlement Agreement.[11]

First, TASC asserts that the Company identified the same lost revenues from distributed generation ("DG") as an issue in its last rate case.[12] Staff does not believe the Settlement Agreement would prohibit the Commission from processing this Application, if it determined it is in the public interest to do so. Under TASC's theory, a public service corporation, that enters into a settlement would never be entitled to seek relief in a subsequent proceeding on an issue that is the same as that addressed in the settlement. However, issues often arise after a settlement has been entered into, which require Commission action. The Commission is not precluded from addressing these simply because there is a settlement agreement.

Second, TASC argues that under-recovery of revenue resulting from the adoption of DG was a primary issue in the Company's last rate case. TASC further claims that the signatories to the Settlement Agreement proposed that the LFCR be approved to "recover a portion of distribution and transmission costs associated with residential, commercial and industrial customers when sales levels are reduced by EE and DG," and that when the Commission approved the Settlement Agreement and authorized TEP's LFCR that "resolved" all issues arising from that Docket.[13] Again, TASC's position is that once an issue is raised and resolved by the Commission that it can never be addressed

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[10] TASC Br. at 5; ARISEIA Br. at 2.

[11] ARISEIA raises essentially the same issues as TASC asserting that the same issues were raised and addressed in TEP's last rate case, and that TEP is prohibited from raising those same issues again in this Application.

[12] TASC Br. at 6.

[13] *Id.* at 8.

again in the future. For the reasons discussed above, this would make little sense. Staff would also refer TASC to section 8.2 of the Settlement Agreement which reads: "Nothing in this Agreement is intended to bind the Commission to any specific EE or DG policy or standard."[14] Staff believes that this provision undercuts TASC's argument that the Commission would be violating the Settlement Agreement if it addressed the issues raised in TEP's Application.

Third, TASC claims that TEP had the opportunity to ask for the relief that it now seeks in its rate case, but chose not to and is now precluded from doing so now outside of a rate case.[15] In particular, Section 15.2 of the Settlement Agreement indicates that

> the rate design portion of this Agreement shall remain open until July 1, 2014, to allow for the possible adjustment of specific tariffs to correct for unanticipated customer rate impacts that are determined to be inconsistent with the public interest....

Staff agrees that this provision would have given TEP the opportunity to seek changes to its rate design within the context of the Settlement Agreement, but that does not mean that the Commission is precluded from considering the issues raised by TEP in its current Application. The mere fact that the Settlement Agreement addressed TEP's under-recovery issue does not preclude TEP from seeking relief in the future or the Commission from granting additional relief if necessary, and in the public interest.

Fourth, TASC opines that TEP's proposed change to its net metering tariff could impact its authorized ROE and, therefore must be addressed in a rate case.[16] Although Staff agrees that this matter should be addressed in TEP's next rate case, because the Commission will have more tools at its disposal to address the issues raised by TEP, that is not to say that the Commission must do so. As discussed above, there is no legal prohibition to the Commission addressing the issues raised by TEP as long as it determines the impact of any change on the Company's fair value rate of return, and as long as it determines TEP's fair value rate base.[17]

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[14] Decision No. 73912, Ex. A at 7 (Section 8.2), Docket No. E-01933A-12-0291.
[15] TASC Br. at 9.
[16] *Id.* at 10.
[17] *Scates*, 188 Ariz. at 537, 578 P.2d at 618.

Finally, TASC states that TEP's proposal, if approved, would provide TEP with two remedies that address the same problem.[18] In particular, TASC indicates that TEP was awarded an LFCR to address the under-recovery of fixed costs, and the Company is seeking to remedy the same problem through the modification of its net metering tariff.[19] Staff believes this argument goes to the merits of what TEP is seeking, and not whether it can be addressed in this Application. That being said, TEP filed its request to reset its LFCR ("LFCR Reset") on May 1, 2015, and to the extent there is truly overlap between what the LFCR addresses, and the remedy that TEP is seeking in this Application, the Commission could address that issue in the LFCR Reset.

III. CONCLUSION.

Although there is no legal requirement that the issues TEP has raised be addressed in a rate case, a rate case will provide the Commission with more tools to address those issues. Further, addressing these issues in a rate case is more efficient, and will conserve Commission and Staff resources. It is Staff's understanding that TEP will in all likelihood be filing a rate case next year. If the Commission ultimately desires to address these issues in this Application, then Staff believes that a hearing is necessary.

RESPECTFULLY SUBMITTED this 29th day of May, 2015.

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[18] TASC Br. at 11.
[19] *Id.*

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