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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

DOUG LITTLE – Chairman
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ANDY TOBIN

Arizona Corporation Commission
DOCKETED
MAR 17 2016
DOCKETED BY

IN THE MATTER OF THE APPLICATION OF ARIZONA PUBLIC SERVICE COMPANY FOR APPROVAL OF LOST FIXED COST RECOVERY MECHANISM.

DOCKET NO. E-01345A-11-0224

PROCEDURAL ORDER

BY THE COMMISSION:

On May 24, 2012, the Arizona Corporation Commission ("Commission") issued Decision No. 73183. Decision No. 73183 approved new rates for Arizona Public Service Company ("APS"), and among other things, approved a Lost Fixed Cost Recovery Mechanism ("LFCR") for APS. The LFCR, which was proposed in a settlement agreement by parties to Decision No. 73183 ("Rate Case Settlement") and approved by that Decision, is a rate design mechanism developed to ensure that APS recovers a portion of its authorized fixed costs which it would otherwise not recover because of Commission policies on energy efficiency ("EE") savings and distributed generation ("DG") installations, which have the effect of lowering kilowatt hour ("kWh") consumption by APS's customers.

On January 15, 2016, APS filed an application, pursuant to the LFCR Plan of Administration ("POA") approved by Decision No. 73183, for approval of a LFCR Annual Adjustment Percentage effective March 1, 2016 ("LFCR Annual Adjustment Application" or "Application"). The Application states that APS calculated its requested LFCR Annual Adjustment Percentage in accordance with the POA, and that APS used metered data to calculate DG savings for 2015.[1] If the Application is approved as filed, the currently authorized LFCR Charge of 1.4592 percent would be increased to 1.7095 percent. According to the Application, approval of APS's request would result in a $7.9 million increase in

[1] Decision No. 74202 (December 3, 2013) ordered APS to implement a $0.70 per KW per month interim LFCR DG adjustment for all residential DG installations after December 31, 2013. APS states that its Application reflects such collections.

revenues for the 12-month collection period beginning March 2016. APS states that for a typical APS residential customer, the LFCR charge would increase roughly $0.34 per month, or 0.25 percent.

On February 24, 2016, the Energy Freedom Coalition of America ("EFCA") filed an Application for Leave to Intervene.

Also on February 24, 2016, EFCA filed a Motion for Procedural Conference ("Motion").

On February 25, 2016, APS filed its Response to EFCA's Application for Leave to Intervene and Motion for Procedural Conference.

On February 29, 2016, EFCA filed its Reply in Support of its Application for Leave to Intervene and Motion for Procedural Conference.

On March 7, 2016, the Commission's Utilities Division ("Staff") filed its Response to EFCA's Motion.

EFCA

In its Application for Leave to Intervene, EFCA states that it is a solar advocacy association whose members are solar companies, and that its member solar companies include Silevo, Inc., SolarCity Corporation, ZEP Solar, LLC, and NRG Energy, Inc. ("Members"). EFCA states that many of its Members have installed rooftop solar systems within APS's service territory.

EFCA states that if the LFCR Annual Adjustment Application is approved, current and potential customers of EFCA's Members, along with all other APS residential ratepayers, will experience increased costs through the LFCR. EFCA argues that its Members will be directly and substantially affected by the proceedings on the Application because its Members' customers will pay any LFCR adjustment, and that EFCA should therefore be allowed to intervene pursuant to A.A.C. R14-2-105 ("Rule 105").[2] EFCA asserts that its intervention will not unduly broaden the issues in this proceeding

[2] Rule 105 provides as follows:
R14-3-105. Intervention as party and other appearances
A. Intervention. Persons, other than the original parties to the proceedings, who are directly and substantially affected by the proceedings, shall secure an order from the Commission or presiding officer granting leave to intervene before being allowed to participate.
B. Application. An application for leave to intervene shall be in writing and must state the basis for the application. Such application shall be served and filed by an applicant at least five days before the proceeding is called for hearing. No application or leave to intervene shall be granted where by so doing the issues theretofore presented will be unduly broadened, except upon leave of the Commission first had and received. Upon the granting of an application to intervene by the Commission or the presiding officer, the intervening person shall thereafter be designated an "Intervenor".
C. Other appearances. Notwithstanding the provisions of subsections R14-3-105(A) and R14-3-105(B), any consumer or prospective consumer may appear at any proceeding and make a statement on his own behalf, at a time designated by the Commission or presiding officer. A person so appearing shall not be deemed a party to the proceedings. When two or more interested persons under this rule have

or prejudice any parties to the docket. EFCA further asserts in support of its intervention request that as a representative for its Members, it has specific knowledge about the impacts of the requested LFCR adjustment to offer the Commission, and that its intervention will obviate the need for each of its Members to intervene individually. EFCA asserts in its Application for Leave to Intervene that the LFCR "is likely unconstitutional."

EFCA contends that it has a direct and substantial interest in this proceeding. EFCA argues that the interests of its Members encompass the interests of its Members' customers, who are customers of APS and have an interest in ensuring fair treatment in regard to the solar energy systems they invest in or are considering purchasing or leasing. EFCA further argues that the Application directly and substantially impacts EFCA's Members because any change in APS's rates will be paid by EFCA's Members' customers.

EFCA asserts that its intervention would not broaden the issues presented in this proceeding, because the Commission is obligated to ensure that any rates adopted in this proceeding are just and reasonable, and must deny the Application if the LFCR is found to be unlawful. EFCA argues that questioning the legality of an application does not equate to broadening the scope of the proceeding.

EFCA's Motion requests that a procedural conference be set in this docket for the purpose of setting a hearing on the LFCR Annual Adjustment Application, or for instituting a stay on processing the Application until the Arizona Supreme Court issues its decision on appeal of the Arizona Court of Appeals' decision in *Residential Utility Office v. Arizona Corp. Comm'n*, 238 Ariz. 8, 355 P.3d 610 (App. 2014), *cert. granted* February 9, 2016 ("*RUCO*"). EFCA claims that the LFCR is similar to the SIB mechanism at issue in *RUCO*, and due to this alleged similarity, EFCA claims that *RUCO* "casts substantial doubt on the constitutionality of the LFCR." EFCA asserts that the Application raises disputed issues of fact and law that should be subject to hearing, and lists in its Motion 11 issues EFCA believes should be evaluated at hearing, including whether APS must refund monies already collected pursuant to the LFCR.

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substantially like interests and positions, the presiding officer may declare them a class of interested persons for purposes of the hearing. The members of the class shall designate to be spokesman for the class one of their number, or his attorney, or such greater of their number, or attorneys, as the presiding officer shall determine. More than one class may be established for a hearing.

Contrary to APS's assertion, EFCA contends that A.R.S. § 40-246 is not the proper procedural means for challenging the lawfulness of the LFCR.

APS

APS contends that EFCA's Application for Leave to Intervene should be summarily denied, because EFCA has demonstrated no direct or substantial interest in this proceeding, EFCA's intervention would unduly expand APS's routine compliance filing, and EFCA cannot offer assistance to the Commission.

APS asserts that EFCA has not demonstrated a direct and substantial interest in this proceeding as required by Rule 105. APS states that EFCA does not allege that it or any of its Members will pay the LFCR adjustment requested in the Application, and that while EFCA's Members may have customers who will pay the adjustment, EFCA cannot intervene on behalf of those APS customers any more than Wal-Mart could intervene on behalf of its customers. APS argues that EFCA has also failed to demonstrate how its interest, its Members' interests, or its Members' customers' interests, are substantial.

APS contends that EFCA's intervention would unduly broaden these proceedings, and would prejudice the current parties. APS states that the Application is a routine compliance filing which involves only the issue of whether APS has complied with the Commission-approved LFCR POA. APS asserts that the scope for the proceeding proposed by EFCA would expand this LFCR compliance proceeding into a rate case proceeding, contrary to the intent of the parties to the Rate Case Settlement. APS asserts that it, and all the parties to this rate docket who negotiated the Rate Case Settlement proposing the LFCR, would be prejudiced by EFCA's intervention in this compliance proceeding, because the Rate Case Settlement was based on a balancing of the parties' competing interests, and included the LFCR mechanism in lieu of the full rate decoupling or higher base rate increase that APS had requested.

APS states that Rule 105 does not provide "assisting the Commission" as a basis for intervention. APS argues that as an intervenor, EFCA would cloud the issue of whether the Application complies with the POA with its claims regarding the constitutionality of the LFCR, and EFCA would seek to delay this proceeding.

APS states that if intervention is denied, the Motion is moot, but if intervention is granted, the Motion should be denied because it is both procedurally and substantively improper. APS contends that the Motion is premature, because the constitutionality of the adjustment mechanism in *RUCO* is currently under review by the Arizona Supreme Court. APS asserts that a new legal review by the Commission would be redundant and wasteful, and asserts that the better course is to wait for further clarity from the court regarding the constitutionality of the SIB mechanism. APS also argues that the LFCR adjustment mechanism is substantively different from the SIB mechanism.

APS is dismissive of EFCA's implication that LFCR revenues might be subject to refund. APS states that there is no possibility of a refund of money collected under the LFCR, because the LFCR is a properly authorized rate, and that the time for reviewing Decision No. 73183, which authorized it, has long since passed.

APS asserts that the proper procedural means for raising the issues EFCA sets forth in its Motion would be for an entity with proper standing to bring a complaint pursuant to A.R.S. § 40-246.[3]

Staff

Staff does not address EFCA's intervention request, and limits its response to the Motion. Staff opposes both EFCA's request for a stay of the LFCR Annual Adjustment Application, and EFCA's request for a hearing. Staff states that the LFCR mechanism does not implicate fair value considerations, because it is a type of rate design mechanism intended to assist in the recovery of a

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[3] A.R.S. § 40-246 provides as follows:
40-246. Complaint alleging violation by public service corporation of law or rule or order of commission; exception; joinder of complaints; notice of hearing
A. Complaint may be made by the commission of its own motion, or by any person or association of persons by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law or any order or rule of the commission, but no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water or telephone corporation, unless it is signed by the mayor or a majority of the legislative body of the city or town within which the alleged violation occurred, or by not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of the service.
B. All matters upon which complaint may be founded may be joined in one hearing, and a complaint is not defective for misjoinder or nonjoinder of parties or causes, either before the commission, or on review by the courts. The commission need not dismiss a complaint because of the absence of direct damage to the complainant.
C. Upon filing the complaint, the commission shall set the time when and a place where a hearing will be had upon it and shall serve notice thereof, with a copy of the complaint, upon the party complained of not less than ten days before the time set for the hearing, unless the commission finds that public necessity requires that the hearing be held at an earlier date. Service may be made as a summons in a civil action is required to be served, or may be made in any manner giving actual notice, and no irregularity in the service is an excuse or defense.

previously authorized revenue requirement. Staff contends that the fact that the LFCR is a rate design apparatus sets it apart and outside *RUCO*, and therefore neither a hearing nor a stay in processing the Application are necessary.

Conclusion

EFCA advances no valid argument to justify granting it intervention in this LFCR Annual Adjustment Application proceeding. The LFCR was approved as part of APS's rates on May 24, 2012, in Decision No. 73183, pursuant to a settlement agreement approved by the Commission. EFCA's intervention would unduly broaden the narrow issues presented by the Application, which is essentially a compliance matter, to include issues EFCA outlines in its Application for Leave to Intervene and in its Motion.

Decision No. 73183 set guidelines for LFCR annual adjustments, and the parameters of the LFCR mechanism were subject to litigation during the hearing on APS's rate case application, and on the Rate Case Settlement, as was the legality of the LFCR itself. Although EFCA, as an entity, may not have participated in the APS rate proceeding, the APS ratepayers whose interests EFCA purports to represent were represented during the rate case hearing process, and no party sought to appeal Decision No. 73183. Although EFCA argues against the propriety of an appeal brought pursuant to A.R.S. § 40-246, absent such an appeal by a party with standing to bring such an appeal, the time for affected parties to litigate the specific terms, and legality, of the LFCR mechanism has long since passed. EFCA's intervention request effectively constitutes a collateral attack by attempting to sidestep the legal effect of Decision No. 73183 once it became a final Commission Decision.

EFCA points out that numerous entities similarly situated to itself were permitted to intervene in the original rate case in this docket; however, EFCA fails to adequately address the untimeliness of its request, in contrast to those parties' timely interventions.[4] EFCA also contends that its intervention would not prejudice the parties, because "if this were true, the settlement agreement would have either prohibited intervention or adopted more stringent standards for intervention." However, EFCA fails

[4] In the case of the Four Corners proceeding in this docket, the Commission publicly noticed the proceeding to allow additional interventions and presentation of new evidence. That proceeding differed factually from this LFCR Annual Adjustment Application proceeding. The Four Corners proceeding did not involve the implementation of an approved rate design mechanism, the parameters of which were agreed to by all parties and set by an approved POA.

to directly address the prejudice that would result if it were allowed at this late date to intervene in APS's LFCR Annual Adjustment request, which mechanism was subject to negotiation by the parties and review by the Commission prior to issuance of Decision No. 73183.

Therefore, pursuant to Rule 105, EFCA's Application for Leave to Intervene will not be granted because the intervention request is untimely, and EFCA's intervention would unduly broaden the issues presented by APS's LFCR Annual Adjustment Application.

IT IS THEREFORE ORDERED that **the Application for Leave to Intervene filed by the Energy Freedom Coalition of America is hereby denied.**

DATED this 17th day of March, 2016.

D Nodes for

TEENA JIBILIAN
ASSISTANT CHIEF ADMINISTRATIVE LAW JUDGE

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