



ORIGINAL

1 Court S. Rich AZ Bar No. 021290
2 Loren R. Ungar, AZ Bar No. 027101
3 Rose Law Group pc
4 7144 E. Stetson Drive, Suite 300
5 Scottsdale, Arizona 85251
6 Direct: (480) 505-3937
7 Fax: (480) 505-3925
8 crich@roselawgroup.com
9 lungar@roselawgroup.com
10 *Attorneys for Energy Freedom Coalition of America*

Arizona Corporation Commission

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BEFORE THE ARIZONA CORPORATION COMMISSION

**DOUG LITTLE
CHAIRMAN**

**BOB STUMP
COMMISSIONER**

**BOB BURNS
COMMISSIONER**

**TOM FORESE
COMMISSIONER**

**ANDY TOBIN
COMMISSIONER**

13 **IN THE MATTER OF THE)**
14 **APPLICATION OF TRICO)**
15 **ELECTRIC COOPERATIVE, INC,)**
16 **AN ARIZONA NONPROFIT)**
17 **CORPORATION, FOR A)**
18 **DETERMINATION OF THE)**
19 **CURRENT FAIR VALUE OF ITS)**
20 **UTILITY PLANT AND PROPERTY)**
21 **AND FOR INCREASES IN ITS)**
22 **RATES AND CHARGES FOR)**
23 **UTILITY SERVICE AND FOR)**
24 **RELATED APPROVALS.)**

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ENERGY FREEDOM COALITION OF AMERICA

POST-HEARING BRIEF

October 5, 2016

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1 Energy Freedom Coalition of America (“EFCA”), through its undersigned counsel, hereby
2 submits its Post-Hearing Brief.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. INTRODUCTION.**

5 Trico Electric Cooperative, Inc. (“Trico” or the “Company”) and the Utilities Division of
6 the Arizona Corporation Commission (“Staff”) have proposed a settlement agreement (the
7 “Proposed Settlement”) that asks the Commission to ignore well settled Commission precedent
8 while approving dramatic and controversial rate design alterations that are unsupported by
9 evidence. Importantly, the record shows that Trico and Staff deprived Trico’s customers of their
10 Due Process rights by materially altering Trico’s proposal, as noticed, long after the time for
11 intervention had past and, as of the last day of the hearing, had still not provided all Trico customers
12 with notice of the newly proposed changes. The record also clearly demonstrates that Trico is
13 unprepared, from a technological and administrative standpoint, to become the first utility in
14 Arizona to force all of its residential customers to take service under a controversial mandatory
15 demand rate structure.

16 The Proposed Settlement, if approved, would all at once: (1) wipe away any and all
17 economic benefit to Trico customers derived from distributed generation rooftop solar (“DG”); (2)
18 eliminate the utility’s successful and cost effective net metering (“NEM”) program; (3) fail to fully
19 grandfather and protect existing DG customers from material rate changes; and (4) implement a
20 confusing new mandatory three-part demand rate without the necessary metering infrastructure,
21 comprehensive education program, or even notice to its members.

22 The Proposed Settlement includes provisions that both freeze Trico’s current net metering
23 tariff and creates a new arbitrary “DG Energy Export Tariff” that is applicable to DG customers.
24 These provisions violate two important points of the Commission’s Net Metering (“NEM”) Rules
25 and must be denied.

26 Furthermore, the Proposed Settlement would adopt an inherently unfair approach to
27 grandfathering existing residential solar DG customers onto its current NEM tariff that the
28 Commission just rejected in another proceeding, as it would set a retroactive deadline of May 31,

1 2016 for submitting NEM applications, fail to grandfather DG customers on their current rate
2 design, fail to ensure that DG customers are grandfathered beyond Trico's next rate case, and fail
3 to ensure that these customers will continue to receive the full value for their solar DG output.
4 Importantly, the Proposed Settlement does not even protect existing DG customers from being
5 forcibly transitioned to three-part rates. The Proposed Settlement constitutes retroactive rate
6 making and is unsupported by past Commission decisions including the recent August 18, 2016,
7 UNS Electric, Inc. ("UNSE") rate application Decision.¹ It is also contrary to the clear guidance
8 that Commissioner Tobin provided at the outset of this hearing.²

9 Similarly, neither Trico nor Staff offered adequate support for the Proposed Settlement's
10 premature attempt to implement a mandatory residential demand charge, freeze Trico's residential
11 TOU rate option, and implement a new arbitrary DG export rate in advance of a final decision in
12 the Commission's Value of Solar docket—again in contradiction to the recent UNSE Decision. In
13 addition, Staff provides a flawed analysis of solar DG economics and the appropriate financial
14 benchmarks to which Trico members' DG investments should be compared that obfuscates the
15 true detrimental impacts that the new DG export rate would have on DG.

16 In light of these legal defects, violations of Commission Rules and decisions, and
17 shortcomings in both the Proposed Settlement and the supporting evidence submitted by Trico and
18 Staff, the Commission should reject the Proposed Settlement as set forth herein.

19 **II. SUMMARY OF PROPOSED FINDINGS**

20 In each of the following Sections, the various aspects of Trico's proposal will be discussed
21 and the policy and legal reasons for why each must be rejected will be set forth. Several proposals
22 contained in the Settlement Agreement must be denied as a matter of law as Trico failed to furnish
23 adequate and constitutionally mandated notice and also seeks a waiver of NEM rules despite the
24 fact that the law does not permit such a waiver. Instead, the Commission should find based on the
25 record that the current rate design and NEM policies for DG customers should be maintained.

26 It is important to remember that, even in the context of a settlement, the Company alone
27

28 ¹ Docket No. E-04204A-15-0142, Decision No. 75697 ("UNSE Decision").

² Tobin Tr. Vol. I at 8:12-16.

1 possesses the burden to prove that the proposed rates, tariffs, and charges are just, reasonable, and
2 nondiscriminatory. As will be demonstrated at length below, the Company has not carried its
3 burden. Trico has not presented the data, studies, or analyses necessary to support its requested
4 changes to its rate design, the NEM export rate, or its customer charges. The Company also has
5 failed to prove the existence of, amount, or causation of its purported under-recovery. In failing to
6 support its proposals with the requisite data, studies, or analyses, Trico has not satisfied its burden
7 of proof and the Commission is obligated to reject its proposals. Additionally, Trico's proposals
8 run afoul of Commission policy by: (1) seeking to avoid full grandfathering of DG customers
9 under current rates and tariffs; (2) attempting to adopt a three-part rate design without having
10 designed or implemented an education plan; (3) trying to adopt new NEM tariffs without
11 developing a reasonable value of solar or adopting a plan to account for the outcome of the pending
12 Value of Solar docket; and (4) acting in a manner contravening the principles of gradualism in
13 seeking an increase in its customer charge to \$24.00.

14 Accordingly, EFCA requests that as a matter of law and of Commission policy, and
15 because of Trico's failure to meet its burden to properly support its proposals, that the Commission
16 reject the proposed changes to Trico's rate design, export rate, and customer charge. Instead, the
17 Commission should maintain Trico's current rate design and issue a ruling permitting for the
18 implementation of optional experimental rates focused on time-of-use and time varying rates and
19 design a rate or rates that reflects peak load considerations on its system. If these experimental
20 designs prove successful, the Company can propose a full roll out of such rate designs in its next
21 rate case and, in that case, the Company can provide notice to its customers of its intent to
22 implement dramatic rate design changes as required by law. To the extent that the Commission
23 does adopt any of the Company's proposals, it should also provide for the full grandfathering of
24 DG customers that submitted an interconnection application prior to the issuance of a final order.
25 The Commission should also provide for a second phase of this rate case wherein a final decision
26 will be made concerning any proposals that impact only DG customers after consideration of the
27 findings made in the Value of Solar docket as applied to the information presented herein.

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1 **III. TRICO FAILED TO FURNISH PROPER NOTICE OF ITS INTENT TO ADOPT A**
2 **THREE PART DEMAND RATE OR SEEK AN INCREASE IN THE CUSTOMER**
3 **CHARGE TO \$24.00 AND, THEREFORE, THESE PROPOSALS MUST BE**
4 **DENIED.**

5 **A. Full and Timely Notice is required to be given as a matter of Due Process.**

6 Providing proper notice is critical for a utility's customers and the public to gain an
7 understanding of what is at issue in a rate case. Due process unequivocally requires that sufficient
8 notice be given. "The elements of procedural due process are notice and an opportunity to be
9 heard."³ "The issue of notice for due process purposes is not merely a question of the mode of
10 notification employed. Due process also requires that the notice be of such nature as reasonable
11 to convey the required information. That is, the content of the notice must be sufficient to apprise
12 interested parties of the pendency of the action and to make them aware of the opportunity to
13 present their objections."⁴ "The goal of exposing the public decision-making process to the public
14 itself could be significantly, if not totally thwarted, in the absence of mandatory notice provisions
15 and their enforcement."⁵ Furnishing full, fair and accurate notice of a proceeding such as this is
16 the only way to ensure participation by interested parties and protect their due process rights.
17 Proper notice is particularly important when, as here, a utility seeks to impose an entirely new rate
18 design and customer charges.

19 Having recognized the paramount importance of providing full and fair notice, the
20 Commission has imposed notice requirements for rate cases that afford customers and the public
21 with the opportunity to intervene or otherwise participate in the proceedings.⁶ Under Commission
22 rules, the Administrative Law Judge instructs the "form and manner" of notice to customers that
23 utilities must provide for a rate hearing.⁷ This typically occurs early in the proceeding to ensure
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25 ³ *Iphaar v. Indus. Comm'n of Ariz.*, 171 Ariz. 423, 426, 831 P.2d 422, 425 (App. 1992) (Internal quotations omitted).

26 ⁴ *Matter of Rights to Use of Gila River*, 171 Ariz. 230, 237-38, 830 P.2d 442, 449-50 (1992) (Internal citations omitted).

27 ⁵ *Carefree Improvement Ass'n v. City of Scottsdale*, 133 Ariz. 106, 649 P.2d 985 (App. 1982).

28 ⁶ A.A.C. §§ R14-3-103, -105, and -109; see also A.R.S. §§ 41-1021, -1022, and -1023 (setting forth specific notice and public participation requirements to engage in rule making).

⁷ A.A.C. § R14-2-105.

1 that the public is afforded enough time to participate and if desired, intervene, in the proceeding.
2 As such, the Administrative Law Judge's required notice format is generally based on the utilities'
3 proposals as outlined in the initial rate case application. This holds true of the notice that was
4 issued in the instant proceeding.⁸

5 And yet, in this rate case, the Company admits that its "notice did not tell people that [Trico
6 was] proposing rate design changes or demand rates."⁹ Trico witness Nitido also stated that if
7 customers had asked Trico whether demand charges were going to be considered in this
8 application, Trico would have responded that they would not be considered.¹⁰ Not only did Trico's
9 notice not provide any clue that demand charges and three-part rates were going to be discussed
10 or adopted, but it provided only for a raise in the customer charge to \$20.00.¹¹ Now, the Company
11 seeks to raise the customer charge to \$24.00 and pair that charge with a new rate design with
12 mandatory demand charges. If this settlement were adopted by the Commission in its entirety,
13 Trico would become the first regulated utility in Arizona to adopt mandatory demand charges for
14 all residential customers. Given the unprecedented changes to rate design at issue here, proper
15 notice of the proposals is of the utmost importance to guarantee that the public and Trico's own
16 customers had opportunity participate in a meaningful and constitutionally required manner.
17 Further, if notice is to provide any meaningful value or protections to those who are entitled to it,
18 notice must be an accurate representation of what is being proposed. That is not the case here.

19 By failing to provide the requisite notice of the nature and extent of the changes to current
20 charges, rates, and tariffs, Trico denied all interested parties their due process rights to intervene
21 and engage in meaningful participation in this rate case. Therefore, all proposals that were not
22 within the scope of the issued notice should be denied. This request is not without merit nor is such
23 an outcome extraordinary. Important due process rights are at stake and at least one other
24 commission has required that a utility issue new notice of a settlement that contained proposals

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27 ⁸ Rate Case Procedural Order at p. 4 (Dec. 3, 2015).

⁹ Nitido Tr., Vol. I at 116:10-21, 125:7-126:5.

¹⁰ Nitido Tr., Vol. I at 123:14-18, 128:8-22.

¹¹ Rate Case Procedural Order at p. 4 (Dec. 3, 2015).

1 not reflected in the original notice of the utility's application.¹² EFCA requests that the
2 Commission deny aspects of the settlement proposal that were not reflected in Trico's notice to its
3 customers.

4 **B. In other rate cases seeking to adopt three-part rates with mandatory demand**
5 **charges, specific notice of the intent to adopt such rates were proffered.**

6 Trico is not the first utility to seek adoption of a three-part rate with mandatory demand
7 charges on all or a subset of their residential customers. Indeed, many utilities have pending or
8 recent applications including just such a proposal. Trico, however, is the first utility attempting to
9 impose such rates without giving its customers any semblance of notice of the proposal.¹³ A
10 comparison of the notices issued by utilities seeking imposition of mandatory demand charges and
11 wholesale changes to rate design will demonstrate that Trico has fallen short of its duty to provide
12 full and fair notice.

13 Initially, Arizona Public Service Company ("APS") is seeking to impose mandatory
14 demand charges,¹⁴ and its notice includes the following language: "Among other things, the
15 application . . . *seeks to establish a new residential and small commercial rate design that moves*
16 *away from current two-part volumetric rates to three-part demand-based rates . . .*"¹⁵ (Emphases
17 added).

18 In the recent UNS Electric, Inc. ("UNSE") rate case,¹⁶ UNSE stated as follows: "UNSE is
19 proposing . . . *modifications to its rate design . . .*"¹⁷ (Emphasis added).

20 Finally, when the Tucson Electric Power Company ("TEP") sought to impose demand
21 charges on solar customers and some commercial customers,¹⁸ it included the following language

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23 ¹² "[T]he joint parties requested that [the utility] be required to reissue notice, arguing the notice previously provided
24 is insufficient to implement the non-unanimous stipulation's provision to impose a new charge for residential
25 customers with distributed generation that was not included in EPE's prior notice and application. . . The
26 Commission remands this case . . . and instructs [the utility] to reissue notice to ensure that all [utility] ratepayers are
27 adequately noticed." *Application of El Paso Electric Company to Change Rates*, Texas PUC Docket No. 44941,
28 Order on Appeal of SOAH Order No. 19 at 1 (May 23, 2016). Attached hereto as Exhibit A.

¹³ Quinn Direct Test., Ex. EFCA-14 at 53:13-19.

¹⁴ APS Docket No. E-01345A-16-0036.

¹⁵ Quinn Direct Test., Ex. EFCA-14 at Ex. A, p. 27 thereto.

¹⁶ UNSE Docket No. E-04204A-15-0142.

¹⁷ Quinn Direct Test., Ex. EFCA-14 at Ex. A, p. 4 thereto.

¹⁸ TEP Docket No. E-01933A-15-0322.

1 in its notice: “TEP is also seeking approval of: (1) *critical and substantial modifications to its rate*
2 *design* and net metering tariffs.”¹⁹ (Emphasis added).

3 Each of the notices furnished by these other utilities notes that the utility will be seeking a
4 change to its rate design. APS’ notice expressly references that it seeks adoption of three-part
5 demand-based rates. Given that each notice above at least mentions the possibility of changes to
6 the current rate designs, these notices went further than Trico’s notice in this case.²⁰

7 These notices stand in stark contrast to that provided by Trico here. In its notice, Trico
8 states that it only seeks “an increase in total revenues of \$2,182,076, or 2.49 percent. Among other
9 things, Trico is proposing to modify its Net Metering Tariff and increase its monthly charge from
10 \$15.00 to \$20.00.”²¹ By omitting even a passing reference to changes in rate design (such as that
11 present in APS, TEP, and UNSE’s respective notices), the Company wholly failed to apprise the
12 public of the possibility of adoption of a three-part rate design and demand charges. The notice
13 also failed to provide the public with its intent to seek an increased customer charge to \$24.00. In
14 failing to provide even cursory notice of its intent to seek demand charges and a new three-part
15 rate or of an increase of \$9.00 to its customer charge, the Company failed to comply with due
16 process notice requirements. In so doing, Trico failed to comply with a notice requirement that
17 even its fellow utilities complied with when seeking implementation of residential demand
18 charges.

19 **C. Had Proper Notice Been Furnished, it is Likely that there would have been far**
20 **Greater Intervention in this Proceeding.**

21 The imposition of demand charges is a hot-button issue in Arizona and across the nation.
22 Various news media outlets have reported on proposals wherein utilities sought to impose
23 controversial demand rates on residential customers.²² As EFCA witness Quinn testified, prior

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25 ¹⁹ Quinn Direct Test., Ex. EFCA-14 at Ex. A, p. 11 thereto.

26 ²⁰ Note that EFCA is not suggesting that any of the other notices referenced herein are themselves legally sufficient,
27 however, they plainly include additional references to rate design that are conspicuously missing from Trico’s
28 notice.

²¹ Rate Case Procedural Order at p. 4 (Dec. 3, 2015).

²² Rachel Leingang, APS to Push for Controversial Demand Charges, Arizona Capitol Times (May 10, 2016)
<http://azcapitoltimes.com/news/2016/05/10/aps-to-push-for-controversial-demand-rates/>; see also Ryan Randazzo,
How Much Power Do You Use at Home? Not Knowing Could Cost You, The Arizona Republic (May 8, 2016)

1 hearings proposing adoption of demand charges have led to substantial participation by at least
2 several interested parties. Specifically, Quinn stated that “[t]he Commission decided to have
3 hearings [concerning demand charges] in three cities around the state, Lake Havasu, Nogales, and
4 Kingman. And they probably talked to, I don’t know, a couple thousand residential customers who,
5 almost every one of them, were against and opposed to demand charges.”²³

6 Yet in this case, there was virtually no intervention or substantial participation by the
7 public. This can only be a result of the fact that proper and timely notice of Trico’s intent to impose
8 three-part rates with demand charges and its substantial increase to its customer charge was never
9 given. This is demonstrated by the fact that other pending rate cases in which demand charges and
10 increased customer charges were at issue have attracted significantly more intervenors than those
11 that intervened here.²⁴

12 Additionally, the Company admitted that it was aware of the controversial nature of
13 demand charge proposals and that organizations like the AARP and Arizona Association of
14 Realtors had publicly opposed three-part rates with demand charges in the past.²⁵ In fact, EFCA
15 witness Quinn noted that AARP may also have participated in this rate case had it realized the full
16 extent of the proposed increase to the customer charge.²⁶ Yet neither the AARP, the Arizona
17 Association of Realtors, nor any other interested party (including other utility or solar entities, both
18 of which have consistently intervened in other pending rate cases concerning demand charges)
19 were afforded the notice required to give rise to an opportunity to intervene. Indeed, by the time
20 Trico changed its proposal to seek an increased customer charge to \$24.00 and adoption of a three-

21 <http://www.utilitydive.com/news/demand-charges-vs-tou-rates-the-great-arizona-rate-design-experiment/426902/>
22 (“But if Arizona’s largest utility gets its way, millions of people will have to learn how to manage their electricity
23 demand. It’s a concept familiar to business operators but foreign to most households. Arizona utilities have begun to
24 revive the concept of demand rates, which they unsuccessfully tried to make common in the 1970s and ’80s.”); Herman
25 K. Trabish, Demand Charges vs. TOU Rates: The Great Arizona Rate Design Experiment, UtilityDrive (Sep. 26,
26 2016)[http://www.utilitydive.com/news/demand-charges-vs-tou-rates-the-great-arizona-rate-design-
27 experiment/426902/](http://www.utilitydive.com/news/demand-charges-vs-tou-rates-the-great-arizona-rate-design-experiment/426902/) (“To cover a utility’s fixed costs, are demand charges or time-of-use (TOU) rates superior? It’s a
28 question on the cutting edge of utility rate design discussions across the country, and one Arizona regulators are
addressing on the ground today.”).

²³ Quinn Tr., Vol. IV at 922:2-13.
²⁴ See, e.g., UNSE Docket, No. E-04204A-15-0142; Sulphur Springs Valley Electric Cooperative, Inc. (“SSVEC”) Docket, No. E-01575A-15-0312; TEP Docket, No. E-01933A-15-0100; APS Docket, No. E-01345A-16-0036.
²⁵ Nitido Tr., Vol. I at 114:14 – 115:14.
²⁶ Quinn Tr., Vol. IV at 927:1-14.

1 part rate with demand charges, the period for intervention had passed and no party with objections
2 to (or supporting) these new proposals could participate.²⁷ Thus, it is only fair to conclude that had
3 full and fair notice been given in this proceeding, more parties would have sought to intervene or
4 otherwise participate in this proceeding as had occurred in other rate cases concerning substantial
5 increases to customer charges and three-part demand-based rates.

6 **D. A Recent Nevada Court Order Supports Strict Enforcement of the Notice**
7 **Requirements in Rate Cases.**

8 A recent order issued by the First Judicial District Court of Nevada in *Vote Solar v. The*
9 *Public Utilities Commission of Nevada*, 16 OC 00052 (Sep. 12, 2016) (the “Order” attached hereto
10 as Exhibit B) is instructive here. In that case, NV Energy (a regulated Nevada utility) filed an
11 application for various changes to its rates. The application did not, however, contain any proposal
12 that would impact the rate design applying to a certain class of NEM customers (the “NM1
13 Customers”).²⁸ Subsequently, the Public Utilities Commission of Nevada (“PUCN”), without
14 issuing any continuance or notice, adopted a wholly new proposal that would impact NV Energy’s
15 rates as applied to the NM1 customers.²⁹ The District Court considered whether the adoption of
16 new rates for NM1 customers without first providing proper notice violated the Nevada
17 constitution and statutes.³⁰ The District Court stated that its laws required that in rate cases, notice
18 was required to accurately reflect the subject matter to be addressed and to provide language
19 sufficient to alert interested persons of the subject matter at issue in the rate proceeding.³¹ It then
20 found that (1) neither NV Energy nor PUCN issued any notice that changes to rate design
21 impacting NM1 customers were being considered; (2) the notice in that case was insufficient; and
22 (3) there was a “denial of fairness and due process through inadequate [n]otice.”³² The District
23 Court reached this conclusion despite the fact that the notice contained some language generally
24 stating that the PUCN could modify the proposed rate designs and acknowledged that the notice

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26 ²⁷ Nitido Tr., Vol. I at 129:7-15.

27 ²⁸ Order at 2:10-12.

28 ²⁹ *Id.* at 3:7-12.

³⁰ *Id.* at 5:16-25.

³¹ *Id.* at 8:15-20.

³² *Id.* at 8:24-25; 12:10-18.

1 did not limit the PUCN's ability to only either approving or rejecting the proposals made by NV
2 Energy.³³ Having held that the notice was defective and therefore violated the public's due process
3 rights, the District Court ordered that the portions of the adopted rate design impacting NM1
4 customers be set aside.³⁴

5 Although not beholden to the Nevada District Court's order, the fact scenario and
6 principles of law are so similar that the Order should be viewed as instructive by the Commission.
7 Like the Nevada case, the notice Trico issued here utterly failed to apprise any interested party of
8 potential changes to the Company's rate design or of an increase in the customer charge from
9 \$15.00 to \$24.00. Indeed, no general language was included in the notice stating that the
10 Commission may unilaterally or subsequently modify the proposed rate design. By the time the
11 proposal was altered to seek the three-part demand-based rates and \$9.00 increase to customer
12 charges, all interested parties had been denied the opportunity to intervene in this case.³⁵
13 Accordingly, the Commission should follow the lead of the Nevada District Court and set aside
14 any proposals in the instant application that were not properly noticed.

15 **E. None of the Company's Alleged Defenses Cure the Defective Notice Issued Here.**

16 Trico attempts to excuse its deficient notice by arguing that: (1) it subsequently furnished
17 notice of its settlement agreement, which included its amended proposals to adopt a \$24.00
18 customer charge and to modify current rate design; (2) the original notice contained "catchall"
19 language informing the public that the proposals contained in its application could subsequently
20 be modified; and (3) the lack of notice is not prejudicial as the demand charge will be set at \$0.00
21 and used simply to help educate its customers.

22 The first argument is unavailing. The Company never updated or otherwise modified its
23 legal notice and therefore, never provided interested parties with an opportunity for meaningful
24 participation.³⁶ Trico argues that it provided updated notice by way of bill inserts mailed to its
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26 ³³ *Id.* at 9:6-23, 10:12-16; 11:4-11.

27 ³⁴ *Id.* at 15:27 – 16:2.

28 ³⁵ Nitido Tr., Vol. I at 129:7-15.

³⁶ *Iphaar.*, 171 Ariz. at 426, 831 P.2d at 425; *Matter of Rights to Use of Gila River*, 171 Ariz. at 237-38, 830 P.2d at 449-50.

1 customers. But this alleged “notice” also failed to satisfy due process requirements as Trico
2 admitted at the hearing itself that it only sent the first bill inserts just a couple weeks before the
3 hearing commenced and that it had still had not provided these bill inserts to *at least half* of its
4 ratepayers.³⁷ The few customers that received the bill insert certainly received it well after the time
5 had passed for any interested party to intervene in this proceeding.³⁸ The failure to provide timely
6 notice (or any notice at all in this case) is more egregious considering that, as late as at least April
7 15, 2016, the Company was informing inquiring customers that it was not seeking implementation
8 of demand charges or changes to rate design in this rate case. Yet just two weeks later, on May 4,
9 2016, Trico altered its proposal to seek mandatory demand charges.³⁹ This means that concerned
10 customers that inquired whether the Company was pursuing demand charges were falsely assured
11 that Trico was *not* pursuing mandatory demand charges.

12 Surely Trico was aware that it intended to amend its proposal to request implementation of
13 a three-part demand-based rate a couple of weeks prior to its May 4th filing, and yet, Trico willfully
14 kept such information out of the concerned public’s hands.

15 In sum, even assuming that the billing insert was capable of curing Trico’s defective legal
16 notice (which it was not), it was not even sent to Trico’s customers and could not provide Trico’s
17 ratepayers with an opportunity to participate in this proceeding and is therefore as inadequate as
18 the initial notice.

19 Trico has also asserted that the “catchall” language included in its notice informed the
20 public that the proposals contained in its application could subsequently be modified and,
21 therefore, its lack of notice on changes to the customer charge and rate design is not deficient.
22 However, the “catchall” language in the notice is insufficient to cure the defective notice. The
23 “catchall” language states specifically that “[t]he [C]ommission is not bound by the proposals
24 made by Trico, staff, or any intervenors and, therefore, the final rates approved in this docket may
25 be lower or higher than the rates described above.”⁴⁰ This language is inapplicable to the situation

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27 ³⁷ See *Cathers Tr.*, Vol. IV at 765:16 – 767:1.

28 ³⁸ *Nitido Tr.*, Vol. I at 129:7-15.

³⁹ *Nitido Tr.*, Vol. I at 125:7-25.

⁴⁰ Rate Case Procedural Order at p. 4 (Dec. 3, 2015).

1 here because it only contemplates that *the Commission* may adopt changes to the proposals. But,
2 in the instant case, it was *the Company* that amended its application to ask for demand charges and
3 a higher customer charge. Thus, this language is wholly inapplicable to this situation.⁴¹
4 Additionally, the “catchall” language only provides that the Commission may adopt *rates* higher
5 or lower than those proposed by the Company. It gives no notice that the Commission may
6 ultimately adopt a new, untested, and extremely controversial *rate design* that differs from the one
7 proposed in the Company’s application. Thus, the “catchall” language could not apply to provide
8 for the adoption of any rate design other than that contained in the Company’s initial application.

9 To this point, the Nevada case also provides guidance. Unlike Trico’s “catchall” language,
10 the “catchall” language that was deemed inadequate in the Nevada case specifically stated that the
11 PUCN could modify proposed *rate designs*.⁴² Even with language specifically allowing for
12 modification of proposed rate designs, the District Court held that adoption of unnoticed rate
13 designs was inappropriate as interested parties “have a constitutional due process and statutory
14 right to know specifically what matters the PUCN *will* hear and enter orders on.”⁴³ Therefore,
15 because no timely and adequate notice of the proposed amendment to the rate design impacting
16 NM1 customers was ever furnished, the lack of notice violated the interested parties’ due process
17 rights even with the existence of this broad “catchall” language.⁴⁴ In other words, even if the PUCN
18 had the ability to adopt a rate design different than that proposed in the application, it still needed
19 to provide sufficient notice of its intent to do so. In this proceeding, and as discussed above, Trico’s
20 notice does not contain general language authorizing the Commission to modify the proposed rate
21 design itself nor was any updated notice furnished in a manner giving interested parties an
22 opportunity to meaningfully participate in this proceeding. Thus, like the Nevada case, even if the
23 “catchall” language theoretically permitted the Commission to modify the proposed rate designs,
24 that language alone does not cure defective notice if the interested parties are still deprived of their
25 due process right to meaningful participation.

26 ⁴¹ See generally Nitido Tr., Vol. I at 130:20 – 132:2.

27 ⁴² Order, p. 9, Ins. 12-23.

28 ⁴³ *Id.*

⁴⁴ *Id.*

1 Further, Trico's witness Nitido even opined that the "catchall" language likely gave
2 customers the impression that the Commission would only make changes to proposed rates that
3 are in the customers' best interest.⁴⁵ Yet the proposed rates here are not likely to benefit the vast
4 majority of the Company's customers. Further, it will require them to make substantial changes to
5 how they use electricity or substantial investments related to energy use if they want to manage
6 their energy expenses. Thus, by the Company's own admission, the "catchall" language would not
7 have been likely to notify its customers that the Commission would adopt a significantly higher
8 customer charge and a wholly novel rate design that has been widely protested by consumers
9 around the country. Therefore, this "catchall" language cannot cure the deficiencies in Trico's
10 notice.

11 In addition, if Trico is arguing that the "catchall" means that Trico can change its proposal
12 in any way it wants, at any time, then it will have effectively rendered the notice at best absolutely
13 useless or at worse, a tool to mislead the public. The fact that the notice includes any specific
14 details of the proposal would only seek to mislead and reassure a public that would reasonably
15 conclude it had a right to rely on an official public notice. For example, a concerned and diligent
16 customer who may have reviewed the notice in this case would have been reassured that Trico
17 would not be making the controversial proposal for three-part rates. However, by arguing that the
18 "catchall" relieves it of any duty to provide notice of the specifics of its actual proposal, Trico is
19 asking the Commission to bless a practice where the utility can provide notice of the specific
20 aspects of its application that are, in reality, the exact opposite of what the utility actually intends
21 to seek. This perversion of public notice is not just poor public policy, but obviously a deprivation
22 of due process rights.

23 Finally, the fact that the demand charge will be set at \$0.00 does not cure the defective
24 notice. No matter the stated purpose of these demand charges, the fact remains that Trico is asking
25 the Commission to adopt and implement a wholesale change to its rate design. And it is asking the
26 Commission to do so despite the fact that it never provided adequate notice of such wholesale
27 changes to rate design.

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⁴⁵ Nitido Tr., Vol. I at 130:6-19.

1 As discussed in greater detail below, there can also be no doubt that ultimately, the three-
2 part rate design with demand charges will be raised from the current \$0.00 charge. Trico witness
3 Cathers admitted as much, stating that the purpose of implementing the demand tariff now is to
4 “be moving toward demand in the future, demand charges.”⁴⁶ Further, Trico envisions the demand
5 charge to increase to at least \$2.00 per kW-month in the near future.⁴⁷ Thus, the fact that the current
6 demand charge is to be set at zero has no bearing. The truth of the matter is that, without notice,
7 the Company intends to implement a wholly new rate design herein and, utilizing such a rate
8 design, ultimately implement demand charges in an amount above the initial \$0.00. Further, and
9 as discussed in greater detail below, the demand charge Trico is proposing is highly punitive,
10 charging a customer based on their highest 15-minute maximum demand rather than a longer and
11 less burdensome interval, such as 1-hour. Thus, the defective notice does prejudice interested
12 parties by denying them meaningful opportunity to participate in this proceeding and object to the
13 wholesale implementation of a rate design that will ultimately impact their utility bills, even if the
14 impact is not immediately felt.

15 Trico is not forever prohibited from seeking the increase in its customer charge or imposing
16 a three-part rate design with mandatory demand charges. But if it wishes to do so, it is imperative
17 that Trico give the public, and notably its customers/member-owners, sufficient notice of the same.
18 In this case, Trico simply failed to provide such notice. Instead, the proposed rates and tariffs were
19 only proposed after the public was prohibited from intervening in this proceeding and by the end
20 of the hearing Trico had still failed to even attempt to communicate these changes with roughly
21 half of its customers. Due to this failure to provide the requisite notice, and the unfairness and
22 prejudice that resulted from such a failure and denial of due process, the Commission should reject
23 the Proposed Settlement and specifically decline to adopt mandatory demand rate and any
24 customer charge in excess of \$24.00.

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⁴⁶ Cathers Tr., Vol. IV at 761:7-25.

⁴⁷ Nitido Supplemental Test., Ex. TRICO-2 at 6:5-20.

1 **IV. NET METERING MUST REMAIN AT THE RETAIL RATE**

2 **A. The NEM Rules Do Not Legally Permit or Allow a Waiver.**

3 To implement the proposed reduction in NEM under the Proposed Settlement Agreement,
4 Trico and Staff seek a waiver of A.A.C. R14-2-2301, *et seq.* (the “NEM Rules”).⁴⁸ Trico and
5 Staff ignore the long-held legal imperative that “rules and regulations prescribing methods of
6 procedure of an administrative board or commission, and specifically the Corporation Commission
7 . . . *must be followed by it so long as they are in force and effect.*”⁴⁹

8 In this case, the Commission rule concerning NEM tariffs plainly states that “[i]f the
9 electricity generated by the Net Metering Customer exceeds the electricity supplied by the Electric
10 Utility in the billing period, the Customer shall be credited during the next billing period for the
11 excess kWh generated. That is, the excess kWh during the billing period will be used to reduce the
12 kWh supplied (not kW or kVA demand or customer charges) and billed by the Electric Utility
13 during the following billing period.”⁵⁰ In other words, the NEM Rules require that DG customers
14 receive *a full retail credit on a kWh for kWh basis* for exported power. Because these rules
15 specifically mandate NEM tariffs in the form and amount set forth above, these rules “have the
16 effect of law and *are binding on the Commission and must be followed by it* so long as they are in
17 force and effect.”⁵¹ Thus, without language that permits the Commission to either waive or grant
18 an exception, no waiver or exception can be granted.

19 It is especially telling that the Commission has expressly provided for waivers of other
20 requirements including (but not limited to): (1) waiver of rules governing administrative hearings
21 for electric utilities when in the public interest;⁵² (2) waiver of REST rules for good cause;⁵³ and
22

23 ⁴⁸ See Ex. Trico 3 (Proposed Settlement Agreement) at § 7.3.

24 ⁴⁹ *George v. Ariz. Corp. Comm’n*, 83 Ariz. 387, 390-91, 322 P.2d 369, 371 (1958) (emphasis added); *accord Clay v. Ariz. Interscholastic Ass’n, Inc.*, 161 Ariz. 474, 476, 779 P.2d 349, 351 (1989).

25 ⁵⁰ A.A.C. R14-2-2306(D).

26 ⁵¹ *Gibbons v. Ariz. Corp. Comm’n*, 95 Ariz. 343, 347, 390 P.2d 582, 585 (1964) (emphasis added).

27 ⁵² A.A.C. R14-2-212 (“Variations or exemptions from the terms and requirements of any of the rules included herein (14 A.A.C. 2, Article 2) shall be considered upon the verified application of an affected party to the Commission setting forth the circumstances whereby the public interest requires such variation or exemption from the Commission rules and regulations.”).

28 ⁵³ A.A.C. R14-2-1816(A) (“The Commission may waive compliance with any provision of this Article for good cause.”).

1 (3) waiver of compliance with electric energy efficiency standards for good cause.⁵⁴ Unlike those
2 provisions where the Commission purposefully and expressly set out waiver provisions (and the
3 standards by which such waivers may be obtained) there is absolutely nothing in the rules
4 governing NEM tariffs providing for waiver of or deviation from them.⁵⁵ Instead, should
5 deviations from the NEM rules be permitted, it is incumbent upon the Commission to provide for
6 the same by adopting new rule(s) that not only create such a waiver, but also enunciate the standard
7 that must be met for the grant of such waiver.

8 **B. There is No Evidentiary Basis to Support the Proposed Arbitrary 7.7**
9 **Cent/kWh Export Rate and it is not derived from any Scientific Methodology**
10 **as Contemplated in the Value of Solar Docket.**

11 The Proposed Settlement sets out that NEM should be replaced with an entirely
12 unsupported compensation rate of \$0.077/kWh for exported solar power. Both Staff and Trico
13 readily admit that there was no report, analysis, or study that concluded that \$0.077/kWh is the
14 appropriate value for the energy exported to the grid from DG systems. This flaw is fatal to the
15 proposed export rate. The Company and Staff are proposing that the Commission issue a waiver
16 of the NEM Rules to replace retail rate NEM with an export rate that the record shows is
17 unsupported and unrelated to the actual value of DG.

18 Staff witness Van Epps succinctly summarized the lack of evidentiary support for the
19 \$0.077 export rate in the following exchange from the hearing:

20 Q: Are you aware of any study that's been completed or any evidence that's
21 been introduced in this case that supports that the value of the exported
22 energy in Trico's service territory is 7.7 cents?

23 A: The export rate in this case was a settled – a settled position between Staff
24 and the Company. So, I mean, there's -- if you're asking me whether or not
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26 ⁵⁴ A.A.C. R14-2-2419(A) (“The Commission may waive compliance with any provision of this Article for good
27 cause.”).

28 ⁵⁵ See generally *Indus. Comm'n of Ariz. v. Old Republic Ins. Co.*, 223 Ariz. 75, 77–78, ¶ 7, 219 P.3d 285, 287–88
(App. 2009) (“Unless clear indication of legislative intent to the contrary exists, we will not construe the words of a
statute to mean something other than what they plainly state.” (Internal citations omitted)).

1 there was a study done to determine the export rate, the export rate came
2 out of a settlement.⁵⁶

3 If Staff and Trico had information sufficient to prove that the value of exported DG solar
4 to Trico is \$0.077/kWh then this would have been their opportunity to put forward such evidence,
5 instead, they readily admit that the proposed export rate was one they simply agreed upon, and not
6 one that is supported by any value of solar study.⁵⁷

7 **C. Trico did not Justify Adopting an Arbitrary New DG Export Rate and**
8 **Significantly Changing its Net Metering Tariff Just a Month or so before the**
9 **Commission Issues a Final Decision in the Value of Solar Docket.**

10 The Commission is currently engaged in the Value of Solar docket investigating the costs
11 and benefits of DG and potential frameworks or methodologies that may be useful in considering
12 how to assign value to DG in rate cases.⁵⁸ A decision in that docket is expected as early as October
13 2016. Trico has not justified preempting the outcome of the Value of Solar docket and creating
14 rate instability, costs, and uncertainty when a decision in that docket is so close.

15 Trico claims that a decision must be made because of the rapid increase in DG installations
16 in Trico's territory.⁵⁹ The facts, however, demonstrate that DG installations have actually slowed
17 in Trico's service territory since 2014. In 2014 there were 457 DG interconnection applications
18 compared to 404 in 2015.⁶⁰ As of August 2016, there were only 180 DG installations to date which
19 works out to a prorated number of approximately 270 installations to be completed in 2016.⁶¹ Trico
20 witness Cathers also testified that DG installation have slowed recently over the last couple of
21 months of 2016 from approximately 50 to 35 a month.⁶² As the pace of DG installations has
22 actually slowed in Trico's service territory, there is no compelling need to shortchange the finding
23 in the Value of Solar docket.

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26 ⁵⁶ Van Epps Tr., Vol. III at 561:15-23.

27 ⁵⁷ See Hedrick Tr., Vol. II at 411:11-413:5; see also Nitido Tr., Vol I at 171:13-173:8.

28 ⁵⁸ Commission Docket No. E-00000J-14-0023.

⁵⁹ Cathers Direct Test., Trico Ex. 1 at 14:16-20.

⁶⁰ Cathers Tr., Vol. IV at 803:13-18.

⁶¹ *Id.* at 803:10; 804:20-805:8.

⁶² Cathers Tr., Vol. IV at 748:22-749:3.

1 **D. Trico’s and Staff’s Proposal to Hold the Docket Open for 18 months to**
2 **Address the NEM Tariff is a Red Herring because it will not protect DG**
3 **Customers while sowing confusion and dramatically reducing the economic**
4 **value of installing DG.**

5 Staff and Trico argue the Proposed Settlement would hold the current docket open for up
6 to 18 months, during which period Trico or Staff can request that the Commission update the
7 export rate that would be set by the Proposed Settlement, which warrants moving forward with the
8 changes to NEM.⁶³ But keeping the docket open for 18 months and moving forward with the
9 changes make little sense, provides no protections, sows confusion, and only shortchanges the
10 insights that the DG valuation methodology being developed in the Value of Solar docket can
11 bring to this case. Tellingly, prior to entering into the Proposed Settlement Agreement, Staff
12 witness Van Epps, highlighted that the Value of Solar Docket, “will continue to provide the
13 Commission and Staff with information about an appropriate export rate.”⁶⁴

14 Aside from prematurely adopting an arbitrary and inappropriate export rate, the proposed
15 approach would create significant uncertainty for customers for up to an additional 18 months
16 beyond when the Commission issues a decision in this proceeding. Customers will have no idea
17 what export rate Trico will ultimately offer them, and in the meantime will face a dramatically
18 reduced economic value of installing solar DG. Furthermore, the Proposed Settlement
19 inexplicably limits the ability to request an update of Trico’s export rate to only Trico or Staff.
20 Neither party, however, is obligated or required to request an update if the outcome of the Value
21 of Solar proceeding is favorable or potentially favorable to DG customers. The Proposed
22 Settlement would not provide an avenue for *other intervenors or EFCA* to request such an update.
23 The Proposed Settlement’s approach is, therefore, unfair to customers and other parties.

24 Similarly, there is no mechanism for DG customers to be fully compensated retroactively
25 should the 7.7 cent export rate be determined to be less than full valuation if the matter were to
26 be reopened.⁶⁵ In other words, DG customers get confusion, uncertainty, and will likely be short

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28 ⁶³ Proposed Settlement at § 8.6.

⁶⁴ Van Epps Direct Test., Ex. S-11 at 4:21-23.

⁶⁵ Ford Tr., Vol. III at 706:16-707:23.

1 changed under Trico and Staff's proposal yet are provided with no mechanism to make them whole
2 in the likely event that they are under-credited between now and the end of the Value of Solar
3 proceeding. Finally, *no party*, including Staff or Trico, can make *any* modification to the
4 elimination of NEM banking as contemplated in section 8.3 of the Proposed Agreement despite
5 the fact that the Value of Solar docket is likely to speak to that issue as well. If Staff and Trico are
6 willing to keep the docket open for 18 months, surely it would make sense to keep the docket open
7 for just a couple of months until the Value of Solar docket decision is released in order to have this
8 decision informed by that docket.

9 While EFCA believes a final decision retaining the current retail rate for exported energy
10 may be issued now based on the presented evidence, it is not opposed to providing for a "second
11 phase" in this rate case to allow the Commission to consider and/or incorporate the record from
12 the Value of Solar docket. Concluding the hearing and simply keeping the docket open is not
13 equivalent to actually incorporating the determinations from the Value of Solar docket in a separate
14 phase of this proceeding. A separate proceeding informed by the findings from the Value of Solar
15 docket would ensure protections for all DG customers. This procedure was recently adopted in
16 the UNSE and TEP rate cases. The Commission in UNSE stated that "[a] consistent application
17 of the eventual findings and conclusions of the Value of DG docket promotes good public policy
18 and is in the public interest."⁶⁶ Accordingly, EFCA is not opposed to participating in a "second
19 phase" of this docket once the Value of Solar docket is completed.

20 **E. The Arbitrary DG Export Rate also cannot be adopted because Trico Failed**
21 **to Prove that Trico Under-Recovers from DG Customers.**

22 Trico and Staff altogether fail to provide key evidence necessary to prove their claims of
23 an alleged revenue shortfall resulting from DG customers. Witness after witness testified for Staff
24 and Trico that they do not know the amount the average DG customer pays to Trico in a month.
25 Further, neither Staff nor Trico could provide any evidence about how many DG customers make
26 monthly payments to Trico in any amount whatsoever. For example, despite asserting the
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⁶⁶ Commission Docket No. E-04204A-15-0142, UNSE Decision at 140:6-9.

1 existence of lost revenue from DG customers, Trico witness and CEO Nitido was unable to answer
2 a simple question about the average monthly bill paid by solar customers:

3 Q. Do you know what your average solar customer pays monthly?

4 A. Pays monthly?

5 Q. Yeah.

6 A. I don't know.⁶⁷

7 Moreover, Trico's expert, Hedrick, was similarly unable to provide information about how many
8 solar customers made payments at any specific level to Trico on a monthly basis.⁶⁸ Surprisingly,
9 Hedrick even admitted during cross exam that he was unaware of how many customers with DG
10 pay enough to cover their cost of service on a monthly basis:

11 Q. So when I asked you earlier about solar customer bills and if you could tell
12 me which block they fell in, can you tell me the number of solar customers
13 that cover their cost of service?

14 A. No.⁶⁹

15 It was not just Trico that failed to substantiate its claims of DG-caused lost revenue with any
16 substantive evidence. Staff similarly was unaware of these facts. Staff witness Van Epps
17 acknowledged as much, averring that Staff cannot verify the amount of the under-recovery or cost
18 shift alleged by the Company.⁷⁰ Despite supporting the notion that an underpayment of revenue
19 was occurring via DG customers, Staff witness Paladino also admitted under oath that she did not
20 know how many DG customers paid their cost of service and had actually not seen any information
21 related to how much any DG customers pay at all.⁷¹

22 Staff and the Company base their arguments in support of changes to NEM and new rate
23 designs for DG customers on the allegation that the Company is under-recovering from DG
24 customers. Yet, what the above excerpts from the transcript and citations clearly demonstrate is
25 that neither Staff nor the Company have actual facts or numbers to substantiate these claims.

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27 ⁶⁷ Nitido Tr., Vol. I at 163:19-23.

28 ⁶⁸ See Hedrick Tr., Vol. II at 367:4-368:1.

⁶⁹ *Id.* at 374:4-8.

⁷⁰ Van Epps Tr., Vol. III at 558:2 – 559:8.

⁷¹ See Paladino Tr., Vol. III at 492:21-493:3.

1 Without actual data, the allegations of under-recovery are merely unproven allegations, and cannot
2 be the basis for dramatic changes to rate design and NEM.

3 In summary, Trico and Staff have not provided, or do not even possess, data bearing on the
4 following issues: (1) which energy consumption blocks DG customers either currently fall in or
5 will fall in upon the adoption of the proposed rates; (2) the average amount that DG customers pay
6 in their bills; (3) the number of DG customers that currently pay monthly bills sufficient to cover
7 their cost of service; and (4) the size of the DG systems installed by its customers.⁷²

8 With regard to the theoretical examination of lost fixed costs that Trico did present, EFCA
9 witness Monsen demonstrated that Trico overstated those theoretical lost fixed costs when Trico
10 engaged only in preparing *estimates* thereof.⁷³ Trico simply estimated its lost fixed costs by
11 multiplying residential DG installations by Trico's theoretical average lost fixed costs.⁷⁴ In so
12 doing, Trico's analysis was based only on assumptions of its lost fixed costs, not a full analysis or
13 study and did not reflect what is actually happening in Trico's service territory.

14 Further, while Trico claims it urgently needs changes to DG rates to stem a burgeoning
15 under-recovery, the record tells a far different story. In fact, the record tells the story of a very
16 healthy utility that just last year assigned to its members' accounts roughly \$7 million in capital
17 credits resulting from the utility taking in more revenue than it needed in 2015.⁷⁵

18 Hedrick's testimony demonstrates that even assuming that the unproven revenue shortfall
19 exists, it is illogical to blame DG customers alone for Trico's alleged under-recovery.⁷⁶ By
20 Hedrick's own calculations, approximately 23,000 residential customers within Trico's service
21 territory (approximately 60% of the Company's total rate base) fell below the average energy
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23 ⁷² Hedrick Tr., Vol. II at 367:13 – 368:1, 374:9-24; Paladino Tr., Vol. III at 492:22 – 493:3; Van Epps Tr., Vol. III at
542:9-25.

24 ⁷³ Monsen Direct Test., EFCA Ex. EFCA-10 at 32:7-12.

25 ⁷⁴ *Id.*

26 ⁷⁵ Nitido Tr., Vol. I at 140:10-19.

27 ⁷⁶ Trico utilizes Hedrick as an expert witness. Hedrick admits that he exclusively works for utilities (and has hundreds
of utility clients) and can't recall any occasion in which he has been critical of a utility filing. *See*, Hedrick Tr., Vol.
28 II at 361:25 – 362:10, 363:1-3. This in itself demonstrates that Trico's expert witness is biased against utility
competitors, such as DG installation businesses and customers, and also has great incentive to provide analysis and
testimony that will serve the interests of Trico while making him an attractive expert to other utilities throughout the
nation.

1 consumption.⁷⁷ Hedrick explained that any customer, not just DG customers, that use less than the
2 average energy consumption fails to cover their cost of service.⁷⁸ In other words, there are
3 exponentially more non-DG customers than DG customers that contribute to the alleged under-
4 recovery and cost shift that Trico complains of here. Yet the Company disingenuously seeks to
5 blame all of its issues on DG customers alone.

6 Further, even with sixty percent (60%) of Trico's customers apparently failing to pay for
7 their cost of service, the Company continues to make take in revenues well in excess of its costs.
8 Trico's CEO and General Manager Nitido stated that in 2015, the Company realized a \$6.9 million
9 distribution margin, which occurs when its revenue exceeds its costs and other expenses.⁷⁹ He then
10 went on to explain that Trico has had a positive distribution margin for at least the last seven years,
11 if not longer.⁸⁰ The Company has, for the last few years, been fiscally healthy enough to retire
12 capital credits and disburse such credits to their members.⁸¹ As Nitido confirmed, Trico is not
13 operating at a loss.⁸² Having not experienced any loss whatsoever, Trico simply cannot credibly
14 claim that its DG customers are creating any appreciable under-recovery, let alone threatening the
15 financial livelihood of the Company.

16 **F. Trico's Analysis of DG is Flawed, Arbitrary, and does not Include all**
17 **Benefits of Solar.**

18 In order to properly value DG, the benefits and the costs of DG must be appropriately
19 weighed. In this case, the record reflects that the benefits of DG were not accurately considered.
20 This is important to the extent that the Company and Staff allege an under-recovery from DG
21 customers. If there were an under-recovery, the negative impact of such under-recovery could be
22 offset by positive benefits bestowed by DG customers. This is why a proper review of the costs
23 and benefits of DG is important (and why it is occurring in the ongoing Value of Solar Docket)
24 and specifically, this is why Trico's failure to account for DG benefits renders its proposals

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26 ⁷⁷ Hedrick Tr., Vol. II at 373:7-23.

27 ⁷⁸ *Id.* at 371:22 – 372:11, 373:7-23.

28 ⁷⁹ Nitido Tr., Vol. I at 140:10-19.

⁸⁰ *Id.* at 141:1-5.

⁸¹ *Id.* at 142:20 – 143:7.

⁸² *Id.* at 148:19-25.

1 unsupportable.

2 Trico’s “evaluation” of DG is completely based on its Cost of Service Study (“COSS”).⁸³
3 Trico argues that a single year COSS can accurately reflect the value of DG. This red herring
4 argument is spurious on its face. COSSs are based on a single test-year snapshot of *past historical*
5 costs and cannot, by their design, capture the long-term costs and benefits of DG.⁸⁴ Valuation of
6 the costs and benefits of DG based only on the short-term would ignore many significant benefits
7 associated with DG that accrue over the longer term.⁸⁵ COSS are based on a utility’s embedded
8 rather than marginal costs. Thus, a change in the utility’s COSS as a result of DG adoption has no
9 direct link to how the company’s costs may actually be reduced in the future.⁸⁶

10 Further, Trico admits it did not conduct any specific DG COSS or any benefit-cost analysis
11 crediting DG for all the avoided costs and benefits it creates.⁸⁷ Trico failed to engage in such
12 analysis or credit DG with the full range of avoided costs (some of which have been articulated by
13 Commissioner Little and are included in the preceding table). Instead, Trico arbitrarily attempts
14 to compensate DG customers at a rate derived using a backwards-looking approach predicated on
15 the rate charged by the Company’s wholesale provider(s) during the prior twelve months.⁸⁸ Trico’s
16 cost-of-service analysis is backwards-looking, short-sighted, and fails to take into account the
17 long-term benefits DG provides.⁸⁹ In other words, its analysis is designed to entirely ignore DG
18 benefits and conclude that NEM should be changed based on an unsubstantiated under-recovery.

19 Trico entirely fails to credit DG with any values for: (1) avoided energy costs (other than
20 the 2015 test year fuel and energy component of wholesale power under its Cost of Service Study
21 rather than current rates); (2) avoided generation capacity costs; (3) avoided transmission costs;
22 (4) avoided distribution costs; and (5) environmental benefits including greenhouse reductions and
23 decreased water demands.⁹⁰ Even Trico witness Hedrick admits DG could “potentially” benefit

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⁸³ Cathers Tr., Vol. IV at 792:10-18.

25 ⁸⁴ Monsen Direct Test., EFCA Ex. 10 at Ex. WAM-11, 22-23, thereto.

26 ⁸⁵ *Id.*

27 ⁸⁶ *Id.*

28 ⁸⁷ Hedrick Tr., Vol. II at 377:4-20; Cathers Tr., Vol. IV at 793:14-16.

⁸⁸ Hedrick Direct Settlement Test., Trico Ex. 6 at 3:15-18; 12:5-13.

⁸⁹ Monsen Direct Test., EFCA Ex. 10 at 22-29.

⁹⁰ Hedrick Tr., Vol. II at 375:8-377-20; 387:11-17; 388:21-389:7; 390:13-22.

1 Trico's distribution system.⁹¹ Yet, Hedrick assigns a zero figure for the value of these DG benefit
2 categories without: (1) a DG-specific cost of service study; (2) actual usage data from DG
3 customers (3) accounting for future avoided energy and fuel costs; or (4) review of Trico's latest
4 IRP.⁹²

5 The Company's analysis is also gravely flawed because it: (1) is limited to backwards
6 looking load reduction impacts and not on future benefits to the grid; (2) ignores potential
7 generation capacity savings to AEPCO and thus rate savings to Trico; and (3) ignores that DG load
8 reduction reduces wear and tear on the transmission and distribution grid helping to avoid the
9 replacement or installation of new costly infrastructure equipment in the near future.

10 Instead of conducting any analysis as contemplated in the Value of Solar Docket⁹³ or the
11 NEM Rules, Trico and the Staff arbitrarily chose a proposed NEM export rate of 7.7 cents per
12 kWh that was "derived through settlement discussions and not through pricing analysis."⁹⁴ Even
13 Staff witness Van Epps admits that there is no connection *between the Company's alleged under-*
14 *recovery and the 7.7 cent rate* and that there is no study that supports the 7.7 cent proposed NEM
15 rate.⁹⁵ The proposed NEM rate also does not give any value to Trico's avoided transmission and
16 distribution capacity costs or other potential avoided non-power supply costs.⁹⁶

17 Trico does not have (or has not provided) any data for what blocks of energy consumption
18 their DG customers fall in.⁹⁷ Trico also does not know how many DG customers pay the utility
19 monthly amounts that are above or below the average residential customer.⁹⁸ Trico does not know
20 the specific number of DG customers that cover their cost of service or the average amount DG
21 customers pay.⁹⁹ Nor has Trico calculated the money earned from selling NEM exports, received
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23 ⁹¹ *Id.* at 384:12-16.

24 ⁹² Hedrick Direct Test., Trico Ex. 1 at 14:15-19; Hedrick Tr., Vol. II at 377:4-20; 379:13-15; 387:11-17; 388:21-
393:12.

25 ⁹³ See Commission Docket No. 14-0023, Comm'r Little Letter dated December 22, 2015, at 1-2.

26 ⁹⁴ Monsen Direct Settlement Test., EFCA Ex. 11 at 41 and Ex. WAM-4 (EFCA DR 5.9), thereto; Monsen Tr., Vol.
IV at 828:5-829:18.

27 ⁹⁵ Van Epps Tr., Vol. III at 561:4-562:16.

28 ⁹⁶ Hedrick Settlement Direct Test., Trico Ex. 6 at 12:4-13.

⁹⁷ Hedrick Tr., Vol. II at 367:13-368:1; 374:9-24.

⁹⁸ Hedrick Tr., Vol. II at 367:13-368:1; 374:9-24.

⁹⁹ *Id.*

1 at 7.7 cents, to non DG customers at 11.293 cents.¹⁰⁰

2 In an avoided cost analysis of NEM, it is imperative that *all* costs avoided by the utility as
3 a result of DG adoption be considered when determining a rate for reimbursement. For example,
4 the California Independent System Operator in its 2015-2016 board-approved transmission plan,
5 cancelled \$192 million worth of planned subtransmission projects due to load-reducing impacts of
6 distributed energy resources.¹⁰¹ Trico is attempting, without any justification, to preempt these
7 precepts as contemplated in the Value of Solar Docket when a decision in that docket is expected
8 as early October of 2016.

9 Trico simply refused to account for the benefits of solar, instead predicating its proposed
10 NEM rate solely on an arbitrarily chosen rate. Accordingly, EFCA witness Monsen was the only
11 witness to provide any analysis of all avoided costs. As set forth below, when accounting for all
12 long-term avoided costs, including integration costs, the record in this case supports that the value
13 of NEM is between 9.5–14¢/kWh.¹⁰²

14 **G. The Only Benefit-Cost Analysis in this Docket Fully Supports the Retention of**
15 **the Current NEM Rate.**

16 The only effective way to analyze the true value of DG, and the corresponding export rate,
17 is through a benefit-cost analysis, which is required under the NEM Rules for any changes in
18 charges to DG customers.¹⁰³ This analysis is the only tool that considers a full range of avoided
19 costs when determining compensation for DG users for exported power. To determine the full
20 scope of the benefits realized by the adoption of DG systems, it is imperative to engage in a
21 forward-looking analysis that considers and accounts for the full range of costs avoided by the
22 utility.¹⁰⁴ By considering all avoided cost categories in the value of DG calculation, a more
23 accurate result may be reached because a complete range of stakeholder interests are available for
24 comparison.

25 _____
¹⁰⁰ *Id.* at 392:13-393:12.

26 ¹⁰¹ See Docket No. E-01575A-15-0312, Surrebutal of Mark Fulmer for The Alliance For Solar Choice, filed May 6,
2016, at 8.

27 ¹⁰² Monsen Direct Test., EFCA Ex. 10 at 31:10-13 and Ex. WAM-13 thereto.

28 ¹⁰³ See, e.g., A.A.C. R14-2-2305.

¹⁰⁴ Monsen Direct Test., EFCA Ex. 10 at 12:16 – 13:8 and Ex. WAM-13 thereto.

1 EFCA witness Monsen highlights that the recent DG valuation study conducted in the
 2 UNSE rate case by The Alliance for Solar Choice witness, Mark Fulmer, properly considered six
 3 avoided costs elements drawn directly from an Integrated Resource Plan (“IRP”) in formulating
 4 the benefit-cost analysis.¹⁰⁵ IRP filings reflect a complete “picture” of a utility and its market
 5 environment on a forward-looking basis. While acknowledging differences between the Trico’s
 6 system and UNSE, Monsen testified that “I believe that were I to conduct a comparable analysis
 7 [of Trico], I would reach a similar conclusion.”¹⁰⁶

8 Mr. Fulmer’s benefit-cost study is the only examination of the costs *and benefits* of DG in
 9 the evidentiary record in this case and that examination fully supports the current NEM program.
 10 This analysis was based on UNSE’s own 2014 IRP and included the categories of DG benefits set
 11 forth by Commissioner Little in the Value of Solar Docket.¹⁰⁷ Mr. Fulmer calculated the full value
 12 of DG using the IRP while assuming a south-facing PV array and alternatively a west-facing PV
 13 array.

14 Fulmer’s full analysis revealed a value of solar as follows:¹⁰⁸

Categories Set Forth by Commissioner Little	UNSE IRP Analysis (\$/MWh)	UNSE IRP Analysis with West facing PV arrays (\$/MWh)
Avoided Energy Costs	\$50.44	\$50.44
Generation Capacity Savings	\$40.16	\$77.62
Transmission Capacity Savings	\$2.78	\$5.15
Distribution Capacity Savings,	\$0.00	\$2.00
Environmental Benefits – avoided Greenhouse gases	\$6.76	\$6.76
Total Avoided Costs	\$100.13	\$141.97
Incremental integration Costs	(\$4.55)	(\$2.00)
With integration costs	\$95.58	\$139.97
Avoided environmental externalities	\$40.28	\$40.28
With Emissions Costs	\$135.86	\$180.25

25 The table above shows the results of Fulmer’s analysis, and includes additional appropriate
 26

27 ¹⁰⁵ See Monsen Direct, EFCA Ex. 10, at 29-31 and Ex. WAM 13 thereto; see also Docket No. E-04204A-15-0142, Surrebuttal Test. of Mark Fulmer for The Alliance for Solar Choice, dated February 23, 2016, at 30-40.

28 ¹⁰⁶ Monsen Direct, EFCA Ex. 10, at 31:15-17.

¹⁰⁷ See Commission Docket No. 14-0023, Comm’r Little Letter dated December 22, 2015, at 1-2.

¹⁰⁸ See Monsen Direct Test., EFCA Ex. 10 at Ex. WAM-13, 34; Table 2, thereto.

1 savings and cost factors which enable a more accurate cost comparison on a dollar per megawatt
2 hour basis. Under Fulmer's complete valuation of DG considering costs and benefits, he found
3 that the levelized benefits of solar DG are on the order of 10–14 cents/kWh (or \$100-\$140/MWh),
4 which is indicated under "Total Avoided Costs." On the bottom line, after accounting for the
5 benefits of avoided air emissions, the value of solar is approximately 13.6–18 cents/kWh (or \$136-
6 \$180/MWh).

7 Mosen's testimony relating Fulmer's analysis to this docket is the only evidence regarding
8 the value of DG solar derived from a benefit-cost analysis introduced in this case and reveals that
9 the Settlement Agreement's proposal to compensate exports at \$0.077/kWh undervalues the
10 exports. Compensating NEM customers at Trico's current retail residential energy rate equates to
11 11.76 cents per kWh. Under Mosen's evaluation, this figure is squarely in the range of total net
12 benefits provided by DG, and when avoided emissions are taken into account, the 11.76 cent figure
13 is actually below the range of net benefits provided by DG.¹⁰⁹ Regardless, pro-solar advocates do
14 not seek an above-retail value for their exported energy. Rather, they seek a one to one offset of
15 energy imports from the utility by energy exports from their PV system because it is the simplest
16 way to account for their exported energy. NEM should be continued at the retail rate because it is
17 correctly valued and the only evidence that analyzes the costs *and benefits* of DG fully supports
18 the current NEM program.

19 **H. Evidence Further Supports that the Company's Proposed DG Tariffs and**
20 **Change to NEM Would Curtail DG Adoption Because DG Investments would**
21 **become Uneconomical.**

22 The choice to go solar, whether to be environmentally conscious or to save money, has to
23 make economic sense to the individual customer. DG customers make substantial investments to
24 purchase or finance their acquisition of DG. After the DG system is installed, the reduced payments
25 to the utility act as the return on the solar investment, paying the customer back for his or her
26 sizable investment over a period of time. This period of time is defined as the "payback period" or
27 the period of time it takes for the customer to break even on his or her investment. If the payback
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¹⁰⁹ Mosen Direct Test., EFCA Ex. 10 at 31:19-24.

1 period is too long in duration, then a customer would likely make a wiser investment elsewhere
2 and not purchase a solar system at all. As Staff witness Van Epps pointed out, “if the [NEM]
3 mechanism is significantly changed and the export rate low, the value [of DG] to potential solar
4 customers would be greatly reduced.”¹¹⁰ If implemented, Trico’s rates would eliminate all
5 economic benefits of solar or even over charge solar customers for their investments, frustrating
6 the entire objective of saving money.

7 Staff witness Liu analyzed the payback period for the rate designs under the exiting RS1
8 Tariff and the Proposed Settlement tariffs.¹¹¹ His analysis revealed that payback period for DG
9 customers would increase 37.5 percent or from 8.4 years to 11.4 years.¹¹² Notwithstanding, as
10 discussed in greater detail below, Liu’s analysis is deeply flawed and appears to be influenced by
11 Staff’s desire to support the Proposed Settlement.¹¹³ Specifically, he used unrealistic assumptions
12 to support his economic analysis of the impact of the Proposed Settlement rate.¹¹⁴

13 Liu used for his analysis a system installed cost of \$2,750/kW-DC that he used in the UNSE
14 rate case.¹¹⁵ Trico, however, revealed through discovery that the actual average system cost was
15 \$3,690/kW-DC in its service territory, which makes the economics of DG more expensive.¹¹⁶

16 Liu also elected to use a 33-year internal rate of return (“IRR”) instead of a 20-year IRR in
17 his modeling.¹¹⁷ Staff used the 20-year IRR in the UNSE rate case, but decided to use 33 years in
18 this case without any justification.¹¹⁸ Liu even admitted in his UNSE testimony that 20 years was
19 equivalent to the lifespan of a DG system, but decided to add 13 years to his IRR analysis without
20 any explanation.¹¹⁹ Of course, using a longer 33-year IRR makes the resulting return larger than
21 the normal 20-year IRR because there is additional time to earn money on the DG investment and
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23 ¹¹⁰ Van Epps Direct Test., Ex. S-11 at 5:11-12.

24 ¹¹¹ Liu Settlement Direct Test., Ex. S-13.

25 ¹¹² Liu Settlement Direct Test., Ex. S-13 at 6.

26 ¹¹³ Monsen Settlement Rebuttal Test., Ex. EFCA 11 at 30-35.

27 ¹¹⁴ *Id.*

28 ¹¹⁵ Liu Settlement Direct Test., Ex. S-13 at 4:16-18.

¹¹⁶ See EFCA Ex. 8 (Trico DR 7.21 response).

¹¹⁷ Liu Settlement Direct Test., Ex. S-13 at 6-7.

¹¹⁸ See Monsen Direct Test., EFCA Ex. 10 at Ex. WAM-5, 9-10 thereto (Surrebuttal Testimony of Yue Liu, Docket No. E-04204A-15-0142, February 19, 2016).

¹¹⁹ *Id.*

1 obfuscates the true return on a DG system under the proposed rates.

2 Monsen analyzed the proposed RS1 and NM tariffs, using Staff's own model while
3 correcting for Staff's flaws above, and derived that accurate payback period was actually 18.1
4 years.¹²⁰ *An increase over 50 percent from Staff's 11.4 year payback period.*¹²¹ Further, under a
5 20-year IRR analysis looking at the accurate investment return time frame of a DG system, Monsen
6 found that the IRR was decreased *by approximately 60 percent*, from 8.2 percent to just 3
7 percent.¹²² Even a 33-year IRR using more realistic assumptions for Trico, decreased the IRR
8 approximately 40 percent, from 10.3 percent to 6.2 percent.¹²³

9 The changed economics to DG as a result of the proposed rates would make investments
10 in DG significantly less cost effective and result in payback periods longer than the useful life of
11 the DG systems themselves. In other instances where changes similar to those proposed in Trico's
12 application were adopted, as with the SRP territory and in Nevada, the market for rooftop solar
13 has essentially grounded to a halt. The proposed tariffs will have the same effect and drastically
14 reduce the implementation of DG solar in Trico's service territory.

15 **V. MANDATORY DEMAND CHARGES, NO MATTER HOW SMALL, ARE NOT**
16 **IN THE PUBLIC INTEREST IN THIS CASE.**

17 Mandatory demand charges are not in the public interest, and certainly not in the interest
18 of Trico's residential ratepayers. These charges are unprecedented, volatile, punitive, and
19 confusing for residential and small commercial customers alike—whether those customers have
20 DG systems or not. During the hearing, Mr. Nitido admitted that Trico members themselves have
21 not expressed any interest in such rates:

22 Q. Have your customers come to you and said I desire to be on a rate that doesn't
23 allow me to use or encourages me not to use my appliances at the same time?

24 A. Have they come to us with that?

25 Q. Yeah.

26 _____
27 ¹²⁰ Monsen Tr., Vol IV at 835:2-9.

28 ¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

1 A: No. Why would they?

2 Q. I agree. Why would they?¹²⁴

3 Regardless of these pitfalls, the Staff and Trico urge the adoption of the Proposed Settlement that
4 all but guarantees the adoption of increased demand charges, and hinders the process of vetting
5 those charges in the future.

6 The following Sections highlight how mandatory demand charges are inappropriate for
7 Trico's residential ratepayers and further demonstrate that Trico is woefully unprepared to
8 implement demand charges on its primitive system. To date, Trico has not: (1) developed an
9 educational plan (and thus, cannot demonstrate that implementation of a \$0.00 demand charge is
10 integral to or will further such a plan); (2) retained or even identified a vendor to develop such a
11 plan; (3) determined a cost, either estimated or actual, for implementing the plan; or (4) installed
12 the necessary equipment or gathered the requisite data to implement an educational plan. The
13 Commission must therefore conclude that Trico is, in contravention to its own directives,
14 attempting to implement demand charges without first implementing or even developing the
15 educational plan necessary to prepare its customers for the implementation of demand charges.

16 **A. Demand Charges are Volatile and Punitive to Customers, and Extremely So**
17 **When Customers Must Manage 3,000 Intervals Per Month**

18 The significance of awarding Trico a mandatory residential demand charge outcome must
19 not be underestimated, as opening the door to mandatory demand charges will have far-reaching
20 consequences. The nature of demand charges makes them volatile, subjecting customers to a
21 greater likelihood of high monthly bills than traditional residential rates or time-of-use rates. The
22 volatility stems from the fact that demand charges set a large part of a customer's bill based on a
23 short period of time. This means that a customer's entire bill could be based upon a single
24 aberration, a moment that is not indicative of the efforts the customer took to conserve all month.
25 That problem is compounded by the fact that Trico would have customers manage demand in 15-
26 minute intervals—resulting in approximately 3,000 individual periods of time in a given month

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¹²⁴ Nitido Tr., Vol. I at 203:10-17.

1 that a customer will be required to contemplate their energy usage.¹²⁵ The customer must be
2 diligent for every 15-minute period over the course of an entire month.¹²⁶ Any deviation for any
3 single period could lead to a locked in higher bill, no matter how diligently the customer conserved
4 energy for the remaining 3,000 segments.

5 Essentially, to avoid increased charges under a demand rate, a customer must be able to
6 carefully monitor their usage and have the ability to avoid simultaneous use of appliances, and in
7 Trico's case, the customer must make this evaluation *every 15 minutes or 3,000 times a month*.
8 The result is at best a nuisance, as customers are forced to prolong chores and other household
9 work by ensuring they never multitask by using different appliances, and at worst a costly trap, as
10 many major appliances cycle on and off automatically, making their usage impossible to control.
11 To make matters worse, customers will not be provided with access to complete time
12 information¹²⁷ regarding consumption, so they will likely struggle to assess their load and demand
13 behavior.

14 Utilities frequently contend that because demand rates have long been used in commercial
15 and industrial rate classes that residential customers should be able to adapt to them, but it would
16 be naive to expect residential customers to behave like commercial customers, day in day out, each
17 month, throughout the year, in different seasons in order to minimize their exposure to demand
18 charges. Businesses subject to demand rates frequently have employees specifically tasked with
19 monitoring the company's energy usage, and often that employee's *sole function* is evaluating that
20 usage.¹²⁸ Plus, businesses often close after 5pm and on weekends. Residential customers do not
21 have that luxury. They are composed of various households and families that prepare meals, use
22 water, enjoy entertainment and utilize appliances at irregular times and for irregular intervals. The
23 introduction of rates sensitive to the whims of residential behavior would only risk dramatically
24 increasing monthly bills.

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27 ¹²⁵ See Quinn Direct Test., EFCA Ex. 14 at 55:14-20.

¹²⁶ *Id.*

¹²⁷ See Cathers Tr., Vol. IV at 758:11-25.

¹²⁸ See Quinn Tr., Vol. IV at 924:21-25.

1 **B. Trico is Unprepared to be the Only Utility in Arizona to Subject its Ratepayers**
2 **to Mandatory Demand Charges.**

3 1. *Despite the Commission's Recently Stated Preference for Ratepayer*
4 *Education to Precede the Adoption of Mandatory Demand Charges, Trico*
5 *is asking to Implement Demand Charges Prior to Even Formulating a Plan*
6 *for Education.*

7 The Commission recently rejected UNSE's proposal for mandatory three-part demand
8 rates because the utility had not engaged in any educational activity before bringing its proposal
9 forward:

10 The public distrust or antipathy to the [mandatory three-part rate] proposal has
11 convinced the Company and the Commission that any transition to three-part rates
12 will require a massive public education effort before we can say with any degree of
13 certainty that mandatory residential demand rates in UNSE's service territory are
14 in the public interest.¹²⁹

15 Subsequently, at the hearing in this case Commissioner Tobin himself described his view of the
16 UNSE Decision and the Trico case, "[w]e basically put a stake on the heart of demand charges
17 until our utilities adequately and properly are able to educate our consumers as to how to utilize
18 them. And for purposes of this forum and just to be clear, I don't support a DC charge of zero
19 percent because I think it's a backdoor way into DC charges."¹³⁰

20 Despite this very recent and clear Commission direction, Staff and Trico are asking to
21 implement mandatory demand charges in Trico's service territory before any educational outreach
22 has commenced or even been designed.¹³¹ Even more egregious is that in UNSE's rate application
23 it was seeking on-peak demand periods of 1 hour or approximately 150 hours per month that a
24 customer would have to manage when the Commission gave this direction.¹³² In contrast, Trico
25 is seeking to have its customers manage demand in 15-minute intervals *or approximately 3,000*
26 *individual periods of time*, in a given month, without any education plan.

27 Specifically, the Proposed Settlement only contemplates Trico will conduct customer
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29 ¹²⁹ Decision No. 75697 at 65:15-18 (emphasis added).

30 ¹³⁰ Tr. Vol. I at 7:25-8:6.

31 ¹³¹ Monsen Settlement Rebuttal Test, EFCA Ex. 12 at Exhibit WAM-1, Data Request and Response 5.11, thereto.

32 ¹³² Decision No. 75697 at 27 (UNSE conceding "that it will take much longer than the Company had originally
33 anticipated to inform and educate customers about how three-part rates work.").

1 outreach regarding the demand rates *after* the Commission decision approving it.¹³³ In fact, Trico
2 does not even intend to begin developing or implementing its educational plan until after it
3 completes updating the meters within this territory (which the Company estimates will take at least
4 six months to complete) and potentially, will gather one year's worth of data prior after the
5 installation is complete before initiating its plan.¹³⁴ Indeed, Trico does not even have an estimate
6 of how much it will cost to develop and implement a functional and effective educational plan let
7 alone an approved budget in place to pay for such a plan.¹³⁵ Despite acknowledging the need for a
8 consultant or vendor to develop and implement any educational plan, Trico has not yet even
9 identified any such vendor, let alone bid on the services of one.¹³⁶ Thus, it is entirely premature to
10 adopt a new demand charge with the intention of providing information or educational tools when
11 there has been, (1) no education plan formulated¹³⁷ and (2) no clear need or purpose for
12 implementing a new rate element for educational purposes established.¹³⁸ Trico will even have to
13 hire a third party, which it has not done, to design its educational program.¹³⁹

14 2. *The Formal \$0 Demand Charge Tariff Itself is Not Necessary for Trico to*
15 *Engage in Education of its Customers*

16 Trico conflates consumer education with implementation of a formal legal tariff. EFCA
17 does not oppose Trico educating its customers in anticipation of it potentially seeking the
18 implementation of mandatory demand rates in its next rate case. At least at that time Trico
19 customers could be both educated and, hopefully, provided with adequate public notice of Trico's
20 intent. Trico asserts that its educational efforts will be effective only if they are part and parcel of
21 an already approved demand charge tariff. So why is the zero-dollar tariff rate needed for carrying
22 out education efforts at all? Neither Staff nor Trico could identify any practical or legal reason

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133 Proposed Agreement, Ex. S-3 at § 10.1.

24 134 Cathers Tr., Vol. IV at 753:6 – 754:7 (“And really before we start educating people, we really would like to get
25 the system in place to get the data to them. And ideally you would have a year's worth of data that people could
download and look at, too, before you really start getting into the educational part of things.”); *accord* Nitido Tr.,
Vol. I at 214:6-13.

26 135 Nitido Tr., Vol. I at 191:13–193:6.

27 136 Nitido Tr., Vol. I at 191:16–192:12.

28 137 Nitido Tr., Vol. I at 191:13–192:17.

138 Nitido Tr., Vol. I at 200:10-15; 204:23–205:2.

139 Nitido Tr., Vol. I at 213:15–21.

1 that would prevent Trico from educating customers, collected demand data, and presenting that
2 data to customers either on their bill or with an enclosed “shadow” bill without the formal adoption
3 of the tariff.¹⁴⁰ In other words, Staff and Trico could not explain why the tariff itself was necessary
4 for educating customers about demand rates. Perhaps most relevant is the fact that Trico itself has
5 not yet even formulated *any* educational plan.¹⁴¹ Without any educational plan designed or
6 formulated, it is simply impossible for Trico or Staff to know whether a zero-dollar demand charge
7 tariff will assist with the educational initiatives ultimately adopted, let alone whether such a charge
8 would be superior to any other methodology they may adopt.

9 Sound public policy should not be shrouded in confusion, yet beyond the inherently
10 confusing nature of demand charges, the \$0.00 demand charge in the Proposed Settlement
11 introduces confusion in numerous ways. Instead of offering clarity to Trico’s members, the \$0.00
12 demand charge instead obscures Trico’s long term objectives and burdens customers with the task
13 of seeking out an explanation.¹⁴² During the hearing, Ms. Cathers asserted that placing an
14 additional line item on customer bills in the amount of zero would result in customers questioning
15 this charge and prompt them to investigate Trico’s website or tariffs in search of an explanation.¹⁴³
16 In essence, Trico is banking on the fact that the \$0.00 demand charge will be so confusing to its
17 customers that they will take it upon themselves to investigate what this charge is and how it will
18 impact the customer. Surely Trico can think up better ways to educate its ratepayers than using an
19 approved \$0.00 tariff to confuse them. The tariff is legally significant but is useless to the ratepayer
20 education process. EFCA suggests that Trico’s customers deserve the opportunity to be educated
21 on the subject before Trico is awarded the legally significant tariff implementing the rate design.

22 3. *Trico Cannot Provide Needed Interval Demand Data Information to its*
23 *Members.*

24 Trico simply is not equipped with metering infrastructure that can provide the data a
25 customer needs to understand and react to a demand rate. Lacking this important technology, it is

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27 ¹⁴⁰ Ford Tr., Vol III at 687:20-23 and Cathers Tr., Vol IV at 759:22–760:13.

28 ¹⁴¹ Nitido Tr., Vol. I at 214:14-18.

¹⁴² Cathers Tr., Vol. IV at 759:13-21.

¹⁴³ *Id.*

1 clear that Trico is not the right utility to burden its ratepayers with mandatory demand charges.
2 Two-thirds of Trico meters cannot even report a customer's maximum demand on a daily basis,¹⁴⁴
3 although Trico is seeking to upgrade those meters to provide minimal interval data. Unfortunately,
4 even after Trico has made this upgrade – a task that would take approximately six months¹⁴⁵ and
5 cost roughly six hundred thousand dollars¹⁴⁶ – it will then only have the capability of reporting a
6 customer's demand data once a day.¹⁴⁷

7 This is a glaring omission and proof that Trico is the wrong utility for this experiment.
8 Trico only plans to provide customers with a single maximum monthly demand figure, which does
9 nothing to tell the customer how to respond to the resulting charge. This is particularly critical
10 when the charge is based on 3,000 separate intervals throughout the billing period. The customer
11 needs to know how his or her demand is changing throughout these intervals in order to know how
12 to change behavior.¹⁴⁸ The behavioral response to a demand rate is not as simple as not turning off
13 certain appliances simultaneously, because many major appliances cycle on and off throughout the
14 day, so a customer needs to know how and when that occurs in conjunction with the use of
15 manually operated appliances in order to attempt to shift their usage.¹⁴⁹

16 A bill indicating only the peak demand does not tell the customer anything about the
17 relevant usage before and after the occurrence, whether shifting some usage to a different time
18 would have “shaved” the peak or caused the same or even a higher peak at a different time. As
19 witness Quinn described, “And getting a bill on a month that says the highest 15 minutes usage
20 you had last was June 2nd at 2:00 a.m. in the morning, what does that do for you? You don't know
21 if everything else was real close to that or was way down, something abnormal happened. It is
22 much more confusing than people think.”¹⁵⁰ Accordingly, the proposed three-part rate should be
23 denied in its entirety as its inherent problems significantly outweigh any perceived benefit.

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25
26 ¹⁴⁴ Nitido Tr., Vol. I at 202:10-12.

¹⁴⁵ *Id.* at 214:6-13.

¹⁴⁶ *Id.* at 192:22-23.

¹⁴⁷ *Id.* at 202:10-12.

¹⁴⁸ Quinn Tr., Vol. IV at 943:13-18.

¹⁴⁹ *Id.* at 826:19 – 828:4.

¹⁵⁰ Quinn Tr., Vol. IV at 943:13-18.

1 **C. Trico Intends to Raise the Demand Charge in its Next Rate Case.**

2 The Commission should not derive any comfort from the fact that the initial demand rate
3 is set at \$0.00 as Trico has made it perfectly clear it believes this is merely the first step to
4 implementing a higher dollar charge. As Ms. Cathers described, “I think that there needs to be,
5 for our board to approve the costs and the effort of this, there needs to be a plan for the future that
6 you are -- and our board of directors definitely believes that a demand rate in the future, properly
7 designed, and they do not want to hurt any particular customer class, is something that we want to
8 be investigating and moving toward.”¹⁵¹ In essence, Trico will not begin educating customers on
9 demand rates unless it gets some affirmation from the Commission that it will be able to raise the
10 zero figure in its next rate case, which approval of the Proposed Settlement would provide.

11 That affirmation comes at the expense of the thorough vetting that is appropriate for such
12 a radical rate design change. Once the demand rate structure is in place as described in the Proposed
13 Settlement, the issue to be resolved during Trico’s next rate case is not whether or not a demand
14 rate itself is appropriate, but rather at what level the existing rate should be set. EFCA witness
15 Quinn explained, “when we get to the next rate case, we are not going to debate then whether the
16 demand charge is good or not. The company will say this is what we have done and this is what is
17 going to work. But there won’t be that initial debate and vetting of demand charges like we had in
18 UNS[E] and like we are going to have in APS.”¹⁵² Further, the Proposed Settlement opens the
19 possibility of Trico filing a rate application under the “streamlined” rate application process of
20 A.A.C. R14-2-107, which would subject the next demand rate to even less scrutiny. Indeed, when
21 asked about this critical issue, Staff had no answer as to whether Trico could use the streamlined
22 process during its next case under the Proposed Settlement.¹⁵³

23 **VI. CURRENT DG CUSTOMERS MUST BE GRANDFATHERED AS THE**
24 **COMMISSION AFFIRMED RECENTLY IN THE UNSE RATE CASE DECISION.**

25 In the event that the Company’s proposed rates and NEM changes are adopted, all DG
26 customers that submit an interconnection application prior to the issuance of the final order in this

27
28 ¹⁵¹ Cathers Tr., Vol. IV at 761:7-13.

¹⁵² Quinn Tr., Vol. IV at 928:7-12.

¹⁵³ Paladino Tr., Vol. III at 518:21-23.

1 proceeding must be grandfathered under their currently existing rate design *and* their NEM tariff.
2 Trico requests that DG customers that have submitted interconnection applications after May 31,
3 2016, be subjected to the proposed new buyback rate and the demand charges and as such, this
4 proposal must be denied.¹⁵⁴

5 Not only has the Commission stated that full grandfathering of DG customers is the proper
6 course of action in rate cases, the Commission recently ordered the grandfathering of *all* DG
7 customers that had submitted an interconnection application prior the date of the final order issued
8 in the in the UNSE Decision.¹⁵⁵ Specifically, the Commission stated that “we have rejected
9 [UNSE’s] proposal to establish a grandfathering date that precedes the date of the Commission
10 order, we emphasize that this result should be regarded as our default policy. Although we
11 recognize that each unique rate case may warrant different results, we believe that the applicable
12 grandfathering date should not generally precede the date of the relevant Commission
13 Decision.”¹⁵⁶ Nothing presented in this case would justify a departure from the Commission’s
14 default policy of full grandfathering of DG customers under currently existing rates and their NEM
15 tariff. Indeed, the Commission did not permit UNSE to set a cutoff date for purposes of
16 grandfathering preceding the date of the final order despite the fact that UNSE, like Trico here,
17 alleged that it had provided prior notice to its customers that current rates and tariffs were subject
18 to change.¹⁵⁷

19 Further, in this proceeding, Commissioner Tobin commented that “rates should be set after
20 the Commission votes and not backdating rates to prior to these hearings” and also noted that the
21 Commission has been unanimous in its support of the application of full grandfathering for DG
22 customers in utility rate cases.¹⁵⁸ Grandfathering all of Trico’s DG customers that submit an
23 interconnection application prior to the issuance of a final order of this proceeding would also be
24 consistent with Chairman Little and Commissioner Burns statements on grandfathering while also

25
26 ¹⁵⁴ Nitido Tr., Vol. I at 187:22 – 188:12; Van Epps Tr., Vol. III at 580:9-16.

27 ¹⁵⁵ Commission Decision No. 75697 at pp. 115-120.

28 ¹⁵⁶ *Id.* (emphasis added).

¹⁵⁷ Ford Tr., Vol. III at 711:20 – 712:8.

¹⁵⁸ Tobin Public Comment Tr., Vol. I at 8:9-16.

1 being prudent, fair, and in keeping with Commission precedent.¹⁵⁹ In fact, in Nitido's Direct
2 Testimony, Trico's CEO argued that it would be unfair to stick existing DG customers with a
3 demand charge and contended that the Company's Board believed that it should not dramatically
4 change the cost structure for those that had already invested in DG.¹⁶⁰

5 EFCA therefore urges the Commission not to depart from recent Commission decisions in
6 and, instead, to remain consistent by fully grandfathering all DG customers that have submitted an
7 interconnection application prior to the issuance of a final order on their existing rate design and
8 tariffs.

9 **VII. THE COMMISSION SHOULD DENY TRICO'S REQUEST TO RAISE THE**
10 **CUSTOMER CHARGE TO \$24.00.**

11 As discussed in greater detail above, EFCA notes that Trico did not give timely notice of
12 its intent to raise the current customer charge from \$15.00 to \$24.00. Instead, Trico should not be
13 permitted to request an increase to greater than \$20.00 which was the amount it noticed to its
14 customers.¹⁶¹ Trico's witness Nitido is unable identify even one example where a utility's
15 proposed customer charge was actually increased from the proposal contained in the notice.¹⁶² In
16 light of this, and even with the notice containing a "catchall" stating that proposed rates were
17 subject to increase, the Company's customers could not have predicted that there was a likelihood
18 of a marked *increase* to the proposed customer charge¹⁶³ and certainly could not have predicted
19 that it would be the *Company itself* that proposed an increase in excess of the amount it provided
20 notice to its customers that it would be seeking. In addition, since the notice did not also include
21 a request for demand rates, neither the public nor Trico's customers could have expected to be
22 subjected to a major increase in the monthly customer charge *and* the implementation of demand
23 charges.¹⁶⁴ Due to the failure to properly notice the extent of this increase (and accordingly,
24 depriving the public of the chance to intervene), the Commission should decline to adopt the

25
26 ¹⁵⁹ ACC Hearing for Commission Docket No. E-01933A-15-0100 at 4:11:55 – 4:13:03.

27 ¹⁶⁰ See Nitido Direct Test., Trico Ex. Trico-1 at 16:6-8.

28 ¹⁶¹ Rate Case Procedural Order at p. 4 (Dec. 3, 2015); Nitido Tr., Vol. I at 126:22 – 127:9.

¹⁶² Nitido Tr., Vol. I at 134:2-19.

¹⁶³ Rate Case Procedural Order at p. 4 (Dec. 3, 2015).

¹⁶⁴ Quinn Tr., Vol. IV at 926:17 – 927:13.

1 \$24.00 rate and instead, adopt an increase closer to the \$5.00 increase that the Company timely
2 noticed.

3 Even if the Commission does not conclude that the defective notice concerning the increase
4 to the customer charge is fatal, the Company nonetheless failed to prove that the increase was just
5 and reasonable or in keeping with the principles of gradualism.

6 The proposed increase to this fee will result in an increase of 60% to the customers' basic
7 service charge.¹⁶⁵ More likely than not, the Company increased the proposed customer charge by
8 \$4.00 to effectively begin collecting the amounts it ultimately intends to collect through the
9 demand charge while the demand charge is currently set at \$0.00.¹⁶⁶ Additionally, this major
10 increase will be added to bills that, as Trico itself acknowledges, are already some of the highest
11 in the area.¹⁶⁷ Staff, despite providing virtually no rationale, supports this increase despite
12 acknowledging that the increase is "a larger increase than in past rate cases" and "can have an
13 adverse effect on low usage customers."¹⁶⁸

14 Gradualism is an important feature of rate design because it protects ratepayers from the
15 shock of sudden large increases. Gradualism provides for stability and predictability in a
16 customer's bills. If the policy of gradualism is rejected, then "rate shock" becomes a destabilizing
17 force that creates uncertainty with ratepayers. Gradualism is a hallmark of sensible rate design.
18 Ratepayers should not be punished with massive rate increases simply because the Company
19 negotiated a higher customer charge than it had initially conceived of when the opportunity arose
20 in negotiations with Staff. By requesting a massive and immediate increase to its customer charge
21 and pairing the same with demand charges, Trico acts in opposition to the principles of gradualism,
22 including avoidance of rate shock, and the constitutional mandate providing only for the adoption
23 of "just and reasonable rates."

24 The Company seeks to justify its request for such a substantial increase and claim that such
25 an increase is gradual by arguing that the proposed decrease in the volumetric rates will balance

26 _____
27 ¹⁶⁵ Nitido Tr., Vol. I at 221:1-9.

28 ¹⁶⁶ Quinn Tr., Vol. IV at 926:17 – 927:13.

¹⁶⁷ Nitido Tr., Vol. I at 95:3-20.

¹⁶⁸ Ford Direct Test., Staff Ex. S-20 at 1314:7-12.

1 out the impact of this new customer charge and, even with an increase to \$24.00, the Company
2 will not be fully recovering its total service costs (claiming the fee would need to be approximately
3 \$32/month to cover its service costs).¹⁶⁹ Yet Trico has failed to provide data demonstrating with
4 any certainty that the decrease in volumetric rates will balance out the increase to the basic service
5 charge. In addition, there is no evidence as to the impact on customers' bills when the Company
6 inevitably raises the demand charge from its current \$0.00 rate and ultimately pairs it with the
7 higher customer charge.

8 Further, the fact that the Company still will not be recovering all its service costs through
9 a fixed charge simply has no bearing here. Gradualism is concerned with shielding customers from
10 massive and sudden rate increases. There can simply be no doubt that a proposal that increases the
11 customer charge by 60% is just such a massive and sudden increase that should be avoided. The
12 customer charge is also one that, as Staff acknowledges, is likely to disproportionately impact low
13 use customers (like DG customers). Thus, Trico utterly failed to demonstrate both that this increase
14 comports with the principals of gradualism and that the increase is just and reasonable.

15 **VIII. EFCA SUPPORTS MAINTENANCE OF PROPERLY-DESIGNED TIME-OF-**
16 **USE RATES FOR RESIDENTIAL CUSTOMERS.**

17 Trico argues that due to its pricing structure with AEPCO, its residential time-of-use
18 ("TOU") rate (RS2TOU), "is not an effective rate and does not provide customers a meaningful
19 opportunity to reduce costs while at the same time reducing the costs incurred by the cooperative
20 and should be frozen."¹⁷⁰

21 Trico, however, ignores costs other than generation purchases do have a time component
22 to them and could be incorporated into TOU rates and AEPCO's rate restructured.¹⁷¹ Staff already
23 acknowledged in the Sulphur Springs Valley Electric Cooperative rate case ("SSVEC"), that
24 SSVEC who is also served by AEPCO and applied to also freeze its TOU rate, could restructure
25 its rates with AEPCO to provide additional attractiveness to its TOU rates. In SSVEC, staff
26 recommended that SSVEC's TOU rate should not be frozen and provides relevant guidance here:

27 _____
28 ¹⁶⁹ Nitido Reply Test., Trico Ex. Trico-5 at 9:10-18.

¹⁷⁰ Hedrick Direct Settlement Test., Ex. Trico-6 at 10.

¹⁷¹ Monsen Direct Settlement Test., EFCA Ex. 11 at 38-39.

1 The Company (SSVEC) asserts that it has not had much interest from its members in
2 signing up for TOU rates, and is requesting to freeze the TOU rate schedules and eventually
3 phase them out. Staff does not believe that it is appropriate to freeze the existing TOU rate
4 schedules. According to the Company, its customers' lack of interest in TOU rates relates
5 to the fact that the Company's power supply from . . . AEPCO is not time-differentiated.
6 However, Staff believes that AEPCO's rates could be structured differently in the future,
7 and if so, the attractiveness of the Company's TOU rates may increase. Staff further
8 believes that both the existing and the proposed TOU rates are not harmful to the
9 Company's operations, and Staff recommends that the Company continue to offer TOU
10 rates for its residential, commercial, and large power customers.¹⁷²

11 Second, Trico has not provided any reason to assume that its residential members will
12 understand and respond to demand charges. If Trico's residential customers understand and
13 respond to the TOU rate, but not the demand rate, a TOU rate would clearly be a more meaningful
14 option to reduce costs for both Trico and members compared to a demand rate. Third and possibly
15 more importantly, Trico continues to offer TOU rate options for its non-residential customers and
16 has not proposed to freeze those tariffs with the goal of terminating the rate as it has suggested it
17 will do for its residential TOU rate. Since Trico is not proposing to freeze its non-residential TOU
18 tariffs, then evidently Trico must believe that they are somehow beneficial, either as a customer
19 service option or to reduce Trico's costs. For those reasons, it is not clear why Trico claims that
20 residential TOU rates are not similarly beneficial to Trico. Therefore, it appears that Trico is
21 selectively freezing its residential TOU rate but not freezing its non-residential TOU rates.

22 Ultimately, utility customers are benefitted by having multiple options open to them. So
23 long as the TOU rate remains optional and made available to all residential customers, EFCA is in
24 favor of maintaining such an option. In fact, in the UNSE rate case, the Commission noted that
25 "the better, more tempered, path to modernity is to move as many customers as possible to TOU
26 rates,"¹⁷³ while also promoting other rate options. Given the acknowledged potential developments
27 of an offered TOU rates with the fact that no harm is borne by the Company if it continues to offer
28 it, EFCA supports to adopt and leave open the RS2TOU rate.

29 IX. CONCLUSION.

30 For the reasons stated above, the following actions should be taken:

31 ¹⁷² Monsen Direct Settlement Test., EFCA Ex. 11 at WAM-3, 11:17-25 thereto.

32 ¹⁷³ UNSE Decision at 65:24-25.

1 (1) The Commission should find that Trico failed to meet its burden of proof imposed
2 pursuant to A.A.C. R14-2-2305;

3 (2) Decline to “waive” Trico’s compliance with NEM requirements as it is not legally
4 permitted to waive such compliance;

5 (3) Reject Trico’s lost fixed cost calculations for lack of credible support and decline
6 to adopt the proposed RS1 and “DG Energy Export Tariff” rates that were allegedly designed in
7 an effort to recover these unsubstantiated lost fixed costs;

8 (4) Reject the proposed increases to the fixed customer charge for residential
9 customers, or in the alternative, approve only one reasonable increase to the current fixed customer
10 charge equally applicable to all residential customers (both DG and non-DG customers). In no
11 event shall the customer charge exceed the original requested \$20/month amount;

12 (5) Reject or modify the Proposed Settlement’s grandfathering provision such that it:

13 (a) Applies to all NEM customers that have existing solar DG or customers that
14 submitted a completed interconnection application by the date of the final Order in this docket;

15 (b) Grandfathers both (1) the ability to use NEM and (2) the two-part rate
16 design that is in place today for NEM customers;

17 (c) Clearly states that the grandfathering applies to both Trico’s NEM rules
18 under Schedule NM and Trico’s current residential rate design; and

19 (d) Affirmatively states that grandfathering for existing NEM customers and
20 NEM customers who apply for interconnection prior to 30 days after the issuance of a decision
21 regarding NEM and rate design issues for solar DG customers in this docket will run for at least
22 20 years from date system was installed;

23 (6) The Commission should reject the Proposed Settlement’s \$0/kW residential
24 demand charge and freeze on Trico’s TOU rate option. Instead, the Commission should direct
25 Trico to develop a demand billing pilot program designed to provide a random selection of
26 residential customers with appropriate metering equipment and educate them on demand charges
27 and managing their electricity demand, and to demonstrate customer understanding and acceptance
28 of demand charges prior to bringing forward a proposal to implement a residential demand charge

1 in its next rate case;

2 (7) The Commission should reject the Proposed Settlement's \$0.077 export rate, and
3 instead rule that:

4 (a) All NEM and DG customer rate design issues shall be considered in a
5 second phase of this proceeding;

6 (b) No changes to NEM or DG customer rates shall be adopted until a final
7 decision has been issued in Phase 2 of this proceeding;

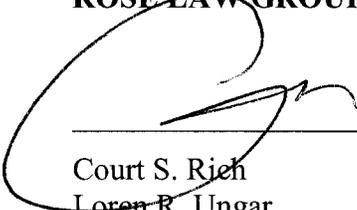
8 (c) All customers requesting an interconnection agreement between now and
9 the issuance of a final decision in Phase 2 of this proceeding will be grandfathered onto current
10 NEM and DG rates, *including* their current rate design; and

11 (d) Phase 2 of this proceeding will commence after the Order is issued in the
12 Value of Solar proceeding; and

13 (8) Trico should create experimental rates focused on time-of-use and time varying
14 rates and design a rate or rates that reflects peak load considerations on its system and if successful,
15 propose a full roll out of such rate designs in its next rate case. These rate design alternatives would
16 preserve customer choice for Trico members, reduce future rates, and enable Trico to remain
17 financially healthy.

18
19 Respectfully submitted this 5th day of October, 2016.

20
21 **ROSE LAW GROUP pc**

22
23 
24 _____
25 Court S. Rich
26 Loren R. Ungar
27 Evan Bolick

28 *Attorneys for Energy Freedom Coalition of America*

1 **Original and 13 copies filed on**
2 **this 5th day of October, 2016 with:**

3 Docket Control
4 Arizona Corporation Commission
5 1200 W. Washington Street
6 Phoenix, Arizona 85007

7 *I hereby certify that I have this day served a copy of the foregoing document on all parties of
8 record in this proceeding by regular or electronic mail to:*

9 Belinda A. Martin
10 Administrative Law Judge
11 bmelinda@azcc.gov

COASH & COASH
mh@coashandcoash.com

12 Janice Alward
13 Arizona Corporation Commission
14 jalward@azcc.gov

C. Webb Crockett
Patrick Black
Fennemore Craig, P.C
wcrockett@fclaw.com
pblack@fclaw.com

15 Thomas Broderick
16 Arizona Corporation Commission
17 tbroderick@azcc.gov

Vincent Nitido
Trico Electric Cooperative, Inc.
vnitido@trico.coop

18 Kevin Higgins
19 Energy Strategies, LLC
20 khiggins@energystrat.com

Robert Hall
Solar_bob@msn.com

21 Michael Patten
22 Jason Gellman
23 Snell & Wilmer L.L.P.
24 mpatten@swlaw.com
25 jgellman@swlaw.com

Charles Wesselhoft
Pima County Attorney's Office
Charles.wesselhoft@pcao.pima.gov

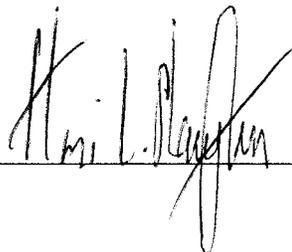
26
27
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By: 

Exhibit A

TX PUC Order on Appeal



Control Number: 44941



Item Number: 711

Addendum StartPage: 0

PUC DOCKET NO. 44941
SOAH DOCKET NO. 473-15-5257

RECEIVED
2016 MAY 23 PM 12:11
PUBLIC UTILITY COMMISSION

APPLICATION OF EL PASO
ELECTRIC COMPANY TO CHANGE
RATES

§
§
§

PUBLIC UTILITY COMMISSION
OF TEXAS

ORDER ON APPEAL OF SOAH ORDER NO. 19

This order addresses an appeal of SOAH Order No. 19 by OPUC, Eco EL Paso Inc., Energy Freedom Coalition of America, and Sunrun Corporation (collectively, the joint parties). The Commission grants the appeal and instructs El Paso Electric Company (EPE) to reissue notice that meets the requirements of PURA and Commission rules.

On August 10, 2015, EPE filed an application for authority to change rates seeking an overall \$71.5 million increase in annual Texas retail base rate and miscellaneous revenues. Settlement discussion began in January 2016 and concluded with the filing of a non-unanimous stipulation on March 29, 2016.

On April 5, 2016, the joint parties requested a hearing on the non-unanimous stipulation. In addition, the joint parties requested that EPE be required to reissue notice, arguing the notice previously provided is insufficient to implement the non-unanimous stipulation's provision to impose a new charge for residential customers with distributed generation that was not included in EPE's prior notice and application.

In SOAH Order No. 19, the SOAH administrative law judge denied the request that new notice be issued, determining all parties affected by the non-unanimous stipulation had already been properly noticed. In their appeal, the joint parties ask the Commission to 1) overrule the portion of SOAH Order No. 19 determining that EPE's notice is sufficient and 2) require that EPE reissue notice that meets the requirements of PURA and Commission rules.

The Commission grants the appeal and overrules the portion of SOAH Order No. 19 determining that EPE's notice is sufficient. The Commission remands this case to SOAH and instructs EPE to reissue notice to ensure that all EPE ratepayers are adequately noticed.

711

SIGNED AT AUSTIN, TEXAS the 23rd day of May 2016.

PUBLIC UTILITY COMMISSION OF TEXAS



DONNA L. NELSON, CHAIRMAN



KENNETH W. ANDERSON, JR., COMMISSIONER



BRANDY MARTY MARQUEZ, COMMISSIONER

Exhibit B

Doc#471021 - Order Granting in Part and Denying in Part
Petition for Judicial Review

REC'D & FILED

2016 SEP 12 PM 4:09

SUSAN MERRIWETHER
CLERK

BY SW DEPUTY

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5
6 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR CARSON CITY**

8 -o0o-

9 **VOTE SOLAR,**

10 **Petitioner,**

11 **v.**

12 **THE PUBLIC UTILITIES COMMISSION**
13 **OF NEVADA,**

14 **Respondents.**

15 **And all participating parties.**

CASE NO. 16 OC 00052 1B

DEPT. 2

**ORDER GRANTING IN PART AND
DENYING IN PART PETITION FOR
JUDICIAL REVIEW**

16 **PROCEDURAL BACKGROUND**

17 Vote Solar filed a Petition for Judicial Review (the "Petition") requesting this
18 Court vacate and set aside both the Order on Reconsideration and Rehearing and the
19 Modified Final Order of the Public Utilities Commission of Nevada ("PUCN"). The
20 Alliance for Solar Choice ("TASC"), Great Basin Solar Coalition ("Great Basin"), the
21 Nevada Attorney General's Bureau of Consumer Protection ("BCP"), Nevada Power
22 Company d/b/a NV Energy ("Nevada Power") and Sierra Pacific Power Company d/b/a
23 NV Energy ("Sierra") (collectively, "NV Energy"), Nevadans for Clean Affordable
24 Reliable Energy ("NCARE"), and the Solar Energy Industries Association ("SEIA") filed
25 statements of intent to participate in the Petition for Judicial Review. Vote Solar, TASC,
26 Great Basin, BCP, NCARE, and SEIA (collectively, "Petitioners") filed memoranda of
27 points and authorities in support of the petition, and the PUCN and NV Energy filed
28 memoranda of points and authorities in opposition to the petition.

1 ('NAC'), Chapters 703 and 704, including but not limited to Section
2 4.5 of Senate Bill 374 (2015) and NAC 703.535."

3 "The purpose of the hearing is to address interim proposals to
4 facilitate the interconnection of additional renewable distributed
5 generation, if the 235-MW limitation for existing net energy metering
6 rules is met prior to January 1, 2016."

7 During the scheduled hearings the PUCN considered a PUCN's Regulatory
8 Operations Staff (Staff) proposal which, unlike NV Energy's application, included a rate
9 design that did affect NEM1 customers. The PUCN did not continue the scheduled
10 hearing or issue a new notice that the PUCN would hear Staff's proposal which could
11 affect NEM1 customers. The PUCN issued orders that affected NEM1 customers' rate
12 design.

13 Several parties filed petitions for reconsideration or rehearing. The PUCN
14 ordered the hearing be reopened solely on the issue of grandfathering existing solar
15 customers. The PUCN then issued the two orders at issue in this case, the Order on
16 Reconsideration and Rehearing and the Modified Final Order.

17 The PUCN wanted, in its Modified Final Order (the "PUCN Order"), to
18 implement Senate Bill 374 ("SB 374") of the 2015 legislative session. The PUCN adopted
19 new net energy metering rates for customer-generators within NV Energy's service
20 territories. The Nevada Supreme Court recently explained the purpose of SB 374:

21 For the last two decades, Nevada law has required utility
22 companies to offer renewable energy system owners credits
23 for excess energy produced, through a program of net
24 metering. Because net metering apparently imposed an
25 unfair financial burden on non-net metering customers, see
26 Hearing on SB 374 Before the Assembly Commerce and
27 Labor Comm., 78th Leg., at 47 (Nev., May 20, 2015), the net
28 metering program was capped at 3% of the total peak
capacity of all utilities in the state. *Id.*; see 2013 Nev. Stat.,
ch. 510, at 3341 (amending NRS 704.773). During the last
legislative session, however, the legislature allowed for net
metering beyond the cap, albeit at a tariff, and placed
regulatory authority over the net metering program with the
Public Utilities Commission of Nevada (PUCN), charging
that entity with maintaining fairness between customers of

1 the net metering program and non-net metering customers
2 and giving it certain tools to do so. Hearing on SB 374, at
3 47-48 (Nev., May 20, 2015); see 2015 Nev. Stat., ch. 379, at
4 2146-55.

5 In describing the tools the Legislature gave the PUCN through the passage of SB
6 374, the Nevada Supreme Court stated that “[f]or example, the new law gives discretion
7 to the PUCN to act in the public interest, authorizing it to establish different rate classes
8 for net metering customers ..., to limit enrollment in net metering, and to determine
9 whether the [new net metering rates] should be applied to existing net metering
10 customers. 2015 Nev. Stat., ch. 379, §§ 2.3 and 2.5, at 2148-49.”

11 The PUCN Order, which approves cost-of-service studies that identify annual
12 cost-shifts of \$623 per customer-generator in Nevada Power’s service territory and \$471
13 per customer-generator in Sierra’s service territory, finds that the net metering rates
14 that were in effect prior to 2016 allowed customer-generators to avoid paying their full
15 share of the fixed costs of electricity service. (R. at 413.) The PUCN found that the
16 under-recovery of fixed costs from customer-generators caused other customers to pay
17 more than their fair share of fixed costs, resulting in an expected \$16 million annual
18 cost-shift. (R. at 457, 476, 519-20.) The PUCN found that this shift of costs from
19 customer-generators to other customers was unreasonable and therefore adopted
20 revised rates to gradually eliminate the cost-shift.

21 The PUCN Order gradually implements the following changes to net metering
22 rates with the changes occurring in five incremental steps (one every three years) over a
23 total period of 12 years: 1) fixed monthly charges (the Basic Service Charges) increase to
24 provide for the recovery of certain fixed costs of providing standby electric service to
25 customer-generators; 2) volumetric rates (the Base Tariff General Rates) decrease to
26 account for the recovery of fixed costs through fixed charges; 3) netting (measuring the
27 difference between kilowatt-hours received from the utility and kilowatt-hours fed back
28 to the grid) occurs once each hour, rather than once each month; and 4) the
compensation provided for net excess electricity decreases from the retail rate to a
value-based rate.

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STANDARD OF REVIEW

NRS 703.373(11) prohibits this Court from substituting its judgment for that of the PUCN as to the weight of the evidence on questions of fact and shall affirm the PUCN Order unless “the substantial rights of the petitioner have been prejudiced because the final decision of the PUCN is: (a) In violation of constitutional or statutory provisions; (b) In excess of the statutory authority of the PUCN; (c) Made upon unlawful procedure; (d) Affected by other error of law; (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or (f) Arbitrary or capricious or characterized by abuse of discretion.”

Under NRS 233B.135(2) Petitioners have the burden of proving that the final decision is invalid under 233B.135(3).

NEM1 CUSTOMERS

Issue

The dispositive issue on notice is whether – in light of the PUCN’s consideration of Staff’s proposed rate design and orders affecting NEM1 customers’ rate design – the notices violate constitutional and statutory requirements. To determine whether the notices violate constitutional and statutory requirements the court must decide whether the notices contain a brief description of the purpose of the filing or proceeding, including, without limitation, a clear and concise introductory statement that summarizes the relief requested or the type of proceeding scheduled. Another way of stating the dispositive issue on notice is whether the PUCN exceeded its subject matter jurisdiction when, in light of the notice it had provided, it heard and entered orders on Staff’s proposed rate design which affected NEM1 customers.

Notice Requirements

NRS 703.320(1) requires the PUCN give notice of hearings. The legislature delegated to the PUCN to specify by regulation the manner of giving notice. NAC

1 703.160 is the PUCN regulation specifying the manner of giving notice. NAC
2 703.160(4)(c) is the relevant subsection in this case. It provides:

3 4. The public notice ... must include, as appropriate:

4 ...

5 (c) A brief description of the purpose of the filing or proceeding,
6 including, without limitation, a clear and concise introductory
7 statement that summarizes the relief requested or the type of
8 proceeding scheduled;

9 ...

10 Some Petitioners mistakenly cited and argued that subsection (c) includes
11 language that requires the introductory statement to also include the effect of the relief
12 or proceeding upon consumers. The PUCN amended 703.160(4) on March 19, 2015 by
13 filing a temporary regulation with the Secretary of State, docketed as LCB File No.
14 T008-14. The amendment eliminated the effect-of-the-relief requirement.

15 The Nevada Supreme Court has provided judicial gloss to the notice requirement.
16 In *Public Serv. Comm'n v. Southwest Gas*, 99 Nev. 268, 662 P.2d 624 (1999)
17 proceedings were initiated by the utilities as rate increase applications. The Public
18 Service Commission (PSC) notices stated: "All rate schedules, special charges, service
19 contract rules and regulations pertaining to Applicant's operation are subject to review
20 in this proceeding." *Id.* 271. In the rate increase application proceedings the PSC moved
21 to change the utilities' rate design. The court stated: "Inherent in any notice and hearing
22 requirement are the propositions that the notice will accurately reflect the subject
23 matter to be addressed and that the hearing will allow full consideration of it;" and
24 "notice must be specific enough to alert all interested persons of the substance of the
25 hearing." *Id.* 271. The court quoted a PSC order in an earlier case in which the PSC said:
26 "[A] person examining [the utilities'] applications should be able to rely on the factors
27 stated by the Applicant in its applications Therefore, were the Commission to hear
28 and issue orders on matters not submitted by the Applicant in its application, there

1 would to that extent be a denial of fairness and due process through inadequate Notice.”
2 *Id.* 271-72. The court continued, “[t]he PSC recognizes that it should not hear matters
3 and issue orders on matters not submitted by the applicant nor provided for with some
4 degree of specificity in the notice. Such would be and is a ‘denial of fairness and due
5 process through inadequate Notice.’” *Id.* 272. The court noted that rate changes are
6 substantially different from rate design and pointed out that the subject matter of the
7 PSC action, rate design, did not appear in the notices. The court found that the general
8 language of the notices “clearly could not and did not give the utilities an opportunity to
9 oppose the proposed change in the rate design,” and held as a result that all matters
10 relating to rate design were improperly heard and decided. *Id.* 271.

11 *Southwest Gas* noted that the dispositive issue in that case was whether proper
12 and *jurisdictional* notice had been given. *Id.* 270. That court cited *Checker, Inc. v.*
13 *Public Serv. Comm’n*, 84 Nev. 623, 446 P.2d 981 (1968) for the proposition that the
14 Commission was without jurisdiction because it had not complied with the notice and
15 hearing requirements imposed by the legislature. Those courts were talking about
16 subject matter jurisdiction. Subject matter jurisdiction may be raised by the parties at
17 any time or by a court *sua sponte*. *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163,
18 179 (2011). Subject matter jurisdiction cannot be conferred or waived by the parties.
19 *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990).

20 *Checker* includes an important reminder of the need for the “inexorable
21 safeguard” of a fair and open hearing. *Checker* cited the United States Supreme Court in
22 *Ohio Bell Tel. Co. v. Public Util. Comm’n*, 301 U.S. 292, 304 (1937):

23 Regulatory commissions have been invested with
24 broad powers within the sphere of duty assigned to them by
25 law. Even in quasi-judicial proceedings their informed and
26 expert judgment exacts and receives a proper deference from
27 courts when it has been reached with due submission to
28 constitutional restraints. Indeed, much that they do within
the realm of administrative discretion is exempt from
supervision if those restraints have been obeyed. All the
more insistent is the need, when power has been bestowed so
freely, that the “inexorable safeguard” of a fair and open
hearing be maintained in its integrity. The right to such a

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hearing is one of “the rudiments of fair play” assured to every litigant by the Fourteenth Amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored.

Analysis

The court will now apply the law regarding notice to the facts of this case.

NV Energy’s applications did not seek NEM1 rate design changes. Both applications state: “This filing does not ... [a]ffect the rights of NEM1 customers in any way.” The PUCN filed a Notice of Prehearing Conference and Notice of Hearing regarding each application. Each notice stated that “[t]he purpose of the hearing is to address interim proposals to facilitate the interconnection of additional renewable distributed generation if the 235-MW limitation for existing net energy metering rules is met prior to January 1, 2016.” At the noticed hearing the PUCN considered Staff’s proposal and entered orders that affect NEM1 customers’ rate design.

The PUCN notices do not contain, in the purpose-of-the-hearing section or anywhere else, notice that the PUCN would consider changing NEM1 customers’ rate design. As the *Southwest Gas* court pointed out, “[i]nherent in any notice and hearing requirement are the propositions that the notice will accurately reflect the subject matter to be addressed ...” and “notice must be specific enough to alert all interested persons of the substance of the hearing.” One subject matter addressed by the PUCN was NEM1 customers’ rate design. Because the Notices do not contain notice that the PUCN would consider NEM1 customers’ rate design, or ever use the term “rate design” at all, the Notices did not accurately reflect subject matter the PUCN addressed and the Notices were not specific enough to alert all interested persons that the PUCN would address NEM1 customers’ rate design.

The *Southwest Gas* court also stated, “[t]he PSC recognizes that it should not hear matters and issue orders on matters not submitted by the applicant nor provided for with some degree of specificity in the notice. Such would be and is a denial of

1 fairness and due process through inadequate Notice.” Because the PUCN heard matters
2 and issued orders on matters neither submitted by the applicant nor provided for with
3 any degree of specificity in the Notice there was a denial of fairness and due process
4 through inadequate Notice.

5 The PUCN, NV Energy, or both, argued as follows:

6 1. Petitioners participated in all hearings and no one ever objected to the
7 notices until after the final orders were issued. The argument fails because the due
8 process and NRS 703.320 (through NAC 703.160(4)) notice requirements are
9 jurisdictional. Therefore, Petitioners participation and failure to object cannot and does
10 not remedy the defect in notice, or confer subject matter jurisdiction on the PUCN to
11 change NEM1 customers’ rate design in the hearing as noticed.

12 2. The Notices are sufficient because they refer to Section 4.5 of SB 374
13 which expressly states that “[t]he Commission may make modifications to the
14 tariff [filed by the utility], including modifications to the rate design and the terms
15 and conditions of [NEM] services to customer-generators.” This argument fails
16 because, although Section 4.5 of SB 374 expressly states what the PUCN *may* do,
17 the public and NEM1 customers have a constitutional due process and statutory
18 right to know specifically what matters the PUCN *will* hear and enter orders on.
19 Further, the same Notices of Hearing that refer to Section 4.5 of SB 374 also refer
20 to NV Energy’s applications which specifically state that “[t]his filing does not ...
21 [a]ffect the rights of NEM1 customers in any way.” So even if their argument were
22 true, the Notices would be contradictory and unclear and therefore
23 unconstitutionally and statutorily defective.

24 3. *Public Serv. Comm’n v. Southwest Gas* is distinguishable because in
25 that case the type of proceeding changed, while here the proceedings have always
26 involved rate design, and in *Southwest Gas* the utilities did not have an
27 opportunity to present evidence, whereas in this case Petitioners actually
28 presented evidence. The first part of the argument fails because it is factually

1 incorrect. The proceedings did not involve NEM1 customers' rate design until the
2 PUCN decided to hear and make orders based upon Staff's proposal which was
3 different from NV Energy's filing which did "not ... [a]ffect the rights of NEM1
4 customers in any way." The second part of the argument fails because
5 participation in the hearings cannot and does not cure the lack of subject matter
6 jurisdiction.

7 4. The PUCN used the word "standing" one time. If it is making an
8 argument that Petitioners lack standing the argument fails because the PUCN
9 failed to support the argument with any legal authority or argument. The
10 argument also fails because the court can address subject matter jurisdiction *sua*
11 *sponte* as discussed above.

12 5. The PUCN's notices did not state that the PUCN's decision would be
13 limited to granting or denying NV Energy's applications. The statement is true but
14 cannot justify the PUCN's hearing matters and issuing orders on NEM1 rate
15 design when that matter was not submitted by NV Energy nor provided for with
16 some degree of specificity in the PUCN Notices.

17 6. The public and NEM1 customers should have familiarized
18 themselves with the law that precipitated the applications. This argument fail
19 because the PUCN failed to support the arguments with any legal authority. The
20 argument also fails because the PUCN established the manner of giving notice,
21 and the PUCN regulation, NAC 703.160(11), does not require the public or NEM1
22 customers to familiarize themselves with the law and then guess what the PUCN
23 intends to or will hear and issue orders on.

24 7. It is unreasonable to require notice so specific that the PUCN must
25 describe in detail the laws and outlining the scope of a proceeding. Petitioners
26 have not argued that the PUCN must describe in detail the laws or outline the
27 scope of a proceeding. As the Nevada Supreme Court has said, the notice must
28 accurately reflect the subject matter to be addressed and be specific enough to

1 alert all interested persons of the substance of the hearing. If matters arise during
2 the hearing process that were not covered in a notice of hearing, the PUCN can
3 issue new notice.

4 8. Even if interested persons failed to read SB 374 sec. 4.5, they still
5 could have intervened. This argument fails because the PUCN failed to support the
6 arguments with any legal authority. There is a procedure to intervene, but a
7 procedure to intervene does not remedy the lack of subject matter jurisdiction that
8 results from constitutionally and statutorily defective notice. The PUCN cannot
9 fail to give notice or give defective notice because there is a procedure to intervene.
10 Stated another way, the PUCN must comply with the notice requirements even
11 though there is a procedure to intervene.

12 9. Petitioners propose the PUCN be limited to accepting or denying
13 applications without the option of making modifications. Petitioners have not
14 made this argument. Modifications to proposals made in an application may be
15 made so long as the PUCN does not hear matters and issue orders on matters not
16 submitted by the applicant nor provided for with some degree of specificity in the
17 notice.

18 10. NEM customers' interests were represented at the hearings. The
19 argument fails because representation at the hearings does not cure the lack of
20 subject matter jurisdiction caused by the constitutionally and statutorily defective
21 Notices. The argument also fails because it fails to consider the interests of
22 members of the public.

23 11. Substantial rights of Petitioners were not prejudiced. The argument
24 fails because lack of prejudice to substantial rights does not cure the lack of
25 subject matter jurisdiction caused by the constitutionally and statutorily defective
26 Notices.

27 12. NEM1 rates were discussed several times before the hearing. This
28 argument fails because discussing matters not covered in notices does not remedy

1 the lack of subject matter jurisdiction caused by constitutionally and statutorily
2 defective notices.

3 13. Any defects in notice was cured by the rehearing. This argument fails
4 because the rehearing was limited to the issue of grandfathering. Because the
5 rehearing was limited to the issue of grandfathering it does not remedy the lack of
6 subject matter jurisdiction caused by constitutionally and statutorily defective
7 Notices.

8
9 *Conclusion*

10 Because the PUCN heard matters and issued orders on matters not
11 submitted by the applicant nor provided for with any degree of specificity in the
12 Notices there was a denial of fairness and due process through inadequate Notice.
13 The PUCN lacked subject matter jurisdiction to hear matters and issue orders on
14 NEM1 customers' rate design because that matter was not submitted by the
15 applicant nor provided for with any degree of specificity in the Notices. The
16 PUCN's consideration of and orders on NEM1 customers' rate design violated
17 constitutional due process and NRS 703.320 (through NAC 703.160(4))
18 provisions, and the orders were made upon unlawful procedure.

19
20 **NEM2 CUSTOMERS**

21 Some Petitioners argued that the PUCN Orders should be set aside, at least
22 as to NEM1 customers, because the PUCN violated NEM1 customers' due process
23 rights by failing to provide required notice. The at-least-as-to-NEM1-customers
24 language implies that maybe the PUCN Orders should be set aside as to NEM2
25 customers as well. But none of the petitioners provided any legal authority or
26 argument to support this implied assertion. Without legal authority or argument
27 to support the implied assertion, and the fact that the position of the NEM1 and
28 NEM2 customers are different – for example, the fact that the applications state

1 "[t]his filing does not ... [a]ffect the rights of NEM1 customers in any way" – the
2 court declines to consider *sua sponte* whether PUCN's Order should be set aside
3 because the PUCN violated NEM2 customers' due process rights by failing to
4 provide required notice.

5
6 **The PUCN Order Is Not Contrary to Law**

7 The PUCN Order is consistent with legislative declarations regarding
8 renewable energy and economic development. Moreover, notwithstanding the
9 PUCN's authority to limit enrollment in net metering and to close net metering to
10 new customer-generators, the PUCN Order does neither and provides that net
11 metering will continue to be offered to both existing and future customer
12 -generators. Electric utilities in Nevada continue to offer net metering by "taking
13 the difference between (i) the electricity a customer generates and sends to the
14 utility, and (ii) the electricity that a utility sends to the customer." (Vote Solar
15 Mem. at 11.) The PUCN Order increases the frequency of the "netting" so that it
16 occurs on an hourly basis over the billing cycle. (R. at 515.)

17 Additionally, NRS 704.775, which outlines a rate design requiring the
18 "banking" of excess kilowatt-hours for retail compensation in future billing
19 periods, was applicable only to the net metering rates offered prior to the date on
20 which the cumulative capacity of net metering systems reached 235 megawatts. SB
21 374, Sec. 2.95. Therefore, the PUCN Order, which was issued after the
22 235-megawatt threshold was reached on August 20, 2015 (R. at 16145.), does not
23 violate the law by replacing the banking of electricity (kilowatt-hours) with the
24 banking of value-based bill credits.

25
26 **The PUCN Order Is Not Arbitrary or Capricious**

27 For a court to find that an administrative agency's decision is arbitrary or
28 capricious, the agency's decision "must be in disregard of the facts and

1 circumstances involved.” *Meadow v. Civil Service Bd. of LVMPD*, 105 Nev. 624,
2 627, 781 P.2d 772, 774 (1989). Nevada courts have traditionally upheld PUCN
3 decisions “if there [is] substantial evidence in the record to support the [PUCN’s]
4 orders.” *Public Service Comm’n of Nevada v. Continental Tel. Co.*, 94 Nev. 345,
5 348, 580 P.2d 467, 469 (1978). Substantial evidence is that which “a reasonable
6 mind might accept as adequate to support a conclusion.” *Nevada Power Co. v.*
7 *Public Utilities Commission, et al.*, 122 Nev. 821, 834, 138 P.3d 486, 495 (2006).

8 The PUCN’s decision in this case is not arbitrary or capricious because the
9 PUCN did not disregard the facts or circumstances involved. Rather, the PUCN
10 relied on substantial evidence in the form of extensive cost-of-service studies and
11 voluminous testimony submitted by various parties to the underlying proceedings.
12 Based on substantial evidence, the PUCN reached a finding that
13 customer-generators cause NV Energy to incur costs that were not being recovered
14 from customer-generators under the prior net metering rates. Also, based on
15 substantial evidence, the PUCN imposed increased fixed charges on
16 customer-generators to ensure that NV Energy is not forced to recover from other
17 ratepayers the fixed costs associated with providing standby electric service to
18 customer-generators. Finally, the PUCN relied on substantial evidence in the
19 record when it adopted its market-based valuation of the net excess electricity
20 produced by customer-generators. This court cannot substitute its judgment for
21 that of the PUCN as to the weight of the evidence on questions of fact such as the
22 cost of serving customer-generators or the value of net excess electricity.

23
24 **The PUCN Order Does Not Violate the Contract Clause of the United**
25 **States Constitution**

26 There is no evidence supporting the assertion that the PUCN Order impairs
27 any contractual rights in violation of the Contract Clause. The record does not
28 show that there was any contract or contractual provision promising a particular

1 utility rate to customer-generators. Rooftop solar companies and their customers
2 remain free to perform their obligations under contracts that were executed prior
3 to the PUCN Order being issued. The PUCN Order could result in certain
4 customers receiving returns on their investments that fail to meet expectations,
5 but expectations alone are not sufficient to sustain a contract impairment claim.
6 In light of the powers bestowed upon the PUCN by the Legislature, net metering
7 customers entered into agreements with their solar companies "subject to any
8 regulating legislation which the State might enact to protect its citizens." *Koscot*
9 *Interplanetary, Inc. v Draney*, 90 Nev. 450, 458, 530 P.2d 108, 113 (1974).
10 Statutes do not provide "contractual" benefits or guarantees. *Id.*; see also *K-Mart*
11 *Corp v. State Indus. Ins. Sys.*, 101 Nev. 12, 20, 693 P.2d 562, 567 (1985). By
12 establishing net metering statutes, the Nevada Legislature did not promise that
13 net metering rates would remain at any particular level in perpetuity or that the
14 law would never change. See *id.*; see also *Robertson v. Kulongoski*, 466 F.3d 1114,
15 1117 (9th Cir. 2006).

16

17 *Conclusion*

18 The Court must affirm the challenged orders as to NEM2 customers
19 because Petitioners failed to carry their burden of proof that the orders violate
20 constitutional or statutory provisions, exceed the statutory authority of the PUCN,
21 were made upon unlawful procedure, affected by other error of law, are clearly
22 erroneous in view of the reliable, probative, and substantial evidence on the whole
23 record, are arbitrary or capricious, or characterized by abuse of discretion.

24

25

ORDER

26

IT IS ORDERED:

27

The Petition for Judicial Review is granted in part. The orders, insofar as

28

they concern NEM1 customers, are set aside and remanded because the orders

1 were made in violation of constitutional and statutory provisions, and were made
2 upon unlawful procedure.

3 The Petition is denied in part. The orders, insofar as they concern NEM2
4 customers, are affirmed.

5 September 12, 2016.

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8 JAMES E. WILSON JR.
9 DISTRICT JUDGE
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1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of the First Judicial District Court of
3 Nevada; that on the 12 day of September, 2016, I served a copy of this
4 document by placing a true copy in an envelope addressed to:

5 Christopher Mixson, Esq.
6 5594 B Longley Lane
7 Reno, NV 89511

Leslie Baugh, Esq.
225 Broadway, Ste 1670
San Diego, CA 92101-5000

8 Carolyn Tanner, Esq.
9 Garrett Weir
10 PUCN
11 1150 E. William Street
12 Carson City, NV 89701

Tami Cowden, Esq.
Philip Hymanson
3773 Howard Hughes Pkwy, Ste
400N
Las Vegas, NV 89169

13 Public Utilities Commission of
14 Nevada Regulatory Operations Staff
15 1150 E. William Street, Ste 250
16 Carson City, NV 89701

Solar Energy Industries Association
Lucas Foletta, Esq.
100 W. Liberty Street, 10th Floor
Reno, NV 89501

17 Bureau of Consumer Protection
18 Eric Witkoski, Chief DAG
19 Michael Sanders, DAG
20 10791 West Twain, Ste 100
21 Las Vegas, NV 89135

The Alliance for Solar Choice
Kathleen Drakulich, Esq.
Adam Hosmer-Henner, Esq.
100 W. Liberty Street, 10th Floor
Reno, NV 89501

22 NV Energy
23 Elizabeth Elliott, Esq.
24 6100 Neill Road
25 Reno, NV 89501

Arturo Gonzalez, Esq.
Christopher Carr, Esq.
Navi Dhillon
425 Market Street
San Francisco, CA 94105

26 Leif Reid, Esq.
27 50 W. Liberty Street, Ste 410
28 Reno, NV 89501

Joseph Palmore, Esq.
Morrison & Foerster, LLP
2000 Pennsylvania Avenue NW
Washington DC 20006

For Vote Solar
EarthJustice
Sara Gersen, Esq.
800 Wilshire Blvd, Ste 1000
Los Angeles, CA 90017

Nevadans for Clean Affordable
Reliable Energy
Robert Johnston, Esq.
550 W. Musser Street, Ste H
Carson City, NV 89703

Jill Tauber, Esq.
1625 Massachusetts Avenue, NW
Ste 702
Washington, DC 20036

Washoe County School District
Neil Rombardo, General Counsel
Jason Geddes, PhD
425 E. 9th Street
Reno, NV 89512

Southern Nevada Homebuilders
Association
Joshua Hicks, Esq.
5371 Kietzke Lane
Reno, NV 89511

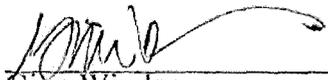
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1 Bombard Renewable Energy
Martha Ashcroft, Esq.
2 7251 West Lake Mead Blvd, Ste 300
Las Vegas, NV 89128

3
4 Great Basin Solar Coalition
Jerry Snyder, Esq.
429 Plumb Lane
5 Reno, NV 89509

6 the envelope sealed and then deposited in the Court's central mailing basket in the
7 court clerk's office for delivery to the USPS at 1111 South Roop Street, Carson City,
8 Nevada, for mailing.

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Gina Winder
Judicial Assistant