ARIZONA CORPORATION COMMISSION

BEFORE THE ARIZONA CORPORATION COMMISSION

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CHAIRMAN
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IN THE MATTER OF THE GENERIC PROCEEDINGS CONCERNING ELECTRIC RESTRUCTURING ISSUES.	DOCKET NO. E-00000A-02-0051
IN THE MATTER OF ARIZONA PUBLIC SERVICE COMPANY'S REQUEST FOR VARIANCE OF CERTAIN REQUIREMENTS OF A.A.C. R14-2-1606.	DOCKET NO. E-01345A-01-0822
IN THE MATTER OF THE GENERIC PROCEEDING CONCERNING THE ARIZONA INDEPENDENT SCHEDULING ADMINISTRATOR.	DOCKET NO. E-00000A-01-0630
IN THE MATTER OF TUCSON ELECTRIC POWER COMPANY'S APPLICATION FOR A VARIANCE OF CERTAIN ELECTRIC COMPETITION RULES COMPLIANCE DATES.	DOCKET NO. E-01933A-02-0069
IN THE MATTER OF THE APPLICATION OF TUCSON ELECTRIC POWER COMPANY FOR APPROVAL OF ITS STRANDED COST RECOVERY.	DOCKET NO. E-01933A-98-0471

PROCEDURAL ORDER

BY THE COMMISSION:

On October 18, 2001, the Arizona Public Service Company ("APS") filed a Request for a Partial Variance to A.A.C. R14-2-1606(B) and for Approval of a Purchase Power Agreement ("PPA").

A Procedural Conference was held on December 5, 2001, to discuss procedural issues and the appropriate scope of this proceeding. APS filed direct testimony on December 12, 2001, and the parties filed briefs on procedural matters on December 19, 2001.

DISCUSSION

In its Brief, APS argues that the variance rule is the appropriate procedural mechanism for the Commission to adjudicate APS' request. APS cites R14-2-1614(C), stating that it applies to "any" of the Electric Competition Rules. APS states that "[i]n no instance is the Commission's power to grant

a waiver or variance limited in any respect other than by the 'public interest,' which is a substantive determination on the merits of the proposed variance or waiver and not a limitation on the procedural process of seeking the variance or waiver." (APS Brief p. 3)

APS argues that the rules allow a variance; that Commission practice has been to routinely consider and grant waivers from other generally applicable rules, often without a hearing; that Arizona case law recognizes the discretion of the Commission to use utility-specific orders rather than rules of general applicability; and that to deny APS a rule variance available to other utilities would violate the equal protection provisions in the Arizona Constitution. APS believes that no additional notice requirements or constitutional due process considerations are legally necessary, and that any additional notice would be at the Commission's discretion.

The Residential Utility Consumer Office ("RUCO") believes that it may be prudent for the Commission to comply with the requirements of A.R.S. § 40-252 and recommends that the Commission also include the caption from the APS stranded cost docket, E-01345A-98-0473.

The Arizonans for Electric Choice and Competition ("AECC") urge the Commission to undertake its review of Arizona's electric policy direction, as it pertains to the future provision of standard offer service, as part of this docket, but not to re-open the issue of customer choice and the Settlement Agreement.

The Arizona Competitive Power Alliance ("Alliance") argues that granting the requested variance would: be a "de facto repeal of a critical provision of the Electric Competition Rules" (Alliance Brief p. 2) and would violate the rulemaking requirements of the Arizona Administrative Procedure Act; would breach the Settlement Agreement; and would violate Decision No. 61973. The Alliance believes that APS must first negotiate changes to the Settlement Agreement with the parties, and then seek an amendment to the A.A.C. R14-2-1606(B) through the rulemaking process. Further, the Alliance argues that APS must also obtain approval of any negotiated amendments to the Settlement Agreement by requesting that Decision No. 61973 be amended in a separate proceeding conducted pursuant to A.R.S. § 40-252. Finally, the Alliance requests that the Commission dismiss APS' application as legally improper; order APS to submit a Plan of Administration; and suggests that if the Commission wishes to consider issues raised by APS and the response of the other parties,

it should use a workshop or generic fact-finding proceeding.

The Arizona Transmission Dependent Utility Group ("ATDUG") discussed the appropriateness of a variance request when an approved tariff of the Commission or an order conflicts with the variance request, and also, when there is a settlement agreement among multiple parties who may have relied to their detriment on the settlement. ATDUG agrees with Staff that the transfer of generation assets to APS' affiliate should be postponed because "[o]nce that asset transfer is accomplished, the receiving entity, Pinnacle West Energy Corporation ("PWEC"), will be an exempt wholesale generator and forever beyond the reach of the Commission." (ATDUG Brief p. 3).

The Southwestern Power Group II, L.L.C. ("SWPG"), Toltec Power Station, L.L.C. ("Toltec"), and the Bowie Power Station L.L.C. ("Bowie"), argue that APS "cannot achieve the underlying goal of its Request for Variance without (i) an amendment to the Settlement Agreement and Addendum and (ii) an amendment to or recission (sic) of the Commission's Decision No. 61973." (Brief at pp. 2-3). SWPG, Toltec, and Bowie believe that a proceeding conducted pursuant to A.R.S. § 40-252 is appropriate to protect the rights of the signatory parties to the Settlement Agreement and to persons who could be directly and substantially affected. They also believe that the consent of the signatory parties is a prerequisite to such action.

In its Brief, Staff states that APS' application complies with A.A.C.R14-2-1614(C) because APS alleges that it is affected by the Rule and that the requested variance will serve the public interest. Staff believes that if the Commission were to grant APS' application for a waiver of A.A.C. R14-2-1606(B), it would also have to amend Decision No. 61973, the Commission Order that approved the Settlement Agreement. Staff states that Decision No. 61973 already granted APS a variance from the terms of 1606(B) by granting a two-year extension, and granting APS an indefinite extension would involve amending Decision No. 61973. Staff believes that APS should be required to provide broad public notice of its application, including notice to parties to Decision No. 61973 and to its customers.

By Procedural Order issued January 22, 2002, the Commission has opened a generic docket on electric restructuring (Docket No. E-00000A-02-0051) ("generic docket"), and has established deadlines for interested parties to respond to questions raised by Commissioners.

By Procedural Order issued January 25, 2002, a Procedural Conference was scheduled to discuss the procedural posture and schedule in this matter.

On January 28, 2002, Tucson Electric Power Company also filed a Request for a Variance (Docket No. E-01933A-02-0069).

On January 30, 2002, Staff filed a Response to the Procedural Order establishing the generic docket and requested consolidation of all related electric competition dockets, including the generic docket, the APS variance request, the TEP variance request, the AISA inquiry, and the TEP request to amend its market generation credit, Docket No. E-01933A-98-0471. Staff also suggested that it be allowed to review the other parties' initial responses and then submit a report. The Staff Report would summarize the positions taken by the various parties, include discussion on any omitted items, and develop policy recommendations.

On January 31, 2002, APS filed its Response to Staff's January 30, 2002 filing, objecting to the consolidation of all related electric dockets. APS asked for the prompt consideration of its Application and believes that the various pending proceedings identified by Staff have not been shown to be legally interdependent.

At the January 31, 2002 Procedural Conference, the parties argued their positions on consolidation and the procedural timeframes for filing testimony and for hearing.

On February 1, 2002, APS filed its Supplemental Brief on Application of A.R.S. § 40-252 to this Proceeding ("Supplemental Brief"). APS argues that a finding that APS' filing invokes A.R.S. § 40-252 is unnecessary at this time, as the procedures for notice and hearing for its "variance request" can be identical to those pursuant to an A.R.S. § 40-252 proceeding. APS also incorporated its November 26, 2001 Reply to Staff's Response and re-argued the points it made in its previous filings: the Electric Competition Rules specifically include any variances granted thereto; no party to the Settlement Agreement has alleged that the APS filing required a change to either the settlement or to Decision No. 61973; that the Commission has granted variances to the Electric Competition Rules without complying with the procedural requirements of Decision No. 61973; casting the proceeding as one arising under § 40-252 "may also severely limit or even render moot the Commission's ability to act in the public interest"; and that the reference to § 40-252 "could be portrayed and construed as

the Commission attempting to in some way 'reopen' the 1999 APS Settlement" and could "produce a severely negative financial impact on the Company given the heightened scrutiny being given to the credit quality of public utilities." (APS Supplemental Brief pp. 3-4).

On February 4, 2002, Panda Gila River, L.P. ("Panda") filed its Response to APS' Supplemental Brief. In response to APS' citation of Decisions Nos. 63316 and 63364, Panda states that whether or not Decision No. 61973 must be amended requires a case-by-case analysis, and the fact that amendment of the environmental portfolio standard in Decision No. 63364 did not require amendment of Decision No. 61973, is irrelevant to whether § 40-252 should be complied with in this docket. Panda argues that the fact that none of the parties to the Settlement have alleged that Decision No. 61973 must be amended is meaningless, because Decision No. 61973 is a "decision of the Commission that any person is entitled to rely upon." (Panda Response p. 3) Finally, Panda argues that APS' concern that by invoking A.R.S. § 40-252, the Commission may reopen the Settlement which may threaten the financial stability of APS, is a "scare tactic" that is "nothing more than an attempt to limit the scope of the Commission's decision to only those issues raised by APS regardless of what is in the best interest of the other parties and the citizens of Arizona." (Panda Response p. 3) Panda requests that the Commission reject the Supplemental Brief of APS.

On February 4, 2002, the Alliance filed its Response to APS' Supplemental Brief. The Alliance argues that "A.R.S. § 40-252 provides the sole procedural mechanism by which a decision of the Commission can be altered or amended. The Commission rule, A.A.C. R14-2-1614(C), only provides a means by which a party can seek an exemption from certain of the Commission Electric Competition Rules; it does not and cannot be used to circumvent the exclusive statutory procedure for amending a Commission <u>decision</u> under A.R.S. § 40-252." (Alliance Response p. 2, emphasis original). The Alliance distinguishes the two other Decisions cited by APS as involving variances that would not compel the Commission to amend Decision No. 61973 nor any other decision, and neither would have required the "*de facto* repeal of the rule from which an exemption was sought." (Alliance Response p. 2) The Alliance says that APS asserts that "the parties to the Settlement Agreement always intended that APS be able to escape its obligations under the Settlement Agreement by unilaterally obtaining an exemption from the rule incorporating those obligations."

(Alliance Response p. 2) The Alliance believes that the language of the Addendum to the Settlement Agreement where it states that no future Commission "order, rule or regulation" should be construed as conflicting with the Settlement, as expressing an opposite intent. The Alliance also asserts that APS is not prejudiced procedurally, and that APS' assertion of a possible adverse financial impact should have already occurred because APS filed the variance request and because of the scope of inquiry under the generic electric docket.

On February 6, 2002, Sempra Energy Resources ("Sempra") filed its Opposition to Arizona Public Service Company's Attempted Filing of Supplemental Brief. Sempra argues that APS is not acting in compliance with the December 19, 2001 Procedural Order, which contemplated the filing of only one brief, and that APS has not shown good cause to extend the time to allow filing reply briefs. Sempra also cites the arguments contained in the Panda and Alliance filings as support to deny APS' request for leave to supplement its February 1, 2002 filing.

ANALYSIS

A.A.C. R14-2-1614(C) allows the Commission to consider variations or exemptions from the terms or requirements of any of the rules. APS' application does assert the elements necessary for a variance request. Additionally, in order for the Commission to take the action APS requests (approval of the proposed PPA), Commission Decision No. 61973 must be amended. As Staff points out, APS was originally granted a variance from the terms of R14-2-1606(B) in Decision No. 61973, and any additional variations will require appropriate amendments to Decision No. 61973. Although APS cites to previous Commission Decisions Nos. 63316 and 63364[1] and argues that there is precedent for not requiring a § 40-252 proceeding, the circumstances of this proceeding are different. In neither of those dockets did any party allege that granting the application would violate the Settlement Agreement or Decision No. 61973, and the issue was not raised or addressed. Although APS argues that the Commission has a practice of granting waivers, it did not acknowledge or address the distinguishing differences with this Request – that its variance is contested and that there are allegations that what APS is requesting was specifically and particularly rejected in Decision No.

[1] Presumably, APS meant to refer to Decision No. 63354 (February 8, 2001).

61973 and in the Settlement Agreement to which it was a party.

Both the Decision and the Settlement Agreement state that APS will obtain power for standard offer customers pursuant to the Electric Competition Rules. Decision No. 61973 states: "Power for Standard Offer Service will be acquired in a manner consistent with the Commission's Electric Competition Rules." (p. 10), and the Addendum to Settlement Agreement provides that "[a]fter the extensions granted in this Section 4.1 have expired, APS shall procure generation for Standard Offer customers from the competitive market as provided for in the Electric Competition Rules. An affiliated generation company formed pursuant to this Section 4.1 may competitively bid for APS' Standard Offer load, but enjoys no automatic privilege outside of the market bid on account of its affiliation with APS." (Addendum to Settlement Agreement, p. 3). Clearly, APS agreed to, and the Commission's Decision approving the Settlement Agreement as modified by the Commission, required APS to procure generation for Standard Offer customers from the competitive market consistent with the Electric Competition Rules. The fact that APS has requested a "variance" from the Electric Competition Rule that directs how power purchased for standard offer service is to be acquired, clearly shows that the PPA is not consistent with the Electric Competition Rules.

Further, the variances that the Commission agreed to in the Settlement Agreement (Section 4.1.1, the two-year extension of time to separate assets and the "similar two-year extension" authorized "for compliance with A.A.C. R14-2-1606(B)") and granted in Decision No. 61973, were obviously bargained-for terms of the Settlement Agreement. In fact, one of the parties to the Decision, but not a signatory to the Settlement Agreement, requested that a provision be "explicitly stated in the Agreement", to reflect APS' intent to procure generation for standard offer customers from the wholesale generation market as provided for in the Electric Competition Rules, as well as the understanding that the affiliate generation company could bid for APS' standard offer load under an affiliate FERC tariff, but that there would be no automatic privilege outside of the market bid,. (Decision No. 61973 at p.9) The Commission agreed and ordered APS to "include language as requested." APS has not recognized that parties to the docket resulting in Decision No. 61973 also have due process rights, even though they may not be signatories to the Settlement Agreement. Further, it is possible that the Commission may take some action that requires amending Decision

No. 61973, but that does not implicate the Settlement Agreement.

APS initiated and proposed this change in how it is to obtain its power for standard offer service. By filing the application, APS asked the Commission to take this action, and the issue is not whether the Commission should "speculate now as to whether the Commission can or will substantively amend Decision No. 61973 in a manner that somehow implicates Section 40-252." The issue is how to insure that all interested parties' rights to due process are protected while allowing the parties to develop a record for the Commission to consider when making its ultimate determination.

APS' argument that the Commission finding that APS' application required proceeding according to A.R.S. § 40-252 "could be portrayed and construed as the Commission attempting to in some way 'reopen' the 1999 APS Settlement" is misdirected. It is APS, not the Commission, that initiated this action requesting the Commission change the way that APS will procure power for Standard Offer Customers.

In order for the variance APS requests to be granted by the Commission to have meaning or applicability, the Commission Decision must be amended. Accordingly, in addition to proceeding as a request for a rule variance, this matter should be processed as an application to amend a Commission Decision pursuant to A.R.S. § 40-252. By denominating the application as a request to amend Decision No. 61973 and by proceeding to take evidence, the Commission is not taking or proposing any action which would be inconsistent with the provisions of the Settlement Agreement. Several parties have alleged that APS' filing for approval of the proposed PPA is inconsistent with the Settlement Agreement, and that approval of the PPA would violate the Settlement Agreement and Decision No. 61973. These allegations are serious as they may ultimately affect or limit what action, if any, the Commission may take. For those reasons, APS is strongly encouraged to meet with the parties to Decision No. 61973 and this matter and resolve these issues.

Pursuant to A.A.C. R14-3-101, the Commission now issues this Procedural Order to govern the preparation and conduct of this proceeding.

IT IS THEREFORE ORDERED that Dockets Nos. E-00000A-02-0051; E-01345A-01-0822; E-00000A-01-0630; E-01933A-02-0069; and E-01933A-98-0471 are hereby consolidated.

IT IS FURTHER ORDERED that Staff shall file its Staff Report in the generic docket on or

before March 22, 2002.

IT IS FURTHER ORDERED that APS' application will proceed under the schedule established in this Procedural Order.[2]

IT IS FURTHER ORDERED that in addition to APS' request to process its request as a variance of a Commission Rule, the application should also be processed pursuant to A.R.S. § 40-252.

IT IS FURTHER ORDERED that the **hearing in the APS matter shall commence on April 29, 2002 at 10:00 a.m.**, or as soon thereafter as is practical, at the Commission's offices, 1200 West Washington Street, Phoenix, Arizona 85007.

IT IS FURTHER ORDERED that public comments will be taken on the first day of hearing.

IT IS FURTHER ORDERED that a **pre-hearing conference in the APS matter shall be held on April 25, 2002 at 10:00 a.m.**, at the Commission's Phoenix offices, for the purpose of scheduling witnesses and the conduct of the hearing.

IT IS FURTHER ORDERED that intervention in the APS matter shall be accordance with A.A.C. R14-3-105, except that **all motions to intervene must be filed on or before March 22, 2002**.

IT IS FURTHER ORDERED that Staff and Intervenor testimony and associated exhibits to be presented at hearing in the APS matter shall be reduced to writing and filed on or before **noon on March 29, 2002**.

IT IS FURTHER ORDERED that Company rebuttal testimony and associated exhibits to be presented at hearing in the APS matter shall be reduced to writing and filed on or before **noon on April 22, 2002**.

IT IS FURTHER ORDERED that any objections to any testimony or exhibits which have been prefiled as of April 25, 2002, shall be made before or at the April 25, 2002 pre-hearing conference.

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[2] The procedural schedule for the TEP applications will be set in a separate Procedural Order and will proceed on a different track from the APS application.

IT IS FURTHER ORDERED that all testimony filed shall include a table of contents which lists the issues discussed.

IT IS FURTHER ORDERED that any substantive corrections, revisions, or supplements to pre-filed testimony shall be reduced to writing and filed no later than five days before the witness is scheduled to testify.

IT IS FURTHER ORDERED that the parties shall prepare a brief, written summary of the pre-filed testimony of each of their witnesses and shall file each summary at least two working days before the witness is scheduled to testify.

IT IS FURTHER ORDERED that copies of summaries should be served upon the Presiding Officer, the Commissioners, and the Commissioners' aides as well as the parties of record.

IT IS FURTHER ORDERED that APS shall provide public notice of the hearing in this matter, in the following form and style, with the heading in no less than 24 point bold type and the body in no less than 10 point regular type:

PUBLIC NOTICE OF ARIZONA PUBLIC SERVICE COMPANY'S REQUEST FOR APPROVAL OF A PURCHASE POWER AGREEMENT WITH ITS AFFILIATE, PINNACLE WEST CAPITAL CORPORATION, AND FOR ANY REQUIRED ASSOCIATEDWAIVERS/AMENDMENTS NECESSARY PURSUANT TO THE ELECTRIC COMPETITION RULES AND COMMISSION DECISIONS. DOCKET NO. E-01345A-01-0822.

On October 18, 2001, Arizona Public Service Company ("APS" or "Company"), filed an application for approval of a long-term purchase power agreement between APS' affiliate, Pinnacle West Capital Corporation ("Agreement") and for the required associated waivers/amendments necessary pursuant to the Electric Competition Rules and Commission Decisions with the Arizona Corporation Commission ("Commission"). The Commission will hold a hearing on this matter beginning April 29, 2002, at 10:00 a.m. at the Commission's offices, 1200 West Washington Street, Phoenix, Arizona 85007. Public Comments will be taken in Phoenix on the first day of hearing.

The law provides for an open public hearing at which, under appropriate circumstances, interested parties may intervene. Intervention shall be permitted to any person entitled by law to intervene and having a direct and substantial interest in the matter. Persons desiring to intervene must file a written motion to intervene with the Commission, which motion

should be sent to the Company or its counsel and to all parties of record, and which, at the minimum, shall contain the following:

1. The name, address, and telephone number of the proposed intervenor and of any party upon whom service of documents is to made if different than the intervenor.

2. A short statement of the proposed intervenor's interest in the proceeding (e.g., a customer of the Company, a shareholder of the Company, etc.)

3. A statement certifying that a copy of the motion to intervene has been mailed to the Company or its counsel and to all parties of record in the case.

The granting of motions to intervene shall be governed by A.A.C.R14-3-105, except that all motions to intervene must be filed on or before March 22, 2002. The granting of intervention, among other things, entitles a party to present sworn evidence at hearing and to cross-examine other witnesses. However, failure to intervene will not preclude any person from appearing at the hearing and making a statement on such person's own behalf.

The Commission does not discriminate on the basis of disability in admission to its public meetings. Persons with a disability may request a reasonable accommodation such as a sign language interpreter, as well as request this document in an alternative format, by contacting Shelly Hood, ADA Coordinator, voice phone number 602/542-3931, E-mail shood@cc.state.az.us. Requests should be made as early as possible to allow time to arrange the accommodation.

IT IS FURTHER ORDERED that the Applicant shall cause the above notice to be published at least two days in a daily newspaper of general circulation in its service territory, with publication to be completed as soon as possible but not later than February 15, 2002, and shall provide copies of the above notice to its customers by mailing either in bill inserts or other mailing, no later than March 12, 2002.

IT IS FURTHER ORDERED that the Applicant shall file certification of mailing and publication as soon as practicable after the mailing and publication have been completed but not later than March 22, 2002.

IT IS FURTHER ORDERED that notice shall be deemed complete upon mailing and publication of same, notwithstanding the failure of an individual to read or receive the notice.

IT IS FURTHER ORDERED **that any interested person who has not been granted party status in any of the above-captioned dockets that wishes to remain on the service list for these dockets, shall file such a request with Docket Control[3] no later than March 1, 2002.**

IT IS FURTHER ORDERED that any party who wishes to accept service via electronic email shall file such a document with the Commission, indicating how such service should be effected.

IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113-Unauthorized Communications) applies to this proceeding as the matter is now set for public hearing.

IT IS FURTHER ORDERED that the time periods specified herein shall not be extended pursuant to Rule 6(a) or (e) of the Rules of Civil Procedure.

IT IS FURTHER ORDERED that the Presiding Officer may rescind, alter, amend, or waive any portion of this Procedural Order either by subsequent Procedural Order or by ruling at hearing.

DATED this 8th day of February, 2002.

LYN FARMER
CHIEF ADMINISTRATIVE LAW JUDGE

Copies of the foregoing mailed/delivered this 8th day of February, 2002 to:

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[3] The Hearing Division will maintain the service list.

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