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April 14, 2003

Ernest G. Johnson, Director
Utilities Division
Arizona Corporation Commission
1200 W. Washington
Phoenix, AZ 85007

Re: ***Trico's Issues List for the Electric Competition Advisory Group ("ECAG")***

Dear Mr. Johnson:

Enclosed please find Trico Electric Cooperative, Inc.'s Proposed Revisions to and Issues Concerning the Retail Electric Competition Rules.

Very truly yours,

WATERFALL ECONOMIDIS CALDWELL
HANSHAW & VILLAMANA, P.C.

Russell E. Jones

REJ/cw
Enclosure

TRICO ELECTRIC COOPERATIVE, INC.'S PROPOSED REVISIONS TO AND ISSUES CONCERNING THE RETAIL ELECTRIC COMPETITION RULES

I. INTRODUCTION

These proposed revisions supplement the proposed revisions filed on behalf of Trico Electric Cooperative, Inc. ("Trico") and other Rural Electric Distribution Cooperatives ("REDCs") ("REDC Proposals").

Trico reserves all of its rights in the issues it has asserted in the pending appeal in the Court of Appeals, Division One, 1CA-CV 01-0068, entitled: *Phelps Dodge Corporation, et al., Intervenors-Appellants, Cross Appellees, Residential Utility Consumer Office, Intervenor-Appellant, the Arizona Corporation Commission, an agency of the State of Arizona, Defendant-Appellant, Cross Appellee, Arizona Electric Power Cooperative, Inc., et al., Plaintiff-Appellees, Cross Appellants* ("Appeal"), and does not waive, in any manner, its rights in and to such issues and appeal. The Appeal will decide the validity of the Retail Electric Competition Rules ("Rules") or several of the basic provisions thereof. Therefore, Trico urges the Staff and the Commission that they should not subject the participants in the Rules process to devote very substantial amounts of time and money in any generic proceeding pertaining to amendments to the Rules. It is very likely that such generic proceeding will invade the appellate jurisdiction of the appellate courts in connection with the Appeal and therefore will be void and of no effect. In the pending Appeal the Cooperatives who are parties to the Appeal have attacked several specific individual Rules. For the Commission now to revise those Rules that are before the appellate court will tend to nullify the appellate court's jurisdiction with respect to such issues.

In the event the Staff and Commission reject postponement of the Generic Proceeding, then Trico submits the following:

The Commission has known since the formation of AEPCO in 1962 that Trico and the other distribution cooperative Class A members of AEPCO are contractually bound by their Wholesale Power Contracts with AEPCO[1] to purchase all of their electricity from AEPCO. The existing Rules prohibit AEPCO from selling electricity competitively and it can only sell electricity at wholesale to its member REDCs which then make Standard Offer Service sales. Therefore, Trico and AEPCO's other Class A members cannot compete with Electric Service Providers ("ESPs"). The obvious purpose of the Commission in adopting the Rules was to provide electricity through ESPs at lower cost than the cost of Standard Offer Service. Losing customers to ESPs, which undoubtedly will include larger customers, will result in higher rates for those REDC customers who will not be offered service by ESPs, as in the case of California and other states, and otherwise remain with the REDC because of reliability and other factors. These other customers will be largely, if not entirely, residential customers. For this and many other reasons that will be furnished to Staff and the Commission at their request, the existing Rules are completely unfair to Trico and the other REDCs. Accordingly, if the Commission

[1] Mohave Electric Cooperative, Inc. ("Mohave") is now a partial requirements member of AEPCO but has a "Take or Pay" contract with AEPCO for its allocated capacity and energy.

intends to treat the REDCs fairly, it must either exclude them from the Rules entirely or there must be major amendments to the Rules.

Trico's proposed amendments to the Rules assume that the Commission will continue to make the REDCs subject to the Rules. If certain of the REDCs' proposed changes as supplemented by Trico's proposed changes are accepted, other proposed changes will be unnecessary. As to those Sections of the Rules in which it is proposed that one or more subsections be deleted, there is no attempt by Trico to renumber or reletter the remaining subsections.

II. PROPOSED REVISIONS TO THE RULES

1. R14-2-210.E(3). Delete this subsection.

Reason for revision:

This subsection is illegal for each of the following reasons:

a. This subsection violates A.R.S. §40-374 which provides in part:

> "... no public service corporation shall charge, demand, collect or receive a greater, less or different compensation ... for any product or commodity, or for any service rendered in connection therewith, than the rates, fares, tolls, rentals and charges applicable to such ... product, commodity or service specified in its schedule on file and in effect at the time, nor ..."

b. The subsection provides for a Statute of Limitations. Only the Legislature can enact a valid statute of limitations, not the Commission.

c. Although Arizona does not have a case directly in point, in most, if not all, decisions from other jurisdictions that have considered the issue, it has been held, even where a public utility negligently under-bills a customer for electricity consumed, the utility is required to collect for the underbilling without restraints such as the time limitations set forth in this subsection. *See*, as an example, *Memphis Light, Gas &Water Division, a division of the City of Memphis, v. The d'Abrindale School District,* 705 S.W.2d, 652, 653 (Tenn. 1986), which stated in part:

> "... the overwhelming weight of authority from other jurisdictions holds that where a public utility negligently under-bills a customer for electricity consumer, the defense of equitable estoppel is not available to the customer to bar the utility from collecting for the electricity actually consumed ..."

d. Contractual claims, such as claims for electricity consumed should be determined by the court, not the Commission. *Campbell v. Mountain Sts. Tel & Tel. Co.*, 120 Ariz. 426, 432, 586, P.2d 987, 993 (1978).

2. **R14-2-1601(34)**

Add to this subsection: "The Commission shall establish an intrastate universal service fund which shall assure the continued availability of Standard Offer Service to Customers who receive service from Providers of Last Resort at reasonable rates. The universal service fund shall be structured and administered as required by the Commission."

Reason for revision:

Should there be a substantial loss of customers by a Provider of Last Resort, its rates for remaining customers will substantially increase to the point that they are no longer reasonable. The Commission recognized this situation with respect to competition in the telecommunications industry and adopted R14-2-1113, which has the same effect as this proposed revision. As noted below, this provision properly should be set forth as a separate Rule rather than as an amendment of the definition of "Provider of Last Resort."

3. **R14-2-1603.A**

In the second sentence after "Affected Utility" insert "or a Utility Distribution Company having been issued a Certificate of Convenience and Necessity by the Commission". Delete "to continue to provide electric service in its service area during the transition period set forth in R14-2-1604." and substitute "may provide Standard Offer Service and Competitive Services." Delete the balance of subsection A.

Reason for revision:

REDCs should have the right to sell electricity competitively as do ESPs. Since they have already been issued a CC&N by the Commission, they should not be required to obtain an additional CC&N with respect to sale of Competitive Services. Otherwise, the Rules will be completely unfair to the REDCs who, under the existing Rules, cannot sell electricity competitively. There should be no reason why AEPCO cannot sell Competitive Services. Allowing it to do so will allow Trico and most of the other REDCs to compete under the Rules which they are unable to do under the existing Rules. R14-2-1615.C appears to give the distribution cooperatives a right to sell electricity competitively within their respective certificated areas. However, under the existing Rules, since AEPCO can not sell electricity competitively, the REDCs who must purchase all of their electricity from AEPCO will only be able to sell electricity at Standard Offer Service rates.

4. **R14-2-1603.B(3)**

Delete the semicolon at the end of this subsection and insert: ", such tariffs shall be based in whole or in part on the fair value of the property used or to be used by the applicant in providing electrical service, including but not limited to the fair value of all purchased power contracts, however designated, and other contracts having more than a nominal value. Before any

such tariff shall be approved by the Commission, the applicant shall furnish the Commission detailed information concerning the amount of the applicant's legal obligations incurred or to be incurred in performing electrical service, the fair value of such property, and the expected growth of net income or rate of return upon the fair value of its property during its first year of operations. Such tariffs shall be based upon the classification of consumers of the applicant prescribed by the Commission to be used by the applicant."

Reason for revision:

In *U.S. West v. Arizona Corp. Com'n*, 201 Ariz. 242, 34 P.3d 351 (2001), the Arizona Supreme Court in dealing with the telecommunications industry in which the federal government preempted the field and required competition, held that in setting the rates of telecommunications companies the Commission must give consideration to fair value. Unlike the telecommunications industry, there is no federal mandate by preemption in the electric utility industry requiring competition. However, at the very minimum, the principle established in that case concerning the necessity to use fair value certainly would apply to setting the rates of ESPs. The Commission simply cannot ignore fair value which is mandated by Article 15, Sections 3 and 14 of the Arizona Constitution. That case held constitutional provisions are mandatory. Article 15, Section 3 provides that the Commission shall prescribe just and reasonable classifications to be used by PSCs. Therefore, such tariffs must be based on such classifications.

5. **R14-2-1603.E**

At the end of this subsection add: "The application shall not be granted by the Commission unless there is a separate public hearing on the application with written notice of the public hearing to all Affected Utilities, Utility Distribution Companies and electric utilities not subject to the jurisdiction of the Commission in whose service territories the applicant wishes to offer Competitive Services, which written notice shall be given not less than 20 days prior to the date of the public hearing."

Reason for revision:

A.R.S. §40-252 requires the Commission to hold a public hearing after proper notice when the amendment of a Commission decision granting a CC&N to a public service corporation ("PSC") is considered. This was recognized by the Commission when it required public hearing and a proper notice thereof in respect to the issuance of CC&Ns to ESPs commencing with the CC&N issued to PG&E.

6. **R14-2-1603.I(4)**

Add at the end of this subsection: "all sales of Competitive Services by the applicant shall be made pursuant to a tariff approved by the Commission."

Reason for revision:

Article 15, Section 3 of the Arizona Constitution provides that the Commission shall prescribe the rates to be charged by PSCs. *U.S. West, supra,* stated that such provision was mandatory. Accordingly, only rates prescribed or set by the Commission can legally be charged.

7 **R14-2-1604.A, B, C**

Delete each of these subsections.

Reason for revision:

This supplements the REDC Proposals. Competitive phases are no longer applicable. The Commission should provide for an effective date of the revised Rules being the date that the Commission enters a decision determining that the wholesale electric market in Arizona provides just and reasonable rates and is not subject to market power by any PSC or other provider of electricity. As to the provisions pertaining to Aggregation and Self-Aggregation, these provisions are contrary to Article 15, Sections 3 and 12 of the Arizona Constitution, which sections provide that the Commission shall establish the classes to be used by PSCs and there can be no discrimination of rates, price or otherwise within such classes.

8. **R14-2-1604.D**

Delete this subsection and substitute: "Subject to the provisions of R14-2-1602.A, customers shall be eligible to obtain competitive electric services no later than January 1 of the calendar year following the date that the Commission enters a decision determining that the wholesale electric market in Arizona provides just and reasonable rates and is not subject to market power by any PSC or other provider of electricity."

Reason for revision:

This supplements the REDC Proposals. The January 1, 2001 date obviously is inapplicable. In its Decision No. 65154 entered September 10, 2002, the Commission in effect stayed the Rules because of the volatile condition of the wholesale market in Arizona. Certainly until the wholesale market produces just and reasonable wholesale rates and can be expected to do so on a consistent basis, and there are no providers who have market power that can upset just and reasonable wholesale rates, the Rules should not become effective.

9. **R14-2-1604.F**

Delete

Reason for revision:

This supplements the REDC Proposals. Because of the provisions of Rule R14-2-1602.A, this subsection is no longer applicable. In addition, the REDCs should not be required to propose methods to enhance consumer choice among generation resources. Furthermore, it is an impossibility for an REDC who is a party to a Wholesale Power Contract with AEPCO to modify such contractual arrangements pertaining to delivery of power supplies and associated loans. RUS simply will not consider any such modification.

10. **R14-2-1605**

Delete this section and substitute the following:

"Competitive Services shall require a Certificate of Convenience and Necessity and one or more tariffs as set forth in R14-2-1603.B(3) approved by the Commission or in a rate case decided by the Commission."

Reason for revision:

Competitive Services should not be restricted to ESPs. Article XV, Sections 3, 12 and 14 of the Arizona Constitution require that rates charged by PSCs must be prescribed or set by the Commission, not PSCs or the market, and not by contract between the PSC and the consumer.

11. **R14-2-1606.C(1)**

Delete this subsection and substitute:

"On the Effective Date and thereafter with respect to rates for Standard Offer Service each Affected Utility and Utility Distribution Company shall charge the Commission approved tariffs for Bundled Services which are on file with the Commission, subject to changes approved by the Commission pursuant to applicable statutes and Rules of the Commission."

Reason for revision:

The date and purpose of this subsection is no longer viable. The second and third sentences of this subsection are simply a repetition of existing law and are unnecessary.

12. **R14-2-1606.C(2)**

Delete the first 2 lines and substitute: "On or before the Effective Date, if not already filed, each of the Affected Utilities and Utility Distribution Companies shall file with the Commission unbundled Standard Offer Service tariffs pursuant to the following, where applicable:"

Reason for revision:

Several of the items set forth in subparagraphs a and b are not applicable to REDCs.

13. **R14-2-1606.C(6)**

Delete.

Reason for revision:

This supplements the REDC Proposals. In order to level the playing field among ESPs, REDCs and the Utility Distribution Companies ("UDCs"), it is necessary to delete this provision so that the REDCs and other UDCs can be competitive.

14. **R14-2-1606.D**

Delete.

Reason for revision:

The REDCs and UDCs have complied with the provisions of the first sentence and it should therefore be deleted. The second sentence makes the REDCs non-competitive with ESPs, which is completely unfair to the REDCs.

15. **R14-2-1606.H**

In paragraph 1 insert "unbundled" before "Noncompetitive Services". Delete paragraph 2. In paragraph 3, delete "if approved by the Commission".

Reason for revision:

With respect to paragraph 1, the Commission has already approved the Bundled Noncompetitive Services for Affected Utilities. Therefore, it must be made clear that the required approval is to unbundled Noncompetitive Services. Since the rates of ESPs are not cost based, paragraph 2 should be deleted so that REDCs will not be disadvantaged with respect to competition. As to paragraph 3, ESPs pursuant to R14-2-1611.E are not required to obtain Commission approval by reducing their rates before their maximum, provided that they are not below marginal costs. To make competition fair for the REDCS, they should not be required to obtain Commission approval if they reduce their rates below their Commission approved rates.

16. **R14-2-1607.A**

Strike everything in the subparagraph commencing with the words "by reducing costs ..."

Reason for revision:

The Commission should not determine how the Affected Utilities mitigate their stranded costs. Certainly expanding wholesale markets is not applicable to REDCs, and it may be ill advised economically for REDCs to offer a wider scope of permitted regulated utility services for profit even if they were permitted to do so.

17. **R14-2-1607.C**

Delete "on or before July 1, 1999, or" and "whichever occurs 1st." In the second sentence delete the period at the end and add ", if applicable."

Reason for revision:

The date has passed and filings have been made. The second sentence in all likelihood will not be applicable to REDCs.

18. **R14-2-1607.E**

Delete this subsection and substitute: "Stranded Costs shall be determined in the same manner as Just Compensation is determined pursuant to Article II, Section 17 of the Arizona Constitution."

Reason for revision:

Unless Stranded Costs mean the same thing as Just Compensation pursuant to Article II, Section 17 of the Arizona Constitution, provisions concerning Stranded Costs are in violation of that constitutional provision and therefore void. This constitutional provision requires that Just Compensation must be determined by the Courts, not the Commission.

19. **R14-2-1609.B**

Delete the first sentence.

Reason for revision:

REDCs as Utility Distribution Companies are not vertically integrated and have no transmission. Also, there is no justification in requiring UDCs to assure that adequate transmission import capability is available to meet load requirements of distribution customers within their service areas if the supplier is an ESP. The ESP should have such obligation. If the obligation could validly be placed upon the UDCs, they certainly should be compensated for fulfilling such capability.

20. **R14-2-1611.A**

Delete.

Reason for revision:

Market based rates cannot be deemed to be just and reasonable because they ignore fair value which is required by the Arizona Constitution and *U.S. West, supra.* Additionally, the Commission, not ESPs or the market, is required to prescribe or set the rates. Both federal and state courts have decided that market based rates are not always just and reasonable. This is especially true when the market has been manipulated such as it has been by Enron and other marketers.

21. **R14-2-1611.B**

After the phrase "such services," insert "and requiring service pursuant to such tariffs,".

Reason for revision:

The Arizona Constitution requires the Commission to prescribe or set rates which are set forth in tariffs, and therefore ESPs must charge rates pursuant to Commission approved tariffs in which the Commission has prescribed or set the rates.

22. **R14-2-1611.E**

After "holding a Certificate pursuant to this Article" insert: ", Affected Utilities and Utility Distribution Companies".

Reason for revision:

In the event maximum rates are lawful, which Trico contests, affected Utilities and UDCs should be able to charge less than maximum rates as do the ESPs.

23. **R14-2-1611.F**

In the first sentence after "maximum rates" and "approved tariffs" insert "for Competitive Services." In the second sentence after "effective only", insert "when the Commission prescribes the rates set forth in the tariffs and". At the end of the subsection delete the period and insert: "of such tariffs."

Reason for revision:

ESPs cannot set maximum rates. The Arizona Constitution requires that all rates shall be prescribed or set by the Commission.

24. **R14-2-1612.G**

Delete and substitute the following:

> "Each Electric Service Provider shall provide at least 45 days written notice to all of its consumers of its intent to cease providing generation services to all of its consumers necessitating that each of such consumers must obtain service from another supplier of generation services."

Reason for revision:

ESPs cannot supply transmission, distribution or ancillary services. In addition, all notices should be required to be in writing to avoid litigation.

25. **R14-2-1612.J**

Delete the first two sentences and substitute the following: "Each Electric Service Provider shall give at least 15 days written notice to each of its customers who the Electric Service Provider has elected to have the customer return to Standard Offer Service. The Electric Service Provider shall provide 15 calendar days written notice to the next scheduled meter read date to the appropriate Utility Distribution Company regarding the intent to terminate a service agreement with a particular customer."

Reason for revision:

In the first sentence, 5 days is not sufficient notice and should be increased to 15. Notice should be in writing to avoid litigation. In the second sentence, written notice should be required for the same reason, and the phrase "with a particular customer" at the end of the sentence is for clarification.

26. **R14-2-1612.M**

Delete the period at the end of the subsection and insert "and shall furnish the Commission annually with a report establishing such compliance.

Reason for revision:

Reliability is one of the essential elements of electric service. ESPs should be responsible to provide reliable service as do the Affected Utilities and as will the UDCs. The Commission must receive proof of such reliability compliance.

27. **R14-2-1612.O**

Delete the colon at the end of the 3rd line and substitute "if applicable to the service provider:

Reason for revision:

Several of the items set forth in this subsection are not applicable to REDCs and they should not be required to comply with something that is not applicable to them.

28. **R14-2-1613.A(7)**

Insert prior to the subsection "Fair".

Reason for revision:

The Arizona Constitution speaks in terms of fair value and the Rules should be consistent therewith.

29. **R14-2-1613.B**

Delete paragraph 1. In the first sentence of paragraph 2, delete "For the period after December 31, 2003, semiannual" and substitute: "Annual". In the second sentence delete ", 2004." and insert: "of the first full calendar year after the Effective Date."

Reason for revision:

The dates are inapplicable. Instead of the use of dates the reporting schedule should refer to the Effective Date.

30. **R14-2-1614.A**

At the end of this subsection delete the period and insert: "which shall not become effective until duly approved by the Commission and which shall set forth rates prescribed by the Commission."

Reason for revision:

The Arizona Constitution requires the Commission to prescribe or set rates, not ESPs. ESPs are not entitled to set their own rates.

31. **R14-2-1614.D**

Delete "procedures" and substitute "duly adopted Rules".

Reason for revision:

Resolving disputes regarding the implementation of retail electric competition is a substantive matter, not procedural. Commission procedures should apply solely to procedural matters.

32. **R14-2-1614.E**

Delete "Prior to October 1, 1999" and substitute "On the Effective Date or within a reasonable time thereafter,".

Reason for revision:

The date is no longer applicable. In the event that the Director has already implemented a Consumer Education Program as approved by the Commission, then it should take effect on the Effective Date. If the Director has not yet implemented such program, then the Director should do so within a reasonable time after the Effective Date.

33. **R14-2-1615.A**

Delete this subparagraph and substitute the following:

> "An Affected Utility and Utility Distribution Company may offer Competitive Services so long as the rates charged consumers do not exceed the Affected Utility's Commission approved tariffs and are not less than the Affected Utility's marginal costs."

Reason for revision:

The January 1, 2001 date is now inapplicable. In order to level the playing field, Affected Utilities and UDCs should be permitted to compete with ESPs to the extent that they do not charge rates higher than those approved by the Commission in their duly filed tariffs.

34. **R14-2-1615.B**

Delete this subsection.

Reason for revision:

Affected Utilities and UDCs should be permitted to provide Competitive Services so that they are not placed at a disadvantage with the ESPs.

35. **R14-2-1615.C**

If the Commission rejects the foregoing revisions to subsections A and B, then subsection C should be retained. If the Commission adopts the proposed changes to subsections A and B, subsection C will then be immaterial and should be deleted.

Reason for revision:

The foregoing revision is apparent on its face and should the changes to subsections A and B be acceptable, subsection C is no longer necessary or have any effect.

36. **R14-2-1617.A**

Insert at the beginning of this subsection: "This Section shall not apply to Electric Distribution Cooperatives.

Reason for revision:

The disclosure of information as provided in Section 14-2-1617 is applicable only to electric providers furnishing generation services at flexible rates. REDCs do not provide generation services. REDCs do not have affiliates as that term is defined in R14-2-801 and R14-2-802. To impose the burden of time and expense required by this Section on REDCs is unfair and nonproductive.

III. PROPOSED ISSUES WITH THE RULES

1. So long as the REDCs are subject to the Rules, either those Rules which are unfair to them should be amended as proposed or should provide that such Rules do not apply to REDCs.

2. The provisions of R14-2-1615.A and B, which require divestiture by Affected Utilities of their competitive assets and competitive services has proven not to work properly with respect to APS and TEP as evidenced by the Commission's Decision No. 65154 issued September 10, 2002. The Commission must recognize the effect of the *U.S. West* case. Rates must be based, at least in some part, on fair value. The Commission must prescribe or set the rates, not ESPs or the market. The Constitution mandates the Commission to prescribe just and reasonable classifications to be used by PSCs and discrimination within classes is prohibited. The Commission, therefore, must approve all rate tariffs filed by ESPs and such approval must be made in a realistic manner protective of consumers. Approving rates of $25 per kWh is unconscionable.

3. By their very nature, Cooperatives are different from investor owned utilities and ESPs. They cannot have affiliates with the same control by stock ownership as do profit corporations. With minor exceptions, the Cooperatives' financing is limited to the control of RUS as supplemented by CFC. The all requirements Wholesale Power Contracts, which are the linchpin of RUS financing, subject the Distribution Cooperatives to the same limitations and restrictions as their wholesale supplier, which in the case of REDCs with the exception of Navopache, is AEPCO. These distinctions must be given consideration by the Commission in determining whether the REDCs should be subject to the Rules and, if so, whether certain Rules should be applied to them or whether certain Rules should be amended so that they are not unfair to them.

4. As suggested by proposed Revision No. 2, the Commission should establish a universal service fund for Providers of Last Resort similar to that provided in R14-2-1113 for the telecommunications industry. This should be set forth in a separate Section of the Rules, rather than in definition R14-2-1601(34). Should an Affected Utility or a UDC lose a substantial portion of its load, especially large consumers, by applying the fair value, rate of return method in establishing their rates, such rates will become extremely high and will no longer be just and reasonable as to the remaining consumers. This is an obvious problem that must be solved.