TRICO ELECTRIC COOPERATIVE, INC.'S REPLY TO COMMENTS IN ECAG PARTICIPANTS' INITIAL FILINGS

I. INTRODUCTION

The Director of the Utilities Division by Memorandum dated October 17, 2003, invited replies to filings made by ECAG participants to Staff's March 19, 2003 request concerning proposed revisions to, and issues concerning, the Retail Electric Competition Rules ("Rules").

Trico Electric Cooperative, Inc. ("Trico") filed a supplement to the filing by the Rural Electric Distribution Cooperatives. Therein Trico reserved all of its rights in the pending appeal in the Court of Appeals, Division One, 1CA-CV 01-0068, in which the Commission and certain Intervenors are the Appellants and Cross-Appellees and Trico and other Cooperatives are the Appellees and Cross-Appellants. In that case the trial court entered judgment in favor of the Cooperatives November 28, 2000. Oral arguments were held before the Court of Appeals on February 7, 2002. No decision has been rendered by the appellate court to date. The appeal challenges the most important provisions in the Rules on grounds that they are unconstitutional. The Commission is prohibited from amending its decisions that are within the jurisdiction of the appellate court in a pending appeal if such amendment could result in rendering the court's decision nugatory. In the event the Commission amends those Rules which are alleged in the pending appeal to be unconstitutional, the appellate jurisdiction of the court will be defeated or usurped by making its decision when rendered nugatory.[1] As an example, the constitutionality of

[1] See *Whitfield Transp., Inc. v. Brooks,* 81 Ariz. 136, 141, 302 P.2d 526, 529 (1956); *American Smelt. & R. Co. Hayden v. Arizona APCHB,* 24 Ariz.App. 66, 70, 535 P.2d 1070, 1073, 1074 (1975); *Arizona Corp. Com'n v. Citizens Utilities Co.,* 120 Ariz. 184, 192, 584 P.2d 1175, 1183 (1978); and *State v. O'Connor,* 171 Ariz. 19, 21, 827 P.2d 480, 482 (1992).

A.A.C. R14-2-1611(A)[2] has been challenged in the appeal. The seventh Ordering paragraph of Decision No. 65154 issued by the Commission on September 10, 2002, states:

> "IT IS FURTHER ORDERED that Staff open a rulemaking … to amend … A.A.C. R14-2-1611(A)."

Should the Commission amend or rescind that subsection of the Rules, the appellate court's decision in regard to the original subsection would be rendered nugatory. Accordingly, Trico urges the Commission to postpone such rulemaking proceeding until the pending appeal is finally decided by the appellate courts.

II. COMMENTS ON PARTICIPANTS' FILINGS.

A. Volatility of Wholesale Generation

Pursuant to the Federal Power Act, as amended, FERC has jurisdiction over wholesale electric rates and is mandated to regulate such rates to assure that they are just and reasonable. FERC's performance in connection with the California fiasco is history. There is no assurance that FERC will promptly and properly regulate wholesale electric rates which will be subject to the effects of supply and demand. Perhaps recent merchant generation construction in Arizona may reduce the volatility of the wholesale market in this State in the short run, but there certainly is no assurance that in the long run when demand substantially exceeds supply that rate spikes and generally substantially increased rates will not reoccur.

Trico fully supports the following:

(1) The statement by RUCO:

> "… FERC has yet to develop a wholesale market structure that can assure reasonable prices in the longer term. Until the Commission can assure customers that the wholesale electric

[2] Henceforth in the reference to the Rules A.A.C. R14-2-will be omitted.

> market is in fact, and will always continue to be, workably competitive, residential customers should not be exposed to market-based prices.
>
> …
>
> A vibrant, robust wholesale electric market is a laudable goal. However, unless the Commission can assure that one actually exists, exposing standard offer customers to wholesale prices that have proven to be extremely volatile may undermine the goal of providing customers with reliable power at the lowest possible cost. The Commission must be able to assure customers that the wholesale market is sufficiently developed and that the resulting standard offer rates will be stable, just and reasonable."

(2) The following statement in the final report of the Legislature's Ad Hoc Electric Industry Competition Study Committee ("Committee") which is endorsed by SRP:

> "If a competitive wholesale market is lacking, then load-serving entities should be allowed to build generation facilities or otherwise plan for needed expected growth in order to ensure reliable, affordable and available electricity for their consumers."

(3) In its comprehensive comments, APS stated:

> "… The wholesale electric market has reeled from the cumulative impact of inadequate supervision and enforcement of market rules, poor regulatory design of such rules, accounting and related financial turmoil, and outright manipulation by some players …"

B. <u>Reliability</u>.

Although few of the participants commented on reliability, reliable electricity is as important as affordable electricity. This was recognized by the Committee which stated in its final report that Arizona requires reliable electricity.

RUCO states:

> "Residential customers in Arizona have never expressed a great desire to abandon cost-of-service electric rates in favor of market-based rates."

A principal reason for this is reliability.

Reliability must be assured in each of generation, transmission and distribution. The Rules create a new class of electric public service corporations, Electric Service Providers ("ESPs"), who alone are permitted to sell electricity competitively.[3] ESPs do have responsibility in providing reliability in their sale of electrons. (The indication in 1612 that they have reliability responsibility otherwise is incorrect.) However, most of the obligation to provide reliability falls on the Affected Utilities ("AUs") and Utility Distribution Companies ("UDCs") who are completely responsible for transmission and distribution.

When all electric utilities were operating solely under regulated monopoly, they provided for transmission and distribution only for their native loads and a reasonable reserve. They did not provide transmission and distribution capacity for independent power producers (and perhaps competing utilities or their affiliates) for transmission over their lines. To do so would have required facilities neither used nor useful and therefore such facilities could not be included in their rate bases in determining their rates. 1609.A requires transmission and distribution providers to provide non-discriminatory open access to transmission and distribution facilities to serve all customers of the AUs, UDCs and the ESPs on a no preference or priority basis. 1609.B requires UDCs to "retain the obligation to assure that adequate transmission import capability is available to meet the load requirements of all distribution customers." Assuming that the AUs' or UDCs' transmission and/or distribution lines were serving at near full capacity and the additional electricity of the ESPs were to be served over those facilities which would cause the capacity to

[3] One of the issues in the appeal pending in the Court of Appeals is whether the Commission has jurisdiction to establish more than one class of electric public service corporations. This issue is based upon Article XV, Section 3 of the Arizona Constitution which provides: "The Corporation Commission … shall prescribe just and reasonable classifications to be used … by public service corporations." It does not provide that the Commission shall prescribe just and reasonable classifications of public service corporations.

be exceeded, then obviously the AUs' and UDCs' native loads could not be fully served resulting in unreliability to their customers.

Since reliability is largely the responsibility of AUs and UDCs, especially since they must be ready at all times to provide Standard Offer Service and act as Providers of Last Resort, their financial health should be a primary concern of the Commission. The Rules place them at risk.

Unfortunately, generation plants and transmission and distribution lines cannot be constructed over a short period of time. The Rules do not take this into consideration. Further, in order to transmit the electricity of ESPs, in many instances requires additional facilities to be constructed. Since the amount of transmission required by ESPs is entirely within their control, it is impossible for AUs and UDCs to plan for the amount of such transmission. The Rules do not adequately provide for the payment of the cost of construction caused by the ESPs transmitting electricity over the AUs' and UDCs' lines.

Because of the nature of electricity, which is different than any other form of energy or essential products furnished by public service corporations, to provide reliable electricity, providers must properly plan their electric systems taking into consideration the time lag between the planning stage and time when increased capacity and energy is on line. Accordingly, AUs and UDCs must plan well in advance to fulfill their responsibilities to serve those consumers who they are required to serve. ESPs under the Rules can place a substantial burden on the AUs and UDCs by the sale of electricity over the transmission and distribution lines of the AUs and UDCs, then abruptly reducing or eliminating such burden. To accommodate such burden, AUs and UDCs may very likely will provide for the excess capacity and energy

required. Upon such reduction or elimination, the cost for such excess must be borne by the remaining customers of the AUs and UDCs. Such abrupt reduction or elimination is provided in the Rules in 1612.G which permits ESPs to cease providing electricity upon 45 days notice to all affected consumers. 1612.J permits ESPs to give only five days notice to their customer to return to the Standard Offer Service and need only give the UDC who will provide the Standard Offer Service 15 calendar days notice prior to the next meter read date. Both APS and TEP explain the complete unfairness of this burden shifted to the AUs and UDCs who cannot properly plan their systems.

C. <u>The Rules Discriminate Against AUs and UDCs in Favor of ESPs.</u>

The following provisions of the Rules are discriminatory:

	<u>AUs and UDCs</u>	**<u>ESPs</u>**
1.	Rates must be prescribed by the Commission at rate hearings. 1606.A, C(1)(3).	Rates are "approved" not "prescribed" by the Commission. 1611.B. Rates which are based upon the market, 1611(A), are deemed just and reasonable whether they are or not. Rates may be charged not to exceed a maximum and not less than a minimum (marginal cost). 1611.E. In all proceedings heretofore held by the Commission in granting CC&Ns to ESPs, the Commission has approved a maximum rate of $25.00 per kWh.
2.	Rates must be based on cost. 1606.C(4).	Rates are not based on costs. 1611.
3. .	Standard Offer Service rate shall not include special discounts or contracts with terms. 1606.C(6).	Rates can be discounted but not below marginal cost and no restriction on terms. 1611.
4.	Must charge same rate to each consumer in a class. R14-2-103.	Permitted to aggregate consumers without restriction, 1604.A(4), and all customers may self-aggregate. 1604.A(4). No prescription by Commission of rate charged to members of class and no restriction on rates charged except as provided in 1611.E.

5.	Must divest competitive generation assets and competitive services. 1615.A(5).	No divestiture requirement
6.	Cannot provide Competitive Services. 1615.B.	Can provide Competitive Services and the sole provider of Competitive Services. 1601(15).
7.	Required to be Provider of Last Resort to consumers whose annual usage is 100,000 kWh or less. 1601(34), 1606.A.	Rules do not require ESPs to be a Provider of Last Resort. 1601(34).
8.	Obligated to provide non-discriminatory open access and distribution facilities. 1609.A.	Do not have transmission or distribution facilities. 1601(7).
9.	Must assure adequate transmission import capability to meet loads of ESPs. 1609.B.	No such obligation in Rules.
10.	Must unbundle rates in a specific manner. 1606.C(1)	No such obligation in Rules.
11.	Must submit bills which unbundle both Competitive and Noncompetitive services to all customers. 1612.M	No such obligation in Rules. ESPs have no bundled services.
12.	Unbundled rates must be calculated in same manner as they are in Standard Offer Service Rates. 1606.D	No such obligation in Rules.
13.	Cannot terminate service to consumer without Commission approval unless pursuant to R14-2-211 or Commission has approved rules and regulations that permit termination of service for a substantial cause such as nonpayment of bills.	Can terminate consumer's service on 45 days notice. 1612.G

APS has alluded to this discrimination in stating the Rules have harmed AUs. TEP also comments on several of the foregoing items, in addition suggests that consumers with loads of less than 3 MW be excluded from the Rules and that the Rules be amended to provide

appropriate remedies for economic issues involved with customers returning from service by ESPs to UDCs.