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ARIZONA CORPORATION COMMISSION

November 3, 2021

VIA EMAIL

mark.brnovich@azag.gov

The Honorable Mark Brnovich
Arizona Attorney General
1275 West Washington Street
Phoenix, Arizona 85007

Dear Attorney General Brnovich:

As authorized by A.R.S. § 41-193(A)(7), the Arizona Corporation Commission ("Commission") is requesting an opinion regarding retail electric competition.

1. May the Commission issue competitive certificates of convenience and necessity ("CC&N") pursuant to A.R.S. § 40-202 notwithstanding the Court's ruling in *Phelps Dodge*?
2. May the Commission now seek to certify the rules invalidated because of the lack of attorney general certification as required by A.R.S. § 41-1044?

Background

On August 4, 2021, Green Mountain Energy submitted an application at the Commission for a CC&N to provide competitive electric generation services in accordance with the Energy Competition Act ("ECA"). Specifically, Green Mountain Energy is seeking to be certificated to provide services within the existing certificated service territories of Arizona Public Service Corporation and Tucson Electric Power. In its application Green Mountain asserts that the Commission must comply with the ECA notwithstanding the Court of Appeals ruling in *Phelps Dodge*, and notwithstanding the current status of the Commission's rules A.A.C. R14-2-1602 et seq.

The Commission's prior attempts to transition electric public service corporations to competition go back almost 30 years. On May 20, 1994, the Commission opened Docket No. U-0000-94-165 to investigate the introduction of retail electric competition in Arizona. In December 1996, the Commission created the Retail Electric Competition Rules ("Rules"), Arizona Administrative Code ("A.A.C.") R14-2-1601 through -1616. (Decision No. 59943, December 26, 1996). Through a series of workshops, hearings, and decisions, the rules were revised in 1998, 1999, and 2000. The Commission determined that the Rules were exempt from the attorney general review and certification provisions of the Arizona Administrative Procedure Act ("APA"), Arizona Revised Statutes ("A.R.S.") section 41-1044. Meanwhile, in 1998, the Arizona State Legislature amended A.R.S. § 40-202, to state that competition for electric generation services is the public policy of the state and required public power entities, which are not subject to the Commission's jurisdiction, to open their service territories to competition in the sale of electric generation services, and

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“confirmed” the authority of the Commission to similarly open the service territories of public service corporations.

A.A.C. R14-2-1603 specifically addressed the process by which a competitive electric provider could apply for a CC&N. Approximately twenty entities received CC&Ns to provide competitive electric service, including meter services and meter reading services, in 1999 and 2000. In response to concerns about the ability of the market to establish just and reasonable rates, the Commission issued Decision No. 65154 on September 10, 2002, commonly referred to as the “Track A” order, which halted the impending divestitures of Arizona Public Service Company and Tucson Electric Power Company and suspended a requirement in the rules that provided for the utilities to purchase all their power in the competitive market.

Public service corporations consisting of distribution cooperatives and the Arizona Consumers Council filed suit against the Commission seeking to invalidate the Rules and the CC&Ns for competitive electric service that had been granted by the Commission.

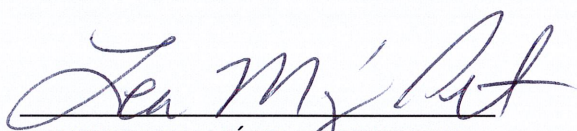
The court of appeals in *Phelps Dodge v. Arizona Elec. Co-op, Inc.*, 207 Ariz. 95 (2004), found that Commission rule R14–2–1611(A), which deemed market rates for competitive services to be just and reasonable, violated Article 15, Section 3 of the Arizona Constitution. The provision also violated Article 15, Section 14 by establishing a method for setting just and reasonable rates that does not include consideration of the fair value of property owned by Electric Service Providers in Arizona. Because R14–2–1611(A) cannot be validly applied under any set of circumstances, it is unconstitutional on its face. *Id.* at 607. The court also found that the Commission lacked constitutional or legislative authority to promulgate A.A.C. R14–2–1609(C)–(J), and –1615(A) and (C), and these provisions were therefore invalid. The court also stated that the Commission possessed constitutional authority to promulgate R14–2–1616. The Commission was required by the APA, A.R.S. § 41–1044(B), to submit R14–2–1603, –1605, –1609, –1610, –1612, –1614, –1615 (B) and –1617 to the attorney general for review and certification. Importantly, R14-2-1603 is the rule that addresses the issuance of competitive CC&Ns. Because the Commission failed to do so, the court found those provisions to be invalid. Because the Commission possessed plenary ratemaking authority to promulgate R14–2–1602, –1613, –1615(B), and –1616, the Commission was not required to submit these provisions to the attorney general for review and certification.

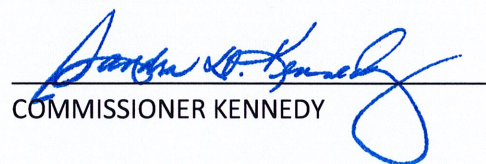
After *Phelps Dodge*, the Commission halted retail electric competition and did not submit the portion of the Rules that required attorney general certification. Even after the Court’s ruling in *Phelps Dodge*, almost a dozen companies submitted applications for competitive CC&Ns that those companies never pursued any further, and the Commission never acted on, except the one submitted by Sempra Energy Solutions (“Sempra”). In 2006, Sempra filed an application for a CC&N to provide competitive retail electric service. This was the first such application to be filed following the *Phelps Dodge* decision. Decision No. 70485 suspended Sempra’s application pending the Commission’s determination regarding whether the public interest would be served by authorizing the provision of competitive electric services to end users in Arizona. Although the Commission held workshops, ultimately, Sempra did not pursue its application, and the Commission ultimately took no further action on the application. In 2021, Green Mountain Energy applied for a competitive CC&N. It is because Green Mountain is actively pursuing its application for a CC&N, that the Commission is seeking an Attorney General Opinion confirming whether the Commission currently possesses the authority to process Green Mountain’s application and issue a competitive CC&N.

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We look forward to hearing from you in this matter. If you have any questions, please do not hesitate to contact us.

Sincerely,


CHAIRWOMAN MÁRQUEZ PETERSON


COMMISSIONER KENNEDY


COMMISSIONER TOVAR