

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 BOB STUMP
CHAIRMAN

3 GARY PIERCE
COMMISSIONER

4 BRENDA BURNS
COMMISSIONER

5 BOB BURNS
COMMISSIONER

6 SUSAN BITTER SMITH
COMMISSIONER

7
8 IN THE MATTER OF THE APPLICATION OF
9 TUCSON ELECTRIC POWER COMPANY
10 FOR THE ESTABLISHMENT OF JUST AND
11 REASONABLE RATES AND CHARGES
DESIGNED TO REALIZE A REASONABLE
RATE OF RETURN ON THE FAIR VALUE
OF ITS OPERATIONS THROUGHOUT THE
STATE OF ARIZONA.

Docket No. E-01933A-12-0291

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13 **RUCO'S SUPPLEMENTAL BRIEF**

14 **INTRODUCTION**

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16 The Residential Utility Consumer Office ("RUCO") submits this Brief to supplement the
17 Joint Closing Brief being filed contemporaneously by Tucson Electric Power ("TEP" or the
18 Company") in the above captioned matter. During the hearing of this matter, the Administrative
19 Law Judge ("ALJ") asked the parties to discuss adjustors and how they relate to Arizona's fair
20 value requirement. RUCO believes that this discussion is larger than just this case and
21 believes that a separate discussion explaining RUCO's views is warranted.

22 Adjustor mechanisms have become the normal way of doing business in Arizona. In this
23 case alone the proposed and existing adjustor mechanisms include the Environmental
24 Compliance Adjustor ("ECA"), the Lost Fixed Cost Recovery ("LFCR") mechanism, the

1 Purchased Power and Fuel Adjustment Clause (“PPFAC”), and the Demand Side Management
2 (“DSM”) mechanism¹. There is little question that the PPFAC would withstand legal scrutiny in
3 Arizona. Whether the other adjustor mechanisms would withstand legal scrutiny is less clear.

4 RUCO supports the Settlement. The Settlement is a compromise. As with any
5 compromise, there is good and there is bad. It goes without saying that the good must
6 outweigh the bad in order for RUCO to consider signing. In this case, the “bad” includes the
7 question of the legality of the adjustors – specifically, from RUCO’s standpoint, RUCO’s ability
8 to challenge the legality of the adjustors in this case.

9 RUCO believes that the Settlement as proposed is in the public interest². Therefore,
10 RUCO is willing to forgo any legal challenges to its specific provisions. RUCO’s support for the
11 Settlement should not be interpreted as RUCO’s belief that all of the adjustors in this case
12 comply with Arizona’s fair value requirement. RUCO has simply chosen not to challenge the
13 legality of adjustors in this case.

14
15 **THE LEGAL BACKGROUND OF ADJUSTOR MECHANISMS IN ARIZONA**

16 The Arizona Constitution protects consumers by generally requiring that the Commission
17 only change a utility’s rates in conjunction with making a finding of the fair value of the utility’s
18 property.³ However, Arizona’s courts recognize that, “in limited circumstances,” the
19 Commission may engage in rate making without ascertaining a utility’s rate base.⁴ One of those

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21 _____
21 ¹ The PPFAC and the DSM already exist.

22 ² For a full discussion of why RUCO believes the Settlement is in the public interest, see the Joint Closing
Brief being filed by the Company.

23 ³ Arizona Constitution. Art. XV, § 14; *Simms v. Round Valley Light & Power Company*, 80 Ariz. 145, 151, 294 P.2d
378, 382 (1956); see also *State v. Tucson Gas*, 15 Ariz. 294, 308; 138 P.781, 786 (1914); *Arizona Corporation
Commission v. State ex rel. Woods*, 171 Ariz. 286, 295, 830 P.2d 807, 816 (1992).

24 ⁴ *Residential Utility Consumer Office v. Arizona Corporation Commission*, 199 Ariz. 588, 591 ¶11, 20 P.3d
1169, 1172 (App. 2001).

1 circumstances exists where the Commission has established an automatic adjustor mechanism.
2 *Scates v. Arizona Corp. Comm'n*, 118 Ariz. 531, 535, 578 P.2d 612, 616; *Residential Util.*
3 *Consumer Office v. Arizona Corp. Comm'n ("Rio Verde")*, 199 Ariz. 588, 591 ¶ 11, 20 P.3d
4 1169, 1172. An automatic adjustor mechanism permits rates to adjust up or down "in relation to
5 fluctuations in certain, narrowly defined, operating expenses." *Scates* at 535, 616. An
6 automatic adjustor permits a utility's rate of return to remain relatively constant despite
7 fluctuations in the relevant expense. An automatic adjustor clause can only be implemented as
8 part of a full rate hearing. *Rio Verde* at 592 ¶ 19, 1173, *citing Scates* at 535, 616.

9 The Commission has also defined adjustor mechanisms as applying to expenses that
10 routinely fluctuate widely. In a prior decision in which it eliminated APS' fuel and power
11 adjustor, the Commission stated:

12 The principle justification for a fuel adjustor is volatility in fuel prices. A
13 fuel adjustor allows the Commission to approve changes in rates for a
14 utility in response to volatile changes in fuel or purchased power
15 prices without having to conduct a rate case. (Decision No. 56450,
16 page 6, April 13, 1989).

17 The Commission went on to discuss the undesirability of such adjustors because they can
18 cause piecemeal regulation that is inefficient and undesirable. *Id.* at 8. *See also Scates* at 534,
19 615.

20 The provisions of Arizona's Constitution should be liberally construed to carry out the
21 purposes for which they were adopted.⁵ Conversely, exceptions to a constitutional requirement
22 should be narrowly construed.⁶ Essentially, the Commission should not use the "emergency"
23

24 ⁵ *Laos v. Arnold*, 141 Ariz. 46, 685 P.2d 111 (1984).

⁶ *See Spokane & I.E.R. Co. v. U.S.*, 241 U.S. 344, 350, 36 S.Ct. 668, 671 (1916) (an "elementary rule" that exceptions from a general policy embodied in the law should be strictly construed).

1 exception or the adjustor mechanism exception liberally as an excuse to set aside the rule of
2 finding fair value when setting rates.⁷

3 The legal definition of what constitutes an "adjustor" in Arizona appears to be well settled.
4 What is less settled is whether decoupling adjustors which adjust revenues and other types of
5 adjustors which adjust plant costs and/or more general types of expenses are legal in Arizona.
6 Because the Settlement in this case is in the public interest, RUCO will not challenge the
7 legality of the adjustors in this case. However, RUCO is not waiving its right to challenge the
8 constitutionality of accounting mechanisms in other cases.

9 RESPECTFULLY SUBMITTED, this 22nd day of March, 2013.

10
11 

12 Daniel Pozefsky
13 Chief Counsel

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15 AN ORIGINAL AND THIRTEEN COPIES
16 of the foregoing filed this 22nd day
of March, 2013 with:

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22
23 _____
24 ⁷ Arizona case law and the Attorney General Opinion 71-17 set forth the legal parameters within which the
Commission should act when considering emergency rate relief.

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