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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS
MARC SPITZER, CHAIRMAN
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON
KRISTIN K. MAYES

Arizona Corporation Commission

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ARIZONA CORPORATION COMMISSION
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IN THE MATTER OF THE) DOCKET NO. E-04230A-04-0798
COMPLAINT OF MOHAVE)
ELECTRIC COOPERATIVE, INC.)
AGAINST UNISOURCE ENERGY) **RESPONSE TO MOTION FOR**
CORPORATION FOR THE) **DISMISSAL**
POTENTIAL INTERFERENCE WITH)
THE CERTIFICATE OF)
CONVENIENCE AND NECESSITY)

Mohave Electric Cooperative, Inc., ("MEC"), through undersigned counsel, hereby responds to the Motion for Dismissal filed by UNS Electric, Inc. ("UNS Electric"), a subsidiary of UniSource Energy Corporation in the above-captioned matter.¹ UNS Electric contends that MEC's complaint should be dismissed on the grounds that a) MEC is trying to accomplish a rate increase outside a rate case, and b) a system-wide borderline agreement usurps the authority of the Arizona Corporation Commission ("Commission"). The Motion for Dismissal serves only to delay the resolution of the pending service issue involving Central Trucking ("CTI"). It also demonstrates the critical need for a system-wide borderline agreement to

¹ UniSource Energy Corporation has not answered the Complaint. Instead, UNS Electric, Inc., asserting it is the proper party, has answered and filed the Motion to Dismiss. MEC recognizes UNS Electric is in the better position to know and understand the corporate structure of UniSource and is simultaneously filing a Motion for Leave to File a First Amended Complaint adding UNS Electric. By responding to the UNS Electric Motion for Dismissal, MEC, however, does not waive, at this preliminary stage of the proceeding, any rights or remedies arising from UniSource Energy Corporation's failure to file a responsive pleading.

1 ensure that all borderline customers of MEC and UNS Electric are handled in an
2 expeditious, fair and uniform fashion.

3 A. MOTIONS TO DISMISS ARE NOT FAVORED.

4 Motions to Dismiss are not favored and are not to be granted unless it
5 appears that the complainant “would not be entitled to relief under any state of facts
6 susceptible of proof under the claim stated.” *See, State ex rel Corbin v. Pickrell*, 136
7 Ariz. 589, 594, 667 P.2d 1304, 1309 (1983); *San Manuel Copper Corp. v. Redmond*,
8 8 Ariz. App. 214, 218, 445 P.2d 162, 167 (1968). UNS Electric apparently believes
9 that by misdirecting the Commission with arguments regarding ratemaking and the
10 diminishment of Commission authority, this long-standing standard can be ignored.
11

12 B. MEC SEEKS COMMISSION ASSISTANCE IN SECURING
13 UNIFORM SERVICE CONDITIONS FOR BORDERLINE
14 CUSTOMERS, NOT RATE RELIEF.

15 MEC is ready, willing and able to provide service to CTI on the same
16 terms and conditions applicable to every similarly situated prospective MEC
17 customer. CTI, however, seeks to avoid certain infra-structure costs and MEC, as an
18 accommodation to CTI, is willing to pursue certain alternatives with UniSource
19 Energy, Inc. MEC unsuccessfully sought to initiate good faith discussions with UNS
20 Electric regarding various alternative methods of accommodating CTI. Unfortunately
21 UNS Electric appears more interested in asserting a claim to this portion of MEC’s
22 certificated territory than addressing any of the alternative solutions suggested by
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1 MEC.² Therefore, MEC filed its Complaint alleging, among other things, that UNS
2 Electric is interfering with the certificated area of Mohave and the contractual
3 relationship between CTI and Mohave. The Commission has jurisdiction to hear the
4 Complaint.

5 A.R.S. §40-202 provides, in relevant part: “The commission may
6 supervise and regulate every public service corporation in the state and do all things,
7 whether specifically designated in this title or in addition thereto, necessary and
8 convenient in the exercise of that power and jurisdiction.” The section goes on to
9 enumerate many of the Commission’s powers in a deregulated electric generation
10 marketplace.
11

12 A.R.S. §§ 40-246 and 40-249 make it clear that the Commission has the
13 authority to hear complaints by one public service corporation against another, even
14 on an *ex parte* basis if deemed appropriate by the Commission.

15 A.R.S. §40-281.B recognizes the Commission’s authority, upon
16 complaint of an affected public service corporation, to make an order and prescribe
17 terms and conditions of the location of affected lines, plants or systems, as the
18 Commission deems just and reasonable.
19

20 A.R.S. §40-322 acknowledges the Commission’s right to ascertain and
21 set just and reasonable standards, classifications, regulation, practices, measurements
22 or service to be furnished and followed by public service corporations. In addition,
23 A.R.S. § 40-331 recognizes the Commission’s authority to order, after notice, two or
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25 ² UNS Electric filed an application with the Commission seeking to divest MEC of this portion of its certificated
26 area just ten days after MEC filed its Complaint. *See*, Docket Nos. E-04204A-04-0824 and E-01750A-04-0824

1 more public service corporations to make changes in their systems, while A.R.S. § 40-
2 332 deals with the Commission's power to order joint use of facilities belonging to
3 public service corporations, including access to electric transmission service and
4 electric distribution service under rates, terms and conditions of service that are just
5 and reasonable.

6
7 With its efforts to resolve the matter between the two public service
8 corporations going nowhere, MEC invoked the Commission's jurisdiction to
9 undertake the precise type of action the law directs be brought before the Commission
10 - - resolution of interference and joint use issues between public service corporations.

11
12 1. System-wide Borderline Agreements Do Not Usurp Commission
13 Authority.

14 One alternative method of accommodating CTI acceptable to MEC is a
15 system-wide agreement establishing mutually acceptable guidelines for handling
16 borderline customers of UNS Electric and MEC. UNS Electric, however, contends
17 that the Commission's approval of a system-wide borderline agreement somehow will
18 diminish the Commission's authority and ability to enforce a utility's obligation to
19 serve. To the contrary, a system-wide borderline agreement provides uniform
20 guidelines by which two neighboring utilities may provide and receive assistance from
21 each other in providing reliable utility service at reasonable rates to affected
22 borderline customers.

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25 Importantly, Commission approval of a system-wide borderline
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1 agreement is required. Such approval is necessarily contingent upon a demonstration
2 that the system-wide borderline agreement serves the public interest. There is no
3 diminishment of Commission jurisdiction or ability to enforce the obligation to serve.
4
5 In fact, a system-wide borderline agreement provides the Commission, as well as the
6 utilities and the affected customers, a tool to ensure fast and effective provision of
7 service, without the need for separate hearings on each individual agreement.
8

9 The Motion for Dismissal filed by UNS Electric only serves to
10 emphasize MEC's need to file its formal Complaint requesting the Commission order
11 UNS Electric (and/or its parent UniSource Energy Corporation) to negotiate, in good
12 faith, a system-wide borderline agreement. Unless the Commission intercedes, MEC
13 and all affected borderline customers, like CTI, will remain without a quick and
14 uniform method of determining whether service is available from the adjoining
15 provider. Certainly MEC's request for the Commission's assistance in securing a
16 system-wide borderline agreement with UNS Electric is not a basis to for dismissing
17 the Complaint.
18

19 2. MEC is Not Seeking a Rate Increase

20 As another alternative method of accommodating CTI, MEC expressed
21 a willingness to accept service from UniSource under its Rate Schedules 45 and 46,
22 provided the Commission also authorizes MEC to collect, through a surcharge from
23 CTI, the actual cost incurred by MEC, including a reasonable margin if UniSources
24 rates exceed MEC's cost of power. Complaint at paragraph 14. UNS Electric
25 misconstrues MEC's suggestion as an attempt "to accomplish a rate increase" outside
26

1 of a rate case and claims such request should be dismissed. UNS Electric is wrong.

2 MEC is aware that Arizona case law has stressed the need for the
3 Commission to be sensitive to its constitutional obligation to determine fair value in
4 connection with ratemaking. However, none of the cases deal precisely with the issue
5 presented. Here, MEC has filed a Complaint seeking the Commission's assistance in
6 dealing with a neighboring public service corporation. MEC is under no obligation to
7 purchase power from UNS Electric, but is willing to consider doing so to
8 accommodate a specific customer. In return, MEC asks the Commission to permit
9 MEC to collect any increased costs from the benefited customer through a specifically
10 approved surcharge. This is akin to a request for the Commission to approve a special
11 service contract. Moreover, the type of cost involved, purchased power costs, could
12 otherwise be collected through MEC's existing purchased power adjustment
13 mechanism (PPAM). However, using the PPAM would result in MEC's existing
14 customers subsidizing a service MEC is not legally obligated to provide. MEC
15 requests a specific surcharge applicable to the benefited customer to avoid such
16 subsidization. In short, no rate increase is being requested and UNS Electric's
17 allegation that Mohave is attempting to secure Commission approval of a rate increase
18 outside of a rate case is without merit.

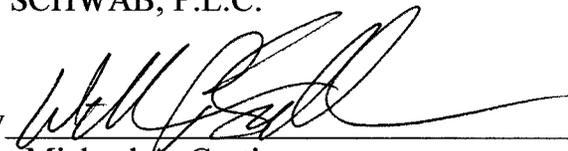
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21 WHEREFORE, having fully responded to the Motion for Dismissal
22 filed by UNS Electric, Inc., MEC respectfully requests that the Commission:

- 23 1. Deny UNS Electric's Motion for Dismissal; and
- 24 2. Expeditiously proceed to determine the substance of MEC's
25 Complaint.

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RESPECTFULLY SUBMITTED, this 3rd day of January, 2005.

CURTIS, GOODWIN, SULLIVAN, UDALL
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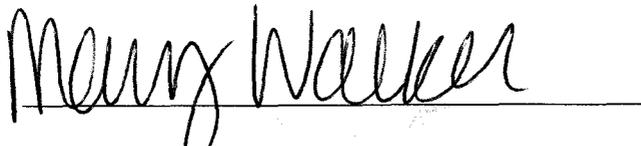
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