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BEFORE THE ARIZONA CORPORATION COMMISSION

JEFF HATCH-MILLER,
Chairman

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Commissioner

WILLIAM A. MUNDELL,
Commissioner

MIKE GLEASON
Commissioner

KRISTIN K. MAYES
Commissioner

IN THE MATTER OF THE COMPLAINT)
OF MOHAVE ELECTRIC COOPERATIVE,)
INC. AGAINST UNISOURCE ENERGY)
CORPORATION)

Arizona Corporation Commission
DOCKETED

JAN 18 2005

DOCKETED BY *CAF*

E-04230A-04-0798

E-04204A-04-0824

E-01750A-04-0824

Docket Nos: E-04230A-04-0798
and E-01750A-04-0798

**REPLY IN SUPPORT OF
MOTION FOR DISMISSAL**

UNSE Electric, Inc. ("UNSE Electric") replies to Mohave Electric Cooperative, Inc.'s ("MEC") Response to Motion for Dismissal.

MEC's Complaint raises the question of whether UNSE Electric must, as a matter of law, agree to a "system-wide borderline agreement." The answer is "no." Borderline agreements are a creation of the Arizona Corporation Commission ("Commission") and are used to provide service to a particular customer who has requested service from a non-certificated carrier. UNSE Electric is aware of no system-wide agreement ever approved by the Commission and there is no statute, rule or Commission order requiring UNSE Electric

1 to enter into a system-wide agreement. In this case, MEC is holding a customer hostage in
2 an attempt to force UNS Electric into a system-wide agreement.¹ As an alternative, MEC
3 asks the Commission to establish a new MEC rate so that MEC may resell UNS Electric
4 power under a now-defunct federal tariff. MEC's Complaint should be dismissed because
5 there is no legal requirement that UNS Electric enter into a system-wide borderline
6 agreement and because MEC may not charge rates that have not been approved in a
7 Commission rate case.
8

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10 I. As a matter of law, UNS Electric does not have to enter into a system-wide
11 borderline agreement merely to serve one customer.

12 MEC filed its complaint to force UNS Electric into a system-wide borderline
13 agreement. As set forth in UNS Electric's Motion to Dismiss, a system-wide agreement
14 runs contrary to the Commission's authority to issue certificates of convenience and
15 necessity for defined exclusive service territories. Borderline agreements are an exception
16 to this rule, created by the Commission to enable individual customers to receive power
17 under circumstances where the certificated carrier cannot provide the service on a timely,
18 reasonable basis. Each borderline agreement is based on a fact specific analysis focusing
19 on the particular customer's situation. Borderline agreements are used in response to a
20 customer request. They are not imposed on customers by the public service corporations.
21 MEC's system-wide proposal would illegally force customers to accept service from a
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25 ¹ UNS Electric has offered for months, and is still ready, willing and able, to provide
26 service to CTI under a standard, customer specific authorization agreement, but MEC has
not accepted UNS Electric's offer.

1 non-certificated provider. All other utilities in the state, including UNS Electric's
2 affiliate, Tucson Electric Power Company ("TEP"), enter into borderline agreements
3 successfully with other public service corporations on a case by case basis. These
4 customer-specific agreements were approved by the Commission.
5

6 For purposes of this Motion to Dismiss, the deciding factor is that there is no
7 statute, rule or Commission order requiring (or even recommending) system-wide
8 borderline agreements. In effect, MEC is asking the Commission to establish a new policy
9 requiring public service corporations to enter into system-wide borderline agreements with
10 any public service corporation with whom it shares a border. At a minimum, such a
11 proposal should be the subject of a rule-making or generic proceeding, not a complaint
12 action. There is simply no legal basis nor Commission precedent to support MEC's claim
13 and, therefore, it should be dismissed.
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16 II. MEC cannot charge CTI a new rate outside of a rate case.

17 MEC's request for a "surcharge, plus a reasonable margin" is a request for a new
18 rate requiring a rate case. MEC contends that its request for a new rate should be viewed
19 as an "adjustor clause," not requiring a rate case. This argument must be rejected for three
20 reasons. First, even adjustor clauses must first be approved in a rate case. Second, to the
21 extent MEC's request for a "reasonable margin" constitutes a profit or increase in net
22 income, it does not qualify as an adjustor. Third, the FERC tariff on which the MEC
23 request is based is not in effect; therefore, there is no defined "cost" on which the adjustor
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1 can be based.² As required in *Scates*,³ adjustor mechanisms initially must be approved in a
2 rate case, must not effect net income and must have a precise formula to control
3 adjustments.
4

5 The *Scates* case provided in pertinent part:

6 The automatic adjustment clause is a device to permit
7 rates to adjust automatically, either up or down, in
8 relation to fluctuations in certain, narrowly defined,
9 operating expenses. . . . such clauses usually embody
10 a formula established during a rate hearing to permit
11 adjustment of rates in the future to reflect changes and
12 specific operating costs, such as wholesale costs of gas
13 or electricity. Thus, although a utility may receive increased
14 gross revenues when utility rates increase under automatic
15 adjustment clauses, a utility's net income should not be
16 increased, because operating costs also will have risen to
17 offset the increased revenue. . . . When courts have upheld
18 such automatic adjustment provisions, they have generally
19 done so because the causes are initially adopted as part of
20 the utility's rate structure in accordance with all statutory
21 and constitutional requirement and, further, because
22 they are designed to ensure that the adoption of a set
23 formula is geared to a specific, readily identifiable cost,
24 the utility's profit or rate of return does not change.⁴

25 ² Alternatively, MEC's rate request is moot because the federal tariff on which it is based
no longer exists. See UNS Electric's Answer, paragraph 14.

26 ³ *Scates vs. Arizona Corporation Commission*, 118 Ariz. 531, 578 P.2d 612 (App. 1978).

⁴ *Id.* at 535, 578 P.2d at 616 (emphasis added).

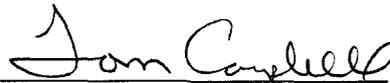
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III. Conclusion.

UNS Electric respectfully requests that its motion to dismiss be granted.

RESPECTFULLY SUBMITTED this 18th day of January, 2005.

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