

# EXCEPTION



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BEFORE THE ARIZONA CORPORATION

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1  
2 COMMISSIONERS

3 JEFF HATCH-MILLER, CHAIRMAN JAN 21 P 4: 01

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AZ CORP COMMISSION  
DOCUMENT CONTROL

E-04230A-04-0798

E-04204A-04-0824

E-01750A-04-0824

8 IN THE MATTER OF THE COMPLAINT OF  
9 MOHAVE ELECTRIC COOPERATIVE, INC.  
10 AGAINST UNISOURCE ENERGY  
11 CORPORATION.

DOCKET NO. E-04230A-04-0798

12 IN THE MATTER OF THE APPLICATION OF  
13 UNS ELECTRIC, INC. FOR AN ORDER  
14 APPROVING A TRANSFER OF A PORTION OF  
15 A CERTIFICATE OF CONVENIENCE AND  
16 NECESSITY.

DOCKET NO. E-04204A-04-0824

DOCKET NO. E-04230A-04-0824

**EXCEPTIONS OF MOHAVE  
ELECTRIC COOPERATIVE, INC.**

17 Mohave Electric Cooperative, Inc. ("Mohave"), by and through its attorneys  
18 undersigned, respectfully files these exceptions, pursuant to A.C.C. R.14-310(B)<sup>1</sup> to the  
19 recommended "Emergency" Order ("RO") filed in the above captioned matters.

20 **I. There Is No "Emergency"**

21 The entire RO is premised upon the existence of an emergency. The RO  
22 describes the emergency in the following terms:

23 "[W]e believe that an emergency currently exists that requires  
24 immediate action". . . . "It is simply unacceptable that any  
25 customer should be required to wait this length of time to  
receive electric service." [Finding of Fact 14] "Through the  
letters filed in the dockets, and the statements made at the  
procedural conferences, we recognize the frustration and

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JAN 21 2005

Arizona Corporation Commission  
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<sup>1</sup> Mohave notes that parties are to be allowed ten (10) days to file exceptions under the Rule. In this case, the parties have been allowed only three (3) days.

1 desperation expressed by CTI's representative due the  
2 company's inability to obtain electric service under the terms  
3 that would enable it to proceed with construction of planned  
4 facilities in Mohave County. . .". Finding of Fact 15.

5 A. Mohave Will Provide Services Immediately

6 By letter dated January 18, 2005 to the Commissioners (incorporated herein by  
7 reference) and by letter dated January 19, 2005 to CTI (a copy of which is attached as Exhibit  
8 A), Mohave has evidenced its offer to render electric service immediately to CTI initially  
9 through use of portable generators. While Mohave disputes that an "emergency" exists,  
10 Mohave's offer to provide electric service immediately, eliminated even the possibility of an  
11 emergency. This offer was responsive to comments made at the Procedural Conference held  
12 January 12, 2005, where Mohave was informed that the Commission believed the matter  
13 needed to be resolved immediately. The offer was made after UNS Electric ("UNS")  
14 declined to accept Mohave's Conditional Consent tendered on January 14, 2005.  
15

16 B. No Emergency Ever Existed.

17 Mohave, for months, had offered electric service to CTI under Commission  
18 approved service regulations (which require CTI to advance the funds necessary to extend  
19 Mohave's facilities to the CTI site). CTI declined the offer, ostensibly due to the cost of the  
20 extension. The refusal of CTI to accept Mohave's standard offer of service does not create an  
21 "emergency". It reflects an economic decision by CTI.  
22

23 In conclusion, the record does not support the RO's conclusion that an  
24 "emergency" ever existed. However, even if an emergency had existed when the RO was  
25

1 filed, it has now been eliminated through Mohave's offer to provide CTI service immediately  
2 through portable generation. The RO is moot.

3 **II. The Commission Does Not have Authority to Take the Action**  
4 **Proposed Under the RO Under the Circumstances of this Case.**

5  
6 The RO proposes the Commission order UNS to provide service, on an interim  
7 basis, to CTI. Such an action tramples Mohave's vested property rights, as well as its due  
8 process rights.

9 **A. The Order Violates Mohave's Property Rights.**

10 There is no dispute that CTI is located within Mohave's existing certificate of  
11 convenience and necessity. Arizona law is unambiguous. "Once granted, the certificate  
12 confers upon its holder an *exclusive* right to provide the relevant service for as long as the  
13 grantee can provide adequate service at a reasonable rate." (emphasis added) *James P. Paul*  
14 *Water Co. v. Arizona Corporation Commission*, 137 Ariz. 426, 429, 671 P.2d 404, 407  
15 (1983). "The original holders do have vested property rights under the certificate protected  
16 by Article 2, Section 17 of the Arizona Constitution." *Tonto Creek Homeowners*  
17 *Association v. Arizona Corporation Commission* 177 Ariz. 49, 59 864 P.2d 1081, 1091  
18 (App. 1993) citing *Trico Elec. Coop. v. Senner*, 92 Ariz. 373, 381, 377 P.2d 309, 315  
19 (1962). Mohave has always been willing to provide service under its Commission approved  
20 rates and regulations. CTI has never provided Mohave the funding required to receive  
21 service. Moreover, Mohave, promptly responded to the comments made at the January 12  
22 procedural conference, first by providing its Conditional Consent, which was rejected by  
23 UNS and then by offering service directly through portable generation. Under the  
24  
25

1 circumstances of this case, the proposed order authorizing UNS to provide electric service  
2 within Mohave's certificated area would constitute a taking of Mohave's vested property  
3 rights.

4  
5 B. Mohave Has Not Received Due Process.

6 As noted, Mohave has a property interest in the certificate of convenience and  
7 necessity issued by the Commission. That interest includes monopoly protection against  
8 other public service corporations. As stated in Tonto Creek, "absent the most extenuating  
9 circumstances, obtaining actual notice of charges while seated in the very hearing convened  
10 to decide the issues would not afford the parties a meaningful opportunity to be heard." 177  
11 Ariz. at 57, 864 P.2d at 1089. See also, A.R.S. § 40-246(c) (requesting at least ten (10) days  
12 notice of a hearing, together with service of the complaint); § 40-247 (permitting parties to  
13 offer evidence).

14  
15 In the present case, the parties received a procedural order issued January 4,  
16 2005 setting a Procedural Conference for January 12, 2005. Nothing in the procedural order  
17 discusses an emergency situation or places Mohave on notice that an immediate resolution of  
18 the situation was expected at the procedural conference.<sup>2</sup> There has been no evidentiary  
19 proceeding or even a single sworn declaration filed in these dockets alleging "an emergency"  
20 exists. Despite the lack of procedural due process, Mohave responded promptly. Mohave's  
21 Conditional Consent has been rejected by UNS. Immediately thereafter, Mohave offered CTI  
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23  
24  
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<sup>2</sup> The phrase "as well as whether settlement of the issues raised in the complaint may be able to be resolved through mediation with staffs assistance" falls far short of such notice.

1 electric service initially through portable generation and simultaneously withdrew its  
2 Conditional Consent.

3 In short, there has been no evidentiary hearing of any kind in these matters. The  
4 procedural order was inadequate to place Mohave on notice that an "emergency" was alleged  
5 to exist. In fact, no evidence of an emergency exists. The procedure followed in these  
6 matters fall well short of procedural due process.  
7

### 8 **III. Ordering UNS Electric To Provide Service Rewards UNS For** 9 **Failing To Cooperate With Mohave.**

10 Neither Article 15, Section 3 of the Arizona Constitution or A.R.S. § 40-332(a)  
11 (the only authority sited in the RO) permit the Commission to violate Mohave's certificate by  
12 ordering UNS to enter its certificated area and provide service, even on an interim basis. If  
13 an emergency did in fact exist, the remedy consistent with Arizona law is an order requiring  
14 UNS to provide power to Mohave so that Mohave could serve its own customers. See e.g.  
15 A.R.S. § 40-332 (authorizing the Commission to order the joint use of facilities where the  
16 utilities fail to agree upon its use). The RO, however, ignores this remedy and, instead, seeks  
17 to reward UNS for refusing to make any serious attempt to provide Mohave power. Such a  
18 result is not only contrary to law for the reasons set forth above, it would be inequitable.  
19

### 20 **IV. Conclusion**

21 At no time has Mohave refused to provide CTI electric service. CTI has been  
22 unwilling to expend the funds necessary to receive service in the normal course of business.  
23 Mohave recognizes that UNS has the capability of providing power at or near the CTI  
24 property at distribution level voltage. Mohave requested UNS to provide Mohave that power,  
25

1 which UNS has declined. To reward UNS by authorizing it to provide service to CTI not  
2 only is inequitable, but violates Mohave's property rights vested through its certificate of  
3 convenience and necessity. Moreover, the abbreviated procedure followed by the  
4 Commission violates the Commission's own rules, as well as Mohave's right to procedural  
5 due process.  
6

7 Without waiving its legal rights, Mohave has responded to the Commission's  
8 request by offering to make electric service available to CTI initially through portable  
9 generation. Even without such an offer, the record does not support a finding of an  
10 emergency. However, Mohave's offer to provide electric service initially through portable  
11 generation renders moot the RO.  
12

13 Wherefore, it is respectfully requested that the Commission reject the  
14 recommendation filed on January 18, 2005 in the above captioned proceedings.

15 DATED this 21<sup>ST</sup> day of January, 2005.

16 CURTIS, GOODWIN, SULLIVAN,  
17 UDALL & SCHWAB, P.L.C.

18  
19 By: 

20 Michael A. Curtis  
21 William P. Sullivan  
22 2712 North 7th Street  
23 Phoenix, Arizona 85006-1090  
24 Attorneys for Mohave Electric  
25 Cooperative, Inc.

1 **Original and thirteen (13) copies of**  
2 **the foregoing filed this 21<sup>st</sup> day of January, 2005 with:**

3 Docket Control Division  
4 ARIZONA CORPORATION COMMISSION  
5 1200 West Washington Street  
6 Phoenix, Arizona 85007

7 **Copies of the foregoing hand delivered/mailed**  
8 **this 21<sup>st</sup> day of January, 2005 to:**

9 JEFF HATCH-MILLER, CHAIRMAN  
10 COMMISSIONER WILLIAM A. MUNDELL  
11 COMMISSIONER MARC SPITZER  
12 COMMISSIONER MIKE GLEASON  
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12 1234-7-46(Unisource\_CTI)/pleadings/exceptions

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P.O. Box 1045, Bullhead City, AZ 86430

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January 19, 2005

Central Trucking, Inc.  
Mr. Terrence G. O'Hara  
Vice President Western Division  
P.O. Box 6355  
Kingman, AZ 86401

Dear Mr. O'Hara:

This letter is to inform you that Mohave Electric Cooperative stands ready to provide power to Central Trucking Inc. at 2255 W. Oatman Road. Mohave Electric is ready and willing to serve C.T.I. at its standard commercial metered rates using on site generation until such time as Mohave Electric can build or arrange for standard distribution facilities to the site.

Mohave Electric is willing to negotiate a lease or purchase agreement on C.T.I.'s existing generator system and fuel tank or Mohave will provide its own facilities to serve C.T.I.

Mohave Electric will provide and install a 200 amp temporary service including metering facilities and a disconnect for C.T.I.

We look forward to serving you. Please contact us at 928.758.0579 on or before Friday, January 21, 2005.

Sincerely,

Aaron Stallings  
Manager of External Affairs  
Mohave Electric Cooperative

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**EXHIBIT A**