

OPEN MEETING ITEM



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COMMISSIONERS  
MIKE GLEASON - Chairman  
WILLIAM A. MUNDELL  
JEFF HATCH-MILLER  
KRISTIN K. MAYES  
GARY PIERCE

ORIGINAL



ARIZONA CORPORATION COMMISSION

22

DATE: JULY 9, 2007

DOCKET NO: E-01933A-06-0801

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Jane Rodda. The recommendation has been filed in the form of an Opinion and Order on:

TUCSON ELECTRIC POWER COMPANY  
(APPROVAL OF A POWER AGREEMENT  
WITH TUCSON ELECTRIC POWER AND ASARCO)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

JULY 18, 2007

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Working Session and Open Meeting to be held on:

JULY 24, 2007 AND JULY 25, 2007

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602) 542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

BRIAN C. McNEIL  
EXECUTIVE DIRECTOR

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1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 MIKE GLEASON, Chairman  
4 WILLIAM A. MUNDELL  
5 JEFF HATCH-MILLER  
6 KRISTIN K. MAYES  
7 GARY PIERCE

8 IN THE MATTER OF THE APPLICATION OF  
9 TUCSON ELECTRIC POWER COMPANY FOR  
10 APPROVAL OF A CUSTOMER AGREEMENT  
11 WITH ASARCO, LLC AND SILVER BELL  
12 MINING, LLC.

DOCKET NO. E-01933A-06-0801

DECISION NO. \_\_\_\_\_

13 OPINION AND ORDER

14 DATE OF HEARING:

May 14, 2007

15 PLACE OF HEARING:

Tucson, Arizona

16 ADMINISTRATIVE LAW JUDGE:

Jane L. Rodda

17 APPEARANCES:

Ms. Michelle Livengood, Legal Division,  
Tucson Electric Power Company; Mr.  
Raymond Heyman, Senior Vice President  
and General Counsel, UniSource Energy  
Corporation;

Mr. Lawrence V. Robertson, Munger and  
Chadwick, on behalf of ASARCO, LLC  
and Silver Bell Mining, LLC; and

Mr. Christopher Kempley, Chief  
Counsel, Legal Division, on behalf of the  
Utilities Division of the Arizona  
Corporation Commission.

18 **BY THE COMMISSION:**

19 \* \* \* \* \*

20 Having considered the entire record herein and being fully advised in the premises, the  
21 Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

22 FINDINGS OF FACT

23 1. On December 28, 2006, Tucson Electric Power Company ("TEP" or "Company")  
24 submitted for Arizona Corporation Commission ("Commission") approval, a proposed Electric  
25 Power Supply Agreement ("Proposed Agreement") between TEP, ASARCO, LLC ("Asarco"), and

1 Silver Bell Mining LLC, ("Silver Bell") (collectively "ASARCO"). TEP alleged that the terms of  
2 the Proposed Agreement are confidential and provided the Proposed Agreement to Commission  
3 Utilities Division Staff ("Staff") pursuant to a Protective Agreement.

4 2. On March 15, 2007, Staff filed a Motion for Procedural Order, believing that certain  
5 provisions of the Proposed Agreement are best considered in the context of a hearing. Specifically,  
6 Staff expressed concerns about a provision of the contract that would limit ASARCO's participation  
7 in Docket No. E-01933A-05-0650.<sup>1</sup>

8 3. By Procedural Order dated March 23, 2007, the Commission convened a telephonic  
9 Procedural Conference on April 2, 2007, with the purpose of establishing procedures for a hearing in  
10 this matter. TEP and Staff participated in the Procedural Conference through counsel.

11 4. By Procedural Order dated April 13, 2007, the matter was set for hearing and notice  
12 was sent to the parties to Docket No. E-01933A-05-0650.

13 5. On April 12, 2007, TEP filed with Docket Control a public, redacted, version of the  
14 Proposed Agreement.

15 6. On April 21, 2007, Arizonans for Electric Choice and Competition ("AECC") filed a  
16 Request for Intervention. On April 23, 2007, Asarco and Silver Bell, and the Department of Defense  
17 ("DOD") filed Requests to Intervene. On April 27, 2007, Phelps Dodge filed a Request for  
18 Intervention.

19 7. On April 24, 2007, Staff filed its Staff Report, recommending approval of the  
20 Proposed Agreement with some modifications, which related to the restrictions on participation in  
21 another docket as well as the proposed retroactive approval of the contract rates.

22 8. On May 2, 2007, ASARCO filed a Response to the Staff Report. ASARCO states that  
23 it and TEP negotiated the Proposed Agreement in good faith and at arms' length, and ASARCO  
24 supports the Proposed Agreement as written.

25 9. On May 3, 2007, TEP filed its Response to the Staff Report. TEP objected to Staff's  
26 recommendations to alter the terms of the proposed contract.

27  
28 <sup>1</sup> TEP application to amend Decision No. 62103.

1           10.     On May 3, 2007, TEP filed a limited objection to the Intervention of AECC, Phelps  
2 Dodge and DOD. TEP did not object to the intervention of AECC, Phelps Dodge or DOD provided  
3 they are not given access to the confidential and proprietary rate and pricing information in the  
4 Proposed Agreement.

5           11.     By Procedural Order dated April 13, 2007, the Commission granted intervention to  
6 Asarco and Silver Bell, DOD, AECC and Phelps Dodge. The Interventions of DOD, AECC and  
7 Phelps Dodge were limited to preclude access to confidential pricing and rate information.

8           12.     The hearing convened as scheduled on May 14, 2007, at the Commission's Tucson  
9 offices. Ms. Denise Smith, Director of Renewable and Conservation Programs testified for TEP. At  
10 the time the Proposed Agreement was negotiated, Ms. Smith was the Director of Commercial  
11 Customer Care and was involved in the contract negotiations. Mr. John Low, a Vice President for  
12 Mining Operations for ASARCO with responsibility for the Mission Complex and Silver Bell mines,  
13 testified for ASARCO. Ms. Barbara Keene, a public utilities analyst manager, and Mr. Elijah  
14 Abinah, Assistant Director of the Utilities Division, testified for Staff.

15           13.     ASARCO operates copper mining operations at its Mission Complex and at its Silver  
16 Bell Mine which both receive electric service from TEP. Over the years, TEP and ASARCO have  
17 entered into a series of electric service agreements. The most recent electric service agreement was  
18 approved by the Commission in Decision No. 61868 (August 5, 1999), and expired on December 31,  
19 2006 (the "1999 ESA").

20           14.     In August 2005, ASARCO filed for protection under Chapter 11 of the United States  
21 Bankruptcy Code (Case Number 05-21207, Southern District of Texas, Corpus Christi Division).

22           15.     TEP's December 28, 2006, filing sought approval of a new electric service agreement  
23 with ASARCO that provides that it would be effective retroactively January 1, 2007, through  
24 December 31, 2011. When it filed the agreement with the Commission, TEP understood that the  
25 Commission would not be able to approve the Agreement in time for the new rates to go into effect  
26 on January 1, 2007, upon the expiration of the prior contract. In its filing for approval, TEP sought  
27 expedited consideration of the Proposed Agreement.

28           16.     TEP has been charging ASARCO the rates under the Proposed Agreement beginning

1 January 1, 2007.

2 17. On March 2, 2007, TEP filed a letter extending the time for the Commission to  
3 consider the Proposed Agreement until April 12, 2007.

4 18. Under the Proposed Agreement, the Mission Complex and Silver Bell Mine would  
5 purchase, at a minimum, the power requirements specified in the Proposed Agreement from TEP at  
6 the energy prices contained in the Time-of-Use ("TOU") Pricing Plan. The TOU pricing structure  
7 being used will facilitate the reduction of electric power costs for the Mission Complex and Silver  
8 Bell Mine, allowing them to shift loads from on-peak to off-peak or shoulder hours.

9 19. In the absence of the Proposed Agreement, ASARCO would be provided service  
10 under the rates, terms and conditions of Tariff Nos. LLP-14 and LLP-90A. Staff estimated the cost  
11 of obtaining electric power under the tariff rates and the rates established in the Proposed Agreement  
12 for the Mission Complex and Silver Bell mine. Staff determined that the revenue to be received  
13 under the Proposed Agreement would cover TEP's marginal costs. Staff believes that the rates  
14 under the Proposed Agreement are just and reasonable.

15 20. Compared to TEP's total revenues, Staff concludes that any impact from the Proposed  
16 Agreement would be *de minimus*, and any impact on TEP's fair value rate base and rate of return  
17 would also be *de minimus*.

18 21. As conditioned herein below, Staff recommends approval of the Proposed Agreement  
19 because ASARCO has a possible alternative to buying power from TEP. Without the agreement,  
20 TEP would lose net revenues it could otherwise receive. In addition, the agreement is important to  
21 ASARCO because electricity costs play an important role in the competitiveness of a copper mine  
22 and the proposed rates are less than the tariff rates ASARCO would otherwise pay.

23 22. Section 12.2 of the Proposed Agreement provides as follows:

24 Asarco and Silver Bell Mining represent, warrant and agree that  
25 the rates set forth herein are just and reasonable. The rates shall  
26 remain in effect during the term of this Agreement and shall not be  
27 altered, changed or modified as part of the Commission's final  
28 resolution of TEP's Motion to Amend Decision No. 62103 in  
docket number E-01933A-05-0650. Accordingly, upon approval  
of this Agreement by the ACC, Asarco and Silver Bell Mining  
shall not directly or indirectly take any action contrary to the  
evidence, testimony or positions of TEP in docket number E-

1           01933A-05-0650 or any appeal arising from the ACC decision in  
2           said docket. In the event that the Commission orders TEP to  
3           charge rates to Asarco and Silver Bell Mining that are different  
4           than those set forth in this Agreement, any Party hereto may, at its  
5           sole discretion, void this Agreement. (emphasis added)

6           23. Staff believes that the limitations set forth in section 12.2 of the Proposed Agreement  
7           are not in the public interest. Staff believes that no company or intervenor should be precluded from  
8           participating in proceedings before the Commission. Staff recommends that the Commission specify  
9           in its Order that the provisions of section 12.2 of the Proposed Agreement shall be null and void upon  
10           approval.

11           24. Staff believes that because TEP has been billing ASARCO under the rates in the  
12           Proposed Agreement, which rates have not yet been approved, TEP is charging unauthorized rates.  
13           Staff recommends that the Commission require TEP to reimburse ASARCO the difference between  
14           the rates charged under the 1999 ESA (which expired December 31, 2006) and the rates charged  
15           under the Proposed Agreement. Staff believes the reimbursement should extend from January 1,  
16           2007, the date on which TEP began charging the Proposed Agreement rates, and should continue for  
17           as long as TEP is charging rates not approved by the Commission.

18           25. Finally, Staff recommends that the Commission specify in its Order that approval of  
19           the Agreement at this time does not guarantee any future ratemaking treatment for the Proposed  
20           Agreement.

#### 21           Applicability of Rates

22           26. TEP argues that Staff's recommendations to charge the expired contract rate pending a  
23           new agreement and to void section 12.2 of the Proposed Agreement are without merit and would  
24           negate the agreement that the parties negotiated at arms' length.

25           27. TEP argues there is no legal basis for the Commission to order TEP to charge  
26           ASARCO the expired rate. With the expiration of the prior contract, TEP is not authorized to charge  
27           the prior contract rates. In the absence of a new agreement, TEP asserts the applicable rates would  
28           be the Commission-approved tariff rates, which are higher than those agreed to in the Proposed  
29           Agreement. TEP claims that if the Staff recommendation is approved, parties to contracts will be  
30           able to ignore the expiration or termination of Commission-approved electric service agreements and

1 perpetuate selective terms, which result, TEP argues, would not be in the public interest.

2       28. TEP notes that all parties, including Staff, recognize that the rates in the Proposed  
3 Agreement are just and reasonable, and in the public interest. TEP states that charging the newly  
4 proposed rates is an accommodation by TEP for the benefit of ASARCO, and that to penalize TEP by  
5 requiring it to refund the difference between the expired rate and the new rates would interfere with  
6 the parties' contractual rights, is contrary to the terms of the Decision No. 61868 as well as the  
7 Proposed Agreement, and would be unjust and confiscatory. TEP states that if ASARCO had been  
8 required to pay for electric service pursuant to Tariffs LLP-14 and LLP-90A, ASARCO would have  
9 paid \$709,642 or \$578,965 more, respectively, than what it paid pursuant to the terms of the  
10 Proposed Agreement during the period January through April 2007.

11       29. Further, TEP argues that Article 15, Section 3 of the Arizona Constitution states that  
12 the Commission has the power only to "prescribe the forms of contracts" used by public service  
13 corporations, and that the courts have ruled that this only applies to the actual "form" of the contract,  
14 not the content. *Citing Corona De Tucson, Inc. v. Senner*, 92 Ariz. 373, 387, 309 P.2d 309, 319  
15 (1962). TEP asserts that Staff's recommendation would impermissibly change the terms of the  
16 contract.

17       30. ASARCO states that it and TEP engaged in good faith and arms' length negotiations  
18 to arrive at the rates reflected in the Proposed Agreement, and believes that TEP was sufficiently  
19 responsive to ASARCO's needs for rates that would allow it to remain viable in the highly  
20 competitive world-wide copper market. ASARCO was prepared to pay the negotiated rates as of  
21 January 1, 2007, forward at the time it entered into the Agreement, and continues to be willing to do  
22 so. As a matter of business ethics, ASARCO does not support the recommendation that TEP  
23 reimburse them for the amounts paid in excess of the expired contract rates.

24       31. At the hearing, Staff explained that its recommendation that TEP reimburse ASARCO  
25 was intended in lieu of an administrative penalty against TEP for charging unauthorized rates. (Tr at  
26 76)

27       32. We find that the proposed date for the new rates to take effect, January 1, 2007, is  
28 reasonable under the circumstances. The parties understood that the rates would not be effective until

1 and unless the Commission approved them, but that there was not sufficient time to have the  
2 Commission approve the contract prior to the expiration of the previous contract. The tariff rates  
3 would apply if the parties had not agreed that Asarco and Silver Bell could take power under the  
4 proposed rates pending Commission approval of the contract. There is no evidence the rates are other  
5 than just and reasonable, and TEP does not benefit from the contract rates vis-à-vis the tariff rates.  
6 Some of the delay in negotiating a new contract was caused by ASARCO's bankruptcy and the start  
7 of a new CEO, and there is no allegation or evidence that TEP was responsible for an unreasonable  
8 delay. (Tr at 49-50) TEP filed the application for ACC approval prior to beginning to charge the  
9 new rates. Consequently, under these circumstances, we find that the proposal to have the rates  
10 effective commencing January 1, 2007, is just and reasonable and in the public interest.

11 Section 12.2 – Participation in Other Dockets

12 33. Similar to its opposition to changing the effective date of the contract rates, TEP  
13 argued that the Commission lacks jurisdiction to change the terms of section 12.2. TEP asserts  
14 several important and valid reasons support of the inclusion of section 12.2. First, TEP states the  
15 Proposed Agreement was negotiated at arms' length and in good faith and establishes just and  
16 reasonable rates, so there is no reason for ASARCO to try to negotiate a different rate in Docket No.  
17 E-01933A-05-0650 or any other docket; and Asarco and Silver Bell want certainty in rates now, not  
18 after resolution of the future rate case. Second, the first two sentences of section 12.2 provide that the  
19 rates set forth in the Proposed Agreement are just and reasonable and shall remain in effect during the  
20 term of the Agreement. TEP believes there is no reason to void this portion of Section 12.2. Third,  
21 the last sentence of section 12.2 provides that if the Commission attempts to change the rates, any  
22 party can withdraw from the Proposed Agreement. TEP states there is no rationale why this part of  
23 section 12.2 should be voided.

24 34. TEP's witness testified that the intent of section 12.2 is to prevent ASARCO from  
25 negotiating different rates than it agreed to in this contract as part of a future rate case. (Tr at 28)

26 35. ASARCO believed that if the Proposed Agreement is approved there would be no  
27 need to participate in a rate case docket through the term of the Agreement. (Tr at 61) Initially,  
28 ASARCO stated that Staff's recommendation concerning section 12.2 was unnecessary and would

1 have little practical effect, since if the Commission approved the contract rates, ASARCO would  
2 have no cause or incentive to participate in the rate proceeding that may emanate from Docket No. E-  
3 01933A-05-0650. However, ASARCO admitted at the hearing, that if in Docket No. E-01933A-05-  
4 0650, or a related docket, the Commission were to consider imposing a surcharge on TEP customers,  
5 ASARCO might be interested in participating in such docket. (Tr at 64)

6 36. At the hearing, Staff clarified its position in the Staff Report and explained that it is  
7 the third sentence of the section 12.2<sup>2</sup> which Staff finds contrary to the public interest. Staff believes  
8 that all companies with a direct interest in a pending matter should be allowed to come before the  
9 Commission to express their views. (Tr at 88)

10 37. TEP, ASARCO and Staff agreed at the hearing that if the third sentence of section  
11 12.2 were removed, they would find the remainder of section 12. 2 to be acceptable. (Tr at 54, 81,  
12 and 95)

13 38. Removing the third sentence of section 12.2 of the Proposed Agreement is in the  
14 public interest. Generally, it is not good public policy to allow the imposition of wholesale limits on  
15 the participation of interested parties in Commission proceedings. Such restrictions might limit the  
16 information available to the Commission in its deliberations as well as prejudice a party who may not  
17 recognize the import of signing away its right to participate in a future proceeding. In this case, the  
18 offending language is broader than necessary to give effect to the stated purpose of the parties, which  
19 is to give certainty and finality to the rates agreed to in this Proposed Agreement. With the removal  
20 of the third sentence, the remaining language of section 12.2 provides adequate assurance that the  
21 rates agreed to in the Proposed Agreement will not be affected by the impending TEP rate case. The  
22 last sentence of section 12.2 acknowledges that the Commission retains authority over the rates TEP  
23 charges ASARCO.

24 39. Consequently, we find that the third sentence in section 12.2, highlighted above, shall  
25 be removed from the Proposed Agreement.

26

27 <sup>2</sup> "Accordingly, upon approval of this Agreement by the ACC, Asarco and Silver Bell Mining shall not directly or  
28 indirectly take any action contrary to the evidence, testimony or positions of TEP in docket number E-01933A-05-0650 or  
any appeal arising from the ACC decision in said docket."

**CONCLUSIONS OF LAW**

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1. TEP is an Arizona public service corporation within the meaning of Article XV, Section 2, of the Arizona Constitution.

2. The Commission has jurisdiction over TEP and over the subject matter of the application.

3. With the modification of the Proposed Agreement to remove the third sentence of section 12.2, as discussed herein, it is in the public interest to approve the Proposed Agreement.

4. Staff's proposed recommendation as set forth in Findings of Fact No. 25 is reasonable and should be adopted.

**ORDER**

IT IS THEREFORE ORDERED that Section 12.2 of the agreement for electric service between Tucson Electric Power Company and ASARCO LLC and Silver Bell Mining LLC, shall be modified as discussed herein.

IT IS FURTHER ORDERED that the agreement for electric service between Tucson Electric Power Company and ASARCO LLC and Silver Bell Mining LLC, shall be approved as modified herein.

IT IS FURTHER ORDERED that Tucson Electric Power Company, ASARCO LLC and Silver Bell Mining LLC, shall file with Docket Control within 30 days of the effective date of this Decision, as a compliance item in this docket, a revised agreement for electric service that complies with the findings of this Decision. The parties may provide the revised agreement confidentially to the Director of the Utilities Division and shall file a redacted public version of the revised agreement with Docket Control, as a compliance item in this docket.

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IT IS FURTHER ORDERED that approval of the agreement for electric service at this time does not guarantee any future ratemaking treatment of the Agreement with ASARCO LLC and Silver Bell Mining LLC.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN

COMMISSIONER

COMMISSIONER

COMMISSIONER

COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this \_\_\_\_ day of \_\_\_\_\_, 2007.

BRIAN C. McNEIL  
EXECUTIVE DIRECTOR

DISSENT \_\_\_\_\_

DISSENT \_\_\_\_\_

1 SERVICE LIST FOR: TUCSON ELECTRIC POWER COMPANY

2 DOCKET NO.: DOCKET NO. E-01933A-06-0801

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