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BEFORE THE ARIZONA CORPORATION

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JUN 10 2008

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ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

IN THE MATTER OF THE APPLICATION)
OF TUCSON ELECTRIC POWER)
COMPANY FOR THE ESTABLISHMENT OF)
JUST AND 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-07-0402

Arizona Corporation Commission

DOCKETED

JUN 12 2008

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IN THE MATTER OF THE FILING BY)
TUCSON ELECTRIC POWER COMPANY)
TO AMEND DECISION NO. 62103.)

DOCKET NO. E-01933A-05-0650

LIMITED APPEARANCE FOR
PURPOSE OF RESPONDING IN
OPPOSITION TO STAFF'S REQUEST
FOR PROCEDURAL ORDER, AND
REQUEST FOR ORAL ARGUMENT

ASARCO, LLC and Silver Bell Mining, LLC (collectively "ASARCO"), by and through their undersigned counsel, hereby enter their appearance in the above-captioned and above-docketed proceedings for the limited purpose of responding in opposition to the Commission Staff's ("Staff") June 6, 2008 Request For Procedural Order ("Request").

I.

**THE STAFF'S REQUEST, AND THE UNDERLYING PURPOSE THEREOF, ARE
PREDICATED UPON A FALLACIOUS FACTUAL ASSUMPTION**

The Staff's Request and the underlying purpose thereof are predicated upon the fallacious threshold assumption that the rates proposed in the May 29, 2008 Settlement Agreement, which

LAWRENCE V. ROBERTSON, JR.
ATTORNEY AT LAW
P.O. Box 1448
Tubac, Arizona 85646
(520) 398-0411

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LAWRENCE V. ROBERTSON, JR.
ATTORNEY AT LAW
P.O. Box 1448
Tubac, Arizona 85646
(520) 398-0411

1 was filed in the above-captioned and above-docketed proceedings, applies to all customers of
2 Tucson Electric Power Company (“TEP”), with the exception of Life Line customers.

3
4 “The Settlement Agreement provides for, among other things, an
5 approximate six percent (6%) rate increase across all rates
6 schedules with the exception of the Life Line rate. Such an
7 increase would have an impact on the power supply agreements
8 approved by Decision No. 65207 and Decision No. 69873.”
9 [Request, page 2, lines 2-5] [Emphasis added]

10 However, neither the factual circumstances surrounding Decision No. 69873 nor the language of
11 that decision support the Staff’s conceptual predicate.

12 More specifically, on August 28, 2007, the Commission issued Decision No. 68973 in
13 which it approved a January 1, 2007 Electric Power Supply Agreement (“Agreement”) between
14 TEP and ASARCO, together with the rates for electric service therein provided for from January
15 1, 2007 through December 31, 2011. In that regard, the following excerpts from Decision No.
16 69873 are quite pertinent and illuminating as to what the Commission intended:

17 “Staff determined that the revenue to be received under the
18 Proposed Agreement would cover TEP’s marginal costs. Staff
19 believes that the rates under the Proposed Agreement are just and
20 reasonable.” [Finding of Fact No. 19, page 4, lines 12-14]
21 [Emphasis supplied]

22 * * *

23 “There is no evidence the [proposed] rates are other than just and
24 reasonable, and [that] TEP does not benefit from the contract rates
25 vis-à-vis the tariff rates.” [Finding of Fact No. 32, page 7, lines 4-
26 5] [Emphasis supplied]

27 * * *

28 “With the removal of the third sentence, the remaining language of
Section 12.2 provides adequate assurance that the rates agreed to in
the Proposed Agreement will not be affected by the impending
TEP rate case.”¹ [Finding of Fact No. 38, page 8, lines 19-21]

* * *

¹ The “impending TEP rate case” was filed on July 2, 2007, and is the subject of Docket No. E-01933A-07-0402, in which the Staff filed its Request!

LAWRENCE V. ROBERTSON, JR.
ATTORNEY AT LAW
P.O. Box 1448
Tubac, Arizona 85646
(520) 398-0411

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“With the modification of the Proposed Agreement to remove the third sentence of section 12.2, as discussed above, it is in the public interest to approve the Proposed Agreement.” [Conclusion of Law No. 3, page 9, lines 6-7] [Emphasis supplied]

* * *

“IT IS FURTHER ORDERED if Tucson Electric Power Company, ASARCO LLC and Silver Bell Mining, LLC are unable to agree upon the terms of a subsequent agreement for electric service, Tucson Electric Power Company shall make a filing with the Commission describing the circumstances surrounding attempts to negotiate an agreement. The rates applicable under the agreement for electric service approved herein shall remain in effect until further order of the Commission.” [Fourth Ordering Paragraph, page 9, lines 21-26] [Emphasis supplied]

Thus, the above-quoted assertion by the Staff in its Request that the rates proposed in the May 29, 2008 Settlement Agreement apply

“...across all rates schedules with the exception of the Life Line rate”

conveniently ignores the history of the Agreement between TEP and ASARCO, and the language of Decision No. 69873 approving the same, as discussed above. Instead of acknowledging that the Agreement is a special contract arrangement between TEP and ASARCO, which was specifically approved by the Commission in a separate docketed proceeding specifically instituted for the purpose of examining the justness and reasonableness of the same, the Staff endeavors to include the Agreement among “all rates schedules” of TEP, with the exception of the Life Line rate.

Moreover, the Staff attempts to achieve this transformation less than one (1) year after the Commission expressly recognized and approved the special contractual arrangement between TEP and ASARCO for electric service in Decision No. 69873.

The Staff’s unilateral attempt to revisit and rewrite history should be summarily rejected. In that regard, in recent communications between the undersigned counsel for ASARCO and counsel for TEP, TEP confirmed that TEP does not interpret the proposed May 29, 2008

LAWRENCE V. ROBERTSON, JR.
ATTORNEY AT LAW
P.O. Box 1448
Tubac, Arizona 85646
(520) 398-0411

1 Settlement Agreement and the rates therein proposed as being applicable to Agreement between
2 TEP and ASARCO, and the rates for electric service that ASARCO will pay during the term of
3 the Agreement.

4 **II.**

5 **THE STAFF'S ATTEMPT TO IMPUTE PREVIOUS NOTICE TO ASARCO**
6 **SHOULD BE SUMMARILY REJECTED**

7 In its Request, the Staff makes the following statement, which is puzzling at best, and
8 audacious at worst:

9 “While it is clear that both ASARCO and Sierrita have notice
10 because counsel for ASARCO and Sierrita have participated fully
11 in the settlement discussions, albeit on behalf of other clients...”
[Request, page 2, lines 6-7] [Emphasis supplied]

12 It is unclear why the Staff included this factually unwarranted and legally defective assertion
13 within its Request, because that “notice” which the Staff purportedly seeks to achieve will be
14 provided if and when the Commission decides to exercise its authority under A.R.S. § 40-252 in
15 the manner requested by the Staff. However, one must wonder if the Staff isn't endeavoring to
16 criticize ASARCO for not having intervened in TEP's rate case and participated in the settlement
17 negotiations, even though ASARCO had no perceptible reason to do so, given the language of
18 Decision No. 69873 and its issuance subsequent to TEP's filing of its rate case in July 2007.

19 In addition, it would appear that the Staff has already forgotten that the settlement
20 negotiations resulting in the May 29, 2008 Settlement Agreement were conducted in confidence
21 under the auspices of Rule 408, and that the ongoing substantive content therefrom was to be
22 shared by participating counsel AND THOSE CLIENTS WHOM COUNSEL WERE
23 REPRESENTING IN THE SETTLEMENT NEGOTIATIONS, and only those clients. Thus, in
24 addition to the fact that ASARCO had no perceptible reason to believe that its rates for electric
25 service would be affected by TEP's currently pending rate case, the undersigned counsel was not
26 in a position to share with ASARCO confidential information of any nature which he acquired
27 through his representation of other clients in the aforesaid settlement negotiations.
28

1 Michael Grant
2 Gallagher & Kennedy, PA
3 2575 East Camelback Road
4 Phoenix, Arizona 85016-9225

4 Timothy M. Hogan
5 ARIZONA CENTER FOR LAW
6 IN THE PUBLIC INTEREST
7 202 East McDowell Road, Ste. 153
8 Phoenix, Arizona 85004

7 David Berry
8 WESTERN RESOURCE ADVOCATES
9 Post Office Box 1064
10 Scottsdale, Arizona 85252-1064

10 Gary Yaquinto, President
11 Arizona Investment Council
12 2100 North Central Ave., Suite 210
13 Phoenix, Arizona 85004

13 Jeff Schlegel
14 SWEEP
15 1167 West Samalayuca Drive
16 Tucson, Arizona 85704-3224

16 Peter Q. Nyce, Jr.
17 DEPARTMENT OF THE ARMY
18 901 North Stuart Street
19 Arlington, Virginia 22202-1837

19 Dan Neidlinger
20 NEIDLINGER & ASSOCIATES
21 3020 North 17th Drive
22 Phoenix, Arizona 850153

22 Michael W. Patten, Esq.
23 ROSHKA DeWULF & PATTEN
24 One Arizona Center
25 400 East Van Buren Street, Ste. 800
26 Phoenix, Arizona 85004

25 Robert J. Metli
26 SNELL & WILMER LLP
27 One Arizona Center
28 400 East Van Buren Street
Phoenix, Arizona 85004-2202

Eric Guidry
Energy Program Staff Attorney
WESTERN RESOURCE ADVOCATES
2260 Baseline Road, Suite 200
Boulder, Colorado 80302

Nicholas J. Enoch
LUBIN & ENOCH, PC
349 North Fourth Avenue
Phoenix, Arizona 85003

Greg Patterson, Director
Arizona Competitive Power Alliance
916 West Adams, Suite 3
Phoenix, Arizona 85007

Meghan Grabel, Esq.
Thomas L. Mumaw, Esq.
PINNACLE WEST CAPITAL
CORPORATION
400 North 5th Street, MS 8695
Phoenix, Arizona 85004

Scott S. Wakefield, Chief Counsel
RUCO
1110 West Washington St., Suite 220
Phoenix, Arizona 85007

Christopher Hitchcock
Law of Office of Christopher
Hitchcock, P.L.C.
1 Copper Queen Plaza
Post Office Box AT
Bisbee, Arizona 85603-01 15

Raymond S. Heyman
Senior Vice President and
General Counsel
UNISOURCE ENERGY
CORPORATION
One South Church Ave., Suite 1820
Tucson, Arizona 85701

Phil Dion
Vice President – Legal & Regulation
Tucson Electric Power Company
One South Church Ave., Suite 1820
Tucson, Arizona 85701

LAWRENCE V. ROBERTSON, JR.
ATTORNEY AT LAW
P.O. Box 1448
Tubac, Arizona 85646
(520) 398-0411

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Michelle Livengood
Tucson Electric Power Company
One South Church Avenue, Suite 200
Tucson, Arizona 85701

Barbara A. Klemstine
Brian Brumfield
Arizona Public Service
P.O. Box 53999
Mail Station 9708
Phoenix, Arizona 85072-3999

C. Webb Crockett
FENNEMORE CRAIG, PC
5003 North Central Ave., Ste. 2600
Phoenix, Arizona 85012-2913

Daniel D. Haws
OSJA, ATTN: ATZS-JAD
USA Intelligence Center and Ft. Huachuca
Ft. Huachuca, Arizona 85613-6000

Michael L. Kurtz
Kurt J. Boehm
Boehm, Kurtz Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202

Billy L. Burnett
33 5 1 North Riverbend Circle East
Tucson, Arizona 85750-2509



Janet F. Wagner, Assistant Chief Counsel
Robin R. Mitchell, Staff Attorney
Nancy Scott, Staff Attorney
Arizona Corporation Commission
Legal Division
1200 West Washington Street
Phoenix, Arizona 85007

John E. O'Hare
3865 North Tucson Boulevard
Tucson, Arizona 85716

Cynthia Zwick
1940 East Luke Avenue
Phoenix, Arizona 85016

Ruth Graham Kern
Senior Associate General Counsel
ASARCO, LLC
8222 South 48th Street, Suite 220
Phoenix, Arizona 85044

David Couture
Director, Regulatory Affairs
Tucson Electric Power Company
4350 East Irvington
Post Office Box 711
Tucson, Arizona 85702

Michael D. McElrath
Energy Manager
Phelps Dodge Mining Company
One North Central Avenue
Phoenix, Arizona 85004