



0000090696

RECEIVED

DOCKETED

1999 DEC 30 P 12:09

DEC 30 1999

AZ CORP COMMISSION  
DOCUMENT CONTROL

DOCKETED BY	SS
-------------	----

1 **CARL J. KUNASEK**  
Chairman  
2 **JIM IRVIN**  
Commissioner  
3 **WILLIAM A. MUNDELL**  
Commissioner  
4

BEFORE THE ARIZONA CORPORATION COMMISSION

7 **TUCSON ELECTRIC POWER COMPANY,**  
8 an Arizona corporation,

DOCKET NO. E-00001-99-0243

9 Complainant,

10 v.

11 **CYPRUS SIERRITA CORPORATION,** a  
12 Delaware corporation,

13 Respondent.

14  
15  
16 **CYPRUS SIERRITA'S RESPONSE TO**  
17 **TUCSON ELECTRIC POWER COMPANY'S OPENING POST-HEARING BRIEF**  
18

19  
20 **FENNEMORE CRAIG**  
A Professional Corporation  
21 Paul J. Mooney (No. 006708)  
Jay L. Shapiro (No. 014650)  
22 Thomas D. Ulreich (No. 019345)  
3003 North Central Avenue  
23 Suite 2600  
Phoenix, Arizona 85012-2913  
24 Telephone: (602) 916-5000  
Attorneys for Cyprus Sierrita Corporation  
25  
26  
27  
28

1           Cyprus Sierrita Corporation ("Cyprus") hereby files its Response to Tucson Electric  
2 Power Company's ("TEP") Opening Post-Hearing Brief (hereinafter "TEP's Brief") in the  
3 above-captioned docket.

4           **TEP'S BRIEF REFLECT THE TRANSFORMATION OF TEP'S POSITION THROUGHOUT**  
5           **THIS DISPUTE.**

6           No better illustration of the ever-changing character of TEP's arguments in this case  
7 can be seen than the contrast between TEP's Brief and its opposition to Cyprus' motion  
8 to dismiss TEP's formal complaint in this docket. During oral argument on Cyprus' motion,  
9 TEP represented that this proceeding concerned "ratemaking," *not* a dispute over  
10 "contractual intent":

11                     *This is not a simple contract dispute.* And let me tell you why  
12 it's not a simple contract dispute. The parties do not dispute  
13 the validity of the agreements or their amendments. *We don't*  
14 *dispute any of the terms or conditions. They say what they*  
15 *say. We agree they say what they say.*

16                     *We don't dispute any contractual intent.* The contracts exist.  
17 We both intended to contract, and we did.

18 Transcript of Oral Argument on Cyprus' Motion to Dismiss TEP's Formal Complaint (June  
19 10, 1999) (hereinafter "OAT") at 33, In. 17 thr. 34, In. 3.<sup>1</sup> Abandoning its prior  
20 representation that this proceeding is not a "dispute [over] any contractual intent," TEP,  
21 *nine (9) lines* into its Brief, begins arguing that the express provisions of the Second  
22 Amendment fail to reflect the parties' unexpressed contractual intent. See TEP Brief at 1,  
23 Ins. 7-11. TEP must not be allowed to turn this proceeding into a dispute over contractual  
24 intent based on parole evidence after convincing the Commission that it must accept  
25 jurisdiction over a "ratemaking" dispute in order to protect TEP's other ratepayers.

26 <sup>1</sup> TEP attempts to bolster its position by referencing Cyprus' appeals of the Commission's  
27 decision to accept jurisdiction and that of the Superior Court declining to assert jurisdiction  
28 over the parties' dispute. As TEP is well aware, however, Cyprus filed such appeals to  
preserve its objection to the Commission's exercise of subject matter jurisdiction in the  
event TEP or the Commission later claimed that such appeals were necessary. Notably,  
with the consent of the Commission and TEP, respectively, these appeals have been stayed  
pending a final decision by the Commission in this docket.

1 In fact, TEP's first and only discussion of "ratemaking" finally appears fifteen (15)  
2 pages into its Brief when TEP addresses the recovery of long-run marginal costs under the  
3 Second Amendment, the singular issue that calls into play the interests of TEP's other  
4 ratepayers. See id. at 15, ln. 5 thr. 18, ln. 3. Ultimately, the issue of TEP's other  
5 ratepayers, which TEP used to invoke the Commission's jurisdiction (see Complaint at ¶  
6 20), has been reduced to one unsupported phrase in the very last sentence of TEP's Brief.  
7 See TEP Brief at 22, Ins. 3-5. In the end, as Cyprus forewarned in its closing brief, TEP's  
8 claim is reduced to a plea that the Commission rewrite the Second Amendment because  
9 TEP no longer likes the contractual bargain it struck with Cyprus over three years ago. This  
10 is not "ratemaking"!

11 **TEP, NOT CYPRUS, MUST CARRY THE BURDEN OF PROOF IN THIS PROCEEDING.**

12 As the party seeking relief in this docket, TEP is the party that bears the burden of  
13 proof. See A.A.C. R14-3-109(G).<sup>2</sup> On several occasions TEP has tried to suggest that it is  
14 entitled to relief because Cyprus has failed to prove its claims. See, e.g., TEP Brief at 9, ln.  
15 9 ("There is no support for Cyprus' claim that it is entitled to the artificially reduced rates.")  
16 & 18, Ins. 1-3 ("There is no substantial evidence to support Cyprus' claims that TEP is  
17 meeting its long-run marginal costs under the current operation of the Second  
18 Amendment."). Again, TEP is the party seeking relief and is the party making the  
19 affirmative claims regarding the justness and reasonableness of the Second Amendment.  
20 See, e.g., Complaint at ¶¶ 20, 22 & 32. In fact, as TEP itself recognizes, Cyprus refrained  
21 from affirmatively asserting that TEP was recovering its marginal costs until its expert's  
22 analysis conclusively demonstrated that TEP is recovering substantially more than its  
23 marginal costs under the "literal wording" of the Second Amendment. See TEP Brief at 15,  
24 Ins. 19-20 ("In its Answer, Cyprus asserted that it did not know whether TEP's marginal  
25 costs were met by the rates in question."); Answer at ¶ 22. Moreover, in contrast to TEP,  
26

27

28

---

<sup>2</sup> Admittedly, Cyprus' counterclaim involves affirmative claims. These claims have not, however, been disputed by TEP in this proceeding.

1 Cyprus has always been content to honor the "literal wording" of the contract. See  
2 Answer at ¶ 24; TE 20.

3 **ONLY CYPRUS HAS IDENTIFIED THE BURDEN TEP MUST OVERCOME IN PROVING**  
4 **THAT THE SECOND AMENDMENT IS UNJUST, UNREASONABLE AND CONTRARY**  
5 **TO THE PUBLIC INTEREST.**

6 TEP asserts that "the Commission has the obligation to correct the operation of the  
7 [Second Amendment] pursuant to its rate-making authority because the artificially low  
8 rates are not just, reasonable or in the public interest." TEP Brief at 2, Ins. 2-4. Yet, TEP  
9 fails to set forth any standard by which the Commission can evaluate this claim. Instead,  
10 TEP limits its discussion of "ratemaking" principles to abstract, intangible standards, such  
11 as "the Commission's regulatory obligation to `do the right thing'." Id. at 2, Ins. 20-21);  
12 see also id. at 3, Ins. 8-10.

13 Obviously, the Second Amendment is not unjust, unreasonable and contrary to the  
14 public interest just because TEP says it is. TEP must meet its burden of proof with  
15 evidence not simply by allegation. Otherwise, TEP's burden of proof would be  
16 meaningless. And, the Commission's 1996 approval of the Second Amendment, or any  
17 other electric service agreement, would be an exercise in futility. Under TEP's reasoning, a  
18 utility could retract its agreement any time after approval by claiming that it is not making  
19 as much money as it allegedly intended. To borrow from TEP, the "right thing to do" is to  
20 hold TEP to its burden of proof, as the Commission's rules require. See A.A.C. R14-3-  
21 109(G).

22 **THERE IS A "RATEMAKING" STANDARD THAT GOVERNS TEP'S CLAIMS.**

23 As Cyprus suggested previously, the Commission should employ the three-part  
24 analysis Staff and the Commission follow in approving special contracts for electric utility  
25 service in assessing TEP's claims in this proceeding. See Cyprus Brief at 4-5. TEP's Brief  
26 offers no reason not to adhere to this three-part analysis. This three-part test is the  
27 appropriate standard for this proceeding because it is the *only* analysis (of which the  
28 parties are aware) that the Commission uses in approving special contracts like the Second

1 Amendment. See id. In fact, this three-part test is comparable to the well-established  
2 standard that "just and reasonable" rates include the recovery of operating costs.

3 In traditional "ratemaking" (i.e., setting tariffed rates for retail customers), the  
4 Commission's standard for "just, reasonable and in the public interest" calls for (i)  
5 determining the fair value of the utility's rate base; (ii) setting rates that cover the utility's  
6 costs plus a reasonable rate of return on the fair value of rate base. Scates v. ACC, 118  
7 Ariz. 531, 533-34, 578 P.2d 612, 614-15 (App. 1978); see also HT at 107, In. 18 thr.  
8 108, In. 3 (testimony of S. Glaser).

9 As TEP told the Hearing Officer, approval of special electric service agreements  
10 does not involve all the elements of traditional ratemaking. OAT at 36, Ins. 6-11 ("You  
11 know, not every rate-related case has to be a full-blown rate hearing under [A.R.S. §] 40-  
12 250. That's what the Scates case says. There are exceptions to that, and, quite frankly, a  
13 special contract is a recognized exception to having a full-blown rate case."). TEP's  
14 witness further testified that when the Commission approved the Second Amendment in  
15 November 1996 there was no determination of the fair value of TEP's property (HT at 102,  
16 Ins. 7-9); there was no revenue requirement established (HT at 99, Ins. 10-12); and there  
17 was no future ratemaking treatment guaranteed to TEP (HT at 101, 22-25). See also ACC  
18 Decision No. 59909 (Nov. 26, 1996); TE 8; CE 13.

19 Mr. Glaser's testimony is consistent with the testimony of Staff's economist, Ms.  
20 Keene: when reviewing a special contract, after confirming the customer has a viable  
21 alternative to purchasing electric power from the utility, the Commission's analysis focuses  
22 on whether the special contract rate will allow the utility to cover its costs under the  
23 agreement. If it is determined that the utility will cover its costs, then Staff recommends  
24 the Commission approve the special contract. See HT at 232, In. 16 thr. 233, In. 1; 239,  
25 Ins. 15-21; 260, Ins. 3-11; 277, In. 19 thr. 279, In. 18; see also Cyprus' Brief at 4-5 &  
26 n.2. Again, TEP has offered no authority warranting variance from this three-part analysis.

27 . . .

28

1           **TEP HAS NOT PROVED THAT CONTINUED ADHERENCE TO THE "LITERAL**  
2           **WORDING" OF THE SECOND AMENDMENT IS UNJUST, UNREASONABLE OR**  
3           **CONTRARY TO THE PUBLIC INTEREST.**

4           TEP has failed to demonstrate that the Commission would answer any part of the  
5 three-pronged analysis differently today than in November 1996. TEP does not argue that  
6 Cyprus did not have a viable alternative to the Second Amendment in November 1996. HT  
7 at 162, Ins. 6-24. Nor does TEP assert that this alternative was not commensurate with  
8 the Second Amendment. Id. Furthermore, TEP concedes that it is recovering its short-run  
9 marginal costs under the "literal wording" of the Second Amendment. TEP Brief at 17, Ins.  
10 17-20. It follows that, as Cyprus has maintained since opening statements in this case, to  
11 prevail on its claims TEP must prove that the rate Cyprus currently is paying does not cover  
12 TEP's long-run marginal costs. HT at 29, Ins. 6-16; Cyprus Brief at 6, Ins. 5-7. There  
13 simply is no other "ratemaking" issue before the Commission in this docket and TEP has  
14 failed to meet this burden.

15           First, unable to challenge the substance of Mr. Higgins' marginal cost analysis using  
16 Staff's methodology, TEP derides Mr. Higgins, a regulatory economist on whose expertise  
17 TEP itself recently relied in its stranded cost settlement agreement, as somehow being  
18 unqualified to analyze TEP's long-run marginal costs. TEP Brief at 16, Ins. 11-12. TEP  
19 fails, however, to point out how Mr. Higgins' alleged lack of qualification impacts his  
20 methodology or conclusions. See id. at 16. Moreover, at the same time it criticizes Mr.  
21 Higgins, TEP touts its own non-economist employee, Mr. Snook, as the foremost,  
22 disinterested expert in this case. Id. at 16, Ins. 18-21; 17, Ins. 17-21. When the two  
23 experts' qualifications and analyses in this case are juxtaposed, it becomes clear that the  
24 analysis offered by Cyprus is substantially more objective and reliable in determining  
25 whether TEP's long-run marginal costs are being recovered under the "literal wording" the  
26 Second Amendment:<sup>3</sup>

27           <sup>3</sup> The supporting citation for the evidence summarized in the following table is: Compare CE  
28 25 at 1-2 & Exhibit A thereto; HT at 713, Ins. 12-21; 731, In. 3 thr. 732, In. 4 with TEP  
10 at 1; HT at 382, In. 24 thr. 383, In. 19; 439, In. 18 thr. 440, In. 18; 447, In. 15 thr.  
448, In. 9.

ISSUE	KEVIN HIGGINS	LELAND SNOOK
Educational	Economics	Electrical Engineering
Work Experience	Regulatory Economic Policy & Analysis	Negotiating Wholesale and Retail Electric Agreements; Energy Supply Side Planning
Prior Commission Testimony	Extensive	None
Prior Marginal Cost Analysis	Dating back to the 1980s; created three documented marginal cost studies on behalf of an investor-owned utility; analyzed numerous marginal cost studies on behalf of utilities and regulatory bodies; analysis used and relied on by public utility Commission	Recent; internal for TEP only; cost studies to support TEP's contract negotiations and resource planning goals
Marginal Cost Analysis in this Case	Outcome Unknown Prior to Analysis	Preordained Result
Methodology in this Case	Replication and Update of Staff's 1996 analysis	No resemblance to Staff's 1996 analysis; hand-picked numbers & assumptions

Second, Mr. Snook's severe criticism of Mr. Higgins' analysis, on which TEP's entire ratemaking arguments hinge (see TEP Brief at 16, In. 21 thr. 17, In 1 and citations therein), does nothing to advance TEP's case. In reality, Mr. Snook faults Mr. Higgins for: (i) disagreeing with Mr. Snook's analysis, and (ii) updating Staff's report based on current data to determine whether, as TEP alleges, TEP is not recovering its long-run marginal costs under the "literal wording" of the Second Amendment. The fact that Mr. Snook disagrees with Mr. Higgins is neither surprising nor particularly persuasive. Mr. Snook's analysis was a custom-designed marginal cost study based upon self-serving assumptions and inflated numbers intended to support the position TEP had previously taken when it filed its complaint several months earlier, before Mr. Snook even worked for TEP. Mr. Snook's methodology bears no resemblance to the methodology Staff employed in its 1996 analysis (e.g., HT at 459, In. 14 thr. 462, In. 6). Indeed, Mr. Snook admitted to not understanding Staff's analysis, which was the starting point and basis for Mr. Higgins'

1 study as well as the Commission's approval of the Second Amendment in the first  
2 instance. E.g., id. at 440, Ins. 19-24; 441, Ins. 9-12; 442, Ins. 19-23.<sup>4</sup>

3 In summary, there is no credible evidence that the alleged \$20 million revenue  
4 shortfall to TEP erases the almost **\$38 million positive net present value** of the Second  
5 Amendment to TEP that Staff estimated in 1996. See Cyprus Brief at 7-8. Rather, the  
6 overwhelming weight of the evidence conclusively demonstrates that TEP not only is  
7 covering its long-run marginal costs under the Second Amendment but that TEP is making  
8 **millions of dollars above** that amount. CE 25 at 8-21; see also Cyprus Brief at 5-11.  
9 TEP's attempt to demonstrate otherwise fails. See, e.g., Cyprus Brief at 12-15. By  
10 indicting Mr. Higgins' analysis, TEP implies that Staff's 1996 analysis is the wrong  
11 methodology for the Commission's determination of the "justness and reasonableness" of  
12 the Second Amendment. Yet, the record is clear that TEP never objected to the  
13 methodology employed in Staff's 1996 analysis. Id. at 238, In. 24 thr. 239, In. 14; 295,  
14 Ins. 17-20; 469, Ins. 4-23. Nor does TEP offer any substantive reason why the  
15 Commission should reject this methodology (including Mr. Higgins' replication and update  
16 thereof), in favor of Mr. Snook's marginal cost study.

17 **BARBARA KEENE HAS NOT ENDORSED TEP'S POSITION.**

18 TEP misrepresents Ms. Keene's testimony. Contrary to what TEP asserts on page  
19 17 of its Brief (at Ins. 2-3), Cyprus never attempted to "have Staff's economist Ms. Keene  
20 verify Mr. Higgins' adjustments." Nor did Ms. Keene "refuse to do so." Rather, Cyprus  
21 asked Ms. Keene to explain, based on her admitted understanding, the effect(s) certain  
22 **known** data, e.g., TEP's own estimation of the magnitude of this dispute and admitted  
23 delay in building additional plant from 1998 to 2001, would have on **Staff's** 1996 net  
24 present value analysis. HT at 271, Ins. 2-16; 281, In. 16 thr. 282, In. 11; 285, In. 1 thr.  
25 286, In. 7. Not coincidentally, Ms. Keene's answers to those questions, just as those of

26 \_\_\_\_\_  
27 <sup>4</sup> TEP alleges that Mr. Higgins' analysis is laden "with inappropriate and self-serving  
28 adjustment[s]." See TEP Brief at 16, In. 12. Yet, TEP's Brief fails to identify these  
"inappropriate and self-serving" adjustments. In contrast, Cyprus specifically identifies the  
mistakes and self-serving adjustments made by Mr. Snook. See Cyprus Brief at 12-15.

1 Mr. Snook to virtually the same line of questioning, confirm the results of Mr. Higgins'  
2 analysis. See id.; HT at 439, In. 21 thr. 440, In. 4; 444, In. 3 thr. 446, In. 14; 472, Ins. 4-  
3 8; CE 25 at 10-21.<sup>5</sup>

4 Meanwhile, TEP completely ignores the most revealing testimony by Ms. Keene.  
5 See TEP Brief at 18, Ins. 19-20; 19, Ins. 19-21. When asked specific questions about  
6 whether she supports TEP's position in this case, Ms. Keene made it abundantly clear that  
7 she was **not** endorsing either parties' position in this case:

8 Q. And you have not taken any position regarding this  
9 dispute between the parties?

10 A. That's correct.

\* \* \* \*

11 Q. You're not suggesting that the Commission normalize to  
12 address this dispute?

13 A. Staff was not taking a position.

\* \* \* \*

14 Q. ***You're not taking a position that the Commission should  
15 grant the relief Tucson Electric Power seeks in this  
16 case?***

17 A. ***Staff is not taking a position.***

18 HT at 290, In. 10 thr. 291, In. 5 (emphasis added).

19 Ms. Keene also did *not* testify that "the Fuel Adjustment Clause is now making an  
20 `apples to oranges' comparison of data rather than an `apples to apples' comparison. TEP  
21 Brief at 8, In. 22 thr. 9, In. 2. The portion of Ms. Keene's testimony on which TEP relies  
22 for this proposition merely shows that: (a) Ms. Keene did not specifically look at TEP's  
23 FERC account 501 when she conducted her 1996 analysis, and (b) Ms. Keene agrees that  
24 there are hypothetical situations in which a ***generic*** normalization of comparative data ***may***  
25 be appropriate. Neither point advance TEP's case. First, Ms. Keene testified that while  
26 she was aware that Cyprus' energy charge could go up or down under the Second

27 <sup>5</sup> TEP's assertion that Mr. Higgins agrees with TEP's position and the remedy TEP seeks in  
28 this proceeding (see TEP Brief at 18, In. 19 thr. 19, In. 18) is also absurd. TEP overlooks  
two critical facts: (i) Mr. Higgins' 1997 report was an audit of TEP's FERC account 501  
and a strategic evaluation of TEP's October 1997 demand that Cyprus agree to *reform* the  
contract based on TEP's demands, *not* a regulatory or legal review of the merits of TEP's  
claims; and (ii) Mr. Higgins' report ultimately endorsed Cyprus' position in this case, *not*  
TEP's. CE 25 at 4-8; TE 19.

1 Amendment, she only considered one year's data, *not* comparative years, in conducting her  
2 1996 analysis. HT at 273, In. 7 thr. 275, In. 25 Second, Mr. Higgins conclusively  
3 demonstrated that the alleged "mismatch" in data has not changed the ultimate conclusion  
4 of Ms. Keene's 1996 analysis: there remains a significant *positive* net present value to TEP  
5 under the Second Amendment rate. (CE 25 at 10-21) Third, and finally, Ms. Keene never  
6 actually testified that she would "normalize" the Second Amendment as TEP proposes  
7 doing in this case.<sup>6</sup> See HT at 255, Ins. 5-21.

8 Again, Ms. Keene's actual testimony is persuasive. Ms. Keene testified that  
9 notwithstanding what she has learned since her 1996 analysis, she probably would  
10 recommend approval of the Second Amendment today so long as TEP is recovering its  
11 long-run marginal costs thereunder. HT at 260, Ins 3-14. The overwhelming weight of the  
12 evidence shows that the "literal wording" of the Second Amendment results in a *positive*  
13 net present value of millions of dollars. As a consequence, it is reasonable to infer that if  
14 faced with the decision today, more likely than not Staff would recommend approval of the  
15 Second Amendment just as it did in November 1996. See Cyprus Brief at 6-11.

16 **CONTRARY TO TEP'S ASSERTION, THE COMMISSION CANNOT IGNORE**  
17 **SUBSTANTIVE CONTRACT LAW.**

18 TEP seems to believe that the Commission can and should ignore the laws  
19 governing the interpretation, construction and enforcement of contracts. See TEP Brief at  
20 12, Ins. 5-7 ("Cyprus [has] argued that `the parties are bound by the contract provision" as  
21 if that is a legal standard that the Commission must follow. It is not."). Of course, Cyprus  
22 maintains that the Commission cannot and should not address the contract claims at the  
23 heart of TEP's action against Cyprus. See U.S. West, 185 Ariz. at 280, 915 P.2d at 1235.  
24 Nevertheless, if the Commission is going to address these issues, it must act in a quasi-  
25 judicial capacity and conform with Arizona law, including general due process standards.

26 \_\_\_\_\_  
27 <sup>6</sup> TEP's claim that the data in the base period is materially different from the comparison  
28 period ignores the undisputed fact that at least one month of the 12-month base period  
(July 1995 - June 1996) contains the so-called "oranges" that TEP now claims only appear  
in the comparison period. TE 10, Ins. 15-16.

1 See State ex rel Corbin v. ACC, 143 Ariz. 219, 223-26, 693 P.2d 362, 366-69 (App.  
2 1984). The Commission must not ignore the parol evidence rule, the canon of contract  
3 construction that an ambiguous term in a contract be construed against its draftsman and  
4 the rule against reformation in the instance of a unilateral mistake, all substantive legal  
5 standards governing contract interpretation and construction. See Cyprus Brief at 15-25 &  
6 cases cited therein. The application of these legal standards disposes of TEP's claims in  
7 their entirety.

8 **THE COMMISSION MUST REJECT TEP'S POST HOC ATTEMPT TO VARY THE**  
9 **CLEAR MEANING OF SECTION VI(F) OF THE SECOND AMENDMENT BY**  
10 **INTRODUCING PAROL EVIDENCE.**

11 Throughout this proceeding TEP has asserted that it has a better understanding of  
12 Cyprus' contractual intent in entering into the Second Amendment than Cyprus. E.g., TEP  
13 Brief at 9, Ins. 21-22 ("Mr. McElrath is wrong. Cyprus negotiated to receive a reduced rate  
14 only for actual fuel cost savings. It did not negotiate for FERC Account 501, per se.").  
15 Further, TEP posits that because Mr. McElrath utilized the succinct expressions of its hired  
16 consultant to explain Cyprus' reasons for agreeing to the FERC account 501 term when  
17 responding to TEP's demand letters (see TE 20), it could not have really been Cyprus'  
18 intent during the parties' negotiations. See TEP Brief at 10, In. 19 thr. 12, In.7.  
19 Ultimately, however, Mr. McElrath was right and the evidence of Cyprus' contractual intent  
20 is clear and contrary to what TEP suggests.

21 The following facts are undisputed: Cyprus wanted to reduce its overall cost for  
22 electric power any way it could; Cyprus wanted to share in TEP's fuel cost savings any  
23 way it could; and Cyprus wanted the energy charge calculation based on an index or proxy  
24 that was known, established and subject to verification by a third party so that Cyprus  
25 would not have to question TEP each time it received a bill for electric power. CE 24 at 9-  
26 11; HT 137, Ins. 8-24; 387, In. 1 thr. 388, In. 2. Messrs. Glaser and Snook both testified  
27 that Mr. McElrath sought a known, measurable, independently verified index that tracked  
28 TEP's fuel costs **during the parties' negotiations**. HT at 137, Ins. 8-14; 138, In. 23 thr.  
139, In. 5; 401, In. 14 thr. 402, In. 12. This is also borne out by the evidence which

1 clearly shows that the FERC account 501 term in Section VI(F) of the Second Amendment  
2 resulted from the evolving language discussed during the parties' negotiations.<sup>7</sup> See CE 2-  
3 5; CE 24 at 19-20; HT at 400, Ins. 6-25.

4 TEP goes to great length to portray how it claims the fuel adjustment clause was  
5 intended to work. See TEP Brief at 3-7. However, the mechanism TEP itself selected and  
6 agreed to use to measure Cyprus' energy charge under the Second Amendment is working  
7 as written and intended as evidenced by TEP's billings to Cyprus *for almost one year*. HT  
8 at 74, Ins. 20-25. As drafted by TEP to fulfill Cyprus' desire to utilize a known and  
9 measurable proxy for fuel costs (see TEP Brief at 5, Ins. 19-22), the so-called "fuel  
10 adjustment clause" had to, and actually does, record the movement of costs in and out of  
11 TEP's FERC account 501. See CE 23, Tab C at 17-19 & 81-82. If TEP had wanted to limit  
12 the cost movements that mechanism tracked to "actual fuel cost savings" only, as it now  
13 claims was its intent, then, in 1996, it could and should have negotiated at least one of the  
14 following additional terms: (i) language limiting decreases in Cyprus' energy charge to  
15 "actual fuel cost savings," (ii) an index that included more than just FERC account 501  
16 alone, or (iii) a floor on potential decreases in the energy charge portion of the price of  
17 power to Cyprus. But, TEP did none of these things. See CE 23, Tab C at 17-18; HT at  
18 90, Ins. 2-11; 128, Ins. 6-19; 350, Ins. 10-21; 655, Ins. 3-6.

19 **TEP, AND TEP ALONE, MUST BE HELD ACCOUNTABLE FOR ITS ADMITTED**  
20 **FAILURE TO "CONNECT THE DOTS".**

21 TEP's criticism of Mr. McElrath for failing to "correct the situation . . . at issue in  
22 this case" is offensive. See TEP Brief at 13, Ins. 18-19 ("Cyprus cannot claim that it even  
23 attempted to 'connect the dots' . . .").<sup>8</sup> In the past, Cyprus notified TEP of typographical

24  
25 <sup>7</sup> TEP's assertion that Mr. McElrath should have informed top executives at Cyprus about  
26 TEP's FERC account 501 as well as every scenario under which Cyprus' could experience a  
27 reduction in its energy charge defies common sense. See HT at 582, Ins. 8-15; 607, Ins.  
18-22; 647, In. 10 thr. 648, In. 1. It also does not change the fact that the parties  
ultimately agreed to the FERC account 501 term as the mechanism for computing Cyprus'  
energy charge under the Second Amendment.

28 <sup>8</sup> Mr. McElrath's testimony is clear that before he sought authorization to sign the Second  
Amendment he was satisfied that FERC Account 501 fulfilled his intent to utilize a known,

1 and billing errors which inadvertently reduced the bill from TEP to Cyprus. But this dispute  
2 does *not* arise out of a "billing error;" it does *not* concern a "typographical error" or a "Y2K  
3 problem"; and it does *not* involve FERC doing away with FERC account 501.<sup>9</sup> HT at 656,  
4 ln. 4 thr. 657, ln. 15. This case is about TEP being dissatisfied with the contractual  
5 mechanism it selected and agreed to use to measure the energy charge Cyprus pays to TEP  
6 as part of its electric bill, which mechanism is working exactly as drafted by TEP and  
7 agreed to by Cyprus.

8 TEP's attempt to use an historical event that occurred months before TEP selected  
9 the FERC account 501 term to include in the Second Amendment; namely, the Valencia  
10 merger and resulting cost component movement out of FERC account 501, as a basis for  
11 contract reformation must be rejected. This follows from, among other things, the fact  
12 that TEP undoubtedly should have known the exact effect the Valencia merger would have  
13 on revenue from a contract containing a FERC 501 term. See Cyprus Brief at 20-23. In  
14 this light, this is certainly not a "loophole" Cyprus is trying to exploit. TEP Brief at 9, Ins.  
15 7-8.

16 In addition to trying to shift the blame to Cyprus, TEP also blames the Commission  
17 for TEP's failure to "connect the dots." See TEP Brief at 14, Ins. 12-13 ('the Commission  
18 also had information on the merger, but did not foresee any impact on Cyprus' rates under  
19 the Second Amendment") & Ins. 20-23. No amount of finger pointing at Cyprus or the  
20 Commission can change the fact that TEP drafted Section VI(F) of the Second Amendment  
21 the way it did.<sup>10</sup> TEP Brief at 13, Ins. 1-17 & 15, Ins. 2-4; see also Cyprus Brief at 20-23.

22  
23 measurable and independently verified proxy for TEP's fuel costs. HT at 582, Ins. 16-25;  
24 646, Ins. 3-22.

24 <sup>9</sup> There is no dispute that if FERC account 501 ceased to exist, then Section VI(F) of the  
25 Second Amendment would fail of its essential purpose. See Rose v. Freeway Aviation,  
26 Inc., 120 Ariz. 298, 299, 585 P.2d 907, 908 (App. 1978); Restatement (Second) of  
27 Contracts § 263 (1979). Barbara Keene's testimony appears to acknowledge this point.  
28 HT at 288, Ins. 18-20 ("I have seen changes made because an index no longer existed, or  
sometimes a rate is based on a tariff that no longer exists . . .").

27 <sup>10</sup> TEP's claim that "no one recognized that the removal of Silo costs from FERC Account  
28 501 would cause the Fuel Adjustment Clause to produce artificially lower rates" (TEP Brief  
at 13, Ins. 2-3), does not change the fact that TEP *should have* made that realization. Ms.

1 In situations involving a unilateral mistake in entering into a contract, like the instant  
2 dispute, the law is clear: the party who committed the mistake bears *all* of the  
3 consequences. See CE 23, Tab C at 80-81; Isaak, 127 Ariz. at 504, 623 P.2d at 14.

4 **RETROACTIVE REPARATIONS ARE NOT A REMEDY AVAILABLE TO TEP.**

5 TEP's attempt to justify its prayer for retroactive reparations in this case is contrary  
6 to Arizona law. Despite all of the briefing and argument on Cyprus' motion to dismiss  
7 TEP's formal complaint, until now, TEP has remained silent regarding the alleged authority  
8 of the Commission to order a customer to pay a public service corporation retroactive  
9 reparations for alleged "underbillings." In its Brief (at 20-21), TEP for the first time cites to  
10 authority, two **Mississippi** appellate court decisions and two Arizona statutes, allegedly  
11 conferring authority that this Commission clearly does not, and legally cannot, possess.

12 In **Arizona**, the source for the Commission's ratemaking authority is vested in Article  
13 XV of the Arizona Constitution and the implementing statutes, A.R.S. §§ 40-201, *et seq.*  
14 The Commission's powers are limited and do not exceed those to be derived from a strict  
15 construction of the Constitution and implementing statutes. Williams v. Pipes Trades  
16 Indus. Program of Ariz., 100 Ariz. 14, 17, 409 P.2d 720, 723 (1966); Walker v.  
17 DeConcini, 86 Ariz. 143, 150, 341 P.2d 933, 938 (1959). The Commission "has no  
18 implied powers." Kendall v. Malcolm, 98 Ariz. 329, 334, 404 P.2d 414, 419 (1965).

19 The Arizona Constitution grants the Commission jurisdiction to regulate **public**  
20 **service corporations**. Ariz. Const. Art. 15, § 3. It is undisputed that the Commission has  
21 authority to order a **public service corporation** to make reparations **to a customer** if the  
22 Commission has made a determination that the **public service corporation** has charged the  
23 **customer** "excessive or discriminatory" rates pursuant to A.R.S. § 40-248. See Mountain  
24 States Tel. & Tel. Co. v. ACC, 124 Ariz. 433, 436, 604 P.2d 1144, 1147 (App. 1979).  
25 However, once a rate has been set, unless **expressly** authorized by law or another

26  
27 Kissinger testified that the consequences of selecting a FERC account 501 term would  
28 have been obvious to her if Mr. Snook had simply bothered to ask. See HT at 323, In. 13  
thr. 324, In. 7. As for Messrs. Glaser and King, given the knowledge they possessed, it is  
difficult to imagine how they failed to "connect the dots." See CE 10, 17 & 19.

1 competent branch of government, such as the judiciary, the Commission *lacks* authority to  
2 entertain a collateral attack to make a retroactive determination of a different rate and  
3 require the payment of reparations. Mountain States, 124 Ariz. at 436, 604 P.2d at 1147;  
4 accord Arizona Grocery Store Co. v. A.T.S.F. Ry. Co., 284 U.S. 370, 390, 52 S. Ct. 183,  
5 186 (1932); El Paso & S.W.R. Co. v. ACC, 51 F.2d 573, 577 (D. Ariz. 1931).

6 In this case, TEP asks the Commission to find that the law giving *public service*  
7 *corporations* the privilege to complain about the rates charged by other *public service*  
8 *corporations*, A.R.S. § 40-249, impliedly provides the Commission authority to order  
9 reparations *from a non-public service corporation customer* to the public service  
10 corporation. TEP Brief at 20-21. Very clearly, the proposition that the Commission can  
11 reach into the pocket of Cyprus, a *customer*, and force it to pay retroactive reparations to  
12 TEP, the *public service corporation* that agreed to the mechanism that set the rate, is  
13 nowhere expressly stated, much less implied, in the Arizona Constitution or statutes to  
14 which TEP cites.<sup>11</sup>

15 **THE RELIEF SOUGHT BY TEP SHOULD NOT BE GRANTED.**

16 The result demanded by the overwhelming weight of the evidence has remained  
17 constant. TEP asks the Commission to rewrite the Second Amendment to allow TEP to  
18 make more money than it is entitled to under the contract's "literal wording." However,  
19 there is no "ratemaking" justification for correcting the situation TEP itself created. The  
20 evidence conclusively establishes that the 3.6 ¢/kWh rate Cyprus currently pays to TEP for  
21 the energy charge portion of the price of electric power is "just, reasonable and in the  
22 public interest" because TEP is recovering substantially more than its marginal costs.

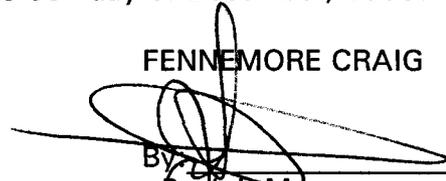
23

24 \_\_\_\_\_  
25 <sup>11</sup> A plain reading of A.R.S. § 40-248 reveals the obvious fact that, as its title, "Reparation  
26 of overcharge; action to recover overcharge; limitations," suggests, it was meant to deal  
27 with situations where a customer of a utility has been overcharged or burdened by a  
28 discriminatory rate, *not* where the utility thinks it has been "underbilling" its customer.  
Similarly, the reference to a "corporation" in the second sentence of the statute ("the  
commission may order that the corporation make reparation to the complainant . . .")  
clearly refers to a "public service corporation" under the Commission's jurisdiction, *not* any  
corporation.

1 Because TEP has not, and cannot, demonstrate otherwise, the Commission should deny the  
2 relief sought by TEP's formal complaint in its entirety.

3 RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of December, 1999.

4 FENNEMORE CRAIG

5   
6 By: \_\_\_\_\_

7 Paul J. Mooney  
8 Jay L. Shapiro  
9 Thomas D. Ulreich  
10 Attorneys for Cyprus Sierrita  
11 Corporation

9 ORIGINAL and ten copies of  
10 the forgoing filed this 30<sup>th</sup> day of  
11 December, 1999, with:

11 Docket Control  
12 Arizona Corporation Commission  
13 1200 West Washington Street  
14 Phoenix, AZ 85007

14 COPY of the foregoing mailed  
15 this 30<sup>th</sup> day of December, 1999, to:

15 Jane L. Rodda  
16 Hearing Officer  
17 Arizona Corporation Commission  
18 400 W. Congress Street  
19 Tucson, AZ 85701

18 Raymond S. Heyman  
19 ROSHKA HEYMAN & DEWULF, PLC  
20 400 N. 5<sup>th</sup> Street, Ste. 1000  
21 Phoenix, AZ 85004

21 Bradley S. Carroll  
22 Tucson Electric Power Company  
23 220 W. Sixth Street-DB203  
24 PO Box 711  
25 Tucson, AZ 85702

23 Lyn Farmer, Chief Counsel  
24 Legal Division  
25 Arizona Corporation Commission  
26 1200 West Washington Street  
27 Phoenix, AZ 85007

27 ...

28 ...

1 Janet Wagner  
Legal Division  
2 Arizona Corporation Commission  
1200 West Washington Street  
3 Phoenix, AZ 85007

4

5 By: Mary Housa  
1023906.1

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28