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BEFORE THE ARIZONA CORPORATION COMMISSION

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Commissioner

TUCSON ELECTRIC POWER COMPANY, an  
Arizona corporation,

) DOCKET NO. E-00000I-99-0243

)  
)  
) Complainant, )  
)

vs. )  
)

CYPRUS SIERRITA CORPORATION, INC., a  
Delaware corporation,

)  
)  
) Respondent. )  
)

Arizona Corporation Commission

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TUCSON ELECTRIC POWER COMPANY'S

RESPONSE TO CYPRUS SIERRITA CORPORATION, INC.'S

CLOSING BRIEF

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1 Tucson Electric Power Company (“TEP” or the “Company”) hereby respectfully submits  
2 this response to “Cyprus Sierrita’s Closing Brief “ filed with the Commission on December 14,  
3 1999 (“Cyprus’ Brief”).

4 **I. INTRODUCTION.**

5 This case is still about doing the right thing and correcting the operation of the Fuel  
6 Adjustment Clause. Cyprus’ Brief provides no basis for perpetuating a Fuel Adjustment Clause  
7 that is not working properly. Cyprus presents no evidence or legal principle to support its claim  
8 that it is entitled to rates lowered as a result of an accounting change. Instead, Cyprus’ Brief is a  
9 composition of misstated law, mischaracterized evidence, unsubstantiated statements and attacks  
10 on TEP’s management.

11 The only purpose for any fuel adjustment clause is to lower or raise rates in relation to  
12 fluctuations in actual fuel costs. As the Arizona Court of Appeals explained in Scates v. Arizona  
13 Corp. Commission, 118 Ariz. 531, 534, 578 P.2d 612, 615 (Ariz. App. 1978):

14 The automatic adjustment clause is a device to permit rates to adjust  
15 automatically, either up or down, in relation to fluctuations in certain,  
16 narrowly defined, **operating expenses**. [citations omitted] Such  
clauses usually embody a formula...to permit adjustment of rates in  
the future to reflect changes in specific **operating costs**...

17 (T)he impact of certain increased or decreased costs are passed on to  
18 the consumer so that the utility neither benefits from a decreased cost  
19 **nor suffers a diminished return** as a result of an increase in a cost  
covered by the adjustment clause. 71-15 Op. Att’y Gen. (1971)  
[emphasis added].

20 The Commission should not permit the Fuel Adjustment Clause to lower rates where, as  
21 here, it is undisputed that TEP’s fuel costs have not been reduced. To do so would result in unjust  
22 and unreasonable rates to the detriment of TEP and its ratepayers while allowing Cyprus to take  
23 advantage of a “loop-hole” in the operation of the Fuel Adjustment Clause.

1 **II. CYPRUS' BRIEF MISSTATES THE LAW AND RATEMAKING PRINCIPLES OF**  
2 **JUST AND REASONABLE RATES.**

3 **A. Cyprus' Misstatement Of The Law.**

4 Cyprus' Brief erroneously states:

5 The Second Amendment is just, reasonable and in the public  
6 interest based upon the only standard relevant to this case, the  
7 three-part test the Commission used in approving the Electric  
8 Service Agreement between TEP and Cyprus and each of the two  
9 amendments. (Cyprus' Brief at 4: 1-4)

10 Here, Cyprus completely misses the mark. The parties do not dispute whether the Second  
11 Amendment should be approved (or repealed) by the Commission. The dispute concerns whether  
12 it is just and reasonable for the Fuel Adjustment Clause to lower Cyprus' rates for accounting  
13 changes and not reduced fuel costs.

14 There are several additional crucial and fatal flaws to Cyprus' "legal analysis." For  
15 example, there is absolutely **no evidence** that the Commission uses a "three-part test" in approving  
16 an electric service agreement, amendments thereto or the rates that are produced thereby. Cyprus  
17 has not cited any statute or Commission rule in support of its novel proposition. It can not. Instead,  
18 the evidence is that the Commission Staff (not the Commission) undertakes a three-part analysis in  
19 making its recommendations (not approval) to the Commission regarding electric service  
20 agreements. Commission Staff economist, Ms. Keene testified that :

- 21 1. The three things that she and Dr. Berry looked at in their analysis  
22 were: (1) a viable alternative for the customer; (2) the rate that the  
23 customer would pay is commensurate with the alternative; and (3)  
the rate covers the utility's marginal cost. (Hearing Transcript  
"H.T." at 232:19-233:1);
2. Staff does not approve electric service agreements or their  
amendments but simply makes recommendations to the  
Commissioners (H.T. at 234:24);
3. The Commissioners can accept, reject or modify Staff's  
recommendation (H.T. at 247:22-25);

- 1 4. None of the Commissioners contacted Ms. Keene to ask about her
- 2 analysis (H.T. at 247:5-9); and
- 3 5. None of the Commissioners discussed with Ms. Keene the factors
- 4 that they considered in determining how to vote on the Second
- 5 Amendment (H.T. at 247:14-18).

6 Cyprus has attempted to manufacture a legal standard for this case to suit its own purposes.

7 Cyprus' attempt fails, however, because its "standard" is contrary to well established law

8 concerning the Commission's authority to regulate rates.<sup>1</sup>

9 **B. The Standard For Determining Just And Reasonable Rates.**

10 There is no law or ratemaking principle to support Cyprus' claim that it is entitled to rates

11 under a Fuel Adjustment Clause as a result of an accounting changes rather than reduced fuel

12 costs. Such rates are unjust and unreasonable, because TEP is still incurring the same fuel costs

13 while its revenues are being diminished.

14 The legal standard that governs the Commission's regulation of rates is well established.

15 The Commission has full, plenary, and exclusive power to set rates for public service corporations

16 doing business in Arizona. Tucson Electric Power Co. v. Arizona Corporation Commission, 132

17 Ariz. 240, 645 P.2d 231 (1982). This power derives from the Arizona Constitution and requires

18 the Commission to prescribe rates that are "just and reasonable." Ariz. Const. Art. XV. Contrary

19 to Cyprus' assertion that the only relevant rate-making standard is the "three-part test" it describes,

20 the Commission is granted broad discretion in determining just and reasonable rates. Turner

21 Ranches Water and Sanitation Company, v. Arizona Corporation Commission, 304 Ariz. Adv.

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22 <sup>1</sup> In similar fashion, Cyprus has dedicated much of its brief discussing legal issues such as burden of

23 proof and contractual intent. TEP believes that contractual intent is one of many valid factors for

the Commission to consider but disputes Cyprus' self-serving presentation of the facts. The record

is clear that the parties intended the Fuel Adjustment Clause to lower rates for actual fuel cost

savings.

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1 Rep. 3, (Ct. App. Div. 1, 1999) citing Pine-Strawberry Improvement Association v. Arizona  
2 Corporation Commission, 152 Ariz. 339, 340, 732 P.2d 230, 231 (App. 1986).

3 In addition to other ratemaking considerations, a public service corporation's income from  
4 rates and charges should be sufficient to meet its operating costs and to provide its stockholders a  
5 reasonable rate of return on the utilities investment. Simms v. Round Valley Light and Power Co.,  
6 80 Ariz. 145, 153, 294 P.2d 378, 383 (1956). The evidence in the record shows that the artificially  
7 low rates afforded to Cyprus under the current operation of the Fuel Adjustment Clause do not  
8 cover TEP's marginal costs and provide a fair return to TEP investors. (Ex. TEP-11; Ex. TEP-12;  
9 H.T. at 447:22 to 448:9).

10 **III. CYPRUS HAS MISCHARACTERIZED THE EVIDENCE IN THE RECORD**  
11 **REGARDING MARGINAL COSTS.**

12 In its Opening Statement, TEP noted that Cyprus made the issue of marginal costs a "red  
13 herring" in the case. H.T. at 19:21-22:1. The relevance of marginal cost evidence is that it  
14 supports the fact that the artificially low rates are not just and reasonable; however, the law and the  
15 record are clear that neither the Staff nor the Commission solely consider marginal costs in  
16 approving electric service agreements. Cyprus' Brief argues that because the artificially low rates  
17 meet TEP's long term marginal costs, as determined by the last minute analysis conjured by Mr.  
18 Higgins, the rates are just and reasonable. In doing so, Cyprus fails to recognize that even if TEP's  
19 marginal costs are being met, the artificially low rates are still unjust and unreasonable because the  
20 Fuel Adjustment Clause lowered Cyprus' rate for an accounting change rather than actual reduced  
21 costs.

22 **A. The Staff's Marginal Cost Analysis.**

23 There has been much debate over Staff's marginal cost analysis. But the undisputed facts

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1 are: (1) Staff's marginal cost analysis used FERC Account 501 data that included the Silo costs in  
2 the base period (H.T. at 242:15-18; 267:3 to 268:5); (2) Dr. Berry (who did not testify in this case)  
3 performed the long term marginal cost analysis (H.T. at 235:12-21); (3) Staff did not do any  
4 further analysis or study of TEP's marginal cost in this case (H.T. at 290:4-9); (4) Staff did not  
5 take a position in this case (H.T. at 290:13-18); and (5) Ms. Keene stated that she would seek a  
6 clarification from the parties today to insure that they had the same understanding as she did  
7 regarding marginal cost data. (H.T. at 260:3-14).

8 Cyprus' inference that Staff would still make the same recommendation, even if there was  
9 a positive net present value is incorrect. The testimony of Ms. Keene makes it clear that Staff and  
10 Cyprus have distinctly different views regarding the operation of the Fuel Adjustment Clause and  
11 marginal costs. Whereas Cyprus has claimed that its marginal cost analysis is directly tied to  
12 Cyprus' entitlement to a reduction in "FERC 501 dollars," Ms. Keene testified as follows:

13 Q. (Hearing Officer) And just so I understand, I think I understood  
14 your testimony on this, but when you were looking at system average fuel  
15 cost, you did not focus on a specific FERC account?

16 A. (Ms. Keene) Right. To me, it was just additional information in  
17 parentheses, and I didn't think it was important. (H.T. at 299:19-25; see  
18 also H.T. at 253:2-254:7.)

19 Ms. Keene went on to testify that she did not consider the description of FERC Account 501  
20 dollars in the parenthetical because: (1) she thought it was merely descriptive; (2) she understood  
21 the concept of a Fuel Adjustment Clause and the requirement for comparable data; and (3) she  
22 understood that TEP's system average fuel cost could only go down if TEP actually saved money  
23 (H.T. at 253:2-255:21, 292:1-12 and 299:19-25.

1           **B.     Cyprus' Analysis.**

2           Although Cyprus claims that it has used Staff's marginal cost analysis to show that TEP's  
3 marginal costs are being met, the evidence reveals that Mr. Higgins manipulated the data and  
4 Staff's analysis to obtain the results he was hired to find. On cross-examination, Mr. Higgins was  
5 forced to admit that: (1) there is no single way to compute marginal costs (H.T. at 701:9-12); (2)  
6 the calculation of marginal costs requires some "judgment" calls on the part of the analyst (H.T. at  
7 701:13-16); (3) although familiar with marginal cost computer models he did not use any to assist  
8 him in his analysis (H.T. at 701:13-23); (4) he did not speak with Dr. Berry to learn the  
9 assumptions used in Staff's analysis (H.T. at 703:23 to 704:2); (5) he only updated some of the  
10 variables in the original Staff analysis (H.T. at 702:15-25); and (6) to obtain his results, he even  
11 changed the structure of the Staff analysis (H.T. at 703:8-13).

12           Make no mistake, the analysis that Mr. Higgins presented was very different from the one  
13 Staff conducted. Ms. Keene was quick to distance Staff's analysis from Mr. Higgins' presentation.  
14 During cross-examination by Cyprus' counsel, Ms. Keene testified:

15           Q.     Lastly, in your deposition, you said that you don't see how  
16 marginal cost would not be covered. Do you remember that statement?

17           A.     Yes.

18           Q.     And were you making that statement, Ms. Keene, because based on  
19 Staff's analysis, there was a \$38 million net present value which left a lot  
20 of room above marginal cost, correct?

21           A.     Actually, what I was referring to was the term system average fuel  
22 cost. If you're adjusting the rate based on system average fuel cost, your  
23 marginal costs are going to be covered. (H.T. at 292:1-12).

1 Ms. Keene's response accurately deflated Mr. Higgins' marginal cost analysis because, in this  
2 case, the artificially low rates are the result of accounting changes, not lower system average fuel  
3 costs.

4 Cyprus' Brief incredibly claims that TEP did not challenge Mr. Higgins' analysis. This is  
5 false. Mr. Snook severely criticized Mr. Higgins' attempt to manipulate long run marginal costs.  
6 (Ex. TEP-12 at 5:11-17, 6:3-12, 7:12-26, 9:10-18, and 10:12-11). In particular, Mr. Snook  
7 criticized the following adjustments made by Mr. Higgins to the Staff's analysis:

- 8 1. Mr. Higgins' update of short-run marginal cost is in error because he  
9 excludes TEP's fixed fuel costs which should be included in a long-run  
10 marginal cost analysis (Ex. TEP-12 at 6:27-30; 7:1-26);
- 11 2. Mr. Higgins' adjustment of the starting date of TEP generation to 2001 is  
12 in error because he conveniently forgets the analysis is based on Staff's  
13 perception in November 1996. But for the interruptible portion of the  
14 Second Amendment, TEP would have had to build the capacity as planned  
15 (Ex. TEP-12 at 10:12-30; 11:1-8);
- 16 3. Mr. Higgins failed to adjust for power TEP purchased in order to serve  
17 Cyprus (H.T. at 531:15-23);
- 18 4. Mr. Higgins' reduction of the size of the plant to 75 MW, based on TEP's  
19 actual planned addition is in error. TEP planned to add 150 MW when  
20 Staff did its analysis, but Staff based the analysis on the size of Cyprus'  
21 load. This adjustment is completely erroneous (Ex. TEP-12 at 9:10-18);  
22 and
- 23 5. Mr. Higgins' relaxing Staff's requirement to cover the cost of the new  
resource over the term of the agreement is in error because it is integral to  
a net present value analysis. This adjustment completely changes the  
analysis and is inappropriate for the methodology employed by Staff (H.T.  
at 443:21-25 to 446:14).

Mr. Snook further made the following unrebutted criticisms of Cyprus' marginal cost  
testimony:

1. Cyprus' attempt to validate the finding of the Brubaker and Associates report  
by stating that any price for electrical power above 2.0 ¢/kWh would

1 contribute to TEP's fixed costs fails. Certainly any amount above TEP's short-  
2 term fuel cost of 2.0 ¢/kWh would contribute to TEP's fixed costs, but that  
3 does not necessarily cover long-run marginal cost, which includes marginal  
4 fixed costs. Up to the point at which marginal fixed costs are actually being  
covered, less TEP's return on equity, there is no profit at all, yet Cyprus  
argues that TEP is getting some contribution to fixed costs so it is all profit  
(Ex. TEP-11 at 3:1-31; 4:1-2).

5 2. Cyprus attempts to dismiss the two-to-one ratio of legitimate savings passed  
6 on to Cyprus as a result of the Second Amendment as "sophistry". (Cyprus'  
7 Brief at 8, fn. 8). However, Mr. Snook testified that for every dollar per MWh  
saved by TEP on system average fuel cost to serve Cyprus, Cyprus saves two  
dollars per MWh on its energy charge (H.T. at 539:13-30; 540:1-6).

8 3. Cyprus attempts to create a smokescreen by claiming stranded cost  
9 implications should not be considered in a marginal cost analysis. To make  
10 this case, Mr. Higgins testified that stranded cost implications should not be  
11 considered in determining whether TEP is meeting its long-run marginal cost.  
12 (H.T. at 683:22-25; 684-1-25; 685:1-8). However, they are. According to  
13 TEP's Settlement Agreement, customers are to pay stranded cost to TEP  
14 through 2008 based on their current rates. If Cyprus' current rates are set  
15 incorrectly, it has an impact into the future. If Cyprus does not self-generate,  
it should be obligated to pay its fair share of TEP's stranded cost as  
determined by the methodology set forth under TEP's Settlement Agreement.  
As stated previously, when appropriate adjustments are made to Staff's  
analysis, TEP has a net present value of negative \$3 million, even without  
stranded cost. When stranded cost is included, TEP's net present value is  
further reduced by \$5.4 million. See generally Ex. TEP-12 at 7:12-30 to 9:8.

16 In sum, Cyprus' marginal cost analysis is flawed and lacks credibility.

17 **C. TEP's Analysis.**

18 In an attempt to deflect criticism from its own practice of "expert shopping", Cyprus  
19 contends that TEP's analysis was "preordained." It was not. Mr. Snook used Staff's analysis as a  
20 starting point for its long-run marginal cost analysis (Ex. TEP-12 at 5:19-30; 6:1). Mr. Snook's  
21 analysis also relied on Commission approved QF buyback tariffs which are based on TEP's long-  
22 run marginal cost and long-run marginal costs from TEP's Commission approved 1995 Integrated  
23 Resource Plan (Ex. TEP-10 at 10:25-31; 11:1-10). Further, Mr. Snook used a methodology for

1 determining the cost of backup power that was filed with the Commission in support of TEP's  
2 interruptible rates and approved by the Commission. (Ex. TEP-12 at 7:28-30; 8:1-22). Cyprus'  
3 reference to Mr. Snook's use of these resources as "fudge factors," evidences its lack of familiarity  
4 with accepted marginal cost analyses.

5 Further, Cyprus' attempts to dismiss Mr. Snook's inclusion of costs for "back-up" reserves  
6 for firm capacity are misguided. For example, Mr. Higgins attempted to equate the cost for "back-  
7 up" reserves for firm capacity with operating reserves under ancillary services. The record is clear  
8 that these are not the same. (Ex. TEP-12 at 7:28-31; 8:1-8). In fact, Mr. Snook has experience  
9 dealing with transmission and ancillary services, and made a knowledgeable decision to include  
10 the back-up reserves. (See Ex. TEP-12 at 7:28-9-8).

11 Finally, Cyprus claims that Mr. Snook's entire analysis lacks foundation and should not be  
12 considered because Mr. Bill Johnson could not recall creating spreadsheets used by Mr. Snook.  
13 (Cyprus Closing Brief at 13:20-28; 14:1-2). This is a ludicrous position. Since TEP began  
14 including the corrected amounts on invoices to Cyprus, TEP has consistently used the same  
15 "normalization" methodology. (Ex. TEP-11 at 7:12-26).

#### 16 **IV. CYPRUS' UNPROVED CLAIMS AND THEORIES.**

##### 17 **A. Cyprus' Opening Statement**

18 Nothing is more damaging than to overstate your case in your opening  
19 statement. The jury will remember it and resent your misrepresentations.  
20 Fundamentals of Trial Techniques, Thomas A. Mauet (Little, Brown and  
21 Company 1980) at 52.

22 Throughout this proceeding Cyprus has made bold claims and statements that it could not  
23 prove. Many of these false claims were carried through to Cyprus' opening statement and Cyprus'

1 Brief. A review of some of Cyprus' false promises and claims shows the lack of evidence in the  
2 record to support Cyprus' position.

3 **1. TEP alone drafted the Second Amendment with no input from Cyprus.**

4 **Opening Statement:** "This is a contract that TEP drafted" (H.T. at 26:17); "There is  
5 going to be no evidence in this case that Cyprus wrote this contract" (H.T. at 59:14-16).

6 **The Record:** Mr. Snook testified that Cyprus also drafted portions of the Second  
7 Amendment and made extensive comments to the agreement. (H.T. at 516:13-14). In fact, Ex.  
8 TEP-14 is a copy of the red-line version of the agreement containing Cyprus' revisions, including  
9 wording that changed the Fuel Adjustment Clause. (See also H.T. at 536:3-537:12).

10 **2. Mr. Snook only performed his initial marginal cost analysis in his head.**

11 **Opening Statement:** "He did it initially in his head. He said he didn't write anything  
12 down, he didn't take any notes. He just did it in his head." (H.T. at 37:7-10).

13 **The Record:** Mr. Snook testified at his deposition and at the hearing that he used a  
14 calculator, made cross-check calculations and made notes on confidential documents in connection  
15 with his original marginal cost analysis. (H.T. at 448:16-455:12).

16 **3. TEP lied when it said that Mr. King, Mr. Snook and Mr. McElrath met to**  
17 **discuss FERC Account 501.**

18 **Opening Statement:** "They're making it up as they go. The fact is that conversation  
19 never took place.... But it's not true, it didn't happen" (H.T. at 54:11-12; 55:3).

20 **The Record:** Mr. Spiller of Cyprus testified that he remembered "being there when FERC  
21 501 was discussed." (Ex. TEP-2 at 6:24- 7:14). Mr. Snook testified that he, too, was at the  
22 meeting. (Ex. TEP-11 at 5:26-6:8; H.T. at 411:15-412:13). On cross-examination, Mr. McElrath  
23

1 backtracked to admit that there was a meeting, but that he did not recall what was discussed. (H.T.  
2 at 640:1-21).

3 **4. There is nothing in the FERC Account 501 data that refers to Valencia costs.**

4 **Opening Statement:** "Parenthetically, there's nothing in that chart of accounts that lists  
5 Valencia as a line item." (H.T. at 48:24-25).

6 **The Record:** Mr. Snook testified that there was a specific reference to Valencia Units 1  
7 and 2 contingent liabilities in the FERC Account 501 data. (H.T. at 415:13-19; Ex. CYP-21).

8 **5. Barbara Keene and Joe King never had a discussion regarding her analysis of**  
9 **FERC Account 501.**

10 **Opening Statement:** "When I took Ms. Keene's deposition she denied that such a  
11 conversation ever took place, or that she had ever made such a statement to Mr. King or anyone  
12 else." (H.T. at 32:18-21).

13 **The Record:** Ms. Keene testified at her deposition and again at the hearing that she did  
14 have a conversation with Joe King in which she explained to him that she "did not exclude any  
15 costs from the data that was given to [her] regarding FERC Account 501." (H.T. at 262:14-  
16 268:23).

17 **6. Based upon what she knows today, Barbara Keene would make the same**  
18 **recommendation regarding the Second Amendment that she made in 1996.**

19 **Opening Statement:** "Would you change your recommendation today? No. That's the  
20 testimony I think you're going to hear from Barbara Keene, because that's what she told us when  
21 she was deposed." (H.T. at 33:25-34:4).

22 **The Record:** Ms. Keene testified that knowing what she knows today she would try and  
23 get a clarification from the parties to see if they were looking at things the same way. H.T. at

1 260:23-262:13. She never testified that she would make the same recommendation today that she  
2 made in 1996.

3 **7. The issues in the FERC SRP case are the same as those in this case.**

4 **Opening Statement:** "It will probably come as a surprise to you, but they had this very  
5 issue, this very dispute with Salt River Project, who had a contract that indexed their fuel charges  
6 to FERC Account 501 and two other FERC Accounts." (H.T. at 46:11-16).

7 **The Record:** Mr. Snook testified that the two cases involve two completely different  
8 issues. (H.T. at 427:1-22). Ms. Kissinger and Mr. Snook both testified concerning the differences  
9 (See H.T. at 312:25-313:8, 427:1-428:11, and 540:7-541:17). Primarily, in the SRP contract, the  
10 energy charge is explicitly determined by a formula which includes FERC Account 501 and there  
11 is no comparison of cost component data between time periods. In the Second Amendment, FERC  
12 Account 501 is a component of a Fuel Adjustment Clause which does contain a cost component  
13 data comparison between the base and comparative periods.

14 **8. TEP asked Bill Johnson to pad the cost components in FERC Account 501.**

15 **Opening Statement:** "Bill Johnson was asked to find a way to pad 501, and he said, "I  
16 can't do it. It's wrong. I won't." (H.T. at 62:23-25).

17 **The Record:** In TEP's response to Cyprus' Eighth Set of Data Requests; Request No. 3,  
18 Mr. Schmollinger stated that he never asked Mr. Johnson to increase costs in the FERC 501  
19 Account, but that Mr. Johnson was asked to make sure all costs in the FERC 501 Account were  
20 proper. (H.T. at 175:10 to 176:25).

21 **9. Joe King "screwed up" and was fired because of this dispute.**

22 **Opening Statement:** "You're going to hear from Joe King because I'm going to call him,  
23 because I have some questions I'd like to ask Mr. King about what happened and what he knew

1 and when he knew it, because he clearly knew and he clearly screwed up, and I think the evidence  
2 is going to show that Mr. King paid a price for that within TEP, that he lost the job he had and got  
3 reassigned somewhere he didn't want to be." (H.T. at 56:6-13).

4 **The Record:** Cyprus never called Mr. King as a witness. (H.T. at 549). There is no  
5 evidence that Mr. King "screwed up;" "paid a price;" "lost the job that he had" or was reassigned  
6 "somewhere he didn't want to be."

7 **10. TEP violated SEC rules by not reporting this dispute in its financial**  
8 **statements.**

9 **Opening Statement:** "This \$20 million dispute is not sufficiently material that they  
10 bothered to note it in their financial statements.... I think the rules of the SEC require them to."  
11 (H.T. at 41:15-42:10).

12 **The Record:** Ms. Kissinger testified that Cyprus is wrong. The SEC has different  
13 standards for contingent losses and contingent gains. This is a contingent gain situation and the  
14 annual amount of revenue on the contingent gain is not material. (H.T. at 370:4 to 371:16).

15 **B. Cyprus' Counterclaim.**

16 Similarly, the record is void of any evidence to support Cyprus's counterclaim against  
17 TEP. Cyprus failed to produce any evidence of damages resulting from the application of the new  
18 TEP FERC OATT into the Second Amendment. However, TEP has stated that to the extent there  
19 has been a lag in the transition, it would credit the necessary offset to Cyprus for the amounts  
20 determined to be owed to TEP pursuant to this dispute.

21 **V. CONCLUSION.**

22 A Fuel Adjustment Clause, by definition, adjusts rates for actual fluctuations in fuel costs.  
23 The Fuel Adjustment Clause at issue is changing rates for an accounting anomaly. The evidence is

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1 clear that TEP, Cyprus and the Commission did not realize at the time of the approval of the  
2 Second Amendment this result would occur. The artificially low rates are not the result of fuel  
3 cost savings and there is no equitable, factual, legal or regulatory reason to allow this situation to  
4 continue. The mismatched data in the Fuel Adjustment Clause must be normalized so that an  
5 “apples to apples” cost comparison results. Cyprus should be required to pay rates based upon this  
6 normalized data. The Commission should grant TEP’s request so that the rates produced by the  
7 Second Amendment are just and reasonable and Cyprus does not set the unhealthy precedent of  
8 taking advantage of a loophole in an electric service agreement approved by the Commission.

9 DATED this 30th day of December, 1999.

10 ROSHKA HEYMAN & DEWULF, PLC

11  
12 By: 

13 Raymond S. Heyman  
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15  
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1 **Original and ten copies of the foregoing**  
2 **filed this 30<sup>th</sup> day of December, 1999, with:**

3 Docket Control  
4 Arizona Corporation Commission  
5 1200 West Washington Street  
6 Phoenix, Arizona 85007

7 **Copy of the foregoing hand-delivered**  
8 **this 30<sup>th</sup> day of December, 1999, to:**

9 Jerry L. Rudibaugh, Chief Hearing Officer  
10 Hearing Division  
11 Arizona Corporation Commission  
12 1200 West Washington Street  
13 Phoenix, Arizona 85007

14 Lyn Farmer, Legal Division  
15 Arizona Corporation Commission  
16 1200 West Washington Street  
17 Phoenix, Arizona 85007

18 Deborah Scott, Director  
19 Utilities Division  
20 Arizona Corporation Commission  
21 1200 West Washington Street  
22 Phoenix, Arizona 85007

23 **Copy of the foregoing mailed**  
**this 30<sup>th</sup> day of December, 1999, to:**

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