ORIGINAL

0000106221

RECEIVED

2009 DEC 16 P 4: 39

AZ CORP COMMISSION
DOCKET CONTROL

Arizona Corporation Commission
DOCKETED

DEC 16 2009

DOCKETED BY

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

IN THE MATTER OF THE PETITION OF GARKANE ENERGY COOPERATIVE, INC. FOR A DECLARATORY ORDER

Docket No. E-01891A-09-0377

REPLY IN SUPPORT OF PETITION FOR DECLARATORY ORDER

(ORAL ARGUMENT REQUESTED)

GALLAGHER & KENNEDY, P.A.
2575 E. CAMELBACK ROAD
PHOENIX, ARIZONA 85016-9225
(602) 530-8000

INTRODUCTION

Garkane Energy Cooperative, Inc. ("Garkane" or the "Cooperative") submits this Reply in support of its request for a declaratory order confirming that Commission approval of its secured financings is not required because the Cooperative is a foreign public service corporation engaged in interstate commerce.

On November 23, 2009, Staff filed its Response to Garkane's Petition. Staff agrees that retroactive approval is not required with respect to the Cooperative's past debt and related encumbrance transactions: "the Commission should…confirm that A.R.S. § 40-301, *et seq.*, and § 40-285 did not apply to Garkane's secured loan transactions referenced in its Petition."[1] However, Staff has taken the position that the Commission should reserve its ability to regulate future financings on a "case by case basis."

Garkane urges the Commission to rule, consistent with its prior decisions and constitutional precedent, that A.R.S. §§ 40-285 and 40-301, *et seq.*, do not apply to Garkane's

[1] Staff Response, p. 8, ll. 3-5.

future secured loan transactions. That position is legally correct and additionally, for the past ten years, it has saved the Commission and the Cooperative considerable time and resources in processing debt applications for this Utah-based, nonprofit, member-owned cooperative.

To address Staff's concern that facts might change in the future, Garkane is willing to file with the Commission a copy of any future finance application submitted to the Utah Public Service Commission, together with an affidavit stating its then current customer count so that the Commission and Staff could monitor whether this jurisdictional position should change. This will save the Cooperative, its members and the Commission and its Staff scarce budgetary resources while preserving the ability to re-examine jurisdictional status should facts materially change.

DISCUSSION

Initially, it's important to clarify a factual matter which may have played a role in Staff's revised position that the Commission should now proceed on a "case by case basis" in evaluating Garkane's debt requirements. In support of that position, Staff states that:

> Garkane's case presents some very unique circumstances which were obviously considered when prior opinions were given regarding the non-applicability of A.R.S. § 40-301, not the least of which is the fact that 90% of their operations were located in Utah at the time.
>
> * * *
>
> Facts change as is evidenced by the fact that the Company this year acquired more territory in Northern Arizona.[2]

While the Cooperative did acquire territory in Northern Arizona this year, at the same time, it also acquired additional Utah operations, including those just over the border from Colorado City in Hildale. The net effect is that 89% of the Cooperative's customers are in

[2] Staff Response, p. 1, ll. 20-23 and ll. 27-28.

Utah[3]—a figure not materially different than the 90% number which formed the basis for the 1999 Garkane debt exemption agreement with the Commission's legal division.[4]

There is no dispute that Garkane is a foreign public service corporation engaged in interstate commerce. In addition to owning and operating generation plants, transmission lines and distribution facilities in Utah and Arizona, Garkane transmits electricity directly between the two states. There also is no dispute that Garkane's ability to raise capital through secured loans is an essential part of its interstate operations. Consequently, Garkane and Staff continue to agree that the Cooperative's five prior secured loan transactions since 1999 do not require retroactive approval by the Commission.

However, Staff's recommendation that future "financing and related encumbrance applications" should be reviewed raises two key issues for Commission consideration: (1) whether the Commission correctly analyzed and disclaimed jurisdiction in prior similar circumstances on the basis of constitutional law and (2) whether Staff's "case by case" proposal should be adopted in light of constitutional and feasibility problems regarding it.

I. <u>The Commission's Prior Disclaimers of Jurisdiction Were and Are Correct as a Matter of Constitutional Law</u>.

The answer to the first inquiry is "yes." On at least four prior occasions, the Commission has held that the exercise of its jurisdiction over the debt issuances of a foreign utility conducting interstate business would violate the United States Constitution because such regulation would create an impermissible burden on interstate commerce. To understand why these decisions remain valid today, they should be viewed in light of the following chronology:

---

[3] Exhibit A hereto, Avant Affidavit.
[4] April 8, 1999 letter to Mr. Kempley, Exhibit D to Garkane's Petition.

- **1969:** The Arizona Attorney General issued Opinion No. 69-10 which concluded, based on principles of (1) commerce clause constitutional law and (2) statutory construction, that A.R.S. §§ 40-301 through 40-303 do not apply to foreign corporations engaged in interstate commerce.

- **1971:** The Arizona Legislature amended A.R.S. § 40-301 to state that the statute is not applicable to foreign public service corporations providing communications services in interstate commerce.

- **1981:** The Commission issued Decision Nos. 51727 and 52244. These held that A.R.S. §§ 40-301 through 40-303 were not applicable to the securities and debt financing transactions of Citizens Utilities Company and Southern Union Company, reasoning that if the Commission exercised such supervision "it would create an impermissible burden on interstate commerce in violation of the United States Constitution."

- **1983:** The Commission issued Decision No. 53560 which held that A.R.S. §§ 40-301 through 40-303 were not applicable to similar transactions by Southwest Gas Corporation, reasoning that if that if the Commission exercised such supervision "it would create an impermissible burden on interstate commerce in violation of the United States Constitution."

- **1999:** The Commission issued Decision No. 61895 in which it held that PHASER Advanced Metering Services, a division of Public Service Company of New Mexico, was not required to seek Commission approval of its issuance of securities: "It is the opinion of the Commission's Legal Division that Commission approval is not required for the issuance of securities by foreign corporations that are engaged in interstate commerce."

Thus, the Commission's rulings in 1981, 1983 and 1999—which relied on both the Attorney General's 1969 Opinion and constitutional case law—were issued well after the 1971 statutory amendment and, therefore, remain controlling precedent. In fact, the Commission's repeated rationale applies with even greater force to Garkane in light of the Cooperative's more direct involvement in interstate commerce. Garkane actually transmits electricity across state lines to serve Arizona and Utah members, whereas most of the utilities involved in the Commission's prior rulings merely conducted business and owned separate facilities in different states. They did not engage, as the Cooperative does, in commerce directly over state lines.

In response to the foregoing, while conceding Garkane's facts may support a continued jurisdictional disclaimer, Staff appears to suggest that the Commission should overrule its prior decisions and proceed instead case-by-case. The fundamental problem with this analysis is that it mistakenly focuses on a statutory change without regard to controlling constitutional precedent which the Commission has consistently and correctly concluded was unaffected by the 1971 statutory amendment.

The Commission's prior rulings were based explicitly on constitutional considerations, not statutory interpretation. In all four decisions, the Commission recognized that if it exercised jurisdiction over the ability of those gas, electric and metering utilities to raise capital, "it would create an impermissible burden on interstate commerce in violation of the United States Constitution."[5] That analysis remains valid and persuasive today. Staff's statutory arguments do not justify a reversal of the Commission's prior decisions, especially in light of the constitutional issues at stake.[6]

With regard to A.R.S. § 40-285, though the Commission's prior decisions did not expressly analyze the impact of this statute on interstate commerce, the same constitutional limitations apply. The case law relied upon by the Commission established the importance of protecting a foreign corporation's ability to raise funds necessary for interstate activities and,

---

[5] Decision No. 51727 at 3; Decision No. 52244 at 4; Decision No. 53560 at 3; and Decision No. 61895 at 2.

[6] Staff seems to argue that the Legislature responded to the Attorney General's 1969 Opinion by revising A.R.S. § 40-301 to apply to all foreign public service corporations except those providing communications services in interstate commerce. The first problem with this argument is that there is nothing in the 1971 amendment that indicates that the Legislature intended to do anything more than confirm the Commission's lack of jurisdiction with regard to the communications subset of foreign utilities—not affirmatively convey jurisdiction over the balance of foreign utilities. Clearly, the Legislature could have amended the statute expressly to expand Commission jurisdiction over all other foreign corporations, but it did not. Also, there is no factual basis for the assumption that the Commission was unaware of or ignored the statutory amendment when it rendered its prior decisions. Rather, it is much more likely that the Commission correctly recognized that a statutory amendment (even if it was intended to expand jurisdiction) cannot trump the United States Constitution.

consequently, held that any attempt to regulate those financial transactions would create an unconstitutional burden. *See United Air Lines, Inc. v. Illinois Comm. Com'n.,* 207 N.E.2d 433, 438 (1965); *State v. Southern Bell Tel. & Tel. Co.,* 217 S.E.2d 543, 550 (1975). The application of A.R.S. § 40-285 to Garkane's loan transactions which require a mortgage mostly on assets located in Utah would create the same kind of impermissible burden as presented by the application of A.R.S. § 40-301, *et seq*. Additionally, as discussed in the Memorandum of Points and Authorities attached as Exhibit C to Garkane's Petition for Declaratory Order, principles of statutory interpretation dictate that § 40-285 should either yield to the more specific provisions of § 40-301 or be interpreted consistently therewith.

II. The Commission Should Reject the Case-by-Case Approach.

Staff's suggestion that the Commission reverse course and retain jurisdiction in order to assess on a "case by case basis" whether it should exercise jurisdiction over Garkane's future secured loan transactions poses both constitutional and practical problems.

First, Staff implies that the commerce clause is only endangered when a state abuses its authority, such as by placing an unreasonable condition on the approval. That is not an accurate statement of the law. The cases cited repeatedly by this Commission hold that any "requirement for prior approval" creates an impermissible burden on interstate commerce. *State v. Southern Bell Tel. & Tel. Co.,* 217 S.E.2d at 551. Just the requirement that a foreign public service corporation seek approval—regardless of whether the approval is freely granted—is sufficient to run afoul of the Constitution. *See United Air Lines, Inc. v. Illinois Comm. Com'n.,* 207 N.E.2d at 438 (the commerce clause is not limited to addressing "an actual attempt at multiple regulation or an actual obstruction of commerce").

Furthermore, the practical problems with Staff's "case by case" approach demonstrate exactly why the assertion of jurisdiction does raise "undue burden" concerns. Under Staff's proposal, every time Garkane needs secured financing, it will have to obtain approval from the Public Service Commission of Utah[7] as well as a ruling from this Commission regarding whether Garkane needs to process a second application. In addition to doubling the administrative and legal costs to Garkane as well as increasing unnecessarily the drain on limited Commission resources, Staff's "case by case" proposal offers no concrete guidelines for determining the circumstances that would warrant Commission jurisdiction. At most, Staff implies that an increase in Garkane's Arizona customer base (by some unknown amount) might overcome the constitutional prohibition. Staff's proposal would require future time-consuming evaluations of constitutional issues without any established criteria to govern them.

Garkane, however, offers the following proposal, which would keep the Commission informed as to its status on this issue without the constitutional and resource impacts posed by Staff's suggestion. Rather than requiring Garkane to apply for a jurisdictional ruling each time it engages in a future secured transaction, the Commission could order Garkane to file (1) a copy of the application submitted to the Public Service Commission of Utah at the time of filing and (2) an affidavit similar to Exhibit A hereto describing the percentage of the Cooperative's members who are located in Arizona. This option addresses Staff's concern that factual changes could warrant a future change in position, but will not require a Commission ruling in connection with each loan.

[7] In its Response, Staff questions why Garkane has not opposed the jurisdiction of the Public Service Commission of Utah. The answer is simple—Garkane is domiciled in Utah. The critical distinction between domestic and foreign corporations under the commerce clause is that states have a *prima facie* overriding local interest in the affairs of domestic companies but not over foreign entities.

CONCLUSION

Based on the foregoing, Garkane respectfully requests that the Commission enter its Order confirming that A.R.S. §§ 40-285 and 40-301, *et seq.*, are not applicable to Garkane's past or future secured loan transactions.

RESPECTFULLY SUBMITTED this 16th day of December, 2009.

GALLAGHER & KENNEDY, P.A.

By Michael M. Grant

Michael M. Grant
2575 East Camelback Road
Phoenix, Arizona 85016-9225
Attorneys for Garkane Energy Cooperative, Inc.

Original and 13 copies filed this 16th day of December, 2009, with:

Docket Control
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Copies of the foregoing delivered this 16th day of December, 2009, to:

Maureen Scott
Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Nancy Scott
Utilities Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Deir Dearsall

10703-4/2309166

EXHIBIT A

Gallagher & Kennedy, P.A.
2575 East Camelback Road
Phoenix, Arizona 85016-9225
(602) 530-8000

AFFIDAVIT OF MIKE AVANT

STATE OF UTAH)
) ss.
County of Kane)

MIKE AVANT, being first duly sworn, states under oath that:

1. I am the Engineering Manager for Garkane Energy Cooperative Inc. ("Garkane"). As such, I have personal knowledge of the matters set forth herein.

2. Garkane owns and operates electricity generation plants, transmission lines and distribution facilities in Utah and Arizona and also transmits electric energy across state boundaries to its members/customers in Utah and Arizona.

3. As of the date of this affidavit, Garkane's system customers total 12,715. Of these, approximately 11% are located in Arizona.

Mike Avant

SUBSCRIBED AND SWORN to before me this 14 day of December, 2009, by Mike Avant.

Notary Public

My Commission Expires:

7/7/12

2314878/10703-4

REBECCA L HUNT
Notary Public
State of Utah
Comm. No. 574777
My Comm. Expires Jul 7, 2012