

OPEN MEETING ITEM



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COMMISSIONERS  
GARY PIERCE - Chairman  
BOB STUMP  
SANDRA D. KENNEDY  
PAUL NEWMAN  
BRENDA BURNS



ORIGINAL

ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission  
DOCKETED

JAN 13 2011

DATE: JANUARY 13, 2011

DOCKET NO.: E-01891A-09-0377

DOCKETED BY

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Sarah N. Harpring. The recommendation has been filed in the form of an Order on:

GARKANE ENERGY COOPERATIVE, INC.  
(DECLARATORY ORDER)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

JANUARY 24, 2011

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

FEBRUARY 1, 2011 and FEBRUARY 2, 2011

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

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**BEFORE THE ARIZONA CORPORATION COMMISSION**

COMMISSIONERS

GARY PIERCE - Chairman  
BOB STUMP  
SANDRA D. KENNEDY  
PAUL NEWMAN  
BRENDA BURNS

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

DOCKET NO. E-01891A-09-0377

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

**ORDER**

Open Meeting  
February 1 and 2, 2011  
Phoenix, Arizona

**BY THE COMMISSION:**

This case involves a Petition for Declaratory Order ("Petition") filed with the Arizona Corporation Commission ("Commission") by Garkane Energy Cooperative, Inc. ("Garkane"), a Utah nonprofit rural electric cooperative that supplies electricity to customers in Utah and in parts of Mohave and Coconino Counties in northern Arizona. In its Petition, Garkane requests that the Commission enter an order confirming that A.R.S. §§ 40-301 through 40-303 and A.R.S. § 40-285 are not applicable to Garkane's secured loan transactions because Garkane is a foreign public service corporation engaged in interstate commerce or, alternatively and without waiving its jurisdictional position, retroactively approving five financial transactions entered into by Garkane in 1999, 2003, 2007, and 2009.

\* \* \* \* \*

Having considered the entire record herein and being fully advised in the premises, the Commission finds, concludes, and orders that:

**FINDINGS OF FACT**

**Background**

1. Garkane is a Utah nonprofit rural electric cooperative that supplies electricity to

1 customers in Utah and in parts of Mohave and Coconino Counties in northern Arizona.<sup>1</sup> As of  
2 December 31, 2009, Garkane had 11,187 customers in Utah (88.95 percent of total) and 1,390  
3 customers in Arizona (11.05 percent of total). (Statement of Facts Concerning Prior Financial  
4 Transactions, filed February 1, 2010 (“SOF”) Ex. F.)

5       2.       The Commission initially granted Garkane a Certificate of Convenience and Necessity  
6 (“CC&N”) to provide electric utility services in Arizona in Decision No. 38446 (April 4, 1966).<sup>2</sup>

7       3.       Garkane is domiciled in Utah and applies to the Utah Public Service Commission  
8 (“Utah PSC”) for approval of its financing transactions. (Decision No. 70979 at 6-7.)

9       4.       Garkane purchases electric energy from plants located in different states. (Petition Ex.  
10 A, Affidavit of Ira Mike Avant.)

11       5.       Garkane owns and operates electricity generation plants, transmission lines, and  
12 distribution facilities in Utah and Arizona. (*Id.*)

13       6.       Garkane transmits electric energy across state boundaries to its members/customers in  
14 Utah and Arizona. (*Id.*)

15       7.       Garkane provides administrative, accounting, engineering, and other services to its  
16 operating divisions and facilities in Utah and Arizona. (*Id.*)

17       8.       Garkane has not applied for Commission approval of its financings since at least early  
18 1999, based upon its belief that as a foreign public service corporation engaged in interstate  
19 commerce, it is not required to obtain such approval. (Decision No. 70979 at 6.)

20       9.       Garkane’s belief was communicated to the Commission’s Legal Division in an April  
21 8, 1999, letter from Garkane’s counsel to the then-Chief Counsel for the Commission, in which  
22 Garkane’s counsel stated that he was memorializing a discussion in which the two had agreed that  
23 because of Commerce Clause restrictions and Garkane’s status as a foreign public service corporation  
24 engaged in interstate commerce and owning facilities in more than one state, Garkane is not required  
25 to obtain Commission approval of financings. (Petition Ex. D.) Garkane’s counsel stated in the letter  
26

27 <sup>1</sup> Official notice is taken of Decision No. 70979 (May 5, 2009), in which Garkane’s Certificate of Convenience and  
Necessity (“CC&N”) was extended to include Colorado City.

28 <sup>2</sup> The original order, Decision No. 38392 (February 3, 1966), was revoked and reissued verbatim as Decision No.  
38446 to alleviate due process concerns related to improper and belated service of the original order.

1 that Garkane would not seek Commission approval for an imminent loan or for any future loan  
2 applications unless the Chief Counsel called to inform him that he had misunderstood or misstated  
3 the conclusions reached in their discussion. (*Id.*)

4 10. Since April 1999, Garkane has entered into the following financial transactions: (1) a  
5 Restated Mortgage and Security Agreement between and among the Rural Utilities Service (“RUS”),<sup>3</sup>  
6 National Rural Utilities Cooperative Finance Corporation (“CFC”), and Garkane dated November 1,  
7 1999; (2) a Loan Agreement in the amount of \$10 million between CFC and Garkane dated  
8 December 22, 2003; (3) a Loan Agreement in the amount of \$15 million between CFC and Garkane  
9 dated October 29, 2007; (4) a Substitute Secured Promissory Note in the amount of \$4.5 million  
10 between CFC and Garkane dated April 22, 2009; and (5) a \$5 million Revolving Line of Credit  
11 between CFC and Garkane dated May 18, 2009 (“the five transactions”).

12 11. In Decision No. 70979 (May 5, 2009), Garkane was ordered to file with the  
13 Commission an application requesting a declaratory adjudication regarding the Commission’s  
14 jurisdiction to approve Garkane’s financings under A.R.S. §§ 40-301 through 40-303 and Garkane’s  
15 encumbrances under A.R.S. § 40-285 in light of Garkane’s status as a foreign public service  
16 corporation engaged in interstate commerce. The Commission ordered Garkane, in its application,  
17 alternatively to request approval of all financings and/or encumbrances that have been entered into by  
18 Garkane and not approved by the Commission, if the Commission finds that approval of Garkane’s  
19 financings and/or encumbrances is required.

20 12. The loans and credit facilities provided to Garkane by RUS and CFC have been  
21 secured by standard form mortgages that create liens over all of Garkane’s assets in Utah and  
22 Arizona, including assets acquired after the financing is extended. (Petition Ex. B, Affidavit of Stan  
23 Chappell.) The five transactions were all approved by the Utah Public Service Commission (“Utah  
24 PSC”). (*Id.*)

25 13. Stan Chappell, Garkane’s Finance Manager, asserts that Garkane’s financings and  
26 encumbrances are for lawful objects within Garkane’s proper corporate purposes, are compatible with  
27

28 <sup>3</sup> RUS was formerly known as the federal Rural Electrification Administration.

1 the public interest, are necessary and appropriate for and consistent with the proper performance by  
2 Garkane of its services as a public utility, and have not and will not impair Garkane's ability to  
3 perform those services. (Petition Ex. B, Affidavit of Stan Chappell.)

4 **Procedural History**

5 14. On July 30, 2009, Garkane filed with the Commission its Petition, requesting that the  
6 Commission enter an order confirming that A.R.S. §§ 40-301 through 40-303 and A.R.S. § 40-285  
7 are not applicable to Garkane's secured loan transactions because Garkane is a foreign public service  
8 corporation engaged in interstate commerce or, alternatively and without waiver of Garkane's  
9 jurisdictional position, retroactively approving the five transactions.

10 15. On September 16, 2009, a Procedural Order was issued scheduling a procedural  
11 conference to be held on September 30, 2009, to discuss the process and scheduling for this matter.

12 16. On September 30, 2009, a procedural conference was held at the Commission's  
13 offices in Phoenix, Arizona. Garkane and the Commission's Utilities Division ("Staff") appeared  
14 through counsel. Garkane and Staff agreed that a hearing was not necessary in this matter. Staff  
15 suggested that the proceeding could be bifurcated—with the resolution of the legal issue first being  
16 addressed and then, only if necessary, scrutiny of the five transactions to follow. The parties  
17 proposed for Staff to file a brief in response to Garkane's Petition and for Garkane then to file a reply  
18 to Staff's brief.

19 17. On October 1, 2009, a Procedural Order was issued requiring Staff to file a Response  
20 to the Petition by November 2, 2009, and requiring Garkane to file a Reply to Staff's Response by  
21 November 23, 2009.

22 18. On November 2, 2009, Staff filed a Request for a Modification of the Procedural  
23 Schedule, requesting that Staff's Response deadline be moved to November 23, 2009, and that  
24 Garkane's Reply deadline be moved to December 11, 2009. Staff stated that Garkane supported the  
25 modifications requested.

26 19. On November 3, 2009, a Procedural Order was issued extending Staff's Response  
27  
28

1 deadline to November 23, 2009, and extending Garkane's Reply deadline to December 14, 2009.<sup>4</sup>

2 20. On November 23, 2009, Staff filed its Response to Garkane's Petition.

3 21. On December 16, 2009,<sup>5</sup> Garkane filed its Reply to Staff's Response and a Request for  
4 Procedural Conference.

5 22. On December 21, 2009, a Procedural Order was issued scheduling a procedural  
6 conference to be held on January 11, 2010, to discuss how to proceed in this matter.

7 23. On January 11, 2010, a procedural conference was held at the Commission's offices in  
8 Phoenix, Arizona. Garkane and Staff appeared through counsel and advocated their respective  
9 positions. Garkane asserted that the Commission should grant its Petition and ratify the five  
10 transactions, confirming that neither A.R.S. § 40-301 nor A.R.S. § 40-285 applies to those  
11 transactions. Garkane proposed that going forward, each time it files an application for approval of a  
12 financing with the Utah PSC, Garkane be required also to file a courtesy copy with the Commission  
13 along with an affidavit verifying the current split of customers between Arizona and Utah. Staff  
14 agreed that the five transactions should be ratified, but asserted that the Commission should not  
15 permanently disclaim jurisdiction over transactions of this nature, instead asserting that the best  
16 balance of the Arizona statutes and the Commerce Clause is to have Garkane file an application with  
17 the Commission each time it files an application for approval of a financing with the Utah PSC, so  
18 that the Commission can determine on a case-by-case basis whether Commission approval is  
19 required. The parties both requested that the matter be taken under advisement and that a  
20 Recommended Order be issued. The parties were directed to file a joint stipulation of facts  
21 concerning the five transactions and were advised that if the joint stipulation contained enough  
22 information, the matter would then be taken under advisement.

23 24. On February 1, 2010, the parties filed a Statement of Facts Concerning Prior Financial  
24 Transactions, including copies of five Utah PSC Orders pertaining to the five transactions as well as  
25 an affidavit by Stan Chappell, Finance Manager for Garkane, concerning Garkane's Arizona and  
26 Utah customer counts as of December 31, 2009.

27 <sup>4</sup> This date allowed Garkane to retain a full three weeks to file its Reply.

28 <sup>5</sup> Garkane initially filed the Reply in the wrong docket on December 14, 2009, and then refiled it in the correct docket on December 16, 2009.

1 **The Five Transactions**

2         25. Transaction No. 1 involves a Restated Mortgage and Security Agreement, dated  
3 November 1, 1999, between Garkane, RUS, and CFC, entered into because Deseret Generation &  
4 Transmission Cooperative ("Deseret") was restructuring its RUS debt through CFC, and all six of  
5 Deseret's distribution cooperative members ("members"), including Garkane, were likewise required  
6 to refinance their existing RUS debts through CFC as part of the proposed transaction. (SOF at 1.)  
7 The Utah PSC approved Garkane's<sup>6</sup> refinancing in a Report and Order issued on July 3, 1996, in  
8 Docket No. 96-506-01, which also dealt with Deseret and the other five distribution cooperative  
9 members. (SOF Ex. A.) Transaction No. 1 was designed to effect a general restructuring of  
10 Deseret's obligations, in response to Deseret's financial difficulties. (SOF Ex. A at 2, 4, 5.) The  
11 Utah PSC concluded that it was in the public interest for each of the members to participate in the  
12 proposed transaction because the transaction would result in a more stable wholesale supply, rate  
13 risks would be reduced, and competitive incremental rates would be available, which would leave  
14 Deseret and the members in a better position to provide reliable and reasonably priced services to  
15 consumers. (SOF Ex. A at 11.) The Utah PSC Order authorized the members to issue promissory  
16 notes to CFC for Member Compromise Loans and to provide security interests in their assets to  
17 secure repayment of those Compromise Loans; to issue promissory notes to CFC for Member  
18 Refinancing Loans and to provide security interests to secure repayment of those Refinancing Loans;  
19 and to secure perpetual secured lines of credit from CFC in amounts approved by their respective  
20 boards of directors, up to \$7 million, and to provide security interests to secure repayment of those  
21 lines of credit. (SOF Ex. A at 12-13.) The approximate amounts for Garkane's Member Refinancing  
22 Loan and Member Compromise Loan were \$12,978,576 and \$7,428,575, respectively. (SOF Ex. A at  
23 Ex. A.)

24         26. Transaction No. 2 involves a \$10 million loan-financing arrangement with CFC that  
25 allows Garkane to draw against the loan amount for capital as needed for project financing. (SOF Ex.

26 \_\_\_\_\_  
27 <sup>6</sup> In the Report and Order, Garkane is identified as Garkane Power Association, Inc. (SOF Ex. A.) Official notice is  
28 taken of an August 19, 2002, letter by Garkane CEO Carl Albrecht stating that Garkane Power Association, Inc. had  
officially changed its name to Garkane Energy Cooperative, Inc. effective April 27, 2001. The letter was filed with the  
Commission's Corporations Division on September 19, 2002.

1 B.) Garkane planned to use the financing for a four-year construction work plan, to roll over an  
2 existing line of credit, and possibly to fund the acquisition of Kanab City's municipal electric system.  
3 (*Id.*) The Utah PSC approved the financing arrangement in a one-page Order issued on December 5,  
4 2003, after receiving a recommendation for approval from the Division of Public Utilities of the Utah  
5 Department of Commerce. (*Id.*)

6 27. Transaction No. 3 involves a long-term Loan Agreement and a related Secured  
7 Promissory Note (jointly "Long-Term Loan Facility") with CFC in an amount up to approximately  
8 \$15 million. (SOF Ex. C at 1, 4.) Garkane desired the Long-Term Loan Facility to supplement its  
9 existing \$2 million line of credit (authorized as part of Transaction No. 1), upon which Garkane had  
10 not yet drawn funds, and to use as a flexible financing source for ongoing capital projects and  
11 potentially to finance future acquisitions of certain municipal power systems in its certificated area.  
12 (SOF Ex. C at 2-3, 5.) The Long-Term Loan Facility is secured by a first-lien mortgage on  
13 Garkane's electric system and assets. (*Id.* at 5.) The Utah PSC authorized the Long-Term Loan  
14 Facility in a Report and Order issued on November 2, 2007. (*Id.* at 1, 6.)

15 28. Transaction No. 4 involves a Substitute Secured Promissory Note, dated April 22,  
16 2009, for a 1999 loan from CFC in the amount of \$4,546,000. (SOF at 2.) The 1999 loan had been  
17 approved by the Utah PSC in a one-page Report and Order issued on January 27, 2000. (SOF Ex. D.)  
18 Transaction No. 4 was done solely to remove RUS as the guarantor of the loan and did not result in  
19 Garkane's receiving any additional funds or incurring any new debt.<sup>7</sup> (SOF at 2.)

20 29. Transaction No. 5 increased Garkane's line of credit with the CFC from \$2 million to  
21 \$5 million. (SOF Ex. E at 1.) The Utah PSC approved the increased line of credit in a Report and  
22 Order issued on March 30, 2009, after its Division of Public Utilities recommended approval of the  
23 increased line of credit. (*Id.*) The Utah PSC found that the increase in the line of credit would not  
24 harm the State of Utah, its citizens, or the Utah customers of Garkane and that it therefore was in the  
25 public interest. (SOF Ex. E at 3.)

26  
27 <sup>7</sup> Garkane has not provided a Utah PSC Order approving the 2009 Substitute Secured Promissory Note. We infer that  
28 Utah PSC approval was not obtained because the transaction did not result in any additional encumbrance of Garkane's  
assets.

1 The Statutes at Issue

2 30. A.R.S. § 40-285 provides, in pertinent part:

3 A. A public service corporation shall not sell, lease, assign, mortgage  
4 or otherwise dispose of or encumber the whole or any part of its railroad,  
5 line, plant, or system necessary or useful in the performance of its duties  
6 to the public, or any franchise or permit or any right thereunder, nor shall  
7 such corporation merge such system or any part thereof with any other  
8 public service corporation without first having secured from the  
9 commission an order authorizing it to do so. Every such disposition,  
10 encumbrance or merger made other than in accordance with the order of  
11 the commission authorizing it is void.

12 . . . .

13 C. Nothing in this section shall prevent the sale, lease or other  
14 disposition by any such corporation of property, which is not necessary or  
15 useful in the performance of its duties to the public, and any sale of its  
16 property by such corporation shall be conclusively presumed to have been  
17 of property which is not useful or necessary in the performance of its  
18 duties to the public as to any purchaser of the property in good faith for  
19 value.

20 . . . .

21 31. A.R.S. § 40-301 reads as follows:

22 A. The power of public service corporations to issue stocks and stock  
23 certificates, bonds, notes and other evidences of indebtedness, and to  
24 create liens on their property located within this state is a special privilege,  
25 the right of supervision, restriction and control of which is vested in the  
26 state, and such power shall be exercised as provided by law and under  
27 rules, regulations and orders of the commission.

28 B. A public service corporation may issue stocks and stock  
certificates, bonds, notes and other evidences of indebtedness payable at  
periods of more than twelve months after the date thereof, only when  
authorized by an order of the commission.

C. The commission shall not make any order or supplemental order  
granting any application as provided by this article unless it finds that such  
issue is for lawful purposes which are within the corporate powers of the  
applicant, are compatible with the public interest, with sound financial  
practices, and with the proper performance by the applicant of service as a  
public service corporation and will not impair its ability to perform that  
service.

D. The provisions of this article shall not apply to foreign public  
service corporations providing communications service within this state  
whose physical facilities are also used in providing communications  
service in interstate commerce.

32. A.R.S. § 40-302 provides, in pertinent part:

A. Before a public service corporation issues stocks and stock  
certificates, bonds, notes and other evidences of indebtedness, it shall first  
secure from the commission an order authorizing such issue and stating  
the amount thereof, the purposes to which the issue or proceeds thereof are

1 to be applied, and that, in the opinion of the commission, the issue is  
 2 reasonably necessary or appropriate for the purposes specified in the  
 3 order, pursuant to § 40-301, and that, except as otherwise permitted in the  
 4 order, such purposes are not, wholly or in part, reasonably chargeable to  
 5 operative expenses or to income. Before an order is issued under this  
 section, notice of the filing of the application for such order shall be given  
 by the commission or the applicant in such form and manner as the  
 commission deems appropriate. The commission may hold a hearing, and  
 make inquiry or investigation, and examine witnesses, books, papers, and  
 documents, and require filing data it deems of assistance.

6 **B.** The commission may grant or refuse permission for the issue of  
 7 evidences of indebtedness or grant the permission to issue them in a lesser  
 8 amount, and may attach to its permission conditions it deems reasonable  
 9 and necessary. The commission may authorize issues less than, equivalent  
 to or greater than the authorized or subscribed capital stock of the  
 corporation, and the provisions of the general laws of the state with  
 reference thereto have no application to public service corporations.

10 **C.** A public service corporation shall not, without consent of the  
 11 commission, apply the issue of any stock or stock certificate, bond, note or  
 12 other evidence of indebtedness, or any part thereof, to any purpose not  
 13 specified in the commission's order, or to any purpose specified in the  
 commission's order in excess of the amount authorized for the purpose, or  
 issue or dispose of the proceeds of such issuance on any terms less  
 favorable than those specified in the order.

14 **D.** A public service corporation may issue notes, not exceeding seven  
 15 per cent of total capitalization if operating revenues exceed two hundred  
 16 fifty thousand dollars, for proper purposes and not in violation of law  
 payable at periods of not more than twelve months after date of issuance,  
 without consent of the commission, but no such note shall, wholly or in  
 part, be refunded by any issue of stocks or stock certificates, bonds, notes  
 or any other evidence of indebtedness without consent of the commission.

17 . . . .

18 33. A.R.S. § 40-303 provides, in pertinent part:

19 **A.** All stock and every stock certificate, and every bond, note or other  
 20 evidence of indebtedness of a public service corporation, issued without a  
 21 valid order of the commission authorizing the issue, or if issued with the  
 22 authorization of the commission but not conforming to the order of  
 23 authorization of the commission, is void, but no failure in any other  
 respect to comply with the terms or conditions of the order of  
 authorization of the commission shall make the issue void, except as to a  
 person taking the issue other than in good faith and for value and without  
 actual notice.

24 **B.** Every public service corporation which, directly or indirectly,  
 25 issues or causes to be issued any stock or stock certificate, bond, note or  
 26 other evidence of indebtedness not in conformity with the order of the  
 27 commission authorizing the issue, or contrary to law, or which applies  
 28 proceeds from the sale thereof or any part thereof, to any purpose other  
 than the purpose specified in the commission order, or to any purpose  
 specified in this order in excess of the amount in the order authorized for  
 such purpose, is subject to a penalty of not less than five hundred or more  
 than twenty thousand dollars for each offense.

C. A person is guilty of a class 4 felony who:

1. Knowingly authorizes, directs, aids in, issues or executes any stock or stock certificate, bond, note or other evidence of indebtedness not in conformity with the order of the commission authorizing such, or contrary to law.

....

34. The only express reference to foreign public service corporations in these statutes, which appears in A.R.S. § 40-301(D), was added by the Arizona Legislature in 1971 and, by its own language, excludes from the Commission's regulation under A.R.S. §§ 40-301 through 40-303 only foreign public service corporations providing communications service in Arizona whose physical facilities are also used to provide communications service in interstate commerce. (Laws 1971, Ch. 122, § 1.) A.R.S. § 40-285 makes no reference to a foreign public service corporation or to interstate commerce.

#### The Commerce Clause

35. The Commerce Clause of the United States Constitution states: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]" (U.S. Const. Art. I, § 8, Cl. 3.) Under a concept referred to as the "dormant Commerce Clause," the Commerce Clause has been interpreted to prevent state regulation that discriminates against or overly burdens interstate commerce. (*See, e.g., United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Management Auth.*, 550 U.S. 330, 338, 346 (2007).)

#### Attorney General Opinion No. 69-10

36. In 1969, the Arizona Attorney General ("AG") issued Opinion No. 69-10 ("AG Op. 69-10") concerning whether a foreign public service corporation doing business in Arizona and also engaged in interstate commerce must comply with the requirements of A.R.S. § 40-302 with regard to issuance of stocks, stock certificates, bonds, notes, and other evidences of indebtedness payable at periods of more than 12 months after issuance. The AG answered the inquiry in the negative, explaining that although the Arizona Supreme Court had never considered the validity of A.R.S. §§ 40-301 through 40-303 with regard to foreign public service corporations engaged in interstate commerce, courts of other states that had decided the issue had generally held that public utility commissions lacked such jurisdiction. (AG Op. 69-10 at 3.) Further, the AG stated that the holdings

1 in those other states' cases made it "readily apparent" that the legislatures of those states "never  
 2 intended . . . to subject foreign corporations to the jurisdiction of public utility commissions in the  
 3 issuance of securities." (AG Op. 69-10 at 7.) The AG stated: "It cannot be presumed that the  
 4 legislature intended to give the commission such power in the absence of such a statute and express  
 5 words to that effect." (*Id.*) The AG reasoned that because the pertinent parts of the Arizona statutes  
 6 were almost identical to those of other states interpreted in the cited cases, they should be interpreted  
 7 in the same way—not to require a foreign corporation engaged in interstate commerce to obtain  
 8 Commission approval for the issuance of stocks, stock certificates, bonds, notes, and other evidences  
 9 of indebtedness. (*Id.*) The AG cited cases from California, Missouri, Illinois, and New Hampshire in  
 10 which state courts essentially concluded that their statutes could not be applied to restrict a foreign  
 11 corporation's issuance of securities, a corporate power authorized by the incorporating state and  
 12 indivisible among states. (*See id.* at 3-6.) The AG also cited *United Air Lines, Inc. v. Illinois*  
 13 *Commerce Commission*, 207 N.E.2d 433 (Ill. 1965), in which the Illinois Supreme Court determined  
 14 that the Illinois commission did not have jurisdiction to regulate the issuance of securities by United,  
 15 a foreign corporation engaged in interstate commerce, because such regulation would impose an  
 16 undue burden on interstate commerce. (AG Op. 69-10 at 6.)

17 37. Although A.R.S. § 40-285 existed at the time AG Op. 69-10 was issued and also  
 18 would have prohibited an electric utility from mortgaging or otherwise encumbering its necessary or  
 19 useful system without prior Commission approval, it was not mentioned in AG Op. 69-10.

20 38. Attorney General opinions are advisory in nature and are not binding, although they  
 21 "should be accorded respectful consideration." (*Ruiz v. Hull*, 191 Ariz. 441, 449 (1998).)

## 22 **The Parties' Positions**

### 23 Garkane's Position

24 39. Garkane's position is that A.R.S. §§ 40-301 through 40-303 and A.R.S. § 40-285 do  
 25 not require the Commission to approve Garkane's financings and mortgage encumbrances and,  
 26 indeed, that the U.S. Constitution prohibits the Commission from doing so because such regulation  
 27 would unduly burden interstate commerce. Garkane asserts that the Commission has considered the  
 28 application of A.R.S. §§ 40-301 through 40-303 to foreign public service corporations engaged in

1 interstate commerce several times over the past three decades and has, on each occasion, disclaimed  
2 jurisdiction. (Petition Ex. C at 1<sup>8</sup>.) Garkane asserts that, in so ruling, the Commission has relied  
3 upon AG Op. 69-10. (Petition Ex. C at 1.) Garkane also points out that in Decision No. 61895, the  
4 Commission made a Finding of Fact that the Commission's Legal Division believed that Commission  
5 approval was not required for the issuance of securities by foreign public service corporations  
6 engaged in interstate commerce. (Petition Ex. C at 1-2 (quoting Decision No. 61895 at 2).) Garkane  
7 further asserts that the Commission's then-Chief Counsel confirmed in 1999 that the Commission  
8 does not have jurisdiction over Garkane's debt and lien matters, an assertion based on a letter from  
9 Garkane's counsel to the then-Chief Counsel memorializing a conversation between the two.  
10 (Petition Ex. C at 2, Ex. D.) Garkane asserts that the Commission's exercise of regulatory  
11 jurisdiction over Garkane's debt financings and encumbrances related to loans would create an  
12 impermissible burden on interstate commerce in violation of the United States Constitution. When  
13 asked whether AG Op. 69-10 remained authoritative after the 1971 legislative amendment to A.R.S.  
14 § 40-301 in which subsection (D) was added, Garkane asserted that the legislative amendment would  
15 not invalidate the Commission's prior jurisdictional disclaimers and pointed out that each of the  
16 Commission Decisions cited by Garkane had been issued after the 1971 legislative amendment.  
17 (Petition Ex. C at 2 (citing *Dupnik v. MacDougall*, 136 Ariz. 39, 44 (1983) for the proposition that  
18 where there has been a history of acquiescence in the meaning of a law, it will not be disturbed unless  
19 manifestly erroneous).) Garkane asserts that the Commission's jurisdictional analysis has  
20 consistently been based on federal constitutional grounds rather than on the statutory exclusion in  
21 A.R.S. § 40-301(D) and that the Commission has cited AG Op. 69-10 and multiple state courts while  
22 "repeatedly recogniz[ing] that its regulatory supervision over the financings of foreign public service  
23 corporations who are engaged in interstate commerce 'would create an impermissible burden on  
24 interstate commerce in violation of the United States Constitution.'" (Petition Ex. C at 3 (quoting  
25 Decision No. 51727 at 3; Decision No. 52244 at 4; Decision No. 53560 at 3; Decision No. 61895 at  
26 2).) Garkane asserts that courts have long recognized that the ability to obtain financing significantly

27  
28 <sup>8</sup> Garkane cites Decision No. 51727 (January 16, 1981); Decision No. 52244 (June 18, 1981); Decision No. 53560 (May 18, 1983); and Decision No. 61895 (August 27, 1999).

1 and directly impacts a public service corporation's ability to deliver service, operate, and exist, and  
2 further asserts that the additional administrative burdens and "chaos" that would result from requiring  
3 Garkane to obtain financing approval from multiple states, with potentially different approval  
4 standards and conditions, would outweigh any benefits or interest that Arizona may have in  
5 regulating the financings. (Petition Ex. C at 3.<sup>9</sup>)

6 40. Garkane asserts that applying A.R.S. § 40-285 to Garkane would violate the same  
7 constitutional principles as described above and would also be contrary to Arizona caselaw on  
8 statutory construction. (Petition Ex. C at 4.) Garkane asserts that A.R.S. § 40-285 must be read in  
9 conjunction with A.R.S. § 40-301, which also addresses Commission regulation of public service  
10 corporation debts and liens on a public service corporation's property. (*Id.*) Garkane asserts that  
11 because both relate to a company's ability to pledge its assets, they must be interpreted consistently  
12 and harmoniously—to apply to domestic public service corporations only. (*Id.* at 4-5.) Garkane  
13 asserts that it would not make sense to find that the Constitution prohibits jurisdiction over Garkane's  
14 financing transactions under A.R.S. § 40-301, but allows jurisdiction over the securities required as  
15 integral parts of the same transactions. (*Id.* at 5.) Garkane interprets A.R.S. § 40-285 to apply to all  
16 of the various transactions identified therein, except foreign utility transactions involving a lien or  
17 mortgage in conjunction with a financing transaction under A.R.S. § 40-301. (*Id.*) Garkane asserts  
18 that this interpretation follows the principle that where statutes conflict, effect must be given to the  
19 more specific statute while still adhering to the intent of the more general statute (*Id.* (citing *Backus v.*  
20 *State*, 203 P.3d 499, 502 (2009); *Friedemann v. Kirk*, 197 Ariz. 616, 618 (App. 2000)).) Garkane  
21 reasons that A.R.S. § 40-285 is the more general statute, generally addressing all transactions that  
22 could involve a public service corporation's transfer of possession or rights to its necessary and  
23 useful property, to prevent impairment of service therefrom, while A.R.S. § 40-301 "is aimed  
24 precisely at a public service corporation's need to raise funds by obtaining, among other things, debt  
25 financing secured by a lien or mortgage." (*Id.* at 5-6.) Garkane further asserts that A.R.S. § 40-285  
26 should be interpreted in a manner that preserves its constitutional validity—*i.e.*, as not applicable to

27 <sup>9</sup> Garkane cites *United Air Lines, Inc. v. Illinois Comm. Comm'n*, 207 N.E.2d 433, 438 (Ill. 1965); *State ex rel. Utils.*  
28 *Comm'n v. Southern Bell Tel. & Tel. Co.*, 217 S.E.2d 543, 550 (N.C. 1975); *Panhandle E. Pipe Line Co. v. Public Util.*  
*Comm'n of Ohio*, 383 N.E.2d 1163 (Ohio 1978); and *ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228 (6<sup>th</sup> Cir. 1986).

1 foreign public service corporations engaged in interstate commerce. (*Id.* at 6 (citing *Phoenix*  
2 *Newspapers, Inc. v. Superior Court*, 180 Ariz. 159, 163 (App. 1993)).)

3 41. In response to Staff's concern that facts might change in the future, Garkane offered to  
4 file with the Commission a copy of any future finance application submitted to the Utah PSC,  
5 together with an affidavit stating Garkane's then-current customer count, so that the Commission and  
6 Staff can monitor whether the Commission's jurisdictional position should change. (Reply at 2.)  
7 Garkane asserts that this will save time and money for Garkane and its members and for the  
8 Commission and Staff, while still allowing Staff and the Commission to monitor Garkane's situation.  
9 (*Id.*)

#### 10 Staff's Position

11 42. Staff's position is that although A.R.S. §§ 40-301 through 40-303 and A.R.S. § 40-  
12 285, on their faces, are applicable to the transactions in question, federal constitutional considerations  
13 warrant the Commission's considering Garkane's financing matters on a case-by-case basis going  
14 forward, because facts change. (Response at 1.) Staff acknowledged that the Commission has  
15 disclaimed jurisdiction in certain past cases, but asserted that it would not be advisable to disclaim  
16 jurisdiction permanently for certain entities or transactions, because facts change. (*Id.*) Staff asserts  
17 that the five transactions do not require retroactive approval, however, and that the Commission  
18 should grant Garkane's Petition and confirm that A.R.S. §§ 40-301 through 40-303 and A.R.S. § 40-  
19 285 did not apply to them. (Response at 1, 8.)

20 43. Staff asserts that A.R.S. § 40-301 on its face applies to the issuance of stocks and  
21 bonds by Garkane and that Garkane's reliance upon AG Op. 69-10 to avoid the statute's applicability  
22 is misplaced because AG Op. 69-10 was issued in 1969, two years before A.R.S. § 40-301 was  
23 amended by the addition of subsection (D), which exempts foreign public service corporations  
24 providing communications service within Arizona whose physical facilities are also used in providing  
25 communications service in interstate commerce. (Response at 3-4.) Staff reasons that the version of  
26 A.R.S. § 40-301 upon which AG Op. 69-10 was based was unclear as to legislative intent and that the  
27 legislature may have been responding to AG Op. 69-10 when it added subsection (D). (*See* Response  
28

1 at 4 (quoting AG Op. 69-10 at 7<sup>10</sup>.) In any event, Staff asserts, the legislature clearly intended  
 2 through the addition of subsection (D) to exempt only those foreign public service corporations  
 3 engaged in providing both intrastate and interstate communications service from its provisions.  
 4 (Response at 4.) Staff also points out that A.R.S. § 40-301 *et seq.* have never been found  
 5 unconstitutional by any court and, further, that AG Op. 69-10, like all Attorney General opinions, is  
 6 merely advisory. (Response at 4.) Staff further asserts that one of the Commission Decisions relied  
 7 upon by Garkane (Decision No. 51727) is distinguishable because the foreign public service  
 8 corporation involved was also providing interstate communications service, and that in the others, the  
 9 Commission did not expressly consider the legislative amendment to A.R.S. § 40-301. (Response at  
 10 5.)

11 44. Regarding A.R.S. § 40-285, Staff points out that neither AG Op. 69-10 nor the  
 12 Commission Decisions relied upon by Garkane discussed the applicability of A.R.S. § 40-285 to  
 13 foreign public service corporations engaged in interstate commerce.<sup>11</sup> (Response at 5-6.) Staff also  
 14 asserts that A.R.S. § 40-285's purpose—to prevent a utility from disposing of resources devoted to  
 15 providing utility service, thereby “looting” its facilities and impairing service to the public—is clearly  
 16 different from the purpose behind the other statutes. (Response at 6.) Staff asserts that if the  
 17 Commission disclaims jurisdiction under A.R.S. §§ 40-301 through 40-303 based upon the facts of a  
 18 case, a similar disclaimer with respect to a related encumbrance under A.R.S. § 40-285 may be  
 19 appropriate, but the determination should be made on a case-by-case basis. (*Id.*)

20 45. Staff asserts that the Commission's jurisdictional analysis has consistently been based  
 21 on federal constitutional grounds rather than on the statutory exclusion in A.R.S. § 40-301(D), as  
 22 evidenced by the Commission's citing to AG Op. 69-10 and multiple state courts when finding that  
 23 its regulatory supervision of the financings of foreign public service corporations engaged in  
 24 interstate commerce could create an impermissible burden on interstate commerce in violation of the

25 \_\_\_\_\_  
 26 <sup>10</sup> “[W]here the language of a statute is sufficiently broad to include within its provisions foreign corporations, it was  
 27 not to be presumed that the legislature intended to give the commission such power, and in the absence of plain  
 28 indications to the contrary, such statutes applied only to domestic corporations.” (AG Op. 69-10 at 7.)

<sup>11</sup> Staff stated that one of the cases relied upon by Garkane did discuss A.R.S. § 40-285, but only in the context of a  
 utility's seeking confirmation that § 40-285(A) does not apply to assets that are not necessary or useful in the performance  
 of the utility's duties as a public service corporation. (Response at 6 (citing Decision No. 61985 at 2).)

1 United States Constitution. (Response at 6 (citing Decision No. 51727 at 3; Decision No. 52244 at 4;  
 2 Decision No. 53560 at 3; Decision No. 61895 at 2).) Staff reasons that a state has the authority to  
 3 regulate foreign utilities engaged in interstate commerce within the state, as to essentially local  
 4 concerns, but only to the point where the regulation does not impose an undue burden on the foreign  
 5 public service corporation. (Response at 7 (citing *Panhandle E. Pipe Line Co. v. Public Utils.*  
 6 *Comm'n*, 383 N.E.2d 1163 (Ohio 1978).) Staff adds that having more than one state with the power  
 7 to approve or disapprove a single transaction may be sufficient to find an impermissible burden,  
 8 because of the possibility of conflicting or varying regulations. (See Response at 7 (citing *State ex*  
 9 *rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co.*, 217 S.E.2d 543 (N.C. 1975).) Staff notes,  
 10 however, that Garkane does not argue that the Utah PSC's exercise of jurisdiction over Garkane's  
 11 financial transactions constitutes an impermissible burden on interstate commerce and instead cites it  
 12 as a reason for the Commission to disclaim jurisdiction.<sup>12</sup> (Response at 7.) Staff characterizes  
 13 Garkane's as a unique situation because it used to have 90 percent of its members/owners in Utah,  
 14 which, combined with federal constitutional concerns, made it appropriate for the Commission to  
 15 disclaim jurisdiction over Garkane's financial transactions; but, Staff says, Garkane's situation has  
 16 changed and could again change and, thus, the Commission should not disclaim its jurisdiction over  
 17 Garkane's future financial transactions. (*Id.*) Instead, Staff asserts, the Commission should grant  
 18 Garkane's Petition as to the five transactions, but require Garkane to apply to the Commission for  
 19 approval of all future financial transactions so that they may be considered by the Commission on a  
 20 case-by-case basis. (Response at 7-8.)

### 21 Discussion and Resolution

22 46. Garkane premises its position that the Commission's exercise of jurisdiction in this  
 23 context is unconstitutional largely upon AG Op. 69-10. In reviewing AG Op. 69-10, we find the  
 24 following language noteworthy:

25 It is readily apparent from the holdings in the above cases that  
 26 under the statutes of the respective states it was never intended by the  
 legislatures to subject foreign corporations to the jurisdiction of public

27 <sup>12</sup> This is notable, we presume, because at least two of the cases cited by Garkane suggest that any state's exercise of  
 28 jurisdiction is an unconstitutional burden under some circumstances. (See, e.g., *Panhandle*, 383 N.E.2d at 1169; *United*  
*Air Lines*, 207 N.E.2d at 438.)

1 utility commissions in the issuance of securities. It cannot be presumed  
2 that the legislature intended to give the commission such power in the  
3 absence of such a statute and express words to that effect. Such position is  
4 buttressed by the fact that in the Southern Sierras, Fryeburg, Union Pacific  
5 and Missouri Pacific cases it was stated that though the language of the  
6 statute was sufficiently broad to include within its provision foreign  
7 corporations, it was not to be presumed that the legislature intended to  
8 give the commission such power, and in the absence of plain indications to  
9 the contrary, such statutes applied only to domestic corporations.

10 The pertinent parts of the Arizona statutes are almost verbatim to  
11 those which were interpreted in the aforesaid cases and therefore should  
12 receive a similar construction. Hence, a foreign corporation engaged in  
13 interstate commerce need not secure the consent or approval of the  
14 Arizona Corporation Commission to issue stocks and stock certificates,  
15 bonds, notes and other evidences of indebtedness.<sup>13</sup>

16 47. The language quoted above from AG Op. 69-10 is noteworthy for two reasons—first,  
17 because it demonstrates that AG Op. 69-10 is based on analyses performed by other state courts  
18 rather than upon an independent analysis under the controlling constitutional caselaw in existence at  
19 that time and, second, because the AG concluded that the Arizona Legislature had not intended to  
20 apply A.R.S. §§ 40-301 through 40-303 to foreign corporations, in spite of the broad language of the  
21 statutes. The second conclusion is now demonstrably incorrect, as the Arizona Legislature clarified  
22 its intent by carving out an exception to the statutes in 1971, in the form of A.R.S. § 40-301(D). As  
23 Staff noted, the timing of the amendment could lead one to conclude that the Legislature acted at  
24 least partially in response to AG Op. 69-10. We have no evidence to establish whether that was the  
25 case. In any event, however, since AG Op. 69-10, the Arizona Legislature has expressed an intent to  
26 exclude from the applicability of A.R.S. §§ 40-301 through 40-303 only those foreign public service  
27 corporations providing communications service in Arizona whose physical facilities are also used in  
28 providing communications service in interstate commerce. This fact, coupled with the fact that  
Attorney General Opinions are advisory only, leads us to conclude that AG Op. 69-10 does not  
control the outcome of this case.

48. Garkane has also relied upon several prior Commission decisions in which the  
Commission found that exercising jurisdiction over foreign corporations under A.R.S. §§ 40-301  
through 40-303 would impermissibly burden interstate commerce: Decision No. 51727 (January 16,

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<sup>13</sup> AG Op. 69-10 at 7.

1 1981); Decision No. 52244 (June 18, 1981); Decision No. 53560 (May 18, 1983); and Decision No.  
2 61895 (August 27, 1999).

3 49. Decision No. 51727 involved Citizens Utilities Company ("Citizens"), a Delaware  
4 corporation with administrative offices in Connecticut, which provided utility services (including  
5 telephone service) in Arizona and nine other states. In the Decision, among other things, the  
6 Commission found that Citizens was providing telephone utility service in Arizona and owned  
7 physical facilities used in providing interstate telephone service. The Decision concluded both that  
8 A.R.S. §§ 40-301 through 40-303 were not applicable to Citizens' issuance of securities because the  
9 Commission's exercise of jurisdiction over such issuance would create an impermissible burden on  
10 interstate commerce in violation of the Commerce Clause (citing AG Op. 69-10, an Illinois state  
11 court case cited therein, and *State ex rel. Utilities Commission v. Southern Bell Telephone and*  
12 *Telegraph Co.*, 217 S.E.2d 543 (N.C. 1975)) and that Citizens was excluded from the applicability of  
13 the statutes under A.R.S. § 40-301(D). (Decision No. 51727 at 3-4.) No analysis of the Commerce  
14 Clause issue was provided, and no mention of A.R.S. § 40-285 was made.

15 50. Decision No. 52244 dealt with Southern Union Company ("Southern Union"), a  
16 Delaware corporation with its main offices in Texas, which provided natural gas service in Arizona  
17 and three other states. The Commission concluded that A.R.S. §§ 40-301 through 40-303 were not  
18 applicable to the issuance of securities by Southern Union because the Commission's exercising  
19 jurisdiction over such issuances would be an impermissible burden on interstate commerce in  
20 violation of the Commerce Clause. The Commission again cited the same authority cited in Decision  
21 No. 51727 and again did not provide any analysis of the Commerce Clause issue or mention A.R.S. §  
22 40-285.

23 51. Decision No. 53560 dealt with Southwest Gas Corporation ("SW Gas"), a California  
24 corporation engaged in service as a natural gas public utility in Arizona, Nevada, and California. The  
25 Commission concluded that A.R.S. §§ 40-301 through 40-303 were not applicable to the issuance of  
26 securities by SW Gas because the Commission's exercising such jurisdiction would impermissibly  
27 burden interstate commerce in violation of the Commerce Clause. The Commission again cited the  
28 same authority cited in Decision No. 51727 and again did not provide any analysis of the Commerce

1 Clause issue or mention A.R.S. § 40-285.

2 52. Decision No. 61895 dealt with PHASER Advanced Metering Services ("PHASER"), a  
 3 division of Public Service Company of New Mexico ("PNM"), a New Mexico corporation providing  
 4 electric and natural gas service in New Mexico. PHASER held an Arizona CC&N to provide  
 5 competitive retail electric services as a meter service provider. PHASER asserted that the  
 6 Commission's exercise of jurisdiction over PNM's issuance of securities and disposition or  
 7 encumbrance of plant would create an impermissible burden on interstate commerce in violation of  
 8 the Commerce Clause. The Decision referenced Decision Nos. 53560, 52244, and 51727 as well as  
 9 AG Op. 69-10; found that the Commission's Legal Division was of the opinion that Commission  
 10 approval was not required for the issuance of securities by foreign corporations engaged in interstate  
 11 commerce; found that A.R.S. § 40-285(A) would not apply to the extent that PNM intended to sell,  
 12 lease, assign, or encumber assets that were not necessary or useful in the performance of its duties to  
 13 the public in Arizona; and found that the Commission's Affiliated Interest Rules (A.A.C. R14-2-801  
 14 *et seq.*) did not apply to PNM and PHASER because PNM did not generate more than \$5 million of  
 15 revenue in Arizona. The Commission concluded that PNM was not required to obtain Commission  
 16 approval under A.R.S. §§ 40-301 through 40-303 for the issuance of its securities; that A.R.S. § 40-  
 17 285(A) did not apply to assets PNM intended to sell, lease, assign, or encumber that were not  
 18 necessary or useful in the performance of its duties to the public in Arizona; and that when PNM  
 19 became a Class A public utility, the Affiliated Interest Rules would apply to it.

20 53. Because the Commission Decisions cited by Garkane do not set forth any dormant  
 21 Commerce Clause analysis, it is not possible to scrutinize the Decisions' underpinnings to determine  
 22 whether the Decisions would be decided in the same manner today or to use them as a guide in  
 23 analyzing this case. Thus, it is appropriate for the Commission to analyze and decide this case solely  
 24 on its own merits, using the prevailing dormant Commerce Clause analysis under existing caselaw.<sup>14</sup>

25 54. To determine whether a state law violates the dormant Commerce Clause, one first  
 26 must determine whether the law discriminates on its face against interstate commerce, by differently

27 \_\_\_\_\_  
 28 <sup>14</sup> We decline to decide this case on the basis of statutory construction as proposed by Garkane and make no finding as to the comparative specificity or generality of A.R.S. §§ 40-301 through 40-303 and A.R.S. § 40-285.

1 treating in-state and out-of-state economic interests to benefit the former and burden the latter.  
2 (*United Haulers*, 550 U.S. at 338.) If a discriminatory state law is motivated by economic  
3 protectionism, it is virtually per se invalid and can only be redeemed by a showing that the state has  
4 no other means to advance a legitimate local purpose. (*Id.*) If no facial discrimination is found  
5 because in-state business interests are treated the same as out-of-state business interests, the next test  
6 is that set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which is used to analyze the  
7 constitutionality of nondiscriminatory laws that are directed to local concerns, but that have  
8 incidental effects upon interstate commerce. (*United Haulers*, 550 U.S. at 346.) Under *Pike*, such a  
9 law is upheld unless the burden on interstate commerce is clearly excessive in relation to the putative  
10 local benefits. (*United Haulers*, 550 U.S. at 346.)

11 55. With the exception of foreign public service corporations providing communications  
12 services and with facilities used to provide communications services in interstate commerce, which  
13 are expressly excepted in A.R.S. § 40-301(D), A.R.S. §§ 40-301 through 40-303 and A.R.S. § 40-285  
14 on their faces appear to apply equally to all public service corporations, regardless of domicile. The  
15 statutes are facially neutral in that, except for A.R.S. § 40-301(D), they apply the same standards  
16 across the board to all public service corporations, whether domestic or foreign. Thus, it is  
17 appropriate to apply the *Pike* test to determine their constitutionality, which necessitates scrutiny of  
18 the local interests served and a balancing of those interests against any burden on interstate  
19 commerce.

20 56. The local interests served by A.R.S. §§ 40-301 through 40-303 and A.R.S. § 40-285  
21 are great. The United States Supreme Court has recognized that “the regulation of utilities is one of  
22 the most important of the functions traditionally associated with the police powers of the states.”  
23 (*Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm’n*, 461 U.S. 375, 377 (1983).) A.R.S. §§ 40-  
24 301 through 40-303 are designed to ensure that public service corporations do not issue stock, stock  
25 certificates, bonds, notes, or other evidence of long-term indebtedness or create liens on their Arizona  
26 property unless doing so is consistent with the public interest, sound financial practices, and a public  
27 service corporation’s maintaining its ability to provide an appropriate level of service as a utility.  
28 A.R.S. § 40-285 is designed, in pertinent part, to ensure that a public service corporation does not

1 divest itself of or encumber any portion of its plant or system that is necessary or useful in  
2 performing its duties as a utility, so as to prevent it from impairing its service. At their most basic  
3 levels, A.R.S. §§ 40-301 through 40-303 and A.R.S. § 40-285 are designed to ensure that public  
4 service corporations are not able to engage in inadvisable financial dealings that will jeopardize their  
5 ability to provide an appropriate level of service to their customers at just and reasonable rates. They  
6 are designed to protect utility customers from being placed in jeopardy of receiving substandard  
7 service or no service or of paying unjust rates and charges to receive service, where the jeopardy is  
8 caused by inadvisable or unjust financial decisions of the public service corporation. It is  
9 incontrovertible that the local interests served by the statutes are legitimate and of great importance.  
10 These local interests are discussed in more depth below.

11       57. The obvious and inescapable<sup>15</sup> burden created by the statutes, as applied to Garkane, is  
12 the requirement for Garkane to apply to the Commission for approval and to participate in the  
13 Commission's process to obtain approval of any transaction for which Commission approval is  
14 required by A.R.S. §§ 40-301 through 40-303 and/or A.R.S. § 40-285. That burden, in and of itself,  
15 is unremarkable and certainly not sufficient to overcome the very strong local interests served by the  
16 statutes. Garkane already subjects itself, apparently without objection, to a similar process in Utah  
17 before the Utah PSC, which expressly concerns itself with the impact of transactions on service to  
18 and rates and charges for Utah customers. (See SOF Ex. E at 3 (finding "that the proposed increase  
19 in the line of credit will not harm the State of Utah, its citizens, or the Utah customers of Garkane and  
20 is therefore in the public interest").) Thus, if the Commission is not able to scrutinize Garkane's  
21 transactions for their effect on service to and rates and charges for Arizona customers, no entity will  
22 do so.

23       58. The greater potential burden to Garkane, and on interstate commerce, is that the  
24 Commission may say no, even if the Utah PSC may have said yes, or may impose with its approval  
25 conditions that are not required by the Utah PSC. This burden, while speculative, is significant.  
26 Several state supreme courts have concluded that this burden is sufficient to overcome a public  
27

28 <sup>15</sup> This burden is inescapable if the statutes can constitutionally be applied to Garkane.

1 service commission's strong local interests in regulating a foreign public service corporation's  
2 issuance of securities.

3         59.     The Ohio Supreme Court found in *Panhandle Eastern Pipe Line Company v. Public*  
4 *Utility Commission*, 383 N.E.2d 1163 (Ohio 1978), that application of a statute substantially similar  
5 to A.R.S. § 40-301 to a foreign company primarily engaged in the purchase, transmission, and sale of  
6 gas in interstate commerce over eight states; directly serving only three customers in Ohio (all three  
7 industrial or commercial); and with only 4.39 percent of its transmission pipeline in Ohio resulted in  
8 an undue burden on interstate commerce. The court found that national uniformity in this area of  
9 securities issuance was necessary, expressing concern about the potential chaos that could result from  
10 disapproval, delay, and possibly conflicting multistate regulation and asserting that no overriding  
11 local interests to justify the regulation, in the particular factual setting, had been substantiated in the  
12 record. (383 N.E.2d at 1169.) The court stated that protection for investors and the consuming  
13 public was already provided by federal securities laws and Federal Energy Regulatory Commission  
14 ("FERC") scrutiny and that any local interest served was "clearly outweighed by the enormity of the  
15 potential burden on appellant's interstate transmission of natural gas to its customers." (383 N.E.2d  
16 at 1170.) In reaching its decision, the Ohio court seemed to be heavily influenced by *Utilities*  
17 *Commission v. Southern Bell Telephone and Telegraph Co.*, 217 S.E.2d 543 (N.C. 1975) (concluding  
18 that a requirement for prior approval for securities issuance, as applied to a foreign interstate  
19 telecommunications carrier, was an impermissible burden on interstate commerce);<sup>16</sup> *United Air*  
20 *Lines, Inc. v. Illinois Commerce Commission*, 207 N.E.2d 433 (Ill. 1965) (holding that a requirement  
21 for prior approval for securities issuances, as applied to an airline serving 110 cities in 32 states as  
22 well as the District of Columbia and Canada, would be "unjustifiably expensive, time consuming and  
23 burdensome" and would result in chaos if all 17 jurisdictions in which intrastate service was provided  
24

25 <sup>16</sup> The Ohio court in *Panhandle* provided the following quote from the North Carolina decision in *Southern Bell*:  
26 "Any requirement for prior approval, by its very nature, contemplates that such approval may not be  
27 given. If the North Carolina Commission disapproves a proposed securities issue and the Georgia  
28 Commission approves it, Southern Bell is stymied, for it is put in an impossible position. In our view,  
the mere possibility of such a conflict, as applied to Southern Bell under the facts of this case, makes  
Rule R1-16, and the statutes which authorize the rule, a direct regulation and an impermissible burden  
on interstate commerce."

*Panhandle*, 383 N.E.2d at 1167 (quoting *Southern Bell*, 217 S.E.2d at 551).

1 exercised jurisdiction);<sup>17</sup> and *United Air Lines, Inc. v. Nebraska State Railway Commission*, 112  
 2 N.W.2d 414 (Neb. 1961) (holding that no local interests justified the Nebraska Commission's  
 3 asserting its statutory authority to require prior approval of a securities issuance by United Air Lines  
 4 when the airline operated only one 55-mile intrastate route in Nebraska and, further, stating that the  
 5 Nebraska Legislature could not have intended such a result).<sup>18</sup>

6 60. The Ohio case, and the cases discussed therein, while on point, are factually very  
 7 different from the instant case—in which Garkane serves customers in only two states, directly serves  
 8 approximately 1400 Arizona retail customers as an electric utility, and owns significant facilities in  
 9 Arizona that it uses to serve its retail customers in Arizona.<sup>19</sup> The provision of electric utility service

10 <sup>17</sup> The Ohio court in *Panhandle* provided the following quote from the Illinois *United Air Lines* decision:  
 11 “If Illinois can exercise the power to approve or disapprove the issuance of United’s securities because  
 12 it transacts business here, then so also can each of the other sixteen States where United provides  
 13 intrastate service. There would thus be a total of seventeen jurisdictions asserting the power to  
 14 approve or reject any issuance of stock proposed by United. The task of seeking and gaining approval  
 15 from such a number of States would be unjustifiably expensive, time consuming and burdensome, and  
 16 could create delay which would directly impair the usefulness of United’s facilities for interstate  
 17 traffic. Just as important, each independent regulating authority would be required to apply locally  
 18 defined standards of public interest and locally defined rules in order to approve or disapprove or, as  
 19 our statute suggests (sec. 21), to conditionally approve a single issuance of securities. The result, we  
 20 believe, would be chaotic. The issuance of securities is a single, indivisible act. It cannot be  
 21 fractionalized and given portions allocated to specific States.”

22 *Panhandle*, 383 N.E.2d at 1168 (quoting *United Air Lines*, 207 N.E.2d at 438).

23 <sup>18</sup> The Ohio court in *Panhandle* included the following discussion regarding the Nebraska *United Air Lines* case:

24 “But here the applications of United cannot be said to deal with essentially local aspects of United’s  
 25 business. Here the applications go to the very heart of United’s interstate business, that of financing  
 26 purchases of extensive equipment for use in interstate commerce, and the consolidation of United with  
 27 a large interstate air carrier. Local interests are only incidentally involved, if involved at all.”

28 The extent of United’s “local,” intrastate operations was its transportation of persons and property on  
 the 55 mile trip from Lincoln to Omaha amounting to three one-thousandths of one percent of its  
 revenue passenger miles flown during that year. In addition, United’s real and personal property in the  
 state amounted to less than 1/3 of 1 percent of the total value of all its real and personal property.

The court also recognized the disruptive effect the application of such a statute would have if similar  
 requirements were adopted in every state in which United conducted its operations, stating at pages  
 791-792, 112 N.W.2d at page 419:

“ \* \* \* To require an interstate carrier of the size and scope of operation of United to comply with it  
 goes beyond the scope of a reasonable application of a sound legislative requirement. If Nebraska has  
 power to make that requirement, then every other state where United operates could have like power.  
 The result would be unjustifiably expensive, and near chaos in the keeping of accounts of such a  
 carrier. We do not ascribe such a purpose to the Legislature.”

*Panhandle*, 383 N.E.2d at 1168 (quoting *United Air Lines*, 112 N.W.2d at 419, 422).

<sup>19</sup> In Decision No. 70979 (May 5, 2009), Garkane was granted an extension of its Arizona CC&N to include Colorado  
 City, Arizona. Pursuant to an agreement with the Twin Cities Power Authority (“TCPA”), Garkane purchased all of the  
 electrical transmission, substation, and distribution system assets belonging to the TCPA, along with certain materials and  
 supplies, and the right and duty to provide electrical service to the residents and businesses of the “Twin Cities”  
 (Colorado City, Arizona, and Hildale, Utah), in return for \$3 million in cash. (Decision No. 70979 at 4-5.) Garkane  
 stated that TCPA’s books showed that the system had a value of \$7 million. (*Id.* at 6.) The Decision did not break down  
 the TCPA plant assets by their locations in Colorado City and Hildale, but an Exhibit admitted in the case showed that

1 directly to end-user consumers is fundamentally different from providing natural gas for resale, from  
2 operating as a multistate telecommunications carrier, and from operating as a commercial airline with  
3 extensive interstate and even some international routes. The Commission has a much stronger local  
4 interest in the instant case, to protect Garkane's Arizona customers from inadequate service and  
5 unjust and unreasonable rates, than it would under the Ohio scenario with Panhandle or the scenarios  
6 of the cases upon which the Ohio court relied. At least one recent federal appellate decision seems to  
7 support a determination that the *Pike* balancing test favors the exercise of jurisdiction by the  
8 Commission in this context. In *Southern Union Co. v. Missouri Public Service Commission*, 289  
9 F.3d 503 (8<sup>th</sup> Cir. 2002), the Eighth Circuit Court of Appeals upheld a statute requiring a regulated  
10 foreign gas corporation to obtain approval from the Missouri Commission before acquiring the  
11 securities of another utility, even if the other utility did not operate in Missouri. The court recognized  
12 that rate regulation is a complex process, found that a public utility's investments in other companies  
13 can affect the utility's rate of return if investment losses are allocated to the regulated business, and  
14 found that transactions between affiliated utilities can present difficult issues of preferential treatment  
15 and cost allocation. (289 F.3d at 507.) The court found that the administrative record supported the  
16 Missouri Commission's assertion that the statute is part of its rate regulation responsibilities and  
17 disagreed with Southern Union's contention that the Missouri Commission's exercising jurisdiction  
18 under the statute constituted extraterritorial regulation of interstate commerce. (289 F.3d at 508.)  
19 The court stated that although Southern Union's stock purchases no doubt took place from its  
20 corporate headquarters in Texas, the Missouri Commission scrutinized the transactions because of  
21 their potential effect upon the company's regulated rate of return in Missouri, which constituted

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22 Garkane has at least three substations in Arizona (its Colorado City, Fredonia, and Ryan substations). (Docket No. E-  
23 01891A-08-0598, Ex. A-3.) In addition, the map of Garkane's service area admitted in the case, and the map filed as a  
24 compliance item for Decision No. 70979, show that Garkane's Arizona service area is rather expansive, including  
portions of both Mohave and Coconino Counties. (Docket No. E-01891A-08-0598, Ex. S-5; Docket No. E-01891A-08-  
0598, Compliance filing of July 9, 2009.)

25 The Ohio case, and the Illinois and North Carolina cases discussed therein, were asserted by Garkane to support its  
26 position. Garkane also cited *ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228 (6<sup>th</sup> Cir. 1986), in which the 6<sup>th</sup> Circuit  
27 Court of Appeals held that the Michigan Public Service Commission's ("MSPC's") exercising statutory jurisdiction to  
28 require prior approval of a natural gas company's securities was a direct regulation of interstate commerce and an  
unconstitutional burden on interstate commerce because the MSPC's exercise of jurisdiction furthered no important state  
interest, as FERC already approved each financing-related project (and received information on the financing as part of its  
review) and because the natural gas company had no intrastate operations and was not regulated as to its rates or services  
by the MPSC. The *ANR Pipeline* case is clearly distinguishable from the instant case.

1 regulation of a local public utility for the protection of local ratepayers. (*Id.*) Applying the *Pike* test,  
2 the court recognized the long history of utility rate regulation by states and found that Missouri had a  
3 legitimate interest in protecting local ratepayers by regulating the corporate structure of utility  
4 companies. (289 F.3d at 508-09.) The court then found that Southern Union had failed to meet its  
5 substantial burden to prove that the Missouri Commission's denial of its application for blanket  
6 approval of stock purchases resulted in an unconstitutional burden on interstate commerce. (289 F.3d  
7 at 509.) The court also stated that local public utility rate regulation is presumptively valid and that  
8 the United States Supreme Court has rarely invoked *Pike* balancing to invalidate state regulation  
9 under the Commerce Clause.<sup>20</sup> (*Id.*)

10         61. Likewise, in *Baltimore Gas & Electric Co. v. Heintz*, 760 F.2d 1408 (4<sup>th</sup> Cir. 1985),  
11 the Fourth Circuit Court of Appeals upheld a Maryland statute that prohibited a public service  
12 company from taking, holding, or acquiring the capital stock of a public service company of the same  
13 class, organized or existing under or by virtue of the laws of Maryland, without prior authorization by  
14 the Commission; prohibited a stock corporation from taking, holding, or acquiring more than 10  
15 percent of the total capital stock of any public service company organized or existing under or by  
16 virtue of the laws of Maryland except as collateral security and with Commission approval (or as  
17 provided for a public service company of the same class); and deemed a company controlling a  
18 public service company to be a public service company of the same class as the controlled public  
19 service company. The court found that the primary justification for the state's authority to regulate  
20 public utilities under the police power is to ensure the utilities' continued fiscal responsibility and the  
21 continued ability to provide service, to protect consumers. (760 F.2d at 1417.) Applying the *Pike*

22  
23 <sup>20</sup> In applying the *Pike* test, the court stated the following regarding its analysis of Missouri's local interest:

24         On the issue of Missouri's public interest, the Supreme Court has stated that "the regulation of utilities  
25 is one of the most important of the functions traditionally associated with the police power of the  
26 States." *Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983). If anything,  
27 Missouri's interest in assuring a reliable and affordable supply of natural gas for its citizens is stronger  
28 than a State's interest in regulating the corporate governance of its domestic corporations, an interest  
that was sufficient to uphold the Indiana Control Shares Acquisition Act against a Commerce Clause  
challenge in *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 94, (1987). Moreover, the long  
history of utility rate regulation in this country establishes that Missouri has a legitimate interest in  
protecting local ratepayers by regulating the corporate structure of utility companies. See *Baltimore  
Gas*, 760 F.2d at 1424-25.

*Southern Union*, 289 F.3d at 508-09 (internal parallel citations omitted).

1 test, the court found that the statute's burden on interstate commerce included the natural effects of  
 2 prohibiting reorganization into a holding company structure—preventing the company from  
 3 diversifying into unregulated areas, affecting its ability to obtain financing, and prohibiting its  
 4 stockholders from exchanging their shares for shares of its intended holding company. (760 F.2d at  
 5 1425.) The court found this to be a minimal burden on interstate commerce that was outweighed by  
 6 the state's interest in protecting public utility consumers and, thus, that there was not an  
 7 unconstitutional burden on interstate commerce. (760 F.2d at 1425, 1427.) The court did not,  
 8 however, decide whether the statute would apply to the acquisition of stock of a Maryland public  
 9 service company by a foreign corporation, as that issue was not directly before it. (See 760 F.2d at  
 10 1423.) In reaching its conclusion on the interstate commerce issue, however, the court stated:

11 [The statute] is but one subsection of an elaborate public service  
 12 corporation law, one of the primary purposes of which is to regulate the  
 13 rates charged to the public by the utility and which involves a balancing of  
 14 the investor and consumer interests. A necessary adjunct to ensuring the  
 protection of consumers is the authority to regulate the corporate structure  
 of public utilities, and this authority has been recognized as such by the  
 Supreme Court.<sup>21</sup>

15 62. The Seventh Circuit Court of Appeals, in *Alliant Energy Corp. v. Bie*, 330 F.3d 904  
 16 (7<sup>th</sup> Cir. 2003), provided similar reasoning in upholding what the court referred to as “structural  
 17 provisions”—statutes regulating the financial structure and activities of a holding company owning a  
 18 Wisconsin utility—which included a requirement for a public service corporation to obtain prior  
 19 approval to issue securities, regardless of whether the securities would enter interstate commerce.  
 20 (330 F.3d at 916.) The court acknowledged that the requirements could apply to foreign corporations  
 21 and to transactions occurring entirely outside of Wisconsin. (*Id.*) Applying the *Pike* test, the court  
 22 found that the provisions could have a large impact on interstate financial transactions,  
 23 acknowledging that some financial transactions would require prior Commission approval and that  
 24 some would be banned outright. (330 F.3d at 917.) On the benefit side, the court found, is the  
 25 regulation of local public utilities, which is an important interest, “one of the most important  
 26 functions traditionally associated with the police power of the states.” (*Id.* (quoting *Arkansas Elec.*

27  
 28 <sup>21</sup> 760 F.2d 1424 (internal citations and footnote omitted).

1 *Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).) In its analysis, the court  
2 stated:

3           A state is entitled to regulate the financial structure and investments of  
4 companies that control utilities in that state; otherwise it would lose  
5 considerable power to police the rates charged for the provision of utility  
6 service. The burden on interstate commerce, however significant it may be, is  
7 not enough to outweigh this interest.<sup>22</sup>

6           63. We are also mindful of the Arizona Supreme Court's analysis of the asserted  
7 unconstitutionality of the Commission's Affiliated Interest Rules in *Arizona Corporation*  
8 *Commission v. State ex rel. Woods*, 830 P.2d 807 (Ariz. 1992), under the Commerce Clause. The  
9 court applied the *Pike* test and found that the rules were designed primarily to regulate the rates  
10 charged to the public by the utility and that they balance investor and consumer interests. (830 P.2d  
11 at 819.) The court stated that "[t]he Commission must be able to regulate corporate structures to  
12 protect consumers." (*Id.*) For the second prong of the *Pike* test, the court found that the reporting  
13 requirements and approval provisions in the rules do create administrative and transactional burdens  
14 for utility companies and their affiliates, but that the burdens are not clearly excessive in relation to  
15 the local interests served. (830 P.2d at 820.) The court concluded both that the Commission had  
16 authority to promulgate the rules under its constitutional ratemaking power (under Arizona  
17 Constitution, Article 15, Section 3) and that the rules do not violate the Commerce Clause. (*Id.*)

18           64. While we are cognizant that the prior approval provisions in the Affiliated Interest  
19 Rules are not identical to those in A.R.S. §§ 40-301 through 40-303, we find that they are analogous  
20 and thus that consideration of them is helpful in our resolution of this case. Both require prior  
21 approval for specified transactions; both require prior approval regardless of the domicile of the  
22 entity engaging in the transaction; both involve transactions that are generally not severable (or at  
23 least not easily severable) on a state-by-state basis for each state affected by the transaction; and,  
24 perhaps most importantly, both are designed to protect utility ratepayers from disadvantageous utility  
25 financial transactions that could otherwise result in compromised service, or even loss of service, or  
26 in unjust and unreasonable rates.

27  
28 <sup>22</sup> *Alliant*, 330 F.3d at 918.

1           65. The Commission has a very strong interest in overseeing a public service  
2 corporation's financial dealings (particularly those that result in debt or in encumbrance or disposal  
3 of property that is necessary or useful in providing service) because a public service corporation's  
4 capital structure, overall financial stability, and plant assets play an integral role in the public service  
5 corporation's ability to provide reliable and sufficient service to its Arizona customers at just and  
6 reasonable rates. The Commission has an interest in ensuring that a public service corporation has  
7 sufficient equity in its capital structure so that the public service corporation has a vested interest in  
8 the continued success of the utility operation and is not in danger of losing any of its plant assets  
9 through foreclosure or other seizure if it is unable to meet its debt-service obligations. The  
10 Commission likewise has an interest in monitoring a public service corporation's capital structure to,  
11 on the one hand, ensure that the company is not overly laden with debt (which could threaten its  
12 solvency or hinder its operations) while, on the other hand, recognizing that a company with a  
13 substantial amount of higher cost equity (compared to debt) in its capital structure may require a  
14 higher overall revenue requirement, and thus higher rates, if an adjustment is not made in the rate-  
15 setting process to reflect the reduced risk associated with a higher equity ratio.<sup>23</sup> Further, the  
16 Commission has an interest in ensuring that a public service corporation does not enter into a loan at  
17 too high a price (such as through agreeing to pay an excessive interest rate) because the public service  
18 corporation's doing so could jeopardize its financial stability (due to the excessive debt service  
19 payments required) and also because the public service corporation is likely to seek recovery of the  
20 excessive costs of the debt through its rates. The Commission also has a strong interest in overseeing  
21 the purposes for which a public service corporation seeks to obtain capital through debt or equity,  
22 because it is impermissible for a public service corporation to fund routine operations in this manner,

23 \_\_\_\_\_  
24 <sup>23</sup> The Commission generally establishes a public service corporation's rates by applying a fair value rate of return  
25 ("FVROR") to the public service corporation's fair value rate base ("FVRB"), which is based upon the Commission's  
26 determination of the fair value of the public service corporation's property in Arizona (required by Arizona Constitution,  
27 Article 15, Section 14). To determine a public service corporation's FVROR, the Commission calculates the public  
28 service corporation's weighted average cost of capital ("WACC"), which takes into account the public service  
corporation's capital structure (*i.e.*, breakdown of equity and debt), cost of equity, and cost of debt. The Commission then  
applies the FVROR to the FVRB, and adds the product to the public service corporation's authorized total operating  
expenses, to determine the public service corporation's revenue requirement. The inclusion of the costs of debt and  
equity in the determination of a public service corporation's WACC is one reason the Commission has a very strong local  
interest in regulating the public service corporation's issuances of securities (both related to debt and equity).

1 and a public service corporation's doing so anyway can result in the public service corporation's  
 2 failure to apply to the Commission for a rate case in a timely fashion, although the public service  
 3 corporation's rates are not sufficient to sustain its ongoing operations. This failure can result in an  
 4 emergency rate case<sup>24</sup> and in rate shock.<sup>25</sup> The Commission further has a strong interest in ensuring  
 5 that a public service corporation engages in financial transactions only with reputable entities and,  
 6 preferably, through arm's length transactions, because a public service corporation otherwise is in  
 7 danger of entering into unwise, illegal, or even unnecessary transactions that can harm the public  
 8 service corporation's financial stability. Finally, for obvious reasons, the Commission has a very  
 9 strong interest in ensuring that a public service corporation does not dispose of or otherwise divest  
 10 itself of or unnecessarily encumber any of the plant assets necessary or useful in its provision of  
 11 utility service to its customers.<sup>26</sup>

12         66. The Arizona Supreme Court in *Woods* acknowledged in considering the Affiliated  
 13 Interest Rules that opponents had argued that the rules could be applied even to transactions  
 14 involving a utility affiliate with no corporate connection to Arizona other than through its corporate  
 15 affiliation with the Arizona utility, (*see* 830 P.2d at 819), but ultimately determined that "[t]he  
 16 Commission must be able to regulate corporate structures to protect consumers" and that the burden  
 17 on interstate commerce was not sufficient to outweigh the local interest, (830 P.2d at 819-20).

18         67. The courts have determined that the Commission's requiring prior approval under the  
 19 Affiliated Interest Rules for a merger involving a foreign public service corporation is not an  
 20 unconstitutional burden on interstate commerce, and we believe that the courts would similarly find  
 21 that the Commission's requiring prior approval under A.R.S. §§ 40-301 through 40-303 for a foreign  
 22 public service corporation to obtain a \$15 million loan or to issue \$15 million in stock, or under  
 23 A.R.S. § 40-285 for a foreign public service corporation to encumber all of its necessary or useful

24 <sup>24</sup> An emergency rate case results in expenses to the public service corporation, the public service corporation's  
 25 customers, the Commission, and Staff.

26 <sup>25</sup> Rate shock is more likely to occur when a public service corporation has failed to apply for a rate case for an  
 27 excessively long period of time.

28 <sup>26</sup> For example, if a public service corporation transfers to another entity (possibly with a leaseback arrangement) a  
 piece of property that the public service corporation regularly uses or accesses to provide service, and the entity to which  
 it was transferred loses ownership of the property through bankruptcy or some other means, the public service  
 corporation's ability to serve its customers could be detrimentally impacted until it is able to replace or again obtain  
 access to the property, perhaps at greater cost to itself, which it will ultimately seek to pass on to its ratepayers.

1 system assets, is not an unconstitutional burden on interstate commerce in light of the Commission's  
2 very strong local interests. As a result, we conclude that it is not *per se* an unconstitutional burden on  
3 interstate commerce for the Commission to exercise its jurisdiction under A.R.S. §§ 40-301 through  
4 40-303 or under A.R.S. § 40-285 as against a foreign public service corporation engaged in interstate  
5 commerce. We are aware that this represents a departure from several prior Commission Decisions  
6 discussed herein, but believe that this departure is both necessary and appropriate in light of the  
7 dormant Commerce Clause jurisprudence discussed herein.<sup>27</sup>

8 68. We also find that this conclusion is the correct one regarding the Commission's  
9 exercise of jurisdiction over Garkane's future transactions subject to regulation under A.R.S. §§ 40-  
10 301 through 40-303 and A.R.S. § 40-285. The Arizona Court of Appeals has determined that A.R.S.  
11 § 40-285 was enacted to prevent "looting" of a utility's facilities and impairment of service to the  
12 public and that it requires Commission approval only for necessary or useful property so that public  
13 service corporations are spared the expense of administrative proceedings when disposing of useless  
14 or unnecessary property. (*Babe Investments v. Arizona Corp. Comm'n*, 189 Ariz. 147 (App. 1997)  
15 (citing *American Cable Television v. Arizona Pub. Serv.*, 143 Ariz. 273, 277 (App. 1983)).)  
16 Applying the *Pike* test to A.R.S. § 40-285, it is evident that the state interest served by A.R.S. § 40-  
17 285 is even stronger than that served by A.R.S. §§ 40-301 through 40-303—because Commission  
18 approval is required only for disposal or encumbrance of property that is necessary or useful in the  
19 performance of a public service corporation's duties to the public in Arizona. It is equally evident  
20 that there often may not be the same type of potential conflict in this context as exists under A.R.S.  
21 §§ 40-301 through 40-303 because of the restricted scope of the Commission's approval authority.<sup>28</sup>

22 We also note that the Commission has recently determined in numerous decisions that A.R.S. § 40-  
23 285(A) applies to restrain disposal and encumbrance of assets necessary or useful in providing  
24 service in Arizona, even when the public service corporation in question is a foreign public service  
25 corporation whose physical facilities are used in providing communications in interstate commerce

26 <sup>27</sup> It is a well-settled proposition of administrative law that when an agency deviates from its prior policies or decisions,  
27 it must provide a reasoned explanation for doing so. (*See, e.g., Secretary of Agriculture v. United States*, 347 U.S. 645  
(1954).)

28 <sup>28</sup> We are cognizant that this is not the case for Garkane, as Garkane's assets, regardless of state of location or when  
acquired, have all been pledged collectively as security for its financings.

1 and is thus exempt from the applicability of A.R.S. §§ 40-301 through 40-303. (*See, e.g.*, Decision  
2 No. 71785 (July 12, 2010); Decision No. 71707 (June 3, 2010); Decision No. 71324 (Oct. 30, 2009);  
3 Decision No. 70982 (May 5, 2009).) These recent decisions involving A.R.S. § 40-285(A) are  
4 actually consistent with the PHASER decision cited by Garkane, as the Commission did not conclude  
5 in that decision that A.R.S. § 40-285(A) did not apply to PNM's disposal or encumbrance of assets,  
6 only that approval under A.R.S. § 40-285(A) did not apply to the assets that PNM intended to sell,  
7 lease, assign, or encumber that were not necessary or useful in the performance of its duties to the  
8 public in Arizona. (*See* Decision No. 61895 at 3.) In that decision, the Commission also concluded  
9 that the Affiliated Interest Rules would apply to PNM when it became a Class A utility.

10         69. Ordinarily, when faced with unauthorized long-term debt, the Commission orders that  
11 the debt be converted to paid-in capital or equity and, occasionally, even that the public service  
12 corporation pay a penalty for violating the Commission's statutes. The present situation with  
13 Garkane is unique, however, in that Garkane failed to apply for approval of its financings not through  
14 negligence or an intent to violate the law, but because it believed (based on AG Op. 69-10, prior  
15 Commission decisions, and the advice of counsel as informed by communications with the  
16 Commission's Legal Division) that the law did not require it to apply for approval. While it may not  
17 have been reasonable for Garkane to rely on AG Op. 69-10 or on the opinion of the then-Chief  
18 Counsel, as AG Opinions are only advisory, and the Commission can act only through its Decisions,  
19 it was reasonable for Garkane to rely on the prior Commission decisions discussed herein in deciding  
20 that it was not required to obtain Commission approval of the five transactions, at least under A.R.S.  
21 §§ 40-301 through 40-303.<sup>29</sup>

22         70. Staff has indicated that it would be difficult for Staff to scrutinize the five transactions  
23 for approval at this time. (*See* Tr. of January 11, 2010, Proc. Conf. at 19.) Staff has also suggested  
24 verbally in this matter that it would be reasonable for the Commission essentially to ratify the five  
25 transactions and then prospectively deal with Garkane's future transactions on a case-by-case basis.

26 \_\_\_\_\_  
27 <sup>29</sup> Garkane should have applied for a declaratory adjudication rather than simply assuming the outcome of such a  
28 proceeding, but its assumption as to the outcome of such a proceeding (at least as to A.R.S. §§ 40-301 through 40-303)  
was understandable at the time. Garkane appears not to have considered A.R.S. § 40-285 until asked about it in the  
context of its CC&N extension case resulting in Decision No. 70979.

1 (*Id.* at 13-14.) Rather than ratifying the five transactions, which we believe would of necessity  
2 involve our finding that the transactions met the standards under A.R.S. §§ 40-301 through 40-303  
3 and A.R.S. § 40-285, we find that it is reasonable and appropriate and in the public interest to find  
4 that it is unnecessary for the Commission to take any action regarding the five transactions. This is  
5 not intended and should not be construed as a finding that the five transactions are void under A.R.S.  
6 §§ 40-303(A) or 40-285(A). It merely reflects the Commission's position that the public interest at  
7 this time will not be best served by requiring Garkane, Staff, and the Commission to expend  
8 additional resources revisiting the five transactions. We will, however, order Garkane to apply to the  
9 Commission for approval of all future transactions for which approval is required under A.R.S. §§  
10 40-301 through 40-303 and A.R.S. § 40-285.

#### 11 CONCLUSIONS OF LAW

12 1. Garkane is a public service corporation within the meaning of Article XV of the  
13 Arizona Constitution and A.R.S. Title 40, Chapter 2.

14 2. The Commission has jurisdiction over Garkane and the subject matter of its Petition  
15 for a Declaratory Order.

16 3. It is not *per se* an unconstitutional burden on interstate commerce, under U.S. Const.  
17 Art. I, § 8, Cl. 3, for the Commission to exercise its jurisdiction under A.R.S. §§ 40-301 through 40-  
18 303 or under A.R.S. § 40-285 as against a foreign public service corporation engaged in interstate  
19 commerce.

20 4. It is not an unconstitutional burden on interstate commerce, under U.S. Const. Art. I, §  
21 8, Cl. 3, for the Commission to exercise its jurisdiction under A.R.S. §§ 40-301 through 40-303 or  
22 under A.R.S. § 40-285 as against Garkane, in relation to Garkane's future transactions for which  
23 approval is required under those statutes.

24 5. It is reasonable and appropriate and in the public interest to require Garkane to apply  
25 to the Commission for approval of each future transaction for which approval is required under  
26 A.R.S. §§ 40-301 through 40-303 and A.R.S. § 40-285.

27 6. It is reasonable and appropriate and in the public interest for the Commission not to  
28 take any action as to the five transactions described herein. This inaction is not intended and should

1 not be construed as a finding that the five transactions are void under A.R.S. § 40-303(A) or A.R.S. §  
2 40-285(A).

3 7. It is not necessary for the Commission to hold an evidentiary hearing before issuing  
4 this Decision.

5 **ORDER**

6 IT IS THEREFORE ORDERED that Garkane Energy Cooperative, Inc. shall apply to the  
7 Commission for approval of each future transaction for which approval is required under A.R.S. §§  
8 40-301 through 40-303 and A.R.S. § 40-285.

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1 IT IS FURTHER ORDERED that it is not *per se* an unconstitutional burden on interstate  
2 commerce, under U.S. Const. Art. I, § 8, Cl. 3, for the Commission to exercise its jurisdiction under  
3 A.R.S. §§ 40-301 through 40-303 or under A.R.S. § 40-285 as against a foreign public service  
4 corporation engaged in interstate commerce.

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

6 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.  
7

8 CHAIRMAN

COMMISSIONER

9  
10 COMMISSIONER

COMMISSIONER

COMMISSIONER

11  
12 IN WITNESS WHEREOF, I, ERNEST G. JOHNSON,  
13 Executive Director of the Arizona Corporation Commission,  
14 have hereunto set my hand and caused the official seal of the  
15 Commission to be affixed at the Capitol, in the City of Phoenix,  
16 this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

17 \_\_\_\_\_  
18 ERNEST G. JOHNSON  
19 EXECUTIVE DIRECTOR

20 DISSENT \_\_\_\_\_

21 DISSENT \_\_\_\_\_  
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1 SERVICE LIST FOR: GARKANE ENERGY COOPERATIVE, INC.

2 DOCKET NO.: E-01891A-09-0377

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