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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

Arizona Corporation Commission

DOCKETED

JAN 24 2011

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

Docket No. E-01891A-09-0377

**GARKANE'S EXCEPTIONS TO  
RECOMMENDED OPINION AND  
ORDER**

GALLAGHER & KENNEDY, P.A.  
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Garkane Energy Cooperative, Inc. ("Garkane" or the "Cooperative") files these exceptions to the Recommended Opinion and Order dated January 13, 2011 (the "ROO"). The Cooperative requests that the Commission modify and approve the ROO with the amendments requested in Exhibit 5, attached.

Garkane agrees with Administrative Law Judge Harpring's conclusion that Garkane's past debt and encumbrance transactions do not require any action by the Commission. However, for both legal and practical reasons, Garkane strongly disagrees with the ROO's recommendation that Garkane obtain approval from the Commission for its future secured financing transactions.

Legally, this requirement runs directly counter to several prior decisions of this Commission and numerous court decisions. Practically, the ROO would impose upon Garkane a second time-consuming and expensive financing review process in Arizona. This, despite the fact that, under the more-than-decade-old Utah-only review system, Garkane has consistently supplied safe and reliable service to its Arizona customers without increasing rates for many years and while maintaining the Cooperative's financial stability. Also, if the ROO is approved, the Commission and its Staff will be burdened with additional unnecessary regulatory process

1 and expense precisely at a time when the Commission is seeking to streamline, make more  
2 efficient and economize its oversight.

3 **No Need For Additional Regulatory Oversight**

4 The ROO contains an extensive defense of the need for regulatory oversight of a public  
5 utility's financial dealings,<sup>1</sup> which leaves the impression that without this Commission's review,  
6 Garkane's transactions will be unregulated. That's simply not the case. The ROO also  
7 acknowledges that Garkane's home state of Utah—where about 90% of its customers and most  
8 of its assets are located—reviews all of its loan transactions.<sup>2</sup> So, the issue is not whether  
9 regulatory oversight is required. The issue is how many times these loans need to be reviewed  
10 by a regulatory commission and its professional staff.

11 For the past 10-plus years, Garkane has sought and received the approval of its debt  
12 transactions in its home state from the Public Service Commission of Utah ("Utah PSC") after  
13 reviews by its Division of Public Utilities.<sup>3</sup> But (consistent with four Arizona Commission  
14 decisions on the subject spanning 1981 to 1999), Garkane has not filed duplicative approval  
15 requests with this Commission.<sup>4</sup> As a result, both the Cooperative and its customer owners, as  
16 well as the Commission and its Staff, have saved tens of thousands of dollars that would have  
17 been required by multiple regulatory reviews.

18 Not only has this procedure made economic sense, it has advanced the goal of making the  
19 regulatory process more efficient. And, most importantly, this decade-old practice has produced  
20 excellent results. That is not just Garkane's opinion, but also the conclusions of Staff recited in  
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22 <sup>1</sup> ROO, pp. 21 and 28-29.

23 <sup>2</sup> ROO, p. 2.

24 <sup>3</sup> ROO, pp. 6-7.

<sup>4</sup> ROO, pp. 2-3.

1 the Commission Order approving its re-acquisition of the Colorado City, Arizona territory 18  
2 months ago:

- 3 • Garkane has provided safe, reliable and adequate service for many years in  
4 Arizona.<sup>5</sup>
- 5 • “Garkane has had no rate increases since 1998.”<sup>6</sup>
- 6 • Garkane is financially sound, with a current margins and equity to total assets  
7 level of approximately 36%.<sup>7</sup>
- 8 • When the citizens of Colorado City, Arizona voted overwhelmingly in 2008 for  
9 Garkane to resume service to them, the Cooperative not only was able to do so,  
10 but (1) with a residential rate decrease of more than 18% and (2) with an  
11 improvement in system reliability and quality of service.<sup>8</sup>

12 Obviously, there is no need for the Commission to change its longstanding policy of  
13 withholding review of Garkane’s debt issues. The ROO’s recommendation to the contrary will  
14 only burden the Commission with unnecessary, duplicative reviews; increase both Cooperative  
15 and Commission costs; reverse a longstanding policy which has worked well; and produce no  
16 positive consumer benefits.

17 **The Commission Should NOT REVERSE Its Prior Decisions**

18 In addition to the negative practical implications just discussed, duplicative regulatory  
19 oversight of Garkane violates Commission precedent and well-established principles of  
20 constitutional law.<sup>9</sup>

21 <sup>5</sup> Decision No. 70979, p. 13.

22 <sup>6</sup> *Id.*; see Decision No. 61150.

23 <sup>7</sup> Decision No. 70979, p. 13.

24 <sup>8</sup> Decision No. 70979, pp. 4 (Finding 16), 12 (Finding 39) and 14 (Finding 52).

<sup>9</sup> The legal issues raised herein focus on Commission precedent and constitutional considerations rather than  
statutory interpretation, because the ROO expressly disclaims statutory interpretation as the basis for its decision.  
*See* ROO, p. 19, n. 14. Moreover, as Garkane pointed out in its Petition and Reply, assuming *arguendo* that the  
Legislature’s amendment of A.R.S. § 40-301 in 1971 was intended to assert jurisdiction over all foreign utilities  
other than those engaged in communications services, such an intent cannot trump the Commission’s post-1971  
rulings or constitutional precedent.

1 The ROO correctly acknowledges several key, undisputed facts: Garkane is a foreign  
2 public service corporation engaged in interstate commerce.<sup>10</sup> Garkane's ability to raise capital  
3 through loans secured by standard form, blanket mortgages is an essential part of its interstate  
4 operations.<sup>11</sup> As the ROO states, requiring Garkane to seek approval from multiple<sup>12</sup> regulatory  
5 agencies poses a "significant" burden on interstate commerce.<sup>13</sup> Finally, on four prior occasions  
6 from 1981 to 1999, this Commission has consistently held that exercising jurisdiction over  
7 foreign corporations under A.R.S. §§ 40-301 through 40-303 would impermissibly burden  
8 interstate commerce.<sup>14</sup>

9 These facts should end the inquiry. However, in order to reach a different result, the  
10 ROO inexplicably concludes that the Commission's prior decisions failed to analyze the  
11 Commerce Clause and, therefore, the Commission may now ignore its established precedent.<sup>15</sup>  
12 This statement is simply not correct. Each of the Commission's prior rulings stated that they  
13 were based explicitly on constitutional Commerce Clause considerations. In all four, the  
14 Commission concluded that if it exercised jurisdiction over the ability of foreign utilities to raise  
15 capital, "it would create an impermissible burden on interstate commerce in violation of the  
16 United States Constitution."<sup>16</sup> In the 1999 PHASER decision, the Commission also stated it

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18 <sup>10</sup> ROO, pp. 1-2.

<sup>11</sup> ROO, pp. 3-4.

<sup>12</sup> Both Staff and Judge Harpring emphasize that Garkane does not object to the jurisdiction of the Utah PSC and imply that Garkane should be equally unconcerned about Arizona's oversight. The key distinction is that Utah is Garkane's home state. Therefore, under the Commerce Clause, Utah has a *prima facie* overriding local interest in Garkane's affairs which Arizona does not have.

<sup>13</sup> ROO, pp. 21-22, Finding 58.

<sup>14</sup> ROO, pp. 18-19.

<sup>15</sup> ROO, p. 19, ¶ 53. The ROO also attempts to distinguish the facts of the four prior rulings from Garkane's situation. However, the factual comparison actually demonstrates that regulation of Garkane would have an even greater burden on interstate commerce than the prior utilities due to the fact that Garkane actually transmits electricity across state lines to serve Arizona and Utah members, whereas most of the utilities involved in the Commission's prior rulings merely conducted business and owned separate facilities in different states. They did not engage, as the Cooperative does, in commerce directly over state lines.

<sup>16</sup> Decision No. 51727 at 3; Decision No. 52244 at 4; Decision No. 53560 at 3; and Decision No. 61895 at 2.

1 relied upon “the opinion of the Commission’s Legal Division that Commission approval is not  
2 required for the issuance of securities by foreign corporations that are engaged in interstate  
3 commerce.”<sup>17</sup> Consistent with that statement, a few months before issuance of the PHASER  
4 decision, Garkane’s counsel discussed and confirmed with the then Chief Counsel of the Legal  
5 Division that the Commission did not have jurisdiction “over Garkane’s debt and lien matters.”<sup>18</sup>  
6 The Commission and Legal Division’s analysis remains valid, persuasive and binding precedent  
7 today and is equally applicable to both A.R.S. § 40-301, *et seq.*, and A.R.S. § 40-285.<sup>19</sup>  
8 Accordingly, the Commission is not free to simply ignore its own prior rulings, as the ROO  
9 suggests.<sup>20</sup>

10 In a somewhat contradictory back-up position, the ROO admits that requiring Garkane to  
11 submit future financing transactions to the Commission for approval is “a departure from several  
12 prior Commission Decisions,” but, nonetheless, argues that the departure is justified by the need  
13 to protect Arizona customers.<sup>21</sup> There are several fallacies in this argument, including, but not  
14 limited to, the fact that it is based on the unsupported assumption that the current oversight  
15 exercised by the Utah PSC is insufficient to protect Arizona’s local interest.

16 The past ten years of operation—without duplicative review by Arizona—show this  
17 concern to be unfounded. The primary purpose served by Arizona’s statutes is “to ensure that

18 <sup>17</sup> Decision No. 61895 at 2.

19 <sup>18</sup> Petition for Declaratory Order, Exhibit D, attached hereto as Exhibit 1.

20 <sup>19</sup> As Garkane explained in its Petition, because the statutes relate to the same subject matter, A.R.S. § 40-285 must  
21 be interpreted consistently with A.R.S. §§ 40-301 through 40-303. Additionally, to the extent that the two conflict,  
22 A.R.S. § 40-285 (which generally addresses all transactions that could involve the transfer of property rights) must  
23 yield to the more specific A.R.S. § 40-301.A (which specifically concerns notes and liens on property within this  
24 State). Accordingly, since the Commission repeatedly and correctly held in its prior decisions that jurisdiction under  
A.R.S. §§ 40-301 through 40-303 would violate the Commerce Clause, then that same ruling must apply with  
respect to A.R.S. § 40-285.

<sup>20</sup> See *Lemoyne-Owen College v. National Labor Relations Bd.*, 357 F.3d 55, 61 (D.C. Cir. 2004) (administrative  
agency was not free to “simply ignore” prior analogous cases decided differently); *Hernandez v. Ashcroft*, 345 F.3d  
824, *Grace Petroleum Corp. v. FERC*, 815 F.2d 589, 591 (10<sup>th</sup> Cir. 1987) (regulatory agency may not “casually  
ignore” or “gloss over” prior precedent).

<sup>21</sup> ROO, p. 30.

1 public service corporations are not able to engage in inadvisable financial dealings that will  
2 jeopardize their ability to provide an appropriate level of service to their customers at just and  
3 reasonable rates.”<sup>22</sup> The approvals issued by the Utah PSC confirm that Utah engages in the  
4 same analysis and is concerned about the same customer impacts as this Commission.<sup>23</sup>  
5 Accordingly, it is neither “necessary” nor “reasonable”<sup>24</sup> to assume that the only way to  
6 accomplish the purpose of Arizona’s statutes is to require Garkane to seek Commission review  
7 and approval of all future transactions.

8 The ROO also improperly analyzes the second element of the dormant Commerce Clause  
9 test by downplaying the significant impact that the duplicative approval requirement will have on  
10 interstate commerce. The ROO reasons that the approval requirement alone is “unremarkable”  
11 and the potential for inconsistent regulatory orders is “speculative.” Again, the ROO’s rationale  
12 is faulty.

13 Garkane has presented four cases by four different jurisdictions which have concluded  
14 that requiring companies to submit finance applications to more than one regulatory agency  
15 constitutes an undue burden on interstate commerce that cannot be overcome by a state’s interest  
16 in protecting its local customers from inadvisable transactions:

- 17 • *United Air Lines, Inc. v. Illinois Comm. Com’n.*, 207 N.E.2d 433, 438 (Ill. 1965):  
18 The Supreme Court of Illinois held that “the possibility of conflict, or dual  
19 regulation” was sufficient to overcome the state’s interest in regulating United  
20 even though the airline’s executive offices were in Illinois and Illinois residents  
21 were regular customers.

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22 <sup>22</sup> ROO, p. 21.

23 <sup>23</sup> See, e.g., Utah PSC Orders in Docket Nos. 96-506-01, 07-028-01 and 10-028-02, attached hereto as Exhibits 2, 3  
24 and 4, respectively.

25 <sup>24</sup> The ROO acknowledges that departure from prior Commission decisions is warranted only where necessary and  
supported by a reasoned explanation. See ROO, p. 30, n. 27.

- 1 • *State v. Southern Bell Tel. & Tel. Co.*, 217 S.E.2d 543, 550 (N.C. 1975): The  
2 Supreme Court of North Carolina held that, even though more than 15% of the  
3 phone company's customers were North Carolina residents, the utility was  
4 exempt from the state's regulation, because the "possibility" of conflicting  
5 regulations creates an "impermissible burden on interstate commerce."
- 6 • *Panhandle E. Pipe Line Co. v. Public Util. Comm'n of Ohio*, 383 N.E.2d 1163,  
7 1169 (Ohio 1978): The Supreme Court of Ohio held that the natural gas company  
8 did not have to show an actual conflict between Ohio regulation and that of any  
9 other state; the mere "possibility" of conflicting regulation was sufficient to  
10 violate the Commerce Clause.
- 11 • *ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228 (6<sup>th</sup> Cir.1986): The Federal  
12 Court of Appeals for the Sixth Circuit held that two affiliated natural gas  
13 companies, one of whom did more than 50% of its business in Michigan, were not  
14 required to obtain that state's approval prior to issuing securities, because the  
15 minimal, if any, benefit of duplicative approval did not outweigh the burden on  
16 interstate commerce.

17 Three of these cases were decided prior to the Commission's issuance of its 1981 and 1983  
18 orders disclaiming finance jurisdiction over Citizens, Southern Union and Southwest Gas. All of  
19 the cases were decided prior to issue of the Commission's disclaimer order in the 1999 PHASER  
20 matter.

21 The ROO fails to cite a single authority that undermines or contradicts these cases.  
22 Rather, the ROO relies upon case law analyzing whether affiliated interest rules violate the  
23 Commerce Clause.<sup>25</sup> These cases clearly address a different species of regulation. Affiliated  
24 interest rules focus on transactions between affiliated companies or diversifications that could  
disproportionately or improperly shift losses and costs to, or impact negatively, regulated  
utilities. The burden that these rules place on interstate commerce by restricting the transfer of  
stock and the ability to diversify is significantly less than the ROO's proposed restriction on  
Garkane's ability to obtain the capital that is essential to its very ability to conduct interstate

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<sup>25</sup> ROO, pp. 24-27.

1 operations. Accordingly, the affiliated interest rule cases are neither on point nor instructive on  
2 the issue at hand.<sup>26</sup> Likewise, the extensive discussion of the impact that financing can have on a  
3 utility's profits and rate of return<sup>27</sup> is out of place and wholly inapplicable in light of the fact that  
4 Garkane is a nonprofit cooperative owned by its customers which does not seek a profit on  
5 investment.<sup>28</sup>

6 Finally, the Commission should carefully consider the potential adverse consequences of  
7 abruptly reversing its three-decade-old policy of not requiring duplicative finance reviews. The  
8 Commission's 1999 PHASER decision is instructive. PHASER was a division of Public Service  
9 Company of New Mexico interested in providing competitive retail electric services as a meter  
10 service provider in Arizona. It sought and obtained a Commission ruling (Decision No. 61895)  
11 that Arizona approval was not required for stock and note issuance under A.R.S. §§ 40-301  
12 through 40-303. It is likely that PHASER would not have remained interested in Arizona market  
13 participation if that ruling had not been issued. Entry of this ROO would likely preclude  
14 issuance of such decisions by this Commission in the future.

15 Whether the subject be electric competition, renewable installation, energy efficiency  
16 programs or other undertakings, often it is foreign public service corporations that have the  
17 expertise and resources which the Commission would like to see enter the Arizona market.  
18 Adoption of this ROO would have a significant chilling effect on the interest of such providers to  
19 do business in Arizona.

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21 <sup>26</sup> The ROO also cites several recent Commission Decisions applying A.R.S. § 40-285 to foreign utilities. ROO,  
22 p. 31. However, none of these decisions mention nor analyze the Commerce Clause and, therefore, do not provide  
guidance on that issue.

23 <sup>27</sup> ROO, pp. 28-29.

24 <sup>28</sup> For the same reason, the Affiliated Interest Rules that were approved in *Arizona Corp. Comm'n v. Woods*, 171  
Ariz. 286, 830 P.2d 807 (1992) are also inapplicable to Garkane's circumstances. The Commission specifically  
limits their application to "investor owned utilities," thus excluding customer-owned cooperatives. R14-2-801.8.

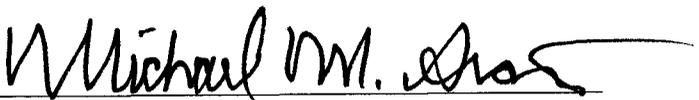
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**CONCLUSION**

Based on the foregoing, Garkane respectfully requests that the Commission modify and approve the ROO with the amendments requested in Exhibit 5.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of January, 2011.

GALLAGHER & KENNEDY, P.A.

By 

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Jennifer A. Cranston  
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Attorneys for Garkane Energy Cooperative, Inc.

**Original and 13 copies** filed this 24<sup>th</sup> day of January, 2011, with:

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

**Copies** of the foregoing delivered this 24<sup>th</sup> day of January, 2011, to:

Commissioner Gary Pierce, Chairman  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007

Commissioner Bob Stump  
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10703-4/2649157v2

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**EXHIBIT 1**

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April 8, 1999

Christopher Kempley, Esq.  
Legal Division  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, Arizona 85007

Re: Garkane Power Association, Inc. ("Garkane")

Dear Chris:

As we discussed, the purpose of this letter is briefly to memorialize the conclusions we reached this week on lack of Commission jurisdiction over Garkane's debt and lien matters.

Garkane is a Utah nonprofit cooperative corporation. It owns facilities and supplies electricity in both Arizona and Utah. More than 90% of its member owners are in Utah.

Garkane is currently in the process of applying for an RUS guaranteed loan. Because Garkane is a foreign corporation engaged in interstate commerce which owns facilities in more than one state, Commission approval is not required because of interstate commerce clause restrictions. Op. Atty. Gen. No. 69-10.

I appreciate your attention to this matter. If I have misunderstood or misstated our conclusions, please call. Otherwise, Garkane will not seek Commission approval for this current or any future loan application.

Very truly yours,



By  
Michael M. Grant

cc: Mr. Carl Albrecht

#735993 v1 - Kempley

**EXHIBIT 2**

DOCKETED

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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In the Matter of the Application )	<u>DOCKET NO. 96-506-01</u>
of DESERET GENERATION & TRANSMIS- )	
SION CO-OPERATIVE, BRIDGER VALLEY )	
ELECTRIC ASSOCIATION, DIXIE-ESCA- )	
LANTE RURAL ELECTRIC ASSOCIATION, )	
INC., FLOWELL ELECTRIC ASSOCIATION, )	
INC., GARKANE POWER ASSOCIATION, )	<u>REPORT AND ORDER</u>
MOON LAKE ELECTRIC ASSOCIATION, )	
INC., and MOUNT WHEELER POWER, INC.)	
for Authority to Issue Securities. )	

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ISSUED: July 3, 1996

By the Commission:

On April 30, 1996, Applicants Deseret Generation & Transmission Co-operative and its members, Bridger Valley Electric Association, Dixie-Escalante Rural Electric Association, Inc., Flowell Electric Association, Inc., Garkane Power Association, Inc., Moon Lake Electric Association, Inc. and Mount Wheeler Power, Inc. filed an application seeking authority pursuant to Utah Code Ann. § 54-4-31 to issue certain securities in connection with a general compromise and workout transaction ("Proposed Transaction"). The Applicants requested Informal Adjudication of the Application under R746-110, Rules of the Public Service Commission, and represented that the matter was anticipated to be unopposed and uncontested. The Applicants requested expedited consideration of the Application, on the grounds that a forbearance agreement with Deseret's principal creditors required regulatory approval prior to July 1, 1996. Finally, Applicants requested a waiver by the Commission of the 20-day tentative period under R746-110-2, for good cause shown. The Applicants have submitted a

summary of the proposed transaction, sworn statements from each of the Applicants, certified documents and other information to establish the facts pertinent to the Application. The Applicants also responded to data requests from the Division of Public Utilities and met informally with representatives of the Division of Public Utilities, the Committee of Consumer Service and Commission Staff.

FINDINGS OF FACT

1. Deseret Generation & Transmission Co-operative ("Deseret") is a wholesale electric generation and transmission cooperative. Deseret's six members, Bridger Valley Electric Association, Dixie-Escalante Rural Electric Association, Inc., Flowell Electric Association, Inc., Garkane Power Association, Inc., Moon Lake Electric Association, Inc. and Mount Wheeler Power, Inc. (collectively, "Members"), are rural electrical cooperatives that provide electric services at retail to their members/owners in the States of Utah, Wyoming, Arizona, Colorado and Nevada.
2. For several years, Deseret has faced financial difficulties. In 1990-1991, Deseret entered into an Agreement Restructuring Obligations ("ARO") with its major creditors ("Creditors"), including the United States of America, Department of Agriculture, acting

through the Rural Utility Services (fka Rural Electrification Administration) ("RUS"), National Rural Utilities Cooperative Finance Corporation and National Cooperative Services Corporation (collectively, "CFC"), and Power Limited Partnership, as successor to Shell Leasing Company ("Owner/Lessor").

3. Deseret's primary assets include a leasehold interest in the personal property assets that comprise the Bonanza Power Plant representing generation rights of approximately 400 MW, an ownership interest in the Hunter II Power Plant representing generation rights of approximately 100 MW ("Hunter II"), transmission lines and rights including a 345 kV line from Bonanza to the Mona substation and three 138 kV lines to substations at Upalco, Vernal and Southwest Rangely, several non-member power sales contracts, wholesale power contracts with its Members, and certain rights relating to the Deserado coal mine and railroad (including a note receivable).
4. Deseret's obligations to its Creditors fall into two general categories:
  - a. Debt. Deseret has debt of approximately \$700 million to RUS and approximately \$120 million to CFC, secured pari passu by the bulk of Deseret's assets, including Hunter II, transmission assets,

non-member contracts, member contracts, Deserado mine assets and real property interests underlying the Bonanza Power Plant (the "Mortgaged Assets").

- b. Leases. Deseret owes approximately \$750 million net present value in lease-related obligations to the Owner/Lessor ("Lease Obligations") for certain personal property assets and contract rights that comprise and are associated with the Bonanza Power Plant ("Lease Assets"). CFC holds a first priority security interest against the Lease Assets as a result of CFC financings and guarantees on behalf of the Owner/Lessor.
5. Deseret has undergone a significant restructuring of its operations, including a reduction of nearly 40% of its workforce with a projected reduction in annual operating, maintenance and production costs of more than \$4 million. Deseret also solicited and oversaw a restructuring of the operations of its coal supplier, Western Fuels-Utah, Inc., including a reduction of nearly 50% of the workforce and a projected reduction of about 30% in coal production costs representing nearly \$10 million per year.
6. Deseret is in default under certain of its agreements. Deseret, the Members, CFC and RUS have negotiated the

Proposed Transaction to effect a general restructuring of Deseret's obligations. RUS and CFC agreed to forbear exercising certain remedies against Deseret based on obtaining necessary regulatory approvals before July 1, 1996. Deseret and the Members thus requested approval prior to July 1, 1996. More recently, Applicants have indicated that, due in large part to the anticipated receipt of timely regulatory approvals, RUS and CFC have agreed to extend their forbearance to September 6, 1996.

7. As part of the Proposed Transaction, RUS has agreed to compromise all obligations owed to RUS from Deseret or the Members on account of Deseret or the existing wholesale power contracts ("RUS Obligations") in exchange for a payment of approximately \$250 million. CFC will receive an assignment of all such obligations owed to the RUS or the right to collect all amounts owed or received on account of those obligations, together with existing security interests in the Mortgaged Assets.
8. As part of the Proposed Transaction, the Members have agreed to pay CFC \$55 million, collectively, in exchange for the right to receive a share of all amounts collected or received on account of the RUS Obligations. Each Member's share of the \$55 million payment is reflected on Exhibit "A" and will be funded by loans from CFC ("Member

Compromise Loans"), which will be amortized over a period not to exceed 30 years, will bear interest at rates equal to CFC's standard loan program rates to be established at the time of closing, and will be secured by a lien on substantially all of the Member's assets. These loans will cease to be obligations of the Members after 12 years, assuming no default. CFC will also extend a line of credit to each Member ("Member Lines of Credit") which can be used to make the minimum loan payments or for other general corporate purposes.

9. As part of the Proposed Transaction, each Member will also refinance, over a period of up to approximately one year, the Member's loans and obligations currently owed to RUS, through loans from CFC totaling approximately \$50 million for all Members collectively ("Member Refinancing Loans"). The approximate amount of each Member's Member Refinancing Loans is reflected on Exhibit "A". The Member Refinancing Loans will be amortized over a period of up to 35 years, will bear interest at rates equal to CFC's standard loan program rates to be established at the time of closing, and will be secured by a lien against substantially all of the Member's assets.
10. Deseret's current rate structure produces a high incremental rate that discourages load growth. As part

of the Proposed Transaction, Deseret will implement a new Member wholesale rate structure ("New Rate Structure") designed by Deseret and the Members to provide a competitive incremental rate, to promote load growth and otherwise to enhance the ability of the Members to compete for new and existing loads. The New Rate Structure will also include an integration of Deseret resources and Member resources, resulting in efficiencies and elimination of conflicting incentives between Deseret and the Members.

11. Deseret's current all-requirements Member contracts provide that Member rates must be set at a level sufficient to repay all of Deseret's indebtedness without regard to the viability of such rates in today's competitive marketplace. As part of the Proposed Transaction, new Member wholesale power contracts (or amendments to the existing contracts) will be executed between Deseret and its Members that will eliminate the connection between Member rates and Deseret debt. Members will be required to purchase their electric requirements from Deseret under the new contracts but Member rates will be adjusted based on changes in production costs and competitive market forces rather than based on the level of Deseret debt.

12. Deseret's obligations to its Creditors, including the Lease Obligations, will be restructured as part of the Proposed Transaction to provide that minimum debt service payments will be consistent with cash-flow projections derived from Deseret's cash flow model. CFC will also extend a \$20 million line of credit to Deseret ("Deseret Line of Credit"), which can be used for debt service and general corporate purposes.
13. The Applicants analyzed various alternatives to the Proposed Transaction, including proposals to purchase all or portions of Deseret's assets or to merge with another power supply cooperative. Applicants have represented that these alternatives were rejected because they failed to provide a return acceptable to the Creditors, failed to provide a rate structure acceptable to the Members, or otherwise failed to satisfy the needs of Deseret, the Members and the Creditors.
14. The Applicants represent that reorganization of Deseret under federal bankruptcy laws has also been evaluated as an alternative. Deseret, under the direction of its Board, has not elected to seek bankruptcy reorganization in light of the significant costs and delay, rate risks and other uncertainties attendant to such a course of action.

15. While the anticipated payments from Deseret to the Members on account of the RUS Obligations (which are to be used to pay the Member Compromise Loans) cannot be assured, a number of factors mitigate the risk to the Members, including the following: (I) payments from Deseret on account of the RUS Obligations, together with capital credits from CFC, are projected to equal or exceed the minimum payments due CFC by the Members with respect to the Member Compromise Loans (ii) the Member Lines of Credit will be available to Members in the event of a shortfall; (iii) Deseret's debt and lease obligations will be restructured to be consistent with Deseret's cash flow projections; (iv) Deseret's payment obligations even after closing may be adjusted to reflect potential revenue changes relating to certain large loads or the sale of Deseret assets; (v) Deseret intends to enter into a power marketing arrangement that will help generate cash flow sufficient to meet Deseret's revised payment obligations for at least the first five years; (vi) The Deseret Line of Credit can be used to avoid default as a result of any short term or temporary financial difficulties; (vii) assuming no default, twelve years after closing each Member will have an option to transfer its interest in the RUS Obligations to CFC in

full discharge of the Member's Member Compromise Loans; and (viii) each Member will receive the benefit of security in certain of Deseret's assets to help offset any potential loss.

16. Prompt implementation of the New Rate Structure is very important to the Members. Increased sales will be a key to reducing per unit distribution expenses under the New Rate Structure. The Members believe that the New Rate Structure will enable the Members to better retain existing loads and to attract new loads.
17. Each Applicant has represented that its articles of incorporation require approval by its Board of Directors in order to issue promissory notes and security agreements in connection with the Proposed Transaction. Each Applicant has represented that its Board of Directors has passed a resolution approving in concept the issuance of securities and the granting of security interests in connection with the Proposed Transaction. Prior to execution, each Applicant's Board of Directors will be required to approve all final documents and agreements to be executed by that Applicant.
18. The Division of Public Utilities filed its Memorandum in this docket dated June 14, 1996, recommending approval of the Application. The Division's Memorandum recommends

that the Applicants be required to inform the Commission and the Division each time an Applicant accesses a line of credit to service the restructured debt. The Division's Memorandum also recommends that Deseret be required to certify by affidavit that the final restructuring plan adopted is not materially different from the restructuring plan filed with the Commission and to provide an Executive Summary of the final restructuring plan, including copies of executed restructuring documents and contracts.

CONCLUSIONS OF LAW

1. Each of the Applicants is a public utility subject to the jurisdiction of this Commission.
2. All legal and factual prerequisites and requirements for the issuance of this Order have been satisfied.
3. Participation by each of the Applicants in the Proposed Transaction as described herein is in the public interest. Although not wholly without risk, the Members' wholesale supply will be more stable, rate risks will be reduced and competitive incremental rates will be available. Deseret and its Members should thus be in a strengthened position to provide reliable, reasonably priced services to consumers.
4. Participation by each Applicant in the Proposed

Transaction, including the proposed issuance of securities and security interests in connection therewith, in exchange for the projected benefits of the same is (i) for lawful and proper purposes; (ii) within each Applicant's corporate powers; (iii) consistent with the public interest, sound financial practices and the proper performance of each Applicant's public service; and (iv) designed to enhance and not impair each Applicant's ability to perform its public services.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

1. Deseret and each of the Members is hereby authorized to participate in the Proposed Transaction as generally described in this Report and Order, or on other terms and conditions substantially consistent with this Report and Order.
2. Each of the Members is hereby authorized to issue securities in the form of promissory notes to CFC for the Member Compromise Loans in approximately the amounts specified in Exhibit "A," and to provide security interests in its assets to secure repayment of the same as generally described in this Report and Order, or on other terms and conditions substantially consistent with this Report and Order.

3. Each of the Members is hereby authorized to issue securities in the form of promissory notes to CFC for the Member Refinancing Loans in approximately the amounts specified in Exhibit "A," and to provide security interests to secure repayment of the same as generally described in this Report and Order, or on other terms and conditions substantially consistent with this Report and Order.
4. Each Member is hereby authorized to secure a perpetual secured line of credit from CFC in an amount approved by its Board of Directors, ranging up to \$7,000,000, and to provide security interests to secure repayment of the same. Each Member shall inform the Commission and the Division each time it accesses its line of credit for purposes of servicing its Member Compromise Loans or Member Refinancing Loans.
5. Deseret is hereby authorized to issue securities in the form of agreements to restructure its obligations under terms and conditions generally as set forth herein, including promissory notes, replacement notes, security interests and other documents.
6. Deseret is hereby authorized to secure a line of credit from CFC in an amount of approximately \$20,000,000 and to provide security interests to secure repayment of the

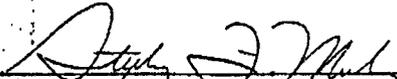
same, all under terms and conditions generally as described in this Report and Order. Deseret shall inform the Commission and the Division each time it accesses its line of credit for purposes of servicing its restructured debt obligations.

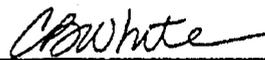
7. Each Applicant is hereby authorized to execute such documents and take such actions as may be reasonably necessary or convenient to the completion of the Proposed Transaction.
8. Deseret shall certify by affidavit that the final restructuring plan adopted is substantially consistent with the restructuring plan filed with the Commission. Deseret shall also provide an Executive Summary of the final restructuring plan, together with copies of executed restructuring documents and contracts.
9. Nothing in this Order shall be construed to obligate the State of Utah to pay or guarantee in any manner whatsoever any securities authorized, issued, assumed or guaranteed hereunder.
10. For good cause shown, the 20 day tentative period under R746-110-2 is hereby waived.

DOCKET NO. 96-506-01

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DATED at Salt Lake City, Utah, this 3rd day of July,  
1996.

  
\_\_\_\_\_  
Stephen F. Mechem, Chairman

  
\_\_\_\_\_  
Constance B. White, Commissioner

  
\_\_\_\_\_  
Clark D. Jones, Commissioner

Attest:

  
\_\_\_\_\_  
Julie Orchard  
Commission Secretary

EXHIBIT "A"

<u>Member</u>	<u>Approximate Member Refinancing Loans (Before Discount)</u>	<u>Approximate Share of Member Compromise Loans</u>
Bridger Valley	\$ 6,808,474.00	\$ 6,844,565
Dixie-Escalante	\$ 2,831,937.00	\$12,473,092
Flowell	\$ 232,185.39	\$ 1,519,725
Garkane	\$12,978,576.00	\$ 7,428,575
Moon Lake	\$18,870,444.41	\$15,958,391
Mount Wheeler	\$21,249,546.00	\$10,775,651

**EXHIBIT 3**

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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In the Matter of the Application of Garkane  
Energy Cooperative, Inc. for Authority to  
Issue Securities

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DOCKET NO. 07-028-01

REPORT AND ORDER APPROVING  
ISSUANCE OF SECURITIES

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ISSUED: November 2, 2007

SYNOPSIS

No detriment to the public interest appearing, the Commission granted the authority sought by the Applicant with certain conditions.

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By the Commission:

PROCEDURAL HISTORY

On August 31, 2007, Applicant Garkane Energy Cooperative, Inc. filed an application seeking authority pursuant to *Utah Code Ann.* § 54-4-31 to issue certain securities in the form of a long-term Loan Agreement and a related Secured Promissory Note in the amount of up to approximately \$15,000,000.00 (the "Long-Term Loan Facility"). Applicant requested Informal Adjudication of the Application under R746-110, Rules of the Public Service Commission, and represented that the matter was anticipated to be unopposed and uncontested. The Applicant further requested expedited consideration of the Application on the grounds that its current line of credit is expected to expire shortly and would, in all events, be insufficient for its anticipated cash requirements under anticipated work plans, and that sufficient advance time will be needed prior to year end to provide necessary evidence to Garkane's secured creditor that the necessary approval(s) have been obtained to circulate the executed documents and this

DOCKET NO. 07-028-01

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Report and Order to give effect to the Long-Term Loan Facility in timely fashion. Finally, Applicant requested a waiver by the Commission of the 20-day tentative period under R746-110-2 for good cause shown on the basis that the Long-Term Loan Facility, in order to provide maximum protection and flexibility to Applicant, must be final and fully enforceable in full force and effect at all times without being subject to any appeal or protests in order to allow Applicant to meet its anticipated financing needs.

Applicant has submitted copies of the relevant documents, certified and verified pursuant to the Verified Application, and other information to establish the facts pertinent to the Application.

On October 25, 2007, the Division of Public Utilities filed a memorandum detailing its investigation of the Application and recommending approval of the same.

Since no meritorious opposition has been raised, and Applicant has made out its *prima facie* case in support of the Application, there appears no reason to convene an evidentiary hearing on the matter. Accordingly, the Commission, having been fully advised in the premises, enters the following Report, containing Findings of Fact, Conclusions of Law, and the Order based thereon.

FINDINGS OF FACT

1. In October, 1996, Applicant entered into a \$2,000,000.00 line of credit (the "Existing Line of Credit") with the National Rural Utilities Cooperative Finance Corporation ("CFC") which can be used for general corporate purposes. The Commission gave Applicant authorization to enter into and to secure the Existing Line of Credit pursuant to its Report and

DOCKET NO. 07-028-01

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Order dated July 3, 1996 in Docket No. 96-506-01. Applicant states it has not drawn on the Existing Line of Credit to date.

2. In recent months, Applicant has undertaken a number of capital improvement projects which will upgrade and replace aging utility plant and equipment, and extend facilities for the delivery of electric power and service within its service area. Applicant has already begun to construct additional facilities to increase the reliability of the system and represents that it will require additional source(s) of long-term financing to sustain these projects as well as other planned improvements. Applicant represents that its financing requirements in the coming four years will easily exceed the \$2,000,000 that would be available to it under the Existing Line of Credit, and anticipates that its financing requirements could exceed that amount as soon as within the next 30-60 days.

3. The Long-Term Loan Facility will supplement the Existing Line of Credit, and can be used as an additional source of funds required for Applicant's electric work plan(s) as Applicant may choose to make use of it. The Long-Term Loan Facility can also be used as a source of financing for potential acquisition(s) of portions of electric distribution assets currently owned by municipal systems in Utah and Arizona located in areas currently certificated to be served by Applicant, but will only be used for such purposes if and when: (i) all required and necessary approvals have been obtained to complete any such acquisition(s); and (ii) Applicant's Board of Directors has approved all material terms and conditions to any such acquisitions.

4. The relevant terms of the Long-Term Loan Facility primarily include the following:

- a. The maximum cumulative amount of borrowing (each such borrowing an "Advance") authorized under the terms of the Long-Term Loan Facility will be approximately \$15,000,000.00;
- b. The initial term of the Long-Term Loan Facility will be forty (40) years from the date of the Secured Promissory Note to be executed and delivered by Applicant to CFC to evidence the Long-Term Loan Facility (the "Maturity Date");
- c. The amortization period ("Amortization Period") of each Advance under the Replacement Facility will be thirty-five (35) years, unless specified otherwise in writing at Garkane's election at the time of each such Advance; provided that in no event will the Amortization period for any Advance extend beyond the Maturity Date;
- d. The initial period under which Advances may be made will be for five (5) years from the date of the Long-Term Loan Facility;
- e. For each Advance under the Long-Term Loan Facility, Applicant may designate either a Fixed or a Variable interest rate. For those portions of Advances which Applicant elects a Fixed Rate, the relevant rate of interest will be such fixed interest rate(s) that CFC publishes and notifies Applicant in advance are offered from time to time for CFC's loans to its members which are similarly classified pursuant to CFC's policies and procedures then in effect. For those portions of Advances which Applicant elects a Variable Rate, the relevant rate of interest will be the rate established by CFC for variable interest rate long-term loans similarly classified pursuant to the long-term loan programs established by CFC from time to time.

DOCKET NO. 07-028-01

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f. The Long-Term Loan Facility will be secured by a first-lien mortgage on Applicant's electric system and assets.

g. Payments under the Long-Term Loan Facility will be due quarterly in February, May, August, and November, unless agreed otherwise between the parties. All amounts outstanding and unpaid as of the Maturity Date will be due and payable on the Maturity Date.

5. Applicant states it has analyzed and considered various alternatives to the proposed Long-Term Loan Facility, including accessing funds available under the Existing Line of Credit. The terms, options, and rates available for long-term financing under the Long-Term Loan Facility are materially better, and more advantageous to Applicant, than the terms of repayment for draws submitted under the Existing Line of Credit. Applicant has represented that the proposed Long-Term Loan Facility represents the best available means available to Applicant to acquire a flexible financing source for ongoing capital projects as well as a potential source of financing for future acquisitions of certain municipal power systems, should such acquisitions occur. The Long-Term Loan Facility was approved by Applicant's Board of Trustees at a regularly scheduled meeting of the board during July, 2007.

CONCLUSIONS OF LAW

1. It is in the public interest to convert this matter to an informal proceeding, pursuant to § 63-46b-4(3), Utah Code Annotated 1953, as amended.
2. Applicant is a public utility subject to the jurisdiction of this Commission.
3. This Commission has jurisdiction over the Application pursuant to the provisions of § 54-4-31(1), UCA 1953, as amended.

DOCKET NO. 07-028-01

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4. Execution and delivery of the Long-Term Loan Facility as described herein is in the public interest.

5. Pursuant to Rule 746-110-2, good cause exists to waive the 20-day tentative period for an order issued in an informally adjudicated proceeding. Accordingly, this order will become effective on the date of issuance.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

1. This matter be, and it is, converted to an informal proceeding pursuant to §63-46b-4(3), UCA 1953, as amended.

2. Garkane Energy Cooperative, Inc., is hereby authorized to execute and to secure the Long-Term Loan Facility in the amount of approximately \$15,000,000, on substantially the same terms and conditions set forth in this Report and Order.

3. Applicant is hereby authorized to execute and deliver such documents and take such actions as may be reasonably necessary or convenient to the completion of the Proposed Long-Term Loan Facility.

4. Nothing in this Order shall be construed to obligate the State of Utah to pay or guarantee in any manner whatsoever any securities authorized, issued, assumed, or guaranteed hereunder.

5. The authority granted herein is effective the date of this Order.

Pursuant to Utah Code §§63-46b-12 and 54-7-15, agency review or rehearing of this order may be obtained by filing a request for review or rehearing with the Commission

DOCKET NO. 07-028-01

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within 30 days after the effective date of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code §§63-46b-14, 63-46b-16 and the Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 2<sup>nd</sup> day of November, 2007.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard  
Commission Secretary  
GH55204

**EXHIBIT 4**

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

-----  
In the Matter of the Application of Garkane )  
Energy Cooperative, Inc. for Authority to )  
Issue Securities )  
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DOCKET NO. 10-028-02  
REPORT AND ORDER

ISSUED: January 11, 2011

SYNOPSIS

*With this Report and Order, the Commission approves the Application of Garkane Energy Cooperative, Inc. for Authority to Issue Securities.*

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By The Commission:

On December 3, 2010, Garkane Energy Cooperative, Inc. (Company) filed an application seeking authority pursuant to Utah Code Ann. § 54-4-31 to issue certain securities in the form of a long-term Loan Agreement and a related Secured Promissory Note in the amount of up to approximately \$15,000,000.00 (the "Loan Facility"). The Company requested informal adjudication of the Application under Utah Admin Code. R746-110 and represented that the matter was anticipated to be unopposed and uncontested. The Company further requested a waiver by the Commission of the 20-day tentative period under R746-110-2 for good cause shown on the basis that the Company desires to finalize the Loan Facility prior to anticipated expiration of the offer for long-term financing currently being held open by the National Rural Utilities Cooperative Finance Corporation ("CFC"), the Company's long term lender which requires, as a condition to providing such additional long term financing, that the Loan Facility must be final and fully enforceable in full force and effect without being subject to any appeal or protests in order to finalize such financing.

DOCKET NO. 10-028-02

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The Company has submitted copies of the relevant documents, certified and verified pursuant to the Verified Application, and other information to establish the facts pertinent to the Application.

BACKGROUND

The Company asserts that it has experienced growth in its system and demand on its cash and equivalents due to several factors, several of which were previously noted in the Commission's Report and Order dated November 18, 2010 in docket No. 10-028-01; furthermore, the Company asserts that it anticipates further financing requirements related to growth on its system as well as replacement and improvements required to its utility plant. The nature of these demands are related to developments that include but are not limited to:

- The acquisition of the Twin Cities Power System;
- Growth in Net Plant and Equipment since 2005 at an average annual rate of 12.16%;
- Anticipated requirements to upgrade transmission and/or distribution facilities to meet planned growth on the Company's system during the next several years.

The relevant terms of the Loan Facility are as set forth therein, and primarily include the following:

- a) The maximum amount of borrowing authorized under the terms of the Loan Facility will be approximately \$15,000,000.00;
- (b) The Maturity Date of the Loan Facility will be no later than the date that is forty (40) years from the date of the Loan Facility (the "Maturity Date");

DOCKET NO. 10-028-02

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- (c) The amortization period of each Advance under the Loan Facility will be determined as follows:
- (i) for each Advance with respect to which the Company elects, at or prior to the date of such Advance, an amortization method for repayment of principal of such Advance, such period as specified in writing by the Company at the time of each such Advance, *provided* that in no event may the Amortization period for any such Advance extend beyond the earlier of thirty-five (35) years from the date of such Advance or the Maturity Date; or
  - (ii) for any Advance with respect to which no amortization method is selected by the Company, a period ending on the date thirty-five (35) years from the date of such Advance, or the Maturity Date, whichever is earlier.
- (d) For each Advance under the Loan Facility, the Company must designate either a Fixed or a Variable interest rate. Such rates are determined and will be set to equal, such fixed or variable rate(s) established by CFC for long-term loans similarly classified pursuant to programs, policies and procedures of CFC then in effect, or such other rate(s) as may be agreed to by the parties in writing at the time of an Advance under the Loan Facility. Interest rates for any such Advance may be converted, at the Company's option, without a fee, pursuant to the terms of the Loan Facility Agreement. Conversion of a variable interest rate to fixed rates for any Advance(s) shall generally occur at a fixed rate or rate(s) of interest offered by or otherwise agreed to in writing by CFC in effect on the date of the Conversion Request; conversions from a fixed interest rate to a variable rate

DOCKET NO. 10-028-02

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require a payment to CFC any applicable conversion fee calculated pursuant to CFC's long-term loan policies as established from time to time for similarly classified long-term loans.

- (e) The Loan Facility will be secured by a first-lien mortgage on the Company's electric system and assets pursuant to the terms of a Restated Mortgage and Security Agreement by the Company, as Mortgagor, in favor of CFC, as Mortgagee, which lien and security interest shall be further evidenced and established by one or more Financing Statement(s) and/or Security Agreements to be executed and filed in appropriate office(s) where the Company does business or owns property.
- (f) Payments under the Loan Facility will be due quarterly in February, May, August, and November, unless agreed otherwise between the parties. All amounts outstanding and unpaid as of the Maturity Date will be due and payable on the Maturity Date.

The Company asserts that it has analyzed and considered various alternatives to the Loan Facility and that the Facility represents the best available means available to the Company to obtain long-term financing for ongoing and future anticipated capital projects and other corporate purposes. The Loan Facility was approved by the Company's Board of Trustees at a regularly scheduled meeting of the board on November 29, 2010.

On December 23, 2010, the Division of Public Utilities (Division) submitted their recommendation for approval of the application. The Division based its recommendation on its review of the Application and attachments, audited annual financial reports for the Company

DOCKET NO. 10-028-02

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from 2005 through 2009 as well as interim financial information through October 2010, and the Company's 2010 Work Plan Summary identifying 22 planned capital projects. The Division also spoke with Stan Chappell, the Company's Finance Manager, about details of the Application and other questions regarding the Company's financial statements. The Division confirmed the details of the Application through its investigation. It concluded that the Company's loan request will allow it to fund its future capital improvement projects and will be able to continue to meet its obligations. It recommended approving the Application.

The Commission finds that all legal and factual prerequisites and requirements for the issuance of this Order have been satisfied. The execution and delivery of the Loan Facility as in the Application is in the public interest. The issuance and/or renewal of securities and security interest in connection with the Loan Facility is (i) for lawful and proper purposes; (ii) within the Company's corporate powers; (iii) consistent with the public interest, sound financial practices and the proper performance of the Company's public service; and (iv) designed to enhance and not impair the Company's ability to perform its public service.

ORDER

The Commission orders as follows:

1. This matter is converted to an informal matter and is adjudicated informally;
2. The Application is granted;
3. The 20-day tentative period under Utah Admin. Code R746-110-2 is hereby waived and this is a final order;
4. Pursuant to Sections 63G-4-301 and 54-7-15 of the Utah Code, an aggrieved party may request agency review or rehearing of this Order by filing a written request

DOCKET NO. 10-028-02

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with the Commission within 30 days after the issuance of this Order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission does not grant a request for review or rehearing within 20 days after the filing of the request, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a petition for review with the Utah Supreme Court within 30 days after final agency action. Any petition for review must comply with the requirements of Sections 63G-4-401 and 63G-4-403 of the Utah Code and Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 11<sup>th</sup> day of January, 2011.

/s/ Ruben H. Arredondo  
Administrative Law Judge

Approved and confirmed this 11<sup>th</sup> day of January, 2011, as the Report and Order of the Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard  
Commission Secretary  
G#70360

**EXHIBIT 5**

## Exhibit 5

### Garkane Requested Amendments to the ROO

At page 16, l. 22 – page 32, l. 10, delete Findings 46-70 and insert:

46. On four prior occasions, the Commission has found that exercising A.R.S. §§ 40-301 through 40-303 jurisdiction over foreign corporations who are engaged in interstate commerce “would create an impermissible burden on interstate commerce in violation of the United States Constitution.” See 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).

47. The Commission’s prior decisions were consistent with well-established constitutional case law holding that the administrative burdens and the potential for inconsistent decisions resulting from requiring public service companies to seek and obtain financing approval from multiple states outweighs the local benefits and interests that a state may have in regulating the transactions. See *United Air Lines, Inc. v. Illinois Comm. Com’n.*, 207 N.E.2d 433 (Ill. 1965); *State v. Southern Bell Tel. & Tel. Co.*, 217 S.E.2d 543 (N.C. 1975); *Panhandle E. Pipe Line Co. v. Public Util. Comm’n of Ohio*, 383 N.E.2d 1163 (Ohio 1978); *ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228 (6<sup>th</sup> Cir. 1986).

48. The same Commerce Clause analysis applies to A.R.S. § 40-285, because Commission regulation of a foreign utility’s ability to obtain financing with an associated mortgage facility would result in the same undue burden on interstate commerce.

49. Disclaiming jurisdiction under A.R.S. § 40-285 is also consistent with principles of statutory interpretation. Because A.R.S. § 40-301, *et seq.*, and A.R.S. § 40-285 relate to the same subject matter, they should be interpreted consistently and harmoniously. Also, the more general provisions of A.R.S. § 40-285 (governing all transactions that could involve the transfer of property rights) should yield to the more specific A.R.S. § 40-301.A (which specifically addresses notes and liens on property within Arizona).

50. In addition to the precedent established by the Commission’s prior rulings, we find that the specific facts presented in this record support our decision to continue to refrain from requiring Garkane to submit and obtain Arizona approval of its secured transactions. Specifically, in 2009, the Commission issued Decision No. 70979, which referenced Staff’s finding that Garkane had provided safe, reliable and adequate service for many years in Arizona. (Decision No. 70979 at 13.) Staff also found “Garkane has had no rate increases since 1998” and is financially sound with “a current margins and equity

to total assets level of approximately 36 percent.” (*Id.*) Finally, Staff stated that Garkane’s service to Colorado City would lower residential rates by more than 18% and would provide an improvement to the system reliability and the quality of service. (*Id.* at 12 and 14.) In light of Garkane’s history of financial stability and continued ability to provide safe, reliable and adequate service to its Arizona customers, we do not see a need for additional regulatory oversight. We also note that Garkane is required to submit and receive approval of its debt transactions from the Public Service Commission of Utah, which commission and its professional staff analyze the transactions to ensure that they are consistent with the public interest, financially sound and designed to enhance and not impair the utility’s ability to serve its customers.

51. As to Garkane’s prior financial transactions, we find that it is reasonable and appropriate and in the public interest for the Commission to have refrained from asserting jurisdiction over those as well.

At page 32, l. 12 – page 33, l. 4, delete Conclusions of Law 1-7 and insert:

1. Garkane is a foreign public service corporation doing business in the State of Arizona and is engaged in interstate commerce.
2. Garkane is not required to obtain Commission approval pursuant to A.R.S. §§ 40-301 through 40-303 for the issuance of its securities, including stock, bonds, notes and other evidence of indebtedness, as well as liens on its property located in Arizona.
3. Garkane is not required to obtain Commission approval pursuant to A.R.S. § 40-285 of its financial transactions that are secured by encumbrances or mortgages over Garkane’s necessary and useful assets.
4. Garkane did not need to submit or obtain approval from the Commission in connection with its prior financial dealings. Accordingly, the Commission takes no action in connection with those prior transactions.
5. It is not necessary for the Commission to hold an evidentiary hearing before issuing this Decision.

At page 33, l. 6 – page 34, l. 4, delete the Ordering Paragraphs and insert:

IT IS THEREFORE ORDERED that the petition of Garkane for declaratory order is granted consistent with Conclusions of Law Nos. 2, 3 and 4.

IT IS FURTHER ORDERED that this Order shall become effective immediately.