OPEN MEETING ITEM

ORIGINAL

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

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ARIZONA CORPORATION COMMISSION

2011 APR 12 P 3: 44

AZ CORP COMMISSION
DOCKET CONTROL

DATE: APRIL 12, 2011

DOCKET NO.: E-04204A-08-0589

TO ALL PARTIES:

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

MARSHALL MAGRUDER VS. UNS ELECTRIC, INC.
(COMPLAINT)

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:

APRIL 21, 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:

APRIL 27, 2011 and APRIL 28, 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.

Arizona Corporation Commission
DOCKETED
APR 12 2011
DOCKETED BY

ERNEST G. JOHNSON
EXECUTIVE DIRECTOR

**BEFORE THE ARIZONA CORPORATION COMMISSION**

COMMISSIONERS

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

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|---|---|
| IN THE MATTER OF THE FORMAL COMPLAINT OF MARSHALL MAGRUDER FILED WITH THE ARIZONA CORPORATION COMMISSION ON DECEMBER 5, 2008. | DOCKET NO. E-04204A-08-0589<br>DECISION NO. _____<br>**ORDER** |

Open Meeting
April 27 and 28, 2011
Phoenix, Arizona

**BY THE COMMISSION:**

* * * * * * * * * *

Having considered the entire record herein and being fully advised in the premises, the Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

## FINDINGS OF FACT

### Procedural History and Background

1. On December 5, 2008, Marshall Magruder filed a Formal Complaint with the Commission against UNS Electric, Inc. ("UNSE" or "Company"), in which he alleged that UNSE failed to comply with provisions of various Commission Decisions, including: 1) Decision No. 70360 (May 27, 2008) (UNSE's 2007 rate case; Docket No. E-04204A-06-0783); 2) Decision No. 61793 (June 29, 1999) (dismissed complaint brought by the City of Nogales against Citizens Utilities ("Citizens");[1] and 3) Decision No. 62011 (November 2, 1999) (approved settlement agreement

[1] In 1998, the City of Nogales filed a formal complaint against Citizens alleging that numerous electric outages caused by Citizens' failure to adequately maintain its transmission and generation back-up capacity resulted in economic damages. The City of Nogales and Citizens entered into a settlement agreement and the City filed a Motion to Dismiss the Complaint with prejudice. As part of the settlement, Citizens agreed to: 1) fund direct payments of $15 to all customers in Santa Cruz County; 2) provide a neutral claims resolution procedure; 3) fund low income relief for Nogales residents; 4) fund Santa Cruz County economic development efforts; and 5) fund 4-year, interest free loans for Santa Cruz County high school graduates. In Decision No. 61793, the Commission dismissed the Complaint and determined to address the service quality issues and Citizens' planned upgrades to its Santa Cruz County system in the then-pending "Citizens Separation Dockets." UNSE subsequently acquired Citizens' electric assets in Santa Cruz County.

between Citizens and the Commission's Utilities Division ("Staff") regarding Citizens' Plan of Action ("POA") to rectify service problems in Santa Cruz County).[2]

2. Mr. Magruder's Complaint alleges that UNSE, which acquired Citizens' electric assets in Santa Cruz County in 2003, is in violation of Commission Orders which he believes required: (1) the replacement of poles and cables pursuant to the 1999 Settlement between Citizens and the City of Nogales;[3] (2) the funding of student loans under the POA; and (3) UNSE to modify its procedures related to notifying all customers on life support (not just low income customers) about providing information to local authorities for use during outages.

3. On December 29, 2008, UNSE filed a Response to Mr. Magruder's Complaint.

4. On January 6, 2009, Mr. Magruder filed a Reply to UNSE's Response.

5. On February 17, 2009, Mr. Magruder filed a Motion for Prehearing Conference.

6. By Procedural Order dated February 18, 2009, a Procedural Conference was scheduled for March 2, 2009, to discuss guidelines for resolving the dispute, including whether the issues should be addressed in the context of compliance with Decision No. 70360.[4]

7. On February 26, 2009, UNSE filed a Response to Mr. Magruder's Motion.

8. UNSE, Staff and Mr. Magruder appeared at the March 2, 2009, Procedural Conference. As a result of the discussion at the Procedural Conference, by Procedural Ordered dated March 12, 2009, it was determined that because each of the issues raised in the Complaint was addressed in Decision No. 70360, they would be best investigated as compliance items, and that the Complaint docket would be held in abeyance pending Staff's investigation into the Company's compliance. Staff was directed to meet with the parties in an attempt to resolve the disputes without having to resort to a formal complaint; to investigate whether UNSE complied with its obligations under the 1999 Settlement Agreement with the City of Nogales with respect to pole and cable replacement projects and student loan/scholarship obligations; and to file a report on its findings and

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[2] Citizens withdrew its requested re-organization which had been addressed in the Citizens Separation Dockets, and the Commission opened Docket No. E-01032A-99-0401 to resolve the Commission's concerns about Citizens' quality of service in Santa Cruz County. In that docket, Citizens and Staff entered into a settlement, under which Citizens committed to a Plan of Action, including, *inter alia*, the construction of a second transmission line to Santa Cruz County.

[3] *See* Decision No. 66028 (July 3, 2003).

[4] Mr. Magruder was an intervenor in the 2007 UNSE rate case, and had raised all of the alleged violations as part of that case.

recommendations.

9. On June 18, 2009, in the Complaint Docket, UNSE filed a Status Update and Request for Dismissal. UNSE stated that the Company had met with Mr. Magruder on June 17, 2009, to examine poles which Mr. Magruder had identified in the Meadow North and South subdivisions, and that Mr. Magruder expressed satisfaction with the condition of all but one pole. UNSE requested that the Commission find that UNSE has complied with Decision No. 70360 with respect to the pole issue.

10. On June 18, 2009, Staff filed a Status Update and Request for Continuance. Staff reported that after a June 5, 2009, conference call with Mr. Magruder and counsel for UNSE, the parties had agreed to a course of action under which the Company would meet with Mr. Magruder, with a later, second conference with Staff. Staff requested that a status conference be scheduled in approximately 30 days. There was no opposition to Staff's proposed course of action.

11. On June 22, 2009, Mr. Magruder filed a "Motion to Quash UNS Electric Request for Dismissal of the Formal Complaint of 5 December 2008." Mr. Magruder asserts that the UNSE Request for Dismissal did not address Decision Nos. 61793 or 62011, and that he also opposed dismissal because Staff had not yet filed its status report on compliance.

12. By Procedural Order dated June 26, 2009, the Motion to Dismiss was held in abeyance pending the outcome of the Procedural Conference to discuss Staff's investigation in the 2007 rate case docket, and a Procedural Conference was set for July 16, 2009.

13. On July 7, 2009, Mr. Magruder requested a continuance of the July 16, 2009, Procedural Conference.

14. On July 13, 2009, UNSE filed a Status Update in the Complaint docket noting the award of four $2,000 scholarships to graduating seniors from Nogales High School and Rio Rico High School.

15. By Procedural Order dated July 13, 2009, the Procedural Conference for the purpose of determining the status of Staff's investigation into UNSE's compliance with Decision No. 70360 and the need for further action was continued until July 23, 2009.

16. UNSE, Staff and Mr. Magruder appeared at the July 23, 2009 Procedural Conference,

and discussed the status of this matter, their positions and recommendations for further action.

17. By Procedural Order dated September 2, 2009, a status conference was set for October 13, 2009. By Procedural Orders dated September 15, 2009, and October 13, 2009, the status conference was ultimately rescheduled for November 18, 2009.[5]

18. On November 13, 2009, Mr. Magruder filed a Request to Resolve a Discovery Dispute.

19. On November 18, 2009, a Procedural Conference convened in the rate case docket to determine if further action was required with respect to UNSE's compliance with Decision No. 70360. That same date, Mr. Magruder docketed a 2008 letter from the Nogales City Attorney to UNSE's counsel.

20. By Procedural Order dated December 7, 2009, issued in the 2007 rate case docket, it was determined that UNSE was in compliance with its obligations under Decision No. 70360, with respect to the three issues in Mr. Magruder's Complaint and that any further action concerning the issues raised by Mr. Magruder concerning these issues should be considered in the Complaint docket. A Procedural Order issued the same date, and filed in the Complaint docket, set a hearing on Mr. Magruder's Complaint for March 15, 2010, and established a schedule for filing testimony. In addition, in order to better determine the nature of the discovery dispute, the Procedural Order directed Mr. Magruder to file a Motion to Compel.

21. On December 21, 2009, in the Rate Case Docket, Mr. Magruder filed a Response to a Procedural Order and a Motion that One Issue Remain Open. In this pleading Mr. Magruder accepted that he did not object to the finding in the Procedural Order that there were no compliance issues concerning Decision No. 70360 with respect to the student loans or utility pole replacement, but he requested that the issue concerning notification of customers on life support remain open and be considered in parallel with the Complaint Docket.

22. On December 21, 2009, Mr. Magruder filed a Motion to Compel UNSE to Respond to Discovery Data Requests. Mr. Magruder states he was filing the Motion to Compel to clarify which

[5] On September 11, 2009, and October 7, 2009, Mr. Magruder requested continuance of the status conference dates because of prior commitments.

of his proffered Data Requests he believed received inadequate responses. Also on December 21, 2009, Mr. Magruder requested that the date for the hearing be changed because of a schedule conflict.

23. On January 5, 2010, UNSE filed a Response to Mr. Magruder's Motion to Compel.

24. On January 6, 2010, Mr. Magruder filed a Reply to UNSE's Response to his Motion to Compel.

25. By Procedural Order dated February 2, 2010, Mr. Magruder's Motion to Compel was denied with respect to the data requests on the subject of the replacement of poles and underground cables because by Mr. Magruder's own statements, he was dropping the issue.[6] In addition, the Motion to Compel was denied as to those questions about the failure to modify procedures to notify all customers on life support of outages because the December 8, 2009, Procedural Order determined that there was no cause of action under Decision No. 70360 with respect to that issue.

26. In a second Procedural Order dated February 2, 2010, the hearing on the Complaint was continued until May 24, 2010, and the procedural schedule adjusted commensurately.

27. On March 22, 2010, Mr. Magruder filed Direct Testimony.

28. On April 12, 2010, UNSE filed a Motion to Dismiss with Prejudice and Motion to Stay Procedural Schedule. UNSE argued that Mr. Magruder's claims fail as a matter of law because: 1) Mr. Magruder lacks standing to pursue either claim; 2) his claim regarding customers on life support is barred by either res judicata or collateral estoppel; and 3) his claim regarding the student loan program is based on a misinterpretation of the Revised Settlement Agreement between the City of Nogales and Citizens Utilities and Decision No. 61793.

29. On April 13, 2010, Mr. Magruder filed a Motion to Quash UNSE's Motion to Dismiss and Motion to Stay Procedural Schedule. Mr. Magruder argued that UNSE's Motions are without merit, untimely and burdensome and that the forthcoming hearing would give the Company ample opportunity to present its defenses.

30. On April 15, 2010, UNSE filed a Response to Mr. Magruder's Motion to Quash, arguing that Mr. Magruder presented no basis for his standing or authority to pursue the claims in his

[6] Magruder Reply to UNSE Response to the Motion to Compel at 2.

Complaint and that it made no sense to expend resources on an evidentiary hearing before determining Mr. Magruder's standing or authority.

31. By Procedural Order dated April 16, 2010, it was determined that UNSE's Motion to Dismiss raised legal issues that needed to be resolved prior to determining the merits of Mr. Magruder's claims, and the procedural schedule was stayed pending resolution of the Motion to Dismiss. Oral argument on UNSE's Motion to Dismiss was set for August 3, 2010.

32. On June 14, 2010, Mr. Magruder and UNSE filed a Joint Motion for Extension of Time to allow the parties and the City of Nogales to discuss the issues.

33. By Procedural Order dated June 21, 2010, oral argument was continued until September 2, 2010.

34. On July 27, 2010, Mr. Magruder filed a Motion for Extension of Time. On July 30, 2010, UNSE filed a Response, and on August 5, 2010, Mr. Magruder filed supplemental information related to his Motion. By Procedural Order dated August 9, 2010, oral argument was continued until October 6, 2010.

35. On October 5, 2010, Mr. Magruder filed a Motion to Disqualify Mr. Jason D. Gellman as an Attorney to Represent UNS Electric in this Matter. Mr. Gellman's name appears on UNSE's pleadings as their attorney. Mr. Magruder argued that because Mr. Gellman was a member of the Commission's Legal Staff in 2005, and represented the Commission in the 2005 case that reopened Decision No. 62011 in order to re-examine electric reliability in Santa Cruz County, Mr. Gellman's participation in this Complaint docket is a conflict of interest and violates Arizona Administrative Code ("A.A.C.") R14-3-104.G.[7]

36. On October 5, 2010, UNSE filed a Response to Mr. Magruder's Motion to Disqualify. UNSE argued that Mr. Gellman did not participate in the docket that led to Decision No. 62011, and that when the Commission re-opened Decision No. 62011, it did so only to review the status of reliability and need for a second transmission line, and not for the purpose of addressing the issues

[7] A.A.C. R14-3-104.G provides: "Former employees. No former employee of the Commission shall appear at any time after severing his employment with the Commission as a witness on behalf of other parties in a formal proceeding wherein he previously took an active part in the investigation or preparation as a representative of the Commission, except with the written permission of the Commission."

that Mr. Magruder raises in this Complaint docket. UNSE adamantly denies any conflict of interest on Mr. Gellman's part as he did not represent Staff regarding the issues raised in the Complaint.

37. On October 5, 2010, UNSE also filed a copy of City of Nogales Order No. 2010-09-084, in which the City approves a settlement agreement between the City of Nogales and the Company and memorializes a Company-funded scholarship program for Nogales and Rio Rico High Schools.

38. On October 6, 2010, a Procedural Conference convened at the Commission's Tucson offices for the purpose of hearing oral argument on UNSE's Motion to Dismiss. Mr. Magruder appeared pro per and UNSE appeared through counsel.[8]

**Pole and Cable Replacement**

39. With regard to pole and underground cable replacement, the Commission found in Decision No. 70360 as follows:

> It is unclear from the record whether there are uncompleted requirements related to the Citizens POA, as Mr. Magruder claims. However, we do not necessarily agree that the remedy proposed by Mr. Magruder is appropriate, and we believe additional information is needed before any further action is taken. We will therefore direct UNSE to file a detailed response to Mr. Magruder's allegations on this issue, within 60 days of the effective date of this Decision. Replies to the Company's response shall be filed by Mr. Magruder, Staff and RUCO within 30 days thereafter.[9]

40. On July 28, 2008, UNSE filed as a compliance item to Decision No. 70360, a "Response to Mr. Magruder's Concerns." In that filing, UNSE stated that based on Citizens' records, the 20 pole replacement and 12 underground cable replacement projects identified in the POA were completed. UNSE attached a table showing the poles and underground cables replaced. UNSE stated that according to the records received from Citizens, all of the projects except for the Mt. Hopkins cable replacement project were completed by Citizens, and that UNSE completed the Mt. Hopkins project in 2003 at a cost of $140,377. In addition, UNSE claimed it made substantial capital investments, totaling $27.5 million, in Santa Cruz County to improve system reliability, and installed a work management applications computer system which shows UNSE replaced or installed 271

[8] Staff did not make an appearance.

[9] Decision No. 70360 at p. 60. Mr. Magruder had proposed that $15.5 million be disallowed from rate base for the Company's alleged failure to make system upgrades.

poles and 16,402 feet of underground cable since 2003.

41. In response to UNSE's compliance filing in the rate case, Staff issued a memorandum on August 26, 2008, that verified that UNSE complied with the requirement in Decision No. 70360 to file a response to Mr. Magruder's concerns. Staff's August 26, 2008, filing did not comment on the substance of UNSE's filings.

42. On September 15, 2008, Mr. Magruder filed a Notice of Filing his Rebuttal to the UNSE Compliance Response to his Concerns. Mr. Magruder charged that the UNSE Response was incomplete, erroneous and failed to provide details concerning the 32 projects, and argued that not all of the projects were completed.

43. Attachment IV to the POA supplement filed on May 7, 1999, contains a list of pole and underground replacement projects.[10] The May 7, 1999 supplement to the POA contains the following statement:

> Planned Improvements That Are Not Dependent On Construction Of Second Transmission Line
>
> Citizens is currently replacing poles and cable. Attachment IV includes detailed schedules showing the areas where replacements will be made, the number of poles or amount of cable that will be replaced, and the capital expenditures to do so, for the years 1999-2003.

44. Comparing UNSE's Response to Mr. Magruder's Concerns with the schedules of replacement projects in the Supplement to the POA shows that Citizens did not replace the number of poles or amount of underground cable identified in Attachment IV to the POA. The May 7, 1999, Supplement to the POA appears to indentify 3080 poles to be replaced during the period 1999 to 2003 at an estimated cost of $4,320,000, and a total of 159,388 feet of cable at an estimated cost of $6,410,520 over the same period. UNSE provided records from Citizens that show that Citizens replaced 1,145 poles at a cost of $1,780,420, and in 1999 and 2000 spent $1,780,420 on replacing underground cable.[11]

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[10] Filed in Docket Nos. E-01032A-98-0611 et al.

[11] It is unclear from the exhibit whether all of the 159,388 feet of cable were replaced, but it seems unlikely that Citizens would have completed all of the cable replacement projects in 1999 and 2000, when the original POA was a five year plan.

45. UNSE expressed the understanding that Citizens estimated the number of poles located within each project area indentified in the POA, set a budget for the replacement work, and as it proceeded with the project, determined which specific poles in each area needed to be replaced. UNSE believes that Citizens completed the projects in 2000.[12]

46. Mr. Magruder states that while he believes that compliance issues remain, he is not pursuing his claim that UNSE and Citizens did not replace the poles and cables as he alleges was required by the POA approved in Decision No. 60211.[13] Mr. Magruder recommends that Staff and the Residential Utility Consumer Office review his testimony and verify that UNSE has complied with the POA.[14]

47. During the July 23, 2009 Procedural Conference, Staff recommended that the parties should develop a priority replacement plan based on system outage and system reliability data.[15]

48. Decision No. 62011, which approved the POA, makes specific and detailed mention of the construction of the second transmission line that was proposed in the POA, but the Order does not specifically mention the pole and underground cable replacement programs.[16] The Decision could be interpreted as requiring the replacement of all of the poles mentioned in Attachment IV to the POA, as Mr. Magruder claims, or it could be interpreted as merely identifying the areas where poles would be examined and replaced if needed, as UNSE believes. The record in this proceeding is not sufficient to make a definitive determination whether the pole and cable replacement project as envisioned in the POA, and as approved by Decision No. 62011 has been complied with. Such determination would involve divining the Commission's intent when it approved the POA, and a time consuming investigation of poles and underground cable.

49. Staff recommended that the Company, Staff and Mr. Magruder should study the outage information that UNSE provided in order to determine where the outages are occurring and how they implicate reliability, so that the Company can determine a replacement priority for poles

[12] UNSE Response to Mr. Magruder's Concerns at 2.

[13] Magruder Reply to Motion to Dismiss at 11. Mr. Magruder later clarified that he does not want the Complaint dismissed with respect to this issue, but wants Staff to follow up to ensure the Order is complied with. *See* Tr. of October 6, 2010, Oral Argument at 52.

[14] Magruder Reply to Motion to Dismiss at 13.

[15] Tr. of July 23, 2010, Procedural Conference at 47.

[16] The Order refers to the April 15, 1999 POA as supplemented on May 7, 1999 and July 13, 1999.

and underground cables.[17]

50. We find Staff's recommendation to be reasonable. Decision No. 62011 arose out of a Complaint brought by the City of Nogales on behalf of its citizens because electric service provided by Citizens had become so unreliable that it was alleged to be harming the City. Since UNSE acquired the CC&N to provide electric service to the area, reliability of electric service has not been an issue. There have been two intervening rate cases, and in neither case did parties indicate that service was not safe and reliable. In the ten years since the City of Nogales brought its Complaint, much has changed. UNSE has made a number of infrastructure improvements, including the installation of local generation and upgrades to the substations along the transmission line serving the City of Nogales that have improved reliability. Rather than expending resources on determining whether specific poles or cables mentioned in 1999 have or have not been replaced, the more cost efficient and reasonable course of action is to ensure that UNSE has a reasonable pole and cable inspection and replacement policy currently in place, and that the Company acts to replace distribution infrastructure in a timely manner.

51. We do not find that requiring UNSE to replace every pole or underground cable implicated in Citizen's 1999 POA to be reasonable or in the public interest when there is no indication that the reliability problems that plagued the City of Nogales prior to 1999 continue to occur. Consequently, we find that dismissing the Complaint as to this issue is in the public interest.[18]

52. By its July 28, 2008 compliance filing, UNSE complied with the requirements of Decision No. 70360, and thus, there are no grounds to bring a complaint on this issue based on Decision No. 70360.

53. We direct UNSE and Staff to confer concerning the reliability of electric service in Santa Cruz County, and invite Mr. Magruder to participate in any discussions, with the result that

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[17] *Id.*

[18] Although we are dismissing the Complaint, we are still concerned about the issue of adequate distribution infrastructure. We note that in Decision No. 71914 (September 30, 2010), UNSE's last rate case, the Commission required UNSE to file an annual report of the distribution indices including a listing of the worst performing circuits and what steps are being taken to mitigate these circuits' poor performance. This requirement should identify those circuits that need corrective action and will assist in minimizing outages. Decision No. 71914 at 67-69. Our requirement herein that the Company implement a pole and cable inspection and replacement policy will work in tandem with the requirement to identify poorly performing circuits to continue to improve service quality.

UNSE implement a policy and plan for a pole and cable replacement program in its Santa Cruz County service area.[19] Unless Staff believes more urgent action is required, Staff shall review the adequacy of this plan as part of its engineering review of the Company's operations in the Company's next rate case. The Company shall provide a copy of its final policy and/or plan to Mr. Magruder.

**Student Loans/Scholarships**

54. With respect to the student loan/scholarship issue, the Commission concluded in Decision No. 70360 as follows:

> It is not entirely clear from the evidentiary record, or the extra-record, late-filed exhibits submitted by Mr. Magruder, whether UNSE is in compliance with its obligations under the prior Settlement Agreement between the City of Nogales and Citizens. Mr. Magruder contends that UNSE is deficient regarding several matters, while the Company maintains that it has complied fully with its responsibilities. No other party has alleged that UNSE is not in compliance with the Commission Order cited by Mr. Magruder. Given that some of the information upon which Mr. Magruder relies was not available at the time of the hearing, we believe the most efficient means of addressing his concerns is to direct UNSE to meet with Mr. Magruder and, if necessary, request that Staff be included in the discussions to provide an objective perspective regarding these issues. Therefore, UNSE should initiate a meeting with Mr. Magruder within 30 days of the effective date of this Decision, and file within 90 days of the effective date of this Decision a statement regarding suggested resolution of the concerns raised by Mr. Magruder on this issue.[20]

55. On June 27, 2008, UNSE filed A Notice of Compliance that it had met with Mr. Magruder on June 20, 2008, concerning the student loans/scholarship issue.

56. On August 25, 2008, UNSE filed in the 2007 rate case docket, a "Compliance filing Regarding Citizens Utilities' Educational Assistance Program (Decision No. 70360)." In that filing, UNSE stated that after reviewing the program, it identified several deficiencies including: that students were not required to attend Arizona schools; students were not required to return to Santa Cruz County to live and work; program funding had been inadequate; and no student had been selected after 2003. UNSE also reported that during the summer of 2008, it met with officials of the City of Nogales and the Superintendent of the Nogales and Rio Rico High School Districts and

[19] UNSE may already have such policy in place. If so, UNSE shall provide its policy for Staff's review.
[20] Decision No. 70360 at pp 61-62.

requested input from the City and school officials to insure that any program to be implemented is meaningful and beneficial. As of its August 2008 Compliance filing, UNSE stated it was awaiting program feedback.

57. UNSE argues in this proceeding that the course of dealing between Citizens and the City of Nogales, under which they did not abide by the settlement agreement's provisions, negated the obligation to continue to fund loans under the settlement agreement, and as a result, as a matter of law, UNSE did not assume the obligation to provide the scholarships discussed in the agreement between the City of Nogales and Citizens. [21]

58. Mr. Magruder argues that UNSE, Citizens or the City of Nogales cannot by their course of action negate a Commission Order. Mr. Magruder has argued that UNSE is approximately $118,000 in arrears in funding the student loans under the 1999 Settlement Agreement. He recommends that the program as specified in Decision No. 61793 be continued, the annual loans funded, and that the amount alleged in arrears be funded.[22]

59. Staff believed that legal issues exist that would prevent enforcing the student loan obligation with respect to UNSE.[23] According to Staff, the Decision that approved UniSource's acquisition of the Citizens assets, did not specify particular obligations that UNSE was assuming, but merely states that if Citizens had an obligation, UNSE was bound.[24]

60. Despite its position, UNSE continued to discuss with the City of Nogales and the local school districts how to establish and administer a new workable scholarship program. On October 5, 2010, UNSE filed a copy of the Scholarship Agreement entered into between UNSE and the City of Nogales under which UNSE will fund the UniSource Energy Services Achievement Scholarship Program in the amount of $9,000 each year commencing in 2011 through 2031.

61. Given the new agreement by the City of Nogales and UNSE concerning UNSE's funding of scholarships in Santa Cruz County, we do not have to find whether Mr. Magruder has standing to raise this issue, or whether the student loan provision of the City of Nogales/Citizens

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[21] Tr. of July 12, 2009, Procedural Conference at 27-29.
[22] Magruder Reply to Motion to Dismiss at 27.
[23] Tr. of July 23, 2009 Procedural Conference at 20.
[24] *Id.* at 19.

settlement agreement survived as a matter of law and was assumed by UNSE. These are complex legal issues, which could lead to additional litigation. In the new agreement, the parties specify their responsibilities under the program, and the City of Nogales specifically acknowledges that the new agreement supercedes any prior agreements, including the Educational Assistance identified in the Revised Settlement Agreement between the City of Nogales and Citizens and the Asset Purchase Agreement between Citizens and UniSource.

62. The Commission did not approve the Revised Settlement Agreement in Decision No. 61793, although the fact that the parties had entered into such agreement was instrumental in the Commission approving the voluntary dismissal of the City of Nogales' Complaint. The new agreement replaces that earlier agreement, which had many practical problems. We find that the City of Nogales is the best judge of what is in the best interest of its citizens with respect to the funding of these scholarships, and that the public interest is not advanced by continuing to attempt to interpret UNSE's obligations under the earlier, and now, superceded agreement.

63. The new agreement between UNSE and the City of Nogales and the school districts is a private agreement between the parties, does not implicate safe and reliable service or rates, and does not require Commission approval.[25]

64. Given the new agreement between the City of Nogales and UNSE that consensually resolves this issue, we dismiss Mr. Magruder's Complaint with prejudice with respect to the issue of UNSE's obligation to fund student loans.[26]

**Notification of customers on life support**

65. In UNSE's 2007 rate case, Mr. Magruder proposed that UNSE be required to identify all customers that have life support equipment, its type and battery capabilities, and provide that information to local law enforcement so that local authorities can check on such customers during power outages.

66. In Decision No. 70360 Commission found as follows:

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[25] Staff opined that the Commission could review a new agreement to ensure that it does not conflict with the public interest, but that the Commission would not need to approve such agreement. See Tr. of July 23, 2009 Procedural Conference at 21.

[26] We note, however, that Mr. Magruder's persistence in keeping this issue alive may have contributed to the enactment of a superior scholarship program to the benefit of the citizens of Santa Cruz County.

> Although we do not believe Mr. Magruder's suggested remedies are necessarily the best way to address the issue he raises, given Mr. Pignatelli's commitment to work with appropriate agencies, we direct the Company to file within 90 days of the effective date of this Decision a statement regarding suggested changes to its procedures that may address the concerns raised by Mr. Magruder on this issue.[27]

67. On August 25, 2008, UNSE filed a "Compliance Filing Regarding Procedures for Outage Notification for Life Support Customers (Decision No. 70360)." In that filing, the Company reported that it currently identifies "life support" customers through a Customer Assistance Residential Energy Support Low-Income Medical Life Support Program ("C.A.R.E.S.-M"). UNSE stated that it does not notify life support customers of outages, but uses its best efforts to reconnect life support customers first in the event of an outage. UNSE stated further that it discussed the issue with the Santa Cruz County Sheriff's Department, which indicated that it would like to be aware of customers with sensitive electric load requirements to use as a cross-reference for safety purposes. UNSE stated that the Sheriff's Department agreed to retain a list of life support customers' names, but has not assumed the obligation to contact life support customers during an outage. UNSE states that it was in the process of contacting the C.A.R.E.S.-M customers to inform them that with their written permission, UNSE will give their names and other information to the Santa Cruz County Sheriff's Department.[28]

68. Mr. Magruder believes that the information related to customers on life support should not be limited to low-income C.A.R.E.S.-M customers, but should extend to all life support customers.

69. Staff believed that Mr. Magruder's position was not adopted in Decision No. 70360, and to adopt it would require a modification of Decision No. 70360 pursuant to A.R.S. § 40-242.[29]

70. By its August 25, 2008, compliance filing, UNSE complied with the directive of Decision No. 70360. Although Decision No. 70360 required UNSE to file additional information on the topic of notifying customers on life support, the Decision did not adopt Mr. Magruder's proposal.

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[27] *Decision No. 70360 at p 59.*

[28] When UNSE contacted all 48 of its Santa Cruz County CARES -M Program participants with life support equipment of the opportunity to provide their names to the Sheriff's Department, 24 customers responded, nine of whom gave permission to have their information released to the Sheriff. *See* UNSE Response to the Complaint at 4.

[29] *Tr.* of July 23, 2009 Procedural Conference at 41.

Staff did not recommend that the Commission take further action on this issue.[30]

71. Mr. Magruder believes that his proposal to notify local authorities of all customers on life support (not only the low income customers) should be adopted. We are concerned that the proposal which sounds benign on its surface, may result in unintended consequences if the affected customers believe that they will be afforded extra attention from County or City officials during an outage. Furthermore, this concern is amplified, because at this time, it is uncertain the role that the Santa Cruz Sheriff's Department has agreed to assume with respect to keeping a list of life support customers.[31] We are also concerned that UNSE may not know which of its customers relies on life support equipment or where such customers are physically located. Not all residents are affected by all outages, and there may be technical or operational issues associated with determining if a particular customer is affected by a particular outage event. The concept requires further study prior to being adopted, and we believe that it may better be addressed as part of a generic or rule-making docket that would apply to all electric providers, not just UNSE. Mr. Magruder originally tried to garner support for this proposal in UNSE's 2007 rate case, but the Commission did not find at that time that adopting the proposal was in the public interest and required more study by the Company. At this time, we are not able to find that the program as proposed is in the public interest or should be implemented as to all customers. The limited experience with the C.A.R.E.S-M customers may serve as a pilot program to determine the value of the program.

72. By its August 25, 2008, compliance filing, UNSE met its obligations under Decision No. 70360. At this time, we find that there is no basis to bring a Complaint that UNSE has violated a Commission Order, Rule or Law with respect to this issue. Consequently, with respect to this issue, we dismiss Mr. Magruder's Complaint with prejudice.

73. The day before oral argument on the Motion to Dismiss, Mr. Magruder filed his Motion to Disqualify Mr. Gellman from representing UNSE, based on A.A.C. R14-3-104.G, which prohibits former Commission employees from appearing as a witness on behalf of other parties in a formal proceeding in which the employee previously took an active part, without Commission

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[30] *Id.* at 51.

[31] Mr. Magruder claims that the Sheriff has agreed to the plan, but UNSE states the Sheriff has not agreed to take any particular action during an outage.

consent.

74. The Company argued that Mr. Gellman did not participate in or represent Staff in the matters underlying Mr. Magruder's Complaint, and that raising the issue at such a late date was unfair to the Company.

75. Mr. Gellman is an attorney who is currently employed by Roshka DeWulf and Patten, PLC, and represents UNSE before the Commission. Formerly, Mr. Gellman was employed by the Commission and represented Staff in a variety of matters, including the re-opened Docket No. E-01032A-99-0401 in 2005, which investigated the status of electric reliability in Santa Cruz County, and in Docket No. E-01032C-00-0751 et al, in which the Commission approved the acquisition of Citizens' electric and gas assets by UniSource Energy Corporation.[32] Mr. Gellman did not represent Staff in Docket No. E-01032B-98-0621, which was the complaint that led to the City of Nogales/Citizens Settlement Agreement, or in Docket No. E-04204A-06-0783, UNSE's 2007 rate case. Mr. Gellman did not appear in this matter, but his name appears on UNSE's pleadings. Nor is Mr. Gellman a witness in this case.

76. We do not believe the record supports a finding that Mr. Gellman should be disqualified from representation in this proceeding.

## CONCLUSIONS OF LAW

1. UNSE is a public service corporation pursuant to Article 15 of the Arizona Constitution and A.R.S. Title 40, generally.

2. The Commission has jurisdiction over UNSE and the subject matter of the Complaint.

3. Notice of this matter has been in conformance with law.

4. As discussed herein, it is in the public interest to dismiss the Complaint with respect to the issue of whether UNSE should be required to replace additional poles or underground cable implicated in the 1999 Citizens POA.

5. The voluntary agreement between UNSE and the City of Nogales to replace any prior agreement concerning the funding of student loans with a new agreement, is in the public interest,

[32] In Decision No. 66028 (July 3, 2003), UniSource was authorized to create subsidiaries to own and operate the Citizens' assets. UniSource subsequently created UNSE to own the electric assets.

and further investigation into the obligations of the superceded loan program is not in the public interest.

6. UNSE is not in violation of any Commission Order or Rule concerning the notification of public authorities about customers on life support equipment, and the Complaint fails to state a claim upon which relief may be granted.

**ORDER**

IT IS THEREFORE ORDERED that the Complaint is dismissed with prejudice.

IT IS FURTHER ORDERED that UNS Electric, Inc. shall confer with Staff concerning outage data and shall develop and implement a pole and cable replacement program.

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IT IS FURTHER ORDERED that in the event Staff has reason to believe that UNS Electric, Inc. is not adequately maintaining its distribution system, or is providing less than safe and reliable electric service, in Santa Cruz County, or elsewhere, Staff shall take appropriate action.

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

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN COMMISSIONER

COMMISSIONER COMMISSIONER COMMISSIONER

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

ERNEST G. JOHNSON
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____

SERVICE LIST FOR: MARSHALL MAGRUDER VS. UNS ELECTRIC, INC.

DOCKET NO.: E-04204A-08-0589

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