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6 Attorney for Complainant

7 **BEFORE THE ARIZONA CORPORATION COMMISSION**

8 DANIEL SINGER

Docket Number: E-01933A-12-0400

9 Complainant,

10 **RESPONSE TO T.E.P.'s MOTION TO DISMISS COMPLAINT**

11 vs.

12 TUCSON ELECTRIC POWER COMPANY,

13 COMMISSIONERS:  
14 Gary Pierce, Chairman  
Bob Stump  
Sandra D. Kennedy  
Paul Newman  
Brenda Burns

15 Respondent.

16 The Complainant, through counsel, responds to Tucson Electric Power Company's Motion to Dismiss Complaint as follows:

17 1. Complainant contends that T.E.P.'s meter failed, resulting in excessive charges in the  
18 4/30/12 and 5/29/12 bills.

19 2. T.E.P. acknowledges "on March 26, 2012, at about 4:00 p.m., the load increased by  
20 four to five times the load it was previously running." (T.E.P.'s response, page 3 lines 7, 8). T.E.P.  
21 further acknowledges "the indicated load remained consistently at that level until about noon on  
22 May 12, 2012..." (T.E.P.'s response, page 3 lines 9, 10). T.E.P. further acknowledges and alleges  
23 "On May 12, 2012 the load begins to lower and returns to pre-spike levels prior to the meter being  
24 removed and exchanged on May 17, 2012." (T.E.P.'s response, page 3 lines 11, 12)

25 3. In light of T.E.P.'s response, either Complainant's office building suddenly increased  
26 its electrical usage on March 23, 2012 by a factor of 4-5 times for a period lasting one month, then  
27 gradually reduced the usage to double the historic usage, until reducing to historic levels right before  
28 T.E.P. replaced the meter, or, Complainants office building did not increase its historic electrical

1 usage as suggested by T.E.P. and instead, the meter inaccurately reflected a surge and eventual  
2 return to normal load level, before being replaced.

3 4. Complainant alleges the subject office building did not experience an increase in  
4 electrical usage beyond normal levels between March 23, 2012 and May 12, 2012.

5 5. According to T.E.P.'s 4/30/12 bill, reflecting usage from 3/29/12 - 4/27/12, the  
6 average temperature was 70 degrees. To the extent the largest usage of electricity at Complainant's  
7 building is from air conditioning, it was too early in the season, and the average temperature too low,  
8 to support the notion that Complainant's air conditioning usage increased in early Spring to more  
9 than three times the level of recorded usage during Tucson's hottest summer months.

10 6. Complainant further alleges that occupancy levels in the subject building are 30%-  
11 40% lower for 2012 than historic levels, resulting in lower electrical bills generally due to lower  
12 usage. A 1.5 month increase in electric usage by a factor of 4-5 times, as alleged by T.E.P., is  
13 inconsistent with the building's actual occupancy during the subject period.

14 7. As a result of decreased occupancy in 2012, six H.V.A.C. units servicing unoccupied  
15 parts of the building were off-line during the subject period. After the meter was replaced, during  
16 the latter part of the summer of 2012, several of previously unused units were brought back on line  
17 and more of the building was air conditioned, with greater electrical load. However, the electric  
18 bills for June, July, August, and September of 2012 reflect historic usage and associated charges  
19 and are all substantially lower than that reflected in the April, 2012 and May, 2012 bills.

20 8. Complainant alleges that the subject building was constructed in the 1980's. Since  
21 construction, there have been no material changes to its electrical infrastructure or usage, except for  
22 the disputed billing periods which are the subject of the complaint, in which T.E.P contends the  
23 electrical usage surged to 4-5 times normal use, then gradually returned to normal levels just prior  
24 to replacement of the meter.

25 9. Similarly, Complainant alleges that he has never received an electric bill for the  
26 subject building in excess of \$3,400.00 per month, even during the hottest summer month, except  
27 for the disputed period, when the bills were \$6,003.63 on 4/30/12 and \$4,477.81 on 5/29/12. In the  
28 summer months after the meter was replaced, the bills were \$2,920.28 on 6/28/12 and \$3,091.49 on

1 7/30/12.

2 10. Complainant has consulted with his H.V.A.C. service professionals and with his  
3 electrician and, upon information and belief, contends that the building's fault protection system  
4 would have engaged if the load reached the levels alleged by T.E.P. Complainant further contends  
5 that the load alleged by T.E.P, for the duration alleged by T.E.P, substantially exceeded the  
6 reasonable potential load demanded by the building at full occupancy at any time of year.

7 11. Though T.E.P. contends in its response that its meter tested within acceptable limits,  
8 T.E.P.'s test took place after it alleges the indicated load returned to normal levels. When  
9 Complainant spoke with T.E.P.'s customer service representative over the phone, Complainant was  
10 informed by T.E.P. that it could not guarantee its meter did not malfunction.

11 12. To the extent T.E.P. contends Complainant's usage must have increased by a factor  
12 of 4-5 times during the disputed period, it should be incumbent on T.E.P. to explain how such a  
13 dramatic increase in usage occurred in sudden contradiction to over twenty years of stable,  
14 consistent usage by Complainant's office building. Complainant contends it is also incumbent on  
15 T.E.P. to explain how the alleged load started reducing to historic levels after Complainant brought  
16 the matter to T.E.P.'s attention and then demanded the meter be replaced, and how the surge  
17 dropped to normal levels just before T.E.P. replaced the meter.

18 13. Motions to dismiss for failure to state a claim are not favored under Arizona law.  
19 Motions to dismiss should not be granted unless it appears that the Complainant would not be  
20 entitled to relief under any state of facts susceptible of proof under the pleadings. Dressler v.  
21 Morrison, 212 Ariz. 279, 130 P.3d 978 (2006). Summary judgement effectively removes the  
22 controversy from the providence of the trier of fact and resolves it as a matter of law. It should not  
23 be awarded, accordingly, unless a review of the record satisfies the Court "that there is no genuine  
24 issue as to any material fact and that the moving party is entitled to judgement as a matter of law."  
25 Rule 56(c), A.R.C.P.; Wells Fargo Bank v. Arizona Laborers, 201 Ariz. 474, 38 P.3d 12 (2002).

26 14. There is a genuine issue of material fact as to whether the increased electrical charges  
27 issued by T.E.P. to Complainant for the subject period were due to an increase in the load demanded  
28 by Complainant's office building, or whether T.E.P.'s system of metering electricity to the building

1 failed.

2 15. A.R.S. 40-361(A) provides that "Charges demanded or received by a public service  
3 corporation for any commodity or service shall be just and reasonable. Every unjust or unreasonable  
4 charge demanded or received is prohibited and unlawful." A.R.S. 40-361(B) provides "Every public  
5 service corporation shall furnish and maintain such service, equipment and facilities as will promote  
6 the safety, health, comfort and convenience of its patrons, employees and the public, and as will be  
7 in all respects adequate, efficient and reasonable." Complainant contends the charges for the  
8 disputed period are unjust and unreasonable and that said charges are prohibited and unlawful.  
9 Complainant further contends that T.E.P. failed to furnish and maintain such service, equipment,  
10 and facilities as to promote the safety, health, confort and convenience of the Complainant and that  
11 said service, equipment, and facilities during the subject period were not adequate, efficient and  
12 reasonable as evidenced by the excessive charges during said period.

13 16. A.A.C. R-14-2-208(2) provides that "The entity having control of the meter shall be  
14 responsible for maintaining in safe operating condition all meters, equipment, and fixtures installed  
15 on the customer's premises by the entity for the purpose of delivering electric service to the  
16 customer." Complainant contends T.E.P. failed to maintain the meter in safe operating condition  
17 and that the meter inaccurately indicated a load 4-5 times the normal use of Complainant's building.

18 17. T.E.P. claims in its Motion to Dismiss that Complainant has failed to state a claim  
19 upon which relief may be granted. Complainant disagrees. This is a claim of excessive and  
20 unreasonable charges for electricity, It is a claim based in law and upon which relief may be granted.  
21 T.E.P. is forbidden under law to issue unjust or unreasonable charges to its customers. Complainant  
22 contends that T.E.P. issued excessive charges as a result of inaccurately measuring the electrical  
23 load used by Complainant's office building.

24 WHEREFORE, Complainant respectfully requests that T.E.P.'s Motion to Dismiss be denied,

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1 that the additional relief requested by T.E.P. in their responsive pleading be denied, and  
2 Complainant further requests that the substantive issues set forth in the complaint be set for hearing.

3  
4 Dated this 19<sup>th</sup> day of October, 2012  
5 **Law Office of Keith A. Singer, P.L.L.C.**

6   
7 Keith A. Singer, Attorney for Petitioner

8 Original hereof mailed this  
9 22 day of October, 2012 to:

10 Docket Control  
11 Arizona Corporation Commission  
12 1200 West Washington Street  
13 Phoenix, Arizona 85007

14 Copy hereof mailed this  
15 22 day of October, 2012 to:

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21 By: KAS/EZ Messenger  
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