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COMMISSIONERS
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IN THE MATTER OF THE PETITION OF COLUMBUS ELECTRIC COOPERATIVE, INC., FOR A DECLARATORY ORDER	DOCKET NO. E-01851A-11-0415 **INITIAL BRIEF IN SUPPORT OF DECLARATORY ORDER**

Columbus Electric Cooperative, Inc. ("Columbus") submits this Initial Brief in Support of its Petition for Declaratory Order, filed on November 18, 2011, seeking an order confirming or establishing that certain Arizona statutes regarding approval of financing and encumbrances, namely A.R.S. Sections 40-301, 40-302, 40-3-3 and 40-285, are not applicable to Columbus.

I. Underlying Facts

Columbus is a New Mexico non-profit rural electric cooperative incorporated in the State of New Mexico on October 1, 1946. The headquarters and principal place of business is at 900 N. Gold Ave., Deming, Luna County, New Mexico. Columbus provides electric service at the retail level over 130 miles of transmission line, 2,098 miles of energized overhead distribution line and 82 miles of underground distribution lines to customers in Grant, Luna and Hidalgo Counties, New Mexico and Cochise County, Arizona. At year-end 2012, Columbus had an average of 5,259 consumers, with 4,782 (91%) located in New Mexico and 476 (9%) located in Arizona. Of the 101,612,619 kWh sold in 2012, 94,922,572 kWh (93.4%) was sold to New Mexico consumers and 6,690.047 kWh (6.6%) sold to Arizona consumers. Of the $13,403,460 in total revenue, $12,549,381(93.6%) was derived from New Mexico consumers and $854,079 (6.4%) was derived from Arizona Consumers.

The administrative services, including marketing, operations, maintenance, planning, finance, billing and support services, are provided from the central office in Deming, New Mexico. There are certain fixed structures physically located in Arizona, such as overhead and underground distribution lines and poles, but the vast majority of Columbus' assets are located in New Mexico, including all substations and the main office. The line crews serving the Arizona customers are based at a satellite office in Animas, Hidalgo County, New Mexico.

Columbus is a member/consumer of Tri-State Generation and Transmission Association, Inc. (Tri-State), located in Westminster, Colorado, a non-profit Colorado generation and transmission cooperative with forty-four distribution cooperative members located in Wyoming, Colorado, New Mexico and Nebraska. Tri-State operates electric generation plants in New Mexico, Colorado and Arizona and purchases power on the open market for delivery to its member cooperatives, including Columbus. Tri-State also receives allotments from the Wetern Area Power Administration, headquartered in Lakewood, Colorado, with generation facilities in 5 western states and also from Basin Electric Power Cooperative, headquartered in Bismark, North Dakota, with generation facilities in 6 states. Columbus has an "all-requirements" contract that requires the purchase of all power requirements from Tri-State, except for a 5% allowance for renewable distributed generation, which necessarily means Columbus purchases electric power over numerous state lines and upon receipt, Columbus delivers that power over state lines, namely New Mexico and Arizona.

The business activities of Columbus are of a nature and character that clearly constitute interstate commerce. Specifically: the purchase of electric energy from a Colorado generation and transmission cooperative with generation plants in three states; operating transmission and distribution lines in New Mexico and Arizona; transmitting and distributing electric energy across state boundaries to consumers in New Mexico and Arizona; and providing administrative, accounting, maintenance and other services to facilities and consumers in New Mexico and Arizona.

As a non-profit cooperative, Columbus cannot raise capital by issuing stock and is required to finance debt to carry on the business of providing utility and energy services. Historically, Columbus has received the majority of its financing through the Rural Utilities Service ("RUS"), located in the United States Department of Agriculture Offices in Washington, or the lending arm of US Government, the Federal Financing Bank (FFB) D.C. Supplemental financing has been provided by the National Rural Utilities Cooperative Finance Corporation ("CFC"), located in Dulles, Virginia. In 2011, as shown in the additional request for relief contained in the Petition for Declaratory Order filed in this matter, Columbus has also obtained financing from the National Bank for Cooperative, ("CoBank"), in Greenwood Village, Colorado. Additionally, Columbus maintains a revolving line of credit with CFC in the amount of 1,500,000.

The loans and credit facilities provided to Columbus are secured by standard form mortgages which create liens over all assets in New Mexico and Arizona and include all assets acquired after financing has been extended. As of the date of the last independent audit, July 31, 2012, substantially all of the Columbus' assets were pledged as security for the long-term debt to RUS, CFC and CoBank, with Columbus maintaining equity and margins of 30.48%.

As of July 31, 2012, Columbus' long-term debt is made up of the following:

RUS - 35 year mortgage notes, with varying maturity dates, in the total amount, less current maturities, of $8,284,412;

FFB - 35 year mortgage notes, with varying maturity dates, in the total amount, less current maturities, of $6,067,555;

CFC – Long term debt with maturity dates between 2018 and 2038, in the total amount, less current maturities, of $1,369,778; and

CoBank- 12 year mortgage note in the total amount, less current maturities, of $2,272,780.

Columbus has historically, and continues to be, subject to the jurisdiction of the New Mexico Public Regulation Commission and the regulation and review of securities issued by a public utility, including Columbus, are governed by New Mexico Statutes, see Sections 62-6-6, 7, 8 and 9, NMSA 1978, and all refinancing obtained by Columbus has been in accordance with those statutes. Additionally, as an RUS borrower, Columbus is subject to extensive requirements regarding operation and financing of the business contained in the United States Code and the Code of Federal Regulations as well as the terms and conditions of the loan agreements.

Columbus was initially issued Certificates of Convenience and Necessity by the Commission in Decision No. 34125, dated October 12, 1962, and Decision No. 34321, dated January 25, 1963, and registered as a foreign corporation authorized to do business in Arizona on September 20, 1984. Columbus previously sought approval for all financing from the Commission, with the most recent such application having been filed in Docket No. E-0185A-94-0032. However, based on the Commission's consistent refusal to exercise jurisdiction over similar debt filings, Michael Grant, then attorney for Columbus, sought and obtained the acknowledgment from the Legal Division of the Commission that the Commission lacked jurisdiction over Columbus' debt financing, see letter dated March 30, 1998, attached as Exhibit A to the Petition for Declaratory Order. Thereafter, Columbus did not seek the approval of the Commission for any debt financing until the filing of this matter, at which time Commission staff suggested that Columbus proceed in a manner similar to Garkane Energy Cooperative, Inc., Docket No. E-01891A-09-0337. Specifically, combining the request for a declaratory order with a request for alternate relief of retroactive approval of three loans obtained in 1997, 2002 and 2008 respectively, as well as approval of proposed debt re-financing. Decision No. 73156 was issued on May 18, 2012, granting retroactive approval of the aforementioned transactions and approving the proposed CoBank re-financing loans.

Columbus' ability to obtain debt financing is absolutely vital to carrying on the business of providing utility and energy services in New Mexico and Arizona.

II. Commission Precedents

The Commission has, on numerous occasions, considered the application of certain Arizona statues to foreign public service corporations and on each occasion the Commission has rightfully disclaimed or declined to exercise jurisdiction. See, for example, Decision No. 51727, issued on January 16, 1981; Decision No. 52244, issued on June 18, 1981; Decision No. 53560, issued on May 18, 1983; and Decision No. 61895, issued on August 27, 1999. These decisions specifically addressed A.R.S. Section 40-301, *et seq.* However, in Decision No. 72175, issued on February 11, 2011, the Commission also addressed A.R.S. Section 40-285, and again disclaimed or declined to exercise jurisdiction. While these decisions referred to the Opinion of the Arizona Attorney General (Opinion No. 69-10), the stated underlying basis for all these decisions was that the application of the statutes in question would constitute an impermissible burden on interstate commerce in violation of the United States Constitution, namely the Commerce Clause. Specifically, each of the aforementioned decisions found that the Commission's regulatory supervision over the financings of foreign public service corporations engaged in interstate commerce "would create an impermissible burden on interstate commerce in violation of the United States Constitution." Decision No. 51727 at 3; Decision No. 52244 at 4; Decision No. 53560 at 3; Decision No. 61895 at 2; and Decision No. 72175 at 51.

In Decision No. 72175 ("*Garkane*"), the Commission engaged in an in depth analysis of the "dormant Commerce Clause". Having fist determined that there is no facial discrimination in the same sections that are at issue in this matter, the Commission engaged in a balancing test between the local interests, namely the regulation of utilities, against the burden on interstate commerce, as set out in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

As was the case in *Garkane*, the burden to Columbus, and thus on interstate commerce, is the prospect of inconsistent or even contradictory regulation between the New Mexico Public Regulation Commission and the Arizona Corporation Commission. Unlike *Garkane,* it is not a potentiality but has already occurred. In obtaining short-term credit in the form of a revolving line of credit from CFC, the borrowing limit for Columbus was determined to be $1,500,000 by application of Arizona rules instead of the requested $1,750,000, for which Columbus was otherwise eligible under CFC rules and the applicable New Mexico laws. As a result, Columbus was forced to accept the $1,500,000 limit dictated by Arizona rules. At its worst, such a conflict between jurisdictions could result in approval in New Mexico and an outright denial or approval on restrictive conditions in Arizona. Thus, the burden on Columbus of having to seek approval in its home jurisdiction of New Mexico as well as Arizona is significant. Additionally, there is significant cost and delay in seeking approval in Arizona. As noted in the *Garkane* decision, just the possibility of such a conflict was deemed sufficient to overcome the strong local interest in regulating a utility and therefore an impermissible burden on interstate commerce, see Decision 72175 at 50.

III. Application to Columbus

In *Garkane,* the Commission found that the facts of that case were not well suited toward supporting the exercise of Commission jurisdiction under A.R.S. Sections 40-301 through 40-303 and 40-285. Columbus is similarly situated to Garkane Energy Cooperative, Inc., but the facts in the present case weigh more heavily against the exercise of such jurisdiction.

Columbus is a non-profit rural electric cooperative with less incentive to enter into questionable financial dealings for its own enrichment or that of its inventors than a for-profit investor-owned utility. Columbus has been serving Arizona customers pursuant to CC&N's issued in 1962 and 1963 and providing reliable electricity since that time and is a stable company, having been in business since 1946. Columbus has 91% of its customers in New Mexico and derives 93.4% of its gross revenue from New Mexico. Columbus is financially sound, with margins and equity to total assets level slightly in excess of 30%. Columbus has had two rate adjustments in recent history. Docket No. E-0185A-00-1016, filed on December 12, 2000, reducing rates and Docket No. E-0185A-090305, filed on June 8, 2009, increasing only the customer charges for all rate classes. Columbus has a general history of compliance with Commission requirements. Finally, Columbus' financial transactions are not only subject to the applicable New Mexico Statutes but to the stringent requirements for RUS borrowers contained in the United States Code and Code of Federal Regulations as well as the loan agreements.

IV. Conclusion

Under these facts, the Commission's interest in exercising its jurisdiction to regulate the financial transactions of Columbus under A.R.S. 40-301, 302, 303 and 285 is clearly outweighed by the onerous impact on interstate commerce and, as was the case with Garkane Energy Cooperative, Inc. and the parties to the other Commission decisions cited herein, the exercise of such jurisdiction would be an impermissible burden on interstate commerce. Additionally, like Garkane Energy Cooperative, Inc., CEC volunteers to file courtesy copies with the Commission Staff of all future financing applications along with an affidavit verifying the then-existing split of its consumers in New Mexico and Arizona.

RESPECTULLY SUBMITTED this 4th day of April, 2013.

Columbus Electric Cooperative, Inc.

By [signature]
Charles C. Kretek, General Counsel
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Arizona Bar No. 021174

Original and thirteen (13) copies of the foregoing Motion mailed for filing this 4th day of April, 2013, to:

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

Copy of the foregoing Motion mailed/delivered to this 4th day of April, 2013, to:

Janice Alward
Steve Olea
Lyn Farmer
Brian Smith
1200 West Washington Street
Phoenix, AZ 85007

AFFIDAVIT OF CHRIS MARTINEZ

STATE OF NEW MEXICO)
:ss
COUNTY OF LUNA)

CHRIS MARTINEZ, being first duly sworn, states under oath that:

1. I am the Executive Vice President and General Manager of Columbus Electric Cooperative, Inc. ("CEC") and, as such, I have personal knowledge of the matter stated in this Affidavit.

2. CEC was incorporated in the State of New Mexico on October 1, 1946, as a non-profit rural electric cooperative.

3. The headquarters and principal place of business for CEC is 900 North Gold Avenue, Deming, Luna County, New Mexico.

4. CEC's distribution system is made up of approximately 130 miles of overhead transmission lines, 2,098 miles of overhead distribution lines and 82 miles of underground distribution lines located in Grant, Luna and Hidalgo Counties, New Mexico and Cochise County, Arizona. The system also has seven substations all of which are located in New Mexico.

5. In 2012, CEC had an average of 5,259 consumers, with 4782 (91%) located in New Mexico and an average of 476 (9%) located in Arizona.

6. In 2012, CEC sold 101,612,619 kWh with 94,922,572 kWh (93.4%) being sold to New Mexico consumers and 6,690,047 kWh (6.6%) sold to Arizona Consumers.

7. Of the $13,403,460 in total revenue for 2012, $12,549,381 (93.6%) was derived from New Mexico consumers and $854,079 (6.4%) was derived from Arizona consumers.

8. The General Manager and staff provide all administrative services, including marketing,

operations, maintenance, planning, finance, general counsel, billing and support services from the corporate headquarters in Deming, Luna County, New Mexico.

9. The vast majority of CEC's assets and infrastructure in located in New Mexico, with only overhead and underground distribution lines located in Arizona and the line crew primarily responsible for maintenance and repair of the Arizona system is located in Animas, Hidalgo County, New Mexico.

10. CEC is a member/consumer of Tri-State Generation and Transmission Association (Tri -State), a not-for-profit generation regional generation and transmission cooperative association founded in 1952 under the laws of the State of Colorado for the purpose of delivering wholesale power to its member systems.

11. Tri-State headquarters are located in Westminster, Colorado from which all business activities are directed General Manager and staff.

12. Tri-State is currently comprised of 44 distribution cooperatives located in Colorado, Wyoming, Nebraska and New Mexico all of who have all-requirement wholesale power supply contracts with Tri-State.

13. CEC's all-requirements contract with Tri-State is effective until 2050 and requires CEC to purchase substantially all of its electric power requirements from Tri-State.

14. Tri-State supplies energy to its members from several sources: including owned and operated generation facilities in Arizona, Colorado, New Mexico and Wyoming; allotments from the Western Area Power Administration, headquartered in Lakewood, Colorado, with generation from federally owned hydroelectric plants in Arizona, Colorado, Montana, Utah and Wyoming; purchases from Basin Electric Power Cooperative, headquartered in Bismark, North Dakota,

with generation facilities in North Dakota, South Dakota, Wyoming, Montana, Minnesota and Iowa; and when necessary, purchases from the open market.

15. CEC receives energy purchased and transmitted over numerous state lines and distributes that same energy over state lines, namely New Mexico and Arizona, and as a result is engaged in interstate commerce in both the purchase and delivery of electric power.

16. As a non-profit rural electric cooperative, CEC cannot raise capital by issuing stock and is required to obtain long-term financing and acquire debt to carry on the business of providing utility and energy services and this process is an essential part of CEC's operations.

17. The majority of debt financing for CEC has come from the United States Department of Agriculture, Rural Utilities Service ("RUS"), based in Washington, D.C., with some financed through the Federal Financing Bank ("FFB").

18. CEC also obtains supplemental loans from the National Rural Utilities Cooperative Finance Corporation ("CFC"), located in Dulles, Virginia, and more recently from the National Bank for Cooperatives ("CoBank"), located in Greenwood Village, Colorado.

19. All long-term debt financing requires CEC are secured by standard form mortgages which create liens against all of CEC's assets, including after-acquired property, located in New Mexico and Arizona.

20. As of July 31, 2012, the date of CEC's most recent audited financial statements, the long-term debt owed is made up of the following:

RUS –	35 year mortgage notes, with varying maturity dates, in the total amount, less current maturities, of $8,284,412;
FFB -	35 year mortgage notes, with varying maturity dates, in the total amount, less current maturities, of $6,067,555;
CFC -	Long term debt with maturity dates between 2018 and 2038, in the total amount, less current maturities, of $1,368,778; and
CoBank -	12 year mortgage note in the total amount, less current maturities, of $2,272,780.

21. CEC also maintains a short-term revolving line of credit with CFC in the amount of $1,500,000, which is limited by the applicable Arizona rules despite the fact that CEC is eligible for a higher limit on the line of credit.

22. Substantially all of CEC's assets are pledged as security for the long-term debt to the aforementioned lenders but maintains equity and margins, of the audit date, of 30.48%.

23. CEC has been, and continues to be, subject to the general jurisdiction of and regulation by the New Mexico Public Regulation Commission with securities governed by New Mexico law, Sections 62-6-6, 7, 8 and 9, NMSA 1978, and the applicable provisions of the New Mexico Administrative Code.

24. Additionally, as an RUS borrower is required by federal laws and regulations and by contract to submit certified annual financial and statistical reports to RUS as well as submitted to an annual audit of its financial statements.

25. With the enactment of R14-2-107 regarding rates, the Commission has recognized the unique nature of non-profit cooperatives and the safeguards provided by the extensive reporting and audit requirements imposed by federal agencies, such as RUS, and/or those of established national non-profit lenders specializing in the utility industry, such as CFC and CoBank.

26. The Commission's belief, with regard to rates, that the efficiencies provided by the new streamlined process of R14-2-107 and procedural safeguards will result in net benefits to the member/customers of cooperatives is equally, if not more, applicable to CEC's financing cases.

27. As was the case with Garkane Energy Cooperative, Inc., Docket No. E-01891A-09-0377, CEC had not applied for Commission approval of its financings since 1994, see E-0185A-94-0032, based on a belief that as a foreign public service corporation engaged in interstate

commerce, it was not required to obtain such approval, see Exhibit A to the Petitioner for Declaratory Order filed in this matter.

28. Along with requesting the Declaratory Order confirming CEC's exemption from certain Arizona statutes regarding financing approval from the Commission, CEC also sought and obtained in Decision No. 73156, retroactive approval of three prior loans and a new re-financing loan.

29. CEC, with its requested relief, seeks to avoid the time-consuming and expensive financing review process in Arizona and, as with Garkane, CEC volunteers to file courtesy copies with Commission of future financing applications along with an affidavit verifying the then-existing split of its consumers in New Mexico and Arizona.

30. CEC's financings and encumbrances have been, and continue to be, for lawful objects within CEC's proper purposes, are compatible with the public interest, are necessary and appropriate for and consistent with proper performance by CEC of its services as a public utility and have not, and will not, impair CEC's ability to perform utility and energy services.

By ______________________
Chris Martinez, Executive Vice
President and General Manager of
Columbus Electric Cooperative, Inc.

SUBSCRIBED AND SWORN to before me the 4th day of April, 2013, by Chris Martinez.

____
Notary Public

CHARLES C. KRETEK
NOTARY PUBLIC
STATE OF NEW MEXICO

My Commission Expires:
____