

ORIGINAL



0000144153

BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

Arizona Corporation Commission  
DOCKETED

APR - 4 2013

2013 APR -4 P 4:09

ARIZONA CORPORATION COMMISSION  
DOCKET CONTROL

DOCKETED BY  
*ky ne*

**COMMISSIONERS**

BOB STUMP, Chairman

GARY PIERCE

BRENDA BURNS

BOB BURNS

SUSAN BITTER SMITH

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.

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

7           Columbus is a member/consumer of Tri-State Generation and Transmission Association,  
8 Inc. (Tri-State), located in Westminster, Colorado, a non-profit Colorado generation and  
9 transmission cooperative with forty-four distribution cooperative members located in Wyoming,  
10 Colorado, New Mexico and Nebraska. Tri-State operates electric generation plants in New  
11 Mexico, Colorado and Arizona and purchases power on the open market for delivery to its  
12 member cooperatives, including Columbus. Tri-State also receives allotments from the Western  
13 Area Power Administration, headquartered in Lakewood, Colorado, with generation facilities in  
14 5 western states and also from Basin Electric Power Cooperative, headquartered in Bismark,  
15 North Dakota, with generation facilities in 6 states. Columbus has an "all-requirements" contract  
16 that requires the purchase of all power requirements from Tri-State, except for a 5% allowance  
17 for renewable distributed generation, which necessarily means Columbus purchases electric  
18 power over numerous state lines and upon receipt, Columbus delivers that power over state lines,  
19 namely New Mexico and Arizona.

20           The business activities of Columbus are of a nature and character that clearly constitute  
21 interstate commerce. Specifically: the purchase of electric energy from a Colorado generation  
22 and transmission cooperative with generation plants in three states; operating transmission and  
23 distribution lines in New Mexico and Arizona; transmitting and distributing electric energy

1 across state boundaries to consumers in New Mexico and Arizona; and providing administrative,  
2 accounting, maintenance and other services to facilities and consumers in New Mexico and  
3 Arizona.

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

15 The loans and credit facilities provided to Columbus are secured by standard form  
16 mortgages which create liens over all assets in New Mexico and Arizona and include all assets  
17 acquired after financing has been extended. As of the date of the last independent audit, July 31,  
18 2012, substantially all of the Columbus' assets were pledged as security for the long-term debt to  
19 RUS, CFC and CoBank, with Columbus maintaining equity and margins of 30.48%.

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

21	RUS -	35 year mortgage notes, with varying maturity dates, in the total amount,
22		less current maturities, of \$8,284,412;
23	FFB -	35 year mortgage notes, with varying maturity dates, in the total amount,
24		less current maturities, of \$6,067,555;
25	CFC -	Long term debt with maturity dates between 2018 and 2038, in the total
26		amount, less current maturities, of \$1,369,778; and

1 CoBank- 12 year mortgage note in the total amount, less current maturities, of  
2 \$2,272,780.  
3

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

11 Columbus was initially issued Certificates of Convenience and Necessity by the  
12 Commission in Decision No. 34125, dated October 12, 1962, and Decision No. 34321, dated  
13 January 25, 1963, and registered as a foreign corporation authorized to do business in Arizona on  
14 September 20, 1984. Columbus previously sought approval for all financing from the  
15 Commission, with the most recent such application having been filed in Docket No. E-0185A-  
16 94-0032. However, based on the Commission's consistent refusal to exercise jurisdiction over  
17 similar debt filings, Michael Grant, then attorney for Columbus, sought and obtained the  
18 acknowledgment from the Legal Division of the Commission that the Commission lacked  
19 jurisdiction over Columbus' debt financing, see letter dated March 30, 1998, attached as Exhibit  
20 A to the Petition for Declaratory Order. Thereafter, Columbus did not seek the approval of the  
21 Commission for any debt financing until the filing of this matter, at which time Commission staff  
22 suggested that Columbus proceed in a manner similar to Garkane Energy Cooperative, Inc.,  
23 Docket No. E-01891A-09-0337. Specifically, combining the request for a declaratory order with  
24 a request for alternate relief of retroactive approval of three loans obtained in 1997, 2002 and  
25 2008 respectively, as well as approval of proposed debt re-financing. Decision No. 73156 was

1 issued on May 18, 2012, granting retroactive approval of the aforementioned transactions and  
2 approving the proposed CoBank re-financing loans.

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

## 5 **II. Commission Precedents**

6 The Commission has, on numerous occasions, considered the application of certain  
7 Arizona statutes to foreign public service corporations and on each occasion the Commission has  
8 rightfully disclaimed or declined to exercise jurisdiction. See, for example, Decision No. 51727,  
9 issued on January 16, 1981; Decision No. 52244, issued on June 18, 1981; Decision No. 53560,  
10 issued on May 18, 1983; and Decision No. 61895, issued on August 27, 1999. These decisions  
11 specifically addressed A.R.S. Section 40-301, *et seq.* However, in Decision No. 72175, issued  
12 on February 11, 2011, the Commission also addressed A.R.S. Section 40-285, and again  
13 disclaimed or declined to exercise jurisdiction. While these decisions referred to the Opinion of  
14 the Arizona Attorney General (Opinion No. 69-10), the stated underlying basis for all these  
15 decisions was that the application of the statutes in question would constitute an impermissible  
16 burden on interstate commerce in violation of the United States Constitution, namely the  
17 Commerce Clause. Specifically, each of the aforementioned decisions found that the  
18 Commission's regulatory supervision over the financings of foreign public service corporations  
19 engaged in interstate commerce "would create an impermissible burden on interstate commerce  
20 in violation of the United States Constitution." Decision No. 51727 at 3; Decision No. 52244 at  
21 4; Decision No. 53560 at 3; Decision No. 61895 at 2; and Decision No. 72175 at 51.

22 In Decision No. 72175 ("*Garkane*"), the Commission engaged in an in depth analysis of  
23 the "dormant Commerce Clause". Having first determined that there is no facial discrimination in

1 the same sections that are at issue in this matter, the Commission engaged in a balancing test  
2 between the local interests, namely the regulation of utilities, against the burden on interstate  
3 commerce, as set out in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

4 As was the case in *Garkane*, the burden to Columbus, and thus on interstate commerce, is  
5 the prospect of inconsistent or even contradictory regulation between the New Mexico Public  
6 Regulation Commission and the Arizona Corporation Commission. Unlike *Garkane*, it is not a  
7 potentiality but has already occurred. In obtaining short-term credit in the form of a revolving  
8 line of credit from CFC, the borrowing limit for Columbus was determined to be \$1,500,000 by  
9 application of Arizona rules instead of the requested \$1,750,000, for which Columbus was  
10 otherwise eligible under CFC rules and the applicable New Mexico laws. As a result, Columbus  
11 was forced to accept the \$1,500,000 limit dictated by Arizona rules. At its worst, such a conflict  
12 between jurisdictions could result in approval in New Mexico and an outright denial or approval  
13 on restrictive conditions in Arizona. Thus, the burden on Columbus of having to seek approval  
14 in its home jurisdiction of New Mexico as well as Arizona is significant. Additionally, there is  
15 significant cost and delay in seeking approval in Arizona. As noted in the *Garkane* decision, just  
16 the possibility of such a conflict was deemed sufficient to overcome the strong local interest in  
17 regulating a utility and therefore an impermissible burden on interstate commerce, see Decision  
18 72175 at 50.

### 19 **III. Application to Columbus**

20 In *Garkane*, the Commission found that the facts of that case were not well suited toward  
21 supporting the exercise of Commission jurisdiction under A.R.S. Sections 40-301 through 40-  
22 303 and 40-285. Columbus is similarly situated to *Garkane Energy Cooperative, Inc.*, but the  
23 facts in the present case weigh more heavily against the exercise of such jurisdiction.

1 Columbus is a non-profit rural electric cooperative with less incentive to enter into  
2 questionable financial dealings for its own enrichment or that of its inventors than a for-profit  
3 investor-owned utility. Columbus has been serving Arizona customers pursuant to CC&N's  
4 issued in 1962 and 1963 and providing reliable electricity since that time and is a stable  
5 company, having been in business since 1946. Columbus has 91% of its customers in New  
6 Mexico and derives 93.4% of its gross revenue from New Mexico. Columbus is financially  
7 sound, with margins and equity to total assets level slightly in excess of 30%. Columbus has had  
8 two rate adjustments in recent history. Docket No. E-0185A-00-1016, filed on December 12,  
9 2000, reducing rates and Docket No. E-0185A-090305, filed on June 8, 2009, increasing only the  
10 customer charges for all rate classes. Columbus has a general history of compliance with  
11 Commission requirements. Finally, Columbus' financial transactions are not only subject to the  
12 applicable New Mexico Statutes but to the stringent requirements for RUS borrowers contained  
13 in the United States Code and Code of Federal Regulations as well as the loan agreements.

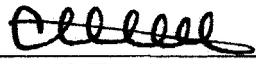
#### 14 **IV. Conclusion**

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

RESPECTULLY SUBMITTED this 4<sup>th</sup> day of April, 2013.

Columbus Electric Cooperative, Inc.

By   
Charles C. Kretek, General Counsel  
P.O. Box 631  
Deming, NM 88031-0631  
Phone: (575) 546-8838  
Fax: (575) 546-3128  
Arizona Bar No. 021174

Original and thirteen (13) copies of  
the foregoing Motion mailed for filing  
this 4<sup>th</sup> 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 4<sup>th</sup> 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,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 21. CEC also maintains a short-term revolving line of credit with CFC in the amount of  
2 \$1,500,000, which is limited by the applicable Arizona rules despite the fact that CEC is eligible  
3 for a higher limit on the line of credit.

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

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

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

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

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

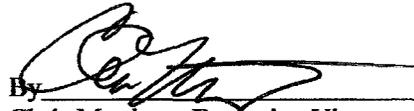
20 27. As was the case with Garkane Energy Cooperative, Inc., Docket No. E-01891A-09-  
21 0377, CEC had not applied for Commission approval of its financings since 1994, see E-0185A-  
22 94-0032, based on a belief that as a foreign public service corporation engaged in interstate

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

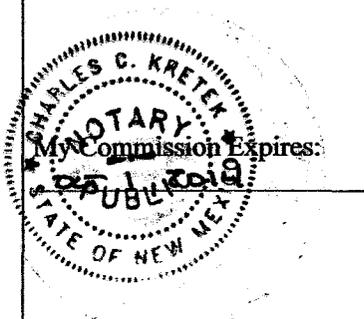
3 28. Along with requesting the Declaratory Order confirming CEC's exemption from certain  
4 Arizona statutes regarding financing approval from the Commission, CEC also sought and  
5 obtained in Decision No. 73156, retroactive approval of three prior loans and a new re-financing  
6 loan.

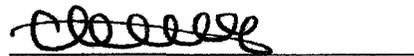
7 29. CEC, with its requested relief, seeks to avoid the time-consuming and expensive  
8 financing review process in Arizona and, as with Garkane, CEC volunteers to file courtesy  
9 copies with Commission of future financing applications along with an affidavit verifying the  
10 then-existing split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

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

15  
16  
17  
18 By   
19 Chris Martinez, Executive Vice  
20 President and General Manager of  
21 Columbus Electric Cooperative, Inc.  
22

23 SUBSCRIBED AND SWORN to before me the 4<sup>th</sup> day of April, 2013, by Chris  
24 Martinez.



25  
26  
27   
28 Notary Public  
29  
30