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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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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
SUPPLEMENTAL BRIEF

Pursuant to the order of the Administrative Law Judge at the August 29, 2013, telephonic hearing, Columbus Electric Cooperative, Inc. ("Columbus") submits this Supplement 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. Background Facts

There can be disagreement that Columbus engages in interstate commerce by distributing electric energy on both sides of the New Mexico and Arizona state line. As previously stated, for 2012, nine percent (9%) of Columbus' customers reside in Arizona, with the remainder residing in New Mexico. The Arizona members accounted for six point six percent (6.6%) of annual kWh sales and six point four (6.4%) of annual revenue in 2012. Columbus' circumstances closely mirror those of both Garkane Energy Cooperative, Inc. ("Garkane") and Dixie-Escalante Rural Electric Association, Inc. ("Dixie"), both Utah based rural electric cooperatives. In Decision 72175 the Commission specifically found that Garkane was a foreign public service corporation doing business in the State of Arizona and was engaged in interstate commerce. More recently, Dixie has requested a declaratory order seeking the same exemption

1 from Arizona statutes from which Garkane has been exempted from and from which Columbus
2 is currently seeking the same declaration in this matter. In Docket No. E-02044A-12-0419,
3 Commission Staff, in its Responsive Brief, has agreed that Dixie warrants a finding
4 commensurate with the Commission's conclusions in *Garkane*. Likewise, in the present matter
5 Commission Staff, in its Responsive Brief, has concluded that Columbus satisfies the criteria set
6 forth in *Garkane*. Specifically, that Columbus is engaged in interstate commerce.

7 At the Telephonic Procedural Conference held on August 29, 2013, the ALJ requested
8 that briefs be filed regarding the apparent differences between the regulation by the Utah Public
9 Utility Commission, pursuant to the Utah Code, and that of the New Mexico Public Regulation
10 Commission, pursuant to the New Mexico Statutes, over the issuance, assumption or guarantee
11 of securities. This brief is being filed in response to that request.

12 **II. Per Se Violation of Commerce Clause**

13 The Commerce Clause of the United States Constitution, Article I, Section 8, clause 3, grants
14 the Congress the authority to regulate commerce among the several states, thereby prohibiting
15 states, and their agencies, with materially interfering with or impeding interstate commerce.
16 Also referred to as the "dormant Commerce Clause", see United Haulers Assoc., Inc. v. Oneida-
17 Herkimer Solid Waste Management Authority. 550 U.S. 330, 339, 346 (2007). Columbus
18 contends that being subjected to the requirements of A.R.S. Sections 40-301, 40-302, 40-303 and
19 40-285, constitutes a *per se* violation of the Commerce Clause, thereby rendering the apparent or
20 actual level of regulation of Columbus in New Mexico, or of Garkane or Dixie in Utah,
21 irrelevant.

22 A *per se* violation of the Commerce Clause occurs when state regulation exerts extra-
23 territorial control over commerce occurring outside of the borders of that state. See Healy v.

1 Beer Institute, 491 U.S. 324, 335-40, (1989); KT&G Corp v. Att’y Gen., 535 F.3d 1114, 1143
2 (10th Cir. 2008); and ACLU v. Johnson, 194 F.3d 1149, 1161 (10th Cir. 1999). In the present
3 case, subjecting Columbus’ ability to seek approval of financing and borrow funds from the
4 Commission has the practical effect of controlling Columbus’ borrowing activities for the large
5 majority of its system and infrastructure located in New Mexico.

6 As a non-profit rural electric cooperative, Columbus cannot raise capital by issuing stock and
7 in order to fund repairs, improvements and additions to infrastructure, Columbus has
8 traditionally sought financing through the Rural Utilities Service (“RUS”). Columbus has also
9 sought supplemental financing from the National Rural Utilities Finance Corporation (“CFC”)
10 and more recently from the National Bank for Cooperatives (“CoBank”). This financing is vital
11 to Columbus’ ability to meet its standard of service obligations.

12 In exercising jurisdiction over Columbus pursuant to the aforementioned statutes, the
13 Commission, should it reject, in whole or in part, any of Columbus’ proposed transactions,
14 would have the effect of limiting or prohibiting Columbus from obtaining the financing
15 necessary to undertake repairs, improvements and additions to the infrastructure, the vast
16 majority of which, including the most vital parts such as substations, are located in the State of
17 New Mexico. In fact, the Commission has already made such a decision when an earlier
18 application of Arizona borrowing limits resulted in a reduction of Columbus’ requested short-
19 term line of credit was reduced from the requested \$1,750,000 to \$1,500,000.

20 Furthermore, the delay and cost resulting from having to comply with the aforementioned
21 statutes, results in a delay in obtaining financing and undertaking repairs, improvements and
22 additions to Columbus’ infrastructure in both New Mexico and Arizona, again with the large
23 majority being located in New Mexico.

1 This detrimental impact, both potential and actual, constitutes extra-territorial control by the
2 Commission's application of the aforementioned Arizona statutes, which is expressly prohibited
3 by the Commerce Clause.

4 **III. Pike Balancing Test**

5 Assuming *arguendo*, for the purposes of this brief only, that the application of the
6 aforementioned statutes does not constitute a *per se* violation of the Commerce Clause,
7 Columbus also contends that application of the balancing test established in Pike v. Bruce
8 Church, 397 U.S. 137 (1970) also supports a finding that Commission regulation of Columbus'
9 financing activities is impermissible under the Commerce Clause.

10 **A. Permissible Local Justification**

11 Under the *Pike* balancing test, where a statute regulates evenhandedly to effectuate a
12 legitimate local public interest, and its effects on interstate commerce are only incidental, it will
13 be upheld unless the burden imposed on such commerce is clearly excessive in relation to the
14 putative local benefits. If a legitimate local purpose is found, then the question becomes one of
15 degree. *Pike*, 397 U.S. at 142.

16 Columbus does not contest the evenhandedness of the statutes in questions but, contrary to the
17 presumption in *Garkane*, contends that the statutes in question do not effectuate a legitimate
18 local public interest. Unlike New Mexico, Arizona does not allow a Debt Service Recovery
19 adjustor clause in rates and as evidenced by Columbus' pending rate case Docket No. E-01851A-
20 13-0252 in which no such adjustor was requested. Thus, the impact of Columbus' debt
21 financing could have on rates is in the calculation of base rate cost and the Commission,
22 undisputedly, already has jurisdiction over the rates Columbus charges Arizona customers,
23 including all the components making up the revenue requirement and base rate costs justifying it.

1 As a result, the Commission can disallow inclusion in the base cost of service any debt service it
2 considers ill-advised and therefore the application of the statutes in question does not serve a
3 legitimate local interest because it is already served under the statutes, rules and regulations
4 applicable to rate review.

5 Furthermore, the interest in protecting Columbus' Arizona property from the liens imposed as
6 a condition of financing, is minimal considering that the vast majority of Columbus' plant in
7 operation is located in New Mexico.

8 **B. Impermissible Degree**

9 Again, assuming *arguendo*, that a legitimate local interest is found with regard to the statutes
10 in question, the inquiry is then one of degree, or a balancing of the local interests served against
11 the burden on interstate commerce.

12 As was the case with *Garkane*, and the Commission precedents cited therein, Columbus
13 believes the burden placed on interstate commerce by application of the statutes in question is
14 such that it is impermissible. The potential burden to Columbus is the prospect of inconsistent
15 regulation between New Mexico and Arizona as well as the regulatory cost associated with
16 complying with the statutes in question. The likelihood of that occurring is even greater here
17 given that New Mexico has adopted statutes that, under certain circumstances, relieve the
18 NMPRC from responsibility for the approval of cooperatives borrowing from the federal
19 government, RUS, in recognition of the extensive oversight and regulation imposed by federal
20 statutes, rules and the loan agreements themselves. See Attachment 1 – History of New Mexico
21 Financing Regulations and Attachment 2 – 2003 NM Legislation. Clearly, the burden of the
22 Arizona statutes in question far exceeds the burdens of the applicable New Mexico statutes and,
23 in essence subject Columbus to oversight similar to, but not as extensive as, that imposed by

1 being an RUS borrower. In fact in this very matter, the expedited approval of financing through
2 CoBank by Columbus took six (6) months, from November 18, 2011, to May 18, 2012.

3 **IV. New Mexico v. Utah Regulation**

4 As previously mentioned, the ALJ inquired about the apparent differences between the Utah
5 Statues regulating the debt financing that both Garkane and Dixie are subject to and which have
6 resulted in a declaratory order exempting them from the Arizona statutes in question. Columbus
7 contends, as argued above, that it is not the level of regulation in the home state of foreign
8 service corporations that supports the finding that the Commerce Clause prohibits application of
9 the statutes in question to Columbus, but the practical effect of that application, in the case of a
10 *per se* violation, or the impermissible burden on interstate commerce, in the case of a *Pike*
11 balancing test.

12 **A. NMSA Sections 62-6-6; 62-6-8.1; and 62-6-9**

13 Prior to the enactment of the legislation set out in Attachment 2 hereto, New Mexico's
14 statutory scheme mirrored that in place in Utah, both at the time of the *Garkane* decision and
15 continuing through the present. Specifically, Section 62-6-6 NMSA 1978, required the
16 submission of an Application seeking approval of the issuance, assumption or guarantee of
17 securities in advance of entering into any such agreements. Section 62-6-9 NMSA 1978,
18 provided for expedited disposition, within thirty (30) days of the filing of such application,
19 unless the commission makes a finding of good cause within that period warranting the
20 continuation of the expedited disposition. As explained by Keven Groenwold in Attachment 1,
21 the practical effect was that of merely going through the motions without any substantive
22 NMPRC decisions amending or altering the requested approvals.

1 After 2003, the New Mexico statutes were amended, as shown in Attachment 2 hereto, to
2 relieve utilities subject to oversight and approval by the federal government pursuant to the Rural
3 Electrification Act of 1936, namely RUS borrowers, from seeking NMPRC approval. Very much
4 like the considerations behind the recent enactment R14-2-107 by the Commission, New Mexico
5 recognized the unique nature of rural electric cooperatives and the imposing federal rules and
6 regulations and contractual obligations of RUS borrowers, and amended New Mexico Statutes,
7 to exempt RUS borrowers like Columbus, from the necessity of seeking NMPRC approval of
8 financing, specifically Section 62-6-6E NMSA 1978.

9 **B. Utah Code 54-4-31**

10 Utah Code 54-4-31 governs the issuance of securities by electric utilities, including Garkane
11 and Dixie. The statutory scheme in Utah is very similar to that in New Mexico prior to 2003.
12 However, the practical application of the Utah statutes addressing financing very closely mirrors
13 that of pre-2003 New Mexico proceedings where the process amounted to simply going through
14 the motions. A review of Utah PUC dockets supports this conclusion. The application of Dixie
15 in Utah Docket No. 08-066-01 took sixty-seven (67) days, from March 21 until May 27, 2008.
16 The application and approval of financing for rural electric cooperative Empire Electric
17 Association, Inc. in Utah Docket No. 10-025-01 took a mere twelve (12) days, from August 18 to
18 August 30, 2010. The application of Garkane in Utah Docket No. 10-028-01 took thirty-eight
19 (38) days, from October 11 to November 18, 2010. A second application by Garkane in Utah
20 Docket No. 10-028-02 took thirty-five (35) days, from December 7, 2010, until January 11,
21 2011. The application and approval for rural electric generation and transmission cooperative
22 Deseret Generation and Transmission Cooperative in Utah Docket No. 11-506-01, took fifty-one

1 (51) days from August 15 to October 5, 2011. Another application by Empire in Utah Docket
2 No. 11-025-01, took twenty-one (21) days, from January 5 to January 26, 2011.

3 The practical effect of these dockets is that the application of the Utah code results in a
4 nominal delay and no practical impact on approval as requested, as was the case in New Mexico
5 prior to 2003 and which led to the current New Mexico statutory scheme. In comparison, the
6 delay and cost associated with the Arizona approval process imposes a burden at least as
7 significant, if not more so, on Columbus as it did on Garkane and Dixie.

8 **V. Conclusion**

9 Columbus does not believe that the level regulation imposed by the New Mexico statutory
10 Scheme in comparison to the Utah statutory scheme in place when *Garkane* was issued is
11 relevant, but assuming *arguendo* that it is relevant, the potential burden on interstate commerce
12 in the present case is more extensive than that found in *Garkane* in support of the Declaratory
13 Order exempting Garkane from application of A.R.S. Sections 40-301, 40-302, 40-3-3 and 40-
14 285 and that in light of the entirety of the circumstances of Columbus, i.e. the breadth of the
15 federal statutes and regulations and contract obligations of RUS loans and oversight imposed by
16 them. Therefore, Columbus believes that it too is entitled to a declaratory order exempting it
17 from seeking approval from the Commission for financing and securities.

18 RESPECTULLY SUBMITTED this 27th day of September, 2013.

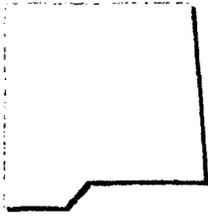
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20 Columbus Electric Cooperative, Inc.

21
22
23 By 
24 Charles C. Kretek, General Counsel
25 P.O. Box 631
26 Deming, NM 88031-0631
27 Phone: (575) 546-8838
28 Fax: (575) 546-3128
29 Arizona Bar No. 021174

1
2 Original and thirteen (13) copies of
3 the foregoing Motion mailed for filing
4 this 27th day of September, 2013, to:

5
6 Docket Control
7 Arizona Corporation Commission
8 1200 West Washington Street
9 Phoenix, AZ 85007

10
11 Copy of the foregoing Motion e-mailed to
12 this 27th day of September, 2013, to:
13
14 Hon. Jane Rodda
15 Mr. Brian Smith, Esq.



NEW MEXICO RURAL ELECTRIC COOPERATIVE ASSOCIATION

KEVEN J. GROENEWOLD, P.E.
Executive Vice President/
General Manager

New Mexico's Rural Electric Self-Insurer's Fund
Home's Compensation Fund
enchantment Magazine
The Voice of New Mexico's Rural Electric Cooperative

August 6, 2013

Mr. Chris Martinez
Executive Vice President & General Manager
900 N. Gold
PO Box 631
Deming, NM 88031

Re: History of Rural Electric Cooperative Financing Regulations in New Mexico

Dear Mr. Martinez,

Thank you for your inquiry of the history of rural electric cooperative financing in New Mexico. The New Mexico Public Regulation Commission ("NMPRC" or "Commission") no longer has any responsibility for the approval of the securities transactions and financings of rural electric cooperatives, provided that these cooperatives are borrowers from the federal government – the Rural Utilities Service ("RUS"). NMPRC oversight was altered by changes in statute adopted by the New Mexico Legislature in the 2003 legislative session. A brief history of the regulation of New Mexico rural electric cooperatives is useful in understanding how the current law developed.

The rural electric cooperatives voluntarily submitted to NMPRC jurisdiction in the late 1960s. This jurisdiction included authority over rural electric cooperative ("REC") financings. Over the next 35 years the Commission process for reviewing REC financings became very methodical and virtually a rubber stamp. Throughout this time and continuing to the present, all New Mexico RECs have been RUS borrowers.

As you know, the RUS process for determining whether to provide funding to a REC is well-established. First, a REC is required to develop a four year work plan. This work plan identifies the construction and capital needs of the REC for a four year period. The REC then applies for a loan from the RUS for the amount of its capital needs. This loan application is typically several hundred pages long and this process can take several months.

Prior to the 2003 change in New Mexico law, the REC would follow receipt of RUS approval of a loan application, with an application to the NMPRC for its approval of the loan. The application to the NMPRC would trigger a regulatory process that entailed the development and submission of an application, along with supporting testimony, and exhibits, the preparation and submission of NMPRC Staff testimony, a possible hearing and final review by the NMPRC with the issuance of an order. In addition to being time-consuming, this process could take many



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ATTACHMENT A

months to complete, if the NMPRC found good cause to extend the 30 day statutory period for consideration provided in NMSA 1978 §62-6-9.

The RUS process consists of very detailed regulatory oversight. By the time the loan was presented for consideration to the NMPRC, it had become a process of simply going through the motions. In the roughly 35 years of Commission oversight over REC financings there were approximately 225 financing cases. This represents almost 10% of the Commission's docket over this time period. Over that period of time only two financing requests were ever denied.

In one case the statute did not allow borrowing for purposes of economic development (\$45,000 loan application). The law was subsequently changed and the loan was re-applied for and granted. In the other instance, the statute requires that loan funds must actually be drawn down within 5 years of Commission approval. The REC received Commission approval for the financing and then did not draw down the money within the required time period.

Given the fact that Commission oversight of REC financings was not proving to be necessary or useful, the momentum for change in the law developed over a period of time. Recognition of the comprehensive nature of the RUS oversight helped regulators and legislators recognize that the continued oversight of REC financings and securities issued by the RUS was an inefficient and unnecessary use of limited resources.

After loan approval, the REC can draw down the loan funds. This begins a whole new phase of RUS oversight. The RUS has General Field Representatives in New Mexico to perform continuous oversight of its loan program. These Field Representatives perform audits of the REC's finances every couple of years and perform detailed work order audits to ensure that RUS loans are properly spent.

The other compelling reason to remove NMPRC oversight was the regulatory cost. Regulatory cases in front of the NMPRC are not cheap. A typical REC financing case cost between \$15,000 and \$20,000. This cost could not be justified to the consumer/owners of the RECs.

The change in the law in 2003 states that if a security is not subject to the oversight and approval of the RUS, then the NMPRC continues to have oversight authority. Currently all RECs are RUS borrowers. If any of the RECs were to buy out of their RUS loans, as other cooperatives have done in other states, NMPRC oversight would be invoked.

The two changes to Statutes in 2003 were made to NMSA 1978 §62-6-6 and §62-6-8.1. I have attached the approved legislation for your reference.

In summary, the change made to REC financing oversight ten years ago has worked very well. There have not been any instances where NMPRC oversight would have resulted in better outcomes. If you have any further questions please let me know.

Sincerely,



Keven J. Groenewold



A Touchstone Energy Cooperative

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AN ACT

RELATING TO UTILITIES; ESTABLISHING LIMITS ON RURAL ELECTRIC
COOPERATIVES INVESTMENTS IN SUBSIDIARY BUSINESSES; REMOVING
REQUIRED PUBLIC REGULATION COMMISSION APPROVAL ON CERTAIN FEDERAL
LOANS ALREADY APPROVED BY A FEDERAL AGENCY; REPEALING THE REPEAL
OF CERTAIN LAWS PERTAINING TO UTILITIES.

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BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO: Section 1.

A new section of the Rural Electric Cooperative Act is enacted to read:

"SUBSIDIARY BUSINESS ACTIVITIES.--

A. Cooperatives may form, organize, acquire, hold, dispose of and
operate any interest up to and including full controlling interest in separate business
entities that provide energy services and products and telecommunications and
communications services and products, including cable and satellite television and
water and wastewater collection and treatment, without prior approval from the public
regulation commission so long as those other business entities meet all of the following
conditions:

(1) the subsidiary is not financed with loans from the federal
rural utilities service of the United States department of agriculture or the United States
department of agriculture or with similar financing from any successor agency. This
limitation shall not apply to rural utilities service loans or United States department of
agriculture loans, or loans from successor agencies, to the extent the loan is to be
used for a purpose authorized by the lending agency;

(2) the subsidiary fully compensates the cooperative for the
use of personnel, services, equipment, tangible property and the cooperative's fully
distributed costs, including all direct and indirect costs and the cost of capital incurred
in providing the personnel, services, equipment or tangible property in question;

1 (3) the total investments, loans, guarantees and pledges of S
2 assets of a cooperative in all of its subsidiaries shall not exceed twenty percent of the B
3 cooperative's assets; and 4

4 (4) the subsidiary agrees to not offer any service or product to 4
5 the public until it has obtained federal and state regulatory approvals, if any, required P
6 to provide the service or product to the public. a
7 e

6 B. A director, or spouse of a director, of a cooperative may not be 2
7 employed or have any financial interest in a separate business entity formed,
8 organized, acquired, held or operated by that cooperative pursuant to the provisions
9 of this section.

10 C. Should the public regulation commission, upon complaint showing
11 reasonable grounds for investigation, find after investigation and public hearing that
12 the charges for the transactions between the cooperative and other business entity do
13 not conform with the provisions of this section, the public regulation commission is
14 authorized to direct the cooperative to adjust those charges to comply with the
15 provisions of this section. If the cooperative does not comply with the public regulation
16 commission's directive, the public regulation commission is authorized to direct the
17 cooperative to divest its interest in the other business entity. For purposes of
18 enforcing this section, members of the public regulation commission, and the public
19 regulation commission staff, are authorized to inspect the books and records of such
20 other business entities and the cooperatives, provided that proprietary or confidential
21 data or information of the separate business entities shall not be disclosed to a third
22 party. The public regulation commission shall adopt rules and reporting requirements
23 to enforce the provisions of this section.

22 D. Nothing in this section grants the public regulation commission the
23 power to regulate a generation and transmission cooperative referred to in Section 62-
24 6-4 NMSA 1978."

24 Section 2. Section 62-6-6 NMSA 1978 (being Laws 1941, Chapter 84, Section
25 18, as amended) is amended to read:

1 "62-6-6. ISSUANCE, ASSUMPTION OR GUARANTEE OF SECURITIES.--

2 A. The power of a public utility to issue, assume or guarantee
3 securities and to create liens on its property situated within this state is a special
4 privilege subject to the supervision and control of the commission as set forth in the
5 Public Utility Act.

6 B. Except as provided in Subsection E of this section, a public utility,
7 when authorized by order of the commission and not otherwise, may issue stocks and
8 stock certificates and may issue, assume or guarantee other securities payable at
9 periods of more than eighteen months after the date thereof for the following purposes
only:

- 10 (1) making loans or grants from the proceeds of federal loans
for economic development projects benefiting its service area;
- 11 (2) the acquisition of property;
- 12 (3) the construction, completion, extension or improvement of
13 its facilities;
- 14 (4) the improvement or maintenance of its service;
- 15 (5) the discharge or lawful refunding of its obligations; or
- 16 (6) the reimbursement of money actually expended for
17 purposes set forth in this subsection from income or from any other money in the
18 treasury not secured by or obtained from the issue, assumption or guarantee of
19 securities, within five years next prior to the filing of an application with the commission
for the required authorization.

20 C. Notwithstanding the provisions of Subsection B of this section, the
21 commission may authorize issuance by a public utility of shares of stock of any class
22 as a dividend on outstanding shares of stock of the public utility of any class and may
23 authorize the issuance of the same or a different number of shares of stock of any
24 class in exchange for outstanding shares of stock of any class of the public utility, and
25 the public utility may issue the stock so authorized.

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1 D. The commission shall not authorize a borrowing under the
2 provisions of Paragraph (1) of Subsection B of this section unless the governing board
3 has approved the borrowing by a two-thirds' majority vote of the members present at a
4 special meeting called for that purpose. The commission shall review the terms of the
5 economic development loan or grant to ascertain the adequacy of any collateral, to
6 have the right to inspect books and review the level of co-participation by the borrower
or grantee.

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7 ~~E. Commission approval is not required for the issuance, assumption~~
8 ~~or guarantee of any security of a public utility whose securities are subject to oversight~~
9 ~~and approval by the federal government pursuant to the Rural Electrification Act of~~
10 ~~1936, as amended, or any successor law to that act."~~

11 ~~Section 3. Section 62-6-8.1 NMSA 1978 (being Laws 1979, Chapter 50,~~
12 ~~Section 1) is amended to read:~~

13 ~~"62-6-8.1. ADDITIONAL JURISDICTION.--Except as provided in Subsection E~~
14 ~~of Section 62-6-6 NMSA 1978 and notwithstanding any other provision of Sections 62-~~
15 ~~6-1 through 62-6-11 NMSA 1978, the commission shall have jurisdiction over and may~~
16 ~~regulate, by general order or regulation, securities of a public utility incorporated~~
17 ~~under the laws of this state that would otherwise be exempt from regulation by the~~
18 ~~commission pursuant to Section 62-6-6 NMSA 1978 or Subsection A of Section 62-6-8~~
19 ~~NMSA 1978 and that is subject to regulation pursuant to 16 USC 824."~~

20 Section 4. Section 62-8-7 NMSA 1978 (being Laws 1991, Chapter 251,
21 Section 1, as amended) is amended to read:

22 "62-8-7. CHANGE IN RATES.--

23 A. At any hearing involving an increase in rates or charges sought by
24 a public utility, the burden of proof to show that the increased rate or charge is just
25 and reasonable shall be upon the utility.

B. Unless the commission otherwise orders, no public utility shall make
any change in any rate that has been duly established except after thirty days' notice
to the commission, which notice shall plainly state the changes proposed to be made

1 in the rates then in force and the time when the changed rates will go into effect and
2 other information as the commission by rule requires. The utility shall also give notice
3 of the proposed changes to other interested persons as the commission may direct. 4
4 All proposed changes shall be shown by filing new schedules that shall be kept open 6
5 to public inspection. The commission for good cause shown may allow changes in 4
6 rates without requiring the thirty days' notice, under conditions that it may prescribe. P
7
8 C. Whenever there is filed with the commission by any public utility a a
9 complete application as prescribed by commission rule proposing new rates, the 5
10 commission may, upon complaint or upon its own initiative, except as otherwise
11 provided by law, upon reasonable notice, enter upon a hearing concerning the
12 reasonableness of the proposed rates. If the commission determines a hearing is
13 necessary, it shall suspend the operation of the proposed rates before they become
14 effective but not for a longer initial period than nine months beyond the time when the
15 rates would otherwise go into effect, unless the commission finds that a longer time will
16 be required, in which case the commission may extend the period for an additional
17 three months. The commission shall hear and decide cases with reasonable
18 promptness. The commission shall adopt rules identifying criteria for various rate and
19 tariff filings to be eligible for suspension periods shorter than what is allowed by this
20 subsection and to be eligible for summary approval without hearing.
21
22 D. If after a hearing the commission finds the proposed rates to be
23 unjust, unreasonable or in any way in violation of law, the commission shall determine
24 the just and reasonable rates to be charged or applied by the utility for the service in
25 question and shall fix the rates by order to be served upon the utility or the
commission by its order shall direct the utility to file new rates respecting such service
that are designed to produce annual revenues no greater than those determined by
the commission in its order to be just and reasonable. Those rates shall thereafter be
observed until changed, as provided by the Public Utility Act.
E. Except as otherwise provided by law, any increase in rates or
charges for the utility commodity based upon cost factors other than taxes or cost of

1 fuel, gas or purchased power, filed for after April 4, 1991, shall be permitted only after
2 notice and hearing as provided by this section. The commission shall enact rules
3 governing the use of tax, fuel, gas or purchased power adjustment clauses by utilities
4 that enable the commission to consider periodically at least the following:

5 (1) whether the existence of a particular adjustment clause is
6 consistent with the purposes of the Public Utility Act, including serving the goal of
7 providing reasonable and proper service at fair, just and reasonable rates to all
8 customer classes;

9 (2) the specific adjustment mechanism to recover tax, gas, fuel
10 or purchased power costs;

11 (3) which costs should be included in an adjustment clause,
12 procedures to avoid the inclusion of costs in an adjustment clause that should not be
13 included and methods by which the propriety of costs that are included may be
14 determined by the commission in a timely manner, including what informational filings
15 are required to enable the commission to make such a determination; and

16 (4) the proper adjustment period to be employed.

17 F. The commission may eliminate or condition a particular adjustment
18 clause if it finds such elimination or condition is consistent with the purposes of the
19 Public Utility Act, including serving the goal of providing reasonable and proper service
20 at fair, just and reasonable rates to all customer classes; provided, however, that no
21 such elimination or condition shall be ordered unless such elimination or condition will
22 not place the affected utility at a competitive disadvantage. The commission rules
23 shall also provide for variances and may provide for separate examination of a utility's
24 adjustment clause based upon that utility's particular operating characteristics.

25 G. Whenever there is filed with the commission a schedule proposing
new rates by a rural electric cooperative organized under the Rural Electric
Cooperative Act, the rates shall become effective as proposed by the rural electric
cooperative without a hearing. However, the cooperative shall give written notice of
the proposed rates to its affected patrons at least thirty days prior to the filing with the

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1 commission, and the commission shall suspend the rates and conduct a hearing
2 concerning the reasonableness of any proposed rates filed by a rural electric
3 cooperative pursuant to Subsections C and D of this section upon the filing with the
4 commission of a protest setting forth grounds for review of the proposed rates signed
5 by one or more members of the rural electric cooperative and if the commission
6 determines there is just cause for reviewing the proposed rates on one or more of the
7 grounds of the protest. The protest shall be filed no later than twenty days after the
8 filing with the commission of the schedule proposing the new rates. The hearing and
9 review shall be limited to the issues set forth in the protest and for which the
10 commission may find just cause for the review, which issues shall be contained in the
11 notice of hearing. The provisions of this subsection shall not be construed to affect
12 commission authority or procedure to regulate the sale, furnishing or delivery by
13 wholesale suppliers of electricity to rural electric cooperatives pursuant to Section 62-
14 6-4 NMSA 1978. In addition to the adjustments permitted by Subsections E and F of
15 this section, the commission may authorize rate schedules of rural electric
16 cooperatives to recover, without notice and hearing, changes in the cost of debt
17 capital incurred pursuant to securities that are lawfully issued. For the purposes of
18 this subsection, a member of a rural electric cooperative is a member as defined by
19 the Rural Electric Cooperative Act."

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20 Section 5. REPEAL.--Laws 1998, Chapter 108, Section 82, as amended by
21 Laws 2000, Chapter 88, Section 3, is repealed.

22 Section 6. EFFECTIVE DATE.--The effective date of the provisions of this act
23 is July 1, 2003.
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