

ORIGINAL



0000149015

BEFORE THE ARIZONA CORPORATION

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

COMMISSIONERS

BOB STUMP - Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH

Arizona Corporation Commission

DOCKETED

OCT 18 2013

DOCKETED BY

RECEIVED

AZ CORP COMMISSION

DOCKET CONTROL

2013 OCT 18 PM 12 08

IN THE MATTER OF THE PETITION OF
COLUMBUS ELECTRIC COOPERATIVE,
INC., FOR A DECLARATORY ORDER.

DOCKET NO. E-01851A-11-0415

STAFF'S SUPPLEMENTAL
RESPONSIVE BRIEF

I. PROCEDURAL BACKGROUND.

The Utilities Division ("Staff") of the Arizona Corporation Commission ("Commission") hereby submits Staff's Supplemental Brief pursuant to the Administrative Law Judge's order entered at the telephonic procedural conference on August 29, 2013. During the course of such conference the parties further discussed the applicability of Commission Decision No. 72175, *In the Matter of Garkane Energy Cooperative, Inc.* ("Garkane"), to the financial transactions of Columbus Electric Cooperative, Inc. ("Columbus" or "Cooperative"). More particularly, the Administrative Law Judge directed the parties to address the differences between the regulation exercised by the Utah Public Utilities Commission ("UPUC") under the Utah Code and that by the New Mexico Public Regulation Commission ("NMPRC") under New Mexico law in order to determine whether New Mexico law provides oversight and regulation comparable to that afforded by the Utah statutes so as to obviate the need for Columbus to seek the Commission's approval of its financial transactions under Arizona Revised Statutes ("A.R.S.") §§ 40-301, 40-302, 40-303 and 40-285.

In accordance with the Administrative Law Judge's Order, Columbus filed its Supplemental Brief on September 30, 2013. Therein, Columbus asserted several alternative arguments to support its position that it should be deemed to be a foreign public service corporation doing business in Arizona, engaged in interstate commerce and, therefore, exempted from the requirements of the Arizona financing statutes as in *Garkane*. Though Staff reiterates its positions as set forth in its initial Responsive Brief that the Cooperative's financial transactions should be exempted from the

1 application of the subject statutes in the manner of *Garkane*, it does not wholly agree with all of the
2 arguments set forth by Columbus in its Supplemental Brief. Moreover, as will be discussed below,
3 Staff does not believe that such arguments are particularly persuasive in this instance.

4 **II. DISCUSSION.**

5 **A. Utah and New Mexico Utility Regulatory Law.**

6 In its Supplemental Brief, Columbus sets forth an analysis of the similarities of and
7 distinctions between applicable New Mexico and Utah regulatory law regarding to the respective
8 states' oversight of an electric utility's financing transactions. Of specific note is the fact that,
9 pursuant to Utah Code § 54-4-31, Utah law requires an electric utility to seek approval of its debt
10 financing from the state commission while, conversely, New Mexico law requires no such application
11 provided the utility's financing is secured from the federal government's Rural Utilities Service
12 ("RUS"). (*See* NMSA § 62-6-6.)

13 While the Cooperative's analysis touches upon the expeditiousness of the Utah financing
14 process under its current statutes, Staff would submit that the expedited review allowed by the Utah
15 statutes and the lack of any required application and approval in New Mexico, though of some merit,
16 are not the governing considerations in this matter. Rather, the impact to interstate commerce is
17 illustrated by the existence of regulatory oversight in both New Mexico and Arizona and the
18 attendant potential for inconsistent regulatory requirements as a result of the application of two
19 separate statutory schemes. This possibility for inconsistent results appears to be the basis for the
20 Commission's order in *Garkane*.

21 By the language of NMSA § 62-6-6E, one could argue that the NMPRC exercises no
22 regulatory oversight over an electric cooperative's financing transactions in light of the absence of a
23 required application and attendant formal commission approval. However, Staff submits that such is
24 not the case. In reality, this statute does not evidence a lack of oversight but, instead, simply provides
25 a different degree of oversight than is exercised in Utah, or Arizona for that matter. As was touched
26 upon by Columbus in its Supplemental Brief, the New Mexico legislature determined that, given the
27 relative recent history of financing by rural electric cooperatives in that state, as of 2003 no formal
28 application and/or NMPRC approval were required where such cooperatives secure federal financing

1 from RUS. In essence, the New Mexico legislature determined that the stringent evaluations and
2 assessments to which the RUS subjects a cooperative in securing its financing is tantamount to that
3 state's application process which was in effect until 2003. Absent RUS financing, cooperatives are
4 required to undergo state commission review of their proposed financings.

5 Staff would further submit that the differences in regulatory requirements between Utah and
6 New Mexico are, in essence, the same as those between New Mexico and Arizona. Given this, Staff
7 would posit that the disparate statutory requirements of New Mexico and Arizona create the same
8 potential, significant burden to Columbus that was present in *Garkane*, i.e., the prospect of
9 inconsistent regulation. The Commission in *Garkane* determined that such likelihood was sufficient
10 to justify deference to the potential concerns regarding burdens on interstate commerce.

11 Moreover, as was espoused by Staff in *Garkane*, the Commission should evaluate the
12 applicability of *Garkane* on case-by-case basis given the reality that "facts change." As noted above,
13 New Mexico law was amended in 2003 when formal applications and NMPRC approval were
14 eliminated for those cooperatives that secured RUS financing. Notwithstanding this statutory change,
15 New Mexico has not recused itself entirely from monitoring electric cooperative financial
16 transactions but, rather, has opted to take a more limited approach by relying on the stringent
17 oversight requirements of RUS. New Mexico regulatory oversight may not appear on its face to be
18 as structured as that in Utah and Arizona; nonetheless, the application of both New Mexico and
19 Arizona law could result in conflicting or varying regulatory requirements and, thus, impose an
20 impermissible burden on interstate commerce. Staff therefore maintains that requiring Columbus to
21 obtain approval of its financial transactions from multiple jurisdictions could constitute a burden on
22 interstate commerce which brings this matter within the ambit of the Commission's analysis in
23 *Garkane*. That the tenets of *Garkane* should apply in this instance is further supported by the fact
24 that the percentage of Columbus' customers in Arizona (9%) is less than those then-existing in
25 *Garkane* (11.5 %) and Dixie (14%).

26 **B. Columbus' Alternative Theories Presented as Support for Garkane Applicability.**

27 As noted above, in addition to the foregoing Utah/New Mexico regulatory oversight
28 comparison, Columbus espouses two other theories for its argument that *Garkane* should apply to its

1 financing transactions. First, the Cooperative asserts that the application of A.R.S. §§ 40-301, 40-
2 302, 40-303 and 40-285 would constitute a *per se* violation of the Commerce Clause. Second,
3 Columbus contends that application of the balancing test established in *Pike v. Bruce Church*, 397
4 U.S. 137 (1970) “supports a finding that Commission regulation of Columbus’ financing activities is
5 impermissible under the Commerce Clause.” Staff will address these in the order presented.

6 **1. Per Se Violation of Commerce Clause.**

7 Staff first contends that Columbus’ discussion of the subject statutes constituting a *per se*
8 violation of the Commerce Clause is outside the scope of the parties’ supplemental briefs. As Staff
9 first asserted above, the Administrative Law Judge specifically limited the scope of such briefs to the
10 differences between the Utah and New Mexico statutes applicable to the regulation of financing
11 transactions. Columbus acknowledged such limitation at page two of its Supplemental Brief wherein
12 it provides that briefs should be filed “regarding the apparent differences between the regulation by
13 the Utah Public Utility Commission, pursuant to Utah Code, and that of the New Mexico Public
14 Regulation Commission, pursuant to the New Mexico statutes....” Thus, discussion of a *per se*
15 violation of the Commerce Clause is outside the scope of the requested briefs.

16 Moreover, Staff submits that, given the discussion set forth above regarding the applicability
17 of *Garkane* to the instant facts, the Administrative Law Judge need not address the *per se* argument
18 in this matter. Notwithstanding this point, Staff would also hasten to add that Columbus’ argument
19 for a *per se* violation of the Commerce Clause as presented in its Supplemental Brief is not
20 persuasive under the present circumstances. The mere existence of the subject Arizona statutes does
21 not, in and of itself, constitute a *per se* violation of the Commerce Clause, and the arguments
22 proposed by Columbus to such effect are not legally or factually convincing.

23 **2. Applicability of *Pike v. Bruce Church*.**

24 Staff would reiterate that any discussion beyond the differences between the Utah and New
25 Mexico regulatory statutes exceeds the scope of this brief. Irrespective of this fact, Staff would
26 concur with Columbus that the balancing test set forth in *Pike* would apply in this matter given the
27 fact that the subject Arizona statutes are facially neutral in their application to foreign and domestic
28 public service corporations. However, Staff does not agree with Columbus’ assertion that the subject

1 Arizona statutes fail to effectuate a legitimate local public interest. As the Commission noted in
2 *Garkane*, “[t]he local interests served by A.R.S. §§ 40-301 through 40-303 and A.R.S. § 40-285 are
3 great.” Citing the United States Supreme Court’s decision in *Arkansas Elec. Coop. v. Arkansas Pub.*
4 *Serv. Comm’n*, 461 U.S. 375, 377 (1983), which found that “the regulation of utilities is one of the
5 most important of the functions traditionally associated with the police powers of the states,” the
6 Commission in *Garkane* delineated numerous local public interest factors¹ and determined that “[i]t
7 is incontrovertible that the local interests served by the [subject] statutes are legitimate and of great
8 importance.”²

9 Arizona’s financing statutes clearly survive the *Pike* analysis; as a result, the only issue
10 presented in this case is whether the *application* of those statutes may impermissibly burden interstate
11 commerce.

12 As noted above, Staff would agree that, as in *Garkane*, the application of both the New
13 Mexico and Arizona regulatory statutes could place an impermissible burden on interstate commerce.
14 While the degree of oversight contemplated by the New Mexico statutes is admittedly less structured
15 than the applicable Arizona statutes, the difference between the two regulatory schemes still creates a
16 very real prospect of the imposition of inconsistent regulation between the two states. Moreover, this
17 potential burden on interstate commerce is exacerbated in this instance by the fact that 91% of
18 Columbus’ customers are located in New Mexico. In order to monitor these issues on a case-by-case
19 basis, the Commission should require Columbus to file with the Commission (a) all future financing
20 applications (to RUS OR THE nmprc); (b) affidavits verifying its then-existing percentages of New
21 Mexico and Arizona customers; and (c) any orders issued relative thereto by the NMPRC.

22 **III. CONCLUSION.**

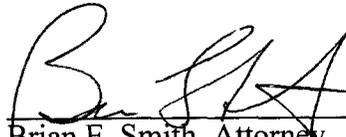
23 Based on the arguments submitted in its Initial Brief and the additional facts and legal
24 analysis set forth above, Staff re-urges its position that the Commission’s conclusions in *Garkane*
25 should apply in this instance. Staff believes that, notwithstanding the distinctions between the Utah
26 and New Mexico regulatory statutes and the respective oversight required thereby, the Commission’s

27 _____
28 ¹ Staff’s listed many of these factors in its Initial Brief filed April 29, 2013.

² Decision No. 72175 at p. 18.

1 interest in exercising its jurisdiction to regulate financial transactions under A.R.S. §§ 40-301, 40-
2 302, 40-303 and 40-285 is outweighed in this instance by the onerous impact to interstate commerce.
3 Staff would again emphasize the need for these issues to be considered on a case-by-case basis. The
4 Commission should therefore require Columbus to file in the Commission's docket all future
5 financing applications, affidavits verifying the then-existing percentages of New Mexico and Arizona
6 customers, and any orders issued by the NMPRC related to Columbus' financings.

7 RESPECTFULLY SUBMITTED this 18th day of October, 2013.

8
9
10 

10 Brian E. Smith, Attorney
11 Maureen A. Scott, Senior Staff Counsel
12 Legal Division
13 Arizona Corporation Commission
14 1200 West Washington Street
15 Phoenix, Arizona 85007
16 (602) 542-3402

14
15 Original and thirteen (13) copies
16 of the foregoing filed this
17 18th day of October, 2013 with:

17 Docket Control
18 Arizona Corporation Commission
19 1200 West Washington Street
20 Phoenix, Arizona 85007

21 Copy of the foregoing e-mailed and mailed
22 this 18th day of October, 2013 to:

23 Charles C. Kretek, General Counsel
24 Columbus Electric Cooperative, Inc.
25 Post Office Box 631
26 Deming, New Mexico 88031-0631
27 chuck@col-coop.com

28 