

**SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION
GOLDWATER INSTITUTE**

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**IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

ROY MILLER, THOMAS F.)	Case No.: <u>CV2008-029293</u>
HUSBAND, JENNIFER BRYSON, and)	
CORPUS COMMUNICATIONS, INC.,)	
)	
Plaintiffs/Petitioners,)	
)	COMPLAINT
vs.)	
)	
ARIZONA CORPORATION)	(for Injunctive and Declaratory Relief,
COMMISSION, and KRISTIN MAYES,)	and/or Special Action Relief)
WILLIAM MUNDELL, JEFF HATCH-)	
MILLER, GARY PIERCE, and MIKE)	
GLEASON, in their official capacities as)	Oral Argument Requested.
members of the Arizona Corporation)	
Commission,)	
)	
Defendants/Respondents.)	

Introduction

1. The Arizona Corporation Commission is established under the Arizona Constitution with limited power to regulate utility rates, but over the years it has expanded its reach beyond its constitutional powers. Last year, the Commission adopted sweeping new rules requiring utilities to derive a specified share of their power from alternative sources. The rules rely in part

on the voluntary actions of third parties, over whom utilities have no control, and result in a Commission-estimated \$2.4 billion per year in direct rate surcharges and other costs to residential and business customers. In May this year, the Commission approved a surcharge for Arizona Public Service (“APS”). That surcharge, imposed upon over one million customers including Petitioners, resulted from the rules that are the subject of this Complaint.

2. Regardless of whether the rules constitute sound public policy, the Corporation Commission has no legitimate power over renewable energy policy, which is a legislative determination. Within the narrow parameters of its constitutional authority, the Commission’s power is plenary, and that authority may be augmented by clear statutory delegation. But through the challenged rules, the Commission has attempted by regulatory fiat to appropriate from the Legislature the power to determine energy policy for virtually the entire state, at enormous projected additional cost to utility ratepayers. That it cannot do.

Parties, Jurisdiction, and Venue

3. Petitioner Roy Miller, an Arizona taxpayer, is a residential APS customer who owns his house in Phoenix, Arizona.

4. Petitioner Thomas F. Husband, an Arizona taxpayer, is a residential APS customer who owns his house in Paradise Valley, Arizona.

5. Petitioner Jemifer Bryson, an Arizona taxpayer, is a residential APS customer who owns a condominium in Phoenix, Arizona.

6. Petitioner Corpus Communications, Inc., an Arizona taxpaying corporation, is a

commercial APS customer renting an office in Scottsdale, Arizona.

7. Respondent Arizona Corporation Commission is established by Article XV of the Arizona Constitution to regulate public utility rates.

8. Respondent Kristin Mayes is a member of the Arizona Corporation Commission. She is sued in her official capacity only.

9. Respondent William Mundell is a member of the Arizona Corporation Commission. He is sued in his official capacity only.

10. Respondent Jeff Hatch-Miller is a member of the Arizona Corporation Commission. He is sued in his official capacity only.

11. Respondent Gary Pierce is a member of the Arizona Corporation Commission. He is sued in his official capacity only.

12. Respondent Mike Gleason is Chairman of the Arizona Corporation Commission. He is sued in his official capacity only.

13. Injunctive and declaratory jurisdiction is proper pursuant to A.R.S. §§ 12-123, 12-1801 and 12-1831. Additionally/alternatively, special action jurisdiction is proper pursuant to Rules 1-4, Ariz. R. P. Spec. Actions.

Facts Common to All Claims

14. The core provisions of the Renewable Energy Standard and Tariff (“REST”) Rules adopted by the Arizona Corporation Commission require utilities to derive an increasing annual percentage of energy from renewable resources, so that by 2025, utilities generate 15% of their

power from renewable sources.

15. A percentage of the renewable resource requirement must derive specifically from distributed renewable resources, like rooftop solar panels.

16. A percentage of *that* percentage must derive specifically from residential sites, and an equal percentage from commercial sites.

17. Fulfilling the REST Rules depends on residential and commercial ratepayers voluntarily installing distributed renewable energy generators on their property.

18. Neither the Corporation Commission nor utility companies have authority to force ratepayers to install distributed generators, though the REST Rules penalize utilities for failing to meet the distributed energy requirement.

19. APS residential installations have never numbered more than a few hundred per year, but the REST Rules effectively require many thousands of new installations.

20. Even with incentives, APS questioned during the ratemaking process whether it could persuade enough customers to participate to put the utility in compliance with the REST Rules. At least \$3.5 million were left in unclaimed incentives during 2007.

21. The safety, reliability, and logistics of transmission and delivery of renewable energy sources is uncertain and subject to market forces and technological developments.

22. Renewable energy incentives are not restricted to APS customers. Those who use off-grid power in APS's service district, but do not use APS services, are still eligible to receive incentives for installing renewable energy resources. Thus, utility customers, including

Petitioners, are forced to subsidize off-grid systems to benefit people who do not pay any REST surcharge.

23. Conversely, some customers who are forced to pay the surcharge, like renters who do not own their roof including Petitioner Corpus Communications, Inc., are not able to install renewable technologies on their property and therefore are ineligible to receive the incentives for which they must pay.

24. APS's renewable energy surcharge is a per kWh charge capped at different amounts for residential, small commercial, and large commercial customers. Because of the caps, customers whose usage is at or below the cap bear a disproportionate share of the costs compared to those whose usage exceeds the cost.

25. A.R.S. §§ 40-361(A) and 40-361 (B) requires that utilities provide adequate and efficient service at just and reasonable rates. The Commission may not interfere with these duties, and furthermore it may only regulate subject to these duties.

26. Residential customers, who account for roughly 800,000 of the one million meters serviced by APS, will spend up to \$1.06 million per month in REST surcharges for 2008.

27. APS estimates the cost for it to comply with the REST Rules will total \$48.2 million in 2008 and will increase to \$95.7 million by 2012, totaling \$347 million over the next five years. See Arizona Corporation Commission Decision No. 70313, ¶ 6.

28. The Commission's staff estimated the total costs of the REST Rules to be at least \$2.4 billion more than convention energy sources (\$886,991,021 in additional costs for distributed

energy, plus \$317,532,804 in additional costs for nondistributed energy, plus \$1,204,523,824 in compliance costs). This estimate does not include the cost of new infrastructure needed to meet the REST requirements each year through 2030, which the Commission's staff found to be "unknown." See Arizona Corporation Commission Decision No. 69127, App. B pp. 63-73.

29. The costs of complying with the renewable energy requirements are directly paid by utility customers in the form of a utility surcharge mandated by the REST Rules. Additional costs will be passed along to ratepayers in the form of higher rates.

30. All taxpayers are also paying for the REST Rules because the Commission is expending public funds to enforce them.

I. Constitutional and Statutory Authority

31. The Commission has no authority except that which derives from the Arizona Constitution or statutes. *Phelps Dodge v. Arizona Elec. Power Co-Op*, 207 Ariz. 95, 111, 83 P.3d 573, 589 (App. 2004).

32. In adopting the REST Rules, the Commission concluded that it had authority under Article XV of the Arizona Constitution and Title 40 of the Arizona Revised Statutes.

33. The Arizona Constitution (Art. XV, § 3) authorizes the Corporation Commission to prescribe rates and to enact rules and regulations that are reasonably necessary steps to ratemaking.

34. The Commission did not prescribe rates in the REST Rules, nor were the REST Rules steps reasonably necessary for ratemaking. Thus, the Commission sought statutory review from

the Attorney General.

35. When the Commission lacks constitutional authority to promulgate rules, it must have “specific statutory authority” pursuant to A.R.S. § 41-1001(14)(a)(i).

36. A.R.S. Title 40 encompasses seven different chapters, each with multiple articles that comprise over 250 provisions. It is not “specific statutory authority.” The Attorney General agreed the citation was “vague.” Arizona Corporation Commissioner (now Chairman) Gleason dissented from the rules, believing them to be beyond the Commission’s authority.

37. The Commission admits that it has no “isolated source of statutory or constitutional authority” to enact the REST Rules. See Memorandum from Christopher Kempley, Chief Legal Counsel, Legal Division, Arizona Corporation Commission, to Terry Goddard, Attorney General (March 30, 2007).

38. The Commission’s statutory authority is limited to promulgating rules that are within the subject matter area listed in a specific statute. A.R.S. § 41-1001.01(A)(8). No statute authorizes the Commission to make rules to promote the use of renewable energy resources or control the types of resources utilities use to supply power.

39. For all these reasons, the REST Rules and the APS surcharge approved pursuant to those rules are outside the scope of the Commission’s authority and therefore are unlawful.

II. Management Interference Doctrine

40. The management interference doctrine prohibits the Corporation Commission from controlling management affairs of a utility and interfering with the relationships between

utilities and their customers. *Phelps Dodge*, 207 Ariz. at 113, 83 P.3d at 591.

41. The essence of the REST Rules is a bottom-line mandate, calibrated year by year, that specific percentages of energy will be provided from renewable sources. R14-2-1804. Beyond that, the rules prescribe precise percentages of such energy to be transmitted from distributed sources and non-distributed sources. R14-2-1805. Within the distributed power sources, the rules prescribe precise percentages for commercial and residential generation. R14-2-1805(D).

42. The rules make no exceptions nor provide any flexibility for cost considerations, technology advances or lack thereof, adequacy or reliability of supply, or prices of competing energy sources.

43. The REST Rules essentially eliminate, for the next 15 years and beyond, the cost-benefit analysis that is essential to sound business decisions.

44. For all these reasons, the REST Rules control the internal management of utilities and interfere with the relationship between utilities and their customers in ways not authorized by the Arizona Constitution or statutes.

45. The financial burden for the illegal interference with management prerogatives is borne in whole or part by APS ratepayers and Arizona taxpayers.

III. Separation of Powers

46. According to Article III of the Arizona Constitution, “The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall

be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.” Although the Corporation Commission is not named as such, it is in fact the fourth department of Arizona’s government. *State v. Tucson Gas, Elec. Light & Power Co.*, 15 Ariz. 294, 306, 138 P. 781, 786 (1914). Thus, the separation of powers clause applies equally to the Commission.

47. In matters not encompassed by the Commission’s constitutional ratemaking authority, the power to regulate public utilities belongs to the legislature. *Phelps Dodge*, 207 Ariz. at 111, 83 P.3d at 589.

48. Until the legislature delegates authority, regulating the use of renewable energy remains exclusively in the legislature’s prerogative.

49. The legislature has not yielded authority over energy policy to the Commission either expressly or by implication, but rather has actively legislated in the field. For example:

- a. A.R.S. § 41-1510 establishes a solar energy advisory council, which, among other things: (i) assists and advises on matters relating to the development and use of solar energy and renewable energy resources; (ii) encourages research and local government institutions and home builders in obtaining technical and financial support from the federal government for activities in solar and alternate energy systems; (iii) identifies and describes solar energy technologies that are feasible and practical in terms of short-term application; (iv) identifies and describe long-range programs that are feasible; (v) encourages the cooperation of sectors with

special expertise in solar energy technology; and (vi) recommends standards, codes, certifications, and other programs necessary for orderly and rapid commercialization and growth of solar energy use in Arizona.

- b. A.R.S. § 43-1085 creates individual tax credits for solar devices.
- c. A.R.S. § 43-1164 creates corporate tax credits for solar devices.
- d. A.R.S. § 43-1090 creates individual tax credits for solar hot-water plumbing.
- e. A.R.S. § 43-1176 creates corporate tax credits for solar hot-water plumbing.
- f. A.R.S. § 42-5159(A)(31) exempts from the transaction privilege (sales) tax electricity purchased from a qualified environmental technology manufacturer.
- g. A.R.S. § 41-1510.01 vests in the Department of Commerce—not the Corporation Commission—the power to determine which commercial solar energy projects qualify for tax credits.
- h. A.R.S. § 15-213.01 allows school districts to enter into guaranteed energy cost savings contracts with a qualified provider through a competitive sealed proposal process as long as feasibility studies and audits demonstrate that the savings outweigh the expenditures. The energy contract must be reviewed annually and modifications may be made for changes in utility rates, weather, equipment, and other factors.
- i. A.R.S. § 15-213.02 establishes a school energy program, which provides for utilities to fund energy-saving measures like insulating buildings, installing storm

windows, using computerized energy control systems, and improving indoor air quality at schools. The schools repay the utility via an energy charge on its utility bill.

- j. A.R.S. § 41-1514.02 directs the Department of Commerce to establish an environmental technology assistance program to recruit and expand companies involved with solar and other renewable energy products.
- k. Of course, A.R.S. § 40-361(A)-(B) requires that utilities provide adequate and efficient service at just and reasonable rates, and the Commission may not make rules that interfere with utility companies' statutory obligations.

50. The REST surcharge constitutes a tax, and the power to collect and spend taxes lies solely in the legislature, not the Corporation Commission or private utility companies.

51. For all these reasons, the power to enact renewable energy rules, standards, and tariffs remains exclusively in the legislature, and the Corporation Commission lacks authority to promulgate the REST Rules.

Request for Relief

For their relief, Petitioners request that this Court take the following actions:

- A. Declare the REST Rules invalid, and enjoin their further effect;
- B. Declare that the provisions of the REST Rules exceed the Corporation Commission's legitimate powers and violate Petitioners' constitutional rights;
- C. Preliminarily and permanently enjoin the Corporation Commission from approving

and enforcing energy surcharges or environmental standards pursuant to the provisions of the REST Rules;

D. Issue a special action writ of prohibition prohibiting the Corporation Commission from enforcing the REST Rules;

E. Award costs pursuant to A.R.S. § 12-341;

F. Award attorney fees pursuant to A.R.S. §§ 12-348 and 12-2030, Rule 4(g), Ariz. R. P. Spec. Actions, and the private attorney general doctrine; and

G. Award such other and further relief as may be just and equitable.

RESPECTFULLY SUBMITTED this 19th day of November, 2008 by:

A handwritten signature in black ink, appearing to read "Clint Bolick", is written over a horizontal line.

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