IN THE SUPREME COURT OF ARIZONA

ROY MILLER, THOMAS F. HUSBAND, JENNIFER BRYSON, and CORPUS COMMUNICATIONS, INC.,	Case No.: CV-08-0196-SA
Petitioners,	
vs.	
ARIZONA CORPORATION COMMISSION, TERRY GODDARD, in his official capacity as Attorney General, and KRISTIN MAYES, WILLIAM MUNDELL, JEFF HATCH-MILLER, GARY PIERCE, and MIKE GLEASON, in their official capacities as members of the Arizona Corporation Commission,	
Respondents.	

COMBINED REPLY OF PETITIONERS

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Introduction

Throughout its response, the Arizona Corporation Commission expansively describes its power, using such terms as "very broad" (Resp. at 32) and "sweeping" (*id.* at 25). That may describe the Commission's sincere aspiration, but it does not reflect the law. 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.

The Commission takes a kitchen-sink approach in its brief, presenting an array of factual, procedural, and substantive arguments why the Court should not take the case and why its actions fall within its constitutional or statutory powers. For the convenience of the Court, we have combined our responses to the Commission, the Attorney General, and the three *amici*,[1] addressing the latter four briefs when their arguments are different from the Commission's. We begin by

[1] Brief of *Amici Curiae* (filed Aug. 15, 2008) ("advocacy-group *amici*"); Brief of Amicus Curiae Arizona Public Service Company (filed Aug. 27, 2008) ("APS"); and Amici Curiae Brief of Commissioner Gary Pierce and Representative Kirk Adams (filed Sept. 3, 2008). Petitioners note that the latter two briefs were filed very late in the briefing schedule, for reasons that are not apparent from the filings; and that the interest-group brief exceeds by more than double the 12-page limit set forth in Ariz. R. Civ. App. P. 16(b).

placing the facts in their proper legal context; then demonstrate why the Court should accept jurisdiction; and finally establish that the REST Rules exceed the Commission's authority, violate the constitutional separation of powers, and interfere with matters properly entrusted to the companies it regulates.

Though this case comes with an extensive administrative record, the solitary issue before this Court is a question of law: does the Commission possess the constitutional or statutory authority to determine energy policy for the State of Arizona? The case thus appropriately is before this Court; and petitioners demonstrate below why the Commission lacks the authority it asserts.

Argument

I. RELEVANT FACTS

Neither this nor any court is a proper forum for a debate over energy policy, and contrary to the assertions of respondents and their *amici*, petitioners do not seek to inject such a debate into these proceedings. Rather, the debate itself is relevant to the legal issue because it underscores the wisdom of decades of jurisprudence by this and other Arizona appellate courts that narrowly construes the Commission's authority beyond its plenary ratemaking power.

The Commission made a number of factual findings concerning the adequacy of existing power supplies, the costs and benefits of renewable energy sources, and other matters. Those findings are subject to intense dispute.

Commissioner (now Chairman) Gleason objected to the rules in unusually harsh terms, contending among other things that they are in "reckless disregard for reliability" (Pet. App. 2, Dissent p. 3), result in "an extremely wasteful use of ratepayer dollars to subsidize the least economical renewable technology" (*id.*, p. 4), and constitute "a virtual mandate for imprudence" (*id.*, p. 5).

Petitioners do not seek to replace the Commission's findings with those of the dissent or of anyone else. But the Commission cannot by its own findings expand its constitutional or statutory powers. Nor can the findings sustain the Commission's unprecedented intrusion into the police powers of the Legislature or into the management prerogatives of utility companies.

Three aspects of the Rules and the record are pertinent in providing the factual backdrop against which the legal issues should be decided. First, the Rules regulate in rigid fashion over an extensive period of years matters that are inherently changing and uncertain. Second, the Rules on their face are far more comprehensive and prescriptive than any regulations ever before considered, much less sanctioned, by any court of the state. Finally, the record reveals that implementation of the Rules will be extraordinarily costly to consumers. All of those undisputed facts have important ramifications that are addressed in section III, *infra.*

A. Uncertainty. The Commission made a number of generic and conclusory findings about renewable energy sources (Pet. App. 2, pp. 54-56). But the comments from members of the public, advocacy groups, utility companies, and renewable energy concerns (*id.*, pp. 3-54) exhibit a wide and divergent array of opinions on the feasibility of the REST Rules. As the Commission found, comments "from the public in opposition to the Proposed RES Rules have been based primarily on economic and reliability concerns" (*id.*, p. 56).

The Commission and *amici* may well be correct that continued dependence on fossil fuels is inappropriate, and that renewable energy will be reliable and increasingly affordable. But as the record reflects in abundance, the only certainty with regard to energy options is uncertainty, a fact corroborated by credible outside sources. *Forbes* recently found, for instance, that "today the sun contributes only 0.03% of the electricity generated in the U.S., and this juice costs, on average, 27 cents per kilowatt-hour before subsidies. Absent those government handouts, the solar industry would vaporize." Improvements in solar technology, the article reports, could bring down costs; but shortages of key components are forcing prices up. The future of federal subsidies is uncertain, and the viability of the technology depends in large measure on the price of oil, which has gyrated. Andy

Stone, "Sun Worshippers," *Forbes* (Aug. 11, 2008), p. 34 (Supp. App. 1). So the potential for solar is uncertain.[2]

Likewise with wind power. As the *New York Times* reports, "Expansive dreams about renewable energy . . . are bumping up against the reality of a power grid that cannot handle the new demands. The dirty secret of clean energy is that while generating it is getting easier, moving to market is not." While extensive wind energy theoretically is possible, the report explains, the "basic problem is that many transmission lines, and the connections between them, are simply too small for the amount of power companies would like to squeeze through them." Moreover, ownership of energy grids is "balkanized," and the best wind sources often are remote from transmission facilities. Hence "experts say that without a solution to the grid problem, effective use of wind power on a wide scale is likely to remain a dream." Matthew L. Wald, "Wind Energy Bumps Into Power Grid's Limits," *New York Times* (Aug. 27, 2008), pp. A1 & A13 (Supp. App. 3).

None of this is to say that renewable energy is not desirable or possible or that utility companies should not pursue it, but rather that its potential over both the

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[2] *Amicus* APS corroborates the uncertainty of solar power in a 2006 letter to the Commission, saying that "[w]hile Arizona has abundant potential solar energy, these technologies are currently very expensive and large scale commercial implementation is at a very early stage. Another widely experienced challenge is the high rate of project failure which exacerbates the challenge of meeting progressive targets" (Supp. App. 2, pp. 2-3).

short- and long-term is unknown—a reality that pervades the comments to the Rules. See, e.g., Pet. App. 2, App. B, p. 52 ("APS stated that it does not feel that it can reliably predict the availability or costs of renewable power for purchase beyond 2010"); *id.*, p. 62 ("APS further stated that it is hopeful that several new cost-competitive technologies will become available to meet the Distributed Energy Requirement . . ., but that it does not yet know how cost effective or successful such alternatives will be for APS customers"); *id.*, p. 79 (Unisource Energy states that the Commission staff's "wind assumptions are too optimistic" and its solar assumptions are inadequate to meet REST requirements); *id.*, p. 17 (Unisource states that the REST requirements are "simply not achieveable"). The constitutional requirement of just and reasonable rates and the statutory command of an adequate, efficient, and reasonable energy supply for Arizona consumers requires flexibility in response to ever-changing energy markets and technology.

B. Prescriptiveness. The REST Rules, by contrast, are anything but flexible. While leaving it to the utility companies to determine exactly how to fulfill it, 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 and non-distributed sources (R14-2-1805). Even more onerous, and for reasons that remain a mystery because they are

not apparent from the Commission's findings, within the distributed power sources the Rules prescribe precise percentages for commercial and residential generation (R14-2-1805(D)). 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. Likewise, the Rules make no exceptions nor provide any flexibility for the willingness or ability—or lack thereof—of third parties, who are beyond the control of the Commission or the utility companies, to provide their prescribed share of distributed energy.[3] The Rules provide for penalties for failure to meet the requirements (R14-2-1815).

Contrast the Commission's approach to a bill considered in the most recent legislative session. Chapter 7 of H.B. 2766 (Supp. App. 4), like the REST Rules, would have established a policy "that by 2025, at least fifteen percent of the electricity delivered to retail utility customers in this state shall be from renewable sources of energy." However, it would not dictate year by year calibrations, or prescribe the minimum percentages of distributed and nondistributed generation, or mandate third-party participation, or establish penalties. It would allow consumer incentives and third-party electricity generation. Rather than establishing

[3] As the activist-group *amici* acknowledge (Br. at 19), "The success of the distributed portion of the Rest Requirements does indeed depend upon customer investments in eligible resources." The Rules provide for waivers for "good cause" (R14-2-1816), but set forth no instances in which such waivers should be granted and no guidelines for the exercise of the Commission's discretion.

compliance penalties, it would provide for annual reports to the governor and the executive officers of the two legislative houses. The bill was passed by the House of Representatives by a large bipartisan margin but was not acted upon by the Senate.

The bill illustrates several points. At least a large majority of the House of Representatives apparently does not believe it has ceded authority over energy policy to the Corporation Commission. While those who sponsored or supported the bill obviously favor increased use of renewable energy, they did not seek to impose year by year mandates or penalties. Rather, they embraced a flexible, learn-as-we-go forward approach. Finally, the judicial invalidation of the REST Rules does not necessarily mean there will be no renewable energy policy in Arizona. Indeed, because the Commission has jurisdiction over some but not all of the state's utility companies,[4] Arizona presently has a two-tiered energy policy: a highly prescriptive set of rules for ACC-regulated companies, and no such rules for other companies (such as the Salt River Project). The Commission has insinuated itself into energy policy and the governance of utility companies to an extent unprecedented in our state's history.

[4] A.R.S. § 40-202(A) (authorizing the Commission to regulate public service corporations); Ariz. Const. Art. 15, § 2 (defining public service corporations).

C. Excessive Cost. The Commission found that "[r]enewable energy resources rely on free energy or very low-cost energy" (Pet. App. 2, p. 55). However, it expressly did *not* find that the renewable energy sources mandated by the REST Rules would provide electricity at lower cost than conventional sources. Quite to the contrary: the acronym REST stands for Renewable Energy Standards and Tariff, the "T" indicating increased cost. Given the constitutional and statutory mandates of energy at "reasonable" costs (Ariz. Const. Art. XV, § 3; A.R.S. § 40-361(A)), the conscious choice to *require* higher-cost energy makes the Rules very hard to justify as an appropriate Commission action.[5]

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[5] The activist-group *amici* (Br. at 23) suggest that a factual dispute exists over whether the Rules will increase utility rates. Of course, utility rates already have increased by virtue of the Rules' surcharge mandate (R14-2-1808), as well as the Commission's rate-increase approval for APS challenged here.

Likewise, over the course of the consideration of the REST Rules, APS stated that

> we understand, and the RES acknowledges, that the cost of renewable energy is generally higher than energy from traditional resources, and will likely remain so for the foreseeable future. For example, quality solar resources are available in Arizona, but solar generation is currently about 3 to 5 times more expensive per kilowatt hour than coal or nuclear resources. . . . There is little APS or the State of Arizona can do to change these fundamental economics for renewables in the near term.

(Supp. App. 2, p. 3.)

To avoid any factual disputes, Petitioners are content to rely on the Commission staff's cost estimates in the record, as presented in this section.

Over the course of the Commission's deliberations, Commissioner Gleason asked what turned out to be a $2.4 billion dollar question: what are the estimated yearly costs of distributed and nondistributed renewable energy resources above the market cost of comparable conventional generation, as well as the cost of compliance over the course of the REST Rules? The staff responded with the following estimates:

- Additional costs for distributed renewable energy resources: $886,991,021 (Pet. App. 2, App. B, pp. 63-64)
- Additional costs for non-distributed renewable energy resources: $317,532,804 (*id.*, pp. 67-68)
- Compliance costs: $1,204,523,824 (*id.*, pp. 72-73).

Additionally, the staff found that the projected cost of new infrastructure needed to supply the renewable energy required to meet the RES each year through 2030 is "unknown" (*id.*, pp. 68 & 70).

Hence, the Commission's own staff findings project at least $2.4 billion in costs for its REST Rules above and beyond conventional energy sources.[6] Hence, the surcharges approved by the Commission this year will be only the beginning of additional rate increases attributable to the REST Rules. See, e.g., *id.*, p. 71 ("APS

[6] Unisource Energy commented that some of the staff's assumptions were "not realistic," and that applying its own cost model assumptions "would result in a significant increase in the total projected RES program costs" (*id.*, pp. 78-79).

stated that it believes that the revenue provided by the Sample Tariff will not be sufficient to fully support the RES except in the very near term, and that the funding necessary to support the Distributed Renewable Energy Requirement alone will likely exceed the Sample Tariff revenues after 2007"; "Unisource Energy stated that the Sample Tariff would not provide sufficient funding to meet the RES requirements in any year after 2006 under any sets of assumptions that were analyzed"). As the Commission's Economic, Small Business, and Consumer Impact Statement makes clear, "The cost to consumers will also vary over time and will directly follow the costs to the Affected Utilities. . . . After 2007, costs to consumers are likely to increase" (Pet. App. 2, App. C, p. 2).

These enormous projected energy cost increases are attributable to the prescriptive nature of the Rules: they mandate use of renewable energy sources not only when they become economically viable or competitive, but *regardless of cost.* Consciously choosing more-expensive energy sources has substantial implications for the legal issues presented in this lawsuit, as explained more fully below.

II. PROCEDURAL ISSUES

The respondents raise numerous procedural objections to the Court exercising jurisdiction and to the right of petitioners to prosecute the action. All are without merit.

A. Urgent Issue of Statewide Importance. The Commission (Resp. at 19-20) strains its credibility with the argument that this is just a run-of-the-mill administrative order. Far from it. The REST Rules will affect in fundamental ways most of the state's utilities, dramatically transform energy policy, and add a Commission-estimated $2.4 billion to the utility bills for millions of ratepayers. The importance and urgency of the issue are underscored by the presence of *amici*, encompassing more than one dozen advocacy groups; Arizona Public Service Company; and a member of the Corporation Commission who disagrees both with the legal positions of the Commission majority and the Chairman, who dissented to the challenged rules. The initial rate hikes and transformation of the state's energy structure already are underway. The Rules freeze in place energy policy for most of two decades. That this matter is urgent and of statewide importance speaks for itself.

B. Standing. Citing federal rather than state law, although this is a state law matter raising no federal claims, the Commission (Resp. at 20-21) contends petitioners have no standing to prosecute the action. Under Arizona law, they do.

In *Ethington v. Wright*, 66 Ariz. 382, 189 P.2d 209 (1948), this Court recognized the rights of taxpayers to challenge the unlawful use of public funds. Even more to the point, petitioners' injury is as ratepayers. The best evidence is supplied by the Commission itself. When asked in its impact statement (Pet. App.

2, App. C, p. 3) to identify "Persons who will be directly affected by, bear the costs of, or directly benefit from the proposed rulemaking," the Commission listed as the first two of nine categories "the public at large" and "consumers of electric service in Arizona."[7] The impact is direct and tangible, for the impact statement establishes that the "cost to consumers . . . will directly follow the costs to the Affected Utilities" and "are likely to increase" (*id.*, p. 2)—indeed, as demonstrated in the preceding section, to the tune of $2.4 billion. Both Ariz. Const. Art. XV, § 3 and A.R.S. § 40-361(A) entitle patrons to just and reasonable utility rates, which are directly and immediately implicated by the REST Rules.

The Commission is correct that special actions may not proceed as class actions. The petitioners, however, are individuals acting on their own behalf. Even where a special action is framed as a class action, a court will allow the matter to proceed to determine the individual petitioners' rights. See *Clark v. State Livestock Sanitary Bd.*, 131 Ariz. 551, 642 P.2d 896 (App. 1982).

The petitioners' standing is plainly established.

C. Appropriateness of Special Action. "'This court has original jurisdiction over the issuance of extraordinary writs against state officers'." *State Comp. Fund v. Symington*, 174 Ariz. 188, 191, 848 P.2d 273, 276 (1993). This is a statutory,

[7] Indeed, the breadth of the affected persons identified by the Commission demonstrates that the validity of the Rules is a matter of statewide importance.

nondiscretionary special action pursuant to A.R.S. §§ 40-254(F) and 40.254.01(F), which authorize a special action against the Corporation Commission and authorize this Court to issue a writ of *mandamus* against it.[8] "Unlike special actions, statutory special actions 'are not at all discretionary and they are not subordinate to a right of appeal—they are the right of appeal'." *Circle K Convenience Stores, Inc. v. City of Phoenix*, 178 Ariz. 102, 103, 870 P.2d 1198, 1199 (App. 1993) (quoting Ariz. R. P. Spec. Action 1 state bar comm. note (b)). Although the state bar committee note does not expressly refer to those statutes, they are virtually identical to A.R.S. § 23-948, which is referenced in the note.

Although no statute expressly authorizes nondiscretionary special action jurisdiction over the Attorney General, petitioners (Pet. at 3-5) have presented multiple reasons, based on past precedents, why the Court should exercise its discretion to accept jurisdiction. Should the Court conclude that all claims are not nondiscretionary, the same reasons and case law authorize the Court to exercise its discretion to hear the pervasive matters of law presented here for review.

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[8] The Attorney General (Resp. at 10) objects that a writ of *mandamus* is inappropriate because, although A.R.S. § 41-1044(B) requires him to determine whether a Commission rule falls within its scope of authority, it does not tell him how to decide the question. The writ sought here is the same as a mandate to a lower court that has erred in its legal judgment: an order requiring the Attorney General to enter the correct determination.

D. Equally Plain, Speedy, or Adequate Remedy. Both the Commission and the Attorney General object to the Court's jurisdiction on this basis. Yet all parties agree that a great deal is at stake—the structure of the state's energy generation and substantial and continually escalating costs to ratepayers—along with important constitutional questions such as the Commission's jurisdiction and separation of powers. As in *Symington*, 174 Ariz. at 192, 848 P.2d at 277, "A prompt resolution is needed so that the [branches of government] will know where they stand and can take such action as they determine necessary relative to budgetary matters." Moreover, as here, "Timely resolution of the matter before us would not be promoted by requiring the Fund to proceed through the trial and appellate courts, nor are such proceedings necessary because the issue before us turns solely on legal issues rather than on controverted factual issues." *Id.* Where an action for an extraordinary writ challenges an official's authority, as here, jurisdiction should not be denied for failure to exercise alternative appeals. *Senner v. Bank of Douglas*, 88 Ariz. 194, 199-200, 354 P.2d 48, 52 (1960).

E. Failure to Exhaust Administrative Remedies. Both respondents contend that petitioners should have exhausted administrative procedures and appealed the Commission's order. However, the law clearly establishes that actions like this one contesting the agency's jurisdiction may proceed as separate actions without

submitting to administrative rules and process.[9] See, e.g., *id.*; and cases cited in Pet. at 6. As this Court established in *Tucson Warehouse & Transfer Co., Inc. v. Al's Transfer, Inc.*, 77 Ariz. 323, 325, 271 P.2d 477, 478 (1954), "a decision of the Commission which goes beyond its power as prescribed by the Constitution and statutes is vulnerable for lack of jurisdiction and may be questioned in a collateral proceeding," without pursuing administrative or appeal remedies. Accord, *State Bd. of Tech. Regis. v. McDaniel*, 84 Ariz. 223, 227, 326 P.2d 348, 351 (1958) (administrative hearing and superior court review is not always the exclusive or an adequate remedy where jurisdictional question is presented).

F. Laches. Finally, the Corporation Commission and APS object to the action on the basis of laches. Petitioners filed the action promptly following the Commission's action approving the APS tariff, which is the first time that petitioners were affected by the Rules in a tangible way. Indeed, had they filed the collateral action earlier, no doubt respondents would have attacked it on ripeness grounds.

A special action seeking extraordinary writs against state officers has no specific time limit. *Symington*, 174 Ariz. at 192, 848 P.2d at 277. "Furthermore there is a well established principle of law that laches can not be urged as a defense

[9] Indeed, the Administrative Review Act itself has an exception to otherwise applicable rules and procedures to challenge an agency's jurisdiction. See A.R.S. § 12-902(B).

to a suit to enjoin a wrong which is continuing in its nature." *Pacific Greyhound Lines v. Sun Valley Bus Lines, Inc.*, 70 Ariz. 65, 72, 216 P.2d 404, 409 (1950) (citations omitted). The harms alleged here are continuing and escalating. Laches do not bar this action.

III. THE COMMISSION LACKS LEGAL AUTHORITY TO SET THE STATE'S ENERGY POLICY

"The Commission does not possess any inherent powers, *Williams v. Pipe Trades Indus. Program*, 100 Ariz. 14, 17, 409 P.2d 720, 722 (1966), but instead exclusively derives its power from the constitution and the legislature." *Phelps Dodge Corp. v. Ariz. Elec. Power Coop., Inc.*, 207 Ariz. 95, 111, 83 P.3d 573, 589 (App. 2004) (citing *U.S. West Communications, Inc. v. Ariz. Corp. Comm'n*, 197 Ariz. 16, 23, 3 P.3d 936, 943 (App. 1999)). Likewise, the Commission possesses "no implied powers." *So. Pacific Co. v. Ariz. Corp. Comm'n*, 98 Ariz. 339, 345, 404 P.2d 692, 696 (1965). Hence the Commission must identify a source of clear constitutional or statutory authority for the sweeping REST Rules. It has failed to do so. Moreover, the constitutional separation of powers and the management interference doctrine preclude the Commission from establishing energy policy for the State of Arizona through prescriptive regulation of business decisions.

A. Constitutional Authority. The Constitution does not empower the Commission to enact broad prescriptive energy policy. To find such authority would require not only sweeping aside decades of precedent that recognize plenary

authority with regard to ratemaking but extremely limited regulatory power beyond that, but also the plain language of the constitutional provision, which undergirds those precedents.

1. Ratemaking authority. It is not clear how sincerely the Commission itself believes it possesses authority for the REST Rules under the Arizona Constitution's grant of power under Art. XV, §§ 3 and 6.[10] For pursuant to A.R.S. § 41-1044(B), it need identify statutory authority for its regulatory powers only when the Commission is not acting pursuant to its ratemaking power. *Phelps Dodge*, 207 Ariz. at 115, 83 P.3d at 593 (citing *State ex rel. Corbin v. Ariz. Corp. Comm'n*, 174 Ariz. 216, 219, 848 P.2d 301, 304 (App. 1992)). The Commission properly pursued statutory review because, indeed, it is not acting pursuant to its ratemaking powers. And contrary the Commission's suggestion, it is the courts, not the Commission itself, that determine whether a particular rule is related to ratemaking powers.

The Commission's attempt to shoe-horn the REST Rules within its power to set rates is torturous. Even though the Rules lead inexorably to higher utility rates, it is impossible to characterize a set of rules as ratemaking when in fact they do not set rates, nor are they "reasonably necessary steps in ratemaking." *Phelps Dodge*,

[10] *Amici* Commissioner Gary Pierce and Rep. Kirk Adams agree that the REST Rules do not fall within the Commission's ratemaking authority (Br. at 11-13).

207 Ariz. at 111, 83 P.3d at 589 (citing *Ariz. Corp. Comm'n v. State ex rel. Woods*, 171 Ariz. 286, 294, 830 P.2d 807, 815 (1992)).

In *Phelps Dodge*, the court of appeals found that rules relating to the financial affairs of utility companies were sufficiently related to ratemaking to fall within the Commission's constitutional authority. But it found that a rule requiring nondiscriminatory open access to transmission and distribution facilities, and another requiring companies to divest themselves of competitive generation assets, were not. The court concluded such rules "are aimed at controlling the Affected Utilities rather than rates and are therefore outside the Commission's plenary ratemaking authority." *Id.*, 207 Ariz. at 114, 83 P.3d at 592. That clear line of demarcation applies perfectly here: the REST Rules do not set rates but are aimed at controlling the affected utilities. Therefore, the asserted source of authority fails.

2. Permissive regulatory authority. The Commission expansively interprets its permissive regulatory authority under Ariz. Const. Art. XV, § 3, which provides that the Commission may "make and enforce such reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations." On its face, this language confers limited authority. Given that it refers to "employees and patrons," the rule plainly pertains to practical concerns, encompassing such

matters as requiring convenient bill payment mechanisms, safe power transmission lines, air-conditioned public buildings, careful toxic waste disposal, and the like. It is very difficult to find in those words "sweeping" authority, to use the Commission's depiction, to control core business decisions of utility companies, much less to enact and impose comprehensive energy policy.

This and other Arizona appellate courts have narrowly construed the Commission's regulatory powers outside of the scope of ratemaking. The rule of law emanates from *Corp. Comm'n v. Pacific Greyhound Lines*, 54 Ariz. 159, 168, 94 P.2d 443, 447 (1939), which examined precisely the question presented here: "the extent of the authority of the commission as to regulation of the business of [public service] corporations" on matters other than ratemaking. The Court held that the Commission's regulatory authority over such corporations is limited to matters related to ratemaking; and that all other regulations of such businesses, as well as the broad "public policy of the State of Arizona in reference to public service corporations," are the exclusive province of the legislature, unless delegated to the Commission. *Id.*, 54 Ariz. at 176-77, 94 P.2d at 450. That is the crux of the matter here: the Commission's rules directly regulate the business of public service corporations and purport to establish renewable energy policy for the State. The Commission has no constitutional authority to do either.

Subsequent cases on point confirm the rule of *Pacific Greyhound*. In *So. Pacific Co. v. Ariz. Corp. Comm'n*, *supra*, the Court overturned the Commission's order requiring the company to resume certain train service. Accord, *Tucson Warehouse*, 77 Ariz. at 326, 271 P.2d at 478 (limiting the Commission's authority); *Phelps Dodge, supra*. Hence, the Attorney General in 1979 found that the Commission has no authority to require public service corporations to purchase fuel oil jointly or cooperatively. Ariz. Op. Att'y Gen. No. I79-099, 1979 WL 23168 (Apr. 9, 1979).

In *Woods*, 171 Ariz. at 294, 830 P.2d at 815, this Court restated the rule of *Pacific Greyhound*: "the Commission has no regulatory authority under article 15, section 3 except that connected to its ratemaking power." The Court cautioned that it would not lightly overturn that precedent, especially if it is possible to resolve legal questions without doing so. *Id.*, 171 Ariz. at 293-94, 830 P.2d at 814-15. The REST Rules assert control over the core business decisions of public service corporations, and dictate public policy, to a degree far beyond anything that is remotely contemplated by the plain language of the constitutional provision, and equally far beyond anything previously considered or upheld by Arizona courts.

Sustaining the Rules as an appropriate expression of the Commission's constitutional authority would require this Court to overturn *Pacific Greyhound* and to read the constitutional language far more broadly than reasoned

interpretation would tolerate. It would inform members of the public, retroactively, that to affect energy policy, they should direct their efforts not to their legislative representatives and the governor, but to an obscure five-member commission whose rules and procedures, like most regulatory agencies, are opaque and complex. The Commission plainly lacks the constitutional authority to assert such sweeping and prescriptive regulatory control over energy policy and over the core business decisions of public service corporations.

3. Regulating "proceedings." In an argument noteworthy for its novelty, the Commission (Resp. at 32) points to language in Ariz. Const. Art. XV, § 6 that gives it power "to prescribe rules and regulations to govern *proceedings* instituted by and before it" (emphasis added) as a source of constitutional authority for the REST Rules. No court ever has construed this language to confer open-ended regulatory authority upon the Commission. For good reason: its plain language is limited to "proceedings," which *Black's Law Dictionary* (4th Rev. Ed.) defines as "the form and manner of conducting juridical business before a court or judicial officer; regular and orderly progress in form of law; including all possible steps in an action from its commencement to the execution of judgment." If all the Commission has to do to enlarge its power is to hold a proceeding, its power would be without limit. This provision does not remotely rise to the level of authority "specifically and expressly given to the commission by some provision of the

constitution," *Pacific Greyhound*, 54 Ariz. at 176-77, 94 P.2d at 450, that is necessary to sustain the Commission's regulatory impositions.

B. Statutory authority. The activist-group *amici* (Br. at 23) charge that petitioners "seem to think that nothing short of a legislative enactment that contains the words 'renewable energy' will suffice to confer the necessary authority on the Commission to adopt the REST Rules." Not exactly, but close. A delegation of legislative authority to determine broad energy policy requires something far more clear and specific than the generic language of the array of statutes relied upon by the Commission.

Ariz. Const. Art. XV, § 6 provides that the Legislature "may enlarge the powers and extend the duties of the corporation commission." When the Commission exercises delegated powers, A.R.S. §§ 41-1001(14)(a)(i) and 41-1022(A)(1) require that the Commission identify "the specific statutory authority for the rule." The Legislature may delegate power to the Commission "to determine the type and extent of service to the public," but there is "no presumption to do so except by clear letter of statute." *So. Pacific Co. v. Ariz. Corp. Comm'n*, 98 Ariz. at 694-95, 404 P.2d at 343; accord, *Phelps Dodge*, 207 Ariz. at 114, 83 P.3d at 591. Moreover, each separate sub-part of the rules must be justified as an appropriate exercise of Commission authority, even though they were approved in a single decision. *Phelps Dodge*, 207 Ariz. at 116, 83 P.3d at

594; accord, *U.S. West*, 197 Ariz. at 24, 3 P.3d at 944. A.R.S. § 41-1001.01(A)(8) provides further that an agency may "not make a rule under a specific grant of rule making authority that exceeds the subject matter areas listed in the specific statute." Hence, for each discrete facet of the Rules, the Commission must both identify specific statutory authority *and* demonstrate that authority by "clear letter of statute."[11]

The relationship between the Commission and the Legislature, outside of the realm of ratemaking, is akin to the children's game "Mother, May I?": the Commission may regulate public service corporations or engage in public policy, even if it does so taking baby steps, only with the Legislature's express permission. Here, the Commission has taken what can only be characterized as a giant step, without the requisite permission. It must be required to step back.

We start with the purported sources of statutory authority invoked by the Commission, then examine statutes that demonstrate that the Legislature did not

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[11] The activist-group *amici* confuse the question presented here of whether the Legislature has delegated its powers to the Commission with whether a particular delegation of power is constitutional. The cases they cite (Br. at 24) all deal with the latter issue, which of course does not arise unless the Legislature has delegated power in the first place. They do raise an important point, however: by hitching the REST Rules to statutory authority that is at best amorphous, the Commission exposes itself to legitimate claims that the delegation is unconstitutional because no "policy is laid down" and no "standard is established by statute." *State v. Gee*, 73 Ariz. 47, 52, 236 P.2d 1029, 1032 (1951).

intend to delegate open-ended authority over renewable energy policy to the Corporation Commission.

1. Invoked statutory authority. The Attorney General (Br. at 11-13) relies solely on A.R.S. § 40-321(A), which the Commission also includes in its grab-bag of provisions. The statute confers upon the Commission the power to address the possibility that a public service corporation is unable to meet its requirements, or will do so in a manner that endangers the public. Respondents seek to convert the statute into a generic grant of power to enact broad-based energy policy, but that is far from the "clear letter of the statute."

The provision authorizes corrective Commission action when it finds that "any public service corporation" is providing service, facilities, or methods that are "unjust, unreasonable, unsafe, improper, inadequate or insufficient." The statute plainly is remedial, not a grant of plenary policymaking authority.

It is a bedrock principle of equity that a remedy is bound by the scope and nature of the legal violation. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995). As this Court held in *So. Pacific Co. v. Ariz. Corp. Comm'n*, 98 Ariz. at 343, 404 P.2d at 694-95, utility companies in the first instance have the authority to "determine the type and extent of service to the public within the limits of adequacy and reasonableness." To upset that presumption, not only must the

Legislature clearly convey authority to do so, but the Commission must make particularized rather than generic findings of inadequacy.

That it did not do. Its findings simply recite in conclusory terms the same verbiage used in the statute. There are no specific findings at all that any company, much less all affected utilities, will be unable to dispatch their obligations, nor will they provide energy in an unsafe manner. Rather, the findings reflect a policy preference for renewable over conventional energy.

Nor did the Commission find that ongoing efforts by public service companies to develop alternative fuel sources are inadequate. One could reasonably assume that if the findings made by the Commission about the desirability and necessity of alternative energy sources are true, utility companies already would be at work developing such resources. Not surprisingly, the record reveals that they are. APS, for instance, stated in 2006 that "[w]e very much support, and are actively engaged in, the development and deployment of renewable energy technologies" (Supp. App. 2, p. 2). The findings assume a static energy market dependent wholly on conventional fuel sources. But the record reflects a different reality. The findings were not attached to any specific deficiencies, but were employed to sanction a comprehensive, top-down regulatory scheme. The REST Rules are public policy disguised as remedial regulation.

Even if this statute were to provide any basis for regulatory action predicated on such conclusory findings, those findings could not sustain the broad sweep of the Rules. For instance, none of the findings establish a basis for the year-by-year calibrations of the renewable energy requirement (R14-2-1804). None of the findings establish a basis for distributed versus nondistributed renewable energy sources, or for the precise distributional requirements assigned to each, or for the residential versus nonresidential allocations (R14-2-1805). A.R.S. § 40-321(A) confers upon the Commission important remedial powers that must be exercised in careful ways. It is not a *carte blanche* authorization to determine how renewable energy policy shall be set or to insinuate the Commission into decisions that are best and legally entrusted to the entities that are charged with the responsibility of providing power to Arizonans. If the Legislature wishes to prescribe such policy and engage in such regulation, or to delegate such authority to the Commission, it knows how to do so. It has not done that in this statute.

The Commission (Resp. at 32) cites other statutes that supposedly "lend support to the rules in varying degrees." Of course, the statutes must do much more than that—they must clearly delegate authority to create renewable energy policy or to engage in the specific types of regulations imposed by the Commission. Petitioners (Pet. at 20-22) previously have demonstrated that the statutes previously cited by the Commission do not convey clear or specific

authority for the REST Rules. Indeed, A.R.S. § 40-202 does not expand the Commission's constitutional authority at all. *So. Pacific Co. v. Ariz. Corp. Comm'n*, 98 Ariz. at 348, 404 P.2d at 698; *Phelps Dodge*, 207 Ariz. at 112, 83 P.3d at 590. The Legislature has not delegated its policymaking and regulatory authority to the Commission in ways sufficient to sanction the REST Rules.

2. Contrary statutory authority. One statute that the defenders of the REST Rules understandably do *not* cite as authority is A.R.S. § 40-361(A), for it requires public service corporations to assess "reasonable" charges for their services.[12] The REST Rules compel higher costs, which are passed along to the utilities' customers. Any statutory authority invoked by the Commission to support the REST Rules necessarily would contradict this statute's command.

Moreover, the Legislature has evidenced its determination to exercise primacy over renewable energy policy through wide-ranging legislation. A.R.S. § 43-1085 created individual tax credits for solar devices and § 43-1164 established corporate tax credits for solar energy devices. A.R.S. §§ 43-1090 and 43-1176 provide individual and corporate tax credits for solar hot-water plumbing,

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[12] Curiously, the Commission (Resp. at 36) now invokes A.R.S. § 40-361(B), which it says "provides explicit authority for the Commission to ensure that public service corporations' services are adequate, efficient, and reasonable." To the contrary, that statute *directly* regulates public service corporations and does not mention the Commission at all, much less give it any additional authority. If that is how the Commission perceives "explicit" legislative authority, it underscores the need for this Court to rein in the Commission.

respectively. 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. Likewise, 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. A.R.S. § 42-5159(A)(31) exempts from the transaction privilege (sales) tax electricity purchased from a qualified environmental technology manufacturer (as defined in A.R.S. § 41-1514.02). A.R.S. § 41-1510 established a solar energy advisory council to, *inter alia*, advise the Legislature on the feasibility of solar power and to take steps through voluntary and cooperative action to promote it. H.B. 2766 (Supp. App. 4), which passed the Arizona House of Representatives this year, would have set renewable energy standards for public service corporations, but in a less prescriptive and draconian fashion than the REST Rules. By legislating extensively on renewable energy policy, and by setting up an advisory council to give it the data and expertise to further do so, the Legislature plainly has not ceded such policy determinations to the Commission.

C. Separation of Powers. The Commission's violation of our Constitution's separation of powers is the flip-side of its lack of constitutional authority under Art. XV, § 3—by straying beyond the boundaries of its own powers, it has trespassed on the powers reserved to the Legislature.

While the Commission's policymaking and regulatory powers are primary and plenary only with regard to ratemaking, the Legislature possesses the residuum of policymaking and regulatory authority with regard to corporations. Ariz. Const. Art. XIV, § 2 confers upon the Legislature the power to regulate corporations. Further, the police power is "inherent in state legislatures." *McDaniel*, 84 Ariz. at 228, 326 P.2d at 351. Hence, apart from the Commission's ratemaking authority, the power to establish other requirements for the conduct of business by public service corporations is retained by the Legislature. Likewise, matters of "public policy of the State of Arizona in reference to public service corporations" is the province of the Legislature. *Pacific Greyhound*, 54 Ariz. at 176-77, 94 P.2d at 450. Because the REST Rules invade legislative prerogatives by regulating the conduct of affected utilities and setting renewable energy policy, they impermissibly violate the separation of powers.

D. Management Interference Doctrine. APS contends (Br. at 11-12) that ratepayers may not invoke the management interference doctrine, and that it has successfully protected its corporate interests in the enactment of the REST Rules. In a certain sense, that is true: throughout the rulemaking process, APS made it abundantly clear that whatever the Commission chose to do, it should ensure that APS can recover associated costs through rate increases (see, e.g., Pet. App. 2, p.

49; Supp. App. 5, p. 2). The Commission did just that in R14-2-1808 and 1813, providing for annual review of the REST tariff based upon increased costs.

Hence, petitioners invoke the management interference doctrine not on behalf of the company, but on their own behalf. Even under the far more restrictive federal law of standing, the U.S. Supreme Court has recognized, "When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights." *Warth v. Seldin*, 422 U.S. 490, 505 (1975).

Here, ratepayers are foremost among the intended beneficiaries of both Ariz. Const. Art. XV, § 3 (mandating "just and reasonable rates") and A.R.S. § 40-361. Regulated industries are in a position of supplication to the Commission, and cannot be expected to vigorously champion their autonomy on behalf of ratepayers. This case exemplifies that phenomenon: APS has countenanced (and even supported) an unprecedented intrusion into its core management and decisionmaking functions, so long as it will be held harmless in the rates it charges. Petitioners should be allowed to invoke the doctrine when the preservation of management autonomy is essential to their tangible interests under the Arizona Constitution and statutes.

This Court repeatedly has held that "plainly it is not the purpose of regulatory bodies to manage the affairs of the corporation." *So. Pacific Co. v. Ariz. Corp. Comm'n*, 98 Ariz. at 343, 404 P.2d at 694. The "line separating permissible Commission acts and unauthorized managerial interference . . . is drawn between rules that attempt to control rates, which are permissible, and rules that attempt to control the corporation, which are impermissible." *Phelps Dodge*, 207 Ariz. at 113, 83 P.3d at 591. Petitioners previously have demonstrated (Pet. at 22-28) the multiple ways that the challenged regulations displace managerial authority. The REST Rules are a poster child for heavy-handed, top-down, bureaucratic regulation that is prohibited by the management interference doctrine.

The Legislature, acting through A.R.S. § 40-361(B), requires public service corporations to provide "adequate, efficient and reasonable" services. The Commission may not "directly and materially" interfere with the discharge of a corporation's statutory responsibility. *Corp. Comm'n v. Consol. Stage Co.*, 63 Ariz. 257, 260, 161 P.2d 110, 111 (1945). ""Nowhere in the Constitution or in the Statutes is the commission given jurisdiction, directly or by implication, to control the internal affairs of corporations." *Id.*, 63 Ariz. at 261, 161 P.2d at 112. If it is beyond the Commission's power to discontinue the service of a railroad agent, see *Ariz. Corp. Comm'n v. So. Pacific Co., supra*; or to second-guess a railroad's decision to eliminate one train route, see *So. Pacific Co. v. Ariz. Corp. Comm'n,*

supra; then surely it is beyond the Commission's power to decide for a utility company the precise extent of renewable fuel sources it must use, the distribution of renewable energy generation, the provision of distributed energy by commercial and residential customers, and other crucial business decisions, particularly when they impose substantial additional costs upon ratepayers.

What the REST Rules do is to essentially eliminate, for most of the next two decades, the cost-benefit analysis that is essential to sound business decisions. Particularly in a time of great uncertainty regarding the cost and availability of traditional energy sources and the cost and viability of alternative energy sources, utility companies must be nimble in discharging their statutory obligation to provide reliable service at reasonable rates. The Commission is empowered to intervene when exigent circumstances warrant; but a one-size-fits-all energy policy, cast deep into the unknowable future and at tremendous additional cost to ratepayers, is beyond the Commission's legitimate power.

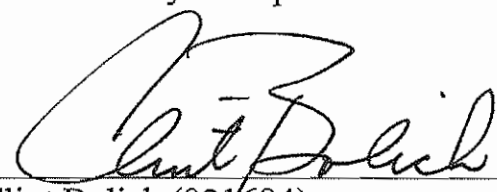
If the Commission is sincere in its belief that the Legislature has delegated to it plenary power over renewable energy policy, it has little to fear from a decision holding it to its constitutional and statutory limits, for the Legislature can act swiftly to delegate that authority. The fact that the Legislature failed to enact a far less sweeping and prescriptive energy policy this year suggests that, although it demonstrably favors renewable energy as reflected in a plethora of favorable

programs, it prefers a more flexible approach than the Commission has imposed. That is its policy prerogative, not the Commission's.

Conclusion

For the foregoing reasons, petitioners respectfully request that this honorable Court agree to hear the case and grant the requested relief.

RESPECTFULLY SUBMITTED this 5th day of September 2008 by:



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Certificate of Compliance

The foregoing Petition for Special Action complies with Arizona Rule of Procedure for Special Actions 7(e) in that it is double spaced and uses a proportionately spaced typeface of Times New Roman, 14 point font, and has a word count of approximately 7,148 words.