SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
Clint Bolick (021684)
Carrie Ann Sitren (025760)
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
Attorneys for Plaintiffs/Petitioners

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

ROY MILLER, THOMAS F. HUSBAND, JENNIFER BRYSON, and CORPUS COMMUNICATIONS, INC., **Plaintiffs/Petitioners,** **vs.** **ARIZONA CORPORATION COMISSION, and KRISTIN MAYES, WILLIAM MUNDELL, JEFF HATCH-MILLER, GARY PIERCE, and MIKE GLEASON, in their official capacities as members of the Arizona Corporation Commission,** **Defendants/Respondents.**	Case No.: CV2008-029293 **Plaintiffs'/Petitioners' Motion for Summary Judgment** Oral Argument Requested. *Hon. Joseph B. Heilman*

Plaintiffs/Petitioners ("Plaintiffs") move for summary judgment pursuant to Ariz. R. Civ. P. 56(a). The motion is supported by the points and authorities in the Memorandum of Law below, and by the Statement of Facts ("SOF") and Exhibits ("Exh.") filed contemporaneously.

MEMORANDUM OF LAW

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. In 2007, the Commission adopted sweeping new rules requiring utilities to derive a specified share of its 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 addition to infrastructure costs. In April and then again in December, 2008, the Commission approved a surcharge for Arizona Public Service ("APS"). That surcharge, imposed upon over one million customers including Plaintiffs, resulted from the rules that are the subject of this action.

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.

Plaintiffs seek to enforce the Arizona Constitution's separation of powers and limit the Commission's authority as defined in the Constitution on behalf of ratepayers and taxpayers who are tangibly harmed by the Commission's actions. 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 is appropriately before this Court on a motion for summary judgment, and Plaintiffs demonstrate below why the Commission lacks the authority it asserted as a matter of law.

Argument

The Corporation Commission does not possess any inherent powers. *Phelps Dodge Corp. v. Ariz. Elec. Power Co-op.*, 207 Ariz. 95, 111, 83 P.3d 573, 589 (App. 2004) (citation omitted). Instead, the Commission derives its authority only from statutes and the Arizona Constitution. *Id.* (citation omitted). Likewise, the Commission possesses "no implied powers." *S. Pac. Co. v. Ariz. Corp. Comm'n*, 98 Ariz. 339, 345, 404 P.2d 692, 696 (1965). Hence it must identify a source of clear constitutional or statutory authority for the sweeping Renewable Energy Standard and Tariff ("REST") Rules. A.R.S. § 41-1001(14)(a)(i). It has failed to do so. Moreover, the constitutional separation of powers and the management interference doctrine preclude it from establishing energy policy for the State of Arizona through prescriptive regulation of business decisions. Plaintiffs begin by setting forth the standard of review and establishing that they have standing and filed a timely action, then demonstrate why the Commission lacks the authority it asserted.

I. Standard of Review.

The Court decides whether an agency acted illegally. *Navajo County v. Property Tax Oversight Comm'n*, 203 Ariz. 491, 494, 56 P.3d 65, 68 (App. 2002). The Court should give no

deference but instead independently review the agency's interpretation of the law. *Id.* It should not hesitate to substitute its legal judgment for the agency's. *Gardiner v. Ariz. Dep't of Econ. Sec.*, 127 Ariz. 603, 606, 623 P.2d 33, 36 (App. 1980); *cf. Babe Invs. v. Ariz. Corp. Comm'n*, 189 Ariz. 147, 150-52, 939 P.2d 425, 428-30 (App. 1997) (substituting court's judgment for Arizona Corporation Commission's on burden of proof). Because only legal judgments are materially in dispute, the case is appropriately before this Court on a motion for summary judgment. Ariz. R. Civ. P. 56(c)(1). Summary judgment is appropriate if there is no genuine issue of material fact and Plaintiffs are entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c); *Orme Sch. v. Reeves*, 166 Ariz. 301, 802 P.2d 1000 (1990).

II. Jurisdiction.

Plaintiffs seek a declaratory judgment that the REST Rules are invalid, exceed the Corporation Commission's legitimate powers, and violate Plaintiffs' constitutional rights, and a preliminary and permanent injunction against the Commission from enforcing the rules. In addition or in the alternative, Plaintiffs seek a special action writ of prohibition prohibiting the Commission from enforcing the rules. Although special action relief is discretionary, it "is appropriate when there is no plain, speedy and adequate remedy by way of appeal' or 'in cases involving a matter of first impression, statewide significance, or pure questions of law.'" *Phoenix News., Inc. v. Ellis*, 215 Ariz. 268, 270, 159 P.3d 578, 580 (App. 2007) (citation omitted). This case presents all of those factors.

III. Timeliness.

Actions against public entities must be brought within one year after the cause of action accrues. A.R.S. § 12-821. Because Plaintiffs have been illegally assessed the REST surcharge each month to date and the Corporation Commission continues to enforce the rules ultra vires, the injury is continuing. At any rate, Plaintiffs filed this action within one year after the Corporation Commission approved the REST surcharge assessed against them (April 28, 2008).

Furthermore, with respect to special action relief, "There is no specific time limit as to when [it] must be brought." *N. Propane Gas Co. v. Kipps*, 127 Ariz. 522, 525, 622 P.2d 469, 472 (1980). "The only limit . . . lies in the doctrine of laches." *State ex rel. Ariz. Dep't of Econ. Sec. v. Kennedy*, 143 Ariz. 341, 343, 693 P.2d 996, 998 (App. 1985) (citation omitted). However, laches does not apply where the public interest is involved. *George v. Ariz. Corp. Comm'n*, 83 Ariz. 387, 392, 322 P.2d 369, 372 (1958) (denying Corporation Commission's defense of laches). Where the challenged government action raises constitutional issues, invades the powers of other branches, affects nearly all utility ratepayers in the state by a Commission-estimated $2.4 billion, transforms the state's energy structure, and freezes in place energy policy for most of two decades, the public interest demands that the equitable doctrine of laches not bar the action.

In any event, Plaintiffs filed an original action petition in the Arizona Supreme Court promptly after the surcharge affecting them was adopted. As long as the Corporation Commission continues to enforce the rules in excess of its jurisdiction, the violation of

Plaintiffs' rights is continuing and judicial action is always appropriate to enforce constitutional standards.

IV. Authority.

A. Constitutional Authority. The Arizona 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 recognizes extremely limited regulatory power beyond the Commission's plenary ratemaking authority, but also the plain language of the constitutional provision, which undergirds those precedents.

It is not clear how sincerely the Commission itself believes it possesses constitutional authority for the REST Rules. Pursuant to A.R.S. § 41-1044(B), it need identify statutory authority for its regulatory powers only when it is not acting pursuant to its ratemaking power. *Phelps Dodge*, 207 Ariz. at 115, 83 P.3d at 593 (citation omitted). The Commission properly pursued statutory review because, indeed, it is not acting pursuant to its ratemaking power.

1. *Ratemaking authority*. The Corporation Commission did not prescribe rates pursuant to Art. XIV, § 3 in the REST Rules. In fact, nowhere do the Renewable Energy Standard & Tariff provisions even reference rates or ratemaking. 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*, 207 Ariz. at 111, 83 P.3d at 589 (citation omitted). The REST surcharge is not the object of the rules but rather their necessary consequence. Thus, even if the surcharge could be independently characterized as a "rate," the underlying energy standards which require, in

meticulous detail, that specific percentages of power be supplied using specified technologies (SOF 28, *et seq*.), cannot be justified by the constitutional rate-setting provision.

In *Phelps Dodge*, the court found that rules relating to the financial affairs of utility companies were sufficiently related to ratemaking to fall within the Commission's constitutional authority. 207 Ariz. 95, 83 P.3d 573. But a rule requiring nondiscriminatory open access to transmission and distribution facilities, and another requiring companies to divest themselves of competitive generation assets, were not. *Id.* 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.* In Art. XV, § 3, the Constitution describes the Commission's permissive power to "make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the State" and "make and enforce 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." Yet those clauses apply only in connection with the Commission's ratemaking authority. *Phelps Dodge*, 207 Ariz. at 111, 83 P.3d at 589 (citing *Woods*, 171 Ariz. at 294, 830 P.2d at 815). This has been long settled. *S. Pac. Co.*, 98 Ariz. at 345, 404 P.2d at 696 (recounting *Ariz. Corp. Comm'n v. Pac. Greyhound Lines*, 54 Ariz. 159, 94 P.2d 443 (1939)). The Commission has no

regulatory authority under Art. XV, § 3 except as connected to ratemaking. Ariz. Op. Atty. Gen. No. I79-099, 1979 WL 23168 at *1 (April 9, 1979).

The relationship between the Commission's mandatory ratemaking authority in the first clause of Art. XV, § 3 was first compared to the subsequent permissive clauses in that section in *Ariz. E. Rr. Co. v. State*, 19 Ariz. 409, 171 P. 906 (1918). In that case, the Arizona Supreme Court identified the first clause of the section, "to prescribe classifications, rates, and charges of public service corporations," as mandatory and specific. *Id.*, 19 Ariz. at 413-14, 171 P. at 908. The next clause, "to make reasonable rules, regulations and orders by which such corporations shall be governed in the transaction of business within the state," is permissive and general. *Id.*, 19 Ariz. at 414, 171 P. at 908. The Supreme Court held the general grant is "directly related to the subject matter of the" specific grant, the general directly following the specific. *Id.*

The Supreme Court then explained that, "if there be doubt as to the extent of the power thereby granted in general terms, such doubt may be reasonably resolved by considering the two grants of power together, one specific and the other general, under the maxim noscitur a sociis, . . . that general terms following particular ones must be tied to and made only to apply to such things as are ejusdem generis with those comprehended in the specifications." *Id.* In other words, the second, general power relates only to the first, specific power. While the Court did not feel compelled to adopt this proposal in *Ariz. E. Rr. Co.*, it did so later, holding repeatedly that the Corporation Commission has no constitutional authority except as connected to ratemaking. *See* cases cited, *supra*.

Although that rule is clear, Arizona courts have not had occasion to apply it specifically to the Commission's power to "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." Even if the Court rejects established limits and recognizes for the first time a non-ratemaking constitutional authority of the Commission, the power to enact the REST Rules still cannot be found. Given that the clause refers to "employees and patrons," it plainly must pertain 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 impossible to find in those words any authority to control core business decisions of utility companies, much less to enact and impose comprehensive energy policy.

Arizona courts have narrowly construed the Commission's regulatory powers outside of the scope of ratemaking. The rule of law emanates from *Pac. Greyhound*, 54 Ariz. at 168, 94 P.2d at 447, 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 Arizona Supreme 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 *Pac. Greyhound*. In *S. Pac. Co.*, 98 Ariz. 339, 404 P.2d 692, the Court overturned the Commission's order requiring the company to resume train services. *Accord*, *Tucson Warehouse*, 77 Ariz. at 326, 271 P.2d at 478 & *Phelps Dodge*, 207 Ariz. 95, 83 P.3d 573 (limiting the Commission's authority). 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, the Arizona Supreme Court restated the rule of *Pac. 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 *Pac. 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 the core business decisions of public service corporations.

3. *Regulating "proceedings."* Although the Corporation Commission did not suggest it when promulgating the REST Rules, the Commission asserted in its original action response that it has constitutional authority to enact the rules under its power to "prescribe rules and regulations to govern *proceedings* instituted by and before it." Ariz. Const. Art. XV, § 6 (emphasis added). 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 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," *Pac. Greyhound*, 54 Ariz. at 176-77, 94 P.2d at 450, which is necessary to sustain the Commission's regulatory impositions.

B. Separation of Powers. The Commission's violation of our Constitution's separation of powers is the flip-side of its lack of constitutional and statutory authority: By

straying beyond the boundaries of its own powers, it has trespassed on the powers reserved to the Legislature.

"The concept of the separation of powers is fundamental to constitutional government as we know it." *Ahearn v. Bailey*, 104 Ariz. 250, 252, 451 P.2d 30, 32 (1969). The separation of powers clause of the Arizona Constitution prohibits one branch of government from exercising the powers rightfully granted to another. Ariz. Const. Art. III, § 1. No government department may reach into the power of another department. *State v. Prentiss*, 163 Ariz. 81, 84-85, 786 P.2d 932, 935-936 (1989). 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.

The Corporation Commission is created by Article XV of the Arizona Constitution and is authorized only to proscribe rates. Ariz. Const. Art. XV, § 3. 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. Indeed, Ariz. Const. Art. XIV, § 2 confers upon the Legislature the power to regulate corporations. Further, the police power is "inherent in state legislatures." *State Bd. of Techn. Registr. v. McDaniel*, 84 Ariz. 223, 228, 326 P.2d 348, 351 (1958). 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. *Pac. Greyhound*, 54 Ariz. at 176-77, 94 P.2d at 450; *see also Ariz. E. Rr. Co.*, 19 Ariz. at 416, 171 P. at 909 (upholding Legislature's police power over public utilities regulated by the Corporation Commission). The Legislature may delegate its authority to the Commission by statute, Ariz. Const. Art. XV, § 6, but it has not done so in the field of renewable energy (*see* Section C, *infra*).

The separation of powers between the Legislature and Commission, with the former possessing broad police power and the latter possessing narrow ratemaking power in addition to powers delegated by statute, is supported by important public policy considerations. First, the Commission is a remote, obscure public agency. Its five members represent the entire state. Ordinary citizens who are concerned about energy policy are much more likely to contact their legislators—three of whom represent each of the state's 30 legislative districts—than to seek out the Commission. Second, the Commission's tools are limited. For instance, it cannot directly provide tax credits, incentives, or rebates, which are critical in the renewable energy context. Hence the Commission's awkward attempts through the REST Rules to compel utility companies to do indirectly what the Commission cannot do directly. By contrast, the Legislature has a broad range of tools to build coherent, comprehensive renewable energy policy. Finally, because the Commission has jurisdiction only over some but not all Arizona utility companies,[1] it cannot erect uniform energy policy for the entire state. Only the Legislature can.

[1] A.R.S. § 40-202(A) authorizes the Commission to regulate "public service corporations," and Ariz. Const. Art. XV, § 2 limits that definition to non-municipal corporations, thus excluding municipal utilities like the Salt River Project.

The Legislature has not delegated its policy-making authority to the Corporation Commission, nor has it shown inclination to do so. In fact, the Legislature has itself actively legislated in the field by establishing an advisory council on renewable energy technologies and implementation. A.R.S. § 41-1510. The Legislature has taken initial steps to develop renewable energy policy by ordering the solar energy advisory council to assist, advise, and make recommendations regarding the use of renewable energy resources and identify technologies that are feasible in both the short- and long-term. *Id.* The Legislature plainly would not have taken such steps if it had ceded authority over the subject to the Commission.

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 in 2008 (Chapter 7 of H.B. 2766 ((Exh. 22, pp. 24-25)) suggests that, although it demonstrably favors renewable energy as reflected in a plethora of legislative enactments, it prefers a more flexible approach than the Commission has imposed. That is its policy prerogative, not the Commission's.

C. Statutory Authority. Ariz. Const. Art. XV, § 6 provides that the Legislature "may enlarge the powers and extend the duties of the Corporation Commission." 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] . . . beyond the clear letter of a statute." *S. Pac. Co.*, 98 Ariz. at 343, 404 P.2d at 694-95; *accord*, *Phelps Dodge*, 207 Ariz. at 114, 83 P.3d at 592.

When the Commission exercises delegated powers, it must identify "the specific statutory authority for the rule." A.R.S. §§ 41-1001(14)(a)(i), 41-1022(A)(1), & 41-1001(1). Moreover, each separate subpart of the rules must be justified as an appropriate exercise of Commission authority, even if the subparts are approved in a single decision. *Phelps Dodge*, 207 Ariz. at 116, 83 P.3d at 594. Further, A.R.S. § 41-1001.01(A)(8) provides 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."[2] Such authority is missing for each subpart of the rules, outlined in SOF 28-48.

Instead of identifying specific statutory authority for the REST Rules, the Commission merely concluded that it had general authority to enact the rules under Title 40 of the Arizona Revised Statutes. SOF 20. Title 40 encompasses seven different chapters, each with multiple articles that comprise over 250 provisions. This is hardly a reference to the "specific" statutory authority that agencies must cite to make rules.

The Attorney General's Chief Assistant also acknowledged that the authority cited by the Commission to enact the REST Rules was "vague." SOF 21. Two months, 15 pages, and half a dozen statutory citations later, the Commission admitted to the Attorney General that there is no

[2] Whether a particular delegation of power is constitutional is a question separate from whether the Legislature has delegated power at all. In this case, the Legislature has simply failed to delegate. If the Commission could point to a statute purportedly authorizing it to enact the REST Rules, the statute further must lay down policy and establish standards for the delegation of power to be constitutional. *See State v. Gee*, 73 Ariz. 47, 52, 236 P.2d 1029, 1032 (1951).

"isolated source of statutory or constitutional authority" to support the REST Rules. SOF 22. Plaintiffs first examine the purported sources of statutory authority to reveal that no relevant power has been delegated to the Commission, then Plaintiffs examine statutes that demonstrate that the Legislature did not intend to delegate open-ended authority over renewable energy policy to the Commission.

1. *Purported statutory authority.* The Commission cites an array of supposed statutory sources of authority. Many are so groundless that they illustrate that the Commission is grasping at straws. Each supported basis is examined in turn.

a. First, A.R.S. § 40-202 provides no relevant authority for the Corporation Commission to enact the REST Rules. "The Arizona Supreme Court has interpreted this section . . . as bestowing no power on the Commission beyond that already provided by the constitution or specifically granted otherwise by the legislature." *Phelps Dodge*, 207 Ariz. at 112, 83 P.3d at 590. "Clearly this statute does no more than confirm that which the Commission already possessed under the Constitution; namely, the general right to supervise and regulate public service corporations. The right to supervise and regulate and do those things necessary and convenient in the exercise of its power of supervision and regulation *does not in and of itself grant additional powers* to the Commission beyond that which the legislature specifically has set forth. Section 40-202 means that the Commission may supervise and regulate under the authority granted by the Constitution and statutes and, in addition, has the power to do those things necessary and convenient in the exercise of the granted powers." *S. Pac. Co.*, 98 Ariz. at 348, 404 P.2d at 698 (emphasis added). Thus, Section 40-202(A) does not independently

authorize the Commission to promulgate the REST or any other rules.

b. Section 40-361(B) similarly fails to confer the requisite authority to the Corporation Commission. That statute requires of *utilities* to "furnish and maintain such service, equipment, and facilities as will promote the safety, health, comfort, and convenience of its patrons, employees, and the public and as will be in all respects adequate, efficient, and reasonable."

Despite the Commission's assertion that the statute "provides explicit authority for the Commission" to enact the rules, (Exh. 14, p. 10), nowhere does the statute delegate authority to *the Commission*. On the contrary, it evidences the Legislature's intent to maintain substantive policymaking authority over utilities, a power the Commission here seeks to usurp. The Commission's reference to this statute as an "explicit" delegation of rulemaking authority actually underscores the need for this Court to rein it in.

c. A.R.S. § 40-321(A) 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. The Commission seeks 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 the Supreme Court held in *S. Pac. Co.*, 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 that "[w]e very much support, and are actively engaged in, the development and deployment of renewable energy technologies." Exh. 6, 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 A.R.S. § 40-321(A) were to provide any basis for regulatory action predicated on such conclusory findings, those findings could not sustain the broad sweep of the rules as outlined in SOF 28-48. For instance, none of the findings establish a basis for the year-by-year calibrations of the renewable energy requirement in R14-2-1804 (SOF 29). None of the findings establish a basis for distributed versus non-distributed renewable energy sources, or for evaluating the procedure for choosing distributed and non-distributed sources, or for the precise distributional requirements assigned to each, or for the residential versus nonresidential allocations in R14-2-1805 and -1812(B)(6) (SOF 30-31). 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.

By contrast, the Legislature has shown it is entirely capable of delegating authority to the Corporation Commission in express and specific terms when it chooses to do so. For example, A.R.S. § 40-841 requires the Commission to prescribe, for the health and safety of railroad employees, safety standards and devices requiring railroads to install warning lights on trains. The Legislature also statutorily prohibited the sale of new residential gas appliances with pilot lights, beginning one year from the time the Commission found alternative ignition devices, and the Legislature provided that the Commission "may determine, after demonstration, that there is

no feasible alternate means to the use of a pilot light or that . . . a pilot light is necessary for public health and safety." A.R.S. § 40-1202. No similar statute for evaluating or requiring the use of renewable energy exists to justify the Corporation Commission's 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 utilities to assess "reasonable" charges for their services. The REST Rules compel higher costs, which are paid by ratepayers. Indeed, the acronym REST stands for Renewable Energy Standards and Tariff, the "T" indicating increased cost. Although the Commission found that "[r]enewable energy resources rely on free energy or very low-cost energy," Exh. 11, p. 55, it expressly did *not* find that the renewable energy sources mandated by the REST Rules would provide electricity at lower cost than conventional sources. Any statutory authority invoked by the Commission to support the REST Rules necessarily would contradict the legislative as well as the constitutional command for utilities to provide energy at "reasonable" rates. A.R.S. § 40-361(A); Ariz. Const. Art. XV, § 3.

Over the course of the Commission's deliberations, then-Commissioner Gleason asked what turned out to be a $2.4 billion dollar question: what are the estimated yearly costs of distributed and non-distributed 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? Commission staff responded with the following estimates:

- Additional costs for distributed renewable energy resources: $886,991,021, SOF 58;
- Additional costs for non-distributed renewable energy resources: $317,532,804, SOF 59;

- Compliance costs: $1,204,523,824, SOF 60.

Additionally, the staff found that the projected cost of new infrastructure needed to supply the renewable energy required to meet the requirements each year through 2030 is "unknown." SOF 61. 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.[3]

The surcharges approved by the Commission last year will be only the beginning of additional rate increases attributable to the REST Rules. SOF 63-64 ("APS 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." SOF 65.

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*. The conscious choice to *require*

[3] Unisource Energy Corporation 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." SOF 62.

higher-cost energy makes the rules very hard to justify in the face of statutory and constitutional mandates for "reasonable" charges.

Beyond simple cost mandates, the Legislature has evidenced its determination to exercise primacy over renewable energy policy. For example, A.R.S. § 43-1085 creates individual tax credits for solar devices, and § 43-1164 establishes corporate tax credits for them. A.R.S. §§ 43-1090 and -1176 provide individual and corporate tax credits, respectively, for solar hot-water plumbing. 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. A.R.S. § 41-1510 establishes a solar energy advisory council to advise the Legislature on the feasibility of solar power and to promote it through voluntary and cooperative action. 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.

As recently as 2008, the Arizona House passed H.B. 2766 (Exh. 22), which would have set renewable energy standards for utilities, but in a less prescriptive and draconian fashion than the REST Rules. Chapter 7 of the bill, like the REST Rules, would have established a policy that by 2025, at least 15% of power be supplied by renewable energy. Exh. 22, p. 24. However,

it would not dictate year by year calibrations, or prescribe minimum percentages of distributed and non-distributed generation, or mandate third-party participation, or establish penalties. It would allow consumer incentives and third-party electricity generation. Rather than establishing compliance penalties and requiring preapproval of the Corporation Commission, it would provide for post-hoc annual reports to the Governor and Legislature. The bill was passed by a large bipartisan margin in the House of Representatives 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. Because the Legislature can act as it deems appropriate, the judicial invalidation of the REST Rules would 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, Arizona presently has a two-tiered energy policy: a highly prescriptive set of rules for Commission-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.

D. Management Interference. Even if the Corporation Commission had constitutional or statutory authority, it still could not legally enact the REST Rules because they violate the management interference doctrine. "Nowhere in the Constitution or in the Statutes is the

commission given jurisdiction, directly or by implication, to control the internal affairs of corporations." *Corp. Comm'n v. Consol. Stage Co.*, 63 Ariz. 257, 261, 161 P.2d 110, 112 (1945). The running of public service corporations is a matter of management prerogative and beyond the power of the Commission to directly control. Ariz. Op. Atty. Gen. No. I79-099, 1979 WL 23168, at *1 (April 9, 1979). "[P]lainly it is not the purpose of regulatory bodies to manage the affairs of the corporation." *S. Pac. Co.*, 98 Ariz. at 343, 404 P.2d at 694.

The Legislature, acting through A.R.S. § 40-361(B), requires utilities to provide "adequate, efficient and reasonable" services. The Commission may not "directly and materially" interfere with the discharge of a corporation's statutory responsibility. *Consol. Stage Co.*, 63 Ariz. at 260, 161 P.2d at 111. Additionally, the authority of Commission itself "is subject to the 'just and reasonable' clauses." *Residential Utility Consumer Office v. Ariz. Corp. Comm'n*, 199 Ariz. 588, 591, 20 P.3d 1169, 1172 (App. 2001). Yet in promulgating the REST Rules, the Corporation Commission has ignored those requirements.

The Commission's rules continue to interfere in corporate management, leaving the ratepayer to bear the costs. The Commission's most recent REST surcharge for APS, ordered in December 2008, is *higher* than the amount APS requested. SOF 26. APS implored the Commission to charge its customers less, preferring to roll over remaining 2008 funds into its 2009 renewable energy budget. SOF 26. The Commission's contrary mandate for APS to charge its customers *more* than APS thought adequate, efficient, and reasonable contravenes legislative and constitutional requirements and significantly interferes with business management. The development of renewable energy may also suffer at the hand of the

Commission's prescriptive rules, as the Commission has denied APS permission to expend $350,000 of its $250 million annual budget for general research and development to advance the role of renewable energy in the company's resource mix. SOF 27.

The Arizona Supreme Court "will not infer the grant of authority [to the Commission] to interfere with the Affected Utilities' management decisions beyond the 'clear letter of the statute.'" *Phelps Dodge*, 207 Ariz. at 113, 83 P.3d at 591 (citation omitted). This is because the "continuing success as well as the efficient operation of any commercial enterprise depends primarily upon its ability to centralize responsibility and establish a unified management." *S. Pac. Co.*, 98 Ariz. at 342, 404 P.2d at 694. Even public utilities are commercial enterprises with a right to manage business affairs and operate beyond the power of the Commission to control. *See* Ariz. Op. Atty. Gen. No. I79-099, 1979 WL 23168 at *1 (April 9, 1979).

"[A]dministrative intervention, although necessary to effectuate many legislative policies, may act as a barrier to the normal accomplishments of progressive management." *S. Pac. Co.*, 98 Ariz. at 343, 404 P.2d at 694 (citation omitted). "It must never be forgotten that, while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership." *S. Pac. Co.*, 98 Ariz. at 343, 404 P.2d at 694 (quoting *State ex rel. S.W. Bell Tel. Co. v. Pub. Serv. Comm'n of Mo.*, 262 U.S. 276, 289 (1923)). 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. The REST Rules cross that line by attempting to control core management decisions.

What the REST Rules do is to essentially eliminate, for the next 15 years and beyond, 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, utilities must be nimble in discharging their statutory obligation to provide reliable service at reasonable rates. The Commission is empowered by A.R.S. § 40-321(A) 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.

A detailed prescription of the type of energy sources, and procedure for choosing them, is precisely within the utility's management functions and not the Commission's prerogative. "[I]t cannot be doubted but that a public utility may . . . in the exercise of its managerial functions, determine the type and extent of service to the public within the limits of adequacy and reasonableness." *S. Pac. Co.*, 98 Ariz. at 343, 404 P.2d at 694-95. The REST Rules completely remove utilities' management discretion by dictating the energy sources, by proportion, from which utilities may produce power for their customers. SOF 28, *et seq.* The Commission's rigid long-term plan allows public service corporations no management flexibility to adjust energy sources or prospects for alternative energy (and therefore rates) when oil prices suddenly change.

Utilities, which ordinarily champion their rights under the management interference doctrine, may not do so when they recoup their costs—in this case, through the REST surcharge. The Plaintiffs who bear the burden therefore must invoke the doctrine on their own behalf.[4] Plaintiffs also invoke the doctrine as victims of unfair cost distribution under the prescriptive REST Rules. Customers who do not exclusively own their roof (and cannot install renewable energy technology), including renters like Plaintiff Corpus Communications, Inc., must pay into the REST fund but are ineligible to receive the incentives from it. On the other hand, off-grid customers who do not pay the REST surcharge (because they do not receive utility services) can collect subsidies from the utility's REST fund. *See* Exh. 11, Dissent p. 6. Additionally, because the REST surcharge is capped, customers whose usage is at or below the cap bear a disproportionate share of the costs compared to those whose usage exceeds the cost. Thus, the Corporation Commission's interference with utility management causes unfair distribution of renewable energy costs among ratepayers.

If it is beyond the Commission's power to discontinue the service of a railroad agent, *Ariz. Corp. Comm'n v. S. Pac. Co.*, 87 Ariz. 310, 350 P.2d 765 (1960), or to second-guess a railroad's decision to eliminate one train route, *S. Pac. Co.*, 98 Ariz. 339, 404 P.2d 692, then

[4] Ratepayers, as intended beneficiaries of Ariz. Const. Art. XV, § 3 and A.R.S. § 40-361 (mandating reasonable rates and services), have standing to assert management interference even under the far more restrictive federal requirements: "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, management autonomy is essential to protect Plaintiffs' tangible interests under the Arizona Constitution and statutes.

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 procedure for choosing sources, 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.

Conclusion

The Corporation Commission is an agency of limited powers. It may only regulate public utilities as authorized by either the state Constitution or by specific grant of power by the state Legislature. The Constitution does not authorize the Commission to promulgate rules relating to the use of renewable energy generators. That power lies with the Legislature until such a time as it prescribes by statute that another agency may regulate public utilities accordingly. Until the Legislature delegates power to the Commission to enact rules, standards, and tariffs relating to renewable energy, the Commission lacks authority to enact and enforce the provisions of the REST Rules.

When and if and the Legislature provides specific statutory authority for the Commission to promulgate regulations to promote the use of renewable energy resources by public utilities in Arizona, the Commission must adhere to existing statutory and common law guidelines. These guidelines include respecting the management interference doctrine by allowing utilities reasonable freedom from interference in the running of their business. The Commission must also ensure that it exercises any authority to regulate renewable energy use fairly and economically, so as to ensure reliable service and reasonable rates, consistent with the

requirements of the Arizona Constitution.

For now, however, the Corporation Commission has brazenly usurped policymaking authority entrusted by our Constitution to the Legislature. The REST Rules are legislation, not ratemaking. As a result, they are impermissible.

RESPECTFULLY SUBMITTED this 25th day February, 2009 by:

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Clint Bolick (021684)
Carrie Ann Sitren (025760)
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
Attorneys for Plaintiffs/Petitioners

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Clerk of Court
Maricopa County Superior Court
201 West Jefferson Street
Phoenix, AZ 85003

COPY of the foregoing hand-delivered this 25th day February, 2009 to:

Hon. Joseph B. Heilman
Maricopa County Superior Court
125 West Washington Street
Phoenix, AZ 85003

Janice M. Alward
Janet Wagner
Wesley C. Van Cleve
Legal Division
ARIZONA CORPORATION COMMISSION
1200 W. Washington St.
Phoenix, AZ 85007
Attorneys for Defendants/Respondents

TERRY GODDARD
Office of the Arizona Attorney General
1275 W. Washington
Phoenix, AZ 85007

BOB BURNS
Senate
1700 W. Washington, Room 204
Phoenix, AZ 85007

KIRK ADAMS
House of Representatives
1700 W. Washington, Room 221
Phoenix, AZ 85007