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

ROY MILLER, THOMAS F. HUSBAND, JENNIFER BRYSON, and CORPUS COMMUNICATIONS, INC.,	Case No.: CV2008-029293
Plaintiffs/Petitioners,	**PLAINTIFFS' COMBINED REPLY TO ARIZONA CORPORATION COMMISSION'S RESPONE TO MOTION FOR SUMMARY JUDGMENT**
vs.	**and**
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,	**RESPONSE TO COMMISSION'S CROSS-MOTION FOR SUMMARY JUDGMENT**
	and
Defendants/Respondents.	**RESPONSES TO AMICUS BRIEFS**
	Hon. Joseph B. Heilman

Plaintiffs reply in this memorandum to the Commission's response to their Motion for Summary Judgment, and respond to the Commission's Cross-Motion for Summary

Judgment ("ACC Mem."). Additionally, plaintiffs provide commentary on relevant portions of the *amicus* briefs.

Not surprisingly, the Commission spends a major portion of its brief trying to head plaintiffs off at the pass, raising an array of procedural obstacles in an effort to prevent the Court from examining the Commission's dubious authority to dictate the State's energy policy. Accordingly, we divide our arguments into procedural and substantive issues.

I. PROCEDURAL ISSUES

A. Standard of Review. Plaintiffs do not differ with the Commission on the rules regarding standard of review. The Commission's admonition that a court "'must give deference to the Commission's determination of what regulation is reasonably necessary for effective ratemaking'" (ACC Mem. at 7, citing *Ariz. Corp. Comm'n v. State ex. rel. Woods*, 171 Ariz. 286, 294, 830 P.2d 807, 815 (1992)) would apply if this was a challenge to ratemaking. Rather, this lawsuit challenges the Commission's *legal authority* to enact the REST Rules. The Court decides *de novo* whether an agency has acted illegally, giving no deference to the agency's interpretation of the law. *Navajo County v. Prop. Tax Oversight Comm'n*, 203 Ariz. 491, 494, 56 P.3d 65, 68 (App. 2002). Accord, *Gardiner v. Ariz. Dep't of Econ. Sec.*, 127 Ariz. 603, 606, 623 P.2d 33, 36 (App. 1980); *Babe Investments v. Ariz. Corp. Comm'n*, 189 Ariz. 147, 150-52, 939 P.2d 425, 428-30 (App. 1997). *De novo* review under such circumstances is essential to the rule of

law, for were the Commission free to decide its own jurisdiction, the constitutional limits on its authority would be a nullity.

B. Collateral Attack. This case presents the classic example of when a collateral attack is appropriate. Apparently, the Commission believes that if utility ratepayers do not inform themselves of a proposed regulation, enter the administrative proceedings as a party, and then contest them in a petition for rehearing, they are barred from attacking the regulation in court. That is a recipe for precisely the abuse of power that has occurred here. If the typical ratepayer even knows that the Corporation Commission exists, he or she should be able to presume that the Commission will act within its narrow and defined scope of legal authority and not act as if it were the Legislature. When it acts outside that authority in ways that tangibly affect ratepayers—i.e., when it adopts sweeping legislative rules that lead to substantial rate hikes—ratepayers should have meaningful recourse to challenge the authority under which the increases were issued. See, e.g., *Uni-Bell PVC Pipe Ass'n v. City of Phoenix*, 2005 WL 3211540 at *2 (D. Ariz. 2005) (a "significant difference" exists between a "general policy . . . and an affirmative act that requires citizens to pay money. Courts considering such an affirmative extraction of money should carefully review the statutory authority upon which it is based").

The Commission wants to have it both ways. On the one hand, it wishes to exercise sweeping, unprecedented legislative powers, but then to shield itself from meaningful judicial review by cloaking itself within the narrow parameters of

administrative review. Were the REST rules adopted by the Legislature, plaintiffs freely could challenge them in a proceeding such as this. Similarly, collateral attack of regulations that exceed agency jurisdiction exists precisely to check overzealous agency actions.

A.R.S. § 40-253 provides that only a party to the administrative proceedings may file an appeal. The plaintiffs were not parties in the rulemaking process. However, the availability of administrative appeal "does not foreclose the exercise of this court's discretion to accept jurisdiction" of a special action. *Ariz. Dep't of Pub. Safety v. Superior Ct.*, 190 Ariz. 490, 493, 949 P.2d 983, 986 (App. 1997); accord, *Cronin v. Sheldon*, 195 Ariz. 531, 533, 991 P.2d 231, 233 (1999); *City of Phoenix v. Superior Ct.*, 158 Ariz. 214, 216, 762 P.2d 128, 130 (App. 1988). Indeed, it is a "common exception" to the rule requiring exhaustion of administrative remedies when the power of an agency is questioned. *Town of Paradise Valley v. Gulf Leisure Corp.*, 27 Ariz. App. 600, 610, 557 P.2d 532, 542 (1976).

The Commission inadvertently discloses the applicable line of demarcation when it cites case law holding that "'[w]here jurisdiction lies . . . the resulting decision cannot be collaterally attacked for error of law, whether that error be one of misconstruction of a statute or other legal error'" (ACC Mem. at 8-9 (emphasis omitted), citing *Oliver v. Ariz. Dep't of Racing*, 147 Ariz. 83, 87, 708 P.2d 764, 768 (App. 1985)). The Commission's brief emphasizes the words "cannot be collaterally attacked for error of law," when it

should have emphasized the first three: "where jurisdiction lies." For an agency's jurisdiction, which is precisely at issue here, unquestionably is subject to collateral attack.[1]

Accordingly, in *Senner v. Bank of Douglas*, 88 Ariz. 194, 199-200, 354 P.2d 48, 52 (1960), the Arizona Supreme Court accepted jurisdiction over an extraordinary writ when the action challenged the Commission's authority, holding that "mandamus is a proper remedy where the Commission has clearly abused its discretion. . . . Such remedy is not foreclosed by the statutory provisions [for administrative review], which have been held not to be '*in all cases*, the *exclusive* and an *adequate remedy*'" (emphasis in original) (citation omitted).

"It is fundamental that no court of law, board or administrative agency can act without jurisdiction." *State ex rel. Pickrell v. Downey*, 102 Ariz. 360, 364, 430 P.2d 122, 126 (1967). A rule or judgment is "invulnerable as against collateral attack" only if the entity has "(a) Jurisdiction of the person; (b) jurisdiction of the subject matter; and (c) jurisdiction . . . to render the particular kind of judgment." *Collins v. Superior Ct.*, 48 Ariz. 381, 393, 62 P.2d 131, 137 (1936). Plaintiffs' primary challenge here is to the Commission's subject-matter jurisdiction; but as to discrete portions of the rules, the

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[1] The Commission cites several cases in which refunds of taxes were sought. In such cases, public policy repeatedly has been held to require strict compliance with administrative procedures. Even those cases, however, recognize that the rule requiring exhaustion of administrative remedies does not apply when the agency's jurisdiction is questioned. See, e.g., *Univar Corp. v. City of Phoenix*, 122 Ariz. 220, 224, 594 P.2d 86, 90 (1979). In tax refund cases, the question typically raised is one of legal error, not

agency also lacks personal jurisdiction and jurisdiction to issue a particular type of rule. Agency decisions pertaining to such jurisdictional matters are subject to judicial review without administrative review. *Collins v. State*, 166 Ariz. 409, 412, 803 P.2d 130, 133 (App. 1990); *State ex rel. Dandoy v. City of Phoenix*, 133 Ariz. 334, 338, 651 P.2d 862, 866 (App. 1982) (issues of subject-matter jurisdiction render agency orders "absolutely void and subject to collateral attack").

The Arizona Supreme Court explained in *Ariz. Pub. Serv. Co. v. So. Union Gas Co.*, 76 Ariz. 373, 382, 265 P.2d 435, 441 (1954) that the "disharmony" that emanated from earlier cases on this issue

> arose from failure to distinguish between the right of a court to misconstrue the law measuring the rights of the parties before it and the right of a court to misconstrue a statute or law from which jurisdiction or power of the court flows—a jurisdictional law. If there is a statute expressly conferring a limited jurisdiction and the court construes it in such a manner that the result was to exercise a power the statute did not authorize, the construction in such event is jurisdictional.

The Court applied the rule of *Tube City Mining & Milling Co. v. Otterson*, 16 Ariz. 305, 310, 146 P. 203, 205 (1914), that a collateral attack is proper when the challenged decision "was rendered without jurisdiction and is void."

Hence, in *Tucson Warehouse & Transfer Co. v. Al's Transfer, Inc.*, 77 Ariz. 323, 325, 271 P.2d 477, 478 (1954), the Arizona Supreme Court applied *So. Union* to hold that

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jurisdiction.

> any order which the Commission has power to make is conclusive unless the statutory procedure for review is followed. On the other hand, 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.

Tucson Warehouse is conclusive on the issue of collateral attack in this case here. The question of whether the Commission had authority to enact the REST Rules and the subsequent rate surcharge is jurisdictional, and thus appropriate for a special action in a collateral attack. See, e.g., *George v. Ariz. Corp. Comm'n*, 83 Ariz. 387, 392, 322 P.2d 369, 372 (1958) (Commission's action was "a bare usurpation of power it did not and could not possess. Its action being void, it follows that the rule prohibiting collateral attack has no application"); *So. Pac. Transp. Co. v. Ariz. Corp. Comm'n*, 173 Ariz. 630, 633, 845 P.2d 1125, 1128 (App. 1992).

This lawsuit challenges the constitutional and statutory authority of the Commission to enact the REST Rules and subsequent rate surcharge. If the rules are void, the surcharge is void as well. *So. Pac.*, 173 Ariz. at 632, 845 P.2d at 1127. The Commission could have been given specific authority to adjudge its own jurisdiction, see *Minor v. Cochise County*, 125 Ariz. 170, 172, 608 P.2d 309, 311 (1980), but it was not. "Certainly the Commission cannot obtain jurisdiction merely by declaring itself to have jurisdiction." *Hunt v. Norton*, 68 Ariz. 1, 5, 198 P.2d 124, 126 (1948). That is exactly what it is attempting to do here. Collateral attack is proper to challenge the Commission's jurisdiction.

C. Timeliness. The next obstacle the Commission erects is timeliness. The Commission concedes (ACC Mem. at 12) that no statute of limitations applies to special actions, but it asserts that the one-year statute of limitations trips up plaintiffs' declaratory judgment claim and that laches bars the special action. Neither contention is correct.

Had the plaintiffs filed their challenge before the rate surcharges were imposed, the Commission would be here arguing that the case was not ripe. First, it took the Attorney General more than seven months (from adoption of the rules on Nov. 14, 2006 until June 15, 2007) to certify the REST Rules. A challenge within that time frame would have been premature given that the Attorney General's certification is a prerequisite to the rules' effectiveness. See A.R.S. § 41-1044. Second and more to the point, a cause of action does not accrue until the plaintiff has suffered an injury that is certain and not contingent. See, e.g., *Amfac Distribution Corp. v. Miller*, 138 Ariz. 152, 153, 673 P.2d 792, 793 (1983) (claim accrues when plaintiff knew or reasonably should have known about the claim *and* when the damages are certain). Indeed, "Only when he has sustained damages is he able to sue." *Id.*, 138 Ariz. at 154, 673 P.2d at 794. The Commission acknowledges (ACC Mem. at 11-12) that plaintiffs filed their action within one year of Decision No. 70313, when the rate surcharge was imposed and plaintiffs were tangibly damaged.[2]

[2] The Commission asserts that the rules are merely "successor" rules and that the rate charge is an "adjustor," and that therefore the world did not really change in a way significant enough to give rise to a cause of action. The assertion is absurd. Though the REST Rules followed earlier rules, the Commission itself refers to them as the "*new*

A defendant "may not use the statute of limitations as a shield for inequity." *Nolde v. Frankie*, 192 Ariz. 276, 279, 964 P.2d 477, 480 (1998). "The purpose of a statute of limitations is generally to 'protect defendants and the courts from litigation of stale claims' for which evidence may be lost or the memories of witnesses faded. However, courts disfavor statute of limitations defenses, preferring instead to resolve litigation on the merits when possible." *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 178, 181 P.3d 219, 225 (App. 2008) (citation omitted); accord, *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). Obviously, no such concerns are implicated in a case where the record is intact and there are no witnesses. "The defense of statute of limitations is never favored by the courts, and if there is doubt as to which of two limitations periods should apply, courts generally apply the longer." *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 590, 898 P.2d 964, 968 (1995); accord, *O'Malley v. Sims*, 51 Ariz. 155, 165, 75 P.2d 50, 54-55 (1938). In light of the clear preference for avoiding draconian application of the statute of limitations, the Court here should find that the statute of limitations was triggered not when the REST Rules were adopted, but when the surcharge was adopted and plaintiffs were tangibly harmed.

Renewable Energy Standard and Tariff Rules" (Pls.' Exh. 11, Decision No. 69127, p. 1 (emphasis added)), which of course followed a lengthy rulemaking process. The REST tariff (pursuant to which the surcharge was adopted) was enacted simultaneously with the REST Rules (Pls.' Exh. 19, R14-2-1808), to reimburse utilities for "the reasonable and prudent costs of complying with *these* rules" (*id.*, R14-2-1808(A) (emphasis added)). Indeed, the new rules displace the former Environmental Portfolio Standard rules by

Moreover, the end-point of a statute of limitations is not triggered where "the harm inflicted by the statute is continuing, or does not occur until the statute is enforced—in other words, until it is applied." *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993). From the plaintiff ratepayers' perspective, the REST Rules and obligatory rate surcharges are the proverbial unwelcome gift that keeps giving, so as to constitute a continuing violation that triggers a new statute of limitations whenever a new injury (such as a rate increase) occurs. See, e.g., *Nat'l Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002); *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1058 (9th Cir. 2002).

As for the laches argument, the Commission has made it before to no avail where, as here, the challenge involves the public interest. *George v. Ariz. Corp. Comm'n*, 83 Ariz. 387, 392, 322 P.2d 369, 372 (1958). "Furthermore there is a well established principle of law that laches can not be urged as a defense to a suit to enjoin a wrong which is continuing in its nature." *Pac. Greyhound v. Sun Valley Bus Lines*, 70 Ariz. 65, 72, 216 P.2d 404, 409 (1950). For both reasons, laches simply is not applicable in this case.

The Commission and *amicus* APS nonetheless assert that APS has changed its position in reliance on the rules so as to trigger laches. As a preliminary matter, it is not clear how the Commission has standing to raise the defense on behalf of another entity that, despite its insistence that its interests are affected, has not attempted to intervene.

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adding the crucial appendage, "and Tariff."

The factual assertions made by APS, in turn, are problematic, because there is no way for the plaintiffs or the Court to determine whether they are true. Indeed, they are at variance with APS' assertions throughout the REST rulemaking process that it was already committed to and engaged in significant renewable energy efforts. Pls.' Exh. 23 at 1 ("APS is committed to expanding the use of distributed renewable technologies to generate electricity. This is demonstrated by the fact that, in 1997 before the EPS, APS was the first utility in the State, to offer a green energy option to our customers"); Pls.' Exh. 24 at 2 ("APS has repeatedly demonstrated its commitment to renewable energy. The Company was the first utility in Arizona to install and encourage solar technologies. In addition, APS has entered into significant long-term contracts for wind, biogas and geothermal resources and has committed to seeking to acquire 10% of its incremental load growth from renewable resources"). [3]

Even assuming the Commission's standing to assert detrimental reliance on behalf of APS, or APS's standing to introduce factual assertions as an *amicus*, laches should not apply for two independent and important reasons. First, plaintiffs moved swiftly to challenge the Commission's action as soon as they sustained tangible harm in the form of increased rates. The Commission set and approved the APS surcharge on April 28, 2008; it became effective, and plaintiffs first paid it, in May 2008; and plaintiffs filed a petition

[3] *Amicus* Arizona Center for Law in the Public Interest (ACLPI) states (Br. at 9) that "APS' planned deployment of renewable resources actually *exceeds* the RES requirements" (emphasis in original). If so, APS clearly has not placed itself in detrimental reliance, since it was planning to do all that the Commission is requiring and

for original action the following month. Second, plaintiffs do not seek to disrupt any settled commitments that APS has made. Unlike the bonds at issue in *Schulz v. State of New York*, 615 N.E.2d 953, 957 (NY 1993), where undoing financial transactions would "add hundreds of millions of dollars . . . to the taxpayers' burdens," plaintiffs do not contest at all the ability of APS to pursue renewable energy policies, to maintain existing contracts (whether made pursuant to the REST Rules or on its own initiative), or to seek rate increases to support them pursuant to the Commission's extensive ratemaking authority. Rather, plaintiffs challenge the Commission's authority to impose *mandatory* requirements and surcharges effectuating its vision of an ideal statewide energy policy. The dissenting opinion in *Schulz* is even more appropos to the circumstances here:

> A determination of constitutionality would obviously end the matter, whereas a finding of unconstitutionality would raise the issue of an appropriate remedy. In such a case, the Court is free to consider whether or not such remedy should be purely prospective. What this Court should not do is fail to allow the merits of these constitutional issues to be addressed.

Id. at 961 (Smith, J., dissenting).

This Court need not import New York law to resolve the matter. Given that statute of limitations and laches are disfavored when significant public interest issues are presented,[4] and that the plaintiffs acted promptly once they suffered tangible harm, under

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more.

[4] Plaintiffs plainly did not pursue a special action in order to circumvent the statute of limitations, see *State ex rel. Neely v. Rodriguez*, 165 Ariz. 74, 78, 796 P.2d 876, 880 (1990), given that their lawsuit conjoins a special action with an action for equitable relief.

the well-established jurisprudence in our state they should be allowed their day in court.

D. Special Action Jurisdiction. The Commission next asserts that the Court should not accept special action jurisdiction. "'Special action jurisdiction 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). "[W]here there is a lack of case law on the issue to be addressed and the matter is one of statewide importance, special action jurisdiction is *essential*." *Trebesch v. Superior Ct.*, 175 Ariz. 284, 286-87, 855 P.2d 798, 800-01 (App. 1993) (emphasis added).

The question of the Commission's authority to establish energy policy is one of first impression. The lawsuit affects all of APS's approximately 1.1 million customers in 15 counties. The questions presented are issues of law. Accordingly, special action jurisdiction is appropriate.

Additionally, plaintiffs have no equally plain, speedy, and adequate avenue for relief. The Commission suggests that participation in its "annual implementation plan proceedings" is just such an avenue (ACC Mem. at 14). But plaintiffs are not here to quibble over the amount of the surcharge or the specifics by which the Commission implements the REST Rules. The dispute is over the agency's power to enact the REST Rules and, on that basis, to impose the obligatory rate surcharges. Where a case

questions an agency's authority, a statutory procedure for administrative review is not "the *exclusive* and an *adequate* remedy." *State Bd. of Tech. Registration v. McDaniel*, 84 Ariz. 223, 227, 326 P.2d 348, 351 (1958) (emphasis in original). Indeed, appealing an agency action to itself is a "futile . . . useless" remedy and is therefore inadequate. *Gulf Leisure*, 27 Ariz. App. at 610, 557 P.2d at 542. Additionally, others (including former Commissioner Gleason) already gave the Commission "the opportunity to correct its own errors" on rehearing under A.R.S. § 40-253, and duplicative efforts by plaintiffs were not required. See *Save Our Valley Ass'n v. Ariz. Corp. Comm'n*, 216 Ariz. 216, 220, 165 P.3d 194, 198 (App. 2007). Accordingly, no plain, speedy, or adequate remedy exists by appeal.

The criteria for special action are disjunctive—satisfaction of any of the conditions is sufficient ground for the Court to exercise its discretion. Here, all of the conditions are fully satisfied. Accordingly, as other courts have recognized, special action jurisdiction is appropriate to consider significant constitutional challenges to the Corporation Commission's authority. See, e.g., *Mtn. States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 351, 773 P.2d 455, 456 (1989); *Woods*, 171 Ariz. at 287-88, 830 P.2d at 808-09.

E. Standing. The Commission invokes federal standing requirements that are constitutionally based and not applicable in cases that do not raise federal claims. Rather, our Supreme Court has explained that

> the question of standing in Arizona is not a constitutional mandate since we have no counterpart to the "case or controversy" requirement of the federal constitution. In addressing the question of standing, therefore, we are confronted only with questions of prudential or judicial restraint. We impose that restraint to insure that our courts do not issue mere advisory opinions, that the case is not moot and that the issues will be fully developed by true adversaries. . . . [T]hese considerations require at a minimum that each party possess an interest in the outcome.

Armory Pk. Neighborhood Ass'n v. Episcopal Comm. Srvcs. in Ariz., 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985) (citation omitted). Indeed, because standing is not a constitutional requirement, courts may waive standing in "exceptional circumstances, generally in cases involving issues of great public importance that are likely to recur." *Sears v. Hull*, 192 Ariz. 65, 71, 961 P.2d 1013, 1019 (1998).

Plaintiffs easily meet the applicable criteria. They possess an interest in the outcome because every month from now until they cease to be APS customers, they will be assessed utility surcharges based on unlawful rules. A decision in this case will not be advisory but either will uphold or strike down those rules. The rules and surcharges are ongoing, so the case is not moot. The Court may take notice of the fact that the issues are being fully developed by true (though respectful) adversaries.

In addition to their standing as ratepayers, the plaintiffs may challenge the rules as taxpayers. In *Ethington v. Wright*, 66 Ariz. 382, 387, 189 P.2d 209, 213 (1948), the Arizona Supreme Court recognized "the right of a taxpayer to question expenditure of state funds on any grounds of illegality or unconstitutionality of the enactment calling for their expenditure." Likewise, the Court affirmed in *Bennett v. Napolitano*, 206 Ariz. 520,

527, 81 P.3d 311, 318 (2003) that taxpayers have standing to challenge the expenditure of funds "for an unconstitutional purpose" (emphasis omitted). The contention that "there are no state funds at issue" (ACC Mem. at 16) is simply incredible: the Commission itself acknowledges its active, ongoing role in the implementation of the rules, including "annual implementation plan proceedings" (*id.* at 14). The Court may take judicial notice of the undeniable fact that bureaucratic processes cost money, often plenty of it.

The Commission complains that the plaintiffs cannot have standing because too many others share the same harm. Of course, by definition that is the case for any taxpayer action, where the harm is shared by many other taxpayers (sometimes, by every taxpayer in the entire state). As APS ratepayers, plaintiffs sustain a harm that is not shared by others who are customers of utilities (like the Salt River Project) that are not regulated by the Corporation Commission. Regardless, plaintiffs easily satisfy the minimal prudential requirements for standing.

APS asserts that plaintiffs do not have standing to challenge the rules based on the management interference doctrine.[5] The same standing requirements, of course, are applicable to this claim. Even if plaintiffs did not have standing to assert this claim, the case would constitute an "exceptional circumstance" under *Sears*, 192 Ariz. at 71, 961 P.2d at 1019, because it presents "issues of great public importance that are likely to

[5] As will appear in Part II-D, *infra*, the management interference doctrine pertains to the Commission's constitutional authority, which plaintiffs as ratepayers have standing to

recur."[6] Customers of other utility companies in Arizona are suffering similar continuing violations. Even if APS—which is a regulated utility whose rates are controlled by the Commission—does not invoke the management interference doctrine, its ratepayers should have the ability to do so because they bear the cost burden and they cannot freely choose another utility company.

APS asserts (Br. at 11) that the surcharges inflicted upon plaintiffs are "perhaps related in some cases" to the REST Rules, but in fact the rules themselves directly mandate the surcharges for costs related to the rules. Pls.' Exh. 19, R14-2-1808. Moreover, A.R.S. § 40-361(A) provides that "[c]harges demanded or received by a public service corporation for any commodity or service shall be just and reasonable." Regardless of the reason why APS has not invoked the management interference doctrine on its own behalf, when it fails to do so, ratepayers have a tangible stake in doing so to protect their right to "just and reasonable rates" under Arizona law.

In an analogous situation, the U.S. Supreme Court recognized standing on the part of criminal defendants to challenge peremptory challenges of jurors. In *Powers v. Ohio*,

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challenge.

[6] In fact, the Court in *Sears*, 192 Ariz. at 72, 961 P.2d at 1020, cited as an example of such issues of great importance that are likely to recur a Washington State case that considered whether it was unconstitutional or unlawful for a public utility's offer of inducements to its customers to use electricity rather than natural gas, on the grounds that the case involved issues of the generation, sale, and distribution of energy within the state and immediately affected the management and operation of utilities. See *Wash. Nat. Gas Co. v. Pub. Util. Dist. No. 1*, 459 P.2d 633, 634-35 (Wash. 1969). Those issues are very similar to those raised here.

499 U.S. 400, 401 (1991), the Court recognized third-party standing where the party asserting the claim has suffered cognizable injury, has a close relationship to the third party, and where some hindrance exists to the third party asserting its own interest. The test was adopted in *State v. Anaya*, 170 Ariz. 436, 441, 825 P.2d 961, 966 (App. 1991). Here, the plaintiffs have sustained a cognizable and ongoing monetary injury by way of the surcharges. They are customers of the third party. And as a supplicant of the Commission, wholly dependent upon the Commission for its revenues, the third party has a disincentive to challenge the Commission's authority—especially where it is held financially harmless for the challenged regulatory impositions. Though plaintiffs have standing to assert the management interference doctrine on their own, they also have third-party standing.

The prudential objectives of Arizona's standing doctrine are fully met in this case. The plaintiffs should be allowed to litigate the issues of great public importance at issue in this case.

II. SUBSTANTIVE ISSUES

The judicial inquiry in this case is markedly different than the inquiry that would occur in a case challenging a statute. Whereas a legislative enactment is entitled to a presumption of validity and the power of the Legislature to enact it may be presumed absent an express restriction on the Legislature's power, the Court should begin with the opposite presumption in the case of the Commission on the question of its authority to

enact public policy. That is because the Corporation Commission possesses no inherent powers, but only those expressly provided by the Constitutions or statutory delegation. *Phelps Dodge Corp. v. Ariz. Elec. Power Co-op*, 207 Ariz. 95, 111, 83 P.3d 573, 589 (App. 2004). Nor does it possess "implied powers." *So. Pac. Co. v. Ariz. Corp. Comm'n*, 98 Ariz. 339, 345, 404 P.2d 692, 696 (1965). Hence, the Commission must identify a specific source of clear constitutional or statutory authority for each and all of the rules. A.R.S. § 41-1001(14)(a)(i). Constitutional or statutory language that arguably could be interpreted to provide authority simply is not enough.

Instead of citing clear and specific authority for the REST Rules, the Commission offers a generic justification, combining the constitutional grant of authority with a broad array of statutes to articulate what amounts to a plenary grant of authority—precisely what the abundant judicial precedents construing the Commission's authority in a variety of contexts all agree the Commission does *not* have. As set forth in plaintiffs' opening brief, numerous court decisions have invalidated Commission regulations that are far less sweeping than the rules at issue here. By contrast, the Commission cannot point to a single precedent that upholds anything close to the REST Rules, and for good reason: the scope, invasiveness, and cost of the rules are without precedent. As such, the rules themselves are a useful starting place for plaintiffs' rebuttal.

A. <u>The REST Rules</u>. The Commission provides a general defense of the rules as a whole, rather than, as it must, linking specific rules to clear and specific sources of legal

authority to each and every part of the rules. *Phelps Dodge*, 207 Ariz. at 116, 83 P.3d at 594. The Commission reassuringly contends that the rules "do not dictate a particular method of compliance, and instead provide the utilities significant discretion" (ACC Mem. at 28). But in fact, in their totality, the rules establish broad energy policy for the state, which is the province of the Legislature; and in their particulars, they displace essential business decisions entrusted to the utilities themselves. All with a whopping price tag, by the Commission's own estimates, of $2.4 billion above conventional energy generation (Pls.' SOF 58-60), to be borne by utility ratepayers, including plaintiffs.

The Rules (set forth in Pls.' Exh. 19) include the following provisions:

- Utilities are required to obtain renewable energy credits to satisfy specified annual percentages of retail power sold, starting with 1.25 percent in 2006 and increasing to 15 percent after 2024 (R14-2-1804).

- Of each annual percentage, the Commission mandates a specific percentage of distributed renewable energy resources, starting with five percent in 2007 and increasing to 30 percent after 2011 (R14-2-1805).

- Of that percentage, the Commission prescribes that half of the distributed energy requirement be satisfied on residential property and half on commercial property (R14-2-1805(D)).

- The Commission defines what constitutes a credit, who owns it, and whether and how it may be transferred, purchased, and sold (R14-2-1804).

- The Commission authorizes itself to approve utility agreements to purchase renewable energy and credits (R14-2-1804(G)).

- The Commission establishes a regime of manufacturing credits for the non-distributed energy requirement when utilities invest in or provide incentives to solar energy manufacturing plants in Arizona (R14-2-1807(A), 1807 (B), and 1804(F)).

- The Commission limits the type of eligible renewable technologies that can be used to

fulfill the rules (R14-2-1802).

- The Commission limits the amount of wholesale electricity sold by non-utility owned generators that a utility may use to satisfy the distributed renewable energy requirement (R14-2-1805(E)).

- The Commission disqualifies energy conservation products, energy management products, energy efficient products, and other products that use nonrenewable fuels (R14-2-1802(D)).

- The Rules require utilities to recover costs of compliance via a special tariff (R14-2-1808).

- The Commission obligates utilities to pay up to half of the cost for customers to install distributed renewable resources; and prescribes how customers may request funds, sets a minimum amount that customers must contribute to the projects, and limits the amount of funds customers may receive (R14-2-1809).

- The Commission requires utilities to study issues relating to implementing distributed renewable resources and submit a broad array of prescribed data to the Commission (R14-2-1810).

- The Rules require utilities to submit detailed compliance plans annually (R14-2-1813).

- The Commission provides itself with the power to impose penalties for noncompliance (R14-2-1815).

The rules thus establish statewide renewable energy policy implemented through the utilities subject to its regulation. It excludes such alternative sources as nuclear power and hydro-generated power, and prescribes mandatory outcomes that ordinarily would be subject to business discretion, market conditions, cost considerations, technological advances or lack thereof, and the individual choices of third parties over whom the Commission has no control.

While the constitutional and statutory authority cited by the Commission to justify the

rules as a whole is far from clear or specific, the authority for individual rules is nonexistent. In both their totality and their specifics, the rules exceed the Commission's limited authority.

B. Constitutional Authority. Plaintiffs will not repeat their arguments regarding the well-established limits on the Commission's constitutional authority. The rule of *Pac. Greyhound*, 54 Ariz. at 177, 94 P.2d at 450, that the "public policy of the State of Arizona in reference to public service corporations" is the exclusive province of the Legislature, remains unquestionably intact. The Commission's constitutional power plainly does not extend to the creation of broad renewable energy policy.

The Commission asserts that even though the rules set no rates, they were adopted pursuant to the Commission's ratemaking power. In *Woods*, 171 Ariz. at 299, 830 P.2d at 820, the Court on that basis upheld Commission regulations of transactions between public service corporations and their corporate affiliates.[7] Recognizing the framers' intent in investing the Commission with ratemaking power "to protect consumers from abuse and overreaching by public service corporations" and "the special relationship between affiliated companies and the strong potential that transactions between affiliates will affect rates," *id.*, 171 Ariz. at 295-96, 830 P.2d at 816-17, the Court concluded that "we do not believe the Proposed Rules so interfere with management functions that they constitute an attempt to control the corporation rather than

[7] Indeed, as part of the Commission's rulemaking authority, Art. XV, § 3 expressly authorizes the Commission to issue rules "by which such corporations shall be governed in the transaction of business within the State." The rules at issue in *Woods* regulated the transaction of business by public service corporations.

an attempt to control rates," and thus the rules were "reasonably necessary for ratemaking." *Id.*, 171 Ariz. at 297, 830 P.2d at 818.

Applying that line of demarcation, the court in *Phelps Dodge*, 207 Ariz. at 129-30, 83 P.3d at 607-08, held that rules relating to the financial affairs of utility companies were sufficiently related to ratemaking, but rules requiring nondiscriminatory open access to transmission and distribution facilities and obliging 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; accord, *So. Pac.*, 98 Ariz. at 345-46, 404 P.2d at 696 (requiring company to restore discontinued train service does not fall within ratemaking power). The REST Rules are far from the types of corporate transaction regulations that were sustained in *Woods* and *Phelps Dodge*, and instead constitute corporate governance regulations that are not part of the Commission's ratemaking power.

The Commission then seeks shelter in the "permissive" authority in the last part of Ariz. Const. Art. XV, § 3. There are two plausible interpretations of the language stating that the Commission "may . . . 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 regulated companies. First is that the language refers back to the Commission's ratemaking authority provided in the same section, to the effect that "the Commission has no regulatory authority under article 15, section 3 except that connected to its ratemaking power."

Woods, 171 Ariz. at 294, 830 P.2d at 815. The second is that the Commission has limited additional authority to regulate for the convenience, comfort, safety, and health of employees and patrons. What is not plausible, or supported in law, is that this language confers *carte blanche* authority upon the Commission to enact sweeping renewable energy policy. Were it to do so, then few if any of the many judicial rulings reining in the Commission's authority would have been so decided.

Nor are self-serving, pro forma Commission findings (ACC Mem. at 20) that the rules serve public convenience, comfort, safety or health remotely sufficient to enlarge the Commission's jurisdiction. "The scope of an agency's power . . . may not be expanded by agency fiat." *Cochise County v. Ariz. Health Care Cost Containment Syst.*, 170 Ariz. 443, 445, 825 P.2d 968, 970 (App. 1991); accord *Corella v. Superior Ct.*, 144 Ariz. 418, 420, 698 P.2d 213, 215 (App. 1985) ("administrative powers are limited to those granted by a constitution or statute. . . . No administrative agency can give itself powers not expressly granted"); *Caldwell v. Ariz. St. Bd. Of Dental Examiners*, 137 Ariz. 396, 398, 670 P.2d 1220, 1223 (App. 1983) (agency powers "are measured and limited by the statute creating them").

Nor does the assertion that the Commission's rules do not directly contradict with existing legislation make the Rules permissible. If the Commission lacks clear and specific authority to issue the Rules, what the Legislature has or has not done is irrelevant—the Commission's authority does not derive from Legislative inaction; but rather derives only from affirmative statutory authority. Yet the fact that the Legislature has not created a "competing

statutory scheme" (ACC Mem. at 20) may well mean that the Legislature does not support pervasive regulation. In fact, the Legislature has legislated extensively on renewable energy (see Pls.' Op. Br. at 14, 20-23), including an array of renewable energy tax credits that may indeed conflict with or duplicate the incentives imposed by the Commission. Compare A.R.S. §§ 43-1085, 43-1164, 43-1090, and 43-1176 with Pls.' Exh. 19, R14-2-1807 (A) and (B), R14-2-1804(F), and R14-2-1809.

The Constitution does not provide any authority, much less clear and specific authority, for the REST Rules. They therefore exceed the Commission's jurisdiction.

C. Statutory Authority. The Commission hitches its wagon primarily to A.R.S. § 40-321. There are two possible ways to read the statute: as a remedial statute, under which the Commission is empowered to step in when the Commission finds that a public service corporation cannot meet its obligations; or as a broad grant of regulatory authority bounded only by the requisite Commission findings. That there are two possible interpretations suggests that the statute fails as a source of clear and specific delegation of authority to enact the REST Rules.

The statute's history demonstrates that the statute provides remedial, not plenary authority. It was adopted in 1912 (Ch. 90, § 35), and initially predicated the exercise of the Commission's authority on "a hearing had upon its own motion or upon complaint," which suggests remedial intent. Likewise with A.R.S. § 40-322 (adopted in 1912 under Ch. 90, § 46), in which the Commission also attempts to finds authority. In *Qwest Corp. v. Kelly*, 204 Ariz. 25, 31 n.2, 59 P.3d 789, 795 n.2 (App. 2002), the court reviewed tenants' claims against a

telephone utility regarding wire maintenance service, observing that § 40-321 "gives the Commission the power to oversee a public service corporation's business and ensure that it is conducting business in a safe, reasonable, and proper manner." The court linked § 40-321 to A.R.S. § 40-241, which gives the Commission authority to conduct investigations and inspect the records of a public service corporation. *Id.* Likewise, in *Ariz. Corp. Comm'n v. Palm Springs Utility Co.*, 24 Ariz. App. 124, 536 P.2d 245 (1975), the court sustained a specialized order requiring a utility to change its water quality. Plainly, the statute authorizes the Commission, by general rules or specialized orders, to ensure that utilities fulfill their essential obligations. But it is far from a clear, specific, or open-ended grant of authority.

The REST Rules are bereft of findings that any of the utility companies under its regulatory authority, much less all of them, were or would be incapable of dispatching their essential obligations. To the extent that the Commission deemed that renewable energy sources were preferable, there are no findings that APS's ongoing efforts to diversify its portfolio, or the efforts of other particular companies, were inadequate.[1] There were no findings that alternative forms of energy, such as nuclear energy or hydro-generated power, were inadequate substitutes or supplements to the specifically prescribed sources chosen by the Commission. Nor does the Commission attempt to link each of the specific rules to this authority. Even had it done these

[1] The Commission found, only in the most conclusory fashion and using select statutory language, that the generation portfolios of all Affected Utilities lacked adequate and sufficient diversity "to promote and safeguard the security, convenience, health and safety" of customers and the public (Pls.' Exh. 11, Finding of Fact 227).

things, however, the rules represent broad policymaking power not clearly and specifically delegated by the statute.

With regard to §§ 40-321 and 40-322, the Commission asserts that each "supports" (ACC Mem. at 22) the REST Rules. It is not sufficient that the rules are consistent with statutes. It is necessary that the statute clearly authorize the regulation. It is remarkable that after nearly 100 years, the Commission only now is citing these statutes as a source of sweeping and heretofore undiscovered authority. The Legislature may delegate power to the Commission to "determine the type and extent of service to the public," but there is "no presumption" that it did so "beyond the clear letter of a statute." *So. Pac.*, 98 Ariz. at 343, 404 P.2d at 694-95; accord, *Phelps Dodge*, 207 Ariz. at 114, 83 P.3d at 592. None of the statutes cited by the Commission satisfy that exacting standard. A sweeping exercise of policymaking power, intruding on the details of energy generation to an unprecedented extent, cannot as a matter of law be predicated on statutory interpretations that range from arguable to fanciful. Even now, and certainly following an adverse judgment, the Commission may seek legislative ratification of what it has done. It has in the past given the Commission significant yet circumscribed powers, even as it has paved its own way in making statewide renewable energy policy. What it has not done is to surrender its policymaking authority, nor has it specifically delegated to the Commission in clear terms the power to make renewable energy powers or to commandeer utilities to effectuate its policy vision. Failing such delegation, the REST Rules are invalid.

D. Management Interference Doctrine. The Commission contends that the management interference doctrine is outside the scope of a collateral attack. Then, it makes an astounding categorical assertion (ACC Mem. at 25), which is 180 degrees from clearly established law, that "the Commission, in the exercise of its regulatory power, may interfere with the management of public utilities whenever the public interest demands." Neither assertion is correct.

As a case cited by the Commission (*id.* at 25-26) makes clear, "Nowhere in the Constitution or in the Statutes is the commission given jurisdiction, directly or by implication, to control the internal affairs of corporations."[8] *Ariz. Corp. Comm'n v. Consolidated Stage Co.*, 63 Ariz. 257, 261, 161 P.2d 110, 112 (1945). Indeed, control over the corporation was precisely the dividing line between permissible and impermissible Commission rules articulated in both *Woods*, 171 Ariz. at 297, 830 P.2d at 818; and *Phelps Dodge*, 207 Ariz. at 114, 83 P.3d at 592.

Though the Commission soothingly recites that its rules "do not interfere with management discretion" (ACC Mem. at 28), elsewhere in its brief, in a more candid moment, the Commission states bluntly that the rules "govern the composition of the utility's resource portfolio" (*id.* at 18). If that does not "interfere with management discretion," it is difficult to conceive of a regulation that would.

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[8] Given that many of the statutes cited as sources of authority by the Commission were in existence at the time of this decision—including A.R.S. §§ 40-321 and 40-322—presumably the court did not view them as broad grants of power to displace managerial decisions.

Indeed, even as *amicus* APS gamely resists plaintiffs' efforts to protect the company's essential management discretion, it states (Br. at 8) that it has committed over $5 billion in long-term contracts, incentives, and additional personnel and management to comply with the REST Rules. Likewise, Commission staff estimated utility compliance costs with the REST Rules at $2.4 billion. Pls.' SOF 58-60.

Meanwhile, *amicus* ACLPI asserts (Br. at 7) that "[e]arly adoption of new technologies is often a reasonable business decision. . . ." That is exactly what it is and should be: a *business* decision, that supposedly APS was going to make anyway. But left to its own business judgment—and operating within the Commission's otherwise applicable ratemaking and regulatory constraints—APS would be sufficiently nimble to respond to market forces, technological developments, and changed conditions, instead of being frozen into place by a long-term regulatory regime that accounts for none of those dynamic factors. Indeed, ACLPI candidly admits (Br. at 3) that "it is not possible to know today which resource portfolio will be the least cost" over the long run. Likewise, even the Commission recognizes the uncertainty (ACC SOF 19). That fact exacerbates the Commission's interference with management discretion, and if its choices are wrong (and even if they are right), consumers will bear the financial consequences. In essence, the Commission has substituted its "business decision," to use ACLPI's term, for the utilities' business decisions. That it may do only in specific circumstances, and certainly not on the scale or to the extent of these rules.

The particulars of the Commission's management interference are described in Part II-A,

supra. "Decisions such as quantity, price and timing of purchases of supplies" of public service corporations interfere directly with management. Ariz. Op. Att'y Gen. No. I79-099, 1979 WL 23168 at *2 (Apr. 9, 1979). The REST Rules go far beyond such matters.

For the reasons more fully described in our opening brief (pp. 23-28), the REST Rules' displacement of business decisions and market forces with regulatory impositions goes far beyond the Commission's limited powers. APS may not mind given that the rules require it to pass along all compliance costs to its customers. But it is the plaintiffs and other ratepayers who bear the burden of the enormous costs. The heavy interference with management discretion exceeds the Commission's powers.

Conclusion

For all the foregoing reasons, plaintiffs respectfully request that this Court grant the relief sought.

RESPECTFULLY SUBMITTED this 21st day of May, 2009 by:

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