

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-029293

09/02/2009

HONORABLE JOSEPH B. HEILMAN

CLERK OF THE COURT

T. Pavia

Deputy

ROY MILLER, et al.

CLINT BOLICK

v.

STATE OF ARIZONA CORPORATION
COMMISSION, et al.

WESLEY C VAN CLEVE

MINUTE ENTRY

The Court has read and considered the following documents and pleadings relevant to a decision on this issue:

1. Plaintiffs'/Petitioners' Petition for Special Action Relief;
2. Defendants'/Respondents' Answer/Response [thereto];
3. Plaintiffs'/Petitioners' *Motion for Summary Judgment filed 2/25/09*;
4. *Plaintiffs'/Petitioner's Statement of Facts in Support of Motion for Summary Judgment filed 2/25/09*;
5. Defendants' *Response and Cross Motion for Summary Judgment filed 4/6/09*;
6. *The Arizona Corporation Commission's Statement of Facts in Support of its Cross Motion for Summary Judgment and Response to Plaintiffs'/Petitioners' Motion for Summary Judgment filed 4/6/09*;

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7. *The Brief of Amicus Curiae, Arizona Public Service Company* filed 4/28/09;
8. *Notice of Errata in Plaintiffs'/Petitioners' Statement of Facts in Support of Motion for Summary Judgment*, filed 4/29/09;
9. *The Brief of Amici Curiae* filed 4/30/09 by the Arizona Center for Law in the Public Interest;
10. Plaintiff's *Combined Reply to Arizona Corporation Commission's Response to Motion for Summary Judgment* filed 5/21/09;
11. Plaintiff's *Statement Controverting Arizona Corporation Commission's Statement of Facts* filed 5/21/09;
12. Defendants' *Reply in Support of Cross Motion for Summary Judgment* filed 6/10/09.

Additionally, the Court has considered the arguments of counsel propounded at oral argument on June 15, 2009.

Statement of the Case, Jurisdiction and Findings Related Thereto:

In this special action, the petitioner challenges the Arizona Corporation Commission's (the "Commission") promulgation of the Renewable Energy Standard and Tariff ("REST") Rules. The REST Rules establish standards for including annual percentages of renewable energy resources in affected utilities' portfolios; quantifies and qualifies the crediting of renewable energy resources for purposes of measuring compliance; and provides for the setting of just and reasonable rates accordingly. The substantive issue is whether the Commission exceeded its constitutional authority under ARIZ. CONST. Art. XV, § 3 (hereinafter: sometimes referred to as simply, "§ 3") when the REST Rules were enacted.

This court has jurisdiction over the issuance of prohibition writs against the Commission under Ariz.R.P.Spec.Act., Rule 1. The Commission argues that this Court should not accept special action jurisdiction because the petitioners have an equally plain, speedy, and adequate remedy by participating in the annual implementation plan proceedings. However, the petitioners are not affected utilities, but rather utility consumers. Therefore, the Court finds that there is no remedy by appeal. Additionally, the Court agrees that the matter is a question of law, a question of first impression, and of statewide importance. *Phoenix News Inc. v. Ellis*, 215 Ariz. 268 (App. 2007).

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The overarching question before the Court is whether the Commission has the constitutional or statutory authority to promulgate the REST Rules and if the Commission has acted within that authority. Therefore, the Court accepts jurisdiction of this special action and now turns to the issues raised in the petition.

Findings of Fact and Conclusions of Law:

Unlike most public service commissions, our Commission was established by the Arizona Constitution, with a significant degree of the Commission's authority being derived from the Constitution. Essentially, the Commission derives its authority from two sources. The Arizona Constitution art. XV, § 3 grants the Arizona Corporation Commission full power over public service corporations to:

prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected, by public service corporations within the state for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the state [...] Provided further, that classifications, rates, charges, rules, regulations, orders, and forms or systems prescribed or made by said corporation commission may from time to time be amended or repealed by such commission.

Additionally, the Commission is granted authority by the Arizona Legislature under Title 40 of the Arizona Revised States. Specifically applicable here is Ariz. Rev. Stat. § 40-321, which directs the Commission to ensure the utilities provide adequate service in a reasonable manner and further enables the Commission to accomplish these goals through rulemaking. The Court notes that all *Amici Curiae* join in the legal analysis of the Commission's authority as set forth in the Commission's pleadings and arguments, as well as the result as set forth in the Rest Rules.

First, for purposes of historical context, it is important to address the genesis of the REST Rules. It should be noted, and the Court specifically finds, that the REST Rules are only the final chapter (to date) of a long line of rules and regulations that attempt to help guaranty that the rates charged by energy providing utilities, who are granted tariffs by the Commission, are the lowest rates possible both now and in the future. The Commission enacted the Integrated Resource Planning Rules in 1988 requiring affected utilities to bring forth a plan that provides electric service with the "least cost" resource portfolio. (Def.'s Statement of Fact ("SOF") 2.) In 1996, the Commission enacted a Solar Portfolio Standard where the costs of obtaining solar

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power were to be recovered in rates through a system benefits charge. *Id.* Then in 2001, the Commission replaced the Solar Portfolio Standard with the Environmental Portfolio Standard including additional renewable technologies (i.e. solar electric, solar water heating, wind, hydro power, landfill gas, biomass, and geothermal). *Id.*

Furthermore in 2003 and 2004, the Commission conducted statewide workshops where interested parties were allowed to examine “the appropriate resource mix, surcharge levels, portfolio percentages and phase-in levels” for the Environmental Portfolio Standard Rules and propose changes. *Id.* In January 2005, the Commission issued a report summarizing the comments and proposals presented during the workshops by the interested parties and staff. (Def.’s SOF Ex. 2.) In April 2005, the Commission filed a draft rule package and asked the public to provide comments. The Commission also held open meetings to discuss the proposed changes. (Def.’s SOF 3.)

In February 2006, the Commission docketed a second draft rule package including draft amendments to the Environmental Portfolio Standard Rules. Again, the Commission allowed interested parties to submit written comments and the Commission held open meetings to discuss the beginning of the formal rulemaking process. (Def.’s SOF Ex. 1.) On March 14, 2006 in Commission Decision No. 68566, the Commission concluded that “the proposed rules are intended to ‘increase renewable energy resources for diversity of the fuel supply, to enhance system reliability and safety in the post 9/11 era, and to mitigate against volatility in non-renewable fuel prices.’” (Def.’s SOF 3.) The Decision also directed staff to prepare a formal rulemaking notice that was published in the *Arizona Administrative Registrar*. *Id.*

Public comment hearings were held in May and June of 2006 providing the opportunity for interested parties and the public to file written comments. *Id.*

On November 14, 2006, the Commission Decision No. 69127 enacted the REST Rules and submitted the REST Rules to the Attorney General for certification, citing Arizona Constitution Article XV and Arizona Revised Statutes Title 40 and with specific authority in Ariz. Rev. Stat. § 41-1001(14)(a)(i). *Id.* (Pl.’s SOF 5.) The Arizona Attorney General characterized the Commission’s cited authority as vague and requested specific authority from the Commission. (Pl.’s SOF 5.) The Commission provided a memorandum to the Attorney General indicating that “the Commission cannot necessarily compartmentalize its decision-making into precise categories that will neatly reflect an isolated source of statutory or constitutional authority.” *Id.* Subsequently, the Attorney General gave deference to the expertise of the Commission and certified the REST Rules on June 15, 2007. *Id.* (Def.’s SOF 3.) The Commission and the *Amici*

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Curiae all point out that the Plaintiffs never appeared or contested any of these proceedings during their pendency, a fact which as noted previously does not deprive the Plaintiffs from bringing this action but does call into question Plaintiffs' diligence in bringing their position to the attention of the Commission at a time when their concerns might have been more favorably addressed.

The Commission Decision's §§ 225 through 243 reveals the findings of facts concerning current Arizona electric utilities generation portfolios' lack of sufficient and adequate diversity to promote and safeguard the security, convenience, health and safety of the affected utilities' customers and the public in Arizona. *Id.* Based on these findings the REST Rules require affected utilities to derive an increasing annual percentage of energy from renewable resources, where by 2025 affected utilities will generate 15% of their power from renewable resources. (Complaint, 3). On February 3, 2006, the Commission filed a report in Docket No. RE-00000C-05-0030 stating:

diversification of power plant energy resources is critical in maintaining a reliable electric system in Arizona. While reliance on only a few types of fuels can be dangerous, utilities that broaden their fuel portfolios to a wide variety of fuels will have less severe impacts on their systems if one type of fuel is temporarily or permanently not available. An expansion of the existing Environmental Portfolio Standard to 15 percent of retail sales would lessen the vulnerability of Arizona's generation portfolio to unanticipated disruptions. If the new renewable energy replaces the use of the more vulnerable fuels, such as natural gas, this broadening of the portfolio will act as 'insurance' against possible future disruptions. (Def.'s SOF Ex. 1 at 9.)

According to the REST Rules, all affected utilities, including Arizona Public Service, filed REST implementation plans and the associated rate recovery mechanisms. (Def.'s SOF 7.) The Commission has approved the REST implementation plans in Decision Nos. 69728, 70096, 70303, 70304, 70305, 70313, 70315, 70623, 70653, 70654, 70655, 70699, 70700, and 70701. *Id.*¹

Clearly, the foregoing demonstrates that the final REST Rules are nothing more than the progeny of a long line of rate-regulating rules and regulations.

1. In its *Amicus* brief to the Court, APS acknowledges it has already spent in excess of \$1Billion to comply with the REST Rules.

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In 2008, the Arizona House of Representatives attempted to pass HB 2766 a renewable energy policy but the bill failed in the Arizona State Senate. (Pl.'s Ex. 22.)

A review of case law regarding the Commission's authority provides that the Commission's authority is divided into two main powers: the exclusive authority, regarding pure ratemaking is granted in the first half of § 3, and the permissive authority, regarding rules and regulations is found in the latter half of § 3. *Ariz. Corp. Comm'n v. Woods*, 171 Ariz. 286 (1992). In 1939, the Arizona Supreme Court substantially limited the Commission's power to classifications, rates and charges of public service corporations. *Corp. Comm'n v. Pac. Greyhound Lines*, 54 Ariz. 159 (1939). However in 1992, the Arizona Supreme Court noted that the *Pacific Greyhound* court "apparently ignored language in *Arizona Eastern Railroad* [19 Ariz. 409 (1918)] that at least implied that the Commission and the legislature have *concurrent* power to regulate beyond the scope of classification, rates, and charges." *Woods*, 171 Ariz. at 293, nt. 6 (emphasis in original).² Therefore, the Commission's ratemaking authority granted by article XV, § 3 extends beyond purely setting rates to include the promulgation of rules and regulations that are "reasonably necessary steps in ratemaking, while the legislature retains power to govern public service corporations in matters unrelated to this ratemaking authority." *Id.* (referencing *Corp Comm'n v. Pac. Greyhound Lines*, 54 Ariz. 159).

Thus, this Court is compelled to examine and resolve the issue of the Commission's authority to enact the REST Rules under the *Pacific Greyhound* doctrine and "must give deference to the Commission's findings in determining what regulation is *reasonably necessary* for effective ratemaking." *Id.* at 294, ¶ 2 (emphasis added).

In understanding the definitions of *reasonably necessary* the Court turns to Black's Law Dictionary, which defines reasonably as "[j]ust; proper." BLACK'S LAW DICTIONARY 1431 (4th ed. 1968). Moreover, the *Woods* Court defines necessary as "to

2. In *Woods*, the Supreme Court noted that decisions after *Pacific Greyhound* continued to narrow the Commission's power and authority under §3 and stated:

Pacific Greyhound and its progeny thus undercut the framers' vision of the Commission's role as set forth in the text of the constitution, as described by the framers, and in earlier case law. *Woods*, 171 Ariz. at 293.

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protect consumers from abuse and overreaching by public service corporations,” which may have a devastating impact on rates. *Woods*, 171 Ariz. at 295.

Further, the REST Rules do not conflict with statutory authority. In *Pacific Greyhound*, there was a conflict between a specific Commission order and a statute. Consequently, it was necessary to determine which branch of government held controlling authority. *Id.* at 167. The court in *Pacific Greyhound* held that “the paramount power to make all rules and regulations governing public service corporations not specifically and expressly given to the Commission by some provision of the Constitution rests in the legislature.” *Id.* at 176. The court reasoned that the meaning and purpose of the limitation is clear in the Constitution when considered as a whole. *Id.* at 177.

Therefore, unlike *Pacific Greyhound*, there is no competing statute that conflicts with the REST Rules. The petitioner argues that the legislature has taken initial steps to develop renewable energy policy and attempted to pass HB 2766 in 2008. However, this argument calls upon this Court to speculate on the intent of the legislature. Conversely, this Court finds that the legislature’s silence on the present matter is intentional. Therefore, the Commission has acted within its authority to protect the public’s interest in providing consumers with low-cost electric services in Arizona by establishing the REST rules.

Furthermore, the REST Rules are “reasonably necessary steps” towards ratemaking. When the Commission enacts rules that regulate a utility’s relationship with its corporate affiliates and subsidiaries, then the Commission’s ratemaking authority extends even to the affiliates of public service corporations because the capital costs of the affiliates’ activities can affect the public service corporation’s overall costs, affecting rates. *Id.* In *Woods*, the Commission proposed rules to oversee various transactions between public service corporations and their corporate affiliates. *Id.* at 287. The court held that the role of the Commission extends to the corporate affiliates because the Commission is required to use its power in the public’s interest. *Id.* at 292. The court reasoned that the Commission’s ratemaking authority is not limited to setting rates and charges, but instead extends to any reasonably necessary steps in ratemaking. *Id.* at 297.

Like *Woods*, the Commission’s permissive authority supports the enactment of the REST Rules. Considering the Commission’s protracted efforts to require affected utilities to provide electric services with low cost energy resource portfolios, the REST Rules are a continuation of these efforts by diversifying energy resources which is critical to maintaining reliable electric services in Arizona. Additionally, the availability of

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fossil fuels in the future is limited. If affected utilities are unable to provide consumers with a low cost energy resource to provide electricity, this could lead to higher rates in the future. The REST Rules are the Commission's efforts to control costs and rates over the long-run by promoting and safeguarding the security, convenience, health, and safety of the affected utilities customers and the public in Arizona.

The Court finds the Commission's ratemaking authority extends beyond setting rates and includes the promulgation of rules and regulations when the rules are reasonable and necessary steps in ratemaking. Therefore, the Court finds that even with *Pacific Greyhound's* limited interpretation of article XV, § 3, the REST Rules are reasonably necessary for ratemaking. The Commission, therefore, has the authority to promulgate the REST Rules even in the absence of regulatory authority separate from ratemaking. This Conclusion makes it unnecessary to review the parties' arguments of statutory authority for the promulgation of the REST Rules.

Additionally, the Court recognizes that there still remains the unanswered question of whether the legislature has exclusive or concurrent power with the Commission as it relates to matters outside of ratemaking. *Ariz. Corp. Comm'n v. Woods*, 171 Ariz. 286, 294, n.8 (1992). Because the Court finds that the dissemination of the REST Rules falls within the Commission's ratemaking authority, the Court refrains from attempting to resolve this ongoing ambiguity.

For the foregoing reasons,

IT IS ORDERED, denying Plaintiffs' *Motion for Summary Judgment*, granting Defendants' *Cross-Motion for Summary Judgment*.