IN THE COURT OF APPEALS FOR THE STATE OF ARIZONA
DIVISION ONE

ROY MILLER, THOMAS F. HUSBAND, JENNIFER BRYSON, and CORPUS COMMUNICATIONS, INC.,	Case No. 1 CA-SA 08-0261
Petitioners,	
vs.	
ARIZONA CORPORATION COMMISSION, and KRISTIN MAYES, WILLIAM MUNDELL, JEFF HATCH-MILLER, GARY PIERCE, and MIKE GLEASON, in their official capacities as members of the Arizona Corporation Commission,	
Respondents.	

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
FILED

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BY:

PETITION

(Special Action, Injunctive, and Declaratory Relief)

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Introduction

The Arizona Corporation Commission is established under the Arizona Constitution with limited power to regulate utility rates, but over the years it has expanded its reach beyond its constitutional powers. Last year, the Commission adopted sweeping new rules requiring utilities to derive a specified share of 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 May this year, the Commission approved a surcharge for Arizona Public Service ("APS"). That surcharge, imposed upon over one million customers including Petitioners, resulted from the rules that are the subject of this special 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.

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

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

Jurisdictional Statement

A writ of prohibition, relief now provided by special action, is appropriate to challenge the constitutionality of Corporation Commission actions. *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 351, 773 P.2d 455, 456 (1989). "[Q]uestions that may be raised in a special action are: . . . Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority." Ariz. R. P. Spec. Actions 3. The question here is whether the Corporation Commission exceeded its legal authority in promulgating

renewable energy standards and the rate surcharge that is the necessary outcome. This Court has jurisdiction, Petitioners have standing, and the Petition is timely filed under the Rules for Special Actions.

A. Jurisdiction. This Court has jurisdiction to hear and determine petitions for special actions without regard to its appellate jurisdiction. A.R.S. § 12-1831; *Martin v. Reinstein*, 195 Ariz. 293, 300, 987 P.2d 779, 786 (App. 1999).[1,2] Its jurisdiction to grant "extraordinary relief against a state agency or official" is original. *State ex rel. Hance v. Ariz. Bd. of Pardons & Paroles*, 178 Ariz. 591, 594, 875 P.2d 824, 827 (App. 1993). Such relief has been granted previously in a special action petition to hear constitutional arguments on unauthorized acts of the Corporation Commission. *Mountain States Tel. & Tel. Co.*, 160 Ariz. at 351, 773 P.2d at 456; *see also Ariz. Corp. Comm'n v. State ex rel. Woods*, 171 Ariz. 286, 288, 830 P.2d 807, 809 (1992).

"'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).

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[1] The Court also has jurisdiction to issue declaratory judgments (A.R.S. § 12-120.21(A)(4)) and injunctions (A.R.S. § 12-120.21(A)(3)).

[2] If this Court finds that it is not the proper court, A.R.S. § 12-120.22 requires that the petition be transferred to the proper court.

"[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) (citation omitted) (emphasis added). Such is the case here.

1. The case raises "constitutional issues of first impression." *Ariz. Indep. Redist. Comm'n v. Fields*, 206 Ariz. 130, 135, 75 P.3d 1088, 1093 (App. 2003). This Petition challenges actions taken by the Corporation Commission that transgress constitutional boundaries and invade powers reserved to the Legislature. "Limiting the actions of each branch of government to those conferred upon it by the constitution is essential to maintaining the proper separation of powers." *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 485-86, 143 P.3d 1023, 1026-27 (2006). The authority of the Commission to enact the challenged rules or otherwise mandate environmental policy in Arizona are issues of first impression.

2. The issues are of "statewide importance." *Fields*, 206 Ariz. at 135, 75 P.3d at 1093. The rate surcharge contested here impacts all of APS's approximately 1.1 million customers. Other utilities have received or will receive permission for rate surcharges pursuant to the challenged underlying rules, which will affect virtually every resident of the state. The rules will affect in fundamental ways most of the state's utilities, dramatically transform energy policy, and add a Commission-estimated $2.4 billion to the utility bills for millions of ratepayers.

The initial rate hikes and transformation of the state's energy structure already are underway. The rules freeze in place energy policy for most of two decades. That this matter is urgent and of statewide importance speaks for itself.

3. The case involves "purely legal questions." *State ex rel. Romley v. Martin*, 203 Ariz. 46, 47, 49 P.3d 1142, 1143 (App. 2002). The action here is presented on the basis of a complete administrative record. No fact-finding by this Court is necessary. The questions are purely legal in nature.[3]

4. There is no equally plain, speedy, or adequate remedy by appeal. *Roman Catholic Diocese of Phoenix v. Superior Ct.*, 204 Ariz. 225, 227, 62 P.3d 970, 972 (App. 2003). The challenged surcharges are currently being assessed against ratepayers, and costs are mounting. Utilities are being forced to change their energy sources in the face of rapidly changing economic conditions. *See* Tom Wright, "Winds shift for renewable energy as oil price sinks, money gets tight," *Wall Street Journal*, pp. B1-B2 (Oct. 20, 2008) ("*WSJ*") (App. 1)[4]. Given that Petitioners accept the Commission's findings as undisputed, there is no reason to delay relief for Arizona's financially overburdened ratepayers. Also, given the

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[3] Should this Court find any matter for trial, Petitioners request that the Court transmit the matter to a superior court, subject to reference back, pursuant to Ariz. R. P. Spec. Actions 4(f).

[4] Parenthetical references to "App. __" are to the attached Appendix.

financial and business consequences, justice delayed may well be justice denied, and an unnecessary and protracted legal proceeding is an inadequate remedy.

Nor is an alternative administrative or lower court proceeding legally required. Administrative procedures, such as A.R.S. § 40-253 (permitting the Commission to rehear its own orders), need not be followed when the case presents a question of the Commission's power. Alternative appeals do not offer an adequate remedy and are not required, and failure to exercise them does not preclude jurisdiction in this Court.

First, there is no equally adequate remedy by appeal. When the case presents a question of an agency's power, as here, a statutory procedure for review is not "the *exclusive* and an *adequate remedy*." *State Bd. of Technical Registration v. McDaniel*, 84 Ariz. 223, 227, 326 P.2d 348, 351 (1958). Jurisdiction is appropriate regardless of whether Petitioners previously appealed to the Commission for rehearing because "exhaustion of remedies does not refer to re-application to the same council or board. . . ." *Tn. of Paradise Valley v. Gulf Leisure Corp.*, 27 Ariz. App. 600, 610, 557 P.2d 532, 542 (1976). At the least, appealing an agency action to itself (A.R.S. § 40-253) is a "futile . . . useless" remedy and is therefore inadequate. *Id.* Additionally, others (including Commissioner Gleason and several utility companies) already gave the Commission "the opportunity to correct its own errors" on rehearing under A.R.S.

§ 40-253, and duplicative efforts by Petitioners 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).

Second, it is a "common exception" to the rule requiring exhaustion of administrative remedies when the power of an agency is questioned.[5] *Gulf Leisure Corp.*, 27 Ariz. App. at 610, 557 P.2d at 542. "[A] decision of the Commission which goes beyond its power as prescribed by the Constitution and statutes is vulnerable for lack of jurisdiction and may be questioned in a collateral proceeding" without pursuing administrative or appeal remedies. *Tucson Warehouse & Transfer Co., Inc. v. Al's Transfer, Inc.*, 77 Ariz. 323, 325, 271 P.2d 477, 478 (1954).

Finally, the availability of an avenue of 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) (citing *Vo v. Superior Ct.*, 172 Ariz. 195, 198, 836 P.2d 408, 411 (App. 1992)); *City of Phoenix v. Superior Ct.*, 158 Ariz. 214, 216, 762 P.2d 128, 130 (App. 1988); *Cronin v. Sheldon*, 195 Ariz. 531, 533, 991 P.2d 231, 233 (1999). The Arizona Supreme Court has previously accepted jurisdiction of an

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

extraordinary writ, despite the failure to exercise alternative appeals, when the action challenged the Corporation Commission's authority. *Senner v. Bank of Douglas*, 88 Ariz. 194, 199-200, 354 P.2d 48, 52 (1960); *see also Westerlund v. Croaff*, 68 Ariz. 36, 41-42, 198 P.2d 842, 845 (1948). Direct special action review of the Corporation Commission's rules by this Court is also appropriate, regardless of alternative appeals.

Further, review by this Court is necessary for a speedy remedy. "Timely resolution of the matter before us would not be promoted by requiring [Petitioners] to proceed through the trial and appellate courts, nor are such proceedings necessary because the issue before us turns solely on legal issues rather than on controverted factual issues." *State Comp. Fund v. Symington*, 174 Ariz. 188, 192, 848 P.2d 273, 277 (1993). "A prompt resolution is needed so that the [branches of government] will know where they stand and can take such action as they determine necessary. . . ." *Id.* For all these reasons, there is no equally plain, speedy, or adequate remedy by appeal.

Any of the four factors alone provides adequate justification for this Court to accept special action jurisdiction. *Roman Catholic Diocese of Phoenix*, 204 Ariz. at 227, 62 P.3d at 972. All of them together present compelling justification. In a very analogous case in which consumers and others challenged the constitutional authority of the New Mexico Public Utility Commission to issue certain rules, the

state Supreme Court granted a petition to exercise original jurisdiction. *State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 980 P.2d 55 (N.M. 1999). This Court likewise has every reason to do so here.

B. Timeliness. "There is no specific time limit as to when a petition for special action 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). In any event, Petitioners promptly filed an original action petition in the Arizona Supreme Court promptly after the surcharge affecting them was adopted. Further, as long as the Corporation Commission continues to enforce the rules in excess of its jurisdiction, the violation of Petitioners' rights is continuing and judicial action is appropriate.

C. Standing. Petitioners have standing to allege the Corporation Commission's lack of authority to promulgate the rule package. They are required to fund utility compliance with the rules[6] and the Corporation Commission's

[6] R14-2-1808(A) characterizes the tariffs charged to ratepayers as "the methods for recovering the reasonable and prudent costs of complying with these rules" (App. 2).

enforcement, and they are directly affected by the changes in service resulting from the rules' requirements.

Special action standing is available to any "party beneficially interested." A.R.S. § 12-2021. "This phrase . . . will not receive a close construction but must be applied liberally to promote the ends of justice." *Armer v. Superior Ct.*, 112 Ariz. 478, 480, 543 P.2d 1107, 1109 (1975) (citations omitted). In *Amer*, citizens and taxpayers were "beneficially interested in having the [county] comply with the law on financial disclosure." *Id.* The Supreme Court reasoned, "the people are regarded as the real party and . . . it is sufficient that [each] is interested as a citizen or taxpayer in having the laws executed." *Id.* Similarly, the ratepayer Petitioners here "as members of the public for whose benefit" the Constitution and laws of the State were enacted, have standing to bring a special action as beneficially interested parties. *See id.*

Petitioners also have standing as Arizona residents and consumers because they fund the Commission's enforcement of the unlawful rules. *See Ethington v. Wright*, 66 Ariz. 382, 387, 189 P.2d 209, 213 (1948) (holding taxpayers had standing to challenge constitutionality of a statute enforced by the Corporation Commission because public moneys would be unlawfully expended and taxes illegally extracted for enforcement).

Although utility ratepayers in *Morris v. Fleming*, 128 Ariz. 271, 625 P.2d 334 (App. 1980) were denied standing to challenge a utility tax, that case is factually inapposite and commands standing for Petitioners here. In *Morris*, standing was denied because the Commission taxed the utility, not the ratepayer. *Id.*, 128 Ariz. at 273, 625 P.2d at 336. The utility's decision to raise rates as a result of the tax was a purely managerial decision in which the Commission had no role, and the utilities were not obligated to raise rates to meet the tax. *Id.* By contrast, the renewable energy surcharge paid by Petitioners here is directly ordered by the Corporation Commission. R14-2-1808(A) ("[E]ach Affected Utility shall file with the Commission a Tariff . . . that proposes methods for recovering the reasonable and prudent costs of complying with these rules") (App. 2). Thus, Petitioner ratepayers have standing.

Furthermore, the outcome in *Morris* does not control because it was not decided under the "beneficially interested" standard that governs special actions such as this one. Instead, it was analyzed under the Declaratory Judgment Act, which requires that a person's rights, status, or other relations be "affected." *Id.*, 128 Ariz. at 272, 625 P.2d at 335; A.R.S. § 12-1832. Even under that heightened standing requirement, Petitioners have standing based on the Commission's previous admission. In its impact statement, the Commission listed "Persons who will be directly affected by, bear the costs of, or directly benefit from the proposed

rulemaking" to include "the public at large" and "consumers of electric service in Arizona."[7] Decision No. 69127, App. C p. 3 (App. 3).[8] The impact statement further establishes that the "cost to consumers . . . will directly follow the costs to the Affected Utilities" and "are likely to increase," *id.*, App. C p. 2 (App. 3)—indeed, to the tune of $2.4 billion, as demonstrated *infra*. Both Ariz. Const. Art. XV, § 3 and A.R.S. § 40-361(A) entitle patrons to just and reasonable utility rates, which are directly and immediately implicated by the challenged rules.[9] Petitioners plainly have standing.

Procedural History

Pursuant to A.R.S. § 41-1001(14)(a)(i), the Commission was required to reference its "specific statutory authority" to promulgate the Renewable Energy Standard & Tariff ("REST") Rules. The Commission cited "Article XV of the Arizona Constitution and Title 40 of the Arizona Revised Statutes," which the

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

[8] Pages in Decision No. 69127 are renumbered for the majority opinion, dissent and each appendix. A citation to "Decision No. 69127, App. C p. 3" refers to page 3 of Appendix C in the decision.

[9] Although ratepayers across Arizona are affected, Petitioners bring this action as individuals acting on their own behalf and not on behalf of any class, which is appropriate. Even where a special action is framed as a class action, a court will allow the matter to proceed to determine the individual petitioners' rights. *Clark v. State Livestock Sanitary Bd.*, 131 Ariz. 551, 642 P.2d 896 (App. 1982).

Attorney General branded "vague."[10] Letter from Terri Skladany, Chief Asst. Att'y Gen., to Brian McNeil, Exec. Dir. Ariz. Corp. Comm'n (Feb. 1, 2007) ("Letter") (App. 4). In a response that took the Commission two months and 15 pages, it admitted there is no "isolated source of statutory or constitutional authority" to support the REST Rules. Memorandum from Ariz. Corp. Comm'n to Terry Goddard, Att'y Gen., and Terri Skladany, Chief Asst. Att'y Gen. (March 30, 2007) ("Memorandum") (App.54).

Finding the issue of the Commission's authority to be a "close question," the Attorney General "gave great deference to the expertise of the Commission" in his decision to approve the REST Rules. Memorandum from Terry Goddard, Atty' Gen., to Brian McNeil, Ariz. Corp. Comm'n Exe. Dir. (June 15, 2007) ("Certification") (App. 6). Effective May 2008, the Commission mandated a REST surcharge for all APS customers, including Petitioners. Decision No. 70313 (App. 7). Any question of the Commission's authority – especially a "close" one, and one of such widespread financial magnitude – must not be decided by the Commission when challenged. That is the exclusive province of the judiciary.

Parties

Petitioners are Arizona taxpayers and APS customers. Petitioners Roy

[10] The Attorney General is required to certify Corporation Commission rules as to whether they are "[w]ithin the power of the [Commission] to make and within the enacted legislative standards." A.R.S. § 41-1044(B).

Miller and Thomas F. Husband are residential APS customers who own houses. Petitioner Jennifer Bryson is a residential APS customer who owns a condominium. Petitioner Corpus Communications, Inc. is a commercial APS customer that rents office space.

Respondent Arizona Corporation Commission is established by Article 15 of the Arizona Constitution to regulate public utility rates. Respondents Kristin Mayes, William Mundell, Jeff Hatch-Miller, Gary Pierce, and Mike Gleason are members of the Commission. They are sued in their official capacity only.

Statement of Material Facts

Neither this nor any court is a proper forum for a debate over energy policy. However, the debate itself is relevant to the legal issue because it underscores the wisdom of decades of jurisprudence by this and other Arizona courts that narrowly construes the Commission's authority beyond its plenary ratemaking power.

The Commission made a number of factual findings concerning the adequacy of existing power supplies, the costs and benefits of renewable energy sources, and other matters. Those findings are subject to intense dispute. Commissioner (now Chairman) Gleason objected to the rules in unusually harsh terms, contending among other things that they are in "reckless disregard for reliability," result in "an extremely wasteful use of ratepayer dollars to subsidize

the least economical renewable technology," and constitute "a virtual mandate for imprudence." Decision No. 69127, Dissent pp. 3-5 (App. 3).

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

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

A. Uncertainty. The Commission made a number of generic and conclusory findings about renewable energy sources. Decision No. 69127, pp. 54-56 (App. 3). But the comments from members of the public, advocacy groups, and utility companies exhibit a wide and divergent array of opinions on the feasibility of the

REST Rules. *See id.*, pp. 3-54 (App. 3). As the Commission found, comments "from the public in opposition to the Proposed RES Rules have been based primarily on economic and reliability concerns." *Id.*, p. 56 (App. 3).

The Commission may well be correct that continued dependence on fossil fuels is inappropriate, and that renewable energy will be reliable and increasingly affordable. But as the record reflects in abundance, the only certainty with regard to energy options is uncertainty, a fact corroborated by credible outside sources. *Forbes* recently found, for instance, that "today the sun contributes only 0.03% of the electricity generated in the U.S., and this juice costs, on average, 27 cents per kilowatt-hour before subsidies. Absent those government handouts, the solar industry would vaporize." Andy Stone, "Sun Worshippers," *Forbes* (Aug. 11, 2008), p. 34 (App. 8). Improvements in solar technology, the article reports, could bring down costs; but shortages of key components are forcing prices up. *Id.* (App. 8). The future of federal subsidies is uncertain, and the viability of the technology depends in large measure on the price of oil, which has gyrated. *Id.* (App. 8). So the potential for solar is uncertain.[11]

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

Likewise with wind power. "Wall Street analysts say most utilities . . . can profitably choose big wind projects over gas-fired plants only when gas prices are $8 per thousand cubic feet or higher. Natural gas settled [on October 20, 2008] at about $6.79." Clifford Krauss, "Alternative energy suddenly faces headwinds," *New York Times* (Oct. 21, 2008), pp. B1 (App. 9). As the *New York Times* reports, "Expansive dreams about renewable energy . . . are bumping up against the reality of a power grid that cannot handle the new demands. The dirty secret of clean energy is that while generating it is getting easier, moving to market is not." *Id.* (App. 9). While extensive wind energy theoretically is possible, the "basic problem is that many transmission lines, and the connections between them, are simply too small for the amount of power companies would like to squeeze through them." *Id.* (App. 9). Moreover, ownership of energy grids is "balkanized," and the best wind sources often are remote from transmission facilities. *Id.* (App. 9). Hence "experts say that without a solution to the grid problem, effective use of wind power on a wide scale is likely to remain a dream." Matthew L. Wald, "Wind energy bumps into power grid's limits," *New York Times* (Aug. 27, 2008), pp. A1 & A13 (App. 10).

The Court may take judicial notice of the fact that in the short time since the REST Rules were adopted, gasoline prices have plummeted and the economy has gone into free-fall, which bear greatly on energy decisions by businesses,

consumers, and government. *WSJ* (App. 1). Also having a significant bearing on development of wind power are the potential residential health risks, dubbed "Wind Turbine Syndrome." Judy Keen, "Wind turbines linked to 'industrial plague,'" *Ariz. Repub.* (Nov. 25, 2008), p.A12 (App. 11).

None of this is to say that renewable energy is not desirable or possible or that utility companies should not pursue it, but rather that its potential over both the short- and long-term is unknown—a reality that pervades the comments to the rules. *See, e.g.*, Decision No. 69127, App. B p. 52 ("APS stated that it does not feel that it can reliably predict the availability or costs of renewable power for purchase beyond 2010") (App. 3); *id.*, App. B p. 62 ("APS further stated that it is hopeful that several new cost-competitive technologies will become available to meet the Distributed Energy Requirement . . ., but that it does not yet know how cost effective or successful such alternatives will be for APS customers") (App. 3); *id.*, App. B p. 79 (Unisource Energy states that the Commission staff's "wind assumptions are too optimistic" and its solar assumptions are inadequate to meet REST requirements) (App. 3); *id.*, App. B p. 17 (Unisource states that the REST requirements are "simply not achieveable") (App. 3). The constitutional requirement of just and reasonable rates and the statutory command of an adequate, efficient, and reasonable energy supply for Arizona consumers requires flexibility in response to ever-changing energy markets and technology.

B. Prescriptiveness. The REST Rules, by contrast, are anything but flexible. While leaving it to the utility companies to determine exactly how to fulfill it, the essence of the REST Rules is a bottom-line mandate, calibrated year by year, that specific percentages of energy will be provided from renewable sources. *See* R14-2-1804 (App. 2). Beyond that, the rules prescribe precise percentages of such energy to be transmitted from distributed sources and non-distributed sources. R14-2-1805 (App. 2). Even more onerous, and for reasons that remain a mystery, within the distributed power sources the rules prescribe precise percentages for commercial and residential generation. R14-2-1805(D) (App. 2). The rules make no exceptions nor provide any flexibility for cost considerations, technology advances or lack thereof, adequacy or reliability of supply, or prices of competing energy sources.[12]

Likewise, the rules make no exceptions nor provide any flexibility for the willingness or ability—or lack thereof—of third parties, who are beyond the control of the Commission or the utility companies, to provide their prescribed share of distributed energy. Compliance requires the voluntary cooperation of utility customers to install, operate, and maintain distributed generators (like rooftop solar panels) on their property. Even with federal, state, and utility-offered

[12] The Rules provide for waivers for "good cause" but set forth no instances in which such waivers should be granted and no guidelines for the exercise of the Commission's discretion. *See* R14-2-1816 (App. 2).

incentives, voluntary APS residential installations have never numbered more than a few hundred per year, Docket No. E-01345A-07-0468, p. 4 (App. 12), leaving at least $3.5 million in unclaimed incentives during 2007, Decision No. 70313, ¶ 58 (App. 7). Despite this track record, the REST Rules effectively require many thousands of new installations. Docket No. E-01345A-07-0468, p. 4 (App. 12); Ed Taylor, "ACC OKs renewable sources plan," *E. Valley Tribune*, pp. B1-B2 (Feb. 28, 2006) (App. 13). Thus, even with financial incentives, utilities may be unable to persuade enough customers to install generators, while they suffer the penalties. *See* R14-2-1815 (App. 2).

Contrast the Commission's approach to a bill considered in the most recent legislative session. Chapter 7 of H.B. 2766, like the REST Rules, would have established a policy that by 2025, at least 15% of power be supplied by renewable energy. (App. 14) However, it would not dictate year by year calibrations, or prescribe minimum percentages of distributed and nondistributed generation, or mandate third-party participation, or establish penalties. It would allow consumer incentives and third-party electricity generation. Rather than establishing compliance penalties, it would provide for 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,[13] 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.

C. Excessive Cost. The Commission found that "[r]enewable energy resources rely on free energy or very low-cost energy." Decision No. 69127, p. 55 (App. 3). However, it expressly did *not* find that the renewable energy sources mandated by the REST Rules would provide electricity at lower cost than

[13] 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.

conventional sources. Quite the contrary: the acronym REST stands for Renewable Energy Standards and Tariff, the "T" indicating increased cost. Given the constitutional and statutory mandates of energy at "reasonable" costs (Ariz. Const. Art. XV, § 3; A.R.S. § 40-361(A)), the conscious choice to *require* higher-cost energy makes the rules very hard to justify.

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

- Additional costs for distributed renewable energy resources: $886,991,021, Decision No. 69127, App. B pp. 63-64 (App. 3);
- Additional costs for non-distributed renewable energy resources: $317,532,804, *id.*, App. B pp. 67-68 (App. 3);
- Compliance costs: $1,204,523,824, *id.*, App. B pp. 72-73 (App. 3).

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." *Id.*, App. B pp. 68 & 70 (App. 3). 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.[14]

The surcharges approved by the Commission this year will be only the beginning of additional rate increases attributable to the REST Rules. *See, e.g., id.*, App. B p. 71 ("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") (App. 3). 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." *Id.*, App. C p. 2 (App. 3).

These enormous projected energy cost increases are attributable to the prescriptive nature of the rules: they mandate use of renewable energy sources not

[14] Unisource Energy commented that some of the staff's assumptions were "not realistic," and that applying its own cost model assumptions "would result in a significant increase in the total projected RES program costs." *Id.*, App. B pp. 78-79 (App. 3).

only when they become economically viable or competitive, but *regardless of cost.* Consciously choosing more expensive energy sources has substantial implications for the legal issues presented in this lawsuit, as explained more fully below.

Statement of the Issues

Did the Arizona Corporation Commission exceed its authority in enacting the Renewable Energy Standard & Tariff Rules, which prescribe the sources from which utilities may derive energy and impose a surcharge on ratepayers, when the Rules are not connected to the Commission's constitutional ratemaking authority, the Legislature has not delegated specific authority to the Commission by statute, and the Rules interfere with the business management of utility companies?

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 REST Rules. 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.

A. Constitutional Authority.

The Constitution does not empower the Commission to enact broad prescriptive energy policy. To find such authority would require not only sweeping aside decades of precedent that recognize 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 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. The core provisions of the REST Rules, in meticulous detail, require utilities to supply specific percentages of power by using specified technologies according to a specified schedule. R14-2-1804 & R14-2-1805 (App. 2). Neither of the core provisions constitutes ratemaking or steps necessary for ratemaking.

In *Phelps Dodge*, this 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. 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 proposed, "if there be doubt as to the extent of the power thereby granted in general terms, such doubt may 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.

This and other 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 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 later asserted 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. 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 591.

When the Commission exercises delegated powers, it is required to 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."[15]

[15] Whether a particular delegation of power is constitutional is a question separate

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. Decision No. 68566, p. 3 (App. 15). 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." Letter (App. 4). Two months, 15 pages of attempted justification, and half a dozen statutes later, the Commission admitted that there is no "isolated source of statutory or constitutional authority" to support the REST Rules. *Id.*, p. 1 (App. 4). Petitioners first examine the purported sources of statutory authority to reveal that no relevant power has been delegated to the Commission, then Petitioners 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. First, A.R.S. § 40-202 provides no relevant authority for the Corporation Commission to enact the REST Rules. "The

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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).

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.

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 to 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, Memorandum, p. 10 (App. 5), 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. The Commission's reference to this statute as an "explicit" delegation of rulemaking authority underscores the need for this Court to rein it in.

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 this 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." Memorandum from Jack Davis, APS, to Jeff Hatch-Miller, Ariz. Corp. Comm'n Chairman p. 2 (June 23, 2006) (App. 16). 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. For instance, none of the findings establish a basis for the year-by-year calibrations of the renewable energy requirement in R14-2-1804 (App. 2). None of the findings establish a basis for distributed versus nondistributed renewable energy sources, or for the precise distributional requirements assigned to each, or for the residential versus nonresidential allocations in R14-2-1805 (App. 2). 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 passed along to ratepayers. Any statutory authority invoked by the Commission to support the REST Rules necessarily would contradict this statute's command.

Moreover, the Legislature has evidenced its determination to exercise primacy over renewable energy policy through wide-ranging legislation. A.R.S. § 43-1085 created individual tax credits for solar devices, and § 43-1164 established corporate tax credits for 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 established a solar energy advisory council to advise the Legislature on the feasibility of solar power and to promote it through voluntary and cooperative action. H.B. 2766 (App. 14), which passed the Arizona House of Representatives this year, would have set renewable energy standards for utilities, but in a less prescriptive and draconian fashion than the REST Rules. By legislating extensively on renewable energy policy, and by setting up an advisory council to give it the data and expertise to further do so, the Legislature plainly has not ceded such policy determinations to the Commission.

C. Separation of Powers.

The Commission's violation of our Constitution's separation of powers is the flip-side of its lack of constitutional 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 overreach into the power of another department. *State v. Prentiss*, 163 Ariz. 81, 84-85, 786 P.2d 932, 936 (1989). Although the Corporation Commission is not named as such, it is in fact the fourth department of Arizona's government. *Tucson Gas, Elec. Light & Power Co.*, 15 Ariz. at 306, 138 P. at 786. 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, § 6. 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." *McDaniel*, 84 Ariz. at 228, 326 P.2d at 351. Hence, apart from the Commission's ratemaking authority, the power to establish other requirements for the conduct of business by public service corporations is retained by the Legislature.

Likewise, matters of "public policy of the State of Arizona in reference to public service corporations" is the province of the Legislature. *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.

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 not delegated its policy-making authority to the Corporation Commission, nor has it shown inclination to do so. 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 this year (Chapter 7 of H.B. 2766

((App. 14)) 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.

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 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.

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. Further, 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.

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 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' reasonable discretion by dictating the energy sources, by proportion, from which utilities may produce power for their customers. 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 Petitioners who bear the burden therefore must invoke the doctrine on their own behalf.[16] Petitioners 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 Petitioner 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.

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[16] 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 Petitioners' tangible interests under the Arizona Constitution and statutes.

See Decision No. 69127, Dissent p. 6 (App. 3). 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 surely it is beyond the Commission's power to decide for a utility company the precise extent of renewable fuel sources it must use, the distribution of renewable energy generation, the provision of distributed energy by commercial and residential customers, and other crucial business decisions, particularly when they impose substantial additional costs upon ratepayers.

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 Resources, 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 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.

Request for Relief

Petitioners request that this Court:

A. Issue a writ of prohibition prohibiting the Corporation Commission from enforcing the REST Rules;

B. Declare the REST Rules invalid, and enjoin their further effect;

C. Declare that the provisions of the REST Rules exceed the Corporation Commission's legitimate powers and violate Petitioners' constitutional rights;

D. Preliminarily and permanently enjoin the Corporation Commission from approving and enforcing energy surcharges or environmental standards pursuant to the provisions of the REST Rules;

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

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

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

RESPECTFULLY SUBMITTED this 12th day of November, 2008 by:

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Carrie Ann Sitren (025760)
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CERTIFICATE OF SERVICE

ORIGINAL and SIX COPIES of the foregoing filed this 4th day of November, 2008 with:

Clerk of the Arizona Court of Appeals, Division One
1501 W. Washington
Phoenix, AZ 85007

TWO COPIES of the foregoing HAND-DELIVERED this 4th day of November, 2008 to:

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Phoenix, AZ 85007

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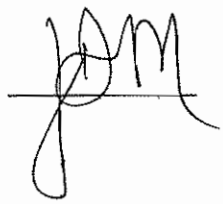

Certificate of Compliance

The foregoing Petition for Special Action complies with Arizona Rule of Procedure for Special Actions 7(e) in that it is double spaced and uses a proportionately spaced typeface of Times New Roman, 14 point font, and has a word count of approximately 10,500 words.