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IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA

ROY MILLER, THOMAS F.)
HUSBAND, JENNIFER BRYSON, and)
CORPUS COMMUNICATIONS, INC.,)

Petitioners,)

vs.)

ARIZONA CORPORATION)
COMMISSION, TERRY GODDARD,)
in his Official Capacity as Attorney)
General, and KRISTIN MAYES,)
WILLIAM MUNDELL, JEFF HATCH-)
MILLER, GARY PIERCE, and MIKE)
GLEASON, in their Official Capacities)
as Members of the Arizona Corporation)
Commission.)

Respondents.)

No. CV-08-0196-SA

BRIEF OF AMICI CURIAE

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INTRODUCTION

Petitioners challenge the authority of the Arizona Corporation Commission (“Commission”) to adopt the Renewable Energy Standard and Tariff (“REST”) rules, (A.A.C. R14-2-1801 *et seq.*). Petitioners contend that the rules exceed both the constitutional and statutory authority of the Commission to promulgate. They are wrong on both counts and *Amici Curiae*¹ request that the Petition be dismissed for the reasons that follow.

The 1990s was a decade of stable utility rates. Coal, nuclear and natural gas were the fuels of choice for electric utilities not only in Arizona but throughout the country. The latter part of the decade saw states experimenting with electric deregulation and the first signs of turmoil were apparent. Then, natural gas prices and electric rates started to increase, frequently and steadily. Retail rates for Arizona Public Service Company (“APS”) have increased from an average of \$0.0775 per kWh in 2004 to \$0.0951 per kWh in 2007. Pinnacle West Capital Corporation, 2007 Statistical Report for Financial Analysis, pp. 44-45. That’s an increase of

¹ American Solar Electric, Inc., Arizona Association of School Business Officials, Arizona Community Action Association, Arizona Solar Energy Industries Association, Interwest Energy Alliance, Distributed Energy Association of Arizona, Environment Arizona, Republicans for Protection of the Environment, Sierra Club-Grand Canyon Chapter, The Solar Alliance, SOLID Energy, Inc., Southwest Energy Efficiency Project, Western Resource Advocates, Inc.

almost 23% and APS is currently seeking additional rate increases. There is also a rate case pending involving Tucson Electric Power.

In response, and in an effort to stabilize rates and eventually lower them for ratepayers, the Commission initiated a proceeding in 2004 to consider the expansion of renewable energy resources and their addition to the resource mix of Arizona's electric utilities. After extensive review, the Commission approved the REST rules that are now challenged by the Petitioners. *See* Decision No. 69127 dated November 14, 2006.

The Petitioners contend that the Commission was without authority to consider a matter as vital as the costs incurred by Arizona's electric utilities and that only the Legislature can speak to such issues. The Petitioners go even further and suggest that nothing short of an explicit directive from the Legislature to the Commission permitting the Commission to enact rules concerning renewable energy would suffice to authorize the Commission to enact the REST rules.

That is not the law. The Commission is authorized by both the Arizona Constitution and specific statutes to take action that is necessary to protect ratepayers from higher costs and that is exactly what the REST rules are intended to do.

STATEMENT OF FACTS

In Decision No. 69127, the Commission adopted the REST rules. The rules became effective on August 14, 2007, after certification by the Attorney General.

The rules apply to “affected utilities,” defined as public service corporations serving retail electric load in Arizona, excluding any utility distribution company with more than half of its customers located outside Arizona. A.A.C. R14-2-1801A. The rules generally require these affected utilities to obtain an increasing percentage of the power they sell from renewable energy resources. Renewable energy resources are distinguished from conventional sources of generation by the fact that renewable energy relies upon fuel like energy from the sun, wind and geothermal resources that are costless or almost so. In contrast, conventional generation resources typically rely on fossil fuels like coal and natural gas that can exhibit significant volatility in their cost.

Recognizing the benefits of renewable energy, the Commission made the following explicit findings of fact when it adopted the REST rules:

225. The generation portfolios of Arizona’s electric utilities currently consist primarily of fossil fuel resources.
226. Load growth in Arizona will require Arizona utilities to add new generation resources to their portfolios in order to provide adequate service to their customers.

227. The generation portfolios of the affected utilities lack adequate and sufficient diversity to promote and safeguard the security, convenience, health and safety of the Affected Utilities' customers and the public in Arizona.
228. Renewable energy resources are not subject to the same price fluctuations and transportation disruptions as conventional fossil fuel energy sources.
229. Renewable energy resources rely on free energy or very low cost energy.

Decision No. 69127 at 54-56.

The REST rules require that affected utilities annually secure an increasing percentage of renewable resources until the year 2025 when they require that at least 15% of total kilowatt hours sold by affected utilities come from renewable resources. A.A.C. R14-2-1804. Of that 15%, the rules require that up to 30% must come from distributed resources which the rules define as renewable resources that are located at a customer's premises. A.A.C. R14-2-1805; A.A.C. R14-2-1801(E).

The rules allow affected utilities to recover the costs associated with the acquisition of renewable resources through a surcharge that is approved by the Commission. The surcharge recovers the costs of incentives to customers for the installation of distributed resources as well as any above-market costs for non-distributed resources. A.A.C. R14-2-1808. As Petitioners note, the Commission has approved such surcharges for Arizona

Public Service Company and Tucson Electric Power Company. The surcharges are imposed on all customers and are based on energy usage but are capped at maximum levels.

The Petitioners' so-called "facts" rely almost exclusively upon a lone dissent from the Commission's approval of the REST rules that is itself devoid of any source data. That one Commissioner among five doesn't like renewable energy is obvious but the Petitioners' burden is not met by simply citing a dissent instead of actual facts.

Most of the "facts" cited by Petitioners were never true but even those that may have had some basis in the distant past are now stale and outdated. *Amici* believe that the verifiable facts about renewable energy are important and will help the Court determine that the Commission's ratemaking and statutory authority has been properly invoked in approving the REST rules.

I. RENEWABLE ENERGY RESOURCES ARE SUBSTANTIAL, RELIABLE AND COST EFFECTIVE.

Petitioners disclaim any knowledge about the efficacy of renewable energy as "sound public policy." Petition at 2. But, as ratepayers, they surely must understand that continued reliance on conventional generation resources will be costly. According to the US Department of Energy:

- Coal prices have nearly tripled over the past five years

- Coal power plants face increasing project uncertainty due to carbon dioxide emissions, siting concerns, and water consumption.
- Natural gas prices have more than doubled during the same time period.

Solar Energy Technologies Program, Solar Energy Industries Forecast: Perspectives on U.S. Solar Market Trajectory, June 24, 2008, pp. 7, 8

By requiring utilities to gradually obtain more energy from renewable resources, the REST rules foster development of alternatives to conventional resources. Improved performance and falling prices will occur through experience (“learning-by-doing”), economies of scale, technological improvements, and expanded supply networks. In addition, utilities have to learn how to acquire alternative resources and how to integrate different types of technologies into their systems. None of these developments will happen expeditiously without the initial impetus given by the REST rules and similar programs in other states. *See, for example*, New Mexico’s renewable energy standard rules NMAC, 17.9.572.1 *et seq.* and Colorado’s renewable energy standard rules, 4 CCR 723-3-3650 *et seq.*

The renewable energy required by the REST rules can reduce utility costs and, through the Commission’s ratemaking process, reduce rates. For example, renewable energy resources would typically displace natural gas

fired generation on APS' system. In 2007, APS paid less for geothermal and wind energy than it paid for natural gas, on a per MWh basis. APS 2007 FERC Form No. 1 at 326.4, 327.4, 402.5, 402.6, 402.7, 403.5 and 403.6. The effect of utility-scale renewable energy has, therefore, already had a beneficial effect. In addition, renewable energy resources typically exhibit stable prices in contrast to the fossil fueled resources they displace. Most renewable resources have no fuel costs *per se* and do not emit significant amounts of carbon dioxide. Renewable energy costs are largely capital costs -- that is, the construction cost of the plant. Consequently, typical purchased power agreements for renewable energy have fixed or stable prices, set in a specified schedule in the contract.

In contrast, natural gas-fired generation and coal-fired generation are subject to uncertain and unpredictable increases in fuel prices over the lifetime of the power plants. Moreover, fossil fueled resources emit large quantities of carbon dioxide (a greenhouse gas) and are subject to the costs of complying with impending carbon dioxide emission regulations. Therefore, the REST rules have the effect of using renewable energy as a stably priced hedge against high and uncertain fossil fuel prices for conventional power generation and against uncertain costs of complying with greenhouse gas emissions regulations.

Petitioners find fault with the REST rules on several grounds that they assert as a matter of fact. First, they claim that only a few types of eligible renewable energy resources produce power reliably and that those resources produce only a “miniscule amount of power.” Petition at 11. They then claim that solar panels are the only eligible renewable technology that generates more than a “trivial” amount of power but that solar panels are inherently unreliable as are wind resources according to the Petitioners. Finally, Petitioners claim that the costs of complying with the renewable energy requirements are excessive and that the allocation of those costs among customers is inequitable.

These arguments reveal that Petitioners have a severely flawed understanding of renewable energy. The technology is sufficiently mature such that energy from renewable resources is now capable of reliably producing power on a large scale at prices that are increasingly competitive with conventional generation.

The REST rules divide renewable energy resources into two categories: non-distributed and distributed generation. The technology, reliability and cost of each are discussed below.

A. Non-Distributed Generation.

1) Major Technologies for Meeting the Non-Distributed Requirements.²

Most of the renewable energy requirement (70% or more, depending on the year) can be met with non-distributed resources. These non-distributed resources are generally utility-scale facilities that use any of a variety of permissible technologies including, but not limited to, biomass and biogas generators, certain specified types of hydropower, landfill gas, geothermal, solar thermal, and wind energy technologies. A.A.C. R14-2-1802. Based on Arizona Public Service Company's experience to date, the availability of resources in or near Arizona, and analyses of resource options, most of the energy to be obtained from non-distributed renewable resources is likely to come from the following technologies.³

² The power generating capacity of a resource is expressed in megawatts (MW). One MW is 1000 kilowatts. The energy produced by a resource and consumed by customers is measured in megawatt hours (MWh) or kilowatt hours (kWh). One MWh equals 1000 kWh. In 2007, APS sold about 29 million MWh of electricity at retail (APS FERC Form 1, 2007). APS' peak demand in 2007 was 7,545 MW.

³ Arizona Public Service Company, Renewable Energy Standard Implementation Plan for 2009-2013, filed in Corporation Commission Docket No. E-01345A-08-0331, Exhibits 3A and 3B. Western Resource Advocates, A Clean Electric Energy Strategy for Arizona, Boulder, CO, 2007.

(a) Concentrating Solar Power (CSP) with Thermal Storage.

Concentrating solar power (“CSP”) generates electricity using a steam turbine and generator. Its heat source is sunlight concentrated by using mirrors or lenses. CSP projects may store heat, for example as molten salt, (called thermal storage) so that electricity can be generated when the sun is not shining. In the Southwest, including Arizona, the potential for CSP development is about 200,000 MW, more than enough to satisfy the REST requirements many times over. Western Governors’ Association, *Solar Task Force Report*, January 2006, p. 11. APS has recently executed a contract to purchase the entire electricity output for 30 years from a 280 MW CSP plant near Gila Bend.⁴ CSP with thermal storage is a significant development in renewable energy technology but Petitioners make no mention of it perhaps because it doesn’t fit their theory that, as a practical matter, the REST rules require that all renewable energy come from photovoltaic panels.

The CSP project near Gila Bend will have about 6 hours of thermal storage, allowing the plant to generate electricity well into the evening to serve air conditioning load after the sun sets, contradicting Petitioner’s claim

⁴ For purposes of comparison, natural gas fired combined cycle power plants have a duty cycle similar to CSP with thermal storage. APS’ combined cycle power plants range in generating capacity from 132 MW to 569 MW.

that solar generation can deliver power only when the sun is shining. The plant will produce about 900,000 MWh of electricity per year, enough for 70,000 households, hardly the “miniscule” amount of energy Petitioners claim.

(b) Wind Energy.

Wind energy is produced through the use of turbines and currently accounts for the majority of new renewable resources in the United States. The generating capacity of individual turbines has increased many times over and so has the scale of individual wind farms. As of early 2008, there were 18,300 MW of wind generation capacity in the United States and another 5,700 MW under construction. American Wind Energy Association, *U.S. Wind Energy Projects as of 03/31/2008*.

As for cost, a sample of 21 wind energy projects which began commercial operation in 2007 sold electricity in 2007 at prices in the range of \$30 per MWh to \$65 per MWh. U.S. Department of Energy, Energy Efficiency and Renewable Energy, *Annual Report on U.S. Wind Power Installation, Cost, and Performance Trends: 2007*, May 2008, p. 17. Those prices are already competitive with conventional generation resources, so much so that Salt River Project (which is not subject to the REST rules) recently contracted for the purchase of all the output from the first wind

energy farm to be constructed in Arizona near Snowflake. The contract calls for the delivery of 63 MW, enough to meet the electric needs of about 15,000 homes. <http://www.srpnet.com/newsroom/releases/072808.aspx>

(c) Geothermal Energy.

Petitioners also ignore geothermal energy. As of 2007, there were 2,294 MW of geothermal generating capacity in the U.S. Energy Information Administration, *Renewable Energy Trends Consumption and Electricity Preliminary 2007 Statistics*, Table 4. Most of the generation capacity is located in California and Nevada. The Salton Sea area of California is a likely resource for Arizona utilities and there is about 1,900 MW of additional generating capacity which could be developed in the area. Elaine Sison-Lebrilla and Valentino Tiangco, *California Geothermal Resources*, California Energy Commission Staff Paper CEC-500-205-070, 2005. Other geothermal projects serving Arizona may be located in southern Utah, New Mexico and possibly Nevada (Nevada has numerous geothermal facilities in production but there is not adequate transmission at present to deliver the power to Arizona).

2) Reliability of Non-Distributed Renewable Energy Technologies.

Petitioners claim that individual sources of renewable energy are unreliable. That's not true but even if it were, it isn't an issue. No generation resource is perfectly reliable. The generating system is made up of numerous individual power plants, each of which experiences planned and unplanned outages. Utilities plan for the unreliability of individual power plants by designing and operating a system of power plants and transmission lines that, when taken together, results in a reliable power supply.

Because of its ability to store heat for making steam, concentrating solar power with thermal storage generates electricity when the utility needs power. Thus, electricity can be generated when the sun is not shining, such as during the evening hours when the demand for power is still high. This dispatchable technology is of growing importance but, as noted previously, was simply ignored by the Petitioners.

Wind energy is intermittent but, at installation levels contemplated by western utilities, it does not compromise the reliability of utilities' systems. APS contracted with Northern Arizona University to analyze the impact that reliably integrating large amounts of wind energy into the APS generation system would have on its system costs. Northern Arizona University, *Final*

Report: Arizona Public Service Wind Integration Cost Impact Study, September 2007, pp. 63, 69. The study found that the cost of reliably integrating 468 MW of wind generation (a 4% energy penetration rate) into APS' system imposes only small operating costs and does not compromise the reliability of the generation system.

Finally, geothermal energy is produced at fairly constant rates over the course of the year. By industry standards, geothermal power plants are quite reliable, having very high availability and capacity factors. Western Governors' Association, *Geothermal Task Force Report*, 2006, p. 5.

B. Distributed Generation.

Up to 30% of the REST requirements will be met with distributed resources. The REST rules define distributed generation as applications of specified technologies that are located at a customer's premises and that displace conventional energy resources that would otherwise be used.

A.A.C. R14-2-1802(B). The technologies include some non-distributed resources like wind or solar electricity (photovoltaics and solar thermal) that can be installed at a customer's premises as well as biomass electric or thermal systems, solar daylighting, solar water heating and many others. *Id.*

Distributed resources provide a variety of benefits to utilities and their customers. Clean Power Research, *The Value of Distributed to Austin*

Energy and the City of Austin, Report to Austin Energy, 2006. These benefits include the following:

- The value of the energy itself – this value derives from the cost avoided by displacing conventional generation (fuel costs, variable operating and maintenance costs) and from avoided energy losses on the transmission and distribution system because distributed energy is produced at the point of consumption and does not have to be delivered to customers over long distances.
- Stable prices relative to volatile and increasing fossil fuel costs, as discussed above.
- Generation capacity of renewable resources.
- Reduced air emissions, such as reduced carbon dioxide, sulfur dioxide, nitrogen oxides, particulate matter, and mercury emissions.
- Increased availability of existing transmission and distribution system capability for use by other remotely located resources.
- Security attained through continuing power generation at consumers' premises when there are system outages.

1) Characteristics of Distributed Resources

Petitioners claim the REST rules effectively require utilities to implement expensive solar technology to fulfill renewable energy

requirements because it is one of the only eligible technologies that, despite its unreliability, can produce more than a “miniscule” amount of electricity. Petition at 31-32.

Petitioners’ emphasis on photovoltaic panels to the exclusion of other distributed resources is misplaced. First, there are multiple technologies which can be used to meet the requirements, not just photovoltaic (“PV”) panels. For example, solar hot water, daylighting, geothermal heating, and biomass projects may fulfill a significant percentage of the REST rules’ requirement in the coming years.

Second, many of the eligible distributed generation technologies are not intermittent and some store heat so that energy or hot water are available when demanded by the consumer. These various technologies compete against each other in the marketplace and customers can select among them on the basis of customer cost and facility performance.

The Petitioners also mischaracterize the costs of energy from solar PV systems. Forecasts of costs per kWh for residential and commercial installations of photovoltaic systems project substantial declines over time. Navigant Consulting, *Arizona Solar Electric Roadmap*, Report to the Arizona Department of Commerce, 2007, p. 9. Cost reductions appear to be more rapid than projected, however. In July 2008, Southern California

Edison announced a contract to purchase electricity generated from PV systems that cost approximately \$3,500 per kilowatt of generating capacity installed, which is about half the average current cost of other photovoltaic installations. Southern California Edison News Release, *Southern California Edison Begins Construction of World's Largest Solar Panel Installation Project*, July 16, 2008.

Petitioners imply that the Commission should allow cost recovery only for those resources that have the lowest cost today without taking into consideration which resources may be less costly over the long run. With the adoption of the REST rules, the Commission has taken a comprehensive approach that seeks to take advantage of ongoing market transformations for renewable energy. These transformations will continue to occur so that prices will decline and performance will improve due to economies of scale, learning-by-doing, technological improvements, and expanded supply networks. In addition, as utilities work with renewable energy resources they will better understand how those resources can be reliably incorporated into the power supply system.

2) Reliability of Distributed Generation.

The Commission has addressed and will continue to address the impact of distributed resources on system reliability in other forums and

dockets that run parallel with the development and implementation of the REST rules. In Decision No. 69674 dated June 28, 2007, the Commission adopted a policy on safe and reliable interconnection to the grid of distributed resources including an Interconnection Document applicable to all projects 10 MW or smaller that establishes technical and procedural requirements, terms, and conditions to promote the safe and effective parallel operation of customer-owned generating facilities.

The Petitioners raise issues of reliability with regard to solar distributed generation in particular. First of all, photovoltaic power production is well understood and many years of experience indicate that average yearly solar production is very consistent in Arizona. Rooftop photovoltaic systems in Arizona dependably produce around 1600 kWh of solar generation per kW per year. Navigant Consulting, *Arizona Solar Electric Roadmap*, prepared for the Arizona Department of Commerce at pp. 19, 66 (2007). See also National Renewable Energy Laboratory PV Watts Version 1 Calculator (<http://www.nrel.gov/rrede/pvwatts/version1.html>).

The National Renewable Energy Laboratory has examined the reliability of photovoltaics by measuring the ability of photovoltaic systems to effectively increase the generating capacity available to a utility without increasing the chances of failing to serve system load. R. Perez et al.,

Update: Effective Load Carrying Capability of Photovoltaics in the United States, NREL/CP-620-40068, June 2006. The study concluded that photovoltaic systems typically installed as distributed resources effectively increase the generating capacity of the Arizona grid by 57% to 65% of the nameplate capacity of the photovoltaic systems, without compromising reliability. Thus, photovoltaics actually add to reliability, not diminish it, tending to produce their highest output at or near the times when utility system demand is at its highest.

3) Customer Investment in Distributed Generation

Petitioners assert that the REST rules require a utility to depend on the participation of its customers to comply (presumably for the distributed portion of the requirement). Petition at 26. Thus, they assert, the rules require affirmative actions on the part of ratepayers over whom the Commission has no authority and they punish utilities which have no legal power to compel participation.

The success of the distributed portion of the REST requirements does indeed depend on customer investments in eligible resources. The REST incentives offered by utilities to stimulate customer investment are set based on market conditions. They are designed to decline over time, reflecting greater consumer interest and falling costs. If a utility does not meet the

REST targets for distributed resources, it will have an opportunity to explain to the Commission the circumstances leading to the shortfall. A.A.C. R14-2-1815. There is no automatic penalty and the Commission may impose no penalty at all. A.A.C. R14-2-1815(C). Because the Commission has not imposed any penalties for shortfalls, there is no evidence that the Commission is holding utilities accountable for the decisions and actions of their customers who are not subject to the Commission's jurisdiction, as asserted by Petitioners. *Id.* at 26-27. Petitioners' claims are, at best, premature.

ARGUMENT

I. THE COMMISSION HAS THE REQUISITE LEGAL AUTHORITY TO ADOPT THE REST RULES.

The law is well-settled that the Corporation Commission "exclusively derives its power from the Constitution and the Legislature." *Phelps Dodge Corporation v. Arizona Electric Power Cooperative*, 207 Ariz. 95, 111, 83 P.3d 573, 589 (App. 2004). The Commission's ratemaking authority granted by Article 15, § 3 of the Arizona Constitution extends beyond setting rates to include the promulgation of rules and regulations that are "reasonably necessary steps in ratemaking." *Ariz. Corp. Comm. v. Woods*, 171 Ariz. 286, 294, 830 P.2d 807, 815 (App. 1992). The Legislature retains power to govern public service corporations in matters unrelated to the

Commission's ratemaking authority but can delegate that authority to the Commission. *Phelps Dodge*, 207 Ariz. at 111, 83 P.3d at 589. The REST rules are a valid exercise of both the Commission's constitutional ratemaking authority and the power that has been delegated to it by the Arizona Legislature.

A. The REST Rules are Supported by the Commission's Ratemaking Authority.

Under Article 15, § 3 of the Arizona Constitution, the Corporation Commission has the sole and exclusive power to set rates for public service corporations. Ariz. Const., Art. 15, §3. This Court has rejected the argument that the Commission's exercise of authority under this section is valid only when it is "direct rate regulation." *Woods*, 171 Ariz. at 295, 830 P.2d at 816. The Court has recognized that "the Commission in exercising its ratemaking power of necessity has a range of legislative discretion." *Id.* at 294, 830 P.2d at 815, quoting *Sims v. Round Valley Light and Power Co.*, 80 Ariz. 145, 154, 294 P.2d 378, 384 (1956). The Commission's ratemaking authority under Article 15, § 3 justifies the exercise of the Commission's regulatory power in circumstances "that may significantly affect economic stability and thus impact the rates charged by a public service corporation." *Woods*, 171 Ariz. at 295, 830 P.2d at 816.

The REST rules are aimed at doing just that. The renewable energy required by the REST rules can reduce and stabilize utility costs by substituting renewable energy for electricity generated with fossil fuels and, through the Commission's ratemaking process, reduce and stabilize rates.

As indicated above, natural gas prices have risen dramatically since 1999 and while future gas prices are uncertain, they are likely to continue increasing. As also noted above, in 2007, APS paid less for renewable geothermal and wind energy than it paid for natural gas on a per megawatt hour basis. Thus renewable energy resources are likely to be cost competitive with gas fired resources on a forward going basis and can serve as a stably priced hedge against high gas prices.

That the REST rules address rising costs of conventional power generation for Arizona can be seen in a 2007 APS rate decision, in which the Commission noted that high prices for natural gas were "the major reason for APS' recent and proposed rate increases..." Decision No. 69663 dated June 28, 2007, at 92. The Commission stated:

We agree ... that APS should be seeking low cost, stably priced renewable energy under long term contracts to hedge against and to limit APS' and the ratepayers' exposure to high natural gas prices over the next 15 years or longer. APS' recent rate increase requests were prompted by rising fuel and purchased power costs, and APS ratepayers have little insulation against the price of natural gas... We have recently adopted requirements for renewables in our Decision adopting the RES

rules, and we find that the record in this case supports a finding that the requirement contained in the RES rules is appropriate for APS at this time. *Id.* at 93-4.

It is hard to imagine a more direct impact on ratemaking than the specific application of the REST requirement to APS because of the rising price of natural gas and the need for low cost, stably priced renewable energy.

Petitioners assert that the impact of the REST rules is to increase rates while *Amici* maintain that the effect will be to reduce rates. Either way, the effect, if not the direction, on utility rates is conceded by the Petitioners. That being the case, they have a hard time maintaining that the REST rules are not directly and closely linked to the Commission's ratemaking power.

Notwithstanding the direct link between utility rates and renewable energy, if the Court determines that the Commission's constitutional authority is insufficient by itself to support the REST rules then the statutes governing public service corporations provide the explicit authority that Petitioners claim is missing.

B. The Commission's Statutory Authority Explicitly Provides the Commission with the Necessary Authority to Adopt the REST Rules.

The Petitioners seem to think that nothing short of a legislative enactment that contains the words "renewable energy" will suffice to confer the necessary authority on the Commission to adopt the REST rules.

However, a delegation of authority from the legislature need not be set forth in explicit terms. *State v. Arizona Mines Supply Co.*, 107 Ariz. 199, 484 P.2d 619 (1971). “So long as a policy is laid down and a standard is established by statute, no unconstitutional delegation of legislative power is involved in leaving to selected instrumentalities both the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply” *State v. Gee*, 73 Ariz. 47, 52, 236 P.2d 1029, 1032 (1951); *see also Energy Control Services, Inc. v. Ariz. Dept. of Econ. Sec.*, 135 Ariz. 20, 23, 658 P.2d 820, 823 (App. 1982) (citing *Haggard v. Indus. Comm’n*, 71 Ariz. 91, 223 P.2d 915 (1950)) (“[t]he rule that legislative powers cannot be delegated to administrative bodies does not mean that administrative bodies may not make rules and regulations supplementing legislation for the complete operation and enforcement of the act, if such rules and regulations are within the standards specifically set forth by the legislature”).

The policy “laid down” in this case is the broad one that the Commission has the power necessary to “supervise and regulate” every public service corporation in the state. Ariz. Const., Art. 15, § 3; Ariz. Rev. Stat. § 40-202(A). The constitutional and legislative policy is clear: the

Commission is intended to have broad authority over public service corporations.

That policy and its application to this case are given expression in at least two specific legislative enactments that are relevant here. First, there is Ariz. Rev. Stat. § 40-321. That statute provides in relevant part:

When the Commission finds that the equipment, appliances, facilities or *service* of any public service corporation, or the methods of manufacture, distribution, transmission, storage or supply employed by it are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the Commission shall determine what is just, reasonable, safe, proper, *adequate* or sufficient, and shall enforce its determination by order or regulation.

Ariz. Rev. Stat. § 40-321(A). (Emphasis added). If that is not enough, then there is Ariz. Rev. Stat. § 40-331. That section provides that:

When the Commission finds that additions or improvements to changes in the existing plant or physical properties of a public service corporation ought reasonably to be made, or that a new *structure or structures* should be erected, to promote the security or convenience of its employees or the public, the Commission shall make and serve an order directing that such changes be made or such structure be erected in the manner and within the time specified in the order. If the Commission orders erection of a new structure, it may also fix the site thereof.

Ariz. Rev. Stat. § 40-331(A). (Emphasis added).

These statutes explicitly address the Petitioner's complaint. In fact, the Petitioners use this exact statutory language to complain that the REST rules force utilities to create and install new "electrically inefficient

structures, implement different technologies than those currently used, and change their relationships with their customers...” Petition at 16. Similarly, the Petitioners complain that implementation of the REST rules “reduces the *adequacy of service* to customers.” *Id.* It is difficult to see how the Petitioners can complain about the Commission’s statutory authority to adopt the REST rules when the Petitioners themselves use the same language that is contained in the statutes authorizing the rules. The Petitioners may disagree as a factual matter with the Commission but that does not affect the Commission’s authority under these statutes to adopt the REST rules.

Petitioners never explain how the REST rules’ requirement that electric utilities acquire renewable energy resources does not directly involve the “methods of manufacture . . . or supply” or the “changes in the existing plant . . .” of an electric utility. Wind turbines, solar panels, geothermal, biomass and concentrating solar power plants are all methods of supplying electricity and well within the authority of the Commission to require when the alternative means ever escalating rates for customers.

The Petitioners fail to address the direct link between the REST rules and the Commission’s statutory authority. If the Commission finds that the equipment, facilities or service of any public service corporation or its

methods of manufacture or supply are inadequate or insufficient, the Commission is authorized to determine what is adequate or sufficient and enforce its determination by “order or regulation.” Ariz. Rev. Stat. § 40-321(A). Moreover, it can order changes to the existing plant of a public service corporation. Ariz. Rev. Stat. § 40-331(A). That is what the Commission did when it found as a matter of fact that it is “just, reasonable, proper and necessary to require the affected utilities to make additions, improvements or changes to their existing generation portfolios in order to meet the requirements of the proposed REST rules...” Decision No. 69127 at 56.

The Commission’s decision falls squarely within its statutory authority. Indeed, it is difficult to conceive how the Commission’s authority to take action to protect ratepayers from skyrocketing rates and volatile fuel costs can even be questioned.

II. THE REST RULES BENEFIT ALL CUSTOMERS.

Though they do not claim to be low-income customers, the Petitioners nevertheless contend that the REST rules “unfairly force lower-income customers to pay a premium for electricity to subsidize those who are affluent enough to upfront the cost of rooftop units.” Petition at 27-28. This contention does not reflect the reality of ratemaking.

First of all, the Court should note that the statewide organization representing low-income customers, Arizona Community Action Association, is one of the *Amici* on this brief supporting the Commission's adoption of the REST rules. That is because the Commission has taken great care to implement programs that assist low-income customers to mitigate overall rate impacts and meet their energy needs. Many years ago, the Commission began to implement low income assistance for customers to reduce bill impacts. There are also weatherization programs and other energy efficiency measures specifically targeted to low-income customers. *See, for example*, Decision No. 67744 dated April 7, 2005, which adopts discounts and energy efficiency programs for APS' low-income customers.

The Petitioners' notion that a single surcharge can be isolated and evaluated for whether it constitutes a subsidy is misguided. The rate structures for Arizona's electric utilities are complex and set by the Commission only after a thorough examination of cost of service and other factors. No two individuals share exactly the same usage characteristics and therefore application of average rates based upon average customer classifications will always have some subsidizing effect. That is true not only within a customer class but among customer classes as well. Rates

approved by the Commission do not precisely and mathematically reflect cost of service analyses for individual residential and commercial customers.

The Petitioners' contention seems to be that anyone, including low-income customers, who are not affluent enough or otherwise choose not to install solar facilities, are subsidizing those that do. But that analysis is incomplete and ignores the very reason for the REST rules in first place. The objective is to lower overall costs to the utility and its customers thereby benefiting all customers including residential, commercial and industrial customers.

In any event, if the Petitioners have a problem with any so-called subsidies based on their incomplete examination of complex rate structures, then they need to file a separate action challenging those subsidies and the rate designs themselves. That is an intensive factual inquiry that cannot possibly be resolved on the basis of casual and unsubstantiated statements like those contained in the Petition.

CONCLUSION.

To these *Amici*, the facts are clear and support the Commission's authority to adopt the REST rules. It is hard to imagine that the body constitutionally charged with regulation and supervision of public service corporations lacks the authority to establish rules for generating resources,

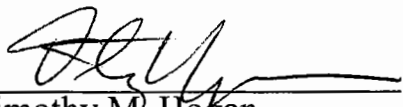
rules that reduce the impact of volatile fuel prices on rates and promote fuel diversity.

It is just as clear that Petitioners disagree with those facts but have no real facts of their own to support their claims. Instead, they repeat the same old tired “factual” claims about renewable energy that now border on myth and contend that there are only legal issues for the Court to resolve. They can’t have it both ways and claim that there are just legal issues in this case but that so-called “facts” support their claims as well.

The Petition should be dismissed. Based on the actual facts and the law, the Commission plainly has the authority to regulate the generation portfolios of electric utilities in Arizona.

DATED this 15th day of August, 2008.

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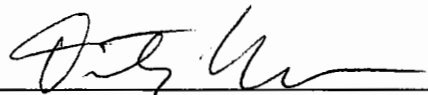
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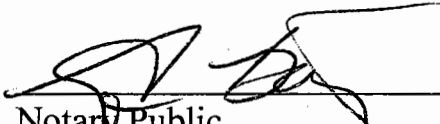
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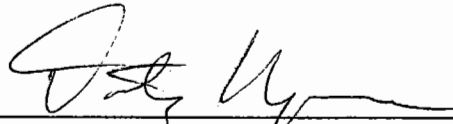
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7(f), Rules of Procedure for Special Actions, and Rule 16, Arizona Rules of Civil Appellate Procedure, the undersigned certifies that the foregoing Brief was prepared using double line spacing, a proportional typeface known as Times New Roman, 14 point. The brief contains 5925 words from the Introduction to the end of the Conclusion according to the Word software used to create the brief.

Dated this 15th day of August, 2008

A handwritten signature in black ink, appearing to read "Timothy M. Hogan", written over a horizontal line.

Timothy M. Hogan