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Arizona Corporation Commission

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IN THE MATTER OF NOTICE OF  
PROPOSED RULEMAKING FOR THE  
ENVIRONMENTAL PORTFOLIO  
STANDARD.

DOCKET NO. RE-00000C-00-0377

COMMENTS OF THE RESIDENTIAL UTILITY CONSUMER OFFICE

The Residential Utility Consumer Office ("RUCO") makes the following comments to the proposed addition of a new section to the Retail Electric Competition Rules (A.A.C. R14-2-1601 et seq.) entitled the Environmental Portfolio Standard, to be numbered as A.A.C. R14-2-1618.

**R14-2-1618 The Environmental Portfolio Standard**

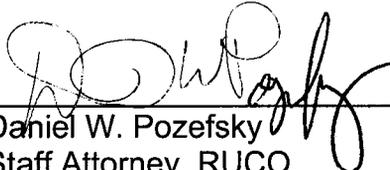
The Environmental Portfolio Standard ("EPS"), as proposed, will be funded by a mandatory surcharge, which utilities will collect from captive ratepayers. The EPS violates Article 15, § 14 of the Arizona Constitution, which requires the Commission to ascertain the fair value of a public service corporation's property in Arizona prior to establishing just rates. See U S West Communications, Inc., v. Arizona Corp. Comm'n, No. 1 CA-CV 98-0672, at ¶ 25, 2000 WL 1218786, at ¶ 25 (Ariz. App. Div. 1. Aug. 29, 2000).

This Commission's practice in the past has been to hold hearings to determine the fair value rate base prior to determining rates. The EPS does not require a hearing be held or

1 even that fair value be established. To the extent the EPS does not require a finding of fair  
2 value rate base prior to imposing a surcharge, it is unconstitutional.

3 As for additional comments, RUCO incorporates its Application for Rehearing of  
4 Decision No. 62506, a copy of which is attached hereto.

5 RESPECTFULLY SUBMITTED this 3rd day of October, 2000.

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10 Staff Attorney, RUCO

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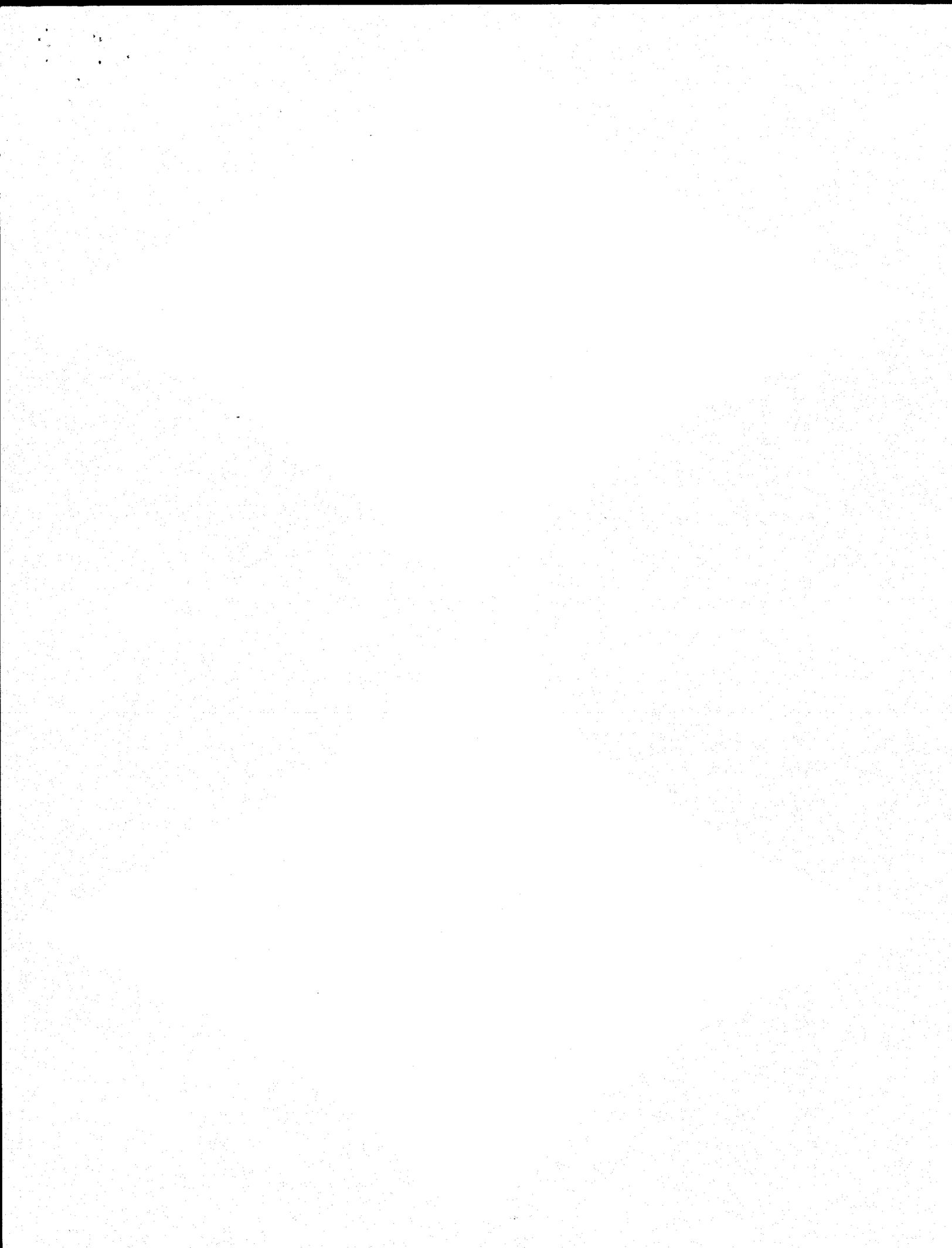
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REHEARING RECEIVED

BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION  
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IN THE MATTER OF THE GENERIC  
INVESTIGATION OF THE  
DEVELOPMENT OF A RENEWABLE  
PORTFOLIO STANDARD AS A  
POTENTIAL PART OF THE RETAIL  
ELECTRIC COMPETITION RULES.

Docket No. E-00000A-99-0205

**RUCO'S APPLICATION FOR REHEARING OF DECISION NO. 62506**

Pursuant to A.R.S. § 40-253, the Residential Utility Consumer Office ("RUCO") requests that the Arizona Corporation Commission ("Commission") rehear the matters decided in Decision No. 62506, docketed May 4, 2000. Decision No. 62506 approved an Environmental Portfolio Standard ("EPS") establishing a mandatory portfolio requirement. RUCO requests that the Commission reconsider its decision approving the mandatory portfolio requirements for the various reasons set forth below.

**I. Background**

On April 8, 1999, Commissioner Carl J. Kunasek filed a copy of a new proposed rule entitled Solar and Environmentally-Friendly Portfolio Standard ("EFPS"). Its purpose was to expand and redefine the previous Solar Portfolio Standard (R14-2-1609).

On April 23, 1999, the Commission in Decision No. 61634, amended the Electric Competition Rules to eliminate the Solar Portfolio Standard (R14-2-1609).

1 The Commission's Utilities Division ("Staff") filed a list of recommended questions and  
2 requested interested parties to file comments by May 21, 1999. Pursuant to a procedural  
3 order of June 16, 1999, a full public hearing was commenced on September 16, 1999. The  
4 hearing was adjourned pending the submission of briefs. Briefs were submitted and the  
5 Commission, in Decision No. 62506, approved an EPS which among other things, set  
6 mandatory environmental standards and penalties for non-compliance.

7  
8 **II. The Commission exceeded its authority in adopting the Environmental Portfolio  
Standard.**

9 The authority of the Commission to prescribe "just and reasonable rates and charges to  
10 be made and collected by public service corporations within the state..." is derived from Article  
11 15, Section 3 of the Constitution of Arizona<sup>1</sup>. The courts in Arizona have repeatedly held that  
12 the power to make rules, regulations and orders by which a corporation shall be governed  
13 necessarily vests in the Commission by virtue of the Constitutional provisions. See Williams v.  
14 Pipe Trades Industry Program of Arizona, 100 Ariz. 14, 17, 409 P2d 720, 723 (1966).

15 The EPS requires Affected Utilities and Electric Service Providers ("ESPs") to derive a  
16 percentage of the energy they sell from environmentally friendly renewable resources. The  
17 percentage established by the Commission increases yearly over a six-year period and  
18 remains at a fixed percentage for the following six years. The EPS further breaks down in  
19 percentages the yearly makeup of the types of renewable resources the Utility Distribution  
20 Companies and ESPs are permitted to use to meet their respective portfolio percentages. For  
21

22  
23 <sup>1</sup> To the extent the Environmental Portfolio Standard requires Affected Utilities and Electric Service Providers to  
24 incur expenses and recoup costs, it can be argued that there is a nexus to ratemaking. However, such a stretch  
is implausible and offends the principles of ratemaking established by statute and case law and put into place for  
the protection of the ratepayer as well as the utility.

1 those utilities that are unable to comply with its requirements, the EPS establishes a penalty  
2 that may be imposed by the Commission.

3 By mandating environmental standards, the Commission has determined that the  
4 utilities must invest in a particular type of generation technology. Such decisions should be left  
5 to management's discretion, to be evaluated by the Commission when a company seeks to  
6 include the generation cost in rates. There are no statutory or constitutional provisions that  
7 allow the Commission to substitute its judgement for management on management related  
8 issues. In fact, this separation of powers between management and the Commission is firmly  
9 entrenched in case law.

10 "It must never be forgotten that, while the state may regulate with a  
11 view to enforcing reasonable rates and charges, it is not the owner  
12 of the property of public utility companies, and is not clothed with  
13 the general power of management incident to ownership." State of  
Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service  
Commission of Missouri, 262 U.S. 276, 289, 43 S.Ct. 544, 547, 67  
L.Ed. 981, 31 A.L.R. 807.

14 Southern Pacific Company v. Arizona Corporation Commission, 98 Ariz. 339, 343, 404 P.2d  
15 692, 696 (1965).

16 Should the regulators be allowed to substitute their judgment for management's, the  
17 shareholders as well as the public will lose confidence in management. In adopting the EPS,  
18 the Commission substitutes its judgement for management's on managerial decisions. This  
19 clearly falls outside the scope of the Commission's authority.

20  
21 **III. The establishment of the Solar Electric Fund is not within the Commission's  
22 constitutional and/or statutory authority.**

23 The EPS establishes a Solar Electric Fund ("SEF") comprised of the proceeds from the  
24 penalties collected by the ESPs and Affected Utilities who are unable to meet the EPS'

1 requirements. The proceeds are to be used in the following calendar year by public entities to  
2 purchase solar generators or solar electricity.

3 The Commission's authority to impose penalties on public service corporations who  
4 violate Commission orders derives from Article 15, Section 16 of the Constitution of Arizona.  
5 However, the establishment of funds for penalties collected is a prerogative of the legislature.  
6 For example, the legislature enacted A.R.S. § 40-443 which establishes the Pipeline Safety  
7 revolving fund which consists of penalties collected from public service corporations who  
8 violate Article 10 of ARS Section 40.

9 Nowhere does the legislature delegate its authority to the Commission to establish a  
10 fund for the collection and direction of EPS penalties. Except for its broad, constitutionally  
11 vested powers over rates and charges of public service corporations, Ethington v. Wright, 66  
12 Ariz. 382, 189 P.2d 209 (1948), the Commission's regulatory jurisdiction is derived from  
13 legislative authorization. Williams v. Pipe Trades Industry Programs of Arizona, 100 Ariz. 14,  
14 409 P.2d 720 1966; Corporation Commission v. Pacific Greyhound Lines, 54 Ariz. 159, 94  
15 P.2d 443 (1939), Op. Att'y Gen. I 79-099 (April 9, 1979).

16 Absent designation by statute, penalty proceeds are to be paid into the state treasury  
17 and credited to the general fund (ARS §§ 35-141, 35-142). The SEF is not a statutorily-  
18 created fund, and therefore proceeds of any penalty assessed by the Commission cannot be  
19 deposited into it.

20 Likewise, the EPS directs the use of funds without considering the state procurement  
21 laws. ARS § 41-2501 et seq. specifically sets forth the terms and conditions for what a state  
22 agency may contract for or purchase on its own behalf with state funds. ARS § 41-2511 vests  
23 the authority to promulgate such regulations governing procurement issues with the Director of  
24

1 Administration. Under ARS § 41-2512 the Director has the power to delegate his or her  
2 authority. The EPS sidesteps the procurement statute, and authorizes the Director of the  
3 Utilities Division to select an administrator to select projects to be financed by the Fund.  
4 Neither the legislature, nor the Director of Administration, has delegated the Commission with  
5 state procurement authority.

6 The Commission's authority is also limited in the amount of penalty it can impose.  
7 Article 15, Section 16 of the Arizona Constitution and ARS § 40-425(A) limit the penalty to not  
8 less than one hundred nor more than five thousand dollars for each offense. The EPS sets the  
9 penalty at thirty cents per kWh. The Commission is without authority to impose a penalty that  
10 falls outside the constitutional limits.

11 The establishment of penalties which exceed the amount set by the Constitution and the  
12 establishment of the Solar Electric Fund are nothing more than powers of the legislature to tax  
13 and appropriate revenues, which the legislature derives from the Constitution. (See AEPCO's  
14 Post Hearing Memorandum.)

15

16 **IV. Conclusion**

17 For the foregoing reasons, RUCO requests that the Commission grant rehearing of  
18 Decision No. 62506 and establish an Environmental Portfolio Standard based on the voluntary  
19 implementation of environmental programs.

20 RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of May, 2000.

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