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EXCEPTION

BEFORE THE ARIZONA CORPORATION COMMISSION

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ARIZONA CORPORATION COMMISSION
PHOENIX, ARIZONA

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2 WILLIAM A. MUNDELL
 CHAIRMAN
3 JIM IRVIN
 COMMISSIONER
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 COMMISSIONER

Arizona Corporation Commission

DOCKETED

JAN 25 2001

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

Docket No. RE-00000C-00-0377

EXCEPTIONS OF THE RESIDENTIAL UTILITY CONSUMER OFFICE

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9
10 The Residential Utility Consumer Office ("RUCO") makes the following exceptions to the
11 recommended Opinion and Order ("RO&O") of the Administrative Law Judge, Jane Rodda, on
12 the Environmental Portfolio Standard.

14 I. The Commission exceeded its authority in adopting the Environmental Portfolio Standard.

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

22 "It must never be forgotten that, while the state may regulate with a
23 view to enforcing reasonable rates and charges, it is not the owner
24 of the property of public utility companies, and is not clothed with
the general power of management incident to ownership." State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service

1 Commission of Missouri, 262 U.S. 276, 289, 43 S.Ct. 544, 547, 67
2 L.Ed. 981, 31 A.L.R. 807.

3 Southern Pacific Company v. Arizona Corporation Commission, 98 Ariz. 339, 343, 404 P.2d
4 692, 696 (1965).

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

9 **II. The Commission acted unconstitutionally by establishing mandatory**
10 **surcharges without a fair market value determination.**

11 Article 15, §14 of the Arizona Constitution requires the Commission to ascertain fair
12 value rate base of a public service corporation's property prior to establishing a just and
13 reasonable rate of return. The EPS imposes a mandatory surcharge on captive ratepayers
14 without a concurrent finding of fair value. To the extent the EPS establishes a mandatory
15 surcharge without a fair value finding, the EPS violates Article 15, § 14 of the Arizona
16 Constitution.

17
18 **III. The establishment of the Solar Electric Fund is not within the**
19 **Commission's constitutional and/or statutory authority.**

20 The EPS establishes a Solar Electric Fund ("SEF") comprised of the proceeds from the
21 deficiency payments¹ collected from Load Serving Entities that are unable to meet the EPS'

22 _____
23 ¹ The RO&O proposes to change the term "penalty" to "deficiency payment" throughout the rule. The RO&O will
24 also make the Commission's authority to impose the penalty permissive, rather than mandatory. The definitional
change may change the name, but not the nature of the payment. It is still a penalty imposed on ESP's who are
unable to meet the provisions of the rule. What the Commission calls the payment has no bearing on the
arguments raised by RUCO.

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 payments 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 deficiency payments. Except for its broad,
11 constitutionally vested powers over rates and charges of public service corporations, Ethington
12 v. Wright, 66 Ariz. 382, 189 P.2d 209 (1948), the Commission's regulatory jurisdiction is
13 derived from legislative authorization. Williams v. Pipe Trades Industry Programs of Arizona,
14 100 Ariz. 14, 409 P.2d 720 1966; Corporation Commission v. Pacific Greyhound Lines, 54
15 Ariz. 159, 94 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 deficiency payments assessed by the
19 Commission cannot be deposited into it.

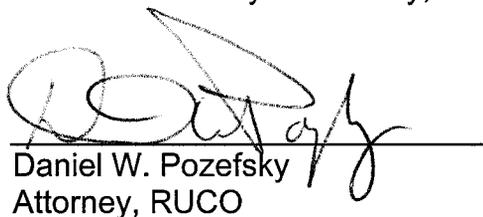
20 Likewise, the EPS directs the use of funds without considering the state procurement
21 laws. ARS § 41-2501 et seq. specifically sets forth the terms and conditions for what a state
22 agency may contract for or purchase on its own behalf with state funds. ARS § 41-2511 vests
23 the authority to promulgate such regulations governing procurement issues with the Director of
24 Administration. Under ARS § 41-2512 the Director has the power to delegate his or her

1 authority. The EPS sidesteps the procurement statute, and authorizes the Director of the
2 Utilities Division to select an administrator to select projects to be financed by the Fund.
3 Neither the legislature, nor the Director of Administration, has delegated the Commission with
4 state procurement authority.

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

10 The establishment of penalties, which exceed the amount, set by the Constitution and
11 the establishment of the Solar Electric Fund is nothing more than the power of the legislature
12 to tax and appropriate revenues, which the legislature derives from the Constitution.

13 RESPECTFULLY SUBMITTED this 25th day of January, 2001.

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1 An original and ten copies
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