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IN THE MATTER OF ARIZONA PUBLIC SERVICE COMPANY REQUEST FOR APPROVAL OF UPDATED GREEN POWER RATE SCHEDULE GPS-1, GPS-2, AND GPS-3.

Docket No. E-01345A-10-0394

IN THE MATTER OF THE APPLICATION OF ARIZONA PUBLIC SERVICE COMPANY FOR APPROVAL OF ITS 2013 RENEWABLE ENERGY STANDARD IMPLEMENTATION FOR RESET OF RENEWABLE ENERGY ADJUSTOR.

Docket No. E-01345A-12-0290

IN THE MATTER OF THE APPLICATION OF TUCSON ELECTRIC POWER COMPANY FOR APPROVAL OF ITS 2013 RENEWABLE ENERGY STANDARD IMPLEMENTATION PLAN AND DISTRIBUTED ENERGY ADMINISTRATIVE PLAN AND REQUEST FOR RESET OF ITS RENEWABLE ENERGY ADJUSTOR.

Docket No. E-01933A-12-0296

IN THE MATTER OF THE APPLICATION OF UNS ELECTRIC, INC. FOR APPROVAL OF ITS 2013 RENEWABLE ENERGY STANDARD IMPLEMENTATION PLAN AND DISTRIBUTED ENERGY ADMINISTRATIVE PLAN AND REQUEST FOR RESET OF ITS RENEWABLE ENERGY ADJUSTOR.

Docket No. E-04204A-12-0297

RUCO'S CLOSING BRIEF

Arizona Corporation Commission
DOCKETED

AUG 27 2013

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1 **1. IF A POLICY IS NEEDED, RUCO RECOMMENDS THE 50/50 SPLIT OR**
2 **THE BASELINE POLICY**

3 RUCO views its role here as less advocate and more moderator in bridging the wide
4 gap that exists between the solar industry and the utilities. Of course RUCO's main
5 objective remains the same – to serve and address its constituency, the ratepayer, the
6 best way possible. RUCO proposed two possible solutions. The first proposal was a
7 50/50 REC split. RUCO-2 at 7.¹ The second proposal, the "Baseline" proposal was
8 subsequently submitted as a workable proposal based on the recommendations made by
9 the other parties at that time. The Baseline proposal sets a yearly target to judge market
10 self-sufficiency. RUCO-3 at 3-4. If the target is reached, then a permanent waiver for that
11 year is triggered. Id. RUCO purposefully did not recommend a specific threshold - it was
12 RUCO's intent to leave room for the parties to work together or have Staff recommend a
13 threshold subject to the parties' comments. The threshold process could entail a short
14 workshop or a Staff report. By comparison to opening up the REST rules, which several
15 proposals have suggested, RUCO's Baseline proposal is much less burdensome. While
16 RUCO would support either of its proposals, but for the reasons discussed below, RUCO
17 believes the Commission should approve its Baseline Proposal.

18 **a) THE BASELINE PROPOSAL ACCOMPLISHES THE OVERALL**
19 **OBJECTIVES SOUGHT BY MOST PARTIES IN THIS MATTER**

20 RUCO's Baseline Proposal is relatively straightforward - if the market can stand on
21 its own in any given year, then that year or the next year needing compliance is waived
22 permanently. RUCO-3 at 3-4. The policy maintains the spirit of the REST, captures market

23 ¹ For ease of reference, trial exhibits will be identified similar to their identification in the Transcript of
24 Proceedings. The transcript volume number will identify references to the transcript.

1 information, upholds Arizona's ability to sell RECs into the voluntary market, and keeps the
2 utilities out of the DE arena if the market is indeed sustainable.

3 **b) THE BASELINE PROPOSAL PROMOTES MARKET CERTAINTY**

4 Several of the proposals put forward call for a year to year waiver. (See for example
5 the proposals of SEIA, NRG, Wal-Mart). This creates a great deal of uncertainty each year
6 since there is no guiding principle around whether or not a waiver is justified from year to
7 year. Conversely, RUCO's Baseline proposal sets a known and measurable benchmark
8 each year. If the market hits the threshold, parties can count on a waiver being instated.
9 RUCO-3 at 3-4. Moreover, the type of waiver that is being suggested is a permanent albeit
10 small reduction in the REST goals. This can be proposed because there is justification
11 behind triggering the waiver -unlike a waiver that would be given as a temporary stop-gap
12 until a more permanent solution is implemented. Some waivers could even build up a long-
13 term under compliance issue for a utility if done incorrectly. The utility would then have to
14 make up years of being under compliant.

15 **c) THE BASELINE PROPOSAL CAN FIT INTO THE YEARLY**
16 **IMPLEMENTATION PLAN TIMELINE AND ACCURATELY**
REFLECT MARKET CONDITIONS

17 Judging market velocity is nothing new to the utilities or Staff. The renewable
18 energy standard implementation plans start out with the best information available at the
19 time and are trued up as the open meeting date approaches. The Baseline proposal fits
20 naturally within this structure. First, the utilities will report the current installation amounts
21 followed by a prediction of market trajectory. Staff will review and then make its
22 recommendation – the parties will have the opportunity to true-up should market realities
23 differ by the time of the Commission decides the case.

1 Staff makes the claim that RUCO's policy moves away from the REST's 15 percent
2 goal because the numbers might not add up exactly to 15 percent of retail sales.
3 (Transcript at 907) First, the threshold can be designed to get as close as possible.
4 Second, nothing will ever be exact, in fact some utilities has systems that are not even
5 metered. They simply make an educated guess as to system output. Therefore, the
6 Baseline policy should not be held to a higher standard than what exists today.

7 **d) IF DONE RIGHT ARIZONA WILL BE ABLE TO CONTINUE TO**
8 **SELL RECS INTO THE VOLUNTARY MARKET**

9 RUCO's proposals will allow Arizona's RECs to remain viable in the voluntary
10 market. Several proposals in this case could impinge on REC owner's abilities to sell
11 RECs in the voluntary market. First, and not surprising, there are voluntary transactions
12 already taking place in Arizona. RUCO-4 at 6. Second, there is book value associated with
13 utility scale RECs, at least for APS.² Transcript at 161. Finally, solar installations reduce
14 retail sales which, in turn lowers the overall energy requirement of the REST. Whatever
15 one's perspective, RECs are useful commodities. Transcript at 821.

16 The national voluntary REC market also views RECs as useful commodities. Ms.
17 Martin, the Executive Director of CRS, the agency tasked with certifying over 90 percent of
18 the RECs in the United States, testified that solar RECs are normally the most valued
19 RECs available. Transcript at 821. Arizona, with its ample sun can produce low priced
20 solar RECs; in turn creating a real export opportunity for the state. Any reasonable
21 safeguards Arizona can put in place to ensure that this economic opportunity remains a
22 possibility should be encouraged. RUCO's Baseline proposal as confirmed by Ms. Martin,

23 ² It is important to remember that DE RECs can also be used as utility scale RECs.

1 would safe guard the property rights of system owners and allow for the development of a
2 possible export market. Transcript at 815 and 821. Perhaps more pertinent is the fact that
3 RECs are heavily relied upon in competitive markets.³ It would be a shame to destroy REC
4 integrity in Arizona given Arizona's solar potential. Finally, making a claim, even implicitly,
5 on a private party's REC without consent could open up the Commission to a takings
6 lawsuit.

7 In sum, RUCO's Baseline proposal is the only proposal under consideration which
8 meets the objectives of the REST while maintaining the integrity of the RECs. RUCO's
9 Baseline proposal would further facilitate the development of the export market which in
10 turn could benefit the ratepayer's of Arizona. For these reasons, RUCO recommends the
11 Commission adopt its Baseline proposal.

12 2. ARIZONA IS NOT CEDING CONTROL

13 In APS' opening statement, the Company mentioned the fact that the Commission
14 needs to choose whether or not to "cede control of Arizona energy policy to California
15 entities...". Transcript at 25. RUCO believes that Arizona has control over its energy policy
16 and respectfully disagrees that a question exists. RUCO suggests that the Commission be
17 mindful of outside markets and the rules that those markets follow. As long as it does not
18 place an unfair burden on ratepayers, RUCO sees no problem, and in fact encourages
19 Arizona's access to an export market.

20 ³ <http://www.ftc.gov/bcp/workshops/carbonoffsets/presentations/lbird.pdf>

21 <http://www.njcleanenergy.com/renewable-energy/project-activity-reports/srec-pricing/srec-pricing>

22 http://www.srectrade.com/pennsylvania_srec.php

1 market to Arizona's REC owners. The Commission should be greatly concerned with that
2 prospect, for among other things it could bring into question the taking of property rights.
3 Finally, standard offer or auction mechanisms are at best questionable as they come with
4 an unknown price tag and results.

5 4. THE COMMISSION SHOULD PROTECT PROPERTY RIGHTS

6 As mentioned above, some proposals such as Staff's "Track and Monitor" run the
7 risk of infringing on property rights of system owners and investors. This could result in a
8 regulatory taking argument under the Fifth Amendment.

9 In Scheehle v. Justices of Supreme Court of Ariz., 508 F.3d 887, C.A.9 (Ariz.), 2007,
10 the ninth Circuit Court of Appeals discussed the issue of a regulatory taking concerning the
11 appointment requirement of attorneys serving as arbitrators in Arizona. While Scheehle
12 dealt with a different set of circumstances than the subject case, it is none-the-less
13 instructive on the law in Arizona. The Ninth Circuit Court of Appeals concluded.

14
15 Since the Fifth Amendment does not prohibit the taking
16 of private property, but rather "places a condition on the
17 exercise of that power," we must look to how the Supreme
18 Court has defined that condition. In Penn Central, the Court
19 observed that the "question of what constitutes a 'taking' for
20 purposes of the Fifth Amendment has proved to be a problem
21 of considerable difficulty." 438 U.S. at 123, 98 S.Ct. 2646. The
22 Court proceeded to identify several factors of particular
23 significance to an evaluation of a regulatory takings claim. In
24 Lingle, the Court summarized these factors as follows:

Primary among those factors are "[t]he economic impact of the
regulation on the claimant and, particularly, the extent to which
the regulation has interfered with distinct investment-backed
expectations." [438 U.S. at 124, 98 S.Ct. 2646.] In addition, the
"character of the governmental action" for instance whether it
amounts to a physical invasion or instead merely affects
property interests through "some public program adjusting the

1 1 benefits and burdens of economic life to promote the common
2 2 good"-may be relevant in discerning whether a taking has
3 3 occurred. *Ibid.* The *Penn Central* factors-though each has given
4 4 rise to vexing subsidiary questions-have served as the principal
5 5 guidelines for resolving regulatory takings claims that do not fall
6 6 within the physical takings or *Lucas* rules. See, e.g., *Palazzolo*
7 7 *v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d
8 8 592 [(2001)] ...; *id.* at 632-634, 121 S.Ct. 2448, ... (O'Connor,
9 9 J., concurring).

10 10 *Scheehle*, 508 F.3d 887, 892. There is little doubt that an argument can be made that
11 11 infringing on an owner's ability to negotiate his/her RECs could be considered a taking and
12 12 hence subject to compensation. The argument, as the Court explained in *Scheehle* would
13 13 be difficult to make and subject to different interpretations. However, there is some basis
14 14 which would support the argument. Viewing a REC as a property right has been buttressed
15 15 by decisions at the Western Renewable Energy Generation Information System
16 16 ("WREGIS"), U.S. Environmental Protection Agency ("EPA"), the National Association of
17 17 Attorneys, and the California Public Utilities Commission ("CPUC").⁴

18 18 Moreover, the integrity of RECs is even more important as Arizona considers
19 19 electric competition. Under competition a REC market is formed and compliance is

20 20 ⁴
21 21 WREGIS Certificate Definition, at
22 22 http://www.wregis.org/uploads/files/106/WREGIS%20Certificate%20Definition%20modification_FINAL%2012%208%2008.pdf

23 23 EPA's Green Power Partnership, Renewable Energy Certificates (RECs), available
24 24 at <http://www.epa.gov/grnpower/gpmarket/rec.htm>

25 25 National Association of Attorneys General, Environmental Marketing Guidelines for Electricity, Dec. 1999,
26 26 http://apps3.eere.energy.gov/greenpower/buying/pdfs/naag_0100.pdf

27 27 CPUC Decision 08-08-028, Appendix B, page 1, available at
28 28 http://docs.cpuc.ca.gov/PUBLISHED/FINAL_DECISION/86954.htm

1 consideration of the net metering issue is not happening sometime next year but rather in
2 a few months.

3 **a) THE COMMISSION'S POLICY SOLUTION SHOULD BE FLEXIBLE**

4 RUCO would recommend that the Commission not implement a permanent solution
5 at this time. If the utility is no longer needed to interact with the marketplace, RUCO
6 believes that it is appropriate to issue a waiver for a particular year's requirement. It would
7 be overkill and unwarranted to permanently eliminate the DE carve-out at this time. Utilities
8 have never had 100 percent control of the market. In recent years very few of the utilities'
9 proposals for incentive levels have been adopted. To say that once incentives go away
10 they are completely hands-off is inaccurate. Utilities presently have available a myriad of
11 different options which they can utilize both inside and outside of general rate case as
12 seen in APS's net metering application. These proposals, if approved, can have a
13 significant impact on the market. What really is needed is a flexible policy that doesn't lock
14 Arizona down a fixed path.

15 **b) OPENING UP THE RULES WILL BE BURDENSOME**

16 There is little question that most Rule changes takes significant time and effort. The
17 level of interest in this case practically assures a lengthy and complicated process should
18 the Commission decide to open the Rules. Moreover, not a single party has fully offered a
19 study or even a good reason to justify a major revision to the REST rules.

20 The Commission cannot lower the REST standards without a waiver or RECs.
21 Transcript at 905 As Staff testified,

1 "Staff believes that the Commission could grant a temporary
2 waiver to institute the track and monitor in the first year and
3 then decide after that whether it wants to open the rules up and
4 make that permanent or continue granting yearly waivers to
5 continue track and monitor like that."

6 (Transcript at 779) Since utilities already track energy statistics "Track and
7 Reduce/Monitor" is simply a year to year waiver that invalidates RECs for outside sale to
8 voluntary markets and is likely to require a change to REST rules. There are a variety of
9 different solutions to this issue that protect REC integrity, far less burdensome and do not
10 involve reopening the Commission's rules.

11 **c) RUCO RECOMMENDS FOCUSING IN ON THE REAL ISSUE OF
12 THE HEARING**

13 A referendum on a core component of the REST rules or a discussion of cost and
14 benefits of those components are unnecessary and outside the scope of this preceding.
15 The Commission already has the tools available to waive the Rules for a particular
16 company or amend the Rules if it wants. "Track and Record" does not appear to be what it
17 originally was represented as - it now is just a proposal to eliminate the DE carve out and
18 report back to the Commission what the utilities already report.

19 APS states that its single goal is to decide:

20 "whether the utilities should be allowed, in absence of the
21 payment of incentives, to use a track and record means of
22 securing compliance with the distributed renewable energy
23 requirements under the renewable energy rules. And that's the
24 only question we have to answer today"

25 Transcript at 22. APS' statement is misleading because the original Track and Record
26 proposal that sent this issue into a hearing has been changed significantly. Moreover,

1 alternatives were to be considered as well. The real issue is that utilities need guidance
2 around how to account for non-incentivized installations if they occur in numbers that
3 jeopardize compliance or start to rival compliance obligations. With this in mind, RUCO
4 believes that it is already within the power of the Commission to provide such guidance
5 and therefore opening up the REST Rules or hastily cobbling together a policy that could
6 invalidate RECs is unnecessary and potentially very damaging.

7 **6. CONCLUSION**

8 For all of the above reasons the Commission should provide a reasonable window of
9 time for the upcoming net metering discussion to resolve the issue. Any action now is
10 unnecessary and could prove counterproductive. As a backstop for utilities with
11 significant market activity and/or under compliance concerns, RUCO recommends a 50/50
12 REC split or RUCO's "Baseline" policy. These policies could also go into effect if the net
13 metering debate becomes prolonged or if the net metering solution is applied to some
14 utilities out into the future.

15

16 RESPECTFULLY SUBMITTED this 27th day of August, 2013.

17

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Daniel W. Pozefsky
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1 AN ORIGINAL AND THIRTEEN COPIES
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