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2013 SEP 13 A 11: 30

AZ CORP COMMISSION
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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

9 BOB STUMP, Chairman
 10 GARY PIERCE
 11 BRENDA BURNS
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 13 SUSAN BITTER-SMITH

14 IN THE MATTER OF ARIZONA PUBLIC
 15 SERVICE COMPANY – APPROVAL OF
 16 UPDATED GREEN POWER RATE
 17 SCHEDULE GPS-1, GPS-2 AND GPS-3

DOCKET NO. E-01345A-10-0394

18 IN THE MATTER OF THE APPLICATION
 19 OF ARIZONA PUBLIC SERVICE
 20 COMPANY FOR APPROVAL OF ITS 2013
 21 RENEWABLE ENERGY STANDARD
 22 IMPLEMENTATION FOR RESET OF
 23 RENEWABLE ENERGY ADJUSTOR

DOCKET NO. E-01345A-12-0290

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

DOCKET NO. E-01933A-12-0296

29 IN THE MATTER OF THE APPLICATION
 30 OF UNS ELECTRIC, INC. FOR
 31 APPROVAL OF ITS 2013 RENEWABLE
 32 ENERGY STANDARD
 33 IMPLEMENTATION PLAN AND
 34 DISTRIBUTED ENERGY
 35 ADMINISTRATIVE PLAN AND
 36 REQUEST FOR RESET OF RENEWABLE
 37 ENERGY ADJUSTOR

DOCKET NO. E-04204A-12-0297

Arizona Corporation Commission

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REPLY BRIEF

1 The parties' Closing Briefs substantially track the positions they took during their
2 written and verbal testimony throughout these proceedings. APS will not rehash the
3 various positions, nor go into detail on material already covered at length. APS
4 continues to believe that Staff's position, and the alternatives identified in Staff's
5 Closing Brief, offer the best option in this proceeding. Further, the Commission-
6 approved budget for APS's direct cash incentives is rapidly approaching zero. APS
7 residential customers will soon be installing solar without any direct incentives. The
8 time to act on this matter is now.

9 APS limits this reply brief to one limited concept that arose in the Closing Briefs:
10 the issue of property taking. Although not the subject of significant focus during the
11 proceeding, several of the parties' Closing Briefs asserted that double counting a REC
12 would constitute a compensable property taking under, presumably, the Fifth and
13 Fourteenth Amendments of the United States Constitution. In making these assertions,
14 however, no party offered any citation. Further, although witnesses stated that a track
15 and record policy could constitute a compensable taking of property, these statements
16 are irrelevant; whether a compensable property taking occurs is a legal conclusion that
17 can solely be determined by a court of competent jurisdiction. And if a court did
18 consider this issue, it does not appear that the court would find double counting a REC
19 to constitute a compensable property taking.

20 **I. Action by the Center for Resource Solutions Cannot Result in a**
21 **Compensable Property Taking.**

22 Based on testimony in this matter, double counting would only occur if CRS, a
23 private entity, determines that a double counting occurred. It is axiomatic, however, that
24 only action by the government can constitute a compensable regulatory taking of
25 property.¹ The constitution does not generally imbue private entities with the police
26 power. If a private entity somehow "takes" another's property, the court system typically
27 provides the sole means for redress. No double counting would occur if the Commission

28 ¹ See generally *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-18, 112 S.Ct. 2886, 2892-95 (1992).

1 adopted a track and record policy and nothing further happened. The possibility of
2 double counting only emerges once CRS interprets its rules, applies that interpretation to
3 the Commission policy and refuses to certify DE RECs. But action by CRS is not action
4 by the Commission. APS agrees with Tucson Electric Power Company and UNS
5 Electric that double counting a REC could never constitute a compensable property
6 taking because it would be CRS—not any governmental action—that caused the double
7 counting to occur.

8 **II. RECs Under Arizona Law Are Solely Accounting Mechanisms for**
9 **Utilities.**

10 RECs exist in one place under Arizona law—the Commission’s REST Rules. In
11 those rules, RECs’ only purpose is to provide a means for utilities establish compliance
12 with the REST.² The REST provides that RECs can be purchased by utilities or sold by
13 utilities, but do not empower third parties to sell RECs to one another.³ Although parties
14 in this proceeding refer to RECs as property, they cite to no case law identifying RECs
15 as a property right. And based on how RECs are defined under Arizona law, including
16 their narrow role and limited alienation rights, it is not clear that RECs constitute
17 property in the first place as defined under Arizona law.

18 **III. Regulatory Takings’ Case Law Does Not Support Treating REC Double**
19 **Counting as a Compensable Property Taking.**

20 In *Lingle v. Chevron U.S.A., Inc.*, the United States Supreme Court summarized
21 its current regulatory takings jurisprudence, identifying the limited circumstances in
22 which regulatory action could constitute a compensable property taking: (i) if the
23 regulatory action physically invades the property in question; (ii) if the regulatory action
24 has sufficient economic impact, and in particular, interferes with distinct investment-
25 backed expectations; or (iii) if the regulatory action deprives the property owner of all
26 economically beneficial use associated with the property in question.⁴ Even assuming

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² See A.A.C. R14-2-1803.

28 ³ A.A.C. R14-2-1803(C).

⁴ 544 U.S. 528, 537-38, 125 S.Ct. 2074, 2081-82 (2005).

1 that DE RECs constitute property under Arizona law, and that it was Commission
2 action, and not CRS interpreting its own rules, that caused double counting, none of
3 these circumstances exist.

4 Double counting cannot physically invade RECs because RECs are intangible. In
5 addition, double counting could not interfere with investment-backed expectations if any
6 Commission action only applied prospectively. After a finding that double counting
7 would occur, any customer decision to nonetheless install DE would necessarily be
8 made despite, and in light of, the possibility of double counting.

9 The final circumstance concerning the complete deprivation of all economically
10 beneficial use is similarly not a basis for a compensable property taking. It is not clear
11 how double counting could “take” all beneficial use of a REC. Testimony in this
12 proceeding suggested that the primary effect of double counting would be to preclude
13 the ability of DE REC owners to sell those DE RECs into a market. But that assumes a
14 DE REC market exists. Although parties have referenced the existence of a voluntary
15 REC market in Arizona, those references concern utility-scale RECs, not DE RECs. The
16 difference is pivotal; without a DE REC market in Arizona, the double counting of DE
17 RECs in Arizona cannot deprive REC owners of the ability to sell those DE RECs.

18 And even if a DE REC market exists, limiting the ability of DE REC owners to
19 sell into that market is not necessarily a compensable property taking. “[L]oss of future
20 profits—unaccompanied by any physical property restriction—provides a slender reed
21 upon which to rest a takings claim.”⁵ The existence of any other possible use of the REC
22 would preclude the finding of a compensable property taking. For instance, in *Andrus*,
23 Congress passed a law restricting, among other items, the sale, transportation and
24 purchase of eagle feathers, and prohibited commercial transactions involving eagle
25 feathers existing before the law was passed.⁶ The district court held that the prohibition
26 on pre-existing eagle feathers constituted a compensable property taking because it

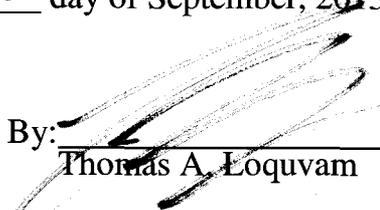
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28 ⁵ *Andrus v. Allard*, 444 U.S. 51, 67, 100 S.Ct. 318, 327 (1979).

⁶ *Id.* at 54, 100 S.Ct. at 321.

1 wholly deprived property owners of their right to sell the feathers, but the United States
2 Supreme Court reversed.

3 In reversing, the Court held that the restriction on the sale only deprived the
4 property owners of one "strand" in the bundle of property rights.⁷ Although selling the
5 feathers might have been the most profitable use of the feathers, the owners could still
6 find other uses for the feathers that did not involve selling them.⁸ The mere loss of future
7 profits was insufficient to sustain a takings claim. Similarly, double counting would only
8 limit the ability of DE REC owners to sell those RECs into a market. Other possible uses
9 for the RECs, however, could exist. If any other possible use exists, such as using those
10 RECs to satisfy internal environmental goals, *Andrus* suggests that no taking would
11 occur.

12 RESPECTFULLY SUBMITTED this 13 day of September, 2013.

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15 By: 

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16 Attorney for Arizona Public Service Company

17 ORIGINAL and thirteen (13) copies
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19 September, 2013, with:

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⁷ *Id.* at 65-66, 100 S.Ct. at 327.

⁸ *Id.*

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