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BEFORE THE ARIZONA CORPORATION COMMISSION

SUSAN BITTER SMITH, CHAIRMAN
BOB STUMP, COMMISSIONER
BOB BURNS, COMMISSIONER
TOM FORESE, COMMISSIONER
DOUG LITTLE, COMMISSIONER

IN THE MATTER OF THE APPLICATION OF ARIZONA PUBLIC SERVICE COMPANY FOR APPROVAL OF NET METERING COST SHIFT SOLUTION.	**DOCKET NO. E-01345A-13-0248** **THE ALLIANCE FOR SOLAR CHOICE'S (TASC) APPLICATION FOR REHEARING**

INTRODUCTION

Pursuant to A.R.S. § 40-253 and A.A.C. § R14-3-111, The Alliance for Solar Choice ("TASC") hereby applies for a rehearing of the Commission's Decision 75251 ("Decision 75251" or the "Decision") ordering that, "a hearing on the Reset Application [by APS] shall be conducted" outside of the next APS rate case.[1] In essence, the Commission's Decision is a determination that a rate increase can occur outside of a normal rate case. As set forth below, such a determination violates Arizona's constitutional prohibition against single issue ratemaking and is grounds for rehearing. Further, Decision 75251 is legally deficient for a number of other reasons described herein, including that the requested rate increase violates Arizona's equal protection and non-discrimination laws, and the Decision was made by Commissioners who should have recused themselves from this matter or, at a minimum, disclosed their actual and perceived conflicts of

[1] In adopting the Decision, the Commission directly contravened the separate recommendations of Staff and Judge Jibilian that the Reset Application should be dismissed and decided as part of a general rate case. The Commission also adopted Decision 75251 over the objections of Chairman Bitter Smith and Commissioner Burns. The Decision, therefore, was made by three Commissioners: Commissioner Stump, Commissioner Little, and Commissioner Forese.

interest or bias prior to rendering their votes. Finally, the Commission made fundamental mistakes concerning the potential impact of the relief APS seeks on non-solar ratepayers and, as a result, the Commission cannot justify the Decision as being in the public interest.

Simply put, the Commission cannot lawfully grant APS's Reset Application, at least not at this juncture and not without the recusal of certain Commissioners, and therefore the Commission's Decision to hold a hearing on the Reset Application is improper and unjust. Accordingly, the Commission should grant TASC's Application for Rehearing and convene a rehearing. Further, in its discretion under A.R.S. § 40-253, the Commission should "abrogate, change, or modify" Decision 75251 to deny a hearing on the proposed rate increase outside a full rate case proceeding and to dismiss the Reset Application.

FACTUAL BACKGROUND

TASC incorporates by reference all filings and exhibits in this Docket and, for the sake of efficiency, does not repeat the general facts or procedural posture of this matter here. For purposes of its Application for Rehearing, however, TASC highlights the following salient facts:

- On April 2, 2015, Arizona Public Service Company ("APS") filed with the Commission a request that the Lost Fixed Cost Recovery ("LFCR') mechanism adjustment be reset from $.70 per kW to $3 per kW, effective August 1, 2015 (the "Reset Application"). [Decision, Findings of Fact ("FOF") ¶¶ 1, 85.]
- The LFCR was previously increased for all new residential distributed generation ("DG") solar customers by Decision 74202 on December 3, 2013[2] (the "2013 Decision").
- On April 17, 2015, Staff filed a Request for Procedural Order in which it stated that "the cross-subsidy issue raised by the Reset Application 'has explicit public policy consideration, and therefore would be most appropriately addressed in the setting of a general rate case.'" [Decision, FOF ¶ 87.] Staff further recommended that "APS withdraw the Reset Application so that the Commission may consider the matters more holistically in a rate case" [*Id.*]

[2] See Decision 74202, December 3, 2013.

- Staff has also explained that, "handling the recovery of lost fixed costs in APS's upcoming rate case will promote efficiency and conserve Staff and Commission resources, and that cost savings and other benefits associated with DG could be considered in a rate case." [*Id.* at ¶ 158.]
- The Recommended Opinion and Order ("ROO") of Administrative Law Judge Teena Jibilian concluded that, "[t]he issues raised by the Rest Application are rate design issues which will be more reasonably and appropriately dealt with in the context of a full rate case proceeding." [ROO, Conclusion of Law ("COL") ¶ 3.]
- Judge Jibilian also concluded that, "[d]ue to the nature of the issues raised by the Reset Application, it is not in the public interest to make a determination on the Reset Application outside a full rate case proceeding, and the Reset Application should therefore be dismissed." [*Id.* at ¶ 4.]
- Indeed, the Commission recognized in its Decision the following: "APS intends to file a full rate case in less than one year. In that rate proceeding, the issues surrounding the appropriate means for APS to recover its fixed costs in the face of reduced kWh usage will be fully examined. APS's cost of service will be determined, and an appropriate rate design will be developed that will allow APS to recover its costs." [Decision, FOF ¶ 163.]
- Yet, without any legal analysis or detailed conclusions of law, the Commission rejected Staff's and Judge Jibilian's recommendations that the Resest Application be dismissed.
- Instead, the Commission ordered that, "a hearing on the Reset Application shall be conducted and the Hearing Division shall schedule a procedural conference for the purposes of setting dates and other related matters." [Decision at p. 33.]
- The Commission entered its Order over the objections of Chairman Bitter Smith and Commissioner Burns. Both submitted formal Dissents in which they stated their opinions that the Reset Application should not be decided outside of a general rate case. [Dissent by Chairman Susan Bitter Smith dated 8/24/15 and Dissent by Commissioner Bob Burns dated 8/28/15.]

- There has been significant discussion and debate by the Commission regarding whether it is proper for regulated entities to make contributions or expenditures to influence Commission elections. [*See, e.g.* Commissioner Letters filed in Docket No. AU-00000A-15-0309.]
- Indeed, this issue relates to actual and perceived conflicts of issue arising out of APS's parent's significant contributions to entities that advocated for the election of several Commissioners in the 2014 election.
- The Commissioners who directly or indirectly benefitted from APS's spending in the 2014 election are Commissioner Stump, Commissioner Little, and Commissioner Forese. These are the same three Commissioners who voted to adopt Decision 75251 and reject the ROO.

LEGAL ARGUMENT

I. The Relief Sought by the Reset Application is Unconstitutional, Rendering Moot the Proceeding Ordered by the Commission in Decision 75251

In its Reset Application, APS requests that the LFCR adjustment for certain solar DG customers be reset, from $.70 per kW to $3 per kW. This proposal, if granted, would violate the Arizona Constitution. The constitutional flaws are twofold, and neither of them can be rectified by the proceeding ordered by Decision 75251. Thus, Decision 75251 ordered hearings on a proposal that cannot be lawfully approved.

First, APS's proposal constitutes single-issue ratemaking in violation of the Arizona Constitution. *See Scates v. Arizona Corp. Commission.*[3] APS's proposal seeks to permit an incremental charge that would violate the fair value determination requirements, conduct expressly precluded by the recent decision in *Residential Util. Consumer Office v. Ariz. Corp. Comm'n*, 719 Ariz. Adv. Rep. 5, ¶ 20 (App. 2015). Second, the Reset Application seeks to violate Arizona's equal protection guarantees. Because the existing LFCR and DG surcharge run afoul of the Constitution's requirements, APS cannot utilize either of them as a basis for the relief it now seeks. Accordingly, the Commission should reconsider its order to hold a hearing on the Reset

[3] *Scates v. Arizona Corp. Commission*, 578 P.2d 612, 615 (Ariz. Ct. App. 1978) (citing Ariz. Const. art. 15, § 14).

Application, dismiss the Reset Application, and address these issues in APS's upcoming full rate case proceeding.

A. The Existing LFCR and its DG Surcharge Component Constitute Unconstitutional Single Issue Ratemaking.

Both APS's LFCR and the existing DG surcharge billed through the LFCR are the result of unconstitutional single issue ratemaking. TASC does not seek modifications to the Commission's prior decisions authorizing the LFCR and the existing surcharge at this juncture (although it reserves its right to do so). However, the Commission lacks the authority to permit APS to add additional charges to, or reset, a mechanism that itself already exists outside the bounds of Arizona's Constitution.

Unconstitutional single-issue ratemaking occurs when utility rates or rate schedules are adjusted outside a general rate case in response to a change in a single cost item considered in isolation. In *Scates*, Mountain States Telephone and Telegraph Company sought to increase rates for the installation, moving, and changing of telephones, without an examination of the company's other costs and revenues.[4] As the *Scates* court recognized,[5] considering some costs in isolation without considering the fair value of utility property at the time of a rate adjustment might result in the Commission allowing a utility to increase rates to recover higher costs in one area without recognizing counterbalancing savings in another. Such single-issue ratemaking is unsound regulatory policy, and impermissible under the Arizona Constitution. Yet that is precisely what APS proposes here, and the proceeding contemplated by Decision 75251 would do nothing to rectify this constitutional infirmity.

The LFCR mechanism was created pursuant to the Settlement Agreement that resolved APS's last rate case, memorialized in Decision 73183. The Settlement Agreement provides that the LFCR will be modified on an annual basis to compensate APS for unrecovered transmission and distribution costs that the utility allegedly incurs when its customers utilize distributed

[4] *Id.* at 614 ("The increase affected charges for all installation, moving and changing of telephones within the State of Arizona. It amounted to an annual rise in revenue to Mountain States of approximately 4.9 million dollars, representing about two percent of its entire annual revenue in the state.").

[5] *Id.* ("The Commission approved the increase without any examination of the costs of the utility apart from the affected services, without any determination of the utility's investment, and without any inquiry into the effect of this substantial increase upon Mountain States' rate of return on that investment.").

generation and energy efficiency to reduce their consumption of utility generated power.[6] Since it was created, the LFCR has been increased for all residential customers three times as a result of the annual modification process.[7] Further, the LFCR was increased for all new residential DG solar customers on one occasion,[8] while APS currently seeks an additional increase of the DG surcharge through the hearing approved in Decision 75251.

None of the three annual modifications or the one DG surcharge creation were approved within the confines of a rate case. Although APS has been authorized to recover approximately $68.88 million through the LFCR through the end of 2015, the Commission has never performed the constitutionally required fair valuation examination along with any of the LFCR increases.

Without the constitutionally required investigation, it is impossible for the Commission to determine that the three LFCR increases and the DG surcharge creation were legally appropriate. In fact, it is possible that APS has been granted these increases in the LFCR while the utility has been overearning.

B. Raising the LFCR Requires a Fair Value Finding That Has Never Been Made.

The Commission approved the LFCR mechanism in Decision 73183 by adopting a Settlement Agreement that resolved APS's last rate case. Decision 73183 specifically provides that the LFCR will adjust "annually to account for the unrecovered costs associated with a portion of distribution and transmission costs resulting from EE programs as demonstrated by the Measurement, Evaluation and Reporting ('MER') conducted for EE programs and from DG as demonstrated pursuant to the means described in Section 9.5 [of the Settlement Agreement]."[9] Since the Commission issued Decision 73183, it has increased the LFCR for all residential customers on three occasions, all in accordance with the annual modification process established in the Settlement Agreement and Decision 73183.[10]

In addition, on December 3, 2013, the Commission modified the LFCR mechanism outside an APS rate case and the annual adjustment process to impose a new surcharge on new residential

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[6] See, Settlement Agreement at Section 9.4.
[7] See, Decision 73732, February 20, 2013; Decision 74394, March 19, 2014; Decision 74994, March 16, 2015.
[8] See, Decision 74202, December 3, 2013.
[9] See, Decision 73183, page 40, lines 16-22.
[10] See, Decision 73732, February 20, 2013; Decision 74394, March 19, 2014; Decision 74994, March 16, 2015.

DG customers (the "2013 Decision").[11] The Commission's 2013 Decision based the solar surcharge "on the difference between APS's cost for purchasing a DG customer's excess generation, and its cost to purchase an equivalent amount of energy from a wholesale PPA."[12]

The December 3, 2013 modification to the LFCR was not in keeping with the intent, timing or methodology for LFCR adjustments established in APS's last rate case. The Commission expressly adopted the LFCR mechanism in APS's last rate case as a means to "allow APS to recover certain verified lost fixed costs due to reduced sales from Commission-approved energy efficiency and distributed generation programs."[13] In contrast, the 2013 Decision modified the LFCR specifically to impose a surcharge on DG customers to address what APS alleged was a cost shift "resulting from the proliferation of solar installations on residential rooftops."[14] No hearing was held prior to the Commission's issuance of the 2013 Decision, meaning that no evidence existed in the record to support an adjustment to the LFCR methodology or to impose a surcharge on DG customers in the amount approved by the Commission.

APS now seeks to impose a second adjustment to the LFCR in a single year, which is not in keeping with the annual LFCR adjustment mechanism the Commission adopted in APS's last rate case. APS specifically proposes to increase the amount of the surcharge the Commission approved in the 2013 Decision. Decision 75251, unconstitutionally grants APS's Motion and sets this issue for hearing.

None of the three annual modifications, the modification of the LFCR mechanism, or the approval of a DG surcharge creation were approved within the confines of a rate case. Based on the Commission's approval of three separate LFCR rate increases since 2013, APS has been authorized to recover approximately $68.88 million through the LFCR through the end of 2015. Importantly, the Commission has never performed a constitutionally required fair valuation examination along with any of the LFCR increases. As a consequence, the Commission has not considered whether any of these rate adjustments might result in APS increasing rates to recover

[11] See, Decision 74202, December 3, 2013.
[12] See, Decision 74202, page 18, lines 14-17.
[13] See, Decision 73183, page 39, lines 5-6.
[14] See, Decision 74202, page 23, lines8-10

higher costs in one area without recognizing counterbalancing savings in another. As such, all of these rate adjustments were violated Arizona's constitutional rate setting requirements.

The Arizona Constitution requires a fair value determination before the Commission may raise a utility rate. The Court of Appeals has found that "[s]urcharges trigger the constitutional requirement for a fair value determination."[15] This requirement applies to any increase in the amount collected under the LFCR. "[A]scertaining the fair value of property of public service corporations is a necessary step in prescribing just and reasonable classifications, rates, and charges."[16] Moreover, in the context of a regulated monopoly, such as APS, "the Commission must both determine and use fair value" in determining utility rates.[17]

Without the full constitutionally required investigation, it is impossible for the Commission to determine that any of the three LFCR increases or the DG surcharge creation are legally appropriate. In fact, it is possible that APS has been granted these increases in the LFCR even though the utility has been overearning. Unless some exception applies, the LFCR surcharge could not have been legally adjusted without a corresponding fair value determination.

1. No Exception Excuses the Lack of a Fair Value Determination when Raising the LFCR.

Arizona's appellate courts have recognized only two narrow exceptions to the constitutional requirement that the Commission determine the fair value of a utility's property when setting rates: (1) automatic adjustor clauses and (2) interim rates.[18] As explained in the following two Sections, neither of these narrow exceptions apply.

a. The LFCR is Not an Adjuster Mechanism

When the Commission approved the DG surcharge in the 2013 Decision, the Commission stated: "Our order in Decision No. 73183 adopted the LFCR as proposed, and our adoptions thereof

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[15] *Residential Util. Consumer Office v. Ariz. Corp. Comm'n*, 719 Ariz. Adv. Rep. 5, ¶ 20 (App. 2015); *see also Residential Util. Consumer Office v. Ariz. Corp. Comm'n,* 199 Ariz. 588, 589, ¶ 1, 20 P.3d 1169, 1170 (App. 2001).

[16] *Ethington v. Wright*, 66 Ariz. 382, 392, 189 P.2d 209, 216 (1948) *see also Ariz. Corp. Comm'n v. Ariz. Pub. Serv. Co.*, 113 Ariz. 368, 370, 555 P.2d 326, 328 (1976) ("[T]he Commission is required to find the fair value of the company's property and use such finding as a rate base for the purpose of determining what are just and reasonable rates.")

[17] *RUCO*, 719 Ariz. Adv. Rep. 5 at ¶ 47.

[18] *RUCO*, 719 Ariz. Adv. Rep. 5 at ¶ 21; *see also RUCO*, 199 Ariz. at 589, 20 P.3d at 1170. ("Absent a valid automatic adjustor mechanism or interim rate, the Commission cannot impose a rate surcharge based on a specific cost increase without first determining a utility's fair value rate base").

was based on our understanding that the LFCR is an adjustor mechanism, subject to adjustments and mid-course corrections between rate cases."[19] In rejecting a similar mechanism in *RUCO*, the Arizona Appeals Court observed, "If ever there was a situation 'fraught with potential abuse,' it occurs when the Commission of its own volition has the ability to declare any rate increase an 'automatic adjustment.'"[20] Such is the case here.

The purpose of an automatic adjustor mechanism is to pass on to customers changes in specific operating expenses that fluctuate between rate cases, such as wholesale gas or electricity prices, that are outside of a public service company's control.[21] This exception does not apply to the LFCR. By definition, the LFCR seeks to recover reductions in contributions to APS "fixed costs" due to reduced kWh sales arising from EE and DG.[22] The "fixed costs" sought to be recovered through the LFCR are associated with capital expenditures, rather than narrowly defined operating expenditures that naturally fluctuate. The Appeals Court in *RUCO* struck down a similar Commission-approved surcharge on the grounds that it attempted to recoup capital expenditures between rate cases rather than naturally fluctuating operating costs.[23]

While adjuster mechanisms are designed to pay utilities back for certain volatile fluctuations in costs without increasing their revenue, the LFCR simply increases utility revenue without considering counterbalancing savings in other areas of utility operations. Such a mechanism impermissibly allows APS to earn more money between rate cases without regard for any operating expenses and therefore stands in derogation of State constitutional requirements that the Commission must base rates and rate modifications on a fair value determination at the time rates are set.

b. The LFCR is Not an Interim Rate

The interim rate exception also does not apply. The interim rate exception is "limited to circumstances in which: (1) an emergency exists; (2) a bond is posted by the utility guaranteeing

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[19] *See*, Decision 74202, page 27, line 28 to page 28, line 1.
[20] *RUCO*, 719 Ariz. Adv. Rep. 5 at ¶ 22 and 25.
[21] *See id* at ¶ 23.
[22] *See* Decision No. 75251, page 31, lines 2-6 (the LFCR "gives APS the opportunity to recover a portion of the distribution and transmission costs associated with those residential, commercial and industrial customers' verified lost kWh sales attributable to EE and DG requirements").
[23] *RUCO*, 719 Ariz. Adv. Rep. 5 at ¶ 25.

a refund to customers if interim rates paid are higher than the final rates determined by the Commission; and (3) the Commission undertakes to determine final rates after valuation of the utility's property."[24] None of these requirements have been met.

None of the three modifications of the LFCR occurring since the last rate case have alleged or been approved citing any emergency and no bond has ever been posted as required in an emergency situation.[25] Clearly, the LFCR cannot be characterized as an interim rate.

C. Creating and Raising the DG Surcharge Requires a Fair Value Determination that was Not Made.

Just like the LFCR itself, the DG surcharge billed through the LFCR has been created in violation of the requirement for a fair value examination and finding and represents unconstitutional single issue ratemaking. In fact, the Commission acknowledged that a fair value examination was required in reaching its 2013 Decision creating the DG surcharge,[26] concluding that the Arizona Constitution "requires the Commission to ascertain the utility's fair value and to consider the impact of any rate increase upon the utility's rate of return.[27]" However, the Commission did not engage in a constitutionally sufficient fair value examination, rendering the current DG surcharge unconstitutional.

1. The Fair Value Investigation Performed when the DG Surcharge was Created was Insufficient.

When the Commission issued the 2013 Decision (officially dated December 3, 2013) the Commission improperly relied on fair value rate base and fair value rate of return findings it had adopted in APS's last rate case.[28] That fair value "finding" was not the product of any discussion or analysis during the pendency of that action. In fact, the idea of making a fair value determination was introduced *for the first time* less than 24 hours prior to the commencement of the hearing itself when then-Chairman Stump docketed *Chairman Stump's Proposed Amendment #2* (the "Stump

[24] *RUCO*, 199 Ariz. at 591, ¶ 12, 20 P.3d at 1172.
[25] *See*, Decision 73732, Decision 74394, and Decision 74994.
[26] Note that no such determination has ever been made for the LFCR increases despite the ACC acknowledging its necessity in order to legally raise the surcharge.
[27] Decision No. 74202 ("2013 Decision"), page 26, lines 21-22.
[28] *See* Decision No. 74202, page 28, lines 23-24.

Amendment") at 4:42 pm on November 12, 2013, the evening before the hearing.[29] The Stump Amendment proposed, and the Commission approved, the use of APS's fair value rate base and fair value rate of return calculated in its previous rate case on May 24, 2012.[30] When the Commission created the DG surcharge in the 2013 Decision, the fair value rate base and fair value rate of return findings it relied upon were based on an out of date 2010 test year.

The recent decision in *RUCO,* Ariz. Adv. Rep. 5, ¶ 42 confirmed that reliance on valuation factors from a past rate case is "inconsistent with the mandate that the Commission perform a fair value determination 'at the time of inquiry.'"[31]

Thus, it is clear that it was unconstitutional for the Commission to have relied on its fair value findings from APS's last rate case when it issued the 2013 Decision, and it would be even more egregious for the Commission to rely on those findings for a future adjustment to the DG surcharge. Without a proper fair value determination, the LFCR and DG surcharge imposition violates the Constitution unless it falls within one of the two judicially recognized exceptions.

2. No Exception Excuses the Lack of a Fair Value Determination.

As discussed above, Arizona's appellate courts recognize only two narrow exceptions to the constitutional requirement that the Commission determine the fair value of a utility's property when setting rates: (1) automatic adjustor clauses and (2) interim rates.[32] For the following reasons, neither of these narrow exceptions applies here.

a. The DG Surcharge is Not an Adjuster Mechanism

The Appeals Court in *RUCO* stressed that adjustor mechanisms must allow rates to adjust automatically, *either up or down.*[33] In addition, adjustor mechanisms adjust rates automatically

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[29] The Stump Amendment is available via Docket Control, in the official records of the Commission. TASC asks that judicial notice be given to all documents referred to that are found in the official records of the Arizona Corporation Commission.

[30] *See* Decision No. 73183, page 46, lines 1-15.

[31] *See also Ariz. Corp. Comm'n v. Ariz. Water Co.,* 85 Ariz. 198, 201-02, 335 P.2d 412, 414-15 (1959) ("A reasonable judgment concerning all relevant factors is required in determining the fair value of the properties at the time of inquiry. If the Commission abuses its discretion in considering these factors or if it refuses to consider all the relevant factors, the fair value of the properties cannot have been determined under our Constitution.")

[32] *RUCO*, 719 Ariz. Adv. Rep. 5 at ¶ 21; *see also RUCO*, 199 Ariz. at 589, 20 P.3d at 1170. ("Absent a valid automatic adjustor mechanism or interim rate, the Commission cannot impose a rate surcharge based on a specific cost increase without first determining a utility's fair value rate base").

[33] *Id.*at ¶ 21

pursuant to a formula established in a rate proceeding.[34] In stark contrast, the Commission's 2013 Decision institutes what the Commission clearly defines as a "fixed charge"[35] (not a charge that automatically adjusts up or down). The Commission also imposed this charge by modifying, as opposed to utilizing, the LFCR mechanism it approved in APS's last rate case. As discussed above, the Commission's modification to the LFCR mechanism in the 2013 Decision was not in keeping with the timing, the intent or the methodology the Commission adopted in APS's last rate case for the LFCR.[36] The Commission's characterization of the LFCR as "defective" in the 2013 Decision[37] is entirely insufficient to rescue the Commission's unconstitutional action. Neither the LFCR methodology nor the adjustments the Commission made to it in the 2013 Decision have a legitimate claim to acting as an acceptable adjustor mechanism under the Arizona Constitution.

b. The Interim Rate Exception Does Not Apply to the DG Surcharge

The DG surcharge also cannot be characterized as an interim rate. The 2013 Decision did not find that an emergency existed. Rather, the 2013 Decision concluded that "a defect in the method for allocating the revenue spread in the LFCR is an 'extraordinary event'...."[38] However, Arizona courts do not recognize an "extraordinary event" exception to the constitutional requirement to determine fair value as a prerequisite to approving rate increases or surcharges. In fact, the Arizona appeals court in *RUCO* expressly rejected the Commission's argument that such an exception exists.[39] This demonstrates that the unconstitutionality of the 2013 Decision is not excused by pointing to an imaginary "extraordinary event."

Moreover, no emergency can be claimed to justify an additional adjustment to the LFCR before APS's next rate case. As the appeals court observed in *RUCO*: "The word 'emergency' has a well understood meaning. It is defined as: 'An unforeseen combination of circumstances which

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[34] *Id.*

[35] See, Decision 74202, page 23, line 26.

[36] See, Decision 74202, page 25, lines 16-18 ("Decision 73183 (and the Plan of Administration for the LFCR approved therein) set forth a specific method for calculating the yearly dollar amounts to be recovered by the LFCR ('hereinafter referred to as 'annual LFCR revenue').")

[37] See Decision 74202, page 26, line 3.

[38] Decision No. 74202, page 29, lines 3-4.

[39] *See RUCO*, 719 Ariz. Adv. Rep. 5 at ¶ 45 (App. 2015) ("Nor do we agree that *Scates* authorizes a rate increase without a fair value determination based on 'exceptional circumstances,' as the Commission and [Arizona Water Company] suggest.")

call for immediate action.'"[40] As noted above, no mention of an emergency can be found in the 2013 Decision, and no mention of an emergency can be found in the Commission's recent Decision 75251 authorizing a possible further adjustment to the LFCR for the second time this year.[41] As TASC fully briefed, the LFCR is working exactly as designed in the last rate case and recovering well below its cap. This is certainly not an emergency.

D. The Commission Cannot Authorize the Increase of a Charge that is Already Unconstitutional and Billed through a Device that Itself is Unconstitutional.

As demonstrated above, the LFCR and the DG surcharge both violate the Arizona Constitution. It follows then that it is unconstitutional for the Commission to grant the relief requested in APS's Motion to Reset the DG surcharge. Decision 75251 wrongfully authorizes a hearing on a request that cannot legally be granted. The Commission does not process cases and continue investigations that can only lead to an unconstitutional result.

It is well established that judicial bodies do not pursue hearings where the relief requested would be illegal or unconstitutional.[42] A tribunal in this state may not conduct a hearing or threaten to proceed when it lacks jurisdiction to award the relief requested.[43] Arizona Courts enforce this so rigorously that they invoke the extraordinary remedy of special action relief to terminate such unlawful proceedings.[44]

Just two years ago the Commission was faced with this exact situation and closed a docket rather than pursue it after realizing that it could lead only to an unconstitutional result. On September 11, 2013, the Commission abruptly and immediately halted its investigation of ways to create a competitive market for electricity in Arizona and directed closure of Docket E-00000W-13-0135 (the "Retail Competition Docket"). The Commission (with current Commissioners Stump and Bitter Smith agreeing) cited legal advice from Commission attorney Janice Alward and voted 4-1 to close the Retail Competition Docket upon being informed that the outcome being

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[40] *RUCO*, 719 Ariz. Adv. Rep. 5 at ¶ 32 (internal citation omitted).
[41] *See, e.g.,* Decision No. 75251, page 31, lines 2-11.
[42] *See Republic Inv. Fund I v. Town of Surprise*, 166 Ariz. 143, 151, 800 P.2d 1251, 1259 (1990) (approving dismissal of de-annexation petition because de-annexation petition was based on special law that violated state constitution).
[43] *See Kadera v. Super. Ct.*, 187 Ariz. 557, 559, 931 P.2d 1067, 1069 (App. 1996).
[44] *See, id.*

pursued was unconstitutional. In fact, then-Chairman Stump made it clear that his vote was "strictly on the threshold of the constitutional impediments, as I see it, and others see it, in light of the legal advice I received."[45] At the time, the Commission was directed by Ms. Alward that it should close the Retail Competition Docket to send a signal "that electric retail competition has met some threshold [constitutional] impediments."[46]

Just as in the Retail Competition Docket, the proposed increase to the DG surcharge has encountered threshold constitutional impediments given that the existing charge itself and the LFCR through which it is billed are unconstitutional. Under Arizona law, and in accordance with Commission precedent, it is time to dismiss this matter, not set it for hearing as ordered in the Decision.

E. The LFCR Disadvantages DG Solar Customers and Creates Different Classes of Citizen Ratepayers.

The Arizona Constitution and the Fourteenth Amendment to the United States Constitution guarantee equal protection to all citizens of the State. Specifically, Article II, Section 13 of the Arizona Constitution provides that, "No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." Further, the statutes governing public service corporations expressly prohibit "[d]iscrimination between persons, localities or classes of service as to rates, charges, service or facilities." *See* A.R.S. § 40-334 ("A public service corporation shall not, as to rates, charges, service, facilities or in any other respect, make or grant any preference or advantage to any person or subject any person to any prejudice or disadvantage....No public service corporation shall establish or maintain any unreasonable difference as to rates, charges, service, facilities or in any other respect, either between localities or between classes of service.")

Here, the DG surcharge illegally creates artificial classes of APS customers: those who utilize DG solar on the customer side of the electric meter to reduce their consumption of APS

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[45] Commission Staff Meeting, September 11, 2015, http://azcc.granicus.com/MediaPlayer.php?view_id=3&clip_id=1169 at 29:10.
[46] Id at 23:20

provided power and those that are permitted to implement nearly any other measure (aside from DG solar) on the customer side of the meter to reduce their consumption of utility power. In the first case, the DG solar customer is subjected to the DG surcharge while in the second case, there is no fee or charge to the customer.

In addition, the proposal seeks to further draw arbitrary lines between artificially created customer classes: on the one hand there will be customers with DG solar who are not permitted to avoid paying the full cost of their service[47] (as APS alleges and TASC disputes) while on the other hand there will be all other customers who, for a number of reasons may pay less than their cost of service. In the first case, DG customers will be fined or subject to charges based on the accusation that they are not paying their cost of service while in the second case, hundreds of thousands of APS customers pay less than their cost of service without any fines or charges levied. Judge Jibilian's Recommended Opinion and Order (the "ROO") recognized the problem and stated, "[i]mportantly, while APS's January 2015 LFCR filing showed that EE accounted for a greater percentage of the cost shift than DG, the Reset Application proposal fails to address any cost shifting to non-DG customers by EE customers."[48]

There is no compelling, or even rational, justification for the Reset Application's discriminatory treatment of DG solar customers as opposed to other customers who utilize energy efficiency measures other than DG solar or who otherwise might pay below their cost of service. Instead, the Reset Application's request to increase rates appears to be for the purpose of disadvantaging (and, therefore, deterring) new DG solar customers, thereby increasing or preserving revenues for APS. That purpose fails the rational-basis test that governs compliance with Arizona's equal protection clause as well as the Fourteenth Amendment.

Further, the Reset Application violates A.R.S. § 40-334 because it seeks to "grant [a] preference or advantage to [certain] person[s] or subject[s] [certain] person[s] to [] prejudice or disadvantage." Because the Reset Application requests relief that violates the Arizona and the

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[47] For the sake of clarity, TASC does not agree that DG customers fail to pay or provide value in excess of the cost to serve them.

[48] ROO at ¶ 162

U.S. Constitution, as well as statutes governing public service corporations, it should be dismissed and the Commission's Decision to do otherwise is erroneous.

II. Decision 75251 is Based Upon Material Misrepresentations of Fact by the Applicant and Factual Errors by the Commission

Decision 75251 is based on a significant mistake of fact that undermines any justification for moving forward outside of a rate hearing. Once this mistake is corrected, it becomes impossible to justify the Decision. While APS pushed the idea that granting its increased DG surcharge could save non-DG ratepayers upwards of $3 million over the first year,[49] the reality is that this increased charge is likely to save non-DG ratepayers less than $10,000 *total* before new rates go into effect and will only have any positive impact on ratepayer's bills for a three month period in 2017. As a result of the timing of: 1) the hearing in this matter concluding in June, 2016; 2) the first DG solar customers exposed to this new charge getting their first bills in November, 2016; 3) the first LFCR reset that positively impacts ratepayers without DG solar occurring in March of 2017 with billing to commence in April, 2017; and 4) the likely effective date for new rates from the upcoming APS rate case being July, 2017, non DG ratepayers likely will only be exposed to the benefit of an increased DG surcharge for the months of April, May, and June of 2017. In addition, the total amount to be redistributed from DG solar customers to non-DG customers in those three months is likely to be under $10,000.

A review of the timeline exposes the mistakes that were made about the ability of this process to provide any sort of relief to non-DG ratepayers. Assuming that this hearing would conclude in June, 2016, the DG surcharge could not be levied on any new DG customers until the July billing cycle of 2016. However, because the new charge would only apply to systems that had not already signed a contract with a solar installer and an interconnection agreement with the utility, the first systems subject to the increased DG surcharge would likely not be built, energized and billed the new charge until November, 2016.[50] As a result, and using historical precedent as

[49] See Arizona Public Service Company's Response To Staff's Request For Procedural Order at p.2.

[50] In fact, while the DG surcharge was first approved in December, 2013, the first new solar customers subject to the charge were not billed until their May, 2015 billings, a full five months after the increase was approved. *See* APS Quarterly Report filed January 15, 2015 in this Docket.

a guide, the first DG solar customers paying the new charge would not commence paying the new charge until November, 2016.

While APS will collect the increased solar fee starting in November, 2016, it will not make a corresponding reduction to the LFCR responsibilities of non-DG customers until it processes its annual LFCR modification. The 2015 annual LFCR modification reflecting 2014 lost fixed costs and balancing account true-up was approved in Decision 74994 on March 16, 2015 and would have only impacted ratepayer billing as of April, 2015. This means that were the increased charge approved in the hearing in this matter, it can be expected that the earliest any non-DG ratepayers will see any reduction in their bills attributable to the increased charge would be in April, 2017.

The rate relief that would commence in April, 2017 would include credit for the DG surcharge recovered from new DG solar ratepayers in 2016 only. That relief would last only until rates were reset in the APS rate case, which has been ordered to be filed in June, 2016 with likely new rates in place in July, 2017. All together then, non-DG customers can expect to receive the benefit of the outcome of this hearing for all of *three months* between April and June of 2017 and not for a year or more as APS has represented.

It is not only the length of time of benefit to non-DG ratepayers but the magnitude of that benefit itself that has been grossly exaggerated. The following chart uses historical data to illustrate the potential revenue that could be collected through the increased DG surcharge being billed for the first time at the end of 2016 that would be applied for the benefit of the non-DG customers through the annual LFCR modification beginning on April, 2017 bills. Note that this chart assumes the exact same rate of adoption[51] of solar will occur following an increase to an average $21/month charge as followed the previous institution of the average $4.90/month charge.[52] Historical precedent says that if a decision is entered in June, the first bills for new customers subject to the increased charge will not go out until November.

[51] All assumptions are pulled directly from Table 2 of APS Quarterly Report filed January 15, 2015 in this Docket.
[52] Note that there is no reason to believe that the market for solar would not be slowed to a significantly greater extent by a $21/month charge than it was by a $4.90/month charge but for the sake of this example TASC will utilize the higher adoption rate to allow a historically consistent comparison.

Month -2016	Number of solar customers receiving bills for new DG surcharge per month	Amount billed in total per month for DG surcharge using $21 average.
November	685	$14,385
December	1,056	$22,176
2016 Total:		$36,561

This chart demonstrates that, assuming the same rate of solar adoption follows this increase that followed the previous increase (TASC believes there will be no viable solar market at all if the increase to $21/month is granted) a total of $36,561 would be collected in 2016 that could be used to lower the bills of non-DG customers in 2017. On an annual basis, this mean that APS's 1.1 million residential customers would see their total bills reduced in 2017 by roughly 3 cents per year *total* as a result of the approval of the increased DG surcharge in June of 2016. However, that $36,561 would be credited on a monthly, prorated basis to non-DG customers. As a result, for the months of April, May, and June of 2017 (the months between the LFCR reset and the new rates under the rate case), all of $9,162.75 of the $36,561 would be redistributed to non-DG customers. This results in an expected savings of approximately just $0.003 per month and a total savings of a mere $0.009 for the three months to each residential customer. In July 2017 new rates would begin so the benefit of the remainder of the $36,561 would be worked out in the rate case.

Now contrast the likely scenario where a non-DG customer *saves less than one penny* as a result of a decision in this matter with the finding of fact in paragraph 164 of the Decision where the Commission found that, "[w]hile the LFCR mechanism may not be a long term solution to address the alleged lost fixed costs associated with DG solar adoption, *it may offer an effective interim solution.*" (emphasis added). It is simply impossible for the Commission, if it had all the facts, to conclude that offering non-DG ratepayers rate relief equal to *less than a penny* could be an "effective interim solution." The only conclusion that can be drawn is that Commission was

mistaken about the potential and likely impact of its decision and the inability for an "interim" solution to have any meaningful impact on the bills of non-DG customers.[53]

In fact, to go through this entire hearing process in order to recover and redistribute less than $10,000 to ratepayers while the utility racks up legal and expert fees that are certain to eclipse that number and that will be charged to the ratepayers is an absurd result. The Commission cannot justify any decision that will save ratepayers something less than $10,000 while simultaneously costing ratepayers hundreds of thousands of dollars in legal and expert fees. The net loss to ratepayers of continuing down this path is a certainty. As a result, the Decision cannot reasonably be found to be in the public interest, is an abuse of discretion and must be reversed.

III. Rehearing Is Warranted Because Decision 75251 Was Tainted by the Commissioners' Bias and/or Their Actual or Perceived Conflicts of Interest

It is undisputed that much attention has been focused on the Commission, and specifically Commissioner Little and Commissioner Forese, regarding significant contributions that APS's parent made to entities that, in turn, advocated for the election or defeat of candidates in Commission elections. *See, e.g.*, Ryan Randazzo, *Phone Records show close contact between regulator, APS and 'dark money'*, Arizona Republic, May 22, 2015, available at: http://www.azcentral.com/story/money/business/2015/05/21/phone-records-show-close-contact-regulator-aps-dark-money/27699025/ ("Forese and Little benefitted from more than 3.2 million in political advertising by independent groups."); Ryan Randazzo, *Clean Elections to review utility regulator's texts*, Arizona Republic, May 22, 2015, available at: http://www.azcentral.com/story/news/arizona/politics/2015/05/23/election-regulators-review-utility-regulators-texts/27830287/; Laurie Roberts, *Corporation Commission cozy with APS? Say it isn't so!*, Arizona Republic, May 22, 2015, available at: http://www.azcentral.com/story/laurieroberts/2015/05/21/aps-bob-stump-text-messages-dark-money/27711891/.

[53] As set forth in the Decision, APS fed into this misunderstanding of the potential benefits arguing, "that while [APS] is strongly inclined to support grandfathering, the cost shift might grow to such an extent that grandfathering all existing DG customers would significantly increase rates for all other non-DG customers." Decision at para 107. Even assuming there is a cost shift of the nature APS alleges (something TASC disagrees with) reducing the cost shift by less than one penny over three months could hardly be said to have a significant impact on anything.

These contributions and expenditures raise more than a mere inference that the Commission's Decision is the product of bias, prejudgment, and/or actual or perceived conflicts of interest. Indeed, two of the three Commissioners that voted to proceed with a hearing on APS's Reset Application – over the objections of two Commissioners, Staff, and Administrative Law Judge Jibilian – are the ones that benefitted directly or indirectly from APS's contributions in the 2014 election cycle, and who have resisted any suggestion or request to seek disclosure of APS's financial records. *See, e.g.,* Commissioner Forese Ltr. dated 9/4/15; Commissioner Stump Ltr. dated 9/8/15; and Commissioner Little Ltrs. dated 9/8/15 and 9/11/15.

In addition, with regard to Commissioner Stump, he has manifested the unconstitutional appearance of a bias against TASC's interests and has publicly and repeatedly indicated he has prejudged the issues that are presented for the Commission's review in this matter. Taken together, the Commissioners' conduct and statements regarding APS's participation in political activity in connection with Commission elections creates a conflict of interest or, at a minimum, an appearance of impropriety. Therefore, rehearing should be granted and the proper recusals or disclosures should be made before the Commission renders a decision on the ROO and the Reset Application.

The Commission is a constitutionally created body that regulates public service corporations and applies the laws of Arizona when deciding issues of ratemaking, such as those presented by the Reset Application. In other words, the Commission is a quasi-judicial body and the Commissioners are, in a sense, judges. Although Commissioners are not subject to the jurisdiction of Arizona's Commission on Judicial Conduct, the Arizona Code of Judicial Conduct is instructive and provides guidance regarding the role of Commissioners are quasi-judicial officers. Rule 1.2 of the Code ("Promoting Confidence in the Judiciary") states that, "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." In addition, Rule 2.3(A) of the Code ("Bias, Prejudice, and Harassment") states that, "[a] judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice." Finally, on the issue of disqualification, Rule 2.11(A) states that, "[a] judge shall

disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned."

Further, the members of the Commission are public officials that are subject to A.R.S. § 38-503, which states that, "[a]ny public officer or employee who has, or whose relative has, a substantial interest in any decision of a public agency shall make known such interest in the official records of such public agency and shall refrain from participating in any manner as an officer or employee in such decision."

Here, APS donated more than $3 million to elect members of the Commission that regulate its rates. And, in the case of Commissioner Stump, a Commissioner has publicly and repeatedly expressed his hardened views on matters that are yet to be adjudicated. Those same Commissioners did not disqualify themselves, nor did they disclose on the record their potential conflict or bias before voting for Decision 75251. Instead, the Commissioners broke with Staff, the ALJ, and two dissenting Commissioners to do as APS desired, which is to proceed with its Reset Application outside of a general rate case. Because of the undeniable appearance of impropriety and the actual or perceived conflict of interest and bias plaguing the Commissioners who voted to reject the ROO and proceed with a hearing on the Reset Application, rehearing should be granted[54]. Further, upon rehearing, Commissioners with actual or perceived bias and/or conflicts of interest should recuse themselves from deciding the LFCR issue or, at a minimum, disclose their conflict on the record.

CONCLUSION

For the forgoing reasons, TASC respectfully requests that the Commission set the Decision for rehearing.

Respectfully submitted this 18th day of September, 2015.

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[54] *See eg, Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 885 (2009).

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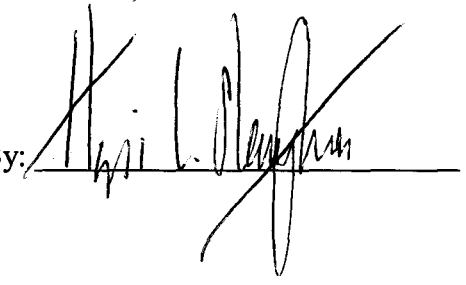
By: 

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