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Arizona Corporation Commission

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BEFORE THE ARIZONA CORPORATION COMMISSION

SUSAN BITTER SMITH
 CHAIRWOMAN

BOB BURNS
 COMMISSIONER

TOM FORESE
 COMMISSIONER

DOUG LITTLE
 COMMISSIONER

BOB STUMP
 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
)
) APPLICATION FOR REHEARING OF
) DECISION NO. 75251 ON THE GROUND
) THAT COMMISSIONER BOB STUMP
) SHOULD HAVE RECUSED HIMSELF
) OR BEEN DISQUALIFIED FROM
) CONSIDERING THE MATTER BEFORE
) THE COMMISSION
)

Pursuant to A.R.S. § 40-253, Intervenor Sunrun, Inc. ("Intervenor") applies for rehearing of Decision No. 75251, docketed on August 31, 2015. Commissioner Stump's repeated and advocative statements in favor of the concepts advanced by Applicant Arizona Public Service ("APS") illustrate that he was, and remains, irretrievably biased in this case—to the point that his participation in the decision violated (and will continue to violate) Intervenor's rights to due

1 process under the United States and Arizona Constitutions and related law. For this reason,
2 reconsideration should be granted and Commissioner Stump should recuse himself, or the
3 Commission should disqualify him, from participating in the present (and ongoing proceedings)
4 in this Matter.

5 Introduction

6 When he took office, Commissioner Stump swore an oath to “support the Constitution of
7 the United States and the Constitution and laws of the State of Arizona” and to “impartially
8 discharge” the duties of his office. [Combined Appendix of Evidence in Support of Intervenor’s
9 Applications for Rehearing of Decision 75251 (“Appendix”), exhibit 1 (State of Arizona oath of
10 office form)] Inherent in this oath is that the Commissioner (and his colleagues) afford due
11 process and “[i]t is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due
12 process.’” *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009). Intervenor appreciates
13 Commissioner Stump’s service to the State of Arizona. However, the collective public record
14 now demonstrates that the Commissioner has pre-judged and expressed views that are hostile to
15 the competing positions advanced by Intervenor (and others) in this Matter, such that his past
16 (and continued) participation as a decision maker in this Matter violates due process, not only for
17 the Intervenor, but for the Public as well. Commissioner Stump has publicly, and extra-
18 judicially stated his conclusions that:

- 19 • **Net metering is a subsidy and imposes an unfair cost shift**—he has said “its
20 [*sic*] about ensuring that all users of the grid (including solar users, since they
21 are indeed connected to it) pay their fare [*sic*] share for using it. If solar users do
22 not then non-solar users have to pick up the tab. It has been cleverly framed as a
23 ‘tax on the sun,’ when it is anything but. No one is making a ‘profit’ on
ensuring that the cost-shift I just described is rectified.” [Appendix, exhibit 2 at
ACC_AR0074 (6/26/2014 Facebook comment)]
- 24 • **Distributed generation residential rooftop solar panel use imposes an**
25 **“unfair cost shift” on non-solar users**—he has said “As Harvard’s Ashley
26 Brown has noted, net metering can be a socially regressive subsidy. It is unfair
to shift the costs of our state’s electric system to lower-income Arizonans.”
[Appendix, exhibit 9 at ACC_AR0284]
- 27 • **He has exhibited his ill will towards parties before the Commission**—he has
28 said “Arizonans should reject the disingenuous, self-interested claims of those

1 who care more about their short-term profits than the long term viability of solar
2 power in Arizona.” [Id.]

- 3 • **The rooftop solar industry should be “killed” in favor of the public utilities**
4 **(like APS here)**—he has said “George [referring to his character George B.
5 Green] begins to develop an appreciation for irony: He knows the sun isn’t free,
6 that ‘killing solar’ just makes it stronger, that solar is impractical without utility
7 connection that some pro-solar folks claim to despise.” [Appendix, exhibit 4 at
8 ACC_AR0270]

9 Each of these “conclusions” concern key issues in dispute that are collectively at the heart of the
10 Matter. The evidence submitted herewith, and as reflected in the public record is telling—
11 Commissioner Stump’s own statements, social media posts, and writings collectively show that
12 he has, for more than a year, engaged in a pattern of expression that would lead an objective
13 observer to conclude that he cannot, or will not, fairly and impartially consider the positions put
14 forward by Intervenor and those sharing their interests regarding the key issues at stake here.

15 The power delegated under the Arizona Constitution to the Corporation Commission
16 requires that the Commission afford due process both to the public utility regulated by the
17 Commission *and to the public* whose interest the Commission must consider. *See Residential*
18 *Utility Consumer Office v. The Arizona Corporation Commission, et. al*, 199 Ariz. 588, 593, 20
19 P.3 1169, 1174 (App. 2001). Due process requires a “fair tribunal,” fairness “requires an
20 absence of actual bias in the trial of cases,” and “our system of law has always endeavored to
21 prevent *even the probability of unfairness.*” *In re Murchison*, 349 U.S. 133, 136 (1955)
22 (emphasis added). As is reflected below and in the accompanying evidence, Commissioner
23 Stump is actually biased, or at minimum, has taken positions that suggest the probability of
24 unfairness in these proceedings and, as a result, rehearing should be granted: He should recuse
25 himself and/or the Commission should disqualify him from participating in these proceedings.

26 **Factual Background**

27 **A. Intervenor.**

28 Sunrun is one of Arizona’s largest rooftop solar companies. Sunrun has assisted in the
financing and/or installation of thousands of rooftop solar systems in Arizona. In addition,
Sunrun employs hundreds of Arizonans. The regulations and decisions of the Arizona

1 Corporation Commission (the “ACC” or “Commission”) substantively affect Sunrun.
2 Intervenor’s application for intervention was granted by procedural order dated August 17, 2015.

3 **B. The APS Application**

4 In the present Matter, APS filed a request that the Lost Fixed Cost Recovery (“LFCR”)
5 mechanism adjustment authorized by Decision No 74202 (December 3, 2013) be reset from .70
6 per kW to \$3.00 per kW, effective as of August 1, 2015 (the “Reset Application”). Commission
7 staff recommended that the Commission take no action on the Reset Application and, instead
8 defer it to APS’ next rate case. [See ALJ Jibilian’s Order, 8/3/2015, ¶ 24 at 4] After considering
9 the evidence, Judge Jibilian agreed, noting that “[t]he arguments have not established an urgent
10 need for commencing a proceeding on the Reset Application at this time” and that “[t]here is
11 little regulatory wisdom in undertaking a proceeding that is severely handicapped from the
12 beginning in the way of possible solutions to a problem that can be readily addressed in a rate
13 case which will be filed in less than one year.” [Id. ¶ 167-68 at 33] Notwithstanding the
14 regulatory wisdom identified by Judge Jibilian, the Commission (on a narrow 3-2 vote), issued
15 Order No. 75251, saying “there is value in commencing a proceeding to examining the issue of
16 resetting the LFCR adjustor mechanism” and that “[w]e believe examination of an interim
17 solution in an evidentiary hearing is appropriate and reasonable in this case. Conducting a
18 proceeding now will allow the Commission to make a reasoned decision based on evidence on
19 the record that results from the hearing. *However, we do not prejudge any of these issues.*”
20 [Order No. 75251, 8/31/2015, ¶ 164 at 32 (emphasis added)]

21 After the Commission issued Order No. 75251, APS filed comments on the anticipated
22 scope of the ongoing proceedings and, surprisingly, characterized the “Commission’s objective”
23 as “considering an interim solution to the cost shift *before APS’s rate case.*” [APS’ Comments
24 Concerning Scope of Proceeding, 9/4/2015 at 3 (emphasis added)]¹ But on the merits, the
25 Commission’s determination to hear the Reset Application outside of APS’s anticipated rate

26
27 ¹ APS’s statement is surprising because, in the face of a 3-2 decision, APS seems to suggest it has clairvoyant
28 abilities and can pronounce what the Commission’s “objective” is. Perhaps, however, in light of the evidence noted
herein, with respect to Commissioner Stump (and as noted in the accompanying Application for Rehearing
regarding Commissioners Forese and Little), APS’s confidence should not be a surprise.

1 case, if not considered on a broad enough basis, may trigger constitutional and statutory defects.
2 [See TASC Comments 9/4/2015] Thus, the Commission's rejection of "regulatory wisdom"
3 must now be viewed in the context of facts outlined here.

4 **C. Commissioner Stump: The Utility Advocate with a Closed Mind.**

5 Commissioner Stump has a long history of making repeated, public, unequivocal, and
6 extra-judicial statements proclaiming his unwavering position on key issues raised in the Reset
7 Application. Not only has Commissioner Stump expressed his support for APS's position
8 specifically, publicly, and repeatedly, outside the context of Commission hearings, he also is an
9 affirmative advocate, fighting for the position he has already staked out. These multiple
10 representations, made over the course of more than a year, demonstrate an irrevocably closed
11 mind on the issues in this Matter, and so require Intervenor to request his recusal and/or
12 disqualification.

13 **1. The Most Recent Instance: Commissioner Stump's "George B. Green"**
14 **Article**

15 In early June 2015, at least six open dockets were pending before the ACC in which
16 incumbent utilities asked the Commission to single out rooftop solar customers and levy a
17 variety of new and significant fees and charges against them. [See Docket Nos. E-01461A-15-
18 0057; E-04204A-15-0099; E-01933A-15—100; E-01575A-15-0127; E-01891A-15-0176 and this
19 matter, E01345A-13-0248] While these dockets were pending, on June 7, the Edison Electric
20 Institute (EEI) held an exclusive, out-of-state conference for executives and representatives of
21 incumbent, investor-owned utilities. EEI is an investor-owned utility advocacy and trade
22 organization representing *all* of the investor-owned utilities in the United States and, arguably, is
23 leading the charge for utility interests in cases like this. [Appendix, exhibit 5]

24 At that conference, attendees received copies of a short story written and published by
25 Commissioner Stump, under the byline "Bob Stump Commissioner, Arizona Corporation
26 Commission." The story, called *George B. Green Re-Discovers Self-Reliance and Independent*
27 *Thought*, (the "EEI Paper") demonstrates how Commissioner Stump has already established his
28 position on key issues, a position that amounts to an endorsement of, and advocacy for, the
utilities' arguments in the six contested dockets. In the EEI Paper, he said:

- 1 • Net metering is a “subsidy” and “unfair.”
- 2 • Residential net metering customers receive a “subsidy,” which acts as a “tax” on
- 3 “the 98 percent of Arizonans in APS territory who choose not to ‘go solar.’”
- 4 • Dismisses the solar industry’s position that fees that render rooftop solar
- 5 uneconomical are “killing solar,” writing, “‘killing solar’ just makes it stronger.”

6 [Appendix, exhibit 4 (EEI Paper at ACC_AR0270)]

7 Commissioner Stump’s EEI Paper is additionally noteworthy not only because his byline
8 emphasizes his position as a Commissioner for the ACC, but because he demonstrated his
9 unabashed admiration for traditional utilities—like APS. For example Stump writes, “[o]ur
10 nation’s utilities are uniquely equipped to preserve and improve our energy future by combining
11 reliability with innovative customer-sited resources as few other entities can.” [*Id.* at
12 ACC_AR0270] In addition, Stump admits a preference for utility-controlled and owned solar
13 energy when he writes how his character (“George”) “installs *utility owned rooftop* solar to make
14 his life easier thereby living up to what Goldwater called ‘true conservative principles’ by not
15 embracing a net energy metering subsidy George thinks is unfair.” [*Id.* (emphasis in original)] In
16 other words, he vehemently staked out his agreement with APS’ position on several crucial
17 issues at the heart of this Matter and the other five then-extant dockets.²

18 **2. Foreshadowing Commissioner Stump’s Building Bias that Closed His Mind.**

19 Commissioner Stump’s “morality play” about George B. Green (as characterized in the
20 EEI Paper) may have been the most recent example of his closed mind on these issues, but it was
21 certainly not the first. A plethora of prior statements, tweets, speeches, news quotes, and
22

23 ² Curiously, Commissioner Stump did not file the EEI Paper in any of the six dockets pending before the
24 Commission. Instead, a sitting Commissioner, writing under his official byline, authored a position paper
25 advocating the utilities’ view of the issues directly at stake in at least six pending dockets representing millions of
26 Arizona ratepayers – and then only distributed his position paper to those attending an exclusive, out of state
27 convention held by investor-owned utilities. Commissioner Stump did not alert Arizona ratepayers, media, or his
28 fellow Commissioners to his views by filing his story in any of the pending dockets. Such a bias, in the issues raised
in the story, and in his failure to fairly alert the “other” side and the public of this story, demonstrates the improper
bias of a closed mind that cannot render fair and impartial service in this Matter. *See infra*, at 12-13 (outlining
Arizona law that a decision maker must be impartial and free of bias or prejudice).

1 Facebook posts preceded the article, all demonstrating that Commissioner Stump no longer can
2 be an impartial arbiter in this Matter.

3 Commissioner Stump's hostility to solar issues first was fully published, in April 2014,
4 when he drafted a letter to Sunrun's CEO. In this letter, Mr. Stump composed a full-throated
5 defense of APS. The tone of the letter was threatening, with Commissioner Stump claiming that
6 he would "continue discussing Arizona's regulatory climate with analysts in an effort to mitigate
7 the damage inflicted by too many in the solar advocacy community." [Appendix, exhibit 6
8 (emphasis added)] The letter further stated that "[t]he rancor must end if solar is to thrive in
9 Arizona." [Id. (emphasis added)] Simultaneously, Commissioner Stump dismissed any
10 culpability or wrongdoing perpetrated by APS, stating: "[Your] behavior inflicts more harm to
11 solar in Arizona than any 'dark money' campaign could ever do." Commissioner Stump then
12 concluded that "Arizona ratepayers' pocketbooks are at stake, and my patience with such antics
13 has worn thin." [Id. (emphasis added)] Such bold position statements evidence Commissioner
14 Stump's dismissal of the solar issues and concerns, and revealed threatened reprisals if the solar
15 industry continued to advocate on its own behalf and speak out against utilities, like APS, that
16 were actively working to destroy the independent rooftop solar industry. [See also Appendix,
17 exhibit 2 at ACC_AR0174, 0173, 0172, 0170 (Facebook comments discussing his
18 communications with/to Sunrun)]

19 Commissioner Stump then sent a letter to the CEO of SolarCity, demanding that
20 SolarCity publicly disclose sensitive business information, practices, and procedures.
21 [Appendix, exhibit 7]

22 Commissioner Stump's hostile letters to solar companies soon were followed by an open
23 letter to rooftop solar supporter and chairman of a group called Tell Utilities Solar Won't Be
24 Killed (TUSK). TUSK's Chairman, Barry Goldwater, Jr., faced the vitriol in Mr. Stump's letter
25 claiming to recount a litany of his claimed "problems" with the solar industry. [Appendix,
26 exhibit 8]

27 Commissioner Stump's anti-solar rhetoric became express advocacy for specific utility
28 positions shortly thereafter. In a February 17, 2015, op-ed in the Arizona Republic,

1 Commissioner Stump praised utility Salt River Project (SRP) for its proposal that would add
2 substantial charges to the bills of residential customers with rooftop solar. [Appendix, exhibit 9]
3 In the op-ed, Commissioner Stump very publicly expressed several positions that specifically
4 reveal his hardened opinions about issues pertinent to the Matter. Mr. Stump publicly declared
5 that (1) he believes the solar industry's position to be "disingenuous, self-interested claims of
6 those who care more about their short-term profits than the long-term viability of solar power in
7 Arizona;" (2) "Arizonans should reject" the solar industry's position; (3) net metering creates an
8 "undue subsid[y];" (4) net metering "can be a socially regressive subsidy;" (5) net metering
9 results in an unfair cost-shift "of our state's electric system to lower-income Arizonans;" and (6)
10 the financial health of the incumbent utility is more important than an individual customer's
11 freedom to choose to generate some of their own power. [*Id.*]

12 These specific positions on key issues at play in this docket were announced very
13 publicly in the op-ed by a Commissioner who then had a nearly year-long history of rancor
14 toward the solar industry. These are key issues that have never been subject to an evidentiary
15 hearing at the Commission, yet Commissioner Stump already has announced his conclusions
16 and, through the op-ed, like his "short story" presented to the exclusive investor-owned utility
17 conference, became a public advocate for these now-hardened opinions demonstrating a closed
18 mind on these issues.

19 **3. Commissioner Stump, the Utility Advocate.**

20 A month after publishing the opinion editorial in February, at the meeting of the
21 exclusive Edison Foundation's Institute for Electric Innovation, Commissioner Stump further
22 declared that his mind was closed and that he has prejudged the issues at play in this docket. In
23 his speech at the conference, he declared that he firmly believes distributed generation customers
24 are not paying their "fair share" and must be subject to some additional fees or charges.
25 [Appendix, exhibits 4 and 10] He referred to an action taken by utility SRP that raised fees on
26 solar users and, according to publicly available information from ArizonaGoesSolar.Org,
27 resulted in a 98% reduction in solar adoption as "an ingenious solution to peak shaving" and a
28 "win-win" solution. [Appendix, exhibit 10 at ACC_AR0289] He then stated his belief that

1 “[t]he question then becomes in Arizona, and nationally, whether solar users are indeed willing .
2 . . to be a good grid citizen,” indicating that he believes that solar customers are not “good grid
3 citizens” today, and foreshadowing fully the theme and character of his then yet-to-be released
4 George B. Green story. [*Id.*]

5 Commissioner Stump did not limit publication of his bias merely to speeches, editorials,
6 and other formal communication. As early as the Spring of 2014, Commissioner Stump’s
7 growing bias was shared with the world through social media as well, through multiple posts that
8 were critical and mocking of the rooftop solar industry. In particular, as set out in the Appendix
9 exhibits 2-3, Commissioner Stump’s Facebook page and Twitter feed were replete with tweets
10 and posts openly taunting the rooftop solar industry. For example, in April 2014, he commented
11 on Facebook that Sunrun had engaged in “inappropriate and unprofessional efforts” to “affect
12 adversely Wall Street’s judgment of APS.” [Appendix, exhibit 2 at ACC_AR0174] In May, he
13 commented “[a]dd the LA Times to the herd of independent minds that believes making solar
14 users pay their fair share for using the grid constitutes a ‘tax.’” [*Id.* at ACC_AR0137] Many of
15 the tweets concerned the election for two then “open” seats on the Commission. [Appendix,
16 exhibit 3] A common theme through many tweets and posts was Commissioner Stump directly
17 soliciting reporters to report negatively on an independent expenditure campaign run by TUSK.
18 On August 3, 2014, Commissioner Stump sent a tweet aimed at local NBC news affiliate
19 political reporter Brahm Resnik. He wrote: “@brahmresnik I said on your show all \$ should be
20 transparent. @TUSKUSA spending dark \$ gets no media. No one knows ‘other guy’ doing it.”
21 [Appendix, exhibit 3 at ACC_AR0198 (emphasis added)]

22 A telling exchange that summarizes Commissioner Stump’s now cemented views is
23 illustrated on Facebook in a June, 2014 exchange between Joel Lawson and Commissioner
24 Stump:

25 “Joel Lawson: I remember talking with a friend (Lewis Teeney) telling him I like
26 the idea of personal solar because they can’t attach taxes and fees to it. He said,
27 they’ll find a way. Man was he right!! I noticed the main solar and wind goes to
28 large corporations so they can charge and tax us forever. When was it decided
that we had to pay government for the right to have power. So the greenies want
solar energy but the corporations don’t want to loose [*sic*] the profits and the

1 government does not want to give up the long term taxing opportunity. The
2 carpetbaggers are behind it all.

3 Bob Stump: Joel, this is not about taxes—it's about ensuring that all users of the
4 grid (including solar users, since they are indeed connected to it) pay their fare
5 [sic] share for using it. If solar users do not, then non-solar users have to pick up
6 the tab. It has been cleverly framed as a 'tax on the sun' when it is anything but.
7 No one is making a 'profit' on ensuring that the cost shift I just described is
8 rectified. And the government is making nothing on it."

9 [Appendix, exhibit 2 at ACC_AR0074]

10 Collectively Commissioner Stump's public comments directly relate to the Reset
11 Application, where APS seeks to increase the fees charged to rooftop solar customers. Such
12 extra-judicial statements, made by a sitting Commissioner, outside the context of a Commission
13 hearing, demonstrate his prejudgment of the issues in this docket—and such statements are
14 inappropriate, as just recently was demonstrated in a colloquy between the Commission's
15 Chairwoman and an Issue Intervenor in another matter. *See Comments from Susan Bitter Smith,*
16 *Open Meeting on Docket Nos. SW-01303A-09-0343 & W-01303A-09-0343, 9/8/2015 at 2:19:56*
17 *to 2:23:45, http://azcc.granicus.com/MediaPlayer.php?view_id=3&clip_id=2050, (in*
18 *responding to a question from the intervenor, Chairwoman Bitter Smith said "[a]nd my sense is*
19 *this is a question that will be answered in the rate case and if I were to answer it, I would have*
20 *prejudged that and then I could not vote on the case.") (emphasis added). [See Appendix,*
21 *Exhibit 11 (for transcript of entire exchange)] As a further example of the necessity of*
22 *impartiality and not prejudging the issues, Chairwoman Bitter Smith made a comment in a*
23 *January 13, 2015, letter to the Commission in Docket No. E-00000J-14-0415, that "I have not*
24 *prejudged issues or reached any conclusions concerning this inquiry" [Appendix, exhibit*
25 *12 (emphasis added)] Finally, Order No. 75251 in this docket attempts, falsely with respect to*
26 *Commissioner Stump, "reset" that the Commissioners "do not prejudice any of these issues."*
27 *The Order demonstrates the necessity of an open mind in this Matter, which Commissioner*
28 *Stump repeatedly and clearly has demonstrated he does not possess.*

Argument

D. The Commission (and Commissioner Stump) Must Afford Due Process in this Proceeding.

1. Due Process is Required.

We start with the oath that Commissioner Stump took—he promised to support the Constitution of the United States and the Constitution and laws of the State of Arizona” and that he would “impartially discharge the duties” of his office.” [Appendix, exhibit 1] The Arizona Constitution, like the United States Constitution, provides the black letter law that “[n]o person shall be deprived of life, liberty, or property without due process of law.” Ariz. Const. art. 2, § 4; see U.S. Const., Fourteenth Amendment. In Arizona, the Commission holds a unique position, having received constitutional authority to “prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected by, public service corporations within the state for service rendered therein” Ariz. Const. art. 15, § 3. That due process is inherent in the Commission’s exercise of its constitutional power is clear— “[a] public utility is entitled to due process when a rate making body undertakes to calculate a reasonable return for the use of its property and services by the public” and “[c]onversely the public is entitled to the same level of protection when the government seeks to increase the utility rates that the public is obligated to pay.” *Residential Utility Consumer Office v. The Arizona Corporation Commission, et, al*, 199 Ariz. 588, 593, 20 P.3d 1169, 1174 (App. 2001) (holding that Commission violated due process when it set an “interim” rate and that the matter should have been part of a full rate hearing).

2. Due Process Requires Fairness on the Part of the Decision Maker.

The United States Supreme Court has identified the touchstone for due process— “[i]t is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process.’” *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009). Fairness “requires an absence of actual bias in the trial of cases.” *In re Murchison*, 349 U.S. 133, 135 (1955) (holding that “one man grand jury” that also was the judge to try the same defendant violated due process). The *Caperton* Court instructed that if a judge “discovers that some personal bias or improper consideration seems to be the actuating cause of the decision or to be an influence so difficult to dispel that

1 there is a real possibility of undermining neutrality, the judge may think it necessary to consider
2 withdrawing from the case,” and “actual bias,” if disclosed, no doubt would be grounds for
3 appropriate relief. *Caperton*, 556 U.S. at 882. Evaluating bias is based on an objective
4 inquiry—“the Court asks not whether the judge is actually subjectively biased, but whether the
5 average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional
6 potential for bias.” *Id.* at 881; *In re Murchison*, 349 U.S. at 136 (noting that any procedure that
7 would offer the temptation to a judge “not to hold the balance, nice clear and true” between
8 competing parties denies due process and undermines the ability to balance the scales of justice
9 equally: “‘justice must satisfy the appearance of justice.’”); *see also Aetna Life Ins. Co. v.*
10 *Lavoie, et. al*, 475 U.S. 813, 825 (1986) (holding that state court justice’s participation in case
11 violated appellant’s due process rights, noting that “we are not required to decide whether in fact
12 Justice Embry was influenced, but only whether sitting on the case then before the Supreme
13 Court of Alabama ‘would offer a possible temptation to the average . . . judge to . . . lead him not
14 to hold the balance nice, clear and true’”) (citation omitted). The scope of the inquiry “cannot be
15 defined with precision” (*id.*) but the difficulties of “inquiring into actual bias, and the fact that
16 the inquiry is often a private one, simply underscore the need for objective rules.” *Caperton*, 556
17 U.S. at 883.

18 These principles apply under Arizona law as well. Arizona’s Supreme Court has held
19 that a constitutional error may occur, among other things, when there is a “biased trial judge.”
20 *State v. Ring*, 204 Ariz. 534, 552, 65 P.3d 915, 933 (Ariz. 2003). And in *State v. Brown*, 124
21 Ariz. 97, 99, 602 P.2d 478, 480 (1979), the Court said “the right to a fair trial is the ‘foundation
22 stone upon which our present judicial system rests’ and that there is an indispensable right to trial
23 presided over by a judge who is ‘impartial and free of bias or prejudice.’” Bias is “‘a hostile
24 feeling or spirit of ill-will’ or ‘undue friendship or favoritism towards one of the litigants.’” *Id.*
25 (citations omitted). In *Brown*, a trial judge identified to the County Attorney, and without telling
26 defense counsel, circumstances where he thought a criminal defendant had committed perjury.
27 That conduct “gave the appearance of abandoning his role as a fair and impartial judge” and
28 “gave an appearance of ‘a hostile feeling or spirit of ill-will’ towards defendant.” *Id.* The Court

1 held that the judge should have been disqualified, noting that “[a] judge should avoid even the
2 appearance of partiality.” *Id.*³

3 Lest one might think the law only applies to judges, the Commission acts in a judicial or
4 at least a quasi-judicial capacity. “The corporation commission in rendering its decision acts
5 judicially.” *Southern Pac. Co. v. Arizona Corp. Comm’n*, 98 Ariz. 339, 346-347, 404 P.2d 692,
6 697 (Ariz. 1965). When the Commission exercises its power to hold and adjudicate hearings in a
7 “judicial or quasi-judicial” capacity, it is required to comply with the Constitutional requirements
8 of due process. *Arizona Public Service Co. v. Arizona Corp. Comm’n* 155 Ariz. 263, 271, 746
9 P.2d 4, 12 (Ariz. App. 1987), *aff’d in part, rev’d in part*, *Arizona Public Service Co. v. Arizona*
10 *Corp. Comm’n*, 157 Ariz. 532, 760 P.2d 532 (Ariz. 1988).⁴ Further, the requirements of due
11 process apply equally to judicial proceedings and quasi-judicial proceedings that are
12 administrative in nature as well as to the “administrative adjudicators.” *Gibson v. Berryhill*, 411
13 U.S. 564, 579 (U.S. 1973) (holding that an administrative licensing board was too biased to hold
14 license revocation hearings when the administrators had a substantial pecuniary interest in the
15 proceeding).

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21 ³ The ethical obligations imposed on the administrative law judges that work for the State (and the Commission)
22 illustrates the fairness standard to which Commissioners arguably are subject. Standard 1 provides that “[a]n
23 administrative law judge shall respect and comply with the law and shall act at all times in a manner that *promotes*
24 *public confidence in the integrity and impartiality of the Office of Administrative Hearings*.” Code of Admin. Law
25 Judge Ethics, Standard 1 (emphasis added) (attached to Appendix at exhibit 13). The comment notes that an ALJ
must take care “to protect the administrative law judge’s reputation for fairness, impartiality, and independence.”
The test for potential impropriety is “whether the conduct would create in reasonable minds a perception that the
administrative law judge’s ability to carry out administrative judicial responsibilities with integrity, impartiality and
competence is impaired.” *Id.* (comment).

26 ⁴ Commissioner Stump acknowledges that the Commission acts in a quasi-judicial capacity. He has said “[t]he
27 Commission is a quasi-judicial office.” And, given the nature of the office, he suggested that for a Commissioner to
28 attend a “pro-APS political event would also be inappropriate.” [Appendix, exhibit 2 at ACC_AR0093-94]
Ironically, he has done far more than attend a pro-APS political event—he publicly, and extra-judicially, espouses
views that advance APS’s agenda, and then returns to sit on the Commission bench.

1 **3. Application—Commissioner Stump Should Recuse Himself or be**
2 **Disqualified.**

3 **a. Actual Bias.**

4 In this case, actual bias is clearly demonstrated, and disqualification warranted, because
5 Commissioner Stump, as a trier of fact, has clearly demonstrated “prejudgment of the specific
6 facts that are at issue” Commissioner Stump’s letters to solar CEOs, his Opinion Editorial,
7 his “morality tale,” and many of his social media posts/comments are not mere formations of an
8 opinion and the expressions of that opinion. The record reflects, instead, that they are the
9 expressions of someone who has prejudged the facts and irrevocably closed his mind on key
10 issues at stake in this Matter. Indeed, as with the *Brown* case, these facts show how
11 Commissioner Stump has gone too far and has shown his “ill-will,” “hostile feeling,” and lack of
12 partiality towards Intervenor and those who advance positions like those of Intervenor.⁵

13 Commissioner Stump’s statements, made over the course of more than the last year and
14 documented above, constitute an unwavering and long-held, hardened position on the “proper”
15 outcome of the very issues pending in this Matter. Mr. Stump has now become an advocate for
16 APS’s positions. He has made no secret that he has prejudged the facts to conclude that a
17 customer’s use of net metering is a “subsidy” that imposes “cost shifts” on fellow electric utility
18 customers, that such behavior is “unfair,” and that those who use distributed generation
19 residential rooftop solar are less honorable than their fellow citizens. And worse, Commissioner
20 Stump has referred to the solar industry as untrustworthy and urged the citizens of the state to
21 reject any and all arguments that Intervenor or similarly situated parties may advance. In short,
22 Commissioner Stump’s numerous comments and actions demonstrate his ill will towards the
23 rooftop solar industry, including Intervenor, and his complete partiality in favor of APS on the
24 key issues *before* those issues are subjected to a factual inquiry by the Commission.

25
26
27 ⁵ The *Brown* Court pointed out that “[a] judge should avoid even the appearance of partiality.” 124 Ariz. at 100,
28 602 P.2d at 481. Commissioner Stump has not only failed this edict—he has affirmatively promoted and shown his
partiality.

1 **b. The *Caperton* Doctrine.**

2 Though Commissioner Stump's public pronouncements establish his actual bias, he
3 should recuse himself or be disqualified, even if actual bias is not shown. Under *Caperton*, due
4 process may be denied, and disqualification be required if there is even a risk of actual bias,
5 "based on objective and reasonable perceptions." *Caperton*, 556 U.S. at 884; see *State v. Brown*,
6 124 Ariz. at 99, 602 P.2d at 480 (noting that recusal was required because judge had acted in a
7 way that his "impartiality might reasonably be questioned") (citations omitted). Here, an
8 objective observer can readily conclude that Commissioner Stump's conduct presents a risk of
9 bias—if not bias itself.

10 By announcing that he believes that the solar industry's position is "disingenuous,"
11 Commissioner Stump has announced a position upon which one could conclude he is biased and
12 may be unwilling to consider Intervenor's arguments on an equal footing with those of the
13 investor-owned, incumbent utility, APS. By announcing that he believes that Sunrun and other
14 solar interests are interested only in "short-term profits," Commissioner Stump has fashioned the
15 lens through which one could see that he now and only is a partisan. By taking to the state's
16 newspaper of record and urging Arizonans to "reject" the solar industry's position,
17 Commissioner Stump has created a record from which one only reasonably could conclude that
18 Commissioner Stump already has prejudged the issues before him.

19 Even though the Commission has never undertaken a study to determine the costs and
20 benefits of distributed solar to utility ratepayers, and has never held an evidentiary hearing on the
21 subject, there is no doubt that Commissioner Stump has already made up his mind that net
22 metering is "socially regressive" and an "undue subsidy" resulting in a cost shift to "low-income
23 Arizonans." One would conclude that Commissioner Stump's positions reflect a lack of
24 partiality and, instead, demonstrate ill-will towards the solar industry. As such, under *Caperton*,
25 *Brown* and the authorities cited herein, Commissioner Stump's participation in this Matter
26 already has violated due process—and so he should recuse himself or be disqualified.⁶

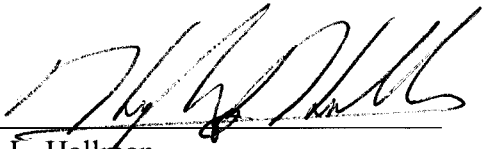
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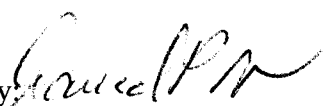
⁶ We recognize the rule as stated in *Jenners v. Industrial Comm'n*, 16 Ariz. App. 81, 491 P.2d 31 (1971), that even if
there is a showing of actual bias, it might not be proper to disqualify if there is no other decision maker empowered

1 **Conclusion**

2 Rehearing should be granted so that Commissioner Stump may recuse himself or
3 otherwise be disqualified from hearing the Matter, and the Commission should then reconsider
4 Order No. 75251 without Commissioner Stump's participation.

5
6 RESPECTFULLY SUBMITTED this 17th day of September, 2015.

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28 to decide the matter. But since other Commissioners are available to decide, this rule would not apply to the present application.

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