

**IN THE SUPREME COURT  
STATE OF ARIZONA**

ROY MILLER, THOMAS F. HUSBAND,  
JENNIFER BRYSON, and CORPUS  
COMMUNICATIONS, INC.,

Petitioners,

v.

ARIZONA CORPORATION  
COMMISSION, TERRY GODDARD, in  
his official capacity as Attorney General,  
and KRISTIN MAYES, WILLIAM  
MUNDELL, JEFF HATCH-MILLER,  
GARY PIERCE, and MIKE GLEASON, in  
their official capacities as members of the  
Arizona Corporation Commission,

Respondents.

No. CV 08-0196 SA

**AMICI CURIAE BRIEF OF COMMISSIONER GARY PIERCE AND  
REPRESENTATIVE KIRK ADAMS**

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## **INTEREST OF AMICI CURIAE**

Pursuant to Rule 16 of the Arizona Rules of Civil Appellate Procedure, Commissioner Gary Pierce, a member of the Arizona Corporation Commission, and Representative Kirk Adams, a member the Arizona House of Representatives, submit this amicus brief in support of the Commission's constitutional authority to adopt the Renewable Energy Standard and Tariff ("REST") rules.

The filing of this brief is permitted under Rule 16 of the Arizona Rules of Civil Appellate Procedure because Commissioner Pierce and Representative Adams are officers of the State of Arizona.

## **INTRODUCTION**

This special action raises important questions about the breadth and depth of the Corporation Commission's powers under the Arizona Constitution, and the interaction of those powers with the inherent, reserved powers of the Arizona Legislature. Unfortunately, the principal parties in this case are both advocating extreme positions that do not accurately reflect the powers granted to the Corporation Commission under the Arizona Constitution and the interaction of those powers with the powers of the Legislature. Petitioners initiate this action adopting the extreme position that the Corporation Commission's authority under the Arizona Constitution is limited to ratemaking. See Petition at 17. Unfortunately, in its Response, the Corporation Commission reciprocates with its own extreme position. By arguing that the REST rules are an expression of the Commission's ratemaking powers, the Corporation Commission argues that its constitutional authority to adopt the REST rules is so pervasive and powerful that it actually destroys the authority of the Legislature to adopt renewable energy

standards of its own.<sup>1</sup> In actuality, however, the Arizona Corporation Commission has non-ratemaking authority under Article 15, § 3 of the Arizona Constitution to adopt the REST rules, but that authority is shared, concurrently with the Legislature.

## ARGUMENT

### I. **The Constitutional Authority of the Corporation Commission is Not Limited to Ratemaking.**

The central pillar of the Petitioner's challenge to the Commission's authority to adopt the REST rules is the notion that the Commission's constitutional authority is limited to ratemaking. That notion, however, is erroneous because it (1) flatly contradicts the plain language of Article 15, § 3 of the Arizona Constitution and (2) contradicts and grossly distorts this Court's jurisprudence.

#### A. **The Plain Language of Article 15, § 3 Extends the Commission's Constitutional Authority Beyond Mere Ratemaking Alone.**

The constitutional power and authority of the Corporation Commission is delineated by Article 15, § 3 of the Arizona Constitution. Section 3 is a single sentence that consists of 183 words, and reads as follows:

The corporation commission shall have full power to, and shall, 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, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the state, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and make and enforce reasonable rules, regulations, and

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<sup>1</sup> Every other state to adopt renewable energy standards has done so via its legislative authority.

orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations; Provided, that incorporated cities and towns may be authorized by law to exercise supervision over public service corporations doing business therein, including the regulation of rates and charges to be made and collected by such corporations; Provided further, that classifications, rates, charges, rules, regulations, orders, and forms or systems prescribed or made by said corporation commission may from time to time be amended or repealed by such commission.

In seeking to understand the breadth and depth of the power delegated to the Commission, this Court's first two cases dealing with Commission's constitutional authority quickly identified three separate and distinct components within § 3, viz. (1) the mandatory and exclusive ratemaking component, (2) the permissive and concurrent non-ratemaking component, and (3) the proviso component. *See State v. Tucson Gas, Electric Light & Power Co.*, 15 Ariz. 294, 138 P.781 (1914) (identifying the mandatory and exclusive ratemaking component and the proviso component), *and Arizona Eastern R.R. Co. v. State*, 19 Ariz. 409, 171 P. 906 (1918) (juxtaposing the mandatory and exclusive ratemaking component with the permissive and concurrent non-ratemaking component).

**1. The Commission's mandatory and exclusive ratemaking authority.**

The Corporation Commission's mandatory and exclusive ratemaking authority under § 3 is established by the first 63 words of the section, which read:

The corporation commission **shall** have full power to, and **shall**, 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, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the state, . . . (emphasis added)

This component of § 3 is marked by the use of the mandatory term “shall.” The term “shall” is used just three times in § 3 and each instance occurs within the first 63 words. The first “shall” guarantees the Commission “full power” to establish just and reasonable rates for public service corporations, which, when viewed in conjunction with the provisos also contained in § 3, convinced the *Tucson Gas* court to conclude that the Commission’s constitutional authority to set rates is exclusive and plenary. *See State v. Tucson Gas, Electric Light & Power Co.*, 15 Ariz. 294, 138 P. 781 (1914). Thus, the Legislature’s general police power does not include the authority to set rates or to thwart rates established by the Corporation Commission.

Also noteworthy within this component of § 3 is the reference to the Commission’s authority to “make reasonable rules . . . by which [public service corporations] shall be governed in the transaction of business within the state.” The scope of this specific grant of “rulemaking power” has been at the heart of most of the published cases involving the constitutional authority of the Commission under § 3.

## **2. The Commission’s permissive and concurrent non-ratemaking authority.**

The second component of § 3 is marked by the use of the permissive term “may:”

. . . and **may** prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations; . . . (emphasis added)

Here, the Commission is again given the authority to “make . . . rules,” this time on behalf of “the convenience, comfort, and safety and the preservation of the health,” of employees and patrons of public service corporations—a grant of power that manifestly extends beyond ratemaking.

Because § 3 gives the Commission authority to “make . . . rules” twice, the scope of the Commission’s first grant of rulemaking authority should, if possible, be construed differently than the scope of the Commission’s second grant of rulemaking authority. *See City of Phoenix v. Yates*, 69 Ariz. 68, 72, 208 P.2d 1147, 1149 (1949) (In construing constitutions and statutes, “[e]ach word, phrase, and sentence must be given meaning so that no part will be void, inert, redundant or trivial.”) Moreover, neither grant of rulemaking authority should be construed so broadly that it entirely swallows the scope of the other grant of rulemaking authority. *See id.*

Thankfully, the two grants of rulemaking authority under § 3 easily lend themselves to such analysis. The second grant of rulemaking authority is different than the first in three important ways. First, the second grant of authority is explicitly permissive in nature. Because the term “may” is used, the Commission has discretion in exercising this grant of rulemaking authority. Second, the Commission is not granted “full power” with respect to the second grant of rulemaking authority. Consequently, the Commission’s authority under this second grant of authority is not exclusive of the Legislature’s general police power. Instead, the Commission’s ability to act on behalf of the comfort, convenience, health and safety of the employees and patrons of public service corporations is shared, concurrently with the Legislature. And finally, whereas the first grant of

rulemaking authority is somewhat general and vague (“govern the transaction of business within the state”) the second grant of rulemaking authority is more limited and defined (“comfort, convenience, safety, and . . . health” of employees and patrons). Under the doctrine of *ejusdem generis*, this Court has said that meaning of the first grant of rulemaking authority “qualifies and refers only to the” Commission’s authority to set classifications, rates and charges. *See Corp. Comm’n v. Pacific Greyhound*, 54 Ariz. 159, 176, 94 P.2d 443, 450 (1939). No such limiting construction has ever been given to the second grant of rulemaking authority, and neither would it be appropriate to do so, given the specific nature of the second grant of rulemaking authority. In sum, the notion that the Commission has no constitutional authority outside of its ratemaking powers is belied by the plain language Article 15, § 3.

**B. *Arizona Case Law Recognizes that the Arizona Constitution Gives the Corporation Commission Non-Ratemaking Powers.***

Unfortunately, Petitioners are not the first commentators to have pressed the notion that the Corporation Commission’s constitutional powers are limited to ratemaking. *See, e.g.*, Ariz. Op. Atty. Gen. No. I79-099, 1979 WL 23168 at 1 (April 9, 1979) (“Except for its broad, constitutionally-vested powers over rates and charges of public service corporations, the Commission’s regulatory jurisdiction is derived from legislative authorization.”) *citing Williams v. Pipe Trades Industry Program of Arizona*, 100 Ariz. 14, 409 P.2d 720 (1966); *Corp. Comm’n v. Pacific Greyhound Lines*, 54 Ariz. 159, 94 P.2d 443 (1939). These commentators generally point to *Corporation Commission v. Pacific Greyhound*

*Lines* as establishing such a rule.<sup>2</sup> As one might expect in light of the foregoing textual analysis of § 3, these commentators grossly distort the holding of *Pacific Greyhound*.

*Pacific Greyhound* is a seminal case<sup>3</sup> that reconciled inherent tension between this Court's early decisions in *Tucson Gas* and *Arizona Eastern Railroad Company*. In *Tucson Gas*, this Court held that the Commission's ratemaking authority over public service corporations was plenary and exclusive. *See* 15 Ariz. 294, 138 P. 781 (1914) (striking down a state statute that made it unlawful to charge an amount for water, electricity or gas in excess of the quantity actually delivered). In *Arizona Eastern Railroad Company*, this Court held that the Commission's authority over public service corporations did not entirely displace Legislature's general police power over public service corporations. *See* 19 Ariz. 409, 171 P. 906 (1918) (upholding a state statute that limited train length to 70

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<sup>2</sup> It is not flattery to this Court to rely solely upon *Pacific Greyhound* for the proposition that the Commission's constitutional authority is limited to ratemaking. Such reliance suggests that some commentators think this Court believes it has the authority to amend the Constitution by failing to give effect to the plain language of § 3.

<sup>3</sup> In 2003, the Corporation Commission filed a special action (No. CV 03-0291 SA) with the Supreme Court of Arizona challenging the Arizona Attorney General's refusal to certify the Commission's slamming and cramming rules. As part of that special action, the Commission unfortunately requested that *Pacific Greyhound* be overruled. In response to the Commission's improvident challenge to *Pacific Greyhound*, the Residential Utilities Consumer Office filed an amicus brief and Qwest Corporation, Arizona-American Water Company, Arizona Utility Investors Association, and AT&T Communications of the Mountain States, Inc. jointly filed an amicus brief in defense of *Pacific Greyhound*. Both amicus briefs (which are attached as Exhibits 1 and 2, respectively) do an excellent job of explaining the context of the *Pacific Greyhound* holding and how that holding does not support the notion that the Commission's constitutional authority is limited to ratemaking.

cars). Hence, after *Tucson Gas* and *Arizona Eastern Railroad Company*, the Court confirmed that both the Legislature and the Commission have authority to regulate public service corporations under the Arizona Constitution. *Pacific Greyhound* simply fleshed out the interaction of their respective powers over public service corporations.

The facts of *Pacific Greyhound* are as follows. Two common carriers, Pacific Greyhound Lines and Central Arizona Transportation Lines, were in dispute over the right to provide transportation service between Phoenix and Wickenburg. The Commission granted Central Arizona Transportation Lines a certificate of convenience and necessity to serve the route, over the objection of Pacific Greyhound Lines which already held a certificate for the area. Pacific Greyhound Lines appealed the action of the Commission, claiming that it contravened a statute which provided that an application to serve a route for which there was already a carrier could only be granted if the original carrier was unable to provide satisfactory service. *Id.* at 166, 94 P.2d at 446. The Commission argued that the statute itself was an unconstitutional incursion on the Commission's authority under § 3 to "make reasonable rules, regulations, and orders, by which public service corporations shall be governed in the transaction of business within the state."<sup>4</sup> In response to the Commission's argument, the *Pacific Greyhound* court held that this grant of rulemaking authority applies solely to the Commission's authority over rates, charges, and classifications. *Id.* at 176-77, 94 P.2d at 450.

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<sup>4</sup> Note, this refers only to the Commission first grant of rulemaking authority under § 3.

Re-examining the meaning of section 3, supra, in the light of the other section of the constitution affecting the question, and the language and reasoning of all our decisions, we are of the opinion that the “full power to . . . make reasonable rules, regulations and orders, by which such corporations shall be governed in the transaction of business within the State, qualifies and refers only to the power given the commission by the same section to ‘prescribe just and reasonable classification to be used, and just and reasonable rates and charges to be made and collected, by public service corporations’ and that both under the direct language of the constitutional and the police power inherent in the legislative authority, the paramount power to make all rules and regulations governing public service corporations not specifically and expressly given to the commission by some provision of the constitution, rests in the legislature. . . .

*Id.*

Importantly, the Court’s holding does not deal with the Commission’s second grant of rulemaking authority under § 3, except to say that the Legislature retains the “paramount” authority over public service corporations outside of the Commission’s ratemaking powers. In other words, *Pacific Greyhound* stands for the proposition that the Commission’s non-ratemaking authority over public service corporations is shared concurrently with the Legislature, and is subject to the Legislature’s “paramount” power. It does not stand for the proposition that the Commission has no constitutional authority beyond ratemaking.

## **II. The Core Provisions of the REST Rules are Within the Commission’s Non-Ratemaking Authority.**

The core provisions of the REST rules are found in A.A.C. R14-2-1804 and -1805. These rules contain the standard-setting provisions of the REST rules. Rule 1804(a) requires electric utilities to obtain 15% of their electricity via renewable energy by 2025. Rule 1805(a) requires electric utilities to obtain 30%

of their renewable energy from distributed generation by 2012. Rule 1805(d) requires 50% of distributed generation to come from residential facilities and 50% to come from commercial facilities. Rule 1804(a) and Rule 1805(a) plainly fall within the Commission's non-ratemaking authority. Rule 1805(d) is less clear.

**A. Rule 1804(a) is supported by the Commission's Non-ratemaking authority.**

Most traditional fuels for generating electricity produce harmful air emissions that exacerbate asthma and cause other deleterious health impacts. These harmful health impacts are classic externalities. That is, barring government intervention, utilities will not necessarily consider the existence and magnitude of these harmful health impacts in calculating their cost-minimizing fuel source(s). Hence, *laissez fair* utility incentives are biased towards an over-reliance on traditional fuel sources.

In contrast, most renewable fuels do not produce harmful air emissions. Consequently, the requirement that Arizona utilities acquire a minimum percentage of their power from renewable energy is a legitimate response to distorted utility incentives and an expression of the Commission's authority to make rules to preserve the health of the employees and patrons of public service corporations.

**B. Rule 1805(a) is supported by the Commission's Non-ratemaking authority.**

The requirement that utilities acquire a certain percentage of their renewable energy via distributed generation is also supported by the Commission's non-ratemaking authority. There is credible evidence that an electric grid with distributed generation is more robust and less susceptible to terrorist attack or natural catastrophes than an electric grid that depends solely on central generation

stations. Because the health and safety of employees and patrons of public service corporations depends in part on the reliability of the electric grid, the Commission acted within its authority to require a certain percentage of electricity to come from distributed generation facilities disbursed throughout the electric grid.

**C. Rule 1805(d) may be supported by the Commission’s Non-ratemaking authority.**

Rule 1805(d) is bad public policy<sup>5</sup> because it unjustifiably raises the costs of renewable energy and distributed generation. The question here, however, is not whether Rule 1805(d) is good policy, but whether it is within the Commission’s legal authority. The key inquiry is whether there is a rationale basis to conclude that Rule 1805(d) enhances “the comfort, convenience, health and safety of employees or patrons of public service corporations.” Suffice it to say, if any of the core provisions of the REST rules are beyond the Commission’s authority, it is Rule 1805(d).

**III. The Core Provisions of the REST Rules do not Fall Within the Commission’s Exclusive Ratemaking Powers.**

As explained above, since *Tucson Gas* Arizona courts have recognized that ratemaking in Arizona belongs exclusively to the Corporation Commission. This creates an inherent conflict with the Legislature’s general police powers; whenever a Commission policy decision is characterized as ratemaking, the necessary implication is that the Arizona Legislature has no authority to adopt that policy. The exclusive nature of the Commission’s ratemaking authority is a remarkable

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<sup>5</sup> Commissioner Pierce discussed the high cost of Rule 1805(d) in his dissent to the 2007 Renewable Energy Implementation Plans for Arizona Public Service, Tucson Electric Power and Unisource Electric attached as exhibits 3, 4, 5 respectively.

deviation from the traditional allocation of powers between a state public utilities commission and a state legislature. *See State v. Tucson Gas, Electric, Light & Power*, 15 Ariz. 294, 306, 138 P. 781, 786 (1914); *Ariz. Corp. Comm'n v. Superior Court*, 105 Ariz. 56, 60, 459 P.2d 489, 493 (1969) (referring to the Corporation Commission as the fourth branch of government because of its exceptional powers under the Arizona Constitution). While the Corporation Commission's exceptional ratemaking authority is justified and required by the language of Article 15, § 3, this Court should keep in mind the remarkable nature of the exception and narrowly construe the category of policies that constitute ratemaking.

In this case, the Commission argues that the core provisions of the REST rules constitute ratemaking because they will impact rates. *See* Response to Pet. For S.A. at 28. While the REST rules will certainly impact rates—predominantly by raising rates in the short-term, but stabilizing rates in the long-term—adopting an “impact-on-rates test” would be a terrible method for delineating the boundaries of ratemaking policies. Thousands of public policies impact rates, such as air quality standards, property taxes, tort laws, and labor laws.<sup>6</sup> In light of the Commission's exclusive ratemaking authority under the Arizona Constitution, the Court should reject an “impact-on-rates test” for determining whether a policy constitutes ratemaking. Such a test would suggest that all of the foregoing public policies—air quality standards, property taxes, tort laws, and labor laws—could only be established by the Corporation Commission.

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<sup>6</sup> For example, limiting the number of cars permissible in a train would clearly impact transportation rates. Yet, as explained above, the *Arizona Eastern Railroad Company* court appropriately concluded that a train-length standard was not ratemaking.

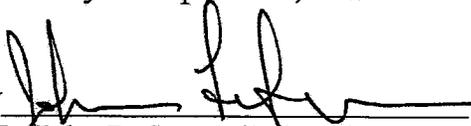
Instead, the Commission's exclusive ratemaking authority more appropriately describes Commission actions such as determining the prudence of utility investment, calculating fair value of utility plant and the weighted cost of capital, establishing a revenue requirement for a utility, allocating utility costs among customer classes, and designing rates for the recovery of those costs. The establishment of a renewable energy standard—though it impacts rates—does not constitute ratemaking. Because the Legislature could also adopt renewable energy standards, the core provisions of the REST rules do not exclusively reside with the Commission.

### CONCLUSION

Commissioner Pierce and Representative Adams respectfully request the Court to uphold the REST rules in a manner that is appropriately respectful of the Legislature's concurrent authority to adopt renewable energy standards of its own.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of September, 2008.

By

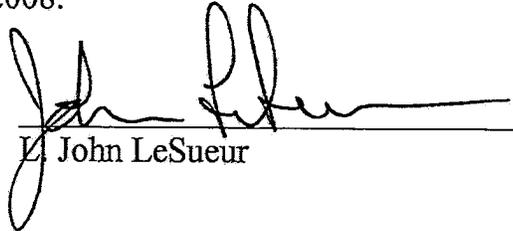
  
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## CERTIFICATE OF COMPLIANCE

Under Arizona Rules of Civil Appellate Procedure 14 and 16, I certify that this brief uses proportionally spaced type of 14 points or more, is double-spaced using a roman font, and does not exceed 12,000 words.

Dated this 3<sup>rd</sup> day of September, 2008.



John LeSueur

## CERTIFICATE OF SERVICE

The undersigned has filed the original and seven copies of Amici Curiae Brief of Commissioner Gary Pierce and Representative Kirk Adams this 3<sup>rd</sup> day of September, 2008 with:

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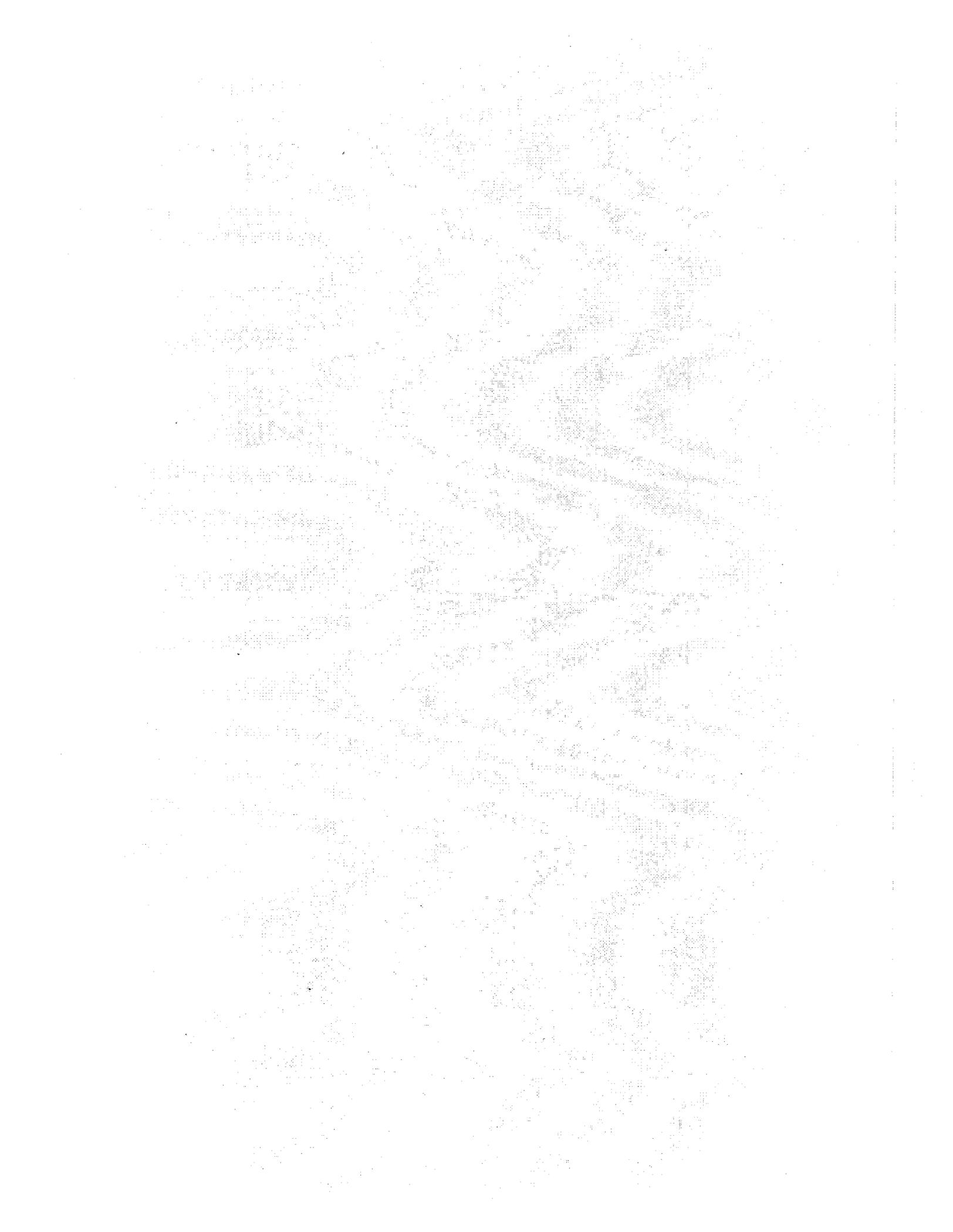
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**IN THE SUPREME COURT  
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No. CV 08-0196 SA

**APPENDIX**

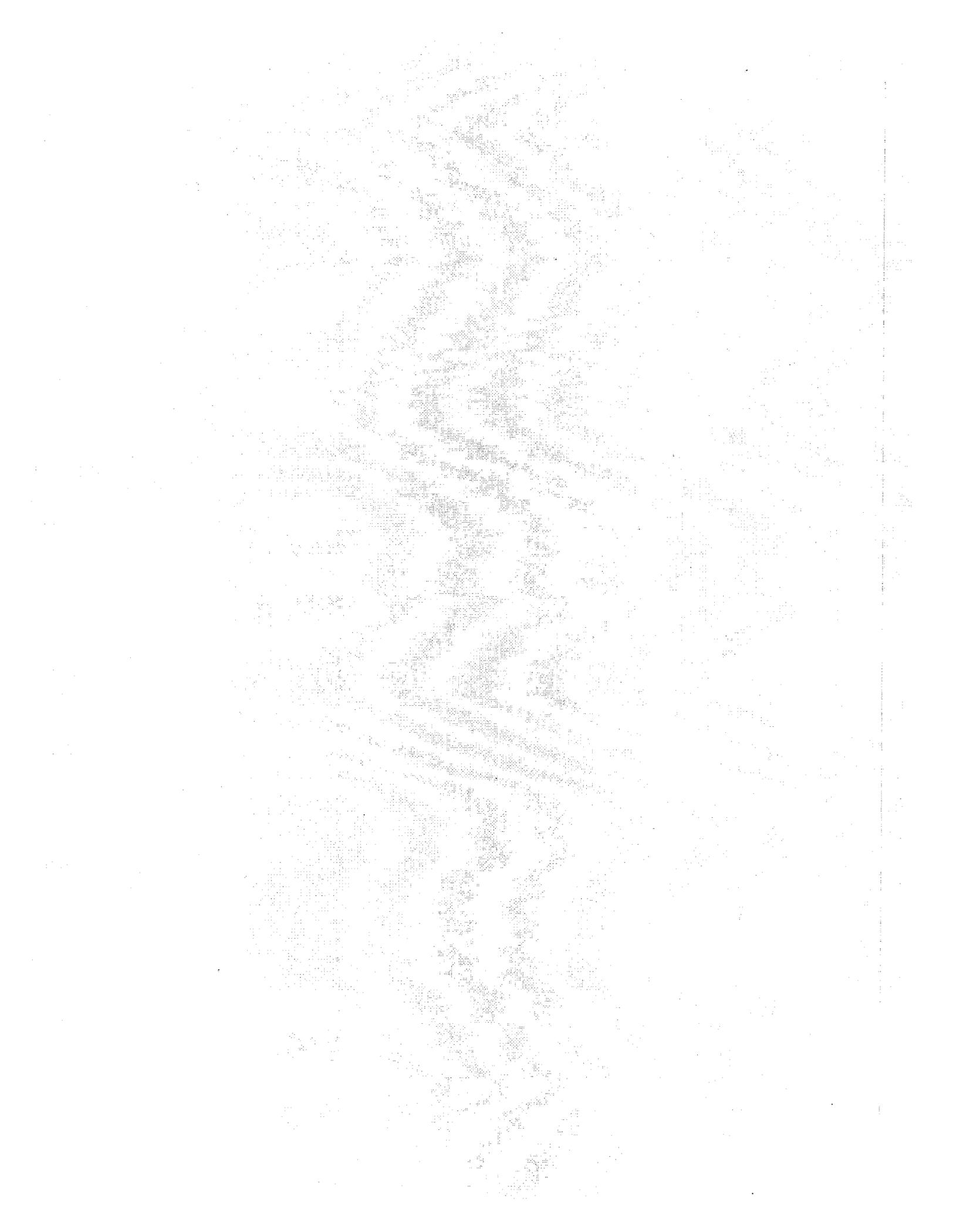
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Chairman; JIM IRVIN, Commissioner; )  
WILLIAM A. MUNDELL, Commissioner; )  
JEFF HATCH-MILLER, Commissioner; )  
MIKE GLEASON, Commissioner, )

CASE NO. CV-03-0291-SA

Petitioners, )

vs. )

STATE OF ARIZONA *ex rel.* TERRY )  
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Arizona, )

Respondent. )

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## INTRODUCTION

The Residential Utility Consumer Office (“RUCO”), an agency of the State of Arizona, submits this brief as amicus curiae in support of the relief requested by Petitioners Arizona Corporation Commission and its members (“Commission”). RUCO is an agency of the State of Arizona created to represent the interests of residential utility consumers in regulatory proceedings before the Commission. A.R.S. Section 40-462. As an advocate for residential utility customers, RUCO supports the goals of the Commission’s Slamming and Cramming Rules (“Rules”) that are the subject of this Special Action. In addition, RUCO is intimately familiar with the constitutional provisions and case law regarding the scope of the Commission’s authority, which is at the heart of this matter. Pursuant to 17B A.R.S. Civil Appellate Procedure Rules, Rule 16(a), RUCO, as a state agency, is permitted to file a brief as amicus curiae without leave of the Court.

### I. THE COMMISSION HAS A CONSTITUTIONAL BASIS TO ADOPT THE RULES APART FROM ITS RATE MAKING AUTHORITY

The Commission is a constitutionally created body. Ariz. Constitution Article 15. Much of its authority is set forth in Section 3 to Article 15, and it is this authority that is at the heart of this proceeding. In addition, other sections of Article 15 convey other authority on the Commission, and the legislature is

authorized (pursuant to Article 15, Section 6) to enlarge the Commission's powers even further. Because much of the Commission's authority is constitutionally based, the courts have referred to it as a fourth branch of government. *State v. Tucson Gas, Electric, Light & Power*, 15 Ariz. 294, 306, 138 P. 781, 786 (1914); *Ariz. Corp. Comm'n v. Superior Court*, 105 Ariz. 56, 60, 459 P.2d 489, 493 (1969).

Article 15, Section 3 provides, in relevant part:

The corporation commission **shall have full power to**, and shall, 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, and **make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business** within the state, **and may** prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and **make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety**, and the preservation of the health, of the employees and **patrons** of such corporations;...(emphasis added)

The text of Section 3 grants the Commission two types of powers: mandatory powers ("shall...") and discretionary powers ("may..."). *See Arizona Eastern R. Co. v. State*, 19 Ariz. 409, 413, 171 P. 906, 908 (1918). The authority to make rules is mentioned twice, as both a mandatory and discretionary power. The mandatory authority described in the first part of Section 3 is often described as the Commission's rate making authority. *See Ariz. Corp. Comm'n v. State ex*

*rel. Woods*, 171 Ariz. 286, 294, 830 P.2d 807, 815 (1992). It is this rate making authority that is the exclusive prerogative of the Commission, and the courts have been careful to protect the Commission's authority over rate making from infringements by other branches. *Tucson Gas*, 15 Ariz. at 299-301; *Ethington v. Wright*, 66 Ariz. 382, 189 P.2d 209 (1948); *State ex rel Corbin v. Arizona Corp. Comm'n*, 174 Ariz. 216, 848 P.2d 301 (App. 1992). Most of the cases that discuss the Commission's authority concern the Commission's exclusive rate making authority.

The Commission's discretionary, but nonetheless constitutionally-based, authority, has received much less attention from the courts. Only two reported cases focused on this aspect of the Commission's authority. In *Arizona Eastern R. Co.*, this Court held that Article 15, Section 3's grant to the Commission of authority to make rules for the comfort, convenience and safety of patrons is not exclusive, but that such power may also be exercised by the Legislature. 19 Ariz. 409, 171 P. 906 (1918). In *Pacific Gas & Electric Co. v. State*, this Court held that even though the legislature and the Commission may both have authority to act as to matters affecting the comfort, convenience and safety, the Commission's action would trump any conflicting legislative enactment. 23 Ariz. 81, 201 P. 632 (1921).

The Commission's Slamming and Cramming Rules at issue in this proceeding are meant to promote customers' comfort, convenience and safety, and

are therefore within the Commission's authority under the second portion of Article 15, Section 3. The Slamming Rules (R14-2-1901 to 1914) protect customers from unauthorized changes of their local and long distance telecommunications providers. R14-2-1902 (Appendix 1 to Petition). Such unauthorized changes of providers result in customers being inconvenienced by having to contact one or more telecommunications carriers to get their service switched back to the original authorized carrier, and could subject customers to charges in excess of the charges of their authorized carrier. The Cramming Rules (R14-2-2001 to 2012) protect customers from unauthorized charges on bills from telecommunications companies. R14-2-2002. The Slamming and Cramming Rules each enhance customers' comfort and convenience by preventing the inconvenience of having to contact a telecommunications company in response to a bill reflecting charges for slammed services or crammed goods or services. In addition, the Rules protect customers from the financial consequences of unauthorized transactions regarding their telecommunications bills. Therefore, the Rules also promote customers' safety, as "safety" includes protection from financial loss. *See Black's Law Dictionary*, 1199 (5<sup>th</sup> Ed. 1979) (safe: secure from harm, danger or loss).

The Commission has authority pursuant to Article 15, Section 3 to adopt the Rules to promote the comfort, convenience and safety of Arizona's telecommunications customers.

II. THE COURT NEED NOT OVERTURN *PACIFIC GREYHOUND* TO UPHOLD THE COMMISSION'S AUTHORITY TO ADOPT THE RULES.

The Commission, in stating the issues in this Special Action, states that *Corp. Comm'n v. Pacific Greyhound Lines* (54 Ariz. 159, 94 P.2d 443 (1939)) limits the Commission's constitutionally-based power to rate making, and suggests that the Court should overrule *Pacific Greyhound* and "restore the Commission's power to protect utility consumers." Petition at 7. Similarly, the Chief Deputy Attorney General, in his letter to Chairman Spitzer explaining the basis for denial of certification of the Rules, cites *Pacific Greyhound* for the proposition that the Commission's rulemaking authority is limited to rate making. Exhibit 5 to Petition, at 2. However, the holding of *Pacific Greyhound* is not as broad as either the Commission or the Attorney General read it, and the Court can uphold the Commission's authority to adopt the Rules without overturning *Pacific Greyhound*.<sup>1</sup>

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<sup>1</sup> The Commission and the Attorney General are not alone in their confusion about *Pacific Greyhound*'s holding. This Court itself acknowledged that *Pacific*

This Court in *Pacific Greyhound* did not conclude that the Commission's constitutionally-based power was limited to rate making. To the contrary, the Court said:

[W]e are of the opinion that the 'full power to \* \* \* make reasonable rules, regulations and orders, by which such corporations shall be governed in the transaction of business within the State', qualifies and refers only to the power given the commission by the same section to 'prescribe just and reasonable classifications to be used, and just and reasonable rates and charges to be made and collected, by public service corporation', and that both under the direct language of the constitution and the police power inherent in the legislative authority, the paramount power to make all rules and regulations governing public service corporations not specifically and expressly given to the commission by some provision of the constitution, rests in the legislature, and it may, therefore, either exercise such powers directly or delegate them to the commission upon such terms and limitations as it thinks proper. (emphasis added) (54 Ariz. at 176-177, 94 P.2d at 450).

The above language reveals two conclusions by the Court. First, the first reference in Article 15, Section 3 to "make...rules" refers to the Commission's rate making authority. The Court says nothing about the scope of the Commission's authority under the second reference to "make...rules." Second, the Commission

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*Greyhound's* language is less than clear, and stated that it was unsure that *Pacific Greyhound* in fact established a doctrine that "the Commission has no regulatory authority under Article 15, Section 3 except that connected with its ratemaking power." *Woods*, 171 Ariz. at 815 & n.8, 830 P.2d 294 & n.8. However, the *Woods* court concluded that it could resolve the case before it without resolving the ambiguity in *Pacific Greyhound. Id.*

does not have authority to make rules beyond those powers either authorized by the constitution or delegated by the legislature. The Court did not conclude that the Commission's authority to make rules pursuant to the first reference in Article 15, Section 3 to "make...rules" was the only authority the Commission had to make rules. Rather, by using the phrase "some provision of the constitution," the Court recognized that there is more than one constitutional provision granting the Commission authority to adopt rules governing public service companies. As discussed above, Article 15, Section 3 has two provisions granting the Commission rule-making authority: one related to rate making, and one related to comfort, convenience and safety.

In *Pacific Greyhound*, the Court examined whether a certain statute was within the legislature's authority to adopt, or whether it concerned matters that were within the exclusive domain of the Commission. The Court did not analyze whether the statute was within the scope of the Commission's non-exclusive authority regarding comfort, convenience and safety. Several examples from the decision demonstrate that the Court was not addressing the Commission's authority regarding comfort, convenience and safety. First, when the Court set forth the relevant portion of Article 15, Section 3, it used an excerpt that only includes the first clause referring to making rules, but did not go on to state the rest

of the section that includes the second rulemaking clause.<sup>2</sup> Second, the Court's statement of the question before it (essentially, the scope of the Commission's authority to make rules) referred only to the first reference to making rules.<sup>3</sup> Third, the Court's statement of its holding on the issue only refers to the first rulemaking clause.<sup>4</sup> Finally, the Court was aware of the two different references in Article 15,

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<sup>2</sup> "It is urged by the commission that this proviso of section 6, supra, is unconstitutional because it is in conflict with section 3 of article XV of the constitution of Arizona, which is, so far as material, as follows: 'The corporation commission shall have full power to, and shall, prescribe just and reasonable classifications to be used, and just and reasonable rates and charges to be made and collected, by public service corporation within the State for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the State, \* \* \*.'" 54 Ariz. at 166, 94 P.2d at 446.

<sup>3</sup> "The question then is whether the provision of section 3, supra, when it refers to the 'full power' of the commission to 'make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the State' [the first of the two references to making rules] refers to all business of every nature carried on by public service corporations, or is limited to classification, rates and charges only, leaving sections 2 and 14 of article XIV, supra, to govern public service corporations in all matters not specifically delegated to the commission, as they unquestionably would be were it not for article XV of the constitution." 54 Ariz. at 169-70, 94 P.2d at 447.

<sup>4</sup> "[W]e are of the opinion that the 'full power to \* \* \* make reasonable rules, regulations and orders, by which such corporations shall be governed in the transaction of business within the State' [again, the first of the two references to rulemaking in Section 3], qualifies and refers only to the power given the commission by the same section to 'prescribe just and reasonable classifications to be used, and just and reasonable rates and charges to be made and collected, by public service corporation', and that both under the direct language of the constitution and the police power inherent in the legislative authority, the

Section 3 to “make...rules”, but chose to state the issue before it, and its holding, in language addressing only the first reference to making rules. The Court quoted extensively from *Arizona Eastern R. Co.*, including the portion of the case that most obviously highlights the two different references in Article 15, Section 3 to making rules. See 54 Ariz. at 173-174, 94 P.2d at 449. The Court’s deliberate omission of the second reference to “make...rules” from its statements of the issue and its holding indicate that its decision was limited to an interpretation of only the first reference to “make...rules.” Because *Pacific Greyhound* only analyzes Article 15, Section 3’s first reference to “make...rules,” its holding limiting the scope of that authority to rate making does not apply to an analysis of the Commission’s authority to adopt rules under Article 15, Section 3’s second reference to “make...rules” for comfort, convenience and safety.

### CONCLUSION

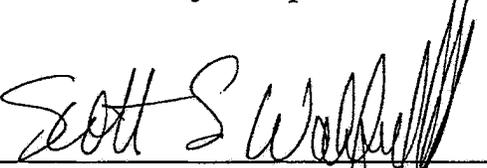
*Pacific Greyhound* analyzes the scope of the Commission’s authority to adopt rules pursuant to its rate making powers. It does not address the Commission’s authority to act pursuant to its constitutional, but non-rate making,

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paramount power to make all rules and regulations governing public service corporations not specifically and expressly given to the commission by some provision of the constitution, rests in the legislature, and it may, therefore, either exercise such powers directly or delegate them to the commission upon such terms and limitation as it thinks proper.” 54 Ariz. at 176-177, 94 P.2d at 450.

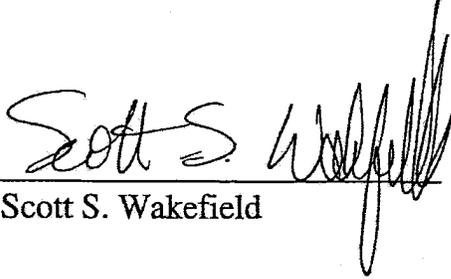
authority to adopt rules for comfort, convenience and safety. Because the Commission's authority to adopt the Slamming and Cramming Rules emanates from its constitutional authority to adopt rules for comfort, convenience and safety, *Pacific Greyhound's* holding does not apply to them. As such, the Attorney General's apparent reliance on *Pacific Greyhound* to deny certification of the Rules was misplaced.

**RESPECTFULLY SUBMITTED** this 5<sup>th</sup> day of September, 2003.

  
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## CERTIFICATE OF COMPLIANCE

Pursuant to the Specifications of Rules of Procedure for Special Actions, Rule 7 (f) and Rules of Civil Appellate Procedure, Rules 14 (b) and 16 (a), the text of this Brief of Amicus Curiae is double spaced, quotations more than two lines are indented and single spaced, and headings and footnotes are single spaced. This Brief of Amicus Curiae is proportionately spaced Times New Roman in 14 point type and contains 2,351 words.

  
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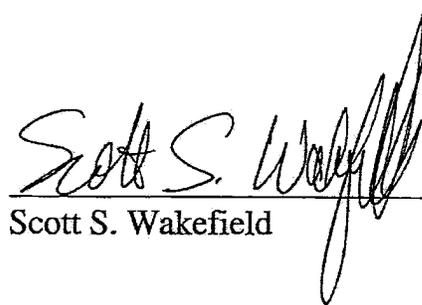
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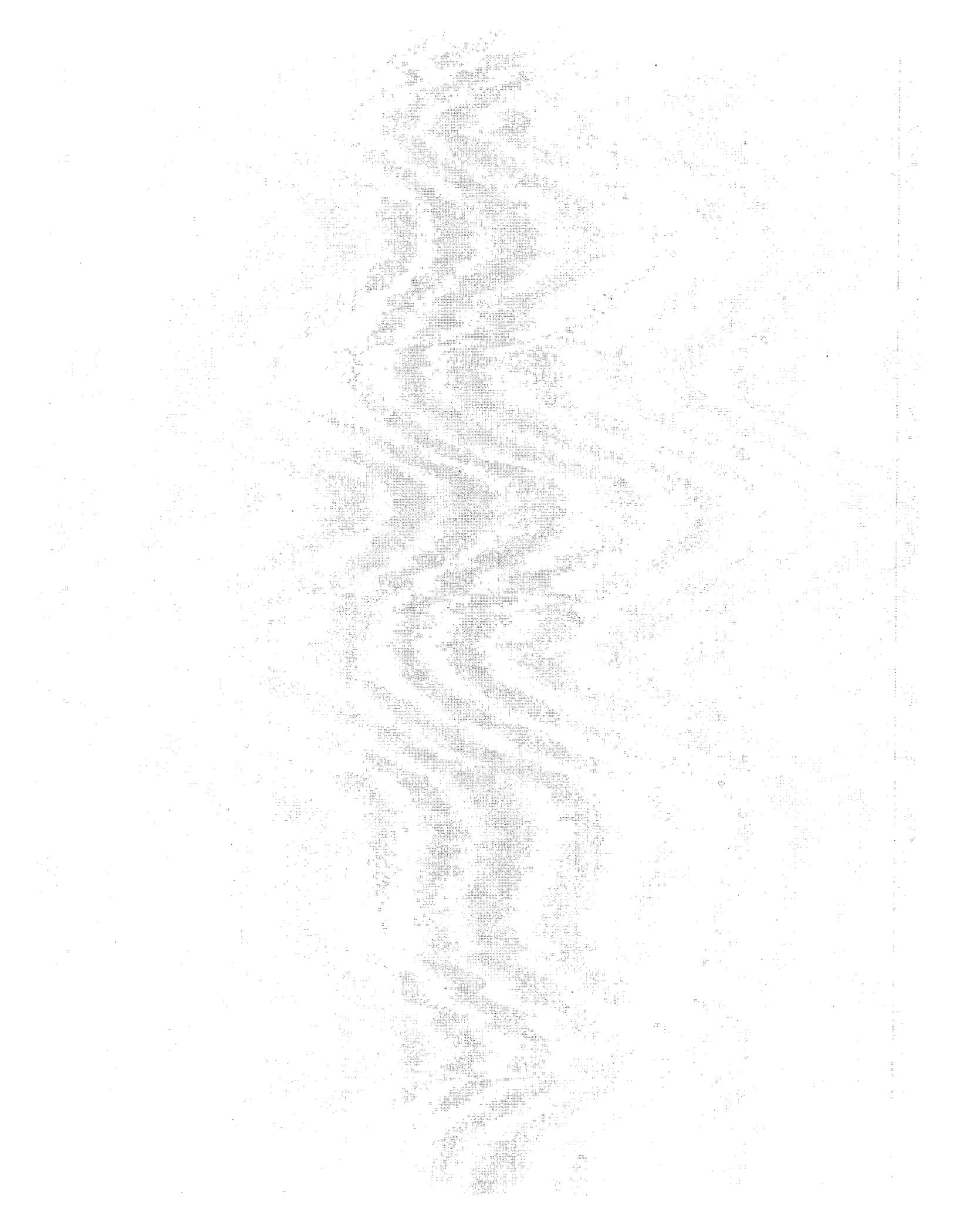
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IN THE SUPREME COURT  
STATE OF ARIZONA

ARIZONA CORPORATION  
COMMISSION; MARC SPITZER,  
Chairman; JIM IRVIN,  
Commissioner; WILLIAM A.  
MUNDELL, Commissioner; JEFF  
HATCH-MILLER, Commissioner;  
MIKE GLEASON, Commissioner,

Petitioners,

v.

STATE OF ARIZONA ex rel.  
TERRY GODDARD, in his official  
capacity as the Attorney General of  
the State of Arizona,

Respondents.

No. CV 03-0291 SA

AMICI CURIAE BRIEF OF ARIZONA UTILITY INVESTORS  
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AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.,  
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IN THE SUPREME COURT

STATE OF ARIZONA

ARIZONA CORPORATION  
COMMISSION; MARC SPITZER,  
Chairman; JIM IRVIN,  
Commissioner; WILLIAM A.  
MUNDELL, Commissioner; JEFF  
HATCH-MILLER, Commissioner;  
MIKE GLEASON, Commissioner,

Petitioners,

v.

STATE OF ARIZONA ex rel.  
TERRY GODDARD, in his official  
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Respondents.

No. CV 03-0291 SA

**AMICI CURIAE BRIEF OF ARIZONA UTILITY INVESTORS  
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AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.,  
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**OTHER AUTHORITIES**

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## INTRODUCTION

Amici, Arizona Utilities Investors Association, Arizona-American Water Company, AT&T Communications of the Mountain States, Inc., and Qwest Corporation (“Amici”) present this brief solely to address the constitutional issues raised by the Arizona Corporation Commission (“ACC” or the “Commission”). Amici take no position on whether the proposed slamming and cramming rules at issue here (the “Rules”) are a valid exercise of the Commission’s authority under Titles 40 and 44 of the Arizona Revised Statutes. Rather, Amici file this brief to address the ACC’s argument that the Court should overrule its prior decision in *Corporation Comm’n v. Pacific Greyhound Lines*, 54 Ariz. 159, 94 P.2d 443 (1939).

The Commission’s petition invites this Court to undertake a radical revision of the law of this State by overruling a well-reasoned decision that has been followed by Arizona courts for almost 65 years. The ACC’s reading of Article 15 and the cases interpreting the Arizona Constitution is erroneous. Amici urge this Court to reject the Commission’s invitation and decide this case within the well-established constitutional framework that has historically governed such issues.

## ARGUMENT

In *Pacific Greyhound*, this Court held that the Commission had exclusive, plenary power over rates, charges and classifications of public service corporations, and this exclusive, plenary authority could not be limited or usurped by the Legislature. The Court also held, however, that the Commission's authority over other aspects of a public service corporation's business was non-exclusive. Under *Pacific Greyhound*, the Commission's orders and rules affecting non-rate matters are subject to the Legislature's general police power, and the Commission cannot issue orders and promulgate rules that are inconsistent with statutes governing the same subject matter.

The Commission asks this Court to "overrule" *Pacific Greyhound*. The Commission advances no compelling public policy reason to revisit, much less reverse a body of law that has been settled for more than 60 years. Nor does it identify any problems caused by *Pacific Greyhound* and its progeny. Rather, it contends that *Pacific Greyhound* "does not reflect the text of the constitution or the cases preceding it." Petition at 4. The Commission further contends that the decisions preceding *Pacific Greyhound* were consistent and, therefore, there was no reason for this Court to revisit those decisions in *Pacific Greyhound* and clarify the scope of the Commission's powers under Article 15, § 3 of the Constitution. *Id.* at 17-18. A careful review of *Pacific Greyhound* and the decisions that

preceded it, however, demonstrates that the Commission is wrong for two reasons: (1) the decisions concerning the Commission's power prior to 1939 did not go nearly as far as the Commission represents; and (2) *Pacific Greyhound* appropriately reconciled those decisions. Amici will undertake a detailed examination of this Court's decisions prior to *Pacific Greyhound* to demonstrate their consistency with each other and with *Pacific Greyhound*.

Contrary to the Commission's claims, the courts have consistently followed *Pacific Greyhound* since it was decided. It is a soundly-reasoned, historically-based precedent that is woven tightly into the fabric of Arizona utility law. Amici will discuss how time and again Arizona courts have relied upon *Pacific Greyhound* in reaching decisions, and not just in isolated areas as suggested by the Commission.

**I. *Pacific Greyhound* Is Consistent With The Decisions Of This Court.**

**A. The Early Decisions: *Tucson Gas* and *Arizona Eastern R.R.***

The first decision of this Court to address the Commission's powers under Article 15, § 3 is *State v. Tucson Gas, Electric Light & Power Co.*, 15 Ariz. 294, 138 P. 781 (1914). In that case, a utility was prosecuted for unlawfully charging and collecting \$1.00 for illuminating gas when the price of the gas furnished to the customer had a value of only 40 cents. This transaction allegedly violated a statute making it unlawful to charge an amount for water, electricity or gas in excess of

the quantity actually provided. *Id.* at 295-96, 138 P. at 781. The utility argued that the statute was unconstitutional because it attempted to fix the rates to be charged for utility services. Thus, the Court considered the issue of whether the Legislature had the authority to enact a statute regulating the amount to be charged for service by a utility, notwithstanding the authority granted to the Commission in Article 15, § 3. *Id.* at 296, 138 P. at 781-82.

By a 2-1 vote, the Court held that Article 15, § 3 granted the Commission full and plenary power to prescribe classifications and fix rates and charges for all public service corporations and, as a result, the Legislature lacked the power to enact the statute at issue. *Id.* at 297-300, 138 P. 782-84. Justice Ross, the author of the majority opinion, went on to provide a lengthy discussion of the Commission's various powers under Article 15, the bulk of which discussion was unnecessary to decide the narrow issue presented. *Id.* at 300-08, 138 P. at 783-87. As discussed below, this Court has consistently treated these statements as *dicta*, recognizing that the holding in *Tucson Gas* was limited to the Commission's plenary authority over ratemaking. *See Pacific Greyhound*, 54 Ariz. at 170-76, 94 P.2d at 448-51 (reviewing prior decisions involving the Commission's regulatory powers).<sup>1</sup>

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<sup>1</sup> Justice Cunningham dissented from the majority opinion in *Tucson Gas*. 15 Ariz. at 308-12, 138 P. at 787-88. Notably, Justice Cunningham and Chief Justice Franklin were delegates to Arizona's Constitutional Convention in 1910. *Arizona*

The next significant decision concerning the scope of the Commission's authority under Article 15, § 3 was *Arizona Eastern R.R. Co. v. State*, 19 Ariz. 409, 171 P. 906 (1918). In *Arizona Eastern R.R.*, the Legislature enacted a statute making it unlawful for any railroad to operate a train consisting of more than 70 cars. The State charged the railroad with violating the statute. In response, the railroad relied on the broad *dicta* in *Tucson Gas*, arguing that Article 15, § 3 vested the exclusive power to regulate public service corporations in the Commission. *Id.* at 409-10, 171 P. at 906-07. The Court held that the Legislature did have authority to enact the statute, limiting the scope of *Tucson Gas* and recognizing the constitutional limits on the Commission's powers under Article 15, § 3. *Id.* at 414-16, 171 P. at 908-09.

In reviewing *Tucson Gas*, the Court explained:

In the case of [*Tucson Gas*], this court had occasion to consider [Article 15, § 3] of the Constitution with reference to the power to fix and prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected by

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*Corp. Comm'n v. State ex rel. Woods*, 171 Ariz. 286, 292 n. 5, 830 P.2d 807, 813 n. 5 (1992). In his dissent, Justice Cunningham opined that the Legislature had authority to enact laws regulating the business of corporations under Article 14, and, more broadly, believed that the framers of the Constitution had intended the Legislature to retain some power to regulate public service corporations. *Tucson Gas*, 15 Ariz. at 310, 138 P. at 787. In contrast, Justice Ross was not a delegate to the Constitutional Convention. He did, however, sit on the Court from 1912 until 1945 and, for that reason, participated in the decisions *infra* at § I(B), including *Pacific Greyhound*.

public service corporations within the state for services rendered therein. It was there determined that such power was by the instrument vested exclusively in the Corporation Commission, but it is obvious that such a determination may not be a guide to the solution of the question presented in this record . . . .

*Id.* at 410-11, 171 P. at 907. Thus the Court concluded that, as stated in *Tucson Gas*, “the authority of the Corporation Commission to prescribe classifications, rates and charges under [Article 15, § 3] is exclusive.” *Id.* at 412, 171 P. at 907.

However, the Court refused to extend the Commission’s “exclusive” authority to other areas of utility regulation. Such an extension would, it reasoned, create a conflict between Sections 3 and 10 of Article 15.<sup>2</sup> *Id.* at 411-13, 171 P. at 907-08. To avoid any such conflict, the Court carefully examined the language of Article 15, § 3, noting that although the first part of this section (authorizing the Commission to prescribe reasonable classifications and to set just and reasonable rates and charges for service) is mandatory, the balance of the section is permissive and discretionary. Accordingly, the Court concluded:

It is noted in the first part of section 3 that the full power given to the Corporation Commission to make reasonable

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<sup>2</sup> Article 15, § 10 provides: “Railways heretofore constructed, or that may hereafter be constructed, in this state, are hereby declared public highways, and all railroad, car, express, electric, transmission, telegraph, telephone, or pipe line corporations for the transportation of persons, or of electricity, messages, water, oil or other property for profit, are declared to be common carriers and *subject to control by law.*” (Emphasis added.) Thus, this constitutional provision applies to a number of different utilities (e.g., telecommunications, electric and water) also classified as public service corporations under Article 15, § 2.

rules, regulations and orders by which public service corporations shall be governed in the transaction of business within the State is a grant in general terms, and is associated with and directly follows the full power to prescribe classifications, rates, and charges, which is a specific power granted in particular terms and directly related to the subject matter of the transaction of its business by public service corporations. . . . [W]e are clearly of the opinion that the general powers granted imperatively in the first part of section 3 have not the same meaning and purpose which is contained in the permissive power granted to the Corporation Commission to make and enforce reasonable rules, regulations, and orders for the convenience, comfort and safety, and the preservation of the health of the employees and patrons of public service corporations, which grant of power is contained in the last part of the section. That these two grants of power not only admit of but demand two separate senses.

*Id.* at 414-15, 171 P. at 908-09.

By analyzing Article 15, § 3 in this manner, the Court in *Arizona Eastern R.R.* prevented any conflict between §§ 3 and 10, concluding that in this instance, the Legislature had authority to enact legislation regulating the activities of railroads and other types of common carriers, as provided in Article 15, § 10:

It is perfectly clear that neither by direct language, nor by any necessary implication, from the powers granted to the Corporation Commission in section 3 is the police power in this State over a railway as a public highway, or over a railroad corporation as a common carrier, vested exclusively in the Corporation Commission. It is equally clear that this power of the state over a railway as a public highway, and over a railroad corporation as a common carrier may, by plain mandate, and in the emphatic language of the Constitution, be exercised by

the law making department of the government.

*Id.* at 415-16, 171 P. at 909.

In a concurring opinion, Justice Cunningham agreed with the result reached by the Court, but believed that the majority had construed the Legislature's power too narrowly by relying on the State's general police power. Instead he reasoned that the power to regulate railroads was reserved by Article 4, § 1 of the Constitution "to be exercised only by the legislative power of the government. [That] power is not reserved to be exercised by the Corporation Commission, but by the legislative power alone." *Id.* at 418, 171 P. at 910. Thus, given his participation in the Constitutional Convention, Justice Cunningham espoused an even narrower view of the Commission's power under Article 15, § 3 than Justices Ross and Franklin. In any case, all of the justices writing in 1918 held that (1) the Commission's plenary authority under Article 15, § 3 was limited to setting rates and charges for utility service, and (2) the Commission's remaining powers were permissive and subject to the Legislature's inherent, reserved power to enact statutes regulating railroads and other types of common carriers, despite their status as public service corporations.

**B. Subsequent Decisions Addressing the Commission's Power.**

Over the next two decades, this Court issued various decisions involving disputes concerning the scope of the Commission's regulatory authority. Notably,

almost none of these decisions relied on the Commission's powers under Article 15, § 3 of the Constitution, but rather considered statutes under which the Legislature delegated powers to the agency pursuant to Article 15, § 6.<sup>3</sup> For example, in *Phoenix Ry. Co. of Arizona v. Lount*, 21 Ariz. 289, 187 P. 933 (1920), authored by Justice Ross, the City of Phoenix brought a mandamus action against a railway company seeking to compel the continued operation of a railway line within the city. The railway company contended that the Commission had authorized abandonment of the line. Thus, the Court considered whether the Commission had the power to approve changes in the operation of the railway line, or whether the city, given its power to grant utilities the right to use and occupy public streets, was also required to approve the change in operations.

In defining the Commission's powers over the railroad company's operations, the Court relied principally on various provisions of the Public Service Corporation Act, then codified at Title 9, Chapter 11 of the 1913 Civil Code, Ariz. Rev. Stat. §§ 2277 – 2360. *Id.* at 292-94, 187 P. at 934-36. After noting that “[t]here is so much of the Public Service Corporation Act that it is not possible to set it forth here,” the Court quoted several provisions of the Act, and concluded by

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<sup>3</sup> Article 15, § 6 provides: “The law-making power may enlarge the powers and extend the duties of the Corporation Commission and may prescribe rules and regulations to govern proceedings instituted by and before it; but, until such rules and regulations are provide by law, the Commission may make rules and regulations to govern such proceedings.”

stating that in addition to those powers and duties, “many others are conferred on [the Commission] by chapter 11, title 9” of the 1913 Civil Code. *Id.* at 293-94, 187 P. 934. The Court ended its discussion of the scope of the Commission’s powers by examining several recent cases, including *Tucson Gas* and *Arizona Eastern R.R.* With respect to the former, the Court reiterated that its holding was limited to the Commission’s power to set rates. *Id.* at 296, 187 P. at 295. In summarizing the holding of *Arizona Eastern R.R.*, the Court explained that “while the Corporation Commission might have exercised the power to regulate the number of cars in a train, its power to do so was permissive and not exclusive of the power of the legislative department.” *Id.*<sup>4</sup>

The Court then reviewed other statutory provisions concerning the city’s authority to regulate the use of its public streets. Although “the right to grant franchises to public utilities to occupy the streets and alleys of incorporated cities and towns is vested in the municipal authorities,” the Court held this power did not conflict with the Commission’s authority under the Public Service Corporation Act to issue certificates of convenience and necessity. *Id.* at 299-300, 187 P. at 936. Ultimately, the Court concluded that the railway company, as a public service corporation, was subject to the jurisdiction of the Commission, and that the

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<sup>4</sup> Immediately following this discussion, however, the Court noted: “None of these cases, although they are referred to by counsel, can be said to have any direct bearing upon the point here in controversy.” *Id.*

Commission's order authorizing the railway company to abandon its line was proper under the authority delegated to it by the Legislature. *Id.* at 300, 187 P. at 936-37, citing A.R.S. § 2312 (1913)<sup>5</sup> and *Phoenix Ry. Co. v. Geary*, 209 Fed. 694 (D. Ariz. 1914).

Other decisions involving the Commission's authority to regulate public service corporations were *Northeast Rapid Transit Co. v. City of Phoenix*, 41 Ariz. 71, 15 P.2d 951 (1932), and *Menderson v. City of Phoenix*, 51 Ariz. 280, 76 P.2d 321 (1938). In *Northeast Rapid Transit*, the city sued to enjoin a company from operating a passenger service line following revocation of the city's permit to operate. The transit company contended that the Commission had sole and exclusive jurisdiction over common carriers of passengers, and that it was operating in accordance with the certificate of convenience and necessity issued to it by the Commission. *Northeast Rapid Transit*, 41 Ariz. at 73-75, 15 P.2d at 952-953. Although noting that a franchise was not required to use public streets as

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<sup>5</sup> Ariz. Rev. Stat. § 2312 (1913) provided: "Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment apparatus, facilities or other physical property of any public service corporation or of any two or more public service corporations ought reasonably to be made, or that a new structure or structures should be erected, to promote the security or convenience of its employees or the public, or any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes be made or such structure or structures be erected in the manner and within the time specified in said order . . . ."

a common carrier, the Court concluded that the city was entitled to enjoin the transit company because the company did not hold a proper certificate of convenience and necessity as required by statute. *Id.* at 76-78, 15 P.2d at 953-54. Notably, the Court stated that the Commission's power to issue certificates of convenience and necessity was delegated to it by the Legislature pursuant to Article 15, § 6, rather than being an "exclusive" power exercised by the Commission pursuant to Article 15, § 3.

In *Menderson*, the same transit company brought suit against the City of Phoenix, contending that the City was operating a bus line in competition with Menderson's bus line and without a certificate of convenience and necessity.<sup>6</sup> The Court rejected Menderson's argument, concluding, first, that the plain language of Article 15, § 2 of the Constitution expressly excludes municipal corporations from the definition of a "public service corporation." *Menderson*, 51 Ariz. at 282-83, 76 P.2d at 322. Second, because all of the Commission's regulatory powers in Article 15 expressly refer to "public service corporations," the Constitution prohibits an extension of the Commission's jurisdiction to municipalities. *Id.*

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<sup>6</sup> It appears from *Northeast Rapid Transit* that Menderson was the general manager of the transit company and held the transit company's certificates of convenience and necessity in its own name, prompting the Court to hold that the transit company had no statutory right to operate under the certificates. *Northeast Rapid Transit*, 41 Ariz. at 73-75, 15 P.2d at 952-54.

The Court also addressed the argument that the Legislature may grant the power to regulate municipalities to the Commission under Article 15, § 6 of the Constitution, which, as noted above, permits the Legislature to “enlarge the powers and extend the duties” of the Commission. The Court rejected that argument as well, concluding that the Legislature “may enlarge or extend the powers and duties of the commission over the subject matter of which it has already been given jurisdiction, and other matters of the same class, not expressly or impliedly exempt by other provisions of the Constitution.” *Id.* at 285, 76 P.2d at 323.

Taken together, these decisions (and other contemporaneous decisions of the Court) generally stand for the following unremarkable propositions. First, under Article 15, § 3, the Commission has full and plenary authority to prescribe classifications and to set rates and charges for service furnished by public service corporations; the Legislature cannot enact laws infringing on this power, except to establish procedural requirements for Commission proceedings under Article 15, § 6. *Tucson Gas*, 15 Ariz. at 298-300, 138 P. at 782-83.

Second, the phrase “and make reasonable rules, regulations, and orders, by which [public service] corporations shall be governed in the transaction of business within the state” in Article 15, § 3 is related to the Commission’s authority to prescribe classifications and set rates and charges for service, as opposed to being

an independent and general grant of authority to the Commission. *Arizona Eastern R.R.*, 19 Ariz. at 413-14, 171 P. at 908.

Third, the remaining powers set forth in Article 15, § 3 do not preclude the enactment of laws by the Legislature that restrict or regulate the activities of public service corporations, whether under the general reservation of legislative power found in Article 4, § 1, or another, more specific grant of authority found elsewhere in the Constitution, such as Article 15, § 10. *E.g., id.* at 415, 171 P. at 909. Therefore, with respect to matters unrelated to ratemaking, the Commission cannot adopt an order or rule that is inconsistent with a validly-enacted statute of the Legislature adopted pursuant to its police power.

Finally, the Legislature “may enlarge the powers and extend the duties” of the Commission pursuant to Article 15, § 6 and, in fact, did so as early as 1912 in enacting the Public Service Corporation Act. 1912 Ariz. Sess. Laws, ch. 90, *codified at* Ariz. Rev. Stat. §§ 2277-2360 (1913). However, the Legislature may only enlarge or extend the powers and duties of the Commission with respect to the subject matter over which the Commission has been given jurisdiction, i.e., public service corporations. *Menderson*, 51 Ariz. at 284-85, 76 P.2d at 322-23.

### C. The Outlier: *Pacific Gas*.

The only decision of the Court that is inconsistent with the foregoing regulatory framework is *Pacific Gas & Electric Co. v. State*, 23 Ariz. 81, 201 P.

632 (1921).<sup>7</sup> In 1914, the Commission issued a general order regulating the placement, construction and maintenance of telephone, telegraph, signal, trolley, electric light and power lines within the State. Later that year, at the November general election, voters passed an initiative measure that regulated the same subject matter. Reconstruction and new work were exempted for a period of six months from the date of the initiative's passage, and all lines and other facilities were required to comply with the initiative's standards and requirements within five years. In 1919, an action was brought against Pacific Gas & Electric Company for violations of the initiative. In its defense, the utility argued that the Commission had exclusive jurisdiction over the subject matter of the initiative under Article 15, § 3, and therefore the initiative was unconstitutional. *Id.* at 81-82, 201 P. at 633.

In an opinion written by Justice Ross, the Court held that the utility could not be prosecuted for violating the initiative. The Court distinguished both *Tucson Gas* and *Arizona Eastern R.R.*, concluding that neither decision applied to the issue presented. The Court stated that in *Tucson Gas*, "the only question involved was the rates and charges of public service corporations and the constitutional body to

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<sup>7</sup> Notably, by the time *Pacific Gas* was decided, none of the justices on the Court had attended the Constitutional Convention. In addition to Justice Ross, the other members of the Court were Justices McAlister and Flanigan. Like Justice Ross, Justice McAlister was a member of the Court when *Pacific Greyhound* was later decided.

regulate them. It was what may be called a 'rate case.'" *Id.* at 84, 201 P. at 633.

The Court provided a more detailed analysis of *Arizona Eastern R.R.*:

The logical effect of the conclusion reached in that case was that both the Corporation Commission and the Legislature could lawfully and constitutionally, in the exercise of the police power of the state, provide for the protection and safety of the employees of public service corporations. But in that case there is no conflict of authority, the Corporation Commission having failed to exercise its delegated powers to promulgate rules and regulations covering the subject-matter, while the Legislature had acted. . . .

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In the present case both the Commission and the Legislature have acted covering the same ground. Both unquestionably under proper circumstances may operate there — one, the Corporation Commission, under authority delegated to it by the Constitution, and the other, the Legislature, under its inherent reserved powers.

*Id.* at 84-85, 201 P. at 634. The Court resolved this conflict in summary fashion, concluding that once the Commission had acted, neither the Legislature nor the electorate, acting by means of initiative, had authority to act. *Id.* at 85-86, 201 P. at 634.

*Pacific Gas* appears to have arisen under unusual circumstances. First, the Attorney General agreed with the utility that the initiative was invalid (although his predecessor did not). *Id.* at 83-84, 201 P. at 633. Moreover, several entities that were not public service corporations filed briefs in opposition to the State's

position, including the City of Mesa and the Salt River Valley Water Users' Association. The Court responded to their concerns as follows:

It would seem that the water users' association, the city of Mesa, and perhaps other cities of the state, as well as public utility companies, have constructed their electric light and power plants in conformity with the provisions of the [Commission's order], and not in accordance with the provisions of the initiative measure. . . . If the passage of the initiative measure had the effect of abrogating [the Commission's order], it follows that any municipality or public utility company whose plant is not constructed, or was not reconstructed within five years after it became law, in accordance with its provisions, is guilty of a misdemeanor and necessarily must be put to the expense of changing its plant to conform therewith.

*Id.* at 83, 201 P. at 633.<sup>8</sup> Moreover, the Court also noted that the Commission's order embodied recommendations contained in a report issued by the National Electric Light Association, and was modeled after orders issued by a number of public utility commissions from other states. *Id.* at 82, 201 P. at 633. In short, a close reading of *Pacific Gas* suggests that the Court's decision was based on political and pragmatic considerations, particularly in light of the summary disposition of its prior precedent and the lack of authorities supporting the Court's

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<sup>8</sup> As discussed in *Menderson*, Article 15, § 2, which defines the term "public service corporations," excludes municipalities. In addition, quasi-municipal districts, such as the Salt River Valley Water Users' Association, are similarly not public service corporations and are not subject to the Commission's jurisdiction. See *Rubenstein Constr. Co. v. Salt River Project Agric. Improvement & Power Dist.*, 76 Ariz. 402, 404, 265 P.2d 455, 456 (1953). Therefore, the interest of these amici in the case is unclear.

holding. This may explain why the case was never discussed or cited until *Pacific Greyhound*.<sup>9</sup>

**D. Pacific Greyhound.**

With the foregoing background, the Court revisited the Commission's jurisdiction under Article 15, § 3 in *Pacific Greyhound*. The case involved a dispute between two common carriers, Pacific Greyhound Lines and Central Arizona Transportation Lines, over the right to provide motor carriage service between Phoenix and Wickenburg. Central Arizona applied for an amendment of its certificate of convenience and necessity to include that route. Over the objection of Pacific Greyhound, which already held a certificate covering the route, the Commission granted the application. Pacific Greyhound sought relief from the Commission's order and obtained a judgment from the superior court. 54 Ariz. at 162-66, 94 P.2d at 444-47.

On appeal, the Commission challenged the lawfulness of the statute governing the issuance of certificates of convenience and necessity to motor carriers. This statute provided that if an applicant requests a certificate to operate over a route or in a territory already served by a common motor carrier, the Commission may issue a certificate to the applicant only if the existing common

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<sup>9</sup> After *Pacific Greyhound*, *Pacific Gas* was cited on only one occasion, without comment, in a long citation of prior decisions, *Arizona Corp. Comm'n v. Mountain States Tel. & Tel. Co.*, 71 Ariz. 404, 410, 228 P.2d 749, 753 (1951), and was not relevant to the issue before the Court.

carrier is unable to provide satisfactory service. *Id.* at 166, 94 P.2d at 446. The Commission argued that this provision was unconstitutional because it conflicted with the powers granted to the Commission under Article 15, § 3 of the Constitution. In support of its argument, the Commission relied principally on the Court's *dictum* in *Tucson Gas*. *Id.* at 166-67, 94 P.2d at 446.

The Court began its discussion by addressing *Tucson Gas*, noting that “[m]uch of the language used in the opinion was broader than the specific issue involved.” *Id.* at 167, 94 P.2d at 447. It therefore concluded:

We think, strictly speaking, [*Tucson Gas*] is authority only as to the powers of the commission over classification, rates and charges, and in view of the importance of the question involved and the somewhat ambiguous and perhaps conflicting language found in the opinion, we have decided to reexamine, as an original question, the extent of the authority of the commission as to regulation of the business of [public service] corporations on other matters than the three enumerated.

*Id.* at 167-168, 94 P.2d at 447. The Court's view of the limited scope of *Tucson Gas* was consistent with and supported by its prior decisions. *E.g.*, *Arizona Eastern R.R.*, 19 Ariz. at 410-411, 171 P. at 907; *Phoenix Ry.*, 21 Ariz. at 296, 187 P. at 935; *Pacific Gas*, 23 Ariz. at 84, 201 P. at 633.

The Court then discussed the relevant provisions of the Constitution, indicating first that the Legislature, under Article 14 of the Constitution, “would have plenary authority over [public service] corporations as well as all others, to

regulate, alter and restrain their operations in any manner it might see fit, not inconsistent with other provisions of the constitution of this state, or the constitution of the United States.” *Pacific Greyhound*, 54 Ariz. at 169, 94 P.2d at 447. However, the Court also considered Article 15’s grant of certain powers to the Commission regarding public service corporations. Accordingly, the Court framed the issue as follows:

The question then is whether the provision of section 3, supra, when it refers to the “full power” of the commission to “make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the State” refers to all business of every nature carried on by public service corporations, or is limited to classification, rates and charges only, leaving sections 2 and 14 of article XIV, supra, to govern public service corporations in all matters not specifically delegated to the commission, as they unquestionably would were it not for article XV of the constitution.

*Id.* at 169-70, 94 P.2d at 447.<sup>10</sup>

The Court then examined its prior decisions on the Commission’s powers, stating “it is evident from them that we did not intend to hold section 3 had the extremely broad meaning which it is claimed we did give it in the Tucson Gas Company case.” *Id.* at 170-71, 94 P.2d at 448. The Court began by addressing

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<sup>10</sup> The Court’s view of the Legislature’s general powers to regulate corporations under Article 14 of the Constitution is consistent with the view of Justice Cunningham in his dissenting opinion in *Tucson Gas*. 15 Ariz. at 310, 138 P. at 787 (“No one will deny the legislative power the right to enact laws regulating, limiting, or restraining the business of corporations in general.”).

*Arizona Corp. Comm'n v. Heralds of Liberty*, 17 Ariz. 462, 154 P. 202 (1916), written by Justice Ross, in which it held that the Commission's powers under Article 15, § 5 to issue certificates of incorporation and licenses to foreign corporations did not divest the Legislature of the power to prescribe the types of corporations that may do business in Arizona and their qualifications.<sup>11</sup> See *Heralds of Liberty*, 17 Ariz. at 469-71, 154 P. 205-06.<sup>12</sup> The Court noted that Article 5, § 3 made no distinction between public service corporations and other types of corporations and, therefore, the Commission's construction concerning the scope of its powers under that provision was inconsistent with its plain terms. *Pacific Greyhound*, 54 Ariz. at 171, 94 P.2d at 448.

The Court next considered *Eastern Arizona R.R.*, stating that the issue decided in that case was analogous, "for the matter involved was not the regulation of a 'classification, rate or charge', but of the general conduct of the business of the corporation." *Id.* After quoting extensively and with approval from *Arizona*

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<sup>11</sup> Article 15, § 5 provides: "[T]he Corporation Commission shall have the sole power to issue certificates of incorporation to companies organizing under the laws of this state, and to issue licenses to foreign corporations to do business in this state, as may be prescribed by law."

<sup>12</sup> In *Heralds of Liberty*, the Court explained that if Article 15, § 5 were construed to grant the Commission authority to determine which corporations were entitled to be licensed, the Commission's "judgment of the qualifications of an applicant to do business will be substituted in that event for the judgment of the Legislature. . . . The commission is an agency of the state created for the purpose of exercising certain functions and performing certain duties for the state, not for the purpose of prohibiting or restricting insurance business, but for the purpose of regulating it in the manner provided by law." *Id.* at 470-71, 154 P. at 205.

*Eastern R.R.*, the Court concluded that although motor vehicles are not expressly mentioned in Article 15, § 10, “we think it obvious that [Article 15, § 10] was intended to cover all known methods for the transportation of persons, electricity, messages, water, oil or any other property for profit, and that it should be construed as including motor vehicles operating as common carriers for profit on the public highways. All of these corporations are declared to be ‘subject to control by law’ which, as we have said, clearly implies a legislative act.” *Id.* at 174-75, 94 P.2d 449-50.

The Court then described *Pacific Gas* as holding that “both the commission and the legislature had covered the same ground and that both acted with authority, but that the authority of the corporation commission was superior to that of the legislature.” *Id.* at 175, 94 P.2d at 450. The Court disagreed with and criticized *Pacific Gas*, stating, “[o]ur conclusion that the order of the corporation commission superseded the initiative adopted by the people was not consistent with the decision in the Arizona Eastern case.” *Id.*

After briefly noting several other decisions that involved the Commission’s powers, including *Phoenix Ry.*, *Northeast Rapid Transit* and *Menderson*, the Court concluded:

It will be seen from the foregoing recitals that our decisions have not been entirely consistent in all respects, and particularly in some of the reasoning and the language used. But running all through them we find an

emphatic statement, whenever the Tucson Gas Company case is referred to, that the decision therein only affirms the exclusive power of the corporation commission insofar as charges, rates, classifications and regulations pertaining thereto are concerned.

Re-examining the meaning of section 3, supra, in light of the other sections of the constitution affecting the question, and the language and reasoning of all our decisions, we are of the opinion that the "full power to . . . make reasonable rules, regulations and orders, by which such corporations shall be governed in the transaction of business within the State", qualifies and refers only to the power given the commission by the same section 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", and that both under the direct language of the constitution and the police power inherent in the legislative authority, the *paramount power* to make all rules and regulations governing public service corporations not specifically and expressly given to the commission by some provision of the constitution, rests on the legislature, and it may, therefore, either exercise such powers directly or delegate them to the commission upon such terms and limitations as it thinks proper.

*Id.* at 176-77, 94 P.2d at 450 (emphasis added). Thus, the Court held that Article 15, § 3 gave the Commission exclusive and plenary authority in the area of ratemaking, but left paramount power in the Legislature with respect to the regulation of all other aspects of the business of a public service corporation. Consequently, the Court found that the Legislature had authority to enact statutes governing applications for certificates of convenience and necessity, and to require that an existing certificate holder be allowed an opportunity to furnish satisfactory

service before granting a certificate to a competing applicant. *Id.* at 177, 94 P.2d at 451-52.

In sum, this Court did *not* “stray[] from the sound teachings of its earlier cases” in *Pacific Greyhound*, as the Commission now contends. Petition at 17. The discussion of the Commission’s powers in *Tucson Gas* was unnecessary to the Court’s holding, and was recognized as *dicta* on multiple occasions over the decade that followed the decision (including opinions authored by Justice Ross himself). “Dictum thrice repeated is still dictum.” *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 81, 638 P.2d 1324, 1327 (1981). This Court should not rely on 90-year old *dicta* to overrule *Pacific Greyhound*.

The only previous opinion criticized and overruled in *Pacific Greyhound* was *Pacific Gas*. Additionally, *Pacific Gas* was never cited in any published opinion prior to *Pacific Greyhound*, and, for the reasons explained above, can best be described as an outlier. No other decision supports the Commission’s argument that it has unlimited power to regulate the business activities of public service corporations, and is free to adopt rules and issue orders without regard to Arizona laws.

Individuals have suggested that the *dicta* in *Tucson Gas* should be treated as authoritative because the decision was published in 1914. For example, in a law review article cited in the Petition, the student author stated, “*Tucson Gas* probably

best mirrors the framers' intent, because it was decided only four years after the constitutional convention." Deborah Scott Englby, The Corporation Commission: Preserving its Independence, 20 Ariz. St. L. J. 241, 248 (1988). This simplistic view overlooks the fact that the author of the *Tucson Gas* opinion, Justice Ross, was a member of this Court for 33 years, and was on the Court in 1939 when *Pacific Greyhound* was issued.<sup>13</sup> Had he believed that *Pacific Greyhound* represented a radical, erroneous interpretation of Article 15 or was inconsistent with *Tucson Gas*, he certainly would have said so, or at least refused to join in the *Pacific Greyhound* opinion.

Further, the *dicta* in *Woods* upon which the Commission relies so heavily is just *dicta*. Although the *Woods* Court suggested, but did not hold, that *Pacific Greyhound* was inconsistent with Article 15, § 3, the opinion ignored the best evidence of *Pacific Greyhound's* correct reading of the Constitution. Specifically, the decisions that preceded *Pacific Greyhound* (as discussed earlier) and the actions taken by the Legislature immediately after the Constitution was adopted evidence a contemporaneous understanding of the division of power between the Commission and the Legislature intended by the framers.

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<sup>13</sup> In fact, all of the members of the *Pacific Greyhound* panel were experienced jurists. Justice McAlister served on the Court from January 1921 to January 1945, while the author of *Pacific Greyhound*, Justice Alfred Lockwood, served on the Court from January 1925 to January 1943. Thus, *Pacific Greyhound* was not the product of a new group of justices unfamiliar with prior Court decisions involving the Commission.

A clear indication of how the framers viewed the Commission's power under Article 15, § 3 of the Constitution can be found in the Public Service Corporation Act, which, as discussed above, was enacted by the Legislature in 1912. Ariz. Sess. Laws 1912, Chap. 90.<sup>14</sup> In that legislation, the Legislature granted a wide variety of powers and imposed a number of duties on the Commission, in addition to establishing various standards and requirements applicable to public service corporations. If the framers intended the Commission to possess unlimited power to regulate public service corporations under Article 15, § 3, as the Commission now contends, it is difficult to understand why the Legislature, in its first regular session, would enact a comprehensive series of statutes relating to public service corporations only two years after the Constitutional Convention.

Ultimately, *Pacific Greyhound* did not result in a dramatic change in the Commission's powers or in the manner in which public service corporations were regulated; rather, it clarified and affirmed that while the Commission's power to prescribe classifications and to set rates and charges is plenary, the Commission's remaining powers are subject to the Legislature's power to impose duties and set standards through legislation.

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<sup>14</sup> A copy of the Public Service Corporations Act is included in Appendix 1.

## II. Arizona Courts Have Followed *Pacific Greyhound* Since 1939.

The Commission has now asked this Court to overrule *Pacific Greyhound*, and with it, more than 60 years of precedent following that decision. In conducting legal research for this brief, amici were able to locate no fewer than nine cases discussing *Pacific Greyhound* at length, and 30 cases in which *Pacific Greyhound* was cited or mentioned as authority supporting the appellate court's ruling. Moreover, the principles embodied in *Pacific Greyhound* – that the Commission's plenary authority applies only to ratemaking activities, and that the Legislature is free to exercise its police power and legislate on other matters affecting public service corporations, delegating such powers to the Commission upon the terms and limitations it thinks proper – have been restated and applied by both the Arizona courts and the Legislature. See e.g., A.R.S. § 40-281 through -287, § 40-301 through -303, § 40-321 through -328, § 40-336 through -340, etc. See also *Arizona Corp. Comm'n v. Palm Springs Utility Co., Inc.*, 24 Ariz.App. 124, 127, 536 P.2d 245, 248 (App. 1975); *Arizona Public Serv. Co. v. Town of Paradise Valley*, 125 Ariz. 447, 449-50, 610 P.2d 449, 451-52 (1980). Contrary to the Commission's suggestion in its reply, the principles of *Pacific Greyhound* have been applied and treated as controlling law in a variety of contexts.

### A. Certificates of Convenience and Necessity.

One of the powers vested in the Commission by the Legislature that has led to frequent litigation is the Commission's power to issue certificates of convenience and necessity to a utility, permitting the utility to provide public service in a defined area. The courts have repeatedly rejected arguments by the Commission and others that the Commission has inherent, constitutional authority to issue such certificates, and have held that this authority is delegated to the Commission by the Legislature.

In *Williams v. Pipe Trade Industry Program of Ariz.*, 100 Ariz. 14, 21, 409 P.2d 720, 724 (1966), the Court found that neither the Constitution nor any statute gave the Commission "unlimited power to issue certificates of public convenience and necessity." In *Williams*, the Commission attempted to issue such a certificate to a company "furnishing hot or cold air or steam for heating or cooling purposes," arguing that it had the plenary power to do so under Article 15, § 3 of the Constitution. *Id.* at 16-17, 409 P.2d at 721. The Court rejected this argument relying, in part, on *Pacific Greyhound*, and finding that the Commission could not issue certificates of convenience and necessity absent authorization by the legislature:

We have repeatedly held that the power to make reasonable rules and regulations and orders by which a corporation shall be governed refers to the power to prescribe just and reasonable classification and reasonable rates and charges. *Southern Pacific Co. v. Arizona*

*Corporation Commission*, 98 Ariz. 339, 404 P.2d 692; *Corporation Commission of Arizona v. Pacific Greyhound Lines*, 54 Ariz. 159, 94 P.2d 443.

The Constitution does not authorize the Commission to issue public certificates of convenience and necessity, but by Article 15, 6 of the Constitution the legislature is empowered to enlarge the powers and duties of the Commission. The legislature has, indirectly, authorized the Commission to issue certificates of public convenience and necessity in certain instances.

*Id.* at 17, 409 P.2d at 722. As a result, the Court found that the Commission lacked jurisdiction because there was no statute permitting the Commission “to certificate an individual or a corporation ‘in furnishing, for profit, hot or cold air or steam of heating or cooling purposes.’” *Id.* at 21, 409 P.2d at 724. Although the Commission urged that the company’s business involved the provision of “water” or “gas” so as to fall within its regulatory purview, the Court again rejected the Commission’s interpretation of the language of the Constitution. *Id.* (“Nor can the words ‘gas’ and ‘water’ as used in Article 15, § 2 be so strained and distorted out of their normal context as to embrace the proposed uses.”).

In *Tonto Creek Estates Homeowners Ass’n v. Arizona Corp. Comm’n*, 177 Ariz. 49, 60, 864 P.2d 1081, 1092 (App. 1993), the Court of Appeals held that the Commission lacked the authority to transfer a certificate of convenience and necessity for water service from the original certificate holders to a homeowners’ association operating an adjoining water system. The Commission again asserted that it had jurisdiction to transfer the certificate because the Constitution vested it

with the plenary power to regulate public service corporations. *Id.* at 55, 864 P.2d at 1087. After a lengthy discussion of *Pacific Greyhound* and *Williams*, the Court of Appeals determined that:

Issuing certificates of convenience and necessity is far from a plenary power of the Commission. To the contrary, it is a legislative power delegated to the Commission subject to restrictions as the legislature deems appropriate. *Greyhound*, 54 Ariz. at 177, 94 P.2d at 450. Reviewing title 40, we can find no statute that specifically grants the Commission power to order the transfer of a certificate of convenience and necessity from one corporation to another. If the Commission has this power it must be derived from section 40-252 which generally allows the Commission to rescind, alter or amend an earlier decision . . . .

*Id.* at 56, 864 P.2d at 1088. Because the Commission failed to afford the original certificate holders with the notice and an opportunity for hearing required under A.R.S. § 40-252, the Court found that the Commission's order purporting to transfer or modify the certificate was void for lack of jurisdiction. *Id.* at 58, 864 P.2d at 1090.

#### **B. Provision of Utility Services.**

The Commission has claimed the constitutional authority to require public service corporations to provide specified levels of service. Again, the courts have rejected that argument and held that the Commission's authority in this area is granted by statute. In *Southern Pacific Co. v. Arizona Corp. Comm'n*, 98 Ariz. 339, 348-49, 404 P.2d 692, 698-99 (1965), the Court held that a Commission decision requiring a railroad to restore discontinued train service was void because

the Commission had failed to demonstrate that the service was necessary. Citing *Pacific Greyhound*, the Court found no constitutional authority to support the Commission's actions:

The construction of § 3. Art. 15, has been long settled. In *Corporation Commission of the State of Arizona v. Pacific Greyhound Lines*, 54 Ariz. 159, 94 P.2d 443, § 3 was examined in detail. It was held that the power to make reasonable rules, regulations and orders by which corporations shall be governed in the transaction of business refers only to the power given the Commission by the Constitution to prescribe just and reasonable classifications and just and reasonable rates and charges to be made by a public service corporation. The orders of the Commission questioned in this case cannot be sustained on the grounds of constitutional authority.

*Id.* at 345-46, 404 P.2d 696.

Additionally, the Court rejected the Commission's broad reading of A.R.S. § 40-202<sup>15</sup> as the basis for the agency's authority:

Clearly this statute does no more than confirm that which the Commission already possessed under the Constitution; namely the general right to supervise and regulate public service corporations. The right to supervise and regulate and do those thing necessary and convenient in the exercise of its power of supervision and regulation does not in and of itself grant additional powers to the Commission beyond that which the legislature specifically has set forth.

*Id.* at 348, 404 P.2d 698. The Court found that to the extent the Commission was authorized by the Legislature, the relevant statutes were A.R.S. § 40-365 and

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<sup>15</sup> Subpart (A) of A.R.S. § 40-202 provides: "The commission may supervise and regulate every public service corporation in the state and do all things, whether specifically designated in this title or in addition thereto, necessary and convenient in the exercise of such power and jurisdiction."

§ 40-367, which limited the scope of the Commission's powers.<sup>16</sup> *Id.* at 344-45, 404 P.2d 695-96. Because the Commission failed to comply with these statutes by not determining whether the change in service was reasonable and adequate (i.e., whether the deletion of one interstate train resulted in inadequate service within Arizona), the railroad was deprived of its property without due process of law and the Commission's decision was a nullity. *Id.* at 348-49, 404 P.2d at 698-99.

The Arizona courts have also applied *Pacific Greyhound* in evaluating both the scope of the Commission's authority to act and the authority of the Legislature to delegate the authority to regulate aspects of a utility's business unrelated to rates and charges. For example, in *Arizona Public Serv. Co. v. Town of Paradise Valley*, 125 Ariz. 452, 610 P.2d 454 (App. 1979), the Court of Appeals addressed the question of whether the Legislature had delegated to the Town the authority to require that power lines of a utility be placed underground. The Court of Appeals first addressed the issue of whether the Legislature had the power to delegate this authority to the Town, or whether the Commission had sole authority to regulate this aspect of a utility's business. The Court stated that *Pacific Greyhound* established that the Commission did not have exclusive authority over aspects of a utility's business other than rates, and the Legislature had a paramount power over

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<sup>16</sup> These statutes require common carriers to file with the Commission schedules showing their rates, fares, charges and classifications for intrastate service and prohibit any change in such rates and in the rules, regulations or contract affecting service without notice.

other utility issues that it could delegate to the Town, but had not done so here. 125 Ariz. at 455, 610 P.2d at 457. This Court concurred in (and largely reiterated) the Court of Appeals' constitutional analysis, but held that the Legislature had, in fact, delegated authority to municipalities, such as Paradise Valley, to prescribe the underground placement of new utility poles and wires. *Arizona Public Serv. Co. v. Town of Paradise Valley*, 125 Ariz. 447, 449-51, 610 P.2d 449, 451-53 (1980).

In *Arizona Corporation Comm'n v. Palm Springs Utility Co.*, 24 Ariz. App. 124, 536 P.2d 245 (App. 1975), the Court of Appeals upheld an order of the Commission requiring a utility to furnish water of a specified quality to its customers. The Court of Appeals rejected any argument that the Commission had inherent constitutional authority under Article 15, § 3 to impose quality standards and was required to do so by rule, citing *Pacific Greyhound*. Instead, the court relied primarily on A.R.S. §§ 40-202, -254, -321, and -361 in holding that the Commission possessed the authority to regulate the quality of water provided by a utility through orders as well as rules.

This Court has also applied *Pacific Greyhound* outside the context of certificates of convenience and necessity. In *Corporation Comm'n v. Consolidated Stage Co.*, 63 Ariz. 257, 161 P.2d 110 (1945), this Court rejected a claim that the Commission had the authority to order a transfer of a share of stock in a motor carrier corporation from an existing shareholder to a prospective shareholder. In

reaching this conclusion, the Court cited *Pacific Greyhound* along with a number of other cases as defining the limits of the authority of the Commission.

Taken together these decisions (and the other numerous decisions) that follow or cite *Pacific Greyhound* with approval establish that: (1) *Pacific Greyhound* is the well-settled law of this State, and (2) the Commission's exclusive, plenary authority is limited to ratemaking.

The Commission and RUCO suggest that even under *Pacific Greyhound*, the Commission's actions taken pursuant to its non-exclusive authority under Article 15, § 3 trumps an inconsistent statute adopted by the Legislature. This argument is plainly at odds with *Pacific Greyhound*. In *Woods*, this Court characterized the holding of *Pacific Greyhound* as follows:

The [*Pacific Greyhound*] court holds that the legislature has the 'paramount power' to regulate in areas other than those concerned with ratemaking. 54 Ariz. at 176-77, 94 P.2d at 450. It does not state whether 'paramount power' means 'exclusive power,' or 'concurrent power' with a 'power to override' Commission regulations.

171 Ariz. at 294 n. 8, 830 P.2d at 815 n. 8. As the *Woods* Court recognized, that under *Pacific Greyhound*, the authority of the Legislature is paramount, and the Commission's and RUCO's analysis does not alter that result..

The Commission suggests that the Court can avoid the logic and language of *Pacific Greyhound* by treating certificates of convenience and necessity as a category of cases separate from attempts to regulate service quality or other terms

and conditions of service; this argument rings hollow. The logic of *Pacific Greyhound* is equally applicable to Commission attempts to contravene statutes governing utility marketing practices or other aspects of a utility's business. Because courts have applied *Pacific Greyhound* outside the context of certificates of convenience and necessity, the Commission attempts to distinguish *Southern Pacific*, 98 Ariz. 339, 404 P.2d 692 (1965), and *Town of Paradise Valley*, 125 Ariz. 447, 610 P.2d 449 (1980) (both non-certificate cases) by treating each of them as *sui generis*. The Commission cannot, however, ignore the fact that in both of these cases, as in other cases cited above, the courts looked to *Pacific Greyhound* as defining the areas in which the Commission had exclusive constitutional authority and those where its powers were defined and limited by statute.

### CONCLUSION

The Court should reject the Commission's invitation to change the law of this State upon which all parties involved in the regulatory process have relied for more than 60 years. Indeed, in concluding the portion of the *Woods* opinion relied upon most vehemently by the Commission, this Court recognized that:

Nevertheless, *Pacific Greyhound* has been precedent for over fifty years. Utilities, the Commission, and countless state officials undoubtedly have relied on that case. Although we examine such precedent critically in light of the history and text of the constitution, we do not readily overturn it, especially if it is possible to resolve the questions presented without disturbing that precedent. In the present

case, therefore, we measure the Commission's regulatory power by the doctrine apparently established by *Pacific Greyhound* and its progeny--that the Commission has no regulatory authority under article 15, section 3 except that connected to its ratemaking power.

*Woods*, 171 Ariz. at 293-94, 830 P.2d 814-15.

The consideration of this case does not require the Court to reach the issue of whether *Pacific Greyhound* should be overruled. The Commission has offered no compelling reason why it should be overruled other than an easily refuted claim that *Pacific Greyhound* is inconsistent with the Constitution and prior cases.<sup>17</sup>

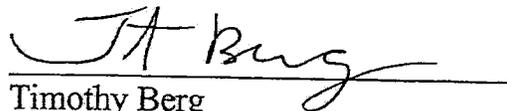
In any event, if this issue is reached, as is demonstrated in this brief, *Pacific Greyhound* was correctly decided and is consistent with both the Arizona Constitution and with previous decisions of this Court, such as *Tucson Gas* and *Eastern Arizona R.R.* The Court should reject the Commission's attempt to change the basic law of this State and expand its powers beyond those established in the Constitution.

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<sup>17</sup> The absence of any policy argument in support of the Commission's claim that *Pacific Greyhound* should be overruled is telling. This Court should only overrule its prior precedents for the most compelling of reasons. "[I]t is, therefore, 'with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society.'" A. Bickel, *The Morality of Consent* 23 (1975).

DATED this 24<sup>th</sup> day of October, 2003.

FENNEMORE CRAIG



Timothy Berg

Norman D. James

Theresa Dwyer

Attorneys for Arizona Utility  
Investors Association, Arizona Water  
Company and Qwest Corporation

*-and-*

Richard S. Wolters

1875 Lawrence Street, Suite 1503

Denver, CO 80202

Attorney for AT&T Communications  
of the Mountain States, Inc.

## CERTIFICATE OF SERVICE

Timothy Berg, being first duly sworn upon his oath, states that on October 24, 2003 he cause the original and six copies of the Amici Brief and Appendix thereto of Arizona Utility Investors Association, Arizona Water Company, AT&T Communications of the Mountain States, Inc., and Qwest Corporation to be hand-delivered for filing to:

Clerk of the Court  
Supreme Court of Arizona  
1501 West Washington  
Phoenix, Arizona 85007

and that he cause two copies of the foregoing to likewise be mailed to:

Terry Goddard, Attorney General  
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Mark D. Wilson  
Office of the Attorney General  
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Phoenix, Arizona 85007

Christopher Kempley  
Timothy Sabo  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, Arizona 85007

Scott Wakefield  
Residential Utility Consumer Office  
1110 West Washington, Suite 220  
Phoenix, Arizona 85007

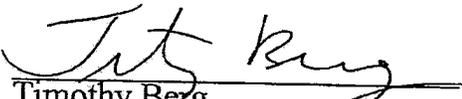
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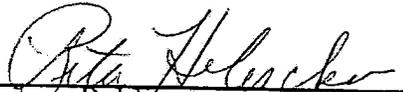
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Timothy Berg

SUBSCRIBED AND SWORN to before me on this 24<sup>th</sup> day of October,  
2003 by Timothy Berg.

My commission expires:

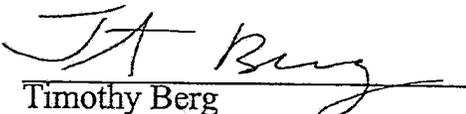
  
Notary Public

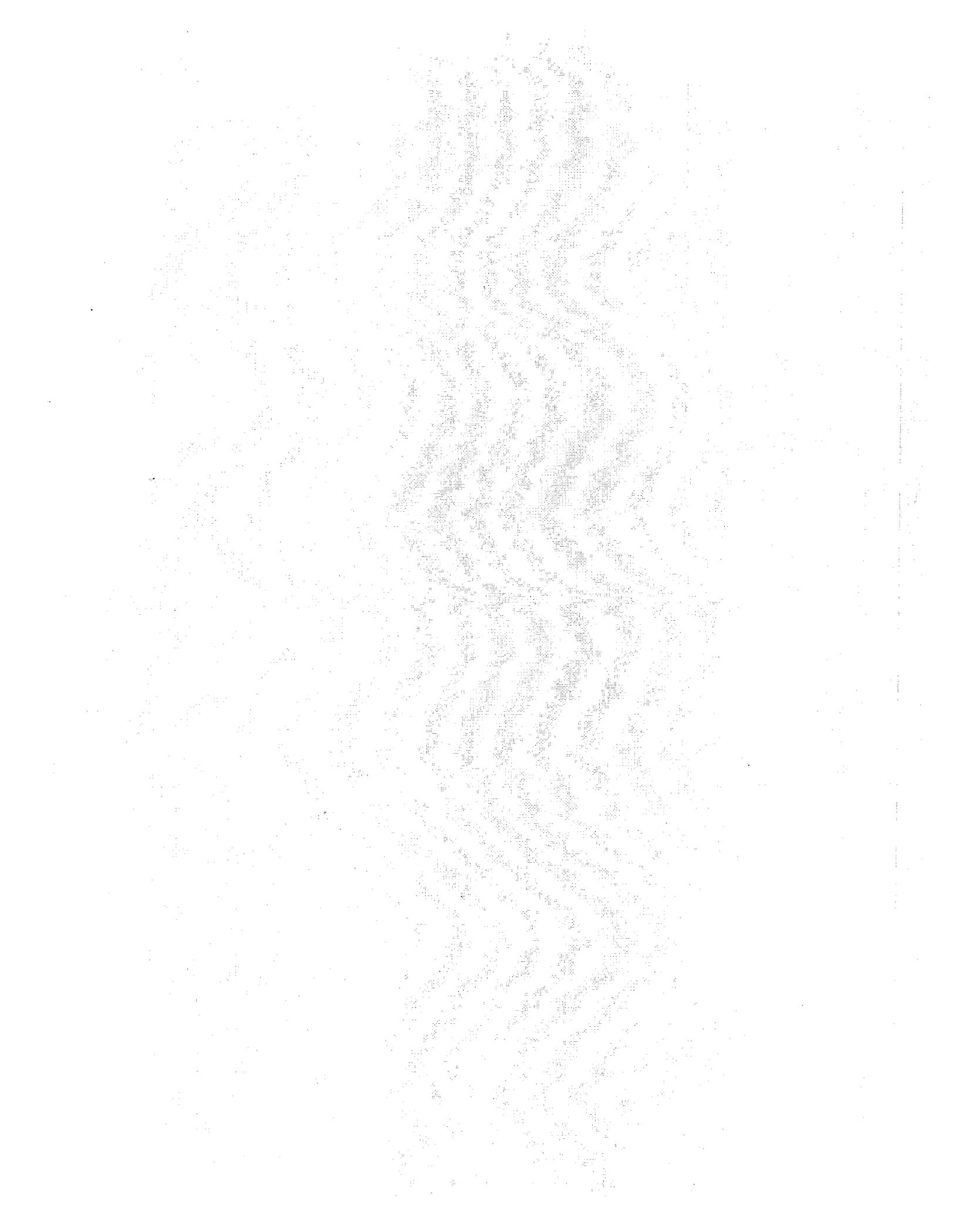


## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14, Arizona Rules of Civil Appellate Procedure, and Rule 7, Arizona Rules of Procedure for Special Actions, the undersigned counsel certifies that this brief uses a proportionately spaced typeface of Times New Roman at 14 points. According to the Microsoft Word word count function, this brief contains 9,464 words, excluding the Table of Contents, Table of Authorities, Certificate of Service, this Certificate of Compliance, and any addendum.

DATED this 24<sup>th</sup> day of October, 2003.

  
Timothy Berg



1 Commissioner Pierce *dissenting*:

2 I dissent from the Commission's approval of Staff's Option A REST  
3 Implementation plan. The Commission should have approved Staff's Option B Plan,  
4 which would have provided the same amount of renewable energy and the same amount  
5 of distributed generation for more than two million dollars less than Staff's Option A  
6 Plan. Aside from the cost savings entailed in Staff's Option B Plan, the primary  
7 difference between the two plans is that the Option B Plan relaxes the requirement found  
8 in A.A.C. R14-1805.D that 50% of distributed generation come from residential rooftops  
9 and 50% come from commercial rooftops. Because there is no public policy basis for  
10 distinguishing between residential DG and commercial DG, I cannot support Staff's  
11 Option A Plan.

12 The cost of residential DG<sup>1</sup> is staggering. Staff's Option A Plan costs \$33 million.  
13 Eighty-seven percent of that cost—\$28.6 million—is for residential and commercial DG.  
14 Of that number, approximately ninety percent—\$25.7 million—is for residential DG. In  
15 other words, more than three-fourths of the cost of Staff's Option A Plan is for residential  
16 DG, which will produce less than 5% of APS's renewable energy in 2008. A stubborn  
17 insistence by this Commission that 50% of DG come from residential facilities is an  
18 albatross around the neck of our REST rules.

19 Given the negative externalities associated with generating electricity using fossil  
20 fuels, I believe the Commission is justified in requiring utilities to acquire a portion of

21  
22 <sup>1</sup> It is difficult to make an apples-to-apples comparison of the cost of residential DG with  
23 the cost of commercial DG because residential facilities receive an up-front incentive,  
24 whereas commercial facilities receive a performance-based incentive. This results in  
25 residential DG looking relatively more expensive in early years than commercial DG. It  
26 also results in the risk of underperformance of the facility being shifted from residential  
customers to all ratepayers. There is no doubt, however, that residential DG is more  
expensive than commercial DG; the very reason residential customers receive an up-front  
incentive is because, unlike commercial customers, they are difficult to entice with  
performance-based incentives. The only uncertainty is the magnitude of the cost premium  
of residential DG over commercial DG.

1 their electricity—at premium prices—from renewable and DG sources. We cannot afford,  
2 however, to require utilities to pay super-premium prices for residential DG for no  
3 discernable reason.

4       So far I have spoken only of the direct costs of residential DG, but I'm equally  
5 concerned about the opportunity cost. In other words, what did the Commission give up  
6 when it required APS to devote \$25.7 million towards residential DG in 2008? APS's  
7 application indicates that APS can generate or purchase 464,568 MWh of renewable  
8 energy for \$5.9 million. Assuming linear pricing, APS could more than quadruple the  
9 amount of renewable energy it acquires in 2008 if the Commission would relax its  
10 residential DG requirement. In other words, for the same cost, APS could have enjoyed  
11 more than four times the amount of reductions in NO<sub>x</sub>, SO<sub>x</sub>, and Carbon Dioxide  
12 emissions in 2008 than it will experience under Staff's Option A Plan.

13       Inquiring into the opportunity costs of requiring 50% of DG to come from  
14 residential rooftops begs the question: what are we trying to achieve in our REST rules?  
15 Are we trying to increase the number of DG facilities installed on residential rooftops, or  
16 are we trying to promote and increase the use of renewable energy generally? The name  
17 of the rules—i.e., the *Renewable Energy Standard and Tariff*—certainly suggests that their  
18 purpose is to promote renewable energy generally, and that is certainly how the rules are  
19 portrayed to and perceived by the general public. Given this, it occurs to me that there is a  
20 certain amount of mislabeling associated with approving a REST implementation plan  
21 that spends more money on installing residential DG than it does on generating and  
22 acquiring renewable energy.

23       If the Commission continues to use the REST rules to prop up residential DG,<sup>2</sup> it  
24 will sour me on the entire enterprise. I dissent.

25 \_\_\_\_\_  
26 <sup>2</sup> I hold no animus towards residential DG. I'd be happy to see residential DG flourish so  
long as it does so on the same terms that are being offered to commercial DG customers.

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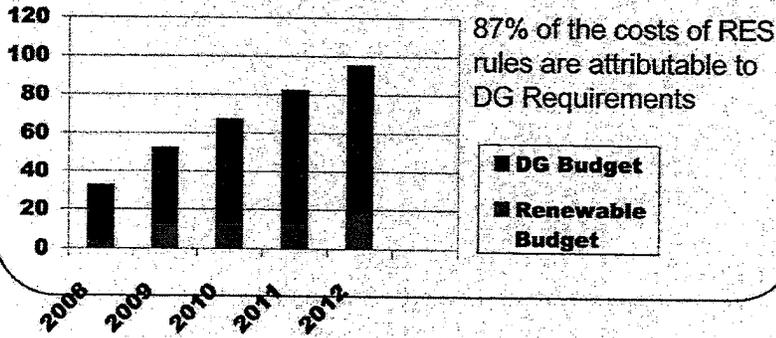
Note: Following are some tables and graphs that visually describe what I've tried to explain here.

	2008	2009	2010	2011	2012
<b>APPS's REST Targets &amp; Budget</b>					
<b>TARGETS:</b>					
Renewable Target	1.75%	2.00%	2.50%	3.00%	3.50%
DG Target	.175%	.3%	.5%	.75%	1.05%
<b>BUDGET: (millions)</b>					
Renewable Budget	\$4.4	\$12.6	\$12.8	\$12.8	\$19.0
DG Budget	\$28.6	\$39.9	\$55.0	\$70.1	\$76.7
Total Budget	\$33.0	\$52.5	\$67.8	\$82.9	\$95.7

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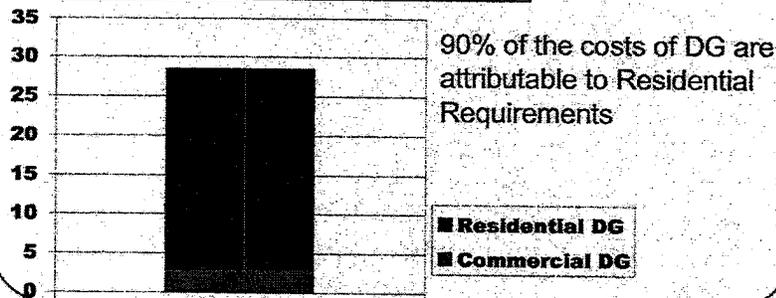
### APS's Forecasted REST Costs

	2008	2009	2010	2011	2012
Total Cost (millions)	\$33.0	\$52.5	\$67.8	\$82.9	\$95.7
Renewable Cost	\$4.4	\$12.6	\$12.8	\$12.8	\$19.0
DG Cost	\$28.6	\$39.9	\$55.0	\$70.1	\$76.7



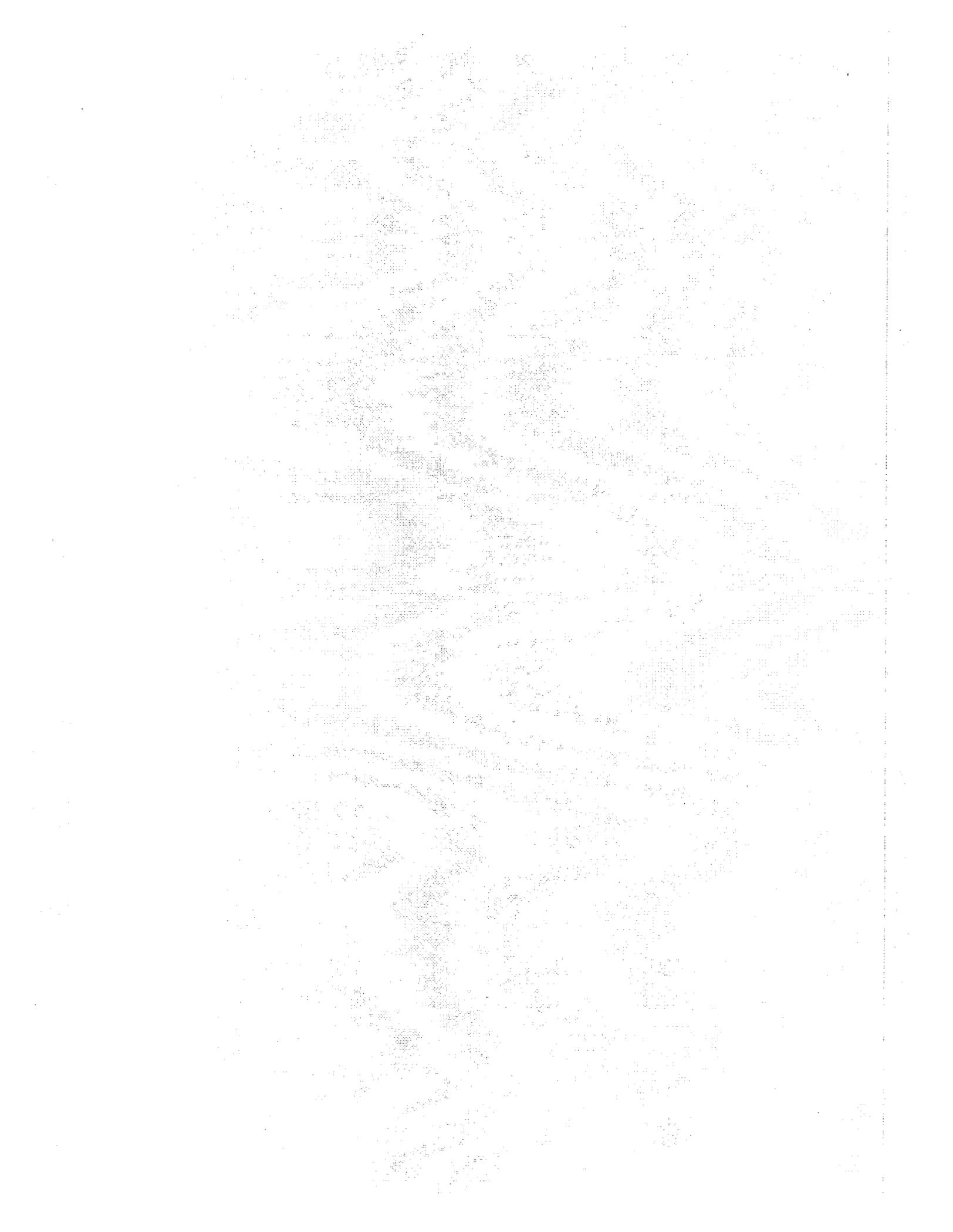
### APS's 2008 DG Budget

Total 2008 DG Budget	\$28.6
Residential DG Component	\$25.7
Commercial DG Component	\$2.9



1 SERVICE LIST FOR: Arizona Public Service Company  
2 DOCKET NO. E-01345A-07-0468

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34	Sandy Bahr	Office of the Governor
35	202 E. McDowell Rd. -277	1700 West Washington
36	Phoenix, Arizona 85004	Phoenix, Arizona 85007



1 Commissioner Pierce *dissenting*:

2 I dissent from the Commission's approval of Staff's Proposed REST  
3 Implementation plan. The Commission should have approved Tucson Electric Power's  
4 Sample Tariff Plan, which would have provided the same amount of renewable energy  
5 and the same amount (maybe more) of distributed generation for nearly five million  
6 dollars less than Staff's Proposed Plan. Aside from the cost savings entailed in TEP's  
7 Sample Tariff Plan, the only difference between the two plans is that the Sample Tariff  
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9 generation ("DG") come from residential rooftops and 50% come from commercial  
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13 million. Sixty-two percent of that cost (\$9.7 million) is for residential and commercial  
14 DG. Of that number, approximately ninety percent (\$8.7 million) is for residential DG.  
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2 however, to require utilities to pay super-premium prices for residential DG for no  
3 discernable reason.

4       So far, I have spoken only of the direct costs of residential DG, but I'm equally  
5 concerned about the opportunity costs. In other words, what did the Commission give up  
6 when it required TEP to devote \$8.7 million towards residential DG in 2008? TEP's  
7 application indicates that TEP can generate or purchase 170,000 MWh of renewable  
8 energy for \$5.9 million. Assuming linear pricing, TEP could more than double the  
9 amount of renewable energy it acquires in 2008 if the Commission would relax its  
10 residential DG requirement. In other words, for the same cost, TEP could have enjoyed  
11 more than twice the amount of reductions in NOx, SOx, and Carbon Dioxide emissions in  
12 2008 than it will experience under Staff's Proposed Plan.

13       Inquiring into the opportunity costs of 50% residential DG mandate begs the  
14 question: what are we trying to achieve in our REST rules? Are we trying to increase the  
15 number of DG facilities installed on residential rooftops, or are we trying to promote and  
16 increase the use of renewable energy generally? The name of the rules—i.e., the  
17 *Renewable Energy Standard and Tariff*—suggests that their purpose is to promote  
18 renewable energy generally, and that is certainly how the rules are perceived by the  
19 general public. Given this, it occurs to me that there is a certain amount of mislabeling  
20 associated with approving a REST implementation plan that spends more money on  
21 installing residential DG than it does on generating and acquiring renewable energy.

22       If the Commission continues to use the REST rules to prop up residential DG,<sup>2</sup> it  
23 will sour me on the entire enterprise. I dissent.

24  
25  
26 <sup>2</sup> I hold no animus towards residential DG. I'd be happy to see residential DG flourish so  
long as it does so on the same terms that are being offered to commercial DG customers.

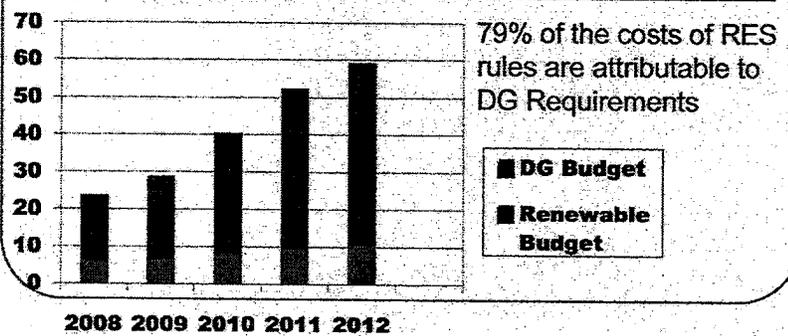
1 Note: Following are some tables and graphs that visually describe what I've tried to  
 2 explain here.

**TEP's REST Targets & Budget**

	2008	2009	2010	2011	2012
<b>TARGETS:</b>					
Renewable Target	1.75%	2.00%	2.50%	3.00%	3.50%
DG Target	.175%	.3%	.5%	.75%	1.05%
<b>BUDGET: (millions)</b>					
Renewable Budget	\$5.9	\$6.5	\$8.0	\$9.6	\$10.7
DG Budget	\$17.7	\$22.4	\$32.4	\$42.9	\$48.8
<b>Total Budget</b>	<b>\$23.6</b>	<b>\$28.9</b>	<b>\$40.4</b>	<b>\$52.5</b>	<b>\$59.5</b>

**TEP's Forecasted REST Costs**

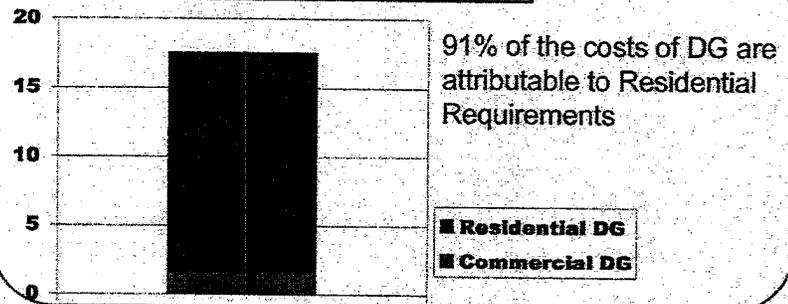
	2008	2009	2010	2011	2012
<b>Total Cost (millions)</b>	<b>\$23.6</b>	<b>\$28.9</b>	<b>\$40.4</b>	<b>\$52.3</b>	<b>\$59.3</b>
Renewable Cost	\$6.0	\$6.5	\$8.0	\$9.5	\$10.6
DG Cost	\$17.6	\$22.4	\$32.4	\$42.8	\$48.7



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### TEP's 2008 DG Budget

<b>Total 2008 DG Budget</b>	<b>\$17.6</b>
Residential DG Component	\$16.0
Commercial DG Component	\$1.6



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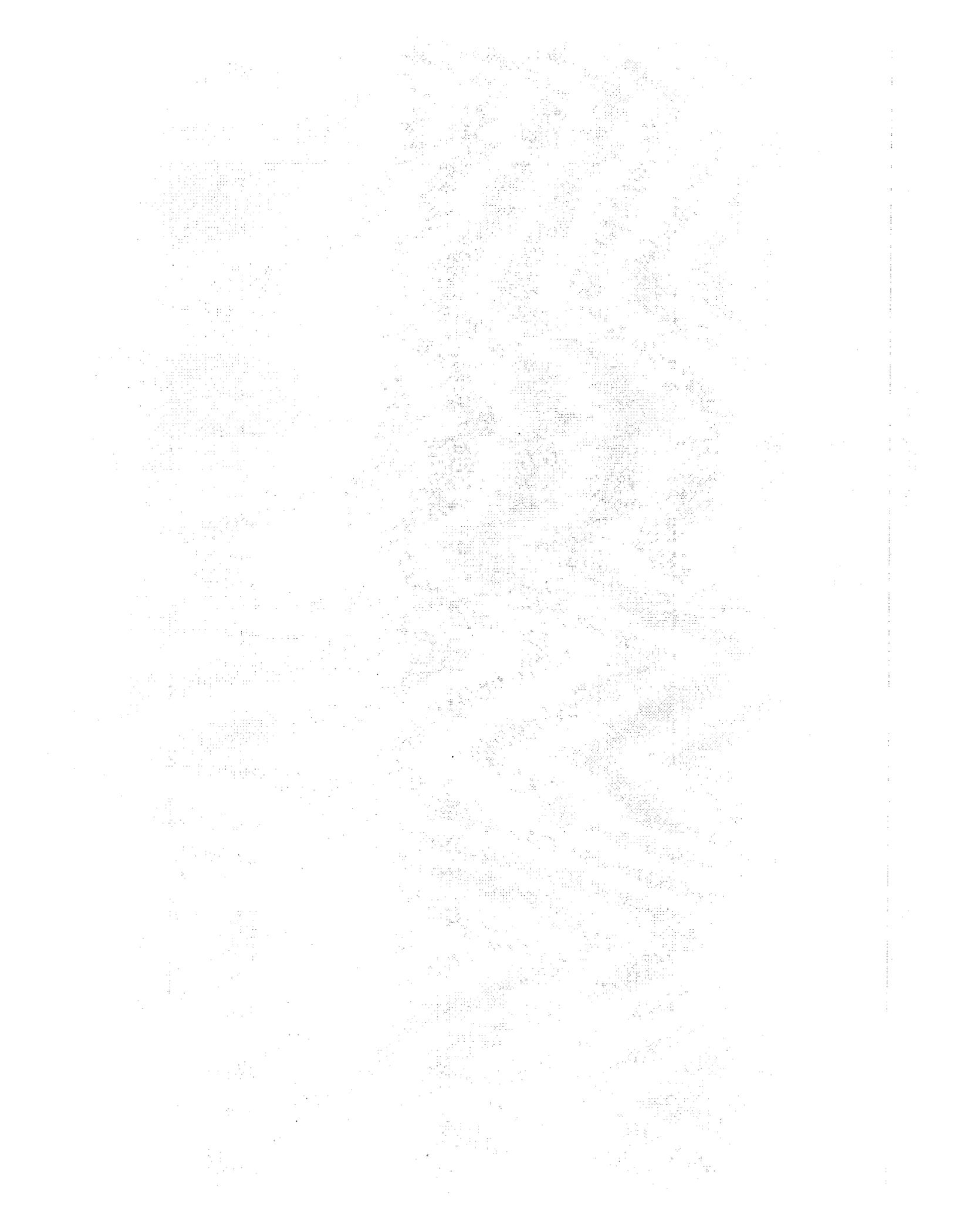
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24 Oro Valley, Arizona 85755-7106

24 Mr. John Kromko  
25 717 North Seventh Avenue  
26 Tucson, Arizona 85705



1 their electricity—at premium prices—from renewable and DG sources. We cannot afford,  
2 however, to require utilities to pay super-premium prices for residential DG for no  
3 discernable reason.

4         So far, I have spoken only of the direct costs of residential DG, but I'm equally  
5 concerned about the opportunity costs. In other words, what did the Commission give up  
6 when it required UNS Electric to devote \$2.4 million towards residential DG in 2008?  
7 UNS Electric's application indicates that UNS Electric can generate or purchase 31,000  
8 MWh of renewable energy for \$425,000. Assuming linear pricing, UNS Electric can  
9 increase the amount of renewable energy it acquires in 2008 more than five fold if the  
10 Commission would relax its residential DG requirement. In other words, for the same  
11 cost, UNS Electric could have enjoyed more than five times the amount of reductions in  
12 NO<sub>x</sub>, SO<sub>x</sub>, and Carbon Dioxide emissions in 2008 than it will experience under Staff's  
13 Proposed Plan.

14         Inquiring into the opportunity costs of 50% residential DG mandate begs the  
15 question: what are we trying to achieve in our REST rules? Are we trying to increase the  
16 number of DG facilities installed on residential rooftops, or are we trying to promote and  
17 increase the use of renewable energy generally? The name of the rules—i.e., the  
18 *Renewable Energy Standard and Tariff*—suggests that their purpose is to promote  
19 renewable energy generally, and that is certainly how the rules are perceived by the  
20 general public. Given this, it occurs to me that there is a certain amount of mislabeling  
21 associated with approving a REST implementation plan that spends more money  
22 installing residential DG than it does on generating and acquiring renewable energy.

23         If the Commission continues to use the REST rules to prop up residential DG,<sup>2</sup> it  
24 will sour me on the entire enterprise. I dissent.

25 \_\_\_\_\_  
26 <sup>2</sup> I hold no animus towards residential DG. I'd be happy to see residential DG flourish so  
long as it does so on the same terms that are being offered to commercial DG customers.

1 Commissioner Pierce *dissenting*:

2 I dissent from the Commission's approval of Staff's Proposed REST  
3 Implementation plan. The Commission should have approved UNS Electric's Sample  
4 Tariff Plan, which would have provided the same amount of renewable energy and the  
5 same amount (maybe more) of distributed generation for nearly one million dollars less  
6 than Staff's Proposed Plan. Aside from the cost savings entailed in UNS Electric's  
7 Sample Tariff Plan, the only difference between the two plans is that the Sample Tariff  
8 Plan relaxes the requirement found in A.A.C. R14-2-1805.D that 50% of distributed  
9 generation ("DG") come from residential rooftops and 50% come from commercial  
10 rooftops. Because there is no public policy basis for distinguishing between residential  
11 DG and commercial DG, I cannot support Staff's Proposed Plan.

12 The cost of residential DG<sup>1</sup> is staggering. Staff's Proposed Plan costs \$3.1 million.  
13 Eighty-six percent of that cost (\$2.7 million) is for residential and commercial DG. Of  
14 that number, approximately ninety percent (\$2.4 million) is for residential DG. In other  
15 words, more than three-fourths of the cost of Staff's Proposed Plan is for residential DG,  
16 which will produce less than 5% of UNS Electric's renewable energy in 2008. A stubborn  
17 insistence by this Commission that 50% of DG come from residential facilities is an  
18 albatross around the neck of our REST rules.

19 Given the negative externalities associated with generating electricity using fossil  
20 fuels, I believe the Commission is justified in requiring utilities to acquire a portion of

21 \_\_\_\_\_  
22 <sup>1</sup> It is difficult to make an apples-to-apples comparison of the cost of residential DG with  
23 the cost of commercial DG because residential facilities receive an up-front incentive,  
24 whereas commercial facilities receive a performance-based incentive. This results in  
25 residential DG looking relatively more expensive in early years than commercial DG. It  
26 also results in the risk of underperformance of the facility being shifted from residential  
customers to all ratepayers. There is no doubt, however, that residential DG is more  
expensive than commercial DG; the very reason residential customers receive an up-front  
incentive is because, unlike commercial customers, they are difficult to entice with  
performance-based incentives. The only uncertainty is the magnitude of the cost premium  
of residential DG over commercial DG.

1 Note: Following are some tables and graphs that visually describe what I've tried to  
 2 explain here.

3  
 4 **UNS Electric's REST Targets &  
 5 Budget**

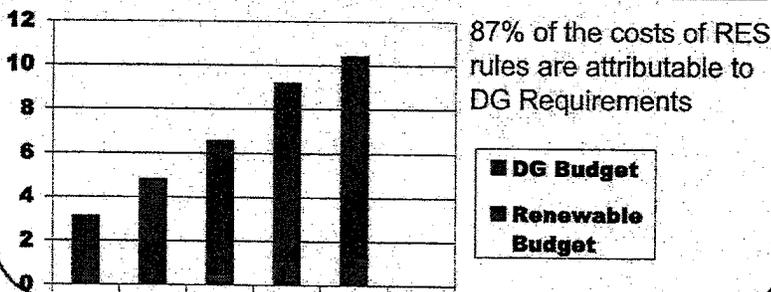
6

	2008	2009	2010	2011	2012
<b>TARGETS:</b>					
Renewable Target	1.75%	2.00%	2.50%	3.00%	3.50%
DG Target	.175%	.3%	.5%	.75%	1.05%
<b>BUDGET: (Millions)</b>					
Renewable Budget	\$ .4	\$ .5	\$ .5	\$ 1.1	\$ 1.3
DG Budget	\$ 2.7	\$ 4.3	\$ 6.1	\$ 8.1	\$ 9.1
<b>Total Budget</b>	<b>\$ 3.1</b>	<b>\$ 4.8</b>	<b>\$ 6.6</b>	<b>\$ 9.2</b>	<b>\$ 10.4</b>

14  
 15 **UNS Electric's Forecasted REST  
 16 Costs**

17

	2008	2009	2010	2011	2012
<b>Total Cost (Millions)</b>	<b>\$ 3.1</b>	<b>\$ 4.8</b>	<b>\$ 6.6</b>	<b>\$ 9.2</b>	<b>\$ 10.4</b>
Renewable Cost	\$ .4	\$ .5	\$ .5	\$ 1.1	\$ 1.3
DG Cost	\$ 2.7	\$ 4.3	\$ 6.1	\$ 8.1	\$ 9.1

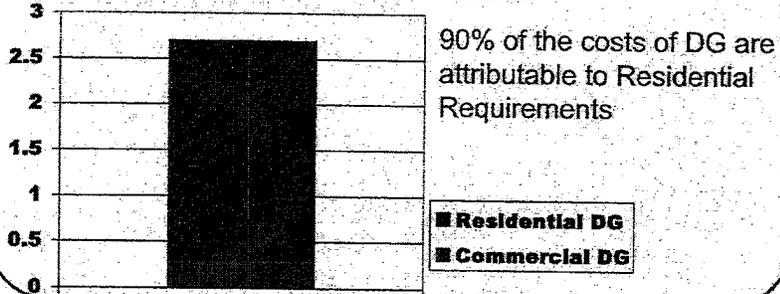


25 **2008 2009 2010 2011 2012**

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### UNS Electric's 2008 DG Budget

Total 2008 DG Budget	\$2.7
Residential DG Component	\$2.4
Commercial DG Component	\$.3



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