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**ARIZONA CORPORATION COMMISSION**

**PAUL NEWMAN**  
**COMMISSIONER**

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March 15, 2012

The Honorable Steve Pierce  
President  
Arizona State Senate  
1700 West Washington Street  
Phoenix, Arizona 85007

Dear Senate President Pierce:

I am writing to ask you to vote no on HB2789/Striker, which would create constitutional chaos and regulatory uncertainty for the nascent renewable energy and energy efficiency industries in Arizona. If this bill is passed into law, Arizona's solar industry will simply head to other states.

The solar industry is a huge part of Arizona's future. One reason solar isn't considered 'cost-competitive' right now is because we don't count the pollution costs of fossil fuel plants, nor do we count the real value of solar. In other words, because solar feeds into the grid at peak power times, uses no fuel, and has low long-term costs, it has much higher value than a power plant that will need a lifetime of fuel, railroads and/or pipelines and waste management.

Please don't turn out the lights on a unique opportunity for our state to export a new product and produce revenue.

HB2789/Striker is a proxy for the Goldwater Institute and certain legislators who are hostile to renewable energy and energy efficiency/conservation. The large energy users such as the mines, as well as the coal industry, are also supporting this effort. The Goldwater Institute has spent five years fighting renewable energy, losing the same argument in five different court proceedings. A great deal of public treasury has been used to debate these issues repeatedly.

But let's speak plainly: this is a turf battle over resource planning, and powerful political players are pushing their anti-clean energy agenda. These powerful players can't manipulate the Commission, so they are doing an end-run.

I don't know why the Goldwater Institute and some of our legislators dislike solar and efficiency so much. Why don't they get as excited about the utilities sending \$2.5-3 billion every year to Texas and Colorado for natural gas, coal and uranium? Why don't they realize our high energy efficiency standard will save ratepayers an estimated \$9 billion over 20 years?

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It's time to wake up and smell the coffee, smell the air pollution from fossil fuels, and smell the business opportunity for solar and efficiency. Clean energy adds value to our state and diversifies our economy and our energy options. Arizona's Renewable Energy Standard is currently the lowest in the Western U.S. and we need to *increase* it, not decrease or kill it.

Oscar Wilde said a cynic is a man who "knows the price of everything and the value of nothing." Goldwater is mixing up price and value. Yes, coal-fired power is 'cheap' because utilities don't pay for 'externalities' such as pollution, CO2 and waste. And solar is considered 'expensive,' but we don't count the real value of solar such as adding power to the grid at peak, high-cost times, zero risk of fuel cost increases, no water, and no waste.

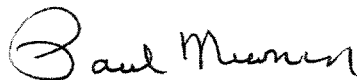
I am opposing this bill because it's unconstitutional and impinges on our plenary regulatory authority. If a change like this is to be made, it needs to be via a constitutional amendment.

I practiced law in Arizona for 25 years and served in the legislature for 3 terms, and I know an unconstitutional bill when I see it. The makers of the constitution foresaw a great need for an independent institution run by state wide elected Commissioners relatively immune from political influence to properly regulate powerful monopoly interests. This bill is the biggest attack against the Commission's authority in the state's 100 year history.

The solar industry grew 67% in 2010. Over 90% of Arizonans would like to see their state develop much more solar and wind capacity. Let's figure out our energy future, not fight about it.

Arizona was once famous for the five C's: copper, cattle, cotton, citrus, and climate. I want to add a sixth C: clean energy. I look forward to working with all members of the legislature on a bipartisan basis so we can continue to plan Arizona's bright clean energy future. It is of mutual interest to all Arizonans.

Sincerely,



Paul Newman  
Commissioner

Attachment  
*Legal Opinion re: HB2789/Striker dated March 14, 2012*  
*Written by Janice Alward, Chief Counsel*  
*of the Arizona Corporation Commission*

**COMMISSIONERS**  
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ERNEST G. JOHNSON  
Executive Director

**ARIZONA CORPORATION COMMISSION**

March 14, 2012

Commissioner Paul Newman  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007

RE: Proposed Legislation – HB 2789

Dear Commissioner Newman:

You have asked the Commission's Legal Division for an analysis and opinion concerning the constitutionality of proposed legislation HB 2789 which now provides:

***40-501. Renewable energy standards; requirements***  
***A PUBLIC SERVICE CORPORATION SHALL NOT BE REQUIRED TO MEET A RENEWABLE ENERGY STANDARD THAT IS GREATER THAN THE STANDARDS REQUIRED IN ANY RULES IN EFFECT ON JANUARY 1, 2012.***

**I. SUMMARY.**

The above version of HB 2789 is unconstitutional because the Commission's Renewable Energy Standard and Tariff ("REST") Rules are ratemaking under the *Miller v Ariz. Corp. Comm'n*, 227 Ariz. 21, 27, 251 P.3d 400, 406 (App. 2011). When the Commission engages in ratemaking matters, the Arizona Constitution invests the Commission with exclusive and plenary powers. Proposed legislation that attempts to limit the Commission's ratemaking authority is contrary to Article XV, section 3 of the Constitution. For example, legislation that would provide that "*A public service corporation shall not be required to raise customers' rates for water service to an amount that is greater than the rates in effect on January 1, 2012*" is unconstitutional because it would purport to limit the Commission's ratemaking authority. Similarly, proposed legislation that sets a limit on the Commission's ratemaking authority concerning the REST rules' standards is also unconstitutional because the REST rules are ratemaking.

**II. ANALYSIS.**

**A. HB 2789 Is Unconstitutional Under Article XV, Section 3 Of The Arizona Constitution.**

As was discussed in our earlier opinion of a previous version of HB 2789, the Commission, unlike most state public service commissions, was created by the Arizona Constitution, as opposed to legislative enactments. Accordingly, a significant degree of the

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Commission's authority stems from the Arizona Constitution. Article XV, section 3 of the Constitution gives the Commission exclusive authority over ratemaking. *See Arizona Corp. Comm'n v. Woods*, 171 Ariz. 286, 294, 830 P.2d 807, 815 (1992). It is well settled that this exclusive jurisdiction is not limited to merely setting rates, but extends to matters determined by the Commission to be necessary for effective ratemaking. *Id.* at 294, 830 P.2d at 815. Arizona courts have construed the Commission's ratemaking authority as an exclusive grant of power, *i.e.*, neither the legislature nor the judiciary may interfere with the Commission's ratemaking authority. *State v. Tucson Gas, Electric Light and Power Co.*, 15 Ariz. 294, 301, 138 P. 781, 783 (1914). The enactment of the Commission's REST Rules has already been determined to be within the Commission's exclusive ratemaking authority. Thus, the Legislature cannot engage in ratemaking for the state's public service corporations by either directly setting rates or setting restrictions on the Commission's ratemaking rules.

It may be helpful to set out again the formula that the Commission generally uses to determine rates:

$$(\text{Rate Base} \times \text{Rate of Return}) + \text{Expenses} = \text{Revenue Requirement.}$$

In this formula, "Rate Base" is the dollar value of the utility's physical assets that are prudently acquired and used and useful in the provision of utility service; "Rate of Return" is the authorized return on the utility's rate base; "Expenses" are the reasonable and prudent costs of service that cannot be capitalized, such as purchased power costs, fuel costs, salaries, and taxes; and "Revenue Requirement" is the amount of money that rates are designed to collect.

From this formula, the importance of the composition of the utility's resource portfolio in the rate setting process is apparent. When determining rates, the Commission must determine the prudent composition and the associated value of the utility's resource portfolio in order to determine a value for the "rate base" element of the ratemaking formula. *See Litchfield Park Svc. Co. v. Ariz. Corp. Comm'n*, 178 Ariz. 431, 435, 874 P.2d 988, 992 (App.1994). The renewable energy standards directly impact a utility's physical assets. The nexus between these standards and ratemaking could not be more direct. *See Miller*, \_\_\_ Ariz. \_\_\_, \_\_\_ P.3d \_\_\_ (stating that REST Rules' nexus to ratemaking is even more direct than that of the affiliated interest rules at issue in *Woods*).

#### **B. HB 2789 Is Unconstitutional Under The Separation Of Powers Doctrine.**

Article III of the Arizona Constitution provides the "departments of our state government shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." *Kromko v. Ariz. Board of Regents*, 216 Ariz. 190, 193, 165 P.3d 168, 171 (2007). Article III of Arizona's Constitution has been found to be one of the most "explicitly and firmly" expressed separation of powers provision in the United States. *Id.* at 193 (citing *Mecham v. Gordon*, 156 Ariz. 297, 300, 751 P.2d 957, 960 (1988)).


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The Legislature has no authority to remove any of the Commission's constitutional duties, nor can the Legislature perform its constitutionally mandated duties to affect the Commission or any other constitutional department negatively in accomplishing its political aims. *Hudson v. Kelly*, 76 Ariz. 255, 263, 263 P.2d 362, 367 (1953). Just as the Legislature cannot pass a law to destroy a constitutional office, it also may not veil its actions to accomplish the same feat. *Id.* at 266, 263 P.2d at 369 (citing *State ex rel. Gaston v. Black*, 199 Ala. 321, 74 So. 387, 388 (1917)). In other words, the Legislature cannot draft away the Commission's plenary constitutional powers through legislation. The only way to change the Arizona Constitution is through a constitutional amendment.

### III. CONCLUSION.

I hope that the discussion set forth above has been helpful. Please contact me if you wish to discuss these matters further.

Sincerely,



Janice Alward  
Chief Counsel, Legal Division  
Arizona Corporation Commission

cc: Chairman Pierce  
Commissioner Stump  
Commissioner Kennedy  
Commissioner Burns