

**Arizona Public Service's (APS's) Track and Record Proposal  
PART III**

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***The essentials***

- See our previous brief sheets for background on [What a Renewable Energy Credit \(REC\)](#) is and the background on why the Arizona Corporation Commission is addressing how utilities obtain the Renewable Energy Credits needed to comply with the Arizona Renewable Energy Tariff and Standard (REST).
- Arizona's Renewable Energy Standard & Tariff (REST) requires that 4.5% of electricity comes from distributed generation (DG) systems such as rooftop solar.
- Regulated utilities demonstrate compliance with the REST by purchasing Renewable Energy Credits (RECs) from their customers who have installed DG systems, typically with upfront cash incentives meant to help customers finance the installation of the DG system.
- With the rising demand for DG installations since the start of the REST, the Arizona Corporation Commission agreed to significantly reduce upfront incentives. As a result, the regulated electric utilities lost their guaranteed source of RECs that are needed to demonstrate compliance.
- In June 2012, utilities proposed a Track and Record option that would allow utilities to demonstrate compliance by tracking and counting towards compliance any new DG connection added within each service territory, independent of REC ownership.
- The REST rules had not been updated since they were approved in 2006.
- The Utilities Division Staff ("Staff") of the ACC proposed seven options to modify the REST rules. Ultimately, the ACC adopted a modified version of APS's Track and Record option.
- The adopted modifications require a utility to include in its compliance reports the actual kWhs of energy produced within its service territory from DG. A utility must differentiate between kWhs for which it owns the REC, and kWhs produced in the service territory for which it does not own the REC. Those kWhs for which a utility does not own the REC will not count towards compliance, but will be "acknowledged" by the ACC for informational purposes only. The REC remains with the producer of DG energy, unless purchased by a utility.

**Background on RECs in Arizona**

In 2006, the Arizona Corporation Commission implemented the [Renewable Energy Standard & Tariff \(REST\)](#), a set of rules meant to encourage the generation of power from renewable energy sources. The REST is unique

because it includes a distributed generation (“DG”) carve-out. This carve-out mandates that 30% of a utility’s total annual renewable energy retail load comes from DG, as opposed to utility-scale power plants.<sup>1</sup> The ACC tracks a utility’s compliance by considering the Renewable Energy Credits (RECs) collected by utilities from customers with DG systems. (See our brief sheet “[What is a Renewable Energy Credit](#)” to learn more.)

### Why the REST Rules Needed Modification

The REST modifications clarify and update how the ACC deals with compliance and related RECs. The REST rules had not been updated since their approval in 2006, despite dramatic changes in the renewable energy marketplace. Upfront incentives were eliminated as installation costs for DG systems lowered significantly. In the preamble to the modified REST rules, the ACC states:

“In recent years some utilities have seen their incentives eliminated as market conditions have changed... [I]t is unclear how utilities who are no longer offering DE incentives would demonstrate compliance with the REST rules’ DE requirements... [I]t is necessary for the Commission to provide a new framework for considering compliance with the rules.”<sup>2</sup>

### Proposed Modifications to REST

On March 31, 2014, the Arizona Corporation Commission (“ACC”) opened a docket to considering modifications to the Renewable Energy Standard Tariff (“REST”) rules. On April 4, 2014, the Utilities Division Staff (“Staff”) of the ACC proposed seven options to modify the REST rules:

- I. Track & Monitor – track all renewable energy production in a service territory and note whether the utility owns the RECs.
- II. Process Where Utility Would Purchase Least Cost RECs or kWh – utilities would purchase RECs to meet REST requirements, and that it was the least costly method of complying with the REST requirements.
- III. Creation of Maximum Conventional Energy Requirement – Changes minimum required percentage of renewable energy to a maximum allowed conventional energy.
- IV. Mandatory Upfront Incentives (“UFI”) – Customers required to accept the UFI in exchange for the utility receiving the RECs.

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<sup>1</sup> ARIZONA CORPORATION COMMISSION. OPINION AND ORDER IN THE MATTER OF THE PROPOSED RULEMAKING TO MODIFY THE RENEWABLE ENERGY STANDARD AND TARIFF RULES, DECISION NO. 74882, 17 (Dec. 31, 2014), <http://images.edocket.azcc.gov/docketpdf/0000159140.pdf>.

<sup>2</sup> *Id.* at Exhibit A.

- V. REC transfer Associated with Net Metering – Customers installing DG would be required to transfer all RECs produced by that DG in order to participate in net metering.
- VI. Recovery of DG/DE Costs Through the Standard Rate Case Process – Utilities not allowed to recover costs of complying with DG minimum requirements through a tariff or surcharge. Must seek recovery through a regular rate case process.
- VII. Track & Record - Utilities would track, record, and report all renewable energy produced in their service territory and identify RECs not owned by the utility. The Commission would consider all information to determine compliance.<sup>3</sup>

After extensive comment on the proposed modifications, Commissioner Brenda Burns filed a proposal to adopt a modified form of the Track and Record method on May 21, 2014.<sup>4</sup> On July 3, 2014, the Solar Energy Industries Association (“SEIA”) filed comments in response to the proposed language for the Track and Record method. SEIA indicated general support for the method, subject to some modified language. SEIA’s proposed adding that RECs not owned by the utility should not be counted toward REST compliance.<sup>5</sup> SEIA proposed eliminating language that the ACC would “acknowledge” RECs not owned by the utility to avoid double-counting.

On August 1, 2014, the Residential Utility Consumer Office (“RUCO”) filed comments regarding the EPA Clean Power Plan. RUCO expressed concern that EPA requirements would be stringent and revolve around RECs. If REC integrity was not preserved in REST modifications, Arizona might be subjected to “steeper than necessary 111(d) compliance targets.” RUCO recommended that the ACC create a transaction through which a utility can gain RECs from willing solar adopters, emphasizing that REC accumulation should start as soon as possible.<sup>6</sup>

On November 3, 2014, Staff filed Comments in which it described additions and modifications to the rule language to clarify the Notice of Proposed Rule Making (“NPRM”) intent. Staff stated that the NPRM’s intent was “to clearly establish the means by which the Commission will measure utility compliance under the REST rules” and to “eliminate the specter of double-counting.”<sup>7</sup> Staff added to the

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<sup>3</sup> *Id.* at 7.

<sup>4</sup> Brenda Burns, RE: DOCKET RE- 0000C-14-0112 - PROPOSED RULEMAKING TO MODIFY THE RENEWABLE ENERGY STANDARD RULES IN ACCORDANCE WITH DECISION No. 74365, (May 21, 2014), <http://images.edocket.azcc.gov/docketpdf/0000153494.pdf>

<sup>5</sup> Solar Energy Industries Association, RE: DOCKET RE- 0000C-14-0112 - PROPOSED RULEMAKING TO MODIFY THE RENEWABLE ENERGY STANDARD RULES IN ACCORDANCE WITH DECISION No. 74365, (July 3, 2014), <http://images.edocket.azcc.gov/docketpdf/0000154529.pdf>.

<sup>6</sup> Residential Utility Consumer Office, RUCO’S COMMENTS, (Aug. 1, 2014), <http://images.edocket.azcc.gov/docketpdf/0000155144.pdf>.

<sup>7</sup> COMMISSION, *supra* note 1 at 21.

preamble the phrase “non-utility owned RECs will be acknowledged *for informational purposes*” to clarify the acknowledgment would not be for compliance purposes.<sup>8</sup>

### Adopted REST Modification

Below are the modifications adopted by the ACC to the REST rules. All changes are underlined.

#### “ARTICLE 18. RENEWABLE ENERGY STANDARD AND TARIFF

##### R14-2-1805. Distributed Renewable Energy Requirement

- F. Any Renewable Energy Credit created by production of renewable energy which the Affected Utility does not own shall be retained by the entity creating the Renewable Energy Credit. Such Renewable Energy Credit may not be considered used or extinguished by any Affected Utility without approval and proper documentation from the entity creating the Renewable Energy Credit, regardless of whether or not the Commission acknowledged the kWhs associated with non-utility owned Renewable Energy Credits.
- G. The reporting of kWhs associated with Renewable Energy Credits not owned by the utility will be acknowledged.

##### R14-2-1812. Compliance Reports

- A. Beginning April 1, 2007, and every April 1st thereafter, each Affected Utility shall file with Docket Control a report that describes its compliance with the requirements of these rules for the previous calendar year and provides other relevant information. The Affected Utility shall also transmit to the Director of the Utilities Division an electronic copy of this report that is suitable for posting on the Commission's web site.
- B. The compliance report shall include the following information:
  - 1. The actual kWh of energy produced within its service territory and the actual kWh of energy or equivalent obtained from Eligible Renewable Energy Resources, differentiating between kWhs for which the Affected Utility owns the Renewable Energy Credits and kWhs produced in the Affected Utility's service territory for which the Affected Utility does not own the Renewable energy Credits;
- C. The Commission may consider all available information and may hold a hearing to determine whether an Affected Utility's compliance report satisfied the requirements of these rules.”<sup>9</sup>

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<sup>8</sup> *Id.* at Exhibit A.

<sup>9</sup> *Id.* at Exhibit A.

### Are there property rights at issue?

A REC signifies a [property right](#) in the added benefits that accompany renewable energy generation, beyond the actual electricity. Such benefits include energy price stability, brand development and the reduced need for fossil fuels. Under Arizona's current policy, the owner of a solar rooftop unit retains title to the REC generated, while the actual electricity generated from that unit enters the grid.

Although the issue is relatively new, a few courts have already addressed whether RECs constitute property rights and have found that they do. Specifically, the Second Circuit, in 2008, found that "RECs are inventions of state property law whereby the renewable energy attributes are "unbundled" from the energy itself and sold separately."<sup>10</sup> More recently, in 2013, the Armed Services Board of Contract Appeals (ASBCA) found that RECs constitute personal property due to their "exclusive nature and transferability."<sup>11</sup> If RECs do constitute property rights, their devaluation, when caused by government action (such that undermines the integrity of a REC), may result in an exercise of the government's eminent domain power without due compensation.

### Learn more

To find the ACC e-docket for

Go to: <http://edocket.azcc.gov/default.aspx>

Search for: RE-00000C-14-0112

### Latest developments

This docket appears to be concluded. The last entry was on February 23, 2015.

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<sup>10</sup> *Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Public Utility Control*, 531 F.3d 183, 186 (2d Cir. 2008).

<sup>11</sup> ARMED SERVICES BOARD OF CONTRACT APPEALS, OPINION BY ADMINISTRATIVE JUDGE MELNICK ON THE GOVERNMENT'S MOTION FOR PARTIAL DISMISSAL AND THE PARTIES' CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT, ASBCA No. 57779, 10 (Aug. 7, 2013), <http://www.asbca.mil/Decisions/2013/57779%20Honeywell%20International,%20Inc.%208.7.13%20PUBLISHED.pdf>