



February 15, 2019

Ms. Merideth Hadala
Michigan Public Service Commission
7109 W. Saginaw Highway
P.O. Box 30221
Lansing, MI 48909

RE: Legally Enforceable Obligation Rules Stakeholder Meeting

Dear Ms. Hadala:

Torch Clean Energy ("Torch") appreciates the opportunity to provide comments in this Legally Enforceable Obligation ("LEO") Rules Stakeholder process being conducted by the Michigan Public Utility Commission (the "MPSC") to create a LEO ruleset under the Public Utilities Regulatory Policies Act of 1978 ("PURPA"). By way of background, Torch is a utility scale solar energy developer with a development portfolio in the State of Michigan. At the Stakeholder Meeting on January 11, 2019, the Staff asked that we submit comments related to the proposed LEO ruleset. We believe that the MPSC has the opportunity, through this rule making process, to provide clear set of LEO rules that will allow QF developers the procedural certainty necessary to make investment decisions, obtain financing and ultimately bring capital investment and jobs to the State of Michigan. As a result, we are respectfully submitting this letter which provides certain comments for consideration by the Staff and other Stakeholders.

We note that in the materials presented for at the previous Stakeholder Meeting, the Staff conducted a review of how other jurisdictions handled LEO creation. We would like to draw the Staff's attention to three additional states not included in the previous materials.

First, would like to bring to your attention to what is currently being proposed in Arizona by Commissioner Tobin of the Arizona Corporation Commission (the "ACC"). Please see Attachment A for a recent proposal by Commissioner Tobin to clarify the ACC's rules implementing PURPA. We note that while the proposal does not explicitly define a LEO, it provides for the functional equivalent of one by requiring a utility to contract at avoided cost rates within 120 days of the later of (1) the first request for PURPA pricing and (2) the first request for interconnection.

Second, we would like to bring your attention to the PURPA rules in Utah and Wyoming. These rules/procedures can be found on applicable Schedule 38's. While these rules do provide certain challenges and obstacles to the QF developer, they are clear, well-defined and have resulted in QF projects being built where economic at the utility's avoided costs. We are very concerned that if the ruleset that has been proposed

by the Staff is adopted, no QF projects will be built which we do not believe to be the goal of the MPSC or the Staff.

Finally, we would like to provide specific feedback on a number of provisions that we believe will have the effect of completely stopping PURPA development in Michigan, as follows:

i) A requirement that a QF must obtain “permission to construct” the facility and “proof of all land use approvals and environmental permits necessary to construct and operate the facility” prior to being able to establish a LEO, will essentially require that a QF complete all of its development of a project prior to knowing whether it will have a valid contract and at what price. During the lengthy process of developing a project, which can take several years and significant investments of capital (both human and monetary), the utility’s avoided cost pricing could change. We believe a QF should be able to know the rate at which it will be able to sell power prior to making the investment decision to fully develop the project.

ii) We note that the proposed ruleset appears to require the QF execute a PPA prior to establishment of a LEO. We believe it is important that this requirement remain within the ability for the QF to accomplish on a unilateral basis such that a utility cannot thwart QF development by failing to tender a PPA or delaying negotiations. As a result, we propose that this requirement be clarified such that a QF must simply state in willingness to contract on the terms contained in the standard form of PPA approved by the MPSC (regardless of QF size) and at the avoided cost rates approved by the MPSC.

We believe that a creation of a LEO should be simplified to the following requirements:

- The QF should state its willingness to sell power to the utility at the utility’s avoided cost on the terms contained in the standard offer PPA;
- The QF should have made an interconnection request and executed an initial study agreement and paid any required fees; and
- The QF should have established site control and provided evidence of such if requested by the utility.

We thank you for your time and consideration of this matter.

Sincerely,

/s/ Torch Clean Energy



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Arizona Corporation Commission

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FEB 1 2019

DOCKETED BY

Andy Tobin
Boyd Dunn
Sandra D. Kennedy
Justin Olson

February 1, 2019

RE: Commission Policies Regarding PURPA in Arizona; Docket No. E-00000Q-19-0015

Commissioners:

The Public Utility Regulatory Policies Act (PURPA) of 1978 is a federal law that requires electric utilities to purchase power from qualifying facilities (QF). Congress and the Federal Energy Regulatory Commission state that the goal of PURPA is to encourage the development of renewable energy resources by developing a market for QF electricity¹ and providing certainty with respect to QF's potential return on investment.²

Congress requires each state Public Utilities Commission (PUC) to implement FERC's rules.³ FERC has said, "Implementation may consist of the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utilities arising under [PURPA], or any other action reasonably designed to implement [PURPA]."⁴

Although the Arizona Corporation Commission (ACC) could have implemented PURPA in a piecemeal approach by resolving PURPA disputes on a case by case basis,⁵ the Commission elected to comply with PURPA by adopting administrative regulations and policy statements of general applicability.⁶

On July 27, 1981, the Commission issued Decision No. 52345 (the "1981 Policy"), which implemented FERC rules 18 C.F.R. § 292.303(a) for each electric utility the Commission has ratemaking authority over, complying with the federal mandate.⁷ The 1981 Policy adopted a policy for standard rates for QFs 100 kW and under, rates and contracts for QFs over 100 kW, rates for additional services, changing rates, standards for interconnection, and periodic data requirements. The 1981 Policy requires all contracts to be

¹ See *F.E.R.C. v. Mississippi*, 456 U.S. 742, 750-51 (1982) (Explaining that Congress believed traditional electricity utilities were reluctant to purchase power from nontraditional generating facilities and that this problem impeded the development of such facilities) (referencing the remarks of Sen. Percy, Sen. Durkin, Sen. Haskell, and Sen. Hart and hearings before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess., 552-553 (1977)).

² See *Jd Wind 1, LLC Jd Wind 2, LLC Jd Wind 3, LLC Jd Wind 4, LLC Jd Wind 5 LLC Jd Wind 6, LLC*, 130 FERC ¶ 61127, 61631 (Feb. 19, 2010) ("an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility.")

³ See 16 U.S.C. § 824a-3(f); see also 16 U.S.C. 824a-3(h) (authorizing FERC to enforce this requirement against any state PUC that does not implement FERC's rules in its state).

⁴ See 18 CFR 292.401(a) (1981).

⁵ See *F.E.R.C. v. Mississippi*, 456 U.S. at 760 (finding that the Mississippi PUC could satisfy PURPA's requirements by simply "opening its doors" to claimants); *Arizona Corp. Comm'n v. Palm Springs Util. Co.*, 24 Ariz. App. 124, 128, (1975) (finding that, while the promulgation of rules and regulations of general applicability is generally favored over the generation of policy in a piecemeal fashion through individual adjudicatory orders, nothing "expressly or impliedly prohibit the Commission from dealing with specialized situations on a case by case approach").

⁶ See Docket No. 81-045, *In the Matter of Consideration by the Commission of Design of Rates and Policies for Cogeneration and Small Power Production as Set Forth in Sections 201 and 210 of [PURPA]* (implementing PURPA through a policy of general applicability); see also, e.g. Docket No. E-00000A-99-0431, Decision No. 69877 (Aug. 28, 2007) (adopting the PURPA standard of net metering as a policy of general applicability); Docket No. E-00000J-14-0023, *In the Matter of the Commission's Investigation of Value and Cost of Distributed Generation* (also known as the "Value of Solar Docket"), Decision No. 75859 (Jan. 3, 2017) (establishing a method of determining distributed generation avoided cost rates that comport with PURPA through a policy of general applicability).

⁷ See Decision No. 52345, p12 (Jul. 27, 1981) ("[T]his policy complies with the final rules regarding the implementation of Section 201 and 210 of PURPA.")



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submitted to the Commission for review and approval.⁸ If an agreement cannot be reached, the 1981 Policy requires issues of controversy to be submitted to the Commission for review.⁹

On December 18, 1989, the Commission issued Decision No. 56271 (the "Supplement Policy"), which supplemented the 1981 Policy by adding provisions regarding supplementary, standby, and maintenance service to QFs greater than 100 kW (the 1981 Policy and the Supplement Policy collectively, the "Current Policy").

On January 11, 2019, Clenera LLC filed a letter with the Commission, commenting that the Current Policy does not address, or is otherwise ambiguous regarding, certain PURPA items, including: determination of financeable lengths of PURPA "contracts;" the right to known fixed price forecasting and setting of proper avoided cost contract characteristics; and, the negotiation timeframe and administrative process regulated electric utilities are to follow when negotiating with QFs in good faith.¹⁰

While the Commission believes that the Current Policy addresses and implements all FERC rules as required by Sections 201 and 210 of PURPA,¹¹ the Commission also acknowledges that aspects of the Current Policy and FERC rule 18 CFR § 292.304(d)(2)¹² contain ambiguities that the Commission could resolve.

Given that regulated electric utilities and QFs are to continue negotiating within the framework of the Current Policy, it appears the Commission could provide immediate guidance on these ambiguities.

Clarifying the Commission's interpretation of the rules already generally applicable to regulated electric utilities in the state will highlight expectations for negotiating parties pursuing PURPA contracts, ensure the Commission's continued compliance with FERC rules, and further carry-out the intent of Congress.

The legal and administrative record on PURPA is extensive. A survey of PUC's in other states appears to show that the ambiguities that have affected negotiations in Arizona are similar to those that have been clarified in other Western states.¹³ Including their interpretations and findings into the ACC's deliberative process may help the Commission in providing clarity to its Current Policy.

⁸ See *id.*, at p.10.

⁹ See *id.*, at p.10.

¹⁰ See Response of Clenera LLC (Jan. 11, 2017), <http://docket.images.azcc.gov/0000195095.pdf>.

¹¹ See Decision No. 52345, at p12 ("[T]his policy complies with the final rules regarding the implementation of Section 201 and 210 of PURPA.").

¹² This rule provides that a QF shall have the option to sell energy or capacity to a regulated electric utility pursuant to a "legally enforceable obligation" for the delivery of energy or capacity "over a specified term." FERC has said, "[O]ur regulations, do not, however, specify a particular number of years for such legally enforceable obligations." Windham Solar LLC & Allco Fin. Ltd., 157 FERC ¶ 61134 (Nov. 22, 2016).

¹³ See *e.g.*, In Re: Optimum Renewables LLC, Complainant, No. FCU-2017-0004, 2018 WL 305996 (Jan. 3, 2018) (Iowa Utilities Board (20 years)); In the Matter of the Petition of Mtsun, LLC to Set Terms & Conditions for Qualifying Small Power Prod. Facility Pursuant to M.C.A. S 69-3-603, No. 7535B, 2017 WL 5990072 (Nov. 29, 2017) (Montana Public Service Commission (15 years)); In the Matter of the Application of Rocky Mountain Power for Modification of Contract Term of Purpa Power Purchase Agreements with Qualifying Facilities, No. 15-035-53, 2016 WL 157566 (Jan. 7, 2016) (Utah Public Service Commission (15 years)); In the Matter of the Application of Rocky Mountain Power for Modification of Contract Term of Purpa Power Purchase Agreements with Qualifying Facilities, No. 20000-481-EA-15, 2016 WL 3483204 (June 23, 2016) (Wyoming Public Service Commission (20 years)); In the Matter of Idaho Power Companys Petition to Modify Terms & Conditions of Purpa Purchase Agreements in the Matter of Avista Corps. Petition to Modify Terms & Conditions of Purpa Purchase Agreements in the Matter of Rocky Mountain Power Companys Petition to Modify Terms & Conditions of Purpa Purchase Agreements, No. 33419, 2015 WL 6958997 (Nov. 5, 2015) (Idaho Public Utilities Commission (2 years)).



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In addition, a survey of approved PURPA contracts and renewable PPA's in Arizona gives the Commission a sense of what could be considered the "status quo" for both contract length and avoided cost contract characteristics.¹⁴

A list of citations to the aforementioned proceedings, relevant case law, and contracts will be filed in the docket for the Commission's consideration.

Based on my review of the previously mentioned records, I am offering a potential resolution for your consideration, which, if adopted, would clarify the Commission's interpretations of our current PURPA policy and resolve any present ambiguities. I look forward to discussing the merits of this proposal at the upcoming Open Meeting and hope you offer any ideas or amendments you believe would help the Commission provide further clarity.

Sincerely,

Andy Tobin
Commissioner

¹⁴ See, e.g., Docket No. E-04204A-15-0314, In matter of the application of UNS Electric, Inc. for approval of a power purchase agreement with LS-Cliffrose, LLC (Aug. 31, 2015) (seeking Commission approval of a 24-year contract term), <http://docket.images.azcc.gov/0000166011.pdf>.



RESOLUTION

EXPRESSING THE ARIZONA CORPORATION COMMISSION'S INTERPRETATION OF AND CLARIFYING AMBIGUITIES IN THE EXISTING RULES, REGULATIONS, STATUTES, AND POLICIES OF THE COMMISSION, FEDERAL ENERGY REGULATORY COMMISSION, AND CONGRESS RELATED TO IMPLEMENTING THE PUBLIC UTILITIES REGULATORY POLICIES ACT OF 1978 IN ARIZONA

WHEREAS, the Public Utility Regulatory Policies Act (PURPA) of 1978 requires the Arizona Corporation Commission (Commission) to implement the rules of the Federal Energy Regulatory Commission (FERC) and carry-out the legislative intent of Congress;¹ and

WHEREAS, the Commission issued Decision No. 52345 on July 27, 1981, and Decision No. 56271 on December 18, 1989, to implement PURPA in Arizona and set forth the regulations and policies of the Commission;² and

WHEREAS, it is the policy of the Commission that the Commission encourage the development of qualifying facilities (QF) in Arizona;³ and

WHEREAS, it is the policy of the Commission that the Commission take an active leadership role in the development of renewable energy resources such as solar, wind, and biomass power;⁴ and

WHEREAS, it is the policy of the Commission that the Commission promote equity in the production and sale of electricity in Arizona;⁵ and

WHEREAS, it is the policy of the Commission that the Commission attempt to reduce the administrative and bureaucratic barriers to the advancement of QFs and not impose frustrating delays and procedures;⁶ and

WHEREAS, the regulations and policies of the Commission in Decision Nos. 52345 and 56271, and the rules and regulations promulgated by FERC,⁷ contain ambiguities that have hindered the execution of PURPA contracts that would promote development of renewable energy

¹ See 16 U.S.C. § 824a-3(f).

² See Decision No. 52345, p12 (Jul. 27, 1981) ("[T]his policy complies with the final rules regarding the implementation of Section 201 and 210 of PURPA.").

³ See *id.* at p1 ("It shall be the policy of the Arizona Corporation Commission to encourage the development of cogeneration and small power production.").

⁴ See *id.* at p1 (finding it essential that the Commission take a leadership role).

⁵ See *id.*

⁶ See *id.*

⁷ See 18 CFR § 292.304(d) (2016) (establishing that a QF shall have the option to sell energy or capacity pursuant to a "legally enforceable obligation" for the delivery of energy or capacity "over a specified term").



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investments in Arizona and have created uncertainty regarding QF's expected returns on investment; and

WHEREAS, renewable energy projects operating in Arizona as a result of PURPA comprise no more than 1% of Arizona's total energy portfolio today;⁸ and

WHEREAS, a contract under PURPA should be long enough to allow QFs a reasonable opportunity to attract capital from potential investors;⁹ and

WHEREAS, a contract price that is known at the outset of a PURPA obligation for the entire length of the contract furthers the purposes behind PURPA and provides potential investors with reasonable certainty regarding their expected rate of return;¹⁰ and

WHEREAS, a purchasing utility bears the risk that avoided costs will decrease in the future, and a selling QF bears the corresponding risk that avoided costs will increase in the future, the risks of avoided costs are deemed to balance-out in the long-term;¹¹ and

WHEREAS, public utility commissions (PUC) in other states have established PURPA contract lengths of 2, 5, 10, 15, and 20 years;¹² and

⁸ See Docket No. E-00000V-15-0094, Resource Planning and Procurement: Arizona Public Service Company, 2017 Integrated Resource Plan (Apr. 3, 2017) (showing an existing portfolio of 9,327 MW), <http://docket.images.azcc.gov/0000178832.pdf>; Tucson Electric Power Company, 2017 Integrated Resource Plan (Apr. 3, 2017) (showing an existing portfolio of 3,171 MW), <http://docket.images.azcc.gov/0000178618.pdf>; UNS Electric Inc, 2017 Integrated Resource Plan (Apr. 3, 2017) (showing an existing portfolio of 437 MW), <http://docket.images.azcc.gov/0000178617.pdf>; Arizona Electric Power Cooperative Inc, 2017 Demand- and Supply-Side Data Filing (Apr. 3, 2017) (showing an existing portfolio of 555 MW), <http://docket.images.azcc.gov/0000178652.pdf>; Salt River Project, 2017-18 Integrated Resource Plan (2018) (showing an existing portfolio of 8,863 MW), <https://www.srpnet.com/about/stations/pdfx/2018irp.pdf>; see in comparison Docket No. E-04204A-15-0314, In matter of the application of UNS Electric, Inc. for approval of a power purchase agreement with LS-Cliffrose, LLC (Aug. 31, 2015) (seeking Commission approval of a 75MW QF that generates power via solar photovoltaics; deemed approved by operation of law on Sep. 16, 2015), <http://docket.images.azcc.gov/0000166011.pdf>; Decision No. 73729 (Feb. 20, 2013) (approving two 600 kW QF dairy farms that generate power via biological biomass waste, totalling 1.2 MW), <http://docket.images.azcc.gov/0000142948.pdf>; Decision No. 63670 (May 24, 2001) (approving a 12 MW QF paper mill that generates power via biomass waste), <http://images.edocket.azcc.gov/docketpdf/0000025271.pdf>; see also, U.S. Energy Information Administration, Independent Statistics & Analysis, EIA.GOV (Aug. 23, 2016) (showing total utility-scale solar capacity in Arizona in 2015 at approximately 1,000 MW and differentiating approximately 200 MW or less of that capacity as PURPA QFs), <https://www.eia.gov/todayinenergy/detail.php?id=27632>.

⁹ See Windham Solar LLC and Allco Finance Ltd., 157 F.E.R.C. ¶ 61,134, at P 8 (2016).

¹⁰ See Jd Wind 1, LLC Jd Wind 2, LLC Jd Wind 3, LLC Jd Wind 4, LLC Jd Wind 5 LLC Jd Wind 6, LLC, 130 FERC ¶ 61127, 61631 (Feb. 19, 2010) (finding that the purposes behind PURPA are furthered by allowing a QF to establish a fixed contract price for its energy and capacity at the outset of its obligation and that a fixed contract price provides a potential investor in a QF with reasonable certainty about the expected return on a potential investment).

¹¹ See Allco Renewable Energy Ltd. v. Massachusetts Elec. Co., 208 F. Supp. 3d 390, 400 (D. Mass. 2016), aff'd, 875 F.3d 64 (1st Cir. 2017).

¹² See, e.g., In Re: Optimum Renewables LLC, Complainant, No. FCU-2017-0004, 2018 WL 305996 (Jan. 3, 2018) (Iowa Utilities Board (20 years)); In the Matter of the Petition of Mtsun, LLC to Set Terms & Conditions for Qualifying Small Power Prod. Facility Pursuant to M.C.A. S 69-3-603, No. 7535B, 2017 WL 5990072 (Nov. 29, 2017) (Montana Public Service Commission (15 years)); In the Matter of the Application of Rocky Mountain Power for Modification of Contract Term of Purpa Power Purchase Agreements with Qualifying Facilities, No. 15-035-53, 2016 WL 157566 (Jan. 7, 2016) (Utah Public Service Commission (15 years)); In the Matter of the Application of Rocky Mountain Power for Modification of Contract Term of Purpa Power Purchase Agreements with Qualifying Facilities, No. 20000-481-EA-15, 2016 WL 3483204 (June 23, 2016) (Wyoming Public Service Commission (20 years)); In the Matter of Idaho Power Companys Petition to Modify Terms & Conditions of Purpa Purchase Agreements in the Matter of Avista Corps. Petition to Modify Terms & Conditions of Purpa Purchase Agreements in the Matter of Rocky Mountain Power Companys Petition to Modify Terms & Conditions of Purpa Purchase Agreements, No. 33419, 2015 WL 6958997 (Nov. 5, 2015) (Idaho Public Utilities Commission (2 years)).



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WHEREAS, regulated electric utilities in Arizona have entered into PURPA contracts and purchased power agreements (PPA) with QFs and similar renewable energy projects with durations of 15, 20, and 24 years;¹³ and

WHEREAS, lenders and financial institutions that provide financing to QFs and other similar renewable energy projects in other states have generally required contract terms of no less than 15 years to issue or approve financing;¹⁴ and

WHEREAS, clarifying the Commission's interpretation of its existing policies and regulations is in the public interest and further implements FERC's rules in Arizona and carries out the legislative intent of Congress in enacting PURPA; and

BE IT RESOLVED by the Arizona Corporation Commission and the power vested in it by the Arizona Constitution and delegated to it by Congress through FERC under PURPA that any and all ambiguities arising out of the Commission's policies and regulations that implement PURPA in Arizona that affect a negotiation for a PURPA contract yet to be approved by the Commission between a regulated electric utility and an applicant, who has submitted a request for current avoided cost pricing to the regulated electric utility, has secured a site for a proposed PURPA project, and has submitted an application for interconnection with the regulated electric utility, be interpreted as follows:

1. Contracts shall have a term length of no less than 15 years.
2. Contracts shall include a table, chart, or graph, which indicates the avoided cost rate for each year for the duration of the contract term.
3. The QF shall have the preference of choosing whether the avoided cost rate for the duration of the contract be a levelized, fixed avoided cost rate or an annual, increasing or decreasing avoided cost rate.¹⁵
4. Contracts shall include all other material clauses, provisions, and definitions approved by the Commission in contracts for QFs of similar nameplate capacity and generation technology, and such material clauses, provisions, and definitions shall be substantially similar in both

¹³ See *supra*, note 8, Docket No. E-04204A-15-0314, In matter of the application of UNS Electric, Inc. for approval of a power purchase agreement with LS-Cliffrose, LLC, (seeking approval of a contract term with a length of 24 years).

¹⁴ See *supra*, note 12, In the Matter of the Petition of Mtsun, at *9 ("Expert testimony in the record indicated 15 years was the maximum contract length necessary for QFs to obtain long-term financing, and that argument was not challenged or refuted by parties, including [the utility] and [the Montata ratepayer advocate].").

¹⁵ See Lehigh Valley Power Comm. v. Pennsylvania Pub. Util. Comm'n, 128 Pa. Cmwlth. 276, 285-86, 563 A.2d 557, 561-62 (1989) ("FERC has approved the concept of levelization of payments by utilities to QFs.") ("So long as the total payment over the duration of the contract term does not exceed the estimated avoided costs, nothing in these rules would prohibit a State regulatory authority or non-regulated electric utility from approving such an arrangement.").



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form and content to those contracts previously approved.

5. Contracts shall be executed by the parties and submitted to the Commission for approval no more than 120 days from the later date of the following: the date of the first request for current avoided cost pricing the QF made to the utility; the date of the first application for interconnection the QF submitted to the utility; or the date this Resolution and Executive Order is entered by the Commission.

IN WITNESS THEREOF, We, the Duly Elected Commissioners of the Arizona Corporation Commission, have hereunto set our hands caused to be affixed the Official Seal of this Commission.

CHAIRMAN BURNS

COMMISSIONER DUNN

COMMISSIONER TOBIN

COMMISSIONER KENNEDY

COMMISSIONER OLSON

DONE at the Capitol, in the City of Phoenix, on this _____ day of _____, 2019.

ATTEST: _____
EXECUTIVE DIRECTOR MATT NEUBERT

DISSENT: _____

DISSENT: _____

On this 1st day of February, 2019, the foregoing document was filed with Docket Control as a Correspondence From Commissioner, and copies of the foregoing were mailed on behalf of Andy Tobin, Commissioner - A.C.C. to the following who have not consented to email service. On this date or as soon as possible thereafter, the Commission's eDocket program will automatically email a link to the foregoing to the following who have consented to email service.

**Arizona Corporation Commission
E-00000Q-19-0015**

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Consented to Service by Email

By: 

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