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IN THE SUPREME COURT OF ARIZONA

MESQUITE POWER LLC, Plaintiff/Appellee, v. ARIZONA DEPARTMENT OF REVENUE, an agency of the State of Arizona; COUNTY OF MARICOPA, a political subdivision of the State of Arizona, Defendants/Appellants.	**Case No. CV-23-0016-PR** Court of Appeals Division One No. 1 CA-TX 22-0002 Arizona Tax Court No. TX2018-000928 **BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REVIEW**

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INTRODUCTION

The primary question presented in this matter is whether the Arizona Department of Revenue may incorporate the value of a power-purchase agreement ("PPA") -- which inarguably is intangible personal property -- into the value of a power plant's "personal property," despite clear statutory language that requires the Department of Revenue to assess property taxes based only on the *tangible* personal property of such power plants.

PPAs are agreements between power producers and customers for the purchase of electricity. These agreements are enforceable and meet the classic definition of a contract -- and while they may be valuable, they certainly are intangible. Statute requires the Department of Revenue to assess only the value of a power plant's *tangible* personal property for purposes of property taxes. The Department of Revenue, however, has created a novel workaround by which (1) the value of a power plant's tangible property is "influenced" (in the words of the Court of Appeals) by the existence of these intangible PPAs, and (2) this "influence" naturally raises the value of the power plant's tangible property (and thus its tax bill).

This question is of significant importance not only to independent power producers, but also to every taxpayer who relies on the clear language of tax statutes when making financial decisions.

The Arizona Competitive Power Alliance (the "Alliance") is a tax-exempt, nonprofit entity founded in 2001 to represent the interests of independent power producers in Arizona and throughout the southwestern United States. The Alliance comprises twenty member companies, many of which use PPAs in the operation of their businesses.

The answer to the question presented in this case will have a direct and significant impact on the tax burden borne by members of the Alliance, and, therefore, on the continued viability of the longstanding business model employed by those members in providing inexpensive and reliable electric power to its customers.

Therefore, pursuant to Rules 16 and 23 of the Arizona Rules of Civil Appellate Procedure, the Alliance, as *amicus curiae,* respectfully urges the court to grant review as requested in the petition for review filed by Mesquite Power LLC in the above-captioned matter.

BRIEF BACKGROUND ON PPAs

PPAs are a type of futures contract, wherein the sales price for a given quantity of electric power is set in advance of the fulfillment date, and often before the seller has acquired the electric power being sold. Each electricity supplier can fulfill the PPA either with electricity generated by the supplier, or with electricity purchased on the open market from other suppliers. This is important because, as

with other futures contracts, a PPA can be an asset or a liability to the electricity supplier, depending on the ever-fluctuating costs of generating and purchasing electricity.

PPAs -- like any sales contract -- are an essential element of independent power producers' business model. If the Department of Revenue disrupts that business model by converting PPAs into tax liabilities, the ability of independent power producers to provide inexpensive and reliable electricity to their customers will be disrupted.

ARGUMENT

In this case, the Department of Revenue has taken the novel position that the value of a PPA should be taken into account when determining the taxable value of a power plant's *tangible* assets -- despite the fact that Arizona Revised Statutes ("A.R.S.") section 42-14156 plainly states that intangible personalty is *not* to be included in a power plant's taxable value. *See,* A.R.S. § 42-14156(B)(2) ("'Personal property' means all *tangible* property.") (emphasis added). Thus, this is not a case of an administrative agency interpreting an ambiguous statute; the statute is quite clear, as is the Arizona Legislature's sole and exclusive constitutional authority to say what property is subject to taxation. *See,* Ariz. Const. Art. 9, §§1, 11; *Apache Cty. v. Atchison, T. & S.F. Ry.,* 106 Ariz. 356, 359 (1970) ("The power to classify [property for purposes of taxation] is legislative.").

Instead, this is a separation-of-powers case with a significant and direct impact on the people of Arizona.

If the Department of Revenue is permitted to rewrite (or simply to ignore) the clear legislative language of A.R.S. section 42-14156, it will create havoc with the longstanding business model employed by independent power producers. Specifically, and as just one example, if (as the Department of Revenue urges) an existing PPA can be taken into account in valuing the tangible property of a power plant, then that value could change dramatically day-by-day according to the price of electric power on the open market.[1] In fact, a PPA can be a *liability* if the cost of generating or purchasing electricity rises significantly between the date the PPA is executed and the date the customer takes delivery. Given this reality, the Department of Revenue's position would make power producers' tax obligations entirely unpredictable, thus hobbling the producers' flexibility in budgeting for things like repairs and capital improvements.

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[1] Under the Department of Revenue's logic, the property taxes of a television station would rise if the station were to secure the rights to broadcast NCAA basketball. Likewise, the property taxes on a law firm's office equipment would be subject to an increase if the law firm were to obtain a large monthly retainer or employ a partner with a superior reputation -- while the taxes on the identical office equipment at another law firm would stay the same. This would be madness -- as well as being inconsistent with this court's prior holdings. *See, e.g., In re America West Airlines, Inc.,* 179 Ariz. 528 (1994).

Frankly, the wisdom of A.R.S. section 42-14156(B)(2) as written by the Arizona Legislature is as clear as the language of the statute itself: The value of an intangible asset (such as a PPA) is difficult to determine and subject to fluctuation, and therefore should have no bearing on the value of the underlying tangible property.[2]

CONCLUSION

The Alliance therefore urges the court to grant review as requested in the petition and to reaffirm the Arizona Legislature's sole and exclusive constitutional authority to determine what property is subject to taxation under Arizona law.

RESPECTFULLY SUBMITTED this 8th day of March, 2023.

ARIZONA COMPETITIVE POWER ALLIANCE

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[2] To be clear, the wisdom of the statute is not at issue here, given the Arizona Legislature's plenary authority in such matters. *See again,* Ariz. Const. Art. 9, §§1, 11.

CERTIFICATE OF COMPLIANCE

1. This certificate of compliance concerns an *Amicus Curiae* Brief in Support of Petition for Review and is submitted under Rule 16(b)(4).

2. The undersigned certifies that the brief to which this certificate is attached uses type of at least 14 point, is double-spaced, and contains 1,035 words.

DATED this 8th day of March, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2023, I transmitted the foregoing document electronically to the Clerk of the Court of the Arizona Supreme Court for filing via AZ TurboCourt, and on the same date, served electronically and mailed a copy of the foregoing via U.S. Mail Service for regular U.S. Mail delivery, to:

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