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Buying Power: Utility Dark Money and the Battle over Rooftop Solar

Troy A. Rule*

ABSTRACT

As rooftop solar energy systems become an ever more attractive alternative to grid-supplied electricity, electric utilities are actively seeking ways to protect themselves against this new form of disruptive innovation in their markets. One strategy that some utilities are employing involves using large “dark money” campaign contributions to influence public utility commission races and other state-level elections. Ambiguous campaign finance rules in the wake of the US Supreme Court’s Citizens United decision have generated a hazardous degree of uncertainty regarding the extent of legal constraints on investor-owned utilities’ funding of the utility regulators’ election. Accordingly, some utilities have begun interpreting the law as permitting them to secretly make unlimited campaign contributions and to thereby exert unbounded influence over the regulatory structure that governs them. What legal theories or strategies might help to resolve or mitigate this troubling new trend of dark money politics in utility law? This essay highlights the nation’s growing regulatory capture problems involving electric utilities and identifies some plausible means of addressing them.

INTRODUCTION

In recent years, the question has been posed as to whether an electric utility should be allowed to covertly contribute unlimited amounts of money to the election campaigns of the five state regulators who control that utility’s profits and who have the power to protect its monopoly. From a public policy perspective, the answer to this question seems obvious: restrictions on such campaign contributions are crucial to preserving the integrity and effectiveness of utility regulatory systems. Unfortunately, as a legal matter, the answer to this question appears open for debate. As the

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popularity of rooftop solar energy increases, legal uncertainty regarding the extent to which utilities can indirectly fund their own regulators' election campaigns is becoming a growing problem, particularly in jurisdictions where these regulators are popularly elected.

Public choice theorists have long identified state Public Utility Commissions (PUCs)¹ as being susceptible to "regulatory capture,"² a condition arising when private parties exert undue influence over their own regulators to the detriment of the general public.³ PUCs are vulnerable to capture problems largely because of the tremendous impact that PUC decisions can have on a utility's bottom line. PUCs often exercise significant control over utilities' expenditures, pricing, and rates of return on capital investments. Given what is at stake in their interactions with PUCs, utilities are understandably tempted to try and curry commissioners' favor in hopes of furthering their own interests, above those of their customers or those of the state in which they operate.

However, new market pressures and newly loosened campaign finance laws have recently elevated regulatory capture risks at some PUCs to a new level. In states where PUC commissioners are elected rather than appointed, some utilities seem to believe they have a legal license to effectively purchase seats on the very state commissions that heavily regulate their activities. Further, there is growing evidence that this sort of pernicious activity is already beginning to occur and is hampering the nation's transition toward a cleaner, more sustainable electricity system. This essay describes how recent developments in campaign finance law

1. The acronym "PUC" used throughout this essay is also intended to include public service commissions, corporation commissions, and any and all other commissions that serve as a state's primary electric utility regulators.

2. See Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL'Y 203, 203 (2006) (cited in Margot Kaminski, *The Capture of International Intellectual Property Law through the U.S. Trade Regime*, 87 S. CAL. L. REV. 977, 989 (2014)) (observing that "[m]ost of the literature that is explicitly concerned with regulatory capture has been developed in the context of utility regulation").

3. Numerous commentators have offered definitions for regulatory capture over the years. Most essentially describe it as a situation in which private, regulated entities exert undue influence over their own regulators to gain benefits at the expense of the general public. See, e.g., Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1343 (2013) (defining capture as occurring "when organized groups successfully act to vindicate their interests through government policy at the expense of the public interest"); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 178 (Special Issue) (1990) (defining capture as "the adoption by the regulator for self-regarding (private) reasons, such as enhancing electoral support or postregulatory compensation, of a policy which would not be ratified by an informed polity free of organization costs").

have created unprecedented regulatory capture risks involving electric utilities and PUCs, and suggests possible means of addressing these important challenges. Part I of this essay describes how the growth of distributed solar energy is introducing new challenges for electric utilities. Part II explains how recent developments in campaign finance law could allow utilities to have undue influence over their own regulators in policy struggles over rooftop solar, highlighting how one Arizona utility's purported dark money contributions have adversely impacted utility regulation in that state. Part III identifies and examines some potential legal and policy strategies for preventing utilities from exerting undue political influence in this turbulent period of transition and change within the electricity industry.

I. BOOMING SOLAR, NERVOUS UTILITIES

Over the past decade, rooftop solar energy has emerged as a powerful and viable form of indirect competition for electric utilities. Technological improvements, production economies of scale,⁴ and other factors have resulted in rapid price declines for photovoltaic (PV) solar panels.⁵ Plummeting PV module prices, combined with steady reductions in the "soft costs" of solar energy development,⁶ various domestic tax credits,⁷ net

4. See Alan C. Goodrich, et al., *Assessing the Drivers of Regional Trends in Solar Photovoltaic Manufacturing*, 6 ENERGY & ENVTL. SCI. 2811 (2013), pubs.rsc.org/en/content/articlepdf/2013/ee/c3ee40701b [<https://perma.cc/6DYW-PUA2>] (concluding that China's cost advantages in the production of solar PV cells have been driven largely by manufacturing economies of scale and other supply-chain related factors that could potentially be replicated in other parts of the world).

5. See GALEN BARBOSE & NAÏM DARGHOUTH, *Tracking the Sun VIII: The Installed Price of Residential and Non-Residential Photovoltaic Systems in the United States* 16 (8th ed. 2015) (finding that average PV module prices fell by 85% from 1998 to 2014).

6. See *id.* at 2 (reporting that the recent continued declines in the costs of solar PV installations are "primarily associated with reductions in PV soft costs, which include such items as marketing and customer acquisition, system design, installation labor, permitting and inspection costs, and installer margins").

7. In late 2015, Congress extended the federal 30% solar energy investment tax credit through 2019, providing for a gradual decrease in the credit to 10% by 2022. See Cassandra Sweet, *Wind, Solar Companies Get Boost From Tax-Credit Extension*, WALL ST. J., Dec. 16, 2015, [wsj.com/articles/wind-solar-companies-get-boost-from-tax-credit-extension-1450311501](http://www.wsj.com/articles/wind-solar-companies-get-boost-from-tax-credit-extension-1450311501) [<https://perma.cc/EWR8-63SJ>] (describing congressional extension of solar investment tax credit program).

metering programs,⁸ and other incentives, have driven dramatic increases in distributed solar energy installations over that period.⁹ In many cities throughout the country, “distributed” solar energy installations on rooftops and other open spaces have at last become potentially money-saving investments for households and businesses.¹⁰

Although solar PV manufacturers and installers are delighted with recent growth rates in their industry, electric utilities tend to take a somewhat different view of distributed solar power. Every additional kilowatt-hour of electricity that a customer-owned rooftop solar system generates is one less kilowatt-hour that the system’s owner must purchase from its utility through the grid. Accordingly, customer-owned or privately leased rooftop solar installations are an increasingly formidable threat to conventional utilities’ long-held monopoly position in retail electricity markets—an ever more viable alternative means for utility customers to meet their demands for electric power.

The emergence of rooftop solar energy creates an unprecedented challenge for electric utilities, which are not generally accustomed to facing market competition. State PUCs have vigorously protected most electric utilities from competition for more than half a century by actively preventing rival utilities from distributing retail electricity within clearly

8. See Steven Ferrey, *Nothing But Net: Renewable Energy and the Environment, MidAmerican Legal Fictions, and the Supremacy Doctrine*, 14 DUKE ENVTL. L. & POL’Y F. 1, 1-2 (2003) (explaining that “net metering,” which “enables consumers with small generating facilities [such as] solar panels . . . to offset their electric bills with any excess power produced at their facility, running the retail utility meter backwards when the renewable energy generator funnels power to the grid . . . is the cornerstone of state energy policies encouraging private investment in renewable energy sources”).

9. Mike Munsell, *US Solar Market Sets New Record, Installing 7.3GW of Solar PV in 2015*, GREENTECH MEDIA (Feb. 22, 2016), greentechmedia.com/articles/read/us-solar-market-sets-new-record-installing-7.3-gw-of-solar-pv-in-2015 [<https://perma.cc/ADH4-6XF9>] (describing a finding in the GTM Research and SEIA report *U.S. Solar Market Insight 2015 Year in Review* that total cumulative solar generating capacity in the U.S. increased from roughly two gigawatts in 2010 to twenty-five gigawatts in 2015).

10. See Cory Honeyman, *U.S. Residential Solar Economic Outlook 2016-2020: Grid Parity, Rate Design and Net Metering Risk*, GREENTECH MEDIA (Feb. 22, 2016), greentechmedia.com/research/report/us-residential-solar-economic-outlook-2016-2020 [<https://perma.cc/KT4L-NWXT>] (reporting that residential solar has reached grid parity in at least twenty U.S. states, a condition in which “the levelized cost of solar-generated electricity falls below gross electricity bill savings in the first year of a solar PV system’s life”).

drawn exclusive service territories.¹¹ Having historically relied upon state utility regulators to shield them from competition, utilities today are understandably now looking to these same regulators to help them protect their interests and incumbent monopoly position against the rooftop solar industry—a totally new type of competitor.¹²

Over the past few years, utilities have petitioned state utility regulators for a wide range of policy and rate reforms that would slow the growth of distributed solar energy. Utilities in some states have sought PUC approval to dramatically raise the “fixed” portion of retail customers’ utility bills, thereby increasing the total monthly charges paid by customers owning solar panels.¹³ In other states, utilities have secured PUC approvals to modify net metering programs in ways that make rooftop solar far less

11. State protection of electric utility monopolies has been a justifiable and well-accepted regulatory strategy for decades. *See, e.g.*, *Consolidated Edison Co. of N.Y. v. Public Serv. Comm’n*, 447 U.S. 530, 549–50 (1980) (stating that “utilities are permitted to operate as monopolies because of a determination by the State that the public interest is better served by protecting them from competition”).

12. At least one former utility commissioner has specifically predicted that the growth of rooftop solar will drive utilities to place ever-increasing pressure on commissioners to protect utilities’ interests. *See* Mark Ferron, FINAL COMMISSIONER REPORT, CALIFORNIA PUBLIC UTILITIES COMMISSION (Jan. 16, 2014), [cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/About_Us/Organization/Former_Commissioners/Peevey\(1\)/News_and_Announcements/99FinalCommissionerReport140116.pdf](http://cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/About_Us/Organization/Former_Commissioners/Peevey(1)/News_and_Announcements/99FinalCommissionerReport140116.pdf) [<https://perma.cc/TUQ5-ZTY5>] (quoting then-retiring California Public Utilities Commissioner Mark Ferron as suggesting that the Commission would “come under intense pressure to use [its] authority to protect the interest of the utilities over those of consumers and potential self-generators, all in the name of addressing exaggerated concerns about grid stability, cost, and fairness”).

13. The Wisconsin investor-owned utility We Energies was initially granted Public Service Commission approval in 2014 to impose these “fixed charges.” *See* Thomas Content, *Regulators Agree to Increase Fixed Charge on We Energies Electric Bills*, MILWAUKEE-WISCONSIN JOURNAL SENTINEL, Nov. 14, 2014, archive.jsonline.com/business/psc-begins-consideration-of-we-energies-rate-hike-plan-b99390765z1-282726581.html [<https://perma.cc/WF7M-QNYT>] (describing the Wisconsin Service Commission’s approval of a 75% increase in its fixed charges and the approval’s potential adverse impacts on rooftop solar development within the utility’s service area). However, a county court invalidated the charge in a case in late 2015. *See* Kari Lydersen, *Court Rejects Wisconsin Utility’s Fee on Solar Customers*, MIDWEST ENERGY NEWS (Oct. 30, 2015), midwestenergynews.com/2015/10/30/court-rejects-wisconsin-utilities-fee-on-solar-customers/ [<https://perma.cc/JWN8-SJRA>].

cost-competitive with grid-supplied power.¹⁴ Further, at least one utility has obtained its PUC's permission to single out retail customers with solar energy systems and impose additional monthly fees solely on them.¹⁵ However, despite utilities' increasingly vigorous resistance, the rooftop solar industry continues to expand and become an ever more popular and attractive option for utility customers throughout much of the country.

II. UTILITIES' GROWING INCENTIVES AND ABILITY TO INFLUENCE PUCs

The growing popularity of rooftop solar energy is amplifying the importance of PUCs—the primary regulators of electric utilities at the state level. In an era when utility customers in some regions are installing rooftop solar arrays in droves, PUCs' decisions on issues such as solar energy fees, demand charges, and net metering reforms are having greater consequences on electric utilities' bottom lines. As these decisions are made, utilities' incentives to impact the composition of these PUCs are increasing as well.

A. *Citizens United* and its Potential Implications for Utilities

Recent developments in campaign finance law have potentially introduced a powerful new way for investor-owned utilities to leverage their substantial financial resources to influence who serves on state PUCs. Chief among these developments was the U.S. Supreme Court's landmark

14. See, e.g., Daniel Rothberg, *Regulators Deal a Blow to Rooftop Solar Industry*, LAS VEGAS SUN, Dec. 22, 2015, <http://lasvegassun.com/news/2015/dec/22/regulators-deal-a-blow-to-rooftop-solar-industry/> [https://perma.cc/7FTB-YJAY] (describing the Nevada Public Utilities Commission decision approving a 75% reduction in credits to rooftop solar energy users for excess energy generated under net metering program in the investor-owned utility NV Energy's service area). It is worth noting that, as of April 2016, rooftop solar energy industry stakeholders had filed a lawsuit seeking reversal of the Nevada Public Utilities Commission's decision on NV Energy's proposed changes to net metering rules. See Krysti Shallenberger, *TASC Sues Nevada PUC to Overturn Net Metering Decision*, UTILITYDIVE.COM (Mar. 22, 2016), utilitydive.com/news/tasc-sues-nevada-puc-to-overturn-net-metering-decision/416087/ [https://perma.cc/286K-A6E2] (describing The Alliance for Solar Choice's newly-filed lawsuit against the Nevada Public Utilities Commission).

15. See Ray Stern, *Home Solar in Arizona Takes Hit After Vote by Corporation Commission to Add Surcharge*, PHOENIX NEW TIMES, Nov. 15, 2013, phoenixnewtimes.com/news/home-solar-in-arizona-takes-hit-after-vote-by-corporation-commission-to-add-surcharge-6637814 [https://perma.cc/F67T-GHWF] (describing the Arizona Corporation Commission's approval of a monthly fee of seventy cents per kilowatt of installed solar energy generating capacity within the service area of Arizona Public Service Co.)

holding in *Citizens United v. Federal Election Commission* in 2010.¹⁶ *Citizens United* and other related cases effectively allow corporations to contribute unlimited amounts of money to non-profit political entities known as 501(c)(4) organizations, which can use those funds to indirectly bankroll elections.¹⁷ Corporations typically are not required to publicly disclose the amount of these so-called “dark money” contributions or that they contributed any money at all.¹⁸

Although the *Citizens United* decision and its progeny have drawn substantial criticism within the legal academy and among the general public,¹⁹ the basic holding in the case remains intact. The 5–4 majority in *Citizens United* based its holding largely on the notion that corporations hold First Amendment free speech rights substantially equivalent to those of individual citizens. Accordingly, corporations are equally entitled to express their political views through undisclosed contributions to qualified nonprofit political action groups.²⁰

Importantly, however, neither *Citizens United* nor any subsequent, major appellate case has involved a set of facts in which the making of dark money campaign contributions was also a heavily regulated utility. Thus the question still looms whether the five-justice majority in *Citizens United* intended for the lax corporate campaign finance rules it validated to fully extend to investor-owned electric utilities whose expenses, prices, and returns on capital investments are largely dictated by the state. It seems doubtful that the Court contemplated creating such a wide and problematic loophole for utilities; yet, recent activities suggest that some utilities may already be availing themselves of these lax corporate finance rules, helping shield their monopolies from an escalating tide of rooftop solar energy installations.

B. A Case Study: Bright Sunshine and Dark Money in Arizona

The potentially hazardous impacts of *Citizens United* on state utility regulation are perhaps most visible in Arizona, where a heated battle between electric utilities and the rooftop solar energy industry has been

16. 558 U.S. 310 (2010).

17. For general information about *Citizens United* and its impacts, see generally Ganesh Sitaraman, *Contracting Around Citizens United*, 114 COLUM. L. REV. 755, 761–63 (2014).

18. For an informative description of how *Citizens United* has given rise to dark money contributions and an analysis of some of the impacts of these developments, see generally Jennifer A. Heerwig & Kathryn Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443 (2014).

19. See, e.g., Sitaraman, *supra* note 17 at 762 (noting that “[p]olling from the weeks after the decision indicate[d] that 80% of Americans opposed the Court’s ruling”).

20. See generally *Citizens United*, 558 U.S. at 339–40.

brewing for years. Arizona has characteristics that make it particularly vulnerable to utility regulatory capture in this era of affordable rooftop solar energy and permissive dark money laws. For example, the state has excellent solar energy resources,²¹ which have helped to drive a blistering pace of rooftop solar energy development and to catapult the state to near the top of a wide range of solar energy ranking lists.²² However, Arizona is also one of about a dozen states that elect, rather than appoint, its utility regulators.²³ All five seats on the Arizona state agency regulating electric utilities—the Arizona Corporation Commission (ACC)—are filled through popular elections.²⁴ In states such as Arizona, where commissioners are elected rather than appointed, utilities can more easily use indirect “dark money” campaign contributions to impact the outcome of commissioner elections.

Historically, elections for seats on the ACC have been relatively quiet and uneventful affairs involving only modest levels of campaign expenditures. However, that changed in 2014, when two of the five commission seats came up for election. The 2014 ACC election cycle seemed especially important to Arizona’s largest utility, Arizona Public Service Co. (APS)—an investor-owned utility with more than one million in-state customers.²⁵ The pace of rooftop solar installations had been rapidly increasing in Arizona. In response to this growth, APS had recently become the first major utility in the country to earn regulators’ approval

21. A National Renewable Energy Laboratory study found that Arizona’s potential for electricity generation through rooftop PV is 22,736 GWh per year, placing the state in the top ten in the U.S. See Anthony Lopez, et al., *U.S. Renewable Energy Technical Potentials: A GIS-Based Analysis* 12, NAT’L RENEWABLE ENERGY LAB. (July 2012), nrel.gov/docs/fy12osti/51946.pdf [<https://perma.cc/2JNS-74YL>].

22. See, e.g., *Top Ten Solar States*, SOLAR ENERGY INDUS. ASS’N (March 2016), seia.org/research-resources/top-10-solar-states [<https://perma.cc/93H9-BT24>] (reporting that Arizona ranks second in the country for total installed solar energy generating capacity and fourth for solar energy generating capacity per capita).

23. Most states empower the governor to appoint utility commissioners. In those states, utilities’ only potential means of influencing appointments is to contribute heavily to a gubernatorial campaign or to directly lobby to the offices of sitting governors. Utility commission seats are filled via gubernatorial appointment in 38 of the 50 states. In Virginia, a state legislative vote determines who serves on the state’s utility commission. See PUBLIC SERVICE COMMISSION ELECTIONS, 2016: ELECTED VS. APPOINTED COMMISSIONERS, BALLOTPEdia, ballotpedia.org/Public_Service_Commission_elections_2016#Elected_vs._appointed_commissioners [<https://perma.cc/JN4W-SQJK>].

24. See *id.* Laws in Alabama, Arizona, Georgia, Louisiana, Mississippi, Montana, Nebraska, New Mexico, North Dakota, Oklahoma and South Dakota provide for the popular election of utility commissioners.

25. See APS, *Company Profile*, aps.com/en/ourcompany/aboutus/companyprofile/Pages/home.aspx [<https://perma.cc/JZ7L-UHU5>].

to single out customers with solar panels and charge them an extra monthly fee.²⁶ But the new fee was small and based on the nature of the negotiations that led to the fee, it was evident that APS wanted it to be much higher.²⁷ It was clear to all stakeholders that the composition of the ACC over the coming years would have a tremendous impact on how soon the utility could obtain approval to increase its new solar fees.

With so much at stake in the 2014 ACC elections, APS, or its parent company, Pinnacle West, appear to have availed itself of the loose “dark money” campaign finance rules resulting under *Citizens United* to have a material impact on the election outcome. Specifically, it is widely suggested in the media—and neither APS nor Pinnacle West has denied—that the utility or its affiliates funneled millions of dollars into third-party groups that waged an aggressive campaign to promote the election of two particular candidates to the ACC.²⁸ Tom Forese and Doug Little, a pair of candidates who ran for the ACC together and benefited from substantial dark money support that APS or Pinnacle West will not deny contributing,²⁹ ultimately prevailed in what was a relatively close election.³⁰

The practical consequences of APS’s apparent purchase of seats on the ACC began to emerge less than five months after the 2014 election. In April of 2015, APS submitted a proposal to the ACC to more than

26. See Matthew Philips, *Arizona’s New Fee Puts a Dent in Rooftop Solar Economics*, BLOOMBERG BUSINESSWEEK, Nov. 22, 2013, bloomberg.com/news/articles/2013-11-22/arizonas-new-fee-puts-a-dent-in-rooftop-solar-economics [https://perma.cc/2F2J-SZHK] (describing APS’s newly-approved monthly fees on distributed solar energy users as the “first ever in the U.S.”).

27. See *id.* (noting that “APS had hoped to be able to charge about \$50 a month per home” rather than the mere \$3 to \$6 that received ACC approval).

28. See Ryan Randazzo, *Regulator Robert Burns Wants APS to Disclose ‘Dark Money’ Donations*, THE ARIZONA REPUBLIC, Dec. 1, 2015, azcentral.com/story/money/business/energy/2015/12/01/regulator-robert-burns-wants-aps-disclose-its-dark-money-contributions-political-candidates/76592810/ [https://perma.cc/NR4W-642Y] (stating that “APS, the state’s biggest utility, is widely believed to have contributed about \$3.2 million last year to independent political groups that campaigned for . . . Tom Forese and Doug Little”).

29. See Letter from Don Brandt, APS CEO, to Bob Burns, ACC Commissioner (Dec. 29, 2015), images.edocket.azcc.gov/docketpdf/0000168038.pdf [https://perma.cc/GC74-GZHU] (refusing a request to disclose the extent of APS’s or Pinnacle West’s political contributions on the ground that “[c]ompelled disclosure about political contributions that APS or its affiliates may have made out of shareholders profits would go beyond what is required of all corporations under Arizona campaign finance law, and would impinge on APS’s First Amendment rights”).

30. See Ryan Randazzo, *Republicans Forese, Little Win Arizona Corporation Commission Race*, THE ARIZONA REPUBLIC, Nov. 4, 2014, azcentral.com/story/money/business/2014/11/04/arizona-corporation-commission-election-night/18427899/ [https://perma.cc/Y6B4-EMVY].

quadruple the size of the utility's new fees on rooftop solar energy users.³¹ In a surprisingly bold decision, a 3–2 majority on the newly-composed commission—including Forese and Little—voted a few months later to allow the ACC to address this fee increase request outside the context of a formal rate case.³²

To many outside observers, it seemed that by early 2015, APS had lawfully succeeded in capturing the government body charged with regulating its activities.³³ The term “regulatory capture,” which appears frequently within the public choice and legal academic literature, describes such instances when a regulated private party exerts heavy influence over its regulators and thereby advances its own interests above the broader policy objectives that the regulators were entrusted to protect.³⁴ In Arizona, APS had ostensibly captured the ACC by materially influencing the election of at least two of the commission's five members. Moreover, APS seemingly sought to leverage this capture situation to secure regulatory outcomes that benefited the utility but arguably not the broader interests of Arizona citizens.

III. PRESERVING PUCS' INTEGRITY IN THE DARK MONEY ERA

As distributed solar energy becomes a more viable alternative to grid-supplied power, utility dark money controversies like that in Arizona are

31. See Press Release, APS, *APS Asks to Reset Grid Access Charge for Future Solar Customers* (Apr. 2, 2015), [aps.com/en/ourcompany/news/latestnews/Pages/aps-asks-to-reset-grid-access-charge-for-future-solar-customers.aspx](https://www.aps.com/en/ourcompany/news/latestnews/Pages/aps-asks-to-reset-grid-access-charge-for-future-solar-customers.aspx) [https://perma.cc/FNZ6-MPX2] (reporting that APS had formally sought ACC approval to increase the grid access charge established by the Commission in November 2013 from seventy cents per kilowatt—or approximately \$5 per month—to \$3 per kilowatt, or roughly \$21 per month for future residential solar customers).

32. See Ryan Randazzo, *Regulators Delay APS Solar-Fee Decision*, THE ARIZONA REPUBLIC, Aug. 18, 2015, (describing the 3–2 ACC decision in which Commissioners Bob Stump, Doug Little, and Tom Forese voted in favor of commencing a proceeding prior to and outside of APS's scheduled 2016 rate case to address APS's request for increased monthly fees on solar energy users).

33. See, e.g., Ray Stern, *APS' Alleged "Dark Money" Toward Two Candidates Looks to Have Paid Off*, PHOENIX NEW TIMES, Aug. 26, 2014, [phoenixnewtimes.com/news/aps-alleged-dark-money-toward-two-candidates-looks-to-have-paid-off-6634263](https://www.phoenixnewtimes.com/news/aps-alleged-dark-money-toward-two-candidates-looks-to-have-paid-off-6634263) [https://perma.cc/7W8H-J2QA] (quoting failed ACC election candidate Vernon Parker as stating, “This is not good, when a regulated monopoly can choose who regulates them[.]”).

34. See, e.g., Nicholas Bagley, Response, *Agency Hygiene*, 89 TEX. L. REV. 1, 2 (2010) (defining regulatory capture as a “phenomenon whereby regulated entities wield their superior organizational capacities to secure favorable agency outcomes at the expense of the diffuse public” and as a “regulatory manifestation [of] public choice theory”).

likely to grow more common.³⁵ Particularly in states where public utility commissioners are elected rather than appointed, utilities' perceived license to use dark money contributions to impact who regulates them is deeply troubling. In the wake of *Citizens United*, appropriately limiting utilities' influence on PUC elections in these states is more important than ever before.

A. *The Recusal Approach*

One strategy for combating utility regulatory capture issues, akin to the apparent situation in Arizona, is to demand that sitting PUC commissioners known to have received heavy financial support from a particular entity during their election bids recuse themselves from PUC matters that involve that entity or its affiliates. Moreover, the U.S. Supreme Court's holding in the 2009 case of *Caperton v. A.T. Massey Coal Co., Inc.* arguably requires such recusal when an entity's support of a PUC commission candidate was so substantial that it likely impacted the outcome of the election.³⁶

Caperton involved a large coal company that had recently been ordered in state court to pay a \$50 million judgment for fraudulently canceling a coal mining agreement.³⁷ Rather than simply paying the judgment, the company, Massey Coal, appealed the decision to the West Virginia Supreme Court of Appeals—a court whose justices are popularly elected. While waiting for the higher court to hear the case, Massey Coal's Chief Executive Officer, Don Blankenship, then contributed \$3 million through a non-profit corporation to the election campaign of a particular candidate—Brent Benjamin—to fill a vacancy on that same court.³⁸ Blankenship's \$3 million contribution exceeded all other funds raised or spent by Benjamin or his campaign committee and ultimately helped Benjamin to win the election and take a seat on the court.³⁹ When Massey Coal's appeal eventually came before the court, *Caperton* requested that Justice Benjamin recuse himself from hearing it. *Caperton* justified his request by arguing that Blankenship's sizable contributions to Justice Benjamin's campaign created too great a risk of bias in favor of Massey Coal.

35. See, e.g., Eric Barton, *Big Energy's Campaign Cash Keeps Solar Down in Florida*, MIAMI HERALD, Apr. 5, 2015, miamiherald.com/news/politics-government/article17474102.html [<https://perma.cc/PTH7-PBT5>] (describing how "Florida's largest utilities have invested heavily in state political campaigns to fend off competition"). For more examples of utilities' recent efforts to combat the growth of rooftop solar energy through political and lobbying activities, see generally Bret Fanshaw & Gideon Weissman, *Blocking the Sun: 12 Utilities and Fossil Fuel Interests that are Undermining American Solar Power*, FRONTIER GROUP (Oct. 2015).

36. See generally 556 U.S. 868 (2009).

37. *Id.* at 872.

38. *Id.* at 873.

39. *Id.*

In a 5–4 decision, the U.S. Supreme Court held that Justice Benjamin was indeed legally obligated to recuse himself from hearing the *Caperton* case. Writing for the majority, Justice Kennedy stated:

[T]here is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.⁴⁰

The majority opinion in *Caperton* also explains how decisions regarding whether recusal is required in these situations should be made. According to the court, such inquiries must center on the “contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.”⁴¹ In Blankenship’s case, his “significant and disproportionate influence” on the outcome of Justice Benjamin’s election,” “coupled with the temporal relationship between the election and the pending case,” caused the “probability of actual bias” to rise to “an unconstitutional level.”⁴²

1. Recent Calls for Commissioner Recusals in Arizona

The facts in *Caperton* bear a striking resemblance to those alleged in connection with Arizona’s 2014 ACC elections. The \$3.2 million that APS or Pinnacle West purportedly contributed to 501(c)(4) groups supporting the joint campaigns of Tom Forese and Doug Little easily exceeded all other expenditures by all candidates in the 2014 ACC elections and quite possibly had a material effect on the election outcome.⁴³ Further, the ACC’s website states that commissioners act in a judicial capacity when hearing rate cases, suggesting that Forese and Little were acting in a capacity that was legally equivalent or at least similar to that of Justice Blankenship in *Caperton*. Moreover, the fact that APS submitted a request to more than quadruple its monthly fees on retail customers with rooftop solar energy systems just a few months after Forese and Little took their

40. *Id.* at 884.

41. *Id.*

42. *Caperton v. A.T. Massey Coal, Co.*, 556 U.S. 868, 886–87 (2009).

43. See Mary Jo Pitzl & Rob O’Dell, *Outside Money Played Huge Role in Arizona Elections*, THE ARIZONA REPUBLIC, Nov. 8, 2014, <http://azcentral.com/story/news/arizona/politics/2014/11/09/election-outside-money-campaign-funding/18751133/> [<https://perma.cc/48ZY-K8GA>] (reporting that a total of \$4,901,982 was spent on campaigns in the 2014 ACC elections and that \$3,837,582 of those expenditures were by “independent expenditure committees”).

new seats on the ACC shows a temporal relationship not unlike that in *Caperton*.⁴⁴

Given the strong similarities between the facts in *Caperton* and those surrounding the APS dark money controversy in Arizona, it is hardly surprising that there have already been calls for Commissioners Forese and Little to recuse themselves from APS-related matters before the PUC. In particular, two former ACC commissioners filed a formal request in September of 2015 for Commissioners Forese and Little to recuse themselves from the ACC's consideration of APS's request to quadruple its fees on rooftop solar users.⁴⁵ Tellingly, less than one week after the former commissioners filed their request, APS voluntarily withdrew its fee-quadrupling proposal.⁴⁶ This quick APS response suggests that the mere threat of recusals based on *Caperton* are already helping to temper regulatory capture issues at the ACC, and could eventually serve a similar function in other jurisdictions.

2. *The Limits of Recusal-Based Strategies for Policing Utility Regulatory Capture*

Although the threat of recusal demands is one plausible means of policing against utilities' use of dark money contributions to influence PUC elections, it also suffers from some serious limitations. Perhaps chief among these limitations is the fact that the most important evidence needed to succeed in such recusal demands is arguably shielded from disclosure. To win a court order based on *Caperton* requiring a commissioner's recusal from a particular entity's PUC matter, the person seeking the order must provide evidence that the entity made sizable contributions favoring that commissioner's candidacy. Yet, obtaining evidence of these contributions is difficult in an era where most corporations can legally

44. See *supra* note 31.

45. See Eric Jay Toll, *Complaint Seeks Recusal of 3 Arizona Corporation Commission Members in Upcoming APS Case*, PHOENIX BUSINESS JOURNAL, Sept. 22, 2015, bizjournals.com/phoenix/morning_call/2015/09/complaint-seeks-recusal-of-3-corporation.html [https://perma.cc/P43T-GD6A] (describing filings by former ACC Commissioners Bill Mundell and Renz Jennings, citing *Caperton* and alleged APS dark money contributions, and demanding that Commissioners Forese and Little recuse themselves from considering APS-related matters).

46. See Bob Christie, *Arizona Pulls Rate Hike Request for New Solar Customers*, THE WASH. TIMES, Sept. 25, 2015, washingtontimes.com/news/2015/sep/25/arizona-pulls-rate-hike-request-for-new-solar-cust/ [https://perma.cc/8VNC-WN3Q] (describing decision by APS to withdraw its ACC request for increases to its monthly solar fees).

make large donations through dark money channels without disclosing their identities.⁴⁷

The problem of utilities hiding campaign contributions based on purported nondisclosure rights has been on full display in the controversy surrounding APS and its alleged dark money contributions benefiting Commissioners Forese and Little. In late 2015, ACC Commissioner Bob Burns sent a formal letter to APS and Pinnacle West demanding that the entities disclose all such contributions made during the 2014 election cycle and asserting that the Arizona Constitution empowered him to demand disclosure.⁴⁸ In response, APS CEO Don Brandt sent a letter brazenly refusing to disclose any APS or Pinnacle West contributions. Brandt sought to boldly justify this refusal based on the fact that APS and Pinnacle West were corporations, declaring, “[c]ompelled disclosure about political contributions that APS or its affiliates may have made out of shareholder profits would go beyond what is required of all corporations under Arizona campaign-finance law, and would impinge on APS’ First Amendment rights.”⁴⁹

As of early 2016, APS and Pinnacle West continued to resist Commissioner Burns’ demands that the entities disclose any and all dark money contributions related to the 2014 ACC elections. Frustrated by the companies’ behavior, Commissioner Burns began refusing to vote on any APS-related matters, stating that he would not resume doing so until the utility complied with his disclosure demands.⁵⁰ As this unusual battle over

47. See Brent Ferguson, *Beyond Coordination: Defining Indirect Campaign Contributions for the Super PAC Era*, 42 HASTINGS CONST. L.Q. 471 (2015) (observing that direct “[c]ontributions to candidates are fully disclosed, but current law provides various ways for outside groups to obscure the true source of their funding”).

48. A former Arizona Supreme Court Justice produced a seven-page letter in September of 2015 supporting the notion that an ACC Commissioner could subpoena records about such contributions. See Laurie Roberts, *Retired Chief Justice: Regulators Can Force APS to Disclose Dark Money*, THE ARIZONA REPUBLIC, Sept. 17, 2015, (discussing former Arizona Supreme Court Chief Justice Thomas Zlaket’s letter determining that ACC commissioners were “clearly empowered” under Arizona law to subpoena records from APS and Pinnacle West).

49. Ryan Randazzo, *APS Refuses Request to Disclose Political Contributions*, THE ARIZONA REPUBLIC, Dec. 31, 2015, azcentral.com/story/money/business/energy/2015/12/30/aps-refuses-request-disclose-political-contributions/78104254/ [<https://perma.cc/C6UN-5URU>].

50. See Ryan Randazzo, *Corporation Commissioner Robert Burns Refuses to Vote for APS Items Until Company Discloses ‘Dark Money’ Ties*, THE ARIZONA REPUBLIC, Apr. 13, 2016, azcentral.com/story/money/business/energy/2016/04/12/corporation-commissioner-robert-burns-refuses-vote-aps-items-until-company-discloses-dark-money-ties/82954430/ [<https://perma.cc/VBF8-55WH>] (reporting that ACC Commissioner Bob Burns had declared that “he will not advance any of the utility’s business matters until it complies with his request to review any spending it has done on elections”).

disclosure shows, demanding commissioner recusals based on *Caperton* can only truly be an effective means of combating the sort of dark money-driven capture problems seemingly evident in Arizona if a court, commissioner, or other party is able to compel disclosure of the contributions at issue.

A second disadvantage of relying on *Caperton*-based calls for recusal to limit regulatory capture at PUCs is that it is a purely *ex post* solution to the problem. Because one can make such recusal demands only after a commissioner has already won election and is sitting on a PUC, this recusal approach can weaken a PUC's capacity to effectively regulate. Some state PUCs have as few as three members, so the absence of even one commissioner can substantially hinder a PUC's ability to govern on a particular utility's matters for years at a time.

One other drawback of relying on *Caperton* to limit utilities' capture of PUCs is that it is likely only a viable strategy in the minority of states that elect, rather than appoint, PUC members. In most states the governor is empowered to appoint PUC commissioners.⁵¹ If a utility in a state that appoints PUC commissioners made large indirect dark money contributions supporting a particular gubernatorial campaign in hopes of influencing a new governor's PUC appointments, it is unclear whether the rule in *Caperton* would apply.

Likewise, since *Caperton* involved an elected judge acting in a judicial capacity, its holding would likely not apply to situations in which utilities made sizable contributions through 501(c)(4) entities to support the election campaigns of state legislators. There is growing evidence that, in a few states, powerful investor-owned utilities are lobbying heavily within legislatures for new statutory rules that slow the adoption of distributed solar energy.⁵² Since legislators do not act in a judicial capacity, the holding in *Caperton* would likewise not support requiring legislators who had received large campaign contributions from utilities to recuse themselves from legislative votes on utility-related legislation.⁵³

51. See *supra* note 23 and accompanying text.

52. A bill enacted in Utah in Spring 2016 exemplify this trend. See Emma Penrod, *13 Utah Lawmakers Change Votes, Pass Rocky Mountain Power Plan*, THE SALT LAKE TRIBUNE, Mar. 10, 2016, sltrib.com/home/3647139-155/utah-house-reconsiders-and-passes-rocky [https://perma.cc/HB6Q-45SH] (describing how Rocky Mountain Power, a large investor-owned utility that "holds financial sway within Utah politics" "mounted a sizable lobbying effort" in the Utah legislative session's "final hours" to secure passage of a bill that opponents say would have "potential to kill hundreds of solar jobs in the state").

53. It is worth noting that Professor John Nagle, who also participated in this symposium, penned an article advocating for laws requiring such legislator recusals more than a decade ago. See generally John Copeland Nagle, *The Recusal Alternative to Campaign Finance Reform*, 37 HARV. J. LEGIS. 69 (2000).

B. A Broader Approach: Distinguishing Utilities from Other Corporations under Citizens United

Given the shortcomings of recusal-based approaches to limiting utility regulatory capture, is there any other means of addressing these risks? A more comprehensive way of addressing them would be through a major appellate court decision that distinguished heavily regulated utilities from ordinary corporations under *Citizens United* and established that utilities had comparatively narrower rights to contribute to political campaigns.

Suppose, for example, that a state enacted legislation prohibiting regulated utilities and their affiliates from directly or indirectly contributing more than \$2,500 per election cycle to campaigns for public utility commission seats and required full disclosure of any such contributions. If an investor-owned electric utility challenged such a law, it is uncertain as to how the U.S. Supreme Court would rule on the issue. Given the significant unpopularity and backlash associated with the *Citizens United* holding, the Court may be willing to carve out investor-owned utilities from the case's permissible campaign finance rules.

At first glance, it seems that any such restrictions on corporate contributions to campaigns would be unconstitutional under *Citizens United*. After all, investor-owned utilities like APS are typically private corporate entities and are not all that different from Microsoft, Amazon, or any other corporation. Moreover, the *Citizens United* line of cases essentially establishes that corporations have First Amendment rights to secretly make limitless contributions to 501(c)(4) organizations that support particular candidates.⁵⁴

However, investor-owned utilities arguably have distinctive attributes that make them materially different from ordinary corporations and thus deserving of a less permissive set of campaign finance rules. Unlike Microsoft or Amazon, many investor-owned electric utilities enjoy state protected monopolies and, in exchange, have impliedly consented to having their expenditures, pricing, and rate of return effectively dictated by a government agency.⁵⁵ Surely, this special type of corporation, which is effectively an arm of the state and has always been uniquely prone to

54. See *supra* notes 17-18 and accompanying text.

55. See Troy A. Rule, *Unnatural Monopolies: Why Utilities Don't Belong in Rooftop Solar Markets*, 52 IDAHO L. REV. 401, 403 (2016) (stating that utility regulations "generally prohibit utilities from charging excessive prices and ensure that utilities provide service to all qualified customers within their service areas" and that, "[i]n exchange for these obligations, state regulators protect utilities from certain types of competition and allow them to earn a reasonable return on their infrastructure investments.").

regulatory capture problems, is deserving of separate treatment under campaign finance laws.

Language from Justice Antonin Scalia's concurring opinion in *Citizens United* supports the notion that the majority in that case did not contemplate having its loose campaign finance principles apply to heavily regulated utilities, even when those utilities are investor-owned corporations. A known originalist, Justice Scalia reasoned in his concurring opinion that the Founders did not originally extend broad campaign finance privileges to corporations because corporations during that era were fundamentally different from those operating today. Justice Scalia reasoned that "[m]ost of the Founders' resentment towards corporations was directed at the state-granted monopoly privileges that individually chartered corporations enjoyed. Modern corporations do not have such privileges, and would probably have been favored [for broad speech rights] by most of our enterprising Founders."⁵⁶

Scalia's observations certainly ring true as to most modern corporations; however, they definitely do not apply to electric utilities, which do have "state-granted monopoly privileges." In fact, Justice Scalia's originalist rationale for distinguishing modern free-market corporations from early state-chartered ones arguably supports applying separate, more stringent campaign finance rules to investor-owned utilities, instead of conflating them with the Amazons and Microsofts of the world.

Language appearing later in Justice Scalia's concurring opinion in *Citizens United* further bolsters the argument that the majority in that case did not intend for regulated utilities to enjoy the same loose treatment under campaign finance laws as ordinary corporations. Scalia emphatically stated, ". . . to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy."⁵⁷ This statement reveals again Scalia's presumption in *Citizens United* that the "corporate speech" at issue was speech by a prototypical corporation—one that is generally free to make its own reasonable decisions about expenditures, pricing, and where it does business. Those sorts of entities are agents of the "modern free economy" and tend to operate in at least somewhat competitive markets.

In contrast, regulated electric utilities, which operate solely within exclusive, government-dictated territories and pursuant to heavy legal constraints on their expenditures, pricing and other activities, are not "agents of the modern free economy" at all. Excluding or impeding their speech through reasonable campaign finance rules thus arguably has no troublesome "muzzling" effect akin to what Justice Scalia described. Instead, it prevents utilities from leveraging their government-provided

56. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 388 (2010).

57. *Id.* at 929.

advantages and incumbent monopoly status to drown out the voices of other less-privileged stakeholders, to capture their own regulators, and to stifle innovation.

A relevant case before the U.S. Supreme Court would be the most straightforward way to establish that utilities are materially distinguishable from ordinary corporations under *Citizens United* and subject to more stringent campaign finance rules. For instance, a case challenging a state statute that, like the hypothetical statute described above, restricted regulated utilities' campaign contributions and required them to publicly disclose all such activities might compel a court to address the issue. Unfortunately, utilities' heavy influence within many state legislatures might also create obstacles to the passage of such a bill.⁵⁸

In states with constitutions allowing for referenda or ballot initiatives, those modes might provide a potential alternative means of resolving the existing legal uncertainty regarding utilities and campaign finance activities. A successful ballot initiative restricting utility political contributions could easily draw constitutional challenges from utilities and provide an opportunity for courts to rule on the issue. By effectively circumventing state legislatures, such initiatives could potentially even be an option in states in which a major electric utility has substantial influence within the state government.

CONCLUSION

Although the future remains bright for rooftop solar energy, clouds of utility dark money politics increasingly loom on the horizon. Fortunately, there exist plausible strategies for preventing utilities from exerting undue influence over their own regulators and thereby slowing the growth of distributed solar. In states where PUC commissioners are popularly elected, the possibility of demanding commissioner recusal based on *Caperton* provides one potent means of deterring campaign finance through utility dark money. However, in states where governors appoint the commissioners, calls for commissioner recusal are less likely to succeed. In those states, a state statute or ballot initiative with provisions that limit utility campaign contributions and require their disclosure on the ground that investor-owned utilities are materially distinguishable from ordinary corporations under *Citizens United* is the most promising means of combatting utility regulatory capture problems.

Hopefully, courts and policymakers will soon recognize the distinct characteristics of regulated utilities in the context of campaign finance and

58. See, e.g., *supra* note 52 (describing Rocky Mountain Power's "financial sway in Utah politics").

embrace more restrictive rules to guard against utility regulatory capture. Policies that clearly address these issues and thereby mitigate capture problems will grow ever more important as the nation continues its exciting transition toward a more sustainable and resilient energy system.