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Transitioning a Community Away from Fossil-Fuel Generation to a Green Economy: An Approach Using State Utility Commission Authority

Alan Ramo & Deborah Behles*

A transition is starting throughout the nation as renewable energy resources are developed and older fossil-fuel facilities retire.[1] The communities that bear the brunt of fossil-fuel pollution will also likely bear this transition's economic impacts. Yet, there is no guarantee that these communities will share in the transition's economic benefits—in particular, the

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1. *See generally* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT SUMMARY FOR POLICYMAKERS 2–22 (2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf ("This . . . [r]eport is based on the assessment carried out by the three Working Groups of the Intergovernmental Panel on Climate Change (IPCC).").

building, operation, and ownership of new renewable energy resources. Renewable energy laws generally do not consider these types of impacts when determining where to site new resources.[2]

The California Public Utilities Commission (CPUC), in a case involving Native Americans in Arizona affected by the operations and closure of a recently retired coal-fired power plant, developed a novel plan to generate a revenue stream from a closed power plant to assist an impacted community with a transition to renewable energy.[3] The CPUC's decision provides an important roadmap for other states to consider communities impacted by the operation and closure of fossil-fuel facilities as the energy grid transitions into green resources.

I. CONCEPT OF JUST TRANSITION TO A GREEN ECONOMY

Scientists have found that significant greenhouse gas reductions would be necessary to avoid the likely devastating impacts of climate change.[4] Reputable scientists have also found that the Earth is nearing a tipping point where climate change will be irreversible.[5] These impacts are already occurring.[6] Recent years were among the warmest on record, and studies continue to link climate change to extreme weather events.[7]

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2. *See id.* at 14–18.

3. *See infra* Part II.

4. *See, e.g.*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 1, at 7–8, 18–20.

5. *Id.* at 13–14; *see* James Hansen et al., *Target CO2: Where Should Humanity Aim?*, 2 OPEN ATMOSPHERIC SCI. J. 217, 225–26 (2008); *see also* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, IPCC SPECIAL REPORT ON MANAGING THE RISKS OF EXTREME EVENTS AND DISASTERS TO ADVANCE CLIMATE CHANGE ADAPTION: FACT SHEET (2011), *available at* http://www.ipcc.ch/news_and_events/docs/srex/SREX_fact_sheet.pdf (discussing the likely changes in extreme events).

6. *See NOAA Says 2010 Among Warmest on Record; Pew Links Climate, Harsh Weather Frequency*, Daily Env't Rep. (BNA) No. 125, at A-14 (June 29, 2011).

7. *See, e.g.*, *id.* ("[T]he existence of the link between climate change and extreme weather is not so much theoretical anymore as it is observational." (internal quotation marks omitted)); *cf.* BULLETIN OF THE AM. METEOROLOGICAL SOC'Y, STATE OF THE CLIMATE IN 2010, SPECIAL

To mitigate future impacts, federal, state, and local governments are evaluating options to reduce greenhouse gases.[8] Many efforts focus on the electrical generation industry since generating electricity from fossil fuels creates approximately forty percent of the United States' carbon dioxide emissions.[9] To reduce electricity's greenhouse gas levels, reduction plans require increased electricity generation through renewable, less-polluting resources, or resource conservation.[10] Increased development of renewable energy and energy efficiency measures can mitigate climate change impacts and help communities transition away from fossil fuel dependence.[11]

A significant barrier to transitioning to clean energy sources is the local economic dependency fostered by a fossil fuel economy.[12] Many communities remain financially

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SUPPLEMENT TO THE BULLETIN OF THE AMERICAN METEOROLOGICAL SOCIETY, VOL. 92, NO. 6, JUNE 2011, at S16, S39–40 (J. Blunden et al. eds., 2011).

8. *See* PEW CTR. OF GLOBAL CLIMATE CHANGE, CLIMATE CHANGE 101: STATE ACTION 1 (2011), *available at* http://www.pewclimate.org/docUploads/climate101-state.pdf ("A wide range of policies have been adopted at the state and regional levels to reduce greenhouse gas emissions, [and] develop clean energy resources . . . .").

9. *See Electricity Explained: Electricity and the Environment—Basics*, U.S. ENERGY INFO. ADMIN., http://www.eia.doe.gov/energyexplained/index.cfm?page=electricity_environment (last updated Mar. 25, 2013) ("Power plants that burn fossil fuels and materials made from fossil fuels . . . are the sources of about 40% of the total U.S. carbon dioxide . . . emissions."); *see also World Carbon Emissions From Fossil Fuel Combustion Reach Record High, IEA Says*, Daily Envt'l Rep. (BNA) No. 101, at A-2 (May 25, 2012) (discussing the increase of already high levels of "fossil fuel-related carbon dioxide emissions, mostly from power plants").

10. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 1, at 14–22.

11. *See id.*

12. *See* Christa Marshall, *'Coal Country' Poses the Biggest Obstacle in Senate Climate Debate*, N.Y. TIMES, Nov. 2, 2009, http://www.nytimes.com/cwire/2009/11/02/02climatewire-coal-country-poses-the-biggest-obstacle-in-s-79147.html?pagewanted=all (discussing how the majority of states are economically dependent on coal); *see also* INT'L ENERGY AGENCY, THE ECONOMICS OF TRANSITION IN THE POWER SECTOR 5, 6 (2010), *available at* http://www.iea.org/publications/freepublications/publication/economics_of_transition.pdf (discussing the general economics of transitioning away from fossil fuel generation); Uma Outka, *Environmental Law and Fossil Fuels: Barriers to Renewable Energy*, 65 VAND. L. REV. 1679, 1688–90 (2012) (outlining transitional considerations of a renewable energy transition).

dependent upon fossil fuels for their economic development.[13] These communities are often low-income communities of color that disproportionately bear the adverse environmental and health impacts from fossil fuel exploration, extraction, production, consumption, and disposal.[14] Climate change resulting from fossil fuel burning will only increase cumulative environmental and health disparities.[15] Communities that bear a disproportionate impact of environmental pollution also generally have a higher energy burden,[16] which makes them more vulnerable to fluctuating energy prices[17] and the expected increased energy needs due to climate change.[18]

A transition to renewable energy could help revitalize these fossil-fuel dependent communities. Renewable energy and energy efficiency resources reduce the bills of the residences where they are installed, and green development

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13. *See* U.N. DIV. FOR SUSTAINABLE DEV., THE TRANSITION TO A GREEN ECONOMY: BENEFITS, CHALLENGES AND RISKS FROM A SUSTAINABLE DEVELOPMENT PERSPECTIVE 9–15 (2012), *available at* http://www.uncsd2012.org/content/documents/Green%20Economy_full%20report%20final%20for%20posting%20clean.pdf (describing the risks of transitioning to a green economy).

14. *See* MANUEL PASTOR ET AL., MINDING THE CLIMATE GAP: WHAT'S AT STAKE IF CALIFORNIA'S CLIMATE LAW ISN'T DONE RIGHT AND RIGHT AWAY 8–12 (2010), *available at* http://dornsife.usc.edu/pere/documents/mindingthegap.pdf; Clifford Rechtschaffen, *The Evidence of Environmental Injustice,* 12 ENVTL. L. NEWS 1, 3–5 (2003) ("To environmental justice proponents disproportionate burdens of environmental risk appeared to be borne by communities populated by people of color or of concentrated poverty."); *see also Air Emissions*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/cleanenergy/energy-and-you/affect/air-emissions.html (last updated Sept. 25, 2013) ("Fossil fuel-fired power plants are responsible for 67 percent of the nation's sulfur dioxide emissions, 23 percent of nitrogen oxide emissions, and 40 percent of man-made carbon dioxide emissions.").

15. *See* PASTOR ET AL., *supra* note 14, at 15–17; Seth B. Shonkoff et al., *Minding the Climate Gap: Environmental Health and Equity Implications of Climate Change Mitigation Policies in California*, 2 ENVTL. JUST. 173, 173–75 (2009).

16. Energy burden is defined as "the expenditures of the household for home energy divided by the income of the household." 42 U.S.C. § 8622(2) (2006 & Supp. V 2011).

17. The energy burden continues to grow as energy prices for heating oil, natural gas, electricity, and propane are rising. *See* CAMPAIGN FOR HOME ENERGY ASSISTANCE, THE LIHEAP INVESTMENT 1 (2010), *available at* http://liheap.org/assets/investment/LIHEAP_investment_june2010.pdf (discussing a program to provide assistance to low-income households to pay for heating and cooling their home).

18. *See id.* at 2 (showing the energy price increases).

could also create jobs in the community.[19] Investment in green resources has been shown to create more jobs than investment in the fossil fuel resources.[20] Development of renewable energy resources can also provide a revenue stream and income to communities.[21]

II. A CASE STUDY: THE MOHAVE GENERATING STATION AND ITS IMPACT ON NAVAJO AND HOPI COMMUNITIES

The case involving the Mohave Generating Station provides an example of how a transition from fossil fuel to renewables can be supported. The case demonstrates that finding a solution requires understanding each community's history and opportunities.

The Mohave Generating Station (Mohave) began operations in 1971.[22] It was located in Laughlin, Nevada, along the Arizona border, and "approximately 75 miles southwest of the Grand Canyon."[23] The two-unit, 1580 megawatt (MW) coal-fired power plant emitted up to 40,000 tons of sulfur dioxide (SO_2) per year and was at one point the largest source of SO_2 emissions in the West.[24]

Mohave was operated by Southern California Edison (SCE), which was its 56% majority owner.[25] Its coal came by

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19. *See, e.g.*, L.A. BUS. COUNCIL, MAKING A MARKET: MULTIFAMILY ROOFTOP SOLAR AND SOCIAL EQUITY IN LOS ANGELES 4, 5, 7 (2011), *available at* http://dornsife.usc.edu/assets/sites/242/docs/LABC-Exec-Summary-Brochure.pdf (estimating that 4500 job years could be created with a 300 MW multi-family solar program).

20. *See, e.g.*, ROBERT POLLIN ET AL., GREEN PROSPERITY: HOW CLEAN-ENERGY POLICIES CAN FIGHT POVERTY AND RAISE LIVING STANDARDS IN THE UNITED STATES 2, 9–10 (2009), *available at* http://www.peri.umass.edu/fileadmin/pdf/other_publication_types/green_economics/green_prosperity/Green_Prosperity.pdf.

21. *See* L.A. BUS. COUNCIL, *supra* note 19, at 6–7, 14–15.

22. Investigation on the Comm'n's Own Motion of the Maint. & Operating Practices, Safety Standards & the Reasonableness of Costs Incurred from the Mohave Coal Plant Accident, Decision No. 94-03-048, 53 CPUC2d 452, 456, 1994 Cal. PUC LEXIS 216, at *2 (Cal. Pub. Utils. Comm'n Mar. 9, 1994) [hereinafter Mohave Coal Plant Accident].

23. *Final Project Mohave Report Fact Sheet*, U.S. ENVT'L PROTECTION AGENCY, http://www.epa.gov/region9/air/mohave/mofact.html (last visited Oct. 8, 2013).

24. *Id.*

25. *In re* S. Cal. Edison Co. Regarding the Distribution of SO_2 Allowance Sale Proceeds Related to the Suspended Operation of Mohave Generating

way of an usual 275-mile slurry line from the Black Mesa Coal Mine on the Hopi and Navajo Reservations in Arizona, operated by Peabody Western Coal Company and jointly owned by the Navajo Nation and Hopi Tribe.[26] Groundwater from an aquifer under the Hopi and Navajo reservations, called the N-aquifer, provided the water for the slurry line.[27]

For decades, the Navajo and Hopi had little control over their coal and water resources.[28] "Until 1938, the Department of the Interior had exclusive authority to lease to private companies the right to develop natural resources on Indian land, even over Tribes' objections."[29] One commentator labeled these times "the nadir of Native existence on the continent" due to their loss of land, inactive Tribal governments, and inability to protect against further encroachments from the outside.[30]

In 1938, under the Indian Mineral Leasing Act (IMLA), the Tribes obtained the right to negotiate their mineral rights subject to the Secretary of Interior's oversight.[31] "Nevertheless, the IMLA did little to prevent private companies from exploiting Tribes' weak bargaining position, which resulted from their dire economic circumstances and their lack of adequate representation, among other factors."[32]

With this backdrop, a long history of the Hopi and Navajo struggle to gain control over and the full value of their

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Station, Application No. 06-12-022, Decision Determining Treatment of Sale Proceeds of Sulfur Dioxide Allowances from Mohave Generating Station, Decision No. 13-02-004, 2013 Cal. PUC LEXIS 69, at *13 (Cal. Pub. Utils. Comm'n Feb. 13, 2013) [hereinafter Mohave Sulfur Allowances]. It was also owned by the Los Angeles Department of Water and Power (10% share), Nevada Power Company (14% share), and the Salt River Project (20% share). *Id*. at *13 n.11.

26. *Id.*; Opinion Authorizing S. Cal. Edison Co. to Make Necessary & Appropriate Expenditures on Critical Path Investments at Mohave While Continuing to Seek Resolution of the Water & Coal Issues & to Establish a MERMA Account, Decision No. 04-12-016, at 4 (Cal. Pub. Utils. Comm'n Dec. 2, 2004) [hereinafter SCE Expenditures].

27. SCE Expenditures, *supra* note 26, at 5.

28. *See* Kimberly C. Perdue, Comment, *The Changing Scope of the United States' Trust Duties to American Indian Tribes:* Navajo Nation v. United States, 80 U. COLO. L. REV. 487, 488 (2009).

29. *Id.*

30. Charles F. Wilkinson, *Home Dance, the Hopi, and Black Mesa Coal: Conquest and Endurance in the American Southwest*, 1996 BYU L. REV. 449, 457 (1996).

31. *See, e.g.*, Perdue, *supra* note 28, at 488.

32. *Id.*

resources began.[33] For the Hopi, it included a history of attempts at centralized government, overcoming the resistance to centralized government, and ultimately their reluctance to separate minerals from their ancestral land of 12,000 years or more.[34] Ultimately, the Hopi's general counsel in 1962 resolved territorial disputes with the Navajo and the mineral rights for Black Mesa, with a fifty-fifty split of coal proceeds.[35]

This same general counsel then sought to negotiate deals with Peabody Coal that would ultimately allow coal mining and using water to slurry coal for the new Mohave facility.[36] What the Hopi did not know was that their attorney was apparently working concurrently for Peabody Coal.[37]

The royalty agreements, not surprisingly, were soon viewed as greatly undervalued. The Hopi received "an extremely low royalty rate"[38] amounting to 3.335% of gross sales for the coal at the time, as did the Navajo, which the Interior Department in a later audit concluded was "little more than half of what the government [was then] receiving."[39] The lease for water was similarly underpriced.[40]

While the lease agreement for coal had no reopener clause that the parties could invoke themselves,[41] Article VI of the lease allowed the U.S. Interior Secretary "to adjust the royalty rate to a 'reasonable' level on the twentieth anniversary of the lease."[42] As that date approached, the lease now provided Navajo only 2% of the gross proceeds of coal sales.[43] As early as the 1970s, Navajo began to negotiate with Peabody for a revision, insisting that the royalty rate be at least 12.5%, the

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33. *See* Wilkinson, *supra* note 30, at 450–51.

34. *See id.* at 456–58.

35. *See* Healing v. Jones, 210 F. Supp. 125, 132 (D. Ariz. 1962) ("[S]uch area is a reservation for the joint use of the Hopi and Navajo Indian Tribes."), *aff'd*, 373 U.S. 758 (1963); Wilkinson, *supra* note 30, at 463–64.

36. *See* Wilkinson, *supra* note 30, at 461–67.

37. *Id.* at 469–71.

38. Navajo Nation v. United States, 46 Fed. Cl. 217, 221 (2000), *rev'd*, 263 F.3d 1325 (Fed. Cir. 2001), *rev'd*, 537 U.S. 488 (2003).

39. Wilkinson, *supra* note 30, at 470, 471 (alteration in original) (quoting Jim Richardson & John A. Farrell, *Divided Opposition, in The New Indian Wars*, DENVER POST, Nov. 21, 1983, at 19) (internal quotation marks omitted).

40. *See id.* at 472.

41. *See Navajo Nation*, 46 Fed. Cl. at 220.

42. *Id.* at 221.

43. United States v. Navajo Nation, 537 U.S. 488, 495 (2003).

minimum allowed by Congress for federal lands.[44] In 1984, Navajo finally asked the Secretary of the Interior, Donald Hodel, to adjust the rate to a fair market value.[45] The Bureau of Indian Affairs Navajo Area Director, who was delegated approval authority by the Secretary, decided that a fair market return for the coal would be 20%.[46] Peabody filed an administrative appeal.[47]

While Peabody's appeal was pending, and apparently on the eve of it being denied,[48] Peabody hired a lobbyist recommended by SCE who was a close personal friend of the Secretary.[49] Shortly after meeting with the lobbyist, Secretary Hodel signed a departmental internal memorandum that the Court of Claims determined was prepared by Peabody, delaying a decision on the appeal and directing negotiations between the parties.[50] All the Navajo knew was that the appeal was not being decided and that "'someone from Washington' had urged a return to the bargaining table."[51] "Facing severe economic pressures," the Navajo soon capitulated and accepted the 12.5% royalty rate for a mine adjacent to Black Mesa they owned exclusively.[52] It was also agreed the rate would apply to the Hopi and Navajo jointly-owned Black Mesa site.[53]

In 1993, the Navajo and Hopi initiated litigation to set aside the agreement, based upon the government breaching its

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44. *Id.* at 496.

45. *See, e.g.*, Navajo Nation v. United States, 263 F.3d 1325, 1336 (Fed. Cir. 2001), *rev'd*, 537 U.S. 488 (2003).

46. *See, e.g.*, *Navajo Nation*, 46 Fed. Cl. at 222. The United States Supreme Court noted that the 12.5% royalty rate, while the minimum required by law, is also the customary rate found in most such leases issued or readjusted after 1976. *Navajo Nation*, 537 U.S. at 488–89. However, the unusual use of slurry suggests that the true market rate would have been higher given the plant's isolation and its need for the Black Mesa coal.

47. *Navajo Nation*, 46 Fed. Cl. at 222.

48. *See id.*

49. *See, e.g.*, *id.*

50. *Id.* at 222–23.

51. *Id.* at 223.

52. *Navajo Nation*, 263 F.3d at 1328; *see Navajo Nation*, 46 Fed. Cl. at 223–24. The negotiation also resolved the Hopi and Navajo right to tax Peabody separately on the coal, capping the total payments to 20.5%. *Id.* at 224. However, arguably an 8% tax plus the fair royalty rate of 20% should have provided a total of 28.5% to the Hopi and Navajo. *See id.*

53. *See Navajo Nation*, 537 U.S. at 498 n.5; *Navajo Nation*, 46 Fed. Cl. at 224.

trust responsibilities.[54] In 1999, the Navajo filed a separate lawsuit claiming SCE and Peabody had illegally conspired to influence the federal government, among other claims.[55] The Supreme Court twice reversed the Circuit Court in the original royalty case, and ultimately in 2009, it found that no applicable statute allowed for a money damages remedy for Hodel's conduct.[56] The conspiracy lawsuit, however, continued until 2013.[57]

While this litigation was percolating, environmentalists raised a new set of issues that would question Mohave's viability.[58] On February 19, 1998, Grand Canyon Trust and Sierra Club filed a citizen suit against Mohave's owners alleging Clean Air Act violations of emission limits, compliance orders, and reporting requirements.[59] The lawsuit requested, among other things, the installation of pollution control equipment known as scrubbers, and fabric filter dust collectors known as baghouses.[60]

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54. *See Navajo Nation*, 46 Fed. Cl. at 224.

55. *See* Navajo Nation v. Peabody Holding Co., 209 F. Supp. 2d 269, 272 (D.D.C. 2002).

56. *See* United States v. Navajo Nation, 556 U.S. 287, 287 (2009).

57. A settlement was reached between Navajo and SCE in August 2011. Press Release, Navajo Nation Dep't of Justice, Navajo Nation, Peabody Energy, Salt River Project and Southern California Edison Reach Settlement on Navajo Royalty Litigation (Aug. 4, 2011), *available at* http://empowerblackmesa.org/press/2011_08_04_Navajo_Nation_Peabody_Reach_Settlement_on_Navajo_Royalty_Litigation. Reportedly, Peabody Coal, and the Navajo Nation approved reopening the royalty agreement in ten years, with an immediate payment of $50,000,000 and a commitment by Peabody to provide an additional $15,000,000 in infrastructure assistance to Navajo communities in the mining areas over the next ten years. Press Release, Buckley Sandler LLP, Buckley Sandler Partner Negotiates Settlement of Navajo Nation's 12-Year Royalty Litigation with Peabody Energy, Salt River Project & Southern California Edison (Aug. 15, 2011), *available at* http://www.buckleysandler.com/news-detail/buckleysandler-partner-negotiates-settlement-of-navajo-nations-12-year-royalty-litigation-with-peabody-energy-salt-river-project-southern-california-edison. The agreement also included $10,500,000 in a disputed retroactive bonus payment, an agreement to make annual bonus payments of $3,500,000, scholarship payments for Navajo students, and a one-time bonus payment of $1,550,000. *Id.*

58. *See* Complaint at 12–17, Grand Canyon Trust, Inc. v. S. Cal. Edison Co., No. CV-S-98-00305-LDG (D. Nev. Feb. 19, 1998).

59. *See id.*

60. *See id.* at 11.

During this proceeding, on March 19, 1999, the United States Environmental Protection Agency (EPA) released a report that determined "no other single emissions source is likely to have as great an impact on visibility in the [Grand Canyon]" as Mohave.[61] EPA announced that it would consider applying controls through a formal rulemaking pursuant to Clean Air Act visibility requirements.[62]

In October 1999, SCE and its co-owners signed a consent decree agreeing to reduce emissions by installing and operating the requested scrubbers and baghouses.[63] The consent decree also provided that the upgraded technology[64] would not have to be installed if the facility ceased to operate in 2005.[65] According to SCE, the prospect that EPA would require similar controls, the possible need to sell Mohave due to California's oncoming energy deregulation, and the potential termination of coal and water rights were factors leading it to settle.[66]

California was indeed launched into its ill-fated energy industry deregulation.[67] California's utilities were ordered to divest generating resources sufficiently to create an electricity market.[68] SCE applied for permission to sell its Mohave share

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61. *Final Project Mohave Report Fact Sheet*, *supra* note 23; *accord The Mohave Generating Station & Grand Canyon Visibility*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/region9/air/mohave/index.html (last visited Oct. 8, 2013).

62. *See, e.g.*, *Final Project Mohave Report Fact Sheet*, *supra* note 23.

63. The terms of the consent decree were incorporated into EPA's requirements for the facility. *The Mohave Generating Station & Grand Canyon Visibility*, *supra* note 61.

64. SCE Expenditures, *supra* note 26, at 3 & n.3, 4.

65. *See, e.g.*, Consent Decree at 8, Grand Canyon Trust v. S. Cal. Edison Co., No. CV-S-98-00305-LDG (D. Nev. Dec. 17, 1999).

66. *See* Application Regarding the Future Disposition of the Mohave Generating Station, Application No. 06-12-022, Data Request Set (Cal. Pub. Utils. Comm'n May 29, 2008) [hereinafter Data Request Set]; *see also* Mohave Sulfur Allowances, *supra* note 25, at *14 (discussing the consent decree); Application of S. Cal. Edison Co. (U 338-E) Regarding the Distribution of SO_2 Allowance Sale Proceeds Related to the Suspended Operation of Mohave Generating Station, Application No. 06-12-022 (Cal. Pub. Utils. Comm'n Dec. 20, 2006), *available at* http://docs.cpuc.ca.gov/PublishedDocs/EFILE/A/63119.pdf.

67. *See* Alan Ramo, *California's Energy Crisis—The Perils of Crisis Management and a Challenge to Environmental Justice*, 7 ALBANY L. ENVTL. OUTLOOK J. 1, 3 (2002).

68. *See, e.g.*, *id.*

to an out-of-state buyer.[69] Before the deal was approved, deregulation fell apart, and rates skyrocketed.[70] The Commission halted the Mohave sale, fearing that Mohave's cheap coal baseload electricity was too important to lose to an out-of-state owner outside of CPUC's control.[71]

The Hopi's and Navajo's support for Mohave now was becoming ambivalent: On the one hand, coal and water royalties provided 30% of the Hopi's entire revenue, while at one point unemployment was hovering at 50%, with 44% of the Hopi families with children under eighteen living in poverty.[72] For the Navajo, Mohave generated 10%–13% of its General Fund, with royalties and taxes ranging from $16.7 million to $19.1 million per year,[73] and 93% of the 270 jobs at the mine were held by Native Americans, almost all Navajos.[74] Peabody reportedly asserted that the total economic benefit to the tribes and local communities from Mohave operations were about $83 million annually.[75]

Yet, the N-aquifer, from which 4400 acre-feet per year of water was drained,[76] was essential to the Hopi and Navajo traditional life and customs:

> [T]he coal operation caused great harm to the way of life of the farmers because there was not enough clean water for vegetation. The Navajo Aquifer has been the sole source of drinking water for residents that live near and on the Black Mesa region . . . .
>
> Many ranchers and farmers have depended on the N-Aquifer and its ability to feed natural springs and seeps that supply water for livestock, general public drinking use, and cultural offering places.
>
> Today, due to the increase of drought and climate change, water is ever more important in a region that receives less than 12 inches of rainfall per year. Black Mesa families become economically stressed

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69. *See In re* Application of S. Cal. Edison Co. (U 338-E) for Authority to Sell Its Interest in the Mohave Generation Station, Application No. 99-10-023, Interim Opinion, 2001 Cal. PUC LEXIS 32, at *3–5 (Cal. Pub. Utils. Comm'n Jan. 18, 2001) [hereinafter Mohave Sale].

70. *See id.* at *4.

71. *See id.* at *14–18

72. SCE Expenditures, *supra* note 26, at 27–28.

73. *Id.* at 29.

74. *See id.* at 4, 28.

75. *See* Application Regarding the Future Disposition of the Mohave Generating Station, Application No. 02-05-046, Supporting Testimony Regarding the Future Disposition of the Mohave Generating Station 1, 15 (Cal. Pub. Utils. Comm'n Jan. 30, 2003) [hereinafter SCE Supplemental Testimony].

76. SCE Expenditures, *supra* note 26, at 5.

> when drought conditions increase because their income depends on the health of the Navajo Aquifer to feed their livestock and farmlands. Black Mesa families have to drive 20 to 60 miles to haul water for their personal consumption and for their livestock and farm lands at least 3 times a week.[77]

The irony, or really the tragedy, is that global warming, resulting in part from the burning of coal at Mohave, was already contributing to Southwest drought conditions.[78]

All these issues collided as water and coal contracts expired in 2005.[79] SCE entered into negotiations with the Hopi, Navajo, and Peabody.[80] The Navajo insisted that the royalties litigation had to be settled,[81] and the Hopi insisted that the old aquifer was off-limits.[82] A study was commissioned examining a new source, the C-Aquifer.[83] However, many of the N-Aquifer issues applied to the C-Aquifer.[84]

At the same time, SCE was concerned with the long-term economics of the plant, given that it depended upon Colorado River water to operate, and its rights to that water terminated in 2026.[85] Finally, SCE "considered that there could be a range possible [sic] future costs of addressing Mohave's CO_2 emission based upon greenhouse gas regulatory proposals under discussion at that time."[86]

Environmentalists, fearing that SCE may just pull the plug, urged the CPUC to study alternatives to Mohave's coal

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77. *In re* Application of S. Cal. Edison Co. Regarding the Distribution of SO_2 Allowance Sale Proceeds Related to the Suspended Operation of Mohave Generating Station, Application No. 06-12-022, Modified Testimony: Distribution of Mohave Generating Station SO_2 Credit Revenues I-1, III-6 (Cal. Pub. Utils. Comm'n Sept. 16, 2011).

78. *See* U.S. GLOBAL CHANGE RESEARCH PROGRAM, GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES 42 (Thomas R. Karl, Jerry M. Melilo & Thomas C. Peterson eds., 2009).

79. *See* SCE Expenditures, *supra* note 26, at 2.

80. *See id.* at 5–6.

81. *See id.* at 30.

82. *See id.* at 5–6 (discussing how Hopi opposed the use of all groundwater).

83. *Id.* at 6–10.

84. SCE Supplemental Testimony, *supra* note 75, at 22 ("It should be remembered that the C-Aquifer, like the N-Aquifer, is still groundwater and may ultimately have similar issues, like claims on the water, that the N-Aquifer has.").

85. *See* SCE Expenditures, *supra* note 26, at 9; Data Request Set, *supra* note 66.

86. Data Request Set, *supra* note 66.

technology.[87] The CPUC agreed, requiring that "[t]he alternatives investigated should include options that provide economic stability to the Hopi Tribe and Navajo Nation, and where appropriate, utilize renewable resources for generation."[88] The study, completed in early 2006, found that "the solar dish and wind options have relatively low capital and operating costs, potentially making them an economically attractive alternative."[89]

The negotiations ultimately failed.[90] As 2005 approached, SCE made a last-ditch request that the environmental plaintiffs extend the time limits in their consent decree, which they declined to do.[91] SCE finally announced it was suspending operations at Mohave, and in June 2006, it concluded it could not resume operations in part because of coal and slurry water costs "estimated based upon the then-ongoing efforts to return Mohave to service including the coal and water negotiations with the Navajo Nation, Hopi Tribe and Peabody Western Coal Company."[92] SCE ultimately decided it was not cost-effective and decommissioned and dismantled the power plant.[93]

In hindsight, it appears Mohave was doomed from the beginning. For years, it ran beyond its design parameters, resulting in an accident in 1985 killing several workers.[94] It

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87. *See* SCE Expenditures, *supra* note 26, at 40–42.

88. *Id.* at 70.

89. SARGENT & LUNDY LLC, STUDY OF POTENTIAL MOHAVE ALTERNATIVE/COMPLEMENTARY GENERATION RESOURCES, at ES-35 (2006), *available at* http://www.grandcanyontrust.org/documents/pl_mohaveAlternatives041306.pdf.

90. *See* Neil Young, *Arizona Utility Made Effort to Save Mohave Generating Station*, LAUGHLIN TIMES, Oct. 20, 2013, http://www.laughlintimes.com/articles/2013/05/29/news/local/news884.prt.

91. Application of S. Cal. Edison Co. (U338E) for a Comm'n Finding That Its Procurement-Related & Other Operations for the Record Period January 1 Through December 31, 2006 Complied with Its Adopted Procurement Plan, Application No. 07-04-001, Opinion on 2006 Energy Res. Recovery Account (ERRA) Proceeding, Decision No. 07-12-027, at 5–7 (Cal. Pub. Utils. Comm'n Dec. 20, 2007).

92. Data Request Set, *supra* note 66.

93. Application of S. Cal. Edison Co. (U338E) to End the Monthly Reporting Requirement Under Comm'n Decision 04-12-016, Application No. 10-02-011, Decision to End S. Cal. Edison Co.'s Monthly Reporting Requirement Under Comm'n Decision 04-12-016, Decision No. 10-09-035, at 1–2 (Cal. Pub. Utils. Comm'n Sept. 23, 2010).

94. *See* Mohave Coal Plant Accident, *supra* note 22, at 462–63, 1994 Cal. PUC LEXIS 216, at *28.

used an unusual coal supply technology that left it dependent on troublesome coal and water rights mired in controversial federal/tribal politics,[95] and its emissions affected one of the most beloved of the nation's national parks.[96] Its energy was cheap, 3.5 cents per kilowatt hour (kWh),[97] but only if it avoided pollution controls installed at other coal plants, and only so long as it benefited from what Hopi and Navajo argued was a century of coal and water rights exploitation.[98]

Yet, the very people claiming they had been victimized financially and environmentally fought to keep the plant open. Whether the price for coal and water was fair, it remained an essential part of the reservation income. It is a clear example that even a seriously flawed electricity resource will be difficult to terminate if people are economically dependent upon it. As the plant faced permanent closure, the idea of a "Just Transition" was born.

III. THE CALIFORNIA PUBLIC UTILITIES COMMISSION'S JUST TRANSITION CASE

The CPUC's consideration of Mohave's impacts on the Hopi and Navajo communities began in a 2002 proceeding examining the potential closure of the facility.[99] After extensive evidentiary hearings, the CPUC found that Mohave's closing would have "devastating effects on the Hopi and Navajo people and tribes as a whole, as well as on the workers at the Mohave facility, at the mines and on the pipeline."[100]

Then, after Mohave closed in December 2005, the CPUC again considered issues related to Mohave in SCE's general rate case.[101] In this arcane ratemaking proceeding, a remarkable coalition of environmentalists and grassroots

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95. *See supra* notes 26–32 and accompanying text.

96. *Final Project Mohave Report Fact Sheet*, *supra* note 23.

97. Mohave Sale, *supra* note 69, at *15.

98. *See generally* Young, *supra* note 90 (discussing the plant needing to upgrade to "comply with environmental regulations," and the Native Americans' concerns).

99. *See* SCE Expenditures, *supra* note 26.

100. *Id.* at 14.

101. *See* Application of S. Cal. Edison Co. (U 338-E) for Authority to Increase Its Authorized Revenues for Elec. Serv. in 2006 & to Reflect That Increase in Rates, Application No. 04-12-014, Opinion on S. Cal. Edison Co.'s Test Year 2006 Gen. Rate Increase Request, at 1 (Cal Pub. Utils. Comm'n May 11, 2006) [hereinafter SCE Rate Case].

Native American organizations, the Just Transition Coalition (described more fully below) intervened to demand that the CPUC allocate funds from the sale of Acid Rain SO_2 allowances, which were an unneeded windfall if Mohave remained closed, to help transition the Hopi and Navajo communities to cleaner energy alternatives.[102]

In response to Just Transition Coalition's intervention, the CPUC required SCE to set the SO_2 allowance revenues aside in a separate account that would be disbursed in a future proceeding.[103] That future proceeding began in December 2006.[104] In that case, the CPUC affirmed its authority to disburse the revenues from the sale of Mohave's sulfur allowances to help the Hopi and Navajo communities impacted by Mohave.[105]

A. THE ACID RAIN PROGRAM ALLOWANCES AT ISSUE

The availability of acid rain allowances provided a convenient funding source for the Just Transition Coalition, as it could for other coal-fueled power plants.[106] In 1990, Congress enacted Title IV of the Acid Rain Program,[107] which initiated a system of buying and trading allowances or credits for tons of SO_2 emitted by fossil-fuel facilities.[108] An allowance authorizes a utility or industrial source to emit one ton of SO_2 during a given year or any year thereafter.[109] At the end of each year, a source must hold an amount of allowances at least equal to its annual

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102. *Id.* at 20 & n.16, 21; Application of S. Cal. Edison Co. (U 338-E) for Authority to Increase Its Authorized Revenues for Elec. Serv. in 2006 & to Reflect That Increase in Rates, Application No. 04-12-014, Motion for a "Just Transition" in Response to Closure of the Mohave Generating Station, at 1–3 (Cal. Pub. Utils. Comm'n Jan. 11, 2006) [hereinafter Motion for a Just Transition].

103. SCE Rate Case, *supra* note 101, at 26–27 (noting that this action, setting aside the revenues in a separate fund, was essential for preserving the funding to be disbursed in a way decided in a future proceeding).

104. *See* Mohave Sulfur Allowances, *supra* note 25.

105. *Id.* at *1.

106. *See generally* CHI. CLIMATE EXCHANGE, THE SULFUR DIOXIDE EMISSION ALLOWANCE TRADING PROGRAM: MARKET ARCHITECTURE, MARKET DYNAMICS AND PRICING 5 (2004), *available at* http://www.ccfe.com/education_ccfe/SO2_Background_Drivers_Pricing_PDF.pdf (discussing how the SO_2 trading program "provides a profit incentive").

107. *See* North Carolina v. EPA, 531 F.3d 896, 917 (D.C. Cir. 2008).

108. *See id.* at 902.

109. 42 U.S.C. § 7651a(3) (2006 & Supp. V 2011).

emissions, e.g., a source that emits 5000 tons of SO_2 must hold at least 5000 allowances that are usable in that year.[110] However, regardless of how many allowances a source holds, it is never entitled to exceed federal emissions limits set to protect public health.[111] Allowances are allocated to utilities without charge as an incentive to reduce their emissions.[112] As a 56% owner of Mohave, SCE's annual share of allowances until 2010 was just under 29,800, and, beginning in 2010, was over 29,200.[113] An interesting aspect of the proceeding was that the allowances' potential value shifted significantly from being worth hundreds of dollars per allowance to being worth only a few dollars at most, due to EPA regulatory actions and judicial rulings.[114]

B. THE JUST TRANSITION COALITION AND PROPOSAL

The Just Transition Coalition first appeared in SCE's rate case.[115] It was composed of a strategic alliance of environmental and grassroots Native American interests including the Indigenous Environmental Network, Black Mesa Trust, Black Mesa Water Coalition, To' Nizhoni Ani, Grand Canyon Trust, and the Sierra Club, working with Grand Canyon Trust's attorney who had extensive experience before the CPUC, Sara Myers.[116] The Coalition's purpose was to help the Navajo and Hopi communities, devastated by Mohave's operation and closure, transition to a renewable energy economy.[117] As Roger Clark of the Grand Canyon Trust, a founding member of the Coalition, observed:

> The best scenario would be for Edison to give up trying to keep Mohave open and, instead, invest in alternative energy projects and transmission lines that would help the Hopi and Navajo exploit their potentially abundant wind and solar power resources . . . . With

110. *See id.* § 7651b(g).

111. *See id.*

112. *See* CHI. CLIMATE EXCHANGE, *supra* note 106, at 5.

113. *See* 40 C.F.R. § 73.10 (2012). The numbers were calculated by adding the "Total Annual Phase II" allowances for each boiler, and multiplying that total by .56 for SCE ownership percentage.

114. Mohave Sulfur Allowances, *supra* note 25, at *27–31 (describing change in allowance value); *cf.* North Carolina v. EPA, 531 F.3d 896, 916–18 (D.C. Cir. 2008) (holding that the EPA lacks statutory authority to arbitrarily reduce SO_2 emissions allowances).

115. *See* Mohave Sulfur Allowances, *supra* note 25, at *3 & n.1.

116. SCE Rate Case, *supra* note 101, at 20 n.16. The authors joined Myers on behalf of the Sierra Club after the initial protests were filed.

117. *See* SCE Rate Case, *supra* note 101, at 21.

> California wanting to invest in cleaner forms of energy . . . why buy another 20 years of inefficient, old coal-fired generation?[118]

When Mohave closed, the Coalition advocated for exactly that—investment in renewable resources that would assist the Navajo and Hopi communities.[119] The Coalition asserted that this transition was equitable due to Mohave's operation and closure's devastating economic and social impacts and decades of what it considered subsidized cheap coal power.[120]

The Coalition identified sulfur allowance revenues to fund this transition because the allowances were no longer needed after Mohave closed, and because SCE received the allowances for free.[121] As the Coalition summarized: "After 35 years of running Mohave at great cost to the Navajo and Hopi, it is now unreasonable to permit SCE to reap hundreds of millions of dollars in new, unearned revenues from the sale of sulfur allowances as the result of SCE's own decisions to close Mohave."[122]

The Coalition's proposal recommended that the best and most appropriate use of the Mohave allowance proceeds was "to promote renewable energy development that directly benefits the Navajo Nation and/or the Hopi Tribe, while providing" electricity to California residents and ratepayers.[123] To assure that its proposal fell within the CPUC's authority, the Coalition tied its proposal to SCE's current renewable procurement requirements, a process in which SCE requires proposals to meet the statutory renewable portfolio standard.[124] It suggested that the allowance revenues be used as an adder to incentivize renewable projects in California that are owned or co-owned with significant ownership interest by the Hopi Tribe

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118. Marc Lifsher, *Deal May be Near on Power Plant*, L.A. TIMES, Nov. 8, 2005, articles.latimes.com/print/2005/nov/08/business/fi-mohave8 (internal quotation marks omitted).

119. *See* Motion for a Just Transition, *supra* note 102, at 2–3.

120. SCE Rate Case, *supra* note 101, at 22.

121. *See* Motion for a Just Transition, *supra* note 102, at 10, 15.

122. *Id.* at 15.

123. Application of S. Cal. Edison Co. (U 338-E) Regarding the Distribution of SO_2 Allowance Sale Proceeds Related to the Suspended Operation of Mohave Generating Station, Application No. 06-12-022, Just Transition Coal.'s Opening Brief, at 5–8 (Cal. Pub. Utils. Comm'n Feb. 21, 2012) [hereinafter Opening Brief], *available at* http://docs.cpuc.ca.gov/PublishedDocs/EFILE/BRIEF/160768.pdf.

124. *See* Mohave Sulfur Allowances, *supra* note 25, at *26.

and/or Navajo Nation, or located on lands owned by the Hopi Tribe and/or Navajo Nation.[125]

C. POSITIONS OF OTHER PARTIES

The Hopi and Navajo participated in the proceeding, as did the utility unions and ratepayer advocates.[126] Initially, the Hopi Tribe requested a "Mohave-suspension relief package" with direct financing and financial assistance to the Tribe.[127] The Navajo Nation proposed that the revenues fund renewable energy studies and development that benefited the Nation.[128] Neither initial proposal tied the use of the funds to SCE's procurement process. By the end of the proceeding, after years of mediation, workshops, and litigation, the Hopi and Navajo proposed, similar to the Just Transition Coalition, that the revenues incentivize renewable energy generation pursuant to SCE's procurement process that benefited their respective tribes.[129]

Other parties participated in the proceeding. A group representing union workers and a non-profit representing ratepayers proposed that the allowances be retired.[130] SCE and

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125. *See id.*; Opening Brief, *supra* note 123, at 5–6.

126. Mohave Sulfur Allowances, *supra* note 25, at *2–4.

127. Application of S. Cal. Edison Co. (U 338-E) Regarding the Distribution of SO_2 Allowance Sale Proceeds Related to the Suspended Operation of Mohave Generating Station, Application No. 06-12-022, Protest of the Hopi Tribe to Application of S. Cal. Co. Regarding the Distribution of SO_2 Allowance Sale Proceeds, at 5 (Cal. Pub. Utils. Comm'n Jan. 31, 2007) [hereinafter Hopi Tribe Protest].

128. *See, e.g.*, Application of S. Cal. Edison Co. (U 338-E) Regarding the Distribution of SO_2 Allowance Sale Proceeds Related to the Suspended Operation of Mohave Generating Station, Application No. 06-12-022, Navajo Nation Proposal for Allocation of the Proceeds from the Sale of SO_2 Credits Resulting from the Shutdown of Mohave Generating Station, at 1 (Cal. Pub. Utils. Comm'n Mar. 9, 2007), *available at* http://docs.cpuc.ca.gov/PublishedDocs/EFILE/REPORT/104886.PDF.

129. *See* Mohave Sulfur Allowances, *supra* note 25, at *23–26.

130. Application of S. Cal. Edison Co. (U338E) Regarding the Distribution of SO_2 Allowance Sale Proceeds Related to the Suspended Operation of Mohave Generating Station, Application No. 06-12-022, Admin. Law Judge's Ruling on Treatment of Proceeds from Sulfur Dioxide Allowance Sales by S. Cal. Edison Co., at 13 (Cal. Pub. Utils. Comm'n Apr. 7, 2011) [hereinafter ALJ Ruling], *available at* http://docs.cpuc.ca.gov/PublishedDocs/EFILE/RULINGS/133248.pdf.

the CPUC's Division of Ratepayer Advocates proposed that the allowances revenues be returned directly back to ratepayers.[131]

D. THE CPUC'S LEGAL AUTHORITY AND FINAL DECISION

Although there was precedent for the CPUC considering community impacts from utilities,[132] using sulfur allowances to benefit out-of-state non-ratepayers was novel. Thus, the CPUC initially conducted a mediation to see if a resolution could be reached.[133] Although those efforts failed, the Coalition's position started to coalesce with the Hopi and Navajo positions.[134] Since the case presented a matter of first impression, the CPUC initially examined its legal authority to disburse the allowance revenues under the California Constitution, the California Public Utilities Code, and federal law,[135] as well as California's more recent requirements under its renewable energy portfolio standard.[136]

The California Constitution and statutory authorities give the CPUC broad authority to regulate the public utilities of the State.[137] This authority includes the ability to act in a supervisory and regulatory manner to do all things "which are necessary and convenient in the exercise of such power and jurisdiction."[138] This supervisory and regulatory power has been construed liberally to allow the CPUC broad power to regulate utilities within its jurisdiction.[139] As part of its broad authority, the CPUC has the authority to exercise equitable jurisdiction as

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131. Mohave Sulfur Allowances, *supra* note 25, at *32–33.

132. *See* Application of Pac. Gas & Elec. Co. for Authorization to Sell the El Dorado Hydroelectric Project to El Dorado Irrigation Dist. Pursuant to Pub. Utils. Code Section 851, Application No. 98-04-016, Opinion, 1999 Cal. PUC LEXIS 677, at *1–2 (Cal. Pub. Utils. Comm'n Sept. 16, 1999).

133. *See Just Transition Coalition Wins Request for Formal Mediation from CPUC*, NAVAJO-HOPI OBSERVER (Apr. 3, 2013), http://www.navajohopiobserver.com/main.asp?SectionID=29&SubSectionIS=41&ArticleID=5693&TM=30930.23.

134. *See* Mohave Sulfur Allowances, *supra* note 25, at *4–6.

135. *See* ALJ Ruling, *supra* note 130, at 15–16.

136. *See id.* at 29.

137. *See, e.g.*, CAL. CONST. art. XII, § 6 ("The commission may fix rates, establish rules, . . . and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction.").

138. CAL. PUB. UTIL. CODE § 701 (West 2012).

139. *See* Wise v. Pac. Gas & Elec. Co., 91 Cal. Rptr. 2d 479, 482 (Cal. Dist. Ct. App. 1999) ("[T]he PUC . . . [has] broad regulatory power over public utilities . . . .").

an incident to its express duties and consistent with its regulation of public utilities and established legal principles.[140] For example, the CPUC can issue injunctions, create constructive trusts, reform contracts, and issue cease and desist orders.[141] In particular, "[w]here necessary, the Commission may attach conditions to a transaction in order to protect and promote the public interest."[142]

The CPUC's authority can be limited only by express direction or statutory enactment of the California Legislature.[143] SCE and the CPUC's Division of Ratepayer Advocates argued that the CPUC's authority to award allowance proceeds to a third party was limited by rate refund requirements.[144] Rate refunds are "specific amounts held by utilities as rebates from their suppliers and earmarked for customer 'refunds' by prior commission orders and utility tariffs."[145] To qualify as a rate refund, three requirements must be met: (1) the funds to be refunded must have been previously collected in rates from ratepayers; (2) the funds must be previously ordered to be refunded by a regulatory agency; and (3) the refunds must be made to the customers who paid higher rates, to the extent practical.[146] The CPUC found that none of these criteria were satisfied because the allowance revenues were not held or collected as rates, the allowances were not previously ordered refunded, and the ratepayers did not pay for the allowances.[147]

The CPUC also examined whether it had regulatory authority to allocate the allowance revenues to promote renewable development.[148] The CPUC relied upon California's Renewable Portfolio Standard (RPS) program, which mandates

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140. *See, e.g.*, *id.* at 487.

141. *Id.*; Consumers Lobby Against Monopolies v. Pub. Utils. Comm'n, 25 Cal. 3d 891, 907 (Cal. 1979); *see also* W. San Martin Water Works, Inc. v. San Martin Cnty. Water Dist., 71 Cal. Pub. Util. Rptr. 75, 85 (1997) (discussing how the CPUC may "exercise equitable powers in aid of jurisdiction specifically conferred upon it . . . . Restoration of the status quo is within these powers").

142. *In re* Citizens Telecomm. Co. of Cal., 210 Cal. Pub. Util. Rptr. 4th 189, 236 (2001); *accord* CAL. PUB. UTIL. CODE § 851 (West 2012).

143. *See* Pac. Tel. & Tel. Co. v. Pub. Utils. Comm'n of Cal., 62 Cal. 2d 634, 650, 653 (Cal. 1965).

144. *See, e.g.*, ALJ Ruling, *supra* note 130, at 16 (summarizing SCE's and DRA's arguments).

145. Cal. Mfrs. Ass'n v. Pub. Utils. Comm'n, 24 Cal. 3d 836, 845 (Cal. 1979).

146. *See id.* at 839–40; ALJ Ruling, *supra* note 130, at 17–18.

147. ALJ Ruling, *supra* note 130, at 17–18.

148. *See* Mohave Sulfur Allowances, *supra* note 25, at *39–40.

that load-serving entities including SCE achieve a target of meeting 33% of their customer demand with renewable electric generation by 2020.[149]

Other authorities supported this approach, although the CPUC did not rely upon them. For instance, the Federal Clean Air Act provides that one of its purposes is "to encourage energy conservation, use of renewable and clean alternative technologies."[150] The California Public Utilities Code also recognizes the interest of the State to improve economically-disadvantaged conditions for minorities, including Native Americans[151] by increasing procurement of renewable energy.[152] California Public Utilities Code further provides that preference should be given for "renewable energy projects that provide environmental and economic benefits to communities afflicted with poverty or high unemployment, or that suffer from high emission levels of toxic air contaminants, criteria air pollutants, and greenhouse gases."[153]

After reviewing its authority, the CPUC determined that:

> The Commission's role as a utility regulatory agency is . . . the touchstone in evaluating the parties' proposals for disposition of the SO_2 allowance proceeds. . . . [T]he Commission's options for allocating the SO_2 allowance proceeds are limited to those that are connected to the Commission's ongoing regulation of California public utilities and that may be implemented under the Commission's supervision.[154]

Under these principles, the CPUC found that it had authority to disburse the allowance revenues to incentivize renewable generation that benefited Hopi and Navajo communities.[155] The CPUC then considered the equity issues and found that "[i]n view of the history of Mohave and the Commission's long-standing concern for the consequences of its closure, it is reasonable to use the SO_2 allowance proceeds to benefit the Hopi Tribe and the Navajo Nation, as well as SCE customers."[156] To accomplish this, the CPUC created a revolving

149. CAL. PUB. UTIL. CODE § 399.11 (West 2012).
150. 42 U.S.C. §7651(b) (2006 & Supp. V 2011).
151. *See* CAL. PUB. UTIL. CODE § 8282(b) (West 2012).
152. *Id.* § 8281(b)(1)(D)–(E).
153. CAL. PUB. UTIL. CODE § 399.13(a)(7).
154. ALJ Ruling, *supra* note 130, at 15–16.
155. *See* Mohave Sulfur Allowances, *supra* note 25, at *18.
156. *Id.* at *39.

fund that would utilize the revenues for deposits required as part of the renewable procurement process.[157]

"The Navajo Nation applaud[ed] the [CPUC] for crafting an equitable solution that would provide economic benefits to the tribes and mitigate the devastating effects of the closure of the Mohave Generating Station . . . ."[158] The Hopi Tribe called the decision "the most sound and equitable approach for all affected parties."[159] The Just Transition Coalition supported the decision stating that "[t]he devastation that Mohave's operation and closure caused to the Navajo and Hopi communities warrant this result."[160]

E. IMPLICATIONS FOR DECISION

Beyond its immediate impact in facilitating future Hopi and Navajo renewable energy development, the CPUC's decision presents a roadmap for other states to consider creative solutions to help communities transition away from fossil-fuel generation. The facts in another case are unlikely to be the same as the Mohave case, but it demonstrates how a community's history and circumstances may establish an equitable case supporting remediation. It may in fact be easier to justify the expenditure of even greater ratepayer funds for transition if the impacted communities are within the state and are themselves ratepayers.

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157. *Id.* at *39–40.

158. Application of S. Cal. Edison Co. (U 338-E) Regarding the Distribution of SO_2 Allowance Sale Proceeds Related to the Suspended Operation of Mohave Generating Station, Application No. 06-12-022, Comments of the Navajo Nation on Proposed Decision Determining Treatment of Sale Proceeds of Sulfur Dioxide Allowances from Mohave Generating Station, at 1 (Cal. Pub. Utils. Comm'n Feb. 4, 2013), *available at* http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M042/K159/42159470.pdf.

159. Application of S. Cal. Edison Co. (U338E) Regarding the Distribution of SO_2 Allowance Sale Proceeds Related to the Suspended Operation of Mohave Generating Station, Application No. 06-12-022, Hopi Tribe's Comments on the Proposed Decision Determining Treatment of Sale Proceeds of Sulfur Dioxide Allowances from Mohave Generating Station, at 2 (Cal. Pub. Utils. Comm'n Feb. 5, 2013), *available at* http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M049/K629/49629398.pdf.

160. Application of S. Cal. Edison Co. (U 338-E) Regarding the Distribution of SO_2 Allowance Sale Proceeds Related to the Suspended Operation of Mohave Generating Station, Application No. 06-12-022, Just Transition Coal. Comments on the Proposed Decision Determining Treatment of Sale Proceeds of Sulfur Dioxide Allowances from Mohave Generating Station, at 5 (Cal. Pub. Utils. Comm'n Feb. 4, 2013), *available at* http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M042/K157/42157387.pdf.

State public utility commissions[161] throughout the country can craft similar creative solutions.[162] Similar to the CPUC, other State Public Utility Commissions generally have broad power to consider the public interest in their regulation of utilities.[163] Also similar to the CPUC, the only limitation to this broad authority is generally specific, enumerated statutory exceptions.[164] Further, the majority of states have some type of renewable standard,[165] which means that encouraging development of renewable energy should be within the relevant state agency's jurisdiction.[166]

CONCLUSION

The CPUC's creative approach provides a framework for considering how to transition a community away from fossil fuel generation. Other state utility commissions have similar authority as the CPUC, and creative disbursements like this can provide the necessary incentive to spur critical green development in impacted areas. Consideration of the equities, as the CPUC has illustrated, can be done consistent with an agency's jurisdictional authorities in a way that does not undercut ratepayer or other potential interests.

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161. State agencies that regulate utilities have many different names such as public utility commissions, corporation commissions, or public service commissions.

162. *See, e.g.*, *Victory for Clean Air as Minnesota Public Utilities Commission Orders Otter Tail Power to Stop Burning Coal at Hoot Lake Coal Plant by 2020*, FRESH ENERGY (Jan. 31, 2013), http://fresh-energy.org/2013/01/news-release-victory-for-clean-air-as-minnesota-public-utilities-commission-orders-otter-tail-power-to-stop-burning-coal-at-hoot-lake-coal-plant-by-2020/.

163. *See generally* FRED BOSSELMAN ET AL., ENERGY, ECONOMICS AND THE ENVIRONMENT 46–51 (Foundation Press 3d ed. 2010) (discussing *Munn v. Illinois*, 94 U.S. 113 (1877)); 14 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS §6674.30 (2012) (discussing how public utility commissions have authority that "extends to the making of orders generally applicable to the service to be provided by the public service . . . as the public interest may from time to time require").

164. *See* FLETCHER, *supra* note 163, § 6674.30; 29 CORPUS JURIS SECUNDUM ELECTRICITY § 56 (2013); *see also* 27A AMERICAN JURISPRUDENCE § 149 (2d ed. 1996) ("A state statute may provide the exclusive method for regulating electric utilities in that state.").

165. *Renewable Portfolio Standard Policies*, DATABASE ST. INCENTIVES FOR RENEWABLES & EFFICIENCY (Mar. 2013), http://www.dsireusa.org/documents/summarymaps/RPS_map.pdf.

166. Analyzing a state agency's jurisdiction would be done on a case-by-case basis.

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