

**IN THE SUPREME COURT
STATE OF ARIZONA**

JOHNSON UTILITIES, L.L.C., an
Arizona limited liability company,

Petitioner,

vs.

ARIZONA CORPORATION
COMMISSION; and TOM
FORESE, BOB BURNS, ANDY
TOBIN, BOYD W. DUNN, and
JUSTIN OLSON, in their official
capacities as members of the
Arizona Corporation Commission,

Respondents.

Arizona Supreme Court No. _____

Court of Appeals, Division One Case No.
1 CA-SA 18-0197

Arizona Corporation Commission
Docket No. WS-02987A-18-0050

PETITION FOR REVIEW

Johnson Utilities, L.L.C. petitions the Supreme Court of Arizona to
review the decision of the Court of Appeals in this matter.

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I. Introduction

This case, like the *City of Surprise v. Arizona Corp. Comm'n* case recently decided by this Court, presents an issue of statewide importance regarding the scope and limitations of the Arizona Corporation Committee's ("ACC") authority over the internal managerial functions of a public utility company. And just like in the *City of Surprise* matter, the ACC has overstepped its clear Constitutional and statutory bounds.

Johnson Utilities, L.L.C. ("Johnson Utilities") is a public service corporation which provides water and wastewater services to homes in various portions of Pinal County, Arizona. Pursuant to an Order from the ACC, the ACC staff appointed an interim manager over Johnson Utilities.¹ The appointment of an interim manager and subsequent additional overreaching actions taken by the ACC – which included an effective seizure of Johnson Utilities' assets and bank accounts – are impermissible attempts to control the management of Johnson Utilities that exceed the scope of the ACC's authority over a public service corporation.

¹ [Decision 76785 \(July 24, 2018\), WS-02987A-18-0050, at 307](#) (ordering ACC Staff to "immediately commence efforts to obtain an agreement with an Interim Manager who shall assume operation of Johnson Utilities, L.L.C." with "full authority to conduct the business and affairs of Johnson Utilities, L.L.C. in all respects, except as authority is expressly reserved as a right of ownership under Arizona law.") (copy attached as [Exhibit "A"](#)).

The Court of Appeals rendered a decision which, if permitted to stand, provides the ACC with unfettered control over the internal managerial and ownership functions of a public service corporation.

II. Issue Presented for Review

1. Did the Arizona Corporation Commission (“ACC”) exceed its constitutional and statutory authority by ordering the complete replacement of the management of Johnson Utilities with outside management that is answerable only to the ACC?

III. Additional Issue Presented To, but Not Decided By, the Court of Appeals

1. Even if the ACC *had* the constitutional and/or statutory authority to replace the management of Johnson Utilities with a designee or agent of its choosing – which it does not – does such authority extend to the effective seizure of Johnson Utilities’ assets and receivables?

IV. Statement of Facts

Johnson Utilities provides water and wastewater services to homes in parts of Pinal County. On July 24, 2018, the ACC rendered an Opinion and Order, instructing its staff to appoint a manager over Johnson Utilities and ordering Johnson Utilities to fully cooperate with such efforts. ([Exhibit A](#)). On August 14, 2018, the ACC appointed EPCOR Water Arizona (“EPCOR”) to take over

management of Johnson Utilities.² The ACC asserts that this includes having full and exclusive access to and control over all revenues paid by customers for utility service, unilateral control over Johnson Utilities' bank accounts, and requires that EPCOR report solely to the ACC and not to the legal owner of Johnson Utilities.

On August 15, 2018, Johnson Utilities filed a Petition for Statutory Special Action with this Court, Case No. CV-18-0221-SA, requesting relief from the ACC's actions. On August 22, 2018, this Court declined to accept jurisdiction (with one dissenting Justice) but did so "without prejudice to refile in the court of appeals." ([Copy of the Order is attached hereto as Exhibit "C"](#)). On that basis, Johnson Utilities refiled its case with the court of appeals.

On March 7, 2019, the Court of Appeals, Division One, delivered its Decision. ([Copy of the Decision is attached hereto as Exhibit "D"](#)). The Court of Appeals held that (1) the ACC's constitutional ratemaking authority permitted it to appoint a manager to a public service corporation; (2) the ACC's statutory powers permitted it to appoint a manager to a public service corporation, specifically finding implied support in A.R.S. § 40-321(A), among others, and (3) that A.R.S. § 40-422 does not specifically *prohibit* the ACC from appointing such a manager.

² *Staff's Notice of Filing Agreement for Interim Management Services*, ACC No. WS-02987A-18-0050, at *1 (Aug. 14, 2018) (ACC made a contract with EPCOR to manage Johnson Utilities and providing copy of said contract) ([copy attached hereto as Exhibit "B"](#)).

Here, the ACC has gone a step further than replacing management; the ACC has taken control the assets of Johnson Utilities by controlling its bank accounts. Further, the ACC has placed a moratorium on new utility connections, significantly impeding Johnson Utilities' ability to operate and grow its business. Moreover, and incomprehensibly, the ACC has taken all of these actions without any requirement that interim manager EPCOR post a bond for purposes of security in the event that EPCOR's actions expose Johnson Utilities to future liability. Johnson Utilities, a public service corporation that is subject to *oversight* by the ACC, remains completely at the mercy of the ACC, without access to its funds, without the ability to be consulted on management decisions, without the ability to expand its business, and without any security that the actions of the ACC, through its appointed manager, will not expose the company to significant liability. In taking these actions, the ACC impermissibly usurped the critical managerial and ownership rights of Johnson Utilities.

Johnson Utilities asks this Court to: (1) rule that the ACC exceeded its authority; and (2) reverse any actions already taken.

V. Legal Argument

A. The ACC lacks constitutional authority to replace a utility's management.

The ACC has exclusive jurisdiction to prescribe rates and to enact rules and regulations for utilities that are reasonably necessary steps to ratemaking. Ariz. Const. art. 15, § 3. However, this constitutional power is limited to actions

reasonably related to *ratemaking*. Further, in order to be permitted under the ACC's constitutional authority, the actions cannot "so interfere with management functions that they constitute an attempt to control the corporation rather than attempt to control rates." *Ariz. Corp. Comm'n v. State ex rel. Woods*, 171 Ariz. 286, 297, 830 P.2d 807, 818 (1992) (en banc).

Arizona courts have interpreted the constitutional grant of authority to the ACC relatively narrowly when dealing with interference in the internal management of the company. *See Southern Pacific Co. v. Ariz. Corp. Comm'n*, 98 Ariz. 339, 404 P.2d 692 (1965) (holding that the ACC exceeded its constitutional grant of authority in requiring railroad to restore discontinued train service without showing that it was necessary); *Ariz. Corp. Comm'n v. Consolidated Stage Co.*, 63 Ariz. 257, 261, 161 P.2d 110, 112 (1945) (holding that "[n]owhere in the Constitution or in the Statutes is the [ACC] given jurisdiction, directly or by implication, to control the internal affairs of corporations.")

Here, the actions of the ACC cannot be interpreted as reasonably related to its ratemaking authority. The ACC has replaced management of Johnson Utilities, taken control of its bank accounts, and prevented it from opening new utility connections. There must be some line drawn at what can be considered reasonably related to ratemaking. These actions are only conceivably related to ratemaking in that if the ACC assumes complete control of a corporation, it controls the rates.

Clearly, this interpretation is not what was intended by the constitutional grant of authority to the ACC, or the constitution would have provided for such complete control. Replacing a manager and assuming control of other managerial aspects go beyond the ACC's ratemaking authority. The actions taken by the ACC accordingly overreach its constitutional authority.

Further, the cases relied upon in the court of appeals Decision contain an underlying theme: the actions taken by the ACC involved some form of monitoring the decisions of management. In *Woods*, the ACC was permitted to approve transactions between the public service corporation and its affiliates because such transactions could affect the rates charged. *Woods*, 171 Ariz. 286, 830 P.2d 807. In *Phelps Dodge*, the ACC was permitted to control the price of an asset, but could not go so far as to require the sale of the asset. In sum, the ACC could monitor the terms of a deal which could affect rates, but it could not force the internal decision of making a deal in the first place. *Phelps Dodge Corp. v. Ariz. Elec. Power Co-Op*, 207 Ariz. 95, 83 P.3d 573 (App. 2004). In *Miller*, the ACC was permitted to make rules requiring public utilities to diversify their energy sources. In all of these cases, the ACC was permitted to make rules for management to follow that extend from its authority to monitor public service corporations. In none of these cases was the ACC permitted to choose the person capable of making the decisions. *Miller v. Ariz. Corp. Comm'n*, 227 Ariz. 21 (App. 2011).

Case law in Arizona has provided instances where the ACC may, under very limited circumstances, permissibly make rules that may interfere with the *management decisions* of a public utility company; it does not provide instances where the ACC may choose the manager to make decisions in the first place. Such action goes beyond the scope of the ACC’s authority to control rates and can only be viewed as an attempt to control the corporation.

Moreover, the ACC did not attempt to use any less intrusive means in this case; it immediately sought to replace management of the utility and assume control of business operations.³ The court of appeals Decision indicates that in *Phelps Dodge*, requiring the sale of assets was an attempt to control the corporation because “there was a less intrusive means to reach the same end, and there was no apparent justification related to ratemaking for taking the more intrusive route.” ([Exhibit D, ¶14](#)). Surely, if the ACC’s intent here was to affect ratemaking, the ACC did not need to take such drastic action. Less intrusive means were available to the ACC.

³ In an Open Meeting Memorandum, filed March 8, 2018, ACC staff requested that Johnson Utilities take a number of remedial actions regarding water and wastewater system repairs before April 16, 2018. If all repairs were not completed by then, the ACC would appoint an interim manager. The ACC provided Johnson Utilities with grossly insufficient time to complete extensive repairs over a vast geographic area in Pinal County, essentially setting it up to fail in order to appoint a manager of its choosing. ([A copy of the Open Meeting Memorandum is attached hereto as Exhibit “E”](#)).

The constitutional grant of authority to the ACC has been interpreted by Arizona courts to grant it the power to control aspects reasonably related to ratemaking. However, the actions at issue here are not sufficiently related to ratemaking, and Arizona case law does not stand for the proposition that the ACC can control who makes management decisions in a public service company. The ACC has exceeded its constitutional authority in appointing a manager and assuming control of Johnson Utilities.

B. The ACC lacks statutory authority to replace a utility's management.

As discussed above, the Arizona Constitution provides the ACC with exclusive jurisdiction to prescribe rates and to enact rules and regulations that are reasonably necessary steps to ratemaking. Ariz. Const. art. 15, § 3. In all other matters, the power to regulate public utilities belongs to the legislature. *Phelps Dodge*, 207 Ariz. at 111, 83 P.3d at 589. The legislature has discretion to delegate certain portions of this regulatory authority to the ACC through the passage of legislation:

[B]oth under the direct language of the constitution and the police power inherent in the legislative authority, the paramount power to make all rules and regulations governing public service corporations not specifically and expressly given to the commission by some provision of the constitution, rests in the legislature, and it may, therefore either exercise such powers directly or delegate them to the commission.

Ariz. Corp. Comm'n v. Superior Court, 459 P.2d 489, 491, 105 Ariz. 56, 58 (1969) (citation omitted).

The right to supervise and regulate and do those things necessary and convenient in the exercise of its power of supervision and regulation does not in and of itself grant additional powers to the Commission beyond that which the legislature specifically has set forth.

Southern Pacific, 98 Ariz. at 347, 404 P.2d at 700.

Importantly, delegation of authority by the legislature to the ACC must be explicit; it cannot be inferred: “[W]e will not infer the grant of authority to interfere with [a public utility’s] management decisions beyond ‘the clear letter of the statute.’” *Phelps Dodge*, 207 Ariz. at 113, 83 P.3d at 591 (quoting *Southern Pacific*, 98 Ariz. at 343, 404 P.2d, at 695). As was explained in *Phelps Dodge*:

Although the line separating permissible Commission act and unauthorized managerial interference can be difficult to precisely discern, our supreme court has suggested that the line is drawn between rules that attempt to control rates, which are permissible, and rules that attempt to control the corporation, which are impermissible.

Id. (citing *Woods*, 171 Ariz. at 297, 830 P.2d at 818).

Moreover, in *City of Surprise v. Arizona Corp. Comm’n*, this Court recently reiterated the scope of the ACC’s statutory authority and provided guidance on how the related statutes should be interpreted. *City of Surprise v. Arizona Corp. Comm’n*, No. CV-18-0137-SA, 2019 WL 1389031, at *1 (Ariz. Mar. 28, 2019). Indeed, “[t]he Corporation Commission has no implied powers and its powers do not exceed those to be derived from a strict construction of the Constitution and implementing statutes.” (emphasis added) *Id.* at *5, ¶ 20 (citing *Commercial Life Ins. Co. v. Wright*, 64 Ariz. 129, 139, 166 P.2d 943 (1946)). This Court found

further support in two canons of statutory interpretation: (1) *expression unius est exclusion alterius*, and (2) *noscitur a sociis*. In the first instance, this Court found that the legislature’s decision to include certain terms in a list, but omit others, was intentional. *City of Surprise*, 2019 WL 1389031, at *4, ¶ 14. In applying *noscitur a sociis*, statutory phrases must be read in light of their surrounding terms. *Id.*

No statute provides an express grant of authority to replace a public utility’s management, assume control of its bank accounts, and prevent it from expanding its business. In our situation, the court of appeals relied heavily on A.R.S. § 40-321(A) as a source of statutory power under which the ACC can appoint a new manager to a public utility. This statute provides:

When the commission finds that the equipment, appliances, facilities or service of any public service corporation, or the methods of manufacture, distribution, transmission, storage or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine what is just, reasonable, safe, proper, adequate or sufficient, and shall enforce its determination by order or regulation.

This statute lists many specific items over which the ACC has control. Importantly, it does not list “management,” “receiver,” “officer,” “employee,” or the like. It can only be interpreted, per the canon of *expression unius est exclusion alterius*, that the intent of the legislature in passing this statute was to list the specific aspects of a public utility over which the ACC has oversight authority, to the exclusion of other areas. Certainly, A.R.S. § 40-321(A) gives the ACC discretion in the methods it chooses to regulate those items. It does not change the

fact that those items do not include the replacement of management of a public utility. The legislature had the opportunity to indicate that the ACC could replace a public utility's management; the legislature chose not to do so. Under a strict statutory interpretation, such authority cannot be now read into the statute merely because it is convenient for the ACC.

Further, pursuant to *noscitur a sociis*, the terms must be read within their surrounding context. This statute is clearly aimed at oversight of a public utility's operations, which the ACC has authority to regulate. In full context, it is decidedly not aimed at replacement of or control over a corporation's managerial functions. To find otherwise is to stretch the interpretation in a way that is "so markedly different from [that which] the legislature expressly included." *City of Surprise*, 2019 WL 1389031, at *4, ¶ 14.

No statute grants authority to the ACC to replace management of a public utility. Indeed, courts have consistently held that the ACC does not have jurisdiction to directly interfere with management of a utility. *See Consolidated Stage Co.*, 63 Ariz. at 263, 161 P.2d at 112 (holding that the ACC "cannot dictate who [a utility's] officers shall be"). Nevertheless, that is precisely what the ACC did here and, unless remedied by this Court, what it will continue to do.

VI. Conclusion

Nowhere – not in the Constitution, nor in any statute – has the ACC been granted general jurisdiction over regulated utilities. It lacks authority to change the

management, to impose a receiver, or to interfere in the internal management of a utility. While the ACC is an important oversight body for public utilities, its reach is not limitless. It may only operate per those powers it has been specifically granted by law. To hold otherwise removes the line between oversight and absolute control.

For the reasons explained above, this Court should find that the ACC exceeded its constitutional and statutory authority in replacing the management of Johnson Utilities and continuing to take actions which control the internal management of Johnson Utilities.

RESPECTFULLY SUBMITTED this 8th day of April, 2019.

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