ARIZONA SUPREME COURT

ROBERT BURNS, Plaintiff/Appellant, v. ARIZONA PUBLIC SERVICE COMPANY, et al., Defendants/Appellees.	Arizona Supreme Court No. CV-21-0080-PR Court of Appeals Division One No. 1 CA-CV 19-0183 Maricopa County Superior Court No. CV2017-001831

APPELLEE ARIZONA CORPORATION COMMISSION'S RESPONSE TO APPELLANT'S PETITION FOR REVIEW

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I. INTRODUCTION

Appellant's Petition asks this Court to directly interfere in Arizona Corporation Commission ("Commission") operations on issues for which Arizona courts give deferential treatment and "wide berth." *Burns v. Arizona Pub. Serv. Co.*, 250 Ariz. 607, ¶ 23, 483 P.3d 229, 234 (Ct. App. 2021) ("If we were to grant relief in this case, we would essentially be overturning the Commission's vote and directly interfering in Commission operations.").[1] The Court of Appeals' opinion in this case confirming dismissal of Appellant's claims correctly applied clear constitutional and statutory law in conformance with well-established principles of construction. Appellant's request for review of issues properly decided should be denied.

II. FACTUAL BACKGROUND

Former Commissioner Robert Burns ("Burns") brought this action as a collateral attack to overturn the Commission's Decision No. 76161 (the "Decision") in a rate case involving Arizona Public Service Company ("APS"), Docket Nos. E-01345A-16-0036 and E-01345A-16-0123 ("Rate Case"). During the Rate Case, Commissioner Burns issued two subpoenas for documents and made a demand for witness testimony (collectively the "Subpoenas"). [APPV1-0005-47]. The Subpoenas' purpose was to gather evidence of APS campaign contributions to the

[1] Currently, only the Pacific Reporter page citations are available and will be used by Appellee throughout.

other Commissioners, with the goal of disqualifying them from the Rate Case. [APPV2-0037-38]. APS objected to the Subpoenas [*see* APPV2-0038] and Burns eventually filed motions in the Rate Case to compel the Subpoenas and to disqualify the other Commissioners. [APPV2-0043-44].

By a 4-1 vote, with Burns as the lone dissenter, the Commission entered its Decision denying Burns' motions, finding: (1) the information Burns sought was not relevant to the Rate Case; (2) the subpoenas he issued were overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence; and (3) the requests for witness interviews sought irrelevant information and were not reasonably calculated to lead to the discovery of admissible evidence. [APPV2-0057]. The Commission also denied Burns' motion to investigate whether all the other Commissioners must disqualify themselves, reasoning that: (1) the case on which Burns relied, *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868 (2009), was distinguishable and did not apply to commissioners engaged in ratemaking; (2) the rule of necessity would make it impossible to grant Burns' disqualification motion, as the Commission would be left without a quorum; and (3) Burns, as a decision-maker rather than a litigant, lacked standing to seek disqualification of his colleagues. [APPV2-0056].

Burns filed his First Amended Complaint ("FAC") in the underlying action seeking declaratory relief relating to (1) the enforceability of the Subpoenas, and

(2) the enforceability of his demand to call witnesses. [APPV2-0104-07]. The Commission filed a motion to dismiss the FAC which was granted by the trial court on February 15, 2018. [APPV3-0003-16]. Burns thereafter filed a Second Amended Complaint ("SAC") that made additional requests for declaratory relief, including with respect to his prior disqualification motion filed with the Commission, all relating to the ratemaking proceedings. [APPV2-0178-80]. The trial court granted the Commission's motion to dismiss the SAC on December 18, 2018. [APPV3-0017-24]. In granting dismissal of the FAC and SAC, the trial court properly held: (1) the Commission had authority to consider Burns' motions and enter its Decision; (2) the action concerns only an internal decision of the Commission itself on the scope and extent of discovery to enforce in the Rate Case; (3) the trial court should not interfere with these internal decisions; and (4) the claims relating to Burns' motion for disqualification failed for a lack of standing. [APPV3-0003-24].

On review, the Court of Appeals affirmed dismissal of the FAC and SAC. *Burns*, 483 P.3d at 231, ¶ 1. In doing so, the Court of Appeals held: (1) a commissioner lacks authority to individually enforce an investigatory subpoena in a rate-making case over the opposition of the majority of the Commission; (2) the trial court did not err by confirming the Commission's decision not to enforce Subpoenas because the Commission was acting within its plenary constitutional authority; (3) only an interested party or the attorney general could challenge the Commission's

determination not to enforce a subpoena in a rate case; (4) Burns lacked standing to bring a due process challenge seeking to disqualify other commissioners from ruling in the Rate Case; and (5) Burns was not entitled to declaratory relief giving effect rulings issued in his favor on the motion to dismiss the FAC. *Id.* at 231, 234-37, ¶¶ 1, 23, 26, 30, 34.

III. REASONS FOR DENYING REVIEW

Burns argues that the Court should accept review based upon three purported issues of first impression decided by the Court of Appeals. [Petition at 3]. Burns does not argue that "a decision of the Supreme Court should be overruled or qualified" or that "there are conflicting decisions by the Court of Appeals." ARCAP 23(d)(3).

As discussed below, each issue was resolved correctly by the Court of Appeals using well-established bodies of Arizona law and settled principles of constitutional and statutory construction. No factors supporting review are present and Burns' Petition should be denied.

A. The Court Of Appeals Correctly Held That A Commissioner Lacks Authority To Individually Enforce An Investigatory Subpoena In A Rate-Making Case Over Opposition Of The Commission Majority.

Burns first argues that this Court should accept review because the Court of Appeals purportedly misconstrued Ariz. Const. Art. XV, §§ 4, 6 and A.A.C. § R14-3-109(O) to create limits or veto powers on the investigatory powers conferred by

Ariz. Const. Art. XV, § 4 and A.R.S. § 40-241(A). [Petition at 9-12]. To the contrary, the Court of Appeals properly construed the constitutional and statutory scheme at issue in a manner that harmonizes all provisions and avoids absurd results. *See, e.g.*, *Herndon v. Hammons*, 33 Ariz. 88, 92, 262 P. 620, 621 (1927) ("It is a cardinal rule of constitutional construction that the interpretation, if possible, shall be such that each provision should harmonize with all others" and "provisions relating to the same subject must be construed together and read in the light of each other."); *see also Siete Solar, LLC v. Arizona Dep't of Revenue*, 246 Ariz. 146, 150, 435 P.3d 1052, 1056 (Ct. App. 2019), *review denied* (Aug. 27, 2019) (when construing related statutes Arizona courts "strive to achieve consistency among them" and "avoid an absurd result"). Accordingly, Burns' request for review should be denied.

i. A commissioner-issued subpoena in a rate case is subject to review and oversight by the Commission as a whole.

Although an individual commissioner has the power to issue an investigatory subpoena under Ariz. Const. Art. XV, § 4, that power is not without limits when exercised as part of commission proceedings. *Burns*, 483 P.3d at 234, ¶¶ 19, 21. Ariz. Const. Art. XV, § 6 provides that "the commission may make rules and regulations to govern [proceedings instituted by and before it.]" *See Ariz. Corp. Comm'n v. Woods*, 171 Ariz. 286, 294 (1992) ("[T]he Commission's power goes beyond strictly setting rates and extends to enactment of the rules and regulations

that are reasonably necessary steps in ratemaking”). Under this express constitutional authority, the Commission implemented A.A.C. R14-3-109(O), which provides: “**[t]he Commission** . . . upon motion made . . . may 1. Quash the subpoena if it is unreasonable or oppressive.”) [emphasis added]); *see also* A.R.S. § 40-102(C) (“The act of a majority of the commissioners when in session as a board shall be the act of the commission”). The Commission did so in its Decision not to enforce the Subpoenas issued by Burns in the Rate Case.

Proper interpretation of Ariz. Const. Art. XV, §§ 4, 6 and A.A.C. § R14-3-109(O) allows but one conclusion: An investigatory subpoena issued by a commissioner in a contested case is subject to review and oversight by the Commission as a whole. *Burns*, 483 P.3d at 234, ¶ 21. This conclusion does not (as Burns suggests) forbid or limit an individual commissioner from exercising the investigatory powers conferred under Ariz. Const. Art. XV, § 4 and A.R.S. § 40-241(A). *Id.* at 236, ¶ 18 (dismissal of Burns' claims did not grant the Commission “an implied power to ‘nullify[] their fellow commissioners' investigatory subpoenas or requests to call and question witnesses in a rate case.’”). Rather, A.A.C. R14-3-109(O) simply allows the Commission as a body to review and resolve objections to subpoenas issued as part of ***commission proceedings***. The applicability of A.A.C. R14-3-109(O) if Burns had issued discovery requests or an investigation in another context (*i.e.,* outside of the Rate Case) was not an issue

before the trial court or Court of Appeals. *Id*. at 234, ¶ 22.

If, as Burns contends, Ariz. Const. Art. XV, § 4 and A.R.S. § 40-241(A) granted a commissioner subpoena enforcement power beyond review and oversight by the Commission as a whole, such power would also be beyond review and oversight of the judiciary. A.R.S. §§ 40-254 and 40-254.01 provide the only avenues for judicial review of commission proceedings, yet only allow for judicial review of "an order or decision of the commission." Therefore, if the Commission as a whole could not rule on objections to a commissioner-issued subpoena, then the affected party could not seek judicial review. The Court of Appeals properly avoided an interpretation yielding such a result.

ii. A.A.C. R14-3-109(O) applies to the subpoenas in question.

Without any supporting authority, Burns also contends that A.A.C. R14-3-109(O) does not apply to subpoenas issued by a commissioner during the course of a contested case. [Petition at 12]. A.A.C. R14-3-101(A), however, states the opposite: "…these Rules of Practice and Procedure [including, R14-3-109(O)] shall govern in ***all cases*** before the Corporation Commission…[but] neither these rules nor the Rules of Civil Procedure shall apply to any investigation by the Commission, any of its divisions or its staff." (Emphasis added).

Burns does not dispute that the Subpoenas were issued during the course of the Rate Case before the Commission. [APPV2-0061-62; 90 at ¶ 135; 94 at ¶ 154;

96-97 at ¶ 169; 103-04 at ¶ 201]. The Court of Appeals therefore correctly applied R14-3-109(O) and held the Commission as a whole was authorized to review APS' objections and quash the discovery requests at issue.

B. The Court Of Appeals Correctly Held That Only An Interested Party Or The Attorney General Can Challenge Commission Orders.

Burns argued below and argues again to this Court that the statutory provisions governing judicial review of an order by the Commission are inapplicable to his claims for declaratory relief challenging the Commission's Decision. The plain language of A.R.S. § 40-254(A) and case authority interpreting this statute demonstrate otherwise.

A.R.S. § 40-254(A) expressly provides that only a "party in interest, or the attorney general on behalf of the state" may commence an action (for a declaratory judgment or otherwise) challenging "an order or decision of the commission." *See also* A.R.S. § 40-254.01 (providing only "[t]he attorney general…or a party to a proceeding before the commission" may appeal and order or decision of the commission "involving public service corporations and relating to rate making or rate design" to the court of appeals). Other than by a writ of mandamus from the Arizona Supreme Court, the statutory procedure to challenge Commission orders is exclusive. *See* A.R.S. § 40-254(E); A.R.S. § 40-254.01(F).

The Arizona Supreme Court historically has recognized that decisions by the

Commission, when authorized to make such decisions, are not subject to collateral attack. *See Ariz. Pub. Serv. Co. v. So. Union Gas Co.*, 76 Ariz. 373, 377 (1954) ("Our statutes on the subject under consideration expressly provide…the dissatisfied party or the attorney general on behalf of the state may bring an action in the superior court against the commission; that except by this form of action, no court of this state shall have jurisdiction to enjoin or review the commission's decision; and that in all collateral actions the decision of the commission shall be conclusive.") (citations omitted); *see also Miller v. Arizona Corp. Comm'n*, 227 Ariz. 21, 24, 251 P.3d 400, 403 (Ct. App. 2011) (holding that Commission orders are "conclusive unless the statutory procedure for review is followed"); *Tucson Warehouse & Transfer Co.*, 77 Ariz. 323, 325, 271 P.2d 477, 478 (1954) ("The complaint is a collateral attack upon an order of the Corporation Commission and if it had jurisdiction to set aside the order of revocation, plaintiff must fail").

Because Burns was not the attorney general or a party to the Rate Case, he had no right to challenge the Commission's Decision in a collateral action—a consequence intended by Arizona's legislature. The Court of Appeals properly held that Burns could not challenge (in an action for declaratory judgment or otherwise) the reasonableness of the Commission's Decision. *Burns*, 483 P.3d at 235, ¶ 26.

C. The Court Of Appeals Correctly Affirmed Dismissal Of Burns' Claims For Declaratory Relief.

Burns urges this Court to reconsider whether he has standing under A.R.S. §

12-1832 to seek a declaration of his constitutional and statutory rights. [Petition at 14-15]. Arizona's Declaratory Judgment Act does not give Burns the right to seek advisory opinions on issues where the Commission has already acted or where there is no dispute. Further review is unnecessary and should be denied.

Arizona's Supreme Court has firmly established that "[a] declaratory judgment will be granted only when there is a justiciable issue between parties." *Arizona State Bd. of Dirs. for Junior Colls. v. Phoenix Union High Sch. Dist.*, 102 Ariz. 69, 73, (1967) ("No proceeding will lie under the declaratory judgment acts to obtain a judgment which is advisory only or which merely answers a moot or abstract question; a mere difference of opinion will not suffice"). A justiciable controversy only exists "if there is an assertion of a right, status, or legal relation in which the plaintiff has a definite interest **and a denial of it by the opposing party**." *Ponderosa Fire Dist. v. Coconino Cty.*, 235 Ariz. 597, 601, 334 P.3d 1256, 1260 (Ct. App. 2014) (internal citation omitted) (emphasis added); *see also Riley v. Cochise County*, 10 Ariz. App. 55, 59-60 (1969) (granting dismissal because "mere difference of opinion between public officers" did not constitute a justifiable controversy).

Further, as explained by the Court of Appeals, the Declaratory Judgment Act expressly provides that a court may refuse enter a declaratory judgment when it "would not terminate the uncertainty or controversy giving rise to the proceeding." *Burns*, 483 P.3d at 236, ¶ 33 (citing A.R.S. § 12-1836). Accordingly, Burns' right to

seek a declaration of his constitutional and statutory rights under A.R.S. § 12-1832 "is not absolute." *Id.*

As to the Commission, there are two possibilities with respect to Burns' ill-defined, all-encompassing declaration requests: (1) the Commission addressed the issue in the Decision; or (2) the Commission did not address the issue prior to this litigation. For every issue actually addressed in the Commission's Decision, the reasons set forth in Section B required dismissal. With respect to any issues not addressed by the Commission's Decision, there was no "justiciable controversy" that allowed for declaratory relief. Further, any declaratory judgment regarding Burns' investigatory rights leading up to or outside the context of the Commission's Decision would not have terminated the controversy giving rise to the action—*i.e.*, whether Burns could unilaterally enforce compliance with the Subpoenas in the Rate Case. *See Burns*, 483 P.3d at 236, ¶ 34. Dismissal of Burns' claims was therefore proper.

D. The Court Of Appeals Correctly Held That Burns Lacked Standing To Seek Disqualification Of Fellow Commissioners In The Rate Case.

Burns cannot identify any specific provision under Article XV of the Arizona Constitution or Title 40 to the Arizona Revised Statutes that confers on him a "constitutional due process obligation" to investigate or seek disqualification of his fellow commissioners for potential bias. Further review of this issue is not

warranted.

It is well-settled that due process rights belong to the parties—not an adjudicator or in this case, a commissioner. *See, e.g., Reichert v. State ex rel. McCulloch*, 278 P.3d 455, 463-65 ¶¶ 24 & 29 (Mont. 2012) (holding that state legislators lacked standing to assert that supreme court justices must recuse themselves on due process concerns because the "Legislators are not 'parties' to this action," and the parties themselves did not have fairness concerns); *Kerr v. Killian,* 197 Ariz. 213, 217, ¶ 16 (Ct. App. 2000) (holding that Department of Revenue lacked standing to assert due process rights of others) (citation omitted); *State v. Herrera*, 121 Ariz. 12, 15–16, 588 P.2d 305, 308–09 (1978) ("In order to possess standing to assert a constitutional challenge, an individual must himself have suffered some threatened or actual injury resulting from the putatively illegal action. This is to assure that the petitioner has a personal stake in the outcome of the controversy.") (internal citation/quotations omitted).

Burns was not a party to the Rate Case and did not have a personal stake in the outcome. Instead, he was a "co-equal decision-maker" [*see Burns*, 483 P.3d at 229, ¶ 29] and, as such, was not entitled to raise due process concerns in the Rate Case. The cases relied upon by Burns—all of which involve due process claims asserted by a *party* to the litigation—are not to the contrary. The Court of Appeals properly distinguished such cases [*see id.* at 235, ¶¶ 27-28] and correctly concluded:

"Burns has not established that anyone other than a party to a proceeding before the Commission has standing to raise a due process challenge[.]" *Id.* at 235, ¶30.

Burns' inability to cite any constitutional, statutory or regulatory provision granting him authority (or imposing upon him a duty) to investigate potential bias of co-commissioners is fatal to his claim. *See Berry v. Foster,* 180 Ariz. 233, 235 (Ct. App. 1994) ("As pointed out by Berry, nowhere in Title 15 or in the Arizona Constitution is there express or implied authority granted to a school board to investigate, discipline or censure one of its own members"). Burns' awkwardly manufactured argument that he has some unspecified constitutional obligation to investigate his co-commissioners for potential bias "no different than…the duty of a judge to fully investigate the potential risk of bias among jurors" [*see* Petition at 17] was also properly rejected by the Court of Appeals. *Burns*, 483 P.3d at 236, ¶ 29 ("Burns was not a judge polling the actual decision-makers in a rate case; he was a co-equal decision-maker with those he alleges were biased").

IV. ADDITIONAL ISSUES NOT LISTED BY APPELLANT

Pursuant to ARCAP 23(f)(2), there are "additional issues not listed by the petitioner that the parties presented to the Court of Appeals, which that court did not decide and which the Supreme Court may need to decide if it grants review":

1. Did the FAC and SAC constitute a collateral attack on Decision No. 76161 that requires dismissal under Arizona's collateral attack rules and A.R.S. §§ 40-254, 40-254.01?

2. Did Burns lack capacity/standing to bring this action?

3. Did Burns lack authority to initiate an investigation of his fellow commissioners?

4. Did the rule of necessity require dismissal of the SAC?

V. CONCLUSION

In accordance with the foregoing, Appellees respectfully request that this Court deny the Petition for Review.

RESPECTFULLY SUBMITTED this 14th day of July, 2021.

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