

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
SUPPLEMENTAL BRIEF IN RESPONSE TO APPELLANT'S
PETITION FOR REVIEW**

Polsinelli PC

Edward F. Novak (006092)

Jonathan G. Brinson (025045)

One E. Washington Street, Suite 1200

Phoenix, AZ 85004

(602) 650-2000

(602) 264-7033

enovak@polsinelli.com

jbrinson@polsinelli.com

Attorneys for Appellee

Arizona Corporation Commission

TABLE OF CONTENTS

I.	Commissioner Burns’ Interpretation Of Ariz. Const. Art. XV, § 4 Would Deprive The Commission Of Its Constitutional And Statutory Powers	2
A.	The Commission has the power of a court of general jurisdiction, which includes the power to quash a subpoena.....	2
B.	The Commission has exclusive authority for ratemaking.....	3
C.	Commissioner Burns’ interpretation runs afoul of the legislature’s and Commission’s rulemaking power under Ariz. Const. Art. XV, § 6.....	4
D.	Commissioner Burns does not have power or authority to create rules or procedures for enforcing his own subpoena.	6
II.	The Constitution Does Not Require The Commission To Affirmatively Enforce Commissioner Burns’ Subpoenas.....	8
III.	Commissioner Burns’ Action Is An Impermissible Collateral Attack.....	9
IV.	The Constitutional Grant Of Power In Art. XV, § 4 Flows Through The Commission, Not The Individual Commissioners	10
V.	Commissioner Burns’ Interpretation Of Ariz. Const. Art. XV, § 4 Would Lead To Absurd And Unconstitutional Results	12
VI.	Resolving This Internal Commission Issue Would Require Undue Judicial Involvement	14
I.	There Is No Dispute Or Controversy Giving Rise To Declaratory Relief....	16
II.	The Appellate Court Determined That Commissioner Burns Has Standing To Seek A Declaration, But Simply Found That Burns Is Not Entitled To His Requested Relief	17
III.	Courts Have Discretion Not To Grant Declaratory Judgment That Would Not Terminate The Uncertainty Or Controversy	17
IV.	Commissioner Burns Lacks Capacity/Standing.....	18

TABLE OF AUTHORITIES

Page(s)

Cases

Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n,
220 Ariz. 587, 208 P.3d 676 (2009)15

Ariz. Pub. Serv. Co. v. So. Union Gas Co.,
76 Ariz. 373, 265 P.2d 435 (1954)9

Ariz. State Bd. of Dirs. For Junior Colleges v. Phoenix Union High Sch. Dist.,
102 Ariz. 69, 424 P.2d 819 (1967)16

Bennett v. Napolitano,
206 Ariz. 520 (2003).....18

Braillard v. Maricopa Cty.,
224 Ariz. 481, 232 P.3d 1263 (App. 2010)18

Brewer v. Burns,
222 Ariz. 234 (2009).....14, 18

Carrington v. Ariz. Corp. Comm’n,
199 Ariz. 303, 18 P. 3d 97 (App. 2000)8

Grande v. Casson,
50 Ariz. 397, 72 P.2d 676 (1937)18

Green v. Osborne,
157 Ariz. 363, 758 P.2d 138 (1988)12

Herndon v. Hammons,
33 Ariz. 88, 262 P. 620 (1927)2

Horne v. Polk,
242 Ariz. 226, 394 P.3d 651 (2017)7, 13

Johnson Utils., LLC v. Ariz. Corp. Comm’n,
249 Ariz. 2153, 4

<i>Kimball v. Shofstall</i> , 17 Ariz. App. 11, 494 P.2d 1357 (1972)	18
<i>Miller v. Ariz. Corp. Comm’n</i> , 227 Ariz. 21, 251 P.3d 400 (App. 2011)	14
<i>Moore v. Bolin</i> , 70 Ariz. 354, 220 P.2d 850 (1950)	16
<i>Perini Land and Dev. Co. v. Pima County</i> , 170 Ariz. 380, 825 P.2d 1 (1992)	12
<i>Polaris Int’l Metals Corp. v. Ariz. Corp. Comm’n</i> , 133 Ariz. 500, 652 P.2d 1023 (1982)	16, 17
<i>Skinner v. Pinal Cty.</i> , No. CV-09-00195	18
<i>Stop Exploiting Taxpayers v. Jones</i> , 211 Ariz. 576 (App. 2005).....	14
<i>Tohono O’odham Nation v. Ducey</i> , 174 F. Supp. 3d 1194 (D. Ariz. 2016)	18
<i>Tucson Warehouse & Transfer Co.</i> , 77 Ariz. 323, 271 P.2d 477 (1954)	10
<i>Ward v. Stevens</i> , 86 Ariz. 222, 344 P.2d 491 (1959)	12
Statutes	
A.R.S. § 12-1831, ET SEQ.....	15
A.R.S. § 12-1836.....	17
A.R.S. § 40-102.....	6
A.R.S. § 40-102(C)	4, 6, 13
A.R.S. § 40-202(A).....	5
A.R.S. § 40-252.....	13

A.R.S. §§ 40-254 and 40-254.01	13
A.R.S. §§ 40-254, 254.01	7, 9
A.R.S. § 40-254.01.....	3
A.R.S. § 40-424.....	13
A.R.S. § 40-424(A).....	7
Other Authorities	
Fourteenth Amendment	7
ARIZ. CONST. ART. XV, § 4	<i>passim</i>
Ariz. Const. Art. XV, § 6.....	<i>passim</i>
Ariz. Const. Art. XV, § 17	2, 3, 7, 13
Ariz. R. Civ. P. 37(a)	2
ARIZONA CONSTITUTION	1, 15, 17
Black’s Law Dictionary (10th ed. 2014)	11
Opinion ¶ 21. R14-3-109(O).....	5

INTRODUCTION

Appellee Arizona Corporation Commission (the “Commission”) provides the following supplemental argument on the two issues for which this Court granted review. The Commission incorporates by reference argument previously raised in its Response to Appellant’s Petition for Review, as well as its Answering Brief submitted to the Court of Appeals. For the reasons that follow, this Court should affirm the Court of Appeals’ Opinion. The Court of Appeals correctly decided Issue #1 and also made correct conclusions for Issue #2 that resolve the outcome here.

ISSUE 1: WHETHER THE ARIZONA CONSTITUTION ALLOWS A MAJORITY OF ACC COMMISSIONERS TO PREVENT ANY SINGLE COMMISSIONER FROM EXERCISING THE INVESTIGATORY POWERS THAT ARE EXPRESSLY DELEGATED TO THEM IN ARIZ. CONST. ART. XV, § 4

Commissioner Burns’ statement of Issue #1 (above) misstates the underlying issue and the Court of Appeals’ holding. The Court of Appeals’ narrow holding is limited to the context of a ratemaking case, wherein the Commission has plenary power, and involves the Commission’s refusal to affirmatively enforce Commissioner Burns’ subpoenas when he filed a motion that the Commission do so. Commissioner Burns’ position on this issue would deprive the Commission of its constitutional and statutory powers, is an impermissible collateral attack, interferes with the Commission’s internal workings, and would lead to absurd and unconstitutional results.

I. Commissioner Burns’ Interpretation Of Ariz. Const. Art. XV, § 4 Would Deprive The Commission Of Its Constitutional And Statutory Powers

Commissioner Burns’ argument focuses exclusively on one subclause within one section of Art. XV – “and the several members thereof.” His interpretation of this Art. XV, § 4 subclause and how it applies in a ratemaking case contradicts: (1) the dominant clause in § 4, empowering “The Commission;” (2) the Commission’s plenary powers in ratemaking cases under Art. XV, § 3; (3) the Commission’s and the state legislature’s authority under Art. XV, § 6; (4) the protections of Art. XV, § 17; and (5) the statutory and regulatory provisions established by the state legislature and the Commission. Rather than harmony, Commissioner Burns’ argument invites chaos. *See Herndon v. Hammons*, 33 Ariz. 88, 92, 262 P. 620, 621 (1927) (“[E]ach provision should harmonize with all others”).

A. The Commission has the power of a court of general jurisdiction, which includes the power to quash a subpoena.

Ariz. Const. Art. XV, § 4 grants the Commission “the power of a court of general jurisdiction to enforce . . . the production of evidence by subpoena.” Arizona’s courts of general jurisdiction have authority to quash subpoenas when presented with a motion to compel. *See* Ariz. R. Civ. P. 37(a); 45(c)(6)(B)(ii), (e)(2). The issue below came to the Commission through Commissioner Burns’ motion to compel Appellee APS’ compliance with the two ratemaking case subpoenas. [Appellant’s APPV1-0089-126].

The Commission exercised the same power as courts of general jurisdiction when it “den[ied] the Motion to Compel” because “[t]he subpoenas seek information that is irrelevant to the rate case.” [Appellant’s APPV2-0031-59 at 49-50]. The Commission specifically found that “[s]ince the subpoenas are irrelevant, it is not necessary for the Commission to reach the issues of (1) whether a Commissioner has the authority and jurisdiction to subpoena the information from APS, Pinnacle West, and Mr. Brandt on these topics.” [*Id.* at 50].

B. The Commission has exclusive authority for ratemaking.

The Commission’s authority is exclusive when exercising ratemaking authority under Arizona’s Constitution, Art. XV, § 3. *See, e.g., Johnson Utils., LLC v. Ariz. Corp. Comm’n*, 249 Ariz. 215, 221 ¶¶ 22-23 (setting forth the Commission’s exclusive and plenary authority over ratemaking, including “authority to make rules, regulations and orders” relating to those ratemaking powers). This exclusive and plenary ratemaking power limits judicial review to a direct review made under Ariz. Const. Art. XV, § 17 (providing that “[n]othing herein shall be construed as denying to public service corporations the right of appeal to the courts of the state from the rules, regulations, orders or decrees fixed by the corporation commission”) and A.R.S. § 40-254.01 (providing the procedures for only the attorney general or a party to a ratemaking case to obtain judicial review, and removing judicial jurisdiction to

“review any order or decision of the commission” in any other way other than a writ of mandamus).

Consistent with Arizona’s Constitution and this Court’s prior holdings, the Court of Appeals correctly held that because Commissioner Burns issued his subpoenas “as part of commission [ratemaking] proceedings,” they are “subject to review and oversight by the Commission as a whole.” Opinion, ¶ 21. “[T]he subpoenas in question here were in fact issued during the course of a contested rate-making proceeding.” *Id.*, ¶ 22. Thus, what would happen “if Burns had issued the subpoenas in a different context is not before” the Court. *Id.*

C. Commissioner Burns’ interpretation runs afoul of the legislature’s and Commission’s rulemaking power under Ariz. Const. Art. XV, § 6.

“The law-making power may enlarge the powers and extend the duties of the corporation commission, and may prescribe the rules and regulations to govern proceedings instituted by and before it; but, until such rules and regulations are provided by law, the commission may make rules and regulations to govern such proceedings.” Ariz. Const. Art. XV, § 6. While the Constitution thus provides the legislature with power to enlarge the Commission’s powers and duties, and to prescribe rules and regulations for its proceedings, there is no similar grant of power relating to individual commissioners. *See* 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”).

“And one such rule that the Commission has prescribed is that the Commission as a whole resolves objections to subpoenas.” Opinion ¶ 21. R14-3-109(O) provides that “[t]he Commission . . . upon motion made . . . may 1. Quash the subpoena if it is unreasonable or oppressive.” This provision is not limited to subpoenas requested by third parties, as Commissioner Burns suggests. While the first sentence provides that “[s]ubpoenas requiring the attendance of a witness . . . may be issued upon application in writing,” nowhere does the permissive language “may” indicate that this is the only means by which a subpoena may issue. Nor does the language suggest that the enumerated procedures only apply where a subpoena has issued pursuant to application. If so, then Commissioner Burns’ subpoena itself was defective because it was not issued through application. R14-3-109 is titled “Hearings, prehearings, conduct of hearings, procedure, evidence, subpoenas, briefs, arguments, official notice and rulings,” with subsection (O) titled “Subpoenas.” R14-3-109 properly applies to Commissioner Burns’ subpoenas. *See* R14-3-101(A) (“[T]hese Rules of Practice and Procedure shall govern in all cases before the Corporation Commission.”).

Arizona’s legislature also enacted several statutes, in conformance Art. XV, § 6, that dictate the outcome here. Pursuant to A.R.S. § 40-202(A), “[t]he commission may supervise and regulate every public service corporation in the state and do all things, whether specifically designated in this title or in addition thereto,

necessary and convenient in the exercise of that power and jurisdiction.” To the extent not already granted directly by the Constitution, this statute enlarges the Commission’s power to include reviewing a commissioner’s subpoena in a ratemaking case. Such action is certainly “necessary and convenient,” as the facts of this case demonstrate. Having commissioners unilaterally utilize subpoenas in a ratemaking case in an attempt to disqualify one another, without any authority of the Commission itself to deny motions to compel such subpoenas, would lead to disarray, inefficiency, and inconvenience.

A.R.S. § 40-102 also expanded the Commission’s powers and duties by providing that a commissioner must be designated by the Commission in order to undertake any investigation, inquiry or hearing that would have the force of the Commission. A.R.S. § 40-102(C) (“Any investigation, inquiry or hearing may be undertaken or held by or before any commissioner designated by the commission for the purpose, and every finding, order or decision made by a commissioner so designated, when approved and confirmed by the commission and ordered filed in its office, shall be the finding, order or decision of the commission.”).

D. Commissioner Burns does not have power or authority to create rules or procedures for enforcing his own subpoena.

Neither the legislature nor the Commission have created rules or procedures for Commissioner Burns to rule upon his own subpoenas. There is no such procedure, and the Constitution only empowers the legislature and Commission with

such authority. Commissioner Burns does not articulate how to carry out his asserted right to have his own subpoenas enforced outside of the Commission. The Constitution provides him no avenue to do so on his own. *See Horne v. Polk*, 242 Ariz. 226, 230, 394 P.3d 651, 655 ¶ 14 (2017) (recognizing that “the combination of functions in a single official violates an individual’s Fourteenth Amendment due process right to a neutral adjudication in appearance and reality”). Instead, Commissioner Burns argues that the courts should resolve objections to subpoenas issued by individual commissioners. [APPV3-0003-16 at 11].

Neither the Constitution nor applicable statutes provide a means for such judicial review that sidesteps the Commission itself. *See, e.g.*, Ariz. Const. Art. XV, § 17 (preserving a right of appeal to the courts only for “rules, regulations, orders, or decrees fixed by the corporation commission” itself, and not for orders fixed by individual commissioners); A.R.S. §§ 40-254, 254.01 (creating a procedure only for the judicial appeal of any “order or decision of the commission,” but not for an order or decision of an individual commissioner); A.R.S. § 40-424(A) (providing powers to fine contempt only to the Commission itself and not individual commissioners). Proceeding to a judicial review without the rules and procedures necessary to do so would also violate Ariz. Const. Art. XV, § 6.

II. The Constitution Does Not Require The Commission To Affirmatively Enforce Commissioner Burns' Subpoenas

This matter is before the Court, not because the Commission directly interfered with Commissioner Burns' ratemaking subpoenas, but because the Commission refused to itself enforce those subpoenas by granting Commissioner Burns' motion to compel. Nothing in the Constitution requires the Commission to affirmatively act to enforce a commissioner's subpoena. If the Commission is required to always grant a commissioner's motion to compel compliance with a commissioner-issued subpoena, then the commissioners individually would have greater power than the Commission itself. *See, e.g., Carrington v. Ariz. Corp. Comm'n*, 199 Ariz. 303, 305, 18 P. 3d 97, 99 (App. 2000) (“[A] party may resist the Commission's subpoena on grounds [that] the subpoena seeks irrelevant information”). The Commission here simply found that Commissioner Burns' subpoenas were irrelevant. The Commission did not determine whether Commissioner Burns had authority to issue the subpoenas.

This explains why the Court of Appeals correctly rejected Commissioner Burns' improper framing of this issue as the superior court granting “the Commission an implied power to nullify their fellow commissioners' investigatory subpoenas or requests to call and question witnesses in a rate case.” Opinion ¶ 18 (“The superior court's ruling created no such power”); *see also* APPV3-0003-16 at 14 (“The Court is aware of no Arizona case setting aside, as arbitrary and capricious,

a decision by the ACC *not* to act in a particular case”). Instead, the Court of Appeals correctly notes that this is a “review of a Commission determination not to enforce a subpoena,” and that courts “afford the Commission the same latitude when it votes not to pursue an investigation started by one of its elected members.” Opinion ¶ 23.

If Commissioner Burns’ motion to compel was properly before the Commission, then the Commission had power to rule upon the motion consistent with its procedures and controlling law. That is what happened here. Commissioner Burns cannot contest the substance of the Commission’s order. *See* A.R.S. §§ 40-254, 254.01 (precluding challenge to Commission orders except by interested parties or through writ of mandamus). Although not articulated in this way by Commissioner Burns, the only other potential outcome is that the Commission did not have authority to consider Commissioner Burns’ motion to compel. Such an outcome is untenable given the Constitutional, statutory, and regulatory law supporting the Commission’s exclusive authority and its procedures in a ratemaking case.

III. Commissioner Burns’ Action Is An Impermissible Collateral Attack

This Court has long recognized that the Commission’s decisions are not subject to collateral attack, both by way of statute and as a matter of common law. *Ariz. Pub. Serv. Co. v. So. Union Gas Co.*, 76 Ariz. 373, 377, 265 P.2d 435, 438 (1954) (“[U]nless it appears from the record made by the corporation commission

that it had no jurisdiction or power to decide [the issue], the only method of upsetting the judgment on this ground is by the direct proceeding provided by the statutes”); accord *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”).

Commissioner Burns does not seriously dispute that the Commission had authority to consider his motion to compel the ratemaking subpoenas. Commissioner Burns himself submitted his motion to compel to the Commission. Instead, Commissioner Burns argues that the Commission’s order erroneously failed to enforce his subpoenas. This is a direct attack on the Commission’s order itself and is not a proper subject of the current action.

IV. The Constitutional Grant Of Power In Art. XV, § 4 Flows Through The Commission, Not The Individual Commissioners

Commissioner Burns’ asserted questions that this Court should consider repeatedly use language not found in Art. XV § 4: “[W]hether and how the *individual* investigatory powers granted commissioners;” “to seek a declaration on his *individual* investigatory rights;” “whether an *individual* commissioner has standing.” [Petition at 9 (emphasis added)]. Art. XV, § 4 does not grant authority to “[t]he corporation commission and the *individual* members thereof.” Rather, power is granted to “[t]he corporation commission, and the *several* members thereof.” The

distinction has meaning. The most common definition of the word “several” is “more than one or two but not a lot.” Black’s Law Dictionary (10th ed. 2014). Yet even the secondary definition relied upon by Commissioner Burns, which is more appropriate for issues of liability, is “separate; particular; distinct, *but not necessarily independent* <a several obligation>.” *Id.* (emphasis added). The commissioners’ grant of power was intentionally tied to, and subject to, the power of the Commission as a whole.

The commas used in Art. XV, §4 similarly require this outcome. Commissioner Burns’ interpretation of completely separate individual powers would change the provision to: “The corporation commission and each individual member thereof shall have power” Instead, the drafters made the dominant clause “[t]he corporation commission,” with “and the several members thereof” a subordinate clause that is subject to the corporation commission’s powers. The text of Art. XV, § 4 contemplates that members will act in unity with the collective body, and not in opposition to the Commission itself. A later clause makes this even more clear, as the powers granted must be exercised “for the purpose of the commission, and of the several members thereof.” The drafters did not use the disjunctive “or,” but instead require the powers to be utilized to advance the purpose of the Commission.

V. Commissioner Burns' Interpretation Of Ariz. Const. Art. XV, § 4 Would Lead To Absurd And Unconstitutional Results

“[C]ourts should adopt a construction of the constitution which avoids an absurdity.” *Green v. Osborne*, 157 Ariz. 363, 367, 758 P.2d 138, 143 (1988) (recognizing that “[t]he current situation results in two conflicting provisions of the constitution,” and that “[s]uch an absurd result should be avoided.”). Additionally, even in situations where constitutional language is clear, “[i]f enforcing the clear language of the constitution results in an absurd situation, the court may look behind the bare words of the provision to discern its intended effect.” *Perini Land and Dev. Co. v. Pima County*, 170 Ariz. 380, 383, 825 P.2d 1, 5 (1992) (citing *Ward v. Stevens*, 86 Ariz. 222, 228-29, 344 P.2d 491, 495 (1959)). A constitutional provision’s clear language is absurd “if it is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of persons with ordinary intelligence and discretion.” *Id.*

Here, Commissioner Burns’ interpretation of Art. XV, § 4 to mean that commissioners can both pursue and enforce subpoenas in a ratemaking case, completely independent of the Commission itself, would lead to the absurd result of conflict between numerous constitutional and statutory provisions. First, this interpretation directly conflicts with Art. XV, § 3’s grant of exclusive power to the Commission in ratemaking cases. Second, allowing commissioners to independently

enforce their own subpoenas conflicts with both state and federal constitutional rights to due process. *See Horne*, 242 Ariz. at 230 ¶ 14.

Third, Art. XV, § 17 only provides constitutional due process safeguards to Commission orders and not orders from individual commissioners. Fourth, A.R.S. §§ 40-254 and 40-254.01 only provide parties with judicial review of Commission orders, not individual commissioners' orders. Fifth, treating an individual commissioner order the same as an order from the Commission would conflict with A.R.S. § 40-102(C) (providing that “[t]he act of a majority of the commissioners when in session as a board shall be the act of the commission,” and that only a commissioner designated by the Commission may issue an order on behalf of the Commission). Sixth, A.R.S. § 40-252 does not provide any means for an individual commissioner to alter or amend that commissioner's order. Seventh, A.R.S. § 40-424 only provides the Commission, not individual commissioners, with enforcement remedies. Eighth, there are no procedures pursuant to Art. XV, § 6 on how to enforce or rule upon a commissioner's subpoena in a ratemaking case outside of the Commission itself.

Finally, chaos rather than order could ensue in ratemaking cases. As shown by this very matter, with individual commissioners having a means to issue and enforce their own subpoenas on “any corporation whose stock shall be offered for sale to the public and of any public service corporation doing business within the

state,” such procedure could be used to gain information on other commissioners, political opponents, or for a number of improper personal purposes. The Commission would have no way to stop this and would lose control of any matter over which Arizona’s Constitution provides the Commission with exclusive authority.

VI. Resolving This Internal Commission Issue Would Require Undue Judicial Involvement

“The Commission is ‘a constitutional body which owes its existence to provisions in the organic law of this state.’” Opinion ¶ 17 (quoting *Miller v. Ariz. Corp. Comm’n*, 227 Ariz. 21, 24, 251 P.3d 400, 403 ¶ 12 (App. 2011)). “It has broad constitutional and statutory powers to regulate public service corporations.” *Id.* “Generally speaking, ‘in areas in which the Commission is given exclusive power, it is supreme subject to judicial review.’” *Id.* (quoting *Stop Exploiting Taxpayers v. Jones*, 211 Ariz. 576, 581, ¶ 20 (App. 2005)).

“[A] court should abstain from judicial review of the merits if the issue is properly decided by” a constitutional body of government. *Brewer v. Burns*, 222 Ariz. 234, 238 ¶ 16 (2009) (recognizing that courts should act with caution when “asked, in effect, to referee disputes between” other government entities). This includes where there exists “a textually demonstrable constitutional commitment of the issue to a coordinate political department.” *Id.* at ¶ 17. Here, Art. XV, § 3 of Arizona’s Constitution provides a “textually demonstrable constitutional

commitment” of Commissioner Burns’ subpoenas in a ratemaking case to resolution by the Commission. This is consistent with courts’ deference to the duly enacted and carefully considered decisions of representative bodies of government. *See Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n*, 220 Ariz. 587, 595, 208 P.3d 676, 684 ¶ 20 (2009).

Given the Commission’s exclusive powers in ratemaking cases under Art. XV, § 3, as well as the rulemaking powers granted to the legislature and Commission under Art. XV, § 6, the questions raised by Commissioner Burns regarding the procedure for enforcing subpoenas in a ratemaking case are properly addressed internally within the Commission. The Court of Appeals correctly determined that “[i]f we were to grant relief in this case, we would essentially be overturning the Commission’s vote and directly interfering in Commission operations.” Opinion ¶ 23.

ISSUE 2: WHETHER THE ARIZONA UDJA AT A.R.S. § 12-1831, ET SEQ. GRANTS AN ACC COMMISSIONER STANDING TO SEEK A DECLARATION OF THEIR RIGHTS AND THEIR FELLOW COMMISSIONERS’ RIGHTS

As stated by Commissioner Burns, the second issue does not properly reflect the Court of Appeals’ Opinion. As the Court of Appeals correctly stated, “the superior court recognized its authority to consider whether the Arizona Constitution afforded Burns the right to enforce his subpoenas unilaterally in a rate-making case . . . , but concluded that Burns was not entitled to the declaratory relief he requested.”

Opinion ¶ 17. Accordingly, the Court of Appeals' Opinion does not dispute Commissioner Burns' right to seek declaratory relief in this matter.

I. There Is No Dispute Or Controversy Giving Rise To Declaratory Relief

Declaratory relief is available “only when there is [a] justiciable issue between parties.” *Ariz. State Bd. of Dirs. For Junior Colleges v. Phoenix Union High Sch. Dist.*, 102 Ariz. 69, 73, 424 P.2d 819, 823 (1967). Here, there is not “a present existing controversy which permits the court to adjudicate any present rights.” *Moore v. Bolin*, 70 Ariz. 354, 357, 220 P.2d 850, 852 (1950) (“[C]onstitutional questions will not be determined abstractly or in a hypothetical case, or anticipated in advance of the necessity for determination thereof”). The Commission's underlying order merely found that the information sought through Commissioner Burns' subpoenas was irrelevant to the ratemaking case, and declined to enforce the subpoenas accordingly. [APPV2-0031-59 at 49-50].

The Commission specifically noted that it would not reach decision on the issues over which Commissioner Burns now seeks declaratory judgment. [*Id.* at 50]. Accordingly, there is no justiciable controversy warranting declaratory relief at this time. *See Polaris Int'l Metals Corp. v. Ariz. Corp. Comm'n*, 133 Ariz. 500, 505, 652 P.2d 1023, 1028 (1982) (stating that courts lack authority to enter declaratory judgment on a “mere difference of opinion” on a constitutional question).

II. The Appellate Court Determined That Commissioner Burns Has Standing To Seek A Declaration, But Simply Found That Burns Is Not Entitled To His Requested Relief

Both the superior court and the Court of Appeals considered on the merits Commissioner Burns' contention that he has unilateral authority to enforce his own subpoenas. Opinion ¶¶ 16-17. “[T]he superior court recognized its authority to consider whether the Arizona Constitution afforded Burns the right to enforce his subpoenas unilaterally in a rate-making case, *see Polaris Int’l Metals Corp. v. Ariz. Corp. Comm’n*, 133 Ariz. 500, 506 (1982), but concluded that Burns was not entitled to the declaratory relief he requested.” *Id.* ¶ 17.

III. Courts Have Discretion Not To Grant Declaratory Judgment That Would Not Terminate The Uncertainty Or Controversy

“The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.” A.R.S. § 12-1836. The four issues that the superior court declined to resolve through declaratory judgment would not resolve the primary issue of whether Commissioner Burns could unilaterally enforce compliance with his subpoenas in a ratemaking case. Thus, not only is there no dispute on these four issues, but they would not have resolved the alleged controversy for which Commissioner Burns brought this action.

IV. Commissioner Burns Lacks Capacity/Standing

Although neither the trial court nor the Court of Appeals disagreed with Commissioner Burns' right to seek declaratory relief, Commissioner Burns does not have capacity/standing to bring this action. "[C]oncern over standing is particularly acute when this Court is asked, in effect, to referee disputes between the political branches." *Brewer*, 222 Ariz. at 237, ¶ 11. "Without the standing requirement, the judicial branch would be too easily coerced into resolving political disputes between the executive and legislative branches, an arena in which courts are naturally reluctant to intrude." *Bennett v. Napolitano*, 206 Ariz. 520, 525 ¶ 20 (2003). This principle applies with even greater force with disputes that are internal to the Commission itself. Commissioner Burns' declaratory judgment action here is similar to a dissenting judge suing a court through a declaratory judgment action.

As stated by the United States District Court of Arizona:

Capacity is a party's personal right to litigate in federal court. Ordinarily, a state official's capacity to sue and be sued is governed by state law. Arizona law provides that Arizona officials lack capacity to sue or be sued absent a specific statutory grant of this authority. *Grande v. Casson*, 50 Ariz. 397, 72 P.2d 676, 681 (1937); *see also Brailard v. Maricopa Cty.*, 224 Ariz. 481, 232 P.3d 1263, 1269 (App. 2010) ("a governmental entity may be sued only if the legislature has so provided") (citing *Kimball v. Shofstall*, 17 Ariz. App. 11, 494 P.2d 1357, 1359 (1972)); *Skinner v. Pinal Cty.*, No. CV-09-00195) ("the test is whether specific statutory authority authorizes the political subdivision to sue and be sued").

Tohono O'odham Nation v. Ducey, 174 F. Supp. 3d 1194, 1199 (D. Ariz. 2016).

No statute or constitutional provision confers specific capacity or standing on Commissioner Burns here as an elected official. Allowing Arizona's UDJA to serve as a catch-all would allow any state official to always bring an action to have the judiciary referee disputes between and among the constitutional bodies of government.

CONCLUSION

For the foregoing reasons, as well as those previously set forth in the Commission's Response to Appellant's Petition for Review, its Answering Brief submitted to the Court of Appeals, and the Court of Appeals Opinion, the Commission respectfully requests that this Court affirm the rulings entered by the superior court and the Court of Appeals, and affirm dismissal of Commissioner Burns' action.

RESPECTFULLY SUBMITTED this 18TH day of January, 2022.

POLSINELLI PC

By /s/ Jonathan G. Brinson
Edward F. Novak
Jonathan G. Brinson
CityScape
1 East Washington Street, Suite 1200
Phoenix, AZ 85004
*Attorneys for Appellee Arizona
Corporation Commission*