

COMMISSIONERS

Lea Márquez Peterson – Chairwoman
 Sandra D. Kennedy
 Justin Olson
 Anna Tovar
 Jim O'Connor



JUSTIN OLSON
 Commissioner

ARIZONA CORPORATION COMMISSION

November 9, 2021

The Honorable Mark Brnovich
 Arizona Attorney General
 2005 N Central Ave
 Phoenix, Arizona 85004

Dear Attorney General Brnovich:

As authorized by A.R.S. § 41-193(A)(7), Commissioners Justin Olson and Jim O'Connor are requesting an opinion regarding retail electric competition:

1. Considering the Arizona Supreme Court's conclusions regarding the Commission's "permissive" authority and the legislature's "paramount" authority in *Johnson Utilities, L.L.C. v. Arizona Corp. Comm'n*, 249 Ariz. 215 (2020), does the Commission have an affirmative duty to enact the policy of the state as expressed in A.R.S. § 40-202(B)?
2. Is the Commission legally required to have retail electric competition rules in place before it can issue competitive certificates of convenience and necessity ("CC&N") pursuant to A.R.S. § 40-202(B), -207(A), and -208?
3. If the responses to questions one and two above are in the affirmative, does the Commission have an affirmative duty to create retail electric competition rules that comply with *Phelps Dodge v. Arizona Elec. Co-op, Inc.*, 207 Ariz. 95 (2004)?
4. If the response to question one above is in the affirmative, but the response to question two is negative, does the Commission's affirmative duty to enact the policy of the state as expressed in A.R.S. § 40-202(B) apply whether or not the Commission chooses to create retail electric competition rules?

Background

The Arizona State Legislature has established that Arizona's electric industry should be structured as a competitive market: "It is the public policy of this state that a competitive market shall exist in the sale of electric generation service." A.R.S. § 40-202(B). The legislature requires that service territories be open to competition (A.R.S. § 40-208) and therefore directs the Commission to order Public Service Corporations ("PSCs") to open their territories to competition (A.R.S. § 40-202(E)). The legislature also affirms the Commission's authority to adopt rules to enact retail electric competition (A.R.S. § 40-202(B)(1-8)), enact consumer protection rules (A.R.S. § 40-202(C)), and develop and oversee a consumer outreach and education program regarding retail electric competition (A.R.S. § 40-113).

The Commission previously created retail electric competition rules, but the Arizona Court of Appeals in *Phelps Dodge v. Arizona Elec. Co-op, Inc.*, 207 Ariz. 95 (2004) found some of the provisions unconstitutional, while other provisions lacked the necessary attorney general review and certification. The Commission has yet to create updated retail electric competition rules that comply with *Phelps Dodge*.

In *Johnson Utilities* (2020), the Arizona Supreme Court affirms that the legislature retains power to govern PSCs in matters outside of the Commission’s ratemaking authority, and that in such cases, the Commission’s authority is subject to the “paramount” authority of the legislature.¹ In the decision, the Court discusses the difference between the Commission’s ratemaking authority and its permissive authority found in article 15, section 3 of the Arizona Constitution.² The Court concludes the Commission’s ratemaking authority is plenary, exclusive, and self-executing, but *limited* to “ascertaining the ‘fair value’ of PSCs and prescribing classifications, rates, and charges.”³ Therefore, the legislature has no power to enact statutes to ascertain the value of PSCs nor “prescribing rates or charges, nor may it regulate the timing, procedure, or methods the Commission uses in calculating rates.”⁴

In contrast, the Commission’s permissive authority—its power to regulate PSCs for the convenience, comfort, health and safety of its employees and patrons—is not plenary nor exclusive, but rather shared with the legislature.⁵ Though held concurrently, the Court makes clear their respective authority is not equal: “when there is a conflict between a Commission regulation and a statute, the legislature’s police authority is ‘paramount,’ meaning it has the authority to override the regulation of the Commission.”⁶

In addition, even if there is no conflict between a Commission rule and statute, the Commission’s permissive authority is nonetheless “subject to the paramount authority of the legislature.”⁷ As an example, the Court notes that although the Commission has the permissive authority to appoint an interim manager for a troubled utility, the Commission would be subject to laws enacted by the legislature related to the appointment and power of interim managers.⁸ The Court further notes that “several provisions in article 15 state that the Commission’s authority over PSCs is ‘subject to law,’ or ‘as may be prescribed by law,’” which means that these additional enumerated constitutional powers are also “subject to statutes enacted by the legislature.”⁹ These examples suggest that outside of the Commission’s exclusive and plenary ratemaking authority, the Commission is otherwise subject to the statutes of the legislature.

In 2021, Green Mountain Energy applied for a competitive CC&N. Because of *Johnson Utilities* and Green Mountain Energy’s application, Commissioners Olson and O’Connor are

¹*Johnson Utilities, L.L.C. v. Arizona Corp. Comm’n*, 249 Ariz. 215, ¶¶ 28, 30, 59 (2020).

²*Id.* at ¶¶ 18-30.

³*Id.* at ¶¶ 21-25, 50 (citing Ariz. Const. art. 15, §§ 3, 13, and 14).

⁴*Id.* at ¶ 25.

⁵*Id.* at ¶¶ 27-28.

⁶*Id.* at ¶ 30.

⁷*Id.* at ¶ 59.

⁸*Id.*

⁹*Id.* at ¶ 29.

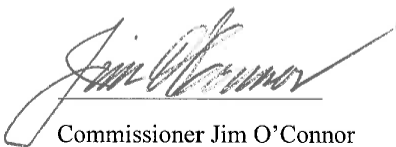
seeking an Attorney General Opinion confirming whether the Commission has an affirmative duty to enact the policy of the state as expressed in A.R.S. § 40-202(B) and whether the Commission is legally required to have retail electric competition rules in place before it can issue competitive CC&Ns pursuant to A.R.S. § 40-202(B), -207(A), and -208.

We look forward to your response. If you have any questions, please do not hesitate to contact our offices.

Sincerely,



Commissioner Justin Olson



Commissioner Jim O'Connor