STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION By KRIS MAYES ATTORNEY GENERAL February 4, 2026	No. I26-001 (R25-010) Re: Constitutionality of Arizona's Utility Securitization Bill H.B. 2679 (2025)

To: The Honorable Christopher Mathis
State Representative
1700 West Washington Street, Suite H
Phoenix, Arizona 85007

Questions Presented

On May 13, 2025, Governor Hobbs signed Arizona's new utility securitization bill into law. H.B. 2679, 57th Leg., 1st Reg. Sess. (2025). Arizona's electric utilities can now "securitize" certain operational costs and assets, issue bonds, and pass the cost to service those bonds on to their customers through a bill surcharge or "Financing Charge." *See* A.R.S. §§ 30-1001 *et seq*; A.R.S. §§ 40-601 *et seq*.

Your Request presents three constitutional questions:

1. Do the provisions of H.B. 2679 that limit judicial review of an approved securitization transaction violate constitutional separation of powers requirements?
2. Do the provisions of H.B. 2679 that identify the exclusive judicial remedies available to customers violate Ariz. Const. art. 18, § 6, the "anti-abrogation clause"?

3. Do the provisions of H.B. 2679 that restrict the Arizona Corporation Commission's review and modification of Financing Charges unconstitutionally intrude on the Commission's exclusive ratemaking authority under Ariz. Const. art. 15, § 3?

Summary Answers

When called upon to address the constitutionality of a statute, the Attorney General presumes a statute is constitutional and will find otherwise only when the statute is clearly or patently unconstitutional. Ariz. Att'y Gen. Op. I83-069 ("Because the Attorney General has the duty to uphold and defend state laws, we will not opine that a statute is unconstitutional unless it is patently so.").

1. No. The legislature has the power to originate substantive law. Ariz. Const. art. 4, Pt. 1 § 1(1). The judiciary has the "[p]ower to make rules relative to all procedural matters in any court." Ariz. Const. art. 6, § 5(5). Sections 30-1007, 30-1010, 40-608, and 40-611 (the "Judicial Review Provisions") are substantive law because they create, define, and regulate rights, and do not implicate any procedural matters within the courts' exclusive constitutional purview.
2. No. The Judicial Review Provisions do not abrogate any right of action for damages which existed at statehood.
3. Yes. The Commission has the constitutional authority and duty to prescribe "just and reasonable rates and charges to be made and collected, by public service corporations within the state for service rendered therein[.]" Ariz. Const. art 15, § 3. The Financing Charges are "charges" for electric service because customers are required to pay the Financing Charges to continue receiving electric service from their utility. Sections 40-

608(D) and 40-610(A) are unconstitutional to the extent that they prohibit the Commission from modifying the Financing Charges after a utility has issued its bonds.

Background

"Securitization" is a financing tool through which utilities can recover certain types of costs, typically costs incurred because of unanticipated weather events, abnormally high fuel costs, or uneconomical generating assets. In broad strokes, securitization allows utilities to more quickly recover sizable costs by issuing bonds that are secured by a dedicated income stream. An essential component of the securitization process is that the dedicated income stream used to repay the bond purchaser (the Financing Charges) must be irrevocable and nonbypassable (*i.e.,* paid first). The more certain the income stream, the higher the creditworthiness, and the cheaper the bonds.

The Arizona Legislature determined that Arizona should "gain the benefits of securitization." A.R.S. § 30-1002(A); § 40-602(A). To accomplish this purpose, the Legislature amended the Arizona Revised Statutes to add new chapters to Title 30, which governs the Arizona Power Authority and other "public power entities," and to Title 40, which governs the "public service corporations" regulated by the Commission.[1] Both statutory schemes follow the same general structure: they describe how the utility can issue and fund bonds to achieve a securitization transaction, establish the process through which a utility can obtain permission to undertake a

[1] A public power entity is "any municipal corporation or political subdivision that owns and operates facilities for the generation, transmission or distribution of electric energy for sale to retail customers in this state." A.R.S. § 30-1001(10). Public power entities are not regulated by the Commission, which only regulates the "rates and charges" of "public service corporations." Ariz. Const. art. 15, § 3.

securitization transaction, and impose a series of limitations that prohibit nearly all review or modification of the resulting Financing Charges.[2]

I. The Securitization Transaction

A utility can use securitization to recover "transition costs." A.R.S. § 40-601(22).[3] There are two types of "transition costs:" (1) "transition asset retirement costs" and (2) "significant event recovery costs." *Id*.

Transition asset retirement costs refer to the "undepreciated value [or] unrecovered balance" of an electric power generation, transmission, or distribution facility, which was part of the utility's existing "rate base" but which will be "permanently reduced" once the utility "retire[s], abandon[s]," or otherwise reduces the book value of the underlying asset. A.R.S. § 40-601(17) (defining transition asset), (18) (defining transition asset retirement costs). Significant event recovery costs are those that arise from damages to utility facilities caused by unexpected events like severe weather, wildfire, or other natural disasters. A.R.S. § 40-601(15).

By selling "transition bonds," the utility can access an immediate influx of cash, use it to cover substantial costs already incurred, and pay the bonds back over a set period by charging the utility's customers. A.R.S. § 40-601(21) ("transition bonds" are "bonds, notes, or other evidence of indebtedness that are issued by a qualified special purpose entity. . . the proceeds of which are used . . . to recover, finance, refinance or refund transition costs"). "The use of low-cost securitized borrowing . . . is intended to enable [utilities] to achieve the benefits of securitization for customers

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[2] H.B. 2679 also amended A.R.S. § 47-9109 to clarify that the portions of Arizona's Uniform Commercial Code which govern secured transactions do not apply to security interests created under A.R.S. § 30-1006 or § 40-607.

[3] For simplicity, all citations in this section are to the relevant provisions in Title 40, A.R.S. §§ 40-601 *et seq*. Title 30, A.R.S. §§ 30-1001 *et seq*., sets forth a nearly identical scheme for securitization transactions involving Public Power Entities.

by reinvesting capital now committed to paying the costs related to the production and delivery of energy from new facilities, resources or other assets." A.R.S. § 40-602(B).

The securitization transaction is a complex process.

A. Mechanics of the Transaction

A key component of the securitization transaction is the creation of the "Qualified Special Purpose Entity." The Qualified Special Purpose Entity is a distinct entity established and wholly owned by the utility which exists to (1) hold the "transition property" and (2) issue the "transition bonds" that are secured by that transition property. A.R.S. § 40-601(13). The "transition property" includes the right to "impose, charge, collect and receive financing charges." A.R.S. § 40-601(23)(b)(ii). "Financing Charges" are those "nonbypassable charges that are paid or payable by all customers to a qualified special purpose entity to recover ongoing financing costs" incurred to facilitate the issuance of the transition bonds. A.R.S. § 40-601(6). Once the Qualified Special Purpose Entity has issued the bonds, the Financing Charges are permanent; they are not "subject to rescission, alteration, amendment, reduction, impairment or adjustment by further action of the commission" except through the "True-up Mechanism." A.R.S. § 40-610(A); A.R.S. § 40-601(24) (the True-up Mechanism is "a formula . . . that adjusts financing charges over time to correct for any overcollection or undercollection of financing revenues").

The Financing Charges are payable to the Qualified Special Purpose Entity, and, once payment is received, the resulting "Financing Revenues" belong to the Qualified Special Purpose Entity, not the utility. A.R.S. § 40-601(6); A.R.S. § 40-608(I) ("Financing revenues are the property of qualified special purpose entity[.]"). However, a Qualified Special Purpose Entity can authorize a "servicer" to "calculate, bill, [and] collect" the Financing Charges on its behalf. A.R.S. § 40-601(14). The applicant public service corporation can act as a "Servicer" for its subsidiary

Qualified Special Purpose Entity. A.R.S. § 40-601(14)(b)(i). A "third-party" can also act as a Servicer, but only "in the event an applicant is unable to act as a servicer." A.R.S. § 40-601(14)(b)(ii); A.R.S. § 40-601(16) (defining "Third-party servicer"). When the utility is a public service corporation, the Servicer must collect the Financing Charges pursuant to the terms of a "Transition Billing Services Tariff." A.R.S. § 40-609(A). The Transition Billing Services Tariff sets forth how the Servicer collects the Financing Charges, but does not itself determine the amount of the Financing Charges. A.R.S. § 40-601(20).

B. Approval of the Transaction

Before a utility can initiate a securitization transaction, it must first obtain approval to do so. A.R.S. § 40-603(A). Specifically, public service corporations must apply to the Commission for a "Financing Order." A.R.S. § 40-603(A).[4]

A.R.S. § 40-603(A) sets forth the required components of an application for Financing Order from the Commission. Among other requirements, the public service company must (1) identify the "Transition Assets" or other costs that the company seeks to securitize; (2) describe the expected characteristics of the "Transition Bonds;" (3) estimate the Financing Charges; (4) explain how the "True-up Mechanism" will adjust the Financing Charges over time; and (5) if the proposed Initial Servicer is a public service company, include a proposed "Transition Billing Services Tariff." A.R.S. § 40-603(A).

Upon review of an application, the Commission "shall" issue a Financing Order that either "approves, rejects or approves with conditions" the proposed transaction. A.R.S. § 40-603(B).

[4] A Public Power Entity must provide public notice to and obtain approval from its governing body before adopting a "Financing Resolution." A.R.S. § 30-1003(A). Because your Request focuses on how H.B. 2679 impacts the Commission, we do not discuss the process for approving a Public Power Entity's Financing Resolution here.

The Commission can only approve (or "approve with conditions") the Financing Order if it finds that the applicant has met certain criteria. *Id.*

One of the criteria that the Commission must find is that the "transition benefit test" is satisfied, *i.e.,* that the "securitization transaction will result in lower costs to the applicant's customers on a net present value basis as compared to other financing options that are available to the applicant." A.R.S. § 40-603(B)(2). The Commission must also find that "[t]he proposed transition billing services tariff," "any true-up mechanism," and the securitization transaction itself are all "just and reasonable" and "in the public interest." A.R.S. § 40-603(B)(3), (4).

Once the Financing Order is approved, the Qualified Special Purpose Entity can (but is not immediately required to) issue bonds and pledge the "Transition Property" as security. A.R.S. § 40-606(A); *see also* A.R.S. § 40-601(23) ("Transition Property" includes the "right to impose, charge, collect, and receive financing charges"). After issuing the bonds, the Qualified Special Purpose Entity can begin to collect the Financing Charges.

II. Subsequent Review of an Approved Securitization Transaction

Another hallmark of securitization is that the Financing Charges must be irrevocable and unmodifiable. *See* A.R.S. § 40-602(A) ("It is the public policy of this state to gain the benefits of securitization by establishing irrevocable financing charges[.]"). To accomplish this, H.B. 2679 limits the circumstances in which courts can review or modify a Financing Order itself and the resulting Financing Charges. Relevant to this Request, H.B. 2679 also prohibits the Commission from reconsidering or modifying the Financing Charges once it has approved a Financing Order.

A. Judicial Review of a Financing Order

A.R.S. § 40-611 dictates the process for seeking judicial review of "a commission decision as to an application for a financing order." A.R.S. § 40-611(A).[5] That process is as follows:

1) "A party. . . who is dissatisfied with a commission decision as to an application for a financing order" can seek rehearing pursuant to A.R.S. § 40-253, which governs applications for rehearing for all other Commission decisions. A.R.S. § 40-611(A). Applications which are not granted within 20 days are deemed denied. *Id*.
2) A party then has 10 days to file a superior court action seeking "to vacate, set aside, affirm in part, reverse in part or remand the commission's decision regarding the financing application." A.R.S. § 40-611(C).
3) There are only two grounds upon which a party can challenge the Financing Order: (a) the Financing Order is "unlawful" or (b) the "factual findings made in the financing order …[are] unsupported" by either the Order itself or the "evidence" that was present to the Commission. A.R.S. § 40-611(D). The challenging party must prove either of these claims by "clear and satisfactory evidence." *Id.*
4) Except as otherwise provided (like in A.R.S. § 40-608), no court has jurisdiction to "review, enjoin, restrain, suspend, stay or delay" (1) a Financing order, (2) the creation of Transition Property, (3) the issuance of Transition Bonds, (4) "a commission's performance of its duties under this chapter." A.R.S. § 40-611 (G).
5) The Superior Court has 60 days to decide the matter (and can extend once for good cause). A.R.S. § 40-611(E).
6) Any appeal must be taken directly to the Arizona Supreme Court. A.R.S. § 40-611(F).

This structure largely tracks the existing processes for rehearing and judicial review of Commission decisions which are set forth in A.R.S. §§ 40-253, -254, and -254.01. However, A.R.S. § 40-611 expressly supplants the procedures for judicial review set forth in A.R.S §§ 40-254 and -254.01. A.R.S. § 40-611(B) ("Sections 40-254 and 40-254.01 do not apply to any claims arising under this chapter.").

[5] A.R.S. § 30-1010 is Title 30's counterpart to A.R.S. § 40-611. *See* A.R.S. § 30-1010(A) ("A party to the proceeding who is dissatisfied with a governing body's decision as to a financing resolution adopted pursuant to this chapter . . . may apply to the governing body for rehearing.").

B. Judicial Review of Financing Charges

A.R.S. § 40-608 also provides a narrow pathway to challenge implementation of the Financing Order.[6] In general, the Financing Charges and the True-up Mechanism "are not subject to review or approval" except that:

1) "the superior court has exclusive jurisdiction" to hear a claim by a customer against a Qualified Special Purpose Entity that "there has been a mathematical or administrative error" in 'the calculation or application of the true-up mechanism" or resulting Financing Charges. A.R.S. § 40-608(E).
2) That jurisdiction is limited to determining what charges should result from the correct application of the True-up Mechanism, and the superior court has no authority to "enjoin, restrain, stay or delay" the imposition of Financing Charges or collection of Financing Revenues. A.R.S.§ 40-608(F).
3) "A court may not enjoin, restrain, stay or delay the application of the true-up mechanism or the collection and remittance of financing revenues." A.R.S. § 40-608(G).

Any party seeking to challenge the Financing Charges or True-up Mechanism must do so within 10 days of when the Qualified Special Purpose Entity notifies the Commission of the adjusted Financing Charges. A.R.S. § 40-608(F), (K). Like A.R.S. § 40-611(F), any notice of appeal from the Superior Court's decision on a challenge to a Financing Charge must be taken directly to the Arizona Supreme Court within five days of the decision. A.R.S. § 40-608(F).

C. Commission Review of Financing Charges

Once the Commission has approved a Financing Order and the Qualified Special Purpose Entity has issued the bonds, "the transition property, the true-up mechanism and the financing charges are irrevocable, final, nondiscretionary and effective without the need for further action by the Commission" and the Financing Charges are not "subject to rescission, alteration, amendment, reduction, impairment or adjustment by further action of the commission" except through the True-up Mechanism. A.R.S. § 40-610(A). Any subsequent "[a]djustments to the

[6] A.R.S. § 30-1007 is Title 30's counterpart to A.R.S. § 40-608.

financing charges. . . resulting from the application of the true-up mechanism are not subject to regulation by the commission." A.R.S. § 40-608(D).

The Commission does, however, retain "continuing jurisdiction over the terms of a transition billing services tariff that is filed and maintained by a public service corporation." A.R.S. § 40-609(A). And while the Commission cannot modify the Financing Charges or True-up Mechanisms themselves, it can consider the "bill impact" of the Financing Charges "when determining the design of the rates within its jurisdiction or the allocation of the costs to and among" ratepayers. A.R.S. § 40-604(D).

Analysis

This Office presumes that a state statute is constitutional. Ariz. Att'y Gen. Op. I83-069; *see also State v. Arevalo,* 249 Ariz. 370, 373 ¶ 9 (2020) ("An act of the Legislature is presumed constitutional[.]") (citation omitted). As further explained below, we conclude that the Judicial Review Provisions are constitutional, but Sections 40-608(D) and 40-610(A) are unconstitutional to the extent that they prohibit the Commission from modifying securitization Financing Charges after a utility has issued its bonds.

I. The Judicial Review Provisions are a constitutionally permissible exercise of the Legislature's authority to adopt substantive law.

The Arizona Constitution requires a separation of powers between the three branches of government. Ariz. Const. art. 3. When assessing whether a statute violates the separation of powers between the legislative and judicial branches, a court must consider "the essential nature of the powers being exercised, the degree of control by the legislative department in the exercise of the power, the objective of the Legislature, and the practical consequences of the action, if available." *State ex rel. Woods v. Block*, 189 Ariz. 269, 276 (1997) (citations and quotations omitted).

The Arizona Constitution gives the legislature the power to originate substantive law. "The legislature has plenary power to deal with any topic unless otherwise restrained by the Constitution." *Seisinger v. Siebel*, 220 Ariz. 85, 92 ¶ 26 (2009). One such restraint is the Arizona Supreme Court's "[p]ower to make rules relative to all procedural matters in any court." Ariz. Const. art. 6, § 5(5). However, the legislature may also enact procedural rules so long as they merely supplement, but do not contradict, existing court-made rules. *State ex rel. Collins v. Seidel*, 142 Ariz. 587, 591 (1984).

Court rules cannot "abridge, enlarge or modify substantive rights of a litigant." A.R.S. § 12-109(B)(1). Thus, procedural matters prescribe the *method* of enforcing a right or obtaining redress for the invasion of a substantive right. *State v. Fletcher*, 149 Ariz. 187, 191 (1986). "Substantive law, on the other hand, is that portion of the law which creates, defines and regulates rights." *Id.* at 191–92 (*citing State v. Birmingham*, 96 Ariz. 109, 110 (1964)).

Here, the "essential nature" of the powers being exercised by the legislature in enacting the Judicial Review Provisions pertain to the legislature's authority to enact substantive law. *State ex rel. Woods*, 189 Ariz. at 276. The Judicial Review Provisions do constrain Arizona courts' authority to review Financing Orders (or Resolutions) and Financing Charges, but they do so in ways that are "substantive" and do not encroach on the judiciary's constitutional authority to govern the procedural aspects of the courts.

First, the Judicial Review Provisions dictate which aspects of the securitization transaction can be challenged in court. A customer who has timely sought a rehearing can later challenge in court a regulatory authority's decision to adopt a Financing Order or Resolution. *See* A.R.S. § 30-1010; § 40-611. In such a challenge, the superior court can consider whether the Financing Order or Resolution was "unlawful" based on the evidence presented. A.R.S. § 30-1010(C); § 40-

611(D). The superior court also has "exclusive jurisdiction" to adjudicate claims arising from the Financing Charges, but the reviewing court can only determine whether there has been a "mathematical or administrative error" with respect to (1) "the calculation or application of the true-up mechanism" or (2) "the calculation of the resulting financing charges and unit financing charges." A.R.S. § 30-1007(D) and § 40-608(E).

As a general rule, the subject-matter jurisdiction of a trial court is a substantive matter to be determined from sources other than procedural rules. *Encinas v. Pompa,* 189 Ariz. 157, 160 (App. 1997); *see also* Ariz. R. Civ. P. 82 ("These rules do not extend or limit the jurisdiction of the superior courts or the venue of actions in those courts."). A jurisdictional directive from the legislature, however, may encroach upon the judiciary's procedural authority if it deprives a trial court of jurisdiction to decide "violation[s] of its procedural directives." *Encinas*, 189 Ariz. at 161 (a statute dictating how attorney general's office was to be served with a complaint alleging RICO violations was unconstitutional because it prohibited a trial court from dismissing for failure to timely serve). But here, the legislature's decision to grant the superior court "exclusive jurisdiction" to hear certain disputes by customers against Qualified Special Purpose Entities does not conflict with any existing procedural rules.

Second, the Judicial Review Provisions limit the types of relief that courts can grant. A customer may not seek—and the superior court may not enter—an injunction or stay preventing the application of the True-up Mechanism or the collection of Financing Revenues, nor can the superior court modify the True-Up Mechanism. A.R.S. § 30-1007(E), (F); § 40-608(F), (G). A.R.S. § 30-1007(F) and § 40-608(G) further clarify that, because the court "may not enjoin, restrain, stay, or delay the application of the true-up mechanism," any "modifications" necessitated by the court's miscalculation findings must be made "at the time of and as part of the next periodic

adjustment of the financing charges." The legislature routinely enacts statutes restricting or prohibiting courts from enjoining certain governmental decisions. *See, e.g.,* A.R.S. § 40-254(F) ("[N]o court of this state shall have jurisdiction to enjoin, restrain, suspend, delay or review any order or decision of the [corporation] commission"). Thus, like jurisdictional limitations, the Judicial Review Provisions' prohibitions on injunctive relief are substantive matters not in conflict with any procedural rule.

Third, the Judicial Review Provisions impose 10-day statutes of limitations for actions challenging approved Financing Charges and provide that the Superior Court's decision can be appealed "only to the supreme court" within five days. *See* A.R.S. § 30-1007(E), § 40-608(F); *see also* A.R.S. § 30-1010(E) and § 40-611(F) (imposing similar limitations for actions challenging a Financing Resolution or Financing Order). The legislature plainly has the constitutional authority to adopt a *statute* of limitations. Indeed, there is an entire chapter of Title 12, Ariz. Rev. Stat., devoted to statutes of limitations and other similar limitations on liability. *See* A.R.S. §§ 12-501 *et seq.* And while the Arizona Supreme Court has adopted a rule that dictates when a notice of appeal must be filed, that rule expressly allows for the legislature to set a different deadline. Ariz. R. Civ. App. P. 9(a) (notices of appeal must be filed "no later than 30 days after entry of the judgment from which the appeal is taken, except as otherwise provided in this Rule *or unless the law provides a different time.*") (emphasis added). Here, the Judicial Review Provisions do "provide[] a different time," requiring notices of appeal to be filed within five days, not 30 days. Because ARCAP 9 expressly contemplates that the legislature may decide to set a different appeal deadline, the five-day notice of appeal requirements in A.R.S. § 30-1007(E), § 40-608(F), § 30-1010(E) and § 40-611(F) do not "contradict" the procedural rule. *State ex rel. Collins*, 142 Ariz. at 591.

Finally, the Judicial Review Provisions require parties challenging a decision to adopt a Financing Order or Resolution to prove their claims by "clear and satisfactory evidence." A.R.S. § 30-1010(C), § 40-611(D). A legislative enactment that changes the burden of proof does not violate the separation of powers because the burden of proof is substantive, not procedural. *Seisinger*, 220 Ariz. at 93 ¶ 30 (collecting cases which holding that "legislature is empowered to set burdens of proof as a matter of substantive law").

In sum, the Judicial Review Provisions are substantive because they "create" and "define" individuals' rights to seek review of a regulatory authority's decision to adopt a securitization Financing Order or Resolution. *Fletcher*, 149 Ariz. at 191. These are essentially jurisdictional statutes that tell people considering a challenge to a Financing Order or Resolution or the resulting Financing Charges (1) when to sue, (2) where to sue, and (3) what relief will be available. Because the Judicial Review Provisions are substantive, they are within the legislature's constitutional authority and do not impermissibly invade the judiciary's authority to govern "procedural matters."

II. The Judicial Review Provisions do not violate the anti-abrogation clause.

Arizona's anti-abrogation clause provides that "[t]he right of action to recover damages for injuries shall never be abrogated." Ariz. Const. art. 18, § 6. The anti-abrogation clause prevents the government from eliminating "the ability to invoke judicial remedies for those wrongs traditionally recognized at common law." *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 17 (1986), disapproved of on other grounds by *Torres v. JAI Dining Servs. (Phoenix), Inc.*, 256 Ariz. 212 (2023).

The anti-abrogation clause, however, "does not extend to new actions created by the legislature." *Torres*, 256 Ariz. at 216 ¶ 9 (citing *Boswell*, 152 Ariz. at 14) (quotations omitted). "It extends only to rights of action that existed at statehood or that are based in pre-statehood

rights." *Id.* at 217–18 ¶ 15. In order to be protected by the anti-abrogation clause, the action must involve a claim for damages. *Id*. at 16.

Four subsections within the Judicial Review Provisions pertain to the types of relief that a customer can pursue in court. A.R.S. § 30-1007(E) and § 40-608(F) prohibit a party from bringing "any action to enjoin, restrain, stay or delay" the Financing Charges or True-up Mechanism. A.R.S. § 30-1010(F) and § 40-611(G) similarly provide that "a court in this state does not have jurisdiction to review, enjoin, restrain, suspend, stay or delay" the implementation of any Financing Resolution or Order.

There are two reasons why these provisions do not run afoul of the anti-abrogation clause. *First*, the anti-abrogation clause only protects "action[s] to recover damages for injuries." Ariz. Const. art. 18, § 6. The Judicial Review Provisions, however, circumscribe certain forms of *equitable* relief. *See. e.g.,* A.R.S. § 30-1007(E) ("A party may not bring any action to enjoin, restrain, stay or delay" the Financing Charges or True-up Mechanism); A.R.S. § 30-1010(F) ("[A] court in this state does not have jurisdiction to review, enjoin, restrain, suspend, stay or delay" the Financing Resolution or related actions). *Second*, the Judicial Review Provisions do not appear to implicate any cause of action for damages that was "cognizable at statehood." *Torres*, 256 Ariz. at 216 ¶ 9. To the extent that there may exist some tort claim which could arise from decision to approve a Financing Resolution or Order, or from the Qualified Special Purpose Entity's implementation thereof, the Judicial Review Provisions would not preclude that.

For these reasons, the Judicial Review Provisions do not violate Ariz. Const. art. 18, § 6.

III. H.B. 2679 unconstitutionally invades the Commission's plenary ratemaking authority.

The Commission has the "full power to, and shall, prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected, by

public service corporations within the state for service rendered therein[.]" Ariz. Const. art. 15, § 3. The legislature may enlarge, but not reduce, the Commission's authority. Ariz. Const. art. 15, § 6. The Commission's ratemaking authority is, in other words, "plenary." *Sun City Home Owners Ass'n v. Arizona Corp. Comm'n*, 252 Ariz. 1, 5 (2021) (*citing Johnson Utils., LLC v. Ariz. Corp. Comm'n,* 249 Ariz. 215, 222 ¶ 25 (2020)).

The Commission has complete authority over whether to approve of a proposed securitization transaction. A.R.S. § 40-603(B) (Commission may "approve[], reject[], or approve[] with conditions" a proposed transaction). However, once approved, H.B. 2679 purports to prohibit the Commission from making *any* modifications to the resulting Financing Charges. These restrictions are found in two separate provisions. First, A.R.S. § 40-610(A) provides that the Financing Charges are not "subject to rescission, alteration, amendment, reduction, impairment or adjustment by further action of the commission," including under A.R.S. 40-252, which permits the Commission to amend any of its prior orders "at any time." Second, A.R.S. § 40-608(D) clarifies any subsequent "[a]djustments to the financing charges. . . resulting from the application of the true-up mechanism" are likewise "not subject to regulation by the commission." Because we conclude that the Financing Charges constitute a "charge" for "service rendered" by the public service corporations seeking to avail themselves of securitization, the statutory restrictions in A.R.S. §§ 40-610(A) and -608(D) infringe upon the Commission's plenary authority to "prescribe . . . just and reasonable rates and charges" and are, therefore, unconstitutional.

A. The Financing Charge is a "charge" for "service rendered" by a public service corporation.

When enacting H.B. 2679, the Arizona Legislature seemed to recognize the constitutional dilemma that emerges from allowing a public service company to include a nonbypassable charge on customers' bills while also prohibiting the Commission from ever modifying that charge. *See*

A.R.S. § 40-610(A). To that end, A.R.S. § 40-608(I) states "[r]egardless of whether financing charges are administered, billed, or collected by a servicer that is a public service corporation, the financing charges are not rates or charges imposed or made by a public service corporation for electric service, and the right to receive financing charges and to collect resulting financing revenues is independent of any rate that is established, made or charged by a public service corporation for electric service."

However intentional the drafting, the Legislature's power to enact statutes is subject to any limitations imposed by a constitutional provision, including any limitation that may be implied by the text of the constitution or its structure taken as a whole. *Citizens Clean Elections Comm'n v. Myers*, 196 Ariz. 516, 520–21 ¶ 14 (2000). Thus, in order to assess whether H.B. 2679 imposes unconstitutional restrictions on the Commission's authority to prescribe "just and reasonable . . . charges," we begin by considering whether the Financing Charges are "charges" within the meaning of art. 15, § 3.

In this context, a "charge" is one that is "made and collected[] by public service corporations" and "for service rendered" within the State. Ariz. Const. art 15, § 3. The Financing Charges meet both criteria, and are therefore "charges" subject to the Commission's constitutional ratemaking authority.

1. The Financing Charge is a charge for electric "service rendered."

Electric generation, transmission, and distribution is a complex undertaking, and, as a result, the Commission regulates more than the price per kWh that public service corporations can charge for the electricity they provide. The Arizona Constitution gives the Commission "full power" to regulate both "rates and charges." Ariz. Const. art 15, § 3. "Rates" and "charges" are different terms which we presume capture different concepts, each of which must be given meaning. *Nicaise v. Sundaram*, 245 Ariz. 566, 568 ¶ 11 (2019) ("A cardinal principle of statutory

interpretation is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous."). In order to respond to the present Request, however, we need not decide exactly where the line between "rates" and "charges" falls. Rather, we conclude the Commission's constitutional authority to regulate "rates and charges" necessarily includes both the cost of the electricity itself, as well as all the other costs incidental to providing electricity that a public service corporation might seek to pass on to its customers.

Related statutes and regulations support this reading. For example, in the statute which describes the Commission's power "to determine and prescribe rates," the legislature defined "rates" and "charges" to include those paid for "any service, product or commodity, or *in connection therewith*[.]" A.R.S. § 40-203 (emphasis added). Likewise, the Commission itself defined "customer charge" as "[t]he amount the customers must pay the utility for the availability of electric service, *excluding any electricity used*, as specified in the utility's tariffs." Ariz. Admin. Code R14-2-201(10) (emphasis added).

Having established that there is a distinction between "rates" and "charges," we further conclude that the Financing Charge is a charge "for service" because: (1) the cost underlying the securitization transaction was incurred by the public service corporation for the purpose of providing electric service; (2) the customer is responsible for the charge solely by virtue of their receipt of electric service from public service corporation; and (3) the customer must continue to pay the Financing Charge in order to continue to receive electric service from the public service corporation.

First, the Financing Charges only exist because a public service corporation incurred a cost as a result of its provision of electric service within the State and now wants to offload some of that cost through a securitization transaction. *See* A.R.S. § 40-601(17) (defining "transition asset"

to include "any electric power generation, transmission, or distribution facilities, including other property or equipment that is used by the applicant and that is identified in an application for a financing order"). Indeed, one purpose of enacting H.B. 2679 was to "enable public service corporations to achieve the benefits of securitization for customers by reinvesting capital now committed to paying the costs related to the production and delivery of energy for new facilities, resources or other assets." A.R.S. § 40-602(B). In other words, the securitization transaction and the charges through which the public service corporation funds its bond service are a means to certain ends (cheaper financing, increased access to capital), all of which are the product of the public service corporation's provision of electric service within the State.

Second, the sole criteria for determining whether a person is responsible for paying the Financing Charges is whether they receive electric service from a public service corporation. The Financing Charges "are nonbypassable, are mandatory, and apply to all *customers*." A.R.S. § 40-608(A) (emphasis added). Customers are those that "receive retail electric service" from the "applicant," A.R.S. § 40-601(5), and, by definition, an applicant is a "public service corporation that provides electric service." A.R.S. § 40-601(2). In other words, all "customers" are responsible for payment of the Financing Charges, and "customers" are defined exclusively by their relationship to—and receipt of electric service from—a public service corporation. This makes the Financing Charges a product of the "service rendered" to those customers.

Third, and most importantly, the Financing Charges are paid first, before any other rates, charges, taxes or fees billed by the public service corporation. "If a customer pays only a portion of the charges stated on a bill provided by a Servicer that includes Financing Charges, the partial payment shall be first applied to the payment of Financing Charges." A.R.S. § 40-609(B). This means that payment of the Financing Charges is a necessary prerequisite to receiving service from

the public service corporation. The Financing Charges must be paid in order for a customer to receive service at all.

For example, assume that a customer receives a $30 bill from her electric utility, and this $30 bill includes a $15 Financing Charge. If the customer pays only $15 to the utility, the full $15 dollars of that customer's payment will be applied to the Financing Charge and deemed Financing Revenues belonging to the Qualified Special Purpose Entity. The remaining $15 of the bill, which is attributable to Commission-approved rates and charges, will be unpaid. If this happens for several months in a row, eventually the customer may be in a position where the utility disconnects her electric service, despite having paid the utility monthly an amount equal to the other Commission-approved rates and charges shown on her utility bill. A charge that appears on a bill from a public service corporation and is a prerequisite to receiving "service" from that public service corporation cannot reasonably be construed as falling outside the Commission's ratemaking authority. To conclude otherwise would unreasonably elevate form over function.

2. The Financing Charges are "collected by" a public service corporation.

In order to fall within the Commission's exclusive authority, the "charge" must also be "made and collected by a public service corporation[]." Ariz. Const. art 15, § 3 (comma omitted). H.B. 2679 uses the construct of the "Qualified Special Purpose Entity" to create distance between the customer who pays the Financing Charge and the public service corporation who benefits from the securitization transaction.

By statute, Financing Charges are payable to the Qualified Special Purpose Entity. A.R.S § 40-601(6); *see also* A.R.S. § 40-608(I) ("Financing revenues are the property of the qualified special purpose entity and are not the property of the servicer or any other public service corporation."). The Qualified Special Purpose Entity is not itself a public service corporation

because it is not engaged in "furnishing . . .electricity for light, fuel, or power." Ariz. Const. art. 15, § 2. Instead, the Qualified Special Purpose Entity is a "wholly owned" subsidiary of the applicant public service corporation, created for the sole purpose of owning the Transition Property and repaying the Transition Bonds. A.R.S. § 40-601(13).

Practically speaking, it will be the customer's own public service company—not the Qualified Special Purpose Entity—that physically collects the Financing Charges. The Qualified Special Purpose Entity can use a "servicer" to "calculate, bill or collect financing charges on behalf of a qualified special purpose entity" and performed related administrative services. A.R.S. § 40-601(14). A.R.S. § 40-601(14)(b)(ii) does permit a "third-party" to act as a servicer, but only "in the event an applicant is unable to act as a servicer." A.R.S. § 40-601(16).[7] Thus, in almost all circumstances, the Financing Charge will appear on the customer's bill from his public service corporation along with every other Commission-regulated rate and charge, and the customer will reasonably (and correctly) understand the Financing Charge to be a charge that must be paid in order to continue to receive electric service from that public service corporation. *See* A.R.S. § 40-609(B).

But even if a Qualified Special Purpose Entity does not use the applicant public service company as its servicer, payment of the Financing Charge is a "nonbypassable" condition of continued service. A.R.S. § 40-601(6). In other words, if the customer wants to continue receiving electric service from his public service corporation, he must pay the full Financing Charge because

[7] Most likely, this would only occur in a situation where the applicant no longer exists (and therefore is not billing customers for service anymore). *See, e.g.,* A.R.S. § 40-610(E)(1) (Financing Charges survive "the bankruptcy, reorganization, sale, dissolution or insolvency of the Applicant" and its successors).

any dollar paid toward "a bill provided by a servicer that includes financing charges" must be "first applied to the payment of financing charges." A.R.S. § 40-609(B).

Again, it would be an absurd elevation of form over function to allow the Financing Charges to avoid any prospective Commission scrutiny simply because the public service corporation creates a wholly owned subsidiary entity that is legally entitled to the revenues generated by the Financing Charges. *State v. LeMatty*, 121 Ariz. 333, 337 (1979) (pragmatic construction is required if technical construction would lead to absurdity). For purposes of deciding whether A.R.S. §§ 40-610(A) and -608(D) unconstitutionally restrict the Commission's ratemaking authority, we conclude that the Financing Charges are "collected by" the public service corporation.

B. A.R.S. §§ 40-608(D) and 40-610(A) unconstitutionally restrict the Commission's authority and duty to set just and reasonable charges.

The Financing Charges are charges for service rendered by a public service corporation. The Commission, therefore, must have "full power" to regulate them. Ariz. Const. art. 15, § 3. Indeed, the Commission has an *obligation* to determine that all rates and charges are "just and reasonable." *Id*. Courts have consistently held that "just and reasonable rates" are those that are fair to both consumers and public service corporations. *See Arizona Cmty. Action Ass'n v. Arizona Corp. Comm'n*, 123 Ariz. 228, 231 (1979). In the securitization context, this means that the Arizona Constitution requires that the Commission retain authority to assess whether the Financing Charges remain fair to consumers over time.

Rate-setting methods that completely remove the Commission from the equation are unconstitutional. *See Phelps Dodge Corp. v. Arizona Elec. Power Co-op., Inc*., 207 Ariz. 95, 107 ¶ 31 (App. 2004), as amended on denial of reconsideration (Mar. 15, 2004). In *Phelps Dodge*, the Arizona Court of Appeals considered a Commission-adopted rule governing how rates are set for

"electric service providers." The rule provided: "Market determined rates for Competitive Services . . . shall be deemed to be just and reasonable." *Id.* at 106 ¶ 27 (quoting Ariz. Admin. Code R14-2-1611(A)). Opponents of that rule argued that "the Commission improperly abandoned its constitutional duty to prescribe just and reasonable rates by promulgating [the rule]." *Id.* The Court agreed, holding: "although the Commission may be influenced by market forces in determining what rates are 'just and reasonable,' the Commission may not abdicate its constitutional responsibility to set just and reasonable rates by allowing competitive market forces alone to do so." *Id.* at 107 ¶ 32. If "market determined rates alone are deemed just and reasonable" the Commission cannot fulfill its constitutional "mandate" to set just and reasonable rates. *Id.* ¶ 31 (cleaned up).

Decades prior, the Arizona Supreme Court similarly rejected a rate that was "based solely on the percentage of return on [a public service corporation's] common stock equity." *Arizona Cmty. Action Ass'n*, 123 Ariz. at 230. The Court explained: "[a]lthough we see no reason why return on common stock equity may not be taken into account in fixing a rate increase, the troublesome aspect here is that the Commission made that factor the sole criterion for triggering an increase." *Id.* at 231. Because the Commission's rate-setting mechanism had the effect of "tying rates to one factor over which APS exercises total control," this caused a "complete divorcement from the interest of the public," which the Arizona Constitution does not permit. *Id.*

Both the Financing Charges and the True-up Mechanism that adjusts them over time are "irrevocable" and not "subject to rescission, alteration, amendment, reduction, impairment or adjustment by further action of the commission." A.R.S. § 40-610(A). Section 40-608(D) says the same thing even more directly: neither the Financing Charges nor the True-up Mechanism are "subject to regulation by the commission." Together, Sections 40-610(A) and -608(D) deprive the

Commission of "full power" to set just and reasonable charges because it puts a variable charge for service permanently outside the Commission's control. Here, the Financing Charges are determined not by market conditions like in *Phelps Dodge*, or stock price like in *Arizona Cmty. Action Ass'n*, but on a pre-set formula—the True-up Mechanism—that is completely beyond the Commission's control.

If the Commission cannot delegate its constitutional obligations to an outside force (*see Johnson Utils*., 249 Ariz. at 221 ¶ 22), the legislature cannot either. Ariz. Const. art. 15, § 6 (the legislature may enlarge, but not reduce, the Commission's authority).

C. The aspects of the securitization transaction over which the Commission retains control are insufficient to solve the constitutional problem caused by the irrevocable Financing Charges.

The Commission does have some authority over the structure of the Financing Order and the ultimate impact of the Financing Charges on customers. But none of these carve-outs for Commission input and discretion restore the Commission's control to the "full power" that the Constitution requires.

First, the Commission is not required to approve any Financing Orders, and has the authority to deny or approve with conditions a proposed Financing Order. A.R.S. § 40-603(B). So, in theory, the Commission could refuse to approve any proposed Financing Order, thereby avoiding the constitutional problem that arises from the irrevocable Financing Charges that a Financing Order would authorize. But once a Financing Order is approved, the Financing Charge will appear on customers' bills until the bonds are repaid and the Commission will have no discretion or authority to modify the charge, even if changed circumstances render the charge unjust or unreasonable. A.R.S. § 40-610(A).

This permanent and absolute limitation on the Commission's authority is constitutionally problematic. In its application for a Financing Order, the public service corporation must, among

other requirements, "estimate the transition costs and financing costs," "describe the expected characteristics of the transition bonds," and "project the financing charges." A.R.S. § 40-603(A)(2)-(4). The public service corporation must also "[c]ommit to making a filing with the commission that will describe the final structure and pricing of the transition bonds, a statement of actual up-front financing costs and an updated calculation of the estimate financing charges." A.R.S. § 40-603(A)(12). But that filing would necessarily come after the Commission has issued a Financing Order approving the proposed transaction and the bonds have issued, causing the Financing Charges to become irrevocable. A.R.S. § 40-610(A) (Financing Charges are irrevocable "[o]n or after the issuance of transition bonds"). Thus, the Commission would be powerless to revoke or modify its Financing Order, even if the final terms of the transaction did not match the expected terms reflected in the application that the Commission found to be "just and reasonable." A.R.S. § 40-603(B)(4). This is not "full power." Ariz. Const. art 15, § 3.

Second, the Commission can consider the "bill impact" of the Financing Charges when "determining the design of the rates within its jurisdiction or allocation of the costs to and among" ratepayers. A.R.S. § 40-604(D). But the fact that the Commission retains plenary authority over its traditional ratemaking function cannot serve as a stand-in for the lack of authority to modify the Financing Charges themselves. To the contrary, that A.R.S. § 40-604(D) suggests that the Commission should be considering the Financing Charges in its rate design only further demonstrates why the charges are properly understood to be "for service."

Finally, while the Commission retains "continuing jurisdiction over the terms of a transition bill services tariff," A.R.S. § 40-609(A), the law expressly prohibits the Commission from altering the Financing Charges or True-up Mechanism that are reflected in that tariff. A.R.S. § 40-610(A) (the Financing Charges "shall not be subject to rescission, alteration, amendment,

reduction, impairment or adjustment by further action of the commission"); *see also* A.R.S. § 40-608(D) (Financing Charges and True-up Mechanism are "not subject to regulation by the commission"). This means that the Commission can control who collects the Financing Charges and how they are reflected on customers' bill, but not how much is collected, no matter how external circumstances change over time. The Arizona Constitution, however, requires that the Commission retain "full power" to decide whether those Financing Charges are just and reasonable.

Conclusion

A.R.S. §§ 40-608(D) and 40-610(A) violate the Arizona Constitution art. 15, § 3 because they deprive the Commission of the power to—and impermissibly interferes with the Commission's obligation to—"prescribe . . . just and reasonable rates and charges to be made and collected, by public service corporations within the state for service rendered therein."

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