



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>May 4, 2016</p>	<p>No. I16-005 (R16-002)</p> <p>Re: The authority of the Arizona Corporation Commission or individual Commissioners to obtain information from a public service corporation and its affiliates.</p>
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To: Commissioner Robert L. Burns
Arizona Corporation Commission

Questions Presented

You have requested a formal opinion on the following questions:

1. “Does A.R.S. § 40-241 give an individual Commissioner the power to gather information related to a public service corporation and its affiliates’ political contributions, lobbying and charitable contributions in order to ensure that all funds expended are consistent with the Commission’s authority to set just and reasonable rates? In other words, does the statute give an individual Commissioner the power to look at this information because it is or may be reasonably necessary information for effective ratemaking and to protect the public interest?”

2. “Does A.R.S. § 40-241 permit an individual Commissioner to investigate the degree to which a public service corporation and its affiliates are intertwined in terms of organization, operation and structure in order to ensure the security and financial health of the

affiliates in order to protect consumers from overreaching and abuse by public service corporations and their affiliates such that an affiliate's operations do not hinder the operations of the public service corporation? Specifically, does the statute permit an individual Commissioner to inspect a public service corporation's and/or its affiliates' accounts, books, papers and documents in order to conduct such a review?"

3. "Does Article XV of the Arizona Constitution give the Commission and/or an individual Commissioner the power to require a public service corporation to report information about itself or about its parent, subsidiary, and other affiliated corporations relevant to the Commission's authority under Article XV, particularly in light of *Arizona Corporation Commission v. State of Arizona ex rel. Grant Woods*, 171 Ariz. 286, 830 P.2d 807 (1992); *Arizona Public Service Company v. Arizona Corporation Commission*, 157 Ariz. 532, 760 P.2d 532 (1988), and Article 8 of the Arizona Administrative Code (Affiliated Interest Rules)?"

Summary Answer

The questions presented inquire regarding the authority of the Arizona Corporation Commission (Commission) and individual Commissioners under Article XV of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") § 40-241.

The Commission has broad constitutional authority relating to reporting requirements and inspection of any Public Service Corporation ("PSC") and its affiliates.¹ Under Article XV, Section 13 of the Arizona Constitution, the Commission has the power to require reports from PSCs and companies whose stock is offered for sale to the public ("Public Companies"), which could include PSC affiliates. Furthermore, under Article XV, Section 3, the Commission has the

¹ As used in this opinion, the term "affiliate" means any other entity directly or indirectly controlling or controlled by, or under direct or indirect common control with, a PSC. *See, e.g.*, A.A.C. R14-2-801(1).

authority to adopt rules reasonably necessary for effective ratemaking. Pursuant to this authority, the Commission has adopted the Affiliated Interest Rules, Ariz. Admin. Code (“A.A.C.”) R14-2-801 through -806, which include reporting requirements that apply to both PSCs and certain affiliates.

The Legislature has also granted individual Commissioners limited powers under A.R.S. § 40-241. Under this statute, an individual Commissioner is authorized to inspect the accounts, books, papers, and documents of a PSC. It also authorizes an individual Commissioner to examine under oath officers, agents, and employees of a PSC in relation to the PSC’s business and affairs. Therefore, a Commissioner may use the statutory authority provided by Section 40-241 to gather information from a PSC related to the amount spent by a PSC on political and charitable contributions and lobbying, so long as that authority is exercised within constitutional bounds. This authority also permits an individual Commissioner to gather information from a PSC regarding the degree to which it is intertwined with its affiliates (in terms of organization, operation, and structure). But, applying rules of statutory construction, the term “public service corporation” in this statutory provision does not include affiliates.

Background

Relevant Sources of Commission Authority

The Commission is a regulatory check on corporations “designed to promote both democratic control and competitive economic forces.” *Ariz. Corp. Comm’n v. State ex rel. Woods*, 171 Ariz. 286, 291 (1992). The Framers drafted Article XV of the Arizona Constitution, which establishes the Commission, with a “pronounced, progressive-era concern with regulating corporations, a concern enhanced by the perceived dominance of large railroad and mining companies during the territorial era.” John D. Leshy, *The Arizona State Constitution* 356 (2d ed.

2013). The Framers did, however, “limit [the Commission’s] most sweeping regulatory jurisdiction to [PSCs].” *Id.* at 357.

Article XV, Section 3 of the Arizona Constitution grants the Commission, but not individual Commissioners, the authority to set rates and make reasonable rules, regulations, and orders governing the transaction of business by PSCs in Arizona.² While some earlier cases construed the Commission’s powers under this Section more broadly, Arizona courts have more recently assumed that the Commission’s regulatory power under Section 3 is “restrict[ed] . . . to its ratemaking function,” while acknowledging that the Commission has discretion in “determin[ing] . . . what regulation is reasonably necessary for effective ratemaking.” *Sierra Club—Grand Canyon Chapter v. Ariz. Corp. Comm’n*, 237 Ariz. 568, 572 ¶ 10 (App. 2015), *review denied* (Feb. 9, 2016) (quoting *Woods*, 171 Ariz. at 294); *see also Phelps Dodge Corp. v. Ariz. Elec. Power Coop., Inc.*, 207 Ariz. 95, 111 ¶ 54 (App. 2004). Although Section 3 does not expressly address inspection, investigation, or reporting, the Arizona Supreme Court, based on the authority that Section 3 confers, upheld the Commission’s Affiliated Interest Rules. *Woods*, 171 Ariz. at 297. These rules require: (1) Commission approval of a utility holding company’s organization or reorganization and transactions between utilities and affiliates; (2) that books and records of affiliates that transact business with a utility be made available for inspection in

² Section 3 provides, in relevant part:

The corporation commission shall have 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, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the state, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations

certain respects; and (3) that reports of diversification plans for utilities and utility holding companies be provided to the Commission. *See* A.A.C. R14-2-801 through -806.

Under Article XV, Section 4 of the Arizona Constitution, the Commission and individual Commissioners may “inspect and investigate the property, books, papers, business, methods, and affairs of any [Public Company] . . . and of any [PSC] doing business within the state.” The Legislature has also provided the Commission and individual Commissioners statutory authority regarding PSC inspections and examinations:

The commission, each commissioner and person employed by the commission may, at any time, inspect the accounts, books, papers and documents of any public service corporation, and any of such persons who are authorized to administer oaths may examine under oath any officer, agent or employee of such corporation in relation to the business and affairs of the corporation.

A.R.S. § 40-241(A).

Finally, Article XV, Section 13 authorizes the Commission, but not individual Commissioners, to require reports to the Commission under oath from PSCs and Public Companies, and to require that such companies provide such information “concerning their acts and operations” as may be required by law or by the Commission. *See also Ariz. Pub. Serv. Co. v. Ariz. Corp. Comm’n*, 157 Ariz. 532, 536 (1988) (interpreting Commission order issued under Section 13); A.R.S. § 40-204 (relating to reports by PSCs to Commission).

Limitations on Commission Authority

The United States Supreme Court has recognized a First Amendment right-of-association privilege against “compelled disclosure of affiliation with groups engaged in advocacy.” *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). The Supreme Court enforced this privilege when

the government “laid no adequate foundation for its direct demands.” *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 555 (1963). The Supreme Court has further clarified that corporations—including those granted government monopolies—are generally entitled to First Amendment speech protections.³ *See, e.g., First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 775-76 (1978) (interpreting the First Amendment’s speech protections as applying to corporations); *NAACP v. Button*, 371 U.S. 415, 428-29 (1963) (analyzing First Amendment speech protections for political speech conducted through corporations); *Consol. Edison Co. of NY v. Pub. Serv. Comm’n*, 447 U.S. 530, 534 n. 1 (1980) (“Nor does Consolidated Edison’s status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights.”).

When First Amendment concerns arise, courts considering allegations of the government’s intrusion on speech or associational rights must evaluate whether there is a compelling or substantial government interest in doing so. *See, e.g., Alabama*, 357 U.S. at 463. Arizona’s specific authorizations noted above (allowing the Commission and its members to investigate PSCs’ affairs in order to achieve the Commission’s purposes on behalf of the public interest) will satisfy this inquiry where any request is substantially related to those purposes. *See, e.g., John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010).

³ Notwithstanding this entitlement to speech protections, right-of-association privilege concerns may well be at their nadir for expenditures by those PSCs that are subject to extensive regulation in exchange for a government-imposed monopoly and rate of return. *See, e.g., United States v. Hubbard*, 650 F.2d 293, 306 (D.C. Cir. 1980) (identifying a corporation’s individual attributes, including “the nature and purposes of the corporate entity,” as determining the availability of any privacy right); *Sw. Transmission Co-op., Inc. v. Ariz. Corp. Comm’n*, 213 Ariz. 427, 431-32 ¶ 23 (App. 2006) (“To be a [PSC,] an entity’s ‘business and activities must be such as to make its rates, charges and methods of operation[] a matter of public concern, clothed with a public interest to the extent contemplated by law which subjects it to governmental control’” (quoting *Trico Elec. Coop., Inc. v. Corp. Comm’n*, 86 Ariz. 27, 34-35 (1959))).

Courts also review exercises of agency inspection and investigation authority for reasonableness. *See Carrington v. Ariz. Corp. Comm'n*, 199 Ariz. 303, 305 ¶ 9 (App. 2000) (citing *People ex rel. Babbitt v. Herndon*, 119 Ariz. 454, 456 (1978)). The United States Supreme Court has identified a three-part test for reasonableness: “[I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.” *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). The *Morton Salt* test is consistent with the first three factors Arizona courts commonly use for reasonableness in cases of Commission requests for information. *See Carrington*, 199 Ariz. at 305, ¶ 9, 18 P.3d at 99 (citing *Herndon*, 119 Ariz. at 456). Consistent with further explication by the United States Supreme Court, Arizona courts also have provided a fourth requirement: if an inquiry becomes “a tool of harassment and intimidation rather than a means to gather appropriate information, the appropriate court may intrude and stop the incursion into the constitutional liberties of the parties under investigation.” *Polaris Int’l Metals Corp. v. Ariz. Corp. Comm’n*, 133 Ariz. 500, 507 (1982); *see also United States v. Powell*, 379 U.S. 48, 57-58 (1964); *Carrington*, 199 Ariz. at 305 ¶ 9 (stating all four factors).

While the subject matter of the questions presented may implicate these limitations, application of any potential First Amendment or reasonableness factors without specific facts and circumstances to evaluate would be speculative; thus further analysis of these issues is beyond the scope of this opinion.

Analysis

Question 1: The authority of an individual Commissioner under A.R.S. § 40-241 to gather information about a PSC and its affiliates' political contributions, lobbying, and charitable contributions.

Section 40-241 empowers the Commission or an individual Commissioner to gather information in two ways. First, the Commission, each Commissioner, and any person employed by the Commission may “at any time, inspect the accounts, books, papers and documents” of any PSC. Second, any Commissioner or Commission employee who is authorized to administer oaths may also “examine under oath, any officer, agent or employee of such [PSC] in relation to the business and affairs of the [PSC].” A.R.S. § 40-241.

Section 40-241 confers power on individual Commissioners as well as the entire Commission. The plain language of Section 40-241(A) specifically refers to not just “[t]he commission” but also “each commissioner.” By using the language “each commissioner,” the Legislature clearly authorized individual Commissioners to exercise the powers in this statute. *J.D. v. Hegyi*, 236 Ariz. 39, 40-41 ¶ 6 (2014) (“If the language [of a statute] is ‘subject to only one reasonable meaning,’ [courts] apply that meaning.” (citation omitted)); *see also Fields v. Elected Officials’ Ret. Plan*, 234 Ariz. 214, 218 ¶ 16 (2014) (stating that “the legislature generally avoids redundancy”).

The authority conferred by Section 40-241 applies to inspections of PSCs and examinations of PSC personnel; it does not extend to affiliates of PSCs. Section 40-241(A) refers to any “public service corporation,” which is not defined in the Arizona Revised Statutes but in the Arizona Constitution. Ariz. Const. art. XV, § 2. Therefore, the term’s interpretation

should be consistent with its constitutional definition, which does not include affiliates. *See id.*; *Stoecker v. Brush Wellman, Inc.*, 194 Ariz. 448, 453 ¶ 17 (1999) (“The statute’s text is read *in pari materia* with the constitutional provision that authorizes it.”) (citation omitted)); *cf. Rural/Metro Corp. v. Ariz. Corp. Comm’n*, 129 Ariz. 116, 118 (1981) (noting that Article XV, Section 6 of the Arizona Constitution “does not allow the legislature to give ‘public service corporation’ designation to corporations not listed in Article 15, § 2”). This conclusion is bolstered by the fact that another pertinent statute specifically refers to “affiliate” separately from a PSC, even though that language was enacted after Section 40-241. *See* 1998 Ariz. Sess. Laws ch. 209, § 23 (2d Reg. Sess.) (amending A.R.S. § 40-202(C)(2), (C)(6)); *State v. Garza Rodriguez*, 164 Ariz. 107, 111 (1990) (“[W]hen determining legislative intent, court[s] may consider both prior and subsequent statutes in *pari materia*.” (citation omitted)).

In sum, pursuant to Section 40-241, an individual Commissioner may gather information regarding a PSC’s political and charitable contributions, and lobbying expenditures, by inspecting the books and records of a PSC, and examining under oath PSC personnel.

Question 2: The authority of an individual Commissioner under A.R.S. § 40-241 to investigate a PSC and its affiliates’ corporate organization, operation, and structure to ensure the security and financial health of the affiliate in order to protect consumers.

Consistent with the answer to Question 1, based on the statute’s plain language, Section 40-241 confers power on individual Commissioners, not just the Commission as a whole. Based on the use of the term “public service corporation,” the statute empowers a Commissioner to investigate by inspecting the accounts, books, papers, and documents of a PSC, but not any affiliates. The statute also authorizes an individual Commissioner to investigate by

examining under oath officers, agents, and employees of a PSC in relation to the PSC's business and affairs. As noted in this question, such an investigation's purpose would be to ascertain any risks the affiliates create regarding the financial wellbeing or effective operation of the PSC.

Question 3: The Commission and individual Commissioners' authority under Article XV of the Arizona Constitution, Affiliated Interest Rules, and related case law to require a PSC to report information about itself or its parent, subsidiary, and other affiliated corporations relevant to the Commission's constitutional authority.

Reporting requirements pursuant to Article XV, Section 3, including the Affiliated Interest Rules.

Under Article XV, Section 3 of the Arizona Constitution, the Commission may require reports pursuant to rules that are reasonably necessary for effective ratemaking. Section 3 grants the Commission authority to “prescribe . . . just and reasonable rates” and “make reasonable rules, regulations, and orders, by which [PSCs] shall be governed in the transaction of business within the state.” Ariz. Const. art. XV, § 3. The authority conferred by Section 3 (ratemaking and rulemaking) must ultimately be exercised by the Commission, not an individual Commissioner. *See, e.g.*, Ariz. Const. art. XV, § 6 (empowering the Legislature to make rules and regulations for Commission proceedings); A.R.S. § 40-102(C) (requiring assent of a majority of Commissioners for an action or order to be “the act of the [C]ommission,” or a “finding, order, or decision of the [C]ommission”). In addition, Section 3 refers to the “corporation commission.” Other provisions of Article XV refer to “the several members” of the Commission, showing that the drafters knew how to confer authority on individual Commissioners and did not do so here. *See* Ariz. Const. art. XV, § 4; *Roubos v. Miller*,

214 Ariz. 416, 420 ¶ 20 (2007) (where the Legislature knows how to do something, as shown elsewhere in the statutory scheme, absence of such language indicates absence of such intent).

Section 3 does not expressly address requiring reports from PSCs. However, in 1990, the Commission adopted the Affiliated Interest Rules. *Woods*, 171 Ariz. at 288. The rules, which apply to the largest utilities, require Commission approval of the organization or reorganization of a utility holding company and transactions between utilities and affiliates. A.A.C. R14-2-801(5), 803, 804(B). They also require that the books and records of affiliates that transact business with utilities be made available for Commission inspection to the extent necessary to audit transactions with utilities. A.A.C. R14-2-804(A). In addition, the rules require reports to the Commission of diversification plans for utilities and utility holding companies. A.A.C. R14-2-805. In *Woods*, the Arizona Supreme Court reviewed whether these rules were constitutional under Article XV, Section 3. *See Phelps Dodge Corp.*, 207 Ariz. at 116 ¶ 83 (discussing *Woods*'s approach to question of rules' constitutionality). The court upheld the rules, concluding that they were "reasonably necessary for effective ratemaking." *Woods*, 171 Ariz. at 294, 297. Under *Woods*, the Commission has authority to adopt additional reporting requirements for PSCs and affiliates under Article XV, Section 3, so long as the additional requirements are reasonably necessary for effective ratemaking. *See id.*

Reporting requirements under Article XV, Section 13.

Under Article XV, Section 13, the Commission, but not individual Commissioners, may require reports and information concerning the "acts and operations" of a PSC or Public Company. Because the language of Section 13 authorizes reports "as may be required by law, or by the corporation commission," the authority to require reports is not conferred on an individual Commissioner. *See also* A.R.S. § 40-204(A), (B) (vesting authority in the Commission). The

power of the Commission to require reports from companies other than PSCs under Article XV, Section 13 was litigated in *Arizona Public Service Co.*, 157 Ariz. 532. The court concluded that a corporation that is not a PSC is subject to the powers set forth in this section if it is a Public Company:

[T]he powers conferred upon the Commission to inspect and investigate under § 4 and to require reports under § 13 extend to all corporations which offer stock for sale to the public. They do not extend to those corporations which do not do so.

Id. at 535. Therefore, this power could relate to an affiliate of a PSC only if the affiliate is a Public Company.

Conclusion

As set forth in this opinion, the Commission, and in some instances individual Commissioners, have the authority to gather information, inspect, and require reports related to the topics specified in the questions presented, subject to fact-specific constitutional considerations.

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