

SUPREME COURT OF ARIZONA

STATE OF ARIZONA *ex rel.* MARK
BRNOVICH, Attorney General,

Petitioner,

v.

SUSAN BITTER SMITH,

Respondent.

Case No.:

PETITION FOR SPECIAL ACTION

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INTRODUCTION

The State of Arizona *ex rel.* Mark Brnovich, Attorney General, requests that this Court issue a writ of *quo warranto* to Susan Bitter Smith directing that she cease functioning as a Corporation Commissioner (“Commissioner”). As a paid lobbyist and trade association executive for several companies regulated by the Arizona Corporation Commission (“Commission”), Ms. Bitter Smith is ineligible to serve as a Commissioner under A.R.S. § 40-101.

The Arizona Constitution establishes the Commission as a regulatory check on corporations that was “designed to promote both democratic control and competitive economic forces.” *Ariz. Corp. Comm’n v. State ex rel. Woods*, 171 Ariz. 286, 291 (1992) (citing John D. Leshy, *The Making of the Arizona Constitution*, 20 Ariz. St. L.J. 1, 89-90 (1988)). The Commission “reflects the framers’ 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). Therefore, the framers gave the Commissioners “sweeping authority” over the business activity they regulate, *Jennings v. Woods*, 194 Ariz. 314, 327-28 ¶¶ 66 (1999), and vested them with “not only legislative but the judicial, administrative, and executive functions of the government.” *State v. Tucson Gas, Elec. Light & Power Co.*, 15 Ariz. 294, 306 (1914).

Consistent with the purpose of establishing an effective regulatory check, the Legislature enacted a broad statute to prevent conflicts of interest related to the Commission. Section 40-101 prohibits both Commissioners and Commission employees from (i) being “in the employ of, or holding an official relation to” or being “pecuniarily interested” in (ii) a corporation or person “subject to regulation” by the Commission. If a Commissioner was ineligible under § 40-101 at the time of his or her election, he or she cannot “cure the defect once in office” but rather is excluded from office altogether. *Jennings*, 194 Ariz. at 330 ¶ 82.

Ms. Bitter Smith is ineligible under § 40-101 for multiple reasons. *First*, since long before her election in 2012 and continuing to this day, Ms. Bitter Smith has been an authorized lobbyist under A.R.S. § 41-1231(1) for two affiliates of Cox Enterprises, Inc. (“Cox”)—CoxCom, LLC (“CoxCom”) and Cox Communications Arizona, LLC (“Cox Communications Arizona”). She therefore holds “official relation[s]” to those entities, which are “subject to regulation” by the Commission. A Cox affiliate provides phone service regulated by the Commission, and under Ariz. Admin. Code (“A.A.C.”) R14-2-801 to -806, CoxCom and Cox Communications Arizona must report information and obtain Commission approval for certain transactions.¹

¹ A copy of these rules is Exhibit (“Ex.”) 1 in the Appendix to Petition for Special Action at pages APP0007-12. Unless otherwise noted, all exhibit citations in this Petition are to the consecutive page numbering in Vols. I and II of the Appendix.

Second, Ms. Bitter Smith is, and was since long before her election, the Executive Director and designated lobbyist for the Southwest Cable Communications Association (“SWCCA”), a trade association for cable companies. This role creates “official relation[s]” to the members of SWCCA, including the Arizona cable affiliates of Cox, Comcast Corporation (“Comcast”), Cequel Corporation (“Suddenlink”), and Time Warner Cable Inc. (“Time Warner”). *See, e.g.*, A.R.S. § 41-1231(3) (defining “designated lobbyist”). The Arizona cable affiliates of Cox, Comcast, and Suddenlink are “subject to regulation” for reporting requirements and transaction approval under A.A.C. R14-2-801 to -806. In addition, the scope of Ms. Bitter Smith’s “official relation[s]” for purposes of § 40-101 covers all affiliates with the same ultimate parent as each member of SWCCA, including the affiliates of Cox, Comcast, Suddenlink, and Time Warner that provide phone service regulated by the Commission. *See, e.g., State ex rel. Bullard v. Jones (Jones)*, 15 Ariz. 215, 218 (1914) (analyzing whether subsidiary insurance companies were “subject to regulation” under predecessor to § 40-101, even where Commissioner held stock only in parent holding company).

Third, Ms. Bitter Smith is, and was since long before her election, “pecuniarily interested” in SWCCA’s members and their affiliates because she is paid over \$150,000 per year for her full-time role at SWCCA. That salary is on top of the \$79,500 per year that Ms. Bitter Smith is paid for serving as a

Commissioner. SWCCA's revenue primarily comes from membership dues, and Ms. Bitter Smith's salary constitutes forty percent of SWCCA's budget. As with her official relations to SWCCA's members, Ms. Bitter Smith's pecuniary interest relates to the entire corporate structure of each SWCCA member at issue, not simply one particular affiliate. *See, e.g., Jones*, 15 Ariz. at 227-28.

In sum, Ms. Bitter Smith has multiple "official relation[s]" and "pecuniar[y] interest[s]" prohibited by § 40-101, and each by itself makes her ineligible to hold office. Because these conflicts existed when Ms. Bitter Smith won election in 2012, she cannot remedy them but instead must "cease functioning as a commissioner." *Jennings*, 194 Ariz. at 332 ¶ 92.

JURISDICTIONAL STATEMENT

This Court should accept jurisdiction because this case involves a statewide official's eligibility for office, requires prompt resolution, and can be decided solely on issues of law. Article 6, Sections 5(1), (6) of the Arizona Constitution and A.R.S. §§ 12-2041 to -2045 vest this Court with original jurisdiction to issue a writ of *quo warranto* to a state officer. This Court's jurisdiction under Article 6, § 5(1) is now "granted through a special action petition." *Dobson v. State ex rel. Comm'n on Appellate Court Appointments*, 233 Ariz. 119, 121 ¶ 6 (2013).² This Court has exercised original jurisdiction in *quo warranto* cases at least ten times,

² Alternatively, this Petition is brought pursuant to Rule 1 of the Rules of the Supreme Court.

with two cases specifically involving whether Corporation Commissioners were eligible under § 40-101. *Jennings*, 194 Ariz. at 316 ¶ 1; *Jones*, 15 Ariz. at 220.³

This Court has recognized repeatedly the need to exercise original jurisdiction to resolve promptly and finally legal questions regarding the eligibility of high-level state officials. In *Sullivan*, this Court stated, “[t]he public business demands a prompt judicial inquiry and a final determination of the actions of the respondent in allegedly unlawfully usurping, holding, and exercising so vital an office as that of Attorney General.” 66 Ariz. at 353. Similarly, this Court stated in *Moore*, “it is in the interest of public business that there should be a final

³ The remaining eight cases are *State ex rel. Woods v. Block*, 189 Ariz. 269 (1997) (action by Attorney General challenging Constitutional Defense Council under the separation of powers); *Ahearn v. Bailey*, 104 Ariz. 250 (1969) (action by members of the Industrial Commission challenging legality of changing commission from three to five members and shortening existing members’ terms); *State ex rel. Smith v. Bohannon*, 101 Ariz. 520 (1966) (action by Attorney General against board member of Arizona State Retirement System who was also president of mortgage company from which ASRS had purchased mortgages); *State ex rel. Jones v. Lockhart*, 76 Ariz. 390, 394-95 (1953) (action by Attorney General challenging gubernatorial appointment of additional State Senator for county that previously had only one Senator); *State ex rel. De Concini v. Garvey*, 67 Ariz. 304, 305-06 (1948) (action by Attorney General to determine whether Secretary of State became vested with office of Governor upon incumbent’s death, or was merely serving as acting Governor); *State ex rel. De Concini v. Sullivan (Sullivan)*, 66 Ariz. 348, 353 (1948) (action by Attorney General to determine whether prior Attorney General had created vacancy by being convicted of a felony); *State ex rel. Sullivan v. Moore (Moore)*, 49 Ariz. 51, 59-60 (1937) (action by Attorney General against two State Tax Commissioners who were elected in top-two election to fill two spots on the commission rather than in separate elections, one for a full term and one to fill vacancy); and *Abbey v. Green*, 28 Ariz. 53, 74 (1925) (action by claimant, after Attorney General refused to bring an action, claiming the office of Judge of the Superior Court of Pima County).

determination of whether the *de facto* tax commissioners are also *de jure* officers as speedily as possible.” 49 Ariz. at 59-60. This comports with the Court’s exercise of original jurisdiction in similar situations. *See, e.g., Adams v. Comm’n on Appellate Court Appointments*, 227 Ariz. 128, 131 ¶ 9 (2011) (accepting original jurisdiction in challenge to qualifications of potential redistricting commissioners “because ‘th[e] case involve[d] a dispute at the highest levels of state government’ requiring ‘a prompt determination’” (quoting *Rios v. Symington*, 172 Ariz. 3, 5 (1992))).

Exercising jurisdiction here is proper because this case involves a statewide office and requires prompt resolution. Until it is resolved, Ms. Bitter Smith could continue exercising the office of Corporation Commissioner as a *de facto* officer even though she is ineligible under § 40-101. The Commission meets every month. [See Ex. 2, Ariz. Corp. Comm’n, *2015 Open Meeting Dates* at APP0014 (last visited Nov. 18, 2015).] Allowing Ms. Bitter Smith to continue holding office during the pendency of proceedings at the Superior Court and Court of Appeals would thwart § 40-101’s purpose and threaten the integrity of the Commission.

Moreover, legal determinations based on undisputed facts can resolve this case. In *Jennings*, this Court stated in a similar situation that it would result in “inordinate delay” for a case to work its way through lower courts before reaching this Court. 194 Ariz. at 317 n.2. As discussed below, § 40-101 makes

Commissioners who have certain types of relationships ineligible to hold office. Because Ms. Bitter Smith possesses multiple relationships prohibited by § 40-101 as a matter of law, there is no need for factual determinations in Superior Court.

STATEMENT OF THE ISSUE

Under A.R.S. § 40-101, a person may not be elected to or hold the office of Corporation Commissioner if that person (i) is “in the employ of, or hold[s] an official relation to” or is “pecuniarily interested” in (ii) a corporation or person “subject to regulation” by the Commission. Is Ms. Bitter Smith ineligible because she is a paid lobbyist and trade association executive for companies with subsidiaries or affiliates that provide phone service regulated by the Commission?

STATEMENT OF FACTS⁴

A. The Commission Regulates Cable Companies that Provide Interconnected Voice Over Internet Protocol Phone Service.

The Commission regulates phone service provided by cable companies at least three ways: setting maximum fees for standalone phone service; setting maximum fees for phone service that is part of combination services (“bundles”) of telephone, cable television, and broadband internet; and imposing fees for the state Universal Service Fund (“USF”).

⁴ This petition cites several public record documents, and Petitioner requests that the Court take judicial notice of them pursuant to Arizona Rule of Evidence 201. *See Pedersen v. Bennett*, 230 Ariz. 556, 559 ¶ 15 (2012); *Ariz. Corp. Comm.*, 171 Ariz. at 289 n.4.

The Federal Communications Commission (“FCC”) and the states have joint authority to regulate telecommunications. The FCC regulates interstate and foreign telecommunications services, and the states retain jurisdiction over intrastate services among other matters. 47 U.S.C. § 152(b); *see generally La. Pub. Serv. Comm’n v. F.C.C.*, 476 U.S. 355, 360, 368 (1986). In Arizona, the state Constitution charges the Commission with regulating “public service corporations” within the State. Ariz. Const. art. XV, § 3; *see also* A.R.S. § 40-202(A). The Constitution defines a “public service corporation” to include “transmitting messages or furnishing public telegraph or telephone service.” Ariz. Const. art. XV, § 2. The Commission’s jurisdiction extends to public service corporations operating in a competitive marketplace. *See Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm’n*, 132 Ariz. 109, 115-16 (App. 1982).

The companies relevant to this case provide phone service using Voice over Internet Protocol (“VoIP”) technology. “Broadly speaking, VoIP service is an Internet application that uses an Internet Protocol (‘IP’) to transmit voice communications over a broadband Internet connection.” *Cable One, Inc. v. Ariz. Dep’t of Rev.*, 232 Ariz. 275, 277 ¶ 11 (App. 2013). The Vermont Supreme Court explained that VoIP converts “voice data . . . into digital bits which are placed in packets and sent over the same pathways as internet data.” *In re Investigation into Regulation of Voice over Internet Protocol (VoIP) Servs.*, 70 A.3d 997, 1000 (Vt.

2013); [see generally Ex. 3, Fed. Commc'ns Comm'n, *Voice Over Internet Protocol (VoIP)* at APP0015-22 (last visited Nov. 18, 2015)]. VoIP allows users to call other VoIP users without ever using the traditional public switched telephone network (“PSTN”). “*Interconnected VoIP service*” also allows “users generally to receive calls that originate on the [PSTN] and to terminate calls to the [PSTN].” 47 C.F.R. § 9.3 (emphasis added). In other words, a person with interconnected VoIP service can receive calls from and make calls to any phone number, regardless of whether the person on the other end of the call is using VoIP, a traditional landline, or a cell phone.⁵

Cable companies market VoIP phone service as part of a “bundle” of services—along with cable television and broadband internet—that a customer may purchase. [Ex. 4, Bitter Smith 10/7/2015 Interview Tr. at APP0044:4-12; Ex. 5, Ltr. from E. Novak and M. Ho to D. Conrad and P. Ahler at APP0176 (Oct. 28, 2015).] Indeed, Cox prominently offers a bundle with phone service, internet, and cable on its website. [Ex. 6, Cox Communications, Inc., *Cox Digital Telephone Service* at APP0186-90 (last visited Nov. 18, 2015) (showing “Featured

⁵ Interconnected VoIP service can be “nomadic” or “fixed.” Nomadic service allows a customer to use the service anywhere he or she has access to the internet. In contrast, “fixed” also known as “non-nomadic” VoIP service “allows a customer to use the service only from a fixed location, such as from the customer’s home.” *Cable One, Inc.*, 232 Ariz. at 277 n.4. The cable companies at issue in this case provide fixed interconnected VoIP service using their cable network, which connects directly to people’s homes and businesses.

Phone Offers”); *see also* Ex. 5 at APP0183-84 (example Cox bill for TV, high speed internet, and telephone stating “[y]our bundle discount is applied to the video portion of your bill”).] Comcast, Suddenlink, and Time Warner similarly offer such bundles. [Ex. 7, Comcast, *XFINITY® Internet, Cable TV, and Phone Service* at APP0191-98 (last visited Nov. 18, 2015); Ex. 8, Suddenlink Communications, *Total Home* at APP0199-201 (last visited Nov. 18, 2015); Ex. 9, Time Warner Cable, *Cable TV, High Speed Internet & Phone Service* at APP0202-05 (last visited Nov. 18, 2015).]

Because the Commission regulates phone service, whether standalone or as part of a bundle, affiliates of Cox, Comcast, Suddenlink, and Time Warner all have applied for Certificates of Convenience and Necessity (“CC&Ns”) from the Commission. [Ex. 4 at APP0040:23-42:15 (recognizing need for CC&N)]; *see infra* page 22 (providing diagram of corporate structures). Cox Arizona Telcom, Inc. received a CC&N from the Commission on July 2, 1996, and transferred the CC&N to an entity now known as Cox Arizona Telcom, L.L.C. (“Cox Arizona Telcom”). [Ex. 10, Ariz. Corp. Comm’n Decision No. 61,569 at APP0207 (filed Mar. 15, 1999) (discussing Cox Arizona Telcom, Inc.’s application and request to transfer CC&N); Ex. 11, Cox Arizona Telcom, L.L.C. Merger Filing with Ariz. Corp. Comm’n, at APP0211-17; Ex. 12, Cox Arizona Telcom, L.L.C. Articles of

Correction Filing with Ariz. Corp. Comm'n at APP0220 (showing name change from Cox Arizona Telcom II, L.L.C to Cox Arizona Telcom, L.L.C.).]

Similarly, Comcast Phone of Arizona, LLC d/b/a Comcast Digital Phone received a CC&N on April 16, 2007. [Ex. 13, Ariz. Corp. Comm'n Decision No. 69,408 at APP0225-36 (filed Apr. 16, 2007).] Mercury Voice and Data, LLC (now d/b/a Suddenlink Communications) received a CC&N on February 3, 2010. [Ex. 14, Ariz. Corp. Comm'n Decision No. 71,480 at APP0237-53 (filed Feb. 3, 2010).] Finally, Time Warner Cable Information Services (Arizona), LLC received a CC&N on June 30, 2009, and Time Warner Cable Business LLC received a CC&N on July 30, 2014. [Ex. 15, Ariz. Corp. Comm'n Decision No. 71,169 at APP0254-68 (filed June 30, 2009); Ex. 16, Ariz. Corp. Comm'n Decision No. 74,587 at APP0269-79 (filed July 30, 2014).]

All of these companies are regulated by Commission-approved tariffs, which set the maximum rates the companies can charge customers for VoIP and impose other conditions on operating in Arizona. [See, e.g., Ex. 17, Tariff for Local Exchange Service for Cox Arizona Telcom, L.L.C. at APP0280-518.] Tariffs also regulate what companies can charge for VoIP service as part of a bundle. [See, e.g., *id.* at APP0291 (defining “combination service”), APP00360 (showing specific prices for service).] All of these companies have applied regularly to the

Commission for changes to their respective tariffs, as reflected in the Commission’s docket.⁶

The Commission also imposes the state USF fee on fixed interconnected VoIP providers, including the companies described above. [*See, e.g.*, Ex. 18, Ariz. Corp. Comm’n Decision No. 74,848 at APP0519-24 (filed Dec. 18, 2014) (setting amount of Arizona USF surcharge and also noting that Solix, Inc. administers the fund for the Commission); Ex. 19, Solix, Inc., *Ariz. Universal Service Fund: 2015 Remittance Worksheet Instructions* at APP0531 (stating Arizona “expects carriers under its jurisdiction to remit intrastate universal service assessments . . . [for] non-nomadic interconnected VoIP services provided in Arizona”); Ex. 5 at APP0184 (sample Cox bill showing charge for “State Universal Service Fund”).]

B. Ms. Bitter Smith Is Retained as an Authorized Lobbyist for Two Cox Affiliates and as the Designated Lobbyist and Executive Director of the Southwest Cable Communications Association.

Ms. Bitter Smith is an authorized lobbyist for two affiliates of Cox—CoxCom and Cox Communications Arizona—and is also the Executive Director and designated lobbyist for SWCCA. Ms. Bitter Smith has been registered as an authorized lobbyist for CoxCom and Cox Communications Arizona since at least 2007—long before she won election in 2012. [Ex. 20, Principal/Pub. Body Reg.

⁶ The full dockets for these companies can be found at <http://edocket.azcc.gov/>.

for CoxCom and Cox Communications Arizona at APP0548, 53, 54, 64;⁷ Ex. 4 at APP0151:22-153:8.] CoxCom is the immediate parent of Cox Arizona Telcom, which holds a CC&N for phone service. *See supra* page 17 (discussing CC&N); [Ex. 22 Ariz. Corp. Comm'n Resp. to Pub. Records Request re: R14-2-801 *et seq.* at APP0590 (Nov. 13, 2015); Ex. 23 Cox Arizona Telcom, L.L.C. Corporate Disclosure Statement, *Cox Commc'ns, Inc. v. Sprint Commc'ns. Co.*, No. 1:12-cv-487-SLF at APP0618 (D. Del., filed Apr. 16, 2012).] CoxCom is also the immediate parent of Cox Communications Arizona, which is Cox's cable affiliate for Arizona. [Ex. 22 at APP0590; Ex. 24, Cox Communications Arizona, LLC Corporate Disclosure Statement, *Cox Commc'ns Ariz., LLC v. City of Tempe*, No. 2:15-cv-1829-JJT at APP0622-23 (D. Ariz., filed Sept. 14, 2015); Ex. 25, Cox Communications Arizona, LLC Corporate Disclosure Statement, *Cox Commc'ns, Inc. v. Sprint Commc'ns. Co.*, No. 1:12-cv-487-SLR at APP0626 (D. Del., filed Apr. 16, 2012)]; *see also infra* page 21 (discussing cable franchises).

Ms. Bitter Smith has been involved with SWCCA since 1980. [Ex. 4 at APP0033:11-16, 36:7-13.]⁸ SWCCA is incorporated as an Arizona nonprofit corporation and has status under § 501(c)(6) of the Internal Revenue Code. [*Id.* at

⁷ The lobbyist registration references CoxCom, Inc. However, that entity is now an LLC, having merged in July 2011. [Ex. 21, CoxCom Merger Filing with Ariz. Corp. Comm'n, at APP0575.]

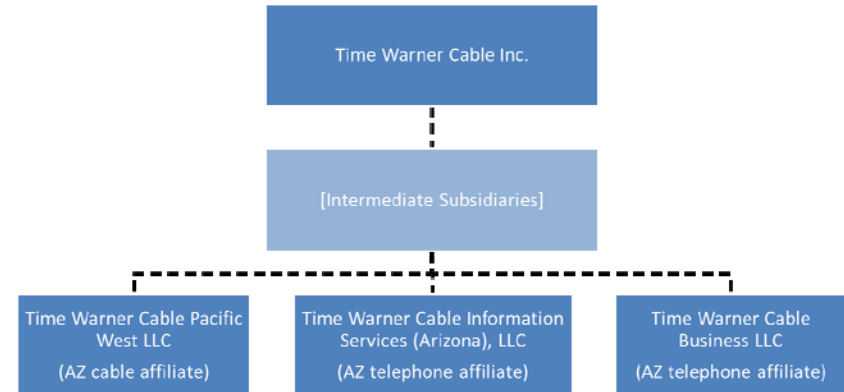
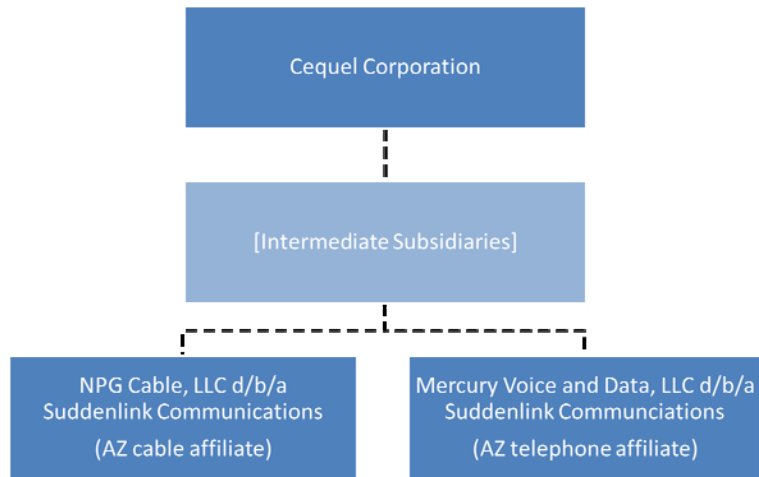
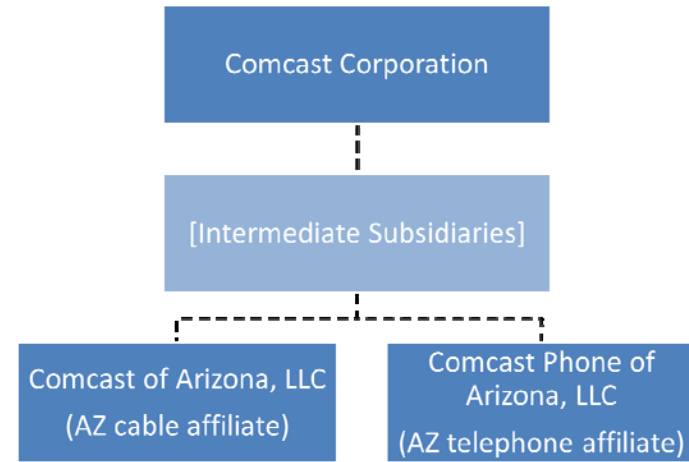
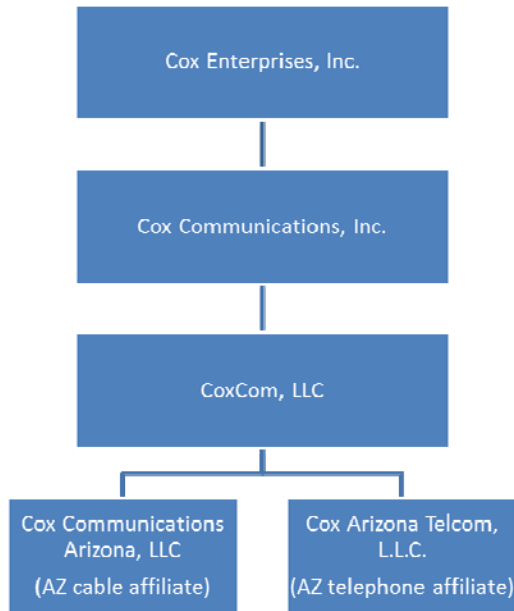
⁸ SWCCA has previously gone by other names, including the Arizona-New Mexico Cable Communications Association. [Ex. 4 at APP0033:17-34:8.]

APP0034:20-35:1.] Companies obtain SWCCA membership by filing an application, on which the existing members then vote to approve entry into the organization. [*Id.* at APP0046:1-48:10; Ex. 26, Excerpt of SWCCA Bylaws at APP0631.] Members also must pay dues. [Ex. 4 at APP0046:1-4.]

Cox, Comcast, Suddenlink and Time Warner all have affiliates that are SWCCA members. [*Id.* at APP0046:5-10, 58:24-59:4, 75:9-11, 92:2-7]; *see infra* page 22 (providing diagrams of corporate structures). Although other affiliates higher up the corporate chain may also participate, the Arizona cable affiliates of these companies are “active members.” [Ex. 4 at APP0046:11-25; Ex. 26 at APP0631, Ex. 27 at APP0633 (list of directors), Ex. 28, Ltr. from E. Novak to P. Ahler at APP0642-48 (Oct. 15, 2015) (memos including “parent members”).] For Cox, the affiliate holding Arizona cable franchises is Cox Communications Arizona (for which Ms. Bitter Smith is also an authorized lobbyist). [Ex. 29, FCC, *Cable Search* at APP0650.]⁹ For Comcast, it is Comcast of Arizona, LLC. [Ex. 30, FCC, *Cable Search* at APP0652.] For Suddenlink, it is NPG Cable, LLC. [Ex. 31, FCC, *Cable Search* at APP0654.] For Time Warner, it is Time Warner Cable Pacific West LLC. [Ex. 32, FCC, *Cable Search* at APP0656.]

Demonstrative charts, prepared by Petitioner, of Arizona cable and telephone affiliates of Cox, Comcast, Suddenlink, and Time Warner are below.

⁹ Cable affiliates can be identified using the FCC’s Cable Operations and Licensing System, available at <https://apps.fcc.gov/coals/forms/search/cableSearchNf.cfm>.



Dark blue boxes represent entities relevant to this case. Light blue boxes represent one or more intermediate subsidiaries. Solid lines represent direct ownership. Dotted lines represent indirect ownership through intermediate subsidiaries.

In 2013 and 2014, Ms. Bitter Smith received a salary of over \$150,000 per year for her role at SWCCA. [See Ex. 33, 2014 IRS Form 990 for SWCCA at APP0671 (Mar. 20, 2015); Ex. 34, 2013 IRS Form 990 for SWCCA at APP0697 (Mar. 18, 2014).] She works as “CEO” over all of its operational aspects and its designated (and only) lobbyist. [Ex. 4 at APP0054:9-16.] Ms. Bitter Smith has stated that she spends 40 hours per week working for SWCCA. [Ex. 4 at APP0049:7-17; Ex. 33 at APP0671; Ex. 34 at APP0697.] SWCCA has only one other employee—a part-time administrative assistant. [Ex. 4 at APP0035:2-8.]

Ms. Bitter Smith’s duties at SWCCA involve lobbying on issues important to SWCCA’s members and otherwise assisting them. Ms. Bitter Smith organizes annual legislative luncheons between SWCCA members and Arizona legislators. [Id. at APP0050:20-51:5; Ex. 35, SWCCA 2014 Ann. Rpt. with Ariz. Sec’y of State at APP0716; Ex. 36, SWCCA 2013 Ann. Rpt. with Ariz. Sec’y of State at APP0718.] She also establishes contact with federal, state, and local government officials and tracks bills for SWCCA’s members. [Ex. 4 at APP0049:18-52:7.]

C. Procedural Background of This Case

Ms. Bitter Smith won an election for Corporation Commissioner in 2012, has exercised the office since January 2013, and the term for this office ends in January 2017. See Ariz. Const. art. XV, § 1(B); [Ex. 4 at APP0033:2-7]. On or about September 1, 2015, Thomas M. Ryan submitted to the Attorney General’s

Office a verified complaint, alleging that Ms. Bitter Smith was ineligible under § 40-101 because of her relationships with cable companies and her role at SWCCA among other reasons. [Ex. 37, Verified Complaint *Quo Warranto* at APP0719-45 (without exhibits).] Mr. Ryan filed a supplemental complaint on or about September 11, 2015, relating to Ms. Bitter Smith listing herself as a “telecommunications” lobbyist. [Ex. 38, First Supplement to Verified Complaint *Quo Warranto* at APP0746-57.] The Attorney General’s Office and Ms. Bitter Smith engaged in discussions and exchanged documents from September through November 2015. Ms. Bitter Smith was voluntarily interviewed on October 7, 2015 and provided a written response to the complaint on October 28, 2015. [Exs. 4, 5.]

ARGUMENT

I. Ms. Bitter Smith Is Ineligible to Serve as a Corporation Commissioner under A.R.S. § 40-101.

Ms. Bitter Smith is ineligible to serve as a Corporation Commissioner under § 40-101 because of her direct relationship with Cox and her relationships through SWCCA with Cox, Comcast, Suddenlink, and Time Warner—all of which provide phone service regulated by the Commission. She is also pecuniarily interested in those companies because of her \$150,000 salary as Executive Director of SWCCA.

The Arizona Constitution provides that “[t]he qualifications of [Corporation] [C]ommissioners may be prescribed by law.” Ariz. Const. art. XV, § 1(C). The First Legislature adopted a qualifications provision, now codified as amended at

A.R.S. § 40-101, to prevent conflicts of interest. Ariz. Rev. Code § 666 (1928); 1912 Ariz. Sess. Laws ch. 90, § 7 (1st Reg. Sess.). Section 40-101 currently states:

A person in the employ of, or holding an official relation to a corporation or person subject to regulation by the commission, or a person owning stocks or bonds of a corporation subject to regulation, or a person who is pecuniarily interested therein, shall not be elected, appointed to, or hold the office of commissioner or be appointed or employed by the commission. If a commissioner, or appointee or employee of the commission becomes the owner of such stocks or bonds, or becomes pecuniarily interested in such a corporation involuntarily, he shall within a reasonable time divest himself of such stocks, bonds or interest. If he fails to do so, he thereby vacates his office or employment.

This Court has analyzed § 40-101 in two prior cases. More recently, in *Jennings*, it held that Commissioner Tony West was ineligible for office because he was a licensed securities salesperson at the time of his election. 194 Ariz. at 332 ¶ 89. West was “in the employ of, or holding an official relation to” a securities dealer because a securities salesperson is licensed to a securities dealer. *Id.* at 321-22 ¶¶ 31-32 & n.10. Second, because the Commission regulated securities dealers, they were “subject to regulation” under § 40-101’s plain language. *Id.* at 323 ¶ 41. Because this conflict existed at the time of West’s election, he could not “cure the defect once in office,” but rather was required to “cease functioning as a commissioner.” *Id.* at 290 ¶ 82, 332 ¶ 92.

In the earlier case of *Jones*, this Court held that Commissioner Jones was eligible to hold office, even though he owned stock in a holding company that

owned two insurance companies regulated by the Commission. 15 Ariz. at 223. Three factors explain the Court’s decision. *See Jennings*, 194 Ariz. at 324-25 ¶¶ 48-52 (citing *Jones*, 15 Ariz. at 218, 226-28). First, Jones had purchased the stock and taken office as a Commissioner before insurance companies were regulated by the Commission. *Id.* at ¶¶ 48-49 (citing *Jones*, 15 Ariz. at 218, 226-28). Second, the insurance statutes contained a separate conflict-of-interest provision that did not contain the penalty of disqualification from office. *Id.* at ¶ 50-51 (citing *Jones*, 15 Ariz. at 227-28). Finally, the Court was concerned that if § 7 of chapter 90 of the 1912 Arizona Session Laws (the predecessor to § 40-101) did apply, then even owning an insurance policy would make a Commissioner “pecuniarily interested.” *Id.* at ¶ 52 (citing *Jones*, 15 Ariz. at 218, 228). In contrast, Ms. Bitter Smith’s relationships with companies providing phone service makes her ineligible.

A. Ms. Bitter Smith’s Status as an Authorized Lobbyist for Two Cox Affiliates Makes Her Ineligible under § 40-101.

1. Serving as an Authorized Lobbyist Creates an “Official Relation” under § 40-101.

Ms. Bitter Smith’s role as an authorized lobbyist for CoxCom and Cox Communications Arizona is an “official relation” under § 40-101. Looking first to the statute’s plain language as “the most reliable indicator of meaning,” *Powers v. Carpenter*, 203 Ariz. 116, 118 ¶ 9 (2002), the phrase “in the employ of, or holding an official relation to” is broad. The statute disqualifies a person holding any

“official relation” to a regulated person or entity. Because that term is not statutorily defined, courts “apply common meanings and may look to dictionaries.” *State v. Pena*, 235 Ariz. 277, 279 ¶ 6 (2014) (citations omitted). The dictionary definition of “official” includes “[o]f, relating to, or involving an office or position of trust or authority” and “[a]uthorized or approved by a proper authority.” [Ex. 39 BLACK’S LAW DICTIONARY at APP0759 (10th ed. 2014); accord Ex. 40, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, at APP0761 (5th ed. 2011).] This Court’s analysis in *Jennings* was consistent with interpreting “official” according to its common meaning. 194 Ariz. at 322 n.10 (“By law, [West] was *authorized* to function as a licensed securities salesperson by reason of the relationship [to a registered securities dealer].” (emphasis added)).

Ms. Bitter Smith holds an official relation to CoxCom and Cox Communications Arizona as an authorized lobbyist. [Ex. 20 at APP0548, 53, 54, 64; Ex. 4 at APP0151:22-153:8.] An authorized lobbyist has a legally recognized relationship with authority and permission to act on its principal’s behalf. Under A.R.S. § 41-1231(1), an “authorized lobbyist” is a person “employed by, retained by or representing a principal, with or without compensation, for the purpose of lobbying and who is listed as an authorized lobbyist by the principal in its registration pursuant to section 41-1232.” An authorized lobbyist’s potential responsibilities, which can include representing a company before Legislators and

State officials on legislation, rulemaking and procurement, involve substantial trust and authority. *See* A.R.S. § 41-1231(11) (defining “[l]obbying”).

Ms. Bitter Smith is not merely registered with the Secretary of State as an authorized lobbyist for CoxCom and Cox Communications Arizona. Through her position as Executive Director and designated lobbyist for SWCCA, she has been retained and employed to represent Cox, one of SWCCA’s largest dues payers; has in fact represented them; and is paid an annual salary of \$150,000 for that work—all while being elected to and holding office as a Commissioner. [*See* Ex. 4 at APP0048:20-22, 54:3-88.]

For example, she plans legislative lunches that many employees of Cox attend, and Cox specifically sponsored. [*Id.* at APP0152:14-153:3; Ex. 41, Ltr. from E. Novak to D. Conrad at APP0771 (Nov. 6, 2015) (enclosing SWCCA 2014 Annual Meeting Summary Final Report).] She also lobbies for SWCCA members’ interests by working on rural broadband expansion at the state and federal levels. [Ex. 42, Ltr. from S. Bitter Smith to FCC at APP0773 (Mar. 12, 2014) (noting that she arranged meeting for “Stephanie Healy of Cox Communications” relating to Connect America); Ex. 4 at APP0074:22-75:4; Ex. 5 at APP0177-78; *see also* Ex. 43, Minutes of Meeting Before the H. Comm. on Transp. on Mar. 8, 2012, 50th Leg., 2d Reg. Sess., at APP0778, 80 (Ariz.) (recording Ms. Bitter Smith as “signed up in support of SB1402,” which related to “bring[ing] broadband to far-reaching

rural areas of the state and to allow future growth of broadband”).] She also generally provides points of contact in federal, state, and local government for SWCCA members. [Ex. 4 at APP0049:18-52:7.] As an authorized lobbyist, who is actually retained and working for CoxCom and Cox Communications Arizona, Ms. Bitter Smith holds “official relation[s]” to those entities.

2. The Cox Affiliates for which Ms. Bitter Smith Is an Authorized Lobbyist Are “Subject to Regulation” by the Commission.

CoxCom and Cox Communications Arizona each qualify as “a corporation or person subject to regulation by the commission.” A.R.S. § 40-101. The Commission’s regulation of these entities involves reporting requirements and transaction approval under the affiliated interest rules, A.A.C. R14-2-801 to -806. The Commission adopted those rules in 1990, and this Court unanimously upheld them in *Arizona Corporation Commission*, 171 Ariz. at 297.

CoxCom and Cox Communications Arizona are subject to regulation under the rules because of their relationship to Cox Arizona Telcom. Cox Arizona Telcom is a “public utility” under R14-2-801(8). It provides telephone service and therefore is a “public service corporation,” the regulation of which is among the Commission’s core duties. Ariz. Const. art. XV, §§ 2, 3.¹⁰ Cox Arizona Telcom

¹⁰ See also *Ariz. Corp. Comm’n*, 171 Ariz. at 290 (“The founders expected the Commission to provide both effective regulation of public service corporations and consumer protection against overreaching by those corporations.” (citing RECORDS

was required to obtain a CC&N from the Commission [Ex. 10 at APP0207; Ex. 11 at APP0211-17; Ex. 12 at APP0220]; must comply with tariffs established by the Commission [*e.g.*, Ex. 17 at APP0280]; and regularly files requests for the Commission to modify its tariffs, including over twenty filings during Ms. Bitter Smith's time on the Commission [Ex. 44, Cox Arizona Telcom Docket Search at APP0782-792]. Cox Arizona Telcom's status as a "Class A investor-owned public service corporation" under R14-2-801(8) is confirmed by the fact that Cox does in fact make filings under the affiliated interest rules. [Ex. 22 at APP0583-603.]

CoxCom is subject to the affiliated interest rules as a "holding company" of Cox Arizona Telcom. A.A.C. R14-2-801(4). A holding company is "[a]ny affiliate that controls a public utility." *Id.* CoxCom is the sole member of Cox Arizona Telcom. [Ex. 12 at APP0220; Ex. 22 at APP0590; Ex. 23 at APP0618.] As such, it exercises "control," which means "the power to direct the management policies of such entity, whether through ownership of voting securities, or by contract, or otherwise." A.A.C. R14-2-801(1).

CoxCom and Cox Communications Arizona are also "affiliates" of Cox Arizona Telcom. *Id.* The definition of "affiliate" includes an entity "under direct or indirect common control[] with the public utility." *Id.* Cox Communications

OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, at 612-15, 967-81 (John S. Goff ed., 1991); Deborah Scott Engelby, Comment, *The Corporation Commission: Preserving its Independence*, 20 Ariz. St. L.J. 241, 242-43 (1988)).

Arizona and Cox Arizona Telcom are under direct common control by CoxCom, their parent. [Ex. 22 at APP0590; Ex. 24 at APP0622-23; Ex. 25 at APP0626.] CoxCom's parent is Cox Communications, Inc., so CoxCom and Cox Arizona Telcom are under the indirect common control of Cox Communications, Inc. [Ex. 23 at APP0618, Ex. 24 at APP0622-23; Ex. 25 at APP0626.]

The Commission's affiliated interest rules govern reporting requirements and transaction approval. With respect to reporting, CoxCom as a holding company must provide the Commission with a description of its diversification plans annually, which may include significant information about affiliates including Cox Arizona Telcom and Cox Communications Arizona, and is subject to a hearing on such a plan. A.A.C. R14-2-805.

With respect to transaction approval, the Commission must approve any organization or reorganization of a public utility holding company, such as CoxCom. *Id.* at 803(B), (C). This means, for example, that CoxCom cannot be reconfigured within the corporate structure of Cox or merge with another entity without Commission approval. *Id.* at 801(5). As another example, CoxCom cannot transfer its membership interest in Cox Arizona Telcom without Commission approval. *Id.* Cox Communications Arizona also cannot acquire any interest in Cox Arizona Telcom without such approval. *Id.* at 801(5), 803(A). The Commission also must review transactions between Cox Arizona Telcom and its

affiliates, including CoxCom and Cox Communications Arizona, and such transactions may not be completed without Commission approval. *Id.* at 804.

CoxCom and Cox Communications Arizona are therefore “subject to regulation” by the Commission under § 40-101. Their contact with the Commission is far more involved than “the initial filing of articles of incorporation, the payment of an annual fee, and the submission of annual reports.” *Jennings*, 194 Ariz. at 329 ¶ 74. Because Ms. Bitter Smith works as an authorized lobbyist for those entities, she holds “official relation[s]” to them. This *by itself* is sufficient to make her ineligible to serve as a Commissioner under § 40-101.¹¹

B. Ms. Bitter Smith’s Role as Executive Director and Designated Lobbyist for SWCCA Makes Her Ineligible under § 40-101.

1. Ms. Bitter Smith Holds “Official Relation[s]” to SWCCA Members that Are Themselves “Subject to Regulation” by the Commission.

Ms. Bitter Smith’s role as the Executive Director and designated lobbyist for SWCCA causes her to be “in the employ of, or holding an official relation to” entities subject to Commission regulation and makes her ineligible to serve as a Commissioner under § 40-101. As noted in Part I(A)(1), *supra*, the plain-language definition of “official relation” includes “[o]f, relating to, or involving an office or

¹¹ As discussed in Part I(B)(2), *infra*, the scope of an “official relation” includes all affiliates of an entity. Therefore, Ms. Bitter Smith’s “official relation” resulting from being an authorized lobbyist for CoxCom and Cox Communications Arizona extends to Cox Arizona Telcom, which provides Commission-regulated phone service. That provides an additional reason why she is ineligible under § 40-101.

position of trust or authority” and “[a]uthorized or approved by a proper authority.” [Ex. 39 at APP0759; *accord* Ex. 40, at APP0761.] Ms. Bitter Smith’s role at SWCCA—which she has held since before her election in 2012 and continues to hold while serving as a Commissioner—qualifies under these definitions.

Ms. Bitter Smith occupies positions of sufficient trust and authority for her SWCCA roles to qualify under § 40-101. SWCCA is a trade association of cable providers in Arizona. *See supra* pages 20-21. Ms. Bitter Smith is the “CEO” of all operational aspects of SWCCA and is its designated (and only) lobbyist. A.R.S. § 41-1231(3) (defining “designated lobbyist” as “the person who is designated by a principal as the single point of contact for the principal” for purposes of the lobbying statute); *see also* [Ex. 4 at APP054:15-16; Ex. 28 at APP0637, 39-40.] Ms. Bitter Smith has represented SWCCA members in performing significant lobbying services for them. *See* Part I(A)(1), *supra*. Indeed several SWCCA members—including Suddenlink and Time Warner—do not have any registered lobbyists in Arizona, other than Ms. Bitter Smith through their membership in SWCCA.¹² Ms. Bitter Smith is paid a salary of over \$150,000 per year for her role at SWCCA. [Ex. 4 at APP0048:20-22; Exs. 33 at APP0671; Ex. 34 at APP0697.]

¹² Principals that are registered are visible on the Arizona Secretary of State’s Lobbyist System, *available at* http://apps.azsos.gov/scripts/Lobbyist_Search.dll (last visited Nov. 18, 2015).

Furthermore, Ms. Bitter Smith's role is authorized by a proper authority for each of the cable company affiliates that are—and continue to be—SWCCA members. That is because those affiliates joined SWCCA, which required filing an application, actively participate in SWCCA, and pay annual dues. [Ex. 4 at APP0046:1-4; Ex. 26 at APP0631.] The Arizona cable affiliates of Cox, Comcast, Suddenlink, and Time Warner are all “active members” of SWCCA. [Ex. 4 at APP0046:16-25.] SWCCA members pay the organization to assist with lobbying issues, such as bill tracking [*id.* at APP0051:6-11], and to provide contacts in government [*id.* at APP0049:18-50:19]. SWCCA's Board includes Cox, Comcast, and Suddenlink representatives. [Ex. 27 at APP0633].

The fact that Ms. Bitter Smith is not registered as an authorized lobbyist for the SWCCA members directly (with the exception of Cox) does not change the conclusion that her position is an “official relation” under § 40-101. Ms. Bitter Smith has been SWCCA's key employee since 1980, with a salary that constitutes forty percent of the organization's budget. [Ex. 4 at APP0049:1-3.] The only other SWCCA employee is a part-time administrative assistant. [*Id.* at APP0035:6-8.] Companies are therefore effectively retaining Ms. Bitter Smith's services when they join SWCCA and pay dues, and Ms. Bitter Smith's position as SWCCA's Executive Director and designated lobbyist is an “official relation” to SWCCA's members under § 40-101.

The Arizona cable affiliates of Cox, Comcast, and Suddenlink, which are all active members of SWCCA, are themselves “subject to regulation” under § 40-101 through reporting requirements and transaction approval under A.A.C. R14-2-801 to -806. This is true for Cox Communications Arizona. *See* Part I(A)(2), *supra* (discussing how that entity is subject to regulation as an “affiliate” of Cox Arizona Telcom). The Comcast cable affiliate for Arizona—Comcast of Arizona, LLC (“Comcast of Arizona”) [Ex. 30 at APP0652]—and the Suddenlink cable affiliate for Arizona—NPG Cable, LLC [Ex. 31 at APP0654]—are similarly subject to regulation.¹³ The memberships of Cox, Comcast, and Suddenlink’s Arizona cable affiliates in SWCCA, combined with Ms. Bitter Smith’s role as Executive Director and designated lobbyist, makes Ms. Bitter Smith ineligible under § 40-101.

¹³ Under A.A.C. R14-2-801(1), Comcast of Arizona is an “affiliate” of Comcast Phone of Arizona, LLC, which holds a CC&N for phone service from the Commission. [Ex. 13 at APP0226; Ex. 4 at APP0043:12-23.] This is because Comcast of Arizona and Comcast Phone of Arizona, LLC are under the indirect control of Comcast Corporation. A.A.C. R14-2-801(1); [Ex. 45, Joint Application for Limited Waiver under R14-2-806 at APP0826 (May 2, 2014)]. That Comcast makes annual filings under R14-2-805 and applied for a limited waiver under R14-2-806 regarding a proposed merger in 2014 confirms that the affiliated interest rules apply. [Ex. 22 at APP0604-15; Ex. 45 at APP0826.]

Similarly for Suddenlink, NPG Cable, LLC is an “affiliate” of Mercury Voice and Data, LLC, which holds a CC&N for phone service. [Ex. 14 at APP0238; Ex. 4 at APP0043:24-44:3.] This is because both entities are under the indirect control of Cequel Corporation. [Ex. 46, Notification by Mercury Voice and Data at APP0850; Ex. 47, Materials Provided by NPG Cable, Inc. to Flagstaff at APP0859 (also noting that NPG Cable, Inc. will convert to NPG Cable, LLC).] The fact that Suddenlink recently made annual filings for 2012 and 2013 under R14-2-805 confirms that the affiliated interest rules apply. [Ex. 48, ACC Supp. Pub. Records Response at APP0867-72 (Nov. 25, 2015).]

2. Ms. Bitter Smith’s “Official Relation[s]” Extend to SWCCA Members’ Affiliates that Provide Phone Service Regulated by the Commission.

Ms. Bitter Smith’s “official relation[s]” through SWCCA to the Arizona cable affiliates of Cox, Comcast, Suddenlink, and Time Warner extend, for purposes of § 40-101, to those companies’ affiliates that provide phone service regulated by the Commission. When applying conflict-of-interest statutes to public officials, courts have not distinguished between affiliates based on the internal organization of a company, but instead have analyzed whether the public official in question has a prohibited relationship with any affiliate of a company. This provides an additional reason why Ms. Bitter Smith is ineligible under § 40-101.

a. Courts Have Rejected Drawing a Distinction Between a Company’s Different Affiliates when Applying Conflict-of-Interest Provisions to Public Officials.

Courts reject distinguishing between different affiliates of a company in the context of applying conflict-of-interest provisions to public officials and others exercising government power. In *Jones*, Commissioner Jones owned stock in a holding company of two Arizona insurance companies. 15 Ariz. at 218-19. This Court did not find that the predecessor to § 40-101 somehow was inapplicable because Jones owned stock in the holding company rather than the Arizona subsidiaries. *See id.*

Other courts' analyses are consistent with *Jones*, particularly in the context of persons exercising quasi-judicial authority. In reviewing an arbitration panel member's alleged conflict of interest, the Ninth Circuit held that "representation of a parent corporation is likely to affect impartiality or may create an appearance of partiality in the lawyer's representation of or dealings with a subsidiary." *Schmitz v. Zilveti*, 20 F.3d 1043, 1049 (9th Cir. 1994) (collecting cases); *see also Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 138-39 (2d Cir. 2007). The Michigan Supreme Court likewise held that an attorney may not, as a quasi-judicial board member, hear cases "involving employees of a particular corporation and at the same time be a member of a law firm representing wholly owned subsidiaries of that corporation[.]" *Schlossberg v. State Bar Grievance Bd.*, 200 N.W.2d 219, 220 (Mich. 1972).

This Court should likewise not distinguish between affiliates when applying § 40-101. The Commissioners exercise "sweeping authority over a substantial field of business activity in Arizona," including public utilities. *Jennings*, 194 Ariz. at 327 ¶ 66. "[T]he founders' intent and the text [of Article 15] gave the elected Commission a strong role in protecting the public interest through regulation of public service corporations." *Ariz. Corp. Comm.*, 171 Ariz. at 292. Accordingly, the Constitution grants the Commission executive, legislative, and judicial powers. *Id.* at 291 (citing *Tucson Gas, Elec. Light & Power Co.*, 15 Ariz.

at 306). The cases cited in the previous paragraph are particularly applicable to this case because the Commissioners exercise quasi-judicial powers when evaluating complaints against regulated utilities, including phone companies. *Id.*¹⁴ Indeed, a federal Comptroller General opinion expressly noted, when analyzing an analogous provision, that the fact that the FCC “is vested . . . [with] quasi judicial powers and discretion” and “given broad powers and wide discretion,” explained “the alertness of the Congress in attempting to [e]nsure” that commissioners and employees were free from conflicts of interest. *Eligibility for Emp’t in Fed. Commc’ns Comm’n – Persons Fin. Interested in Co. Mfg. Tel. Equip.*, 22 Comp. Gen. 843, 845-46, 1943 WL 981 (1943) (citation omitted).

Finally, a company’s internal structure should be irrelevant to the application of a broad *conflict of interest* statute for public officials. To hold otherwise would arbitrarily favor entities using complex organizational structures over simpler structures. For example, a senior executive of a utility holding company would not have an “official relation” to the utility under § 40-101—an absurd result given the

¹⁴ [See, e.g., Ex. 49, Ariz. Corp. Comm’n, *Consumer Complaint Process* at APP0876 (last visited Nov. 18, 2015); Ex. 17 at APP0327 (discussing customer and Cox resolving complaint at Commission); Ex. 50, Ariz. Corp. Comm’n Decision No. 70,486 at APP0882 (filed Sept. 3, 2008) (noting in 2008 that Cox Arizona Telcom had two formal complaint proceedings before the Commission).] Time Warner Cable Information Services (Arizona), LLC and Cox Arizona Telcom have received one and four formal complaints respectively. [Ex. 44 at APP0796, 804, 806, 817; Ex. 51, Time Warner Cable Information Services (Arizona), LLC Docket Search at APP0895.]

statute's purpose. *See Jennings*, 194 Ariz. at 327 ¶ 65 (“assess[ing] whether application of the statute . . . creates an untenable result or otherwise fails to ‘effect the object’ of section 40-101 and ‘promote justice’”) (citations omitted).¹⁵

b. Multiple SWCCA Members Have the Same Ultimate Parents as Affiliates that Provide Phone Service Regulated by the Commission.

As shown in the previous section, to determine whether being the Executive Director and designated lobbyist for SWCCA makes Ms. Bitter Smith ineligible under § 40-101, the Court simply should determine whether the Arizona cable entities that are active SWCCA members have affiliates providing phone service regulated by the Commission. They do. For Cox, the affiliate holding the cable franchises is Cox Communications Arizona [Ex. 29 at APP0650], and the entity that holds the CC&N is Cox Arizona Telcom, *see* pages 29-30, *supra* (discussing Cox Arizona Telcom). The ultimate parent is Cox Enterprises, Inc., but the Court need not look that far because Cox Communications Arizona and Cox Arizona Telcom have the same immediate parent, CoxCom. *See* pages 30-31, *supra*.¹⁶

The same is true for Comcast, Suddenlink, and Time Warner. For Comcast, the cable provider is Comcast of Arizona, LLC [Ex. 30 at APP0652], and the

¹⁵ *Cf.* A.A.C. R14-2-801(1) (for purposes of affiliated interest rules, defining “control” to mean “the power to direct the management policies of such entity, whether through ownership of voting securities, or by contract, or otherwise”).

¹⁶ CoxCom in turn is owned by Cox Communications, Inc., which is owned by Cox Enterprises, Inc. [Exs. 23-25 at APP0616-27.]

entity holding the CC&N is Comcast Phone of Arizona, LLC d/b/a Comcast Digital Phone. [Ex. 13 at APP0226; Ex. 4 at APP0043:12-23.] Comcast Corporation is the ultimate parent of both entities. [Ex. 45 at APP0826]; *see also* page 35 & n.13, *supra*. For Suddenlink, the entity holding the cable franchises is NPG Cable, LLC [Ex. 31 at APP0654], and Mercury Voice and Data, LLC holds the CC&N. [Ex. 14 at APP0238; Ex. 4 at APP0043:24-44:3.] The ultimate parent is Cequel Corporation. [Ex. 46 at APP0850; Ex. 47 at APP0857]; *see also* page 35 & n.13, *supra*. Finally, for Time Warner, the entity providing cable service is Time Warner Cable Pacific West LLC [Ex. 32 at APP0656], and the entities holding CC&Ns are Time Warner Cable Information Services (Arizona), LLC and Time Warner Cable Business LLC. [Ex. 15 at APP0255; Ex. 16 at APP0270.] The ultimate parent is Time Warner Cable Inc. [Ex. 45 at APP0826.]

This case's facts underscore why relationships to affiliates of regulated entities pose a conflict under § 40-101. Cox, Comcast, Suddenlink, and Time Warner market and sell phone service to consumers as part of a "bundle" with cable television and broadband internet. *See* pages 16-17, *supra*. Additionally, Ms. Bitter Smith and SWCCA have lobbied specifically on broadband issues—impacting both cable and phone service. *See* pages 28-29, *supra*; [Ex. 52, Ariz. Corp. Comm'n, Connect America Letter at APP0898 (Oct. 17, 2014)]. The SWCCA Board of Directors' minutes for July 25, 2013 reflect that SWCCA was

specifically discussing VoIP issues in Arizona. SWCCA Board minutes also reflect SWCCA monitoring *Cable One, Inc.*, which relates to assessment of VoIP equipment for taxation purposes. 232 Ariz. at 276 ¶¶ 1-2.¹⁷ The cable companies' offerings are therefore intertwined, regardless of which legal entity provides them.

The personnel involved in SWCCA likewise have overlapping responsibilities. SWCCA's Board of Directors includes representatives who are high-level executives of Cox, Comcast, and Suddenlink. Directors include the General Manager for all of Cox's operations in Arizona and Nevada [Ex. 4 at APP0067:23-69:20; Ex. 27 at APP0633; Ex. 53, Wolfe Bio at APP0901], the Vice President of Government Affairs for Suddenlink [Ex. 4 at APP0090:14-91:22], and the manager of operations and government affairs manager for Comcast of New Mexico [*id.* at APP0092:2-20]. SWCCA apparently does not always distinguish for membership purposes between cable affiliates and their parent companies. For example, SWCCA's notices of its annual meetings were sent not just to "active members" but also to "parent members." [Ex. 28 at APP0642-48.]

At the local level, cable companies' operations and employment practices do little to distinguish between cable, broadband, and phone. The Commission's staff noted in 2008 that "Cox's unregulated operations are intertwined to a significant extent with its regulated operations" and that Cox Arizona Telcom apparently

¹⁷ The SWCCA minutes were provided to the Attorney General's Office for inspection but not copying. [Ex. 41 at APP0763.]

consists of only one employee. [Ex. 50 at APP0886 n15.] Cox’s general manager for the Arizona region also told the Commission that he was “personally involved” in hiring the director of regulation responsible for issues at the Commission—indicating centralized control of labor relations, at least with respect to government relations and public affairs employees. [Ex. 54, Ltr. J.S. Rizley to Ariz. Corp. Comm’rs at APP0905 (Oct. 16, 2008).]¹⁸

Finally, Ms. Bitter Smith’s recusal history itself demonstrates that she is ineligible because recusal is not a permissible means to cure a conflict under § 40-101. *See Jennings*, 194 Ariz. at 327-28 ¶ 68. Ms. Bitter Smith filed a letter with the Commission identifying her relationship with SWCCA’s members [Ex. 5 at APP0181; *see also id.* at APP0178], actually recused herself on Cox and Time Warner matters [Ex. 55, Ariz. Corp. Comm’n Decision No. 74,455 at APP0911 (filed Apr. 18, 2014); Ex. 16 at APP0274 (noting recusal)], and stated it was a mistake not to recuse on a different Cox matter and a Suddenlink matter [Ex. 4 at APP0112:9-19; Ex. 56, Ariz. Corp. Comm’n Decision No. 74,150 at APP0920 (filed Oct. 25, 2013); Ex. 57, Ariz. Corp. Comm’n Decision No. 75,103 at APP0926 (filed May 19, 2015); *see also* Ex. 5 at APP0178]. *Cf. Schmitz*, 20 F.3d at 1049 n.3 (noting arbitrator “admitted that had he known of his firm’s previous representation” of a party’s parent, “he would have disclosed

¹⁸ Though it would not change the § 40-101 analysis, the Commission did not grant Cox a waiver from R14-2-801 to -806. [*See* Ex. 22 at APP0583-603 (Cox filings).]

it”).¹⁹ In sum, because SWCCA members have affiliates providing interconnected VoIP phone service, Ms. Bitter Smith holds “official relation[s]” to entities “subject to regulation” by the Commission and is ineligible under § 40-101.

C. Ms. Bitter Smith’s \$150,000 Annual Salary as Executive Director and Designated Lobbyist for SWCCA Creates a Prohibited Pecuniary Interest under § 40-101.

Ms. Bitter Smith is also ineligible under § 40-101 because her \$150,000 annual salary as Executive Director of SWCCA, paid by membership dues, means that Ms. Bitter Smith is “pecuniarily interested” in SWCCA members and affiliates subject to regulation by the Commission.

1. Courts Have Recognized that “Pecuniarily Interested” Is a Broad Term.

This Court has concluded previously that a broad range of financial interests qualify as pecuniary interests under § 40-101, including income-producing business activities. In *Jones*, this Court considered whether owning an insurance policy amounted to a pecuniary interest, concluding it would but for a different statutory provision that allowed Commissioners to own insurance policies. 15 Ariz. at 227-28; *see also Jennings*, 194 Ariz. at 324-25 ¶ 52.

¹⁹ In addition, Ms. Bitter Smith did not recuse on votes relating to competitors of SWCCA members and affiliates, such as CenturyLink. [*See* Ex. 58, Ariz. Corp. Comm’n Decision No. 75,222 at APP0947 (filed Aug. 26, 2015).] She also did not recuse on votes that related to telephone service generally, such as the state USF fee. [Ex. 18 at APP0523.]

An indirect financial benefit also has been sufficient to prohibit holding a federal regulatory office. An opinion of the federal Comptroller General concluded that the Federal Communications Act precluded from service as a Federal Communications Commissioner or employee any person “who could be regarded as having any financial interest whatsoever in any activity or entity subject to any provision of the act.” *Eligibility for Emp’t in Fed. Commc’ns Comm’n – Persons Fin. Interested in Co. Mfg. Tel. Equip.*, 22 Comp. Gen. at 845. This meant that a retiree was financially interested—and barred from employment—because he received a pension from a telephone equipment manufacturer. *Id.* at 843. The Comptroller General based his reasoning in part on a federal statute containing nearly identical language in material part to § 40-101. *Id.* at 844 (citing Section 11 of the Interstate Commerce Act of Feb. 4, 1887, 24 Stat. 383).

Additionally, in interpreting pecuniary interest under § 40-101, this Court distinguished “‘doing business with’ and ‘being in business with’ a regulated corporation,” suggesting that the former was lawful and the latter was not. *Jennings*, 194 Ariz. at 329 ¶ 76. Other states’ courts have reviewed a corporation commissioner’s income-producing business activities under a “general rule of guidance” that:

[I]f an occupation, business activity, or business activities, in which a Corporation Commissioner participates or with which he is connected,

operates as an effective interference with the discharge of the functions of his office, he shall be deemed to be “engaged in an occupation or business inconsistent with his duties as such commissioner.” Within the meaning of the general rule of guidance, any interest in any occupation, business activity, or business activities, which is affected in a meaningful manner by the Corporation Commission’s exercise of its jurisdiction, constitutes such “effective interference.”

State ex rel. Blankenship v. Freeman (Blankenship I), 440 P.2d 744, 755 (Okla. 1968).²⁰ The Oklahoma Supreme Court applied this test to two Oklahoma corporation commissioners who possessed oil and gas “properties” that the court concluded were subject to commission regulation. *State ex rel. Blankenship v. Freeman (Blankenship II)*, 447 P.2d 782 (Okla. 1968). The court found that one commissioner had forfeited office because the commissioner’s properties were worth over \$600,000 and “the amount of money expended for such interests and the *income derived therefrom*” were “affected in a meaningful manner” by the Commission’s exercise of jurisdiction. *Id.* at 789 (emphasis added). The Minnesota Supreme Court also invalidated a state public utilities commission decision after concluding that a former commissioner’s employment by a regulated entity shortly after he cast a vote affecting the entity created a conflict because the commissioner’s vote “could likely affect [the commissioner’s] direct or indirect

²⁰ Oklahoma’s Corporation Commission laws were among those specifically considered by delegates to the Arizona Constitutional Convention in establishing the Arizona Corporation Commission. See Leshy, THE ARIZONA STATE CONSTITUTION, *supra*, at 356 n.198.

financial interest.” *Petition of Northern States Power Co.*, 414 N.W.2d 383, 386 (Minn. 1987).

2. Ms. Bitter Smith’s Substantial Salary Qualifies as a Pecuniary Interest.

Ms. Bitter Smith’s \$150,000 per year salary qualifies as a pecuniary interest under § 40-101. [Ex. 4 at APP0048:20-22; Ex. 33 at APP0671; Ex. 34 at APP0697.] It poses a much greater risk of a conflict than owning an insurance policy, as was contemplated in *Jones*.²¹ Moreover, Ms. Bitter Smith is in business with regulated entities, not merely doing business with them as a customer. *See Jennings*, 194 Ariz. at 329 ¶ 76.

Similar to the Oklahoma commissioner removed from office in *Blankenship II*, Ms. Bitter Smith has received hundreds of thousands of dollars in income from SWCCA members while serving as a Commissioner. *See* 447 P.2d at 789. Moreover, this case does not involve a mere promise of employment, as in *Petition of N. States Power Co.*, 414 N.W.2d at 386, but a longstanding business relationship through SWCCA. The success of Cox, Comcast, Suddenlink, and Time Warner’s wholly-owned subsidiaries that provide phone service—not to mention the success of the “bundles” that each company prominently markets—

²¹ Even if the Court ultimately concluded that owning an insurance policy is not a pecuniary interest under § 40-101, the fact that such a limited interest was troubling to the Court shows that Ms. Bitter Smith’s \$150,000 annual salary is clearly a pecuniary interest under that statute.

benefits Ms. Bitter Smith because it relates to the profits of her SWCCA members and their parents. In fact, the member's number of subscribers determines the dues paid to SWCCA. [Ex. 4 at APP052:13-24; Ex. 41 at APP0765.]

Finally, there is no relevant distinction between parent companies and subsidiaries in analyzing whether Ms. Bitter Smith holds a pecuniary interest for § 40-101 purposes. This Court previously did not distinguish between parents and subsidiaries in examining pecuniary interest. *See Jones*, 15 Ariz. at 218-19. Rather, it reviewed whether a Commissioner was ineligible because he owned stock in a parent company with two subsidiaries that were Arizona insurance companies regulated by the Commission. *Id.* The entire premise of the Court's analysis was that if removal from office had been included in the relevant insurance statute, owning stock in a parent company was a pecuniary interest that would have triggered ineligibility. *See id.* Other courts have similarly recognized that a parent-subsidiary distinction does not make a difference when applying conflict of interest provisions to public officials, particularly those functioning in a quasi-judicial capacity. *See Part I(B)(2), supra.*

For these reasons, this Court should conclude that Ms. Bitter Smith's salary as SWCCA's Executive Director gives her a pecuniary interest in entities regulated by the Commission. Accordingly, she is ineligible for service as a Corporation Commissioner under A.R.S. § 40-101.

CONCLUSION

Ms. Bitter Smith has three categories of conflicts, each of which is sufficient by itself to make her ineligible to hold office as a Corporation Commissioner under § 40-101. These conflicts are her “official relation[s]” as an authorized lobbyist for two affiliates of Cox; her “official relation[s]” through SWCCA to Cox, Comcast, Suddenlink, and Time Warner; and her “pecuniar[y] interest[s]” in those companies because of her \$150,000 annual salary as the Executive Director and designated lobbyist for SWCCA. Because she had these conflicts at the time of her election, Ms. Bitter Smith cannot remedy them and remain in office. *Jennings*, 194 Ariz. at 331 ¶ 82. Petitioner therefore respectfully requests that this Court accept jurisdiction and issue a writ of *quo warranto* to Ms. Bitter Smith directing that she cease functioning as a Corporation Commissioner.

RESPECTFULLY SUBMITTED this 30th day of November, 2015.

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