



CLIENT ALERT

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ACC's Permissive Power Allows ACC to Appoint an Interim Manager to Remedy Threats to Public Health and Safety

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The Arizona Supreme Court issued its long-awaited opinion in *Johnson Utilities, L.L.C. v. Arizona Corp. Comm'n* on Friday, July 31, 2020, vacating the Arizona Court of Appeals' decision but affirming the Arizona Corporation Commission's ("ACC") authority to impose an interim manager for a privately held public utility.

THE SHORT STORY

The Arizona Supreme Court determined that the ACC had authority under its permissive state constitutional powers to order an Interim Manager ("IM"). For those following the *Johnson Utilities* ("Johnson") and EPCOR litigation, this means that EPCOR can and will remain in place pending some other challenge to its actions. However, the Court held there are restrictions on the ACC's permissive authority, including limitations on its ability that would interfere with other agencies' concurrent statutory authority, such as ADEQ. In this opinion, the Court took the time to explain and correct flaws and inconsistencies in prior case law concerning the scope of the ACC's exclusive ratemaking and concurrent permissive authority under the Arizona Constitution. As a result, this decision is particularly noteworthy as it resets the scope of, and basis for, the Commission's authority to regulate public service corporations in other matters that are not strictly ratemaking.

A DEEPER INITIAL DIVE

What follows is a summary of the most important points of the opinion. The Court began the opinion by walking through the history of the formation and purpose of the ACC and identifying important ACC case law involving its ratemaking authority and permissive authority. The Court noted that much of the case law concerning the ACC's authority was confusing and this opinion aimed to clear up some of the confusion and misapplication of law. To that end, the Court noted, in detail, why the Court's reasoning in *Woods* [regarding the management interference doctrine] was incorrect.

Importantly, the Court held that the ACC's ratemaking authority¹ does not authorize the ACC to appoint an IM to protect "the safety, health, comfort, and convenience of [Johnson's] patrons, employees, and the public" because it deemed Johnson's services, equipment, and facilities to be inadequate and unsafe—this connection to ratemaking authority was considered to be too

much of a stretch. However, the Court recognized another avenue under the Arizona Constitution for the ACC to appoint an IM: "[T]he Commission has the authority to appoint an interim manager pursuant to its permissive power under article 15, section 3." *Opinion*, at ¶ 57.² This broad grant of authority necessarily includes appointing an interim manager to remedy threats to public health and safety." *Id.*

To prevent the impression that the ACC has unlimited permissive powers, the Court then discussed the important limits the Arizona Constitution places on the ACC's permissive authority. These include the following: due process, limiting the ACC's purpose in using its permissive powers to protecting and preserving the safety, health, comfort, and convenience of the public, and noting that any order the ACC issues must be "reasonable." *Opinion*, at ¶ 58. Permissive authority is also limited by the legislature's authority to regulate public health and safety. *Opinion*, at ¶ 59.

Explaining another limitation, the Court noted that the legislature delegated authority to ADEQ to enact and enforce water quality and wastewater standards, as well as enforce those standards with civil remedies and criminal penalties: "As a result, the Commission may not unilaterally exercise its permissive authority in a manner that divests ADEQ of its broad regulatory powers over water quality and wastewater." *Opinion*, at ¶ 60.

The Court expressly declined "to extend *Woods*' construction of the managerial interference doctrine as imposing a limit on the Commission's permissive authority." *Opinion*, at ¶ 61. The Court also noted that the managerial interference doctrine has only been applied by *Woods* and its progeny to limit the ACC's ratemaking authority; it has never been applied to the ACC's permissive authority under Section 3. *Id.*

The Court then spent a significant amount of time explaining why the majority (which included all the Justices save one)

¹ Ariz. Const. art. 15, § 3.

Power of commission as to classifications, rates and charges, rules, contracts, and accounts; local regulation

Section 3. 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; Provided, that incorporated cities and towns may be authorized by law to exercise supervision over public service corporations doing business therein, including the regulation of rates and charges to be made and collected by such corporations; Provided further, that classifications, rates, charges, rules, regulations, orders, and forms or systems prescribed or made by said corporation commission may from time to time be amended or repealed by such commission. (Italics added).

² Ariz. Const. art. 15, § 3.

disagreed with the partial dissenting opinion (written by Justice Bolick). It summarized the majority's opinion thus: "To summarize, the power of the Commission to issue an order appointing an interim manager falls within its permissive authority under article 15, section 3. However, the exercise of that authority has limits. Section 3 expressly requires that any such order must be 'reasonable' and confined to circumstances predicated on, and limited to, protecting and preserving the safety, health, comfort, and convenience of the public. Judicial review is available to assess whether such an order is thereby 'reasonable.' Furthermore, issuing such an order is subject to basic due process protections, including notice, a hearing, and the opportunity to present evidence and cross-examine witnesses." *Opinion*, at ¶ 66.

CONCLUSION

The Court's holding was limited to the legal question of whether the ACC has the authority, under any circumstances, to issue an order appointing an IM; the Court did not look at nor touch the factual issues underlying the legal question. *Opinion*, at ¶ 72. "What is clear is that Johnson, as a PSC operating under a CC&N, has dedicated its property to public use in exchange for being granted a monopoly in its service area....As a result, Johnson's property is subject to regulation by the Commission, including any regulation necessary to protect public health and safety." *Opinion*, at ¶ 73. The opinion offers helpful insight and clarity into the confusion in past Arizona Supreme Court decisions on ACC's ratemaking authority and paves a new path for future decisions under the ACC's limited permissive power.

You can read the Arizona Supreme Court's opinion in full here: <https://www.azcourts.gov/Portals/0/OpinionFiles/Supreme/2020/CV-19-0105-PR%20Johnson%20Utilities%20Opinion.pdf>

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