

**IN THE SUPREME COURT**

**STATE OF ARIZONA**

CITY OF SURPRISE, an Arizona  
municipal corporation,

Petitioner,

v.

ARIZONA CORPORATION  
COMMISSION; TOM FORESE, in his  
official capacity as a member of the  
Arizona Corporation Commission; BOB  
BURNS, in his official capacity as a  
member of the Arizona Corporation  
Commission; ANDY TOBIN, in his  
official capacity as a member of the  
Arizona Corporation Commission;  
BOYD W. DUNN, in his official capacity  
as a member of the Arizona Corporation  
Commission; and JUSTIN OLSON, in  
his official capacity as a member of the  
Arizona Corporation Commission,

Respondents,

LAKE PLEASANT 5000, L.L.C., an  
Arizona limited liability company,  
HARVARD INVESTMENTS, INC., a  
Nevada corporation, and CIRCLE CITY  
WATER COMPANY, L.L.C., an Arizona  
limited liability company,

Real Parties in Interest.

Arizona Supreme Court  
No. CV-18-0137-SA

Arizona Corporation  
Commission  
No. W-03510A-18-0095

**CIRCLE CITY WATER COMPANY, LLC'S  
RESPONSE TO PETITION FOR SPECIAL ACTION**

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## INTRODUCTION

The Arizona Corporation Commission possesses only those powers granted it by Article XV of the Arizona Constitution and the implementing statutes. The Commission has no other inherent powers.

The City of Surprise seeks to condemn all of the utility assets of Circle City Water Company, a public utility regulated by the Commission. Over Circle City's repeated objections, the Commission has forced Circle City to file an application under [A.R.S. § 40-285](#)—a statute governing voluntary transactions—before Surprise condemns its utility assets.

The Commission's interpretation of § 40-285 is contrary to the statute's text, does not further the statute's anti-looting policy, and is a sharp break with long-standing Commission practice. It also represents an expansion of the Commission's limited duties when a municipality condemns a public utility's assets. It is also evident that in ordering Circle City to file a § 40-285 application, the Commission has improperly resolved a contractual dispute, a function strictly reserved to the judicial branch.

The Commission has exceeded the scope of its jurisdiction. This Court should exercise special action jurisdiction over Surprise's Petition and vacate the Commission's orders and actions taken without jurisdiction.



## JURISDICTIONAL STATEMENT

A court's decision of whether to exercise jurisdiction over a petition for special action is discretionary. See *Dobson v. State ex rel. Comm'n on Appellate Ct. Appointments*, 233 Ariz. 119, 121 ¶ 6 (2013). Under the relevant Rules of Procedure for Special Actions and prior decisions of this Court, special action jurisdiction is warranted in this case.

Special action jurisdiction is appropriate when an administrative body, such as the Arizona Corporation Commission, "has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority." Rule 3(b) of the Rules of Procedure for Special Actions. Special action review is "the only appropriate remedy to test the exercise of jurisdiction by the Commission," *Whitfield Transp., Inc. v. Brooks*, 81 Ariz. 136, 139 (1956), because there is no "equally plain, speedy, and adequate remedy by appeal," Rule 1(a) of the Rules of Procedure for Special Actions.

Here, Circle City contends that the Commission has exceeded the scope of its jurisdiction by requiring Circle City to obtain Commission approval under [A.R.S. § 40-285](#) before Surprise condemns its assets. If Circle City is correct, there is no equally plain, speedy, and adequate remedy by appeal. By the time Circle City can appeal the Commission's

final decision, the damage will be irreparable. Circle City will have been forced to endure ultra vires administrative proceedings for which there is no adequate remedy. This alone justifies special action review.

But there other reasons as well. A court should exercise special action jurisdiction over a petition that “presents purely legal questions of statewide importance,” and “requires an immediate and final resolution.” [Dobson, 233 Ariz. at 121 ¶¶ 7-8.](#)

The question of whether the Commission’s interpretation of § 40-285 improperly interferes with municipalities’ right to acquire property through eminent domain presents novel legal issues of statewide importance. And given the fact that the Commission has already forced Circle City to file a § 40-285 application to inquire into Surprise’s eminent domain actions, an immediate and final resolution is urgently needed.

Because Circle City lacks an equally plain, speedy, and adequate remedy by appeal, and the Commission has proceeded in excess of its authority, this Court should exercise jurisdiction over Surprise’s Petition and grant special action relief.

## STATEMENT OF FACTS AND CASE\*

### **I. Circle City is a public utility that holds a certificate of convenience and necessity to provide water utility services.**

The Arizona Corporation Commission (“the Commission”) issued to Circle City in 1958 a Certificate of Convenience and Necessity (“CC&N”) to provide water utility services. APPV1-024 ¶ 19. Circle City is a Class D utility that provides water utility services to customers within a 13-square-mile-area located west of metropolitan Phoenix. APPV1-024 ¶ 17; APPV2-069 ¶ 2. Circle City is a public service corporation within the meaning of [Article XV, § 2, of the Arizona Constitution](#), and [A.R.S. §§ 40-250 and 40-251](#). APPV1-036 ¶ 1; APPV2-070 ¶ 11.

Pursuant to its CC&N, Circle City provides water to approximately 187 customers near Surprise, Arizona. APPV1-024 ¶ 17; APPV2-069 ¶ 1; APPV2-076. Circle City’s “water system consists of a single well, producing 75 gallons per minute . . . , a single 50,000 gallon storage tank, three 25,000 gallon storage tanks, a booster system, and a distribution system serving its current customers.” APPV1-025 ¶ 20.

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\* Selected record items cited are included in the Appendix attached to Petitioner’s Petition for Special Action filed June 1, 2018, cited by volume and page numbers (e.g., APPV1-001).

One of Circle City's chief assets is a contractual entitlement to 3,932 acre-feet of Central Arizona Project ("CAP") water. In 1999, Circle City entered into a subcontract with the United States Bureau of Reclamation and the Central Arizona Water Conservation District. *See* APPV4-013-104. The subcontract allocated Circle City 3,932 acre-feet of CAP municipal and industrial water. APPV4-026. Circle City's CAP allocation lies at the center of this dispute.

## **II. Circle City enters into a Water Facilities Agreement with LP 5000 for a proposed development located outside of Surprise.**

Real Party in Interest Lake Pleasant 5000, L.L.C. is a developer that plans to build an 8,500 home master planned community on approximately 5,000 acres of land within Surprise's municipal planning area and within Circle City's current CC&N territory. APPV1-040; APPV2-069 ¶ 2. Real Party in Interest Harvard Investments, Inc. is a real estate investment and management company that manages and owns Lake Pleasant 5000, L.L.C. (collectively, "LP 5000"). APPV2-070 ¶ 3; APPV5-049.

In 2005, Circle City and LP 5000 entered into a Water Facilities Agreement ("the Agreement"). *See* APPV1-007-021. Circle City agreed to provide potable domestic water services to LP 5000, contingent upon Circle

City obtaining from the Commission an extension of its CC&N to include the area encompassing LP 5000's proposed development. APPV1-007; APPV1-011-012. In return, LP 5000 agreed to construct on-site facilities to distribute the water to the residents of LP 5000's proposed development. APPV1-007-009.

In 2005, the Commission granted Circle City's request to extend Circle City's CC&N to cover LP 5000's proposed development. APPV1-041. As LP 5000 has not yet begun its development, *see* APPV5-047, Circle City does not have any existing customers within the development area.

### **III. Circle City and Surprise begin negotiating a stipulated condemnation of Circle City's water utility assets.**

In 2016, Circle City and Surprise began discussing Surprise's potential condemnation of Circle City's water utility assets. APPV2-070 ¶ 4. In October 2017, Circle City and Surprise entered into a letter of intent to negotiate a stipulated condemnation of "substantially all of the assets of Circle City." APPV1-045-048. One of the "key assets" Surprise seeks to condemn is Circle City's 3,932 acre-feet of CAP water. APPV4-026; APPV5-040. Surprise has indicated that it "intends to acquire these assets through

the power of eminent domain, with or without the cooperation of Circle City.” APPV5-039.

**IV. The Commission denies Circle City a rate increase, citing Surprise’s potential condemnation of Circle City’s utility assets.**

After nineteen years without a rate increase, Circle City filed with the Commission in January 2017 an application for a permanent rate increase. APPV1-022 ¶ 1; APPV1-032 ¶ 52. The next month, the Commission granted LP 5000 leave to intervene in Circle City’s rate case. APPV1-022-023 ¶¶ 4, 11.

In July 2017, Commission Staff recommended approval of Circle City’s requested rate increase. *See* APPV1-023 ¶ 12. The Commission invited LP 5000 to file comments on the Commission Staff’s recommendation. APPV1-023-024 ¶ 13. LP 5000 filed comments “stating that it generally supports the recommendations in the Staff Report, but had some areas of concern.” APPV1-024 ¶ 15. LP 5000’s concern was over Commission Staff’s recommended treatment of overcharges. APPV1-033 ¶ 55.

In January 2018, the Commission entered a decision denying Circle City a rate increase, noting that “Surprise has announced its intent to

purchase” Circle City. APPV1-033 ¶ 58. The Commission concluded that “under these circumstances, it is not in the public interest to approve a rate increase for” Circle City. APPV1-033 ¶ 58; APPV1-036.

**V. LP 5000 asks the Commission to exercise its jurisdiction to prevent Surprise from acquiring Circle City’s CAP allocation.**

On February 21, 2018, LP 5000 sent a letter to the Commission asking it to “exercise its jurisdiction to prevent the sale of [Circle City’s] CAP allocation to Surprise... because those assets are needed to provide service to future customers of” Circle City located within LP 5000’s proposed development. APPV2-005-006.

LP 5000 claims a contractual entitlement to Circle City’s CAP allocation under the Agreement between LP 5000 and Circle City. *See* APPV1-007-021; APPV1-041; APPV2-070 ¶ 3. LP 5000 claims Circle City’s CAP allocation as the primary source of water for its proposed development. APPV2-005; APPV2-070 ¶ 3. Circle City disputes that the Agreement entitles LP 5000 to the CAP allocation.

The Commission swiftly responded to LP 5000’s request. The same day LP 5000 sent its letter, the Commission issued notice of a staff open

meeting taking place the following day, February 22, 2018, that included the following agenda item:

**Circle City Water Co., LLC (W-03510A-17-003):** Commission Consideration, Discussion, and Possible Vote Regarding Commission's Obligations Under [A.R.S. § 40-285](#) Arising from Potential Sale of Circle City Water Company to City of Surprise  
– *Commissioner Dunn*

APPV1-049-050.

On February 22, 2018, Surprise filed a letter asking the Commission to take no action on LP 5000's February 21 request. *See* APPV2-022-051. Surprise argued that, consistent with the Commission's long-standing practice, the Commission does not have authority under [A.R.S. § 40-285](#) to require a public utility to seek the Commission's approval before a municipality may condemn a utility's assets. *See* APPV2-023-028.

Surprise identified eight instances dating back to 2005 where a municipality acquired a public utility's assets without requiring the utility to file an application under § 40-285. *See* APPV2-024-27; APPV2-065. In each case, the Commission canceled the utility's CC&N and administratively closed the docket. *See* APPV2-024-27; APPV2-065. And, as reflected in a 2004 letter from the Commission's former chief counsel,



this has been the Commission's long-held interpretation of its powers under § 40-285. *See* APPV1-005-006.

**VI. The Commission orders Circle City to file an application for Commission approval under § 40-285.**

At a March 13, 2018 open meeting, the Commission discussed Surprise's potential condemnation of Circle City's utility assets. *See* APPV2-053-068. The Commission discussed whether Circle City needed to file an application under § 40-285 before Surprise could condemn Circle City's utility assets. *See* APPV2-053-068.

On March 30, 2018, the Commission issued Decision No. 76637. APPV2-069-072. The Commission concluded that "further investigation is necessary to ensure that the rights of Circle City's customers are adequately protected, that customers within Circle City's CC&N territory will have adequate water utility service following the potential condemnation, and that Circle City has arranged for the orderly disposition of its remaining obligations to its customers." APPV2-070 ¶ 9. The Commission ordered Circle City to file within 30 days an application under § 40-285. APPV2-070-071 ¶ 10.

**VII. Under continuing protest, Circle City files with the Commission its application for Commission approval under § 40-285.**

On April 12, 2018, Circle City filed under protest its application for Commission approval under [§ 40-285](#). See APPV2-073–077. Circle City contested “that the Commission has any jurisdiction over the condemnation of the Company’s water utility assets by the City of Surprise.” APPV2-073 & n.1. Circle City asked the Commission to dismiss the § 40-285 application for lack of jurisdiction over Surprise’s condemnation of Circle City’s utility assets. APPV2-076. After preserving its ongoing objection to the § 40-285 proceedings, Circle City provided as much responsive information as was possible, but was unable to provide any definitive agreement between it and Surprise related to the stipulated condemnation as no such final agreement existed. APPV3-075.

On April 30, Commission staff issued a memorandum addressing the sufficiency of Circle City’s § 40-285 application. APPV2-078–080. Staff noted, among other things, that Circle City failed to include in its application information on the “terms and conditions of the proposed abandonment, sale, lease, transfer, or assignment and copies of any agreement that has been or will be executed concerning the transaction.”

APPV2-078 (quoting [A.A.C. R14-2-402\(D\)\(2\)\(e\)](#)). Staff concluded that without this information on the proposed condemnation “Circle City is not in compliance with Commission Decision No. 76637.” APPV2-079.

On May 2, 2018, the Commission issued a notice of public meeting. APPV2-081–084. The agenda for the May 8 meeting included the following item as part of the Commission’s regular agenda:

**Circle City Water Company, L.L.C. (W-03510A-18-0095) – Application of Circle City Water Company L.L.C. pursuant to [A.R.S. § 40-285](#) and [A.A.C. R14-2-402\(D\)](#); Staff’s Determination of Insufficiency of Application; Evaluation of Circle City’s Compliance with Decision No. 76637.**

APPV2-083.

On May 4, 2018, Circle City responded to the April 30 staff memorandum, again preserving its objections to the Commission proceedings. APPV3-005–025. Circle City noted that [A.A.C. R14-2-402\(D\)](#) requires an executed agreement or an agreement in a substantially similar form to the one that will be executed; it does not require draft agreements. APPV3-006. As there was no such agreement then in existence, Circle City contended that there was nothing to submit to the Commission; rather, it offered to provide to the Commission “a copy of the definitive agreement . . . once it has been finalized.” APPV3-008; APPV3-034–035.

The Commission considered Circle City's § 40-285 application during the May 8 meeting. *See* APPV3-026-071. At the conclusion of the meeting, the Commission directed Circle City to provide a copy of the definitive agreement with Surprise by May 11 or face the prospect of Commission sanctions, including fines or an order to show cause. *See* APPV3-040-045.

On May 10, 2018, Chairman Tom Forese and Commissioner Andy Tobin sent a letter to Surprise, the Central Arizona Water Conservation District, the Arizona Department of Water Resources, and the Bureau of Reclamation addressing Circle City's CAP allocation. APPV3-083-085. The purpose of the letter was "to provide notice regarding a transaction involving the transfer of certain [CAP] allocations currently held by Circle City" because "the parties to this letter would all be involved in the assignment of the CAP contract and would be impacted by a potential transfer of that asset." APPV3-084-085.

On May 11, 2018, Circle City under continuing protest submitted under seal a draft of the settlement agreement for stipulated condemnation with Surprise. APPV4-005-006; APPV4-106. Circle City also submitted a copy of its subcontract for the CAP allocation. *See* APPV4-013-104.

On May 14, 2018, the Commission issued a notice of open meeting to be held the next day. APPV5-013-014. The agenda including the following item:

**Circle City Water Company, L.L.C. (W-03510A-0095)** – Update on the Application of Circle City Water Company L.L.C. pursuant to [A.R.S. § 40-285](#) and [A.A.C. R14-2-402\(D\)](#); Staff’s Determination of Insufficiency of Application; Evaluation of Circle City’s Compliance with Decision No. 76637.

APPV5-014.

The Commission discussed at the May 15 meeting Circle City’s purported lack of compliance with the Commission’s prior orders. *See* APPV5-015-033. Near the end of the meeting, the Commission considered the following motion: “So the motion would be by this Friday we would need [Circle City] to confirm in writing . . . whether the City of Surprise will assume this contract or the obligation to perform under the company’s agreement with the developer in terms of providing water service.” APPV5-031. The Commission unanimously approved the motion, granting Circle City until May 18 to comply. APPV5-031-032.

As directed, Circle City responded in writing to the Commission’s request, stating that “the Commission is attempting to leverage its purported authority under [A.R.S. § 40-285](#) to advance a contractual right

that [LP 5000] now claims under” the Agreement, notwithstanding the fact that the Commission lacks authority to resolve contractual disputes. APPV5-036-037.

Circle City also enclosed a response letter from Surprise, in which Surprise unequivocally reiterated its intent to condemn Circle City’s assets—with or without Circle City’s cooperation—and its position that it will not assume Circle City’s obligations to LP 5000 under the Agreement, if any. APPV5-039-040.

**VIII. Surprise approves the condemnation of Circle City’s CC&N and assets, including Circle City’s CAP allocation.**

In a special election held May 15, 2018, the electorate of Surprise approved by a margin of 80% a resolution authorizing the condemnation of Circle City’s assets. APPV5-041-042.

Surprise’s City Council subsequently authorized the condemnation of Circle City’s utility assets, including Circle City’s CAP allocation. APPV5-044. The City Council also approved the filing of appropriate judicial proceedings to carry out the acquisition, including the filing of a condemnation action in superior court and the filing of special action proceedings. APPV5-043-046.

On June 1, 2018, Surprise filed its Petition for Special Action alleging that the Commission acted without jurisdiction. On June 19, this Court stayed administrative proceedings pending resolution of the Petition.

### STATEMENT OF THE ISSUES

1. A public utility must obtain Commission approval under [A.R.S. § 40-285](#) to sell, lease, assign, or mortgage its utility assets. Commission approval of condemnations is not mandated by the statute's plain text, nor would it further the statute's anti-looting policy and is contrary to long-standing Commission practice. Did the Commission exceed its jurisdiction by requiring Circle City to apply for Commission approval under § 40-285 before Surprise condemns its utility assets?

2. The Commission only has two functions when a municipality condemns a public utility's assets. The Commission must confirm that the utility's role as a public utility has ceased after the condemnation. And the Commission may issue a new CC&N if the municipal utility refuses to serve customers in the utility's former service area. Did the Commission act without jurisdiction by requiring Circle City to file a § 40-285 application before Surprise condemns its utility assets?

3. The Commission lacks jurisdiction to resolve contract disputes. The parties dispute whether Circle City is contractually obligated to dedicate its CAP allocation to the future residents of LP 5000's development. These future residents are only entitled to Circle City's CAP allocation if LP 5000's interpretation of the Agreement is correct. Did the Commission act without jurisdiction by adopting LP 5000's interpretation of the Agreement and instituting proceedings to protect these hypothetical future customers?

### STANDARD OF REVIEW

The crux of this case is whether the Commission properly interprets [A.R.S. § 40-285](#). Contrary to the statute's plain text, the Commission interprets § 40-285 to require a public utility to seek and obtain Commission approval before a municipality may condemn a utility's assets. As this is a pure question of law, this Court reviews de novo. *See US W. Commc'ns, Inc. v. Ariz. Corp. Comm'n*, 201 Ariz. 242, 244 ¶ 7 (2001).

### ARGUMENT SUMMARY

[A.R.S. § 40-285](#) does not require Circle City to obtain Commission approval before Surprise condemns its utility assets. By its plain terms, § 40-285 does not apply to condemnation actions. Rather, Commission



approval under § 40-285 is only necessary when a public utility engages in a voluntary transaction—*i.e.*, when it sells, leases, assigns, or mortgages its utility assets. As Surprise is not seeking to acquire Circle City’s utility assets through voluntary sale, lease, assignment, or mortgage, Circle City need not obtain Commission approval of the condemnation.

Moreover, applying § 40-285 to condemnations would not further the policy behind the statute. The legislature enacted § 40-285 to prevent the looting of a public utility’s assets, which impairs the utility’s ability to serve the public. There are no looting concerns when a municipality acquires a public utility’s assets via condemnation. After the condemnation is complete, the public utility’s former assets will continue to serve the public, with service provided by a municipal utility rather than the public utility.

And the Commission’s long-standing practice confirms that § 40-285 does not apply when a municipality condemns a public utility’s assets. The Commission therefore exceeded the scope of its jurisdiction in requiring Circle City to seek Commission approval under § 40-285 before Surprise condemns Circle City’s utility assets.

In fact, the Commission’s role when a municipality condemns a public utility’s assets is quite limited. The Commission may not regulate

the condemnation itself, nor can it regulate the resulting municipal utility. Instead, it can only serve two narrow post-condemnation functions.

First, when the municipality is condemning all of a public utility's assets, the Commission must confirm that the utility's role as a public utility has ceased, and, if so, cancel its CC&N. Here, Surprise intends to condemn all of Circle City's utility assets. Once the condemnation is complete, the Commission must confirm that Circle City's role as a public utility has ceased and then cancel its CC&N.

Second, where the municipal utility refuses service to customers within the public utility's former service area, the Commission may issue a new CC&N to serve the neglected customers. Surprise has indicated that it intends to provide utility service to all 187 of Circle City's existing customers and that it will provide service to LP 5000's development. But should Surprise refuse service to any customers, the Commission is empowered to issue a new CC&N to a public utility to provide service to the neglected customers.

The Commission simply has no other role to play in condemnations. Because the Commission has taken a more active role in Surprise's proposed condemnation of Circle City's assets, most notably by requiring

Circle City to file an application for Commission approval under § 40-285, the Commission has exceeded the scope of its jurisdiction.

Finally, the Commission may not resolve contractual disputes. This is a function reserved solely to the courts. To conclude that future residents of LP 5000's development may not be served after the condemnation, the Commission necessarily had to accept LP 5000's interpretation of the Agreement as contractually obligating Circle City's CAP allocation to the development. As this was the foundation for Decision No. 76637 and the § 40-285 proceedings, the Commission acted without jurisdiction in interpreting the Agreement and resolving the dispute in favor of LP 5000.

Circle City respectfully requests that the Court accept special action jurisdiction over Surprise's Petition and grant special action relief by vacating the Commission's orders issued without jurisdiction.

## ARGUMENT

**I. The Commission acted without jurisdiction in requiring Circle City to file an application for Commission approval under A.R.S. § 40-285 before Surprise condemns all of Circle City’s utility assets.**

**A. By its plain terms, § 40-285 does not apply to condemnations.**

In interpreting a statute, a court’s “primary task . . . is to discern the legislature’s intent.” *Jenkins v. Hale*, 218 Ariz. 561, 563 ¶ 10 (2008). A “statute’s text is the best evidence of that intent.” *Id.*

A.R.S. § 40-285(A) provides that the Commission must authorize the sale, lease, assignment, or mortgage of a public utility’s assets that are necessary or useful to the performance of its public duties:

A public service corporation shall not sell, lease, assign, mortgage or otherwise dispose of or encumber the whole or any part of its railroad, line, plant or system necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor shall such corporation merge such system or any part thereof with any other public service corporation without first having secured from the commission an order authorizing it so to do.

A utility need only seek Commission authorization under § 40-285(A) for certain types of transactions – when a corporation wishes to “sell, lease, assign, mortgage or otherwise dispose of or encumber” its assets.

There is a critical qualitative difference between the enumerated class of transactions in § 40-285(A) and condemnations. Each of the listed

transaction types—sale, lease, assignment, and mortgage—involves a voluntary transaction. Condemnations, on the other hand, are fundamentally coercive in nature. See *Bonito Partners, LLC v. City of Flagstaff*, 229 Ariz. 75, 79 ¶ 11 (App. 2012) (observing that condemnation involves the exercise of a municipality’s “police power”) (citing *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 541 (2005)). Condemnations do not fit within the class of transactions listed in § 40-285(A).

But even if condemnations were akin to the class of transactions listed in § 40-285(A), the Court should give effect to the legislature’s decision not to include condemnations as a transaction that triggers application of § 40-285. See *Champlin v. Sargeant In & For Cty. of Maricopa*, 192 Ariz. 371, 374 ¶ 16 (1998) (recognizing “the established rule of construction, *expressio unius est exclusio alterius*—the expression of one or more items of a class indicates an intent to exclude omitted items of the same class”).

This textual interpretation is consistent with an Attorney General opinion interpreting 40-285. That opinion supports the conclusion that § 40-285 does not require Commission approval before a municipality acquires a public utility’s assets via condemnation: “As an alternative

procedure, the municipality may of course condemn . . . by court action. Where however the municipal corporation by voluntary agreement seeks to purchase a privately owned public utility,” § 40-285 requires “that the utility obtain permission from the Commission to enter into the contract of sale.” Op. Ariz. Att’y Gen. 62-7 at 12, *available at* APPV2-044.

In contrast to an acquisition via condemnation, when a “municipality acquires the assets of a private public service corporation through purchase it *necessarily requires* that the private utility must voluntarily agree to sell to the municipality in this manner.” *Id.* at 13 (emphasis added), *available at* APPV2-045. With a voluntary sale, a “municipality is therefore on notice as to the requirement under A.R.S. § 40-285 that the public service corporation must obtain permission of the Corporation Commission to sell.” *Id.*

Here, Surprise has clearly communicated its intent to condemn Circle City’s assets—with or without Circle City’s cooperation. *See* APPV5-039–040 (“While it is certainly the desire and intent of the City to pursue the condemnation by mutually agreeable means, the City intends to acquire these assets through the power of eminent domain, with or without the cooperation of Circle City.”). As condemnations are not one of the transaction types that triggers application of § 40-285, Commission

approval under § 40-285 is not required for Surprise to condemn Circle City's utility assets.

**B. Applying § 40-285 to condemnations would not further the statute's anti-looting policy.**

In addition to statutory text, courts also consider “the policy behind the statute” in determining legislative intent. *Jenkins*, 218 Ariz. at 563 ¶ 10. In this case, “[t]he legislature enacted A.R.S. section 40-285 to prevent ‘looting’ of a utility’s facilities and impairment of service to the public.” *Babe Invs. v. Ariz. Corp. Comm’n*, 189 Ariz. 147, 151 (App. 1997); see also *Am. Cable Television, Inc. v. Ariz. Pub. Serv. Co.*, 143 Ariz. 273, 277 (1983) (“We believe that the legislature intended in § 40-285 to prevent utilities from disposing of resources devoted to providing its utility service, thereby ‘looting’ its facilities and impairing its service to the public.”).

Although no Arizona court has squarely addressed whether § 40-285 requires Commission approval before a municipality condemns public utility assets, other courts have found similar anti-looting statutes inapplicable to condemnation proceedings. See, e.g., *People by Public Utilities Commission v. City of Fresno*, 62 Cal. Rptr. 79, 84 (Ct. App. 1967) (holding that “when all of the legislative enactments on the subject are

carefully considered and reconciled the conclusion is inescapable that the Legislature did not and could not have intended to include a public entity's power of eminent domain within the mandatory requirement of Public Utilities Code section 851").<sup>1</sup>

And even the Commission's chief counsel in 2004 recognized that courts in jurisdictions with similar anti-looting statutes "uniformly hold that a public utility commission is without jurisdiction to consider transfers of utility systems that are conducted under the auspices of the courts in condemnation proceedings." APPV1-005.

As this case illustrates, there are no looting concerns in the condemnation context. Surprise intends to condemn all of Circle City's assets so that these assets may be used by a municipal utility to provide water service to its customers, including all customers now served by Circle City. See APPV5-039-040. There are no "looting" or similar concerns raised by such a use. Because the anti-looting policy behind § 40-285 would not be served by interpreting the statute to require Commission

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<sup>1</sup> As [§ 40-285](#) was modeled after California's statute, see [Am. Cable Television](#), 143 *Ariz.* at 278, a judicial interpretation of [California Public Utilities Code § 851](#) is particularly instructive.



approval before a municipality condemns a utility's assets, § 40-285 is inapplicable.

**C. The Commission's long-standing practice confirms that § 40-285 approval is not required with municipal condemnations.**

Moreover, long-standing Commission practice confirms that public utilities need not seek Commission approval before a municipality condemns utility assets. *See* APPV2-024-027 (collecting Commission decisions dating back to 2005 in which the Commission canceled a public utility's CC&N after the completion of condemnation proceedings and without prior Commission approval under § 40-285); APPV1-006 (Commission's then-chief counsel, observing: "I generally agree with the assertion that no Commission proceeding under A.R.S. § 40-285 is necessary to the completion of the City's condemnation . . .").

Rather, the Commission's established practice has been to require a public utility to request that the Commission cancel its CC&N and administratively close the docket at the end of condemnation proceedings. *See* APPV1-006; APPV2-024-027.

Thus, neither the text of § 40-285 nor the policy underlying it support requiring Circle City to seek Commission approval before Surprise

condemns its utility assets. And the Commission's long-standing practice is consistent with this interpretation. The Commission therefore exceeded its jurisdiction in requiring Circle City to file an application with the Commission under § 40-285 before Surprise condemns it.

**II. Because the Commission did more than simply confirm that Circle City's public utility role has ceased or issue a new CC&N if Surprise refuses service, it exceeded the scope of its jurisdiction.**

**A. The Commission lacks jurisdiction over condemnations or municipal utilities.**

Article XV of the Arizona Constitution created the Commission and defines the scope of its powers. It is well established that the "Commission's powers do not exceed those to be derived from a strict construction of the Constitution and implementing statutes." *Williams v. Pipe Trades Indus. Program*, 100 Ariz. 14, 17 (1966). In other words, "a public service commission has no inherent power." *Id.*

The Commission lacks jurisdiction to regulate municipal utilities and municipal condemnations. *Ariz. Const. art. XV, § 2* (expressly excluding municipalities from the definition of public utilities); *see also City of Phoenix v. Wright*, 52 Ariz. 227, 233-34 (1938) ("[W]e think it follows that the constitution, by necessary implication, forbids the regulation by the

corporation commission of municipal corporations which furnish water for public purposes. . . .”). The Commission has no power over Surprise here.

**B. The Commission may only confirm that Circle City’s role as a public utility has ceased after Surprise condemns its assets.**

A public utility remains subject to the Commission’s regulatory oversight until its CC&N is retired. *See Op. Ariz. Att’y Gen. 62-7 at 11* (“Until it is relieved by the Commission of its duties, and the certificate of convenience and necessity is retired, [the public utility] is subject to the Commission’s regulation.”), *available at APPV2-043*; *see also id.* at 8 (“The Legislature has required the Corporation Commission to continue in effect, but to hold in abeyance the certificate of convenience and necessity granted to those utilities that are in the process of being acquired by the municipality . . . .”), *available at APPV2-040*. Thus, the Commission may continue to regulate a public utility as it normally would while condemnation proceedings are pending.

But once the condemnation is complete and the municipality acquires all of a utility’s assets and customers, the utility’s role as a public utility ceases, and the Commission cannot interfere with the transfer of assets. “In the situation when the entire assets of the private utility are acquired by a

municipality and all the customers are to be served by it, the utilities' public service function is ended. The Corporation Commission cannot prohibit sale of its assets." *Id.* at 13-14 ¶ 8, *available at* APPV2-045-046. The Commission "may not enter an order denying the public utility the right to dispose of its assets, except upon the grounds that the utility is not in fact terminating its function in the service of its customers." *Id.* at 14 ¶ 8.

Surprise intends to acquire all of Circle City's assets and customers. *See* APPV2-028; APPV5-039-040; APPV5-043-046. In fact, Surprise has taken the position that Circle City would be in violation of the superior court's condemnation order should it attempt to provide water service within Circle City's current CC&N territory after the condemnation. *See* APPV5-039; *see also* [A.R.S. § 9-516\(D\)](#) (prohibiting as a matter of "public policy of the state" the issuance of a CC&N to a public utility that would compete with a municipal utility established through condemnation of a public utility's assets).

Circle City's role as a public service corporation will cease after the condemnation. Surprise will have acquired all of Circle City's water utility assets and will serve all of Circle City's existing customers. It has even committed to serve LP 5000's development, if and when it occurs. And

while the Commission undoubtedly has the power to regulate Circle City while the condemnation action is pending, the Commission cannot prevent Surprise from acquiring Circle City's assets, including Circle City's CAP allocation, through eminent domain. It may only confirm after the condemnation that Circle City's role as public utility has ceased.

**C. The Commission may issue a new CC&N only after Surprise refuses to provide service to Circle City's former customers.**

Municipalities are empowered to condemn public utility assets. [A.R.S. § 9-516\(B\)](#). Following a municipality's acquisition of all of a public utility's assets, the Commission's "hearing and order must be directed *only* to a determination that there are no other customers or persons who have been served by the private utility and that [the utility] will, in fact, have been relieved of all its duties to serve such customers." Op. Ariz. Att'y Gen. 62-7 at 14 (emphasis added), *available at* APPV2-046.

Should the municipal utility refuse service to any customer within the public utility's former service area, the Commission is empowered to issue a new CC&N for the territory containing the customers who have been denied utility service. See [A.R.S. § 9-516\(D\)](#); see also Op. Ariz. Att'y Gen. 62-7 at 14, *available at* APPV2-046 ¶ 10.

At this point, there is no role for the Commission in Surprise's attempt to condemn Circle City's utility assets. If the acquisition is successful and Surprise refuses to provide water services to any of Circle City's existing customers, the Commission is empowered under [§ 9-516\(D\)](#) to issue a new CC&N to another public service corporation to cover the neglected customers. It would not be empowered to force Circle City—which would now lack any utility assets—to serve under its former CC&N.

Surprise has repeatedly represented to the Commission that it will provide water utility service to all of Circle City's customers. *See* APPV2-062-063; APPV3-048; APPV3-057. This is all that is required of Surprise, and the Commission only has power to issue a new CC&N if Surprise refuses to provide the promised utility services.

To the extent that there are unspecified potential future customers that may be affected by the acquisition, it is not a matter of concern for the Commission at this point. *See* Op. Ariz. Att'y Gen. 62-7 at 12 (The Commission may only inquire "into those matters which would affect the former customers of the utilities.") (emphasis added), *available at* APPV2-044; *id.* at 14 ("The hearing and order must be directed *only* to a determination

that there are no other customers or persons *who have been served* by the private utility . . . .”) (emphasis added), *available at* APPV2-046 ¶ 8.

Thus, the Commission only has post-condemnation functions when a municipality condemns a public utility’s assets. Surprise has not yet condemned Circle City’s utility assets, so there is no role for the Commission at this stage. Because the Commission has forced Circle City to participate in pre-condemnation proceedings, including by filing a § 40-285 application, the Commission has acted without jurisdiction.

**III. To conclude that future customers of Circle City may not be served by Surprise after the condemnation, the Commission necessarily had to interpret the Agreement in favor of LP 5000, in excess of its jurisdiction.**

**A. The Commission lacks jurisdiction to resolve contractual disputes, a power reserved exclusively to the judicial branch.**

Arizona courts have consistently held that “the construction of a contract is a judicial function and the courts, not the corporation commission, have the jurisdiction to determine” the legal rights and obligations that flow from a contract. *Trico Elec. Co-op. v. Ralston*, 67 Ariz. 358, 365 (1948); *see also Gen. Cable Corp. v. Citizens Utils. Co.*, 27 Ariz. App. 381, 386 (1976) (accord).

An aggrieved party to a contract must therefore seek relief from the courts, not from the Commission. *See* Op. Ariz. Att’y Gen. 76-5 at 4 (“A dispute arising from such contractual agreements is of a private nature between the parties to the contract and relief, if any, must be sought in the courts.”), *available at* APPV2-051. The Commission therefore lacks jurisdiction to resolve contractual disputes between private parties, such as Circle City and LP 5000.

**B. Because future residents of LP 5000’s development are only entitled to Circle City’s CAP allocation under LP 5000’s view of the Agreement, the Commission necessarily interpreted a contract.**

Circle City currently provides water utility services to 187 customers. APPV1-024 ¶ 17 (Commission’s Finding of Fact 17, Decision No. 76536). Surprise has repeatedly represented to the Commission that it will provide utility service to all 187 of these customers if it successfully condemns Circle City’s utility assets. *See* APPV2-062-063; APPV3-048; APPV3-057.

The parties vigorously dispute whether the Agreement contractually obligates Circle City to dedicate its 3,932 acre-feet of CAP water to LP 5000’s proposed development. Circle City and Surprise steadfastly maintain that it does not, *see* APPV2-064; APPV3-049-050; APPV5-035-040,



while LP 5000 advances the contrary view, *see* APPV1-040-041; APPV2-006; APPV3-064-065. The hypothetical future residents of LP 5000's speculative development are the only "future customers" of Circle City about whom the Commission has expressed concern.

The Commission's stated justification for requiring Circle City to submit an application under § 40-285 was to ensure "that customers within Circle City's CC&N territory will have adequate water utility services following the potential condemnation" by Surprise. APPV2-070 ¶ 9. Given Surprise's representations that it will serve all 187 of Circle City's existing customers, the Commission's order is only justified if, in fact, LP 5000's hypothetical future residents are owed Circle City's CAP allocation under the Agreement.

Notably, the Commission explicitly adopted LP 5000's interpretation of the Agreement in Decision No. 76637: "Surprise has notified [LP 5000] that, if Surprise's condemnation of Circle City proceeds, Surprise will not agree to assume Circle City's obligations under the" Agreement. APPV2-070 ¶ 8 (Commission's Finding of Fact 8, Decision No. 76637). This finding of fact either presupposes that LP 5000's interpretation of the Agreement is correct—an action that clearly exceeds the scope of the Commission's

jurisdiction. Or, it directs Circle City to file a § 40-285 application so that the Commission can determine whether LP 5000's view of the Agreement is correct—also an action in excess of the Commission's jurisdiction.

The record is replete with other examples of Commissioners or Commission staff members explicitly or implicitly adopting LP 5000's interpretation of the Agreement as a basis to take official Commission action. *See, e.g.*, APPV2-061-065; APPV2-070; APPV3-038; APPV3-052-053; APPV3-060-061; APPV3-084-086; APPV5-017; APPV5-030-031.

As this is a purely private contractual dispute between Circle City and LP 5000, it is for the courts, and not the Commission, to resolve. To the extent the Commission has interpreted the Agreement—which it necessarily had to do to conclude that there are future Circle City customers that may not be served after the condemnation—the Commission has acted in excess of its jurisdiction.

**C. Even if the Commission could resolve contractual disputes, LP 5000's interpretation of the Agreement is manifestly unreasonable as contrary to fact and law.**

LP 5000 claims it is owed Circle City's 3,932 acre-feet of CAP water under the Agreement. *See* APPV1-040-041. But the Agreement does not

actually address Circle City's CAP allocation. See APPV1-007-021. LP 5000's interpretation of the Agreement is incorrect as a matter of fact.

Courts have held that a party to a CAP water contract cannot establish a vested right to CAP water unless the United States Secretary of the Interior is a party to the contract. See *Maricopa-Stanfield Irr. & Drainage Dist. v. Robertson*, 211 Ariz. 485, 490 ¶ 27 (2005) ("A contract with the Secretary is required to establish a right to [CAP] water . . . ."); APPV4-064 ("The United States shall be a party to subcontracts."); see also *Smith v. Cent. Ariz. Water Conservation Dist.*, 418 F.3d 1028, 1038 (9th Cir. 2005) ("[B]ecause neither the master contract nor the relevant subcontracts contain language evincing a clear intent to benefit the landowners, the landowners are not third-party beneficiaries . . . ."). There is no dispute that the Secretary of the Interior is not a party to the Agreement between LP 5000 and Circle City. LP 5000's interpretation of the Agreement is also incorrect as a matter of law.

### **REQUEST FOR ATTORNEYS' FEES AND COSTS**

Under *ARCAP 21*, *A.R.S. §§ 12-341*, and *12-348*, Circle City requests its fees and costs incurred on appeal.

## CONCLUSION

Circle City respectfully requests that the Court accept special action jurisdiction over Surprise's Petition for Special Action. Circle City further requests that the Court vacate Commission Decision No. 76637 and all related orders, and hold that the Commission lacks jurisdiction to require Circle City to seek Commission approval under [A.R.S. § 40-285](#) before Surprise condemns Circle City's utility assets. Finally, Circle City requests that the Court award Circle City its reasonable costs and attorney's fees incurred on appeal.

RESPECTFULLY SUBMITTED this 25 day of June, 2018.

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