SUPREME COURT OF ARIZONA

SUN CITY HOME OWNERS ASSOCIATION, Petitioner/Appellant, v. THE ARIZONA CORPORATION COMMISSION, Respondent/Appellees EPCOR WATER ARIZONA, INC. and VERRADO COMMUNITY ASSOCIATION, INC., Intervenors.	Arizona Supreme Court No. CV-20-0047-PR Court of Appeals Division No. 1 CA-CC 17-0002 Arizona Corporation Commission Docket No. WS-01303A-16-0145 Decision No. 76162

AMICUS CURIAE BRIEF OF ARIZONA WATER COMPANY

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INTRODUCTION

This Court should decline review because the Arizona Constitution and the statutes that apply to the Arizona Corporation Commission ("Commission") establish a deferential standard of review that the Arizona Court of Appeals correctly applied in its review of the Commission's ratemaking decision. Using that standard of review, the Court of Appeals correctly decided that the Commission has the authority to approve consolidated rates, and that substantial evidence in the record supported the consolidated rates that the Commission approved in EPCOR's rate case.

Sun City Home Owners Association's ("SCHOA") Petition For Review asserts two main arguments, both of which this Court should reject as bases for review of the Court of Appeals' decision. SCHOA's first argument, that the Commission's decision is discriminatory, contorts the meaning of "discriminatory" in the utility context, as the dissenting opinion ("Dissent") acknowledges. (Dissent ¶54). Further, the anti-discrimination provisions related to ratemaking in the Arizona Constitution must be read in harmony with the constitutional provisions requiring the Commission to set "just and reasonable rates" and "just and reasonable classifications" based on customers who receive "like and

contemporaneous service." Ariz. Const. art. XV, § 3; § 12. It is only when rates or classifications become unjust and unreasonable that they violate the Constitution and related statutes. Despite Petitioner's assertions and the Dissent's view to the contrary, rate consolidation is not discriminatory, and approving the consolidated rates in this case was not unjust, unreasonable, or an abuse of discretion.

SCHOA's second argument, that the Commission's decision was unsupported by substantial evidence, is incorrect as evidenced by SCHOA's own statements in its Petition for Review about the Commission's Decision and the record. The Court of Appeals correctly declined to reweigh the evidence presented to the Commission and to defer to the Commission's factual determinations regarding rate consolidation.

Arizona Water Company ("Arizona Water" or "Company") therefore supports the Court of Appeals' holding that the Commission is lawfully authorized to prescribe consolidated rates, subject to appropriate Constitutional constraints that are not implicated here.

INTERESTS OF *AMICUS CURIAE*

Amicus Curiae Arizona Water is the second largest Commission-regulated water utility in Arizona. Arizona Water, whose corporate

headquarters is in Phoenix, Arizona, provides water service to over 250,000 people in eight counties and in more than thirty communities and 21 water systems throughout the State.

Arizona Water has an interest in this matter because it is a public service corporation regulated by the Commission and the scope of the Commission's ratemaking authority has a direct effect on its operations. SCHOA and the Dissent are incorrect when they state that the Commission's decision to approve consolidated rates is novel and a drastic departure from past Commission practice. The Commission has authorized Arizona Water to consolidate rates in most of its water systems; in fact, Arizona Water's 21 water systems are consolidated into six for ratemaking purposes. Some of these consolidated rates are almost twenty years old. Arizona Water plans to continue to consolidate customer rates in the future because rate consolidation benefits customers and the Company, is good ratemaking policy, and is good public policy.

ARGUMENT

I. This Court should decline review because the Court of Appeals applied the correct deferential standard of review to the Commission's ratemaking decision.

Throughout the over 100-year existence of both this Court and the Commission, this Court has consistently recognized that article XV, section 3 of the Arizona Constitution gives the Commission plenary authority over ratemaking. Article XV, Section 3 states:

> 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 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 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.

In the first case to address the scope of article XV, section 3, this Court recognized the Commission's plenary authority to "prescribe just and reasonable classifications to be used and just and reasonable rates and charges," subject to review by the courts. *State v. Tucson Gas, Elec. Light & Power Co.*, 15 Ariz. 294, 307 (1914) (noting that the Commission's "labors in gathering the testimony will greatly aid the courts, if appealed to"). In *Tucson Gas*, the majority opinion struck down a statute that it concluded improperly invaded the Commission's ratemaking authority under the Arizona Constitution, holding that "[w]hile the Legislature had no power under the Constitution to do what it undertook to do in [the statute at issue], the Corporation Commission not only has the power to do it, but is afforded every facility for its intelligent execution." *Id.* at 308. Even the *Tucson Gas* dissent recognized the plenary authority of the Commission to set rates but declined to find a conflict because, in the dissent's view, the Commission had not yet established a rate that conflicted with the statute at issue. *Id.* at 309 (Cunningham, J., dissenting) (noting in reference to article XV, section 3 that "[t]his language is susceptible of no interpretation. The Corporation Commission is given all the powers" referenced therein.).

The Court's decisions since *Tucson Gas* have uniformly recognized the Commission's plenary ratemaking authority, even in cases where the Court has recognized limitations on the Commission's authority in other spheres. In *Arizona Eastern Railroad v. State*, for example, this Court found the Commission had concurrent jurisdiction with the Legislature to regulate public service corporations in areas other than ratemaking, but also stated:

> [T]he authority of the Corporation Commission to prescribe classifications, rates, and charges under [article 15, section 3 of the Constitution] is exclusive. Construing the various sections of article 15 of the Constitution together, and looking at the language employed with a regard to the general purview of the instrument, no other construction is possible if its several provisions are to be harmonized and made into a workable instrumentality.

See 19 Ariz. 409, 412 (1918). *See also Corp. Comm'n v. Pac. Greyhound Lines*, 54 Ariz. 159, 168 (1939) (recognizing "the powers of the commission over classification, rates and charges," though limiting its powers in other areas); *Ethington v. Wright*, 66 Ariz. 382, 392 (1948) ("[I]n the matter of

prescribing classifications, rates, and charges of public service corporations and in making rules, regulations, and orders concerning such classifications, rates, and charges by which public service corporations are to be governed, the Corporation Commission has full and exclusive power.").

In *Arizona Corporation Commission v. State ex rel. Woods*, this Court held that article 15, section 3, gives the Commission exclusive authority not only to set rates but also to enact rules and regulations that are "reasonably necessary for ratemaking," and that the Court should defer to the Commission's determinations as to what is reasonably necessary for rate-making. *See* 171 Ariz. 286, 295-297 (1992). *See also Residential Util. Consumer Office v. Ariz. Corp. Comm'n*, 240 Ariz. 108, 111, ¶ 12 (2016) ("The Commission has full and exclusive power to set 'just and reasonable rates' for public service utilities.").

Judicial review of Commission ratemaking decisions has always been available under the Arizona Constitution, though courts have consistently applied strict standards of review given the Commission's plenary ratemaking authority. Article XV, section 6 of the Arizona Constitution gives the Legislature the ability to enlarge the powers of the Commission

and sets forth processes to govern the Commission's proceedings. Further, article XV, section 17 of the Arizona Constitution preserves "the right of appeal to the courts of the state from the rules, regulations, orders, or decrees fixed by the corporation commission . . . ."

Implementing these constitutional provisions, the Legislature has enacted A.R.S. §§ 40-254.01(A) and (E), which establish the procedure for filing "a notice of appeal in the court of appeals to vacate, set aside, affirm in part, reverse in part or remand with instructions to the commission [its ratemaking] order if the court of appeals determines upon a clear and satisfactory showing that the order is unlawful or unreasonable." A.R.S. § 40-254.01(E) states that "[i]n all appeals that are taken pursuant to this section, the party adverse to the commission or seeking to vacate or set aside an order of the commission must make a clear and satisfactory showing that the order is unlawful or unreasonable."

Interpreting these Constitutional provisions and statutes, this Court has held that '"[c]lear and satisfactory" is the same as "clear and convincing" and is a standard of proof greater than "by a preponderance of the evidence."' *Tucson Elec. Power Co. v. Ariz. Corp. Comm'n*, 132 Ariz. 240, 243 (1982) (citations omitted). Further, "[b]ecause ratemaking is a function

specifically entrusted to the Commission by the Arizona Constitution, a stringent standard of review applies." *Freeport Minerals Corp. v. Ariz. Corp. Comm'n*, 244 Ariz. 409, 411, ¶ 6 (App. 2018), *review denied* (Oct. 31, 2018). Specifically, on ratemaking issues, this Court "generally presume[s] the Commission's actions are constitutional, and we uphold them unless they are arbitrary or an abuse of discretion." *Residential Util. Consumer Office*, 240 Ariz. at 111, ¶ 10. Under well-established precedent, therefore, to overturn a ratemaking decision, an appellant must show "clearly and convincingly, that the Commission's decision is arbitrary, unlawful or unsupported by substantial evidence." *Litchfield Park Serv. Co. v. Ariz. Corp. Comm'n*, 178 Ariz. 431, 434 (App. 1994).

The Court of Appeals correctly applied this well-established and deferential standard of review when it upheld the Commission's Decision in this case. *See Sun City Home Owners Ass'n v. Ariz. Corp. Comm'n*, No. 1 CA-CC 17-0002, slip op. 6 ¶ 13 (Ariz. App. Jan. 23, 2020) ("Opinion").

II. This Court should decline review because Petitioners have not shown clearly and convincingly that the Commission's decision to allow for consolidation was arbitrary, unlawful, or an abuse of discretion.

The Arizona Constitution provides the Commission with plenary authority to "prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected." Ariz. Const. art. 15, § 3. The Commission did just that when it weighed the substantial evidence and arguments and decided to place EPCOR's residential wastewater customers in one class for ratemaking purposes.

The Court of Appeals correctly decided that the Commission's decision did not violate the anti-discrimination provision in article XV, section 12 of the Arizona Constitution because the consolidated rate applied to EPCOR's provision of the same water services. Article XV, section 12 states:

> All charges made for service rendered, or to be rendered, by public service corporations within this state shall be just and reasonable, and no discrimination in charges, service, or facilities shall be made between persons or places for rendering a like and contemporaneous service.

A.R.S. § 40-334 also prohibits public service corporations from discriminating against customers, clarifying that unlawful discrimination is found only when the utility applies preferential or prejudicial treatment to a "person" or maintains "unreasonable" differences in rates and charges between localities or classes of service. *See* A.R.S. § 40-334(A)-(B).

There is no allegation in this case that EPCOR has treated similarly situated customers differently. Rather, SCHOA argues that because, it alleges, it costs less to serve Sun City customers than other consumers, consolidating rates penalizes them to the benefit of customers in other geographic areas. This, they assert, is illegal. But neither article XV, section 12 nor A.R.S. § 40-334 require uniformity in cost of service within classes of customers who receive "like and contemporaneous service."

As the Court of Appeals explained, "[t]aken to its logical conclusion, SCHOA's argument would require different rates for each customer if there is any discrepancy in the cost of providing service." *See* Opinion at 9 ¶ 20. Not only is such an outcome against sound public policy, it would be virtually impossible to implement in practice. Even within largely homogeneous classes of customers with "like and contemporaneous

service," each individual customer has differences in their cost of service when considering the multitude of factors at play, including distances from the source of service, equipment required to provide service to various locations, energy required to provide service to various locations, use of service by the ratepayer, and maintenance costs associated with all of the above. For this reason, the Court of Appeals correctly declined to "interpret the constitutional prohibition on 'discrimination in charges, services, or facilities . . . between persons or places' as mandating different charges based on location." *Id*.

The anti-discrimination provisions related to ratemaking in the Arizona Constitution and related statutes must be read in harmony with the constitutional provisions requiring the Commission to set "just and reasonable rates" and "just and reasonable classifications" based on customers who receive "like and contemporaneous service." Ariz. Const. art. XV, § 3. It is only when rates or classifications become unjust or unreasonable that they violate the Constitution and related statutes. Consolidation is nothing more or less than the Commission classifying customers into groups based on "like and contemporaneous services." Prescribing such customer classifications falls squarely within the

Commission's plenary authority. *Tucson Gas, Elec. Light & Power Co.*, 15 Ariz. at 307; *Pac. Greyhound Lines*, 54 Ariz. at 168; *Ethington*, 66 Ariz. at 392. Under the Arizona Constitution, consolidated rates are not unlawfully discriminatory so long as those classifications are "just and reasonable." There is simply no basis for SCHOA's assertion that rate consolidation is, by its nature, inherently unjust or unreasonable.

Petitioners and the Dissent take issue with the rate consolidation approved by the Commission in this case because Sun City was previously served by a different public service corporation, which did not classify Sun City residents in the same class with other wastewater customers. But that fact is irrelevant to the underlying legal analysis. There is nothing discriminatory or unlawful about a public service corporation classifying its own customers into groups based on their type of service so long as there has been a determination that the services provided to all those customers are actually "like and contemporaneous." Indeed, the very fact that customers in these groups all now receive service from the same public service corporation is strong evidence that the service is at least contemporaneous. And, in this case, there was also evidence presented to the Commission that services across the EPCOR districts were "like."

Opinion at 9-10 ¶¶ 20-23. Even though SCHOA and the Dissent disagreed with the outcome, there was substantial evidence in the record for the Court of Appeals to affirm the Commission's decision.

III. This Court should decline review because there is substantial evidence in the record to support the Commission's decision to approve consolidation.

On its face, SCHOA's brief demonstrates that the Commission's decision to consolidate rates was supported by substantial evidence; it just was not the evidence that SCHOA wanted the Commission to accept. SCHOA admits the existence of this evidence when it states in its Petition for Review:

i. The Commission irrationally interpreted the evidence as establishing 'that there should be cost savings for EPCOR, Staff, intervenors, and the Commission as a result of rate consolidation.'" (Pet. for Review at 9).

ii. "The Ruling considered present and future rate shock." (Pet. for Review at 10)

iii. "The Commission also viewed anticipated capital expenditures as a potential source of future rate shock to Sun City

consumers, and reasoned that consolidation would mitigate that shock by cost-spreading." (Pet. for Review at 10).

iv. "The Opinion similarly erred in accepting the Commission's other rationale for consolidation: projected annual administrative savings to EPCOR of $946,000, of which $800,000 was attributed to fewer rate applications." (Pet. for Review at 11).

v. "The Opinion does not discuss two other putative benefits identified by the Commission: eliminating 'rate disparity' among *districts*, and improving affordability 'for customers in *Agua Fria*, *Anthem*, and *Mohave*.'" (Pet. for Review at 11-12).

SCHOA's Petition for Review underscores that the Commission did in fact weigh the substantial evidence and the law and decided against SCHOA. SCHOA argued that the Commission should consider only cost causation when making its decision concerning consolidation. The Commission chose, as it was legally permitted to do, to weigh all the evidence, not just that of cost causation, and decided against SCHOA on this issue. The Court of Appeals properly declined to reweigh the evidence

and deferred to the Commission's factual determinations because "it is the Commission's constitutional responsibility, when engaged in its ratemaking power, to view conflicting evidence and make determinations accordingly." *Sierra Club – Grand Canyon Chapter v. Ariz. Corp. Comm'n*, 237 Ariz. 568, 576, ¶ 26 (App. 2015); *see also* *DeGroot v. Ariz. Racing Comm'n*, 141 Ariz. 331, 336 (App. 1984) ("If two inconsistent factual conclusions could be supported by the record, then there is substantial evidence to support an administrative decision that elects either conclusion.").

CONCLUSION

This Court should decline review because the Commission acted within its constitutional ratemaking authority in setting consolidated rates for customers receiving "like and contemporaneous services," and the Court of Appeals applied the appropriate deferential standard of review.

RESPECTFULLY SUBMITTED this 13th day of April, 2020.

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