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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-001831 02/15/2018

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
C. Mai
Deputy

ROBERT BURNS

WILLIAM A RICHARDS

v.

ARIZONA PUBLIC SERVICE COMPANY, et al.

MARY R O'GRADY

DAVID J CANTELME
MARK D GOLDMAN
TIMOTHY A LASOTA
SARAH LYNN BARNES
BRIAN R BOOKER

UNDER ADVISEMENT RULING

The Court has considered the Joint Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim for Relief ("Commission Defendants' Motion") filed by Defendants Arizona Corporation Commission (the "Commission" or the "ACC") and Commissioners Tom Forese, Doug Little, Andy Tobin, and Boyd Dunn (the "Defendant Commissioners") (the Commission and the Defendant Commissioners collectively, the "Commission Defendants"); the Response in Opposition to Joint Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim for Relief ("Response to Commission Defendants' Motion") filed by Commissioner Robert Burns ("Commissioner Burns") and attached as Exhibit 1 to the Notice of Errata Regarding Plaintiff's Response in Opposition to Joint Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim for Relief; the Reply in Support of Joint Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim for Relief ("Commission Defendants' Reply") filed by the Commission Defendants; the Motion to Dismiss Amended Complaint ("Companies' Motion") filed by Defendants Arizona Public Service Company ("APS"), Pinnacle West Capital

Corporation ("Pinnacle West") and Donald Brandt (APS, Pinnacle West and Donald Brandt collectively, the "Companies") (the Companies and the Commission Defendants collectively, the "Defendants"); the filing entitled "Notice of Errata - - Correct Exhibit 2 to Defendants Arizona Public Service Company, Pinnacle West Capital Corporation and Donald Brandt's Motion to Dismiss Amended Complaint" filed by the Companies; the Response to Defendants Arizona Public Service Company, Pinnacle West Corporation and Donald Brandt's Motion to Dismiss Amended Complaint ("Response to Companies' Motion") filed by Commissioner Burns and attached as Exhibit 1 to Notice of Errata Regarding Plaintiff's Response to Defendants Arizona Public Service Company, Pinnacle West Corporation, and Donald Brandt's Motion to Dismiss Amended Complaint; Defendants Arizona Public Service, Pinnacle West Capital Corporation and Donald Brandt's Reply in Support of Their Motion to Dismiss Amended Complaint ("Companies' Reply"); the authorities cited therein, and the arguments of counsel at the hearing on December 19, 2017.

In his First Amended Complaint ("FAC"), Commissioner Burns alleges, *inter alia*, that the Companies have used, and continue to use, funds to support particular candidates running for seats on the ACC; that these funds were generated from "fees collected by APS from its Arizona customers"; and that these funds were expended to secure the "goodwill" and "allegiance" of certain candidates in order to secure "favorable treatment of APS…in proceedings before the ACC." FAC at ¶¶ 30, 34, 43-44, 48-49, 54. He alleges that "the use of ratepayer-generated funds…to fund political influence efforts" threatens to "create regulatory capture," resulting in an "increase" in "the cost of utility services to APS's customers" as "undue corporate utility influence" induces ACC members to "approv[e] unreasonable rate burdens for APS customers and/or disregard[] the financial…interests of such consumers." *Id.* at ¶¶ 50, 53.

Citing the importance of "open and detailed disclosures" of the "contributions" made by the Companies in order to allow the ACC to determine "whether adjustments to APS rates" are appropriate to "avoid[] improper or unreasonable rate burdens being placed on APS customers," Commissioner Burns alleges that he exercised his "constitutional and statutory authorit[y]" to "issue two subpoenas" (the "Subpoenas") to gather documentary and testimonial evidence from the Companies. FAC at ¶¶ 51, 133, 134. He further alleges that "APS only partly complied with" the Subpoenas, and that the Companies "have refused to comply with the remainder of the Subpoenas." *Id.* at ¶ 138. He alleges that he filed a motion before the ACC to compel compliance with the Subpoenas, asserting that other members of the ACC should recognize and uphold his "independent authority to issue and enforce his investigatory subpoenas," but that the Defendant Commissioners "voted to deny" his motion, thereby "ostensibly den[ying] [him] any further right to pursue or enforce his investigatory subpoenas." *Id.* at ¶¶ 169, 171, 173, 175. He alleges that the Defendant Commissioners, by their votes, thus "obstruct[ed]" his efforts to investigate "[t]he means…by which [the Companies] have attempted or may attempt to…capture the allegiance of

or influence the attitudes and actions of ACC Commissioners or of candidates for such positions." *Id*. at ¶¶ 125, 175.

Alleging that he "has an independent, individual right" as an elected member of the ACC to "pursue investigation using a subpoena and depositions" without being "required to seek or obtain the other Commissioners' authorization," and that the Commission Defendants' "interference in his investigatory activities is both unauthorized and a violation of [his] constitutional and statutory rights," Commissioner Burns seeks a declaration that "he is fully authorized and entitled to demand from" the Companies the documentary and testimonial evidence he seeks without being "required to obtain consent, approval, or authority from any of the other Commissioners" in order to do so. FAC at ¶¶ 179, 204-205.

The Companies and the Commission Defendants seek dismissal of the FAC. *See generally* Commission Defendants' Motion; Companies' Motion.

As Commissioner Burns correctly notes, a defendant seeking dismissal at this stage of the proceedings bears a "heavy" burden. Response to Commission Defendants' Motion at p. 2. Case law is clear that, when considering a motion to dismiss a complaint for failure to state a claim, the Court must accept as true the facts alleged therein, *Coleman v. City of Mesa*, 230 Ariz. 352, 356, 284 P.3d 863, 867 (2012), and may not dismiss the complaint unless there is "no legal theory" under which the plaintiff could be entitled to relief. *Mirchandani v. BMO Harris Bank, N.A.*, 235 Ariz. 68, 70, 326 P.3d 335, 337 (App. 2014). *See also Fidelity Sec. Life Ins. Co. v. State, Dep't of Ins*., 191 Ariz. 222, 224, 954 P.2d 580, 582 (1998) ("In reviewing a trial court's decision to dismiss a complaint for failure to state a claim, we assume as true the facts alleged in the complaint and will not affirm the dismissal unless satisfied as a matter of law that [the] plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof.").

In support of their request that the FAC be dismissed, the Commission Defendants assert, first, that "this Court lacks subject matter jurisdiction because the [ACC] entered a final order in the rate case on August 15, 2017." Commission Defendants' Motion at p. 2. "[I]t is too late to grant any relief," they contend, because the ACC has "made its final decision in the rate case"; "the entry of a final order in the rate case" renders "all discovery matters and disputes…moot." *Id*. at pp. 5, 24.

The Commission Defendants' assertion that they have mooted Commissioner Burns's claims by approving "the final order in the rate case," Commission Defendants' Motion at p. 5, is contrary to the principle that, "[i]n general, a party cannot by its own voluntary conduct moot a case and deprive a court of jurisdiction." *Workman v. Verde Wellness Ctr., Inc*., 240 Ariz. 597, 603-04, 382 P.3d 812, 818-19 (App. 2016) (citation, internal quotations, and internal punctuation

omitted). *See also Tom Mulcaire Contracting, LLC v. City of Cottonwood*, 227 Ariz. 533, 534, 537, 260 P.3d 1098, 1099, 1102 (App. 2011) (awarding fees to unsuccessful contractor who brought mandamus action challenging bidding process, despite city's attempt "intentionally to moot the case" by terminating contract previously awarded to successful bidder). Moreover, the order entered in the rate case cannot be considered "final" because, as Commissioner Burns correctly notes, "a rate-setting decision may be re-opened and vacated or modified at any time." Response to Commission Defendants' Motion at p. 17. *See also* A.R.S. § 40-252 ("The commission may at any time…rescind, alter or amend any order or decision made by it."); A.R.S. § 40-368(B) ("The commission may revoke its approval at any time and fix other rates and charges for the product or commodity or service…"); *Simms v. Round Valley Light & Power Co*., 80 Ariz. 145, 147, 294 P.2d 378, 379 (1956) (after a hearing, commission "entered an order requiring the company to reduce its rate" and then, "upon petition of the company," held another hearing after which it "changed the original order in some respects").

In any event, the Commission's decision in the rate case has not rendered this dispute moot because, as Commissioner Burns correctly pointed out at Oral Argument on December 19th, his claims are based on a dispute over the scope of the constitutional and statutory authority enjoyed by individual ACC members. *See* FAC at ¶¶ 81, 82, 179, 185. The constitutional and statutory provisions on which Commissioner Burns bases his claims make no reference to the existence of an open rate case. *See* Ariz. Const., Art. XV, § 4 ("Article XV, § 4")[1]; A.R.S. § 40-241(A)[2]. Indeed, A.R.S. § 40-241(A) expressly provides that the authority granted therein may be exercised "at any time." While the scope of the power conferred by Article XV, § 4 and A.R.S. § 40-241(A) may be the subject of dispute, it cannot be seriously contended that those provisions are meaningless unless a rate case is open and pending before the ACC. The Court therefore rejects the Commission Defendants' assertion that the decision made by the Commission last August has rendered Commissioner Burns's claims moot.

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[1] Article XV, § 4 of the Arizona Constitution provides, "The corporation commission, and the several members thereof, shall have power to inspect and investigate the property, books, papers, business, methods, and affairs of any corporation whose stock shall be offered for sale to the public and of any public service corporation doing business within the state, and for the purpose of the commission, and of the several members thereof, shall have the power of a court of general jurisdiction to enforce the attendance of witnesses and the production of evidence by subpoena, attachment, and punishment, which said power shall extend throughout the state. Said commission shall have power to take testimony under commission or deposition either within or without the state."

[2] A.R.S. § 40-241(A) provides, "The commission, each commissioner and person employed by the commission may, at any time, inspect the accounts, books, papers and documents of any public service corporation, and any of such persons who are authorized to administer oaths may examine under oath any officer, agent or employee of such corporation in relation to the business and affairs of the corporation."

The Commission Defendants assert, next, that the FAC should be dismissed because Commissioner Burns "lacks legal capacity to file this lawsuit," arguing that "[n]o statute and no constitutional provision confers capacity on him to do so." Commission Defendants' Motion at p. 23. On the contrary, the declaratory relief authorized by A.R.S. §§ 12-1831 *et seq*. has long been recognized as "an appropriate vehicle for resolving controversies as to the legality of acts of public officials," *Rivera v. City of Douglas*, 132 Ariz. 117, 119, 644 P.2d 271, 273 (App. 1982), including disputes over the proper scope of the Commission's investigatory powers. *See Polaris Int'l Metals Corp. v. Ariz. Corp. Comm'n*, 133 Ariz. 500, 506, 652 P.2d 1023, 1029 (1982). *See also Dobson v. State ex rel. Comm'n on Appellate Court Appointments*, 233 Ariz. 119, 121, 309 P.3d 1289, 1291 (2013) (action for declaratory as well as injunctive relief brought by four members of the Commission on Appellate Court Appointments against Commission and State); *Bd. of Supervisors of Maricopa Cnty. v. Woodall*, 120 Ariz. 379, 380-81, 586 P.2d 628, 629-30 (1978) (declaratory judgment action brought by three county supervisors against county attorney and board of supervisors' clerk); *Romley v. Daughton*, 225 Ariz. 521, 523-24, 241 P.3d 518, 520-21 (App. 2010) (declaratory judgment action brought by county attorney against board of supervisors and its five members; board counterclaimed for declaratory relief).

Like the Commission Defendants, the Companies, too, contend that Commissioner Burns lacks authority to pursue his claims. In support of their contention, they argue, first, that A.R.S. § 40-241(A) entitles Commissioner Burns to no relief as to Pinnacle West because that statute, by its terms, applies only to "public service corporations," and "Pinnacle West is not a 'public service corporation'." Companies' Motion at p. 23. As Commissioner Burns correctly argues, however, publicly traded corporations fall within the scope of the investigatory authority conferred by Article XV, § 4, and Pinnacle West is "publicly traded." Response to Companies' Motion at p. 17. *See also* Article XV, § 4 (authorizing inspections of the "property, books, papers, business, methods, and affairs" not only of "any public service corporation doing business within the state," but of "*any corporation whose stock shall be offered for sale to the public*") (emphasis added). The fact that A.R.S. § 40-241(A), by its terms, applies only to "any public service corporation" does not, therefore, dispose of Commissioner Burns's claim for relief as it relates to Pinnacle West.

The Companies go on to argue that, as a matter of law, Commissioner Burns lacks authority to obtain the information he seeks because the Subpoenas "encroach" on powers that are constitutionally entrusted to other branches of government. Companies' Motion at p. 6. They argue that the Legislature is entrusted with authority to "regulat[e] political expenditures" of the sort that are the subject of the Subpoenas, and that the Subpoenas simultaneously usurp the authority of "the Secretary of State, Attorney General and…Clean Elections Commission" to "investigate alleged violations of the State's campaign finance laws." *Id*.

The Court is not persuaded. Different agencies and branches of government frequently have overlapping authority and responsibilities that are not mutually exclusive. An act committed in violation of state statute may, for example, expose the wrongful actor to simultaneous proceedings initiated by multiple different government officers and agencies, including criminal proceedings initiated by the Attorney General or County Attorney, tax proceedings before the Department of Revenue (if the wrongful act was committed for financial gain), and, if the actor is a licensed professional, license revocation proceedings before the appropriate state agency. Likewise, an allegedly illegal act by a public official may simultaneously subject that official to criminal prosecution by Executive Branch officials and impeachment proceedings in the Legislature. The Court therefore rejects the Companies' assertion that the Legislature's authority under Ariz. Const. Art. VII, § 16 to enact statutes requiring public disclosure of campaign contributions, and the authority of the Secretary of State, Attorney General, and Clean Elections Commission to investigate campaign finance violations, somehow strip the Commission or any of its members of the authority conferred on them by Article XV, § 4 and A.R.S. § 40-241(A).

The Companies next assert that "[t]he Subpoenas violate the First Amendment," and that failing to dismiss the FAC would therefore infringe on "Pinnacle West's First Amendment rights." Companies' Motion at p. 15. Citing *Citizens United*[3] for the proposition that "[c]orporations…, like individuals," enjoy a First Amendment right to "contribute to the discussion, debate, and the dissemination of information and ideas," the Companies assert that the FAC fails to "plead[] facts that would overcome a First Amendment defense." *Id.* at pp. 15, 19 (internal quotations omitted). The Commission Defendants echo this argument, asserting that "[t]he United States Constitution allows a corporation to contribute as much money as it wants in the exercise of its First Amendment rights to free speech to advocate for or against a candidate for office so long as it does not coordinate its efforts with that candidate." Commission Defendants' Motion at p. 21.

The Companies go on to assert that the Subpoenas represent "uniquely pernicious" "[v]iewpoint discrimination" because they "are aimed at the Companies" based on "the Companies' alleged choice to support the candidates they preferred." Companies' Motion at p. 17. Stating that "APS has already produced much of [the] information" sought by the Subpoenas "and will provide the rest - - *if* it is treated confidentially," Companies' Reply at p. 2 (emphasis in original), the Companies assert that Commissioner Burns's unwillingness to treat the subpoenaed information as confidential makes it "clear" that his "true interest" is not in obtaining the information that is the subject of the Subpoenas, but "in discouraging APS and Pinnacle West from engaging in any political speech." Companies' Motion at p. 16.

[3] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343, 130 S.Ct. 876, 900 (2010).

At this stage of the proceedings, the Court cannot consider unpled factual assertions, speculate about any party's state of mind, or attempt to divine any party's "true" motive. *Cf. Moretto v. Samaritan Health Syst.*, 190 Ariz. 343, 346, 947 P.2d 917, 920 (App. 1997) (motion to dismiss "should be granted only when a plaintiff has pled facts that reveal a legal bar to recovery"; "unpled facts [that] establish a legal bar to recovery" cannot be asserted in a motion to dismiss). On the contrary, the Court is limited to the facts as alleged in the FAC (which the Court must accept as true) and reasonable inferences that can be drawn in the plaintiff's favor from those facts. *Coleman*, 230 Ariz. at 356, 284 P.3d at 867. The Court cannot, therefore, indulge the Companies' allegation that Commissioner Burns's "true interest" is "in discouraging APS and Pinnacle West from engaging in any political speech," or otherwise find that this allegation entitles the Companies to relief.

Moreover, although the Companies rely heavily on *Citizens United*, nothing in that case suggests that the First Amendment offers blanket protection against the mandatory disclosure of political spending. On the contrary, *Citizens United* expressly recognizes that, while "[t]he First Amendment protects political speech," "disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way." 558 U.S. at 371, 130 S.Ct. at 916. Such "transparency," the *Citizens United* court observed, "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id*. *Accord Doe v. Reed*, 561 U.S. 186, 221, 228, 130 S.Ct. 2811, 2832-33, 2837 (2010) (Scalia, J., concurring) (rejecting assertion that "the First Amendment accords a right to anonymity in the performance of an act with governmental effect," and concluding that "[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed").

The Companies' First Amendment defense is not, in other words, a matter that the Court can resolve as a matter of law at this stage of the proceedings. Because "[a]s-applied challenges to contribution disclosure laws are fact-specific in nature," *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 840 (9th Cir. 2014), the Court cannot, at this point in the case, assess the merits of the Companies' contention that compliance with the Subpoenas would impose an unconstitutional burden on their First Amendment rights. *See also Voting for America, Inc. v. Steen*, 732 F.3d 382, 395 (5th Cir. 2013) (determining whether regulations unconstitutionally impact "core political speech" requires a "detailed, fact-specific analysis of [their] impact…").

Finally, the Commission Defendants and the Companies both argue that the FAC should be dismissed because it seeks declaratory relief to which Commissioner Burns is not entitled. They assert, first, that Commissioner Burns had no authority to issue the Subpoenas unilaterally, or to otherwise initiate investigations on his own authority. *See* Commission Defendants' Motion at p. 19 ("[A]n individual commissioner has no authority to act for or to bind the Commission, except to the extent the Commission has expressly delegated such authority to an individual commissioner. In [the] rate case, the Commission has delegated nothing to Commissioner Burns.

Thus, his authority was limited to casting his vote on questions before the Commission."); Companies' Motion at pp. 19, 20 ("Members of the Commission enjoy the power to issue and enforce subpoenas under [Article XV, § 4] when they are acting as *representatives* of the Commission and exercising its delegated powers."; "[I]f individual members had the powers asserted by Commissioner Burns, there would have been no need for [Article XV, § 4] to vest any power in the Commission as a body.") (emphasis in original, internal punctuation omitted).

In the alternative, the Defendants contend that, even if individual commissioners possess the authority asserted by Commissioner Burns, such authority is nevertheless subject to review by the Commission as a whole. Commission Defendants' Reply at pp. 14, 15 ("Whatever Commissioner Burns's powers are, at some point…they must yield to the power of a majority of the Commission to manage that agency…Allowing an individual commissioner's powers to trump those of the Commission invites chaos…"); Companies' Motion at p. 19 ("Article 15, Section 4 does not give members of the Commission the power to disregard the Commission's decision not to enforce a subpoena…Individual members do not have the right to *override* the Commission's decision.") (emphasis in original, internal punctuation omitted).

In response, Commissioner Burns asserts that Article XV, § 4 and A.R.S. § 40-241(A) do, in fact, confer "full investigatory powers" on individual ACC members, and that those powers are "not subject to being vetoed by the other commissioners." Response to Commission Defendants' Motion at pp. 12, 13.

Article XV, § 4 authorizes "[t]he corporation commission, *and the several members thereof*," to "inspect and investigate" the financial affairs of certain corporations, and to compel the attendance of witnesses and the production of evidence by subpoena. The Court agrees with Commissioner Burns that the reference to "the several members" of the Commission evinces an intent to empower individual commissioners, not merely the Commission acting as a collective body, to conduct such inspections and investigations. If Article XV, § 4 were intended to authorize only collective action by the Commission, the reference to "the several members" would be superfluous, an interpretation that is to be avoided when construing a constitutional provision. *See Moore v. Valley Garden Ctr.*, 66 Ariz. 209, 211, 185 P.2d 998, 999 (1947) ("[I]t is a well settled law of construction of constitutions…that the courts must, if consonant with reason, interpret such instruments in a manner such as will give effect to each and every provision thereof.").[4]

[4] The use of the word "several" in Article XV, § 4 does not, as the Companies contend, *see* Companies' Motion at p. 20, presuppose only collective action by Commission members. On the contrary, as Commissioner Burns persuasively argues, "[p]recedent near the time of Arizona statehood" establishes that the term "several" was "commonly used by legal writers" when discussing the "application of a concept, claim or rule" to individual members of a group. Response

A.R.S. § 40-241(A) similarly authorizes "each commissioner" to "inspect" the financial affairs "of any public service corporation." Subsection B of that statute provides that "[a]ny person *other than a commissioner* or an officer of the commission demanding such inspection shall produce under the hand and seal of the commission his authority to make the inspection," A.R.S. § 40-241(B) (emphasis added), thus making clear that a commissioner needs no authority to conduct an inspection of a public service corporation's financial affairs other than the authority conferred by virtue of the office he or she holds.

The Court finds it plain that Article XV, § 4 and A.R.S. § 40-241(A) each authorize Commissioner Burns to seek information from the Companies by subpoena on his own authority, without the prior approval of the Commission as a whole, and therefore rejects the Defendants' arguments to the contrary.

A different issue is presented, however, by the question of whether Commissioner Burns is entitled to enforce the Subpoenas unilaterally after the remaining ACC members have voted against doing so. A party on whom an investigatory subpoena has been served has, of course, the right to object to its validity and/or scope, and to have its objection heard and ruled upon before it must comply. *See, e.g., Carrington v. Ariz. Corp. Comm'n*, 199 Ariz. 303, 305, 18 P.3d 97, 99 (App. 2000) ("[A] party may resist the Commission's subpoena on grounds" that include that "the subpoena seeks irrelevant information"). To hold that an objection to a subpoena is to be resolved solely by the individual commissioner who issued the subpoena in the first place would hardly comport with due process. *See Horne v. Polk*, 242 Ariz. 226, 231, 394 P.3d 651, 656 (2017) ("The right to a neutral adjudicator has long been recognized as a component of a fair process"; "[As] Blackstone observed,…it is unreasonable that any man should determine his own quarrel.") (citation and internal quotations omitted). Indeed, Commissioner Burns does not contest this proposition. He asserts, instead, that when an objection is raised to a subpoena issued by an individual member of the Commission, that objection should be resolved neither by the commissioner who issued the subpoena nor by the Commission as a whole, but by a court. At Oral Argument on December 19, 2017, Commissioner Burns argued that a party who seeks to challenge the validity or scope of a subpoena issued by an individual Commission member

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to Commission Defendants' Motion at p. 14 n. 10. *See United States v. Press Publishing Co*., 219 U.S. 1, 9, 31 S.Ct. 212, 214 (1911) (addressing circumstances in which state criminal statutes are enforceable on Native American reservations, the Court referred to "acts done on such reservations which are made criminal by the laws of the several states," using the term "the laws of the several states" to refer not to the laws of all states, but to the laws of each state in which a reservation is located).

"could go to the courts and say, 'This exceeds the jurisdiction of this Commissioner. This is outside of his authority. And I want a declaration on that. I want an injunction'."[5]

For a number of reasons, the Court agrees with the Companies and the Commission Defendants that authority to determine whether to enforce a subpoena issued by an individual Commission member, or whether to sustain an objection to such a subpoena, rests with the Commission, and not with a court.

First, as the Companies note, the Arizona Constitution confers authority on "the [C]ommission" to enact "rules and regulations to govern proceedings" before it. Companies' Motion at p. 8, *quoting* Ariz. Const., Art. XV, § 6. The Commission has enacted a rule providing that objections to subpoenas are to be resolved by the Commission. Ariz. Admin. Code R14-3-109(O). To hold that the Commission as a body has no authority to resolve objections to subpoenas issued by individual members would be to deny effect to a rule enacted by the Commission pursuant to authority expressly granted to it by the Constitution.

Second, Arizona statute confers on the Commission as a whole, and not on an individual member, authority to issue contempt citations. A.R.S. § 40-424(A) ("If any corporation or person fails to observe or comply with any order, rule, or requirement of the commission or any commissioner, the corporation or person shall be in contempt of the commission and shall, after notice and hearing before the commission, *be fined by the commission*…") (emphasis added). This statute supports the position of the Companies and the Commission Defendants that the Commission as a whole has authority to determine whether to compel compliance with an investigatory subpoena to which an objection has been made.

Third, A.R.S. § 40-102 explicitly states that investigations undertaken by individual members of the Commission are subject to the supervision and approval of the Commission as a whole. *See* A.R.S. § 40-102(C) ("Any investigation, inquiry or hearing may be undertaken or held by or before any commissioner designated by the commission for the purpose, and every finding, order or decision made by a commissioner so designated, *when approved and confirmed by the commission*…, shall be the finding, order or decision of the commission.") (emphasis added).

Fourth, to look to a court to resolve disputes among ACC members about the proper scope of an investigation risks - - indeed, virtually *guarantees* - - undue judicial involvement in the day-to-day affairs of a separate and co-equal branch of government.

[5] Commissioner Burns also acknowledged that "there certainly could be a role for the Commission to play in some of this," *i.e.*, in resolving objections to a subpoena issued by an individual Commission member, but did not explain what he believes that role should be.

No party questions the ACC's status as a separate and independent branch of government whose powers are derived directly from the Arizona Constitution. *See, e.g., Ariz. Corp. Comm'n v. State ex rel. Woods*, 171 Ariz. 286, 290, 830 P.2d 807, 811 (1992) ("The framers established the Commission as a separate, popularly-elected branch of state government."). As an independent branch of government, the ACC is entitled to deference from the other branches. *See Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 595, 208 P.3d 676, 684 (2009) (noting the "deference that we customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our Government") (citation and internal quotations omitted). The same considerations that require courts to act with caution when "asked, in effect, to referee disputes *between*" other branches of government, *Brewer v. Burns*, 222 Ariz. 234, 237, 213 P.3d 671, 674 (2009) (emphasis added), apply with even greater force when a court is asked to referee disputes *within* another branch.

As the Commission Defendants correctly argue, the Commission is constitutionally empowered to "exercise all powers which may be necessary or essential in connection with the performance of its duties," *Garvey v. Trew*, 64 Ariz. 342, 346, 170 P.2d 845, 848 (1946), including "full and exclusive power in the field of prescribing rates which cannot be interfered with by the courts, the legislature or the executive branch of state government." *Qwest Corp. v. Kelly*, 204 Ariz. 25, 30, 59 P.3d 789, 794 (App. 2002) (citation and internal quotations omitted). *See also* Commission Defendants' Motion at p. 8, *quoting Miller v. Ariz. Corp. Comm'n*, 227 Ariz. 21, 25, 251 P.3d 400, 404 (App. 2011) ("Under Article 15, Section 3, of the Arizona Constitution, the Commission possesses plenary power to set just and reasonable rates and charges collected by public service corporations.") (citation and internal quotations omitted). This "full and exclusive power" was conferred on the ACC precisely because the ACC is uniquely constituted to exercise this power effectively. *Woods*, 171 Ariz. at 291, 830 P.2d at 812 ("The framers…creat[ed] an elected commission with broad powers" because "[c]onstraints on legislators' time, the lack of information, and inadequate means of investigation limited the ability of legislatures to oversee public service corporations"). The Court therefore agrees with the Defendants that the Commission "is best situated to know what evidence is, and is not, relevant to its own decision-making in an area over which it has special expertise." Companies' Motion at p. 11.

Even if this Court had the expertise necessary to make informed decisions about what information should and should not be gathered and presented to Commission members for them to consider in the performance of their duties - - whether subpoenas for particular information should or should not issue, whether particular witnesses should or should not be summoned to testify - - the Court could not overrule the decision of a majority of the Commission about the proper scope of an ACC investigation without running afoul of the "separation of powers" principles that are at the heart of our system of government. *See Forty-Seventh Legislature of*

State v. Napolitano, 213 Ariz. 482, 485-86, 143 P.3d 1023, 1026-27 (2006) ("Limiting the actions of each branch of government to those conferred upon it by the constitution is essential to maintaining the proper separation of powers."). As Commissioner Burns himself notes, courts must "give the Commission 'wide berth' in conducting investigations." Response to Companies' Motion at p. 15, *quoting Carrington*, 199 Ariz. at 305, 18 P.3d at 99. The "wide berth" that courts must give to the Commission when it pursues an investigation is no narrower when, as here, the Commission decides to put an end to an investigation.

In his response to the Companies, Commissioner Burns analogizes the Commission's "investigatory powers" to that of a grand jury. Response to Companies' Motion at p. 15 n. 7, *citing Shelby Sch. v. Ariz. State Bd. of Educ*., 192 Ariz. 156, 169, 962 P.2d 230, 243 (App. 1998). The analogy is an apt one, but it refutes, rather than supports, Commissioner Burns's position. A single grand juror cannot act alone; a grand jury acts by majority vote. A.R.S. § 21-414(A).

In the FAC, Commissioner Burns implicitly accuses the Defendant Commissioners of acting in an arbitrary and capricious manner in refusing to enforce the Subpoenas, alleging that they identified "no factual basis for their assertions that compliance with the [Subpoenas] would not yield any relevant information" and that they are "overly broad [and] unduly burdensome." FAC at ¶¶ 184, 187, 195, 198. *See City of Tucson v. Mills*, 114 Ariz. 107, 111, 559 P.2d 663, 667 (App. 1976) (administrative decision may be "set…aside as being arbitrary and capricious" if it "is unsupported by competent evidence"). In his responses to the Defendants' Motions, Commissioner Burns makes this accusation explicit, arguing that the Defendant Commissioners "acted arbitrarily, capriciously and in violation of [his] constitutional and statutory rights" in refusing to enforce the Subpoenas. Response to Commission Defendants' Motion at p. 3. *See also* Response to Companies' Motion at p. 4 ("[E]ven assuming the ACC Defendants do have the right to veto and block a single commissioner's investigatory efforts…the ACC Defendants were not authorized to veto or block Commissioner Burns based on reasons that are…arbitrary [and] capricious…").

While case law recognizes that an ACC decision may be set aside if arbitrary or capricious, *see, e.g., Ariz. Water Co. v. Ariz. Corp. Comm'n*, 217 Ariz. 652, 659, 177 P.3d 1224, 1231 (App. 2008), Commissioner Burns's attempt to challenge the ACC's decision not to enforce his Subpoenas as "arbitrary and capricious" does not persuade the Court that his challenge is one appropriate for judicial relief. The Court is aware of no Arizona case setting aside, as arbitrary and capricious, a decision by the ACC *not* to act in a particular case. In the absence of such controlling authority, in light of the power granted to the Commission by statute and rule to determine the proper scope of Commission investigations, and pursuant to the "separation of powers" principles discussed above, the Court finds that Commissioner Burns is not entitled to his requested relief of a judicial declaration that the Defendant Commissioners had

"no authority to stop [him] from" requiring the Companies to comply with the Subpoenas. FAC at ¶ 188.

In the FAC, Commissioner Burns alleges as follows:

> The Arizona Corporation Commission is Arizona's unique fourth branch of state government, whose elected members are delegated and imbued with a unique combination of Arizona's sovereign executive, legislative and judicial powers.
>
> * * *
>
> The powers vested by Arizona's framers in the Arizona Corporation Commission are, at least in part, "supreme" and may not be invaded by the other branches of government.
>
> * * *
>
> Given its unique position as a fourth branch of state government with designated executive, legislative and judicial powers, there are certain responsibilities and authorities and operations of the Arizona Corporation Commission and its individual Commissioners that are exclusive to the Commission and the office held by Commissioner Burns. As such, judicial intervention in such matters is barred by doctrines of separation of powers and concerning non-justiciable political questions established by the Constitution and law of the State of Arizona.

FAC at ¶¶ 67, 68, 100 (emphasis added). Commissioner Burns's allegations on this point are entirely correct, and that is precisely why Commissioner Burns is *not* entitled to the declaration he seeks. Even if the ACC as a whole lacked authority by statute and rule to determine the proper scope of an ACC investigation, "separation of powers" principles would preclude judicial involvement in the Commission's internal decision-making processes. The Court cannot assume oversight of an ACC investigation, nor can it second-guess a determination by a majority of the ACC as to the proper scope of any such investigation, without improperly usurping the authority constitutionally conferred on another branch of government. *See J.W. Hancock Enters., Inc. v. Ariz. State Registrar of Contractors*, 142 Ariz. 400, 406, 690 P.2d 119, 125 (App. 1984) ("Arizona courts have frequently stated that no branch may exercise the powers belonging to others."). Even accepting the truth of the factual allegations in the FAC, therefore, the Court cannot issue the declaration Commissioner Burns seeks, *i.e.*, that he, as a single member of the

Commission, "is fully authorized and entitled to" to investigate the financial affairs of the Companies over the opposition of his fellow Commission members. *See* FAC at ¶¶ 204-205.

Accordingly,

IT IS ORDERED granting the Joint Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim for Relief filed by Defendants Arizona Corporation Commission and Commissioners Tom Forese, Doug Little, Andy Tobin, and Boyd Dunn.

IT IS FURTHER ORDERED granting the Motion to Dismiss Amended Complaint filed by Defendants Arizona Public Service Company, Pinnacle West Capital Corporation, and Donald Brandt.