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April 3, 2014

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Commissioner Susan Bitter Smith
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

Arizona Corporation Commission
DOCKETED
APR 03 2014

Re: Docket WS-02987A-13-0477

DOCKETED BY 

Dear Commissioner Bitter Smith:

In your letter dated March 24, 2014, to the parties in the above-referenced docket, you requested responses to five questions. This letter provides the responses of Johnson Utilities, LLC ("Johnson Utilities" or the "Company") to those questions.

- 1. Do the parties agree that Johnson Utilities currently serves customers who reside or are located outside the municipal boundaries of the Town of Florence? If so, please provide an estimate of the number of such customers.**

Johnson Utilities serves customers who reside or are located outside the municipal boundaries of the Town of Florence, and the Company does not believe there is any disagreement among the parties on this point. As of December 2013, Johnson Utilities served approximately 20,780 water connections and approximately 28,825 sewer connections outside of the municipal boundaries of the Town of Florence.

As a prefatory comment regarding the Company's responses below, Johnson Utilities would note that last fall the Arizona Corporation Commission ("Commission") approved the application of H2O, Inc. to sell all of its assets to the Town of Queen Creek and to cancel its Certificate of Convenience and Necessity ("CC&N") in Decision 74085 (Docket No. W-02234A-13-0237). An employee of the Town of Queen Creek informed counsel undersigned that the substantial majority (in excess of 85%) of the certificated territory of H2O, Inc. was located outside of the Town's municipal boundaries. In Decision 74085, the Commission imposed only two conditions upon the transfer of H2O Inc.'s assets to the Town of Queen Creek, as follows:

IT IS FURTHER ORDERED that H2O, Inc. shall notify the Commission by a compliance filing in this docket of the successful close of escrow finalizing the sale of H2O, Inc. to the Town of Queen Creek, within 30 days of the closing.

IT IS FURTHER ORDERED that our approval of this application is based upon the Town of Queen Creek's commitment to honor all liabilities of H2O, Inc. relating to mainline extensions and customer deposits.¹

The conditions included in the approval of H2O, Inc.'s application to transfer its assets to the Town of Queen Creek are certainly appropriate. However, for the reasons discussed below, Johnson Utilities respectfully submits that additional conditions on approval of the sale and transfer of the Company's assets to the Town of Florence such as those mentioned below would fall outside the Commission's authority and jurisdiction.

2. *Should provisions be made to ensure that existing customers who reside or are located outside of the municipal boundaries will be served by the Town of Florence? Why or why not?*

There is a statute in place which directly addresses this question and expressly requires the Town of Florence to provide water and wastewater service to existing customers of Johnson Utilities located outside of the municipal boundaries of the Town. Title 9, Chapter 5, Article 2 of the Arizona Revised Statutes addresses municipal ownership of utilities. Specifically, A.R.S. § 9-516(C) states as follows:

A city or town acquiring the facilities of a public service corporation rendering utility service without the boundaries of such city or town, or which renders utility service without its boundaries, shall not discontinue such service, once established, as long as such city or town owns or controls such utility. A city or town which renders utility service outside of its boundaries as prescribed by this subsection shall not be prohibited from selling a part of its utility operation to another utility which operates under regulations prescribed by law. (emphasis added)

Applying this statute to the facts of this case, the Town of Florence is a "city or town acquiring the facilities of a public service corporation [Johnson Utilities] rendering service without the boundaries of such city or town" by virtue of the Asset Purchase and Lease Agreement that will be executed between the Town and Johnson Utilities. As a result, the Town "shall not discontinue such service, once established, as long as such city or town owns or controls such utility." The plain language of this statute makes clear that the Town cannot discontinue water or wastewater service to existing customers of Johnson Utilities who reside or are located outside of the Town's municipal boundaries.

There is Arizona case law directly on point addressing A.R.S. § 9-516(C). In *Yuma Valley Land Co., LLC v. City of Yuma*, 227 Ariz. 228, 256 P.3d 625 (App. Div. 1, 2011), a copy of which is attached hereto as Attachment 1, the Arizona Court of Appeals recently acknowledged that while a municipality has no duty to provide utility service to nonresidents absent a statutory or contractual obligation, under A.R.S. § 9-516(C), "[o]nce a municipality undertakes to provide service to nonresidents, it may not discontinue service as long as the municipality owns or controls the utility."² The Commission can rest assured that, without any question, the Town of Florence cannot lawfully discontinue water and wastewater service to existing customers of Johnson Utilities on the grounds that they reside or are located outside the Town's municipal boundaries. Thus, any additional provisions by the Commission in this regard are simply not needed or warranted. The Company would note also that no such conditions were imposed in the case of H2O, Inc., as discussed above.

¹ Decision 74085 at p. 8, lines 1-6.

² *Yuma Valley Land Co., LLC v. City of Yuma*, 227 Ariz. 228, 229, 256 P.3d 625, 626 (App. Div. 1, 2011).

Additionally, Johnson Utilities would point out that the Arizona Attorney General determined in 1962 that conditions imposed upon a municipality by the Commission would fall outside of the Commission's authority and jurisdiction. In Opinion No. 62-7 issued January 8, 1962, a copy of which is attached hereto as Attachment 2, the Attorney General opined as follows:

The Corporation Commission has no jurisdiction to regulate the relationships between a municipality and its consumers, even though such consumers lie beyond the boundaries of the city. The relations between the municipality and its consumers can only be regulated through the Legislature.

We consider it now settled law that the Arizona Corporation Commission has no jurisdiction over the municipalities in either the regulation, purchase, acquisition or operation of their public utility activities within or without municipal boundaries.³

For all of the reasons set forth above, Johnson Utilities respectfully requests that the Commission abstain from imposing any conditions that would purport to apply to the Town of Florence.

3. *If customers outside the municipal boundaries will be served by the Town of Florence, should provisions be made to ensure that such are treated on an equal footing with those customers who reside or are located within the municipal boundaries? Why or why not?*

The Arizona Supreme Court has construed A.R.S. § 9-516(C) as creating an implicit obligation on municipalities to ensure that rates for customers who reside or are located outside municipal boundaries are reasonable. In *Jung v. City of Phoenix*, 160 Ariz. 38, 770 P.2d 342 (Ariz. 1989), a copy of which is attached hereto as Attachment 3, the Arizona Supreme Court considered an appeal in a case where the City of Phoenix imposed increased water rates for residents located outside of the city's municipal boundaries. The Supreme Court ruled as follows:

At the outset we point out that A.R.S. § 9-516(C) speaks in terms of the city *rendering utility service* without its boundaries. The furnishing of utility service by a public service corporation is regulated by the Corporation Commission, and such utility service must be provided at reasonable rates. Although the Corporation Commission has no jurisdiction over municipal charges for utility service, we believe that the implication of reasonable rates for utility service must be read into A.R.S. § 9-516(C). If such a construction is not adopted, a city could charge any rate it wished despite its effect on the nonresidents' need for utility service. The legislature did not intend to place nonresidents of a city in such an impossible situation. The obligation of a city to continue utility service as required by A.R.S. § 9-516(C) necessarily implies that the charges for such services will be at reasonable rates.

* * *

The City [of Phoenix] does not contend that it does not have a legal duty to continue water service to the nonresidents. The statute at issue [A.R.S. § 9-516(C)] clearly mandates such duty. As a consequence of that duty we hold that the city must provide water service at a reasonable rate.

* * *

³ Arizona Attorney General Opinion No. 62-7 at pp. 4-5

In all cases, the city must have a reasonable basis for the discrimination in its charges. *Delong v. Rucker*, 302 S.W.2d 287 (1957). Proof that service of nonresidents involves greater expenses is sufficient to show a city acted reasonably in charging high[er] rates for nonresidents. See *id.* at 290, *Collins v. Goshen*, 635 F.2d 954 (2nd Cir. 1980).⁴

In addition to the obligation to maintain reasonable rates for non-resident customers implicit in A.R.S. § 9-516(C), there is another statute which prescribes the specific procedure that a municipality must follow in order to increase water or wastewater rates or rate components. A.R.S. § 9-511.01 states as follows:

- A. A municipality engaging in a domestic water or wastewater business shall not increase any water or wastewater rate or rate component, fee or service charge without complying with the following:
 1. Prepare a written report or supply data supporting the increased rate or rate component, fee or service charge. A copy of the report shall be made available to the public by filing a copy in the office of the clerk of the municipality governing board at least thirty days before the public hearing described in paragraph 2.
 2. Adopt a notice of intention by motion at a regular council meeting to increase water or wastewater rates or rate components, fees or service charges and set a date for a public hearing on the proposed increase that shall be held not less than thirty days after adoption of the notice of intention. A copy of the notice of intention showing the date, time and place of the hearing shall be published one time in a newspaper of general circulation within the boundaries of the municipality not less than twenty days before the public hearing date.
- B. After holding the public hearing, the governing body may adopt, by ordinance or resolution, the proposed rate or rate component, fee or service charge increase or any lesser increase.
- C. Notwithstanding section 19-142, subsection B, the increased rate or rate component, fee or service charge shall become effective thirty days after adoption of the ordinance or resolution.
- D. Any proposed water or wastewater rate or rate component, fee or service charge adjustment or increase shall be just and reasonable.
- E. Rates and charges demanded or received by municipalities for water and wastewater service shall be just and reasonable. Every unjust or unreasonable rate or charge demanded or received by a municipality is prohibited and unlawful.
(emphasis added)

This statute ensures the reasonableness of rates adopted by a municipality because it requires that rate increases be justified by a study or data, that the Town provide prior public notice of any rate increases, and that a public hearing be held before any rate increases are implemented. Additionally, the statute prohibits as unlawful any rate increase that is not just and reasonable. Customers residing or

⁴ *Jung v. City of Phoenix*, 160 Ariz. 38, 770 P.2d 342, 344-345 (Ariz. 1989)

located outside the Town's municipal boundaries and served by the municipality may participate in the rate-setting process just like customers who reside or are located within the municipal boundaries. Thus, the statute quoted above provides due process and a meaningful opportunity to participate in the rate setting process for all customers who receive water service or wastewater service from the Town, regardless of their service address.

With specific reference to water service, there is yet another statute which ensures that customers outside of the Town's municipal boundaries are treated fairly by the municipality. A.R.S. § 9-511(A) states as follows:

- A. A municipal corporation may engage in any business or enterprise which may be engaged in by persons by virtue of a franchise from the municipal corporation, and may construct, purchase, acquire, own and maintain within or without its corporate limits any such business or enterprise. A municipal corporation may also purchase, acquire and own real property for sites and rights-of-way for public utility and public park purposes, and for the location thereon of waterworks, electric and gas plants, municipal quarantine stations, garbage reduction plants, electric lines for the transmission of electricity, pipelines for the transportation of oil, gas, water and sewage, and for plants for the manufacture of any material for public improvement purposes or public buildings. If a municipality provides water to another municipality, the rates it charges for the water to the public in the other municipality shall be one of the following:
1. The same or less than the rates it charges its own residents for water.
 2. The same or less than the rates the other municipality charges its residents for water.
 3. If the other municipality does not provide water, the average rates charged for water to the residents in the other municipality by private water companies.
 4. Rates determined by a contract which is approved by both municipalities and in which such rates are justified by a cost of service study or by any other method agreed to by both municipalities. (emphasis added)

The plain language of this statute makes clear that the Town of Florence must treat water customers residing or located outside its municipal boundaries with fairness.

Because the statutes and case law discussed above impose a clear and robust obligation on the Town of Florence to charge rates that are reasonable for customers located outside its municipal boundaries, and to provide a "reasonable basis" for any "discrimination in its charges" under the *Jung* decision, additional provisions by the Commission are not needed or warranted. Moreover, Johnson Utilities would point out again that under Attorney General Opinion No. 62-7, any such conditions imposed upon the Town of Florence by the Commission would fall outside of the Commission's authority and jurisdiction. The Company would also note that the Commission did not impose such conditions in the case of H2O, Inc., as discussed above.

For all of the reasons set forth above, Johnson Utilities respectfully requests that the Commission abstain from imposing any conditions that would purport to apply to the Town of Florence.

Commissioner Bitter Smith.

April 3, 2014

Page 6

4. If such provisions should be made, please provide some recommendations regarding the nature and substance of methods or processes to ensure equal treatment.

For the reasons discussed above, Johnson Utilities submits that no additional provisions beyond the existing statutory mandates and supporting Arizona case law are needed or warranted to ensure the fair treatment of non-residents. Additionally, Johnson Utilities submits that the imposition of such conditions would fall outside of the Commission's authority and jurisdiction, and the Commission did not impose such conditions in the recent case of H2O, Inc., as discussed above.

5. I note that in the application, Johnson Utilities states "For a period of 18 months following the acquisition the Town has no plans to change the rates charged to existing customers of Johnson Utilities." Please provide comments regarding the duration and specific terms of this commitment.

Representatives of the Town of Florence have informed Johnson Utilities that the Town does not intend to change the existing rates for water or wastewater service for at least 18 months after the acquisition. However, we would note that the Town currently charges a 5% franchise fee on the water and wastewater services provided to Johnson Utilities customers residing within the Town's municipal boundaries. Once the acquisition closes, the 5% franchise fee will be eliminated for those customers. Representatives of the Town have also informed the Company that the Town will undertake and complete a full rate study in order to make a determination on any changes in future rates and charges.

We hope that the Commission and the parties will find the information provided herein helpful in this case.

Sincerely,



Jeffrey W. Crockett

cc: Docket Control (Original plus 13 copies)
Chairman Bob Stump
Commissioner Gary Pierce
Commissioner Brenda Burns
Commissioner Bob Burns
Parties on the Service List for Docket WS-02987A-13-0477

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ATTACHMENT 1

H

Court of Appeals of Arizona,
 Division 1, Department B.
 YUMA VALLEY LAND COMPANY, LLC; Terri-
 torial Real Estate, LLC; Saguario Desert Land, Inc. and
 Parkway Place Development, LLC, Plain-
 tiffs/Appellants,
 v.
 CITY OF YUMA, Defendant/Appellee.

No. 1 CA-CV 10-0121.
 May 5, 2011.

Background: Developers brought declaratory judg-
 ment action against city, seeking confirmation that
 city was required to provide water and sewer services
 to their property. The Superior Court, Yuma County,
 No. S1400CV200900840, Andrew W. Gould, J., dis-
 missed the complaint, and developers appealed.

Holding: The Court of Appeals, Brown, J., held that
 city was not obligated to provide services to the
 property, which was outside city limits.

Affirmed.

West Headnotes

[1] Municipal Corporations 268  277

268 Municipal Corporations
 268IX Public Improvements
 268IX(A) Power to Make Improvements or
 Grant Aid Therefor
 268k277 k. Improvements and works be-
 yond boundaries of municipality. Most Cited Cases

A municipality operating a public utility may
 provide service to nonresidents, but no duty exists to
 provide service to nonresidents absent a statute or a
 contractual obligation.

[2] Municipal Corporations 268  277

268 Municipal Corporations
 268IX Public Improvements
 268IX(A) Power to Make Improvements or
 Grant Aid Therefor
 268k277 k. Improvements and works be-
 yond boundaries of municipality. Most Cited Cases

Once a municipality undertakes to provide utility
 service to nonresidents, it may not discontinue service
 as long as the municipality owns or controls the utility.
 A.R.S. § 9-516(C).

[3] Municipal Corporations 268  712(4)

268 Municipal Corporations
 268XI Use and Regulation of Public Places,
 Property, and Works
 268XI(B) Sewers, Drains, and Water Courses
 268k712 Connections with Sewers or
 Drains
 268k712(3) Right or Obligation to
 Connect; Fees
 268k712(4) k. Nonresidents. Most
 Cited Cases

Water Law 405  2037

405 Water Law
 405XII Public Water Supply
 405XII(B) Domestic and Municipal Purposes
 405XII(B)12 Supply to Private Consumers
 405k2037 k. Right and duty to supply in

227 Ariz. 228, 256 P.3d 625, 607 Ariz. Adv. Rep. 29
(Cite as: 227 Ariz. 228, 256 P.3d 625)

general. Most Cited Cases

City, which constructed water and sewer lines adjacent to developer's property, was not obligated to provide water and sewer service to the property, despite developers' contention that city's action made it impossible for the property to receive the services in any other way, where property was not within city boundaries, city did not currently provide service to the property, and city had never undertaken to provide water or sewer service to the property or any areas adjacent to the property outside the city limits. A.R.S. § 9-516(C).

****625** Jennings, Strouss & Salmon P.L.C. By MichaelJ. O'Connor and Douglas Gerlach, Phoenix, Attorneys for Plaintiffs/Appellants.

Snell & Wilmer L.L.P. By KevinJ. Parker, Robert J. Metli, Ronald W. Messerly and Martha E. Gibbs, Phoenix, Attorneys for Defendant/Appellee.

***228 OPINION**

BROWN, Judge.

¶ 1 Yuma Valley Land Company, Territorial Real Estate, Parkway Place Development, and Saguaro Desert Land (collectively "Developers") appeal the superior court's decision dismissing their declaratory judgment complaint against the City of Yuma. For the following reasons, we affirm.

BACKGROUND

¶ 2 Yuma Valley Land Company and Territorial Real Estate own real property ("the Property") in an unincorporated area of Yuma County. Parkway Place Development and Saguaro Desert Land own options to buy the Property and intend to develop it for residential and/or commercial use.

¶ 3 In June 2009, Developers sued the City, seeking confirmation that the City was required to provide water and sewer services to the Property.

Developers alleged that because the City had installed water and sewer lines immediately adjacent to the Property, it had the effect of precluding the Developers from providing water or sewer service to the Property other than by contracting with the City. Developers thus sought a declaratory judgment confirming that the City: (1) could not require payment of development fees as a condition to providing water and sewer services to the Property; and (2) must provide those services to the Property at the rates found in the City's Development Fee Schedule.

****626 *229** ¶ 4 The City moved to dismiss, asserting that although Developers could enter a contract with the City for water and sewer services, no contract existed and therefore the City had no legal obligation to provide such services to the Property. Developers did not dispute that under ordinary circumstances the City had no obligation to provide service to nonresidents, but argued the City was required to provide the requested services when the City's actions made it impossible for Developers to obtain service elsewhere. The City countered that even if Developers could not obtain service elsewhere, it was still not legally obligated to provide service to the Property.

¶ 5 The superior court granted the City's motion to dismiss, pointing to the lack of any Arizona authority supporting the proposition "that the impossibility of a property owner to obtain water or sewage services from an alternative source gives rise to a duty on the part of a City or municipal entity to provide such water and sewage services." The court also noted that the complaint failed to sufficiently allege that it would be impossible for Developers to obtain water and sewer services from any other source. However, the court clarified that even if the complaint were amended to include that allegation, it would not change the court's opinion that the City had no duty to provide water or sewer service to the Property. Developers timely appealed.

DISCUSSION

227 Ariz. 228, 256 P.3d 625, 607 Ariz. Adv. Rep. 29
(Cite as: 227 Ariz. 228, 256 P.3d 625)

¶ 6 In reviewing the dismissal of a complaint for failure to state a claim, we accept as true the facts alleged in the complaint and will affirm the dismissal only if the plaintiff would not be entitled to relief under any interpretation of the facts susceptible of proof. *Fidelity Sec. Life Ins. Co. v. State*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580, 582 (1998); Ariz. R. Civ. P. 12(b)(6). We review de novo questions of law decided by the superior court. *Aldabbagh v. Ariz. Dep't of Liquor Licenses & Control*, 162 Ariz. 415, 418, 783 P.2d 1207, 1210 (App.1989).

[1][2] ¶ 7 A municipality operating a public utility may provide service to nonresidents. *City of Phoenix v. Kasun*, 54 Ariz. 470, 474, 97 P.2d 210, 212 (1939). But no duty exists to provide service to nonresidents absent a statute, *id.* at 480, 97 P.2d at 214, or a contractual obligation, *Copper Country Mobile Home Park v. City of Globe*, 131 Ariz. 329, 333, 641 P.2d 243, 247 (App.1982). Once a municipality undertakes to provide service to nonresidents, it may not discontinue service as long as the municipality owns or controls the utility. Ariz.Rev.Stat. § 9-516(C) (2008).

[3] ¶ 8 Developers concede that a municipality is generally under no obligation to provide water and sewer service to nonresidents, but contend nonetheless that the general rule does not apply when the actions of the municipality have made it impossible for the nonresidents to receive those services in any other way. The limited authority relied upon by Developers, however, is not persuasive.

¶ 9 Developers rely in part on *Travaini v. Maricopa County*, 9 Ariz.App. 228, 450 P.2d 1021 (1969). In that case, an owner of property located within the boundaries of the City of Phoenix sought to connect to a city sewer line. *Id.* at 228, 450 P.2d at 1021. The city denied the owner's request on the grounds that the sewer line would be overburdened by the additional connection. *Id.* This court affirmed the superior court's issuance of a writ of mandamus compelling the city to permit the sewer connection. *Id.* at 229-30, 450 P.2d

at 1022-23. We held that “[a]lthough there is no requirement that the City provide sewer services ... once a city undertakes to provide a service to the people in the city[,] it must provide that service adequately and on an impartial and non-discriminatory basis[.]” *Id.* at 229, 450 P.2d at 1022.

¶ 10 Developers also cite *Tonto Creek Estates Homeowners Ass'n v. Arizona Corp. Commission*, 177 Ariz. 49, 864 P.2d 1081 (App.1993), suggesting that the City is obligated to provide service because it is capable of doing so. In *Tonto Creek*, a homeowners' association assumed operation of a water utility that provided water service to lots within the Tonto Creek Estates subdivision. *Id.* at 54, 864 P.2d at 1086. Over time, the association began providing water service to several *230 **627 properties located in a different subdivision, Tonto Rim Ranch. *Id.* Because the association, as a public service corporation, contracted to provide water to various lot owners located in Tonto Rim Ranch, this court concluded that the Arizona Corporation Commission could properly order the association to provide service to all the lot owners in that subdivision on a non-discriminatory basis. *Id.* at 58-59, 864 P.2d at 1090-91.

¶ 11 Here, it is undisputed that the City has constructed water and sewer lines adjacent to the Property. However, unlike the situation in *Travaini*, the Property is not within the City boundaries and the complaint does not allege the City currently provides service to the Property. Similarly, although the City may be capable of providing service to the Property, Developers have not asserted that the City has ever undertaken to provide water or sewer service to the Property or any areas adjacent to the Property outside the City limits. Thus, neither *Travaini* nor *Tonto Creek* limits the applicability in this case of the general rule that a municipality is not obligated to provide any utility service outside its boundaries absent a contractual or statutory obligation.

¶ 12 Developers also cite *Barbaccia v. County of*

227 Ariz. 228, 256 P.3d 625, 607 Ariz. Adv. Rep. 29
(Cite as: 227 Ariz. 228, 256 P.3d 625)

Santa Clara, 451 F.Supp. 260 (N.D.Cal.1978), in support of their contention that a city must provide utility service if the city's actions make it impossible to obtain service elsewhere. *Barbaccia* involved a takings claim against the City of San Jose and the County of Santa Clara. *Id.* at 262. The plaintiffs owned property in Santa Clara County that had become surrounded by the City of San Jose as the city expanded and annexed adjoining land. *Id.* Through agreements between the county and the city, the county retained some regulatory authority, but the property became subject to city planning and developmental control. *Id.* at 262–63. The plaintiffs alleged that through various actions, including denial of development plans because of a desire to keep the property as open space, the city denied them profitable use of the property. *Id.* at 263–64. After the plaintiffs filed the lawsuit, the county approved a plan for development, contingent upon the property's connection to the city's sewer system. *Id.* at 264. A local ordinance, however, precluded the city from providing sewer hook-ups to residential users outside the city limits. *Id.*

¶ 13 The district court found that the plaintiffs had stated a claim for an unconstitutional taking based on the “extraordinarily unique circumstances” of the case, including the city's decision to block future development by refusing to provide sewer service. *Id.* at 266. The court recognized that “[i]n the majority of cases a municipality will have no obligation to annex surrounding territory or provide non-city users access to its sewer system, but when a city envelops county land and then, while holding a monopoly on [sewage infrastructure], denies annexation or sewer hook-ups the city cannot hide behind the fiction that its power and responsibility stops at its borders.” *Id.*

¶ 14 *Barbaccia* does not support Developers' position that the City is obligated to provide utility services to the Property. *Barbaccia* did not address the issue of whether the City of San Jose was obligated to provide the service; the only issue was whether the plaintiff had stated a claim for an unconstitutional

taking of his property. *Id.* at 264 n. 2 (noting that neither side had directly addressed the “plaintiffs' right to compel the city of San Jose to provide access to its sewers” and recognizing the “traditional rule ... that a municipality may not be forced to extend its sewer lines to property lying outside its boundaries”). Moreover, Developers have not alleged that the City has attempted to impose any planning or developmental control on the Property, as was the case in the very unique circumstances present in *Barbaccia*. Even assuming such allegations, Developers have cited no authority suggesting that evidence supporting a takings claim would permit a court to compel a municipality to extend water and sewer services outside its boundaries.

CONCLUSION

¶ 15 Based on the foregoing, we affirm the superior court's dismissal of Developers' complaint.

*231 **628 CONCURRING: DIANE M. JOHNSEN, Presiding Judge, and JOHN C. GEMMILL, Judge.

Ariz.App. Div. 1,2011.

Yuma Valley Land Co., LLC v. City of Yuma
227 Ariz. 228, 256 P.3d 625, 607 Ariz. Adv. Rep. 29

END OF DOCUMENT

ATTACHMENT 2

Morris Rozar
Phil Haggerty } concurred

January 8, 1962
Opinion No. 62-7
R-621

REQUESTED BY: Honorable George F. Senner, Commissioner
Arizona Corporation Commission

OPINION BY: ROBERT W. PICKRELL
The Attorney General

QUESTIONS:

1. Does the Corporation Commission have jurisdiction to hold hearings regulating the transfer of assets from a privately owned water utility to a municipality and to enter an Order approving or disapproving said transfer?
2. If it does have jurisdiction to conduct such a hearing, may it inquire into the following:
 - A. Amount and reasonableness of the consideration to be paid by the municipality.
 - B. Reasonableness of terms and conditions of deferred payments.
 - C. Reasonableness of conditions in the agreement not related to the amount of the consideration or the terms of payment.
 - D. The duties and obligations of the privately owned public utility and the conditions surrounding the disposition of any certificate of convenience and necessity held by it.
3. What is the effect upon the Corporation Commission's jurisdiction of A.R.S. §9-516(C) and the declaration of public policy contained therein? (Chap. 111, Sec. 1, Laws 1960).

CONCLUSIONS:

1. Yes. A.R.S. §40-285 (1956) requires that a privately owned public utility obtain the approval of the Corporation Commission prior to disposing of its assets. This statute is not rendered inoperative even though a municipality or charter city is a purchaser.
2.
 - A. No.
 - B. No.
 - C. Yes, but only insofar as the conditions relate to the future acts and duties of the private utility and to the customers who will be served thereby after the purchase or acquisition of the utility's properties by the municipality.

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D. Yes.

3. Subparagraph C of A.R.S. §9-516 has the effect of requiring the Corporation Commission to make a determination of fact that a city or town has refused private utility service before it may issue a new certificate of convenience and necessity in detriment to the rights of the holder of the existing certificate whose property is required by the municipality. It is intended to protect the seller, to preserve his rights as a regulated monopoly, pending completion of final purchase and to require the Corporation Commission to make orders when approving such a sale by a privately owned public utility as are necessary to preserve the existence of the original franchise until the municipality has completed the sale or refuses to serve part of the formerly en-franchised area.

REASONING

These questions may be answered by defining the conflicting jurisdictional areas of municipalities and the Corporation Commission and determining the effect of §§40-285, 9-515 and 9-516 A.R.S. (1956) on this situation. The Commission in its request for an opinion pointed out the following:

"Specifically, pursuant to §40-285, Arizona Revised Statutes, we have recently held hearings upon the transfer of the assets of Government Heights Water Company in Tucson to the City of Tucson. The question was raised at that hearing and thereby necessitating this request.

In view of the fact that most sales of privately owned water utility companies to municipalities are made on an installment payment basis, usually the certificate of convenience and necessity is held in abeyance pending the final payment and in case of default the certificate of convenience and necessity automatically reverts back to the seller. Further, pursuant to General Order No. U-4, water utilities under our jurisdiction are allowed to collect certain contributions, advances and deposits which are refundable under definite terms and conditions and are the responsibility of the utility under our jurisdiction.

Does the Arizona Corporation Commission have jurisdiction to hold hearings and regulate the transfer of assets of a privately owned water utility to a municipality? Particularly, does the Commission have juris-

diction to inquire into the transaction as to sales price, terms and conditions of payment and other specific conditions of sale and purchase?"

In addition to the facts given in the letter, we have been informed that the water company has executed a contract of sale with the City of Tucson for the complete transfer of all its property rights, interests, and assets used to serve water. All of its former customers are being served by the city, and the territory which the water company was entitled to serve under its certificate of convenience and necessity lies within the corporate limits of the city. The city expanded its territory and encroached on the area being served by the water company. The agreement by its terms was made subject to the approval of the Corporation Commission. The Commission, at a hearing under A.R.S. §40-285, passed upon the proposed sale, received objections by both the city and the utility on any inquiry relating to the amount of the sale price or the reasonableness of the terms as related to the consideration, and the parties have not submitted themselves voluntarily to any jurisdiction of the Commission. It was stipulated that the Commission shall exercise only such jurisdiction as it may have by law. On May 1, 1961 the city began serving and has since served all the customers of the private utility using the utilities system.

The statute under which the Commission was acting reads as follows:

"§40-285 Disposition of plant by public service corporations; acquisition of capital stock of public service corporation by other public service corporations

A. A . . . water corporation shall not sell, lease, assign, mortgage or otherwise dispose of or encumber the whole or any part of its . . . system, necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, . . . without first having secured from the commission an order authorizing it so to do. Every such disposition, encumbrance or merger made other than in accordance with the order of the commission authorizing it is void.

B. The approval or permit of the commission under this section shall not revive or validate any lapsed or invalid franchise or permit, or enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or waive any forfeiture.

C. Nothing in this section shall prevent the sale, lease or other disposition by any such corporation of property which is not necessary or useful in the performance of its duties to the public, . . ." (Emphasis supplied).

It is our opinion that this statute can and should be given effect in this situation and has not been repealed by implication by A.R.S. §9-511, et seq., regarding the municipality's powers and duties in acquiring private utilities. Repeals by implication are not favored and statutes are to be construed together so as to give effect to all. Industrial Commission v. Hartford Accident & Indemnity Co., 61 Ariz. 86, 144 P.2d 548 (1943). In our opinion A.R.S. §40-285 must be construed with A.R.S. §§9-515 and 9-516 and the constitutional powers of municipalities and the Commission. Before discussing the effect of A.R.S. §40-285, we deem it pertinent to review the mutual powers of the Corporation Commission and the municipality and attempt to resolve apparent or actual conflicts therein.

The Corporation Commission's powers are constitutional and the Legislature may extend its powers, but may not limit them. Arizona Constitution Art. 15 Sec. 6; Garvey v. Trew, 64 Ariz. 342, 170 P.2d 845; Cert. Denied, 91 L.Ed. 673 (1946). The Legislature may not extend the Corporation Commission's powers into fields of subject matter different from those given it by the Constitution. Menderson v. City of Phoenix, 51 Ariz. 280, 76 P.2d 321 (1938). The Corporation Commission has no statutory power over municipalities, we doubt it may be given any by the Legislature. It has no jurisdiction to regulate the relationships of municipalities with the consumers of city owned water utilities. City of Phoenix v. Wright, 52 Ariz. 227, 80 P.2d 390 (1938). The Commission's jurisdiction is limited to the exercise of the powers given it by the Constitution and statutes, and should it make an order in excess of its constitutional and statutory grants of power, such orders are vulnerable for lack of jurisdiction and could be questioned in any collateral proceeding. Walker v. De Concini, 86 Ariz. 143, 341 P.2d 933 (1959). The Corporation Commission has no jurisdiction to regulate the relationships between a municipality and its consumers, even though such consumers lie beyond the boundaries of the city. The relations between the municipality and its consumers can only be regulated through the Legislature. City of Phoenix v. Kasun, 54 Ariz. 470, 97 P.2d 210 (1939). That the Commission had no jurisdiction over the acquisition and operation of public utilities by municipalities, at least over the area and consumers within municipal boundaries, was long ago recognized by the Commission. Southside Gas and Electric Co., Docket 462, Arizona Corporation Commission P.U.R. Annotated 1918A, 493 (1917). The Commission asserted its jurisdiction over the municipalities' customers outside the city limits under the then existing statutory sections. Harber v. City of Phoenix, Docket 383, Arizona Corporation 1918D, 352, (interpreting §§2277 and 2339, Revised Statutes of Arizona, 1913). Commissioner Cole dissented considering the Corporation Commission's jurisdiction could not be extended in any fashion so as to affect the powers of a municipality in the field of public utilities. The dissenting opinion was ultimately accepted. See City of Phoenix v. Kasun, supra.

We consider it now settled law that the Arizona Corporation Commission has no jurisdiction over the municipalities in either the regulation, purchase, acquisition or operation of their public utility

activities within or without municipal boundaries. However, the Commission may exercise all necessary express and implied powers to carry out its own proper functions, acting within the scope of its own jurisdiction over privately owned public service corporations. Garvey v. Frew, supra.

The denial of jurisdictional power to regulate municipalities does not give power to the municipal corporations to regulate relationships between the enfranchised privately owned public utility and members of the public. This power is vested solely in the Corporation Commission. City of Phoenix v. Sun Valley Bus Lines, 64 Ariz. 319, 170 P.2d 289 (1946).

Article 15, Sec. 3, is an Arizona Constitution grant of jurisdictional power to regulate public service corporations by the Corporation Commission. It contains a proviso:

" . . . Provided, that incorporated cities and towns may be authorized by law to exercise supervision over public service corporations doing business therein, including the regulation of rates and charges to be made and collected by such corporations; . . . "

This proviso is not self-executing and requires legislation to give it effect. Phoenix Railway Co. v. Lount, 21 Ariz. 289, 187 Pac. 933 (1920). Northeast Rapid Transfer Co. v. Phoenix, 41 Ariz. 71, 81, 15 P.2d 951 (1932). As of this date we have found nothing which leads us to believe that the Legislature has passed enabling legislation to carry into effect this constitutional proviso. The history of past legislation shows a strong tendency by the Legislature to leave regulation under the Commission and this would militate against any construction of the statutes that would give a municipality regulatory authority. We therefore conclude that there is no legislative intent shown by general statute to vest in a municipality power to regulate a privately owned public utility in any fashion. Municipal powers granted by the Constitution and enabling statutes concern only acquisition of utilities or, as given by charter, direct operation. The municipality's rights to enter into and do business also stem from the constitution. (Art. 2, Sec. 34, Art. 13, Sec. 5). This is a broad grant of power and is in Tucson's case carried into effect by the city charter. City of Tucson v. Polar Water Co., 76 Ariz. 126, 259 P.2d 561 (1953). Title 9, Chap. 5, Art. 2, A.R.S. (1956), deals with municipal ownership. The pertinent parts are as follows:

"§9-511.

A. A municipal corporation may engage in any business or enterprise which may be engaged in by persons by virtue of a franchise from the municipal corporation, and may construct, purchase, acquire, own and maintain within or without its corporate limits any such business . . .

B. The municipality may exercise the right of eminent domain either within or without its corporate limits for

the purposes as stated in subsection A . . . "

"§9-514.

Before construction, purchase, acquisition or lease by a municipal corporation, . . . shall be undertaken, . . . purchase, . . . shall be authorized by the affirmative vote of a majority of the qualified electors who are taxpayers of the municipal corporation "

"§9-515.

A. When a municipal corporation and the residents thereof are being served under an existing franchise by a public utility, the municipal corporation, before constructing, purchasing, acquiring or leasing, . . . shall first purchase and take over the property and plant of the public utility.

B. The property and plant shall become the property of the municipal corporation upon payment by the municipal corporation of the fair valuation thereof within eighteen months after the determination of the valuation . . .

C. The fair valuation of the public utility shall be the equivalent of the compensation to be paid for the taking of private property for public use as provided by article 2, chapter 8 of title 12, and the amount shall be determined by one of the following methods:

1. By agreement between the municipal corporation and the public utility.
2. By arbitrators . . .
3. By a court of competent jurisdiction determining the compensation . . .

D. The municipal corporation and the public utility shall have right of appeal as provided by article 2, chapter 8 of title 12."

These statutes may not be construed as limiting the right of the municipalities to engage in business, nor need they be construed as giving authority by the Legislature to the municipalities to engage in business. City of Tombstone v. Macia, 30 Ariz. 218, 245 Pac. 677, 46 A.L.R. 828 (1926). This case pointed out that the municipality's powers to engage in business were given by the constitution and that the predecessor statute §2035 Civil Code 1913, et seq., be construed as a statute authorizing the issuance of municipal bonds. (Distinguished, City of Tucson v. Polar Water Co., on rehearing, infra).

To the extent that these statutes relate to cities, they are repealed when in conflict with a charter granted pursuant to Art. 13, Sec. 2, Const. of Arizona. See §9-284(A). Tucson is a charter city.

It may enter into the utility business as a constitutional right. The charter is enabling legislation. City of Tucson v. Polar Water Co., 76 Ariz. 126. In that case the Supreme Court held that a privately owned public utility could not recover damages for injuries to it resulting from competition by the charter city when the city entered into the utility business. In the decision on rehearing of the same case, City of Tucson v. Polar Water Co., 76 Ariz. 404, 265 P.2d 773 (1954), the Court affirmed the holding modifying the reasoning and affirmed that part which held that A.R.S. §9-515 (16-604 ACA 1939) had no application to the situation where a municipality expands its territory and encroaches upon an existing utility. This opinion deals with a similar fact situation. The court held that the city could not be required, under the then existing statutes, to compensate the private utility for its damages and pointed out that unless a franchise were exclusive, any damage resulting from competition with the municipality would be without legal effect and would not constitute a legal injury. The court further pointed out that the franchise issued by the Corporation Commission was not an exclusive franchise and that no one could successfully sustain a contention that it was. The court did not cite any authority therefor, but we believe that the statement is amply supported by our constitutional provisions affecting such franchises. (Art. 2 Sections 9 and 13; Art. 4, Part 2, Sec. 19, Sub Sec. 13; Art. 13, Sec. 4; Art. 13, Sec. 6; Art. 14, Sec. 7.).

On rehearing, the court reversed itself only to say A.R.S. §9-515 (16-604 ACA 1939) was an eminent domain statute of general effect, of statewide concern, and would necessarily prevail and take precedence over any provisions of a city charter in conflict therewith.

The court, on rehearing, refused to read into the then existing statutes any provisions requiring the municipality in that case to compensate the private utility; but it said that the Legislature could pass appropriate legislation to protect the franchises issued by the Corporation Commission and the businesses operating thereunder from damage or destruction from municipal competition. They said that there was no constitutional basis for saying that the Legislature could not require the cities to pay a just compensation for such destruction, even though it resulted from competition. They pointed out that there was no such protective legislation.

The Twenty-first Legislature was in its Second Regular Session at the time the second Polar Water case was decided and they promptly passed Sections 1 and 2, Chap. 105, Session Laws 1954, (A.R.S. §9-516 (A) and (B)). The conclusion is inescapable that these amendments to the Cities and Towns Code were intended to provide the protective legislation said to be missing by the court. In 1960 this Section was further amended by adding Subsection C, which reads as follows:

"§9-516. Declaration of public policy; eminent domain

. . .
C. It is declared the public policy of the state that when a city or town has purchased the property or plant of a public

utility serving in an area within or without the boundaries of the city or town pursuant to this article, the corporation commission shall not be authorized or empowered to grant a new certificate of convenience and necessity or franchise to any person, firm or corporation to provide the same kind of public utility service within the area or territory previously authorized to said public utility under its certificate of convenience and necessity or franchise, but if the city or town refuses to provide utility service to a portion or part of the area or territory previously authorized to the public utility, the corporation commission may issue a new certificate of convenience and necessity or franchise to a public utility to provide utility service in that portion or part of the area or territory. As amended Laws 1960, Ch. 111, §1."

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; and to prohibit the Corporation Commission from issuing a new certificate unless it were to find, as a matter of fact, that the city or town had refused to provide utility service to a portion of the area previously enfranchised and which the city or town has taken over from the private utility.

This opinion cannot interpret the impact of this statute on all conceivable fact situations. We give full effect to the presumption of constitutionality. It is sufficient for the purposes of this opinion to interpret the entire §9-515 A.R.S. as being a statute intended to compel the municipalities to pay just compensation to privately owned public utilities whether it chooses to purchase or compete. The City of Tucson has decided to purchase. There is no question of competition. The city charter provides for such purchase. (See Chap. IV §§ 6, 7, 14 and 24). It is given all necessary power to contract. The city elected officials, being responsible to the city voters, are charged with the duty of protecting the consumers to be served by the city upon purchase. No such duty is imposed upon the Corporation Commission.

A.R.S. §9-516 makes applicable to charter municipalities §9-515 as an eminent domain statute, and establishes the method whereby fair valuation is to be determined when the city seeks to acquire the assets of the privately owned public utility. In none of the Constitutional provisions, statutes, or cases is there any intimation that either the people, Legislature, or the courts has placed the determination of value in the hands of the Corporation Commission, either as a fact-finding agency or a judicial body. We have already expressed our doubts that such a function could be given to the Corporation Commission without conflicting with the constitutional powers given to municipalities. A.R.S. §9-516(C) is therefore a statute preserving the rights of the holder of the certificate of convenience and necessity during the period when the utilities' assets

are being purchased. It limits the powers of the Corporation Commission to issue an additional certificate of convenience and necessity during the time the municipality is completing the purchase and is serving all the customers in the area formerly served by the utility. It is implicit in the statute that the Corporation Commission must give effect to the possibility of non-service and that its order authorizing the privately owned public utility to sell its assets to a municipality is to be made preserving, among other matters, the certificate of the private utility.

A.R.S. §9-516(A) (B) and (C) having been passed, the constitution thereof is presumed, and this office is bound by that presumption. We conclude that the Arizona Supreme Court has considered, insofar as it is pertinent to this opinion, that it is proper for the Legislature to enact legislation compelling a municipality to reimburse a public utility operating within its corporate limits for such losses the utility may sustain; even though those losses result from competition with the city insofar as the serving of water is concerned. A.R.S. §9-515(C) sets forth the methods whereby a municipality may exercise its right of eminent domain. Where the statute is not operative the city charter would prevail to determine the method of purchase of the terms, conditions and consideration. The constitutional section, Article 13, No. 5, was not considered self-executing and §9-511, et seq., is the enabling legislation. Hartford Accident and Indemnity Co. v. Wainscott, 41 Ariz. 439, 19 P.2d 328 (1933).

The entire method for determining fair compensation and the right to exercise eminent domain has been set forth in these statutes or in the charters. It has also set forth (absent a charter) how property shall be valued and when the property and plant shall become the property of the municipal corporation. (A.R.S. §9-515(B), (C), (1) and (2)).

Do these sections repeal, by implication, A.R.S. §40-285? This section requires that a privately owned public utility obtain permission from the Arizona Corporation Commission before encumbering or disposing of its assets used in its public service function, as quoted above. §40-285 A.R.S. was taken from California. Trico Electric Corporation v. Ralston, 67 Ariz. 358, 196 P.2d 470 (1948). See Section 851, Public Utilities, West's Annotated California Code. Formerly Sec. 51(A) California Public Utilities Act.

In that case our Supreme Court cited with approval Hanlon v. Eshleman, et al, 146 Pac. 656, 169 Cal. 200 (1915):

" . . . The owner may not transfer such properties unless authorized by the commission. All that the commission is concerned with therefore, is whether a proposed transfer will be injurious to the rights of the public. If not, the owner may be authorized to make the transfer. With the rights of an intending purchaser the commission has nothing to do. . ." (Emphasis supplied).

The Hanlon case held the statute permissive, and the proper parties to a proceeding thereunder were only the privately owned public utility and the Commission. By reenacting A.R.S. §40-285 following the Trico decision in substantially the same wording, it is presumed that the Legislature was aware of the decision and adopted the construction placed thereon. Moore v. Chilson, 26 Ariz. 244, 224 Pac. 818 (1924). In the case of Baldwin, et al v. Railroad Commission of California, 275 Pac. 425, 206 Calif. 581 (1929), the California Supreme Court construed the effect of the California counterpart to our statute in an analogous situation. On application of those former consumers of the water company who would be served by an irrigation district after sale, the Commission refused to pass upon the reasonableness of value, feasibility of project or the reasonableness of purchase price of an agreement made between a privately owned water company and a water storage district (an agency not subject to commission jurisdiction) on the grounds that the Commission lacked jurisdiction. The State of California had vested in a different agency a requirement to make a determination as to the values and the amount to be paid under such a contract. The Commission contended and conceded that a transfer of public utilities does not put an end to all obligations of service but that its regulatory functions were not concerned with rights of the future consumers of the storage district. This situation is parallel to ours in that our law places determination of fair value in agencies other than the Corporation Commission. We quote at length from that case:

"Section 51(a) of the Public Utilities Act, . . . does not in terms require the commissioner to inquire into the value of the properties sought to be transferred for the purpose of determining the reasonableness or adequacy of the contemplated purchase price. Obviously, neither does it hamper the commission's investigation into any of such facts, should such an investigation be deemed necessary or advisable in a matter within its jurisdiction.

. . . we think the position taken by the Railroad Commission is sound. It is thereby precluded from determining that a transfer to the district would not be beneficial to the consumers included within the district. That question is left to the determination of other state agencies. When the Commission has safeguarded, as it has in its order authorizing the transfer of the rights of consumers of the canal company outside the district, and has provided that the consumers within the district shall be served as provided in the Storage District Act, it is clear that the Commission has properly performed its functions. With other questions it has no concern. . . .

The Railroad Commission will have no regulatory powers over the service of water which will be made to these protesting consumers, when completion of the proposed project is voted favorably by the electors in the district. . . .

Petitioners complain that, if none of these matters needs to be determined by the Railroad Commission, then its authority in this case under section 51(a) of the Public Utilities Act becomes nothing more than a 'rubber stamp' approval. This is not true. The Commission must determine whether and to what extent, under the showing made by the applicant for authority to transfer the public utility properties, the canal company may be properly relieved of its public utility obligations.

We therefore conclude that the Railroad Commission, in the proceeding before it, has regularly exercised its jurisdiction. . . " (Emphasis supplied).

If a municipality did undertake to purchase or acquire by agreement the assets of a privately owned water company the municipality could not later disregard the order of the Corporation Commission permitting the sale. Henderson v. Oroville-Wyandotte Irrigation District, Supreme Court California, 2 P.2d 803, 809 (1931). Under A.R.S. §9-515(C), three statutory methods are provided by which the municipal corporation may have determined the fair value of the assets of the public utility. Since the passage of A.R.S. §9-516 these methods are available to municipalities. In none of these instances is any action required by the Corporation Commission. All cases in California, wherein the railroad commission has determined value of purchases by municipalities, are based upon a 1914 addition to the California Constitution; Section 23A, Article 12, Constitution, West's Annotated California Code, Vol. 3, Page 93. There is no comparable Arizona constitutional provision. In California, even with such power, the railroad commission cannot fix purchase price nor make a contract for the persons involved, but can only decline to approve if the purchaser would be financially unable to furnish service or that the transfer would be contrary to the public interest. Atomic Express, 56 Calif. P.U.C. 182 (1958). The city officials are responsible to their electorate. They must decide whether to acquire by purchase or by court action. The determination of what constitutes fair value, at least insofar as charter cities are concerned, lies solely with the city officials. The Corporation Commission's concern is only with the franchised utility and its duty as a public service corporation. Until it is relieved by the Commission of its duties, and the certificate of convenience and necessity is retired, it is subject to the Commission's regulation.

The members of the public to be protected by the Corporation Commission in deciding whether or not to approve a transfer or sale, are not the former consumers who are now to be served by the municipality. See Baldwin v. Railroad Commission, supra. Those to be protected by the Corporation Commission are the persons who will or may be served by the public service corporation after the transfer.

A.R.S. §9-515 provides for several methods by which a municipal corporation may acquire the assets of a privately owned public utility. Two of these are by negotiation and in both cases the public utility

must be a party to the negotiation. Before it can become a party to a valid agreement it must secure permission of the Corporation Commission under A.R.S. §40-285. If such an agreement is made and approved between a municipal corporation and the public utility under the provisions of A.R.S. §9-515(B) and (C)(1), then the parties have entered into an executory bi-lateral contract. In this particular case, the purchase of all the physical assets, including the real property rights of the public utility. Until the sale is complete and all customers in the area are served, the utility has an interest under A.R.S. §9-516(C) as the holder of the certificate, and the Commission continues to retain jurisdiction over the utility and its certificate. As an alternative procedure, the municipality may of course condemn as provided in A.R.S. §9-515(C)(3), by court action. Where however the municipal corporation by voluntary agreement seeks to purchase a privately owned public utility it acquires, subject to the statutory requirement, that the utility obtain permission from the Commission to enter into the contract of sale. This does not thereby result in making a municipality subject to the jurisdiction of the Corporation Commission. The seller-utility must obtain permission in order to make the transfer, and the purpose thereof is to permit the Corporation Commission to make sure that the rights of the customers of the utility will be adequately protected. This requirement is not removed even though the municipality undertakes to acquire all property and serve all the customers of the privately owned public utility. In that case the Corporation Commission still must require the utility to obtain its permission. The duties and powers of the Commission are limited to the necessary hearings and orders to make sure that sale by the utility will not leave persons served neither by the utility nor the municipality. Once the municipality serves all the customers, there are no public duties then left to the utility and none of its assets used in the service of water would be necessary or useful in the performance of its duties. This section does not permit the Corporation Commission to refuse to allow the corporation's assets to be sold. (See A.R.S. §40-285(c)). The Corporation Commission in the instant case, would only be able to go into those matters which would affect the former customers of the utilities, to an orderly disposition of the remaining obligations of the public utility, and to ascertain that all such obligations have been properly provided.

Regarding the certificate, the Commission's jurisdiction continues under A.R.S. §9-516(C) until it has determined that the municipality is serving the entire area and there is no area requiring certification or service by any private utility.

CONCLUSIONS

1. The Corporation Commission has not been given any jurisdiction over a municipality in the municipality's determination of what fields of business, including public utilities, it will enter, nor over the feasibility, desirability or consideration to be paid by the municipality in the acquisition or purchase of public utilities.

2. The Legislature, exercising its power over non-charter municipalities, has decreed that municipalities shall pay fair value to acquire the facilities of public service corporations and has specified how that valuation is to be determined. (A.R.S. §§9-515(C) and 9-516).

3. Under A.R.S. §9-516(A) and (B) the Legislature has declared its intent that charter cities shall not destroy the property of enfranchised utilities by direct competition. The charter city is free to acquire by purchase, and where it chooses so to do, the question of consideration and terms as they relate to all acts of the municipality are not subject to scrutiny by the Commission. This situation involves a mutual voluntary agreement and we do not need to discuss the effect of A.R.S. §9-516(A) and (B) on purchases by a charter city.

4. Municipalities have not been given legislative grant to carry into effect the constitutional privilege of regulation of private utility within its boundaries. (Art. 15, Sec. 3). As a result municipalities are not authorized to exercise any direct supervision over the manner of doing business of public service corporations within its city limits. They may not by agreeing to purchase the assets of the utility, oust the Commission of its jurisdiction under A.R.S. §40-285. The Corporation Commission must give permission to a utility before it may dispose of its assets by agreement to a municipality or any other purchaser.

5. This statute is a permissive statute passed for the protection of the public interest. The Corporation Commission may only concern itself with questions relating to whether or not the proposed transfer will be injurious to the rights of the public. The Commission has nothing to do with the rights of the intended purchaser and has no power to determine the validity of the contract, fairness of the purchase price, or feasibility of the project.

6. When the 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. The 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. They are bound to honor the order made by the Commission in approving the sale.

7. In the situation where only part of the assets of the private utility are being conveyed to a municipality and the utility will continue to serve, after the sale, some customers, the Commission shall make its order relative to those customers which will not be served by the municipality, and the private utility may not then dispose of the assets that the Commission finds are necessary to meet the needs of those customers remaining.

8. 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 the sale of its assets. 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 and that it will, in fact, have been relieved of all its duties to serve such customers. The Commission's determination is to be made relating only to these matters. They 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. This is the effect of A.R.S. §40-285(C).

9. The Corporation Commission in its order approving any sale under A.R.S. §40-285, must give effect to §9-516(C) to the extent that it shall protect from encroachment by additional certification the rights of the holder of the certificate of convenience and necessity of the utility being purchased and can only terminate the certificate of the privately owned public utility being purchased and relieve it from the duties of a public service corporation after it is apparent that the municipal corporation has not and will not refuse "to provide utility service to a portion or part of the area or territory previously authorized to the public utility."

10. If the municipality refuses to serve customers in the area taken over, the Corporation Commission then may issue a new certificate of convenience and necessity to a public utility to provide service to that portion of the area or territory which the municipality has refused to service. Its power of investigation to determine the necessary facts is preserved. To perform these duties the Commission retains jurisdiction over the utility after sale and has full power to investigate completion of sale.

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By Clark Kennedy

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The Attorney General

ATTACHMENT 3

ZONA REVISED STATUTES. (Emphasis added).

Based on the language of subsection (C) and the Title to the amendment, it is clear to us that the legislature intended to grant a right to those persons living outside the boundaries of a city, who are users of a city's water service, to require the continuation of such water service by the City once it has been established. Such a public policy did not exist at the time *City of Phoenix v. Kasun, supra*, was decided. Now, an obligation to furnish continued water services to appellants exists by virtue of A.R.S. § 9-516(C) and the *City of Phoenix v. Kasun, supra*, is inapplicable to the claims asserted here by appellants.

The judgment of dismissal is reversed and this matter is remanded to the trial court for further proceedings.

GRANT and HAIRE, JJ., concur.



160 Ariz. 38

Barney JUNG; James R. Fiddler; Harry Thurston, d/b/a Harry Thurston's Saddle Shop; Lawrence L. Lake, Plaintiffs/Appellants

v.

The CITY OF PHOENIX; Terry Goddard, Mayor of the City of Phoenix; Council of the City of Phoenix; William Parks, Duane Pell, Barry Starr, John Nelson, Howard Adams, Ed Korrick, Mary Rose Wilcox, and Calvin Goode, City Council Members; Phoenix Water and Wastewater Department; William E. Korbitz, Director of the Phoenix Water and Wastewater Department; Marvin Andrews, City Manager; City of Phoenix Water System, Defendants/Appellees.

No. CV-87-0199-PR.

Supreme Court of Arizona,
En Banc.

Jan. 12, 1989.

Nonresident customers of city water department brought civil rights action

against city seeking damages and injunctive relief on ground that their water rates were twice those charged to city residents. The Superior Court, Maricopa County, No. C-543809, James Moeller, J., granted city's motion to dismiss, and appeal was taken. The Court of Appeals, 160 Ariz. 35, 770 P.2d 339, reversed and remanded, and city petitioned for review. The Supreme Court, Holohan, J., (Retired), held that: (1) plaintiff's allegations did not support claim under federal civil rights statute, and (2) statute limiting water rates city could charge nonresidents limited damages and injunctive relief nonresidents could recover from city in action challenging allegedly discriminatory rates, but did not affect claims of nonresidents for period before statute's effective date.

Opinion modified, remanded.

Feldman, V.C.J., filed concurring opinion.

1. Civil Rights ⇐13.12(3)

Allegations by nonresident customers of city's water department, that rates charged nonresidents were twice those charged to residents, did not support claim under federal civil rights statute; any remedy available to nonresidents was under state law. 42 U.S.C.A. § 1983.

2. Waters and Water Courses ⇐205

Statute requiring city to continue water service to nonresidents also required city to charge reasonable rate for such service. A.R.S. § 9-516, subd. C.

3. Waters and Water Courses ⇐203(3)

Generally, municipally owned waterworks system supplying water outside its corporate limits may charge more for that service than it charges users who reside within corporate limits. A.R.S. § 9-516, subd. C.

4. Municipal Corporations ⇐277

In all cases, city must have reasonable basis for discrimination in its charges for

Cite as 770 P.2d 342 (Ariz. 1989)

utility services between residents and non-residents; proof that service of nonresidents involves greater expense is sufficient to show city acted reasonably in charging higher rates for nonresidents. A.R.S. § 9-516, subd. C.

5. Waters and Water Courses ¶182, 203(12)

Statute limiting water rates city could charge nonresidents limited damages and injunctive relief nonresidents could recover from city in action challenging allegedly discriminatory rates, but did not affect claims of nonresidents for period before statute's effective date. A.R.S. § 9-511, subd. A.

Friedeman & O'Leary by John Friedeman and Charles L. Eger, Phoenix, for plaintiffs/appellants.

Roderick G. McDougall, Phoenix City Atty. by Jesse W. Sears and Philip M. Haggerty, Asst. City Attys., Phoenix, for defendants/appellees.

Johnson & Shelley by LaMar Shelley, Mesa, for amicus curiae League of Arizona Cities and Towns.

Charles G. Ollinger, III, Paradise Valley Atty., Paradise Valley, for amicus curiae Town of Paradise Valley.

HOLOHAN, Justice (Retired).

The plaintiffs, appellants, brought an action under 42 U.S.C. 1983 against the City of Phoenix seeking damages and injunctive relief because of alleged discrimination by the defendant city in charging different water rates for customers residing outside its exterior boundaries. The plaintiffs also sought to maintain the action as a class action upon behalf of all customers of the defendant city similarly affected by the water rates.

The superior court granted the city's motion to dismiss which also mooted the question of maintaining the action as a class action. On appeal, the Court of Appeals reversed the judgment of dismissal and remanded the case to the superior court for further proceedings. *Jung v. City of*

Phoenix, 160 Ariz. 35, 770 P.2d 339 (App. 1987) (1 CA-CIV 8692, filed Feb. 24, 1987). We granted the city's petition for review to clarify the nature of the plaintiffs' remedies in this utility rate litigation.

The essential facts, briefly stated, are that prior to 1985, the City of Phoenix maintained a water rate for nonresidents that was the same as that for residents. In 1985 the City of Phoenix enacted an ordinance which doubled the water rates for those residing outside the geographical boundaries of the city. The plaintiffs challenged the increased water rate, alleging that it constituted unconstitutional discrimination by the City against nonresidents.

DISCUSSION

[1] Although we agree with most of the analysis in the opinion of the Court of Appeals, we believe that the opinion suggests, at least by implication, that the plaintiffs' allegations support a civil rights action under 42 U.S.C. § 1983. We believe that any suggestion that the allegations of the complaint support a civil rights action must be corrected. Not every denial of a right conferred by state law involves a denial of equal protection. *See Snowden v. Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497 (1944). The plaintiffs have no constitutional right to receive water at a particular rate. *City of Phoenix v. Kasun*, 54 Ariz. 470, 97 P.2d 210 (1939). The city, in providing water service to nonresidents, is acting in its proprietary capacity and, *absent a statute*, has no duty to provide water to the nonresidents. *Id.* If the city has violated a state statute in its charges for water provided to nonresidents, the plaintiffs' remedy is under state law, not under § 1983 of the Civil Rights Act.

Nature of the Remedy

Almost fifty years ago this court noted in *Kasun* that the legislature was the body which had the right to regulate the rates charged by a municipal corporation operating a public utility. 54 Ariz. at 474, 97 P.2d at 214. Since *Kasun* the legislature has enacted legislation specifically governing

water service to nonresidents by a municipality.

The relevant statute, A.R.S. § 9-516, prohibits a city from discontinuing water service to nonresidents. The statute provides in part:

C. A city or town acquiring the facilities of a public service corporation rendering utility service without the boundaries of such city or town, or which renders utility service without its boundaries, shall not discontinue such service, once established, as long as such city or town owns or controls such utility....

A.R.S. § 9-516(C).

[2] The city argues that neither the cited statute, nor any other for that matter, authorize a court to set municipal water rates. We agree with the city, and the opinion of the Court of Appeals does not indicate disagreement with that position. As the Court of Appeals indicates, the resolution of this case depends upon the proper construction and enforcement of the controlling statute. At the outset we point out that A.R.S. § 9-516(C) speaks in terms of the city rendering utility service without its boundaries. The furnishing of utility service by a public service corporation is regulated by the Corporation Commission, and such utility service must be provided at reasonable rates. Although the Corporation Commission has no jurisdiction over municipal charges for utility service, we believe that the implication of reasonable rates for utility service must be read into A.R.S. § 9-516(C). If such a construction is not adopted, a city could charge any rate it wished despite its effect on the nonresidents' need for utility service. The legislature did not intend to place nonresidents of a city in such an impossible situation. The obligation of a city to continue utility service as required by A.R.S. § 9-516(C) necessarily implies that the charges for such services will be at reasonable rates.

Additionally, the requirement that a city charge reasonable rates where a service has been required to be performed by law is a principle recognized by many authorities. See McQuillan, *Municipal Corpora-*

tions § 35.376A. The principle was recognized in *Kasun* when the court stated:

Was the service which the City of Phoenix rendered to plaintiffs and those in like situation with them, based upon contract or law? *If it was based upon a legal right regardless of contract, by all the decisions the courts may determine whether the terms on which he obtains this service are reasonable or not.* On the other hand, if his right to receive service is based solely on a voluntary contract with the city, then that contract is subject to review by the courts only in the same manner as any other private contract, and it is not for them to determine whether its provisions are arbitrary, unreasonable or discriminatory. (Emphasis supplied).

Kasun, 54 Ariz. at 476, 97 P.2d at 216.

The City does not contend that it does not have a legal duty to continue water service to the nonresidents. The statute at issue clearly mandates such duty. As a consequence of that duty we hold that the city must provide water service at a reasonable rate.

[3] The city points out that a standard of reasonableness is not really a standard because it is subject to various interpretations. Application of a reasonableness standard is not a new concept. It has been applied over the years in a number of cases by various courts. Some general principles abstracted from the cases are helpful in providing guidance about what is reasonable. As a general rule a municipally owned waterworks system supplying water outside its corporate limits may charge more for that service than it charges the users who reside within the corporate limits. See McQuillan, *Municipal Corporations Extraterritorial Rates* § 35.37(3d ed.); 4 A.L.R.2d 590, 598; 64 Am Jur.2d *Public Utilities* § 120 at 647 (1972); *Pompano Beach v. Oltman*, 389 So.2d 283, petition denied (Fla.) 399 So.2d 1144. "A city's first duty is to its own inhabitants who ordinarily pay for the municipal plant directly or indirectly, and who therefore have a preferred claim to the benefits resulting from public ownership." *Delony v.*

Rucker, 302 S.W.2d 287 (1957). The burden of proving the city's rate schedule to be arbitrary and unreasonable rests upon the plaintiffs, for the ordinance is entitled to the presumption of validity that legislative enactments ordinarily receive. A city may "permissibly serve residents at cost and glean a profit from outsiders." *Id.*

[4] In all cases, the city must have a reasonable basis for the discrimination in its charges. *Delony v. Rucker*, 302 S.W.2d 287 (1957). Proof that service of nonresidents involves greater expenses is sufficient to show a city acted reasonably in charging high rates for nonresidents. See *id.* at 290, *Collins v. Goshen*, 635 F.2d 954 (2d Cir.1980). The foregoing examples are provided as illustrations, not as limitations, and other factors may also bear upon the question of reasonableness.

[5] The city asserts that the construction of A.R.S. § 9-516(C) by the Court of Appeals is flawed because the legislative intent on rates to nonresidents was clarified by A.R.S. § 9-511 as amended by Laws 1986.

The city asserts that the disposition of this case by the Court of Appeals is improper because it violates the clear requirements of A.R.S. § 9-511 as amended by Laws 1986. The cited statute provides:

If a municipality provides water to another municipality, the rates it charges for the water to the public in the other municipality shall be one of the following:

1. The same or less than the rates it charges its own residents for water.
2. The same or less than the rates the other municipality charges its residents for water.
3. If the other municipality does not provide water, the average rates charged for water to the residents in the other municipality by private water companies.
4. Rates determined by a contract which is approved by both municipalities and in which such rates are justified by a cost of service study or by

any other method agreed to by both municipalities.

A.R.S. § 9-511(A).

The city argues that the water rates to be charged the plaintiffs must be based on the new statute. Further, A.R.S. § 9-511(A) sets the standard for the rates to be charged, and the rates are not to be tested by a reasonableness standard. We agree in part with the city's contention. From and after the effective date of A.R.S. § 9-511(A), any of the plaintiffs who reside in a municipality to which the City of Phoenix provides water, the charges for the water will be made in accordance with the above statute. We disagree with the city that the amended statute affects the claims of the plaintiffs for the period before the effective date of the amendment, and we do not conclude that all the named plaintiffs are affected by the amended statute because some of them may receive water service from the city and be residents of an unincorporated area of the county. In summary, the enactment of A.R.S. § 9-511(A) affects the plaintiffs in their claims for damages for any period after the effective date of the amendment, and any injunctive relief which might be granted by the superior court must not conflict with the water rate structure provided in A.R.S. § 9-511(A) for any plaintiffs coming with the class covered by the cited statute.

As noted earlier, the complaint seeks relief under 42 U.S.C. § 1983 for arbitrary and discriminatory water rates charged by the city. The action may not be maintained under 42 U.S.C. § 1983, but the plaintiffs' allegations in the complaint show that they may be entitled to relief under another legal theory, and they should be allowed to amend the complaint to assert a right to reasonable rates under A.R.S. § 9-516. *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 667 P.2d 1304 (1983). The dismissal of the complaint without leave to amend was error.

The opinion of the Court of Appeals is modified in accordance with the views expressed in this opinion. The judgment of the superior court is reversed, and the case

is remanded to that court for further proceedings consistent with this opinion.

CAMERON, J., concurs.

GORDON, C.J., and MOELLER, J., did not participate in the determination of this matter.

FELDMAN, Vice Chief Justice, concurring.

I concur in the result. The trial court granted a motion to dismiss, essentially holding that it had no jurisdiction. Plaintiffs alleged in the complaint that the city had set rates that were both discriminatory and unreasonable for non-residents of the municipality. Basing its argument on *City of Phoenix v. Kasun*, 54 Ariz. 470, 97 P.2d 210 (1939), the city contends that the rates are solely a matter of contract and that the court cannot make rates. In my view, the argument is incorrect—a great deal of difference exists between judicial ratemaking and judicial review of rates set by the utility.

Basically, I agree with the court of appeals. Given A.R.S. § 9-516(C) and (D), which prevent municipal water utilities from discontinuing service to current subscribers located outside the municipality's boundaries, and the corporation commission from granting certificates of convenience and necessity to any potential water utility competitors, *Kasun's* contract theory—prohibiting judicial review of rates set by the city—is no longer good law.

Because the city chose to serve the subscribers, because the law prevents discontinuance of such service, and because the city has a virtual monopoly in the provision of services, I believe the city subjects itself to the common law duties of those who provide essential services to others. *Village of Niles v. City of Chicago*, 82 Ill.App. 3d 60, 68, 37 Ill.Dec. 142, 147, 401 N.E.2d 1235, 1240 (1980) (common law of utilities law provides that a "city is subject to the same rules that would apply to a privately owned utility, [including those forbidding unreasonableness and discrimination in utility rates].") (citations omitted); see generally E. McQUILLIN, LAW OF MUNICI-

PAL CORPORATIONS §§ 34.158, at 403, and 35.37a, at 616 (3d ed. 1986). Thus, the city may be enjoined from setting discriminatory or unreasonable rates. Furthermore, under proper circumstances, the city may be responsible in damages.

I believe that all we need to say here is that the plaintiffs have stated a cause of action, and the judgment of dismissal must be reversed. What theories are applicable, and what relief ought to be granted cannot be decided unless and until the facts are proved in the trial court.



160 Ariz. 42

Alfred A. COLBERG and Mildred K. Colberg, husband and wife,
Plaintiffs-Appellants,

v.

Orlo RELLINGER and Judi Rellinger,
husband and wife,
Defendants-Appellees.

No. 1 CA-CIV 8857.

Court of Appeals of Arizona,
Division 1, Department C.

July 14, 1988.

Supplemental Opinion Dec. 13, 1988.

Reconsideration Denied Jan. 27, 1989.

Review Denied April 4, 1989.

Homeowner brought action against contractor and contractor's qualifying party to recover damages for alleged faulty construction of residence. The Superior Court, Yavapai County, Cause No. C-41409, James B. Sult, J., awarded judgment for homeowner against contractor, but denied recovery against qualifying parties. Court also awarded attorney fees to homeowner against company and to qualifying parties against homeowner, and appeal was taken. The Court of Appeals, Shelley, P.J., held that: (1) homeowner did not have neg-