

**THE SCOPE OF THE CORPORATION COMMISSION'S
POWERS UNDER ARTICLE 15, SECTION 3 OF THE
ARIZONA CONSTITUTION:
RECONCILING THE EARLY SUPREME COURT DECISIONS**

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In August, 2003, the Arizona Corporation Commission (“the Commission”) attempted to initiate a special action in the Arizona Supreme Court, seeking an order compelling the Attorney General to certify certain Commission rules dealing with “slamming and cramming” practices in the telecommunications industry. *Ariz. Corp. Comm’n v. State of Arizona ex rel. Goddard*, Ariz. Sup. Ct. No. CV-03-0291-SA (petition filed August 22, 2003). Although the Court ultimately declined to accept jurisdiction, this proceeding is significant because one of the Commission’s arguments squarely raised the source and scope of the agency’s power to regulate public service corporations that provide utility service in Arizona, reflecting the Commission’s belief that it may regulate the business activities of public service corporations under Article 15, § 3 of the Arizona Constitution regardless of whether such power has been delegated by the Legislature.

In its special action petition, the Commission specifically asked the Court to overrule *Corp. Comm’n v. Pacific Greyhound Lines*, 54 Ariz. 159, 94 P.2d 443 (1939), contending that this decision “does not reflect the text of the constitution or the cases preceding it.” Commission Petition at 4. In *Pacific Greyhound*, the Court held that under Article 15, § 3 of the Constitution, the Commission’s plenary powers are limited to prescribing classifications and setting rates and charges for utility service. The power to establish other requirements for the conduct of business by public service corporations is retained by the Legislature, and may be delegated to the Commission as deemed appropriate. 54 Ariz. at 176-77, 94 P.2d at 451-52. That holding has served as the foundation for a number of Arizona appellate decisions issued during the past 65 years.

The Commission argued that *Pacific Greyhound* was decided erroneously, and further argued that the decisions preceding *Pacific Greyhound* were consistent in recognizing the Commission’s full power to regulate all aspects of public service corporations. As a result, the

agency contended, there was no reason for the Court to revisit those decisions in *Pacific Greyhound* and to clarify the scope of the Commission's powers under Article 15, § 3 of the Constitution. Commission Petition at 17-18. That argument was based primarily on *dictum* in *Ariz. Corp. Comm'n v. State of Arizona ex rel. Woods*, 171 Ariz. 286, 291-94, 830 P.2d 807, 812-15 (1992), in which the Court stated, but declined to ultimately hold, that *Pacific Greyhound* "undercut the framers' vision of the Commission's role as set forth in the text of the constitution, as described by the framers, and in earlier case law." *Id.* at 293, 830 P.2d at 814.¹

A careful review of *Pacific Greyhound* and the decisions that preceded it, however, shows that the decisions concerning the Commission's power prior to 1939 did not go nearly as far as the *Woods* Court suggested and the Commission argued in its special action petition. As discussed below, the Court's decision in *Pacific Greyhound* appropriately reconciled those decisions in holding that although the Commission's power under Article 15, § 3 of the Constitution to set rates and charges for utility service is plenary, the agency's remaining powers under that provision are permissive and are subject to the inherent, reserved powers of the Legislature.

1. The Early Decisions: *Tucson Gas* and *Arizona Eastern R.R.*

The starting point of this analysis is *State v. Tucson Gas, Electric Light & Power Co.*, 15 Ariz. 294, 138 P. 781 (1914), the first decision of the Court dealing with the Commission's powers under Article 15, § 3. In that case, a utility was prosecuted for unlawfully charging and collecting \$1.00 for illuminating gas, while the price of the gas furnished to the customer had a value of only 40 cents. This transaction allegedly violated a statute providing that it is unlawful

¹ In *Woods*, the Court held that the Commission had authority to adopt rules governing certain transactions between public service corporations and their affiliates, codified at A.A.C. R14-2-801, *et seq.* The Court based this holding on the Commission's power to set rates under Article 15, § 3. *Id.* at 295, 830 P.2d at 816-18.

to charge an amount for water, electricity or gas in excess of the quantity actually provided. *Id.* at 295-96, 138 P. at 781. The utility contended that the statute was unconstitutional because it attempted to fix rates to be charged for utility services. Consequently, the issue before the Court was whether the Legislature had the authority to enact a statute regulating the amount to be charged for utility services notwithstanding the power granted to the Commission to set rates in Article 15, § 3 of the Constitution. *Id.* at 296, 138 P. at 781-82.

By a 2-1 vote, a majority of the Court held that Article 15, § 3 of the Constitution granted the Commission full and plenary power to prescribe classifications and to fix rates and charges for all public service corporations in the State. As a result, the Legislature lacked the power to enact the statute under which the utility was charged. *Id.* at 297-300, 138 P. 782-84. Unfortunately, the author of the majority opinion, Justice Ross, provided a lengthy discussion of the Commission's various powers under Article 15, the most of which was unnecessary to decide the narrow issue presented. *Id.* at 300-08, 138 P. at 783-87. As discussed below, the Court has consistently treated this discussion as *dictum*, recognizing that the holding in *Tucson Gas* was limited to the Commission's plenary authority over ratemaking. See *Pacific Greyhound*, 54 Ariz. at 170-76, 94 P.2d at 448-51 (discussing prior decisions involving the Commission's regulatory powers).²

² Justice Cunningham dissented from the majority opinion in *Tucson Gas*. 15 Ariz. at 308-12, 138 P. at 787-88. Notably, Justice Cunningham and Chief Justice Franklin had been delegates to the Constitutional Convention in 1910. *Woods*, 171 Ariz. at 292 n. 5, 830 P.2d at 813 n. 5. In his dissent, Justice Cunningham indicated that the Legislature had authority to enact laws regulating the business of corporations under Article 14, and, more broadly, believed that the framers of the Constitution had intended the Legislature to retain some power to regulate public service corporations. *Tucson Gas*, 15 Ariz. at 310, 138 P. at 787. Justice Ross, in contrast, was not a delegate to the Constitutional Convention. However, Justice Ross sat on the Court from 1912 until 1945, and therefore participated in every decision discussed below, including *Pacific Greyhound*.

The next major decision concerning the scope of the Commission’s authority under Article 15, § 3 was *Arizona Eastern R.R. Co. v. State*, 19 Ariz. 409, 171 P. 906 (1918). In that case, the Legislature enacted a statute making it unlawful for any railroad to operate a train consisting of more than 70 cars. The State charged the railroad with violating that statute. The railroad relied on the broad *dictum* in Justice Ross’ majority opinion in *Tucson Gas*, arguing that Article 15, § 3 vested exclusive power to regulate public service corporations in the Commission. *Id.* at 409-10, 171 P. at 906-07. The Court held that the Legislature did have authority to enact the statute, limiting both the scope of *Tucson Gas* and Commission’s powers under Article 15, § 3.

In discussing *Tucson Gas*, the Court explained:

In the case of [*Tucson Gas*], this court had occasion to consider [Article 15, § 3] of the Constitution with reference to the power to fix and prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected by public service corporations within the state for services rendered therein. It was there determined that such power was by the instrument vested exclusively in the Corporation Commission, but it obvious that such a determination may not be a guide to the solution of the question presented in this record

Id. at 410-11, 171 P. at 907. Later in the opinion, the Court similarly stated that in *Tucson Gas*, the Court had determined “that the authority of the Corporation Commission to prescribe classifications, rates and charges under [Article 15, § 3] is exclusive.” *Id.* at 412, 171 P. at 907. However, the Court explained that the extension of the Commission’s authority to other aspects of regulating public service corporations would create a conflict between Sections 3 and 10 of Article 15.³ *Id.* at 411-13, 171 P. at 907-08.

³ Article 15, § 10 provides: “Railways heretofore constructed, or that may hereafter be constructed, in this state, are hereby declared public highways, and all railroad, car, express, electric, transmission, telegraph, telephone, or pipe line corporations for the transportation of persons, or of electricity, messages, water, oil or other property for profit, are declared to be

In order to resolve this conflict, the Court carefully examined the language of Article 15, § 3, noting that while the first part of this section, which authorizes the Commission to prescribe reasonable classifications and to set just and reasonable rates and charges for service, is mandatory, the balance of the section is permissive and discretionary. Accordingly, the Court concluded:

It is noted in the first part of section 3 that the full power given to the Corporation Commission to make reasonable rules, regulations and orders by which public service corporations shall be governed in the transaction of business within the State is a grant in general terms, and is associated with and directly follows the full power to prescribe classifications, rates, and charges, which is a specific power granted in particular terms and directly related to the subject matter of the transaction of its business by public service corporations. . . . [W]e are clearly of the opinion that the general powers granted imperatively in the first part of section 3 have not the same meaning and purpose which is contained in the permissive power granted to the Corporation Commission to make and enforce reasonable rules, regulations, and orders for the convenience, comfort and safety, and the preservation of the health of the employees and patrons of public service corporations, which grant of power is contained in the last part of the section. These two grants of power not only admit of, but demand two separate senses.

Id. at 414-15, 171 P. at 908-09.

By parsing Article 15, § 3 in this manner, the Court resolved the conflict between § 3 and § 10, concluding that the Legislature had authority to regulate the activities of railroads and other types of common carriers under Article 15, § 10:

It is perfectly clear that neither by direct language, nor by any necessary implication, from the powers granted to the Corporation Commission in section 3 is the police power in this State over a railway as a public highway, or over a railroad corporation as a common carrier, vested exclusively in the Corporation

common carriers and *subject to control by law.*” (Emphasis added.) Thus, this constitutional provision applies to a number of different utilities (e.g., telecommunications, electric and water utilities) also classified as public service corporations under Article 15, § 2.

Commission. It is equally clear that this power of the state over a railway as a public highway, and over a railroad corporation as a common carrier may, by plain mandate, and in the emphatic language of the Constitution, be exercised by the law making department of the government.

Id. at 415-16, 171 P. at 909.

Justice Cunningham specially concurred in the result reached by the Court, writing a separate opinion. Justice Cunningham believed that the majority had construed the Legislature's power too narrowly by relying on the State's general police power. He instead believed the power to regulate railroads was reserved by Article 4, § 1 of the Constitution "to be exercised only by the legislative power of the government. The power is not reserved to be exercised by the Corporation Commission, but by the legislative power alone." *Id.* at 418, 171 P. at 910. Thus, Justice Cunningham, despite his participation in the Constitutional Convention, had an even narrower view of the Commission's power under Article 15, § 3 than did Justices Ross and Franklin. In any case, all of the justices, writing in 1918, held that the Commission's plenary authority under Article 15, § 3 was limited to setting rates and charges for utility service, and that the Commission's remaining powers were permissive and subject to the Legislature's inherent, reserved power to enact statutes regulating railroads and other types of commons carriers, despite their status as public service corporations.

2. Subsequent Decisions Addressing the Commission's Power.

Over the next two decades, the Court issued various decisions involving disputes concerning the Commission's regulatory authority. Notably, almost none of these decisions relied on the Commission's powers under Article 15, § 3 of the Constitution, but instead involved statutes by which the Legislature had delegated powers to the agency pursuant to

Article 15, § 6.⁴ For example, in *Phoenix Ry. Co. of Arizona v. Lount*, 21 Ariz. 289, 187 P. 933 (1920), written by Justice Ross, the City of Phoenix brought a mandamus action against a railway company seeking to compel the continued operation of a railway line within the city. The railway company contended that the Commission had authorized abandonment of the line. Thus, the central issue in that case was whether the Commission had the power to approve changes in the operation of the railway line, or whether the city, under its power to grant utilities the right to use and occupy public streets, was required to approve the change in operations.

In describing the Commission’s powers over the railway company’s operations, the Court relied principally on various provisions of the Public Service Corporation Act, which was then codified at Title 9, Chapter 11 of the 1913 Civil Code, Ariz. Rev. Stat. §§ 2277 – 2360. *Id.* at 292-94, 187 P. at 934-36. After noting that “[t]here is so much of the Public Service Corporation Act that it is not possible to set it forth here,” the Court specifically quoted several provisions of the Act, and stated that in addition to those powers and duties, “many others are conferred on [the Commission] by chapter 11, title 9” of the 1913 Civil Code. *Id.* at 293-94, 187 P. 934. The Court concluded this discussion of the Commission’s powers by discussing several recent cases, including *Tucson Gas* and *Arizona Eastern R.R.* With respect to the former, the Court again stated that its holding was limited to the Commission’s power to set rates. *Id.* at 296, 187 P. at 295. In summarizing its holding in *Arizona Eastern*, the Court noted that “while the Corporation Commission might have exercised the power to regulate the number of cars in a

⁴ Article 15, § 6 provides: “The law-making power may enlarge the powers and extend the duties of the Corporation Commission and may prescribe rules and regulations to govern proceedings instituted by and before it; but, until such rules and regulations are provide by law, the Commission may make rules and regulations to govern such proceedings.”

train, its power to do so was permissive and not exclusive of the power of the legislative department.” *Id.*⁵

The Court then discussed various provisions relevant to the city’s authority to regulate the use of its public streets. Although “the right to grant franchises to public utilities to occupy the streets and alleys of incorporated cities and towns is vested in the municipal authorities,” the Court held this power does not conflict with the Commission’s authority under the Public Service Corporation Act to issue certificates of convenience and necessity. *Id.* at 299-300, 187 P. at 936. Ultimately, the Court concluded that the railway company, as a public service corporation, was subject to the jurisdiction of the Commission, and that the Commission’s order authorizing the railway company to abandon its line was proper under the authority delegated by the Legislature. *Id.* at 300, 187 P. at 936-37, *citing* Ariz. Rev. Stat. § 2312 (1913) and *Phoenix Ry. Co. v. Geary*, 209 Fed. 694 (D. Ariz. 1914)⁶.

Another set of decisions involving the Commission’s authority to regulate public service corporations vis-à-vis municipalities was *Northeast Rapid Transit Co. v. City of Phoenix*, 41 Ariz. 71, 15 P.2d 951 (1932), and *Menderson v. City of Phoenix*, 51 Ariz. 280, 76 P.2d 321 (1938). In *Northeast Rapid Transit*, the city sued to enjoin the transit company from operating a

⁵ Immediately following the discussion of these decisions, however, the Court also stated: “None of these cases, although they are referred to by counsel, can be said to have any direct bearing upon the point here in controversy.” *Id.*

⁶ Ariz. Rev. Stat. § 2312 (1913) provided as follows: “Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment apparatus, facilities or other physical property of any public service corporation or of any two or more public service corporations ought reasonably to be made, or that a new structure or structures should be erected, to promote the security or convenience of its employees or the public, or any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes be made or such structure or structures be erected in the manner and within the time specified in said order. . . . “

passenger service line following revocation of the city's permit to operate. The transit company contended that the Commission had sole and exclusive jurisdiction over common carriers of passengers, and that it was operating in accordance with the certificate of convenience and necessity issued by the Commission. *Northeast Rapid Transit*, 41 Ariz. at 73-75, 15 P.2d at 952-953. Although stating that a franchise was not required to use public streets as a common carrier, the Court concluded that the city was entitled to injunction against the transit company because it did not hold a certificate of convenience and necessity as required by statute. *Id.* at 76-78, 15 P.2d at 953-54. In reaching that conclusion, the Court stated that the Commission's power to issue certificates of convenience and necessity was delegated by the Legislature pursuant to Article 15, § 6, rather than being a power exercised by the Commission pursuant to Article 15, § 3.

In *Menderson*, the same transit company brought suit against Phoenix, contending that the city was operating a bus line in competition with Menderson's bus line and without a certificate of convenience and necessity.⁷ The Court rejected Menderson's argument, concluding, first, that the plain language of Article 15, § 2 of the Constitution expressly excludes municipal corporations from the definition of "public service corporation" and, because all of the Commission's regulatory powers in Article 15 expressly refer to "public service corporations," the Constitution prohibits an extension of the Commission's jurisdiction to municipalities. *Menderson*, 51 Ariz. at 282-83, 76 P.2d at 322.

The Court next addressed the argument that the Legislature may grant the power to regulate municipalities to the Commission under Article 15, § 6 of the Constitution, which, as

⁷ It appears from *Northeast Rapid Transit* that Menderson was the general manager of the transit company and held the transit company's certificates of convenience and necessity in its own name, prompting the Court to hold that the transit company had no statutory right to operate under the certificates. *Northeast Rapid Transit*, 41 Ariz. at 73-75, 15 P.2d at 952-54.

stated, permits the Legislature to “enlarge the powers and extend the duties” of the Commission. The Court rejected that argument as well, concluding that the Legislature “may enlarge or extend the powers and duties of the commission over the subject matter of which it has already been given jurisdiction, and other matters of the same class, not expressly or impliedly exempt by other provisions of the Constitution.” *Id.* at 285, 76 P.2d at 323.

Taken together, these decisions (and other contemporaneous decisions of the Court) generally stand for the following propositions. First, under Article 15, § 3, the Commission has full and plenary authority to prescribe classifications and to set rates and charges for service furnished by public service corporations; the Legislature cannot enact laws infringing on this power, except to establish procedural requirements for Commission proceedings under Article 15, § 6. *Tucson Gas*, 15 Ariz. at 298-300, 138 P. at 782-83. Second, the phrase “and make reasonable rules, regulations, and orders, by which [public service] corporations shall be governed in the transaction of business within the state” in Article 15, § 3 is directly related to the Commission’s authority to prescribe classifications and set rates and charges for service, as opposed to being an independent and general grant of authority to the Commission. *Arizona Eastern R.R.*, 19 Ariz. at 413-14, 171 P. at 908. Third, the remaining powers set forth in Article 15, § 3 are permissive and, therefore, do not preclude the enactment of laws by the Legislature that regulate the activities of public service corporations, whether under the general reservation of legislative power found in Article 4, § 1 or another, more specific grant of authority found elsewhere in the Constitution, such as Article 15, § 10. *E.g., id.*, at 415, 171 P. at 909. Finally, the Legislature “may enlarge the powers and extend the duties” of the Commission pursuant to Article 15, § 6 and in fact did so as early as 1912 in enacting the Public Service Corporation Act. 1912 Ariz. Sess. Laws, ch. 90, *codified at* Ariz. Rev. Stat. §§ 2277 - 2360 (1913). However, the

Legislature may only enlarge or extend the powers and duties of the Commission with respect to the subject matter over which the Commission has been given jurisdiction, i.e., public service corporations. *Menderson*, 51 Ariz. at 284-85, 76 P.2d at 322-23.

3. The Outlier: *Pacific Gas & Electric*.

The only decision of the Court that is inconsistent with the foregoing regulatory framework is *Pacific Gas & Electric Co. v. State*, 23 Ariz. 81, 201 P. 632 (1921).⁸ In that case, the Commission had issued a general order in 1914 regulating the placement, construction and maintenance of telephone, telegraph, signal, trolley, electric light and power lines within the state. Later that year, an initiative measure was passed at the November general election that regulated the same subject matter. Reconstruction and new work were exempted for a period of six months from the date of the initiative's passage, and all lines and other facilities were required to comply with the initiative's standards and requirements by no later than five years from the date of the initiative's passage. In 1919, an action was brought against Pacific Gas & Electric Company, charging it with violations of the initiative. The utility argued that the Commission had exclusive jurisdiction over the subject matter of the initiative under Article 15, § 3 and, therefore, the initiative was unconstitutional. *Id.* at 81-82, 201 P. at 633.

The Court held that the utility could not be prosecuted for violating the initiative. The Court addressed both *Tucson Gas* and *Arizona Eastern R.R.*, concluding that neither decision applied to the issue presented. Writing for the Court, Justice Ross stated that in *Tucson Gas* (which, as noted above, he had authored), “the only question involved was the rates and charges of public service corporations and the constitutional body to regulate them. It was what may be

⁸ Notably, by the time *Pacific Gas* was decided, none of the justices on the Court had attended the Constitutional Convention. In addition to Justice Ross, the other members of the Court were Justices McAlister and Flanigan. Like Justice Ross, Justice McAlister was a member of the Court when *Pacific Greyhound* was decided.

called a ‘rate case.’” *Id.* at 84, 201 P. at 633. The Court provided a more detailed discussion of *Arizona Eastern R.R.*, stating:

The logical effect of the conclusion reached in that case was that both the Corporation Commission and the Legislature could lawfully and constitutionally, in the exercise in the police power of the state, provide for the protection and safety of the employees of public service corporations. But in that case there is no conflict of authority, the Corporation Commission having failed to exercise its delegated powers to promulgate rules and regulations covering the subject-matter, which the Legislature had acted. . . .

In the present case both the Commission and the Legislature have acted covering the same ground. Both unquestionably under proper circumstances may operate there – one, the Corporation Commission, under authority delegated to it by the Constitution, and the other, the Legislature, under its inherent reserved powers.

Id. at 84-85, 201 P. at 634. The Court resolved this conflict in summary fashion, concluding that once the Commission had acted, neither the Legislature nor the electorate, acting by means of initiative, had authority to act. *Id.* at 85-86, 201 P. at 634.

This case appears to have arisen under unusual circumstances. First, the Attorney General agreed with the utility that the initiative was invalid (although his predecessor did not). *Id.* at 83-84, 201 P. at 633. Moreover, several entities that are not public service corporations filed briefs in opposition to the state’s position, including the City of Mesa and the Salt River Valley Water Users’ Association. The Court noted:

It would seem that the water users’ association, the city of Mesa, and perhaps other cities of the state, as well as public utility companies, have constructed their electric light and power plants in conformity with the provisions of the [Commission’s order], and not in accordance with the provisions of the initiative measure. . . . If the passage of the initiative measure had the effect of abrogating [the Commission’s order], it follows that any municipality or public utility company whose plant is not constructed, or was not reconstructed within five years after it became law, in accordance with its provisions, is guilty of a misdemeanor and necessarily must be put to the expense of changing its plant to conform therewith.

Id. at 83, 201 P. at 633.⁹ The Court also noted that the Commission’s order embodied recommendations contained in a report issued by the National Electric Light Association, and was modeled after orders issued by public utility commissions in a number of other states. *Id.* at 82, 201 P. at 633. In short, a close reading of *Pacific Gas* suggests that the Court’s decision was based on political and pragmatic considerations, particularly in light of the summary explanation of, and lack of authorities supporting, the Court’s holding. This may explain why the case was never discussed or cited until *Pacific Greyhound*.¹⁰

4. *Pacific Greyhound.*

With the foregoing background, the Court revisited the Commission’s jurisdiction under Article 15, § 3 in *Pacific Greyhound*. That case involved a dispute between two common carriers, Pacific Greyhound Lines and Central Arizona Transportation Lines, over the right to provide motor carriage service between Phoenix and Wickenburg. Central Arizona applied for an amendment of its certificate of convenience and necessity to include that route. Despite the objection of Pacific Greyhound, which already held a certificate covering the route, the Commission granted the application. Pacific Greyhound appealed the Commission’s order and obtained a judgment from the superior court from which the Commission appealed. 54 Ariz. at 162-66, 94 P.2d at 444-47.

⁹ As previously discussed in connection with the *Menderson* decision, Article 15, § 2, which defines the term “public service corporations,” excludes municipalities. In addition, quasi-municipal districts, such as the Salt River Valley Water Users’ Association, are similarly not public service corporations and are not subject to the Commission’s jurisdiction. See *Rubenstein Constr. Co. v. Salt River Project Agric. Improvement & Power Dist.*, 76 Ariz. 402, 404, 265 P.2d 455, 456 (1953). Therefore, the interest of these *amici* in the case is puzzling.

¹⁰ After *Pacific Greyhound*, *Pacific Gas* was cited on only one occasion, without comment, in a long citation of prior decisions in *Ariz. Corp. Comm’n v. Mountain States Tel. & Tel. Co.*, 71 Ariz. 404, 410, 228 P.2d 749, 753 (1951), and was not relevant to the issue before the Court. Even the *Woods* Court failed to mention that decision, discussing only *Tucson Gas* and *Arizona Eastern R.R. Woods*, 171 Ariz. at 292, 830 P.2d at 813.

On appeal, the Commission challenged the lawfulness of a statute governing the issuance of certificates of convenience and necessity to motor carriers. This statute provided that if an applicant requests a certificate to operate over a route or in a territory already served by a common motor carrier, the Commission may issue a certificate to the applicant only if the existing common carrier is unable to provide satisfactory service. *Id.* at 166, 94 P.2d at 446. The Commission argued that this provision is unconstitutional because it conflicted with the powers granted to the Commission under Article 15, § 3 of the Constitution. In support of its argument, the Commission relied principally on the Court’s *dictum* in *Tucson Gas*. *Id.* at 166-67, 94 P.2d at 446.

The Court began its discussion by addressing *Tucson Gas*, noting that “[m]uch of the language used in the opinion was broader than the specific issue involved,” and concluding:

We think, strictly speaking, [*Tucson Gas*] is authority only as to the powers of the commission over classification, rates and charges, and in view of the importance of the question involved and the somewhat ambiguous and perhaps conflicting language found in the opinion, we have decided to reexamine, as an original question, the extent of the authority of the commission as to regulation of the business of [public service] corporations on other matters than the three enumerated.

Id. at 167-168, 94 P.2d at 447. The Court’s view of the limited scope of *Tucson Gas* was consistent with and supported by its prior decisions. *E.g.*, *Arizona Eastern R.R.*, 19 Ariz. at 410-411, 171 P. at 907; *Phoenix Ry.*, 21 Ariz. at 296, 187 P. at 935; *Pacific Gas*, 23 Ariz. at 84, 201 P. at 633.

The Court then discussed the relevant provisions of the Constitution, indicating, first, that the Legislature, under Article 14 of the Constitution, “would have plenary authority over [public service] corporations as well as all others, to regulate, alter and restrain their operations in any manner it might see fit, not inconsistent with other provisions of the constitution of this state, or

the constitution of the United States.” *Id.* at 169, 94 P.2d at 447. At the same time, however, Article 15 of the Constitution grants certain powers to the Commission regarding public service corporations. Accordingly, the Court framed the issue as follows:

The question then is whether the provision of section 3, *supra*, when it refers to the “full power” of the commission to “make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the State” refers to *all business of every nature carried on by public service corporations, or is limited to classification, rates and charges only*, leaving sections 2 and 14 of article XIV, *supra*, to govern public service corporations in all matters not specifically delegated to the commission, as they unquestionably would were it not for article XV of the constitution.

Id. at 169-70, 94 P.2d at 447 (emphasis added).¹¹

The Court then examined its previous decisions concerning the Commission’s powers, noting “it is evident from them that we did not intend to hold section 3 had the extremely broad meaning which it is claimed we did give it in the Tucson Gas Company case.” *Id.* at 170-71, 94 P.2d at 448. The first decision discussed by the Court was *Arizona Corp. Comm’n v. Heralds of Liberty*, 17 Ariz. 462, 154 P. 202 (1916), also written by Justice Ross, in which the Court held that the Commission’s powers under Article 15, § 5 to issue certificates of incorporation and licenses to foreign corporations did not divest the Legislature of the power to prescribe the types of corporations that may do business in Arizona and their qualifications.¹² *See Heralds of*

¹¹ The Court’s view of the Legislature’s general powers to regulate corporations under Article 14 of the Constitution is consistent with the view of Justice Cunningham in his dissenting opinion in *Tucson Gas*. 15 Ariz. at 310, 138 P. at 787 (“No one will deny the legislative power the right to enact laws regulating, limiting, or restraining the business of corporations in general.”).

¹² Article 15, § 5 provides: “the Corporation Commission shall have the sole power to issue certificates of incorporation to companies organizing under the laws of this state, and to issue licenses to foreign corporations to do business in this state, as may be prescribed by law.”

Liberty, 17 Ariz. at 469-71, 154 P. 205-06.¹³ The *Pacific Greyhound* Court noted that no distinction was made between public service corporations and other types of corporations, which was inconsistent with the Commission’s argument concerning the scope of its powers under Article 15, § 3. *Pacific Greyhound*, 54 Ariz. at 171, 94 P.2d at 448.

The Court next addressed *Eastern Arizona R.R.*, stating that the issue decided in that case is analogous to the issue in the present case, “for the matter involved was not the regulation of a ‘classification, rate or charge’, but of the general conduct of the business of the corporation.” *Id.* After quoting extensively and with approval from *Arizona Eastern R.R.*, the Court concluded that while motor vehicles are not expressly mentioned in Article 15, § 10, “we think it obvious that [Article 15, § 10] was intended to cover all known methods for the transportation of persons, electricity, messages, water, oil or any other property for profit, and that it should be construed as including motor vehicles operating as common carriers for profit on the public highways. All of these corporations are declared to be ‘subject to control by law’ which, as we have said, clearly implies a legislative act.” *Id.* at 174-75, 94 P.2d 449-50.

The Court then discussed *Pacific Gas*, which held “that both the commission and the legislature had covered the same ground and that both acted with authority, but that the authority of the corporation commission was superior to that of the legislature.” *Id.* at 175, 94 P.2d at 450.

The Court disagreed with and criticized *Pacific Gas*, stating “our conclusion that the order of the

¹³ The Court in *Heralds of Liberty* explained that if Article 15, § 5 were construed to grant the Commission authority to determine which corporations were entitled to be licensed, the Commission’s “judgment of the qualifications of an applicant to do business will be substituted in that event for the judgment of the Legislature. . . . The commission is an agency of the state created for the purpose of exercising certain functions and performing certain duties for the state, not for the purpose of prohibiting or restricting insurance business, but for the purpose of regulating it in the manner provided by law.” *Id.* at 470-71, 154 P. at 205.

corporation commission superseded the initiative adopted by the people was not consistent with the decision in the Arizona Eastern case.” *Id.*

After briefly noting several other decisions that involved the Commission’s powers, including *Phoenix Ry.*, *Northeast Rapid Transit* and *Menderson*, the Court concluded:

It will be seen from the foregoing recitals that our decisions have not been entirely consistent in all respects, and particularly in some of the reasoning and the language used. But running all through them we find an emphatic statement, whenever the Tucson Gas Company case is referred to, that the decision therein only affirms the exclusive power of the corporation commission insofar as charges, rates, classifications and regulations pertaining thereto are concerned.

Re-examining the meaning of section 3, *supra*, in light of the other sections of the constitution affecting the question, and the language and reasoning of all our decisions, we are of the opinion that the “full power to . . . make reasonable rules, regulations and orders, by which such corporations shall be governed in the transaction of business within the State”, qualifies and refers only to the power given the commission by the same section to “prescribe just and reasonable classifications to be used, and just and reasonable rates and charges to be made and collected, by public service corporations”, and that both under the direct language of the constitution and the police power inherent in the legislative authority, the paramount power to make all rules and regulations governing public service corporations not specifically and expressly given to the commission by some provision of the constitution, rests on the legislature, and it may, therefore, either exercise such powers directly or delegate them to the commission upon such terms and limitations as it thinks proper.

Id. at 176-77, 94 P.2d at 450. Therefore, the Court concluded, the Legislature had authority to enact statutes governing applications for certificates of convenience and necessity, and to require that an existing certificate holder be allowed an opportunity to furnish satisfactory service before granting a certificate to a competing applicant. *Id.* at 177, 94 P.2d at 451-52.

5. Conclusion.

The Court did not “stray[] from the sound teachings of its earlier cases” in *Pacific Greyhound*, as the Commission contended in its special action petition. Commission Petition at 17. The discussion of the Commission’s powers in *Tucson Gas* was unnecessary to the Court’s holding in that case, and was recognized as *dictum* on various occasions over the next two decades. “Dictum thrice repeated is still dictum.” *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 81, 638 P.2d 1324, 1327 (1981). This 90-year old *dictum* does not support overturning *Pacific Greyhound*, as suggested by the *Woods* Court. 171 Ariz. at 291-92, 830 P.2d at 812-13. In reality, the only prior decision criticized and overruled in *Pacific Greyhound* was *Pacific Gas*. *Pacific Gas* had never been cited in any published opinion prior to *Pacific Greyhound* and, for the reasons explained above, is best described as an outlier. None of the remaining decisions lend support to the view that the Commission has plenary power to generally regulate the business activities of public service corporations under Article 15, § 3 of the Constitution.

There have been suggestions that the *dictum* in *Tucson Gas* should nevertheless be treated as authoritative because that decision was issued in 1914. For example, in a law review article cited in the agency’s special action petition, the student author stated “*Tucson Gas* probably best mirrors the framers’ intent, because it was decided only four years after the constitutional convention.” Deborah Scott Englby, *The Corporation Commission: Preserving its Independence*, 20 Ariz. St. L. J. 241, 248 (1988). The *Woods* Court relied on that article to support its own *dictum* regarding *Tucson Gas*, stating the *Pacific Greyhound* Court “substantially limited the Commission’s power by narrowly construing article 15, section 3.” 171 Ariz. at 292,

830 P.2d at 813.¹⁴ The same view was also expressed by John Leshy, who was a member of the faculty of the Arizona State University College of Law at the time the Engleby article was published. See John D. Leshy, *The Arizona State Constitution: A Reference Guide* 287 – 88 (1993).¹⁵ This simplistic view overlooks the fact that the author of the *Tucson Gas* opinion, Justice Ross, was a member of the Court for 33 years, wrote a number of opinions after *Tucson Gas* dealing with the Commission's authority, and was on the Court in 1939 when *Pacific Greyhound* was issued.¹⁶ Justice Ross himself acknowledged that the broad language regarding the Commission's powers in *Tucson Gas* was merely *dictum* well before *Pacific Greyhound* was decided. See *Pacific Gas*, 23 Ariz. at 84, 201 P. at 633 (authored by Justice Ross; discussing limited holding of *Tucson Gas*); *Phoenix Ry.*, 21 Ariz. at 296, 187 P.2d at 935 (same).

A better indication of how the framers viewed the Commission's powers under Article 15, § 3 of the Constitution can be found in the Public Service Corporation Act, which, as discussed above, was enacted by the Legislature in 1912. *Ariz. Sess. Laws 1912*, Chap. 90. In that legislation, the Legislature granted a wide variety of powers and imposed a number of duties on the Commission, in addition to establishing various standards and requirements applicable to public service corporations, many of which are still codified in Title 40, Chapter 2 of the Arizona

¹⁴ In *Woods*, the Engleby article is cited throughout the discussion of the Commission's constitutional origins and the early decisions construing the scope of the agency's powers. 171 Ariz. at 290-92, 830 P.2d at 812-14.

¹⁵ Notably, the *Woods* Court cited a 1991 prepublication manuscript of Leshy's text in its opinion. 171 Ariz. at 290, 830 P.2d at 811.

¹⁶ In fact, all of the members of the *Pacific Greyhound* panel were experienced jurists. Justice McAlister served on the Court from January 1921 to January 1945, while the author of *Pacific Greyhound*, Justice Alfred Lockwood, served on the Court from January 1925 to January 1943. Thus, *Pacific Greyhound* was not the product of a new group of justices who were unfamiliar with prior decisions involving the Commission.

Revised Statutes. A.R.S. § 40-201, *et seq.* If the framers intended that the Commission possess plenary power to regulate all aspects of public service corporations under Article 15, § 3, as suggested by the *Woods* Court, it is difficult to understand why the Legislature, only two years after the Constitutional Convention, would have enacted a comprehensive series of statutes relating to public service corporations that defined the Commission's regulatory duties and powers, which the Commission would be free to disregard.

Ultimately, the Court in *Pacific Greyhound* did not sharply limit the Commission's powers or alter in the manner in which public service corporations are regulated in Arizona. Instead, the Court clarified and affirmed that while the Commission's power to prescribe classifications and to set rates and charges is plenary, the Commission's remaining powers under Article 15, § 3 are permissive and subject to the Legislature's power to impose duties and set standards through legislation. Beginning with its first regular session in 1912, the Legislature has exercised that power, authorizing the Commission (among other things) to issue certificates of convenience and necessity, authorize the transfer of utility plant and assets used or necessary for the provision of service, and approve the issuance of stock, bonds and other evidence of indebtedness. A.R.S. §§ 40-281 – 40-283, 40-285 and 40-301 – 40-303. Consequently, the Court appropriately declined to accept jurisdiction over the Commission's special action and reject the past 65 years of Arizona appellate decisions that have followed *Pacific Greyhound*.