

ARIZONA STATE SENATE

RULES OFFICE



TO: Senator John Nelson

DATE: May 19, 2009

SUBJECT: Stephen Brophy Nomination

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Governor Brewer has nominated Stephen Brophy to serve on the Arizona Power Authority Commission. ARS section 30-105 provides that no member shall "have any interest in any business that may be adversely affected by the operation of the authority in the discharge of its duties." Mr. Brophy disclosed in his application that he "owns interests in businesses which purchase electrical power from Electrical District 7 and the McMullen Water Conservation & Drainage Districts. Both are customers of the Arizona Power Authority." If decisions he makes on the Commission could adversely affect those businesses, the language from ARS section 30-105 **may** disqualify him from serving. (I emphasize the word "may" because it has been opined that Mr. Brophy may not be disqualified, even under the current law, because this language may not have been intended to apply to an average power user. I cannot confirm this one way or the other.)

History

The disqualifying language in ARS section 30-105 was enacted in 1944 as part of the law establishing the Arizona Power Authority. In 1968, the Legislature enacted general conflict of interest laws that apply to all public officers and employees. A portion of the 1968 law repealed several conflict of interest statutes that existed throughout ARS. One could surmise that the intent of the Legislature in passing the 1968 act was to place conflict of interest laws in one place so they would be consistently applied. I do not know this for a fact, however, because I could not find any legislative history to back this theory up.

Assuming my theory is correct that the Legislature's desire was to place all conflict of interest statutes in one place in ARS, one can draw one of two conclusions for why the conflict language in ARS section 30-105 still exists. Either the Legislature missed this statute or they intentionally left it in place. Again, I could find no clues while researching the statute.

Superseding Language

The 1968 law contains an "applicability" section that is important. The following language remains the same today in ARS section 38-501:

B. Notwithstanding the provisions of any other law, or the provisions of any charter or ordinance of any incorporated city or town to the contrary, the provisions of this article shall be exclusively applicable to all officers and employees of every incorporated city or town or political subdivision or the state and any of its departments, commissions, agencies, bodies or boards and shall supersede the provisions of any other such law, charter provision or ordinance. (emphasis added)

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A very reasonable argument can be made that the provisions of the 1968 law supersede the provision in ARS section 30-105 relating to the qualifications of members of the Power Authority Commission. If so, then the general conflict of interest statutes apply and Mr. Brophy would not be disqualified from serving on the Commission because of the two businesses he owns. Rather, he would have to comply with the Title 38 conflict of interest provisions on a case by case basis as issues come before the Commission.

As we discussed, the best way to clear up any uncertainty is to change ARS section 30-105 to delete the disqualifying language. As we have discovered, there may be at least one current member of the Commission who is in the same situation as Mr. Brophy. If the statute were amended this legislative session, Mr. Brophy could continue to serve on the Commission and be confirmed next legislative session.

I want to be clear that I am not giving a legal opinion on the applicability of either the Title 30 or the Title 38 language. I am simply providing information that may help you in deciding whether to move forward with Mr. Brophy's nomination this session or whether to amend the law and allow him to serve until he can be confirmed next year. Let me know if I can provide anything further on this issue.

cc: Beth Lewallen
Tony DeMarco
Greg Jernigan