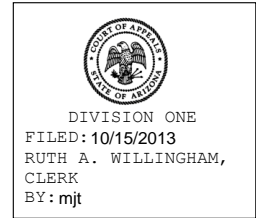


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

PINAL ENERGY, LLC, an Arizona ) 1 CA-CV 12-0620  
limited liability company, )  
) DEPARTMENT B  
Plaintiff/Appellant, )  
) **MEMORANDUM DECISION**  
v. ) (Not for Publication  
) - Rule 28, Arizona  
SOUTHWEST GAS CORPORATION, a ) Rules of Civil  
California corporation, ) Appellate Procedure)  
)  
Defendant/Appellee. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CV 2012-050939

The Honorable Michael D. Gordon, Judge

**AFFIRMED IN PART; REVERSED AND REMANDED IN PART; VACATED IN PART**

Craig A. Marks, PLC Phoenix  
By Craig A. Marks

And

Quarles & Brady, LLP Phoenix  
By Don P. Martin  
and Lauren Elliott Stine

And

Fennemore Craig, P.C. Phoenix  
By Timothy J. Berg  
Attorneys for Plaintiff/Appellant

Gallagher & Kennedy, P.A. Phoenix  
By Michael M. Grant

and Mark Deatherage  
and Laura E. Antonuccio  
Attorneys for Defendant/Appellee

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**N O R R I S**, Judge

¶1 This appeal arises out of the superior court's dismissal of a lawsuit filed by Pinal Energy, LLC against Southwest Gas Corporation for lack of subject matter jurisdiction. We affirm the superior court's dismissal of count 3 of the complaint, but we hold the superior court has exclusive subject matter jurisdiction over the parties' dispute as to counts 1 and 2 and accordingly should not have dismissed those counts. Therefore, we reverse and remand for further proceedings consistent with this decision as to counts 1 and 2. We also vacate the superior court's fee award in Southwest Gas's favor.

**FACTS<sup>1</sup> AND PROCEDURAL BACKGROUND**

¶2 Southwest Gas is a public service corporation as defined in Article 15, Section 2, of the Arizona Constitution.

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<sup>1</sup>We accept as true all well-pleaded facts alleged in the complaint. *Dunlap v. City of Phoenix*, 169 Ariz. 63, 65, 817 P.2d 8, 10 (App. 1990) (appellate court accepts well-pleaded facts alleged in complaint in reviewing order granting motion to dismiss based on statute of limitations). In any event, as Southwest Gas acknowledged in its motion to dismiss, the relevant facts were undisputed. Thus, the superior court was not required to resolve any factual disputes to decide the motion.

It has the exclusive right to distribute and sell natural gas in Pinal County.

¶13 Pinal Energy operates an ethanol production facility in Pinal County that consumes large quantities of natural gas. Because of its then-current and projected natural gas needs, Pinal Energy planned to build a pipeline to bypass Southwest Gas and obtain natural gas services directly from the El Paso Natural Gas Pipeline rather than Southwest Gas. Rather than build its own pipeline, however, Pinal Energy negotiated with Southwest Gas to have Southwest Gas build pipeline facilities and continue to supply natural gas to Pinal Energy at a reduced rate. It did this pursuant to a B-1 tariff issued by Southwest Gas.<sup>2</sup>

¶14 The B-1 tariff allows Southwest Gas to negotiate rates with customers who demonstrate they would otherwise "bypass" Southwest Gas and obtain their natural gas service from some other source at rates lower than Southwest Gas's effective rates. Pinal Energy demonstrated to Southwest Gas's satisfaction that bypassing services from Southwest Gas was "economically, operationally and physically feasible and imminent." Thus, Pinal Energy was able to receive its natural

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<sup>2</sup>A "tariff" lists the services and products offered by a gas company and sets forth the terms, conditions, and rates and charges of the services and products. Ariz. Admin. Code R14-2-301(44) (2012).

gas and transportation service from Southwest Gas at a lower negotiated rate.

¶15 The parties entered into four agreements, including a September 11, 2006 Incremental Natural Gas Facilities Agreement as modified by an April 10, 2007 Addendum 1; an April 10, 2007 Facilities Extension Agreement; and a July 20, 2007 Service Agreement - Transportation of Customer Secured Natural Gas Under Rate Schedule B-1. Under these agreements, Southwest Gas built a pipeline denominated as the "Northern Route." It also agreed to use all "commercially reasonable efforts" to build a second pipeline denominated as the "Permanent Route" by October 1, 2008.

¶16 The parties further agreed to effective rates or volumetric charges. Pinal Energy agreed to pay a "Type A" rate for fixed annual volumes of natural gas -- minimum amounts -- and a "Type B" rate for all volumes actually delivered. The parties also agreed to an arrangement whereby these charges would be adjusted according to a formula that would reflect the actual cost of constructing the facilities, described in the facilities agreement as the "construction cost true-up." According to Pinal Energy, because of the deteriorating economy, reduced customer demand, and Southwest Gas's improved

distribution system, Southwest Gas neither built the Permanent Route nor adjusted the Type A charges.

¶17 On March 9, 2012, Pinal Energy sued Southwest Gas and, in counts 1 and 2 alleged breach of contract and breach of the covenant of good faith and fair dealing asserting Southwest Gas had failed to build the Permanent Route and adjust the charges under the agreements.<sup>3</sup> Southwest Gas moved to dismiss for lack of subject matter jurisdiction<sup>4</sup> arguing the superior court lacked jurisdiction because the dispute concerned rates and therefore was within the exclusive jurisdiction of the Arizona Corporation

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<sup>3</sup>In count 3, Pinal Energy also asked for a declaration that it met the eligibility requirements for bypass rates under the B-1 tariff. At oral argument before this court, counsel for Pinal Energy explained that Pinal Energy was willing to confine the scope of this appeal to only the breach claims (counts 1 and 2) of the complaint. Thus, we affirm the superior court's dismissal of Pinal Energy's request for declaratory relief.

<sup>4</sup>Southwest Gas also moved to dismiss for failure to state a claim. The superior court did not address its arguments in support of that motion and nor will we, as those arguments should first be considered by the superior court. We express no opinion on the merits of those arguments or on the merits of the dispute between the parties.

Commission. The superior court agreed<sup>5</sup> and granted Southwest Gas's motion.<sup>6</sup>

## DISCUSSION

### *I. Southwest Gas's Motion to Dismiss Appeal*

¶18 As a preliminary matter, Southwest Gas argues we should dismiss the appeal as moot because after the superior court entered judgment in its favor, Pinal Energy filed a complaint with the Corporation Commission asking it to order Southwest Gas to construct the Permanent Route, perform the true-up, reduce or eliminate ongoing Type A charges, refund any excess Type A charges paid, and correctly classify any misclassified revenues received from Pinal Energy. According to

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<sup>5</sup>The superior court alternatively found the Corporation Commission had concurrent jurisdiction and also granted dismissal under the primary jurisdiction doctrine.

<sup>6</sup>The superior court's dismissal did not specify whether the dismissal was with or without prejudice. Generally, we do not have jurisdiction over an order granting a motion to dismiss without prejudice, but there are exceptions, including when the dismissal is for lack of subject matter jurisdiction. See Ariz. Rev. Stat. ("A.R.S.") § 12-2101(A)(3) (Supp. 2012) (appeal may be taken "[f]rom any order affecting a substantial right made in any action when the order in effect determines the action and prevents judgment from which an appeal might be taken"); *Garza v. Swift Transp. Co., Inc.*, 222 Ariz. 281, 284, ¶¶ 15-16, 213 P.3d 1008, 1011 (2009) (discussing jurisdiction over appeals from orders that preclude obtaining final judgments as matter of law); *Dusold v. Porta-John Corp.*, 167 Ariz. 358, 361, 807 P.2d 526, 529 (App. 1990) ("[W]e would have jurisdiction over an appeal from [an order determining subject matter jurisdiction] as affecting a substantial right which 'in effect determines the action and prevents judgment from which an appeal might be taken.'" (quoting A.R.S. § 12-2101(D))).

Southwest Gas, by seeking relief from the Corporation Commission, Pinal Energy accepted the superior court's decision that the Corporation Commission has exclusive jurisdiction over the parties' dispute. We disagree.

¶19 First, in making this argument, Southwest Gas relies on several cases that generally recognize a case becomes moot when a party voluntarily complies with a judgment against it. All of the cases, but the Arizona cases in particular, are factually distinguishable. For example, in *Brown v. Kester*, 39 Ariz. 545, 547, 8 P.2d 453, 454 (1932), the appeal was moot after the appellant voluntarily paid a judgment to obtain release from imprisonment for contempt. Likewise, in *Forty-Four Hundred East Broadway Co. v. 4400 East Broadway*, 139 Ariz. 498, 502, 679 P.2d 521, 525 (App. 1983), the appeal was moot when someone other than the cross-appellant paid the judgment.

¶10 Second, Pinal Energy has not voluntarily accepted the superior court's decision dismissing its case for lack of subject matter jurisdiction. Pinal Energy only filed with the Corporation Commission after the court dismissed its case -- a decision we reverse here. Indeed, in its complaint before the Corporation Commission, Pinal Energy reserved its rights to make any arguments with this court concerning subject matter jurisdiction.

¶11 Third, this appeal will determine the exclusive forum for resolving the parties' dispute. Our decision will have a "practical effect" on the parties. *Arpaio v. Maricopa Cnty. Bd. of Supervisors*, 225 Ariz. 358, 361, ¶ 7, 238 P.3d 626, 629 (App. 2010) ("A case becomes moot when an event occurs which would cause the outcome of the appeal to have no practical effect on the parties.") (quoting *Sedona Private Prop. Owners Ass'n v. City of Sedona*, 192 Ariz. 126, 127, ¶ 5, 961 P.2d 1074, 1075 (App. 1998)). Thus, the appeal is not moot.

## II. Subject Matter Jurisdiction

¶12 This court must decide whether the Corporation Commission or the superior court has subject matter jurisdiction over the parties' dispute. This issue is one of law and thus our review is de novo. *Hill v. Peterson*, 201 Ariz. 363, 365, ¶ 5, 35 P.3d 417, 419 (App. 2001); *Mitchell v. Gamble*, 207 Ariz. 364, 367, ¶ 6, 86 P.3d 944, 947 (App. 2004).

¶13 The Corporation Commission has broad constitutional and statutory powers to regulate public service corporations. *Campbell v. Mountain States Tel. & Tel. Co.*, 120 Ariz. 426, 431, 586 P.2d 987, 992 (App. 1978). "[I]t has full and exclusive power in the field of prescribing rates which cannot be interfered with by the courts, the legislature or the executive branch of state government." *Qwest Corp. v. Kelly*, 204 Ariz.



25, 30, ¶ 12, 59 P.3d 789, 794 (App. 2002) (citation omitted) (internal quotation marks omitted); Ariz. Const. art. 15, § 3; Ariz. Rev. Stat. ("A.R.S.") § 40-203 (2011).

¶14 The Corporation Commission, however, has no authority over the construction and interpretation of contracts. *Trico Elec. Coop. v. Ralston*, 67 Ariz. 358, 365, 196 P.2d 470, 474 (1948); *Gen. Cable Corp. v. Citizens Utils. Co.*, 27 Ariz. App. 381, 386, 555 P.2d 350, 355 (1976). Indeed, the Corporation Commission has recognized a superior court should decide "traditional civil law claims" by a customer against a utility based on "common law theories." *Rattlesnake Pass, L.L.C. v. Tucson Electric Power Co.*, Docket No. E-01933A-10-0125, Decision No. 73561, at 15-16, ¶¶ 43-44, (Ariz. Corp. Comm'n Oct. 17, 2012).

¶15 In this case, the parties dispute what their respective obligations are under the agreements and more specifically whether Southwest Gas is obligated to construct the Permanent Route and adjust the charges pursuant to the true-up mechanism. This is a quintessential contract case based on common law theories. Although Southwest Gas argues this is a rate grievance and therefore the Corporation Commission has exclusive jurisdiction, "the claims' most important aspects involve facts and theories of . . . contract far afield of the

Commission's area of expertise and statutory responsibility." *Campbell*, 120 Ariz. at 432, 586 P.2d at 993.

¶16 That the agreements were authorized by the B-1 tariff does not take this case out of the exclusive jurisdiction of the superior court. Indeed, in its motion to dismiss, Southwest Gas confirmed, as Pinal Energy had alleged, that Pinal Energy had established to Southwest Gas's satisfaction that Pinal Energy qualified under the then-applicable B-1 tariff. Nothing in the B-1 tariff itself is in dispute. Instead, the parties' respective obligations under the agreements are in dispute -- the case presents "traditional claims" that our superior courts handle and decide every day. *Id.*

¶17 In *General Cable Corp.*, we addressed a situation similar to this case and concluded the superior court, and not the Corporation Commission, had exclusive subject matter jurisdiction to resolve a contract dispute. 27 Ariz. App. at 386, 555 P.2d at 355. There, as here, a utility agreed to construct new facilities to meet the anticipated service needs of a utility customer. *Id.* at 383, 555 P.2d at 352. There, as here, the customer agreed to pay for minimum amounts of service.

*Id.* There, as here, the customer's demand for service changed, and it did not require all of the anticipated service.<sup>7</sup> *Id.*

¶18 The customer filed a complaint with the Corporation Commission alleging the rates under its contract with the utility were unjust, unreasonable, and discriminatory. *Id.* at 385, 555 P.2d at 354. The Corporation Commission dismissed the complaint because it did not have jurisdiction to determine the legality of the contract. *Id.* The superior court and this court agreed with the commission's determination that the superior court had jurisdiction to interpret the parties' legal rights under the contract. *Id.* We explained in words directly applicable here that "the construction and interpretation to be given to legal rights under a contract reside solely with the courts and not with the Corporation Commission." *Id.* at 386, 555 P.2d at 355. Consistent with *General Cable*, the superior court should not have dismissed Pinal Energy's claims against

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<sup>7</sup>Southwest Gas emphasizes the related case, *General Cable Corp. v. Arizona Corp. Commission*, 27 Ariz. App. 386, 555 P.2d 355 (App. 1976), in which the customer appealed the dismissal of its superior court complaint that challenged a ruling of the Corporation Commission. We affirmed the dismissal because the customer failed to request a rehearing before the effective date of the challenged order as required by statute. The holding of that case is irrelevant to the issue before us.

Southwest Gas for lack of subject matter jurisdiction.<sup>8</sup> Thus, we reverse the judgment in Southwest Gas's favor on Pinal Energy's breach claims (counts 1 and 2) and remand to the superior court. On remand, Pinal Energy may pursue those claims, and if it prevails on those claims, seek damages pursuant to the agreements with Southwest Gas.

### *III. Attorneys' Fees*

¶19 After Pinal Energy appealed the dismissal, Southwest Gas moved for an award of attorneys' fees, which the superior court granted.<sup>9</sup> Once a notice of appeal is filed, the superior court generally is divested of jurisdiction to proceed except in

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<sup>8</sup>Because the superior court and not the Corporation Commission has exclusive jurisdiction over the parties' dispute, we do not need to address the primary jurisdiction doctrine. See *Campbell*, 120 Ariz. at 429, 586 P.2d at 990 (declining to address additional issues when the first issue is dispositive of the appeal).

<sup>9</sup>Although Pinal Energy requested attorneys' fees in its complaint, the superior court implicitly denied that request when it ruled in favor of Southwest Gas. Southwest Gas did not request attorneys' fees until after the superior court had entered judgment and Pinal Energy had filed its notice of appeal. Thus, no fee request was pending when the superior court entered judgment, and the notice of appeal was not premature. See *Fields v. Oates*, 230 Ariz. 411, 286 P.3d 160 (App. 2012).

furtherance of the appeal. *Continental Cas. Co. v. Indus. Comm'n*, 111 Ariz. 291, 294, 528 P.2d 817, 820 (1974); *Allstate Ins. Co. v. Universal Underwriters, Inc.*, 199 Ariz. 261, 266, ¶ 15, 17 P.3d 106, 111 (App. 2000) (citing *Trebilcox v. Brown & Bain, P.A.*, 133 Ariz. 588, 653 P.2d 45 (App. 1982), overruled on other grounds). Pinal Energy's appeal therefore divested the superior court of jurisdiction to entertain Southwest Gas's motion for attorneys' fees.<sup>10</sup> Thus, we vacate the award of fees and costs entered by the superior court on October 3, 2012.

¶20 Pinal Energy requests its fees and costs incurred on appeal pursuant to A.R.S. §§ 12-341.01(A) (Supp. 2012) and 12-341 (2003). We grant its request for reasonable fees and costs as the successful party on appeal, contingent upon its compliance with Rule 21 of the Arizona Rules of Civil Appellate Procedure.

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<sup>10</sup>Southwest Gas also failed to request attorneys' fees in its motion to dismiss, and therefore, was not entitled to a fee award. *Balestrieri v. Balestrieri*, 232 Ariz. 25, 26, ¶ 1, 300 P.3d 560, 561 (App. 2013). In any event, Southwest Gas is no longer the successful party and is not, therefore, entitled to a fee award. See A.R.S. § 341.01(A) (Supp. 2012).

