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2020 VT 5

No. 2019-179

In re Joint Petition of Champlain Broadband, LLC et al.  
(Sandra Baird et al., Appellants)

Supreme Court

On Appeal from  
Public Utility Commission

October Term, 2019

Anthony Z. Roisman, Chair

James A. Dumont and Gillian C.A. Cowley, Law Clerk (On the Brief) of Law Offices of  
James A. Dumont, P.C., Bristol, for Appellants.

Paul J. Phillips and Ralphine N. O'Rourke of Primmer Piper Eggleston & Cramer PC,  
Burlington, for Appellee City of Burlington.

Joslyn L. Wilschek and Anthony N. L. Iarrapino of Wilschek Iarrapino Law Office, PLLC,  
Montpelier, for Appellee Champlain Broadband, LLC.

Daniel C. Burke, Special Counsel, Montpelier, for Appellee Vermont Department of Public  
Service.

Debra L. Bouffard and Owen J. McClain of Sheehey Furlong & Behm P.C., Burlington, for  
Appellee Blue Water Holdings LLC.

PRESENT: Robinson and Eaton, JJ., and Dooley and Skoglund, JJ. (Ret.) and  
Howard, Supr. J. (Ret.), Specially Assigned

¶ 1. **EATON, J.** This appeal concerns the most recent in a series of Public Utility Commission (PUC) orders issued in the last fifteen years related to the City of Burlington's provision of—and misappropriation of funds for—for cable television, telecommunications, and broadband internet services to area residents. Intervenors, as City residents and taxpayers,

challenge the PUC's order approving the sale of assets associated with those services and issuing certificates of public good (CPGs) to the purchaser of the assets. At issue is whether the PUC's order must be reversed because it fails to ensure, pursuant to city charter<sup>1</sup> and statutory<sup>2</sup> provisions, that previous losses or costs associated with the City's misappropriation of funds for the provision of those services will not be borne by City taxpayers. We conclude that the remedies intervenors seek in challenging the PUC's order in this proceeding are effectively precluded by the PUC's prior November 2014 order addressing the CPG violations at issue here. Accordingly, we affirm the PUC's order.

¶ 2. The historical and procedural facts are undisputed. In June 2003, the PUC<sup>3</sup> issued a CPG authorizing the City of Burlington to offer telecommunications services under the name

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<sup>1</sup> 24 V.S.A. App. Ch. 3, § 438(c)(1) provides:

If the City exercises its authority [to establish businesses for the provision of communications services], the Public Utility Commission, in considering any application for a certificate of public good, shall ensure that any and all losses from these businesses, and, in the event these businesses are abandoned or curtailed, any and all costs associated with investment in cable television, fiber optic, and telecommunications network and telecommunications business-related facilities, are borne by the investors in such business, and in no event are borne by the City's taxpayers, the State of Vermont, or are recovered in rates from electric ratepayers.

<sup>2</sup> 24 V.S.A. § 1913(e) provides:

To the extent that a municipality constructs communication infrastructure with the intent of providing communication services, whether wholesale or retail, the municipality shall ensure that any and all losses from these businesses, or in the event these businesses are abandoned or curtailed, any and all costs associated with the investment in communications infrastructure, are not borne by the municipality's taxpayers.

<sup>3</sup> Effective July 1, 2017, the Public Service Board was renamed the Public Utility Commission. See 2017, No. 53, § 9. Throughout this opinion, irrespective of the date of any particular order or case cited, we refer exclusively to the Public Utility Commission for the sake of clarity.

Burlington Telecom. In September 2005, the PUC issued a CPG to Burlington Telecom to own and operate a cable television system within the City. Pursuant to § 438(c)(1) of the Burlington City Charter, the PUC imposed conditions in the CPG providing that any costs of investment in the Burlington Telecom system and any losses incurred by Burlington Telecom would not be borne by City taxpayers. 24 V.S.A. App. Ch. 3, § 438(c)(1).

¶ 3. In August 2007, the City obtained financing from Citibank to fund the acquisition of equipment to build out the Burlington Telecom system. In late 2009, it was discovered that the City had been making monetary advances to Burlington Telecom from its general fund, but those advances had not been repaid within sixty days, as required by the governing CPG. The unreimbursed advances totaled \$16.9 million. In an October 2010 order, the PUC determined that the City's failure to repay the \$16.9 million in unreimbursed advances from its general fund violated specific conditions of the CPG, including conditions requiring reimbursement and ensuring that City taxpayers would not bear any losses or costs incurred by Burlington Telecom.

¶ 4. In 2011, Citibank sued the City, seeking more than \$33.5 million in monetary damages and equitable relief associated with its financing arrangement with the City concerning Burlington Telecom. In 2014, the City petitioned the PUC to approve a settlement agreement with Citibank and to authorize certain actions to implement the agreement, including the sale of Burlington Telecom's assets to Blue Water Holdings LLC and Blue Water's lease of those assets back to the City for a limited period of time. Blue Water is a Vermont limited liability company formed to provide the City bridge financing to allow the City to resolve the Citibank lawsuit and stabilize Burlington Telecom's operations pending the expected future sale of Burlington Telecom. Pursuant to the agreement, the City continued to operate—and was authorized to direct the eventual sale of—Burlington Telecom. The agreement provided that if the projected future sale of Burlington Telecom to a yet-to-be-determined buyer was completed by December 31, 2017, the City would receive fifty percent of the net proceeds from the sale. That percentage would drop to

thirty-five percent if the sale was completed between the end of 2017 and the end of 2018; to twenty-five percent if the sale was completed between the end of 2018 and the end of 2019; and ten percent if the sale was completed thereafter.

¶ 5. In November 2014, the PUC issued an order that, among other things, approved the Citibank settlement and the sale of Burlington Telecom’s assets to Blue Water, as well as the lease of those assets back to the City. In that order, the PUC explicitly “resolved” all existing and ongoing violations of the 2005 CPG conditions found in its October 2010 order, including the City’s violation of conditions restricting its use of general funds for Burlington Telecom’s operations and requiring that Burlington Telecom’s costs and losses not be borne by City taxpayers. In December 2014, the PUC amended the 2005 CPGs to reflect Blue Water’s ownership of Burlington Telecom’s assets and its controlling interest in Burlington Telecom.

¶ 6. In December 2017, Blue Water and the City entered into a purchase agreement with Champlain Broadband, LLC, under which Champlain Broadband agreed to pay the City and Blue Water \$30.8 million for the ownership and control of Burlington Telecom and to continue Burlington Telecom’s operations consistent with the terms and conditions of the existing CPGs held by the City and Blue Water. The agreement provided that, within the earlier of one year of the closing of the agreement or sixty days of the issuance of any new CPGs, the City could elect to use some of its designated closing proceeds to purchase up to thirty-three percent of Champlain Broadband’s voting membership interests.

¶ 7. In February 2018, Blue Water, Champlain Broadband, and the City (doing business as Burlington Telecom) petitioned the PUC to approve their proposed transaction under which Champlain Broadband would acquire Blue Water’s Burlington Telecom assets and continue to operate the system and provide cable television, broadband internet, and telecommunications services to residential and business customers in the greater Burlington area. In relevant part, petitioners requested that the PUC: (1) approve and consent to their transaction; (2) issue CPGs

permitting Champlain Broadband to own and operate a cable television system in the Burlington area and to offer intrastate telecommunications services; (3) revoke the existing CPGs authorizing Blue Water and the City to own and operate Burlington Telecom; and (4) find that the costs and any losses resulting from the City's potential future investment in membership interests in Champlain Broadband would be borne by the investors, not City taxpayers, pursuant to § 438(c)(1) of the city charter. See 24 V.S.A. App. Ch. 3, § 438(c)(1). The Department of Public Service (DPS) supported all the requested relief except for the last request; the DPS took the position that there was insufficient evidence in the record at that point for the PUC to make such a finding.<sup>4</sup>

¶ 8. In March 2018, intervenors moved to intervene in the proceeding. They objected to petitioners' proposed transfer of Burlington Telecom's assets to Champlain Broadband without any conditions ensuring that City taxpayers would recoup the \$16.9 million in unreimbursed advances the City made to Burlington Telecom in violation of the city charter and governing CPGs. In May 2018, the PUC granted intervenors' motion, which was opposed by the City but not DPS. The PUC allowed intervenors to raise issues related to the recovery of losses resulting from the previous CPG violations, stating that its November 2014 order did not resolve all issues related to recovery of the \$16.9-million loss.

¶ 9. On February 19, 2019, following a technical hearing and the parties' submission of pre-filed testimony, proposed findings of fact and conclusions of law, and post-hearing briefs, the PUC issued a final order approving petitioners' proposed transaction, revoking the CPGs held by the City and Blue Water, and granting the requested CPGs for Champlain Broadband's operation of cable television, broadband internet, and telecommunications systems. The PUC concluded that because the City's estimated net proceeds from petitioners' proposed transaction were utility

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<sup>4</sup> As explained below, the PUC concluded that the evidentiary record was sufficient for it to determine that the City's use of its net proceeds from the sale of Burlington Telecom to Champlain Broadband did not violate § 438(c) because those net proceeds were utility funds rather than taxpayer revenue. See 24 V.S.A. App. Ch. 3, § 438(c)(1).

funds that could be used for any utility purpose rather than taxpayer-generated revenue from the City's general fund, any costs or losses resulting from the City's application of those proceeds to purchase membership interests in Champlain Broadband would not violate § 438(c)(1) or § 1913(e).<sup>5</sup>

¶ 10. The PUC also rejected intervenors' contention that petitioners' proposed transaction would violate § 1913(e) and § 438(c)(1) with respect to the \$16.9 million in previously unreimbursed revenues from the City's general fund. The PUC concluded that § 1913(e) applied only to municipalities and not the PUC. As for § 438(c)(1), the PUC reasoned that its review under that provision was prospective in nature and that, beyond setting conditions for a CPG, it had no authority to enforce the provision. The PUC also emphasized that its previous November 2014 order: (1) resolved all existing and ongoing violations of the 2005 CPG conditions, including Burlington Telecom's failure to repay \$16.9 million in advances from the City's general fund; and (2) approved a sale structure that it knew would reduce the City's ability to recover a substantial portion of that \$16.9 million. The PUC stated that it could consider its 2014 order as context in assessing if petitioners' proposed transaction would promote the public good. In so ruling, the PUC rejected intervenors' argument that they were not bound by the November 2014 order, concluding that the doctrine of claim preclusion barred intervenors from challenging the order in this later proceeding.

¶ 11. Based on these and other findings setting forth the benefits of petitioners' proposed transaction, the PUC concluded that the transaction would promote the public good because it would: (1) ensure that the City recouped the maximum share of proceeds from the sale pursuant to the approved 2014 Blue Water agreement; and (2) provide "the City with the option to purchase

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<sup>5</sup> Intervenor do not challenge the PUC's determination that the City's net proceeds from petitioners' proposed transaction are to be considered utility funds rather than taxpayer revenue. Accordingly, we do not review this aspect of the PUC's order.

a membership interest in Champlain [Broadband] that could allow the City to recover previously written-off losses through the receipt of future profits from Burlington Telecom.” In a subsequent order denying intervenors’ motion for additional findings and to alter or amend its decision, the PUC reiterated its determinations that the proposed transaction would promote the public good, that the doctrine of claim preclusion prevented intervenors from challenging its November 2014 order, and that it had limited enforcement authority under § 438(c)(1) and § 1913(e).

¶ 12. Intervenors appeal the PUC’s decision approving petitioners’ proposed transaction and granting Champlain Broadband the requested CPGs. Intervenors do not directly challenge the PUC’s conclusion that the transaction would promote the public good. Nor do they claim error in the PUC’s determination that they are precluded from challenging the PUC’s November 2014 order approving the sale of Burlington Telecom’s assets to Blue Water and resolving all existing and ongoing CPG violations concerning the City’s misappropriation of taxpayer funds to Burlington Telecom. Rather, intervenors argue that, notwithstanding the November 2014 order, the PUC erred by: (1) concluding that it lacked authority to apply § 438(c)(1) and § 1913(e) in response to the instant petition; and (2) granting the petition despite evidence and findings demonstrating that approval of the petition failed to satisfy those provisions.<sup>6</sup>

¶ 13. During the course of this litigation, intervenors have sought two remedies. Initially intervenors sought a CPG condition obliging Champlain Broadband to repay the \$16.9 million, thereby effectively increasing the purchase price of Burlington Telecom by that amount. Here, on appeal, following the PUC’s decision, and based on their interpretation of § 438(c)(1) and § 1913(e), intervenors ask this Court to reverse the grant of a CPG to Champlain Broadband. Further, they suggest that the PUC may award a CPG only to the highest bidder, irrespective of

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<sup>6</sup> The City, Blue Water, Champlain Broadband, and DPS have each filed a brief containing multiple arguments in support of affirming the PUC’s order, including an argument that intervenors’ appeal is moot. Champlain Broadband has also filed a motion to dismiss the appeal based on mootness. We do not address the mootness argument in light of our opinion here.

other CPG considerations. As noted, however, intervenors do not claim error in the PUC's determination that the doctrine of claim preclusion bars them from challenging its November 2014 order. In light of our conclusion that the remedies intervenors seek are wholly inconsistent with the PUC's November 2014 order, we need not address intervenors' challenge to the PUC's analysis of its role with respect to § 438(c)(1) or § 1913(e).

¶ 14. In its February 2019 order granting the instant petition, the PUC rejected intervenors' initial position that they were not bound by the November 2014 order because they were not parties to that proceeding. The PUC relied upon this Court's case law for the proposition that claim preclusion may apply when the subject matter and parties in a former action are "substantially identical." In re Cent. Vt. Pub. Serv. Corp., 172 Vt. 14, 20, 769 A.2d 668, 673 (2001) (quotation omitted) ("The doctrine does not require that the claims were actually litigated in the prior proceeding; rather, it applies to claims that were or should have been litigated in the prior proceeding.").

¶ 15. In determining that claim preclusion applied here, the PUC made the following findings: (1) DPS represents the public, and it was a party in the 2014 proceedings, see 30 V.S.A. § 2(b) (stating that DPS "shall represent the interests of the people of the State" in PUC hearings); see also In re Vicon Recovery Sys., 153 Vt. 539, 540, 572 A.2d 1355, 1356 (1990) ("The Department of Public Service represents the public in matters before the [PUC]."); (2) intervenors' interests in the 2014 proceeding "were represented by [DPS], the agency charged by State law with the obligation to represent the public"; (3) intervenors "fail[ed] to identify any barriers to their interests as taxpaying members of the public being represented by [DPS] in 2014"; (4) intervenors "had adequate notice and ample procedural opportunities to move to intervene and to raise concerns in a timely fashion during the 2014 proceeding"; and (5) intervenors did "not claim they were prevented in any way from intervening in the [2014] proceeding." The PUC further found that the issue raised by "[i]ntervenors [in the instant proceeding]—recovery of the \$16.9

million—was foremost in the Commission’s thinking from the very beginning of the 2014 proceeding and was squarely addressed in orders issued prior to the deadline to intervene” in that proceeding.<sup>7</sup>

¶ 16. Intervenors challenge neither the PUC’s claim-preclusion ruling nor any of its findings in support of that ruling.<sup>8</sup> Nor do they directly address in their appellate brief whether the

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<sup>7</sup> In response to intervenors’ motion to amend, the PUC appeared to address the perceived tension resulting from its earlier ruling granting intervenors’ motion to intervene and its later ruling precluding intervenors from challenging the November 2014 order that resolved ongoing CPG violations and approved the Blue Water sales agreement. The PUC’s response to intervenors’ motion to amend suggests that it granted their motion to intervene primarily based on its recognition that it could still consider the \$16.9-million loss in determining if petitioners’ proposed transaction would promote the public good. As noted above, the PUC recognized in its order granting the motion to intervene that its November 2014 order did not resolve all issues related to recovery of the \$16.9 million in unreimbursed general funds. In denying intervenors’ motion to amend, the PUC acknowledged that its November 2014 order did not predetermine whether a CPG could be issued to whatever entity might seek to own or operate Burlington Telecom in the future pursuant to the approved Blue Water agreement. The PUC emphasized, however, that in the instant proceeding intervenors had been afforded the opportunity to conduct discovery and cross-examination, present witnesses, and submit exhibits in opposing the proposed sale of Burlington Telecom to Champlain Broadband and the issuance of CPGs to Champlain Broadband.

In any event, the PUC was not bound by its reasoning underlying its interlocutory order granting the motion to intervene. See 7C C. Wright, et al., *Federal Practice and Procedure* § 1923, at 632 (3d ed. 2007) (“An order granting leave to intervene is not final and is not appealable as matter of right.”). Following briefing and the presentation of evidence in connection with the merits of the proceeding, the PUC was free to reconsider in its final order the extent to which it could address the unreimbursed \$16.9-million loss in light of its November 2014 order. See *Kneebinding, Inc. v. Howell*, 2018 VT 101, ¶¶ 31-33, \_\_\_ Vt. \_\_\_, 201 A.3d 326 (stating that neither law-of-the-case doctrine nor Vermont Rules of Civil Procedure preclude trial court from revising past rulings prior to final judgment); *Myers v. LaCasse*, 2003 VT 86A, ¶ 11, 176 Vt. 29, 838 A.2d 50 (“The court [has] the discretion to modify an interlocutory order.”). For the reasons explained below, we conclude that the PUC did not abuse its discretion to the extent that its ultimate ruling on the scope of the November 2014 order amounted to reconsideration of the basis for granting the motion to intervene. *Kneebinding, Inc.*, 2018 VT 101, ¶ 34 (“We review the trial court’s reconsideration of a past interlocutory order for abuse of discretion.”).

<sup>8</sup> We do not defer to the PUC’s claim-preclusion analysis. See *In re Cent. Vt. Pub. Serv. Corp.*, 172 Vt. at 19, 769 A.2d at 673 (“The applicability of judicially-created doctrines such as claim preclusion or issue preclusion in rate cases is not an issue within the [PUC’s] expertise of utility law.”). However, we do not address whether the PUC properly applied claim preclusion in this instance because intervenors do not challenge that ruling on appeal. Rather, we consider the scope of that order and its impact on intervenors’ request for relief in this case.

November 2014 PUC order effectively bars the relief they request, even though that question was central to the PUC’s decision to approve the proposed sale of Burlington Telecom to Champlain Broadband and to issue the requested CPGs. At oral argument before this Court, intervenors acknowledged that the November 2014 order resolved all prior and ongoing CPG violations—including those related to the conditions requiring the City to reimburse general funds directed to Burlington Telecom and to make investors rather than taxpayers bear any losses or costs associated with Burlington Telecom. They asserted, however, that the November 2014 order did not resolve whether taxpayers should be repaid the \$16.9-million loss they incurred as the result of the City providing unreimbursed general funds to Burlington Telecom for its operations.

¶ 17. We find petitioners’ assertion untenable. As discussed above, the purpose of the 2014 proceeding was to consider the City’s efforts to resolve longstanding legal and financial issues related to its investments in, and conduct concerning, Burlington Telecom, as well as its financial arrangements with Citibank. At the heart of the proceeding was how to address the City’s violation of CPG conditions that precluded the City from using unreimbursed general funds in support of Burlington Telecom operations and burdening City taxpayers with losses resulting from those violations.

¶ 18. In its November 2014 order, which established the framework for a future sale of Burlington Telecom, the PUC stated that the unresolved CPG violations found in its 2010 order “create[d] a risk to the City’s future ability to direct a sale of [Burlington Telecom’s] Assets, as potential purchasers might be reluctant to purchase a cable and telecommunications system with ongoing CPG violations.” Accordingly, the PUC determined that its order “fully resolve[d] all existing and ongoing [CPG] violations” —including its violation of conditions precluding the City from using unreimbursed taxpayer revenues to fund Burlington Telecom and requiring investors rather than taxpayers to pay for losses associated with Burlington Telecom—because “no

constructive regulatory purpose would be served” by imposing penalties “that effectively would be visited upon City taxpayers and [Burlington Telecom] customers.”

¶ 19. As the PUC recognized in the 2019 order being challenged here, it “knowingly approved [in its November 2014 order] a sale structure that would reduce the ability of the City and its taxpayers to recover a substantial portion of the City’s unauthorized \$16.9 million investment.” The PUC reasoned that it had concluded in its November 2014 order, after addressing the same concerns now raised by intervenors in the instant proceeding, that approving the Blue Water sale would promote the public good “even if the taxpayers ultimately would not be made whole.” Pursuant to the unchallenged November 2014 order, the City sold Burlington Telecom’s assets to Blue Water and resolved the Citibank lawsuit. The PUC found that petitioners “reasonably relied on the finality of the Commission’s November 2014 Order as the basis for the transactions proposed in the petition.”

¶ 20. Notably, the November 2014 order did not impose on either the City or Blue Water, as the purchaser of Burlington Telecom’s assets, the CPG conditions intervenors now want imposed on Champlain Broadband in this proceeding. In setting the parameters of a future sale of the Burlington Telecom system, the PUC recognized that any such sale would not necessarily allow for full recovery of the \$16.9 million in unreimbursed taxpayer funds. Indeed, the PUC stated that there was no assurance the City would be able to recover any of its prior investment in Burlington Telecom if it were unable to direct a sale of Burlington Telecom within the time frame prescribed under the Blue Water agreement.

¶ 21. In the instant proceeding, the PUC correctly concluded that, notwithstanding its November 2014 order resolving all prior and ongoing CPG violations, it had an obligation to assess whether petitioners’ proposal promoted the public good. The PUC emphasized, however, that its assessment had to “be made in the context of [its] November 2014 Order in which the Commission” resolved the CPG violations and determined that the Blue Water sale promoted the

public good “even if the taxpayers ultimately would not be made whole.” With that context in mind, the PUC concluded that the proposed petition would promote the public good because it would allow the City to recoup the maximum share of net proceeds under the approved Blue Water sale and would provide the City with the option of recovering previously written-off losses through the purchase of a membership interest in Champlain Broadband.<sup>9</sup>

¶ 22. The record fully supports that determination. As the PUC found, given the time frames set forth in the PUC-approved Blue Water agreement, upending the sales transaction reached by petitioners in this proceeding would likely impose additional financial burdens on Burlington Telecom customers and City taxpayers. Moreover, beyond disruptions to Burlington Telecom’s workforce and customers and a reduction in Burlington Telecom’s value to potential purchasers, unwinding the transaction could potentially have a negative financial impact on City taxpayers due to the City’s obligations to Citibank under their PUC-approved settlement. Simply put, given the PUC’s past orders, the record supports the PUC’s conclusion that the petition promotes the public good.

¶ 23. There can be little doubt that providing the relief intervenors request—whether it be simply reversing the PUC’s approval of the petition or more specifically ordering the PUC to impose a condition requiring Champlain Broadband (or any other future purchaser of the Burlington Telecom system) to reimburse City taxpayers the \$16.9 million in previous losses resulting from the City’s malfeasance—would be tantamount to rewriting and effectively

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<sup>9</sup> We find unavailing intervenors’ challenge to the PUC’s finding that the proposed sale to Champlain Broadband would ensure the City recouped the maximum share of net proceeds allowed under the Blue Water 2014 agreement. Petitioners assert that Champlain Broadband’s bid was not the highest of the eight bids, any of which at the time would have afforded the City the highest percentage of net proceeds under the agreement. In choosing a bidder, the City had many factors to consider beyond the sale price, including local control of the operations and the opportunity to recover additional funds in the future. As the PUC stated in its order, its role in this proceeding was not to choose a bidder for the City but rather to determine if petitioners’ proposed agreement, which comported with the November 2014 order, promoted the public good.

unwinding the sale agreement that the PUC determined would promote the public good. That, in turn, would thwart the purpose and framework of the PUC's November 2014 order, which approved a comprehensive plan aimed at restoring Burlington Telecom's financial and regulatory stability in order to attract a qualified purchaser within a certain period of time. Assuming any buyer would be willing to take on an additional \$16.9 million to purchase Burlington Telecom—an effective fifty-percent increase from the price Champlain Broadband paid—the City's portion of the net proceeds of any future sale would likely be significantly reduced under the timelines set forth in the PUC's November 2014 order approving the City's agreement with Blue Water and its settlement with Citibank.

Affirmed.

FOR THE COURT:

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Associate Justice