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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

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Arizona Corporation Commission

DOCKETED

OCT 26 2004

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G. IRENE STOCKBRIDGE
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**SECURITY DIVISION'S REPLY TO
RESPONDENTS' RESPONSE TO WALKER
ARMSTRONG'S OBJECTION TO
SUBPOENA**

Respondents.

On March 14, 2003, Respondents obtained a subpoena signed by the Executive Secretary and served it on the accounting firm of Walker Armstrong. Walker Armstrong then filed an objection to the subpoena claiming, among other things, that the documents requested by the subpoena were protected by the accountant-client privilege. See A.R.S. § 32-749. On October 15, 2004, Respondents filed their response to the objection, claiming that there was no accountancy privilege for Walker Armstrong to assert and that any attorney-client privilege has been waived.

The Securities Division files this reply solely relating to the issue of A.R.S. § 32-749.¹

A.R.S. § 32-749(A) states:

Certified public accountants and public accountants practicing in this state shall not be required to divulge, nor shall they voluntarily divulge, client records or information which they have received by reason of the confidential nature of

¹ As the Securities Division does not hold the attorney-client privilege nor is it seeking documents that may be covered by the privilege, it is not responding to that portion of Respondents' response. However, it does note that much of Respondents' factual portion of its pleading is unsupported by any evidence.

1 their employment. Information derived from or as a result of such professional
2 source shall be kept confidential as provided in this section, but this section shall
3 not be construed as modifying, changing or affecting the criminal or bankruptcy
4 laws of this state or the United States, nor shall it be construed to limit the
5 authority of this state or any agency of this state to subpoena and use the
6 information in connection with any investigation, public hearing or other
7 proceeding.

8 Respondents contend that the last phrase of the paragraph, "nor shall it be construed to limit
9 the authority of this state or any agency of this state to subpoena and use the information in
10 connection with any investigation, public hearing or other proceeding," means that there is no
11 privilege if the subpoena is issued by the Arizona Corporation Commission as it is a state agency.
12 However, Respondents misread the statute. There are two parts to the phrase. *See Shumway v.*
13 *Farley*, 68 Ariz. 159, 165, 203 P.2d 507 (1949) (When statute contains two requirements connected
14 by "and" both requirements must be met.) Therefore, under A.R.S. § 32-749(A), the statute applies
15 and an accountancy privilege exists unless two requirements are met:

- 16 1. The state or an agency issues the subpoena; and
- 17 2. It uses the information in connection with any investigation, public hearing or other
18 proceeding.

19 Thus, it is not merely that the state or one of its agencies issues the subpoena, but rather the
20 information sought must also be used by the state.

21 In this instance a state agency, at the request of Respondents, issued the subpoena, but it is
22 not the agency that seeks to use the privileged information. Rather, it is a private party that seeks
23 to use it. Nothing in the statute allows a private individual to breach the accountancy privilege
24 merely by having an agency subpoena issued on its behalf.²

25 ² At least 30 states have accountancy privileges. *See Colorado State Board of Accountancy v. Zaveral Boosalis*
26 *Raisch*, 960 P.2d 102, 106 n. 3 (Colo. 1998) (Listing state statutes.) Of those states, at least four states have language
similar to the subpoena language in the Arizona statute, namely Kansas, Rhode Island, Vermont and Washington. The
Securities Division has been unable to find any case law among them that supports Respondents' interpretation of the
statute.

1 The need for both parts of the phrase to be met is logical as otherwise under Respondents'
2 interpretation the exception would swallow the privilege. As Respondents interpret that statute, the
3 privilege would not apply to any subpoena issued by the state or an agency, whether by the state or
4 any other party. Therefore, the accountancy privilege would not apply in an administrative setting.
5 That would leave the privilege to be applied only in a civil case. There is nothing in the statute to
6 support such an interpretation that would allow the privilege to apply in one type of proceeding but
7 not another. In fact, Respondents' interpretation is wholly illogical.

8 Additionally, as counties are political subdivisions of the state, *see Board of Supervisors v.*
9 *Stanford*, 70 Ariz. 277, 282, 219 P.2d 769 (1950), it could also be argued that the privilege would
10 not apply to any subpoena issued by any county, such as by a clerk of the Superior Court.
11 Therefore, extending Respondents' argument, the privilege would not apply in any criminal,
12 administrative or civil litigation. If that would be the case, there would be no purpose to the
13 legislature enacting A.R.S. § 32-749 as would never apply in any litigation. *State v. Box*, 205 Ariz.
14 492, 496, 73 P.3d 623 (App. 2003) (Legislature is presumed not to enact meaningless, redundant or
15 futile legislation.)
16

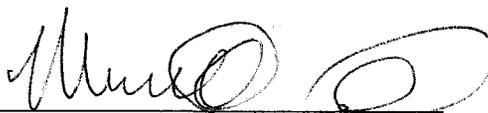
17 Therefore, the Securities Division asks this tribunal to interpret A.R.S. § 32-749(A) as it is
18 written. The accountant-client privilege applies unless the state or an agency issues the subpoena
19 and uses the information obtained in connection with any investigation, public hearing or other
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1 proceeding. As that has not occurred in this situation, the accountant-client privilege still applies
2 to the Walker Armstrong documents.

3 Dated this 26th day of October, 2004

4 ARIZONA CORPORATION COMMISSION

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6 By 
7 Mark Dinell
8 Attorney for the Securities Division

9 ORIGINAL of the foregoing and 13 copies
10 filed with Arizona Corporation Commission
11 Docket Control this 26th day of October
12 2004.

13 COPY of the foregoing MAILED by US
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