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BEFORE THE ARIZONA CORPORATION COMMISSION

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11 JIM IRVIN
12 COMMISSIONER
13 MARC SPITZER
14 COMMISSIONER

DOCKET NO. E-01032C-00-0751

**CITIZENS COMMUNICATIONS
COMPANY'S SURREPLY IN SUPPORT
OF ITS NOTICE OF APPEARANCE OF
SUBSTITUTE COUNSEL**

15 IN THE MATTER OF THE APPLICATION
16 OF THE ARIZONA ELECTRIC DIVISION
17 OF CITIZENS COMMUNICATIONS
18 COMPANY TO CHANGE THE CURRENT
19 PURCHASED POWER AND FUEL
20 ADJUSTMENT CLAUSE RATE, TO
21 ESTABLISH A NEW PURCHASED POWER
22 AND FUEL ADJUSTMENT CLAUSE
23 BANK, AND TO REQUEST APPROVED
24 GUIDELINES FOR THE RECOVERY OF
25 COSTS INCURRED IN CONNECTION
26 WITH ENERGY RISK MANAGEMENT
27 INITIATIVES.

Arizona Corporation Commission

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Introduction

22 The briefs filed on May 29 by RUCO, Staff and Counties relating to Citizens' choice of
23 Brown & Bain as it substitute counsel (collectively the "Responses") make two new arguments.
24 First, each makes the factual argument that there "might be" some sort of "conflict," "contradiction,"
25 or "discrepancy" between what Citizens' witnesses have previously said and what Citizens (through
26 Mr. Flynn's declaration) now says about Brown & Bain's role in advising Citizens. Second, Staff
27 argues that Brown & Bain has a "direct conflict of interest," thereby seeking to disqualify Brown &
28 Bain, not on the basis of Rule 3.7 (the witness-advocate rule which was the explicit basis of its

1 Objection) but on the basis of Rule 1.7(b) (which governs conflicts of interest). These new
2 arguments are borne of desperation, as the Objectors now concede that Mr. Mais is not a witness in
3 these proceedings, and make no effort to show that he is a “necessary” witness within the meaning of
4 Rule 3.7. But both new arguments, like the arguments originally proffered in the Objections, are
5 facially meritless.

6 Staff’s assertion that Brown & Bain should be disqualified because of a “direct conflict of
7 interest” is wrong as a matter of law, because when a party seeks to disqualify an individual lawyer
8 representing its adversary because of that lawyer’s status as a witness, Rule 3.7, not Rule 1.7(b),
9 governs. For that reason, Staff’s assertion that Brown & Bain has a “direct conflict of interest”—
10 whatever Staff means to imply by that assertion—is irrelevant to its objection unless the Objectors
11 first satisfy all of the requirements of Rule 3.7 (i.e., the Objectors first show that Mr. Mais is a
12 witness, and that he is “necessary” because the issues upon which he has knowledge are material and
13 such evidence is “unobtainable elsewhere”). The Objectors cannot make any of these threshold
14 showings and don’t really try.

15 Moreover, the factual premise that there is a “conflict” or “contradiction” in the testimony
16 filed by Citizens as to Brown & Bain’s role when it provided the law firm of Wright & Talisman and
17 Citizens limited procedural and tactical advice is false, and no amount of innuendo, selective
18 quoting, use of highlighted print or ellipses can make it otherwise.

19 This brief demonstrates that Rule 3.7, not Rule 1.7(b) governs the Objections and requires
20 the Objectors to bear a heavy burden of proving each of the requisites of Rule 3.7 disqualification. It
21 shows that the Objectors’ effort to evade the requirements of Rule 3.7 by alleging imaginary
22 “contradictions” in Citizens’ filed testimony relating to Brown & Bain is not only legally incorrect,
23 but refuted by the factual record upon which they rely. Because Mr. Mais is not a witness in these
24 proceedings, because the rules governing these proceedings do not allow a party to add
25 “impeachment” witnesses at this late date, and because, in any event, Mr. Mais could not possibly be
26 a “necessary” witness, for impeachment purposes or otherwise, the Objections must be rejected.

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Legal Analysis

I. THE PRESENCE OF A "CONFLICT" IS IRRELEVANT UNDER RULE 3.7, BUT, IN ANY EVENT, THERE IS NO SUCH PROBLEM HERE.

No Objector ever before cited Rule 1.7(b).¹ No Objector cites that Rule in the Responses. Yet Rule 1.7(b) is now the implicit authority upon which the Objectors rely when they claim they intend to "impeach" Citizens' witnesses through Mr. Mais' testimony, because disqualification of an individual lawyer under Rule 3.7 does not depend on whether the lawyer's testimony would help or harm the client. The "impeachment" issue arises under Rule 3.7 *only if* the complainant shoulders its burden of demonstrating that the prerequisites of that Rule are met and no exception applies.² As we discuss below, the Objectors have abandoned all pretext that they can prove Mr. Mais is a "necessary witness," so the specter of "impeachment" is irrelevant. Rule 3.7 means that any incremental "impeachment" Mr. Mais could provide is irrelevant because he is not "necessary" (*i.e.* other witnesses, including Mr. Flynn, who was the conduit between Brown & Bain and Citizens, and documents could provide it).

Even assuming Rule 1.7(b) trumps Rule 3.7 (which would stand on its head a fundamental principle of construction that a specific provision governs a general provision), and that the Objectors are now allowed to rely on a Rule that they have not even bothered to cite, Rule 1.7(b)

¹ "ER 1.7 Conflict of Interest: General Rule

...

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected, and

(2) the client consents after consultation. ..."

(Subsection (a) addresses conflicts *between* clients, so it is irrelevant here.)

² No good faith argument exists for the relief (disqualification of the entire Brown & Bain firm) that the Counties and Staff continue to advocate, yet they persist in that request. Rule 3.7(b) could not be plainer: "A lawyer *may act* as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by ER 1.7 or ER 1.9." As we discuss above, there is no such Rule 1.7 conflict. (Rule 1.9 addresses a "former client," so it is facially irrelevant.) The Counties completely ignore Rule 3.7(b), and Staff mistakenly contends that firmwide disqualification is required, citing a Comment to Rule 3.7 that reiterates that such a measure is appropriate if, and only if, a conflict exists within the meaning of Rules 1.7 or 1.9.

1 provides no obstacle to the current representation, because that Rule *is waivable by the client*. Rule
2 1.7(b) applies when the lawyer's representation "may be materially limited ... by the lawyer's own
3 interests." But the Rule *still* permits representation if the lawyer "reasonably believes the
4 representation will not be adversely affected" and "the client consents after consultation." Both of
5 those facts are true here, so Rule 1.7(b) cannot support disqualification.

6 Most importantly, the Responses' factual premise—that there is a "conflict" based on
7 "contradiction" or "disparity" between testimony that Mr. Mais might provide and something that a
8 Citizens witness has said (whether at a hearing, or in a brief, or in an affidavit) or realistically will
9 say at hearing—is unequivocally false. The only subject of "inconsistency" (or "impeachment") that
10 the Responses even *attempt* to identify relates to the scope of Brown & Bain's role in advising
11 Citizens with respect to the APS dispute (the Responses contend that Citizens previously said that
12 role was broad, and now claims it was narrow). But there is no inconsistency, as demonstrated by
13 even the selectively highlighted and truncated quotes the Objectors have culled from various sources
14 to support their assertions.

15 Mr. Flynn swears in his declaration that:

16 In the course of representing Citizens, Wright & Talisman considered
17 the possibility of filing a lawsuit against APS or related entities in
18 Arizona state or federal court. Wright & Talisman suggested to
19 Citizens that it would be useful to retain as local counsel a local lawyer
20 familiar with the Arizona federal and state court system to advise us on
21 procedural aspects of complex civil litigation in those for a, including
22 such matters as the backlog of the civil docket in those courts, the
23 degree of difficulty, in general, of obtaining preliminary injunctive
24 relief in commercial litigation in such courts, and other tactical and
25 procedural issues that would affect such a lawsuit and whether it could
26 be resolved expeditiously. [Flynn Decl. ¶3]

27 He goes on to add that the Brown & Bain lawyers were not asked to, and did not, advise him
28 or Citizens about whether Citizens should sue APS or the merits of such a dispute. [*Id.* ¶¶5-9]
Those avowals are entirely consistent with each of the following snippets quoted in the Responses
(and alleged to demonstrate that somebody is lying about Brown & Bain's role):

This tortured analysis is the only hint any of the Objectors provide about the true argument they
apparently are intending to make—that Rule 1.7(b) applies here and overrides Rule 3.7.

- 1 • “Citizens also sought advice [from Brown & Bain] regarding the
2 state law claims and the possibility of initiating an action against
3 APS in Arizona courts....” (The procedural and tactical advice
4 Brown & Bain provided is, indeed, advice “regarding state law
5 claims.”)
- 6 • “In its contractual disputes or negotiations with PWC or APS,
7 Citizens has used separate counsel including Troutman & Sanders,
8 Wright & Talisman and Brown & Bain.” (Citizens *did* use Brown
9 & Bain, who communicated through Mr. Flynn, to provide
10 procedural and tactical advice.)
- 11 • Brown & Bain provided advice on “other tactical and procedural
12 issues that would affect such a lawsuit and whether it could be
13 resolved expeditiously” (Absolutely correct; the preceding part
14 of Mr. Flynn’s declaration explains the substance of the advice.)
- 15 • Messrs. Mais and Lake “provided advice (in both oral and written
16 form) ... regarding the [procedural and tactical] topics [listed in
17 Mr. Flynn’s declaration].” (Absolutely correct.)

18 The centerpiece of the Counties’ “impeachment” plan is a quoted portion of an e-mail that,
19 through the magic of ellipses, omits *over 60 words*. It is difficult to imagine what the Counties
20 *hoped* to prove with the doctored quote, even assuming the Counties thought the Commission would
21 not bother to read the entire document (the omitted portion of which confirms that Mr. Mais
22 provided advice about precisely the topics identified in Mr. Flynn’s declaration). The adulterated
23 quote is merely a statement by Mr. Mais that he was willing to discuss “any other issues that we
24 need to address,” and that the resolution of a factual issue might be important to overcoming a
25 procedural obstacle presented by Arizona law . The e-mail does not contradict the declaration of Mr.
26 Flynn—who will testify in this case—that Brown & Bain was not asked to, and did not, analyze the
27 merits of claims against APS.

28 No amount of bold-faced type or truncated quotes causes the e-mail, or any of the other
quotes selected by the Responses, to contradict anything that has ever been or reasonably could be
expected to be said in these proceedings. If this sideshow is a preview of the Objectors’ cross-
examination in the evidentiary hearing, it speaks volumes about the merits of their positions.

II. NO “EXAMINATION” OF MR. MAIS OR “FACTUAL DETERMINATIONS” ARE JUSTIFIED.

RUCO proposes that the Commission examine Mr. Mais, and Staff contends that there are
“factual determinations” that must be resolved here. But, as discussed above, the presence or

1 absence of these “contradictions” is irrelevant to whether disqualification is appropriate. Rule 3.7
2 prescribes a specific legal framework for addressing the lawyer-witness situation, and until the
3 Objectors prove that each prerequisite of Rule 3.7 is present, whether the lawyer-witness’ testimony
4 would be helpful or harmful is immaterial.

5 Beyond that, there is always some remote possibility that a clever lawyer could unearth some
6 contradiction between something a witness says and something the lawyer for one’s opponent might
7 say if examined. If that were the standard, the other side’s lawyer would always be fair game for
8 tactical disqualification motions, because the lawyer undoubtedly dealt with the client’s experts or
9 has unprivileged factual knowledge about what witnesses have said. If that were the standard,
10 Citizens would have the right to depose Staff counsel regarding what Staff’s experts have said, or
11 what was said to them, and could then seek disqualification of Staff counsel if there were any
12 perceived discrepancies. But that is *not* the standard under Rule 3.7. Rule 3.7 has explicit
13 safeguards to ensure that the client’s right to counsel of choice is respected in the absence of highly
14 unusual circumstances. Speculation that “examination” might yield some useful information is no
15 basis for sidestepping those safeguards.

16 **III. THE OBJECTORS CANNOT “SUPPLEMENT” THEIR WITNESS LIST IN A**
17 **CONTRIVED EFFORT TO DISQUALIFY BROWN & BAIN.**

18 Mr. Mais is not now and has not ever been listed as a witness, and the time for filing written
19 testimony of any kind passed more than two months ago. The Responses do not and could not
20 dispute those facts. Rule 3.7 thus cannot apply, because Citizens’ lawyer is not a witness at all.

21 In an attempt to overcome this fatal defect in its argument, Staff says, without citation to any
22 authority, that “impeachment witnesses are always subject to being called by any party at any time,
23 even in administrative proceedings.” Wrong. All witnesses, whether “impeachment” or otherwise,
24 must be disclosed in Arizona state court well before (or at least at) the final pretrial conference. *See*,
25 *e.g.*, Ariz. Rs. Civ. P. 16(d)(4) (joint pretrial statement shall include “[a] list of the witnesses
26 intended to be used by each party during the trial,” and “[n]o witness shall be used at trial other than
27 those listed”), 26.1; Ariz. Admin. Code R14-3-101 (Rules of Civil Procedure applicable). The
28 procedural order in this case provided for submissions of written testimony, and required the parties

1 to submit such testimony by March 13. That date came and went without a peep about this issue.
2 So, too, did the final pretrial conference (on March 21). Absent some legitimate claim of surprise
3 (which the Objectors do not claim and cannot demonstrate—after all, they have known everything
4 there is to know about Brown & Bain’s role for nearly four months), there is no basis for permitting
5 the Objectors to ignore the procedural order and add an undisclosed, live witness.

6 The purpose of the Objectors’ sudden interest in Brown & Bain is transparent and unseemly,
7 and the Responses only serve to highlight that point. As we have discussed, a large portion of the
8 Responses is spent pursuing the false assertion that Brown & Bain’s role appeared far more
9 prominent than Citizens’ Reply and supporting declaration suggest. Assuming that *were* true, any
10 legitimate interest the Objectors had in Brown & Bain’s role would presumably have been far
11 *greater* several months ago, during which time they claim to have believed that role was more meaty
12 than it was. Yet the Objectors all remained utterly apathetic—until Brown & Bain became Citizens’
13 chosen counsel. Better proof of a “tactical contrivance to trigger disqualification,” *Sellers v.*
14 *Superior Court*, 154 Ariz. 281, 288, 742 P.2d 292, 299 (Ct. App. 1987), would be hard to imagine.

15 **IV. MR. MAIS IS NOT A “NECESSARY” WITNESS.**

16 All three Responses are completely silent on the legal requirement that disqualification is
17 unwarranted unless Mr. Mais is a “*necessary*” witness. That omission is unsurprising, because
18 necessity is absent if, among other things, the evidence he might provide is available elsewhere. The
19 Objectors do not, and could not, meet that requirement, because there are documents (the
20 contemporaneous notes and memoranda) and other witnesses (notably, Mr. Flynn, who was the
21 conduit for all such information) who can supply whatever information Mr. Mais could. [*See, e.g.,*
22 *Flynn Decl.* ¶10 (“If called to testify, I am capable of testifying about the advice, as described above,
23 that Brown & Bain lawyers provided to Wright & Talisman and, through us, to Citizens”)]

24 Indeed, through the Counties’ elaborate discussion of the questions they propose to ask the
25 current, properly-listed Citizens witnesses, they underscore that they could adduce from those
26 witnesses everything they could even *dream* of asking Mr. Mais. If there were a “conflict” or nugget
27 of “impeachment,” they already have their ability to mine it with Mr. Flynn or other Citizens
28 witnesses. In fact, the Counties threaten to do just that. Citizens welcomes and encourages that

1 prospect. The Objectors' desire to add another nose to the count does not make Mr. Mais
2 "necessary," and because he is not a "*necessary witness*," Rule 3.7, by its terms, is inapplicable.

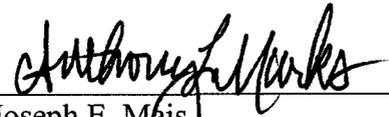
3 **Conclusion**

4 The Objections were wrong from the beginning because they were unsupported by the plain
5 language of the Rule itself or by any legal authority—a point confirmed by the absence of any real
6 attempt in either the Objections or Responses to identify legal authority to justify the requests,
7 apparently in the hope that the Commission likewise believes the law to be irrelevant. Those errors
8 were compounded through the Counties' gross misstatement of the factual record, which it nowhere
9 attempts to defend.

10 The Objectors have clung to their mistakes in the Responses, raising new arguments that are
11 no more supportable than the ones they abandoned. Had these Objections been raised in state or
12 federal court, the Court likely would have rewarded the Objectors with sanctions. They evidently
13 believe that "anything goes" before the Commission. That is an insult to the Commission, and a
14 ruling based, as requested, on anything other than the accepted legal principles identified in Citizens'
15 Reply would reward that disrespect. The Objections should be overruled.

16 Dated: May 31, 2002.

17 Respectfully submitted,
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