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BEFORE THE ARIZONA CORPORATION COMMISSION RECEIVED

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1
2 WILLIAM A. MUNDELL
3 CHAIRMAN
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5 COMMISSIONER
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7 COMMISSIONER

JUL 16 2002

2002 JUL 16 A 11: 30

AZ CORP COMMISSION
DOCUMENT CONTROL

DOCKETED BY []

8 IN THE MATTER OF THE APPLICATION OF
9 THE ARIZONA ELECTRIC DIVISION OF
10 CITIZENS COMMUNICATIONS COMPANY TO
11 CHANGE THE CURRENT PURCHASED POWER
12 AND FUEL ADJUSTMENT CLAUSE RATE, TO
13 ESTABLISH A NEW PURCHASED POWER AND
14 FUEL ADJUSTMENT CLAUSE BANK, AND TO
15 REQUEST APPROVED GUIDELINES FOR THE
16 RECOVERY OF COSTS INCURRED IN
17 CONNECTION WITH ENERGY RISK
18 MANAGEMENT INITIATIVES.

DOCKET NO. E-01032C-00-0751

PROCEDURAL ORDER

Arizona Corporation Commission

DOCKETED

JUL 16 2002

BY THE COMMISSION:

DOCKETED BY [CAR]

12 On September 28, 2000, the Arizona Electric Division ("AED") of Citizens Communications
13 Company ("Citizens") filed with the Arizona Corporation Commission ("Commission") an
14 application to change the current purchased power and fuel adjustment clause rate ("PPFAC"), to
15 establish a new PPFAC bank, and to begin accruing carrying charges and to request approved
16 guidelines for the recovery of costs incurred in connection with energy risk management initiatives
17 ("Application").

18 By Procedural Order issued April 18, 2002, the law firm of Gallagher & Kennedy was
19 disqualified from representing Citizens in this matter. Citizens was directed file an appearance of
20 substitute counsel as soon as practicable.

21 On May 2, 2002, the law firm of Brown & Bain, P.A. ("Brown & Bain") entered an
22 appearance as counsel on behalf of Citizens.

23 On May 9, 2002, Mohave and Santa Cruz Counties ("Counties") filed an Objection to Notice
24 of Appearance of Substitute Counsel. On May 14, 2002, Staff filed a Joinder in the Counties'
25 objection to Brown & Bain's representation. On May 22, 2002, the Residential Utility Consumer
26 Office ("RUCO") filed a joinder in the Counties' opposition to Brown & Bain's appearance as
27 counsel for Citizens in this case.
28

1 On May 22, 2002, Brown & Bain filed a Reply in Support of Its Notice of Appearance of
2 Substitute Counsel.

3 Responses were filed on May 29, 2002 by the Counties, Staff, and RUCO.

4 On June 3, 2002, Brown & Bain filed a Surreply in Support of its Notice of Appearance of
5 Substitute Counsel.

6 Pursuant to Procedural Order issued June 11, 2002, an oral argument was conducted on July
7 2, 2002.

8 **Opposition to Brown & Bain's Representation**

9 The Counties contend that, because attorneys from Brown & Bain previously provided legal
10 advice to Citizens with respect to its purchase power dispute with Arizona Public Service Company
11 ("APS"), the entire Brown & Bain firm should be disqualified. According to the Counties, Joseph
12 Mais and any other Brown & Bain attorney who provided advice to Citizens regarding the purchase
13 power dispute are potential witnesses in this proceeding because Citizens previously waived the
14 attorney-client privilege regarding that dispute. The Counties claim that Rule 42, Rules of the
15 Arizona Supreme Court (Ethical Rule "ER" 3.7), prevents an attorney from appearing as an advocate
16 in a proceeding in which the attorney is likely to be a necessary witness. ER 3.7 provides as follows:

- 17
- 18 (a) A lawyer shall not act as advocate at a trial in which the lawyer
is likely to be a necessary witness except where:
- 19 (1) the testimony relates to an uncontested issue;
- 20 (2) the testimony relates to the nature and value of legal
services rendered in the case; or
- 21 (3) disqualification of the lawyer would work substantial
hardship on the client.
- 22 (b) A lawyer may act as an advocate in a trial in which another
lawyer in the lawyer's firm is likely to be called as a witness
23 unless precluded from doing so by ER 1.7¹ or ER 1.9².
- 24

25 ¹ ER 1.7(a) prohibits a lawyer from representing a client if that representation is directly adverse to another client, unless
26 the lawyer reasonably believes the representation will not be adverse and both clients consent to the representation. ER
1.7(b) provides that a lawyer may not represent a client if the representation 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 the lawyer reasonably
27 believes the representation will not be adversely affected and the client consents after consultation.

28 ² ER 1.9 provides that a lawyer who previously represented a client is prohibited from representing another person in the
same or substantially related matter in which that person's interests are materially adverse to the interests of the former
client, unless the former client consents.

1 The Counties assert that the comments to ER 3.7 support their opposition to Brown & Bain's
2 continued representation. The comments indicate that because a witness must testify on the basis of
3 personal knowledge, while an advocate is expected to explain evidence given by others, it may not be
4 clear if an advocate-witness is offering proof or an analysis of the proof. The Counties cite
5 *Cottonwood Estates, Inc. v. Paradise Builders, Inc.*, 128 Ariz. 99 (1981), for the proposition that a
6 lawyer should not be permitted to represent a client in a case where he may also be called as a
7 witness. In *Cottonwood*, the Arizona Supreme Court upheld the trial court's decision to disqualify
8 the defendant's attorney in a breach of contract case, where the plaintiff intended to call the
9 defendant's attorney as a witness due to his personal knowledge regarding the defendant's assets and
10 liabilities. The Counties claim that, although *Cottonwood* was decided prior to implementation of the
11 current Rules of Professional Conduct, a subsequent case decided after enactment of the current Rules
12 cited *Cottonwood* with approval. *See, Sellers v. Superior Court*, 154 Ariz. 289 (1987).

13 The Counties also cite *Security General Life Ins. Co. v. Superior Court*, 149 Ariz. 332 (1986)
14 as supporting precedent. In *Security General*, the Arizona Supreme Court established a two-part
15 criteria for establishing whether an attorney is a *necessary* witness pursuant to ER 3.7. The Court
16 held that the proposed testimony must be relevant and material, and that the testimony must be
17 unobtainable elsewhere. *Id.* at 335. The Counties argue that both prongs of the *Security General*
18 case are met here because the purchase power dispute is a material issue in this case, and because
19 Brown & Bain attorneys are the only persons who can provide underlying information regarding the
20 assumptions they made, the analysis they undertook, and the advice they rendered.

21 The Counties also argue that the representation by a different Brown & Bain attorney (other
22 than those who offered legal advice on the purchase power dispute) is not permissible. The Counties
23 acknowledge that ER 3.7(b) permits representation by another member of the firm that will not
24 appear as a witness, as long as such representation will not result in a conflict of interest or
25 compromise the interests of a former client. However, the Counties contend that continued
26 representation by the firm will create an unacceptable dilemma for an attorney who may be forced to
27 choose between zealously representing his client or defending the testimony of his partner.

28 Finally, the Counties claim that Brown & Bain's disqualification will not cause a substantial

1 hardship for Citizens. The Counties assert that because there are no current deadlines in place, and no
2 hearing date has been set, Citizens will not be prejudiced by having to select new counsel at this stage
3 of the proceeding.

4 Staff agrees with the Counties' opposition to Brown & Bain's representation in this
5 proceeding. Staff claims that the testimony and pleadings submitted in this case make it clear that
6 Mr. Mais is a potential witness due to Citizens' waiver of the attorney-client privilege. Staff argues
7 that Mr. Mais is not a witness just as to tangential facts but was involved, by Citizens' prior
8 admission, in rendering advice regarding state law claims and the possibility and timing of initiating a
9 lawsuit against APS. Staff concludes that, at a minimum, the Brown & Bain attorneys that gave legal
10 advice regarding the purchase power dispute should be disqualified.

11 RUCO claims that it cannot take a position on disqualification until the Commission
12 investigates and examines Mr. Mais under oath regarding his advice on the purchase power dispute.
13 RUCO suggests that a preliminary hearing should be conducted to determine whether Citizens'
14 communications with Mr. Mais contradict Company witness Flynn's pre-filed testimony.

15 **Citizens' Response to the Request for Disqualification**

16 Citizens contends that the proponents of disqualification bear a heavy burden to prove that the
17 criteria set forth in ER 3.7 have been met. Citizens claims first that, contrary to the opposing parties'
18 arguments, Mr. Mais is not a witness in this case because he was not noticed as a witness prior to the
19 previously established March 13, 2002 deadline for filing testimony. In addition, Citizens asserts that
20 no other party appeared interested in the testimony of Brown & Bain's attorneys until after the firm
21 entered an appearance on behalf of Citizens. Citizens argues that this disinterest in Brown & Bain's
22 prior legal advice shows that the opposing parties have contrived a conflict of interest to trigger
23 disqualification.

24 Citizens also argues that Mr. Mais is not a *necessary* witness under ER 3.7. Citizens contends
25 that the opposing parties' arguments fail to meet the criteria described in the *Security General* case
26 because Mr. Mais' testimony is neither material nor unobtainable elsewhere. Citizens argues that
27 Brown & Bain's previous legal advice was limited to rendering an opinion on the practical likelihood
28 of getting prompt attention from an Arizona state or federal court, if the Company were to file a civil

1 lawsuit against APS. Thus, according to Citizens, Brown & Bain's earlier legal advice is tangential
2 to the issues pending before the Commission in this proceeding. Citizens also contends that there are
3 numerous sources of the identical evidence regarding Brown & Bain's earlier legal advice. Citizens
4 asserts that the advice given by Mr. Mais is reflected in contemporaneous documents and the
5 testimony of Mr. Flynn. As a result, Citizens argues that the incremental value of probing the
6 underlying assumptions of Brown & Bain's advice is too remote to warrant imposing the penalty of
7 denying Citizens its chosen counsel. As an alternative, Citizens offered that the co-author of the
8 April 26, 2001 memorandum to Mr. Flynn (Brian Lake) could be called to testify regarding Brown &
9 Bain's prior legal advice to Citizens.

10 The final argument raised by Citizens is that two of the exceptions to ER 3.7(a) apply in this
11 case. Citizens claims that there is no "contested issue" at stake because Brown & Bain's earlier legal
12 advice was limited to describing procedural aspects of Arizona state and federal litigation. Citizens
13 also asserts that the opposing parties have understated the "hardship" that would be imposed by
14 disqualifying Brown & Bain. Citizens contends that it would be deprived of its trusted, longstanding
15 counsel, and that it would be difficult to find representation in this complex case because most large
16 firms in Arizona would likely have some sort of conflict due to representation of Pinnacle West and
17 its subsidiary companies, including APS.

18 **Discussion and Conclusion**

19 As stated in the April 18, 2002 Procedural Order issued in this case, "[t]he disqualification of
20 an attorney or a firm from a proceeding is not a matter that the Commission takes lightly." The prior
21 Procedural Order expressed concerns with avoiding "the perception of impropriety" and with
22 ensuring that all parties are afforded "full due process." In order to protect the integrity of the
23 Commission's process, the Procedural Order disqualified Citizens' prior counsel in this case because
24 one of the firm's founding members served on the Board of Directors of Pinnacle West and APS at
25 the time that Citizens was embroiled in a dispute with those companies regarding interpretation of the
26 prior purchased power agreement.

27 Brown & Bain's representation of Citizens in this matter does not raise the same type of
28 public policy concerns stated in the prior Procedural Order. However, the firm's representation raises

1 a different issue that requires interpretation of the Arizona Supreme Court's rules, specifically ER 3.7
2 which addresses situations where a lawyer is required to appear as a witness.

3 *The Necessary Witness Standard*

4 As stated above, with certain exceptions ER 3.7 generally precludes a lawyer from
5 representing a client at trial when the lawyer "is likely to be a necessary witness." Since Mr. Mais is
6 apparently the only Brown & Bain attorney who rendered advice regarding the purchase power issue
7 and is also representing Citizens in this proceeding, the threshold question that must be answered is
8 whether Mr. Mais is a necessary witness in this case. The *Security General* case was cited by both
9 sides of the dispute in support of their respective positions on this issue. As described above, the
10 *Security General* definition of *necessity* requires that the proposed testimony must be "relevant and
11 material" and that it must be "unobtainable elsewhere."

12 With respect to whether Mr. Mais' testimony would be relevant and material, the decision by
13 Citizens whether to pursue litigation against APS is an issue in this case and Citizens, having waived
14 the attorney-client privilege with respect to that issue, has opened up for litigation in this case the
15 reasonableness of the legal advice given. As such, testimony by attorneys from Brown & Bain
16 regarding legal advice given on the purchase power dispute would be relevant and material in this
17 proceeding.

18 The more difficult question is whether the information that would be provided by Mr. Mais'
19 testimony is "unobtainable elsewhere." In the *Security General* case, the Arizona Supreme Court
20 determined that the plaintiff failed to show that the defendant attorney's testimony could not be
21 obtained from other witnesses. *Security General* at 335. The Court found that the defendant's
22 attorney, who had previously served as Director of the Arizona Departments of Insurance and
23 Administration, had no personal knowledge regarding either the plaintiff or the defendant attorney's
24 client that was unobtainable "from a host of departmental employees, past and present." *Id.*
25 Accordingly, the Court vacated the trial court's disqualification of the defendant's law firm.

26 The facts presented in this case are significantly different. Here, although Citizens has
27 presented the testimony of another firm's attorney regarding Brown & Bain's advice, as well as a
28 memorandum prepared by Brown & Bain, Brown & Bain attorneys are the only persons who can

1 provide underlying information regarding the legal advice they rendered on the purchase power
2 litigation issue. Unlike the situation in *Security General*, where the plaintiff was attempting to elicit
3 general expert opinion testimony from the defendant's counsel because of that attorney's employment
4 background, in this case the Counties and Staff seek factual testimony regarding the basis of the legal
5 advice given to Citizens. Citizens, having waived the attorney-client privilege with respect to that
6 legal advice, should not now be heard to complain (subject to the exceptions discussed below) that
7 the attorneys who gave the advice are off-limits to discovery and cross-examination. Because the
8 underlying basis of the advice given by the Brown & Bain attorneys is not obtainable from any other
9 source, the second prong of the *Security General* test is also met.

10 *Exceptions to the Necessary Witness Standard*

11 The next question to be considered is whether any of the ER 3.7(a) exceptions apply.
12 Although Citizens contends any testimony by Brown & Bain lawyers would relate to an "uncontested
13 issue," thereby invoking the ER 3.7(a)(1) exception, the issue of advice given regarding whether to
14 litigate the purchase power dispute with APS is a contested issue in this case. Therefore, despite
15 Citizens' claim that Brown & Bain gave only limited procedural advice on that issue, the firm's
16 advice was not given regarding an uncontested issue. The exception in ER 3.7(a)(2), which relates to
17 testimony regarding attorney fees, is clearly not relevant here.

18 The most subjective of the exceptions is ER 3.7(a)(3), which is invoked if disqualification
19 would cause a "substantial hardship on the client." The Comments regarding this section indicate
20 that "a balancing is required between the interests of the client and those of the opposing party" and
21 that, in assessing hardship, "due regard must be given to the effect of disqualification on the lawyer's
22 client." However, the Comments also state that "[I]t is relevant that one or both parties could
23 *reasonably foresee that the lawyer would probably be a witness* (emphasis added)."

24 In this case, Citizens has alleged hardship to the extent that it will be deprived of its trusted
25 counsel, the difficulty of Citizens finding acceptable replacement counsel, and due to additional
26 delays in the case that will cause the Company to incur carrying charges associated with the PPFAC
27 costs. However, the Company's alleged hardship must be balanced against the need for opposing
28 counsel to probe the reasonableness of the advice given by the Brown & Bain attorneys, as well as the

1 integrity of the Commission's process.

2 As indicated in the Comments to ER 3.7 cited above, another factor that must be considered is
3 whether both sides could or should have reasonably foreseen that the Brown & Bain attorneys who
4 gave advice on the purchase power dispute were likely to be witnesses. Citizens' decision not to
5 pursue litigation against APS regarding the purchase power dispute was placed at issue in this case
6 many months ago. Indeed, the Company's legal strategy to waive the attorney-client privilege
7 regarding that decision was directed at countering the opposing parties' claims that the issue should
8 have been litigated. Thus, it should not have come as a surprise to Citizens that the opposing parties
9 would seek to conduct discovery on, and perhaps cross-examine, all of the attorneys who rendered
10 legal advice regarding the purchase power dispute litigation strategy. Weighing all of these factors,
11 the potential hardship to Citizens is not sufficient to overcome the need to afford all parties the ability
12 to fully examine the underlying basis for the legal advice rendered regarding the Company's litigation
13 strategy against APS.

14 Pursuant to ER 3.7(a), and based on the information in the record as it currently exists, Mr.
15 Mais and Mr. Lake are disqualified from representing Citizens in this proceeding due to the
16 likelihood that one or both of those individuals may be necessary witnesses³.

17 *Disqualification of Entire Firm*

18 The final issue to be considered is whether the entire firm of Brown & Bain should be
19 disqualified. As described above, ER 3.7(b) permits a lawyer to act as an advocate in a trial in which
20 another lawyer in the same firm is likely to be a witness, unless prohibited from doing so due to a
21 conflict of interest (ER 1.7) or where the interests of a former client would be compromised (ER 1.9).
22 The Counties argue that the entire firm should be disqualified because the remaining attorneys in the
23 firm could face the dilemma of having to decide whether to defend the client's interests or those of
24 another member of the firm. At the oral argument, Staff indicated that it is opposed only to continued
25 representation by attorneys for Brown & Bain who were involved in rendering advice regarding the
26 purchase power dispute with APS.

27 _____
28 ³ Since Mr. Lake has not entered an appearance in this case, the disqualification technically applies at this time only to Mr. Mais.

1 As explained above, the issue presented by Brown & Bain's representation in this proceeding
 2 does not raise the same type of public perception or appearance of impropriety concerns that were
 3 discussed in the April 18, 2002 Procedural Order. Rather, the dispute before the Commission
 4 involves a narrow issue created when an attorney representing a client may also be required to be a
 5 witness in the case. Although Messrs. Mais or Lake may be necessary witnesses pursuant to ER
 6 3.7(a), the Counties have not presented a sufficient basis for disqualification of the entire Brown &
 7 Bain firm, pursuant to ER 3.7(b). The Counties' suggestion that the remaining attorneys may face an
 8 uncomfortable dilemma if their partners are required to testify does not justify the blanket prohibition
 9 that the Counties request. Absent a conflict under ER 1.7, or compromising a former client's interests
 10 under ER1.9, ER 3.7(b) permits other members of the firm who are not necessary witnesses to
 11 continue to represent the client. Based on the existing record and information, and subject to the
 12 specific disqualifications discussed above, the remainder of the law firm of Brown & Bain shall not
 13 be disqualified from representing Citizens in this matter.

14 IT IS THEREFORE ORDERED that Joseph Mais and Brian Lake are disqualified from
 15 representing Citizens in this proceeding pursuant to ER 3.7.

16 IT IS FURTHER ORDERED that any objections to this Procedural Order shall be filed by no
 17 later than July 23, 2002.

18 IT IS FURTHER ORDERED that if the Commission takes no action regarding any such
 19 objections by July 30, 2002, the objections will be deemed denied.

20 DATED this 16th day of July, 2002.

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 26 ...
 27 ...
 28



 DWIGHT D. NODES
 ASSISTANT CHIEF ADMINISTRATIVE LAW JUDGE

1 Copies of the foregoing mailed/delivered
this 16th day of July, 2002 to:

2
3 Joseph E. Mais
4 Anthony L. Marks
5 BROWN & BAIN, P.A.
6 2901 North Central Avenue
7 P.O. Box 400
8 Phoenix, Arizona 85001-0400
9 Attorneys for Citizens Communications
10 Company

11 Daniel W. Pozefsky
12 RUCO
13 2828 N. Central Ave., Suite 1200
14 Phoenix, Arizona 85004

15 Christine L. Nelson
16 Deputy County Attorney
17 P.O. Box 7000
18 Kingman, Arizona 86402

19 Walter W. Meek
20 AUIA
21 2100 N. Central Ave., Suite 210
22 Phoenix, Arizona 85004

23 Holly J. Hawn
24 Santa Cruz Deputy County Attorney
25 2150 N. Congress Drive, Ste. 201
26 Nogales, AZ 85621
27 Attorneys for Santa Cruz County
28

Raymond S. Heyman
Michael W. Patten
ROSHKA HEYMAN & DeWULF
400 East Van Buren Street, Ste. 800
Phoenix, AZ 85004
Attorneys for Mohave and Santa Cruz
Counties

Marshall Magruder
Lucy Magruder
P.O. Box 1267
Tubac, AZ 85646-1267

Christopher K. Kempley
Legal Division
ARIZONA CORPORATION COMMISSION
1200 W. Washington Street
Phoenix, Arizona 85007

Ernest G. Johnson
Utilities Division
ARIZONA CORPORATION COMMISSION
1200 W. Washington Street
Phoenix, Arizona 85007

By: 
Debbi Person
Secretary to Dwight D. Nodes