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BEFORE THE ARIZONA CORPORATION COMMISSION

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ARIZONA WATER COMPANY, an Arizona corporation, Complainant, vs. GLOBAL WATER RESOURCES, LLC, a foreign limited liability company; GLOBAL WATER RESOURCES, INC., a Delaware corporation; GLOBAL WATER MANAGEMENT, LLC, a foreign limited liability company; SANTA CRUZ WATER COMPANY, LLC, an Arizona limited liability corporation; PALO VERDE UTILITIES COMPANY, LLC, an Arizona limited liability corporation; GLOBAL WATER – SANTA CRUZ WATER COMPANY, an Arizona corporation; GLOBAL WATER – PALO VERDE UTILITIES COMPANY, an Arizona corporation; JOHN AND JANE DOES 1-20; ABC ENTITIES I – XX, Respondents.	)	DOCKET NO. W-01445A-06-0200 SW-20445A-06-0200 W-20446A-06-0200 W-03576A-06-0200 SW-03575A-06-0200 **Global's Response to Arizona Water Company's Motion for a Protective Order**

Arizona Corporation Commission
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Santa Cruz Water Company, LLC; Palo Verde Utilities Company, LLC; Global Water – Santa Cruz Water Company; Global Water – Palo Verde Utilities Company (the "Global Utilities") and Global Water Resources, LLC ("Global Parent")(collectively "Respondents" or "Global") respond in opposition to Arizona Water Company's ("AWC") motion for a protective order.

I. Preliminary Statement.

AWC's motion for a protective order requests a complete exemption from depositions. But discovery is a two-way street, and AWC's motion ignores overwhelming authority that

depositions of a party are permitted. Many of Global's proposed deposition topics relate to the factual basis of AWC's complaint, and are therefore directly relevant. Other topics primarily relate to potential defenses or impeachment of AWC's witnesses – topics whose relevance is beyond doubt. AWC also claims that the depositions would be burdensome, but its conclusory statement lacks any concrete foundation. AWC further objects to the timing of the depositions. But the notice was given sufficiently in advance of the deposition in accordance with the rules. Moreover, AWC's counsel was invited to name an alternate date of his choosing. AWC's objections are without merit, and its motion for a protective order should be denied. Global should be allowed to question AWC's witnesses on these important matters.

II. Global's proposed deposition concerns relevant topics.

The parties are on common ground that the availability of depositions is governed by the Arizona Rules of Civil Procedure ("Civil Rules"), as incorporated in the Commission's rules. The Civil Rules state that "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery, or to the claim or defense of any other party." Rule 26(b)(1). Under the Commission's rules, a Complainant is classified as a party. A.A.C. R14-3-103(A). Thus, AWC is a party, and it is subject to discovery regarding its "claim" as well as matters relevant to Global's potential defenses against AWC's complaint.

AWC, as the Complainant, bears the burden of proof to establish "that the Respondent is in violation of its Tariff, Arizona law, the Commission's rules or prior Orders." *Corrow v. Arizona Water Co.,* Decision No. 67581 (February 15, 2005) at 8; *see also SLV Properties, LLC v. Arizona Water Co.*, Decision No. 65755 (March 20, 2003) at 6. Thus, AWC is in the same position as a plaintiff in a civil suit. AWC cites no authority that a plaintiff is completely immune from discovery regarding the basis of its complaint.

The Civil Rules clearly provide that parties may be deposed. Civil Rule 30(b)(6). As the Committee Comment notes, "Any party may take the deposition of any other party, including depositions taken under Rule 30(b)(6)." Committee Comment to 1991 Amendment to Rule 30(a).

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It is well-established that a complete bar on depositions of a party is an extraordinary remedy to be granted under only the most unusual circumstances. As the Fifth Circuit noted, it "is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error." *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979). As the leading treatise states, it "is even more difficult to show grounds for ordering that discovery not be had when it is a deposition that is sought, and most requests of this kind are denied." Wright, Miller & Marcus, *Federal Practice and Procedure* Civil § 2037 (electronic version through 2007 update). As another court notes, "[n]ot only are protective orders prohibiting depositions rarely granted, but plaintiff has a heavy burden of demonstrating the good cause for such an order." *Medlin v. Andrew,* 113 F.R.D. 650, 653 (M.D.N.C. 1987).

The topics Global listed for the deposition may be divided into four broad categories. The most numerous category concerns the basis for statements or claims made by AWC in its complaint.[1] AWC has unquestionably put these matters at issue by including them in the Complaint. Moreover, the basis for a party's claims is explicitly stated as a proper topic of discovery. Civil Rule 26(b)(1). On a few occasions, the topics may also request AWC's opinion on matters included in its Complaint. A party's opinions on issues related to the case are discoverable under Arizona law. *State ex rel. Willey v. Whitman*, 91 Ariz. 120, 125, 370 P.2d 273, 277 (1962)(in division).

The second category of topics concerns Global's potential defenses to AWC's claims. Discovery of potential defenses is well-established.[2] *See U-Totem Store v. Walker*, 142 Ariz. 549, 553, 691 P.2d 315, 319 (App. 1984)(permitting defendant discovery against plaintiff for potential defenses even after entry of default). For example, prior AWC litigation may disclose grounds for collateral estoppel or judicial estoppel. Likewise, information about AWC's relationships with its affiliates, or the inappropriate conduct of its utility affiliates, is relevant to a potential unclean

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[1] Topics Numbers 1-11, 26, 28, 37-39, and 41-43.

[2] Topics Numbers 12-25, 27, 29, 34.

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hands defense. In addition, such information may be used to impeach AWC's witnesses. As the leading treatise explains, "[d]iscovery is commonly allowed in which the discovering party seeks information with which to impeach witnesses for the opposition." Wright, Miller & Marcus, *Federal Practice and Procedure* Civil § 2015 (electronic version through 2007 update).

The third category concerns how AWC became aware of the matters described in AWC's complaint.[3] Such information has many possible uses. For example, it may lead to the identification of relevant documents, or to the discovery of new witnesses with relevant information. Such information is thus "reasonably calculated to lead to the discovery of admissible evidence" and is therefore discoverable. Rule 26(b)(1). The same is true of AWC's awareness of similar practices[4], and its communications with others about the matters in the Complaint.[5]

The fourth category concerns whether AWC suffered any damages from the conduct alleged in the complaint.[6] The absence of damages is relevant to developing a remedy, should AWC's claims be found to have merit. Likewise, information about damages is relevant to whether AWC has standing to pursue its claim.

III. <u>AWC has not alleged severe inconvenience.</u>

AWC argues, without elaboration or evidentiary support, that the depositions will only "squander the parties' time and force Arizona Water Company to incur additional expense." Such claims are only rarely granted, and then only in extreme circumstances, such a serious health issues. *See* Wright, Miller & Marcus, *Federal Practice and Procedure* Civil § 2037 (electronic version through 2007 update). For example, an out-of-state deponent can be required to attend an in-state deposition. *National Broker Assoc., Inc. v. Maryln Nutraceutials, Inc.*, 211 Ariz. 210, 216 ¶¶ 27-28, 119 P.3d 477, 483 (App. 2005). In addition "[c]onclusory assertions of injury are simply

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[3] Topic Numbers 35 and 36.

[4] Topic Number 33.

[5] Topic Number 40.

[6] Topic Numbers 30-32.

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insufficient." *Medlin, supra.* AWC's arguments are without factual support or explanation and therefore cannot form the basis of a protective order. Moreover, Global submitted to the deposition of two of its most senior officers. AWC has not shown that it would be subject to greater inconvenience.

IV. <u>The notice was timely.</u>

AWC objects to the timing of the notice. But the notice provided 10 business days notice, just as contemplated by the Civil Rules. Civil Rule 30(b)(1); *National Broker,* 211 Ariz. at 215 ¶ 22, 119 P.3d at 483. Shorter periods are sometimes permissible. *National Broker,* 211 Ariz. at 215 ¶ 23, 119 P.3d at 483; *See State v. Superior Court*, 3 Ariz. App. 541, 542, 416 P.2d 435, 436 (1966)(upholding deposition on 24 hours notice). Here Global's notice complied with the 10 business day period, so its timing should not be an issue.

AWC objects that its counsel was unavailable for the day specified due to the state bar convention, and that Global's counsel was aware of this. AWC fails to note that Global's counsel, before filing the notice, asked AWC to choose the date of the deposition but AWC's counsel declined. This offer has been repeated several times.

AWC next objects that the deposition is "premature and inconsistent with the Commission's procedural order" because the deposition would come before pre-filed testimony was due. But that procedural order clearly lists the last date for depositions as before the first date for pre-filed testimony. Thus, the Commission clearly contemplated that depositions would occur before, not after, pre-filed testimony. Moreover, pre-filed testimony is a substitute for oral testimony at the hearing. A.A.C. R14-3-109.M. Thus, AWC's position is analogous to it arguing that it is not subject to discovery until after its witnesses have testified at the hearing. There is no support for such a contention.

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V. Conclusion.

For these reasons, Global requests that the Commission deny AWC's motion for a protective order and order AWC to submit to the deposition(s) forthwith.

RESPECTFULLY SUBMITTED this 6th day of July 2007.

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