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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

COMMISSIONERS

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AZ CORP COMMISSION  
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APR 13 2009

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In the matter of: )  
 )  
ROBERT FRANKLIN HOCKENSMITH JR., )  
CRD# 1798614, )  
 )  
Respondent. )

DOCKET NO. S-20631A-08-0503

SECURITIES DIVISION'S  
RESPONSE TO RESPONDENT'S  
MOTION TO COMPEL FIRST (1<sup>st</sup>)  
REQUEST FOR PRODUCTION OF  
DOCUMENTS

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") hereby responds to the Motion to Compel the Division to respond to Respondent's First Request for Production of Documents submitted in connection with the above-captioned matter. Respondent is saying that there are no rules and procedures under the Commission's Rules of Practice and Procedure to address their document requests, but they are wrong. In short, the Motion to Compel and the First Request for Production of Documents fall well outside acceptable discovery limits as permitted for administrative proceedings under both the Arizona Revised Statutes and Arizona Rules of Practice and Procedure before the Corporation Commission. Accordingly, the Division has no alternative but to reject the demands included in this submission. The Division will, of course, comply with appropriate discovery requests that comport with the prescribed discovery rules for administrative adjudications.

DISCUSSION

Discovery rules in administrative actions are not subject to the whims of individual litigants. To the contrary, the rules and procedures for conducting discovery in administrative proceedings are explicitly provided under Arizona statute and through local administrative agency rules. Only by adhering to these provisions can parties to an administrative adjudication

1 participate in an acceptable, effective and cooperative disclosure process.

2         Legal counsel for Respondent apparently think that the Commission should treat utility  
3 cases and securities cases the same. However, the provisions of the Arizona Securities Act  
4 (“Securities Act”) govern this case, and information obtained during the course of investigations  
5 under the Securities Act are subject to a specific confidentiality provision, A.R.S. § 44-2042. The  
6 Confidentiality provision differentiates the disclosure standards under the Securities Act from  
7 those operating under other statutes, even those within the regulatory umbrella of the Commission.  
8 The policy reasons behind prohibiting officers and employees of the Commission from  
9 disseminating information obtained during the investigation of a matter unless such information is  
10 made a matter of public record include protection of the innocent from disclosure of private  
11 information as well as protection of the integrity of the regulatory enforcement process.  
12 Moreover, due process is not violated by application of the Confidentiality provision of the  
13 Securities Act. The discovery rules for administrative process effectively protect due process.

14         1.         ***Discovery is available for Administrative Proceedings within Arizona, but only***  
15                   ***within the limits as defined by statute and agency rule.***

16         Courts have often had occasion to consider the limits of discovery in administrative  
17 proceedings. Through these deliberations, two salient points have become evident. The first of  
18 these points is the fact that, because they derive from an entirely distinct process, the rules of civil  
19 procedure for discovery **do not** apply in administrative proceedings.<sup>1</sup> *See, e.g., Pacific Gas and*  
20 *Elec. Co.*, 746 F.2d 1383, 1387 (9<sup>th</sup> Cir. 1984); *Silverman v. Commodity Futures Trading Comm’n*,  
21 *549 F.2d. 28, 33 (7<sup>th</sup> Cir. 1977); NLRB v. Vapor Blast Mfg. Co.*, 287 F.2d 402, 407 (7<sup>th</sup> Cir. 1961).

22 \_\_\_\_\_  
23 <sup>1</sup> This principle is particularly important from a policy standpoint. Indeed, merging civil  
24 discovery rules into the administrative arena would have many deleterious results, including: (1)  
25 allowing respondents to access confidential investigative information far removed from the  
26 witnesses and exhibits relevant to the active case against them; (2) allowing respondents to protract  
the proceedings indefinitely; (3) allowing respondents to excessively consume scarce but vital  
resources better expended on other matters necessary for the protection of the public; and (4)  
allowing respondents to force the agency into the position of a civil litigant rather than into its  
proper role as a governmental regulatory authority.

1 The second point is that the authority to pursue discovery during the course of an  
2 administrative proceeding is not conferred as a matter of right. In fact, courts have repeatedly  
3 recognized that there simply is no basic constitutional right to pretrial discovery in administrative  
4 proceedings. *Silverman*, 549 F.2d. at 33 (7<sup>th</sup> Cir. 1977). The federal Administrative Procedures  
5 Act echoes this point by offering no provision for pretrial discovery during the administrative  
6 process. 1 Davis, *Administrative Law Treatise* (1958), § 8.15, p. 588.

7 In accordance with these findings, discovery within the confines of an administrative  
8 proceeding is only authorized to the extent that it is explicitly provided for in a separate statute or  
9 rule. *See, e.g., 73A C.J.S. Public Administrative Law and Procedure*, § 124 (1983)(“Insofar as the  
10 proceedings of a state administrative body are concerned, only the methods of discovery set forth  
11 by the pertinent statute are available, and the methods not set forth therein are excluded”); *See also*  
12 2 Am.Jur.2d. *Administrative Law* § 327 (2d. ed. 1994)(In the context of administrative law, any  
13 right to discovery is grounded in the procedural rules of the particular administrative agency).

14 Following these precepts, the state of Arizona has enacted both statutes and agency rules to  
15 address the issue of discovery in the context of administrative proceedings. Indeed, both the  
16 Arizona Revised Statutes and the Arizona Rules of Practice and Procedure before the Corporation  
17 Commission (“Rules of Practice and Procedure”) contain explicit provisions addressing discovery  
18 procedures in contested administrative adjudications. Only by observing these controlling provisions  
19 can a party effectively pursue discovery in an administrative matter before the Arizona Corporation  
20 Commission.

21 The statute setting forth the parameters of discovery in administrative proceedings is, not  
22 surprisingly, found in the chapter on Administrative Procedure, A.R.S. § 41-1001, *et seq.* Under  
23 Article 6 of this chapter, covering “Adjudicative Proceedings,” Arizona law provides as follows:

24 *A.R.S. § 41-1062: Hearings; evidence; official notice; power to require testimony and*  
25 *records; Rehearing*

26 A. Unless otherwise provided by law, in contested cases the following shall apply:

1 ...  
2 4. The officer presiding at the hearing may cause to be issued  
3 subpoenas for the attendance of witnesses and for the production of  
4 books, records, documents and other evidence and shall have the  
5 power to administer oaths.... *Prehearing depositions and*  
6 *subpoenas for the production of documents may be ordered by the*  
7 *officer presiding at the hearing, provided that the party seeking*  
8 *such discovery demonstrates that the party has reasonable need of*  
9 *the deposition testimony or materials being sought....*  
10 *Notwithstanding the provisions of section 12-2212, no subpoenas,*  
11 *depositions or other discovery shall be permitted in contested*  
12 *cases except as provided by agency rule or this paragraph.*

13 (Emphasis added). The plain import of this provision is that, in Arizona, the only forms of pre-  
14 trial discovery permitted in administrative proceedings are (1) subpoenas, based on a showing of  
15 need and authorized by the administrative hearing officer; (2) depositions, based on a showing of  
16 need and authorized by authorized by the hearing officer; and (3) any other discovery provision  
17 specifically authorized under the individual agency's rules of practice and procedure.

18 The Rules of Practice and Procedure, R14-3-101, *et seq.*, thus serve to augment the available  
19 means of pre-trial discovery within the Corporation Commission. Under these rules, the presiding  
20 administrative law judge may also direct a pre-hearing conference wherein an arrangement is made  
21 for the exchange of proposed exhibits, witness lists, or prepared expert testimony. *See* A.A.C. R-14-  
22 3-108(A). These rules also provide that a party may gain access to additional pre-hearing materials  
23 by way of a discretionary administrative law judge order requiring that the parties interchange copies  
24 of exhibits prior to hearing. *See* A.A.C. R-14-3-109(L). Indeed, Corporation Commission  
25 administrative law judges often call upon these rules in ordering parties to file a list of witnesses and  
26 exhibit at a time and date in advance of the hearing, thereby facilitating the hearing preparation  
process. Such an order has provided for an appropriate exchange of documents in this case.

The aforementioned provisions establish that only certain, specified methods of discovery are  
sanctioned in administrative proceedings before the Arizona Corporation Commission, and that such  
methods of discovery are often both limited and discretionary. The discovery Request filed by

1 Respondents in this instance utterly fails to acknowledge or operate within this discovery framework.

2           **2.     *The Arizona rules and procedures governing discovery for administrative***  
3           ***proceedings comport with the principles of due process.***

4           As previously addressed, *supra*, there is simply no constitutional right to discovery in  
5 administrative proceedings. Nor does the Constitution require that a respondent in an  
6 administrative proceeding be aware of all evidence, information and leads to which opposing  
7 counsel might have access. *Pet v. Dep't of Health Serv.*, 207 Conn. 346, 542 A.2d 672 (1988)  
8 *quoting Federal Trade Comm'n v. Anderson*, 631 F.2d 741, 748 (D.C.Cir. 1979); *Cash v. Indus.*  
9 *Comm'n of Arizona*, 27 Ariz. App. 526, 556 P.2d 827 (App. 1976). Despite this, the concept of due  
10 process is still germane to the procedures of governmental actions such as the administrative  
11 proceeding at issue. As the Supreme Court noted in *Willner v. Comm. on Character and Fitness*,  
12 373 U.S. 96, 107 (1963), a respondent must be adequately informed of the evidence against him  
13 and be afforded an adequate opportunity to rebut this evidence. A denial of pre-hearing  
14 depositions is not a denial of due process because respondent had ample opportunity to cross-  
15 examine the witnesses at a full hearing. *Electomec Design & Dev. Co. v. NLRB*, 409 F.2d 631 (9<sup>th</sup>  
16 Cir. 1969).

17           Courts have since had occasion to consider what types of procedures do in fact comply  
18 with due process in the context of administrative proceedings. It is now well-settled that  
19 procedures designed to ensure "rudimentary requirements of fair play" are sufficient to meet the  
20 due process requirements in administrative adjudications. *Mitchell v. Delaware Alcoholic*  
21 *Beverage Control Comm'n*, 193 A.2d 294, 313 (Del.Super. 1963), *rev'd on other grounds*, 196  
22 A.2d 410 (Del.Super. 1963); *see also Matthews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting  
23 *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)("the fundamental requirement of due process is the  
24 opportunity to be heard at a meaningful time and in a meaningful manner"); *Swift & Co. v. U.S.*,  
25 308 F.2d 849, 851 (7<sup>th</sup> Cir. 1962)("due process in an administrative proceeding, of course, includes  
26 a fair trial, conducted in accordance with fundamental principles of fair play and applicable  
procedural standards established by law"); 73A C.J.S. *Public Administrative Law and Procedure*,

1 § 60 (1983); see also *Adamchek v. Board of Educ.*, 387 A.2d. 556 (Conn. 1978)(although the  
2 Uniform Administrative Procedures Act does not expressly provide for pre-trial discovery, the  
3 procedures required for the UAPA still exceed the minimal procedural safeguards mandated by the  
4 due process clause).

5         Petitioners have often sought to challenge this due process standard for administrative  
6 proceedings. For instance, in *Cimarusti v. Superior Court*, 79 Cal.App.4th 799, 94 Cal.Rptr.2d  
7 336 (2000), a petitioner argued that his due process rights were compromised through the lower  
8 court's curtailment of his discovery requests. The court rejected this claim, reasoning that the pre-  
9 hearing discovery and hearing procedures as provided under the state's Administrative Procedures  
10 Act fully satisfied the petitioner's due process rights. Similarly, in *Silverman*, 549 F.2d 28, a  
11 petitioner argued that he was denied due process in connection with the prehearing production of  
12 documents by the CTFC. In noting that the petitioner received copies of all proposed exhibits, a  
13 list of all proposed witnesses, the identity of the government employees who had investigated the  
14 case, and copies of memoranda reflecting petitioner's own statements to administrative  
15 representatives, the court ruled that the proceedings did not involve a denial of due process.  
16 Responding to a similar appeal, a Texas court found that due process in administrative proceedings  
17 mandates notice, a hearing, and an impartial trier of facts, but not various methods of discovery.  
18 *Huntsville Mem'l Hosp. v. Ernst*, 763 S.W.2d 856, 859 (Tex.App. 1988).

19         These cases demonstrate that, in order to comport with procedural due process in the  
20 context of an administrative proceeding, an agency need only enforce the guidelines of applicable  
21 administrative statutes and rules while using the discretion inherent in these guidelines to ensure a  
22 level of fundamental fairness. See *Pacific Gas and Elec. Co. v. Federal Energy Regulatory*  
23 *Comm'n*, 746 F.2d 1383 (9<sup>th</sup> Cir. 1984)(If an agency has adopted rules providing for discovery in  
24 its proceedings, **the agency is bound by those rules** and must ensure that its procedures meet due  
25 process requirements)(*emphasis added*). It follows that the Arizona statutes and agency rules  
26 governing discovery procedure in administrative proceedings are more than adequate in satisfying

1 any due process concerns.

2  
3 **3. *Attempts to invoke the Civil Discovery Rules in this administrative forum are misplaced and unsustainable.***

4 As previously discussed, the extent of discovery to which a party to an administrative  
5 proceeding is entitled is primarily determined by the particular agency; the rules of civil procedure  
6 are inapplicable. *See, e.g., Pacific Gas and Elec. Co.*, 746 F.2d at 1387; *see also LTV Steel Co. v.*  
7 *Indus. Comm'n*, 748 N.E.2d 1176 (Ohio 2000) (discovery as generally provided by the rules of  
8 civil procedure in court proceedings is not available in administrative proceedings). This point is  
9 particularly obvious in light of the fact that the Arizona legislature and Corporation Commission  
10 have enacted and adopted specific statutes and rules, respectively, to govern discovery procedure  
11 in this administrative forum. *See* A.R.S. § 41-1001, *et seq.* (Rules of Practice and Procedure  
12 Before the Corporation Commission).

13 Despite these explicit rules on discovery, Respondents are attempting to use the civil  
14 discovery rules set forth in the Arizona Rules of Civil Procedure in this administrative proceeding.  
15 The Respondents appear to rely on Rule 14-3-101(A) of the Rules of Practice and Procedure to  
16 justify their position on discovery. In pertinent part, this provision states: "In all cases in which  
17 procedure is set forth *neither by law, nor by these rules, nor by regulations or order of the*  
18 *Commission*, the Rules of Civil Procedure for the Superior Court of Arizona as established by the  
19 Supreme Court of Arizona shall govern." (Emphasis added). However, this catch-all provision  
20 provides a secondary procedural resource only *where there is nothing in the law or rules governing*  
21 *a particular procedure.*<sup>2</sup> As has been pointed out at great length above, however, there is already  
22 plenty of governing authority with respect to discovery procedure in administrative proceedings  
23 within Arizona. Indeed, both laws **and** rules explicitly outline the proper discovery procedures for  
24 administrative proceedings in this state. As such, there is neither need nor justification to charge  
25

26 <sup>2</sup> Note that this Commission rule references different types of *procedures* (e.g. "service," "time computation," "motion practice", etc.), and not just specific "discovery procedures."

1 into the civil rules of procedure for guidance on discovery.

2 **CONCLUSION**

3 The discovery rules for contested administrative proceedings in this state are expressly  
4 provided by statute and agency rule, and the principles of due process are amply preserved within  
5 these rules. As a consequence, discovery requests predicated on inapplicable rules of civil  
6 procedure are misplaced in this administrative forum. It follows that the Division is neither  
7 inclined nor obligated to comply with Respondent's civil procedure-based "Request for Production  
8 of Documents." The Division will, of course, comply with future discovery requests that are not  
9 objectionable and comport with applicable law. Likewise, the Division will, at the appropriate  
10 time, produce complete lists of witnesses and exhibits, and copies of exhibits intended to be  
11 presented at hearing, thereby enabling Respondents both to examine the evidence against them and  
12 to formulate an adequate defense to such evidence.

13 RESPECTFULLY SUBMITTED this 13th day of April, 2009.

14 By:   
15 Pamela T. Johnson  
16 Attorney for the Securities Division of the  
17 Arizona Corporation Commission

18 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing  
19 filed this 13th day of April, 2009 with

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24 COPY of the foregoing hand-delivered this  
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