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2009 NOV 18 11:34

AZ CORP COMMISSION
DOCKET CONTROL

BEFORE THE ARIZONA CORPORATION COMMISSION

8 IN THE MATTER OF THE
9 APPLICATION OF LITCHFIELD PARK
10 SERVICE COMPANY, AN ARIZONA
11 CORPORATION, FOR A
12 DETERMINATION OF THE FAIR
13 VALUE OF ITS UTILITY PLANTS AND
14 PROPERTY AND FOR INCREASES IN
15 ITS WATER AND WASTEWATER
16 RATES AND CHARGES FOR UTILITY
17 SERVICE BASED THEREON.

DOCKET NO: SW-01428A-09-0103

Arizona Corporation Commission

DOCKETED

NOV 18 2009

DOCKETED BY

18 IN THE MATTER OF THE
19 APPLICATION OF LITCHFIELD PARK
20 SERVICE COMPANY, AN ARIZONA
21 CORPORATION, FOR A
22 DETERMINATION OF THE FAIR
23 VALUE OF ITS UTILITY PLANTS AND
24 PROPERTY AND FOR INCREASES IN
25 ITS WATER AND WASTEWATER
26 RATES AND CHARGES FOR UTILITY
SERVICE BASED THEREON.

DOCKET NO: W-01427A-09-0104

**LPSCO'S RESPONSE TO MOTION
TO QUASH SUBPOENA**

Litchfield Park Service Company ("LPSCO" or "Company") hereby responds to RUCO's Motion to Quash Subpoena ("Motion") for the deposition of Matt Rowell filed on November 17, 2009. As a matter of fundamental law, and under the facts of this case, RUCO's Motion is meritless and should be dismissed summarily.

I. BRIEF STATEMENT OF THE RESPONSE.

RUCO's Motion is a frivolous and bad faith attempt to prevent LPSCO from taking the deposition of Mr. Rowell, who is RUCO's designated expert witness in this rate case. RUCO's Motion misstates and misapplies controlling statutes, rules and regulations,

1 which *all* provide LPSCO with the unqualified right to take Mr. Rowell's deposition.¹

2 Put simply, LPSCO has an absolute and unequivocal right to take the deposition of
3 any expert witness that RUCO intends to call at trial in this docket. LPSCO is entitled to
4 take Mr. Rowell's deposition in order to prepare for the January 2010 evidentiary hearing
5 in this case and in order to prepare pre-filed testimony. RUCO doesn't state any
6 legitimate basis for quashing Mr. Rowell's deposition. RUCO's Motion is a classic bad
7 faith litigation tactic designed to prevent LPSCO from exercising its discovery rights.
8 Even worse, RUCO has unnecessarily increased the Company's rate case expense by
9 forcing the Company to incur numerous hours in attorney's fees. Not only should the
10 Administrative Law Judge ("ALJ") deny the Motion, but RUCO should be ordered to pay
11 the Company's attorney's fees associated with this discovery issue. Otherwise, LPSCO
12 will have no choice but to include the legal costs associated with RUCO's frivolous
13 objection as rate case expense to be recovered from ratepayers.

14 **II. THE MOTION TO QUASH SHOULD BE DENIED.**

15 **A. RUCO Has Acted In Bad Faith By Refusing to Produce Its Own**
16 **Testifying Expert Witness for Deposition.**

17 The ALJ is aware of this dispute as a result of the procedural conference on
18 November 16, 2009 with counsel for RUCO, Staff and LPSCO. As such, LPSCO will
19 briefly summarize the underlying facts relating to Mr. Rowell's deposition. On November
20 4, 2009, RUCO filed the direct testimony of Mr. Rowell. RUCO designated Mr. Rowell

21 ¹ See Ariz. Rev. Stat. § 40-244 ("The Commission, or a commissioner, or any party, may
22 take depositions as in a court of record."); Ariz. Rev. Stat. § 41-
23 1062(a)(4) ("Notwithstanding the provisions of § 12-2212, no subpoenas, depositions or
24 any discovery shall be permitted in contested cases except as provided by agency rule or
25 this paragraph."); A.A.C. R14-3-109(P) ("The Commission, a Commissioner, or any party
26 to any proceeding before it may cause the depositions of witnesses to be taken in the
manner prescribed by law and of the civil procedure for the Superior Court of the state of
Arizona."); Ariz. R. Civ. P. 26(b)(4) ("A party may depose any person who has been
identified as an expert whose opinions may be presented at trial."); Ariz. R. Civ. P.
30(a) ("After commencement of the action, the testimony of parties or any expert
witnesses expected to be called may be taken by deposition upon oral examination.").

1 as a testifying expert witness relating to “the issue of design and construction problems at
2 the Palm Valley Water Reclamation Facility (‘PVWRF’) and the allocation of affiliate
3 operating expenses” to LPSCO.² After reviewing Mr. Rowell’s direct testimony, on
4 November 5, 2009 counsel for LPSCO requested that RUCO produce Mr. Rowell for
5 deposition. RUCO refused.

6 On November 9, 2009, LPSCO then provided RUCO with a Notice of Deposition
7 for Mr. Rowell’s deposition on November 20, 2009 at 9:00 am. On November 10, 2009,
8 counsel for RUCO (Ms. Wood) informed LPSCO that RUCO would not agree to produce
9 Mr. Rowell for deposition and that RUCO would file a motion for protective order in the
10 event LPSCO obtained a subpoena for the deposition. The only objection stated was that
11 RUCO believes the deposition is “is unnecessary and over[ly] burdensome given the
12 option of issuing data requests.”³ In that e-mail, RUCO also acknowledged that “we agree
13 [LPSCO] may depose Mr. Rowell regarding his pre-filed testimony....,” a position RUCO
14 apparently has now retracted.⁴

15 LPSCO responded by email dated November 11, 2009 and cited to RUCO various
16 Arizona rules and cases, all of which entitle LPSCO to take Mr. Rowell’s deposition as a
17 matter of law.⁵ In that November 11 e-mail, counsel for LPSCO again asked RUCO to
18 produce Mr. Rowell for deposition, rather than force the Company to obtain a subpoena.
19 Incredibly, RUCO continued its campaign to prevent LPSCO from taking Mr. Rowell’s
20 deposition. Chief counsel for RUCO (Mr. Pozefsky) responded on November 12, 2009,
21 and advised LPSCO to obtain a subpoena for Mr. Rowell to appear at deposition.⁶ In turn,
22 LPSCO drafted and docketed an Application for Subpoena with the Commission on
23 November 12, 2009. That subpoena was issued on November 16, 2009, requiring Mr.

24 ² See Direct Testimony of Matt Rowell at 1, docketed by RUCO on November 4, 2009.

25 ³ See E-mail from M. Wood dated November 10, 2009 (attached as Exhibit A).

26 ⁴ *Id.*

⁵ See E-mail from T. Wiley dated November 11, 2009 (attached as Exhibit B).

⁶ See November 12, 2009 e-mail from D. Pozefsky (attached as Exhibit C).

1 Rowell to appear for deposition on November 20, 2009 at 1:00 p.m.⁷

2 **B. RUCO Misstates the Factual Record.**

3 On pages 2-3 of its Motion, RUCO drastically misstates the underlying factual
4 record relating to data requests between the parties. LPSCO's data requests to Mr. Rowell
5 have no bearing on the Company's right to take his deposition. In its first set of data
6 request to RUCO, LPSCO submitted data requests to Mr. Rowell relating to excess
7 capacity issues. The reason for the data requests was that Mr. Rowell was conducting
8 discovery of the Company regarding a number of plant issues, at the same time he was
9 also submitting expert testimony in the pending rate case of Global Water Resources,
10 including testimony relating to excess capacity and regional wastewater plants. In that
11 docket, Mr. Rowell is the expert witness for the Global Water utilities. The opinions and
12 testimony submitted by Mr. Rowell in the Global rate are contrary to the opinions
13 submitted by RUCO witness Mr. Rigsby in this rate case on the issue of excess capacity.
14 RUCO initially refused to have Mr. Rowell respond to those data requests claiming the
15 issue of "excess capacity" was beyond the scope of Mr. Rowell's testimony. LPSCO
16 insisted that Mr. Rowell respond to those data requests. RUCO eventually provided
17 responses from Mr. Rowell, but those responses did not fully answer LPSCO's questions.

18 Unfortunately, RUCO misstates the communications between counsel for the
19 parties on this issue. Put simply, RUCO conflates the data requests submitted to Mr.
20 Rowell with LPSCO's right to take his deposition. Although RUCO's deduction for
21 excess capacity is only \$36,000, LPSCO still intended to take Mr. Rowell's deposition on
22 that issue as well as many others, including his direct testimony. RUCO claims that the
23 Company "implied" that "if requests 1.5 a-d were answered, a deposition would not be
24

25 ⁷ To further accommodate RUCO, LPSCO subsequently agreed to RUCO's demand that
26 the deposition be scheduled for November 30, 2009 at 9:00 a.m. As such, the parties have
rescheduled the deposition for November 30, 2009, assuming RUCO's Motion is denied.

1 noticed.”⁸ Apparently RUCO claims that LPSCO agreed not to take Mr. Rowell’s
2 deposition if he answered LPSCO’s first set of data requests to RUCO.

3 RUCO simply misunderstood the emails exchanged between the parties. LPSCO’s
4 counsel never agreed not to take Mr. Rowell’s deposition in exchange for answers to data
5 requests. In fact, the very email that RUCO cites in its Motion specifically notes various
6 other issues in dispute relating to Mr. Rowell’s testimony: “But you didn’t tell me RUCO
7 recommends an 8.01 [return on equity] or a more than \$3 million confiscation of used and
8 useful plant, or adjustments to expense allocations, among other things.”⁹ What’s more,
9 the underlying communications between the parties are irrelevant because LPSCO has the
10 absolute and unequivocal right to take Mr. Rowell’s deposition.¹⁰

11 **C. LPSCO Is Entitled To Take Mr. Rowell’s Deposition By Law.**

12 In its Motion, RUCO’s primary argument for avoiding Mr. Rowell’s deposition is
13 that LPSCO has a limited right to take depositions under the APA. RUCO claims that
14 Ariz. Rev. Stat. §41-1062(a)(4) trumps the Commission’s rules and allows LPSCO to take
15 depositions only at the ALJ’s discretion.¹¹ That argument is frivolous for several reasons.

16 To start, RUCO flat misreads § 41-1062(A), which states: “*Unless otherwise*
17 *provided by law*, in contested cases the following shall apply...” (emphasis added). The
18 phrase “unless otherwise provided by law” refers to statutes.¹² Here, Ariz. Rev. Stat. §
19 40-243(A) provides that “[a]ll hearings and investigations before the commission or a

20 ⁸ Motion at 3.

21 ⁹ See E-mail from J. Shapiro dated November 5, 2009.

22 ¹⁰ It is unfortunate that RUCO has resorted to the tactic of misrepresenting the good faith
23 efforts by LPSCO’s counsel to resolve this discovery dispute, a tactic sure to make it
24 difficult to work with RUCO to resolve disputes in rate cases. Fortunately, RUCO’s claim
25 of bad faith motives by LPSCO’s counsel is equally as meritless as RUCO’s position that
26 LPSCO can’t take the deposition of RUCO’s own expert witness.

27 ¹¹ Motion at 3-4.

28 ¹² *Ariz. State Bd. of Regents v. Ariz. State Personnel Bd.*, 195 Ariz. 173, 175, 985 P.2d
29 1032, 1034 (1999) (In § 41-1062, “the legislature used “provided by agency rule” when
30 specifically referring to agency rule, “provided by law” when specifically referring to all
other law including statutes, and “provided by law or agency rule” when referring to
both.”).

1 commissioner shall be governed by this article, and by rules of practice and procedure
2 adopted by the commission.” In turn, Ariz. Rev. Stat. § 40-244(A) expressly provides that
3 any party, including LPSCO, may take depositions as in Superior Court: “*The*
4 *commission, or a commissioner, or any party, may take depositions as in a court of*
5 *record*” (emphasis added). Either RUCO didn’t bother reading Title 40 or RUCO simply
6 chose to ignore this statute in an effort to obstruct the Company’s discovery efforts.

7 Even worse, RUCO apparently did not read all of § 41-1062(A)(4), including the
8 last sentence, which provides “[n]otwithstanding the provisions of § 12-2212, no
9 subpoenas, depositions or any discovery shall be permitted in contested cases *except as*
10 *provided by agency rule or this paragraph*” (emphasis added). On its plain wording, that
11 section of the APA acknowledges that depositions may be taken in administrative
12 proceedings “as provided by agency rule.” The Commission has adopted a rule which
13 gives parties the unqualified right to take depositions. Under A.A.C. R14-3-109(P), “[t]he
14 Commission, any Commissioner or any party to any proceeding before it may cause the
15 depositions of witnesses to be taken in the manner prescribed by law and of the civil
16 procedure for the Superior Court of the state of Arizona.” Not only does that rule mirror §
17 40-244(A), but it incorporates the Arizona Rules of Civil Procedure, which give LPSCO
18 the right to depose Mr. Rowell. Under Arizona Rule of Civil Procedure 26(b)(4), “[a]
19 party may depose any person who has been identified as an expert whose opinions may be
20 presented at trial.” Further, under Arizona Rule of Civil Procedure 30(a), “[a]fter
21 commencement of the action, the testimony of parties or any expert witnesses expected to
22 be called may be taken by deposition upon oral examination.”¹³

23 These rules give LPSCO the unequivocal right to take Mr. Rowell’s deposition.
24 RUCO’s attempts to prevent LPSCO from taking Mr. Rowell’s depositions are in utter

25 ¹³ Even if Mr. Rowell’s deposition was left to the discretion of the ALJ, LPSCO certainly
26 should be allowed to take Mr. Rowell’s deposition in order to explore his opinions,
qualifications and foundation, as well as challenging RUCO’s positions in this case.

1 and complete disregard of controlling statutes and Commission regulations.

2 **D. RUCO'S Other Arguments Are Groundless.**

3 RUCO's other arguments for quashing Mr. Rowell's deposition are equally
4 groundless. On page 4 of its Motion, RUCO claims that the subpoena should be quashed
5 because it is not proposed in good faith. That argument is nonsensical. The suggestion
6 that taking the deposition of RUCO's testifying expert witness is bad faith is difficult to
7 follow, let alone adopt. Apparently RUCO believes that LPSCO's efforts to depose and
8 explore Mr. Rowell's qualifications, experience, opinions and recommendations are an
9 unfair litigation tactic. Obviously, that argument is laughable. The simple fact is that
10 LPSCO has decided to take Mr. Rowell's deposition in order to prepare for the January 5-
11 8, 2010 trial in this case. Any limitation on the Company's right to do so would violate
12 LPSCO's due process rights.

13 Next, RUCO claims that a deposition of Mr. Rowell would be unduly burdensome
14 "because the Company has issued two sets of data requests regarding" the excess capacity
15 issues.¹⁴ RUCO seemingly contends that utilities have a choice of submitting data
16 requests or taking depositions, but not both. Obviously, RUCO does not get to decide
17 what discovery or depositions are necessary to present LPSCO's case in this proceeding.
18 Utility rate cases are complicated and warrant both written discovery and depositions.

19 That's not to mention that RUCO will not incur any burdens from Mr. Rowell's
20 deposition. LPSCO has agreed to pay Mr. Rowell's time at the deposition during
21 questioning by Company counsel, which is standard practice. RUCO's request that
22 LPSCO "pay for all of the costs of the deposition including payment of the fees and
23 expenses associated with the time Mr. Rowell is required to prepare and attend the
24 deposition" is not standard practice.¹⁵ Such request is not supported by any law or rule.

25 _____
26 ¹⁴ Motion at 4-5.

¹⁵ Motion at 3.

1 RUCO also claims that "data requests are far less costly and a far more efficient
2 manner to pursue discovery."¹⁶ In reality, as the ALJ noted at the November 16
3 procedural conference, depositions are a much more efficient way to pursue discovery
4 from a witness than written data requests. Depositions allow parties to ask multiple
5 follow-up questions in a matter of minutes as compared to several weeks for multiple
6 rounds of data requests. After all, there is a reason that litigants are entitled to cross
7 examine the opposing party's witnesses at trial or during depositions.

8 Last, RUCO argues that Mr. Rowell's "deposition [should] be limited to the scope
9 of his testimony."¹⁷ RUCO does not provide any law supporting this argument, which is
10 not surprising because RUCO once again asserts an argument contrary to controlling
11 Arizona law. As a matter of law, LPSCO is entitled to obtain discovery "regarding any
12 matter, not privileged, which is relevant to the subject matter involved in the pending
13 action..."¹⁸ In *American Family v. Grant* (decided just three weeks ago), the Court of
14 Appeals expressly noted that "it is not a basis for objection 'that the information sought
15 will be inadmissible at the trial if the information sought appears reasonably calculated to
16 lead to the discovery of admissible evidence."¹⁹

17 RUCO's attempts to limit the scope of LPSCO's questioning at deposition are
18 frivolous. The simple truth is that RUCO does not have any basis for objecting to or
19 limiting Mr. Rowell's deposition. LPSCO is entitled to take Mr. Rowell's deposition
20 relating to his direct testimony and any other matters that LPSCO believes may lead to the
21 discovery of admissible evidence. If the ALJ were to grant this Motion or allow Mr.

22
23 ¹⁶ Motion at 5.

¹⁷ Motion at 6.

¹⁸ *American Family Mut. Ins. Co. v. Grant*, 2009 WL 3245430 at*3 (Ariz. App. October
24 8, 2009), citing *Ariz. R. Civ. P. 26(b)(1)(A)*. See also Arizona Rule of Civil Procedure
25 26(b)("It is not ground for objection that the information sought will be inadmissible at
26 the trial if the information sought appears reasonably calculated to lead to the discovery of
admissible evidence.")

¹⁹ *Id.*

1 Rowell to avoid answering questions on subjects outside of his direct testimony, any such
2 ruling would violate LPSCO's due process rights and constitute reversible error on appeal.

3 Even further, LPSCO is entitled to take Mr. Rowell's depositions on any matters
4 which may bear on his credibility, bias or motive. LPSCO also may ask questions
5 relating to a variety of subjects in order to impeach RUCO's other witnesses (i.e., Mr.
6 Rigsby) or challenge RUCO's recommendations in this case. In *American Family*, the
7 Court of Appeals held that "the scope of expert cross examination is 'expansive' and 'free
8 ranging.'"²⁰ Mr. Rowell's testimony relating to other subjects beyond his direct testimony
9 is fair game for attacking RUCO's contrary positions taken in this rate case.

10 **III. CONCLUSION.**

11 Boiled down, RUCO's Motion is nothing more than an attempt by RUCO to
12 prevent LPSCO from exercising its discovery rights and preparing for trial. At the
13 November 16, 2009, the ALJ noted LPSCO's right to take depositions. Despite the plain
14 language of the Commission statutes and rules, the Arizona Rules of Civil Procedure, the
15 Administrative Procedures Act, and the ALJ's comments during the November 16
16 procedural conference, RUCO insisted on filing what is nothing more than a frivolous
17 motion. In the process, RUCO has unnecessarily increased rate case expense.

18 The Administrative Law Judge ("ALJ") should deny the Motion and order Mr.
19 Rowell to appear for deposition on November 30, 2009 at 9:00 a.m. Further, the ALJ
20 should not condone these types of litigation tactics. Instead, the ALJ should order RUCO
21 to pay the Company's attorney's fees associated with this discovery issue, subject to the
22 Company's filing of the costs and attorney's fees incurred.

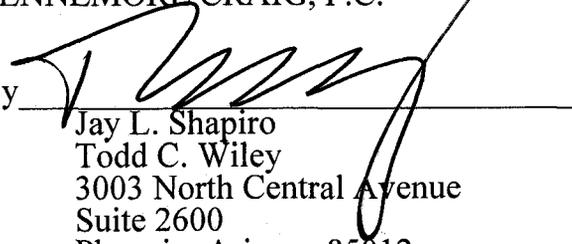
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25 ²⁰ *Id.* at *4. See also *Green v. Nygard*, 213 Ariz. 460, 463, 143 P.3d 393 (App.
26 2006)("Arizona authorities have granted expansive scope for...pretrial discovery from
expert witnesses...").

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RESPECTFULLY SUBMITTED this 18th day of November, 2009.

FENNEMORE CRAIG, P.C.

By



Jay L. Shapiro
Todd C. Wiley
3003 North Central Avenue
Suite 2600
Phoenix, Arizona 85012
Attorneys for LPSCO

ORIGINAL and fifteen (15) copies of the foregoing, were delivered this 18th day of November, 2009, to:

Docket Control
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

COPY of the foregoing was hand-delivered this 18th day of November, 2009 to:

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Assistant Chief Administrative Law Judge
Hearing Division
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Phoenix, Arizona 85007

Kevin Torrey, Esq.
Legal Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Steve Olea, Director
Utilities Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

COPY of the foregoing was sent via U.S. Mail this 18th day of November, 2009 to:

Michelle Wood, Esq.
RUCO
1110 W. Washington St., Suite 220
Phoenix, Arizona 85007

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By: 

/2257942.1/60199.009

EXHIBIT A

WILEY, TODD

From: SHAPIRO, JAY
Sent: Tuesday, November 10, 2009 5:52 PM
To: WILEY, TODD
Subject: Fw: Deposition of Matt Rowell

From: Michelle Wood <MWood@azruco.gov>
To: SHAPIRO, JAY
Cc: Dan Pozefsky <DPozefsky@azruco.gov>; Jodi Jerich <JJerich@azruco.gov>
Sent: Tue Nov 10 17:34:13 2009
Subject: RE: Deposition of Matt Rowell

Jay,

I have discussed the matter with RUCO staff and we are unable to agree to a deposition on the 20th. First, as we have explained we do not agree that Mr. Rowell should be subject to a deposition on matters beyond the scope of his testimony and we will not make him available to testify on such matters. While we agree you may depose Mr. Rowell regarding his pre-filed testimony, we believe it is unnecessary and over burdensome given the option of issuing data requests. In the event you request a subpoena to compel his deposition for testimony outside the scope of his prefiled testimony, we will file a motion for protective order. Moreover, we will expect the Company will pay all witness fees prescribed by rule or law.

Second, I did not realize we would not be in Black Mountain for hearing. I assumed we would start on the 18th and continue through the end of the week. Thank you for bringing the schedule to my attention. Although I am available, Matt Rowell is not because he is filing testimony in another case that day.

RUCO wishes to avoid the time and expense of further litigation. As we have indicated before, Mr. Risgby is available to address any data requests related to his testimony on excess capacity.

Best Regards

Michelle

From: SHAPIRO, JAY [mailto:JSHAPIRO@FCLAW.COM]
Sent: Monday, November 09, 2009 6:07 PM
To: Michelle Wood
Cc: WILEY, TODD
Subject: RE: Deposition of Matt Rowell
Importance: High

Michelle - in response, first, I am not going to further debate the history of our discovery and dispute with you. You have thrown up every road block you can think of and have made it more than clear you have no intention of cooperating with our efforts to conduct discovery regarding RUCO's expert witness, Matt Rowell. Whether this is strategic, or because you simply do not understand our rights, no longer matters.

Second, whether the data requests were answered adequately or not, we have now reviewed RUCO's direct filing and we want to exercise our right to take the deposition of RUCO's hired expert witness, Matt Rowell. We are not required to justify the deposition based on the objections to data requests to him or inadequate answers, although both were factors in our decision. .

Third, we will not limit our questions to the scope of his testimony. We are not required to do so. As we have now explained at least half a dozen times, you have chosen to call an independent witness, his opinions on any utility issue is reasonably calculated to lead to the discovery of admissible evidence.

Fourth, we expect counsel for RUCO to follow the rules, rules that limit the objections that can be made at a deposition. If you intend to be uncooperative or otherwise attempt to limit the scope of his deposition, then you better get a protective order or similar relief.

Fifth, as for the date, I do not know what hearing you have that day because the ACC has Open Meeting on 11/20. This is why the BMSC case starts for a day and continues the following week. Moreover, RUCO has two lawyers, and I am sure Dan is capable of attending the deposition and making RUCO's objections for the record. But we have a filing deadline of 12/4, we need time to get the TRs back, and this is the only possible day I could see where it could be scheduled to accommodate all those needs. If you are aware of another day that would work, let me know. If not, we hope a subpoena will not be necessary. Please let us know immediately if it will be.

In sum, we believe and we can show that we explained to you repeatedly what we felt we were entitled to do and where we were likely headed. Your position has been to cling to an entirely unsupported and unsupportable position that we can only ask Mr. Rowell about his own limited testimony, without offering a single reference to any authority. We tried, you gave us no reason to try further and now we have to prepare our case. That requires Matt's deposition.

If you disagree, then I see no choice for you except to seek the appropriate relief.

Jay

From: Michelle Wood [mailto:MWood@azruco.gov]
Sent: Monday, November 09, 2009 5:40 PM
To: SHAPIRO, JAY; WILEY, TODD; JAMES, NORM; BIRK, WHITNEY
Subject: RE: Deposition of Matt Rowell

Jay,

Your account of the Matt Rowell DR issue is not accurate. We advised you that Mr. Rigsby had made a \$36,000 adjustment for excess capacity, not Mr. Rowell. We asked if your client needed Mr. Rowell to respond to the DR's given that he did not testify on any excess capacity issues. You indicated that if Mr. Rigsby's adjustment was \$36,000, the Company drops the issue and Mr. Rowell did not need to respond.

The next day, you claimed your client was upset with Mr. Rigsby's testimony regarding ROE and hypothetical capital structure and that Mr. Rowell would need to respond to the DRs, which were dropped the day before, or you would issue a notice of deposition. Mr. Rowell answered the DRs in a timely manner, to avoid unnecessary rate case expense even though the DRs posed were unrelated to his testimony. Now, you have issued a notice of deposition. If the intent of the deposition is to ask questions outside of the scope of Mr. Rowell's testimony, please advise so that we can ask for a procedural conference to define the parameters of the deposition.

We are patiently waiting for the full responses to RUCO's 6th DR, which Whitney indicates we may expect tomorrow. If we do not receive the documentation promised, you will leave us no choice but to file a motion to compel or issue notices of deposition for the engineers involved in the design and/or construction of the

Palm Valley and Sarival WWTPs. As I will be in hearing on November 20, 2009, perhaps we can discuss a mutual date upon which the depositions can be set.

With best regards,

Michelle

From: SHAPIRO, JAY [mailto:JSHAPIRO@FCLAW.COM]
Sent: Monday, November 09, 2009 4:34 PM
To: Michelle Wood
Cc: SHAPIRO, JAY; WILEY, TODD; BIRK, WHITNEY
Subject: Deposition of Matt Rowell

Michelle,

Attached is the notice of deposition for Matt Rowell. As we indicated in prior correspondence, RUCO's objections, and Mr. Rowell's testimony in general, would likely lead to the taking of his deposition. We have now determined that we have to take Mr. Rowell's deposition. Please contact me if you have any questions or would like to discuss this matter further.

Jay

FENNEMORE CRAIG

IRS CIRCULAR 230 DISCLOSURE: To ensure compliance with requirements imposed by the IRS, we inform you that, to the extent this communication (or any attachment) addresses any tax matter, it was not written to be (and may not be) relied upon to (i) avoid tax-related penalties under the Internal Revenue Code, or (ii) promote, market or recommend to another party any transaction or matter addressed herein (or in any such attachment). For **additional information** regarding this disclosure please visit our web site.

CONFIDENTIALITY NOTICE: The information contained in this message may be protected by the attorney-client privilege. If you believe that it has been sent to you in error, do not read it. Please immediately reply to the sender that you have received the message in error. Then delete it. Thank you.

EXHIBIT B

WILEY, TODD

From: WILEY, TODD
Sent: Wednesday, November 11, 2009 9:30 AM
To: 'MWood@azruco.gov'
Cc: 'DPozefsky@azruco.gov'; 'JJerich@azruco.gov'; SHAPIRO, JAY
Subject: FW: Deposition of Matt Rowell

Michelle,

I'm responding to your email below relating to Mr. Rowell's deposition. In your email, RUCO has taken the position that it does "not agree that Mr. Rowell should be subject to a deposition on matters beyond the scope of his testimony and [RUCO] will not make him available to testify on such matters." Unfortunately, RUCO's position on that issue is flat contrary to Arizona law and the Arizona Rules of Civil Procedure. You have asserted a variety of arguments in an effort to avoid Mr. Rowell's deposition. Frankly, the fact that RUCO has pulled out all the stops to prevent Mr. Rowell's deposition is proof, in and of itself, that the deposition is relevant.

With respect to your email below, your claim that LPSCO is not entitled to ask Mr. Rowell questions at deposition relating to other subjects beyond the scope of his offered direct testimony is not supported by Arizona law. The simple truth is that RUCO does not have any basis for objecting to Mr. Rowell's deposition. I previously cited you to Arizona Rule of Civil Procedure 26(b), which provides: "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Despite that clear language, RUCO still refuses to allow Mr. Rowell's deposition.

RUCO's refusal to produce Mr. Rowell also violates other civil rules, which require parties to produce their expert witnesses for depositions by the opposing party. *See* Ariz. R. Civ. P. 26(b)(4) ("A party may depose any person who has been identified as an expert whose opinions may be presented at trial."); Ariz. R. Civ. P. 30(a) ("After commencement of the action, the testimony of parties or any expert witnesses expected to be called may be taken by deposition upon oral examination."). RUCO's efforts to block Mr. Rowell's deposition not only violates clear law and the civil rules, but it is unnecessarily increasing rate case expense.

LPSCO is entitled to take Mr. Rowell's deposition relating to his direct testimony and any other matters that we believe may lead to the discovery of admissible evidence. If RUCO refuses to allow Mr. Rowell to answer questions on subjects outside of his direct testimony, then RUCO will be preserving a due process claim for appeal. Simply put, any such position taken by RUCO would deprive LPSCO of its due process rights relating to a fair hearing. As a matter of law, LPSCO is entitled to obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action..." *American Family Mut. Ins. Co. v. Grant*, 2009 WL 3245430 at*3 (Ariz. App. October 8, 2009), *citing* Ariz. R. Civ. P. 26(b)(1)(A). In that case, the Court of Appeals went on to note that "it is not a basis for objection 'that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.'" *Id.* (*citing the same rule that I cited to you*).

Even further, LPSCO is entitled to take Mr. Rowell's depositions on any matters which may bear on his credibility, bias or motive. We also can take Mr. Rowell's deposition on a variety of subjects in order to impeach RUCO's other witnesses (i.e., Mr. Rigsby). In *American Family* (decided just three weeks ago), the Court of Appeals held that "the scope of expert cross examination is 'expansive' and 'free ranging.'" *Id.* at *4. See also *Green v. Nygard*, 213 Ariz. 460, 463, 143 P.3d 393 (App. 2006) ("Arizona authorities have granted expansive scope for...pretrial discovery from expert witnesses..."). Mr. Rowell's testimony relating to other subjects beyond his direct testimony is fair game for attacking RUCO's contrary positions taken in this rate case. For example, we certainly are entitled to inquire with Mr. Rowell as to the basis of his opinions in other utility cases and compare that to Mr. Rigsby's analysis in this case. By law, we are entitled to ask Mr. Rowell any questions that may lead to the discovery of admissible evidence.

RUCO has designated Mr. Rowell as a testifying expert witness in this case, and LPSCO is entitled, by law, to take his deposition relating to any matter that we deem pertinent to the pending rate case. We also intend to depose Mr. Rowell relating to the matters and issues raised in his direct testimony. Again, RUCO simply does not have any basis for objecting to Mr. Rowell's deposition.

In my 16 years of practice, I have never faced a situation where an opposing party has refused to produce its designated expert witness for deposition. By rule, a party is required to produce its designated expert witness for deposition. See Ariz. R. Civ. P. 26(b)(4); Ariz. R. Civ. P. 30(a). Under these circumstances, I would encourage RUCO to voluntarily produce Mr. Rowell for deposition without any unsupported limitations. I also request that RUCO voluntarily produce Mr. Rowell for deposition without issuance of a subpoena.

If we do not hear back from you today on those issues, we intend to issue a subpoena tomorrow for Mr. Rowell's attendance at deposition. We believe November 20, 2009 is a fair date for the parties. You are not in hearing that day. The only issue noted below is that Mr. Rowell is not available "because he is filing testimony in another case that day." We certainly are willing to accommodate Mr. Rowell's schedule, so here are proposed alternatives:

November 20, 2009--starting at 1:00 pm.
November 23, 2009--starting at any time
November 24, 2009--starting at any time

We can't push these dates back any further because our rebuttal testimony is due December 4, 2009, and pushing the dates back any further may not allow sufficient time to get a transcript in time for LPSCO's rebuttal testimony, and will not allow us adequate to prepare rebuttal testimony and decide on rebuttal witnesses.

Please let me know which of those dates work for Mr. Rowell. If we do not hear back from you today, we will issue the subpoena tomorrow for November 20 at 1:00 pm.

Also, in the event that RUCO forces us to issue the subpoena, please let me know if you will accept service of the subpoena for Mr. Rowell's deposition. I want to avoid hiring a process server to serve the subpoena.

Finally, I wanted to note that if RUCO continues its objection to Mr. Rowell's deposition, or files a

motion for protective order, LPSCO intends to pursue the matter with the ALJ and LPSCO will ask either that (i) RUCO pay for LPSCO's attorney's fees relating to this discovery dispute or (ii) the attorney's fees relating to this issue be included as rate case expense in this matter. Likewise, if Mr. Rowell attends his deposition, and counsel for RUCO instructs Mr. Rowell not to answer any questions, then we will pursue our attorney's fees relating to any such objections (again, either from RUCO or as rate case expense).

We look forward to hearing from you today.

Thanks.

Todd

Todd C. Wiley | Fennemore Craig, P.C.

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Mobile: (602) 329-0006

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From: SHAPIRO, JAY
Sent: Tuesday, November 10, 2009 5:52 PM
To: WILEY, TODD
Subject: Fw: Deposition of Matt Rowell

From: Michelle Wood <MWood@azruco.gov>
To: SHAPIRO, JAY
Cc: Dan Pozefsky <DPozefsky@azruco.gov>; Jodi Jerich <JJerich@azruco.gov>
Sent: Tue Nov 10 17:34:13 2009
Subject: RE: Deposition of Matt Rowell

Jay,

I have discussed the matter with RUCO staff and we are unable to agree to a deposition on the 20th. First, as we have explained we do not agree that Mr. Rowell should be subject to a deposition on matters beyond the scope of his testimony and we will not make him available to testify on such matters. While we agree you may depose Mr. Rowell regarding his pre-filed testimony, we believe it is unnecessary and over burdensome given the option of issuing data requests. In the event you request a subpoena to compel his deposition for testimony outside the scope of his prefiled testimony, we will file a motion for protective order. Moreover, we will expect the Company will pay all witness fees prescribed by rule or law.

Second, I did not realize we would not be in Black Mountain for hearing. I assumed we would start on the 18th and continue through the end of the week. Thank you for bringing the schedule to my attention. Although I am available, Matt Rowell is not because he is filing testimony in another case that day.

RUCO wishes to avoid the time and expense of further litigation. As we have indicated before, Mr. Risgby is available to address any data requests related to his testimony on excess capacity.

11/18/2009

Best Regards

Michelle

From: SHAPIRO, JAY [mailto:JSHAPIRO@FCLAW.COM]
Sent: Monday, November 09, 2009 6:07 PM
To: Michelle Wood
Cc: WILEY, TODD
Subject: RE: Deposition of Matt Rowell
Importance: High

Michelle - in response, first, I am not going to further debate the history of our discovery and dispute with you. You have thrown up every road block you can think of and have made it more than clear you have no intention of cooperating with our efforts to conduct discovery regarding RUCO's expert witness, Matt Rowell. Whether this is strategic, or because you simply do not understand our rights, no longer matters.

Second, whether the data requests were answered adequately or not, we have now reviewed RUCO's direct filing and we want to exercise our right to take the deposition of RUCO's hired expert witness, Matt Rowell. We are not required to justify the deposition based on the objections to data requests to him or inadequate answers, although both were factors in our decision. .

Third, we will not limit our questions to the scope of his testimony. We are not required to do so. As we have now explained at least half a dozen times, you have chosen to call an independent witness, his opinions on any utility issue is reasonably calculated to lead to the discovery of admissible evidence.

Fourth, we expect counsel for RUCO to follow the rules, rules that limit the objections that can be made at a deposition. If you intend to be uncooperative or otherwise attempt to limit the scope of his deposition, then you better get a protective order or similar relief.

Fifth, as for the date, I do not know what hearing you have that day because the ACC has Open Meeting on 11/20. This is why the BMSC case starts for a day and continues the following week. Moreover, RUCO has two lawyers, and I am sure Dan is capable of attending the deposition and making RUCO's objections for the record. But we have a filing deadline of 12/4, we need time to get the TRs back, and this is the only possible day I could see where it could be scheduled to accommodate all those needs. If you are aware of another day that would work, let me know. If not, we hope a subpoena will not be necessary. Please let us know immediately if it will be.

In sum, we believe and we can show that we explained to you repeatedly what we felt we were entitled to do and where we were likely headed. Your position has been to cling to an entirely unsupported and unsupportable position that we can only ask Mr. Rowell about his own limited testimony, without offering a single reference to any authority. We tried, you gave us no reason to try further and now we have to prepare our case. That requires Matt's deposition.

If you disagree, then I see no choice for you except to seek the appropriate relief.

Jay

From: Michelle Wood [mailto:MWood@azruco.gov]

11/18/2009

Sent: Monday, November 09, 2009 5:40 PM
To: SHAPIRO, JAY; WILEY, TODD; JAMES, NORM; BIRK, WHITNEY
Subject: RE: Deposition of Matt Rowell

Jay,

Your account of the Matt Rowell DR issue is not accurate. We advised you that Mr. Rigsby had made a \$36,000 adjustment for excess capacity, not Mr. Rowell. We asked if your client needed Mr. Rowell to respond to the DR's given that he did not testify on any excess capacity issues. You indicated that if Mr. Rigsby's adjustment was \$36,000, the Company drops the issue and Mr. Rowell did not need to respond.

The next day, you claimed your client was upset with Mr. Rigsby's testimony regarding ROE and hypothetical capital structure and that Mr. Rowell would need to respond to the DRs, which were dropped the day before, or you would issue a notice of deposition. Mr. Rowell answered the DRs in a timely manner, to avoid unnecessary rate case expense even though the DRs posed were unrelated to his testimony. Now, you have issued a notice of deposition. If the intent of the deposition is to ask questions outside of the scope of Mr. Rowell's testimony, please advise so that we can ask for a procedural conference to define the parameters of the deposition.

We are patiently waiting for the full responses to RUCO's 6th DR, which Whitney indicates we may expect tomorrow. If we do not receive the documentation promised, you will leave us no choice but to file a motion to compel or issue notices of deposition for the engineers involved in the design and/or construction of the Palm Valley and Sarival WWTPs. As I will be in hearing on November 20, 2009, perhaps we can discuss a mutual date upon which the depositions can be set.

With best regards,

Michelle

From: SHAPIRO, JAY [mailto:JSHAPIRO@FCLAW.COM]
Sent: Monday, November 09, 2009 4:34 PM
To: Michelle Wood
Cc: SHAPIRO, JAY; WILEY, TODD; BIRK, WHITNEY
Subject: Deposition of Matt Rowell

Michelle,

Attached is the notice of deposition for Matt Rowell. As we indicated in prior correspondence, RUCO's objections, and Mr. Rowell's testimony in general, would likely lead to the taking of his deposition. We have now determined that we have to take Mr. Rowell's deposition. Please contact me if you have any questions or would like to discuss this matter further.

Jay

FENNEMORE CRAIG

EXHIBIT C

WILEY, TODD

From: Dan Pozefsky [DPozefsky@azruco.gov]
Sent: Thursday, November 12, 2009 10:27 AM
To: WILEY, TODD; Michelle Wood
Cc: Jodi Jerich; SHAPIRO, JAY
Subject: RE: Deposition of Matt Rowell

Todd,

Go ahead and issue the subpoena and get it to us and we will take it from there.

Thanks,

Dan

From: WILEY, TODD [mailto:TWILEY@FCLAW.COM]
Sent: Thursday, November 12, 2009 10:17 AM
To: Dan Pozefsky; Michelle Wood
Cc: Jodi Jerich; SHAPIRO, JAY
Subject: RE: Deposition of Matt Rowell

Dan,

Thanks for responding Dan. We are going to go ahead and get the subpoena issued by the ACC. We are scheduling the deposition for November 20, 2009 at 1:00 pm in our offices. Again, we are willing to change the date to November 23 or November 24 upon RUCO's agreement to produce Mr. Rowell without a subpoena.

Thanks.

Todd

Todd C. Wiley | Fennemore Craig, P.C.
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From: Dan Pozefsky [mailto:DPozefsky@azruco.gov]
Sent: Thursday, November 12, 2009 9:48 AM
To: WILEY, TODD; Michelle Wood
Cc: Jodi Jerich; SHAPIRO, JAY
Subject: RE: Deposition of Matt Rowell

Todd,

Michelle is at a wastewater plant today – I do not expect her back but she may be by the end of the day. Yesterday was a state holiday so no one was here to respond. If you cannot wait until later this afternoon or tomorrow morning go ahead and issue the subpoena and we will accept service – you do not need to hire a process server.

Sorry for the delay in response.

Regards,

Dan

From: WILEY, TODD [mailto:TWILEY@FCLAW.COM]
Sent: Wednesday, November 11, 2009 9:30 AM
To: Michelle Wood
Cc: Dan Pozefsky; Jodi Jerich; SHAPIRO, JAY
Subject: FW: Deposition of Matt Rowell

Michelle,

I'm responding to your email below relating to Mr. Rowell's deposition. In your email, RUCO has taken the position that it does "not agree that Mr. Rowell should be subject to a deposition on matters beyond the scope of his testimony and [RUCO] will not make him available to testify on such matters." Unfortunately, RUCO's position on that issue is flat contrary to Arizona law and the Arizona Rules of Civil Procedure. You have asserted a variety of arguments in an effort to avoid Mr. Rowell's deposition. Frankly, the fact that RUCO has pulled out all the stops to prevent Mr. Rowell's deposition is proof, in and of itself, that the deposition is relevant.

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