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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
DOCKET CONTROL

2 COMMISSIONERS

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- 4 GARY PIERCE
- 5 PAUL NEWMAN
- 6 SANDRA D. KENNEDY
- 7 BOB STUMP

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

DOCKET NO. SW-01428A-09-0103

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

DOCKET NO. W-01427A-09-0104

24 IN THE MATTER OF THE APPLICATION OF
 25 LITCHFIELD PARK SERVICE COMPANY, AN
 26 ARIZONA CORPORATION, FOR AUTHORITY
 27 (1) TO ISSUE EVIDENCE OF INDEBTEDNESS IN
 28 AN AMOUNT NOT TO EXCEED \$1,755,000 IN
 CONNECTION WITH (A) THE CONSTRUCTION
 OF TWO RECHARGE WELL INFRASTRUCTURE
 IMPROVEMENTS AND (2) TO ENCUMBER ITS
 REAL PROPERTY AND PLANT AS SECURITY
 FOR SUCH INDEBTEDNESS.

DOCKET NO. ~~SW~~-01427A-09-0116

Arizona Corporation Commission

DOCKETED

NOV 23 2009

DOCKETED BY

29 IN THE MATTER OF THE APPLICATION OF
 30 LITCHFIELD PARK SERVICE COMPANY, AN
 31 ARIZONA CORPORATION, FOR AUTHORITY
 32 (1) TO ISSUE EVIDENCE OF INDEBTEDNESS IN
 33 AN AMOUNT NOT TO EXCEED \$1,170,000 IN
 34 CONNECTION WITH (A) THE CONSTRUCTION
 35 OF ONE 200 KW ROOF MOUNTED SOLAR
 36 GENERATOR INFRASTRUCTURE
 37 IMPROVEMENTS AND (2) TO ENCUMBER ITS
 38 REAL PROPERTY AND PLANT AS SECURITY
 FOR SUCH INDEBTEDNESS.

DOCKET NO. W-01427A-09-0120

PROCEDURAL ORDER

1 **BY THE COMMISSION:**

2 Consolidation of Dockets

3 On March 9, 2009, Litchfield Park Service Company (“LPSCO” or “Company”) filed with
4 the Arizona Corporation Commission (“Commission”) applications for rate increases for wastewater
5 and water service in above-captioned dockets SW-01428A-09-0103 and W-01427A-09-0104 (“Rate
6 Dockets”). LPSCO filed Motions to Consolidate the Rate Dockets on the same date.

7 By Procedural Order issued May 21, 2009, the Rate Dockets were consolidated.

8 On March 13, 2009, LPSCO filed an application for authority (1) to issue evidence of
9 indebtedness in an amount not to exceed \$1,755,000 in connection with the construction of two
10 recharge wells for the purpose of recharging effluent and (2) to encumber its real property and plant
11 as security for such indebtedness (Docket No. W-01427A-09-0116).

12 Also on March 13, 2009, LPSCO filed an application for authority (1) to issue evidence of
13 indebtedness in an amount not to exceed \$1,170,000 in connection with the construction of one 200
14 kW roof mounted solar generator for the purpose of generating electrical power and (2) to encumber
15 its real property and plant as security for such indebtedness (Docket No. W-01427A-09-0120).

16 By Procedural Order issued November 6, 2009, Docket Nos. W-01427A-09-0116 and W-
17 01427A-09-0120 (“Finance Dockets”) were consolidated.

18 On November 16, 2009, the Commission’s Utilities Division (“Staff”) filed Motions to
19 Consolidate the Rate and Finance Dockets on the basis of administrative efficiency and conservation
20 of resources.

21 Staff’s request to consolidate the Rate and Finance Dockets is reasonable and shall therefore
22 be granted.

23 Request for Deposition Subpoena

24 On November 12, 2009, LPSCO filed an Application for Subpoena, requesting that the
25 Commission issue a subpoena directing Matt Rowell, a witness for the Residential Utility Consumer
26 Office (“RUCO”), to appear at a deposition to be conducted on November 20, 2009.

27 On November 16, 2009, at LPSCO’s request, a telephonic conference was conducted with
28 counsel for LPSCO, RUCO, and Staff to discuss the requested subpoena and RUCO’s opposition to

1 producing Mr. Rowell for deposition. RUCO indicated that it would file a Motion to Quash
2 assuming the subpoena was issued as requested. At the conclusion of the conference, RUCO was
3 directed to file its Motion to Quash by November 17, 2009 if the subpoena was issued on November
4 16, 2009. LPSCO was directed to file its response to RUCO's motion by November 18, 2009.

5 On November 16, 2009, the Commission's Executive Director signed the requested subpoena
6 directing Mr. Rowell to appear for deposition.

7 RUCO's Motion to Quash

8 On November 18, 2009, RUCO filed a Motion to Quash Subpoena. RUCO contends that
9 LPSCO is seeking to depose Mr. Rowell on issues that are not the subject of his pre-filed testimony
10 (i.e., excess capacity) and that RUCO previously provided responses to LPSCO's data requests
11 regarding the issue of excess capacity.

12 RUCO argues that although the Commission's rules permit the use of depositions¹, Arizona
13 statutes limit application of that rule². According to RUCO, A.R.S. §41-1062 only allows a
14 deposition to be taken of a witness "who cannot be subpoenaed or is unable to attend the hearing."
15 RUCO claims that since Mr. Rowell is available to testify at the hearing and is subject to subpoena,
16 he should not be subject to being deposed.

17 RUCO also asserts that the subpoena should be quashed because it was not proposed in good
18 faith. RUCO claims that it attempted to reach agreement with the Company with respect to limiting
19 the deposition to the scope of Mr. Rowell's testimony, but LPSCO's counsel was unwilling to agree
20 to any limitations. RUCO contends that LPSCO is attempting to use the deposition process to harass
21 RUCO because the Company is unhappy with other aspects of RUCO's testimony.

22 RUCO next argues that taking Mr. Rowell's deposition would be burdensome when weighed
23 against the benefit to be gained by allowing a deposition. According to RUCO, its excess capacity
24 position involves only a \$36,000 rate base adjustment and the Company previously served two sets of
25 data requests regarding the excess capacity issue. RUCO asserts that, pursuant to Rule 45 of the
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28 ¹ Arizona Administrative Code ("A.A.C.") R14-3-109.

² Arizona Revised Code ("A.R.S.") §41-1062.

1 Arizona Rules of Civil Procedure (“Ariz. R. Civ. P”), the subpoena should be quashed as unduly
2 burdensome.

3 RUCO’s final argument is that if the deposition is permitted, its scope should be limited to
4 Mr. Rowell’s testimony and that LPSCO should be ordered to pay all costs of the deposition,
5 including fees and expenses associated with the time Mr. Rowell would be required to prepare for
6 and attend the deposition.

7 LPSCO’s Response to Motion to Quash

8 LPSCO contends that RUCO’s motion is a frivolous and bad faith attempt to prevent the
9 Company from taking Mr. Rowell’s deposition, and that RUCO misstates and misapplies the
10 controlling statutes and rules governing the use of depositions in Commission proceedings. In
11 support of its position that it has the right to take Mr. Rowell’s deposition in this case, LPSCO cites
12 A.R.S. §40-244(A), which states that “[t]he commission, or a commissioner, or any party, may take
13 depositions as in a court of record.” LPSCO disagrees with RUCO’s interpretation of A.R.S. §41-
14 1062(A)(4), which states that “no subpoenas, depositions or any discovery shall be permitted in
15 contested cases except as provided by agency rule or this paragraph.” The Company claims that the
16 Commission’s procedural rules offer the opportunity for depositions, as set forth in A.A.C. R14-3-
17 109(P), which provides that “[t]he Commission, a Commissioner, or any party to any proceeding
18 before it may cause the deposition of witnesses to be taken in the manner prescribed by law and of
19 the civil procedure for the Superior Court of the state of Arizona.” LPSCO cites to what it contends
20 are the controlling rules of civil procedure, which provide that “[a] party may depose any person who
21 has been identified as an expert whose opinions may be presented at trial” (Ariz. R. Civ. P. 26(b)(4)),
22 and “[a]fter commencement of the action, the testimony of parties or any expert witnesses expected
23 to be called may be taken by deposition upon oral examination” (Ariz. R. Civ. P. 30(a)).

24 LPSCO also disputes RUCO’s claim that the Company is acting in bad faith by seeking to
25 depose Mr. Rowell. LPSCO argues that it has every right to take Mr. Rowell’s deposition under the
26 law and that the limitations proposed by RUCO would deny the Company’s due process rights.
27 LPSCO claims that RUCO’s reliance on the “unduly burdensome” argument is also misplaced given
28 the Company’s agreement to pay for Mr. Rowell’s time at the deposition during the Company’s

1 questioning. LPSCO disagrees with RUCO that depositions are more costly than the use of data
2 requests, because depositions allow the proponent to ask follow-up questions immediately rather than
3 having to wait for responses through subsequent rounds of discovery.

4 LPSCO also asserts that RUCO's attempt to limit the scope of the deposition is without merit,
5 as recognized by a recent decision by the Arizona Court of Appeals³. LPSCO argues that it is entitled
6 to take Mr. Rowell's deposition regarding his pre-filed testimony and any other matters that the
7 Company believes may lead to the discovery of admissible evidence. Finally, LPSCO contends that
8 RUCO should be required to pay the Company's legal fees associated with this discovery issue

9 Resolution

10 The standard for conducting discovery is intentionally broad to allow parties to a proceeding
11 to prepare for hearing or trial and to mitigate the necessity for unnecessary discovery-based cross-
12 examination on the witness stand. LPSCO cites the applicable standards for the conduct of
13 discovery: that discovery is permitted "regarding any matter, not privileged, which is relevant to the
14 subject matter involved in the pending action ... [and] it is not ground for objection that the
15 information sought will be inadmissible ... if the information sought appears reasonably calculated to
16 lead to the discovery of admissible evidence." (Ariz. R. Civ. P. 26(b)(1)(A))

17 RUCO's reliance on A.R.S. §41-1062 as a basis to quash the subpoena is misplaced. As
18 LPSCO points out, the phrase "unless otherwise provided by law" contained in A.R.S. §41-1062
19 refers to statutes governing state agencies, and A.R.S. §40-243 provides that all hearings and
20 investigations before the Commission are governed by that statute and by rules of practice and
21 procedure adopted by the Commission. As is clear from both the subsequent statute, A.R.S. §40-244,
22 and the Commission's rule in A.A.C. R14-3-109(P), the Commission, an individual Commissioner,
23 or "any party" may take depositions. Further, Ariz. R. Civ. P. 26(b) allows discovery to be
24 undertaken "through interrogatories or by deposition," evidencing the interchangeable nature of
25 either of those discovery tools under the rules of civil procedure.

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³ *American Family Mut. Ins. Co. v. Grant*, 2009 WL 3245430, at (Ariz. App. October 8, 2009) ("It is not ground for
28 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.")

1 RUCO's invocation of the "undue burden" exception is equally unpersuasive. There is no
2 indication that taking the deposition of Mr. Rowell would impose a substantial burden on either Mr.
3 Rowell or RUCO, especially given the obligation and agreement by LPSCO to pay the costs of the
4 deposition, as well as costs for Mr. Rowell's time while he is questioned by the Company's counsel.
5 RUCO's suggestion that the use of depositions is a heretical discovery technique never before seen in
6 proceedings before the Commission is baffling. As indicated in the discussion above, the statutes and
7 rules governing the Commission's process specifically identify depositions as a form of discovery
8 that may be used by any party to a Commission proceeding. Moreover, as argued in the Company's
9 response, the use of depositions may actually provide a benefit to all parties to the extent that relevant
10 issues are fleshed out through direct questioning of expert witnesses and the need for subsequent data
11 requests is minimized.

12 RUCO's Motion to Quash is therefore denied, and Mr. Rowell is directed to appear for
13 deposition by LPSCO on November 30, 2009, at 9:00 a.m., at the location designated in the Notice of
14 Deposition and subpoena issued by the Commission's Executive Director.

15 Request to Bifurcate Issues

16 On November 17, 2009, LPSCO filed a Motion to Bifurcate Issues. LPSCO's motion states
17 that, in accordance with Ariz. R. Civ. P. 42(b), bifurcation of this case into two phases is being
18 requested because PebbleCreek Properties Limited Partnership ("PPLP"), Westcor/Goodyear, LLC
19 and Globe Land Investors, LLC ("Westcor/Globe") have raised potentially complicated issues
20 regarding LPSCO's proposed new hook-up fee ("HUF") tariff. LPSCO proposes that Phase I would
21 address the general rate case issues with respect to establishing the Company's fair value rate base
22 and setting permanent rates and charges for utility service. As requested by the Company, Phase II
23 would be reserved for consideration of LPSCO's proposed new HUF tariff and modification of the
24 Company's existing HUF tariff for wastewater service.

25 LPSCO requests that Phase I be completed in its entirety and, following a Commission
26 Decision setting new rates, this docket would remain open for consideration of the Phase II HUF
27 issues, and issuance of a separate Decision in this docket.

1 LPSCO seeks expedited consideration of its motion due to the imminence of the filing
2 deadline for its rebuttal testimony. However, LPSCO did not indicate whether the other parties
3 support or oppose the bifurcation request.

4 LPSCO's requested bifurcation of this case into two phases is reasonable and shall be granted.
5 Bifurcation will further the interests of administrative efficiency and allow for a thorough
6 consideration of the HUF issues that have been raised in this proceeding separately from the other
7 traditional rate case issues that will be addressed in Phase I.

8 Request to Modify Procedural Schedule

9 On November 18, 2009, LPSCO filed an Unopposed Motion for Modified Procedural
10 Schedule. According to LPSCO's motion, all parties have agreed to slight modifications to the
11 previously established dates for filing of testimony. LPSCO's motion requests that the following
12 revised filing dates be established by Procedural Order:

| | |
|---|-------------------|
| 13 LPSCO Rebuttal (except to PPLP) | December 2, 2009 |
| 14 LPSCO Rebuttal to PPLP | December 7, 2009 |
| 15 Staff/Intervenor Surrebuttal (except PPLP) | December 17, 2009 |
| 16 PPLP Surrebuttal | December 18, 2009 |
| 17 LPSCO Rejoinder | December 29, 2009 |

18 The requested revised filing dates are reasonable and will be adopted. As reflected in
19 LPSCO's motion, all testimony should be filed by 4:00 p.m. on the day it is due.

20 IT IS THEREFORE ORDERED that **Docket Nos. SW-01428A-09-0103, W-01427A-09-**
21 **0104, W-01427A-09-0116, and W-01427A-09-0120 are hereby consolidated.**

22 IT IS FURTHER ORDERED that **RUCO's Motion to Quash is denied and Mr. Rowell is**
23 **directed to appear for deposition by LPSCO on November 30, 2009, at 9:00 a.m.,** at the location
24 designated in the Notice of Deposition and subpoena issued by the Commission's Executive Director.

25 IT IS FURTHER ORDERED that **LPSCO's Motion to Bifurcate this case into two phases**
26 **is reasonable and shall be granted.** Phase I will address the traditional rate case issues with respect
27 to establishing the Company's fair value rate base and setting permanent rates and charges for utility
28

1 service. Phase II will be reserved for consideration in this docket of LPSCO's proposed new HUF
2 tariff and modification of the Company's existing HUF tariff for wastewater service.

3 **IT IS FURTHER ORDERED that LPSCO's Unopposed Motion for Modified Procedural**
4 **Schedule is granted and the following modifications to the previously established procedural**
5 **schedule shall be observed:**

| | | |
|----|---|--------------------------|
| 6 | LPSCO Rebuttal (except to PPLP) | December 2, 2009 |
| 7 | LPSCO Rebuttal to PPLP | December 7, 2009 |
| 8 | Staff/Intervenor Surrebuttal (except PPLP) | December 17, 2009 |
| 9 | PPLP Surrebuttal | December 18, 2009 |
| 10 | LPSCO Rejoinder | December 29, 2009 |

11 **IT IS FURTHER ORDERED** that all parties must comply with Rules 31 and 38 of the Rules
12 of the Arizona Supreme Court and A.R.S. § 40-243 with respect to the practice of law and admission
13 *pro hac vice*.

14 **IT IS FURTHER ORDERED** that withdrawal of representation must be made in compliance
15 with A.A.C. R14-3-104(E) and Rule 1.16 of the Rules of Professional Conduct (under Rule 42 of the
16 Rules of the Arizona Supreme Court). Representation before the Commission includes appearances
17 at all hearings and procedural conferences, as well as all Open Meetings for which the matter is
18 scheduled for discussion, unless counsel has previously been granted permission to withdraw by the
19 Administrative Law Judge or the Commission.

20 **IT IS FURTHER ORDERED** that the Ex Parte Rule (A.A.C. R14-3-113 - Unauthorized
21 Communications) applies to this proceeding and shall remain in effect until the Commission's
22 Decision in this matter is final and non-appealable.

23 **IT IS FURTHER ORDERED** that the time periods specified herein shall not be extended
24 pursuant to Rule 6(a) or (e) of the Rules of Civil Procedure.

25 ...
26 ...
27 ...
28 ...

1 IT IS FURTHER ORDERED that the Administrative Law Judge may rescind, alter, amend,
2 or waive any portion of this Procedural Order either by subsequent Procedural Order or by ruling at
3 hearing.

4 DATED this 23rd day of November, 2009.

6 

7 DWIGHT D. NODES
8 ASSISTANT CHIEF ADMINISTRATIVE LAW JUDGE

9
10 Copies of the foregoing mailed/delivered
this 23rd day of October, 2009 to:

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