

J. Alan Smith, Private Citizen
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Payson, Arizona [PZ 85541]
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PWC Utility Account No. 61138-24899
In Propria Persona

ORIGINAL



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Before the Arizona Corporation Commission

2012 SEP 13 PM 12 27

Arizona Corporation Commission

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SEP 13 2012



COMMISSIONERS

Gary Pierce, Chairman
Paul Newman, Commissioner
Brenda Burns, Commissioner
Bob Stump, Commissioner
Sandra D. Kennedy, Commissioner

J. Alan Smith, Injured Party
Complainant,

vs.

PAYSON WATER CO. INC./BROOKE
UTILITIES INC.
Respondents.

DOCKET NO. W-03514A-12-0007

**RESPONSE AND OBJECTION TO
RESPONDENT'S MOTION TO
QUASH SUBPOENA**

NOW COMES, the Complainant J. Alan Smith, to respond and object to Respondent's Motion to Quash Subpoena and requests of the Administrative Law Judge (ALJ) and the Commission to initiate an action pursuant to ARS § 41-1062 A (4) and ARS § 12-2212 A, B in the Superior Court of Maricopa County to Compel Robert T. Hardcastle, David Allred, Brooke Utilities, Inc. and Payson Water Co., to fully and completely Comply with the Subpoenas served upon them on August 7, 2012 and August 27, 2012 respectively in relation to the investigative matters before the Commission in Docket No. W-03514A-12-0007 and to compel the Respondents, Mr. Hardcastle and David Allred to show cause why they refuse to comply with the Subpoenas issued to them by the Commission on behalf of the Complainant in Docket No.W-03514A-12-0007 and the Complainants in Docket No.W-03514A-12-0008.

A MOTION TO QUASH IS A MOTION TO SUPPRESS, VACATE, SET ASSIDE OR ANNUL.

The Supreme Court decided back in 1950 that *subpoenas can't be quashed if "the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."*

Under that instruction, any information successfully argued as reasonable to an investigation in the making, even if lacking probable cause, can be considered enough of a case to have an administrative subpoena signed by anyone authorized to do so. An administrative subpoena can be signed *ad nauseam* and issued to telecommunication and utility companies, service providers and even hospitals.

“An agency can obtain enforcement of its order by filing a petition for civil enforcement in the trial court of general jurisdiction.” *Model State Administrative Procedure Act (1981) § 5-201(a)*; also See: **ARS § 41-1062 A (4) and ARS § 12-2212 A, B.**

In *United States v. Powell*, 379 U.S. 48 (U.S. 1964) the Court stated that; “a court has a duty to enforce an administrative subpoena if:

- The evidence is competent and relevant;
- The demand for information is definite;
- The purpose of the investigation is authorized by statute;
- Proper administrative steps are followed in issuing the subpoena.”

Mainly there are two constitutional grounds for challenging the enforceability of an administrative subpoena:

- 1) Fourth amendment prohibits unreasonable search and seizures. The restriction imposed by this amendment on unreasonable searches and seizures are not limited to criminal investigations but also applicable to administrative subpoenas. However, a legislative scheme that authorizes administrative searches of commercial property without warrant will not violate the fourth amendment *Donovan v. Dewey*, 452 U.S. 594 (U.S. 1981).
- 2) The Fifth Amendment privilege against self incrimination can also be raised to challenge an administrative subpoena. In *Couch v. United States*, 409 U.S. 322, 93 S. Ct. 611 (1973), it was held that the privilege can only be asserted by an individual, not by a corporation or a union.¹

Respondents misuse the Motion to Quash for inappropriate means and gross misrepresentations of facts throughout all of their arguments in support of their motion.

The Complainants in both the 12-0008 and 12-0007 proceedings discovered in their investigation into the activities of the Respondents and particularly those activities of Mr. Hardcastle and his associates that there is much more to their respective initial complaints as some disclosure was made by the Respondents. However, during the “disclosure process” the Respondents realized they were caught in their criminal activities and did everything humanly possible to avoid compliance with standard procedures, delayed compliance with the Subpoenas and Data Requests, altered documentation, harassed the Complainants with numerous frivolous pleadings and falsely accused the Complainants in both Dockets of abusing the Complaint process.

¹ For further discussion of judicial review of agency subpoenas, see:

- **Moore's Federal Practice--Civil**, Ch. 45, Subpoena; Ch. 205, Reviewability of Issues; Ch. 315, Review or Enforcement of an Agency Order--How Obtained; Intervention; Ch. 320, Applicability of Rules to the Review or Enforcement of an Agency Order; and Ch. 409, Jurisdiction over Administrative Agencies and Orders (Matthew Bender).
- **Federal Standards of Review**, Ch. 16, Review Based on Nature of Agency Procedure (Matthew Bender).
- **Anticau on Local Government Law, Second Edition**, Ch. 25, Exercise of Authority by Local Legislative Body (Matthew Bender).

The Complainants in both proceedings are on a fact finding mission and investigation of the Respondents activities dealing with all of the matters leading up to the revisions of the Curtailment Plan, the acquisition of the Water Augmentation Surcharge Tariff and their abusive implementation and the illicit profits gained there from.

Upon reviewing historical dockets, documents and records of the Commission, there appears to be a very long history of criminal activity by Mr. Hardcastle, David Allred, Brooke Utilities, Inc., and Payson Water Co. including but not limited to, Consumer fraud, theft of water, and illegal confiscation of private wells.

The time is now for the Commission to act, and do the job as required. Failure to act appropriately is unacceptable, negligent and irresponsible on part by the Commission. Vital and Necessary documents, records and materials ordered to be disclosed by Subpoena have not been previously disclosed by the Respondents.

Respondents continue to lie, misinform and misrepresent that all disclosure has been made in the prior proceedings in W-03514A-12-0008 where in fact the documents, records, logs and other materials currently requested in Subpoenas and Data Requests have never been disclosed nor provided by them simply because the ALJ, Legal Staff and the Commission failed or refused to petition the Superior Court to enforce the Subpoenas. By such incompetence the Complainants were left to the presentation of what little evidence they were able to obtain by other means. They were denied improperly due process and their right to discovery and disclosure.

On August 7, 2012 Mr. Hardcastle, David Allred, Brooke Utilities, Inc. and Payson Water Co. were legally served with a Subpoena by J. Stephen Gehring on behalf of Alan Smith after the hearing and notice of that service of process was mailed on August 7, 2012.

On or about August 20, 2012 Mr. Hardcastle filed (not so timely, 10 day requirement) Respondent's Response to the Subpoena served upon them on August 7, 2012 (**See: Attached Exhibit 1**). In that response he arrogantly, deceitfully and defiantly refused to comply with the Subpoena without just cause or excuse in furtherance of his on going and continuing concealment of vital and necessary documents and records that if disclosed would further evidence the criminal activities alleged in both this proceeding and in Docket No. W-03514A-12-0008.

On or about August 13, 2012 Complainant mailed to Executive Director Ernest G. Johnson his Second Subpoena to be issued to Robert T. Hardcastle, David Allred, Brooke Utilities, Inc. and Payson Water Co. which was served upon the Respondents on August 27, 2012 by David R. Vaughn of the Payson Constables Office. Notice of service of process was delayed and not mailed until September 10, 2012.

On September 6, 2012 Respondent Hardcastle filed his Motion to Quash the Subpoena received by him, David Allred and the Respondents on August 27, 2012.

Historical records reveal that the Commission is not in any way, shape or form ignorant of the deceitful tactics and games played by Mr. Hardcastle and that have been practiced by him on the Commission and that they let him get away with to defraud his Customers and Well Owners whom he steals from.

Such tactics are clearly evident in other proceedings leading up the current proceedings. For example: Reference and review of the transcripts of Dockets No. W-03514A-12-0008, W-03512A-06-0407 for comparison. The old water dog has not changed his dirty, deceitful tricks or tactics because they work for him.

ITEM I, OF THE RESPONDENT'S MOTION TO QUASH SUBPOENA.

Hardcastle argues that the Complainant abuses the Respondents and the Complaint process and that all of the documentation filed and witness testimony taken in Docket No. W03514A-12-0008 is more than sufficient for the current proceedings and that any other documentation is not essential to the current case. Oh my! Mommy, Mommy, Johnny is picking on me! The RTH "cry baby" is good! Let us see how good?

Let us examine the real truth and facts here instead of "Hardcastle's Questionable Honesty."

- 1) In the prior proceedings of Docket No. W-03514A-12-0008 Mr. Hardcastle and the Respondents and Mr. Pearson (Pearson Water Co./Pearson Transport) and Mr. Martin Zabola all refused to comply with the Subpoenas. Zabola ran off to N. Dakota to avoid compliance. Pearson absolutely refused to comply and Hardcastle and the Respondents only **PARTIALLY** complied thus crippling the Complainants efforts to prosecute their case and the Commission let them get away with it due to incompetence. **Review the record.**
- 2) On March 27, 2012 Respondent's mailed their "Motion to Modify Subpoena" and refused to supply other documentation, records, hauling logs and invoices relevant and material to the revisions of the Curtailment Plan, 2011 Water Augmentation Period and both proceedings particularly those records, logs and documents pertaining to the EVP System Augmentation and monthly consumption.
- 3) Respondents absolutely refused to produce and never did produce the following:
 - a) Requested Trucking Contractor records associated with the invoices and hauling logs for the periods mentioned are not included. There are no Bills of Lading, Waybills, On-Duty Time (per Federal Motor Carriers Safety Regulations (FMCSR 395.1), Drivers Record of Duty Status (per FMCSR 395.8), Driver Vehicle Inspection Report (per FMCSR 396.11), electronic or computerized logging graphs related to tractor time logs for all trips billed to PWC/BUI during the Augmentation period by Martin's Trucking Service and Person Water/Person Transport and from the drivers (Jim, Chase and Martin). There are no records of Tractor and Trailer unit numbers or Tanker capacity used in hauling water to the MDC System other than what has been shown on the "BUI Hauling LOGS" which are incomplete;
 - b) The hauling log for the 8/12/11 (but provided by ACC legal division). **The first bit of proof that MDC Customers were charged for water hauled to the EVP System;**
 - c) Invoice Numbers 8805, 8806, 8809, 8810, 8811, 8813, 8814, 8817, 8818, 8820, 8821, 8824 and their corresponding "BUI Hauling Logs;

- d) "BUI Hauling Log" for Invoice 8815 and the time period: 8/4/11 to 8/5/11;
- e) "BUI Hauling Log" for Invoice 8816 and the time period: 8/12/11;
- f) "BUI Hauling Log" for Invoice 8822 and the time period: 8/31/11 to 9/01/11;
- g) Invoices associated with "BUI Hauling Log" for the time periods: 8/6/11 to 8/7/11 and 8/30/11;
- h) The location of where any amount of water was acquired, purchased or hauled from any source other than TOP to EVP System during the Augmentation Period May 1 to Sept. 30, 2011;
- i) Documentation on wells owned by PWC/BUI: 1)55-531101; 2) 55-631111; and 3) 55-553798;
- j) Copy of all records of disconnects or termination of service for the years 2009, 2010 and 2011 for both non-payment and Curtailment Plan violations;
- k) The request to provide the reports submitted to the Utilities Division Compliance Section by BUI/PWC related to ACC Decision No. 67821 and only provided documentation titled "Customer Compliance Issues – Curtailment Fine and Fees from September 2011 and did not include documentation for the (April) May 2011;
- l) Copy of all documentation, accounts and disbursement of funds obtained by Brooke Utilities, Inc. and Payson Water Co. from all Curtailment Plan fines and fees imposed on Customers of the MDC System for the years 2009, 2010, 2011 and 2012 and deposited into a separate interest bearing trust account used solely for the purposes of importing water to the MDC System to off set the cost of hauling water;
- m) Any of the Data Requests in either proceeding;
- n) Copy of any contract between Pearson Water Co./Pearson Transport and Payson Water Co. or Brooke Utilities Inc. to haul water from any location to any other location. Particularly from any location to any of the Water Systems owned and operated by Payson Water Co. during the 2011 Augmentation Period;
- o) Copy of Mr. David Allred's Certification as a Class 4 Water Operator;
- p) Copy of the Water Sharing Agreements that Brooke Utilities, Inc. and Payson Water Co. entered into with Patricia Behm, El Caballo Club, Lisa and Ben Harmon, John Olson, Mary Hansen, Any other person or legal entity in the MDC System;
- q) Copy of records of all payments made to Well Owners of the above mentioned Water Sharing Agreements and/or any wells from which Brooke Utilities, Inc. and Payson Water Co. purchase water for the MDC System for the following Well Owners, Wells and years:
 - i. Patricia Behm Well No. 55-560398 for the years 2005 through 2012;
 - ii. El Caballo Club Well No. 55-585747 for the years 2005 through 2012;
 - iii. Lisa and Ben Harmon Well No. 55-553798 for the years 1997 through 2012;
 - iv. John Olson Well No. 55-553798 for the years 2002 through 2012;
 - v. Mary Hansen Well No. 55-553798 for the year 2012;
 - vi. Any other person or entity Well No. 55-553798 for the years 1997 through 2012;

- r) Copy of Brooke Utilities, Inc. and Payson Water Co. costs for the cost and hauling of water to the MDC System for the year 2010 including Invoices and hauling logs;
- s) The list of all Payson Water Co. employees employed during the year 2011 (for purposes of interview);
- t) Copy of Payson Water Co. CC&N (Certificate of Conveyance and Necessity);

Still, other documents supplied by the Respondents and particularly Mr. Hardcastle, on or about March 30, 2012 revealed that documentation and records were intentionally left out while others were intentionally and unexplainably altered and include the following:

BUI/PWC records of the total consumption/usage by all Customers of the MDC System for the billing periods April to May 2011; May to June 2011; June to July 2011; July to August 2011; August to September 2011; and September to October 2011. What was received are format altered documents that do not show the total consumption/usage for each monthly period as requested and leaves out the location ID and Meter ID. The Complainants' were unable to authenticate Total Consumption/Usage that would match documents previously provided by BUI for the period June to July 2011 and are not identical in format and content to the documents previously acquired otherwise and subtitled MDC Water System, Water Augmentation Charges Calculation, expenses incurred in June 2011 but billed to customer on July 2011 and incurred in July 2011 to Aug 2011 and billed in Aug 2011, to the ACC and Customers of the MDC System. They are in fact altered and falsified.

What invoices and hauling logs were supplied were not pristine and had been altered.

- 4) On April 3, 2012 Complainants mailed their "Response and Objection to Respondents Motion to Modify Subpoena, Motion to Deny and Compel Compliance with the Subpoena by Order, with Evidentiary Exhibits;
- 5) On April 5, 2012 Complainants mailed their "2nd Response and Objection to Respondents Motion to Modify Subpoena, Motion to Deny and Compel Compliance with the Subpoena by Order, with Evidentiary Exhibits" clearly intended as a Supplement to the 1st Pleading of identical Caption.
- 6) On April 10, 2012 Respondents mailed their "Reply to Complainants 2nd Response and Objection to Respondents Motion to Modify Subpoena;"
- 7) On April 16, 2012 Complainants mailed their "Objection to Respondents Reply to Complainants' "Supplement" 2nd Response and Objection to Respondents Motion to Modify Subpoena;"
- 8) Referencing the Procedural Order of March 19, 2012: "any motions which are filed in this matter and *which are not ruled upon* by the Commission within 20 calendar days of the filing date of the motion *shall be deemed denied*." (See: Page 3 lines 3-5 of the Procedural Order of March 19, 2012).

The Respondents "Motion to Modify Subpoena" was never granted or ruled on in favor of the Respondents by the Administrative Law Judge. However, Mr. Hardcastle arrogantly and defiantly acted and preformed as if the ALJ had granted the motion. Here we can define abuse of the Complaint process.

The Respondents have no standing to claim that they have ever complied with the Subpoenas issued in W-03514-12-0008 or that the Subpoenas must be quashed or that they do not have to comply with the Subpoenas issued to them in these proceedings or that the Complainant is abusing the Respondents and the Complaint process because the Respondents and Hardcastle have never complied with the Subpoenas.

Why do the Respondents and Mr. Hardcastle conceal and refuse to release the documents and records the Complainants have sought since before April of 2012? What is it that Hardcastle must hide and conceal from the Commission or for that matter the Attorney General? Hardcastle's assumption that the Complainant's filed a false and unwarranted Complaint is entirely based on his refusal to comply with the Subpoenas and Data Requests in his possession and to further conceal potentially incriminating evidence that shall surely bring criminal complaint against him, the companies and others in another venue. He thinks if he can just stall and "bullshit" long enough it will all go away. WRONG!!!

ITEM II, OF THE RESPONDENT'S MOTION TO QUASH SUBPOENA.

Mr. Hardcastle obviously does not understand the administrative process that he manipulates to suit himself.

The Complainant properly applied for and was granted the Subpoenas he deemed necessary for his case and in no way, shape or form has he abused the Complaint process.

On the other hand, Mr. Hardcastle has throughout the prior and these proceedings carried out his plan to delay, refuse to comply and otherwise deny and conceal the evidence that is so damaging to him. Hardcastle does not want the truth to be told or revealed because it will lead to his criminal prosecution.

The Complainant was not prepared for the hearing of August 7, 2012 because Hardcastle and Pearson refused to comply with the Data Requests and Subpoenas in both these proceedings and in 12-0008. Mr. Hardcastle and Mr. Pearson must be held accountable for their defiance and contempt of the Commission and its authority. The ALJ, Legal Staff and the Commission must perform their duties and responsibilities to put an end to Hardcastle's potentially criminal activities that have victimized so many of his Customers and others.

Article 15 of the Arizona Constitution § 4 Power to inspect and investigate specifically states:

"The Corporation Commission, and the several members thereof, ***shall have*** power to inspect and investigate the property, books, papers, business, methods, and affairs ***of any corporation*** whose stock shall be offered for sale to the public and ***of any public service corporation doing business within the State***, and for the purpose of the Commission, and of the several members thereof, ***shall have the power of a court of general jurisdiction to enforce the attendance of witnesses and the production of evidence by subpoena, attachment, and punishment***, which ***said power shall extend throughout the State. Said Commission shall have power to take testimony under commission or deposition either within or without the State.***"

Arizona Administrative Code, Arizona Corporation Commission Rules of Practice and Procedure Rule R14-3-109 (O) Subpoenas, in part specifically states:

“Subpoenas requiring the attendance of a witness from any place in the state of Arizona to any designated place of hearing for the purpose of taking testimony of such witnesses orally before the Commission may be issued upon application in writing. A subpoena may also command the person to whom it is directed to produce books, papers, documents or tangible things designated therein. The application for such subpoenas must specify, as clearly as possible, the books, waybills, papers, accounts or other documents desired.”

Administrative Procedure, Article 6 Adjudicative Proceedings ARS § 41-1062 A (4) in part specifically states:

“The officer presiding at the hearing may cause to be issued subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence and shall have the power to administer oaths. Unless otherwise provided by law or agency rule, subpoenas so issued shall be served and, upon application to the court by a party or the agency, **enforced in the manner provided by law for the service and enforcement of subpoenas in a civil action.** . . . **All provisions of law compelling a person under subpoena to testify are applicable.** . . . Notwithstanding the provisions of Section 12-2212, no subpoenas, depositions or other discovery shall be permitted in contested cases except as provided by agency rule or this paragraph.”

Courts and Civil Procedure, Article 2. Duties and privileges of Witnesses ARS § 12-2212 A, B Subpoena by public officer; contempt specifically states:

- A. When a public officer is authorized by law to take evidence, he may issue subpoenas, compel attendance of witnesses and production of documentary evidence, administer oaths to witnesses, and cause depositions to be taken, in like manner as in civil actions in the superior court.
- B. **If a witness fails to appear at the time and place designated in the subpoena, or fails to answer questions relating to the matter about which the officer is authorized to take testimony, or fails to produce a document, the officer may, by affidavit setting forth the facts, apply to the superior court of the county where the hearing is held, and the court shall thereupon proceed as though such failure had occurred in an action pending before it.**

The above cited Constitutional Mandates, Arizona Administrative Codes (AAC) and Arizona Revised Statutes (ARS) cannot speak any plainer. Motions submitted by the Complainants before the ALJ and Commission have requested over and over and over again that the Commission and the ALJ enforce the Subpoenas and compel the Respondents and Mr. Hardcastle, Dave Allred, Mr. Pearson and Mr. Zabola to comply with the those Subpoenas but, the ALJ, Legal Staff and the Commission did absolutely nothing, failed to act and neglected their duty, obligation and responsibility. WHY?

That failure to act has created numerous appealable issues and reversible errors for the Complainants to address on appeal of any decision the Commission makes in both Dockets No. W-3514A-12-0008 and 12-0007.

Complainant's Motion to Compel Pearson to appear and to provide documents and records was discussed in detail at the August 7, 2012 hearing. In review of those ACC audio/visual recordings at that hearing statements were brought forth by Legal Staff Member Robin Mitchell that disclosed and enlightened the following:

Opinion by ACC Staff Legal, Robin Mitchell:

The Commission does have authority to enforce a Subpoena (17:00) by Statute and Rule.

The Commission would have the authority to enforce or compel the witness to attend under a Subpoena issued by the Commission.

If, you look at . . . The Rules of Civil Procedure. How the Commission gets to that, it. The Commission has similar type of enforcement action. How the Commission gets there that would either have to happen on the motion of the Complainant or by Commission Staff, like an order to show cause, to compel the witness to say why they are not in attendance? (18:10).

There, would be notice and opportunity to be heard by the wayward witness that is not in attendance, but how would you enforce this since our powers are limited. (18:26) You can either fine that individual for failure to appear and I have to flip through the statute books but I think its 44-24 or someone perhaps the Complainant in this case would have to seek an enforcement in the Superior Court. (18:41)

ACALJ: Would the Complainant seeking to enforce the Subpoena have to go to Superior Court to have it enforced? I have not come across this situation before. That is why I ask the question.

Mitchel: I have not found anywhere in any of the research that I have done that this has ever been an issue that has come before the Commission. I looked at the Administrative Practices Act to see what they do to compel (19:29).

Mitchel: Um, Um, to compel the attendance of witnesses and it appears **they** go through Superior Court. I know that the Commission has fining authority for failure to respond. I'm assuming that the Commission could after the hearing fine the wayward witness for failure to attend but to force them in here, I mean you don't have anyone go and snatch them up to make them come (19:57). So I would assume there would have to be some action in the Superior Court in order to compel that attendance (20:10). You could, obviously after an order to Show Cause and on a hearing assess some type of fine for failure to appear but, I don't know what else authority the Commission would have authority to do (20:23).

So why didn't the ALJ, Legal Staff or the Commission pay attention to the fact that the Complainants in 12-0008 and 12-0007 submitted their Motions to Compel Compliance with the Subpoenas? Why did the ALJ, Legal Staff or the Commission fail to act? Could it be that they all place so little importance on the Complaint process?

In In Murphy, J., dissenting, in Oklahoma Press Publishing Co. v. Walling, 327 U. S. 186, 219 (1946) the Court stated:

"The individual has the right to refuse compliance, but normally yields because of the air of authority with which the demand is made, even though the demand cannot be enforced without subsequent judicial aid.

Most administrative invasions of privacy thus occur without the restraining hand of the judiciary ever intervening. **It is only when the individual refuses compliance that the agency must seek judicial aid.**

It should further be noted that the Respondents and Mr. Hardcastle, Mr. Allred, Mr. Pearson and Mr. Zabola never objected to the Subpoenas issued to them. They just refused to comply with them. The Complainant has motioned the ALJ and the Commission to enforce them. According to the court, in ***California Restaurant Assn. v. Henning*, 219 Cal. Rptr. 630 (Cal. App. 1985)** before any penal consequences may be imposed, there must first be an action in which there is a judicial validation of the subpoena in question. Hence, as the Supreme Court tells us in ***Donovan v. Lone Steer, Inc.*, 464 U. S. 408, 415 (1984)** and ***Craib v. Bulmash*, 777 P.2d 1120, 1125 (Cal. 1989)**, the cases provide protection for a person subpoenaed by an agency by allowing that person to raise objections to the subpoena in court before suffering any penalties for refusing to comply with it.” Of course, after judicial enforcement, the failure to obey the court’s enforcement order is punishable as a contempt of court.

According to statutory construction found above in ARS § 41-1062 A (4) and ARS § 12-2212 A and B it is not up to the Complainant on his own to enforce the Subpoena(s) issued by the Commission.

The Complainants in both proceedings motioned the ALJ to compel compliance with the Subpoenas.

Enforcement and compliance is the duty, obligation and responsibility of the Administrative Law Judge, Legal Staff and the Commission once motioned, and who may by affidavit, apply to the Maricopa County Superior Court to enforce the Subpoenas whereupon, the court shall proceed as though the failure had occurred in an action pending before it. But they failed or refused to perform.

Having brought this issue to full circle the ALJ, Legal Staff and Commission cannot further procrastinate and display an incompetence and inability to properly perform their duties and responsibilities as prescribed by law in both the previous as well as the present proceedings.

In the prior proceeding Docket No. W-03514-12-0008 the Commission issued the Subpoenas, the Respondents refused to comply, the Complainants Motioned the ALJ and the Commission to Compel the Respondents and others served with process, to comply with the Subpoenas. The ALJ, Legal Staff and Commission, failed or refused to properly act upon those motions to comply with the Subpoenas without justifiable cause or excuse. The same errors and appealable issues simply cannot be allowed to happen again in these current proceedings. Hardcastle cannot be allowed to get away with any more potential criminal activities.

“The very purpose of the administrative subpoena is to discover and procure evidence, not to prove a pending case, but to make a case if, in the agency’s judgment, the facts thus discovered should justify doing so.” ***EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304,312 (7th Cir. 1981).**

The Respondents and Mr. Haradcastle, Dave Allred and Mr. Pearson in both proceedings have exploited the inabilities of the Commission, Legal Staff and the ALJ to perform according to their distinctive Constitutional

and Statutory authority to enforce the Subpoenas to the point where they can deny the Complainants the vital and necessary documents, records, logs and witness testimony they sought and thumb their defiant noses at the Commission in contempt and get away with it.

What else can the Complainant do? What else could have the Complainants in the previous proceedings have done?

Authority lies with the Administrative agency that issued the Subpoenas, specifically the Arizona Corporation Commission who has failed to exercise its authority to make application to the Superior Court of Maricopa County to enforce the Subpoenas in both the previous and present proceedings.

The Commission and the ALJ and the Commission must act now to correct those errors immediately.

If the ALJ, Legal Staff and the Commission continue to refuse to apply to the Superior Court to enforce the Subpoenas as has been requested then the Commission places this Complainant in the same position as the ALJ, Legal Staff and the Commission placed the Complainants in the previous proceedings who were denied the benefit of enforcement of the Subpoenas.

The Complainants in 12-0008 were compelled by the ALJ to proceed with the hearing unprepared, with only the evidence and witnesses they had at that time and were crippled by the fact that they were denied the vital and necessary evidence and testimony of the witnesses they sought, denied a hearing on discovery issues as requested, and denied a continuance as requested on the bases of the unresolved discovery issues due to the Respondents, Hardcastle's, Allred's, Zabola's and Pearson's refusal to comply with the Subpoenas.

How then can this Complainant in the current proceedings expect to be fully prepared for a hearing on the issues before the Commission or allowed due process of law since due process was absolutely denied the Complainants in the prior proceedings in 12-0008?

The agency should have the burden of protecting the rights of confrontation and cross-examination, the burden should not be shifted to provide a technical way in which those rights are lost. *Williams v. Zuckert*, 371 U. S. 531, 534 (1963).

The documentation, records, logs, invoices and witness Subpoenaed by the Complainant in these proceedings are extremely relevant, material and directly related to all of the issues and allegations raised in the Complaint and particularly relevant to the Water Augmentation Period of 2011, application of the Curtailment Plan, wrongful termination of service, over charging of reconnection fees, misapplication of reconnection fees, Customer Service non-compliance and Consumer Fraud, as Pearson Water Co./Pearson Transport Co. contracted with Payson Water Co., or Brooke Utilities, Inc., to haul water to the Mesa del Caballo, East Verde Park and other water systems and the Companies abused those limited powers and authority granted them by the ACC to extort unjust enrichment and prohibited profits out of their Customers in the MDC System while scamming all concerned from the ACC right down to their Victims and Customers.

WHEREFORE, the Complainant Motions the Commission and its honorable Administrative Law Judge to deny the Respondent's Motion to Quash the Subpoena and requests that the ALJ, Legal Staff and/or the Commission make every effort to make application and affidavit to the Maricopa County Superior Court to Compel the Respondents and Mr. Hardcastle, Mr. Allred, Brooke Utilities, Inc. and Payson Water Co., to fully and completely comply with the Subpoenas issued by the Commission and served upon them on August 7, 2012 and August 27, 2012 respectively without any further delay or excuse.

Respectfully submitted this 11th day of September, 2012



J. Alan Smith, in Propria Persona

CERTIFICATE OF SERVICE

The Original and 13 copies of the foregoing Motion have been mailed this 11th day September, 2012 to the following:

DOCKET CONTROL
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

Copies of the foregoing Motion have been mailed this 11th day September, 2012 to the following:

Robert T. Hardcastle
P. O. Box 82218
Bakersfield, Ca. 93380

By: J.A.S.

EXHIBIT 1

BROOKE UTILITIES, INC.

Mailing Address: P.O. Box 82218, Bakersfield, CA 93380
Customer Service Call Center (800) 270-6084, (855) 508-5507 fax

ROBERT T. HARDCASTLE
(855) 672-5057 Fax
RTH@brookeutilities.com

August 16, 2012

J. Alan Smith
8166 Barranca Rd.
Payson, AZ 85541



In re: **Docket No. W-03514A-12-007, Smith vs. Payson Water Co.**

Dear Mr. Smith,

Pursuant to your Subpoena dated August 2, 2012 in the above referenced Docket, please find Payson Water Co.'s responses timely provided attached.

Sincerely,

Robert T. Hardcastle
President

EC:

PAYSON WATER CO., INC.'S RESPONSES TO
SMITH SUBPOENA DATED AUGUST 2, 2012
ARIZONA CORPORATION COMMISSION
DOCKET NO. W-03514A-12-0007
SMITH vs. PAYSON WATER CO., INC.



At the August 7, 2012 Hearing the Administrative Law Judge stated for the record that he was taking Administrative Notice of all documents in the record under Docket No. W-03514A-12-0008. Accordingly, Payson Water Co. answers the questions related to the Subpoena referenced above as follows:

Question 1 (a, b, c): All documents related to answering this Subpoena have previously been provided and are contained within Docket No. W-03514A-12-008.