

J. Alan Smith, Private Citizen
8166 Barranca Rd.
Payson, Arizona [PZ 85541]
(928) 951-2083 Wk.
PWC Utility Account No. 61138-24899
In Propria Persona



0000139645

Corporation Commissioner

DOCKETED

RECEIVED

AZ CORP COMMISSION SEP 24 2012

DOCKET CONTROL

2012 SEP 24 AM 9 59

DOCKETED BY

Before the Arizona Corporation Commission

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

**MOTION TO INITIATE AN ACTION IN THE
SUPERIOR COURT TO COMPEL JIM PEARSON,
PEARSON TRANSPORT, ROBERT T.
HARDCASTLE, BROOKE UTILITIES, INC.
AND PAYSON WATER CO. TO COMPLY WITH
THE SUBPOENAS SERVED UPON THEM**

NOW COMES, the Complainant J. Alan Smith, to Motion the Administrative Law Judge (ALJ) and the Commission to initiate an action in the Maricopa County Superior Court to Compel Jim Pearson and Pearson Transport, Robert T. Hardcastle, David Allred, Brooke Utilities, Inc. and Payson Water Co., to fully and completely Comply with the Subpoenas served upon them on July 26, 2012, August 7, 2012 and August 27, 2012 respectively and in relation to the matters before the Commission in Docket No. W-03514A-12-0007 in these proceedings to show cause why the Respondents and sub-contractors have refused to comply with the Subpoenas issued to them by the Commission on behalf of the Complainants in both Docket No. W-03514A-12-0008 and 12-0007.

“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.”

Failure by the ALJ, Staff and the Commission to initiate an action in the Superior Court shall clearly demonstrate to the Complainants in both of these proceedings that the Commission is unwilling to exercise its authority to hold a Corporate entity accountable for their most unscrupulous and heinous actions and activities that have resulted in extreme financial injury and harm to Company Customers and that the Commission is unwilling to protect the victims from any further injury, harm and exploitation that these Companies are willing and able to cause their Customers to achieve unauthorized Corporate profits and benefits.

Failure to act appropriately is unacceptable and irresponsible on part by the Commission. Vital and Necessary documents, records and materials have been required to be disclosed. It is not the Complainant position or authority to compel compliance with the Subpoenas issued, it is the Commissions authority that they must enforce in these proceedings.

On or about July 16, 2012 Complainant presented to the Commission Executive Director, Earnest G. Johnson his Applications for two (2) Administrative Subpoena Ducas Tecum to be issued to Jim Pearson, and Pearson Water Co./Pearson Transport Co. to produce copy of certain requested documents, records, logs and papers and to appear at the hearing scheduled for August 7, 2012 at 10:00 a.m.

On July 19, 2012 Executive Director, Johnson signed and certified the Subpoenas and mailed them back to the Complainant. Jim Pearson and Pearson Water Co. were served with the Subpoenas by Debi Woskobojnik on July 25, 2012. Mr. Pearson knowingly and intentionally, absolutely refused to comply as it clearly became evident at the August 7, 2012 hearing.

On Thursday, July 26, 2012 Complainant Alan Smith and witness Richard M. Burt traveled to Williams, Arizona to interview Mr. James Pearson, the interview was recorded with a digital audio recorder and later transcribed and presented in evidence. Mr. Pearson was extremely hostile toward the Complainant and his witness and informed him/them that he would absolutely not comply with the Subpoenas or attend the hearing scheduled for August 7, 2012.

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. 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.

On September 11, 2012 Complainant mailed his Response and Objection to Respondent's Motion to Quash the Subpoena.

If the Respondents and Mr. Pearson have nothing to hide then why do they run and hide and refuse to comply with the Subpoenas? What does Hardcastle have to hide?

In the previous proceeding, Docket No. W-03514A-12-0008 Mr. Pearson, Mr. Hardcastle and the Respondents were subpoenaed to produce a number of documents and records. Pearson absolutely refused to comply with the Subpoenas served upon him. Mr. Hardcastle only partially complied and now in these proceedings absolutely refuses to comply.

It should further be noted that the Commission is not in any way, shape or form ignorant of the deceitful tactics and game plans of Mr. Hardcastle that have been practiced on the Commission as clearly evidenced in many of the previous proceedings and particularly those tactics exercised on the Commission in the proceedings leading up to the sale of the Pine and Strawberry Systems to the Pine Domestic Water Improvement District.

Mr. Hardcastle's antics in the previous proceedings before the Commission in Docket No. W-03514A-12-0008 should be clearly evident and foremost to the minds of all parties whom participated. Case harden proof, reference the audio/video tapes of W-03514A-12-0008, and the transcripts W-03512A-06-0407.

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."

The above cited Constitutional Mandates and Arizona Administrative Codes (AAC) cannot speak any plainer. Motions before the Commission and particularly the ALJ and Staff have requested over and over again that the Commission and the ALJ enforce the Subpoenas and compel the Respondents, Mr. Hardcastle, Mr. Allred, the Respondents and Mr. Pearson to comply with the those Subpoenas but the ALJ, Legal Staff and the Commission have failed to act and neglect their duty, obligation and responsibility to do so. One must ask the question why the Complainant is being denied due process.

As such the ALJ, Staff and Commission have created numerous appealable issues and reversible errors for the Complainant(s) to address on appeal of any decision of the Commission in both, Docket No. W-3514A-12-0008 and 12-0007.

Of real interest is that 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 the ACC audio/visual recordings at that hearing legal opinions were brought forth by Legal Staff Member Robin Mitchell that disclosed 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).

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.

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 neither the Respondents, or Mr. Hardcastle, or Mr. Allred, or Mr. Zabola, or Mr. Pearson ever objected to the Subpoenas issued to 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 the 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. That is the duty, obligation and responsibility of the Administrative Law Judge and the Commission, 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. Having brought this issue to full circle the ALJ, Legal Staff and Commission cannot further display the 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 proceedings of, 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 applications or motions to compel compliance 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.

“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, 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 seek and thumb their defiant noses at the Commission in contempt and get away it. If this were a criminal or civil proceeding in the Superior Court this information would have been disclosed months ago and the Respondents would not be allowed to make up excuses or allowed to simply refuse to comply.

“Agency subpoena power is not confined to those over whom it may exercise regulatory jurisdiction, but extends to any persons from whom it can obtain information relevant and material to its legitimate inquiry.” **FCC v. Cohn, 154 F. Supp. 899, 906 (S.D.N.Y. 1957).**

“For an agency to exercise subpoena power, it need not show that it has regulatory jurisdiction over the person subpoenaed.” **Freeman v. Fidelity-Philadelphia Trust Co., 248 F. Supp. 487 492 (E.D. Pa. 1965).**

“Testimony and records pertinent to a legitimate investigation may be subpoenaed even though the subpoena is directed to a third person who is not subject to the agency’s jurisdiction and who is not the subject of the investigation.” **United States v. Marshall Durbin & Co., 363 F.2d 1 (5th Cir. 1966); Freeman v. Brown Bros. Harriman & Co., 357 F.2d 741 (2d Cir. 1966).**

“All that is necessary is that the records be relevant to an investigation that is within the agency’s authority.” **Redding Pine Mills v. State Bd., 320 P.2d 25 (Cal. App. 1958) State v. Mees, 49 N.W.2d 386 (Minn. 1951).**

“The unduly broad scope of an administrative subpoena may no longer be set up as a defense in the enforcement proceeding.” **FTC v. Crafts, 355 U.S. 9 (1955) and Pope & Talbot v. Smith, 340 P.2d 960 (Ore. 1959).**

“Broadness alone is not sufficient justification to refuse enforcement of a subpoena.” **FTC v. Texaco, 555 F.2d 862, 882 (D. C. Cir. 1977).** The fact that compliance might call for thousands of documents is not

enough to show the subpoena is unduly burdensome.” **NLRB v. G.H.R. Energy Corp., 707 F.2d 110 (5th Cir. 1982).**

What else can the Complainant do? What else could have the Complainants in the previous proceedings have done? This Complainant has not been delegated the Constitutional or the Statutory authority on his own to enforce the Subpoenas. That authority lies with the Administrative agency that issued the Subpoenas, specifically the Arizona Corporation Commission who has failed to exercise its authority to apply to the Superior Court to enforce the Subpoenas in both the previous and present proceedings.

It is the Complainant(s) responsibility to point out as they have in both the proceedings that the ALJ, Legal Staff and the Commission have failed in their duties and responsibilities to enforce the Subpoenas issued by the Commission and that 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 the materials and witnesses Subpoenaed.

The Complainants in 12-0008 were compelled by the ALJ to proceed with the hearing unprepared, with only the evidence and witnesses they had 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 and Pearson’s refusal to comply with the Subpoenas.

How then can the 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 and the proper administration of law was absolutely denied the Complainants in the prior proceedings in 12-0008 and where apparently this Complainant is now being denied?

In **Goldberg v. Kelly 397 U. S. 254, 267-271 (1970)** the Court stressed that, where agency “decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. The right to cross-examine exists in all types of cases where administrative and regulatory actions are under scrutiny **Green v. McElroy, 360 U. S. 474, 497 (1959)** and **Hall v. State Racing Commn., 505 So. 2d 744 (La. App. 1987).**

When an Administrative Law Judge restricts the right unduly and there is prejudice the agency decision will be reversed, **Commission on Medical Discipline v. Stillman, 435 A.2d 747 (Md. 1981).** In **Peters v. United States 408 F.2d 719 (Ct. Cl. 1969)** the agencies there relied on written statements and reports even though their makers had not testified and been subject to any cross-examination.

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. The documents requested in both the previous proceedings and presently have never been produced and have been and are required to be produced and witnesses are required to appear.

Mr. Hardcastle, Mr. Allred, Mr. Zabola and Mr. Pearson “may not claim privilege for corporate records, in every such case the records kept are not within the protection of the self-incrimination privilege.” **Shapiro v. United States, 335 U. S. 1, 58 (1948)** “required records are also not protected by the 5th Amendment privilege against self-incrimination **Craib v. Bulmash, 777, P.2d 1120 (Cal. 1989)** “records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restriction validly established” **Shapiro v. United States, 335 U. S. 1, 58 (1948) Id at 33.**

WHEREFORE, the Complainant Motions the Commission and its honorable Administrative Law Judge to make affidavit and application to the Maricopa County Superior Court to compel the Respondents Brooke Utilities, Inc., Payson Water Co., Mr. Hardcastle, Mr. Allred, Mr. Zabola and Mr. Pearson to comply with the Subpoenas issued by the Commission to them fully and completely without any further delay, frivolous argument or opposition or to show cause why they should not comply. In the alternative the Complainant requests that the Maricopa County Superior Court and the Commission impose sanctions upon the Respondents, Mr. Hardcastle, Mr. Allred, Mr. Zabola and Mr. Pearson pursuant to ARS § 40-424 and other applicable statutes and Rules of Civil Procedure for Contempt of the Superior Court, Corporation Commission and the Administrative Law Judge.

Respectfully submitted this 20th 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 20th 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 20th day September, 2012 to the following:

Jim Pearson
Pearson Water Co.
P. O. Box 193
1120 Rodeo Rd.
Williams, AZ. 86046

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

By: J.A.S.