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BEFORE THE ARIZONA CORPORATION COMMISSION

J. ALAN SMITH,

Complainant,

v.

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

Respondent.

NO. W-03514A-12-0007

**RESPONSE TO MOTION TO
DISMISS**

Complainant, through counsel, hereby responds to the Motion to Dismiss filed by Robert Handcastle on behalf of Payson Water Co., Inc. For the reasons described below, Complainant respectfully requests that the Motion be denied.

The sole basis for the requested dismissal of this matter is the claim that the case allegedly has not proceeded forward as promptly as Respondent would like. This is both incorrect and does not provide a reasonable basis for the complete dismissal of the Complaint. As the Administrative Law Judge will recall, undersigned counsel appeared in person for the September 28, 2012 Procedural Conference in this matter and filed a Notice of Appearance on October 3, 2012. At the September 28, 2012 Procedural Conference, the issue of the outstanding Subpoenas Duces Tecum issued by the Commission to Jim Pearson and Pearson/Transport/Pearson Water was discussed, along with the unusual situation presented in terms of forcing compliance with those administrative orders. This issue had been raised with the Administrative Law Judge via the September 24, 2012 Motion to Initiate an Action in the Superior Court to Compel Jim Pearson, Pearson

1 Transport, and Others to Comply with Subpoenas filed by Complaint. The Judge, and
2 Commission Staff, requested during the September 28, 2012 Procedural Hearing that
3 Complainant's counsel issue a written demand to Mr. Pearson prior to the institution of
4 formal proceedings to enforce the Subpoenas Duces Tecum. Undersigned counsel
5 complied with that request on November 5, 2012. No response was received to this
6 written demand, which is attached as Exhibit 1 to the Notice of Submission of Demand for
7 Compliance with Subpoenas and Request for Issuance of Procedural Order Directing the
8 Institution of Compliance Proceedings in the Superior Court dated January 9, 2013.

9
10 There have been no delays in moving this matter forward, other than those
11 created by the unusual situation presented by Mr. Pearson's lack of compliance with the
12 Subpoenas issued by the Commission. The information sought through these subpoenas
13 is of critical importance to the Complainant's case. Certainly, Respondent has offered no
14 facts or legal authority which would justify the harsh sanction of dismissal. However, and
15 in a continuing effort to bring the case to the point where it can be heard, Complainant
16 requests that a procedural conference be set to discuss both the issues relating to the
17 outstanding Subpoenas and the setting of a final hearing date.

18 Furthermore, Mr. Hardcastle argues in his Motion to Dismiss that the case was
19 "mutually settled" at the informal complaint stage in this proceeding. Neither the
20 Complaint, nor any component of it, has been mutually resolved by the parties. This is
21 apparent from the proceedings that have transpired since the informal complaint stage.

22 For all the foregoing reasons, Complainant requests that the Motion to Dismiss
23 be denied.

24 DATED: January 9, 2013.

25 WALKER & HARPER, PC

26 

27 Michael J. Harper
28 Attorney for J. Alan Smith

1 ORIGINAL and 13 copies mailed for filing
2 this 9th day of January, 2013 to:

3 Docket Control
4 Arizona Corporation Commission
5 1200 W. Washington St.
6 Phoenix, AZ 85007

7 and copies mailed on the same date to:

8 Dwight Nodes, Administrative Law Judge
9 HEARING DIVISION
10 Arizona Corporation Commission
11 1200 W. Washington St.
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A handwritten signature in cursive script, appearing to read 'Robin Mitchell', is written over a horizontal line.