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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION  
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FEB 27 2013



J. ALAN SMITH,  
COMPLAINANT,

DOCKET NO. W-03514A-12-0007

VS.

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

RESPONDENT.

PROCEDURAL ORDER

**BY THE COMMISSION:**

On January 10, 2012, J. Alan Smith ("Complainant") filed with the Arizona Corporation Commission ("Commission") a Formal Complaint against Payson Water Co., Inc. ("Payson Water" or "Company") and Brooke Utilities, Inc.

On February 2, 2012, Payson Water filed an Answer to the Complaint and Motion to Dismiss.

On February 16, 2012, the Complainant filed a Reply to Respondent's Answer.

On February 23, 2012, a Procedural Order was issued scheduling a procedural conference for March 9, 2012.

On March 9, 2012, the procedural conference was held as scheduled.

On March 29, 2012, the Company filed a Motion to Dismiss.

On March 30, 2012, Payson Water filed a Motion to Quash Brooke Utilities, Inc. as a Party to the Complaint.

On April 3, 2012, the Complainant filed a Response and Objection to Respondent's Motion to Quash Brooke Utilities, Inc. as a Party to the Complaint and Motion to Deny.

On April 3, 2012, the Complainant filed a Response and Objection to Respondent's Motion to Dismiss and Motion to Deny.

1 On April 9, 2012, Payson Water filed a Reply to Complainant's Response to Payson Water  
2 Co.'s Motion to Dismiss and Motion to Deny.

3 On April 9, 2012, the Company also filed a Reply by Payson Water Co. to Complainant's  
4 Response and Objection to Respondent's Motion to Quash Brooke Utilities, Inc. as a Party to the  
5 Complaint.

6 On April 13, 2012, the Complainant filed a Response and Objection to Respondent's Motion  
7 to Quash Brooke Utilities, Inc. as a Party to the Complaint and Motion to Deny.

8 On April 13, 2012, the Complainant also filed an Objection to Respondent's Reply to  
9 Complainant's Response to Respondent's Motion to Dismiss and Motion to Stay.

10 On April 20, 2012, the Commission's Utilities Division ("Staff") filed a Notice of Filing  
11 regarding the status of a subpoena issued to Martin's Trucking.

12 On May 3, 2012, Staff filed a Status of Mediation indicating that a settlement was not reached  
13 by the parties and requesting that a hearing be scheduled.

14 On June 18, 2012, a Procedural Order was issued scheduling a hearing for August 7, 2012,  
15 and setting deadlines for the filing of pre-filed testimony.

16 On July 16, 2012, the Complainant filed a Notice of Complainant's Initial Discovery and  
17 Disclosure.

18 On July 17, 2012, the Complainant filed his direct testimony.

19 On July 23, 2012, the Complainant filed a Notice of Complainant's Second Discovery and  
20 Disclosure.

21 On July 30, 2012, Payson Water filed rejoinder testimony.

22 On July 30, 2012, Staff filed a Memorandum stating its position regarding the complaint.

23 On August 1, 2012, the Complainant filed a Notice of Complainant's Third Discovery and  
24 Disclosure.

25 On August 1, 2012, the Complainant filed a Notice of Service of Process Subpoenas on Jim  
26 Pearson and Pearson Water Company.

27 On August 1, 2012, the Complainant filed a Motion to Compel Jim Pearson and Pearson  
28 Water Co. to Comply with Subpoenas.

1 On August 1, 2012, the Complainant filed a Motion to Compel Respondents to Comply with  
2 Complainant's 1<sup>st</sup> Set of Data Requests.

3 On August 1, 2012, Payson Water filed a Supplemental Motion to Quash Brooke Utilities Inc.  
4 as a Party to the Complaint.

5 On August 2, 2012, Payson Water filed a Notice of Initial Disclosure.

6 On August 6, 2012, Payson Water filed a Supplemental Motion to Dismiss.

7 On August 7, 2012, the Complainant filed a Notice of Complainant's Fourth Discovery and  
8 Disclosure.

9 On August 7, 2012, the hearing in this matter was convened, and at which time the  
10 Complainant requested a continuance of the hearing for 90 days. The Complainant indicated that he  
11 had consulted with an attorney who had agreed to represent him in this complaint case, but the  
12 attorney needed an additional 60 to 90 days to review the case file. On that basis, the hearing was  
13 continued for 90 days, on the condition that the Complainant's attorney discuss with the other parties  
14 an alternative hearing schedule and submit such schedule well before the 90 days were exhausted. To  
15 date, no appearance of counsel has been filed on behalf of the Complainant; nor has a proposal been  
16 submitted with alternative hearing dates.

17 On August 7, 2012, Dennis B. Tresca filed an Application for Intervention.

18 On August 13, 2012, Payson Water filed a Motion to Dismiss a Portion of the Complaint.

19 On August 13, 2012, Payson Water filed an Objection to Complainant's Fourth Discovery and  
20 Disclosure.

21 On August 13, 2012, Payson Water filed an Objection to Application of Dennis B. Tresca for  
22 Intervention.

23 On August 20, 2012, Payson Water filed a Notice of Timely Compliance with Subpoena.

24 On August 20, 2012, the Complainant filed a Response to Respondent's Objection to Tresca  
25 Application for Intervention and Motion to Deny.

26 On August 20, 2012, the Complainant filed a Response to Respondent's Objection to  
27 Complainant's Fourth Discovery and Disclosure and Motion to Deny.

28 On August 20, 2012, the Complainant filed a Response to Respondent's Motion to Dismiss a

1 Portion of the Complaint and Motion to Deny.

2 On August 23, 2012, Payson Water filed a Reply to Complainant's Response to Respondent's  
3 Motion to Dismiss a Portion of the Complaint.

4 On September 4, 2012, the Complainant filed a Response to Respondent's Reply to  
5 Complainant's Challenge to Motion to Dismiss a Portion of the Complaint.

6 On September 6, 2012, Payson Water filed a Motion to Quash Subpoena.

7 On September 12, 2012, the Complainant filed a Notice of Service of Process Subpoenas on  
8 Robert T. Hardcastle, Brooke Utilities, Inc., and Payson Water Co.

9 On September 13, 2012, the Complainant filed a Response and Objection to Respondent's  
10 Motion to Quash Subpoena.

11 On September 13, 2012, Mary E. Hansen filed an Application for Intervention.

12 On September 17, 2012, a Procedural Order was issued scheduling a procedural conference  
13 for September 28, 2012, and directing counsel for the Complainant to file a Notice of Appearance  
14 prior to the procedural conference.

15 On September 24, 2012, the Complainant filed a Motion to Initiate an Action in the Superior  
16 Court to Compel Jim Pearson, Pearson Transport, Robert T. Hardcastle, Brooke Utilities, Inc., and  
17 Payson Water Co. to Comply with the Subpoenas Served Upon Them.

18 On September 28, 2012, the procedural conference was held, as scheduled, during which  
19 discussions occurred regarding, among other things, the appropriate process for enforcing a subpoena  
20 previously served on Jim Pearson to appear at the August 7, 2012 hearing that was subsequently  
21 vacated to allow the Complainant additional time to obtain counsel. The Complainant was  
22 represented at the September 28, 2012 procedural conference by Michael J. Harper, of the firm  
23 Walker & Harper, P.C.

24 On October 3, 2012, Mr. Harper filed a formal Notice of Appearance on behalf of the  
25 Complainant.

26 On January 2, 2013, Payson Water filed a Motion to Dismiss on the basis that the  
27 Complainant had failed to pursue the Complaint after retaining counsel.

28 On January 10, 2013, the Complainant filed a Response to Motion to Dismiss claiming that

1 any delays were due to the failure of Mr. Pearson to comply with a previously issued Subpoena.

2 On January 10, 2013, the Complainant also filed a Notice of Submission of Demand for  
3 Compliance with Subpoenas and Request for Issuance of Procedural Order Directing Compliance  
4 Proceedings in the Superior Court.

5 Pursuant to Arizona Revised Statute ("A.R.S.") § 40-244 (B), "[a]ny witness subpoenaed,  
6 except one subpoenaed by the commission, may, at the time of service, demand his mileage and one  
7 days attendance, and if not paid need not attend." Since it is not clear from the record whether Mr.  
8 Pearson may have requested payment prior to attendance at the August 7, 2012 hearing, and whether  
9 he could assert that non-payment prior to attendance at the now-continued hearing allowed him not to  
10 attend despite being subpoenaed to attend, there is not currently an adequate basis to conclude that  
11 Mr. Pearson's failure to comply with the subpoena would permit the Commission to pursue an action  
12 in Superior Court, at this time. Moreover, A.R.S. § 40-424(A) provides that "[i]f any corporation or  
13 person fails to observe or comply with any order, rule, or requirement of the commission or any  
14 commissioner, the corporation or person shall be in contempt of the commission and shall, *after*  
15 *notice and hearing before the commission*, be fined by the commission..." (emphasis added.)

16 These statutes indicate that there is a level of due process required before the Commission  
17 may find an individual in contempt of a Commission Order, including a subpoena, and thereby  
18 impose a fine and pursue further action against the individual for failure to comply. It is therefore  
19 premature to grant the remedy suggested by the Complainant (*i.e.*, ordering Staff counsel to file an  
20 action in Superior Court to enforce the subpoena). However, given the unusual nature of the issue  
21 presented, it is appropriate to conduct a procedural conference to allow the parties to discuss the  
22 matter raised by the Complainant with respect to subpoena enforcement. The parties and Staff should  
23 be prepared to discuss all issues related to this issue including, but not limited to: whether a new  
24 subpoena should be issued; whether a subpoena to take a deposition may be more useful and  
25 appropriate given the circumstances; the legal procedures necessary to enforce a subpoena for failure  
26 to comply; and any other comments or arguments that may be relevant to resolving this issue and  
27 moving this matter forward.

28 IT IS THEREFORE ORDERED that a **procedural conference shall be scheduled for**

1 **March 14, 2013, at 10:00 a.m.**, at the offices of the Commission, Hearing Room No. 1, 1200 West  
2 Washington, Phoenix, Arizona 85007, to discuss pending procedural matters. In lieu of attendance in  
3 person, parties that wish to participate telephonically may call **1-800-689-9374, passcode: 415962** at  
4 the scheduled time.

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

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

11 DATED this 27<sup>th</sup> day of February, 2013.



DWIGHT D. NODES  
ASSISTANT CHIEF ADMINISTRATIVE LAW JUDGE

15 Copies of the foregoing mailed/delivered  
16 This 27<sup>th</sup> day of February, 2013 to:

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18 8166 Barranca Road  
19 Payson, AZ 85541

20 Michael J. Harper  
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