



0000155449

BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

2014 AUG 20 P 1: 42

Arizona Corporation Commission

DOCKETED

AUG 20 2014

ARIZONA CORPORATION COMMISSION DOCKET CONTROL

DOCKETED BY [Signature]

BOB STUMP, Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH

IN THE MATTER OF THE APPLICATION OF ARIZONA WATER COMPANY TO EXTEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY IN CASA GRANDE, PINAL COUNTY, ARIZONA

Docket No. W-01445A-03-0559

ARIZONA WATER COMPANY'S REPLY TO RESPONSES TO MOTION TO STRIKE REBUTTAL TESTIMONY OF ERNEST G. JOHNSON AND TO PRECLUDE HIS TESTIMONY AT HEARING

ORIGINAL

Bryan Cave LLP
Two North Central Avenue, Suite 2200
Phoenix, Arizona 85004-4406
(602) 264-7000

Pursuant to Administrative Law Judge Dwight D. Nodes' Procedural Order dated August 12, 2014, Arizona Water Company hereby replies to the response briefs filed by both Utilities Division ("Staff") and Cornman Tweedy 560, LLC ("Cornman Tweedy"). The Commission should strike Mr. Johnson's testimony and preclude him from testifying in this matter for the reasons Arizona Water Company sets forth in this reply and in its motion papers.

ARGUMENT

A. Mr. Johnson's Testimony Should be Stricken Because His Appearance In This Matter Violated A.A.C. R14-3-104(G).

1. Mr. Johnson Must Comply With A.A.C. R14-3-104(G).

A.A.C. R14-3-104(G) provides the standard Mr. Johnson must meet in order to testify in this matter. Mr. Johnson does not meet this standard. R14-3-104(G) provides:

G. Former employees. No former employee of the Commission shall appear at any time after severing his employment with the Commission as a witness on behalf of other parties in a formal proceeding wherein he previously took

1 an active part in the investigation or preparation as a
2 representative of the Commission, except with the written
3 permission of the Commission.

4 The Arizona Supreme Court has held "that the general rules and regulations of an
5 administrative board or commission, have the effect of law and are binding on the
6 Commission and must be followed by it so long as they are in force and effect." G. L.
7 Gibbons v. Arizona Corp. Comm'n, 95 Ariz. 343, 347, 390 P.2d 582, 585 (1964); see also
8 Clay v. Arizona Interscholastic Assoc., 161 Ariz. 474, 476, 779 P.2d 349, 351 (1989) ("an
9 agency must follow its own rules and regulations; to do otherwise is unlawful").

10 There is no controversy that the Commission employed Mr. Johnson, that he
11 appeared in this formal proceeding as a witness, and that he neither sought nor obtained
12 written permission of the Commission to appear. The only issue pending before the
13 Commission is whether Mr. Johnson "previously took an active part in the investigation or
14 preparation" of this case.

15 Both Cornman Tweedy and Staff miss the mark when they discuss A.R.S. 38-504(A)
16 (or the Arizona Attorney General's Agency Handbook) in their responses. Arizona Water
17 did not rely on that statute in its motion. A.R.S. 38-504(A) does not conflict with or
18 override A.A.C. R14-3-104(G). Cornman Tweedy and Staff do not argue that A.R.S. 38-
19 504(A) trumps A.A.C. R14-3-104(G). Thus, the only relevant consideration is A.A.C. R14-
20 3-104(G).

21 **2. Mr. Johnson's Testimony Violates A.A.C. R14-3-104(G).¹**

22 Mr. Johnson's own testimony proves he took an active part in this case and thus the
23 Commission should exclude him as a witness and preclude him from testifying.

24 • **Mr. Johnson directed the day-to-day activities of the Utilities Division.**

25 Mr. Johnson was the Utilities Division Director for the Commission from October,
26 2001 through August, 2009. [See Rebuttal Testimony of Ernest G. Johnson Sr., Esq.

27 ¹ Arizona Water Company's motion does not accuse Mr. Johnson of acting unethically
28 nor does it intend to impugn his character or reputation in any way.

1 (“Johnson Rebuttal”) at p. 1, ll. 18-23.] The Commission promoted Mr. Johnson to
2 Executive Director in August, 2009. [Id.] Mr. Johnson held that position until the end of
3 2012. [Id.] In Mr. Johnson's own words, as Utilities Division Director he "was responsible
4 for the day-to-day operations of the Utilities Division, including policy development, case
5 strategy, and overall Division management." [See id. at p. 2, ll. 1-3 (emphasis supplied).]
6 As Executive Director of the Commission, Mr. Johnson "was responsible for the day-to-day
7 operations of all agency divisions at the Commission." [See id. at p. 2, ll. 5-7 (emphasis
8 supplied).]

9 Mr. Johnson's testimony during his August 6, 2014 deposition further shows his
10 active participation in this case as Utilities Division Director and Executive Director.

- 11 • **Mr. Johnson actively participated in this case after it became a contested**
12 **matter.**

13 Mr. Johnson's deposition testimony shows that after Cornman Tweedy took the
14 position that the "null and void" language in the original Decision No. 66893 nullified
15 Arizona Water's CC&N, the matter quickly changed character to one that attracted the
16 attention of Mr. Johnson in his role as Director of the Utilities Division. The following
17 passages from Mr. Johnson's deposition testimony show his active participation in Utilities
18 Division Staff's investigation and preparation in this matter:

19 **Q.** And then the language that later became an issue in this
20 case, it's further ordered, and paraphrasing, if the company fails
21 to meet the above conditions with the time specified, this
22 decision is deemed null and void without further order of the
23 Commission.

24 Do you see that?

25 **A.** I do.

26 ***

27 **Q.** As the stakeholder in – affected by such language,
28 utilities, and the Commission began to consider using different
language or dropping this type of language, did you eventually
transition into a role where you did have some commentary on

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

it?

A. I think that would be accurate.

[Deposition of Ernest Johnson (8/6/2014) (“Johnson Dep.”) at p. 46, l. 13 – p. 47, l. 13.]

Additionally,

Q. All right.

That’s understood and accepted. And the issue is in your role, although you have a law degree, we understand, but in your role as utilities division director at that point, how did the null and void language policy come to you and what role did you play in what became of that policy?

A. You know, I’m going to tell you that my memory is very foggy on this issue, because I can’t remember specifics relative to it.

But, this language, as I recall, was a pretty standard language that was put in at the time. And I think it was when this case got into some sort of dispute relative to the effect of that, that gave rise to a subsequent conversation, I think a subsequent change as a matter of fact in the language. The idea being that was it truly null and void without offering a legal opinion, and whatever that means in that context.

And as a division after, as I recall, after we spoke with the legal division, the legal division basically said we need to find additional language. And this was – and I think the language was changed. I don’t know what the exact language is currently.

But it was changed sometime I think subsequent to this matter.

Q. Trying to go back to what you recall as the utilities division director at that time, do you remember having any input from your perspective as utilities division director as to what the new language should say or what some of the problems were with the old language, or what the policy should be of the Commission?

A. It would have been the type issue, that would have been the type issue that would have been discussed, and it would have

1 been the type issue that would have come to my attention.

2
3 [Id. at p. 48, l. 3 – p. 49, l. 17 (emphasis supplied).]

4 Mr. Johnson also testified:

5 **Q.** The docket doesn't appear to show that the staff filed any
6 exceptions to this ROO. Are you aware of any discussions of
7 whether exceptions should be filed?

8 **A.** I don't recall.

9 **Q.** With language like this, had the application been
10 conferred in your mind from a routine CCN extension
11 application to a contested application triggering policy issues?

12 **A.** I don't recall the time line in terms of when this thing
13 would have really become an item for my attention.

14 This was largely a routine matter until I think it was the letter
15 that you reference earlier is filed in the docket. So sometime
16 after that there would have been some level discussion, but it
17 was started at that—it wouldn't have started in my office.

18 It would have probably started among the staff who were on the
19 case.

20 I think probably Mr. Fischer would have had conversations with
21 Mr. Olea about these issues.

22 And then at some point if they felt—Mr. Olea felt there was a
23 need, then we would have had a conversation regarding that.

24 **Q.** Tell me if I'm understanding your testimony accurately.
25 At some point you were brought in to the mix. You're just not
26 sure when that occurred.

27 **A.** Yeah, I think that's accurate.

28 [Id. at p. 56, l. 20 - p. 57, l. 20; see also Johnson Dep. at p. 80, l. 22 – p. 81, l. 3 (admitting
that he was responsible for Staff's decisions regarding the filing of exceptions); p. 81, l. 20 –
p. 93, l. 19 (discussing Staff's role in taking legal and factual positions in filings by the
Legal Division.)]

- 1 • **Mr. Johnson had input into and ultimately decided policy for the Utilities**
2 **Division in this case.**

3 As noted above, Mr. Johnson stated in his pre-filed testimony that he, as Utilities
4 Division Director, was responsible for "policy development." [Johnson Rebuttal at p. 2, ll.
5 1-3.] During his deposition, Mr. Johnson also admitted the following:

6 Q. And I take it that although you weren't around to initial
7 the transmittal memo, that the policy statement of the utilities
8 division contained in the document had your blessing.

9 A. I'm going to assume so.

10 [Johnson Dep. at p. 65, ll. 4-8.]

- 11 • **The Legal Division acted under the direction of Mr. Johnson in this case.**

12 In addition to Mr. Johnson being responsible for case strategy, Mr. Johnson also
13 testified:

14 Q. When you as utilities division director were taking a
15 position on a docketed contested matter, who served as your
16 lawyers at the – in the docketed Commission proceeding?

17 A. The division had access to lawyers in the office of
18 general counsel, subject, as I recall, to that decision being made
19 by the chief counsel, as to who would be – I had no control
20 over that person, so whoever the chief counsel or his directive
21 would make available to the division.

22 Q. Right.

23 When you say office of general counsel, that's the chief of the
24 legal division of the Commission; is that accurate?

25 A. There is a section within the Commission, within the
26 Arizona Corporation Commission, and it is known as the office
27 of general counsel.

28 Q. I want to make sure we're talking about the same thing.

If you look at Page 3 of the application that's before you, dated
August 12th, of 2003, you'll see that the general counsel signed

1 it and a cc to Christopher Kempley, chief general counsel. Is
2 that the chief counsel that you're talking about as of that point
3 in time?

4 A. Yes.

5 [Id. at p. 30, l. 3 – p. 31, l. 1.]

6 Q. At that time period who decided as to whether the
7 utilities division would file exceptions to a pending ROO?

8 A. Ultimately it would be my responsibility.

9 [Id. at p. 80, ll. 23 -25.]

10 Mr. Johnson's testimony shows that the Utilities Division took policy, factual, and
11 legal positions in Legal Division filings, with the Legal Division acting as counsel for the
12 Utilities Division. Those positions directly bear upon the pending issues in this remand
13 proceeding. Mr. Johnson's testimony also shows that he received and reviewed
14 Recommended Opinions and Orders in preparation for Commission open meetings. [See id.
15 at p. 68, l. 7 – p. 69, l. 5 (Mr. Johnson received subject ROO for review before Open
16 Meeting).]

- 17 • **Mr. Johnson signed off on multiple documents the Utilities Division filed
18 in this case.**

19 A review of the docketed matters referenced in the deposition transcript shows that
20 Mr. Johnson reviewed and initialed multiple substantive position statements on behalf of the
21 Utilities Division, and was both directly concerned with and personally participated in
22 issues surrounding the so-called “null and void” issue as it emerged in the case. [See p. 39,
23 ll. 2 – 11; p. 46, l. 13 – p. 47, l. 13; p. 98, l. 15 – p. 99, l. 21.] Mr. Johnson signed-off on (or
24 had his assistant directors sign-off on his behalf) the following documents from the Utilities
25 Division in this case: document no. 0000103104 dated January 9, 2004; document no.
26 0000020055 dated April 11, 2005; document no. 0000051086 dated June 12, 2006; and the
27 Order on Remand From Decision No. 69722, dated November 29, 2010. Even though he
28 did not personally sign-off on document no. 0000051086 dated June 12, 2006, Mr. Johnson

1 admitted he blessed the policy statements in that document. [Johnson Dep. at p. 65, ll. 4-8.]

2 Despite the dozens of times that Mr. Johnson stated “I don’t know” or “I don’t
3 remember” regarding the role he played, it is clear from Mr. Johnson's pre-filed testimony
4 that he actively participated in the day-to-day activities of the Utilities Division. Common
5 sense belies Cornman Tweedy's reliance upon Mr. Johnson's repeated failure to recall details
6 of this case. Mr. Johnson did not deny active participation in this case. Mr. Johnson's
7 deposition transcript as a whole, and in particular the answers referred to above,
8 demonstrate that Mr. Johnson took an active part in this case both as Director of the Utilities
9 Division and Executive Director, was familiar with and directed Commission actions
10 including Legal Division actions, and that Mr. Johnson should be precluded from testifying
11 under the subject rule.

12 **3. The Commission Has A Strong Interest In Enforcing A.A.C. R14-3-**
13 **104(G) To Exclude Mr. Johnson's Testimony.**

14 The Commission has a strong interest in maintaining the independence and
15 impartiality and the appearance of independence and impartiality in its administrative
16 proceedings. The very adoption of A.A.C. R14-3-104(G) demonstrates the importance of
17 the Commission’s interests in independence and impartiality.

18 Mr. Johnson's appearance in this matter is unique. Unlike the former Commission
19 employees Cornman Tweedy lists in its response papers, Mr. Johnson is not just a former
20 employee now representing a party at the Commission in a matter he did not participate in
21 while employed by the Commission. Mr. Johnson served as the head of a Commission
22 Division actively involved in litigating this case during the litigation. Mr. Johnson then
23 became the Executive Director, where he directed the Utilities, Legal and Hearing Divisions
24 on a day-to-day basis while this very visible case was pending at the Commission. Cornman
25 Tweedy has not cited a single instance where a former Utilities Division Director or
26 Executive Director has appeared and presented testimony in a matter he supervised and
27 participated in while at the Commission. Mr. Johnson’s testimony violates A.A.C. R14-3-
28 104(G) and the Commission should strike that testimony and preclude him from testifying at

1 the hearing in this matter.

2 Cornman Tweedy requests that the Commission allow Mr. Johnson to seek
3 Commission approval after the fact if the Commission finds his appearance violates R14-3-
4 104(G). Given Mr. Johnson's unique status, the stakes at issue, and the Commission's
5 commitment to avoiding even the appearance of impropriety, Arizona Water Company
6 trusts that the Commission will not allow Mr. Johnson to avoid the Commission rules in this
7 manner. The subject Rule has no meaning otherwise.

8 **B. Mr. Johnson's Testimony Constitutes Improper Legal Argument.**

9 The Commission should strike Mr. Johnson's testimony because the vast majority of
10 his testimony is improper legal opinion in the guise of "expert" testimony. Mr. Johnson's
11 own words condemn his testimony. During his deposition, Mr. Johnson stated several times
12 that he is not appearing as a legal expert. [See Johnson Dep. at p. 47, l. 24 – p. 48, l. 2.]
13 Yet, of Mr. Johnson's 32 pages of testimony, 4 pages are taken up by his biography, while
14 all or parts of 19 of the remaining 28 pages contain legal opinions. Mr. Johnson opines on
15 the standard of review the Commission should use in this case, creates an entirely new legal
16 framework and then he urges the Hearing Division to use that framework in making its
17 decision in this matter. [Johnson Rebuttal at p. 13-15, 24, *id.* at p. 28, l. 8 – p. 29, l. 13].
18 Mr. Johnson opines on what is reasonable service and repeatedly opines (while now
19 proclaiming that he is not offering a legal opinion) that water service provided by a stand-
20 alone water utility is "unreasonable." [Johnson Rebuttal at Executive Summary; p. 5, l. 12 -
21 p. 6, l. 3).] Expert testimony as to "reasonableness," which essentially tells the finder of
22 fact how to decide a case, is inadmissible legal opinion. See Motion to Strike at 10 (listing
23 cases in which Arizona courts have refused to admit such testimony).

24 Mr. Johnson also repeatedly opines that the Arizona Supreme Court's decision in
25 James P. Paul Water Co. v. Arizona Corp. Comm'n, 137 Ariz. 426, 671 P.2d 404 (1983),
26 does not apply to this case. [Johnson Rebuttal at p. 17, l. 14 – p. 18, l. 2; see also pp. 16, 18-
27 19, 21, 24, 29 and 32.] He then goes on to make a purely legal argument by attempting to
28

1 distinguish James P. Paul from the circumstances presented here. [Id. at p. 18, l. 4 – p. 19, l.
2 11.] In direct contrast to that “testimony,” Mr. Johnson testified at his deposition that the
3 Legal Division’s determination that James P. Paul applied to this matter was “a legal
4 perspective” or a “legal argument” that he could not address. [See Johnson Dep. at p. 89, l.
5 8 – p. 93, l. 5.] The remainder of Mr. Johnson’s testimony, including his statements that
6 the “Commission is not subject to the judicial doctrine of *stare decisis*”, [id. at p. 23, ll. 14-
7 15], is legal opinion that attempts to tell the administrative law judge what law should apply
8 to this case and how that law should be applied to the facts of this matter. In short, Mr.
9 Johnson proffers legal opinions instead of expert testimony. As detailed in the Company’s
10 Motion to Strike, such opinions are inadmissible under Arizona law and should be stricken.
11 See Motion to Strike at 7-10.

12 Cornman Tweedy argues that a Commission hearing is not a court proceeding and,
13 therefore, the Commission can simply ignore this “basic premise or assumption of evidence
14 law.” Pinal Creek Group v. Newmont Mining Corp., 352 F. Supp. 2d 1037, 1042 (D. Az.
15 2005). However, even an administrative hearing must “follow the general principles of
16 law,” Jones v. Industrial Comm’n, 1 Ariz. App. 218, 221, 401 P.2d 172, 175 (1965), and an
17 agency must abide by its own procedural rules. Gibbons, 95 Ariz. at 347, 390 P.2d at 585.
18 In the present case, those rules generally require adherence to the Arizona Rules of
19 Evidence. A.A.C. R14-3-109(K). As a result, the Commission should strike Mr. Johnson’s
20 pre-filed testimony and preclude him from testifying at the hearing of this matter.

21 Cornman Tweedy finally argues that motions to strike are rarely granted by the
22 Commission. While motions to strike may be rare at the Commission, but see Decision
23 Nos. 71794 (striking late filed exhibits and supplemental testimony as violating due
24 process), 73885 at p. 5 n. 3 (noting in response to motion to strike submitted comments that
25 “any legal arguments or purported expert technical analysis will be disregarded) and 72252
26 (striking, in part, pre-filed testimony of purported expert that offered legal opinions), rarely
27 is testimony of the nature of Mr. Johnson’s submitted as part of a proceeding. Mr.
28

Bryan Cave LLP
Two North Central Avenue, Suite 2200
Phoenix, Arizona 85004-4406
(602) 364-7000

1 Johnson's testimony, which impermissibly attempts to direct the administrative law judge
2 on how to decide this matter, presents the unique situation of a former Utilities Division
3 Director and Executive Director testifying in a case that he actively supervised for the
4 Commission. Unlike the Sempra decision cited by Cornman Tweedy, Arizona Water
5 Company is not seeking to strike testimony by fact witnesses that may be directly relevant
6 to the determination of the Commission. Rather, Arizona Water Company asks the
7 Commission to strike inadmissible legal opinions from a former Utilities Division Director
8 and Executive Director, whose appearance violates A.A.C. R14-3-104(G).

9 **CONCLUSION**

10 For the foregoing reasons, and as shown in the testimony of Mr. Johnson in his
11 August 6, 2014 deposition, Mr. Johnson's pre-filed rebuttal testimony should be stricken
12 and his testimony at the hearing precluded.

13
14 RESPECTFULLY SUBMITTED this 20th day of August, 2014.

15 BRYAN CAVE LLP

16
17 By  

18 Steven A. Hirsch, #006360
19 Stanley B. Lutz, #021195
20 Two N. Central Avenue, Suite 2200
21 Phoenix, AZ 85004-4406
22 Attorneys for Arizona Water Company

23 ORIGINAL and 13 copies filed this
24 20th day of August, 2014, with:

25 Docket Control
26 Arizona Corporation Commission
27 1200 W. Washington Street
28 Phoenix, AZ 85007

A copy of the foregoing hand-delivered
this 20th day of August 2014, to:

Bryan Cave LLP
Two North Central Avenue, Suite 2200
Phoenix, Arizona 85004-4406
(602) 364-7000

1 Janice Alward, Chief Counsel
2 Legal Division
3 Arizona Corporation Commission
4 1200 W. Washington Street
5 Phoenix, AZ 85007

6 Steve Olea, Director
7 Utilities Division
8 Arizona Corporation Commission
9 1200 W. Washington Street
10 Phoenix, AZ 85007

11 Lyn Farmer
12 Chief Administrative Law Judge
13 Arizona Corporation Commission
14 1200 W. Washington Street
15 Phoenix, AZ 85007

16 **COPY** of the foregoing mailed and e-mailed
17 this 20th day of August, 2014, to:

18 Jeffrey W. Crockett
19 Brownstein Hyatt Farber Schreck LLP
20 One E. Washington Street, Suite 2400
21 Phoenix, AZ 85004
22 Attorneys for Corman-Tweedy 560, LLC
23 e-mail: jcrockett@bhfs.com

24 Peter M. Gerstman
25 Vice President and General Counsel
26 Robson Communities, Inc.
27 9532 E. Riggs Road
28 Sun Lakes, AZ 85248-7463
e-mail: Peter.Gerstman@Robson.com

