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BEFORE THE ARIZONA CORPORATION

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

ORIGINAL

Docket No. W-01445A-03-0559

**ARIZONA WATER COMPANY'S
SUPPLEMENTAL BRIEF
REGARDING IN RE PORTLAND
GEN. ELEC. CO. (OREGON PUC)**

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Pursuant to Administrative Law Judge Dwight D. Nodes' request at the oral argument held on September 4, 2014, Arizona Water Company files this supplemental brief to address the impact of Order No. 01-0249 of the Oregon Public Utility Commission ("Oregon PUC"), In Re Portland Gen. Elec. Co., 2001 WL 514388 (Or. P.U.C. Mar. 21, 2001), on the pending issues. As set forth below, the reasoning of the Oregon PUC in that case is directly applicable to Arizona Water Company's motion to strike and provides compelling justification for granting that motion.

In In Re Portland Gen. Elec. Co., a former employee of the Oregon PUC attempted to offer expert testimony in a contested matter in which the former employee had participated as a non-supervisory PUC employee. In Order No. 01-0249, the Oregon PUC refused to allow the employee to testify. Under the analysis used by the Oregon PUC, Mr. Johnson's pre-filed testimony should be stricken and he should be precluded from testifying at the hearing in this matter as well.

1 **I. Oregon’s Administrative Rule Recognizes the Differences Between Representing**
2 **a Party and Acting as a Witness For That Party.**

3 The Oregon PUC has a rule similar to A.A.C. R14-3-104(G). Oregon’s rule
4 provides, in relevant part, that:

5 (1) A former Commission employee may not appear on behalf
6 of other parties in contested case or declaratory ruling
7 proceedings, in which the former employee took an active part
8 on the Commission’s behalf.

9 (2) Except with the Commission’s written permission, a former
10 Commission employee may not appear as a witness on behalf of
11 other parties in contested case proceedings in which the former
12 employee took an active part on the Commission’s behalf.

13 Or. Admin. R. 860-001-0330 (renumbered in 2010 from Or. Admin. R. 860-012-0010; the
14 “Oregon Rule”) In 2002, the Oregon PUC extended the scope of its rule by replacing the
15 term “expert witness” with “witness” in subsection (2). The Oregon Rule now substantially
16 conforms to the prohibition contained in A.A.C. R14-3-140(G).

17 Under the Oregon Rule, former employees of the Oregon PUC are prohibited from
18 appearing on behalf of (stated differently, representing) a party in a matter in which they
19 actively participated. Further, they are prohibited from appearing as a witness in a matter in
20 which they actively participated while employed by the Oregon PUC, without first obtaining
21 written permission from the Oregon PUC. In making this distinction, the Oregon Rule
22 highlights the different considerations between representation of a party and merely acting
23 as a witness for a party, which is a key distinction in this matter. As discussed at oral
24 argument and in Arizona Water Company’s August 27, 2014 Supplemental Reply, A.A.C.
25 R14-3-104(G) and A.R.S. § 38-504 should be read together and applied as the Oregon PUC
26 did in addressing the differing concerns and policies implicated by representing a party as its
27 lawyer or lobbyist versus appearing as a witness.
28

1 **II. The Active Participation Element of A.A.C. R14-3-104(G) Should be Broadly**
2 **Construed, As the Oregon PUC Did, to Protect the Integrity of the Commission**
3 **And To Avoid Any Appearance of Impropriety.**

4 In excluding the testimony of its former employee, the Oregon PUC confronted the
5 issue of what constitutes “active participation” by a former employee, a principal issue in
6 this matter. The Oregon PUC properly determined that the concept “should be broadly
7 construed to protect the integrity and perceived fairness of the Commission proceedings.”
8 Order 01-249 at 4. The Oregon PUC thus extended the rule to “apply to any former
9 employee that participated personally on any assigned matter during his or her
10 employment.” Id. The Oregon PUC did so because such participation “would, at the very
11 least, give rise to the belief that the employee had gained inside knowledge about Staff’s
12 opinions and strategies of the case.” Id. As a result, the Oregon PUC liberally construed the
13 reach of its rule “to avoid any appearance of impropriety that might arise when an employee
14 leaves the agency during a proceeding and wants to appear on behalf of an outside party.”

15 Id.

16 The Oregon PUC’s reasoning is sound and should be applied here. As noted in the
17 original Motion to Strike, the Arizona Corporation Commission strives to maintain an
18 appearance of impartiality. Allowing former Commission employees to appear as witnesses
19 in matters that they personally participated in prior to leaving the Commission undercuts the
20 appearance of impartiality and gives rise to legitimate concerns that the ongoing
21 proceedings might be biased by the former employee’s participation. This is especially true
22 when, as here, the former employee held a supervisory position and personally participated
23 in this case while employed by the Commission as the Utilities Division Director and
24 Executive Director. As a result, the “active participation” element of A.A.C. R14-3-104(G)
25 should be construed to apply to Mr. Johnson, who personally participated in and supervised
26 Staff in this matter, in which he now seeks to provide testimony.

1 **III. The Multi-Factor Analysis Used by the Oregon PUC Supports the Exclusion of**
2 **Mr. Johnson's Testimony.**

3 The Oregon PUC established a multi-factor framework for analyzing the propriety of
4 a former employee's proposed appearance as a witness. That framework provides useful
5 guidance in this case. Under the Oregon framework, the Oregon PUC examines, on a case-
6 by-case basis, all relevant factors. The four primary factors examined by the Oregon PUC
7 are (1) "the nature of the former employee's prior role with the agency", (2) "the type of
8 proceeding", (3) "the length of time that has passed since the former employee left the
9 agency", and (4) "whether other parties agree to the former employee's appearance." Order
10 No. 01-249 at 5.

11 An examination of the factors compels precluding Mr. Johnson's testimony in this
12 matter. The first factor, the nature of the employee's prior role, obviously weighs in favor
13 of exclusion. Mr. Johnson was both the Director of the Utilities Division and the Executive
14 Director of the Commission, a role in which he oversaw both the Utilities Division and the
15 Hearing Division, during years while this matter was being hotly contested. As the Oregon
16 PUC noted, "former employees that held influential positions with the Commission, such as
17 advisory staff, senior managers, or technical experts, might, at least from a matter of
18 perception, have had significant access to inside information of agency matters." Id. at 5
19 (emphasis supplied). In his deposition and prefiled testimony, Mr. Johnson admits that he
20 was in charge of day-to-day operations of the Utilities Division, that he directed case
21 strategy and that he was responsible for "policy development." [See Prefiled Rebuttal
22 Testimony of Ernest G. Johnson, Esq. ("Johnson Rebuttal") at p. 2, ll. 1-7; Deposition of
23 Ernest Johnson (8/6/2014) ("Johnson Dep.") at p. 81, l. 20 – p. 93, l. 19.] He also directed
24 the Legal Division with respect to case strategy and positions. [Id.] As a result, Mr.
25 Johnson should, in the words of the Oregon PUC, "be perceived as being able to carry more
26 weight with former colleagues than less senior employees," and his testimony should be
27 precluded. Order 01-249 at 5.
28

1 The second factor, the type of proceeding, also favors disqualifying Mr. Johnson
2 from testifying under A.A.C. R14-3-104(G). This matter became a hotly-contested case in
3 2005 between Arizona Water Company and Cornman Tweedy, while Mr. Johnson was the
4 Director of the Utilities Division. To this day, this matter is highly contested and has
5 resulted in at least one significant policy change regarding the use of “null and void”
6 language by the Commission, a change that Mr. Johnson participated in and discussed while
7 Utilities Division Director. The remaining issues in this case potentially impact all private
8 water utility companies in Arizona. Commission Staff has been heavily involved in this
9 case for approximately eleven years. Mr. Johnson personally participated in this case for at
10 least eight of those eleven years. The adversarial nature of this matter, along with the
11 important issues involved, favors exclusion of Mr. Johnson’s proposed testimony.

12 The third factor considered by the Oregon PUC, the length of time that has passed
13 since the employee left the agency, also favors that result. Mr. Johnson left his position as
14 Executive Director at the end of 2012, but remained on as a transitional consultant six weeks
15 into 2013. [Johnson Dep. at p. 20, l. 13 – p. 21, l. 5.] Mr. Johnson filed the testimony at
16 issue in this matter approximately 17 months later. While this exceeds the period discussed
17 in the Oregon PUC Order, the delay in Mr. Johnson’s testimony does not allay any of the
18 concerns raised by Mr. Johnson’s proposed testimony. As noted during oral argument,
19 unlike the policies implicated by representing a party, Mr. Johnson’s knowledge of internal
20 Commission procedures and deliberations is not attenuated by the passage of time. As the
21 Oregon PUC noted, Mr. Johnson’s positions with the Commission afforded him “significant
22 access to inside information” and created the perception that he is “able to carry more
23 weight with former colleagues than less senior employees.” Order No. 01-249 at 5. His
24 active participation in this matter over a period of at least eight years while at the
25 Commission creates the appearance of impropriety that this Commission should actively
26 seek to avoid.

1 The final factor mentioned by the Oregon PUC, whether the parties consent to the
2 conflict, also weighs against allowing Mr. Johnson to act as a witness in this proceeding.
3 Arizona Water Company does not consent to Mr. Johnson's testimony. Indeed, Arizona
4 Water Company is actively seeking to strike Mr. Johnson's prefiled testimony and preclude
5 Mr. Johnson from testifying at the hearing.

6 The Oregon PUC's conclusion with respect to the situation it faced can and should be
7 applied to the present situation:

8 In summary, [Mr. Johnson] played an active role as a member of
9 Staff ... Given the significance of the dockets, the implication of
10 the issues involved, and the timing of the request, we believe
11 that [Mr. Johnson's] appearance as an expert witness for an
outside party is not in the public interest.

12 Id. at 6.

13 **CONCLUSION**

14 The sound reasoning of the Oregon PUC in In Re Portland Gen. Elec. Co., supra,
15 supports preclusion of Mr. Johnson's proposed testimony under A.A.C. R14-3-104(G) and
16 should be adopted by the Commission. Mr. Johnson's pre-filed rebuttal testimony should be
17 stricken and his testimony at the hearing precluded. The Oregon ruling is also consistent
18 with rejecting Cornman Tweedy's offer during oral argument to make a late application for
19 permission to testify months after the offending testimony has been submitted.

20 RESPECTFULLY SUBMITTED this 22nd day of September, 2014.

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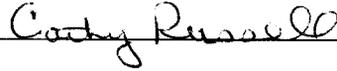
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