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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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MAY 07 2015

AZ CORP COMMISSION
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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.

DOCKET NO. W-01445A-03-0559

PROCEDURAL ORDER

BY THE COMMISSION:

ORIGINAL

Procedural History

This matter was originally commenced on August 12, 2003, when Arizona Water Company (“AWC”) filed an application for an extension of its Certificate of Convenience and Necessity (“CC&N”) in Pinal County, Arizona.

In this docket on April 6, 2004, in Decision No. 66893, the Commission granted AWC a CC&N extension,¹ subject to compliance with the following: (1) AWC was required to charge the customers in the extension area the existing Casa Grande rates and charges until further Commission order; (2) AWC was required to file with the Commission, within 365 days of the Decision, a copy of the “Developers’ Assured Water Supply for each respective development”; and (3) AWC was required to file with the Commission, within 365 days of the Decision, a main extension agreement (“MXA”) associated with the extension area. Decision No. 66893 further stated: “IT IS FURTHER ORDERED that in the event Arizona Water Company fails to meet the above conditions within the time specified, this Decision is deemed null and void without further Order of the Arizona Corporation Commission.”

On March 30, 2005, before the April 6, 2005, compliance deadline, AWC filed a Request for Additional Time to Comply with Filing Requirement (“Request for Time”).

¹ The Decision included the following legal description for the extension area: “Sections 19, 20, 21, 22, 23, W ½ 24, W ½ 25, 26, 27, 28, 29, & 30, all in Township 6 South, Range 7 East of the Gila and Salt River Base and Meridian, Pinal County, Arizona.”

1 On April 7, 2005, “for and on behalf of” Cornman Tweedy 560, LLC (“Cornman”), Robson
2 Communities (“Robson”) filed a letter alleging that because AWC had failed to timely satisfy the
3 compliance conditions of Decision No. 66893, the CC&N extension conditionally granted therein
4 was automatically null and void. The letter stated that Cornman owned approximately 1,120 acres
5 within the extension area; that all but approximately 160 acres of that property were included in the
6 EJ Ranch Master Planned Community (“EJ Ranch”) being developed by Robson, an affiliate of
7 Cornman; and that Cornman desired to obtain water service for its property from Picacho Water
8 Company (“Picacho Water”), another affiliate of Robson, rather than from AWC. The letter also
9 identified Picacho Sewer Company (“Picacho Sewer”) as another affiliate of Robson and Cornman.

10 On April 11, 2005, the Commission’s Utilities Division (“Staff”) recommended that
11 evidentiary hearings be scheduled to consider the merits of AWC’s Request for Time and Robson’s
12 objection to that request.

13 Numerous filings followed, including a November 2005 Procedural Order granting
14 intervention to Cornman and denying intervention to Picacho Water. A hearing was held in July
15 2006 for the purpose of obtaining evidence on the circumstances and events that had resulted in
16 AWC’s not complying with the time periods established in Decision No. 66893. The hearing did not
17 involve a reopening of the Decision granting AWC a CC&N and did not address whether a different
18 water utility should be providing service in the extension area.² AWC, Cornman, and Staff all
19 appeared and participated in the hearing.

20 On July 30, 2007, the Commission issued Decision No. 69722, finding that AWC had been
21 prevented from complying with the Decision No. 66893 requirement to file a Developer’s Certificate
22 of Assured Water Supply (“CAWS”) because the developer for the Florence Country Estates
23 development, at Cornman’s direction, had withdrawn its pending CAWS Application from the
24 Arizona Department of Water Resources’ (“ADWR’s”) consideration. The Commission found that
25 this had made it impossible for AWC to comply with the condition in Decision No. 66893 and was
26 beyond AWC’s control. The Commission also found that the Florence Country Estates development

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28 ² Additional detail regarding the procedural history is set forth in the Procedural Orders issued on March 22, 2006, and
April 19, 2006.

1 area had been included in an Analysis of Assured Water Supply (“AAWS”) issued by ADWR in
2 March 2005 for the EJR Ranch development and that issuance of that AAWS satisfied the objective
3 of the CAWS filing requirement—to ensure the existence of adequate physical water supplies for the
4 development. The Commission determined that “for purposes of compliance, the conditions placed
5 on Arizona Water’s CC&N extension in Decision No. 66893 [had] been fulfilled.” The Commission
6 expressed concern, however, that the Cornman property might not have a current need or necessity
7 for water service and determined that the record should be reopened, pursuant to A.R.S. § 40-252,
8 and the case remanded to the Hearing Division for further proceedings regarding whether AWC
9 should continue to hold a CC&N for the Cornman property. The Commission put AWC on notice
10 that the subsequent remand proceeding would be for the purpose of considering whether the Cornman
11 property should be deleted from the extension area granted to AWC by Decision No. 66893 and
12 directed the Hearing Division to conduct further evidentiary proceedings in this matter, including
13 appropriate opportunities for intervention and an appropriate opportunity for AWC to present its case.

14 Thereafter, a remand evidentiary hearing was scheduled and then continued, prefiled
15 testimony and other filings were made, and procedural conferences were held. In February 2009, at a
16 procedural conference, AWC and Cornman requested that the continued hearing be vacated and that a
17 recommended order be submitted to the Commission based on the prefiled testimony docketed in
18 anticipation of hearing. AWC and Cornman were directed to make their request in writing, and on
19 March 6, 2009, they filed a Motion for Submission of Matter on the Pleadings, requesting that the
20 Commission’s decision be made without an evidentiary hearing. The Motion proposed that the
21 prefiled testimony be admitted into evidence subject to specific objections of the parties either
22 previously made or raised in closing briefs. The Motion was granted in a Procedural Order issued on
23 April 16, 2009, which also established a briefing schedule.

24 On November 29, 2010, a Recommended Order on Remand from Decision No. 69722
25 (“Recommended Order”) was issued. The Recommended Order was discussed during the
26 Commission’s Open Meetings on December 14, 2010, and February 1, 2011, but no decision was
27 adopted by the Commission. Instead, at the Open Meeting on February 1, 2011, the Commission
28 voted to send the matter back to the Hearing Division for further proceedings to determine “whether a

1 public service corporation, like Arizona Water, in this water challenged area and under the
2 circumstances presented in this case, is providing reasonable service if it is not able or not willing to
3 provide integrated water and wastewater services.” This inquiry is the matter at hand, in which
4 procedural conferences have been held, discovery disputes have been resolved, and a number of
5 filings have been made regarding various issues.

6 On February 24, 2014, a Procedural Order was issued adopting a procedural schedule
7 proposed by Cornman and AWC and scheduling a hearing to commence on August 25, 2014. The
8 hearing date was later continued to September 4, 2014, in response to an unopposed request from
9 Cornman.

10 On May 30, 2014, AWC filed the testimony of Rita P. Maguire, Esq.; Paul Walker; William
11 Garfield; and Fredrick Schneider.

12 On July 18, 2014, Cornman filed the Rebuttal Testimony of Stephen Soriano, Ernest G.
13 Johnson, and Fred Goldman.

14 On July 25, 2014, AWC filed a Notice of Deposition of Ernest G. Johnson Sr.

15 On July 29, 2014, AWC filed a Motion to Strike Pre-Filed Rebuttal Testimony of Ernest G.
16 Johnson and to Preclude His Testimony at Hearing (“Motion”). AWC asserted in its Motion that Mr.
17 Johnson’s testimony should not be admitted because Mr. Johnson held two supervisory positions at
18 the Commission during the pendency of this matter and because Mr. Johnson’s testimony “consists
19 solely of legal conclusions, not facts.”

20 On July 31, 2014, Cornman filed Notices of Deposition for Rita P. Maguire and Paul Walker.

21 On August 1, 2014, AWC filed a First Amended Notice of Deposition of Ernest G. Johnson.

22 On August 11, 2014, AWC filed a Supplement to Motion to Strike Pre-Filed Rebuttal
23 Testimony of Ernest G. Johnson and to Preclude His Testimony at Hearing.

24 On August 12, 2014, a Procedural Order was issued directing Cornman and Staff to file
25 Responses to AWC’s Motion by August 15, 2014, and directing AWC to file a Reply to those
26 Responses by August 20, 2014.

27 On August 15, 2014, Cornman and Staff filed their Responses to AWC’s Motion.

28 On August 20, 2014, AWC filed its Reply to the Responses.

1 On August 22, 2014, a Procedural Order was issued vacating the September 4, 2014, hearing
2 date; scheduling a procedural conference to be held at the time previously set for the hearing; and
3 requiring AWC to file a Supplemental Reply addressing both Cornman's argument that A.R.S. § 38-
4 504(A) ("§ 38-504") supersedes A.A.C. R14-3-104(G) ("Rule 104") and is controlling and
5 Cornman's assertion that if Mr. Johnson is precluded from testifying, Mr. Walker likewise should be
6 disqualified because of his prior employment as former Commissioner Spitzer's policy advisor.

7 On August 27, 2014, AWC filed its Supplemental Reply.

8 On September 4, 2014, the procedural conference went forward as scheduled, with AWC,
9 Cornman, and Staff appearing through counsel. AWC and Cornman presented oral argument relating
10 to AWC's Motion, and Staff provided an essentially neutral position. At the conclusion of the
11 procedural conference, the parties were directed to review Oregon Public Utility Commission
12 ("OPUC") Order No. 01-249,³ which addressed a scenario involving use of a former OPUC
13 employee as an expert witness, and to file briefs regarding whether the same or a similar test should
14 be used in this matter. It was determined that the briefs would be due on September 22, 2014.

15 On September 22, 2014, AWC, Cornman, and Staff filed their briefs regarding OPUC Order
16 No. 01-249 (March 21, 2001).

17 ...

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19 ³ OPUC Order No. 01-249 was issued on March 21, 2001, *in re* Portland General Electric Company's Proposal to
20 Restructure and Reprice Its Services in Accordance with the Provisions of SB 1149 (UE 115) and *in re* PacifiCorp's
21 Proposal to Restructure and Reprice Its Services in Accordance with the Provisions of SB 1149 (UE 116). In the Order,
22 OPUC first determined that the former employee could not appear as an expert witness for another party without written
23 permission from OPUC because the former employee had taken an "active part" in the matters under consideration while
24 an OPUC employee, which was the threshold for application of OPUC's rule requiring consent. OPUC determined that
25 "took an active part on the Commission's behalf" should be broadly construed to protect the integrity and perceived
26 fairness of the Commission proceedings." (OPUC Order No. 01-249.) OPUC interpreted the rule to apply to any former
27 employee that "participated personally on any assigned matter during . . . employment." (*Id.*) OPUC then considered
28 whether the former employee should be permitted to testify, adopting a four-part test for whether consent should be
granted once it was determined that the rule applied. (*Id.*) The four-part test considered the following: (1) the nature of
the former employment with the agency, with former employees that served in influential positions perceived to have
greater access to sensitive information and an ability to carry more weight with former colleagues; (2) the type of
proceeding, with contested and more significant matters being subjected to a higher level of scrutiny; (3) the length of
time since employment, with the idea being that "the value of influence and knowledge dissipates over time"; and (4) the
other parties' agreement to the former employee's appearing, as this can reflect the perception of fairness. (*Id.*) After
applying the four-part test, OPUC denied permission for the former employee to appear as an expert witness because he
had served as lead witness on cost of capital before his departure, the dockets involved significant and highly contested
issues, he had resigned only three weeks before the request to appear as a witness, and one party expressly objected to his
appearance. (*Id.*) OPUC determined that the former employee's appearance as an expert witness for another party would
create an appearance of impropriety and would not be in the public interest. (*Id.*)

1 **Background**

2 In October 2001, Mr. Johnson became the Director of the Commission's Utilities Division
3 ("Staff's Director"), serving in that role until August 2009, when Mr. Johnson became the
4 Commission's Executive Director. Mr. Johnson was employed as the Commission's Executive
5 Director until February 8, 2013, although his physical presence at the Commission's offices ended on
6 the last business day of December 2012. Mr. Johnson has been an active member of the Oklahoma
7 State Bar since 1983 and has never been an active member of the Arizona State Bar.

8 Mr. Walker was employed as the Policy Advisor to Commissioner Marc Spitzer from January
9 2001 to May 2004. Nothing in the record indicates that Mr. Walker is an active member of the
10 Arizona State Bar or another state bar.

11 Currently at issue is AWC's Motion, in which AWC requests that Mr. Johnson's Rebuttal
12 Testimony, filed on July 18, 2014, be stricken in its entirety and that Mr. Johnson be prohibited from
13 testifying further in this matter. The procedural schedule in this matter is on hold pending resolution
14 of AWC's Motion.

15 **AWC's Motion & Supplement to Motion**

16 In its Motion, AWC asserts that Mr. Johnson's testimony is inadmissible and improper
17 because Mr. Johnson was employed by the Commission in supervisory and management roles during
18 the pendency of this matter, supervising Staff in its strategy and handling of AWC's initial CC&N
19 extension application, supervising the Hearing Division in its ongoing consideration of this matter,
20 and interfacing with the Commission as its Executive Director during active consideration of prior
21 phases of this matter. AWC asserts that it would be a conflict of interest for Mr. Johnson to "weigh
22 in" on a case that he participated in as a party (Staff) and even managed and that allowing him to do
23 so would violate AWC's right to due process and a fair and impartial hearing.

24 AWC characterizes Mr. Johnson's testimony as "improper legal advocacy masquerading as
25 'expert testimony.'"⁴ AWC asserts that Mr. Johnson's testimony is prohibited by Arizona Rule of
26 Evidence 702 ("Rule 702") because Rule 702 prohibits expert opinions on the law governing the case
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28 ⁴ AWC Motion at 7.

1 or the application of that law to the facts before the tribunal. AWC also asserts that Mr. Johnson is
2 impermissibly acting as a legal advocate for Cornman rather than as an independent expert providing
3 specialized input on matters that will assist the trier of fact in its determinations. AWC states that
4 allowing Mr. Johnson to serve as a legal advocate would be improper under Arizona Rules of
5 Professional Responsibility (“ERs”) 1.11 and 3.7⁵ and is even more improper because Mr. Johnson is
6 not licensed to practice law in Arizona. AWC asserts: “Mr. Johnson’s testimony should be excluded
7 because it consists of nothing more than legal conclusions, not facts, and addresses issues that have
8 already been decided by the Commission and Hearing Division.”⁶ While AWC acknowledges that a
9 trial court has discretion to allow expert testimony, AWC asserts that courts sometimes reject
10 opinions on ultimate issues, under Arizona Rule of Evidence 704 (“Rule 704”), finding that they are
11 not helpful to assist the trier of fact to understand the evidence or to determine a fact in issue.⁷ AWC
12 argues that Mr. Johnson should not be allowed to usurp the factfinder’s role by providing his opinion
13 as to the determinations previously included in the Recommended Opinion and Order issued in
14 November 2010 (under Mr. Johnson’s signature as Executive Director).

15 In its Supplement to Motion, AWC adds Mr. Johnson’s failure to obtain Commission
16 permission to testify, pursuant to Rule 104, as another basis to strike Mr. Johnson’s testimony and
17 prohibit his live testimony. With its Supplement to Motion, AWC provides an excerpt from the
18 transcript of the August 7, 2014, deposition of Mr. Johnson, in which Mr. Johnson confirms that he
19 did not have “written authorization from the [Commission] for [his] assignment for Cornman Tweedy
20 in this case.”⁸

21 **Cornman Response**

22 Cornman asserts that AWC’s Motion is without merit because § 38-504 is the controlling
23 statute regarding limitations on former government employees in Arizona, and it does not prohibit
24 Mr. Johnson from participating as a witness. Cornman argues that Mr. Johnson’s participation as a

25 ⁵ ER 1.11 concerns special conflicts of interest for former and current government officers and employees. ER 3.7
26 concerns lawyers as witnesses.

27 ⁶ AWC Motion at 1.

28 ⁷ AWC cited *Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1042-45 (D. Ariz. 2005), in which
the U.S. District Court for the District of Arizona excluded the expert testimony of a law professor because the
professor’s report read like a legal brief.

⁸ AWC Supplement to Motion at attachment.

1 witness is also permissible under Rule 104 because Mr. Johnson did not take “an active part in the
2 investigation or preparation” of this matter, and AWC has not presented credible evidence that he did.
3 Cornman further argues that Mr. Johnson’s opinions “are not ‘legal conclusions’ but are analyses and
4 opinions presented from a regulatory policy perspective based upon his 25 years as a utility
5 regulator.”⁹ Additionally, Cornman asserts that any criticism of the contents of Mr. Johnson’s pre-
6 filed testimony would go to the weight of the testimony rather than its admissibility. Cornman also
7 asserts that the Commission disfavors motions to strike.

8 According to Cornman, § 38-504 allows a former Commission employee such as Mr. Johnson
9 to appear as a witness once at least 12 months have passed since employment at the Commission, and
10 Mr. Johnson was not contacted to participate in this case until June 2014, more than 12 months after
11 Mr. Johnson left the Commission’s employment. Cornman recites a long list of former Commission
12 employees, including Mr. Walker, who Cornman says have subsequently represented regulated
13 entities or other state agencies before the Commission. Cornman asserts that if there is a problem
14 with Mr. Johnson’s appearing as a witness for Cornman, there is also a problem with Mr. Walker’s
15 appearing as a witness for AWC, because Mr. Walker was employed at the Commission from
16 January 2001 to May 2004, during which time Decision No. 66893 was issued. Cornman also asserts
17 that AWC has not established that this matter is one in which Mr. Johnson “personally participated . .
18 . by a substantial and material exercise of administrative discretion,” as required for the limitation in
19 § 38-504 to apply. Cornman argues that the opposite is true and that neither the title of Staff’s
20 Director nor the title of Executive Director, without more, proves “substantial and material exercise
21 of administrative discretion.”

22 Cornman argues that Mr. Johnson is not required to seek written Commission authorization to
23 appear as a witness under Rule 104¹⁰ because he did not previously take “an active part in the
24 investigation or preparation as a representative of the Commission,” but merely served as Staff’s
25 Director and the Executive Director of the Commission, which Cornman asserts does not result in
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27 ⁹ Cornman Response at 2.

28 ¹⁰ Cornman states that if the Commission has concerns leading it to conclude that Mr. Johnson may be subject to Rule 104, Cornman would request an opportunity for Mr. Johnson to request and obtain permission to appear as a witness before a ruling on AWC’s Motion.

1 taking an active part. Cornman argues that Mr. Walker's former employment as a Policy Advisor, on
2 the other hand, makes him a Commission employee who was involved in the decision-making
3 process and was subject to A.A.C. R14-3-113 (the Commission's Ex Parte Rule) and, thus, an
4 employee with "an active part in the investigation or preparation [of this case] as a representative of
5 the Commission" under Rule 104.

6 Cornman disagrees with AWC's assertion that Mr. Johnson's testimony constitutes legal
7 advocacy for Cornman, subjecting Mr. Johnson to either ERs 1.11 and 3.7 or the Oklahoma
8 equivalents. Cornman asserts that Mr. Johnson has been retained only as a policy witness, to address
9 the policy issues raised in this matter—such as "whether a public service corporation, like Arizona
10 Water, in this water challenged area and under the circumstances presented in this case, is providing
11 reasonable service if it is not able or not willing to provide integrated water and wastewater
12 service."¹¹ Cornman further asserts that, even if the ERs were to apply to Mr. Johnson in this matter,
13 the rules would not preclude Mr. Johnson from testifying because Mr. Johnson is neither
14 "representing a private client in connection with a matter in which the lawyer participated personally
15 and substantially as a public officer or employee," as contemplated by ER 1.11(a), nor established to
16 have "confidential government information" as contemplated by ER 1.11(b). Cornman states that ER
17 3.7 likewise does not apply because this is not a situation in which a lawyer acting as an advocate
18 might be called as a necessary witness. Cornman argues that "Mr. Johnson is not providing legal
19 argument or asserting legal opinions in this case"; that Mr. Johnson is "not representing [Cornman] in
20 this case any more than Rita Maguire, a licensed attorney, is representing AWC by appearing as an
21 expert witness"; and that "Mr. Johnson's testimony reads no more like a legal brief than the
22 testimony of AWC witness Rita Maguire."¹²

23 To support its assertion that the Commission disfavors motions to strike, Cornman provides
24 quotes, both from this matter and an unrelated matter, in which Staff or a Commission Administrative
25 Law Judge explains why a motion to strike should be denied. Cornman asserts that any objections
26 AWC may have with either the scope or relevancy of any portion of Mr. Johnson's testimony can be

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28 ¹¹ Cornman Response at 6-7 (quoting Procedural Order of February 2, 2011).

¹² Cornman Response at 9.

1 properly addressed at hearing and given appropriate weight.

2 **Staff Response**

3 Staff states that although AWC did not explicitly say so, the basis for AWC's motion was
4 conflict of interest. Staff references both Rule 104 and § 38-504, noting that both require the former
5 employee's participation to have been active or direct and substantial and further noting that Rule 104
6 places no time limit on its applicability. Staff also quotes the guidance provided to state agencies in
7 the Arizona Attorney General's Agency Handbook ("Agency Handbook"), § 8.11, which references
8 38-504 and provides the following example: "For example, a Corporation Commission employee
9 who was materially involved in a utility rate hearing involving a public service corporation may not
10 represent that corporation before the Commission for one year after the employee has resigned from
11 state service." Staff notes the materiality requirement in the Agency Handbook example and then
12 states the following in closing:

13 At this time, Staff is not in a position to evaluate the materiality of
14 Mr. Johnson's participation in this matter prior to his departure from
15 Commission employment. Staff notes that AWC's motion and
16 supplement to motion do not provide information speaking to the
17 materiality element. Absent additional information regarding the
18 materiality of Mr. Johnson's involvement in this proceeding, Staff
19 believes that the Company has not fully expressed all the necessary
20 elements to support its motion.¹³

18 **AWC's Reply and Supplemental Reply**

19 In its Reply, AWC argues that Mr. Johnson's testimony should be stricken because Mr.
20 Johnson failed to comply with Rule 104, a Commission rule that has the effect of law and that the
21 Commission itself is required to follow. AWC states that "[t]he only issue pending before the
22 Commission is whether Mr. Johnson 'previously took an active part in the investigation or
23 preparation' of this case."¹⁴

24 AWC argues that Mr. Johnson's own testimony supports a conclusion that Mr. Johnson took
25 an active part in this matter while an employee, setting forth the following major assertions:

- 26 • As Staff's Director, Mr. Johnson was responsible for the day-to-day operations of the

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28 ¹³ Staff Response at 3.

¹⁴ AWC Reply at 2.

1 Utilities Division, including policy development, case strategy, and overall Division
2 management.

- 3 • As the Commission's Executive Director, Mr. Johnson was responsible for the day-to-day
4 operations of all Divisions.
- 5 • As Staff's Director, Mr. Johnson actively participated in this matter after it became contested.
6 Mr. Johnson acknowledged that the issue would have come to his attention after the
7 Robson/Cornman letter was filed, and confirmed that he was "brought in to the mix" at some
8 point and would have been involved in some discussions, although he stated that he did not
9 recall specifics.
- 10 • As Staff's Director, Mr. Johnson had input into and ultimately decided Staff policy. Mr.
11 Johnson stated that he assumes Staff's policy statement had his blessing, even though he did
12 not initial it himself.
- 13 • The Legal Division acted under Mr. Johnson's direction as Staff's Director in this case, as
14 Mr. Johnson would have been responsible for deciding whether Staff would file exceptions to
15 a pending Recommended Opinion and Order.
- 16 • As Staff's Director, Mr. Johnson signed off on multiple Staff documents filed in this matter,
17 demonstrating that Mr. Johnson took an active part in this case and was familiar with and
18 directed Commission actions.¹⁵

19 AWC argues that the Commission has a strong interest in enforcing Rule 104 to exclude Mr.
20 Johnson's testimony because of the Commission's strong interest in maintaining the independence
21 and impartiality of (and the appearance of independence and impartiality of) its administrative
22 proceedings. AWC argues:

23 Mr. Johnson is not just a former employee now representing a party at the
24 Commission in a matter he did not participate in while employed by the
25 Commission. Mr. Johnson served as the head of a Commission Division
26 actively involved in litigating this case during the litigation. Mr. Johnson
27 then became the Executive Director, where he directed the Utilities, Legal
and Hearing Divisions on a day-to-day basis while this very visible case
was pending at the Commission. [Cornman] has not cited a single
instance where a former Utilities Division Director or Executive Director

28 ¹⁵ See AWC Reply at 2-8.

1 has appeared and presented testimony in a matter he supervised and
 participated in while at the Commission.¹⁶

2 In addition, AWC again objects to the content of Mr. Johnson's testimony, asserting that the
 3 "vast majority of his testimony is improper legal opinion in the guise of 'expert' testimony."¹⁷
 4 According to AWC, of the 32 pages of testimony, 4 pages include Mr. Johnson's biography, and all
 5 or part of 19 of the remaining 28 pages contain legal opinions. AWC asserts that Mr. Johnson
 6 crossed into legal opinion by opining on the standard of review for this matter, creating and urging
 7 the Hearing Division to use "an entirely new legal framework" to make its decision in this matter,
 8 opining on what constitutes "reasonable service," opining that non-integrated service is
 9 "unreasonable," opining that *James P. Paul Water Co. v. Arizona Corp. Comm'n*¹⁸ does not apply to
 10 this matter, and opining as to the applicability of *stare decisis* to Commission decisions. Finally,
 11 AWC provides examples of situations in which the Commission previously struck testimony and late-
 12 filed exhibits as violative of due process and struck purported expert testimony that offered legal
 13 opinions.

14 AWC states the following regarding Cornman and Staff's reliance on § 38-504:

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

20 In its Supplemental Reply, AWC elaborates, arguing that "§ 38-504 has no bearing on the
 21 instant situation or the applicability of [Rule 104] to Mr. Johnson's proposed testimony"²⁰ because §
 22 38-504 prohibits a former public officer or employee from representing another person for
 23 compensation before a public agency within 12 months of leaving public service, while Rule 104
 24 expressly prohibits a former Commission employee from appearing as a witness on behalf of another
 25 party in a formal proceeding in which the employee took an active part. AWC states that the statute

26 ¹⁶ AWC Reply at 8.

27 ¹⁷ AWC Reply at 9.

¹⁸ 137 Ariz. 426, 671 P.2d 404 (1983) (holding that the Commission must allow a CC&N holder to retain its CC&N unless the CC&N holder is unable or unwilling to provide reasonably demanded service at a reasonable rate).

28 ¹⁹ AWC Reply at 2.

²⁰ AWC Supplemental Reply at 1.

1 and the rule should be read on their faces and that they were created to address different issues.
 2 AWC reasons that § 38-504 applies only in the context of representation as an attorney,²¹ not
 3 appearing as a witness, and that it thus does not supersede Rule 104. AWC further points out that §
 4 38-504 limits its prohibition to 12 months after employment, while Rule 104 has no time limit. AWC
 5 also asserts that A.R.S. § 38-501, providing that the conflict-of-interest statutes (including § 38-504)
 6 supersede any other “law, charter provision or ordinance,” also does not apply because Rule 104 is
 7 not a “law, charter provision or ordinance.” AWC argues that if Mr. Johnson is not representing
 8 Cornman as a private client for purposes of ER 1.11(a), Mr. Johnson likewise is not representing
 9 Cornman for purposes of § 38-504.

10 In response to Cornman’s suggestions concerning Mr. Walker’s ineligibility to testify because
 11 of Rule 104, AWC asserts that there is nothing in the record to indicate that Mr. Walker actively
 12 participated in any investigation or preparation related to this matter while working as a policy
 13 advisor for the Commission. AWC includes an unsworn declaration from Mr. Walker, recounting
 14 that while serving as a policy advisor to Commissioner Spitzer, Mr. Walker did not investigate or
 15 otherwise participate in the processing of CC&N extension applications and, further, that Mr. Walker
 16 left the Commission in May 2004, before this matter became contested.

17 **§§ 38-504 and 38-501**

18 § 38-504 states, in pertinent part:

19 A public . . . employee *shall not represent another person for*
 20 *compensation* before a public agency by which the . . . employee . . . was
 21 employed within the preceding twelve months . . . concerning any matter
 22 with which the . . . employee was *directly concerned* and in which the . . .
 employee *personally participated* during the . . . employee’s employment .
 . . by a *substantial and material exercise of administrative discretion*.²²

23 § 38-501 states, in pertinent part:

24 A. This article²³ shall apply to all public officers and employees of . . .
 25 the state and any of its departments, commissions, agencies, bodies or
 boards.

26 ²¹ During oral argument on September 4, 2014, AWC broadened its interpretation of representation under § 38-504 to
 27 include legal representation, lobbying, and public policy consulting. (Tr. at 7.)

²² A.R.S. § 38-504(A) (emphasis added).

28 ²³ A.R.S. §§ 38-504 and 38-501 appear within A.R.S. Title 38, Public Officers and Employees; Chapter 3, Conduct of
 Office; Article 8, Conflict of Interest of Officers and Employees.

1 **B.** *Notwithstanding the provisions of any other law, or the provisions*
 2 *of any charter or ordinance of any incorporated city or town to the*
 3 *contrary, the provisions of this article shall be exclusively applicable to all*
 4 *officers and employees of . . . the state and any of its departments,*
 5 *commissions, agencies, bodies or boards and shall supersede the*
 6 *provisions of any other such law, charter provision or ordinance.*

7 **C.** Other prohibitions in the *state statutes* against any specific conflict
 8 of interests shall be in addition to this article if consistent with the intent
 9 and provisions of this article.²⁴

10 For purposes of Title 38, A.R.S. § 38-101 defines an “office,” “board,” or “commission” to
 11 mean “any office, board or commission of the state, or any political subdivision thereof, the salary or
 12 compensation of the incumbent or members of which is paid from a fund raised by taxation or by
 13 public revenue.” The Commission is not exempted from the general applicability of A.R.S. Title 38
 14 or from Chapter 3, Article 8 of the Title.²⁵

15 AWC argues that § 38-504 is not controlling in this matter because the statute’s prohibition is
 16 limited to a former employee who is representing another person for compensation, which AWC
 17 interprets to include only legal counsel, lobbyists, and public policy consultants. Cornman does not
 18 interpret representation so narrowly and would apply it in the context of Mr. Johnson’s testimony and
 19 Mr. Walker’s testimony herein.

20 On its face, the language of § 38-504 would prohibit a former Commission employee’s
 21 representation of another person, for compensation, in a specific matter before the Commission,
 22 within 12 months after leaving Commission employment, if the former employee was directly
 23 concerned with and personally participated in the matter during employment in a manner that
 24 involved a substantial and material exercise of administrative discretion. Although this language may
 25 appear to be clear on its face, and portions of it seem to be clear,²⁶ contemplation of the manner in
 26 which § 38-504 should be applied for Mr. Johnson’s participation as a witness herein raises
 27 questions—(1) What does it mean to represent another person? (2) What does it take to be directly
 28 concerned with and personally participate in a matter? (3) When does participation in a matter

²⁴ A.R.S. § 38-501 (emphasis and footnote added).

²⁵ *Cf. Bolin v. Superior Court in and for County of Maricopa*, 85 Ariz. 131 (1958) (determining that Arizona
 Constitution Art. 15, § 1, rather than A.R.S. § 38-295, controlled the filling of vacancies on the Commission, without
 finding that the Commission was not subject to A.R.S. § 38-295 or Title 38 generally).

²⁶ There seems to be no dispute about the meaning of former employee, the stay-out period of 12 months, or the concept
 of compensation.

1 involve a substantial and material exercise of administrative discretion? Because the legislature has
 2 not defined “represent” for purposes of § 38-504 or set forth criteria for use in determining the
 3 answers to the other two questions set forth above, an examination of statutory construction is
 4 necessary.

5 This analysis is guided by principles of statutory construction established by Arizona’s courts
 6 as well as by statute.²⁷ A statute must be construed to give meaning to each word and phrase,
 7 rendering no part void, superfluous, meaningless, contradictory, or insignificant;²⁸ in conjunction
 8 with other statutes relating to the same subject or purpose, so as to give effect to all of them;²⁹ in a
 9 sensible manner that will avoid absurd results;³⁰ and to give effect to the legislature’s intent, with
 10 consideration for the effects and consequences and spirit and purpose of the law.³¹ In the absence of
 11 a statutory definition, words and phrases in a statute should be given ordinary meaning unless the
 12 context dictates otherwise.³² Additionally, if the legislature makes a requirement in one provision of
 13 a statute but does not include it in another, it must be assumed that the legislature intentionally chose
 14 not to include the requirement where it is absent.³³

15 “Represent another person . . . before a public agency”

16 The legislature has not defined “represent” either in Title 1 or Title 38 of the A.R.S. Thus, an
 17 analysis of dictionary definitions is useful to determine the common and usual meaning of the word
 18 in this context. A review of online dictionaries yields many different definitions for the term, most of
 19 which clearly are not applicable in this context. Honing the lists to those definitions that may be
 20

21 ²⁷ A.R.S. § 1-213 provides: “Words and phrases shall be construed according to the common and approved use of the
 22 language. Technical words and phrases and those which have acquired a peculiar and appropriate meaning in the law
 shall be construed according to such peculiar and appropriate meaning.”

23 ²⁸ *Sharpe v. AHCCCS*, 220 Ariz. 488, 492, 207 P.3d 741, 745 (Ariz. Ct. App. 2009) (citing *Pinal Vista Props., L.L.C. v.*
Turnbull, 208 Ariz. 188, 190, 91 P.3d 1031, 1033 (Ariz. Ct. App. 2004); *Mejak v. Granville*, 212 Ariz. 555, 557, 136 P.3d
 874, 876 (2006)).

24 ²⁹ *Sharpe*, 220 Ariz. at 492, 207 P.3d at 745 (citing *Johnson v. Mohave County*, 206 Ariz. 330, 333, 78 P.3d 1051, 1054
 (Ariz. Ct. App. 2003)).

25 ³⁰ *Sharpe*, 220 Ariz. at 497, 207 P.3d at 750 (citing *Lake Havasu City v. Mohave County*, 138 Ariz. 552, 557, 675 P.2d
 1371, 1376 (Ariz. Ct. App. 1983)).

26 ³¹ *Jennings v. Woods*, 194 Ariz. 314, 327-28, 982 P.2d 274, 287-88 (1999) (citing *Mendelsohn v. Superior Court*, 76
 Ariz. 163, 169, 261 P.2d 983, 987-88 (1953); *State v. Superior Court*, 113 Ariz. 248, 249, 550 P.2d 626, 627 (1976)).

27 ³² *Jennings*, 194 Ariz. at 323, 982 P.2d at 283 (citing *McIntyre v. Mohave County*, 127 Ariz. 317, 319, 620 P.2d 696,
 698 (1980)).

28 ³³ *Sharpe*, 220 Ariz. at 496, 207 P.3d at 749 (citing *Luchanski v. Congrove*, 193 Ariz. 176, 179, 971 P.2d 636, 639
 (Ariz. Ct. App. 1998)).

1 relevant produces the following:

2 **represent**

: to act or speak officially for (someone or something)

3

...

: to speak or act for (someone or something) in a court of law

4

Full Definition of REPRESENT

5

6 **a**(1): to take the place of in some respect (2): to act in the place of or for usually by legal right (3): to manage the legal and business affairs of <athletes *represented* by top lawyers and agents>³⁴

7

represent

8

6.

9

a. To serve as a delegate or agent for: *She represents a district that is very concerned about high rents.*

10

b. To act as a spokesperson for.³⁵

11

represent

12

...

2. to act as a substitute or proxy (for)

13

3. to act as or be the authorized delegate or agent for (a person, country, etc): *an MP represents his constituency.*³⁶

14

represent

15

...

3. to stand or act in place of, as an agent or substitute: *to represent one's company.*

16

4. to speak and act for by delegated authority: *to represent one's government.*³⁷

17

Reviewing the definitions provided above, the overriding theme is that to represent a person

18

involves more than simply speaking for the person in the sense of serving as a witness³⁸ called by that

19

person in an evidentiary hearing. To represent a person also involves having the authority to stand in

20

³⁴ Source: <http://www.merriam-webster.com/dictionary/represent> (accessed March 11, 2015).

21

³⁵ Source: <http://www.thefreedictionary.com/represent> (accessed March 11, 2015) (citing *American Heritage Dictionary of the English Language, Fifth Edition* (2011)).

22

³⁶ Source: <http://www.thefreedictionary.com/represent> (accessed March 11, 2015) (citing *Collins English Dictionary – Complete and Unabridged* (2003)).

23

³⁷ Source: <http://www.thefreedictionary.com/represent> (accessed March 11, 2015) (citing *Random House Kernerman Webster's College Dictionary* (2010)).

24

³⁸ The following definitions of “witness” and “expert witness” demonstrate that one who serves as a witness does not have the same authority as does one who represents a person:

25

witness, n. 1. One who sees, knows, or vouches for something <a witness to the accident>. 2. One who gives testimony, under oath or affirmation (1) in person, (2) by oral or written deposition, or (3) by affidavit <the prosecution called its next witness>.

26

...

27

expert witness. A witness qualified by knowledge, skill, experience, training, or education to provide a scientific, technical, or other specialized opinion about the evidence or a fact issue. Fed. R. Evid. 702-706.

28

Black's Law Dictionary: Seventh Edition (1999) at 1596-97.

1 the place of and express the official position of that person (with the impact being as though that
 2 person spoke). There are circumstances when a person who represents or has represented another
 3 person is also a witness in a proceeding. One example³⁹ is when a Staff employee who has served as
 4 Staff's financial auditor or engineer for purposes of analyzing an application (serving as an agent of
 5 Staff for purposes of communicating with the applicant during inspections and audits before any
 6 hearing) subsequently testifies as a Staff witness at hearing regarding the outcome of that analysis.
 7 While such a Staff employee may represent Staff during the auditing process (in the sense that the
 8 Staff employee is acting in the place of Staff management and is authorized to express Staff's
 9 position in personal, telephonic, and other communications), such a Staff employee would not be
 10 authorized to represent Staff at an evidentiary hearing. That role is performed by legal counsel.

11 In an Open Meeting, where witness testimony is very seldom involved, Staff as a party in a
 12 matter is represented by legal counsel, and other parties to a matter are represented in a manner
 13 consistent with how they would be represented in an evidentiary hearing.⁴⁰

14 Resolution

15 To represent a person before the Commission (whether in an evidentiary hearing, a procedural
 16 conference, or an Open Meeting), as contemplated in § 38-504, one must be authorized to stand and
 17 speak on behalf of, and to make commitments for, that person.⁴¹ Cornman and Mr. Johnson have
 18 repeatedly asserted that Mr. Johnson does not legally represent Cornman. Nor is there any evidence
 19 in the record thus far to indicate that Mr. Johnson could legally represent Cornman, as he is not a
 20 member of the Arizona State Bar and does not appear to qualify under A.R.S. § 40-243 or Arizona
 21 Supreme Court Rule 31(d)(28). In light of this, § 38-504 does not apply to Mr. Johnson's
 22 participation in this matter as a witness for Cornman. Thus, it is not necessary to engage in further

23

24 ³⁹ Another example is when a small privately held company has one owner, officer, and/or employee who serves both
 25 as the company's lay representative (in lieu of hiring legal counsel) and witness regarding the company's operations and
 26 application. Even in this situation, the two functions are distinct, in that the authority to provide testimony as a witness
 does not automatically involve the authority also to represent the person as a party in the case. The authority to represent
 the company as a party is separately imparted and, additionally, expressly restricted by law. (See Arizona Supreme Court
 Rule 31(d)(28); A.R.S. § 40-243.)

27 ⁴⁰ Legal restrictions as to authority to practice law continue to apply in a Commission Open Meeting.

28 ⁴¹ Because it is unnecessary for purposes of AWC's Motion to inquire into and resolve whether § 38-504 applies to a
 non-attorney lobbyist or public policy consultant appearing before the Commission on behalf of another person, we do
 not do so.

1 inquiry regarding the meaning of other language in § 38-504 or the presence of the other conditions
2 required for § 38-504 to apply.

3 **Rule 104**

4 Instead, it is necessary to turn to Rule 104, which provides as follows (emphasis added):

5 Former employees. *No former employee of the Commission shall appear*
6 *at any time after severing his employment with the Commission as a*
7 *witness on behalf of other parties in a formal proceeding wherein he*
8 *previously took an active part in the investigation or preparation as a*
9 *representative of the Commission, except with the written permission of*
10 *the Commission.*

11 Because administrative rules are construed using the same guiding principles as used for
12 statutes, it is first necessary to determine whether the plain language of Rule 104 is clear in its
13 meaning.⁴² If Rule 104's plain language is clear, that is where construction of the rule's meaning
14 ends. For the most part, the language of Rule 104 is clear—it permanently prohibits a former
15 Commission employee from serving as a witness for another party in a formal proceeding if the
16 former employee was actively involved in the investigation or preparation of the matter while
17 employed by the Commission, unless the former employee obtains written permission from the
18 Commission.

19 But what constitutes taking “an active part in the investigation or preparation as a
20 representative of the Commission”? The discussion above regarding the meaning of “represent”
21 sheds light on this. As discussed above, in the context of a Commission proceeding beginning with
22 the filing of an application, there are two distinct manners in which a Commission employee
23 “represents” the Commission. First, in the auditing and inspection phase of a proceeding, a
24 Commission employee represents the Commission Staff (as a specific subpart of the Commission)
25 when communicating with the applicant. Second, a Commission employee who is an attorney
26 represents the Commission Staff (as a specific subpart of the Commission) when Staff is a party. The
27 auditing and inspection phase of a proceeding can be aptly described as “investigation” and
28 “preparation.” Like the financial auditor or engineer, the attorney-employee assigned to a case would
necessarily engage in preparation for any Commission proceeding in which the attorney-employee

⁴² See *McKesson Corp. v. AHCCCS*, 230 Ariz. 440, 442, 444, 286 P.3d 784, 786, 788 (Ariz. Ct. App. 2012).

1 would be involved. Thus, in order to take an active part in the investigation or preparation as a
2 representative of the Commission, one must have served either as a member of Staff who was
3 involved in investigating, auditing, inspecting, or preparing for a proceeding or as an attorney-
4 employee who prepared for the proceeding as Staff's counsel.

5 Mr. Johnson never served as an attorney-employee for the Commission. Thus, it is necessary
6 to determine whether Mr. Johnson was involved in the investigation, audit, inspection, or preparation
7 for the proceeding that is this matter. The extent of Mr. Johnson's involvement herein, as alleged by
8 AWC, is summarized in the bullet points set forth above.⁴³ Most notably, Mr. Johnson acknowledged
9 that the ultimate issue in this matter would have come to his attention after the Robson/Cornman
10 letter was filed and that he was "brought in to the mix." Mr. Johnson also signed off on (*i.e.*,
11 approved for filing) some of the Staff documents filed in this matter and now assumes that Staff's
12 policy position had his blessing at the time. Mr. Johnson reports remembering very little regarding
13 the specifics of this case, which first became truly contested approximately 10 years ago. Rule 104
14 does not include a requirement for the former employee to remember anything about the employee's
15 involvement, however, just for the employee to have taken an active part in investigation or
16 preparation as a representative of the Commission. Mr. Johnson's name appears, in his capacity as
17 Staff's Director, as the proponent of the Staff Memoranda filed in this matter on January 9, 2004;
18 April 11, 2005; and June 12, 2006. The latter two followed the filing of the Robson/Cornman letter
19 in April 2005, at which point this matter had become contested. As Staff's Director and the named
20 proponent for the Staff Memoranda, Mr. Johnson would have borne ultimate responsibility for the
21 contents of the Staff Memoranda even if he did not personally place his initials upon them. It would
22 stretch credulity to believe that Mr. Johnson was not familiar with and involved in formulating the
23 policy behind the contents of the April 2005 and June 2006 Staff Memoranda, even if he no longer
24 recalls the details. As Mr. Johnson recounted, overseeing Staff policy and case strategy was part of
25 his job.⁴⁴ Further, as Staff's Director, Mr. Johnson would have been ultimately responsible for

26 ⁴³ See AWC Reply at 2-8. Cornman has not disputed the accuracy of these, just their import.

27 ⁴⁴ Johnson Testimony at 2. Also, Mr. Johnson's testimony as to his impressions of the operations of Robson utilities
28 suggests a familiarity with the issues before the Commission during his tenure and with the happenings in Arizona's
utility industry in general at that time, particularly as Mr. Johnson indicates that there were no problems raised regarding
the Robson utilities. (*See, e.g.*, Johnson Testimony at 27.)

1 interacting with Staff's attorney to assist in the formulation of Staff's legal position, which has been
2 provided in filings, at hearing, and during other proceedings after April 2005. To conclude that Mr.
3 Johnson did not take an active part in the preparation for this matter would be to conclude that Mr.
4 Johnson did not fulfill his duties as Staff's Director, which he described as being "responsible for the
5 day-to-day operations of the Utilities Division, including policy development, case strategy, and
6 overall Division management."⁴⁵ No assertion has been made that Mr. Johnson did not fulfill those
7 job duties. Thus, the only conclusion is that Mr. Johnson took an active part in the preparation of this
8 matter in his capacity as Staff's Director and that Rule 104 applies to him as a potential witness in
9 this matter.⁴⁶ Given this finding, it is unnecessary to examine and determine whether Mr. Johnson
10 also took an active part as the Commission's Executive Director.

11 Conclusion

12 Rule 104 applies to Mr. Johnson as a former employee of the Commission appearing, any
13 time after severing his employment with the Commission, as a witness on behalf of another party in a
14 formal proceeding wherein he previously took an active part in the preparation as a representative of
15 the Commission. For Mr. Johnson to be permitted to serve as a witness in this matter, he must have
16 the written permission of the Commission.

17 It is not necessary, at this time, to rule on the admissibility of specific portions of Mr.
18 Johnson's pre-filed testimony.

19 ORDER

20 IT IS THEREFORE ORDERED that A.R.S. § 38-504 does not apply to Mr. Johnson's
21 participation in this matter as a witness for Cornman.

22 IT IS FURTHER ORDERED that A.A.C. R14-3-104(G) does apply to Mr. Johnson's
23 participation in this matter as a witness for Cornman.

24 IT IS FURTHER ORDERED that the **hearing** in this matter shall commence on **September**
25 **14, 2015, at 10:00 a.m.**, or as soon thereafter as is practicable, at the Commission's offices, Hearing
26 Room No. 1, 1200 West Washington, Phoenix, Arizona 85007, and shall continue, as necessary,

27 ⁴⁵ Cornman Notice of Filing Testimony filed July 18, 2014, Att. 2 at 2.

28 ⁴⁶ While this conclusion is consistent with the outcome of the OPUC case, the conclusion herein is reached based upon
the totality of the circumstances in this matter, as set forth herein.

1 September 15 through 18, 2015, at 9:00 a.m. or another time to be determined, in the same
2 location.

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

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

9 DATED this 7th day of May, 2015.

11 
12 SARAH N. HARPRING
13 ADMINISTRATIVE LAW JUDGE

14 Copies of the foregoing mailed/delivered
15 this 7th day of May, 2015, to:

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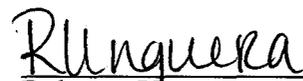
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