



BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

- SUSAN BITTER SMITH - Chairman
- BOB STUMP
- BOB BURNS
- DOUG LITTLE
- TOM FORESE

Arizona Corporation Commission

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AZ CORP COMMISSION DOCKET CONTROL

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:

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,<sup>1</sup> 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").

On April 7, 2005, "for and on behalf of" Cornman Tweedy 560, LLC ("Cornman"), Robson Communities ("Robson") filed a letter alleging that because AWC had failed to timely satisfy the

<sup>1</sup> The Decision included the following legal description for the extension area: "Sections 19, 20, 21, 22, 23, W 1/2 24, W 1/2 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 compliance conditions of Decision No. 66893, the CC&N extension conditionally granted therein was  
2 automatically null and void. The letter stated that Cornman owned approximately 1,120 acres within  
3 the extension area; that all but approximately 160 acres of that property were included in the EJ Ranch  
4 Master Planned Community ("EJ Ranch") being developed by Robson, an affiliate of Cornman; and  
5 that Cornman desired to obtain water service for its property from Picacho Water Company ("Picacho  
6 Water"), another affiliate of Robson, rather than from AWC. The letter also identified Picacho Sewer  
7 Company ("Picacho Sewer") as another affiliate of Robson and Cornman.

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

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

18 On July 30, 2007, the Commission issued Decision No. 69722, finding that AWC had been  
19 prevented from complying with the Decision No. 66893 requirement to file a Developer's Certificate  
20 of Assured Water Supply ("CAWS") because the developer for the Florence Country Estates  
21 development, at Cornman's direction, had withdrawn its pending CAWS Application from the Arizona  
22 Department of Water Resources' ("ADWR's") consideration. The Commission found that this had  
23 made it impossible for AWC to comply with the condition in Decision No. 66893 and was beyond  
24 AWC's control. The Commission also found that the Florence Country Estates development area had  
25 been included in an Analysis of Assured Water Supply ("AAWS") issued by ADWR in March 2005  
26 for the EJ Ranch development and that issuance of that AAWS satisfied the objective of the CAWS

27 \_\_\_\_\_  
28 <sup>2</sup> Additional detail regarding the procedural history is set forth in the Procedural Orders issued on March 22, 2006, and  
April 19, 2006.

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

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

22       On November 29, 2010, a Recommended Order on Remand from Decision No. 69722  
23 (“Recommended Order”) was issued. The Recommended Order was discussed during the  
24 Commission’s Open Meetings on December 14, 2010, and February 1, 2011, but no decision was  
25 adopted by the Commission. Instead, at the Open Meeting on February 1, 2011, the Commission voted  
26 to send the matter back to the Hearing Division for further proceedings to determine “whether a public  
27 service corporation, like Arizona Water, in this water challenged area and under the circumstances  
28 presented in this case, is providing reasonable service if it is not able or not willing to provide integrated

1 water and wastewater services.” This inquiry is the matter at hand, in which procedural conferences  
2 have been held, discovery disputes have been resolved, and a number of filings have been made  
3 regarding various issues.

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

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

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

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

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

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

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

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

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

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

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

26 On August 22, 2014, a Procedural Order was issued vacating the September 4, 2014, hearing  
27 date; scheduling a procedural conference to be held at the time previously set for the hearing; and  
28 requiring AWC to file a Supplemental Reply addressing both Cornman’s argument that A.R.S. § 38-

1 504(A) (“§ 38-504”) superseded A.A.C. R14-3-104(G) (“Rule 104”) and was controlling and  
2 Cornman’s assertion that if Mr. Johnson were precluded from testifying, Mr. Walker likewise should  
3 be disqualified because of his prior employment as former Commissioner Spitzer’s policy advisor.

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

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

12 On September 22, 2014, AWC, Cornman, and Staff filed their briefs regarding OPUC Order  
13 No. 01-249.

14 On May 7, 2015, a Procedural Order was issued declaring that while A.R.S. § 38-504 did not  
15 apply to Mr. Johnson’s participation in this matter as a witness for Cornman, A.A.C. R14-3-104(G) did  
16 apply to Mr. Johnson’s participation in this matter as a witness for Cornman. The Procedural Order  
17 also scheduled the hearing in this matter to commence on September 14, 2015, and to continue, as  
18 necessary, on September 15 through 18, 2015.

19 On September 3, 2015, a telephonic procedural conference was held at the request of AWC and  
20 Cornman, with AWC, Cornman, and Staff appearing through counsel. Cornman explained that Mr.  
21 Johnson was expected, that day, to hand deliver to the Commission’s Executive Director a letter  
22 requesting permission, under Rule 104, to appear as a witness for Cornman in this matter (“Request”).  
23 Cornman stated that it desired to have the hearing continued, pending the Commission’s decision on  
24 Mr. Johnson’s Request. Cornman was unable to specify the duration of the requested continuance due  
25 to uncertainty regarding the Commission’s process for handling the Request. AWC and Staff did not  
26

27 <sup>3</sup> OPUC Order No. 01-249 was issued on March 21, 2001, *in re* Portland General Electric Company’s Proposal to  
28 Restructure and Reprice Its Services in Accordance with the Provisions of SB 1149 (UE 115) and *in re* PacifiCorp’s  
Proposal to Restructure and Reprice Its Services in Accordance with the Provisions of SB 1149 (UE 116). OPUC Order  
No. 01-249 is described in more detail in the Procedural Order issued in this matter on May 7, 2015.

1 oppose the requested indefinite continuance. It was determined that an indefinite continuance would  
2 be granted, that Cornman would file copies of the Request with Docket Control, and that Cornman  
3 would file a Status Report within 30 days.

4 On September 4, 2015, a Procedural Order was issued continuing indefinitely the hearing in  
5 this matter and vacating the September 14-18 hearing dates; requiring Cornman to file a copy of Mr.  
6 Johnson's Request by September 11, 2015; and requiring Cornman to file a Status Report every 30  
7 days until Mr. Johnson's Request was approved or denied.

8 On September 11, 2015, a Notice of Filing was made including a copy of Mr. Johnson's  
9 Request, which had been filed with the Executive Director on September 3, 2015.

10 On October 19, 2015, AWC filed a letter urging the Commission to decline Mr. Johnson's  
11 Request at the Staff Open Meeting to be held on October 20, 2015.

12 On October 20, 2015, Mr. Johnson's Request was considered at the Staff Open Meeting. After  
13 hearing argument from AWC and Cornman, the Commission approved the Request and directed the  
14 Commission's Chief Counsel to file a memorandum reflecting the Commission's approval.

15 On October 22, 2015, the Commission's Chief Counsel filed a Memorandum informing Mr.  
16 Johnson that the Commission had granted his Request.

17 On October 29 and November 4, 2015, Procedural Orders were issued directing AWC,  
18 Cornman, and Staff, by November 16, 2015, to make filings including a proposed schedule for this  
19 matter going forward.

20 On November 16, 2015, AWC, Cornman, and Staff filed a Joint Proposal Regarding Procedural  
21 Schedule ("Joint Proposal"). In the Joint Proposal, AWC requested that prior to a hearing, a ruling be  
22 made on that portion of AWC's Motion regarding the admissibility of certain portions of Mr. Johnson's  
23 testimony. The Joint Proposal stated that this could be decided based upon the pleadings filed in the  
24 docket or after additional oral argument, with AWC expressing a preference for additional oral  
25 argument.<sup>4</sup> The following schedule was then proposed going forward, assuming Mr. Johnson is still a  
26

27  
28 <sup>4</sup> Because the filings and the oral argument transcript related to the Motion are available, additional oral argument is not necessary at this time.

1 witness after the Motion is ruled upon:

<b>Filing/Event</b>	<b>Timing</b>
P.O. ruling on Motion	Determined by ALJ
AWC Surrebuttal (to Johnson Rebuttal)	3 weeks after P.O.
Cornman Rejoinder (of Johnson, if necessary)	3 weeks after Surrebuttal
Filing identifying prefiled testimony, or portions thereof, to be used at hearing	30 days prior to hearing
Filing making updates to prefiled testimony	30 days prior to hearing
Discovery ends	2 weeks prior to hearing
Pre-hearing conference	7 days prior to hearing
Hearing	30 days after Rejoinder deadline

10 The parties further stated that they believe the hearing will take 4 to 5 days. As reflected in the proposed  
11 schedule, Staff does not intend to take an active role at hearing unless directed to do so.

12 AWC's request to have a ruling on its Motion and the parties' proposed schedule both appear  
13 to be reasonable. Thus, it is now reasonable and appropriate to rule upon AWC's Motion and also to  
14 establish the procedural schedule and requirements for this matter going forward.

15 **I. Motion to Strike**

16 The arguments presented by AWC, Cornman, and Staff regarding the Motion were described  
17 in the Procedural Order issued herein on May 17, 2015, and will not be repeated here. In its Motion,  
18 AWC asserted that the Commission should strike Mr. Johnson's rebuttal testimony in its entirety. In  
19 its Reply to Responses to Motion to Strike Rebuttal Testimony of Ernest G. Johnson and to Preclude  
20 His Testimony at Hearing, AWC asserted that 4 pages of Mr. Johnson's testimony consist of his  
21 biography and that "all or parts of 19 of the remaining 28 pages contain legal opinions." AWC  
22 specifically cited the following portions of Mr. Johnson's testimony as examples of legal opinion:

- 23 • Pages 13-15, 24, 28 (lines 8 through 23); 29 (lines 1 through 13)
- 24 • Pages 5 (lines 12 through 23); 6 (lines 1 through 3)
- 25 • Pages 17 (lines 14 through 23); 18-19; 21; 24; 29; and 32
- 26 • Page 23 (lines 14 and 15)

27 AWC also broadly stated that the "remainder of Mr. Johnson's testimony . . . is legal opinion that  
28 attempts to tell the administrative law judge what law should apply to this case and how that law should

1 be applied to the facts of this matter.”

2 Because the Motion does not clearly identify the specific portions of Mr. Johnson’s testimony  
3 that AWC asserts should be stricken, it is necessary to review and determine the admissibility of all of  
4 Mr. Johnson’s testimony. Additionally, it is appropriate to provide guidance as to the areas concerning  
5 which Mr. Johnson may testify at hearing.

6 **Applicable Standards**

7 The Commission’s Rules of Practice and Procedure include no specific provisions related to the  
8 admissibility of expert testimony. Rather, A.A.C. R14-3-109(K) provides, in pertinent part:

9 Rules of evidence. In conducting any . . . hearing, neither the Commission  
10 nor any officer or employee thereof shall be bound by the technical rules of  
11 evidence, and no informality in any proceeding or in the manner of taking  
12 of testimony shall invalidate any order, decision, rule or regulation made,  
13 approved or confirmed by the Commission. Rules of evidence before the  
Superior Court of the state of Arizona will be generally followed but may  
be relaxed in the discretion of the Commission or presiding officer when  
deviation from the technical rules of evidence will aid in ascertaining the  
facts.

14 For the Commission’s general standard, then, one should look to the requirements for expert  
15 testimony in the Arizona Rules of Evidence.<sup>5</sup> Rule 702 therein provides:

16 A witness who is qualified as an expert by knowledge, skill, experience,  
training, or education may testify in the form of an opinion or otherwise if:  
17 (a) the expert’s scientific, technical, or other specialized knowledge will  
help the trier of fact to understand the evidence or to determine a fact in  
18 issue;  
(b) the testimony is based on sufficient facts or data;  
19 (c) the testimony is the product of reliable principles and methods; and  
20 (d) the expert has reliably applied the principles and methods to the  
facts of the case.

21 Rule 704(a) provides: “An opinion is not objectionable just because it embraces an ultimate issue.”

22 The following comment to Rule 704 provides additional insight: “Some opinions on ultimate issues  
23 will be rejected as failing to meet the requirement that they assist the trier of fact to understand the  
24 evidence or to determine a fact in issue. Witnesses are not permitted as experts on how juries should  
25 decide cases.”

26 . . .

27

28 <sup>5</sup> Like A.A.C. R14-3-109(K), A.R.S. § 40-243(A) provides that the Commission is not bound by the technical rules of evidence.

1 Neither Rule 702 nor Rule 704 expressly addresses the issue of expert testimony that includes  
2 legal opinion. Thus, it is appropriate to look to case law to see what has been determined to be  
3 permissible in this regard. No Arizona state case was found expressly considering this issue. However,  
4 the following discussion provided by the U.S. District Court for the District of Arizona, in *Pinal Creek*  
5 *Group v. Newmont Mining Corp.*, 325 F.Supp.2d 1037 (D. Ariz. 2005), is elucidating:<sup>6</sup>

6 Federal Rule of Evidence 702 provides for the liberal admission of  
7 expert testimony regarding factual matters. Expert testimony is admissible  
8 when it will assist the trier of fact in understanding the evidence or  
9 determining a disputed issue of fact. *United States v. Brodie*, 858 F.2d 492,  
10 496 (9th Cir.1988). However, “resolving doubtful questions of law is the  
11 distinct and exclusive province of the trial judge.” *Id.* at 497. Accordingly,  
12 federal courts typically prohibit lawyers, professors, and other experts from  
13 interpreting the law for the court or from advising the court about how the  
14 law should apply to the facts of a particular case. Testimony “which  
15 articulates and applies the relevant law ... circumvents the [fact finder’s]  
16 decision-making function by telling it how to decide the case.” *Specht v.*  
17 *Jensen*, 853 F.2d 805 (10th Cir.1988).

18 The principle that legal opinion evidence concerning the law is  
19 inadmissible is “ ‘so well-established that it is often deemed a basis [sic]  
20 premise or assumption of evidence law—a kind of axiomatic principle.’ ”  
21 *In re Initial Public Offering Sec. Litigation*, 174 F.Supp.2d 61, 64  
22 (S.D.N.Y.2001)(quoting Thomas E. Baker, *The Impropriety of Expert*  
23 *Witness Testimony on the Law*, 40 \*1043 U. Kan. Law Rev. 325, 352  
24 (1992)). The rule regarding legal testimony has been stated as follows:

25 A witness cannot be allowed to give an opinion on a question  
26 of law .... In order to justify having courts resolve disputes  
27 between litigants, it must be posited as an a priori  
28 assumption that there is one, but only one, legal answer for  
every cognizable dispute. There being only one applicable  
legal rule for each dispute or issue, it requires only one  
spokesman of the law, who of course is the judge .... To  
allow anyone other than the judge to state the law would  
violate the basic concept.

*Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir.1988) (citation omitted).  
Courts have held that expert testimony by lawyers, law professors, and  
others concerning legal issues is improper. See, *In re Initial Public Offering*  
*Sec. Litigation*, 174 F.Supp.2d at 64(stating that “every circuit has explicitly  
held that experts may not invade the court’s province by testifying on issues

<sup>6</sup> Although the *Pinal Creek Group* court applied Federal Rule of Evidence 702 rather than Arizona’s Rule 702, the approach and analysis used therein is instructive in this matter, as the federal and Arizona rule are identical. The federal and Arizona versions of Rule 704 are also identical.

1 of law.”); *United States v. Zipkin*, 729 F.2d 384, 387 (6th  
2 Cir.1984)(reversing trial court’s decision to allow bankruptcy judge to  
3 testify regarding his interpretation of the Bankruptcy Act, stating that “[i]t  
4 is the function of the trial judge to determine the law of the case.”); *Wollan*  
5 *v. U.S. Dept. of Int. Bureau of Land Management*, 997 F.Supp. 1397, 1403  
6 (D.Colo.1998)(finding reliance on expert report improper stating that an  
expert’s “legal opinion as to what the homestead laws say or do not say ...  
in [sic] inapposite.... Where the ultimate issue is a question of law, the  
opinion of a legal expert, even a lawyer, interferes with the judge’s role as  
‘sole arbiter of the law’ and should not be allowed.”).

7 In addition to prohibiting legal expert testimony which defines the  
8 governing law, courts have also prohibited legal expert opinion which  
9 applies the law to the facts. Many courts have held that the judge is the sole  
10 arbiter of the law and its application to the facts. See, *Marx & Co. v. Diners’*  
11 *Club, Inc.*, 550 F.2d 505, 508–11 (2d Cir.1977)(holding that the trial court  
12 erred in permitting a lawyer to offer his opinions concerning securities law  
13 and the application of that law to the contract in dispute.); *Peterson v. City*  
14 *of Plymouth*, 60 F.3d 469, 475 (8th Cir.1995)(finding that the trial court  
15 erred in allowing testimony that police officers’ conduct satisfied Fourth  
16 Amendment requirements stating that “[the expert’s] testimony was not a  
17 fact-based opinion, but a statement of legal conclusion. These legal  
18 conclusions were for the court to make. It was an abuse of discretion to  
19 allow the testimony.”); *Montgomery v. Aetna Cas. and Sur. Co.*, 898 F.2d  
20 1537, 1541 (11th Cir.1990)(finding that court abused its discretion by  
21 allowing witness to testify that defendant had a duty to hire tax counsel,  
22 stating “[a] witness also may not testify to the legal implications of conduct  
23 ....”); *Specht v. Jensen*, 853 F.2d at 809(stating that “testimony on ultimate  
24 issues of law by the legal expert is inadmissible because it is detrimental to  
25 the trial process.”).

26 Consistent with the foregoing opinions, the Ninth Circuit has also  
27 excluded legal expert testimony concerning both what the law is and how it  
28 should be applied to the facts of a case. See, *Aguilar v. International*  
*Longshoremen’s Union Local # 10*, 966 F.2d 443 (9th Cir.1992). At issue  
in *Aguilar* was whether casual workers could establish an enforceable  
contract based on a promissory estoppel theory. 966 F.2d at 445. The  
expert’s proffered declaration stated that based on the instructions in the  
employment application, a promise had been made, the workers reasonably  
relied on the promise, and that reliance was reasonably foreseeable. *Id.* at  
447. The Ninth Circuit barred this legal expert evidence because \*1044  
“reasonableness and foreseeability ... were matters of law for the court’s  
determination.” *Id.* at 447. The Court emphasized the rule applicable to  
expert legal opinion evidence and explained that although Fed.R.Evid. 702  
allows for expert testimony if “scientific, technical, or other specialized  
knowledge will assist the trier of fact,” this rule does not permit expert  
opinion concerning legal matters. Because the reasonableness and the  
foreseeability of the worker’s reliance were matters of law for the court’s

1 determination, the court found that those issues were outside the parameters  
2 of Fed.R.Evid. 702 and “were inappropriate subjects for expert testimony.”  
3 *Id.*; See also, *United States v. Weitzenhoff*, 35 F.3d 1275, 1287 (9th  
4 Cir.1993)(expert testimony explaining the legal effect of an environmental  
5 permit was improper because the judge consigned the interpretation of the  
6 law to the jury which was “an impermissible delegation of the district  
7 judge’s duties ....”).<sup>7</sup>

8 The court in *Pinal Creek Group* analyzed the expert testimony of four law professors in the  
9 context of motions to exclude their testimony. The court excluded the first professor’s testimony and  
10 report, finding that the report “offer[ed] nothing other than a discussion of the law and an application  
11 of the law [and] read[] more like a legal brief than an expert report,” and characterizing the proffered  
12 testimony as “inadmissible legal opinion.” (352 F.Supp.2d at 1044.) The court likewise excluded a  
13 portion of the second professor’s report that “read[] like a legal brief,” but determined that portions of  
14 the report providing the professor’s opinions on corporate norms and the relationship between two  
15 corporate entities might assist the trier of fact and that the professor could testify as to those subjects.  
16 (*Id.* at 1044-45.) The court excluded the third professor’s report and testimony altogether, finding that  
17 the professor’s lengthy discussion of anti-trust law and of the application of that law to the facts was  
18 irrelevant, would complicate the already complex case, and would not assist the trier of fact in  
19 understanding the evidence or deciding a disputed issue of fact. (*Id.* at 1045-46.) The court also found  
20 that the fourth professor’s opinions regarding the law governing the case and federal anti-trust law  
21 “invade[d] the province of the trial court and [were] inadmissible,” but that he could provide his  
22 opinions on relevant corporate norms and the relationship between the two corporate entities in view  
23 of those norms. (*Id.* at 1046.)

24 From *Pinal Creek Group*, we conclude that it would generally be error for a court to allow  
25 expert testimony explaining the law that applies to a matter or explaining how that law should be  
26 applied to the facts. We concur that these subjects are appropriately included in argument from parties’  
27 legal counsel, not in expert opinions to be obtained through testimony.<sup>8</sup> To the extent that Mr.

28 <sup>7</sup> 352 F.Supp.2d at 1042-44.

<sup>8</sup> We further note that allowing an expert witness other than a duly licensed Arizona attorney (or an out-of-state attorney admitted *pro hac vice*) to provide legal opinions in a Commission case arguably could run afoul of Arizona ethics rules. Arizona Supreme Court Rule 31(a)(2)(A) defines the “practice of law” to include “preparing or expressing legal opinions,” and Rule 31(b) prohibits any person from practicing law in this state unless the person is an active member of the state bar. In addition, Arizona Ethics Rule 5.5 (within Arizona Supreme Court Rule 42) prohibits an Arizona lawyer from practicing

1 Johnson's testimony clearly ventures into these areas, it should be stricken. The inquiry cannot end  
 2 there, however, as the line between what is and is not legal opinion is blurry in this matter due both to  
 3 the issue presented by the Commission and the inherently nebulous concept of public interest.

4 The issue for which the Commission sent this matter back to the Hearing Division for additional  
 5 evidentiary proceedings is "whether a public service corporation, like Arizona Water, in this water  
 6 challenged area and under the circumstances presented in this case, is providing reasonable service if  
 7 it is not able or not willing to provide integrated water and wastewater services."<sup>9</sup> This language,  
 8 adopted in Decision No. 69722, does not derive directly from any provision of the Arizona Constitution  
 9 or from any of the statutes or rules governing the Commission's granting, revocation, or alteration of  
 10 CC&Ns. Nor does it derive directly from any controlling case law regarding the granting, revocation,  
 11 or alteration of CC&Ns, which requires that the Commission issue a CC&N only after an applicant has  
 12 shown that the public interest would be served by granting the CC&N to the applicant,<sup>10</sup> and that a  
 13 CC&N holder be permitted to retain a CC&N so long as the CC&N holder "can provide adequate  
 14 service at a reasonable rate" and no showing is made that the "certificate holder, presented with a  
 15 demand for service which is reasonable in light of projected need, has failed to supply such service at  
 16 a reasonable cost to customers."<sup>11</sup>

17 The reasonableness or unreasonableness of service is at issue, however, in A.R.S. § 40-321,  
 18 entitled, in pertinent part, "Power of commission to determine adequacy of service rendered by public  
 19 service corporation." A.R.S. § 40-321(A) provides as follows:

20 A. When the commission finds that the equipment, appliances,  
 21 facilities or service of any public service corporation, or the methods of  
 22 manufacture, distribution, transmission, storage or supply employed by it,  
 23 are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the  
 24 commission shall determine what is just, reasonable, safe, proper, adequate  
 25 or sufficient, and shall enforce its determination by order or regulation.

26 law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction and from assisting another in  
 27 doing so.

28 <sup>9</sup> Furthermore, although a Recommended Order was issued regarding the evidence gathered and arguments made in the  
 earlier remand proceeding required by Decision No. 69722, the Commission has not adopted a Decision to resolve the  
 issues for which the remand was ordered in Decision No. 69722.

<sup>10</sup> See, e.g., *Arizona Water Co. v. Arizona Corp. Comm'n*, 217 Ariz. 652, 177 P.3d 1224 (Ariz. Ct. App. 2008).

<sup>11</sup> *James P. Paul Water Co. v. Arizona Corp. Comm'n*, 137 Ariz. 426, 429, 671 P.2d 404, 407 (Ariz. 1983). We read this  
 to refer to the demand for service as reasonable in light of the projected need, not to refer to the reasonableness of the  
 service itself.

1 The Commission has used this authority to adopt rules imposing minimum standards for service by  
 2 public service corporations and to impose such requirements upon individual public service  
 3 corporations, but does not appear to have used it as the legal basis for revoking or altering CC&Ns  
 4 already granted, instead relying upon A.R.S. § 40-282(C) and the concept of public interest.

5 The ambiguity regarding the significance of a finding in this matter that “reasonable service” is  
 6 or is not being provided if service is not integrated makes the question of what is and what is not a legal  
 7 opinion or legal conclusion in this matter less clear than would be the case if “reasonable service” were  
 8 a term of art derived from the Arizona Constitution or from the controlling statutes, rules, or case law  
 9 regarding the granting, revocation, or alteration of CC&Ns.<sup>12</sup> The inherently nebulous concept of  
 10 public interest further complicates the inquiry, particularly as the Commission routinely allows expert  
 11 witnesses to testify as to what is or is not in the public interest and makes both findings of fact and  
 12 conclusions of law concerning what is or is not in the public interest.<sup>13</sup>

13 We keep all of this in mind when considering the admissibility of Mr. Johnson’s testimony. At  
 14 the same time, we are mindful that the Commission is not bound by the Rules of Evidence<sup>14</sup> and has  
 15 traditionally been relatively permissive in its admission of testimony. This is appropriate not only due  
 16 to the administrative nature of the proceedings before the Commission, but because there is no jury to  
 17 be influenced by improper opinion testimony.

18 \_\_\_\_\_  
 19 <sup>12</sup> We note that Arizona courts have not consistently characterized the issue of “reasonableness,” in other contexts, as  
 20 either a question of law or a question of fact. (*See, e.g., Southwestern Freight Lines v. Floyd*, 58 Ariz. 249, 256-57, 119  
 21 P.2d 120, 124 (Ariz. 1941)(concluding that “reasonable and prudent” was not a question of law to be decided by the court  
 22 but a question for the jury); *Maffeo v. Wood*, 16 Ariz. App. 389, 393, 493 P.2d 935, 939 (Ariz. Ct. App. 1972)(concluding  
 23 that there was a lack of harmony in the case law concerning whether reasonableness of conduct was a court or jury question);  
 24 *Penn-American Ins. Co. v. Sanchez*, 220 Ariz. 7, 16, 202 P.3d 472, 481 (Ariz. Ct. App. 2008)(concluding that issues of  
 25 reasonableness were usually questions of fact for the trier of fact); *Lennar Corp. v. Transamerica Ins. Co.*, 227 Ariz. 238,  
 26 244, 256 P.3d 635, 641 (Ariz. Ct. App. 2011)(stating that whether the reasonableness of an insurer’s coverage position can  
 27 be determined as a matter of law depends on the nature of the dispute and other factors and finding that reasonableness in  
 28 the matter was a question for the jury); *Gann v. Morris*, 122 Ariz. 517, 518, 596 P.2d 43, 44 (Ariz. Ct. App. 1979)(stating  
 that under Arizona law, the reasonableness of a contract is a question of law.) The Arizona Supreme Court stated the  
 following in *Valley Medical Specialists v. Farber*, 194 Ariz. 363, 982 P.2d 1277 (Ariz. 1999), which involved a dispute  
 concerning the reasonableness of a restrictive covenant in an employment agreement:

It is true that the ultimate question of reasonableness is a question of law. But  
 reasonableness is a fact-intensive inquiry that depends on weighing the totality of the  
 circumstances. *Bryceland v. Northey*, 160 Ariz. 213, 217, 772 P.2d 36, 40 (App.1989)  
 (“Each case hinges on its own particular facts.”); *Olliver/Pilcher Ins. v. Daniels*, 148 Ariz.  
 530, 532, 715 P.2d 1218, 1220 (1986).

(194 Ariz. at 366-67, 982 P.2d at 1280-81.)

<sup>13</sup> *See, e.g.,* Decision No. 69722 at 19, 20.

<sup>14</sup> *See* A.R.S. § 40-243(A); A.A.C. R14-3-109(K).

1 **Analysis and Resolution**

2 For ease of reference, our analysis follows the organization of Mr. Johnson's testimony, which  
3 is preceded by an Executive Summary ("Summary") and divided into 10 Sections.

4 **Summary:**

5 The Executive Summary is not considered to be a part of Mr. Johnson's testimony. It is noted that it  
6 includes a legal opinion in its fourth bulleted item.

7 **Section I:**

8 Section I provides background regarding Mr. Johnson's current occupation, prior work experience, and  
9 educational background. The testimony in Section I is admissible.

10 **Section II:**

- 11 • From page 4, line 16, through page 5, line 10, Mr. Johnson spells out his understanding of the  
12 Commission's directives in Decision No. 69722 and at the February 2011 Open Meeting. Mr.  
13 Johnson also asserts why the Commission took interest in the Cornman Tweedy property. The  
14 testimony reciting the Commission's directives is admissible. The testimony asserting the  
15 Commission's thinking (page 4, line 19, the entire sentence beginning with "The" and ending  
16 with the notation for footnote 2) lacks a proper foundation and is inadmissible.
- 17 • From page 5, line 12 through page 6, line 2, Mr. Johnson provides his opinion on the public  
18 interest and the general bases for that opinion. This testimony appears to meet the standards of  
19 Rule 702 and 704 and is admissible.
- 20 • From page 6, line 4 through page 6, line 6, Mr. Johnson further explains the basis for his  
21 testimony. This testimony is admissible.

22 **Section III:**

- 23 • From page 6, line 9 through page 8, line 17, Mr. Johnson addresses at length his disagreement  
24 with Mr. Walker's statement that the Commission has unconditionally granted AWC a CC&N  
25 as to the Cornman property and provides factual information regarding the procedural history  
26 of this matter to support his opinion. This portion of Mr. Johnson's testimony includes legal  
27 argument and legal conclusions (regarding the conditional or otherwise uncertain nature of  
28

1 AWC's CC&N and whether AWC relied on Decision No. 66893).<sup>15</sup> This portion of Mr.  
2 Johnson's testimony is inadmissible, some as impermissible legal opinion and the rest as not  
3 helpful to the trier of fact under Rule 702.

- 4 ● From page 8, line 19 through "proceeding" on page 9, line 3, Mr. Johnson provides his legal  
5 opinion concerning the nature of AWC's authority as to the Cornman property and the nature  
6 of this matter. This portion of testimony is inadmissible.
- 7 ● From page 9, line 4, starting with "Because," through page 9, line 6, Mr. Johnson provides his  
8 opinion on the uniqueness of this matter. This testimony is admissible.

9 Section IV:

- 10 ● From page 9, line 12 through page 10, line 3, Mr. Johnson provides factual distinctions between  
11 this matter and three cases cited by Mr. Walker as cases involving CC&N deletions. This  
12 testimony is admissible.
- 13 ● From page 10, line 5 through page 11, line 22, Mr. Johnson provides Cornman's position as to  
14 AWC's ability to provide safe, adequate, and reliable water service to the Cornman property;  
15 provides his opinions regarding reasonable Commission action; sets forth Cornman's reasons  
16 for not wanting to be included in AWC's service area; and provides his opinion regarding the  
17 distinctions between this matter and the cases cited by Mr. Walker. This testimony is  
18 admissible.
- 19 ● From page 12, line 1 through page 12, line 13, ending with "case," Mr. Johnson responds to Mr.  
20 Walker's statements regarding prior cases in which the Commission has deleted CC&Ns. This  
21 testimony is admissible.
- 22 ● From page 12, line 13, beginning with "However," through page 12, line 21, Mr. Johnson  
23 instructs the Commission of its authority to act, the standard to apply in this matter, and how it  
24 should decide. This testimony ventures into legal opinion and argument and is inadmissible.

25 Section V:

- 26 ● From page 13, line 2 through page 13, line 17, Mr. Johnson sets forth the "proper focus" of this

27 <sup>15</sup> It is noted that these legal arguments and legal conclusions directly respond to Mr. Walker's characterization of AWC's  
28 CC&N as "unconditional" and of this matter as being a CC&N deletion proceeding, both of which also appear to be legal  
conclusions.

1 matter and the standard to be applied. This testimony involves legal opinion and argument and  
2 is inadmissible.

- 3 • From page 13, line 19 through page 13, line 22, ending with “process,” Mr. Johnson provides  
4 his understanding of the public interest standard. This testimony is admissible.
- 5 • From page 13, line 22, beginning with “and,” through page 14, line 3, Mr. Johnson provides  
6 legal opinion and argument regarding the public interest standard. This testimony is  
7 inadmissible.
- 8 • From page 14, line 5, through page 14, line 17, Mr. Johnson provides his opinion regarding the  
9 applicability and scope of the public interest standard in this matter and the Commission’s  
10 constitutional authority. This testimony includes legal opinion and legal argument and is  
11 inadmissible.
- 12 • From page 15, line 1 through page 15, line 22, Mr. Johnson provides and explains his opinion  
13 regarding the superiority of integrated water and wastewater systems and, further, his opinion  
14 that excluding the Cornman property from AWC’s CC&N would be in the public interest. This  
15 testimony is admissible.
- 16 • From page 16, line 1 through page 16, line 9, Mr. Johnson responds to a statement in the  
17 testimony of William Garfield. This testimony is admissible.

18 Section VI:

- 19 • From page 16, line 12, through page 18, line 18, Mr. Johnson describes the *James P. Paul* case,  
20 provides his opinion regarding the applicability of the *James P. Paul* case to this matter,  
21 distinguishes *James P. Paul* from this matter on a procedural basis, and provides his opinion  
22 regarding AWC’s CC&N authority for the Cornman property. This testimony mixes legal  
23 opinion and argument, both of which are impermissible under Rule 704, with recitations of facts  
24 regarding the *James P. Paul* case, which are not helpful under Rule 702. This testimony is  
25 inadmissible.
- 26 • From page 18, line 20 through page 21, line 13, Mr. Johnson provides his opinions concerning  
27 past and current norms in the water and wastewater industry in Arizona, including descriptions  
28 of Staff and Commission language in one case, and his opinions regarding the advantages of

1 integrated service. This testimony is admissible.

- 2 • From page 21, line 15 through page 21, line 21, Mr. Johnson provides factual distinctions  
3 between this matter and the *James P. Paul* case. This testimony is admissible.

4 Section VII:

- 5 • From page 22, line 4 through page 23, line 9, Mr. Johnson uses his own observations and  
6 reasoning to refute an assertion by Mr. Walker. This testimony is admissible.
- 7 • From page 23, line 11 through page 24, line 15, Mr. Johnson provides legal opinions regarding  
8 the applicability of *stare decisis* to Commission decisions and the nature of AWC's CC&N.  
9 This testimony is inadmissible.
- 10 • From page 24, line 16 through page 24, line 21, Mr. Johnson provides his opinion regarding the  
11 Commission's current policy preferences. This testimony is admissible.
- 12 • From page 25, line 1 through page 25, line 20, Mr. Johnson repeats observations related to an  
13 opinion Mr. Walker provided related to bad policy. This testimony is admissible.

14 Section VIII:

- 15 • From page 25, line 22, through page 28, line 5, Mr. Johnson responds to Ms. Maguire's  
16 testimony. Mr. Johnson's testimony consists of opinions regarding Robson-owned utilities, all  
17 of which appear to be based upon his observations as a Commission employee. This testimony  
18 is admissible.

19 Section IX:

- 20 • From page 28, line 7, through page 29, line 3, Mr. Johnson recommends a "regulatory analytical  
21 framework" that is stated in very general terms and further recommends that the Commission  
22 use a "suitable analytical framework." This testimony is not clearly legal opinion and thus is  
23 admissible.
- 24 • From page 29, line 5 through page 29, line 13, Mr. Johnson provides legal opinions relating to  
25 the "paramount regulatory consideration" and Article 15, Section 3 of the Arizona Constitution.  
26 This testimony is inadmissible.
- 27 • From page 29, line 15, through page 29, line 23, Mr. Johnson identifies sources that he consulted  
28 in formulating his testimony. This testimony is admissible.

- 1 ● From page 30, line 1 to page 30, line 8, Mr. Johnson opines that the Commission could find  
2 deleting the Cornman property from the AWC CC&N area to be a reasonable outcome in the  
3 public interest. This testimony incorporates a legal opinion and is inadmissible.
- 4 ● From page 30, line 10 through page 32, line 3, Mr. Johnson provides observations regarding the  
5 interests of end-user customers and his recommendation as to the outcome of this matter.  
6 Because we find that the recommendation itself is not presented in the form of a legal opinion,  
7 this testimony is admissible.

8 Section X:

- 9 ● From page 32, line 5 through page 32, line 18, Mr. Johnson provides his conclusions, including  
10 a legal opinion regarding the applicability of *James P. Paul*. With the exception of the bullet  
11 item regarding *James P. Paul*, located at page 32, line 14, this testimony is admissible.

12 **II. Procedure Going Forward**

13 As is apparent from the discussion above, this matter is unique, both procedurally and  
14 substantively. While it began as an AWC CC&N extension case, it has subsequently turned into a  
15 contested proceeding, initially concerning why AWC had not filed a CAWS by the deadline in Decision  
16 No. 66893, then concerning whether AWC should continue to hold a CC&N for the Cornman property,  
17 and now concerning “whether a public service corporation, like Arizona Water, in this water challenged  
18 area and under the circumstances presented in this case, is providing reasonable service if it is not able  
19 or not willing to provide integrated water and wastewater services.” Because of the language used to  
20 frame this inquiry,<sup>16</sup> it is not clear what impact the response to this inquiry is intended to have. In  
21 addition to holding an evidentiary hearing to obtain evidence concerning this inquiry, it will also be  
22 necessary for the Commission to have the parties file briefs regarding what the product of the  
23 evidentiary hearing should be and what significance the response to the inquiry should have.

24 The parties’ proposed procedural schedule, set forth above, does not include Staff’s active  
25 participation in this matter at this stage. However, Staff’s active participation is important in order to  
26 provide the Commission with unbiased information, such as concerning the number of integrated versus

27 <sup>16</sup> On the one hand, it sounds as though the inquiry has broad applicability, to any public service corporation, with AWC  
28 as one example; on the other hand, the inquiry pertains to “this water challenged area and . . . the circumstances presented  
in this case,” which suggests much narrower applicability.

1 non-integrated water and wastewater utilities in Arizona, the differences between integrated and non-  
2 integrated water and wastewater utilities, and actual performance- and compliance-related data for  
3 integrated and non-integrated Arizona water and wastewater utilities. Additionally, Staff is in a unique  
4 position to provide the Commission with recommendations uninfluenced by the financial  
5 considerations that must underlie both AWC's and Cornman's positions.

6 Because it is important for Staff to participate in this matter, the parties' proposed procedural  
7 schedule will be modified to require Staff's participation. Additionally, the proposed schedule will be  
8 modified in an attempt to accommodate holidays and avoid scheduling conflicts likely to occur due to  
9 other scheduled Commission proceedings.

10 IT IS THEREFORE ORDERED that the following portions of the Rebuttal Testimony of Ernest  
11 G. Johnson Sr., Esq. are **stricken as inadmissible**:

- 12 a. Page 4, line 19, the entire sentence beginning with "The" and ending with the notation  
13 for footnote 2 on page 4, line 22;
- 14 b. Page 6, line 9 through "proceeding" on page 9, line 3;
- 15 c. Page 12, line 13, beginning with "However," through page 13, line 17;
- 16 d. Page 13, line 22, beginning with "and," through page 14, line 17;
- 17 e. Page 16, line 12, through page 18, line 18;
- 18 f. Page 23, line 11 through page 24, line 15;
- 19 g. Page 29, line 5 through page 29, line 13;
- 20 h. Page 30, line 1 through page 30, line 8; and
- 21 i. Page 32, line 14.

22 IT IS FURTHER ORDERED that the **hearing** in this matter shall commence on **February 18,**  
23 **2016, at 10:00 a.m.**, or as soon thereafter as is practicable, at the Commission's offices, Hearing Room  
24 No. 1, 1200 West Washington, Phoenix, Arizona 85007, and shall continue, as necessary, in the same  
25 location, on **February 19, 23, 24, and 25, 2016**. The hearing on February 19, 23, and 25, 2016, shall  
26 commence at 9:00 a.m. or another time to be determined, and the hearing on February 24, 2016, shall  
27 commence at 10:30 a.m.

28 ...

1 IT IS FURTHER ORDERED that a **pre-hearing conference** shall be held on **February 12,**  
2 **2016, at 1:00 p.m.,** or as soon thereafter as is practicable, at the Commission's offices, Hearing Room  
3 No. 1, Phoenix, Arizona 85007, for the purpose of discussing the scheduling of witnesses, the conduct  
4 of the hearing, and any other procedural matters for the hearing.

5 IT IS FURTHER ORDERED that **Staff** shall actively and fully **participate** as a party in the  
6 current stage of this matter.

7 IT IS FURTHER ORDERED that **Staff** shall prepare and file, on or before **January 6, 2016,**  
8 for presentation at hearing, testimony and associated exhibits responsive to the testimony filed by AWC  
9 on May 30, 2014, and by Cornman on July 18, 2014.

10 IT IS FURTHER ORDERED that **AWC's** surrebuttal testimony and associated exhibits to be  
11 presented at hearing shall be reduced to writing and filed on or before **January 6, 2016.**

12 IT IS FURTHER ORDERED that **Cornman's** rejoinder testimony and associated exhibits to  
13 be presented at hearing shall be reduced to writing and filed on or before **January 28, 2016.**

14 IT IS FURTHER ORDERED that AWC and Staff shall provide any additional responsive  
15 testimony through witnesses at hearing.

16 IT IS FURTHER ORDERED that AWC, Cornman, and Staff each shall, on or before **January**  
17 **28, 2016,** make a filing that:

18 1. Specifically identifies the prefiled testimony, or portions thereof, that the party intends  
19 to use at hearing in this stage of this matter;

20 2. Specifically identifies the previously admitted evidence in this matter upon which the  
21 party intends to rely to support its position in this stage of this matter;

22 3. Provides any updates and substantive corrections to the prefiled testimony and evidence  
23 identified in items 1 and 2 of this ordering paragraph.

24 IT IS FURTHER ORDERED that **discovery** may continue **until February 4, 2016,** and shall  
25 be as permitted by law and the rules and regulations of the Commission, except that objections to  
26 discovery requests shall be made within 5 calendar days<sup>17</sup> and responses shall be made within 7

27 \_\_\_\_\_  
28 <sup>17</sup> The date of receipt of discovery requests is not counted as a calendar day, and requests received after 4:00 p.m. Arizona time will be considered as received the next business day.

1 calendar days. The response time may be extended by mutual agreement of the parties involved.

2 IT IS FURTHER ORDERED that all **any objections** to prefiled testimony or exhibits shall be  
3 made before or at the **February 12, 2016**, pre-hearing conference.

4 IT IS FURTHER ORDERED that **all filings shall be made by 4:00 p.m. on the date the filing**  
5 **is due**, unless otherwise indicated above.

6 IT IS FURTHER ORDERED that for discovery requests, objections, and answers, if a receiving  
7 party requests service to be made electronically, and the sending party has the technical capability to  
8 provide service electronically, service to that party shall be made electronically.

9 IT IS FURTHER ORDERED that, in the alternative to filing a written motion to compel  
10 discovery, any party seeking resolution of a discovery dispute may telephonically contact the  
11 Commission's Hearing Division to request a date for a procedural hearing to resolve the discovery  
12 dispute; that upon such a request, a procedural hearing will be convened as soon as practicable; and  
13 that the party making such a request shall forthwith contact all other parties to advise them of the  
14 hearing date and shall at the hearing provide a statement confirming that the other parties were  
15 contacted.<sup>18</sup>

16 IT IS FURTHER ORDERED that any motion that is filed in this matter and that is not ruled  
17 upon within 20 calendar days of the filing date of the motion shall be deemed denied.

18 IT IS FURTHER ORDERED that any response to a motion shall be filed within five calendar  
19 days of the filing date of the motion.

20 IT IS FURTHER ORDERED that any reply shall be filed within five calendar days of the filing  
21 date of the response.

22 IT IS FURTHER ORDERED that all parties must comply with Arizona Supreme Court Rules  
23 31, 38, and 42 and A.R.S. § 40-243 with respect to the practice of law and admission *pro hac vice*.

24 IT IS FURTHER ORDERED that withdrawal of representation must be made in compliance  
25 with A.A.C. R14-3-104(E) and Rule 1.16 of the Rules of Professional Conduct (under Arizona  
26 Supreme Court Rule 42). Representation before the Commission includes appearances at all hearings

27 \_\_\_\_\_  
28 <sup>18</sup> The parties are encouraged to attempt to settle discovery disputes through informal, good-faith negotiations before seeking Commission resolution of the controversy.

1 and procedural conferences, as well as all Open Meetings for which the matter is scheduled for  
2 discussion, unless counsel has previously been granted permission to withdraw by the Administrative  
3 Law Judge or the Commission.

4 IT IS FURTHER ORDERED that, as permitted under A.A.C. R14-3-107(B), each party to this  
5 matter may opt to receive service of all filings in this docket, including all filings by parties and all  
6 Procedural Orders and Recommended Opinions and Orders/Recommended Orders issued by the  
7 Commission's Hearing Division, via email sent to an email address provided by the party rather than  
8 via U.S. Mail. To exercise this option, a party shall:

- 9 1. Ensure that the party has a valid and active email address to which the party has regular  
10 and reliable access ("designated email address");
- 11 2. Complete a Consent to Email Service form, available on the Commission's website  
12 ([www.azcc.gov](http://www.azcc.gov));
- 13 3. File the original and 13 copies of the Consent to Email Service form with the  
14 Commission's Docket Control, also providing service to each party to the service list;
- 15 4. Send an email, containing the party's name and the docket number for this matter, to  
16 [HearingDivisionServicebyEmail@azcc.gov](mailto:HearingDivisionServicebyEmail@azcc.gov) from the designated email address, to allow  
17 the Hearing Division to verify the validity of the designated email address;
- 18 5. Understand and agree that service of a document on the party shall be complete upon  
19 the sending of an email containing the document to the designated email address,  
20 regardless of whether the party receives or reads the email containing the document;  
21 and
- 22 6. Understand and agree that the party will no longer receive service of filings in this  
23 matter through First Class U.S. Mail or any other form of hard-copy delivery, unless  
24 and until the party withdraws this consent through a filing made in this docket.

25 IT IS FURTHER ORDERED that a party's consent to email service shall not become effective  
26 until a Procedural Order is issued approving the use of email service for the party. The Procedural  
27 Order shall be issued only after the party has completed steps 1 through 4 above, and the Hearing  
28 Division has verified receipt of an email from the party's designated email address.

1 IT IS FURTHER ORDERED that a party's election to receive service of all filings in this matter  
2 via email does not change the requirement that all filings with the Commission's Docket Control must  
3 be made in hard copy and must include an original and 13 copies.

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

7 IT IS FURTHER ORDERED that the time periods specified herein shall not be extended  
8 pursuant to Rule 6(a) or (e) of the Rules of Civil Procedure.

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

12 DATED this 9<sup>th</sup> day of December, 2015.

13  
14   
15 SARAH N. HARPRING  
16 ADMINISTRATIVE LAW JUDGE

17 Copies of the foregoing mailed/delivered  
18 this 9<sup>th</sup> day of December, 2015, to:

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10 By:   
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