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Arizona Corporation Commission

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BEFORE THE ARIZONA CORPORATION COMMISSION

DOUG LITTLE
CHAIRMAN

BOB STUMP
COMMISSIONER

BOB BURNS
COMMISSIONER

TOM FORESE
COMMISSIONER

ANDY TOBIN
COMMISSIONER

IN THE MATTER OF THE) DOCKET NO. E-01575A-15-0312
APPLICATION OF SULPHUR)
SPRINGS VALLEY ELECTRIC)
COOPERATIVE, INC., FOR A)
HEARING TO DETERMINE THE) THE ENERGY FREEDOM COALITION
FAIR VALUE OF ITS PROPERTY) OF AMERICA'S MOTION FOR LEAVE
FOR RATEMAKING PURPOSES, TO) TO EXTEND DEADLINE FOR FILING
FIX A JUST AND REASONABLE) DIRECT TESTIMONY
RETURN THEREON, TO APPROVE)
RATES DESIGNED TO DEVELOP)
SUCH RETURN AND FOR RELATED)
APPROVALS.)

Pursuant to A.A.C. R14-3-101(A) and the Arizona Rules of Civil Procedure 6(b)(2), Energy Freedom Coalition of America ("EFCA") hereby moves for leave to extend the deadline for the filing of direct testimony (the "Motion") in the above captioned proceeding (the "Proceeding"). EFCA is hereby requesting that the deadline for submission of direct testimony be extended to April 1, 2016.

I. Factual Background

The Arizona Corporation Commission (the "ACC") granted EFCA's application to intervene in this Proceeding on January 22, 2016. After intervention was granted, EFCA reviewed the docket to identify the Procedural Order governing the deadlines in this Proceeding.

1 EFCA determined that the Procedural Order adopted by Administrative Law Judge
2 (“ALJ”) Martin was issued on October 6, 2015, at 1:44 pm (the “Initial Order”). In the Initial
3 Order, ALJ Martin set April 1, 2016, as the deadline for submission of direct testimony related to
4 rate design and cost of service. (See Initial Order, p. 9, lns. 9-11). EFCA has been preparing such
5 testimony for submission on that date.

6 To EFCA’s surprise, however, the ACC Staff submitted direct testimony concerning these
7 issues on March 18, 2016. EFCA immediately re-reviewed the docket and discovered that on the
8 same date as the Initial Order, but a couple hours later (at 3:47 pm), ALJ Martin issued a revised
9 rate case Procedural Order (the “Revised Order”). In the Revised Order, ALJ Martin adopted a
10 deadline of March 18, 2016 for submission of the direct testimony related to rate design and cost
11 of service.

12 At the time the Initial Order and Revised Order were issued, EFCA was not yet an
13 intervenor in this case. Thus, EFCA was not privy to any discussions that led to the issuance of the
14 Revised Order only a couple hours after issuance of the Initial Order, nor was EFCA aware that
15 two orders had been submitted on that same date.

16 Instead, EFCA relied on the docket to identify the applicable procedural order and
17 determine the deadlines for submission therein. (A copy of the ACC docket is attached hereto as
18 **Exhibit A**). The Initial Order is entitled “Procedural Order-Sets a Hearing,” whereas the Revised
19 Order is entitled “Procedural Order - Modifies a [Previously Issued] Procedural Order.” (See **Ex.**
20 **A**, at 3-4.) Notably, despite being issued prior to the Revised Order, the Initial Order is listed in
21 the docket above the Revised Order indicating, in the normal course of business, that it was issued
22 *after* the Revised Order. (*Id.*). Accordingly, EFCA was unaware that the Revised Order acted to
23 revise the Initial Order (assuming from the title it had revised some earlier procedural order likely
24 regarding intervention or other administrative detail) and was therefore unaware that the April 1,
25 2016, deadline had been modified only a few hours later to March 18, 2016.

26 Having now realized its mistake, EFCA immediately reached out to the ACC Staff and
27 Sulphur Springs Valley Electric Cooperative (“SSVEC”) to request an extension of time to file its
28 Direct Testimony by April 1, 2016. (Copies of the correspondence between EFCA and both the

1 ACC and SSVEC are attached hereto as **Exhibit B**). EFCA explained that it made a good-faith
2 mistake premised on how the scheduling orders had been placed in the docket. Though the ACC
3 Staff agreed to stipulate to the extension of time, SSVEC refused to do so. (*Id.*) EFCA reached
4 out in a second effort and offered to stipulate to a commensurate extension of time for all parties
5 to file surrebuttal testimony as needed. (*Id.*) Despite this offer, SSVEC failed to respond and thus
6 again refused to stipulate. Accordingly, EFCA is required to file the instant Motion.

7 **II. Argument**

8 A judge may extend a deadline for cause “where the failure to act was the result of
9 excusable neglect” *See* Ariz. R. Civ. P. 6(b)(2). Courts determine whether excusable neglect
10 occurred on a case-by-case basis. *See Ellman Land Corp. v. Maricopa Cnty.*, 180 Ariz. 331, 339,
11 884 P.2d 217, 225 (App. 1994) (stating also that “[t]he usually articulated test of excusable neglect
12 by a lawyer is whether the neglect might befall a reasonably prudent lawyer under similar
13 circumstances.”). “[D]iligence is the final arbiter of whether mistake or neglect is excusable.” *City*
14 *of Phoenix v. Geyler*, 144 Ariz. 323, 332, 697 P.2d 1073, 1082. The Court has broad discretion
15 when determining whether excusable neglect occurred. *See generally, Haroutunian v.*
16 *Valueoptions, Inc.*, 218 Ariz. 541, 549, ¶ 22, 189 P.3d 1114, 1122 (App. 2008) (“We review a trial
17 court’s denial of relief under Rule 6(b) for an abuse of discretion.”); *Alvarez v. Superior Court,*
18 *In & For Pima County*, 146 Ariz. 189, 191, 704 P.2d 830, 832 (App. 1985) (“[T]he trial court is
19 vested with broad discretion in this matter, and its determination will not be overturned by an
20 appellate court absent a clear abuse of discretion.”). Arizona courts have also held that clerical
21 errors and mistakes in deadlines may qualify as excusable neglect. *See City of Phoenix*, 144 Ariz.
22 at 332, 697 P.2d at 1073 (recognizing that Arizona courts “recently indicated that clerical and
23 secretarial errors in office procedures are unavoidable and . . . [often] excusable.” (Internal
24 quotation omitted)). *accord Ellman*, 180 Ariz. at 340, 884 P.2d at 226 (recognizing that Arizona
25 law “must accept a degree of reparable lawyer error.”).

26 EFCA’s failure to file its direct testimony was borne out of excusable neglect. Due to the
27 organization of the respective scheduling orders on the docket, EFCA did not realize that the
28 Revised Order in fact amended the deadlines contained in what turned out to be the Initial Order.

1 As EFCA was not yet a party to the Proceeding, EFCA had no other reason to know that the Initial
2 Order had been revised the same day it was issued. This error is tantamount to a clerical mistake
3 that any reasonable and prudent attorney could make when reviewing the docket.

4 EFCA was also diligent in redressing the situation. EFCA already was engaged in efforts
5 to prepare its direct witness testimony to be filed on April 1st, *i.e.*, the deadline set forth in the
6 Initial Order. As soon as it realized that its conception of the deadline differed from that of ACC
7 Staff, EFCA re-reviewed the docket to determine whether an error was made and reached out to
8 the opposing parties to redress the same. This Motion is now being submitted only as a last resort
9 after an attempt to reason with the other parties were unsuccessful. In fact, permitting EFCA to
10 submit its direct testimony would prove economical and efficient as it would permit all parties to
11 this Proceeding to be made privy to such testimony prior to the surrebuttal testimony deadline and
12 provide them with a full opportunity to address such testimony in their respective rebuttal and
13 surrebuttals.

14 In sum, this error occurred when the docket suggested that the Initial Order was the most
15 recently adopted, and thus controlling, procedural order. The position of the Initial Order in the
16 docket led EFCA's counsel to believe that April 1st was the proper deadline for submitting direct
17 testimony, and EFCA has been diligently preparing its testimony for submission on that date. The
18 error was simply clerical and constitutes excusable neglect. In addition, filing this testimony in
19 advance of the surrebuttal will be a benefit to all parties by providing parties additional time and
20 opportunity to respond. Accordingly, this Motion should be granted to allow EFCA to file its
21 testimony on April 1, 2016, in accordance with the deadline set forth in the Initial Order.

22 **III. Conclusion**

23 For the aforementioned reasons, EFCA respectfully requests that the deadline for
24 submission of direct testimony be extended to April 1, 2016. EFCA would not object if the ALJ
25 also decides to concurrently extend the deadline for filling surrebuttal testimony if she believes
26 such action to be equitable in light of this Motion.

