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Arizona Corporation Commission

DOCKETED

MAY 19 2016

BEFORE THE ARIZONA CORPORATION COMMISSION

DOCKETED BY *KL*

DOUG LITTLE
CHAIRMAN

BOB STUMP
COMMISSIONER

BOB BURNS
COMMISSIONER

TOM FORESE
COMMISSIONER

ANDY TOBIN
COMMISSIONER

10 **IN THE MATTER OF THE) DOCKET NO. E-01575A-15-0312**
11 **APPLICATION OF SULPHUR)**
12 **SPRINGS VALLEY ELECTRIC)**
13 **COOPERATIVE, INC., FOR A) THE ENERGY FREEDOM COALITION**
14 **HEARING TO DETERMINE THE) OF AMERICA'S MOTION TO CLARIFY**
15 **FAIR VALUE OF ITS PROPERTY) AND RECONSIDER THE ORDER**
16 **FOR RATEMAKING PURPOSES, TO) GRANTING MOTION TO COMPEL**
17 **FIX A JUST AND REASONABLE) AND EXTENDING TIME CLOCK**
18 **RETURN THEREON, TO APPROVE) [Expedited Oral Argument Requested]**
19 **RATES DESIGNED TO DEVELOP)**
20 **SUCH RETURN AND FOR RELATED)**
21 **APPROVALS.)**

18 The Energy Freedom Coalition of America ("EFCA"), through its undersigned counsel,
19 hereby submits this Motion to Clarify and Reconsider the Procedural Order Granting SSVEC's
20 Motion to Compel and Extending Time Clock dated May 16, 2016 (the "Order"). EFCA
21 acknowledges that comments made by Judge Martin indicate that EFCA's compliance with the
22 Data Request is not expected as a result of the Applicant's indication that SSVEC would be serving
23 subpoenas on EFCA's non-party Members. To clarify the record in this Matter and alleviate EFCA
24 of the potential obligation to comply with orders it cannot satisfy, EFCA requests modification of
25 the Procedural Order to suspend EFCA's obligation to produce the information requested of
26 EFCA's individual members and to direct SSVEC to issue subpoenas to EFCA's individual
27 members if it continues to seek the information previously requested of EFCA. EFCA believes

1 this is the appropriate way forward to ensure the record is clear on the resolution of this issue. As
2 this hearing has already commenced, EFCA requests oral argument and a ruling on an expedited
3 basis.

4 The Commission should modify and reconsider its Order because: (1) the Order is
5 inconsistent with the Commission's procedural findings and conclusions made on the record
6 during oral argument on May 12, 2016 ("Oral Argument"); (2) the Order requires EFCA to produce
7 information it does not possess; (3) the broad discretion of the Commission does not permit it to
8 compel non-parties to respond to data requests served upon parties; (4) EFCA is an incorporated
9 entity with a legal existence separate and apart from its members; (5) the Order deprives EFCA's
10 individual, non-party members of their rights to object to a subpoena under Arizona law; (6) the
11 information described in the Motion to Compel is not relevant to the proceedings before this
12 Commission and EFCA members believe it is confidential and proprietary, the disclosure of which
13 would adversely affect EFCA's non-party members without justification; and (7) the request for
14 information by Sulphur Springs Valley Electric Cooperative, Inc., ("SSVEC") is untimely.

15 Therefore, the Commission should modify and reconsider its Order consisting with the
16 findings and rulings made during the Hearing and to clarify the record in this proceeding.

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **I. INTRODUCTION**

19 **A. SSVEC's Data Requests to EFCA and EFCA's Objections**

20 On April 28, 2016, SSVEC sent its First Set of Data Requests to EFCA, comprised of
21 requests numbered 1.1 through 1.18 ("Data Request"). Requests 1.15 through 1.18 described
22 information in EFCA's possession and EFCA responded to the Data Request by providing the
23 requested information in a timely fashion. However, requests 1.1 through 1.14 seek information
24 from EFCA's individual, non-party members ("Disputed Requests"). EFCA does not possess nor
25 does it have the right to request the information sought in the Disputed Requests. EFCA also
26 objected to the Disputed Requests because they are irrelevant and not calculated to lead to the
27 discovery of admissible evidence, unduly burdensome, and sought disclosure of what EFCA's

1 members assert to be confidential, competitive business information, the disclosure of which
2 would give SSVEC an unfair competitive advantage over EFCA's non-party members.

3 On May 10, 2016, SSVEC filed its Motion to Compel EFCA's Responses to its Data
4 Request, arguing that even though EFCA does not have the information described in the Disputed
5 Requests, EFCA should nevertheless be compelled to produce it because EFCA could simply
6 "ask" its individual, non-party members for the information.¹ SSVEC also argued that the
7 information was relevant to the testimony of EFCA's witness Mark Fulmer ("Mr. Fulmer"), and
8 that concerns of EFCA's members about proprietary or confidential business information could be
9 addressed with a confidentiality agreement.²

10 **B. SSVEC's Motion to Compel and EFCA's Response**

11 On May 11, 2016, EFCA filed its response to the Motion to Compel, arguing again that it
12 does not have the information described in the Disputed Requests and that EFCA's individual
13 members are not parties to this docket and thus cannot be compelled to respond to a Data Request.³
14 EFCA also argued that even if EFCA's individual members were parties to this docket, the
15 information described in the Disputed Requests is still not relevant to the issues before the
16 Commission, and its members assert the information sought is confidential business information
17 of non-parties. Finally, EFCA argued that requiring EFCA's non-party members to respond to the
18 Disputed Requests is a violation of EFCA's non-party members' freedom of association.

19 **C. The Commission's Conclusions On the Motion To Compel**

20 At the conclusion of oral argument, the Commission expressed the following significant
21 conclusions:

22 * * *

23 ALJ MARTIN: Okay. You folks never make this easy, do you? I have to say that
24 this kept me awake last night going back and forth because, Mr. Rich, I do respect
the position that this is a trade organization and its members - - I understand your

25 ¹ See SSVEC's Motion to Compel Intervenor Energy Freedom Coalition of America's Responses
26 to SSVEC's First Set of Data Requests ("Motion to Compel").

27 ² *Id.*

³ See Response to SSVEC's Motion to Compel EFCA's Responses to SSVEC'S First Set of Data
Requests ("Response")

1 argument . . .⁴

2 * * *

3 ALJ MARTIN: . . . It's 1.14 - - or, 1.4 through 1.14 that give me pause, because
4 I'm concerned about the information that might be contained in those."⁵

5 * * *

6 ALJ MARTIN: . . . So, Mr. Rich, I will require EFCA Members to answer 1.1, 1.2,
7 1.3 - - Okay. And whatever confidentiality agreement you can work out is fine with
8 me. If it's outside consultants' and lawyers' eyes only, that's fine. - - 1.4, 1.5, if it's
9 possible to calculate 1.6, 1.7, 1.8, 1.9. I will not require 1.10. I will not require 1.11.
10 I will require 1.12. I will not require 1.13. I will require 1.14 . . .⁶

11 * * *

12 MR. RICH: . . . I would submit that I have some questions about what some of
13 these mean precisely and still a question about how I'm supposed to compel . . .
14 non-clients and non parties, I just don't honestly understand how I can make them
15 respond. That, to me, is still an unresolved issue.⁷

16 * * *

17 ALJ MARTIN: Well, the Commission does have subpoena powers, I suppose.

18 MR. RICH: And I have no idea what those other entities will say, but that probably
19 is what is going to be needed, because I don't know how EFCA can compel its
20 members to provide information . . .

21 ALJ MARTIN: No, I understand. I understand. Then I guess all we can do is ask
22 for the information. And if there's a refusal, then, Mr. Crockett, you'll need to go
23 through the Commission for subpoena powers, for a subpoena, okay?⁸

24 * * *

25 **D. The Commission's Order Granting the Motion to Compel**

26 On May 16, 2016, the Commission issued its Order granting SSVEC's Motion.

27 Notwithstanding the Commission's procedural conclusions at Oral Argument, and its holding that
it has the authority to issue subpoenas, if necessary, the Order provides:

* * *

. . . EFCA is directed to provide responses to SSVEC's data requests numbered 1.1,
1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.8, 1.9, 1.12, and 1.14. EFCA is not required to provide
the information sought in data requests numbered 1.10 and 1.11.⁹

⁴ Oral Argument Transcript of Proceedings dated May 12, 2016, filed May 17, 2016
("Transcript"), p. 38, lines 18-22 (emphasis added).

⁵ *Id.* at p. 39, lines 24-25.

⁶ Transcript, p. 44, lines 18-25; p.45, lines 1-2.

⁷ *Id.* at, p. 45, lines 9-14.

⁸ *Id.* at, p. 45, lines 18-25; p. 46, lines 1-5.

⁹ *See* Order at p.3, lines 21-23.

1 * * *

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

4 **II. THE COMMISSION SHOULD RECONSIDER AND AMEND ITS ORDER**
5 **BECAUSE IT CANNOT COMPEL EFCA'S NON-PARTY MEMBERS TO**
6 **RESPOND TO DISCOVERY REQUESTS TO EFCA.**

6 **A. The Commission's Order Is Inconsistent with the Commission's Conclusions**
7 **at Oral Argument.**

8 As described above, the conclusion at oral argument was essentially that the appropriate
9 method for SSVEC to request information from EFCA's individual, non-party members is by
10 subpoena. EFCA believes this is the appropriate and lawful course of action to resolve this dispute.
11 The Commission readily acknowledged that EFCA is an organization distinct from its members
12 (and did not find that EFCA's members were parties to this case), and directed SSVEC to subpoena
13 EFCA's individual, non-party members, if it became necessary.¹¹

14 Yet, in its Order, the Commission required EFCA to produce information it does not
15 possess. For the same reasons stated by EFCA during oral argument – and the reasons this
16 Commission agreed with at that same argument – EFCA cannot produce the information requested.
17 EFCA is a Delaware limited liability company and exists separate and apart from its members.
18 EFCA, not EFCA's individual members, is the intervenor and party to this case. As acknowledged
19 by this Commission, the only method by which SSVEC can properly request information from
20 non-parties is by subpoena.

21 Therefore, the Order directing EFCA to respond to the Disputed Requests should be
22 modified consistent with the Commission's prior findings and statements. Specifically, EFCA
23 seeks relief from the obligations stated in the Commission Order that it cannot fulfill. Instead
24 SSVEC should be advised that the proper and legal way to obtain the requested information from
25 EFCA's individual members is to seek it from those individual non-party members via subpoena.

26
27 ¹⁰ *Id.* at p. 4, lines 7-9.

¹¹ *See* Transcript at p. 46, lines 1-5.

1 **B. EFCA Cannot Be Compelled to Produce Information It Does Not Possess.**

2 It is axiomatic that for production of documents to be ordered, the material sought must be
3 within the possession, custody, or control of the party upon whom the demand is made.¹² A party
4 cannot be compelled to create documents or records which do not exist.¹³

5 EFCA is a voluntary organization and it is not in possession of nor does it have control
6 over the records of its members. Possession and control do not exist when there is no physical
7 owning or holding of the documents or a right to obtain physical ownership from the party with
8 possession.¹⁴ Control exists when a party has a legal right to obtain documents on demand.¹⁵

9 The mere fact EFCA's Members may have possession and control of the information does
10 not give possession and control to EFCA. In the matter of *Ex Parte BASF Corp.*,¹⁶ the Alabama
11 court considered a similar issue, whether a request for production was proper on a subsidiary
12 company to obtain the records of its parent company. The requesting party argued that the
13 subsidiary, as a related entity, had a right to demand the records from the parent. The Alabama
14 court disagreed and held that the subsidiary did not have control over documents in the sole
15 possession of its parent company because the subsidiary and parent were two separate entities, the
16 parent refused to provide documents to the subsidiary when requested, and there was no evidence
17 the parent would produce the documents in the future for the subsidiary's use regardless of the
18 litigation.¹⁷

19 EFCA is currently comprised of seven member organizations. EFCA has no right to compel

20
21 ¹² *State Farm Ins. Co. v. Roberts*, 97 Ariz. 169, 398 P.2d 671 (1965); *See* Rule 34(a), Arizona
Rules of Civil Procedure.

22 ¹³ *Deer Park Associates v. Town of Babylon*, 101 A.D.3d 738, 993 N.Y.S.2d 761 (2014); *In re*
23 *Colonial Pipeline Co.*, 968 S.W.2d 938 (TX 1998); *Price v. Hannahs*, 954 So.2d 97 (FL 2007);
24 *Southwest Louisiana Elec. Membership Corp. v. Duck*, 418 So.2d 38 (LA 1982); *Rocky*
Mountain Farmers Union v. Goldstene, 2001 WL 1403379 (CA 2011) (not reported in F.Supp
2nd).

25 ¹⁴ *In re Summersett*, 438 S.W.3d 74 (TX 2013)

26 ¹⁵ *Southern Financial Life Ins. Co. v. Combs*, 413 S.W.3d 921 (KY 2013); *In re Summersett*, 438
27 S.W.3d 74 (TX 2013); *Diaz v. Washington State Migrant Council*, 165 Wash.App. 59, 265
P.3d 956 (2011); *Lowd v. Reynolds*, 205 N.C.App. 208, 695 S.E.2d 479 (2010);

¹⁶ 957 So.2d 1104 (AL 2006).

¹⁷ *Ex Parte BASF Corporation*, 957 So.2d 1104 (AL 2006).

1 its members to disclose any of the information requested by SSVEC nor does EFCA possess the
2 requested information as a result of voluntary disclosure by its members.

3 While SSVEC may argue its data request is more akin to an interrogatory request under
4 Rule 33, Arizona Rules of Civil Procedure, than to a Request for Production, the fact remains that
5 SSVEC is seeking information outside the possession and control of EFCA. EFCA can only obtain
6 the requested information if its Member companies voluntarily provide the information because
7 EFCA has no means to compel its Members to provide the information.

8 While a party has a duty to make an effort to obtain information requested by an
9 interrogatory, the recipient of an interrogatory cannot be compelled to provide information it does
10 not have.¹⁸ EFCA does not have the ability to compel its Members to produce the information
11 sought by SSVEC. The obligation upon the recipient is to produce information available to it but
12 it has no obligation to produce information it cannot obtain.¹⁹

13 EFCA cannot be compelled to produce that which it does not have or have a right to obtain
14 from its Members. The Order should be modified accordingly.

15 **C. SSVEC Cannot Use Data Requests to Circumvent the Discovery Rules.**

16 In its Order, the Commission cited R14-3-109(K) of the Rules of Practice and Procedure
17 Before the Corporation Commission (“Commission Rules”) as its justification for holding that the
18 Commission “has broad discovery powers and has the authority to order disclosure that might be
19 otherwise impermissible in the traditional courts.”²⁰ However, this rule is not a rule granting
20 procedural discretion.²¹ Rather, by its own terms, it is a rule giving evidentiary discretion.
21 Specifically, it provides:

22 **Rules of evidence.** In conducting any investigation, inquiry or hearing, neither the
23 Commission nor any officer or employee thereof shall be bound by the technical
24 rules of evidence, and no informality in any proceeding or in the manner of taking
testimony shall invalidate any order, decision, rule or regulation made, approved or
confirmed by the Commission. Rules of the Superior Court of the state of Arizona

25 ¹⁸ *U.S. ex. re. Fago v. M&T Mortgage Corporation*, 235 F.R.D. 11 (D.C. Cir. 2006); *U.S. v.*
26 *Asarco, Inc.*, 471 F.Supp.2d 1063 (D.C. Idaho 2005).

27 ¹⁹ *U.S. v. Kordel*, 397 US 1, 90 S.Ct 763, 25 L.Ed 2nd 1, (1970)

²⁰ See Order at p. 2, Ins. 24-26.

²¹ A.C.C. R14-3-109(K).

1 will be generally followed but may be relaxed in the discretion of the Commission
2 or presiding officer when deviation from the technical rules of evidence will aid in
3 ascertaining the facts.²²

4 The Commission has a completely separate rule with respect to procedure, R14-3-101,
5 which provides that the Commission Rules shall govern procedure in all cases before the
6 Commission “when not in conflict with law or regulations or orders of this Commission.”²³
7 Further, it provides that where the Commission Rules do not set forth a specific procedure, “the
8 Rules of Civil Procedure for the Superior Court of Arizona as established by the Supreme Court
9 of the state of Arizona shall govern.”²⁴ Similarly, the Arizona Revised Statutes also codify the
10 Arizona Rules of Civil Procedure and the Rules of Evidence in separate sections.²⁵

11 The discretion granted to the Commission under its Commission Rules is focused on the
12 construction and waiver of the Commission Rules, not the Arizona Rules of Civil Procedure, *e.g.*,
13 “If good cause appears, the Commission ... may waive application of [the Commission] rules
14 when not in conflict with law and does not affect the substantial interests of the parties.”²⁶
15 Additionally, “Special orders of the Commission shall govern over [the Commission] rules...”²⁷
16 These provisions do not grant authority to disregard all rules, and the Commission is still bound
17 by the Arizona Rules of Civil Procedure where the Civil Procedure rules do not conflict with
18 Commission rules. There are no Commission rules which conflict with the Arizona Rules of Civil
19 Procedure regarding discovery. Therefore, the basis stated by this Commission for granting the
20 Motion is flawed and there is no authority to support discretion so broad as to completely waive
21 application of the rules of procedure governing discovery requests.

22 Both State and Federal law make a clear distinction between parties and non-parties when
23 employing discovery devices. It is undisputed that certain discovery devices are, by design, only

24 ²² *Id.* (emphasis added).

25 ²³ Subsection (A) (emphasis added).

26 ²⁴ *Id.* (emphasis added).

27 ²⁵ See Arizona Revised Statutes at Volume 16, Parts 1 and 2 (Arizona Rules of Civil Procedure)
and Volume 17A, Part 1 (Arizona Rules of Evidence).

²⁶ *Id.* at Subsection (B) (emphasis added).

²⁷ *Id.* at Subsection (C) (emphasis added).

1 applicable between parties, such as data requests.²⁸ The rules governing discovery in Arizona make
2 a clear distinction between a party and a non-party, and provide that non-parties are not subject to
3 the same discovery devices that parties are subject to. In fact, the rules expressly provide that non-
4 parties are only subject to subpoenas for information, not interrogatories served to parties.²⁹ This
5 is one of the reasons why, in *University of Texas at Austin v. Vratil*, the Tenth Circuit Court of
6 Appeals overturned the district court's order requiring responses to interrogatories by non-party
7 member institutions of the National Collegiate Athletic Association ("NCAA").³⁰ The Court stated
8 that the discovery rules provide that "interrogatories may only be directed to a party to an action"
9 or that party's officer or agent.³¹

10 *Vratil* is particularly instructive in this case, not because EFCA and the NCAA are identical
11 institutions (they are not identical), it is instructive because both cases involve non-parties who
12 cannot be treated like parties for purposes of discovery.³² As the Tenth Circuit appropriately held:

13 In the event the officer or agent fails to respond, enforcement of the court's orders
14 regarding discovery is obtained under Rule 37, which, notably, contains no
15 procedure for requiring responses from unserved, nonparty members of the
16 association.³³

17 Moreover, the difference in organization structure between EFCA (a limited liability
18 company) and the NCAA (an unincorporated association) militates in favor of EFCA, not SSVEC.

19 **D. EFCA Exists Separately and Legally Distinct from Its Members**

20 EFCA is a limited liability company and not an unincorporated association. As courts have

21 ²⁸ See Rules 33 and 34, Arizona Rules of Civil Procedure (referring to interrogatories and requests
22 for production of documents and things).

23 ²⁹ See Rule 34(c), Arizona Rules of Civil Procedure (stating that a non-party can only be subject
24 to discovery by subpoena). See also, Rule 33(a), Arizona Rules of Civil Procedure ("Any party
25 may serve on *any other party* written interrogatories . . .") (emphasis added); Rule 34(a),
26 Arizona Rules of Civil Procedure ("Any party may serve on *any other party* requests . . .").

27 ³⁰ 96 F.3d 1337 (10th Cir. 1996).

³¹ *Id.* (emphasis added).

³² Application of Joyce E. Davidson Director of the Public Utility Division, Oklahoma Corporation
Commission, for a review of the Fuel Adjustment Clause of Public Service Company of
Oklahoma for the Year 2011, Cause No. PUC 200200754, Order (Feb. 28, 2005) (Oklahoma
Public Service Commission, the Commission held that a utility's data requests to members of
an association were not discoverable.

³³ *Id.* (emphasis added).

1 often stated,³⁴ an unincorporated association is simply a collection of its individual members and
2 has no legal identity aside from its members.³⁵ In *International Association of Machinists, District*
3 *169, etc. v Amana Refrigeration, Inc.*, the United States District Court, E.D. Tennessee held that
4 the plaintiff, an unincorporated association, was required to respond to interrogatories and obtain
5 the requested information from its members because unincorporated associations are not legally
6 distinct from the members.³⁶

7 This is not the case here. Unlike the NCAA or the International Association of Machinists,
8 EFCA is not an unincorporated association. Rather, it is a validly formed limited liability company
9 in Delaware pursuant to Title 6, Chapter 18 of the Delaware Code and registered as a foreign
10 limited liability company with the Arizona Corporation Commission. It is not simply a collection
11 of its individual members, but instead has its own separate and legally distinct identity and has the
12 capacity to litigate or intervene in its own name. Therefore, information requested of its members
13 must be done through methods permitted by the Rules.

14 While SSVEC may serve EFCA's non-party members with subpoenas, it had not done so
15 as of the date of its Motion, the date of the oral argument, or even when the final procedural
16 conference was held. The only request that SSVEC had made for information was to EFCA, using
17 a discovery procedure that is only available to EFCA as a party. The Order directing EFCA to
18 respond to the Disputed Requests should be modified accordingly.

20 ³⁴ *Law v. National Collegiate Athletic Ass'n*, 167 F.R.D. 464, 474 (1996) (citing *Navarro Savings*
21 *Ass'n v. Lee*, 446 U.S. 458, 461, 100 S.Ct. 1779, 1782, 64 L.Ed.2d 425 (1980) and *Moffat*
22 *Tunnel League v. United States*, 289 U.S. 113, 118–19, 53 S.Ct. 543, 545–46, 77 L.Ed. 1069
23 (1933); *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344, 385, 42 S.Ct.
570, 574, 66 L.Ed. 975 (1922); *Four Way Plant Farm*, 894 F.Supp. at 1548 (common law rule
required service of process on all members of unincorporated association).

24 ³⁵ The district court additionally found, regarding the discovery requests, that “[t]he NCAA
25 routinely seeks such information, and NCAA members routinely supply it, for purposes related
26 to the governance of intercollegiate athletics and the achievement of associational objectives”
27 and that as an unincorporated association with no distinction between its members and the
association, such information was thus “available” to the NCAA for discovery purposes. Here,
EFCA does not seek the requested information from its members and its members do not
supply it EFCA, routinely or otherwise.

³⁶ 90 F.R.D. 1 (1978),

1 **E. EFCA’s Individual Members Are Not “Real Parties In Interest” Subject to**
2 **Discovery; EFCA Is the Intervenor, Not Its Members.**

3 Despite the Commission’s comment that the Motion to Intervene indicates that EFCA and
4 its members will be directly and substantially affected by the proceeding, this does not make them
5 “real parties in interest” under the prevailing case law or civil rules, nor does this statement justify
6 depriving EFCA’s non-party members of their rights.

7 In relying on the plain language of the discovery rules governing parties, the Tenth Circuit
8 Court of Appeals in *Vratil* held that the district court inappropriately characterized the unserved,
9 non-party member institutions of the NCAA as “real properties in interest” for discovery
10 purposes.³⁷ A review of Rule 17(a), Arizona Rules of Civil Procedure, regarding a “Real Party in
11 Interest” quickly demonstrates that it has absolutely no application to EFCA, or any party, involved
12 in a rate case before the Commission. The Rule addresses actions by or against personal
13 representatives, municipalities, sureties, infants, guardians, and partnerships.

14 In its origin, the rule concerning the real party in interest was permissive in purpose:
15 it was designed to allow an assignee to sue in his own name . . . the modern function
16 of the rule in its negative aspect is simply to protect the defendant against a
subsequent action by the party actually entitled to recover, and to ensure generally
that the judgment will have its proper effect as *res judicata*.³⁸

17 EFCA has not brought a “claim” against SSVEC as contemplated under Rule 17(a), and
18 EFCA is the real party who intervened in this rate case, a case which will have no *res judicata*
19 effect – the very purpose served by the real party in interest rule.³⁹

20 SSVEC’s attack on EFCA’s individual members ignores the practical differences between
21 a rate case before this commission and cases in the superior court which requests judgment and

22 ³⁷ *Vratil*, 96 F.3d 1337 at 1340.

23 ³⁸ State Bar Committee Note to Rule 17(a), Arizona Rules of Civil Procedure.

24 ³⁹ See also *Rackley v. Bd. of Trustees of Orangeburg Reg'l Hosp.*, 35 F.R.D. 516, 517 (E.D.S.C.
25 1964) (holding that NAACP was not real party in interest and NAACP involvement with
26 plaintiff was irrelevant where named plaintiffs “have the right under the substantive law to
27 maintain the action.”); see also *CCC Info. Servs., Inc. v. Am. Salvage Pool Ass’n*, 230 F.3d
342, 346 (7th Cir. 2000) (Where members are incidentally benefited by the association’s
enforcement of its own contract rights, the citizenship of the association, not its members, is
the only relevant factor in diversity analysis. Any other rule would be too complicated a process
to make it a feasible preliminary to establishing federal jurisdiction).

1 post-judgment remedies. SSVEC inappropriately pretends that EFCA is a defendant under some
2 form of “piercing the corporate veil” cause of action. That is not the case here and there is no
3 analysis that can be undertaken in this case where EFCA’s corporate form can be ignored for any
4 reason, including discovery. Even in cases where a corporate entity is on trial, the fact that an entity
5 served with such an order may be owned by only one individual is not sufficient to disregard its
6 corporate form.⁴⁰ More importantly, there would have to be evidence of fraudulent conduct in
7 order disregard the corporate form. ⁴¹

8 SSVEC’s allegation that EFCA and its members are essentially the same is without merit.
9 EFCA and its Members are separate legal entities. This is not a “piercing the corporate veil” case.
10 There are no legal “claims” pending against EFCA, and there have been no allegations that EFCA
11 has engaged in fraudulent conduct, let alone any conduct that would be subject to inquiry in this
12 rate case.

13 **F. EFCA’s Non-Party Members Have Not Waived Their Rights to Separately**
14 **Respond and/or Object To Subpoenas.**

15 It is well-settled law in Arizona, both in and out of Commission proceedings, that non-
16 parties who receive subpoenas have the right to object to the form and content of the subpoena.
17 R14-3-109(O) specifically governs subpoenas proceedings before this Commission and provides
18 that a witness may object to a subpoena if its requests are not clear or specific, or are otherwise
19 “unreasonable or oppressive.” Moreover, the rule provides that a requesting party must pay for the
20 “reasonable cost” of producing subpoenaed information and the Commission can condition denial
21 of a motion to quash on that basis.⁴²

23 ⁴⁰ *Dietel v. Day*, 16 Ariz. App. 206, 208, 492 P.2d 455, 457 (1972) (“[t]he mere fact that Kramer
24 was an officer and the sole shareholder in R.I.C., Inc., does not in and of itself make this
25 situation one in which the corporate form should be disregarded.”) (citing *Cooper v. Industrial*
Commission, 74 Ariz. 351, 249 P.2d 142 (1952)).

26 ⁴¹ *Id.*

27 ⁴² *Id.* See also Rule 45, Arizona Rules of Civil Procedure (providing for requirements for
subpoenas, objections, and motions to quash). See generally, e.g. *Helge v. Druke*, 136 Ariz.
434, 666 P.2d 534 (App. 1983) (regarding objections on the basis of unreasonableness and
oppressiveness, lack of particularity, and relevance).

1 While it is not the purpose of this Motion to Reconsider to raise all of the objections that
2 might be available to a non-party, the Commission should understand that the Order deprives
3 EFCA's individual, non-party members of their rights to make any objection at all. Having not
4 been served with any subpoena, thus far, EFCA's non-party members have been deprived of the
5 right to make any objections.

6 While EFCA does not believe that it was the Commission's intent to deprive non-parties
7 of any rights under Arizona law, it is nevertheless the effect of the Commission's Order. Therefore,
8 the Commission should reconsider and amend the Order to provide that SSVEC will use the proper
9 method for obtaining information from non-parties.

10 **G. The Disputed Requests Are Not Relevant and Seek Confidential Information,**
11 **which Cannot Be Adequately Protected.**

12 When viewed in light of these proceedings, the information sought in the Disputed
13 Requests is simply not relevant and is beyond the scope of these proceedings. There is no
14 meaningful way SSVEC can use the information sought in the Disputed Requests: this is clear
15 from the rejoinder testimony of David W. Hedrick ("Hedrick") filed by SSVEC.⁴³ When asked
16 how the testimony of staff witness Yue Liu factors into the development of retail rates for SSVEC,
17 Hedrick testified:

18 A. While the testimony is informative, none of the information provided should
19 have any impact on the rates that are designed and approved for SSVEC . . .
20 SSVEC's rates are developed to recover the costs of providing service to its
21 members including a reasonable level of margin. Rates are based on known and
22 measurable costs and are designed to be fair and equitable. The primary
23 objective is to provide safe and reliable service to members at the lowest
24 reasonable rates. SSVEC is always concerned about the impact that energy
25 prices have on the personal economics of its members. However, it would be
26 entirely inappropriate for SSVEC or the Commission to include in its criteria
27 for determination of electric rates and credits, whether those rates allow
customers with installed DG to earn an acceptable return on their investment.⁴⁴

28 Thus, SSVEC's own witness admits the information SSVEC seeks is irrelevant to its case,
29 specifically this witness states that as to this rate case, information about whether its rates allow

30 ⁴³ See SSVEC's Notice of Filing Rejoinder Testimony of Crenden Huber ("Huber Testimony") and
31 David Hedrick ("Hedrick Testimony") dated May 13, 2016.

32 ⁴⁴ Hedrick Testimony at p.11, lines 21-25; p.12, lines 1-9 (emphasis added).

1 customers with installed DG to earn a certain rate of return is completely irrelevant. Yet, this is
2 same kind of information SSVEC now wants from EFCA's individual, non-party members.

3 SSVEC has suggested it would use the information to cross-examine Mr. Fulmer, yet the
4 only questions SSVEC could suggest that it might ask Mr. Fulmer is "who he's talked to in terms
5 of the EFCA members and what he knows."⁴⁵ Had that information been important or material to
6 this case, SSVEC could have requested such information from Mr. Fulmer weeks ago. Clearly, the
7 information described in the Disputed Requests goes far beyond wanting to know whether Mr.
8 Fulmer has talked to an EFCA member and "what he knows."

9 As previously stated, there are at least six rate cases pending before the Arizona
10 Corporation Commission, each of which proposes a rate design that would render roof top solar
11 economically inefficient. Electric utility providers admit that they are in direct competition with
12 the roof top solar industry. Information about a non-party EFCA member's sales, installations,
13 leases, fees, profits, rates of return, and cost calculations are both confidential and proprietary. If
14 SSVEC had the information it seeks, it and other electric utility providers could design a rate
15 specifically structured to destroy the consumer's economic benefit derived from rooftop solar. To
16 require EFCA's non-party members to provide the information described in the Data Request
17 would place those members in a severely disadvantaged position with respect to SSVEC and other
18 electric utility providers.

19 Moreover, SSVEC is an intervenor in other rate cases. Thus, a "lawyer's eyes only"
20 provision does not limit the use of such information to this case as that proprietary knowledge will
21 be available for use in additional rate cases involving EFCA. Similarly, a "consultants' eyes only"
22 option is also insufficient. For example, consultant and expert witness Hedrick's resume references
23 the work he has performed for multiple utilities across several states. Thus protective measure like
24 those already discussed are simply insufficient to protect confidential information.

25 In light of the lack of relevance and probative value that the information SSVEC is seeking
26 from EFCA's non-party members has to this case, and the confidential nature of that information,

27

⁴⁵ Transcript at p. 30, lines 20-21.

1 the Commission should not continue to entertain SSVEC's attack on EFCA's non-party members
2 and should simply move forward with this case. Regardless, as described above, EFCA's non-
3 party members are entitled to assert whatever objections they have to the information requested
4 upon being served subpoenas, and the Order should be amended to protect this right.

5 **G. SSVEC's Request for Information from EFCA's Members Is Untimely**

6 On January 13, 2016, EFCA sought to intervene in this action. The Commission permitted
7 intervention on January 22, 2016. On April, 28, 2016, more than three months after intervening
8 and on the eve of this hearing, SSVEC served a data request on EFCA seeking information in the
9 possession of EFCA's individual members. Thus, not only did SSVEC seek discovery on the eve
10 of this hearing, but its discovery requests were also improper and have caused confusion and delay.
11 There is no justifiable reason for SSVEC's delay and its late discovery should not be permitted.

12 The discovery rules are designed to provide parties "a reasonable opportunity to prepare
13 for trial or settlement-nothing more, nothing less."⁴⁶ Courts must use common sense in applying the
14 rules, with an eye to the specific facts.⁴⁷ Where trial has begun, the risk for prejudice in allowing
15 late discovery is greater than if trial has not been set.⁴⁸

16 Here, there is no reason to permit this late discovery. The hearings have begun. SSVEC
17 has had months to prepare for this matter. Refusing this eleventh hour request does not deprive
18 SSVEC of its "reasonably opportunity" to prepare. Moreover, by its own witnesses admit, the
19 information sought has no relevance to the "specific facts" of SSVEC's case before this
20 Commission.⁴⁹ As a result, the information now being sought can have no bearing on this
21 Commission's decisions "on the merits" of this case.

22 SSVEC will not be able to examine EFCA's witness about the information in a meaningful
23 or relevant way because EFCA's witness does not have knowledge regarding the information
24 SSVEC seeks and does not rely on such information for his own testimony. The information has
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26 ⁴⁶ *Zimmerman v. Shakman*, 204 Ariz. 231, 235, 62 P.3d 976, 980 (App. 2003).

27 ⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Hedrick Testimony at p.11, lines 21-25; p.12, lines 1-9 (emphasis added) cited above.

1 no bearing on how SSVEC seeks to set its proposed rates. Finally, the late discovery would
2 prejudice the other parties to this case by expanding the scope of the proceedings beyond SSVEC's
3 application in this matter.

4 SSVEC should not be able to benefit from its own delay at the expense and prejudice of
5 the other parties. The late discovery should not be permitted.

6 **III. CONCLUSION**

7 For the reasons set forth herein, EFCA respectfully requests that this Commission modify
8 and reconsider its Order and issue an amended Order holding that the proper discovery method for
9 obtaining information from EFCA's non-party members is by subpoena; that SSVEC may serve
10 EFCA's individual members with subpoenas; that EFCA's non-parties may retain their right to
11 object to such subpoenas as provided by Arizona law; and that as a result, the Motion to Compel
12 against EFCA is denied.

13 Respectfully submitted this 19th day of May, 2016.

14
15 /s/ Court S. Rich
16 Court S. Rich
17 Rose Law Group pc
18 Attorney for Energy Freedom Coalition of America
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