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BEFORE THE ARIZONA CORPORATION COMMISSION

DOUG LITTLE
CHAIRMAN

BOB STUMP
COMMISSIONER

BOB BURNS
COMMISSIONER

TOM FORESE
COMMISSIONER

ANDY TOBIN
COMMISSIONER

11	IN THE MATTER OF THE)	DOCKET NO. E-01461A-15-0363
12	APPLICATION OF TRICO)	
13	ELECTRIC COOPERATIVE, INC, AN)	
14	ARIZONA NONPROFIT)	THE ENERGY FREEDOM COALITION
15	CORPORATION, FOR A)	OF AMERICA'S MOTION TO
16	DETERMINATION OF THE)	RECONSIDER THE ORDER DENYING
17	CURRENT FAIR VALUE OF ITS)	THE MOTION TO COMPEL
18	UTILITY PLANT AND PROPERTY)	RESPONSE TO FOURTH DATA
	AND FOR INCREASES IN ITS RATES)	REQUEST 4.14
	AND CHARGES FOR UTILITY)	
	SERVICE AND FOR RELATED)	[Expedited Oral Argument Requested]
	APPROVALS.)	

19 The Energy Freedom Coalition of America ("EFCA"), through its undersigned counsel,
20 hereby submits this Motion to Reconsider ("Motion") the Ruling at the Procedural Conference on
21 August 12, 2016 ("Ruling"), denying EFCA's Motion to Compel Trico Electric Cooperative, Inc.'s
22 ("Trico") Response to Fourth Data Request 4.14 (the "Data Request").¹ It became exceedingly
23 clear from Mr. Hedrick's testimony at the hearing that of all of the Data Requests, the statements
24 and communications between Trico representatives and Guernsey as requested in Data Request
25 4.14 present the most compelling example of information and documents that Trico must disclose.
26 In order to focus its request, this Motion seeks reconsideration with regard to only Data Request
27

28 ¹ This Motion is timely filed pursuant to R14-3-111 and A.R.S. § 40-523(A), within twenty (20) days from the date of the Commission's Ruling.

1 4.14. As this hearing has commenced, EFCA requests oral argument and a ruling on an expedited
2 basis.

3 The relevance and importance of the information sought in the Data Request became much
4 clearer during the pendency of the hearing. The issue of proper notice is one that is paramount to
5 this proceeding. Trico has acknowledged that it failed to provide customers with notice of; 1) its
6 highly controversial decision to change course and seek a tariff for a three-part demand rate; and
7 2) its decision to pursue increased customer charges in an amount in excess of the amount
8 originally noticed to its customers. As a result, EFCA submits that Trico deprived its customers
9 of their due process rights to adequate and proper notice. Trico only begun seeking demand
10 charges in this docket after the expiration of the intervention deadline and, as of the last day of the
11 hearing on August 25, 2016, had still not provided notice to all of its residential customers. Neither
12 Mr. Hedrick nor Ms. Cathars could recall when Trico officially made the important decision to
13 seek demand charges and a higher fixed fee, yet Mr. Hedrick made it clear that he communicated
14 regularly with Trico's team via email. In addition, Trico promised, in writing, to provide its
15 communications with Guernsey, whose representatives were closely involved in the decisions
16 leading up to and during this rate case, including the development of witness testimony. Given the
17 clear relevance and importance of these communications, Trico must be made to honor its previous
18 commitment.

19 Trico explicitly told EFCA in writing that it would provide answers to two (2) key Data
20 Requests on August 5, 2016, which it did not provide. As a result of Trico's specific written
21 agreement to provide part of the information sought, EFCA did not file the Motion to Compel. It
22 would be unconscionable to reward TRICO's failure to abide by its representation to provide
23 EFCA access to communications that are clearly non-privileged and reasonably calculated to lead
24 to the discovery of admissible evidence.

25 Trico's own actions belie its defense. When pressed by the ALJ as to why Trico did not
26 do what it plainly said it would do and provide the promised information to EFCA, Trico's attorney
27 alleged confusion ostensibly caused by EFCA not responding to an email that neither solicited nor
28 required a response. In fact, the email from Trico was itself a response to a letter from EFCA.

1 Trico's claim that it was "confused" is undermined by the fact that Trico did respond to Data
2 Request 4.15 while continuing to withhold the remaining promised information. Why would Trico
3 have provided any of the information it promised in its email if it truly was "confused" about what
4 to do next? Trico's claim of why it breached its written representation is not credible. Trico must
5 be ordered to comply with its duty of good faith and fair dealing.

6 In addition, Trico's bald assertions of "burden" have no merit. Communications between
7 Trico and its experts have been sought and their relevance has been magnified by testimony
8 provided during the hearing. In order to produce the requested discovery, Trico may simply search
9 the names of the witnesses in this case and for whoever else they regularly communicate with at
10 Guernsey regarding this matter. These communications are not, by law, privileged or protected,
11 Trico representatives would merely print and provide this information to EFCA. This is plainly
12 not a burdensome exercise, which explains why Trico did not even try to support its claim of undue
13 burden.

14 In summary, the Commission should reconsider its Ruling because: (1) Trico agreed to
15 produce key pieces of the information and documents requested highly probative, and EFCA relied
16 on that agreement; (2) the Data Requests seek important relevant information and documents that
17 are not protected from discovery by any privilege; (3) the Data Requests are specific and limited
18 in time and scope and do not require Trico to expend significant effort, time or expense to produce
19 the requested information and documents; and (4) Trico failed to submit any specific facts upon to
20 conclude that these requests placed an unreasonable burden on Trico. Therefore, the Ruling is not
21 legally supported and operates to deny EFCA access to discoverable information, seriously
22 impairing EFCA's ability to fully and fairly present its case to this Commission. Therefore, the
23 Commission should reconsider its Ruling and require Trico to produce the documents and
24 information in the Data Request.

25 //

26

27

28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 A. EFCA's Data Request to Trico and Trico's Agreement to Comply

4 On July 8, 2016, EFCA sent the Data Request to Trico.² The Data Request was
5 accompanied by Requests 4.1 through 4.15.³ On July 18, 2016, Trico objected to all the Data
6 Requests with non-specific boilerplate objections as vague, ambiguous, overbroad, irrelevant and
7 unduly burdensome.⁴ On July 20, 2016, counsel for EFCA and Trico personally met and conferred
8 regarding Trico's objections.⁵ Counsel for EFCA then delivered correspondence to Trico
9 summarizing the meeting.⁶ Counsel for EFCA advised counsel for Trico that it had failed to
10 provide any justification or explanation of the objections and informed Trico that if it did not
11 provide the information and documents requested, EFCA would be forced to file a motion to
12 compel.⁷

13 Subsequently, on July 22, 2016, Counsel for Trico responded:

14
15 I have had the opportunity to discuss your position with Trico. We are prepared to
16 provide the communications with Staff regarding the settlement agreement . . . We
17 are also prepared to provide the written communications with Guernsey regarding
18 the Trico rate case . . . We will endeavor to provide the information by next Friday
19 [August 5, 2016].⁸

20 On August 8, 2016, after Trico had failed to respond by August 5, 2016, Counsel for EFCA
21 asked Trico's counsel whether Trico would be providing the information promised.⁹ Counsel for
22 Trico responded: "We are still working on providing it. It will not be provided today [August 8,
23 2016]. . ."¹⁰

24 ² See Motion to Modify Procedural Schedule and Compel Response to Fourth Data Requests 4.1, 4.2, 4.4-4.10, 4.14,
25 and 4.15 ("Motion to Compel") and Exhibit 1, attached thereto.

26 ³ *Id.* at Exhibit 1.

27 ⁴ *Id.*

28 ⁵ *Id.* at Exhibit 2.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at Exhibit 4 (emphasis added)(corresponding to Data Requests 4.2(d)(iv), 4.15, and partial responses to 4.7 and 4.14). See also Emails between Michael Patten and Court Rich dated July 22, 2016 through August 8, 2016, attached hereto as Exhibit 1.

⁹ Motion to Compel at Exhibit 5. See also Exhibit 1, attached hereto.

¹⁰ *Id.* See also Exhibit 1, attached hereto.

1 **B. EFCA’s Motion to Compel and The Commission’s Ruling**

2 By August 11, 2016, more than a month after sending the Data Request, and 20 days after
3 Trico promised to provide the requested information on July 22, 2016, it became clear that Trico
4 was simply delaying to provide its promised responses. As a result, EFCA filed its Motion to
5 Compel, arguing that it sought discoverable information, reasonably calculated to lead to the
6 discovery of admissible evidence and that the requested information is not protected by any
7 privilege, and that Trico had failed to articulate any basis for refusing to comply with the Data
8 Request.¹¹

9 On August 12, 2016, this Commission held oral argument and denied EFCA’s Motion to
10 Compel in its entirety.¹²

11
12 **II. THE COMMISSION SHOULD RECONSIDER ITS RULING BECAUSE THERE**
13 **IS NO PRIVILEGE OR PROTECTION THAT PERMITS TRICO TO WITHHOLD**
14 **THE INFORMATION AND DOCUMENTS REQUESTED IN THE DATA**
15 **REQUESTS ARE NOT OVERBROAD OR UNDULY BURDENSOME.**

16 **A. Arizona Permits Broad Discovery**

17 Discovery and other procedural matters before the Commission are governed by the
18 Corporation Commission Rules of Practice and Procedure “when not in conflict with law or the
19 regulations or orders of this Commission.”¹³ (“Commission Rules”). In cases where the
20 Commission Rules, law, or orders of the Commission do not set forth a specific procedure for
21 discovery, “the Rules of Civil Procedure for the Superior Court of Arizona as established by the
22 Supreme Court of the state of Arizona shall govern.”¹⁴ Inasmuch as the Commission Rules do not
23 set forth a specific procedure for discovery, Arizona law regarding discovery under the Arizona
24 Rules of Civil Procedure govern the Parties here.¹⁵

25 Parties may obtain discovery regarding any matter, not privileged, which is relevant to the
26 subject matter involved in the pending action, whether it relates to the claim or defense or the party

26 ¹¹ See Motion to Compel.

27 ¹² See Transcript of Proceedings dated August 12, 2016, filed August 15, 2016 (“Transcript”), p. 38, lns. 18-22
(emphasis added).

28 ¹³ A.C.C. R14-3-101(A).

¹⁴ *Id.*

¹⁵ *Id.*

1 seeking discovery or to the claim or defense of any other party, including the existence, description,
2 nature, custody, condition and location of any books, documents, or other tangible things and the
3 identity and location of persons having knowledge of any discoverable matter.¹⁶

4 Arizona allows discovery “broadly and liberally.”¹⁷ In Arizona, discovery should be freely
5 had to “facilitate identifying the issues, promote justice, provide a more efficient and speedy
6 disposition of cases, avoid surprise, and prevent the trial of a lawsuit from becoming a ‘guessing
7 game.’”¹⁸ An objecting party has the burden of persuasion and proof to demonstrate that its
8 objections are proper.¹⁹

9 The Commission’s Ruling denying the Motion to Compel is not based on any specific fact
10 or legal authority. Peppered throughout the discussion leading up to the Commission’s Ruling are
11 references to various Data Requests being “overbroad” or “unduly burdensome”²⁰ or the
12 possibility that a Data Request seeks “privileged” information²¹ or protected “settlement”
13 communications.²² However, these references are unsupported and insufficient to meet the Trico’s
14 burden to demonstrate a proper objection.

15 The most obvious evidence that the Data Request is not, overbroad, or unduly burdensome,
16 and that it did not seek privileged information is Trico’s own agreement that it would provide key
17 pieces of the information and documents requested to EFCA; an agreement on which Trico
18 ultimately reneged.

19 **B. Trico Is Estopped From Withholding The Communications and Documents**
20 **It Promised To Deliver To EFCA.**

21 “The three elements of equitable estoppel are ... (1) the party to be estopped commits acts
22 inconsistent with a position it later adopts; (2) reliance by the other party; and (3) injury to the
23 latter resulting from the former's repudiation of its prior conduct.”²³

24 _____
25 ¹⁶ Rule 26(b)(1)(A), Arizona Rules of Civil Procedure.

26 ¹⁷ *Id.*

27 ¹⁸ *Id.*

28 ¹⁹ *Cornet Stores v. Superior Court In & For Yavapai Cty.*, 108 Ariz. 84, 86, 492 P.2d 1191, 1193 (1972).

²⁰ See Transcript at p. 26, ln. 17; p. 29, lns. 17-18; p. 47, ln. 14.

²¹ *Id.* at p. 29, ln. 17; p. 31, ln. 25; p. 32, ln. 1; p. 45, ln. 3.

²² *Id.* at p. 33, lns. 11-12.

²³ *Manicom v. CitiMortgage, Inc.*, 236 Ariz. 153, 160, 336 P.3d 1274, 1281 (App. 2014), as corrected (Nov. 19, 2014).

1 On July 22, 2016, nearly three weeks before the hearing, Trico stated unequivocally that it
2 had discussed the Data Request and was “prepared” provide written communications to and from
3 its expert witness.²⁴ Trico did not allege the information would be difficult to compile, nor did it
4 allege that there was too much information to compile, or that the information was privileged or
5 otherwise protected. It said it was “prepared” to provide the information, that it was “reasonable”
6 and that it would do so on August 5.²⁵ In reliance on Trico’s promise, EFCA waited for Trico to
7 perform.

8 Unbeknownst to EFCA, Trico changed its position and refused to perform. EFCA did not
9 learn that Trico reneged on its promise until August 11, 2016, leaving only six (6) days before the
10 hearing for EFCA to bring Trico’s failure to disclose before the Commission. This short time frame
11 unquestionably harmed EFCA because the Commission, in denying the Motion to Compel,
12 specifically referred to the presentation of the discovery dispute on “short notice”²⁶ even though it
13 agreed the information was “relevant”²⁷ and even though Trico conceded it reneged on its
14 promise.²⁸

15 Additionally, Trico had no basis for changing its position. When the ALJ appropriately
16 asked Trico’s counsel why it did not do what it had plainly promised to do, Trico’s attorney alleged
17 confusion ostensibly caused by EFCA not responding to an email that neither solicited nor required
18 a response.

19 Specifically, EFCA’s counsel stated:

20 * * *

21 Mike,

22
23 According to your email below, Trico was to have the discovery responses
24 to us by last Friday, August 5, 2016. This will confirm that we did not
25 receive the information that Trico indicated it would be providing? Will

26
27 ²⁴ See Motion to Compel at Exhibit 4.

²⁵ *Id.* at Exhibit 5.

²⁶ See Transcript at p. 47, ln. 11.

²⁷ *Id.* at lns. 12-13.

²⁸ *Id.* at p. 43, lns. 12-16.

1 Trico be providing that information today?

2
3 Court S. Rich²⁹

4 * * *

5 In response, Trico's counsel stated:

6 * * *

7
8 We are still working on providing it. It will not be provided today [August
9 8, 2016]. We have had two extensive data requests from EFCA in the
10 interim as well.

11 * * *

12 Significantly, Trico's counsel's response did not even hint at a change of position. Rather
13 it stated clearly that the production was in process although it would not be provided on August 8,
14 2016. Yet, when pressed by the ALJ as to why Trico had not fulfilled its promise, Trico's counsel
15 suddenly alleged confusion:

16 * * *

17 ALJ MARTIN: Okay. The paragraph that begins "I had the opportunity to
18 discuss your position with Trico."

19
20 MR. PATTEN: Right.

21
22 ALJ MARTIN: Okay. You talk about you are prepared to provide certain
23 things in this paragraph.

24
25 MR. PATTEN: Right. We have provided the communications with Staff
26 regarding the settlement agreement . . .

27
28

²⁹ See Motion to Compel at Exhibit 5.

1 ALJ MARTIN: Okay. And then towards the end of it, it says you are also
2 prepared to provide the written communications with Guernsey.

3
4 MR. PATTEN: *And that's the thing we never heard back from them on. I*
5 *don't – frankly, I don't think that is appropriate given – given the rate case*
6 *process in Arizona. . .*

7
8 ALJ MARTIN: All right. Thank you. Mr. McDowell, a response?

9
10 MR. McDOWELL: Yes, a few things. To follow up on that point that you
11 were just discussing, *there is a nowhere in Mr. Patten's email where he says*
12 *if you want us to send the stuff I promised to send here, send me a confirming*
13 *letter. He provided the communications with Staff without Mr. Rich*
14 *responding and saying yes, do that. He commits in here to providing the*
15 *communication with Staff and providing the communication with the expert*
16 *and he should be doing that.*³⁰

17 * * *

18 The claim of confusion is not credible. The email from Trico was itself a response to a
19 letter from EFCA. The email exchange between Trico's counsel and EFCA's counsel did not
20 suggest any confusion or questions. It was straightforward. Trico's claim that it was "confused" is
21 also undermined by the fact that Trico did respond to Data Request 4.15 (the communications with
22 Staff regarding settlement) while continuing to withhold the remaining promised information (the
23 communications with Guernsey).³¹ If Trico's counsel was truly confused about doing what it
24 promised, it would not have provided the communications with Staff regarding settlement – 842
25 pages. If Trico's counsel was truly confused, he would not have stated that Trico was "working
26 on" providing its communications with Guernsey to EFCA without condition.

27 _____
28 ³⁰ Transcript at p. 18-19; p. 20 at Ins. 2-19 (emphasis added), attached hereto as Exhibit 2.

³¹ See Trico Electric Cooperative, Inc.'s Supplemental Response to EFCA 4.15, attached as Exhibit 3 (without documents attached thereto).

1 Trico promised to provide its communications with Guernsey, induced EFCA to wait for
2 those communications, and then wrongfully changed its position and alleged it was burdensome.
3 Based on Trico's express agreement to provide key pieces of the information and documents
4 requested in the Data Requests to EFCA, and EFCA's reliance on that promise, Trico is estopped
5 from arguing that it should not be required to produce the information, or that the request is unduly
6 burdensome.

7 **C. The Communications and Documents Trico Refused To Deliver To EFCA**
8 **Are Not Protected By the Work-Product Privilege.**

9 It is well-settled in Arizona that parties may discover all communications between an
10 opposing party and its expert if the party has named the expert as a trial witness.³² Communications
11 from a prospective expert witness are not protected by the work-product privilege.³³ When
12 information is withheld from discovery on a claim that it is privileged, the claim shall be made
13 expressly and shall be supported by a description of the nature of the documents and
14 communications not produced "that is sufficient to enable other parties to contest the claim."³⁴

15 Trico identified no basis for withholding any information responsive to the Data Request
16 from under the work-product privilege and Trico did not identify a single document or
17 communication it believed was protected. Significantly, Trico did not even prepare a privilege log,
18 which is the mechanism for determining what documents Trico believes is privileged. Without a
19 privilege log or the identification of a single document, there is no basis for denying EFCA's
20 Motion to Compel under the work product doctrine.

21 **D. The Communications and Documents Trico Refused To Deliver To EFCA**
22 **Are Not Protected By the Attorney-Client Privilege.**

23 The attorney-client privilege applies only to confidential communications between counsel
24 and client in connection with securing and rendering legal advice. *State ex rel. Corbin v. Weaver*,
25 140 Ariz. 123, 680 P.2d 833 (App. 1984). It does not apply to communications with a testifying

26 _____
27 ³² See, e.g., Ariz. R. Civ. P. 26(b)(4); *Slade v. Schneider*, 212 Ariz. 176, 181, 129 P.3d 465, 470 (App. 2006). See
also *Emergency Care*, 188 Ariz. at 36, 932 P.2d at 301 (App. 1997) (court favors expansive scope for discovery
from expert witnesses).

28 ³³ See *Id.* See also, *State ex rel. Willey v. Whitman*, 91 Ariz. 120, 370 P.2d 273 (1962).

³⁴ Rule 26(f)(1), Ariz. R. Civ. P.

1 expert witness.

2 Trico identified no basis for withholding any information from EFCA under the attorney-
3 product privilege. As with the work product privilege, Trico did not even prepare a privilege log.
4 Therefore, there is no basis for denying EFCA's Motion to Compel under the attorney-client
5 privilege.

6 **E. Trico's Objections Legally and Factually Insufficient and Fail To Meet Its**
7 **Burden In Demonstrating A Proper Objection.**

8 First, the presumption is that the information and documents responsive to EFCA's Data
9 Request are discoverable. EFCA does not have any burden to show a substantial need or harmful
10 result. The burden falls squarely on Trico to demonstrate a proper objection to the Data Request
11 and Trico has failed to meet its burden.³⁵ Arizona courts permit liberal discovery from testifying
12 experts without any consideration of the requesting party's need or the harm that would result
13 without discovery.³⁶ Arizona has long favored "full cross-examination of expert witnesses."³⁷
14 Arizona authorities consistently have supported free-ranging, skeptical cross-examination of
15 expert witnesses and open discovery to probe the groundwork for their opinions.³⁸ A party has a
16 right of "not being bound by the statement of a witness, to examine him fully as to the source of
17 his information, and to deprive them of this right constitute[s] prejudicial error."³⁹ Denying a party
18 full discovery of a testifying expert deprives that party of the "right to test the accuracy of
19 adversary expert testimony by throwing upon it the searchlight of a full cross-examination."⁴⁰

20 Just as Arizona authorities have granted expansive scope for expert cross-examination, so
21 have they granted expansive scope for pretrial discovery from expert witnesses.⁴¹ Under Arizona
22 practice, an expert may be examined "upon any matter which would be permitted if he were cross-
23 examined in open court."

24 _____
25 ³⁵ *Cornet Stores*, 108 Ariz.at 86, 492 P.2d at 1193.

26 ³⁶ *State ex rel. Miller v. Superior Court In & For Maricopa Cty.*, 159 Ariz. 21, 23, 764 P.2d 756, 758 (App. 1988),
aff'd sub nom. *State ex rel. Miller v. Superior Court of Maricopa Cty.*, 159 Ariz. 567, 769 P.2d 1013 (1989).

27 ³⁷ *Emergency Care Dynamics, Ltd. v. Superior Court In & For Cty. of Maricopa*, 188 Ariz. 32, 35, 932 P.2d 297,
300 (App. 1997).

28 ³⁸ *Id.* at 36, 932 P.2d at 301.

³⁹ *Id.* (quoting *Middleton v. Green*, 35 Ariz. 205, 210-11, 276 P. 322, 324 (1929).

⁴⁰ *Emergency Care Dynamics, Ltd.*, 188 Ariz. at 35, 932 P.2d at 300.

⁴¹ *Id.*

1 Second, a decision to deny a motion to compel discovery requests must be based on
2 “specific, non-boilerplate objections” and supported by “particularized facts.”⁴² “General
3 objections, such as . . . unreasonably burdensome, oppressive, or . . . irrelevant and immaterial . . .
4 are insufficient.”⁴³

5 Here, the Ruling denies EFCA’s Motion to Compel citing only to Trico’s non-specific,
6 boilerplate objections and no particularized facts. Trico failed to demonstrate how the request was
7 overbroad or unduly burdensome, what it would take for Trico to produce the information, or why
8 it could not or should not. To be clear, Trico did not even attempt to allege any specific facts that
9 would lead one to conclude the Data Request was burdensome. In fact, anyone who has ever
10 worked with an electronic email service knows that organizing communications by “from” or “to”
11 in alphabetical order is extremely simple and takes a matter of seconds. From there, printing those
12 documents is similarly simple and is certainly not burdensome when compared with the numerous
13 technical analyses and other such documents routinely provided by utilities in response to
14 discovery without claims of burden.

15 Similarly, Trico did not identify a single communication that it alleges is privileged. It is
16 undisputed that communications between Trico and its named expert witnesses are not privileged
17 under the work-product or attorney-client doctrines, period.

18 The information EFCA requested is discoverable and EFCA has a right to full discovery
19 and full examination of Trico’s experts. Depriving EFCA the right to fully discover the
20 groundwork for Trico’s expert’s opinions, deprives EFCA of the “right to test the accuracy of
21 adversary expert testimony by throwing upon it the searchlight of a full cross-examination.”
22

23 **Data Request 4.14**

24 4.14 requested communications between Trico and Guernsey over the last one (1) year.

25 Trico objected stating only “overbroad, irrelevant and unduly burdensome” and “potential
26 litigation work product.”⁴⁴

27
28 ⁴² See e.g., *Lynn v. Monarch Recovery Mgmt., Inc.*, 285 F.R.D. 350, 356 (D. Md. 2012).

⁴³ *Cornet Stores v. Superior Court In & For Yavapai Cty.*, 108 Ariz. 84, 86, 492 P.2d 1191, 1193 (1972).

⁴⁴ See Motion to Compel at Exhibit 1, 4.14.

1 The Administrative Law Judge denied 4.14, stating only that it was “unduly burdensome
2 and overbroad.”⁴⁵

3 The Commission should reconsider its Ruling on 4.14 because there is no evidence to
4 suggest that the request is overbroad or unduly burdensome. The information requested only spans
5 one (1) year. It relates only to the communications between Trico and one other party. The
6 requested communications are not subject to any privilege or protection, and Trico could quickly
7 and easily provide the information using a simple computer search function. In fact, Trico did not
8 allege a single reason why it could not easily produce the requested information. It did not identify
9 a single communication that it believed could even be subject to a privilege.

10 Most importantly, Trico agreed to and was prepared provide these communications, thus
11 demonstrating that the request was not unduly burdensome and that it has relevant, non-privileged
12 communications that it is required to produce.

13 As is the case with the other requests related to expert testimony, the requested information
14 in 4.14 bears directly on the issues in this case, including Trico’s amendment to its Application.
15 Guernsey is a full-service engineering, architecture, and consulting firm, which provides services
16 to thousands of clients. Guernsey develops cost-of-service studies, rates and financial models, and
17 provides industry insights and analysis for electric cooperatives and municipalities throughout the
18 United States.⁴⁶ “Guernsey regularly sponsors training in financial forecasts and cost of service
19 studies using materials written and presented by David [Hedrick].”⁴⁷ Mr. Hedrick’s curriculum
20 vitae states that he has “provided assistance to electric cooperative boards of directors in the
21 development of strategic goals and objectives” and “training in the development of financial
22 forecast models for electric cooperatives and municipal utility systems.”⁴⁸

23 Trico uses Guernsey for a variety of services, including expert testimony and the
24 development and analysis of rate design.⁴⁹ Mr. Hedrick testified in this rate case that he has
25

26 ⁴⁵ See Transcript at p. 47, ln. 14.

27 ⁴⁶ See <http://www.guernsey.us/electric-utility-analysis>.

28 ⁴⁷ See <http://www.guernsey.us/staff/david-hedrick>.

⁴⁸ See Pre-Filed Direct Testimony of David Hedrick filed October 23, 2015, at Exhibit DWH-1, p. 5

⁴⁹ See *Id.* See also Reporter’s Transcript of Evidentiary Hearing, dated August 18, 2016, filed August 25, 2016, Volume II (“Hearing Transcript II”), P. 363-366; and Transcript at p. 44, lns. 14-15.

1 communicated with Trico via email.⁵⁰ He testified that he was involved in the discussions that led
2 to the decision bring forward a request for a demand charge tariff.⁵¹ He testified that he
3 collaborated with Trico “at the initial stages” of the case and “whether to present [demand charges]
4 as an option.”⁵² He testified that he and Trico discussed different methodologies for establishing a
5 transitional approach to the development of demand rates and ultimately the methodology
6 presented in the settlement agreement.⁵³ Mr. Hedrick further testified that he engaged in “long”
7 and “considerable discussion” with Trico regarding how best to introduce a transition to a demand
8 rate, basic tenets, recovery of costs, and educating members.⁵⁴ He testified that he had “lots of
9 meetings” in discussing the demand rate implementation.⁵⁵ Mr. Hedrick also testified that he was
10 “involved in communications with [Trico] on various issues related to the rate proceedings,
11 requests for information, all those kinds of things.”⁵⁶ He testified he would have to look at his
12 emails to determine the timeline for when Trico decided to move forward with demand charges
13 and that the decision to move forward was not just the result of a single-purpose meeting.⁵⁷ This
14 is a key fact that Ms. Cathers also could not provide in testimony.

15 Mr. Hedrick’s testimony demonstrates why the Commission should reconsider its Ruling
16 denying the Motion to Compel. His testimony confirms not just that Trico is withholding a
17 significant amount of discoverable communications from EFCA, but it describes what kinds of
18 communications it is withholding and how they are relevant to this rate case. EFCA is entitled to
19 review Trico’s communications with Guernsey and examine Trico’s witnesses regarding those
20 communications. Trico specifically stated during oral argument at the procedural conference that
21 Trico uses Guernsey for “a large number of things.”⁵⁸ This statement is consistent with Mr.
22 Hedrick’s testimony. Trico’s statement alone militates in favor of producing the communications,
23 but combined with Mr. Hedrick’s testimony of his extensive communication with Trico, makes

24 ⁵⁰ See Hearing Transcript II at p. 365, lns. 22-25.

25 ⁵¹ *Id.* at P. 363, lns. 6-10.

26 ⁵² *Id.* at 13-15.

27 ⁵³ Hearing Transcript II, p. 363, at lns. 16-24.

28 ⁵⁴ *Id.* at p. 364, lns. 9-15.

⁵⁵ *Id.* at p. 365, lns. 19.

⁵⁶ *Id.* at p. 366, lns. 9-15.

⁵⁷ *Id.*

⁵⁸ See Transcript at p. 44, lns. 14-15.

1 the discoverability of those communications even clearer. Trico is entitled to know and examine
2 Trico's witnesses about the statements and communications from and with its experts.

3 The communications directly relate to Trico's case, its rate design, the timing of its decision
4 to seek higher fixed charges and a demand charge, the admitted failure of Trico to give proper
5 notice of its highly controversial decision to change course and seek a tariff for a three-part demand
6 rate, the groundwork for its experts' opinions, the decision to amend its Application, and the factual
7 circumstances surrounding the settlement. None of these matters are protected by any privilege or
8 evidentiary rule. Depriving EFCA from this relevant and discoverable information severely and
9 unfairly restricts EFCA's ability to examine Trico's witnesses regarding key issues and works
10 injustice by wrongfully impairing EFCA's ability fully present its case to this Commission. The
11 Commission should reconsider its Ruling and require Trico to respond completely to 4.14.

12 **III. CONCLUSION**

13 The information and documents Trico has refused to produce in response to the Data
14 Request is discoverable. Trico represented to EFCA that it would provide communications with
15 its experts to EFCA voluntarily. It stated that it was prepared to do it, that it was reasonable, and
16 that it would produce them by a specified time. Then it refused, putting EFCA at a severe
17 disadvantage. Had Trico not falsely promised to provide the requested information, these issues
18 could have been placed before the Commission weeks before the hearing commenced. Instead, the
19 hearing has commenced and EFCA has been deprived of the opportunity to receive relevant, non-
20 privileged information within Trico's possession and ability to deliver. Trico should not be
21 permitted to benefit from its stonewalling.

22 Trico has identified no legitimate objection to the Data Requests. There is no privileged
23 information. There is no protected information. The request is limited in time and scope. It is
24 specific, and it bears directly on the issues in this rate case, the timing of its key decisions, Trico's
25 proposed rate design, Trico's basis for amending its Application, and the groundwork for Trico's
26 expert's opinions. EFCA has the right to fully examine Trico's witnesses regarding statements
27 made between Trico and its experts regarding these issues. Depriving EFCA of the right to
28 discoverable information regarding key issues not only rewards Trico for its stonewalling tactics,

1 but deprives EFCA of its fundamental right to “the searchlight of a full cross-examination.”

2 For these reasons, EFCA respectfully request that the Commission reconsider its Ruling
3 denying the Motion to Compel and order Trico to produce the requested information with regard
4 to just Data Request 4.14. EFCA further requests that this Commission schedule a hearing on an
5 expedited basis to discuss a schedule for producing the information and examining witnesses.

6
7 **RESPECTFULLY SUBMITTED** this 31st day of August, 2016.

8
9 /s/ Court S. Rich

10 Court S. Rich
11 Rose Law Group pc
12 Attorney for EFCA
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1 **Original and 13 copies filed on**
2 **this 31st day of August, 2016 with:**

3 Docket Control
4 Arizona Corporation Commission
5 1200 W. Washington Street
6 Phoenix, Arizona 85007

7 *I have this day served the foregoing documents on all parties of record in this proceeding by*
8 *sending a copy via electronic or regular mail to:*

9 Janice Alward
10 Arizona Corporation Commission
11 jalward@azcc.gov

12 Thomas Broderick
13 Arizona Corporation Commission
14 tbroderick@azcc.gov

15 Kevin Higgins
16 Energy Strategies, LLC
17 khiggins@energystat.com

18 Michael Patten
19 Jason Gellman
20 Snell & Wilmer L.L.P.
21 mpatten@swlaw.com
22 jgellman@swlaw.com

23 COASH & COASH
24 mh@coashandcoash.com

25
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27
28
By: /s/ Hopi L. Slaughter

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Vincent Nitido
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EXHIBIT 1

Rose Reynolds

Subject: RE: Response to July 21 letter re Trico rate case (15-363)

-----Original Message-----

From: Patten, Michael [mailto:mpatten@swlaw.com]
Sent: Monday, August 8, 2016 10:07 AM
To: Court Rich <CRich@roselawgroup.com>; Sam Doncaster <sdoncaster@roselawgroup.com>
Cc: Hopi Slaughter <HSlaughter@roselawgroup.com>
Subject: RE: Response to July 21 letter re Trico rate case (15-363)

We are still working on providing it. It will not be provided today. We have had two extensive data requests from EFCA in the interim as well.

-----Original Message-----

From: Court Rich [mailto:CRich@roselawgroup.com]
Sent: Monday, August 08, 2016 10:04 AM
To: Patten, Michael; Sam Doncaster
Cc: Hopi Slaughter
Subject: RE: Response to July 21 letter re Trico rate case (15-363)

Mike,

According to your email below, Trico was to have the discovery responses to us by last Friday, August 5, 2016. This will confirm we did not receive the information that Trico indicated it would be providing. Will Trico be providing that information today?

Court S. Rich

7144 E Stetson Drive, Suite 300, Scottsdale Arizona 85251
Direct: 480.505.3937 || Mobile: 602.741.3794

roselawgroup.com
roselawgroupreporter.com
social.roselawgroup.com

RLG is Service

Winner "Best place to work in Arizona"

The information contained in this message is privileged and confidential. It is intended only to be read by the individual or entity named about or their designee. If the reader of this message is not the intended recipient, you are on notice that any distribution of this message, in any form, is strictly prohibited. If you have received this message in error, please immediately notify the sender by telephone at 480.505.3937 or by fax at 480.505.3925 and delete or destroy any copies of this message. Thank you.

Think green, please don't print unnecessarily

-----Original Message-----

From: Patten, Michael [mailto:mpatten@swlaw.com]
Sent: Friday, July 22, 2016 8:03 AM

To: Court Rich <CRich@roselawgroup.com>; Sam Doncaster <sdoncaster@roselawgroup.com>
Cc: Patten, Michael <mpatten@swlaw.com>
Subject: Response to July 21 letter re Trico rate case (15-363)

Dear Court and Sam,

I received your July 21, 2016 letter regarding EFCA 's 4th set of Data Requests and our July 20 meet and confer phone call. I have several points in initial response.

First, I disagree with much of your recitation of the call. However, as I told you on the call, I was going to be out of town for work the remainder of the week with limited time availability. And as I told you, I needed to discuss your position with my client before I could respond. I was not in an position to offer a compromise on the phone call without first consulting with my client.

Second, a rate case is a completely different type of proceeding than complaint litigation before a court. Recitation of Superior Court rules is not necessarily relevant when many procedures in a rate case are markedly different than superior court litigation.

Third, I disagree with your belief that we have not responded to several of the data requests. For example, with respect to 4.4 and 4.5, we provided an adequate response. However, contrary to your arguments, we are not obliged to do your work in reviewing publicly available documents at the commission.

I have had the opportunity to discuss your position with Trico. We are prepared to provide the communications with Staff regarding the settlement agreement. I am sure you have compared your notes from the July 17 settlement meeting with the June 22 term sheet you received and the final settlement agreement and have confirmed there are no material differences. Regardless we will provide the communications. We are also prepared to provide the written communications with Guernsey regarding the Trico rate case, although providing such information is well outside standard Commission discovery practices.

Trico believes this is more than reasonable. Beyond this, EFCA's requests are both tardy (all but one these requests could have been asked months ago) and an overreaching, unduly burdensome discovery tactic.

We will endeavor to provide the information by next Friday. Trico is a small rural electric cooperative and has limited resources to collect and provide the information.

Please let me know if you have any questions.

Mike

Michael W Patten
Snell & Wilmer
Via iPad

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EXHIBIT 2

1 BEFORE THE ARIZONA CORPORATION COMMISSION

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3 IN THE MATTER OF THE)
 4 APPLICATION OF TRICO ELECTRIC)
 5 COOPERATIVE, INC., AN ARIZONA) DOCKET NO.
 6 NONPROFIT CORPORATION, FOR A) E-01461A-15-0363
 7 DETERMINATION OF THE CURRENT)
 8 FAIR VALUE OF ITS UTILITY) PROCEDURAL
 9 PLANT AND PROPERTY AND FOR) CONFERENCE
 10 INCREASES IN ITS RATES AND)
 11 CHARGES FOR UTILITY SERVICE)
 12 AND FOR RELATED APPROVALS.)
 13 _____)

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At: Tucson, Arizona

13

Date: August 12, 2016

14

Filed: August 15, 2016

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

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COASH & COASH, INC.
 Court Reporting, Video & Videoconferencing
 1802 North 7th Street, Phoenix, AZ 85006
 602-258-1440
 staff@coashandcoash.com

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Prepared by:
 LILIA MONARREZ, CSR, RPR
 Certificate No. 50699

24

25

1 on the eve the testimony is due is a sharp practice that
2 really affects all of us as well as Your Honor. We
3 believe that we have already appropriately responded to
4 the four sets of DRs, and we would ask Your Honor to
5 deny the motion to compel and find, as Rule 26 says,
6 that the discovery is unduly burdensome, expensive given
7 the needs of the case and the limitations on the
8 parties' resources.

9 Thank you, Your Honor. And I apologize for
10 going on, but I'm pretty passionate about this one.

11 ALJ MARTIN: All right. Thank you, Mr. Patten.

12 I have a question about something in your email
13 from the 22nd.

14 Do you have that?

15 MR. PATTEN: I will in just a moment, your
16 Honor.

17 ALJ MARTIN: Yes, the very last page of the
18 motion to modify.

19 MR. PATTEN: Yes.

20 ALJ MARTIN: Okay. The paragraph that begins "I
21 had the opportunity to discuss your position with
22 Trico."

23 MR. PATTEN: Right.

24 ALJ MARTIN: Okay. You talk about you are
25 prepared to provide certain things in this paragraph.

1 MR. PATTEN: Right. We have provided the
2 communications with Staff regarding the settlement
3 agreement. It is 842 pages, but obviously much of that
4 is actually drafts of rules and regulations that were
5 being edited. I think that was one -- the only data
6 request that they could not have asked prior to the
7 settlement being docketed.

8 ALJ MARTIN: Okay. And then towards the end of
9 it, it says you are also prepared to provide the written
10 communications with Guernsey.

11 MR. PATTEN: And that's the thing we never heard
12 back from them on. I don't -- frankly, I don't think
13 that is appropriate given -- given rate case process in
14 Arizona. It would basically expand these dockets
15 unbelievably, put a lot of burden on Staff and
16 restrictions on Staff. It has never been the practice
17 or procedure here and, having not heard back from them
18 on this email until earlier this week, I had no clue
19 whether that limitation regarding the Trico rate case
20 was acceptable.

21 And at this point, I don't think that that's
22 appropriate to provide either. That would --
23 wouldn't -- it basically would be very burdensome for
24 Trico to go through and do.

25 ALJ MARTIN: All right. Thank you.

1 Mr. McDowell, a response?

2 MR. McDOWELL: Yes, a few things. To follow up
3 on that point that you were just discussing, there is
4 nowhere in Mr. Patten's email where he says if you want
5 us to send the stuff I promised to send here, send me a
6 confirming letter. He provided the communication with
7 Staff without Mr. Rich responding and saying yes, do
8 that. He commits in here to providing the communication
9 with Staff and providing the communication with the
10 expert and he should be doing that.

11 It was -- it was part of our data request. It
12 is fully discoverable information, and he agreed to do
13 it. There is no special rule in Corporation Commission
14 cases that except these cases from the obligation to
15 provide expert material when requested. There's no
16 special privilege under Arizona law for communication
17 with experts in the context of a Corporation Commission
18 case. It is discoverable information. We requested it.
19 He agreed to provide it and now he's backpedaling.
20 They --

21 MR. PATTEN: Your Honor, frankly, they never
22 responded to this email and that's just another way of
23 them delaying and dragging things out. I had no clue
24 what was acceptable or not acceptable.

25 MR. McDOWELL: The expert -- the expert

1 discovery was discussed in the meet-and-confer
2 conference. We asked for the expert material. He
3 confirmed it in writing. We didn't think it was
4 necessary to send a second confirming email saying,
5 yeah, we want to get what you promised to give us.

6 MR. PATTEN: That is not -- you did not limit it
7 to the rate case. You did not want to limit it to the
8 rate case, and I never got any guidance beyond that.
9 And, frankly, it's just another example of lack of
10 communication and delaying to the last minute. It was
11 two and a half weeks until I got a response to the
12 email, two and a half weeks, and it's something that is
13 not typically provided in a rate case process. I have
14 not seen it done and, frankly, it would probably --
15 probably make rate cases almost unmanageable at some
16 level. And Staff may be able to weigh in on that one as
17 well.

18 MR. McDOWELL: I think that same argument was
19 advanced in the supervisor courts and the superior
20 courts say expert material is fully discoverable.
21 There's no special ruling in superior court --

22 MR. PATTEN: This is not --

23 ALJ MARTIN: Hold it. Stop.

24 MR. PATTEN: -- in superior court. This is a
25 rate case.

1 ALJ MARTIN: Stop. Stop.

2 MR. PATTEN: I'm sorry. I'm sorry.

3 ALJ MARTIN: Do not talk over one another,
4 please.

5 And right now, Mr. McDowell, why don't you go
6 ahead and finish with your reply and then we'll get some
7 other statements.

8 MR. McDOWELL: Okay. Thank you, Your Honor.
9 The rules say the Commission is to follow the rules of
10 civil procedure when there is an absence of direction in
11 the Commission rules. There is -- there is an absence
12 in this case. The civil rules -- the rules of civil
13 procedure and the cases interpreting those are
14 instructive to this tribunal. We are aware of no rule
15 that says sandbagging is permitted in the Corporation
16 Commission.

17 Mr. Rich did -- and this is an attachment also
18 to the -- to the motion. Mr. Rich reached out to
19 Mr. Patten on the 8th asking for the material Mr. Patten
20 promised to provide. Mr. Patten didn't say at that
21 time, I'm not giving you the expert material that he had
22 promised to provide us earlier. I remind Your Honor
23 that this entire case changed seven months after it was
24 filed. When the amendment was filed, this required a
25 new set of data requests from EFCA to get the material

1 that underlied -- underlaid their decision to change and
2 to prepare the amendments.

3 And I would also add, Your Honor, that when we
4 had the meet and confer with Mr. Patten's office, he
5 didn't ask for additional time. He didn't provide
6 specific objections to specific questions so that we
7 could negotiate what questions we weren't concerned
8 about and which requests we were most concerned about.
9 If we had done that, we may not be here missing all of
10 these data requests, but, you know, it takes some
11 communication on both sides for that to occur and we
12 didn't get responses to our requests.

13 MR. PATTEN: Your Honor -- well, I'll respond at
14 the appropriate time.

15 MR. McDOWELL: Okay. I'd also add, Your Honor,
16 that the settlement agreement in this case was filed on
17 July 8th. Some of the data requests that we propounded
18 on July 18th were asking about a settlement agreement.
19 There was no way that we could have filed those data
20 requests earlier than the settlement agreement itself.
21 I'd also point out that Request 4.1 is not an issue in
22 our motion to compel.

23 ALJ MARTIN: Okay. Mr. McDowell?

24 MR. McDOWELL: As you know --

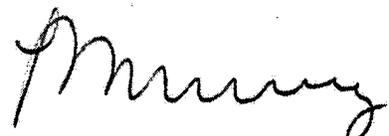
25 ALJ MARTIN: Mr. McDowell?

1 STATE OF ARIZONA)
2 COUNTY OF MARICOPA)

3 BE IT KNOWN that the foregoing proceedings were
4 taken before me; that the foregoing pages are a full,
5 true, and accurate record of the proceedings, all done
6 to the best of my skill and ability; that the
7 proceedings were taken down by me in shorthand and
8 thereafter reduced to print under my direction.

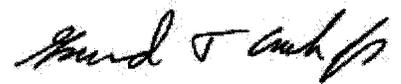
9 I CERTIFY that I am in no way related to any of
10 the parties hereto nor am I in any way interested in the
11 outcome hereof.

12 I CERTIFY that I have complied with the ethical
13 obligations set forth in ACJA 7-206(F)(3) and ACJA
14 7-206(J)(1)(g)(1) and (2). Dated at this 12th day of
15 August, 2016.



16 _____
17 LILIA MONARREZ
18 Certified Reporter
19 Certificate No. 50658.

20 I CERTIFY that Coash & Coash, Inc., has complied
21 with the ethical obligations set forth in ACJA 7-206
22 (J)(1)(g)(1) through (6).



23 _____
24 Coash & Coash, Inc.
25 Registered Reporting Firm R1036

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EXHIBIT 3

Snell & Wilmer
L.L.P.
LAW OFFICES

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DENVER
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LOS CABOS
ORANGE COUNTY
PHOENIX
RENO
SALT LAKE CITY
TUCSON

August 9, 2016

BY U.S. MAIL

Court S. Rich
Rose Law Group pc
7144 E. Stetson Drive, Suite 300
Scottsdale, AZ 85251

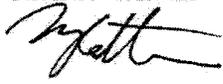
Re: Trico Electric Cooperative, Inc. General Rate Case
Docket No. E-01461A-15-0363

Dear Mr. Rich:

Enclosed please find Trico Electric Cooperative, Inc.'s Supplemental Response to EPCA 4.15.

Please let me know if you have any questions.

Very truly yours,

Snell & Wilmer


Michael W. Patten

MWP:jh

Enclosures

ENERGY FREEDOM COALITION OF AMERICA'S
FOURTH SET OF DATA REQUESTS TO
TRICO ELECTRIC COOPERATIVE, INC.
DOCKET NO. E-01461A-15-0363
AUGUST 9, 2016

EFCA 4.15 Provide copies of all written and electronic communications by, between, or among Trico employees, board members, members, witnesses, consultants, attorney or other representative of Trico and any staff member, employee, attorney, witness or other representative of the Arizona Corporation Commission regarding all settlement negotiations and settlement agreements in this docket.

RESPONSE: The request is overbroad, irrelevant and unduly burdensome. Moreover, any such communications are potentially subject to Rule 408.

RESPONDENT:

SUPPLEMENTAL

RESPONDENT: Subject to the objections set forth above, See enclosed disc that contains the requested communications.