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Arizona Corporation Commission

DOCKETED

OCT 12 2016

DOCKETED BY

BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONER

BOB BURNS
COMMISSIONER

TOM FORESE
COMMISSIONER

ANDY TOBIN
COMMISSIONER

11 **IN THE MATTER OF THE APPLICATION**
12 **OF ARIZONA PUBLIC SERVICE**
13 **COMPANY FOR A HEARING TO**
14 **DETERMINE THE FAIR VALUE OF THE**
15 **UTILITY PROPERTY OF THE COMPANY**
16 **FOR RATEMAKING PURPOSES, TO FIX**
17 **A JUST AND REASONABLE RATE OF**
18 **RETURN THEREON, TO APPROVE RATE**
19 **SCHEDULES DESIGNED TO DEVELOP**
20 **SUCH RETURN.**

DOCKET NO. E-01345A-16-0036

RECEIVED
AZ CORP COMMISSION
DOCKET CONTROL
2016 OCT 12 P 4: 04

18 **IN THE MATTER OF FUEL AND**
19 **PURCHASED POWER PROCUREMENT**
20 **AUDITS FOR ARIZONA PUBLIC**
21 **SERVICE COMPANY.**

DOCKET NO. E-01345A-16-0123

**THE ENERGY FREEDOM
COALITION OF AMERICA'S
RESPONSE TO MOTION FOR
PROCEDURAL CONFERENCE AND
INTERIM PROTECTIVE ORDER**

23 Barbara Lockwood is a noticed witness who pre-filed testimony. The preponderance of
24 that testimony is opinion. Energy Freedom Coalition of America ("EFCA") has questions related
25 to Ms. Lockwood's opinions and seeks Ms. Lockwood's direct answers. Live questions and
26 answers, with immediate follow-up, are the best, most efficient way to get facts from the witness
27 rather than position statements from a lawyer.

1 Arizona Public Service Company (“APS” or “the Company”) has requested a protective
2 order requiring the EFCA to propound discovery on APS’s witness, Barbara Lockwood, through
3 “less intrusive means,” such as through data requests, before taking her deposition.¹ APS argues
4 that a protective order is appropriate because:

- 5 1. written discovery is the better discovery methodology in Arizona Corporation
6 Commission (“ACC”) proceedings and that written discovery has essentially
7 rendered the use of depositions “largely unnecessary”²;
- 8 2. a deposition conducted before the filing of Ms. Lockwood’s rebuttal testimony
9 would “not concern the complete set of testimony”³; and
- 10 3. an early deposition in a complex case with multiple parties would “undermine the
11 orderly gathering of information.”⁴

12 None of these reasons justifies a protective order, which would deprive EFCA of a
13 fundamental discovery tool and would shield APS and its witness from appropriate and standard
14 discovery. EFCA needs, and has a clear right to use, a deposition and the information that could
15 come from it. APS’s alternative suggestion of delaying the deposition would disadvantage EFCA’s
16 ability to timely obtain, analyze, and apply information in its case in chief. This disadvantage
17 would be particularly keen as APS has had unlimited time to prepare its application and put on its
18 own case. Ms. Lockwood herself affirms in her own testimony that timing is absolutely critical for
19 this case.⁵ Accordingly, for the reasons presented below, EFCA respectfully requests that the
20 presiding officer issue an order rejecting APS’s motion and granting EFCA’s notice of deposition.

21 Barbara Lockwood is the key APS witness who provided pre-filed testimony in this
22 proceeding. Her testimony and knowledge of this case is comprehensive, as she addresses virtually
23 all elements of the rate case⁶ and provides an overview of the entire rate request.⁷ She also

24 ¹ APS Motion for Procedural Conference and Interim Protective at 2 (October 6, 2016) [hereinafter “APS Motion”].

25 ² *Id.* at 4.

26 ³ *Id.* at 2.

27 ⁴ *Id.*

28 ⁵ Direct Testimony of Barbara D. Lockwood on Behalf of Arizona Public Service Company at 25:5–11 (June 1, 2016) [hereinafter “Lockwood Testimony”].

⁶ Arizona Public Service Company Rate Application at 19 (June 1, 2016).

⁷ Lockwood Testimony at 1:9–23.

1 distinctly addresses issues of crucial importance to distributed generation (“DG”) solar customers
2 and advocates. For example, she discusses: grandfathering of net metering customers (“NEM”);⁸
3 NEM customer compensation and an alleged cost shift,⁹ NEM/DG customers only paying a
4 fraction of their cost of service;¹⁰ loss of sales due to energy efficiency and NEM not recovered in
5 the LFCR;¹¹ and significant rate design changes, including the imposition of demand charges.¹²
6 Her testimony is the fulcrum of APS’s story in this case. The preponderance of her testimony is
7 opinion. EFCA has critical and relevant questions related to Ms. Lockwood’s opinions, which
8 require her direct answers as a witness offering specialized testimony. Live questions and answers,
9 with immediate follow-up, are the standard, best, and most efficient way to get facts from this
10 witness.

11 MEMORANDUM OF POINTS AND AUTHORITIES

12 Depositions are a standard discovery device, endorsed and made readily available under
13 Arizona’s procedural rules and ACC regulations. Arizona’s deposition rules are given “broad and
14 liberal treatment.”¹³ Commission regulations codify the right to take depositions in addition to
15 other data requests: “The Commission, a Commissioner, or any party to any proceeding before it
16 may cause the depositions of witnesses to be taken in the manner prescribed by law and of the civil
17 procedure for the Superior Court of the state of Arizona.”¹⁴

18 As the party resisting discovery, APS has the burden of proof to establish that it should be
19 excused from answering or timely participating in discovery.¹⁵ “The various means of discovery
20 may be used in any sequence and with unlimited frequency up to the point where a party *shows*
21 annoyance, embarrassment, oppression, or undue burden or expense.”¹⁶ Here, rather than proving
22 or showing an actual problem or burden, the Company complains about hypothetical, potential
23

24 ⁸ *Id.* at 4:11 and 21:1-7, 23:8-25

⁹ *Id.* at 4:11, 21:1-7, 22:1-12, 22:21-28, 23:1-6.

25 ¹⁰ *Id.* at 6:5,

¹¹ *Id.* at 14:1-4.

26 ¹² *Id.* at 20:8-19.

¹³ *Skok v. City of Glendale*, 3 Ariz. App. 254, 257-58, 413 P.2d 585, 588-89 (1966).

27 ¹⁴ Ariz. Admin. Code R14-3-109(P).

¹⁵ *Hine v. Super. Ct. In and For Yuma County*, 18 Ariz. App. 568, 571, 504 P.2d 509, 512 (1972).

28 ¹⁶ *Id.* (emphasis added).

1 hardship. In a mere five lines, the Company complains depositions “could”¹⁷ cause problems,
2 “could”¹⁸ lead to more depositions, “could”¹⁹ become superfluous, and might result in “more
3 depositions after rebuttal.”²⁰ By the Company’s own terms, this list is hypothetical—so much so
4 that it could apply to every proceeding before the Commission. Nowhere does APS show, as it
5 must, actual annoyance, embarrassment, oppression, undue burden, or expense for *this* deposition
6 in *this* case. Having failed to meet its burden, its motion should be denied.

7 **I. The Company must meet and confer before complicating this case with a motion for**
8 **a protective order.**

9 Before filing this discovery motion, the Company should have contacted EFCA and
10 discussed its concerns. It would have learned that its hypothetical concerns will never come to
11 pass. This is fatal to APS’s request because it is a mandatory pre-condition to filing such a motion
12 and APS failed to meet that condition; therefore, its motion is premature.

13 Arizona Rule of Civil Procedure 26(g) mandates that “[n]o discovery motion will be
14 considered or scheduled unless a separate statement of moving counsel is attached thereto
15 certifying that, after personal consultation and good faith efforts to do so, counsel have been unable
16 to satisfactorily resolve the matter.” These mandatory confer provisions require that lawyers “make
17 genuine efforts to resolve the dispute” without wasting the tribunal’s time.²¹ At a minimum, lawyers must
18 contact opposing counsel and attempt to resolve the issue before rushing into motion practice. One court
19 found that failing to pick up the phone proves a “lack of good faith.”²² Indeed, the court found that the
20 lawyer who neglected a phone call had an “insufficient level of sincerity to his obligation to meet and
21 resolve the discovery dispute without . . . intervention.”²³ The same holds true in the case at hand.

22 **II. EFCA has discretion to use a deposition to discover the witness’s testimony.**

23 Depositions are the best way to discover the basis of a witness’s opinions and the witness’s
24 personal memory of past events. A deposition features live questions and answers and immediate

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26 ¹⁷ APS Motion at 3:17.

27 ¹⁸ APS Motion at 3:18-19.

28 ¹⁹ APS Motion at 3:21.

²⁰ APS Motion at 3:22.

²¹ *Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 456, 459 (D. Kan. 1999).

²² *Shuffle Master, Inc. v. Progressive Games, Inc.*, 170 F.R.D. 166, 172 (D. Nev. 1996).

²³ *Id.*

1 follow-up. The free-flowing information exchange in a deposition makes it the cornerstone of
2 civil discovery.

3 Depositions come with rules minimizing a party's ability to influence the evidence. For
4 example, Rule 32(d)(3)(D) prohibits speaking objections because they "suggest answers to the
5 witness." Rule 32(d)(3)(E) limits off-the-record conferences. If obeyed, these rules guarantee
6 discovery of the witness's recollection, not counsel's position.

7 EFCA's questions for Ms. Lockwood focus on her personal relationship with her
8 testimony, not after-the-fact justifications for it. In other words, EFCA wants Ms. Lockwood to
9 explain her opinions and the reasons for them in her own words. Deposition is the best discovery
10 device for that.

11 ***A. Additional written discovery is redundant and unnecessary.***

12 A party is not compelled to choose and select among the devices of discovery to the
13 exclusion of others.²⁴ Further, EFCA has a substantial record to depose Ms. Lockwood based on
14 APS's pre-filed testimony from 15 Company witnesses, including Ms. Lockwood's, which
15 organizes and addresses all aspects of this case. EFCA has also reviewed the 500 data requests in
16 this case, along with the Company's responses. Requiring EFCA to send unneeded additional
17 requests for data will not promote efficient resolution of this matter.

18 ***B. Discovery need not follow any sequence, but even if it did, depositions are not out
19 of order or overly burdensome.***

20 No precedent supports the Company's request to force EFCA to add to the numerous
21 already-served data requests before it deposes a witness. On the contrary, a deposition of a
22 disclosed party witness like Ms. Lockwood, is a matter of right.²⁵ Even if data requests were
23 deemed to be the less intrusive and preferred method of discovery, that method has already been
24 utilized extensively. Thus, although no sequence of discovery is required,²⁶ a deposition at this

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26 ²⁴ *Hine v. Super. Ct. In and For Yuma County*, 504 P.2d 509, 512 (Ariz. App. 1st Div. 1972); *see also*, Ariz. R. Civ. P. Rule 26(d).

27 ²⁵ Ariz. R. Civ. P. Rule 30(a).

28 ²⁶ Ariz. R. Civ. P. Rule 26(d) (Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.)

1 junction could not possibly be out of sequence. Further, in *American Family Mutual Insurance*
2 *Company v. Grant*, cited by APS in its motion, the court cited an example of an instance when
3 depositions were deemed to be actually *less* intrusive than written discovery.²⁷ After praising the
4 “legal and equitable merit” of prompt deposition discovery, the court wrote: “Requiring litigants
5 to at least initially pursue less intrusive discovery [depositions] before resorting to sweeping
6 [written discovery] demands ... [i]s also consistent with the mandate that the rules of civil
7 procedure, including those relating to discovery, ‘be construed to secure the just, speedy, and
8 inexpensive determination of every action.’”²⁸ The Company presents this quote as if the court
9 endorsed a written discovery requirement prior to conducting a deposition. Rather, the Court of
10 Appeals actually praised the prompt use of depositions.

11 Immediately after praising prompt-deposition jurisdictions, the Court of Appeals held that,
12 “[u]nlike some jurisdictions, we see no reason to *require* a party to first” use one form of discovery
13 before another.²⁹ Instead, “discovery methods ‘may be used in any sequence.’”³⁰ The lawyer
14 seeking discovery may select the order and timing of discovery.³¹ It recognized that “[i]n *some*
15 cases,” written discovery “may be an appropriate first step in gathering” evidence, “especially if
16 the information is needed to prepare for a deposition.”³² But it left that strategic decision to the
17 party seeking discovery. If extensive disclosure (such as pre-filed testimony plus 500 data
18 requests) has already occurred, a party need not send additional, superfluous discovery to prepare
19 for a deposition.

20 //

23 ²⁷ *Am. Fam. Mut. Ins. Co. v. Grant*, 217 P.3d 1212, 1218 (Ariz. App. 1st Div. 2009) (citing *Primm v. Isaac*, 127
24 S.W.3d 630, 638 (Ky.2004) (“As [the claimant] has yet to take Dr. Primm's deposition and question him about the
25 sought-after information, the least burdensome route of discovery was simply not followed.”) *See also, Hine v. Super.*
26 *Ct. In and For Yuma County*, 504 P.2d 509, 512 (Ariz. App. 1st Div. 1972) (“In the early days of the rules, when the
view was held by some courts that interrogatories should be relatively few and limited to the important issues of the
case, courts on occasion refused to require interrogatories to be answered if they believed that the information sought
could be obtained more conveniently and efficiently by means of oral depositions.”).

27 ²⁸ *Id.* at 1218.

28 ²⁹ *Id.*

³⁰ *Id.*

³¹ *See, id.*

³² *Id.* (emphasis added).

1 **III. EFCA needs a prompt deposition now in order to fully prepare its case and avoid**
2 **significant time constraints subsequent to APS rebuttal and prior to hearing.**

3 EFCA needs a prompt deposition to prepare direct testimony and prepare for trial. EFCA's
4 deadline to submit direct testimony is December 21, 2016. Before that deadline, EFCA must: 1)
5 depose Ms. Lockwood, 2) obtain a transcript of the deposition, 3) give Ms. Lockwood thirty days
6 to read and sign the transcript, 4) transmit the final transcript to an expert for analysis, and 5)
7 develop an expert's testimony related to her opinions. Cramming all depositions into the post-
8 rebuttal period is unworkable because the Company's rebuttal testimony is due February 17, 2016,
9 only about a month before the March 22 hearing and only fifteen (15) business days before EFCA's
10 surrebuttal testimony must be filed. That is insufficient time to receive information from a
11 deposition and prepare for hearing.

12 **IV. Pre-emptively limiting the scope of a deposition would frustrate the entire purpose of**
13 **this discovery method.**

14 The Rules of Civil Procedure define the scope of deposition questioning: "Parties may
15 obtain discovery regarding any matter, not privileged, which is relevant to the subject matter
16 involved in the pending action.... It is not grounds for an objection that the information sought
17 will be inadmissible at trial if the information sought appears reasonably calculated to lead to the
18 discovery of admissible evidence."³³ Because depositions lack a judicial officer to rule on
19 objections, witnesses answer questions subject to any stated objections.³⁴ Objections are preserved
20 and the tribunal may later rule on them.³⁵ Those rules are consistent with the purpose of discovery;
21 parties get to learn what the evidence is before they debate ultimate issues of relevance or
22 admissibility.

23 In contrast, the Company's proposed ad hoc standard is unworkable. Its ill-defined request
24 to limit questioning to topics "directly related to the content of that witness's written testimony"³⁶
25 is vague and would create more questions than answers. For example:

27 ³³ Ariz. R. Civ. P. 26(b)(1)(A).

28 ³⁴ Ariz. R. Civ. P. 30(c).

³⁵ Ariz. R. Civ. P. 32(d)(3).

³⁶ APS Motion at 7:15-16.

- 1 • Does the influence of possible bias on a witness’s testimony “directly relate[]” to that
2 testimony?
- 3 • Does a witness’s prior statement on the same subject matter “directly relate[]” to that
4 testimony?
- 5 • Do the circumstances of a prior inconsistent statement “directly relate[]” to that testimony?
- 6 • What is the difference between questioning that “directly relates” to pre-filed testimony
7 and questioning that indirectly relates to pre-filed testimony.
- 8 • Ms. Lockwood’s pre-filed testimony references other witnesses’ pre-filed testimony; do
9 questions about the testimony she incorporates by reference “directly relate” to her
10 testimony?

11 The Company’s proposed standard opens a Pandora’s Box of potential discovery disputes. It will
12 encourage parties to make otherwise captious objections, perhaps sincerely believing this
13 unusually restrictive standard supports their position. Each objection forces all parties to litigate
14 a motion to compel. An unknown, unpredictable standard would govern all of this discovery
15 litigation.

16 In contrast, the Rule 26(b) standard is known, understood, and predictable. Applying this
17 standard, depositions routinely cover: 1) prior witness statements related to similar subjects, 2)
18 whether the witness has relevant knowledge beyond their disclosed testimony, 3) the witness’s
19 response to testimony of other witnesses 4) possible sources of bias, especially for opinion
20 witnesses, 5) the witness’s relationship with other parties or witnesses, 6) the witness’s
21 involvement in the case or similar matters, and 7) potential impeachment.

22 The Company does not provide any authority to support restricting these areas of inquiry
23 because none exists. Its only justification for upending traditional depositions rules is an
24 unsubstantiated allegation that counsel might “ask questions that are purely politically motivated and
25 specifically meant to harass or embarrass.”³⁷ Accordingly, the presiding officer should allow for the
26 established rules of procedure on this issue to govern.

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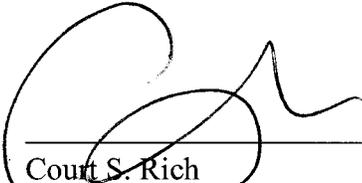
³⁷ APS Motion at 7:21-22.

1 **Conclusion**

2 The Company's speculative motion does not meet the burden of proof required for the
3 Commission to grant its requested relief. APS has put forth no evidence supporting its allegation
4 that any party will engage in prohibited conduct.

5 Even if, for some reason, the Company's personal sentiment overwhelmed that assurance,
6 the objective, well-known standards in the Rules of Civil Procedure give it adequate protection.
7 Like any litigant, it benefits from an objective discovery standard with written, well-known
8 enforcement mechanisms. Complicating this case with an unprecedented discovery restrictions is
9 overly burdensome. EFCA respectfully requests that APS's motion be denied.

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11 Respectfully submitted this 12th day of October, 2016.

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15 _____
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18 Attorney for Energy Freedom Coalition of America
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1 **Original and 13 copies filed on**
2 **this 14th day of October, 2016 with:**

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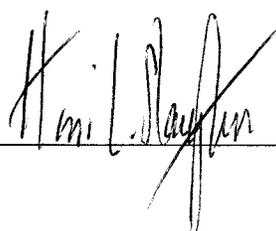
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