

OPEN MEETING ITEM



ORIGINAL



COMMISSIONERS  
JEFF HATCH-MILLER - Chairman  
WILLIAM A. MUNDELL  
MARC SPITZER  
MIKE GLEASON  
KRISTIN K. MAYES

ARIZONA CORPORATION COMMISSION

22

DATE: January 24, 2005  
DOCKET NO: SW-04002A-02-0837  
WS-02987A-02-0837  
TO ALL PARTIES: SW-04002A-04-0465  
WS-02987A-04-0465

Arizona Corporation Commission  
**DOCKETED**  
JAN 24 2005

DOCKETED BY

Enclosed please find the recommendation of Assistant Chief Administrative Law Judge Dwight D. Nodes. The recommendation has been filed in the form of an Opinion and Order on:

ARIZONA UTILITY SUPPLY & SERVICES LLC.  
(CC&N TRANSFER/TRANSFER OF ASSETS)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00 p.m.** on or before:

FEBRUARY 2, 2005

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Open Meeting to be held on:

FEBRUARY 8 AND 9, 2005

For more information, you may contact Docket Control at (602)542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Secretary's Office at (602) 542-3931

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BRIAN C. McNEIL  
EXECUTIVE SECRETARY

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 JEFF HATCH-MILLER, Chairman  
4 WILLIAM A. MUNDELL  
5 MARC SPITZER  
6 MIKE GLEASON  
7 KRISTIN K. MAYES

8 IN THE MATTER OF THE APPLICATION OF  
9 ARIZONA UTILITY SUPPLY & SERVICES,  
10 L.L.C. FOR THE TRANSFER OF A PORTION OF  
11 ITS CERTIFICATE OF CONVENIENCE AND  
12 NECESSITY TO JOHNSON UTILITIES, L.L.C.

DOCKET NO. SW-04002A-02-0837  
DOCKET NO. WS-02987A-02-0837

13 IN THE MATTER OF THE APPLICATION OF  
14 ARIZONA UTILITY SUPPLY & SERVICES,  
15 L.L.C. TO TRANSFER ITS ASSETS AND  
16 CERTIFICATE OF CONVENIENCE AND  
17 NECESSITY TO JOHNSON UTILITIES, L.L.C.

DOCKET NO. SW-04002A-04-0465  
DOCKET NO. WS-02987A-04-0465

DECISION NO. \_\_\_\_\_

**OPINION AND ORDER**

18 DATE OF HEARINGS:

July 16, 2004 and December 9, 2004; Procedural  
Status Conferences: July 30, August 6, August  
24, September 13, September 29, October 14,  
October 21, November 4, and December 1, 2004.

19 PLACE OF HEARINGS:

Phoenix, Arizona

20 ADMINISTRATIVE LAW JUDGE:

Dwight D. Nodes

21 APPEARANCES:

Mr. Jay L. Shapiro, FENNEMORE CRAIG,  
P.C., on behalf of Johnson Utilities, L.L.C. dba  
Johnson Utilities Company;

Ms. Lynn Keeling, KEELING LAW OFFICE,  
on behalf of Arizona Utility & Supply Services,  
L.L.C.<sup>1</sup>;

Mr. Jeffrey C. Zimmerman, MOYES STOREY,  
LTD, on behalf of Arizona Utility & Supply  
Services, L.L.C.;

Mr. Maurice Lee, on behalf of Arizona Utility &  
Supply Services, L.L.C.;

Mr. Todd Wiley, GALLAGHER & KENNEDY,  
on behalf of Centex Homes;

22 \_\_\_\_\_  
23  
24  
25  
26  
27  
28 <sup>1</sup> Ms. Keeling filed a Motion to Withdraw as Counsel of Record for Arizona Utility & Supply Services, L.L.C., on  
December 15, 2004.

1 Mr. J. Scott Rhodes, JENNINGS, STROUSS &  
SALMON, PLC, on behalf of RS Investments;<sup>2</sup>

2 Mr. Stanley B. Lutz, BRYAN CAVE, LLP, on  
3 Behalf of KB Homes; and

4 Mr. Jason Gellman, Staff Attorney, Legal  
5 Division, on behalf the Utilities Division of the  
Arizona Corporation Commission.

6 **BY THE COMMISSION:**

7 On November 8, 2002, Arizona Utility Supply & Services, L.L.C. ("AUSS") filed with the  
8 Arizona Corporation Commission ("Commission") an application in Docket Nos. SW-04002A-02-  
9 0837 and WS-02987A-02-0837 ("02-0837 Dockets") for the transfer of a portion of its Certificate of  
10 Convenience and Necessity ("CC&N") to Johnson Utilities, L.L.C. dba Johnson Utilities Company  
11 ("Johnson").

12 On June 3, 2004, a Procedural Order was issued setting a hearing for July 9, 2004 in the 02-  
13 0837 Dockets.

14 By Procedural Order issued June 17, 2004, the hearing date in the 02-0837 Dockets was  
15 rescheduled for July 16, 2004, at the request of all parties, and the applicable time clock rules were  
16 extended accordingly. The Procedural Order referenced the fact that an emergency situation  
17 involving potential overflows of wastewater on the AUSS system had been temporarily averted by  
18 Johnson's agreement to accept wastewater and effluent from AUSS pending consideration of the  
19 pending application. Johnson's agreement to accept wastewater and effluent from the AUSS system  
20 was facilitated by the Commission's Utilities Division Staff ("Staff") and the Arizona Department of  
21 Environmental Quality ("ADEQ").

22 On June 22, 2004, AUSS filed an application in Docket Nos. SW-04002A-04-0465 and WS-  
23 02987A-04-0465 ("04-0465 Dockets") seeking authority to transfer assets and the entirety of its  
24 CC&N to Johnson.

25 On June 28, 2004, Staff filed a Motion to Consolidate the above-captioned dockets. On June  
26 29, 2004, Staff filed a consolidated Staff Report, recommending approval of the applications subject

27 \_\_\_\_\_  
28 <sup>2</sup> By Procedural Order issued December 2, 2004, Mr. Rhodes and the firm of Jennings, Strouss & Salmon, PLC, were  
granted permission to withdraw as counsel for RS Investments.

1 to certain conditions.

2 By Procedural Order issued June 30, 2004, the above-captioned cases were consolidated and a  
3 consolidated hearing was scheduled for July 16, 2004.

4 On July 16, 2004, the hearing was held as scheduled. At the conclusion of the July 16, 2004  
5 hearing, the parties requested additional time to engage in settlement discussions regarding certain  
6 issues that arose shortly before and during the July 16, 2004 hearing.

7 Procedural teleconferences were conducted with all parties on July 30 and August 6, 2004.

8 On August 4, 2004, AUSS filed a Chapter 7 bankruptcy petition in U.S. Bankruptcy Court for  
9 the District of Arizona ("Bankruptcy Court") (Case No. 4:04-bk-3873-JMM).

10 By Procedural Order issued August 9, 2004, a hearing was scheduled for August 25, 2004 in  
11 the consolidated AUSS/Johnson CC&N transfer application cases.

12 On August 18, 2004, the Commission issued a Show Cause Order against AUSS in Docket  
13 No. SW-04002A-04-0600 regarding alleged deficiencies at two of the Company's wastewater  
14 treatment facilities (Decision No. 67101). The Order also directed Staff to appoint an interim  
15 manager to operate the AUSS system in order to protect the health, safety, and welfare of AUSS  
16 customers.

17 On August 24, 2004, a telephonic procedural conference was conducted to discuss the status  
18 of the CC&N transfer proceeding. The parties agreed that the August 25, 2004 hearing should be  
19 cancelled and that a subsequent status conference should be held after the parties had an opportunity  
20 to discuss the possibility of settlement of issues raised in the above-captioned dockets, as well as in  
21 the AUSS bankruptcy proceeding.

22 Additional telephonic status conferences were held on September 13, September 29, October  
23 14, October 21, and November 4, 2004. During those conferences, the parties indicated that ongoing  
24 attempts were being made to negotiate a resolution of the issues raised in the above-captioned  
25 dockets, as well as by the bankruptcy proceeding.

26 A further telephonic status conference was conducted on December 1, 2004. During the  
27 December 1, 2004 conference, the parties indicated that the bankruptcy court had approved a  
28 settlement agreement that would allow transfer of the AUSS assets to Johnson Utilities and, as a

1 result, the critical issues had been resolved that contributed to the prior delay in concluding the  
2 hearing in the above-captioned dockets. The parties therefore requested that the hearing in this  
3 matter be resumed on an expedited basis.

4 By Procedural Order issued December 2, 2004, a hearing was scheduled for December 9,  
5 2004 to address the remaining issues related to transfer of the AUSS assets and CC&N to Johnson.

6 On December 2, 2004, Johnson and Staff filed a Revised Exhibit J-2, which sets forth a  
7 number of requirements that Johnson must satisfy as a condition of approval of the transfer of the  
8 AUSS assets to Johnson.

9 The December 9, 2004 hearing was held as scheduled. At the conclusion of the hearing, the  
10 matter was taken under advisement pending submission of a Recommended Opinion and Order.

11 \* \* \* \* \*

12 Having considered the entire record herein and being fully advised in the premises, the  
13 Commission finds, concludes, and orders that:

14 **FINDINGS OF FACT**

15 **History of Proceeding**

16 1. AUSS is a public service corporation that provides wastewater service to five sections  
17 of land (Sections 19, 20, 21, 22, and 30 of Township 2 South of Range 8 East) within Pinal County,  
18 Arizona, pursuant to a CC&N granted in Decision No. 64288 (December 31, 2001). On February 22,  
19 2002, AUSS filed a request with the Commission to modify Decision No. 64288. AUSS sought  
20 authority to modify the conditions contained in that Decision in order to be consistent with the  
21 regional wastewater plan approved in the Central Arizona Association of Governments ("CAAG")  
22 §208 Plan<sup>3</sup>.

23 2. Johnson Utilities is a public service corporation that provides water and wastewater  
24 service pursuant to an original CC&N granted in Decision No. 60223 (May 27, 1997). Subsequent  
25 CC&N extensions were granted to Johnson in Decision Nos. 61069 (August 7, 1998); 62087  
26 (November 19, 1999); 63960 (September 4, 2001); and 64062 (October 4, 2001). Decision No.

27 <sup>3</sup> Pursuant to §208 of the federal Clean Water Act, each state is required to develop and implement area-wide water  
28 quality management plans for pollution control purposes. CAAG has been designated as the area-wide water quality  
management planning agency for the Pinal and Gila County areas (Ex. S-1).

1 64288 (December 31, 2001) denied Johnson's request to extend its CC&N into the area granted to  
2 AUSS.

3 3. On November 12, 2002, AUSS filed an application in the 02-0837 Dockets requesting  
4 approval of the transfer of Section 22 of its CC&N to Johnson, consistent with the CAAG's  
5 authorization for Johnson to serve that section. The CAAG §208 Plan determined that Section 22  
6 would be better served by a larger regional reclamation plant, the Pecan Water Reclamation Plant  
7 ("Pecan Plant"), that is owned and operated by Johnson.

8 4. On September 17, 2002, ADEQ issued AUSS a Notice of Violation ("NOV") based on  
9 a site inspection of the Links Estates Wastewater Treatment Plant ("Links Plant"). On September 16,  
10 2003, ADEQ informed AUSS that most of the items of the NOV had been resolved, except for the  
11 transfer of an Aquifer Protection Permit ("APP") to AUSS (Ex. S-1, at 2). On November 13, 2003,  
12 ADEQ issued AUSS another NOV for the unauthorized discharge of effluent to a common area of  
13 the Links Plant. On January 27, 2004, ADEQ informed AUSS that the NOV was closed since the  
14 Company had complied with ADEQ's requirements (*Id.*).

15 5. The Meadow Vista Wastewater Treatment Plant, which is also known as the Ocotillo  
16 Meadows Plant ("Ocotillo Plant") was also acquired by AUSS and used to treat wastewater in its  
17 territory. ADEQ issued a NOV to AUSS on November 20, 2003 due to AUSS' failure to report a  
18 change in ownership of the Ocotillo Plant, as well as AUSS' failure to comply with operation and  
19 maintenance, monitoring, and reporting requirements. ADEQ also issued AUSS a NOV for failure to  
20 operate a subsurface disposal of effluent due to AUSS' transfer of excess effluent from the Links  
21 Plant to the Ocotillo Plant for processing. Staff stated that ADEQ had previously granted a  
22 temporary permit for AUSS to 'vault and haul' sewage from the Castlegate subdivision to the  
23 Ocotillo Plant. However, ADEQ discovered standing effluent at the plant's leach field approximately  
24 two feet deep due to AUSS directing excess effluent to the plant (*Id.* at 3).

25 6. AUSS filed an application on June 22, 2004 in the 04-0465 Dockets, seeking authority  
26 to transfer assets and the entirety of its CC&N to Johnson. This application was the result of a series  
27 of events and meetings between ADEQ, Staff, AUSS, and Johnson to attempt to remedy significant  
28 ongoing operational problems being experienced in the AUSS service territory. According to Staff,

1 AUSS had directed sewage flows to the Links Plant resulting in what ADEQ described as an  
2 'intolerable situation.' Johnson's service territory is adjacent to AUSS and Johnson was therefore in  
3 a position to assist in remedying the problems being experienced by AUSS.

4 7. In its Staff Report in the 04-0465 Dockets, Staff states ADEQ became aware that  
5 AUSS' treatment facilities were unable to properly treat wastewater flows, resulting in approximately  
6 two million gallons of effluent that exceeded regulatory standards and was not allowed to be  
7 discharged, and AUSS' treatment ponds were close to capacity (Ex. S-2, at 2). On May 4, 2004,  
8 pursuant to discussions with ADEQ and Staff, Johnson agreed to begin treatment of AUSS'  
9 wastewater. On May 6, 2004, ADEQ sent a letter to Johnson Utilities confirming Johnson's  
10 agreement to accept wastewater and effluent from the AUSS service area, on a temporary basis, in  
11 order to eliminate problems, especially at the Links Plant, the Meadow Vista (Ocotillo) Plant, and the  
12 Cambria Lift Station (*Id.* at 3).

13 8. On June 4, 2004, ADEQ, Staff, AUSS, and Johnson met to discuss compensation for  
14 treatment of the AUSS wastewater and effluent, but were unable to reach an agreement. Further  
15 discussions were conducted on June 9, 2004 to discuss ongoing problems with AUSS, as well as a  
16 proposed service agreement between AUSS and Johnson. On June 11, 2004, AUSS and Johnson  
17 entered into a Bulk Wastewater Treatment and Effluent Disposal Agreement which was to provide  
18 compensation to Johnson for providing treatment services and required AUSS to request transfer of  
19 its CC&N to Johnson (*Id.*).

20 9. On June 3, 2004, a Procedural Order was issued setting a hearing for July 9, 2004 in  
21 the 02-0837 Dockets. By Procedural Order issued June 17, 2004, the hearing date in the 02-0837  
22 Dockets was rescheduled for July 16, 2004, at the request of all parties, and the applicable time clock  
23 rules were extended accordingly. AUSS was directed to mail notice of the hearing to its customers  
24 by June 18, 2004. Certification of Mailing of the notice was filed by AUSS on July 2, 2004.

25 10. AUSS filed its application on June 22, 2004 in the 04-0465 Dockets and, on June 28,  
26 2004, Staff filed a Motion to Consolidate the above-captioned dockets. On June 29, 2004, Staff filed  
27 a consolidated Staff Report (Ex. S-2), recommending approval of the applications subject to certain  
28 conditions. By Procedural Order issued June 30, 2004, the above-captioned cases were consolidated

1 and a consolidated hearing was scheduled for July 16, 2004. AUSS was directed to mail notice of the  
2 consolidated hearing to its customers by July 6, 2004. Certification of Mailing of the notice was filed  
3 by AUSS on July 9, 2004. The hearing in the consolidated dockets was held as scheduled on July 16,  
4 2004.

5 11. Shortly before the July 16, 2004 hearing, Centex Homes ("Centex") and RS  
6 Investments, LLC ("RSI"), requested intervention in this consolidated proceeding, each claiming  
7 security interests in certain assets of AUSS<sup>4</sup>. At the hearing, RSI introduced into evidence a  
8 promissory note of \$805,000 from AUSS and a security agreement in the Ocotillo Plant (Exs. RS-1  
9 and RS-2). The remaining balance on the note to RS Investments is \$765,000 (Tr. 82).

10 12. On August 13, 2004, Staff filed a Complaint and Petition for Order to Show Cause  
11 against AUSS due to Staff's claim that AUSS was incapable of providing safe, reasonable and/or  
12 adequate service to its customers. Staff alleged that two of AUSS' wastewater treatment plants, the  
13 Links and Ocotillo Plants, were deficient and not in compliance with ADEQ regulations.

14 13. On August 18, 2004, the Commission issued Decision No. 67201 ordering AUSS to  
15 show cause why its service should not be found unjust, unreasonable, and in violation of numerous  
16 Commission regulations and prior Commission Orders, and why AUSS' CC&N should not be  
17 revoked. That Decision also appointed an interim manager to conduct the operations and business of  
18 AUSS until further order of the Commission<sup>5</sup>.

19 14. As stated above, AUSS filed a Chapter 7 bankruptcy petition on August 4, 2004.  
20 Negotiations ensued between the bankruptcy trustee, AUSS, Johnson, Staff, Centex, and other  
21 parties. A number of procedural status conferences were conducted to monitor progress with respect  
22 to disposition of the AUSS assets and ongoing service being provided by AUSS through the interim  
23 manager and bulk service arrangements with Johnson.

24 15. A hearing was conducted in the Bankruptcy Court on November 29, 2004. The Court  
25 approved the settlement presented by creditors for the sale of the AUSS assets.

26  
27 <sup>4</sup> The Centex intervention request was filed on July 12, 2004 and the RS Investments intervention request was filed on  
28 July 14, 2004. Both requests were granted at the July 16, 2004 hearing.

<sup>5</sup> First National Management was appointed interim manager of AUSS.

1 **Post-Bankruptcy Conditions and "Order Preliminary"**

2 16. Staff and Johnson filed a Revised Exhibit J-2 on December 2, 2004 (admitted as  
3 Exhibit J-4 at the December 9, 2004 hearing and attached hereto as "Attachment A") which set forth  
4 a number of requirements that must be satisfied as a condition of extending Johnson's CC&N into the  
5 area currently certificated to AUSS. In the December 2, 2004 filing, Staff and Johnson also requested  
6 that the Commission issue, pursuant to A.R.S. §40-282(D), an "Order Preliminary" to the issuance of  
7 the ultimate CC&N to Johnson. A.R.S. §40-282(D) provides:

8 If a public service corporation desires to exercise a right or privilege under  
9 a franchise or permit which it contemplates securing, but which has not  
10 yet been granted to it, the corporation may apply to the commission for an  
11 *order preliminary* to the issue of the certificate. The commission may  
12 make an order declaring that it will thereafter, upon application, under  
13 rules it prescribes, issue the desired certificate, upon terms and conditions  
14 it designates, after the corporation has obtained the contemplated franchise  
15 or permit or may make an order issuing a certificate on the condition that  
16 the contemplated franchise or permit is obtained and on other terms and  
17 conditions it designates. If the commission makes an order preliminary to  
18 the issuance of the certificate, upon presentation to the commission of  
19 evidence that the franchise or permit has been secured by the corporation,  
20 the commission shall issue the certificate. (emphasis added)

21 17. In accordance with Exhibit J-4, Johnson would be required to satisfy the following  
22 conditions before its CC&N would be extended into the areas currently certificated to AUSS:

- 23 a) Johnson must acquire the assets specified in Exhibit A attached to the  
24 exhibit ("Utility Assets") free and clear of any liens or other  
25 encumbrances;  
26 b) The Utility Assets are located within either public rights-of-way to  
27 which Johnson shall have authorized access and/or within granted  
28 easements, the rights to both of which will be transferred to Johnson  
along with any franchise rights AUSS has under a franchise or similar  
agreement with Pinal County, to the extent such franchise or other  
rights are needed by Johnson to serve;  
c) The Utility Assets being acquired in order for it to commence service  
in the area currently certificated to AUSS can be operated by Johnson  
in accordance with all necessary governmental approvals, including,  
without limitation, approvals required by ADEQ and Pinal County,  
and that, to the extent required, all such approvals have been  
transferred from AUSS to Johnson;  
d) Johnson must also satisfy each of the following requirements by filing  
each of the items listed below with the Commission in the 02-0837 and

## 04-0465 Dockets:

- i) ADEQ's written confirmation affirming that Johnson's Pecan wastewater reclamation plant ("Pecan Plant") has adequate wastewater treatment capacity for Johnson to provide wastewater treatment services to each of the subdivisions listed in Exhibit B attached to Revised Exhibit J-2;
- ii) ADEQ's written confirmation affirming that the Pecan Plant, as constructed and planned, conforms to all applicable requirements for setbacks;
- iii) ADEQ's written approval of the transfer of the existing reuse permit to discharge effluent on the Links Golf Course to Johnson without additional conditions or modifications;
- iv) ADEQ's issuance of an Engineering Certificate of Completion ("ECC") for the existing 6-inch pipeline located in Section 20 of Township 2 South, Range 8 East and approval to allow conversion of this 6-inch pipeline from an effluent delivery line to a wastewater force main and approval of the modifications to the lift stations located at the Links Plant to allow the bypass of the treatment plant;
- v) All ADEQ requisite approvals for construction and operation of a lift station at the site of the former Links Plant to allow the bypass of the Links Plant;
- vi) ADEQ's written indication that it will not hold Johnson responsible for any violations of law or regulation and/or odor and operational problems related to the Utility Assets, is not intended to relieve Johnson of its obligation to operate and maintain the Utility Assets in accordance with applicable laws and regulations after the conveyance, including the obligation to provide safe, reliable and reasonable service in accordance with A.R.S. §40-321, or to waive the Commission's regulatory authority to ensure that Johnson is providing safe, reliable and reasonable service pursuant to the Article XV of the Arizona Constitution and A.R.S. §§40-202, 40-203, and 40-321.

18. Under the Order Preliminary concept, once Johnson has satisfied the above-stated requirements it would be required to file proof that the conditions have been met. Johnson's executive vice-president, Brian Tompsett, testified that he believes these conditions can be satisfied within a period of 90 to 180 days (Tr. 216-218). After such filing by Johnson, and upon verification by Staff that the conditions have been satisfied, the Commission would be requested at a subsequent

1 Open Meeting to approve the following three items: 1) deletion of AUSS' CC&N; 2) extension of  
 2 Johnson's CC&N into the area currently served by AUSS<sup>6</sup>, in accordance with a legal description of  
 3 the CC&N area, upon notice of closing of the transfer from AUSS to Johnson; and 3) approval of the  
 4 transfer of the AUSS Utility Assets to Johnson (Ex. J-4, at 2). The agreement between Staff and  
 5 Johnson also provides that, until these conditions are met, Johnson may not serve the AUSS service  
 6 area, except to provide bulk wholesale wastewater and/or bulk effluent treatment and disposal service  
 7 pursuant to agreements entered into by Johnson (*Id.*).

8 19. In accordance with the amended set of conditions, extension of Johnson's CC&N into  
 9 the current AUSS territory would also be subject to the following:

- 10 a) Johnson shall provide wastewater utility services in the extension area  
 11 under its [Johnson's] existing rates and charges (only after issuance of  
 12 a subsequent "final Order" of the Commission);  
 13 b) Johnson shall file documentation of the transfer of the Utility Assets  
 14 within 180 days of the Decision approving the above-stated items  
 15 (*i.e.*, deletion of the AUSS CC&N; transfer of the CC&N to Johnson;  
 16 and transfer of Utility Assets to Johnson). The documentation shall  
 17 include a detailed list of all of the assets transferred to Johnson; and  
 18 c) Johnson shall provide safe and reliable service in accordance with all  
 19 applicable Commission regulations and Arizona law (*Id.* at 3).

20 20. The agreement between Staff and Johnson would allow Johnson to defer the following  
 21 costs into Account 186-Miscellaneous Deferred Debits<sup>7</sup>: amounts for bulk wastewater treatment and  
 22 effluent treatment and disposal services provided to AUSS and/or customers in the AUSS service  
 23 territory for which Johnson has not been paid<sup>8</sup>; and all reasonable costs associated with the  
 24 acquisition of the Utility Assets and extension of Johnson's CC&N to include the area currently  
 25 certificated to AUSS<sup>9</sup>. The agreement provides that these deferred costs are subject to verification by

26 <sup>6</sup> The extension of Johnson's CC&N would not include the areas in Sections 19 and 30 that are currently certificated to  
 27 AUSS, but in which no customers are currently served. The town of Queen Creek has indicated that it intends to provide  
 28 service to those areas at some point in the future (Tr. 190-191).

<sup>7</sup> This request for approval to defer costs requires the Commission to provide specific deferral authorization to treat costs  
 in a manner that differs from generally accepted accounting principles. Such a deferral mechanism, pursuant to an  
 authorized accounting order, is permitted under National Association of Regulatory Commissioners ("NARUC") Uniform  
 System of Accounts ("USOA") guidelines.

<sup>8</sup> Johnson claims that it has to date incurred costs of approximately \$130,000 for which it has not been compensated under  
 bulk wastewater service agreements with AUSS (Tr. 218).

<sup>9</sup> Johnson's witness stated that the company has to date incurred more than \$300,000 in expenses related to acquisition of  
 the AUSS assets and CC&N (Tr. 218).

1 Staff, and review by the Commission, in Johnson's next general rate filing to determine what costs  
2 are prudent and reasonable for future recovery and/or inclusion in rate base (*Id.*).

3 21. The final provision in the agreement between Staff and Johnson states that, given the  
4 AUSS bankruptcy filing, any transaction involving the transfer of the Utility Assets would be subject  
5 to the approval of the Bankruptcy Court in Case No. 4:04-bk-03873-JMM. The agreement further  
6 provides that any Commission Order involving transfer of the Utility Assets would not take effect  
7 until all requisite approvals are obtained from the Bankruptcy Court. Until all approvals are obtained  
8 in all applicable jurisdictions, including from the Commission and the Bankruptcy Court, AUSS  
9 would still be obligated to provide safe, adequate and reliable service to all of its certificated area  
10 (*Id.*).

11 **Discussion and Resolution**

12 22. This proceeding presents a number of unusual facts and circumstances. As described  
13 above, by early 2004 AUSS' treatment facilities had deteriorated to the point that they were, at best,  
14 functioning on only an intermittent basis. Due to multiple and ongoing ADEQ violations, ADEQ and  
15 the Commission's Staff attempted to find both short-term and long-term solutions for what was  
16 becoming, by mid-2004, a significant health and safety concern for residents in the AUSS service  
17 territory. Through the efforts of ADEQ and Staff, and the willingness of Johnson and homebuilders  
18 in the area to take on the issues raised by the malfunctioning AUSS system, a public health crisis in  
19 the area was narrowly averted.

20 23. Other complicating factors in this proceeding were the eleventh-hour claims raised by  
21 third party creditors and the bankruptcy filing by AUSS, which will ultimately result in a liquidation  
22 of its assets. Staff, Johnson, and the developers/homebuilders, led primarily by Centex, negotiated a  
23 settlement with the bankruptcy trustee, which was approved by the Bankruptcy Court. The  
24 agreement should enable the AUSS assets to be acquired by Johnson and for Johnson to provide  
25 uninterrupted wastewater service to the AUSS customers once the CC&N is transferred to Johnson  
26 pursuant to the conditions set forth in Exhibit J-4. We believe the agreement between Staff and  
27 Johnson represents a reasonable settlement of the many inter-related issues, in multiple jurisdictions,  
28 and therefore is in the public interest and should be approved.

1           24.     As noted above, Johnson seeks an Order Preliminary from the Commission, pursuant  
2 to A.R.S. §40-282(D), in order to proceed with its plans to acquire the AUSS assets under the  
3 settlement approved by the Bankruptcy Court. Under the Johnson and Staff proposal, the requested  
4 Order Preliminary would impose certain requirements on Johnson that must be satisfied prior to  
5 issuance of a subsequent Commission Order formally deleting the AUSS Certificate and transferring  
6 the CC&N to Johnson.

7           25.     In a recent Decision, we pointed out that although A.R.S. §40-282(D) permits the  
8 issuance of an Order Preliminary, the process apparently has not been used by the Commission for a  
9 number of years. *See, Utility Source, LLC*, Decision No. 67446 (January 4, 2005). In recent years,  
10 the Commission has followed the practice of granting so-called "Conditional CC&Ns" whereby a  
11 company is granted a CC&N for a given territory subject to compliance with certain conditions set  
12 forth in the Order. Under the Conditional CC&N policy, no further action by the Commission is  
13 necessary because the CC&N automatically becomes effective upon satisfaction of the conditions, or  
14 becomes null and void if the conditions are not met within the time period designated in the Order.  
15 In the *Utility Source* case we declined to issue an Order Preliminary due to concerns with the  
16 company's failure to obtain necessary regulatory approvals, and its inability to obtain certification of  
17 a sufficient supply of water for the requested CC&N area (Decision No. 67446, at 10-11).

18           26.     We believe that, given the number of unresolved issues, including acquisition of  
19 necessary rights of way, compliance with ADEQ regulations, and final approval by the Bankruptcy  
20 Court, the request for an Order Preliminary is appropriate under the unique facts of this case.  
21 Granting an Order Preliminary will enable Johnson to move forward with its plans for acquiring the  
22 AUSS assets and securing necessary regulatory approvals, while maintaining the Commission's  
23 authority to ensure that all requirements have been met. Once Staff has determined Johnson's  
24 compliance with the conditions set forth in Exhibit J-4, we will have a further opportunity to review  
25 Staff's recommendation and issue a final Order in this proceeding.

26           27.     We are appreciative of Johnson's willingness to serve the AUSS territory under  
27 difficult circumstances, but we also recognize that the existing AUSS customers will experience an  
28 increase in wastewater rates once we have issued a final Order approving Johnson's acquisition of the

1 AUSS assets and CC&N. AUSS customers are currently billed \$30.00 per month for wastewater  
 2 service. Johnson's rate of \$38.50 per month would be applied to the AUSS customers once the  
 3 CC&N transfer is completed. Given this proposed change from AUSS rates to Johnson's rates for  
 4 current AUSS customers, Johnson should notify such customers that rates will increase to \$38.50  
 5 once Johnson obtains the CC&N, in a form approved by Staff, within 60 days of the effective date of  
 6 this Decision. The notice should advise customers of the procedure for sending correspondence  
 7 regarding this matter. If necessary, a public comment hearing and/or evidentiary hearing may be  
 8 conducted prior to issuance of a final Order.

### 9 CONCLUSIONS OF LAW

10 1. AUSS and Johnson are public service companies within the meaning of Article XV of  
 11 the Arizona Constitution and A.R.S. §§40-281, 40-282 and 40-285.

12 2. The Commission has jurisdiction over AUSS and Johnson, and the subject matter of  
 13 the applications.

14 3. Notice of the applications was given in the manner described herein.

15 4. Pursuant to A.R.S. §40-282(D), it is appropriate under the unique facts and  
 16 circumstances of this case to issue an Order Preliminary.

17 5. In accordance with the Order Preliminary issued pursuant to A.R.S. §40-282(D),  
 18 Johnson shall be required to comply with all conditions set forth in its agreement with Staff.

19 6. The cost deferral authorization granted herein does not constitute a finding or  
 20 determination that such costs are reasonable, appropriate or prudent.

### 21 ORDER

22 IT IS THEREFORE ORDERED that, pursuant to A.R.S. §40-282(D), an Order Preliminary is  
 23 hereby issued to Johnson Utilities Company that will authorize Johnson to acquire specified assets of  
 24 Arizona Utility Supply & Services, L.L.C., and the portion of the AUSS CC&N area described  
 25 herein, following compliance with the conditions described herein and issuance of a subsequent  
 26 Order approving the acquisition of assets, deletion of the AUSS CC&N, and extension of the CC&N  
 27 to Johnson.

28 IT IS FURTHER ORDERED that, prior to issuance of a final Order, Johnson Utilities

1 Company must acquire the Utility Assets specified in Exhibit A of Attachment A hereto free and  
2 clear of any liens or other encumbrances.

3 IT IS FURTHER ORDERED that, prior to issuance of a final Order, Johnson Utilities  
4 Company shall have authorized access to the acquired Utility Assets within either public rights-of-  
5 way and/or the Utility Assets must be within granted easements, the rights to both of which will be  
6 transferred to Johnson Utilities Company along with any franchise rights Arizona Utility Supply &  
7 Services, L.L.C. has under a franchise or similar agreement with Pinal County, to the extent such  
8 franchise or other rights are needed by Johnson Utilities Company to serve.

9 IT IS FURTHER ORDERED that, prior to issuance of a final Order, the Utility Assets being  
10 acquired by Johnson Utilities Company in order for it to commence service in the area currently  
11 certificated to Arizona Utility Supply & Services, L.L.C. must be operated by Johnson in accordance  
12 with all necessary governmental approvals, including, without limitation, approvals required by  
13 ADEQ and Pinal County, and that, to the extent required, all such approvals must be transferred from  
14 Arizona Utility Supply & Services, L.L.C. to Johnson Utilities Company.

15 IT IS FURTHER ORDERED that, prior to issuance of a final Order, Johnson Utilities  
16 Company must also satisfy each of the following requirements by filing each of the items listed  
17 below with the Commission in the above-captioned 02-0837 and 04-0465 Dockets: (1) ADEQ's  
18 written confirmation affirming that Johnson Utilities Company's Pecan wastewater treatment plant  
19 has adequate wastewater treatment capacity for Johnson Utilities Company to provide wastewater  
20 treatment services to each of the subdivisions listed in Exhibit B of Attachment A hereto; (2)  
21 ADEQ's written confirmation affirming that the Pecan Plant, as constructed and planned, conforms to  
22 all applicable requirements for setbacks; (3) ADEQ's written approval of the transfer of the existing  
23 reuse permit to discharge effluent on the Links Golf Course to Johnson Utilities Company without  
24 additional conditions or modifications; (4) ADEQ's issuance of an Engineering Certificate of  
25 Completion for the existing 6-inch pipeline located in Section 20 of Township 2 South, Range 8 East  
26 and approval to allow conversion of this 6-inch pipeline from an effluent delivery line to a  
27 wastewater force main and approval of the modifications to the lift stations located at the Links Plant  
28 to allow the bypass of the treatment plant; and (5) all ADEQ requisite approvals for construction and

1 operation of a lift station at the site of the former Links Plant to allow the bypass of the Links Plant.

2 IT IS FURTHER ORDERED that ADEQ's written indication that it will not hold Johnson  
3 Utilities Company responsible for any violations of law or regulation and/or odor and operational  
4 problems related to the Utility Assets acquired from Arizona Utility Supply & Services, L.L.C., is not  
5 intended to relieve Johnson Utilities Company of its obligation to operate and maintain the Utility  
6 Assets in accordance with applicable laws and regulations after the conveyance, including the  
7 obligation to provide safe, reliable and reasonable service in accordance with A.R.S. §40-321, or to  
8 waive the Commission's regulatory authority to ensure that Johnson Utilities Company is providing  
9 safe, reliable and reasonable service pursuant to the Article XV of the Arizona Constitution and  
10 A.R.S. §§40-202, 40-203, and 40-321.

11 IT IS FURTHER ORDERED that, upon issuance of a final Order granting a CC&N for the  
12 specified areas of the current Arizona Utility Supply & Services, L.L.C. service territory, Johnson  
13 Utilities Company shall provide wastewater utility services in the extension area under its existing  
14 tariffed rates and charges.

15 IT IS FURTHER ORDERED that Johnson Utilities Company shall file documentation of the  
16 transfer of the Utility Assets (including a detailed description of the transferred assets) within 180  
17 days of the effective date of a final Order in this proceeding approving the items described herein  
18 (*i.e.*, deletion of the AUSS CC&N; transfer of the CC&N to Johnson; and transfer of Utility Assets to  
19 Johnson).

20 IT IS FURTHER ORDERED that Johnson Utilities Company shall provide safe and reliable  
21 service in accordance with all applicable Commission regulations and Arizona law.

22 IT IS FURTHER ORDERED that Johnson Utilities Company shall be authorized to defer the  
23 following costs into Account 186-Miscellaneous Deferred Debits: (1) amounts for bulk wastewater  
24 treatment and effluent treatment and disposal services provided to Arizona Utility Supply & Services,  
25 L.L.C. and/or customers in the Arizona Utility Supply & Services, L.L.C. service territory for which  
26 Johnson Utilities Company has not been paid; and (2) all reasonable costs associated with the  
27 acquisition of the Utility Assets and extension of Johnson Utilities Company's CC&N to include the  
28 area currently certificated to Arizona Utility Supply & Services, L.L.C.

1 IT IS FURTHER ORDERED that the cost deferral authorization granted herein does not  
2 constitute a finding or determination that the deferred costs are reasonable, appropriate or prudent.

3 IT IS FURTHER ORDERED that this Decision shall not be construed as providing Johnson  
4 Utilities Company any relief through rates with respect to the ultimate recovery of the above-  
5 authorized cost deferrals.

6 IT IS FURTHER ORDERED that Johnson Utilities Company shall prepare and retain  
7 accounting records sufficient to permit detailed review, in a rate proceeding, of all deferred costs  
8 recorded as authorized herein.

9 IT IS FURTHER ORDERED that until all necessary approvals are obtained in all applicable  
10 jurisdictions, Arizona Utility Supply & Services, L.L.C. remains obligated to provide safe, adequate  
11 and reliable service to all of its certificated service area.

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1 IT IS FURTHER ORDERED that Johnson Utilities Company shall notify current Arizona  
2 Utility Supply & Services, L.L.C. customers of the increased rates associated with acquisition of the  
3 AUSS CC&N by Johnson Utilities Company, in a form approved by Staff, within 60 days of the  
4 effective date of this Decision. The notice should advise customers of the procedure for sending  
5 correspondence regarding this matter.

6 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

7 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.  
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10 CHAIRMAN

COMMISSIONER

COMMISSIONER

11  
12  
13 COMMISSIONER

COMMISSIONER

14  
15 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive  
16 Secretary of the Arizona Corporation Commission, have  
17 hereunto set my hand and caused the official seal of the  
18 Commission to be affixed at the Capitol, in the City of Phoenix,  
19 this \_\_\_\_ day of \_\_\_\_\_, 2005.

20 \_\_\_\_\_  
21 BRIAN C. McNEIL  
22 EXECUTIVE SECRETARY

23 DISSENT \_\_\_\_\_

24 DISSENT \_\_\_\_\_  
25  
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28

1 SERVICE LIST FOR:

ARIZONA UTILITY SUPPLY & SERVICE, L.L.C.  
and JOHNSON UTILITIES, L.L.C.

2  
3 DOCKET NOS.:

SW-04002A-02-0837, WS-02987A-02-0837, SW-  
04002A-04-0465 and WS-02987A-04-0465

4 Maurice Lee  
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6 Michael Baldwin  
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Supply & Services, LLC

Lynn A. Keeling  
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Phoenix, Arizona 85007

Ernest Johnson, Director  
Utilities Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, Arizona 85007

Since JUC and certain developers require certain ADEQ approvals in order for JUC to extend permanent wastewater utility service in the service territory currently certificated to AUSS, Staff recommends that JUC be issued an Order Preliminary to the Issuance of a Certificate, as authorized under A.R.S. § 40-282(D). Per that statute, the Commission can proscribe the rules to which JUC can get its CC&N extended into the service area currently served by AUSS. Hence, Staff recommends that JUC receive an order preliminary to an issuance of a certificate now, that it shall extend its CC&N only in accordance with the following rules detailed below.

A. JUC shall be required to satisfy the following conditions before its CC&N will be extended into areas presently served by AUSS:

1. JUC has acquired the assets identified in Exhibit A attached hereto ("Utility Assets") free and clear of any liens or other encumbrances.
2. The Utility Assets are located within either public rights-of-way to which JUC shall have authorized access and/or within granted easements, the rights to both of which will be transferred to JUC along with any franchise rights AUSS has under a franchise or similar agreement with Pinal County; to the extent such franchise or other rights are needed by JUC to serve.
3. The Utility Assets being acquired in order for it to commence service in the area currently certificated to AUSS can be operated by JUC in accordance with all necessary governmental approvals, including, without limitation, approvals required by ADEQ and Pinal County, and that, to the extent required, all such approvals have been transferred from AUSS to JUC.
4. JUC shall also satisfy each of the following requirements by filing each of the following five items listed below with the Commission in Docket Nos. WS-02987A-02-0837 and/or WS-02987A-04-0465:
  - a. ADEQ's written confirmation affirming that JUC's Pecan wastewater reclamation plant (ADEQ Permit No. P-105324) located at 38539 Gantzel Road, Queen Creek, Pinal County, Arizona ("Pecan Plant") has adequate wastewater treatment capacity for JUC to provide wastewater treatment services to each of the subdivisions listed in Exhibit B attached hereto.
  - b. ADEQ's written confirmation affirming that the Pecan Plant, as constructed and planned, conforms to all applicable requirements for setbacks.
  - c. ADEQ's written approval of the transfer of the existing reuse permit to discharge effluent on the Links Golf Course to JUC without additional conditions or modifications.

- d. ADEQ's issuance of an Engineering Certificate of Completion ("ECC") for the existing 6-inch pipeline located in Section 20 of Township 2 South, Range 8 East and approval to allow conversion of this 6-inch pipeline from an effluent delivery line to a wastewater force main and approval of the modifications to the lift stations located at the Links WWTP to allow the bypass of the treatment plant.
  - e. All ADEQ requisite approvals for construction and operation of a lift station at the site of the former Links WWTP to allow the bypass of the Links WWTP.
  - f. ADEQ's written indication that it shall not hold JUC responsible for any violations of any law or regulation and/or odor and operational problems related to the Utility Assets, or any other facilities owned or operated by AUSS, to the extent such violation arises out of any ownership and/or operation before the transfer of such assets to JUC. This condition is not intended to relieve JUC of its obligation to operate and maintain the Utility Assets in accordance with applicable law and regulation after conveyance, including the obligation to provide safe, reliable and reasonable service in accordance with A.R.S. § 40-321. Nor does this waive the regulatory authority of the Commission to ensure that JUC is providing safe, reliable and reasonable service per the Arizona Constitution, Article XV, Section 3 and A.R.S. §§ 40-202, 40-203, 40-321.
- B. Upon receipt of all the above items, JUC shall make a subsequent filing in this docket, attaching written proof that all of the above conditions have been complied with. Once Staff verifies that JUC has met all of the above conditions, the Commission shall then, at a subsequent open meeting, approve the following three things:
- Deletion of AUSS' CC&N.
  - Extension of JUC's CC&N into the area presently served by AUSS and consistent with the attached legal description upon notice of closing the transfer with AUSS.
  - Approval of the transfer of the Utility Assets to JUC.
- C. Until a showing by JUC that all the above conditions are met, JUC cannot and shall not serve in any of AUSS' service territory, except to provide bulk wholesale wastewater and/or bulk effluent treatment and disposal service per one or more agreements entered into by JUC as supported by Staff.

- D. Approval of JUC's extension into the area presently served by AUSS shall also be subject to the following conditions:
- That JUC shall provide wastewater utility services in the extension area under its existing rates and charges.
  - JUC shall file with Docket Control documentation of the transfer of the Utility Assets within 180 days of the decision approving the items in Section B above. The documentation shall include a detailed list of all of the assets transferred to JUC.
  - That JUC shall provide safe and reliable service per all applicable Commission regulations and Arizona law.
- E. In addition, JUC shall be allowed to defer the following costs into Account 186 – Miscellaneous Deferred Debits (i) any amounts for bulk wastewater treatment and effluent treatment and disposal services provided to AUSS and/or customers in the AUSS service territory for which JUC has not been paid and (ii) all reasonable costs associated with the acquisition of the Utility Assets and extension of JUC's CC&N to include the area presently certificated to AUSS. All such amounts shall be subject to verification by Staff and review by the Commission in JUC's next general rate filing to determine what costs are prudent and reasonable for future recovery and/or inclusion in rate base.
- F. Since AUSS has filed for Chapter 7 Bankruptcy, in Bankruptcy Case No. 4:04-bk-03873-JMM, any transaction involving the transfer of the Utility Assets will be subject to the approval of the United States Bankruptcy Court, District of Arizona. Any Commission order that involves transfer of the Utility Assets will not take effect until all requisite approvals required by the Bankruptcy Court are obtained. Until all requisite approvals are obtained in all applicable jurisdictions, including from the Commission and from the United State Bankruptcy Court, AUSS will still be obligated to provide safe, adequate and reliable service to all of its certificated area.

EXHIBIT A

AUSS SERVICE AREA INVENTORY		ADEC NO.	LINEAL FOOTAGE OF PIPE, NO. OF MANHOLES AND CO'S, NO. OF SERVICE TAPS			
ITEM	PROJECT		15" S.L.	12 S.L.	10" S.L.	8" S.L.
1	Southwood Trunk Sewer	20030316	3648	7116	0	0
2	Los Praderas Collection system	20010265	0	0	0	10356
3	Los Praderas Lift Station & Force main		0	0	0	0
4	Cambria Parcel 1 thru 6		0	0	1805	26829
5	Cambria Lift Station	20000570	0	0	0	0
6	Meadow Vista Phase 1 & 2	990573	0	0	0	3618
7	Castlegate Facilities Unknown					
8	Other Infrastructure Necessary for JUC to Serve					
9	Easements, Rights-of-way and Permits Necessary for JUC to Serve					

**EXHIBIT B****LIST OF SUBDIVISIONS TO BE SERVED AT PECAN PLANT**

Subdivision Name	ADEQ File No.
Pecan Creek N. - Parcel 1	20020580
Pecan Creek N. - Parcel 2	20020581
Pecan Creek N. - Parcel 3	20020582
Pecan Creek N. - Parcel 4	20020583
Pecan Creek N. - Parcel 5	20020584
Pecan Creek N. - Parcel 6	20020585
Pecan Creek N. - Parcel 7	20020586
Pecan Creek N. - Parcel 8	20020587
Castlegate Parcel 1	20020619
Castlegate Parcel 2	20020620
Castlegate Parcel 3	20010494
Castlegate Parcel 4	20020621
Castlegate Parcel 5	20010491
Castlegate Parcel 6	20010496
Castlegate Parcel 7	20010493
Castlegate Parcel 8	20030185
Castlegate Cottages P1	20010492
Castlegate Cottages P2	20010495
Castlegate Villages	20010507
Vineyard Estates	20030155
Wayne Ranch	20030492
Circle Cross Ran Parcel 1	20020420
Circle Cross Ran Parcel 2	20020421
Circle Cross Ran Parcel 3	20020422
Circle Cross Ran Parcel 4	20020423
Circle Cross Ran Parcel 5	20020424
Circle Cross Ran Parcel 6	20030122
Skyline Ranch Ph2, Parc A	20040301
Skyline Ranch Ph2, Parc B	20040303
Skyline Ranch Ph2, Parc C	20040305
Skyline Ranch Ph2, Parc D	20040306
Skyline Ranch Ph2, Parc E	20040349
Skyline Ranch Ph2, Parc F	20040350
Skyline Ranch Ph2, Parc G	20040351
Skyline Ranch Ph2, Parc H	20040304
Las Praderas, Ph 1 & 2	20010265
Meadow Vista SD	20040400
Cambria Parcel 1	20010092
Cambria Parcel 2	20000633
Cambria Parcel 3 Ph 1	20010093
Cambria Parcel 3 Ph 2	20010223
Cambria Parcel 4	20000416
Cambria Parcel 5	20000419

**DECISION NO.** \_\_\_\_\_

Cambria Parcel 6  
Cambria Parcel 7  
Laredo Ranch  
Links Estates Ph 1  
Links Estates Ph 2

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20000487  
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