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MAY 11 2005

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

AZ CORP COMMISSION  
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IN THE MATTER OF DIVERSIFIED WATER UTILITIES, INC. TO EXPAND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY TO INCLUDE ALL OF SECTION 13, 14, 15, 23 AND THAT PORTION OF SECTION 16 EAST OF RAILROAD TRACKS ALL IN T3S, R83, PINAL COUNTY, ARIZONA.

DOCKET NO. W-02859A-04-0844

IN THE MATTER OF THE APPLICATION OF JOHNSON UTILITIES COMPANY FOR AN EXTENSION OF ITS EXISTING CERTIFICATE OF CONVENIENCE AND NECESSITY FOR WATER SERVICE.

DOCKET NO. WS-02987A-04-0869

PROCEDURAL ORDER

**BY THE COMMISSION:**

On November 24, 2004, Diversified Water Utilities, Inc. ("Diversified") filed with the Arizona Corporation Commission ("Commission") an application in Docket No. W-02859A-04-0844 for an extension of its Certificate of Convenience and Necessity ("CC&N") in Pinal County by either amending Decision No. 63690 (September 4, 2001)<sup>1</sup> or alternatively by treating the filing as a new application ("Diversified Application").

On December 3, 2004, Johnson Utilities Company ("Johnson") filed an application ("Johnson Application") for an extension of its CC&N in Pinal County. The area sought by Johnson overlaps with a portion of the extension area requested by Diversified.

On January 13, 2005, a Procedural Order was issued in the Johnson Application docket scheduling a hearing for April 18, 2005 and directing Johnson to publish notice of the application.

On March 2, 2005, a Procedural Order was issued consolidating the Diversified and Johnson dockets and scheduling a Procedural Conference for March 7, 2005.

During the March 7, 2005 Procedural Conference, the parties discussed, among other things,

<sup>1</sup> Decision No. 63690 was amended by Decision No. 64062 (October 4, 2001) and Decision No. 65840 (April 22, 2003).

1 filing dates for a consolidated Staff Report and testimony, as well as hearing dates.

2 By Procedural Order issued March 16, 2005, a hearing was scheduled to begin on June 7,  
3 2005; Diversified and Johnson were directed to publish notice of the revised hearing date; and a  
4 number of other procedural filing dates were established. The April 18, 2005 date for the hearing on  
5 the Johnson Application was reserved for public comment because Johnson had completed  
6 publication of notice.

7 On March 23, 2005, the Administrative Law Judge conducted a procedural teleconference at  
8 the parties' request in order to discuss amending the procedural schedule.

9 On March 24, 2005, Johnson filed a Motion for Revised Schedule setting forth a proposed  
10 revised procedural schedule agreed to by the parties.

11 On March 25, 2005, a Procedural Order was issued changing the hearing date to July 20,  
12 2005; revising other procedural filing dates; and directing Diversified and Johnson to publish notice  
13 of the hearing date<sup>2</sup>.

14 During public comment on April 18, 2005, representatives of the developers/landowners that  
15 had previously requested water service in the proposed extension area of the Johnson Application  
16 stated that there was no longer an immediate intent to develop the property included in the Johnson  
17 Application (April 18, 2005, Tr. 4-7).

18 Based on the statements by the developers/landowners, Johnson requested that the  
19 consolidated dockets be dismissed or continued due to a lack of a need for water service in the  
20 proposed extension areas. Diversified opposed the request for dismissal or continuance due to its  
21 assertion that a general need for service exists in the area. Johnson was directed to file a motion for  
22 dismissal or continuance, and Diversified and Staff were permitted an opportunity to respond to  
23 Johnson's motion. Johnson was also ordered to submit affidavits from the affected landowners  
24 indicating their plans for development and need for water service. Discovery in the consolidated  
25 proceeding was stayed pending a decision on Johnson's written motion.

26 On April 22, 2005, Johnson filed a Motion to Continue ("Motion") the consolidated  
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28 <sup>2</sup> It does not appear that Diversified and Johnson published notice of the July 20, 2005 hearing date.

1 proceedings based on the affected landowners' withdrawals of their requests for water service<sup>3</sup>. In its  
2 Motion, Johnson argues that the hearing in this matter should be continued until at least January 2,  
3 2006 because there is no current public need and necessity in the extension areas proposed by either  
4 Diversified or Johnson. Johnson contends that a request for service is a prerequisite to granting a  
5 CC&N for a given area and, absent a request for service, an incomplete evidentiary record would  
6 exist if the proceeding is not continued until a need for service is established.

7 On April 29, 2005, Staff filed a Response to Johnson's Motion. Staff agrees with Johnson  
8 that a CC&N request requires a showing of necessity for service. Staff claims that the contested  
9 nature of the case supports the need for a continuance because difficult public interest issues are  
10 presented by the competing applications. According to Staff, requests for service will provide a more  
11 complete record for the Commission in deciding those issues. Staff suggests that a procedural  
12 conference should be scheduled in September 2005 to assess the status of the applications.

13 On May 4, 2005, Diversified filed its Response to Johnson's Motion. Diversified argues that  
14 even if the Johnson Application is continued or dismissed, the Diversified Application stands on its  
15 own and should proceed. Diversified contends that the record created in Docket Nos. W-02234A-00-  
16 0371, et al., is sufficient to support granting Diversified's application in this proceeding by amending  
17 Decision No. 63960 (September 4, 2001). Diversified cites two cases<sup>4</sup> to support its argument that  
18 the landowners' requests for service should not control a determination of whether granting a CC&N  
19 extension request is in the public interest. Diversified claims that the public interest would be  
20 advanced by granting its application before there is an immediate need for service and that it is  
21 entitled to a hearing and an opportunity to present evidence to show that the application is in the  
22 public interest. Diversified further argues that the Commission has already determined that a need  
23 for service in the proposed extension area exists based on Decision No. 64062 (October 4, 2001),  
24 which granted Johnson a CC&N extension to provide wastewater service. Therefore, Diversified  
25 requests that Johnson's Motion be denied or the Diversified Application should be severed and  
26 considered on its own merits.

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27 <sup>3</sup> Johnson attached copies of affidavits from the landowners to its Motion and filed the original affidavits on May 4, 2005.

28 <sup>4</sup> *Davis v. Ariz. Corp. Com'n*, 96 Ariz. 215, 393 P.2d 909 (1964); *James P. Paul Water Co. v. Ariz. Corp. Com'n*, 137 Ariz. 426, 671 P.2d 404 (1983).

1           Given the facts and circumstances presented in this consolidated proceeding, it is reasonable  
2 to grant a continuance of the hearing date currently scheduled for July 20, 2005. Despite  
3 Diversified's arguments to the contrary, the public interest would not be served by conducting a  
4 hearing on competing applications, or on one of those applications, where there does not currently  
5 exist a request for service from any property owner in the proposed extension areas of either  
6 application. Diversified's reliance on the *Davis* and *James P. Paul Water Co.* cases is misplaced.  
7 Although the cases cited by Diversified discuss the importance of the Commission's "public interest"  
8 consideration in evaluating the merits of a CC&N application, those cases stand primarily for the  
9 proposition that the Commission is not, pursuant to A.R.S. §40-252, barred by the doctrines of *res*  
10 *judicata* or collateral estoppel from reconsidering a prior Order. In the *James P. Paul Water Co.*  
11 case, 137 Ariz. 426, at 429, the Arizona Supreme Court further held that once a CC&N is granted, the  
12 certificate holder possesses "an exclusive right to provide the relevant service for as long as [it] can  
13 provide adequate service at a reasonable rate."

14           However, neither of the cases suggested that the Commission should consider a request for a  
15 CC&N absent a need for service. Rather, as Staff points out, a CC&N by definition requires a  
16 showing of "necessity," because the CC&N grants the holder of the certificate a monopoly franchise  
17 that may only be altered if the utility fails, upon request from a prospective customer, to supply  
18 service at a reasonable rate. 137 Ariz. 426, at 429.

19           If anything, the cases cited by Diversified support the need for a careful and deliberate  
20 consideration of a CC&N extension request before a decision to grant such an application is made. It  
21 is undisputed that Diversified has not received a single request for service in its proposed CC&N  
22 extension area. In this consolidated proceeding, the current lack of any pending requests for service  
23 from either Diversified or Johnson in the proposed extension areas is clearly a critical factor in  
24 determining whether either of the applications should proceed to hearing and consideration by the  
25 Commission. However, there is no urgency at the present time for the Commission to render a  
26 decision on either of the pending applications and neither applicant will be prejudiced by the granting  
27 of a continuance in this proceeding. Moreover, judicial economy is furthered by the continuance of a  
28 proceeding that, at the present time, is not ripe for consideration. In the event circumstances change,

1 any party may request a recommencement of the proceeding.

2 IT IS THEREFORE ORDERED that the Motion to Continue filed by Johnson Utilities  
3 Company is granted and a **Procedural Conference** shall be scheduled for **October 17, 2005, at 1:30**  
4 **p.m.**, at the offices of the Commission, 1200 West Washington, Phoenix, Arizona, to discuss the  
5 status of the pending applications.

6 IT IS FURTHER ORDERED that in the event circumstances change, any party may request a  
7 recommencement of the proceeding through the filing of an appropriate motion.

8 IT IS FURTHER ORDERED that discovery in this consolidated proceeding is stayed until  
9 further order of the Commission.

10 IT IS FURTHER ORDERED that the applicable time clock requirements shall be extended  
11 accordingly in this consolidated proceeding.

12 IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113-Unauthorized  
13 Communications) continues to apply to this proceeding.

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

17 Dated this 11<sup>th</sup> day of May, 2005

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20 DWIGHT D. NODES  
21 ASSISTANT CHIEF ADMINISTRATIVE LAW JUDGE

22 The foregoing was mailed/delivered  
this 11 day of May, 2005 to:

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