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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission
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APPLICATION OF ARIZONA UTILITY
SUPPLY AND SERVICES, LLC FOR A
CERTIFICATE OF CONVENIENCE
AND NECESSITY TO PROVIDE
SEWER SERVICE TO PORTIONS OF
PINAL COUNTY, ARIZONA.

Docket No: SW-04002A-01-0228

IN THE MATTER OF THE APPLICATION
OF JOHNSON UTILITIES, L.L.C. DBA
JOHNSON UTILITIES COMPANY
FOR AN EXTENSION OF ITS
CERTIFICATE OF CONVENIENCE
AND NECESSITY TO PROVIDE
WASTEWATER SERVICE
TO THE PUBLIC IN THE DESCRIBED
AREA IN PINAL COUNTY, ARIZONA.

Docket No: WS-02987A-01-0295

POST-HEARING BRIEF

Through this Application, Johnson Utilities Company ("Johnson Utilities") seeks to expand its Certificate of Convenience and Necessity ("CC&N") to serve northern Pinal County and the Queen Creek area as a regional provider of wastewater service. This regional approach is supported by Pinal County and will foster the public interest by allowing Johnson Utilities' customers to benefit from economies of scale that only a regional provider of wastewater service can provide.

1 The Arizona Corporation Commission (“Commission”) has certificated
2 water utilities in virtually all of the areas that are the subject of Johnson Utilities’
3 Application. In doing so, the Commission has determined that a public need exists for
4 such service. Johnson Utilities submits that the same need exists for wastewater service
5 and that extending its certificate will prevent the unneeded proliferation of septic systems
6 and small sewer systems and will allow Johnson Utilities to efficiently and cost-effectively
7 serve the requested areas.

8 In the areas contested by Arizona Utility Supply and Services (“AUSS”), the
9 Commission should not reward the premature construction activities undertaken by AUSS.
10 Statutory authority explicitly prohibits a public service corporation from constructing any
11 plant or facilities before it has received its CC&N from the Commission. Regulations of
12 the Arizona Department of Environmental Quality (“ADEQ”) further prohibit the
13 construction of a wastewater system prior to approval of a 208 Water Quality Plan
14 Amendment (“208 Amendment”). AUSS, however, has disregarded these mandates and
15 has used a corporate shell game in constructing its system prior to receiving its CC&N and
16 prior to approval of its 208 Amendment.

17 **GRANTING JOHNSON UTILITIES’ EXTENSION WILL SERVE THE PUBLIC INTEREST**

18 **A. The Commission Has Determined that a Public Need Exists**

19 Johnson Utilities seeks to serve as a regional provider of wastewater service
20 in northern Pinal County and the Queen Creek area. See Exhibits J-8 and J-9. The
21 overwhelming majority of the area requested in this Application is currently certificated to
22 water utilities, including Queen Creek Water Company, H2O, Inc., and Diversified
23 Utilities. See Exhibit J-5. Through those certifications, the Commission has determined
24 that a public need exists and that certification of a water utility is in the public interest.
25 See Fisher Cross-Ex., Hearing Transcript (“Transcript”) at 332. The same need exists for
26

1 wastewater service, and the expansion of Johnson Utilities' CC&N to serve the requested
2 areas will serve this need and foster the public interest.

3 **B. Longer-Term Planning Is in the Public Interest**

4 Because Johnson Utilities is certificated for and has facilities in close
5 proximity to the area that is the subject of its Application, granting this extension will
6 allow Johnson Utilities to properly size its existing and proposed system to most
7 effectively serve this area.¹ See Tompsett Direct, Transcript at 150. Such longer-term
8 planning will lead to economies of scale that will benefit Johnson Utilities' existing
9 customers and future customers in the subject areas. See Tompsett Direct, Transcript at
10 150; Johnson Direct, Transcript at 212-13. Otherwise, Johnson Utilities will be forced to
11 construct its system in a piecemeal fashion, which inevitably leads to additional costs for
12 ratepayers. See Johnson Direct, Transcript at 212, 215.

13 In addition, as stated by Mr. Gardner, the failure to foster longer-term
14 planning has led and will continue to lead to the proliferation of septic systems and small
15 package plants in these areas. See Gardner Direct, Transcript at 186-87. Because septic
16 systems are prone to neglect, they present a great risk to the groundwater supply. See
17 Tompsett Direct, Transcript at 138; Gardner Direct, Transcript at 186-87. Inevitably,
18 septic systems contaminate the water supply and result in additional costs to water utilities.
19 See Gardner Direct, Transcript at 186. For these reasons, ADEQ and Pinal County have
20 discouraged their use. See Tompsett Direct, Transcript at 138.

21 The long-term use of small package plants also presents a serious danger to
22 the water supply and a burden for regulatory agencies. See Gardner Direct, Transcript at

23
24 ¹ In its Report, Staff claims that Queen Creek serves as a natural boundary. See Exhibit S-
25 1, at 7. At the hearing, Johnson Utilities presented testimony that Queen Creek does not
26 serve as a natural boundary and that Johnson Utilities can cross Queen Creek with its
facilities. See Tompsett Direct, Transcript at 144-46; Exhibit J-7. Utilities have crossed
Queen Creek in the past and it is not necessary or appropriate to use Queen Creek as a
division for certificated areas.

1 187; Johnson Direct, Transcript at 213. Although developers may prefer smaller sewer
2 systems, which allow development to proceed more quickly at less cost, the use of these
3 smaller systems inevitably leads to problems. *See* Gardner Direct, Transcript at 187. In
4 numerous instances, after a development has completed and a homeowners' association
5 has taken control, these smaller systems have fallen into disrepair, resulting in costly
6 problems for regulatory agencies and health risks to consumers. *See* Gardner Direct,
7 Transcript at 187; Johnson Direct, Transcript at 213. These problems have caused Pinal
8 County to express a policy disfavoring the long-term use of small sewer systems and a
9 preference for regional providers, such as Johnson Utilities. *See* Exhibit J-12. These same
10 problems have caused the Town of Queen Creek to plan long-term for a twenty-year build-
11 out and to run large lines up to ten miles away to handle its wastewater. *See* Gardner
12 Direct, Transcript at 188-89.

13 Clearly, in the areas covered by Johnson Utilities' Application, the public
14 interest is served by a regional provider of wastewater service that will design its system to
15 utilize large, regional treatment plants and that has the financial strength and technical
16 know-how to make such a regional system a reality.

17 **C. Johnson Utilities Is Financially and Technically Able to Serve the**
18 **Requested Areas**

19 It is undisputed that Johnson Utilities has sufficient financial backing to
20 design and to construct an effective wastewater system to effectively serve the requested
21 areas. *See* Fisher Cross-Ex., Transcript at 333-34. Although development in portions of
22 the requested area may not commence immediately, the Commission has determined that a
23 need for water service exists in these areas. The same need exists for wastewater service,
24 and Johnson Utilities is the only well-financed, experienced utility that can construct a
25 regional system to provide wastewater service to these areas.
26

1 Indeed, although AUSS has opposed certain portions of Johnson Utilities'
2 Application, AUSS has more than once offered to sell its system to Johnson Utilities in
3 apparent recognition of Johnson Utilities' financial and technical ability to serve this area.
4 See Johnson Direct, Transcript at 238.

5 **CERTIFICATION OF AUSS IS NOT IN THE PUBLIC INTEREST**

6 Although the Commission should grant Johnson Utilities' Application on its
7 merits alone, the premature construction activities undertaken by AUSS provide further
8 support for granting Johnson Utilities' Application in those areas in which the parties'
9 applications overlap, which include areas in Sections 19, 20, 21, 22, 29, and 30 in
10 Township 2 South, Range 8 East.² See Exhibit J-5.

11 **A. AUSS and Its Related Entities Have Played a Shell Game to Avoid**
12 **Commission Regulation**

13 Statutory authority specifically prohibits a public service corporation from
14 constructing plant or facilities prior to receipt of a Certificate of Convenience and
15 Necessity:

16 A public service corporation, other than a railroad, shall not
17 begin construction of a . . . line, plant, service, or system, or
any extension thereof, without first having obtained from the
commission a certificate of convenience and necessity.

18 A.R.S. § 40-281(A). AUSS claims it has not violated A.R.S. § 40-281(A) because all
19 treatment plants constructed, under construction, or operating in its requested area are or
20 will be owned by non-profit homeowners' associations. See Exhibit J-2. Despite this
21 contention, the ownership of the Links at Ocotillo Wastewater Treatment Plant ("Links
22 Plant"), the Cambria Wastewater Treatment Plant ("Cambria Plant") and related facilities
23 remains murky.

24
25 ² Johnson Utilities notes that the areas requested by AUSS in Section 29 and the southern
26 half of Section 20 in Township 2 South, Range 8 East (Pecan Ranch) were certificated to
Johnson Utilities in Docket No. WS-02987A-99-0583 *et al.*

1 A brief examination of the entities involved in the ownership and
2 construction of these plants further confuses the issue. AUSS is a limited liability
3 company with two members—Maurice Lee and Stephen Kohner. *See* AUSS Application,
4 at Appendix ii. Mr. Lee and Mr. Kohner are also co-managers of Sunbelt Sanitation
5 Group LLC, the entity that previously operated the Links Plant and assigned its interest in
6 the Links Plant to AUSS. *See* Lee Cross-Ex., Transcript at 73; *see also* Exhibit J-2, Tab A
7 (Assignment). Mr. Kohner also acts as the Director and President of the Links at Ocotillo
8 Homeowners' Association ("Links Association"), although there is no indication that Mr.
9 Kohner is a homeowner at the Links Estates, as evidenced by the Association's address at
10 7902 North Black Canyon Highway, which is Mr. Kohner's office. *See* Lee Cross-Ex.,
11 Transcript at 74, 77; Exhibit J-2, Tab A. Finally, Mr. Kohner serves as the manager of
12 DJSP, LLC, the development company that initially owned the Links Plant. *See* Exhibit J-
13 2, Tab A.

14 **1. Ownership of the Links Plant**

15 Although DJSP, LLC initially owned the Links Plant, it granted AUSS an
16 option to purchase the Links Plant under an agreement dated February 1, 2001 ("Links
17 Agreement"). *See* Exhibit J-2, Tab A (Management Agreement for Operation &
18 Maintenance of Wastewater Treatment Plant and Option to Purchase Agreement). In an
19 amendment to the Links Agreement executed July 16, 2001 ("Links Amendment"), and
20 effective February 1, 2001, the parties retroactively revised the ownership of the Links
21 Plant. *See* Exhibit J-2, Tab A (Amendment to Sewer Service Contracts). Under the Links
22 Amendment, ownership of the Links Plant is now held in equal parts by the Links
23 Association, an entity whose Director and President is a member of AUSS, and Woodside
24 Homes, a for-profit entity. *See* Exhibit J-2, Tab A; Lee Cross-Ex., Transcript at 82.

25 AUSS retained its option to purchase the Links Plant under the Links
26 Amendment. *See* Exhibit J-2, Tab A. AUSS also retained its obligation under Section 9

1 of the Links Agreement to provide service to the 72 residents in the Links Estates free of
2 charge. *See* Exhibit J-2, Tab A. AUSS is contractually bound to include this obligation to
3 provide service free of charge in any filings with the Commission, which presumably
4 includes its initial tariff. *See* Exhibit J-2, Tab A.

5 Although AUSS contends that a violation of A.R.S. § 40-281(A) has not
6 occurred at the Links because a homeowners' association owns or will own the plant and
7 facilities, the facts presented at the hearing belie this contention. Prior to July 16, 2001,
8 DJSP, LLC, a for-profit developer, owned and operated the Links Plant. *See* Exhibit J-2,
9 Tab A. Currently, under the Links Amendment, the Links Plant is owned in equal parts by
10 the Links Association, an entity controlled by one of AUSS's members, and Woodside
11 Homes, a for-profit entity. *See* Exhibit J-2, Tab A.

12 Furthermore, as set forth in the subdivision report for the Cambria
13 development, the Links Plant will serve not only the Links Estates, but also the Cambria
14 development. *See* Exhibit J-1; *see also* Lee Cross-Ex., Transcript at 111. To provide this
15 service, the parties have already constructed a collection line from the Links Plant to the
16 Cambria subdivision. *See* Lee Cross-Ex., Transcript at 119.

17 Although ownership of the Links Plant by the Links Association may allow
18 service to residents of the Links Estates without Commission regulation, it does not allow
19 service to the Cambria development. Neither the Links Association nor Woodside Homes
20 has sought authority from the Commission to serve the residents of the Cambria
21 subdivision. *See* Lee Cross-Ex., Transcript at 123-24. In addition, none of the parties
22 involved has sought Commission authority or approval to construct the collection line
23 from the Links Plant to the Cambria subdivision. *See* A.R.S. § 40-281; *see also* A.A.C.
24 R14-2-603, - 606.

1 2. **Cambria Plant—A “Handshake” Deal**

2 The ownership of the Cambria Plant and its related facilities is even more
3 suspect. In a letter dated April 16, 2001, to the Arizona Department of Environmental
4 Quality, AUSS states that it “has taken over and has been assigned the ownership of the
5 Links at Ocotillo Wastewater Treatment Plant as well as the [Cambria Lift Station].” *See*
6 Exhibit J-2, Tab B. In a prior letter dated March 1, 2000, from AUSS to Jim Lee of
7 Madison Diversified, AUSS states that it “is building the [Cambria] treatment plant and
8 will also own the entire treatment plant and collection system.” Exhibit J-2, Tab D.
9 AUSS also represented to Staff that it owned the Cambria Plant. *See Fisher Cross-Ex.*,
10 Transcript at 348-49. Indeed, in the Staff Report, to which AUSS did not object, Staff, in
11 apparent reliance upon AUSS’s representations, states that developers in the Cambria
12 development have already transferred certain treatment plant to AUSS. *See Exhibit S-1*, at
13 1.

14 Despite these written representations, AUSS now contends that Woodside
15 Homes owns the Cambria Plant and facilities and that, if AUSS receives a CC&N, AUSS
16 will be given the plant and facilities free of charge. *See Lee Cross-Ex.*, Transcript at 89-
17 90. Although Mr. Lee estimates that the Cambria Plant is worth \$1.5 million, he claims
18 that his agreement with Woodside Homes is a “handshake” deal. *See Lee Cross-Ex.*,
19 Transcript at 91. Thus, despite numerous representations made by AUSS to regulatory
20 agencies that it was constructing and owned the Cambria Plant and facilities, AUSS now
21 contends that based on a “handshake” deal with Woodside Homes, it will own the
22 Cambria Plant and facilities only upon receipt of a CC&N. That evidence is simply not
23 credible.

1 **3. AUSS Collecting Sewer Hook-Up Fees Without**
2 **Commission Approval**

3 Although AUSS claims that it does not own the Cambria Plant and facilities,
4 clearly it has acted as the certificated owner of those facilities by charging and collecting
5 sewer hook-up fees. *See Exhibit J-2, Tab D.* As Mr. Lee testified at the hearing, AUSS
6 has already invoiced and collected sewer hook-up fees in excess of \$183,000 from
7 Madison Diversified, a development that is separate and apart from the Woodside Homes
8 development. *See Lee Cross-Ex., Transcript at 93.* Not only has AUSS charged and
9 collected hook-up fees, it has also agreed with Madison Diversified that monthly sewer
10 fees for each homeowner in the Madison Diversified development will not exceed \$30.00.
11 *See Exhibit J-2, Tab D.* In doing so, AUSS has acted in blatant disregard for the
12 Commission's regulatory authority over its rates. *See Lee Cross-Ex., Transcript at 93.*

13 **B. Construction of the Cambria Plant Without an Approved 208**
14 **Amendment Violates ADEQ Regulations**

15 In addition to construction prior to receipt of its CC&N and the collection of
16 unapproved hook-up fees, AUSS also began construction of the Cambria Plant in violation
17 of ADEQ's regulations. Under A.A.C. R18-5-303, a wastewater treatment plant "shall,
18 before construction, conform with the Certified Areawide Water Quality Management
19 Plan" for that area. Because CAAG has not approved AUSS's 208 Amendment, ADEQ
20 issued a cease and desist letter to AUSS on August 10, 2001, demanding that AUSS stop
21 construction on the Cambria Plant. *See Exhibit J-3.* As Mr. Lee testified, not only have
22 CAAG and ADEQ not approved AUSS's 208 Amendment, but CAAG has shelved
23 AUSS's 208 application until further notice. *See Lee Cross-Ex., Transcript at 94.* Without
24 this approval, AUSS cannot complete the construction of the Cambria Plant and its use to
25 serve the residents of the Cambria subdivision is speculative at best. *See Lee Cross-Ex.,*
26 *Transcript at 97.*

1 **C. The Commission Should Not Reward AUSS's Disregard for**
2 **Commission and ADEQ Requirements**

3 When a public service corporation seeks to construct a new wastewater
4 system and to serve a new area, it must first seek certification from the Commission. *See*
5 A.R.S. 40-281(A); *see also* Tompsett Direct, Transcript at 148. Concurrently or shortly
6 thereafter, the provider must seek approval of its 208 Amendment by the appropriate
7 association of governments—in this case, the Central Arizona Association of
8 Governments. *See* Tompsett Direct, Transcript at 148. Until an entity has received
9 approval of its 208 Amendment from the appropriate association of governments and
10 ADEQ, it may not commence construction of its treatment plant. *See* A.A.C. R18-5-303.

11 Following receipt of a CC&N and approval of a 208 Amendment, a provider
12 may then begin to construct its system within its certificated area. Additionally, following
13 receipt of a CC&N and approval of a filed tariff, a wastewater provider may begin to
14 charge and collect fees for sewer hook-ups and other tariffed services. *See* A.A.C. R14-2-
15 608.

16 In this case, AUSS has blatantly disregarded these explicit legal
17 requirements. It is undisputed that AUSS has commenced construction prior to receipt of
18 its CC&N. It is undisputed that construction has commenced prior to approval of its 208
19 Amendment. Furthermore, it is undisputed that AUSS has charged and collected over
20 \$180,000 in sewer hook-up fees before the Commission has approved its tariff. This
21 disregard for the Commission's regulatory authority should not be rewarded by the
22 Commission and the premature construction by AUSS should not be viewed as a factor in
23 its favor. To do so, sets a dangerous precedent.

24 Accordingly, the Commission should deny AUSS's Application.
25
26

CONCLUSION

Johnson Utilities is a financially-strong, regional provider of wastewater service that can effectively serve the requested areas. Granting the extension requested by Johnson Utilities in this Application will serve the public interest by preventing the proliferation of septic systems and smaller wastewater systems in northern Pinal County and the Queen Creek area. It will also allow Johnson Utilities to properly design its system so that current and future customers will benefit from economies of scale.

The Commission has already found a need for and has certificated water utilities in the overwhelming majority of the areas that Johnson Utilities has requested. Johnson Utilities submits that the same need exists for its wastewater services and respectfully requests that the Commission grant the extension requested in its Application.

Respectfully submitted this 10th day of September, 2001.

LEWIS AND ROCA LLP



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Original and ten (10) copies of the foregoing hand-delivered this 10th day of September, 2001, to:

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Copy of the foregoing hand-delivered
this 10th day of September, 2001, to:

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