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EXCEPTION

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BEFORE THE ARIZONA CORPORATION COMMISSION

William Mundell
Chairman

Arizona Corporation Commission
DOCKETED

Jim Irvin
Commissioner

AUG 24 2001

Marc Spitzer
Commissioner

DOCKETED BY *ms*

IN THE MATTER OF THE APPLICATION
OF H2O, INC., FOR AN EXTENSION
OF ITS EXISTING CERTIFICATE OF
CONVENIENCE AND NECESSITY

Docket No: W-02234A-00-0371

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

Docket No: WS-02987A-99-0583

Docket No: WS-02987A-00-0618

IN THE MATTER OF THE APPLICATION
OF DIVERSIFIED WATER UTILITIES, INC.
TO EXTEND ITS CERTIFICATE OF
CONVENIENCE AND NECESSITY

Docket No: W-02859A-00-0774

IN THE MATTER OF THE APPLICATION
OF QUEEN CREEK WATER COMPANY
TO EXTEND ITS CERTIFICATE
OF CONVENIENCE AND NECESSITY

Docket No: W-01395A-00-0784

EXCEPTIONS TO RECOMMENDED OPINION AND ORDER
OF ADMINISTRATIVE LAW JUDGE

1 Johnson Utilities Company, LLC (“Johnson Utilities”) appreciates the efforts of the
2 Administrative Law Judge and Staff in this matter and generally supports the findings and
3 conclusions contained in the August 14, 2001 Recommended Opinion and Order (“RO”).
4 Johnson Utilities, however, does have four issues with which it takes exception.

5 First, Arizona Farms (Parcel 1) should be awarded to Johnson Utilities. Johnson
6 Utilities should not be forced to incur the cost and time to reapply for this parcel in the
7 future. The facts in the record and the testimony of the witnesses established a clear need
8 for utility service to Arizona Farms. The failure to award this area to Johnson Utilities
9 when it has an existing CC&N adjacent to this uncontested parcel, only causes the parties
10 to spend additional resources and money to reapply for the same area at a later date.

11 Second, Bella Vista Farms (Parcel 2) water service should be awarded to Johnson
12 Utilities because Johnson Utilities is in a much better position financially and
13 operationally to properly serve the large-scale development planned for Bella Vista. In
14 addition, the owner of this property and Pinal County strongly prefer Johnson Utilities as
15 the provider.

16 Third, the RO requires that Johnson Utilities amend its wastewater tariff. Johnson
17 Utilities had discussed this issue with Staff and it was Johnson Utilities’ understanding this
18 issue has been dismissed from this service area extension case because it was more
19 properly addressed in Johnson Utilities next rate case. The RO effectively requires a
20 change in Johnson Utilities’ rates without an appropriate rate proceeding.

21 Fourth, Johnson Utilities respectfully objects to the requirements in the RO making
22 the awards of certificated area conditional on future growth evaluations by the Staff. The
23 Arizona Corporation Commission (“Commission”) already has adequate procedures to
24 delete all or a portion of a certificated area. The conditional certificates process contained
25 in the RO will create uncertainty for entities investing in the development of this area and
26 will take away a property right without due process.

1 **Arizona Farms**

2 The record clearly reflected a need for a water and wastewater provider for Arizona
3 Farms (Parcel 1). The RO refused to honor Arizona Farms' request that it be served by
4 Johnson Utilities. Byron Handy, speaking on behalf of Arizona Farms, noted in his pre-
5 filed direct testimony and during cross-examination that water and wastewater service is
6 needed before the Arizona Farms parcels can be developed. Despite this testimony, the
7 Staff concluded that, "there is no immediate need for water or wastewater service for these
8 Parcels at this time." *Staff Report, Dated January 9, 2001, Re: In the Matter of the*
9 *Applications of H2O, Inc., Johnson Utilities Company, Diversified Water Utilities and*
10 *Queen Creek Water Company for Extension of their Certificates of Convenience and*
11 *Necessity, at page 16.*

12 It is important to note that Johnson Utilities' present CC&N borders the Arizona
13 Farms parcel on three sides. *See, Allocation of Requested Areas Map attached to the*
14 *Opinion and Order, also attach as Tab 1.* In fact, as Mr. Handy pointed out at the hearing,
15 Johnson Utilities already has a CC&N that includes one of the four sections that will
16 comprise the Arizona Farms development. At the hearing, Arizona Farms sought to have
17 its remaining three sections of land included within Johnson Utilities' CC&N. *Testimony*
18 *of Byron F. Handy, March 16, 2001, Docket No. W-02234A-00-0371, etc., pages 387-394.*
19 Johnson Utilities also provided evidence that an area adjacent to Arizona Farms to the
20 south is presently being developed. *Id. at 394-395.* Inclusion of Arizona Farms in Johnson
21 Utilities' certificated area will allow for more efficient planning and construction of water
22 and wastewater facilities in this area.

23 At the hearing, Mr. Handy further elaborated on the planning and development
24 efforts already made by Arizona Farms. He stated that the property is currently zoned and
25 a PAD has been completed that indicated that the area was going to be served by Johnson
26 Utilities. *See, Testimony of Byron F. Handy, at page 368, lines 22-25.* In his direct

1 testimony he stated that Arizona Farms is actively marketing the Master Planned
2 Community to homebuilders. *Pre-Filed Rebuttal Testimony of Byron F. Handy, at page 6,*
3 *lines 12-15.*

4 The RO appears to take the position that until this area is experiencing an
5 “immediate need” for service, the Commission should not extend Johnson Utilities’
6 CC&N to serve the area. This argument has created a dilemma for the owners of Arizona
7 Farms. Without approved services, the property is difficult to market to buyers and
8 builders, but without buyers and builders, Arizona Farms cannot convince the Commission
9 that it has a need for a certificated utility service provider.

10 Because Arizona Farms has established a need and a proposed scope of
11 development, in addition to the fact that Parcel 1 is not adjacent to any other water or
12 wastewater company, and that a portion of Arizona Farms is already within Johnson
13 Utilities’ existing CC&N, it makes sense that the Commission extend Johnson Utilities’
14 CC&N to encompass these additional areas so that development can proceed. To do
15 otherwise would require that Johnson Utilities spend the additional money, time and effort
16 to file another application.

17 **Bella Vista**

18 The evidence clearly established a need for service at the Bella Vista parcels as the
19 RO recognized. Therefore, the only question before the Commission is which of the two
20 competing utility service providers is best able to provide quality drinking water service to
21 this development, since it would appear from the record that the parties agree Johnson
22 Utilities will be providing wastewater to the area.

23 Contrary to the RO, Johnson Utilities is the best candidate to provide service to this
24 area. The evidence established that the property owners, who are risking substantial sums
25 of money to make this project a reality, prefer to have Johnson Utilities as their service
26 provider. Ms. Aleman, who testified on behalf of the developers of Bella Vista, stated in

1 her testimony that she favors Johnson Utilities because she knows the company and is
2 confident that Johnson Utilities can meet the development's needs. *Testimony of Kathy*
3 *Aleman, March 15, 2001, Docket No. W-02234A-00-0371, etc., page 167, lines 3-10, and*
4 *page 171, lines 9-13.*

5 Johnson Utilities provided ample evidence establishing that it has the resources,
6 experience, sophistication and the existing infrastructure to loop the Bella Vista system
7 into Johnson Utilities's overall plan for the area. Johnson put on professional engineering
8 evidence that showed how the Bella Vista parcels would be incorporated into the larger
9 plan of Johnson Utilities for the area. *See, Prefiled Rebuttal Testimony of Brian P.*
10 *Tompsett; Rejoinder Testimony of Brian P. Tompsett on Behalf of Johnson Utilities, L.L.C.*
11 *March 6, 2001; and Exhibit J-8 Systems Map.* The map of Diversified's existing system
12 that was used by Diversified during the depositions and up until the date of the hearing
13 consisted of nothing more than a simple hand-drawn map¹. *H2O, Inc. exhibit H2O-7,*
14 *March 15, 2001, Docket No. W-02234A-00-0371, etc.*

15 Ms. Aleman also noted that the Bella Vista property owner is concerned that
16 Diversified, a very small company run by a full-time attorney out of his house, does not
17 have the sophistication and experience necessary to handle the substantial size of the Bella
18 Vista development. Bella Vista will be a development of approximately 13,000 houses
19 when fully built. Diversified has no experience in serving such a substantial development.
20 Ms. Aleman stated that although the property owner has nothing against Diversified or its
21 principal, the property owner would rather the Commission not use this development and
22 the property owners's money to test the ability of Diversified to grow from a very small,
23 single well system into the large company necessary to serve this community. *Testimony*
24

25 ¹ At the hearing, Diversified provided an updated map of its facilities that appeared to have
26 been produced in the days just before the hearing. *Diversified Exhibit D-15, March 15,*
2001, Docket No. W-02234A-00-0371, etc.

1 of Kathy Aleman, March 15, 2001, Docket No. W-02234A-00-0371, etc., page 169, lines
2 12-24.

3 It was this fear of multiplying the normal risk of development by the requirement
4 that the developer rely upon a small water provider that has not proven its ability during
5 the hearing or in the years of its operation to serve a large development that resulted in
6 Bella Vista and others property owners in the Diversified area petitioning the County to
7 establish a Municipal Water Improvement District in this area. In Ms. Aleman's words,
8 this District was established "to keep all of our options open," should Johnson Utilities not
9 be awarded the right to serve the area. *Id. at page 169, lines 12-24.*

10 Diversified is a small water company that has a substantial amount of land within
11 its existing CC&N. This existing land has a great deal of growth potential. *Cross-*
12 *examination of Scott Grey, March 21, 2001, Docket No. W-02234A-00-0371, etc., page*
13 *830-831.* Development on this existing land will provide Diversified with significant
14 challenges in its ability to provide service beyond the single wells system they presently
15 have. And if properly handled, development on the existing CC&N area will provide
16 Diversified with significantly increased operating revenues. Extending Diversified's
17 CC&N to include Bella Vista's three sections of land, that will total almost 13,000 houses,
18 in addition to its existing growth potential will stretch Diversified's one-man operation
19 beyond reason. At the hearing, Diversified did not provide any evidence that would
20 establish that Diversified has the resources, manpower and the sophistication to address
21 both its existing CC&N as well as the additional land it sought. Generally, Diversified's
22 answer to how it would meet the demands of the ensuing developments is that it would
23 hire staff and require the developer to install all the necessary components. *Id. at pages*
24 *803-804, and 823-825.* The record clearly establishes the very limited nature of
25 Diversified's operations.
26

1 The Water Task Force Report, ("Report") adopted by the Commission, states that
2 the Commission wants to encourage larger, more regional water providers rather than
3 additional small water companies. *Interim Report of the Arizona Corporation*
4 *Commission's Water Task Force*. The Report also concludes that "because of economies
5 of scale, larger companies are likely to be more efficient. A larger company can
6 consolidate the administrative aspects of many smaller 'systems' thereby significantly
7 reducing the overall cost of service." *Id.* In conclusion, the Task Force "agrees that
8 reducing the number of small non-viable water systems is a desirable goal." *Id.* Consistent
9 with this approach, the Commission should encourage the growth of larger, regional
10 companies and not assign new developments to small water companies over the objections
11 of the landowners simply for the purpose of trying to increase the profitability of the small
12 company. This regional approach is also supported by Pinal County.

13 Finally, the RO does not provide any reason why Diversified, rather than Johnson
14 Utilities, should be granted a CC&N for the three sections of land that comprised Bella
15 Vista². It would appear that the RO, like King Solomon, simply proposes to split the area

16
17 ² The RO also erroneously awards Parcel 24 to Diversified. Parcel 24 is immediately east
18 of Parcel 2. In its Second Amendment to the Application of Diversified Water Utilities
19 Inc. to Extend Its Certificate of Convenience and Necessity, Diversified without
20 explanation provided a January 31, 2000 letter from Mr. David Buchli. This letter states
21 that it is a formal request for Diversified Water Company, Inc. to provide water service to
22 20 acres of land. In response to this request to serve 20 acres, Staff and the Hearing
23 Officer conclude that Diversified should be awarded 640 acres of land. The Staff Report
24 bases this conclusion on the statement that "Diversified has a water system within 1 mile
25 of the requested area and is contiguous to the request area." Not only was there no
26 demonstrated need in this parcel, there was no evidence provided to establish even a
presumption of need. The author of this 16-month old letter was not present at the
hearing to speak in support of Diversified being awarded all of parcel 24, let alone his 20-
acre plot. Additionally, Diversified presented no evidence that the January 31, 2000 letter
set forth any development timeframes for the area- it could be one year or 20 years before
service is actually needed. The letter is an open-ended request for service to 20 acres of
land. The letter does not describe development plans or even the intended use of the water
service. The Commission should not award Parcel 24 to Diversified. Until the owners of
the other 97% of this section parcel come forward, there is no way for the Commission to know
what the future of this parcel is. For these reasons, Diversified should not be granted
Parcel 24.

1 so that both companies get some new territory, rather than establishing one large regional
2 provider. With due respect to the Administrative Law Judge, this approach is not good
3 policy and results in problematic situations when small companies are suddenly pressed
4 upon to meet the demands of large-scale developers.

5 Johnson Utilities has already established itself as a regional provider in the area and
6 is clearly able to provide quality, reliable and prompt service to the development needs of
7 Bella Vista. Additionally, the Bella Vista development is adjacent to Johnson's existing
8 CC&N, so there is no question of Johnson having the necessary facilities and
9 infrastructure nearby to loop the Bella Vista system into Johnson's overall regional plan of
10 the area.

11 Sewer Tariff

12 The RO notes that "Staff further recommends that JUC file, within 30 days from
13 the effective date of this Decision, an amended waste water tariff schedule which includes
14 language for its wastewater rates and charges to state that said charges shall not become
15 effective until wastewater first flows into the collection system." *RO at Paragraph 155.*
16 As a result, the RO contains a requirement that Johnson Utilities file such a tariff.

17 This provision is not appropriate for two reasons. First, Johnson Utilities discussed
18 this issue with Staff and it was Johnson Utilities' understanding that this issue would be
19 addressed in a separate rate case rather than in this service area extension hearing.
20 Johnson Utilities would request that the Commission amend the RO to so reflect this
21 understanding.

22 Second, this requested tariff filing effectively changes Johnson Utilities' rates and
23 revenue and should only be done after an appropriate rate hearing.

24 Conditional Language

25 The RO requires that the allocation of certificated areas be done subject to
26 numerous conditions, any one of which when triggered would result in the automatic de-

1 certification of areas awarded under this action. Johnson Utilities is unaware of any
2 precedent for such conditional certificates. Johnson Utilities joins the other parties in
3 opposing the issuance of these certificated areas subject to automatic de-certification
4 provisions.

5 Making a CC&N null-and-void automatically raises a host of issues. First, there
6 are obvious due process concerns associated with having a property right such as a CC&N
7 be declared null-and-void without an opportunity for a hearing on the merits. Second,
8 some of the conditions, such as the requirement that a certain level of development
9 acceptable to Staff be demonstrated, are beyond the control of the utility. Should a
10 development fail to develop as fast as expected, the utility may lose its right to serve that
11 area simply because a developer for perfectly legitimate reasons chose to slow the pace of
12 development. Such a condition makes it hard for developers to get the financing they need
13 to develop the property. Such condition also puts the utility in jeopardy of having built or
14 preparing to build lines, connections and infrastructure to handle the proposed
15 development, only to have that capital investment taken away because the amount of
16 development pace did not meet with staff approval.

17 Johnson Utilities sees no need for the inflexibility imposed by these conditions.
18 Clearly, the Commission has the authority to address the fitness of a utility to provide
19 service to the public and can delete all or a portion of a CC&N area. Additionally, the
20 Arizona Department of Environmental Quality has the independent authority to take action
21 against a regulated utility should that utility violate the environmental laws. Therefore,
22 concerns that additional requirements are needed to ensure the parties are able to meet the
23 demands of providing safe, reliable utility services are unfounded and only result in a
24 confusing, uncertain certificate process.

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ORIGINAL and ten (10) copies
of the foregoing filed this 24th day
of August, 2001, with:

4

5

The Arizona Corporation Commission
Docket Control – Utilities Division
1200 W. Washington Street
Phoenix, Arizona 85007

6

7

8

COPY of the foregoing hand-
delivered this 24th day of August,
2001, to:

9

10

Administrative Law Judge Marc Stern
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

11

12

13

14

William Mundell, Chairman
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

15

16

17

Jim Irvin, Commissioner
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

18

19

Marc Spitzer, Commissioner
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

20

21

22

Teena Wolfe, Legal Division
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

23

24

25

Mark DeNunzio
Utilities Division

26

LEWIS
AND
ROCA
LLP
LAWYERS

1 Arizona Corporation Commission
2 1200 W. Washington Street
3 Phoenix, Arizona 85007

4 COPY of the foregoing mailed
5 this 24th day of August, 2001,
6 to:

7 William Sullivan
8 Martinez & Curtis, P.C.
9 2712 N. 7th Street
Phoenix, Arizona 85008-1090

10 Jay Shapiro
11 3003 N. Central
12 Suite 2600
Phoenix, Arizona 85012

13 Charles A. Bischoff
14 7272 E. Indian School Road
15 Suite 205
Scottsdale, Arizona 85251

16 Betty J. Griffin
17
18
19
20
21
22
23
24
25
26

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ALLOCATION OF REQUESTED AREAS

