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BEFORE THE ARIZONA CORPORATION COMMISSION

DOCKETED

CARL J. KUNASEK  
Chairman

DEC 05 2000

JIM IRVIN  
Commissioner

DOCKETED BY [Signature]

WILLIAM MUNDELL  
Commissioner

IN THE MATTER OF THE COMPLAINT  
OF DIVERSIFIED WATER UTILITIES,  
INC. AGAINST JOHNSON UTILITIES  
COMPANY AND H2O, INC. FOR  
POTENTIAL INTERFERENCE WITH THE  
OPERATIONS OF AN EXISTING LINE,  
PLANT OR SYSTEM.

Docket Nos: W-02234-A-00-0775  
W-02987-A-00-0775  
W-02859A-00-0775

MOTION TO QUASH  
TEMPORARY RESTRAINING  
ORDER

Diversified Water Utilities, Inc. ("Diversified") misled the Arizona Corporation Commission's (the "Commission") administrative law judge into entering a wrongful temporary restraining order that should be quashed immediately. Diversified secured the issuance of this order without notice, even though both Johnson Utilities' regular counsel, Richard Sallquist, and special counsel, Thomas Campbell, could have been reached in their respective offices on December 1 when Diversified first sought and then obtained the restraining order. Diversified's restraining order application mischaracterizes the legitimate activities of Johnson Utilities. Specifically, Johnson Utilities took the following actions:

1           1.       Johnson Utilities negotiated to purchase a well from the Russell Brandt  
2 family. The well is their private property, and under prevailing law, the seller is entitled to  
3 sell it to whomever they choose. Significantly, the well's owner is not a public service  
4 corporation.

5  
6           2.       As a condition of the well purchase, the seller required that Johnson Utilities  
7 agree to make water from that well available on a wholesale basis to whomever is the  
8 authorized water provider for the seller, as more fully set forth in the Service Agreement, a  
9 draft<sup>1</sup> of which Diversified attached as Exhibit B to its Application for an Order Without  
10 Notice to Preserve Status Quo. See paragraphs 2 and 4 of that Service Agreement.

11  
12           3.       Johnson Utilities conducted legitimate fact finding in preparation for a hotly  
13 contested Commission proceeding involving conflicting requests to extend the water  
14 service areas of four different water providers, including Diversified. This fact finding  
15 included reviewing public documents filed by Diversified with WIFA and providing to  
16 WIFA, at WIFA's request, public documents filed by Diversified with the Commission.

17  
18           Diversified makes the following inaccurate statements that presumably form the  
19 basis for the wrongful restraining order.

20  
21           First, Diversified incorrectly alleges that Johnson Utilities offered to provide  
22 water service within Diversified's certificated area. Johnson Utilities did not make this  
23 offer. Clearly, Johnson Utilities sought to purchase a well in a Diversified certificated  
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<sup>1</sup> The acreage in that draft is inaccurate. This agreement covers backup service to 800  
acres, not the 2240 acres in the draft attached by Diversified.

1 area. However, the seller required as a condition of that purchase that Johnson Utilities,  
2 under certain circumstances, agree to sell water on a wholesale basis to *Diversified or any*  
3 *other authorized provider* of water services. Such a wholesale arrangement does not  
4 violate Diversified's existing certificate and, in fact, should be highly beneficial to  
5 Diversified because it provides Diversified with a source of water with minimal  
6 investment by Diversified. In addition, Johnson Utilities may use water from the well to  
7 provide service within Johnson Utilities' certificated area after proper authorization from  
8 ADWR.  
9  
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11 Second, Diversified intimates that Johnson Utilities had some improper  
12 contact with WIFA. Johnson Utilities did nothing inappropriate in its review of public  
13 records of WIFA, a public agency charged with the responsibility to handle substantial  
14 sums of the public's money. Accordingly, Johnson Utilities secured copies of public  
15 documents from WIFA and, in response to a request by WIFA staff, provided WIFA with  
16 copies of public documents filed by Diversified with the Arizona Corporation  
17 Commission. See Declaration of Marjorie Haberman.  
18  
19

20 Third, Diversified objects to Johnson Utilities contacting landowners in  
21 Diversified's certificated area. Johnson Utilities has discussed the quality of Diversified's  
22 service with such landowners as part of its case preparation in the pending certificate  
23 extension proceedings. One relevant issue that Johnson Utilities is entitled to raise at the  
24 hearing currently set for March 15, 2001, concerns the quality of Diversified's service. If  
25 Diversified cannot or will not provide quality service to its current customers, that is a fact  
26

1 that the Commission should be made aware of when it considers whether to allow  
2 Diversified to expand its certificated area. Accordingly, Diversified should not be allowed  
3 to restrain Johnson Utilities from fully preparing for the contested certification proceeding  
4 by stopping legitimate efforts to discover facts relevant to the hearing.  
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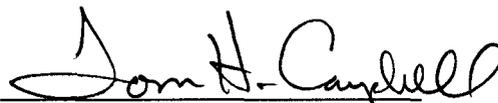
6 Fourth, Diversified misstates the law. Neither Arizona case law nor A.R.S.  
7 §40-281 prohibit Johnson Utilities from buying a well outside of its certificated area nor  
8 from using water from that well to serve customers in Johnson Utilities' certificated area.  
9 Johnson Utilities has water rights that it believes will attach to this well after appropriate  
10 approval by the Arizona Department of Water Resources.  
11

12 Johnson Utilities respectfully contends that the temporary restraining order  
13 without notice (that also may be an unlawful prior restraint) is wrongful and based on  
14 inaccurate information. That order should be quashed immediately.  
15

16 This motion is supported by the attached Affidavits of George Johnson,  
17 Marjorie Haberman and Russell Brandt.

18 RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of December, 2000.  
19

20 LEWIS AND ROCA LLP

21 

22 Thomas H. Campbell  
23 Gregory Y. Harris  
24 40 N. Central Avenue  
25 Phoenix, Arizona 85004  
26 (602) 262-5723

Attorneys for Johnson Utilities Company

1 ORIGINAL and ten (10) copies  
2 of the foregoing filed this 5<sup>th</sup> day  
3 of December, 2000, with:

4 The Arizona Corporation Commission  
5 Docket Control – Utilities Division  
6 1200 W. Washington Street  
7 Phoenix, Arizona 85007

8 COPY of the foregoing hand-  
9 delivered this 5<sup>th</sup> day of December,  
10 2000, to:

11 Karen E. Nally  
12 Assistant Chief Administrative Law Judge  
13 Arizona Corporation Commission  
14 1200 W. Washington Street  
15 Phoenix, Arizona 85007

16 Lyn Farmer, Chief Counsel  
17 Arizona Corporation Commission  
18 1200 W. Washington Street  
19 Phoenix, Arizona 85007

20 Deborah R. Scott, Director  
21 Utilities Division  
22 Arizona Corporation Commission  
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18 COPY of the foregoing mailed  
19 this 5<sup>th</sup> day of December, 2000,  
20 to:

21 Richard L. Sallquist  
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11 \_\_\_\_\_  
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**DECLARATION OF  
MARJORIE J. HABERMAN**

I, Marjorie J. Haberman, make this declaration on my own personal knowledge and belief, except to the extent otherwise indicated.

1. I am a paralegal in the law firm of Lewis and Roca, LLP. In that capacity, I work with Thomas Campbell, counsel for Johnson Utilities Company.

2. On October 2, 2000, Diversified Water Utilities, Inc. ("Diversified") filed several docket items with the Arizona Corporations Commission Utilities Division ("ACC"). Among those items were motions to intervene, a complaint, and a motion in opposition to application and to continue hearings in both of Johnson Utilities' open dockets (WS-02987-99-0583/WS-02987A-00-0618). Diversified also filed an application (W-02828A-00-0074) to extend its CC&N into territory requested in Johnson Utilities' 0618 extension application.

3. Lewis and Roca, LLP, received copies of the above filings on October 3, 2000. The papers filed by Diversified with the ACC specifically referred to loan papers filed by Diversified with WIFA. Because WIFA is a public agency and the records they maintain are public records I called to make an appointment to review and copy Diversified's public records file at the WIFA office on E. Earll Drive. As best I recall, the receptionist put me through to the voice mail of Suzanne Price, and I left a message requesting the above.

4. On October 4, 2000, I spoke on the telephone with Suzanne Price at the WIFA office concerning my request to review Diversified's public file. She

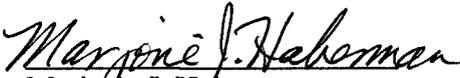
said that Diversified had a financing application on file. She also asked me why I wanted to see the file. I told her that Diversified had filed an application to extend its CC&N into some of the same territory for which Johnson Utilities had requested an extension and I was researching its CC&N extension application. She asked if I could provide her with a copy of the application Diversified had filed with the ACC. I told her that I could make one for her and bring it to the WIFA office when I came in to look at the financing file.

5. On October 11, 2000, I left a phone message with Ms. Price saying I would stop by the WIFA office the next day, drop off the ACC application, and, obtain the WIFA financing application. On October 12, 2000, I stopped at the WIFA office on E. Earll Drive. Ms. Price was not in her office so I left the envelope containing the application Diversified had filed with the ACC but did not obtain a copy of the WIFA at that time.

6. Sometime between the 16<sup>th</sup> and the 18<sup>th</sup> of October I spoke on the phone with Ms. Price again and told her I would have a messenger pick up the Diversified application from her office. The messenger service delivered a copy of Diversified's WIFA application to me on October 18, 2000.

7. I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on December 5, 2000.

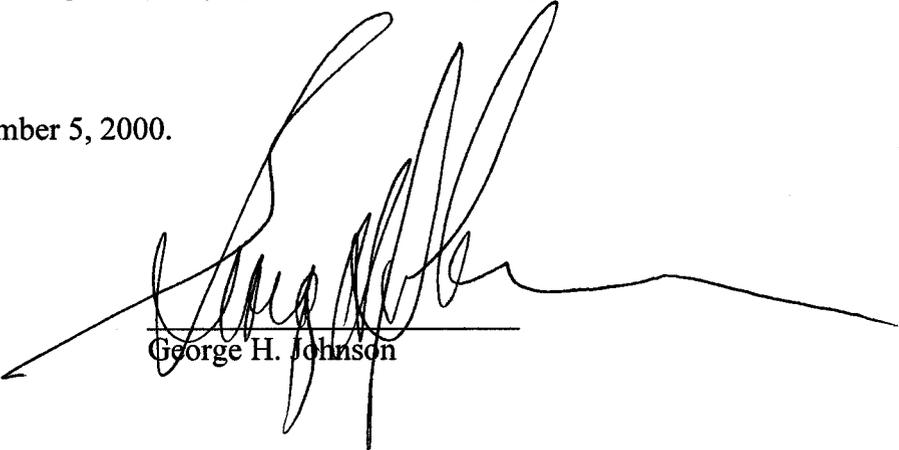
  
Marjorie J. Haberman

**DECLARATION OF  
GEORGE H. JOHNSON**

I, George H. Johnson, make this declaration on my own personal knowledge and belief, except to the extent otherwise indicated.

1. I am the managing member of Johnson Utilities LLC. In that capacity, I have overall responsibility for the operations and business strategy of Johnson Utilities.
2. I have reviewed Diversified Water Utilities' Application for an Order Without Notice to Preserve Status Quo and exhibits.
3. Contrary to the allegations contained in that Application, Johnson Utilities did not offer to provide water service to landowners, developers and residents within Diversified's certificated area. Johnson Utilities negotiated to buy a well located in Diversified's certificate area, but agreed, as more fully set forth in the Service Agreement, a draft of which is attached as Exhibit B to the Application, that Johnson Utilities, under certain circumstances, would sell water on a wholesale basis to the authorized water service provider in the area.
4. I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on December 5, 2000.

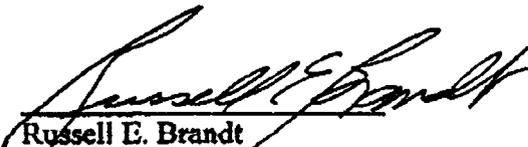
  
\_\_\_\_\_  
George H. Johnson

**DECLARATION OF  
RUSSELL E. BRANDT**

I, Russell E. Brandt, make this Declaration on my own personal knowledge and belief, except to the extent otherwise indicated.

1. I am one of the owners of a certain well that is the subject of Diversified Water Utilities' Application for an Order Without Notice to Preserve Status Quo.
2. I had discussions and negotiations with Diversified about the sale of that well to Diversified, but have not executed an agreement to sell the well to Diversified.
3. I am also involved in negotiations with Johnson Utilities to sell the well, as well as negotiations to enter into a Service Agreement with Johnson Utilities. I have not been "pressured" by Johnson Utilities into selling the well to Johnson Utilities as claimed by Diversified. It is my preference, and the preference of the other owners of the well, to sell the well to Johnson Utilities, if Johnson Utilities is able to sell water on a wholesale basis to the authorized water service provider for certain property as more fully set forth in the draft Service Agreement attached as Exhibit B to the Application.
4. I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on December 5, 2000.

  
Russell E. Brandt