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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

DOCKETED

DEC 19 2000

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IN THE MATTER OF THE COMPLIANT)
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
WS-02987A-00-0775
W-02859A-00-0775

RESPONSE TO JOHNSON
UTILITIES' MOTION TO QUASH

Without citing a single authority to support its position, Johnson Utilities, L.L.C., dba Johnson Utilities Company seeks to quash the Temporary Order entered December 1, 2000, which, as the Administrative Law Judge correctly observed, merely ensures the status quo is preserved pending a Commission determination of the pending certification applications. Argument was conducted on December 6, 2000 whereat Diversified Water Utilities, Inc. ("Diversified") was ready, willing and able to present additional evidence in support of its request for an order restraining Johnson Utilities, L.L.C., dba Johnson Utilities Company ("Johnson Utilities") and its officers, directors, employees, agents and persons working in concert therewith from undertaking any and all of the following activities:

1. Interfering with Diversified's application for financing with the Water Infrastructure Financing Authority ("WIFA");
2. Extending its facilities or service into the area encompassed by Diversified's Certificate of Convenience and Necessity including, without limitation (i) entering into a Well Purchase Agreement with the Russell Brandt Family to acquire a wellsite located

1 within the certificated area of Diversified, but several miles away from the area currently
2 certificated to or served by Johnson Utilities and (ii) entering into a Service Agreement to
3 provide, or otherwise providing, water service to properties within Diversified's Certificate of
4 Convenience and Necessity; and

5 3. Contacting landowners and/or prospective developers of lands within
6 Diversified's certificated area and offering water service and/or encouraging said landowners or
7 prospective developers from seeking deletions from Diversified's certificated area, or otherwise
8 filing complaints regarding Diversified's service.

9 Johnson Utilities boldly admits that it "negotiated to purchase a well from the
10 Russell Brandt Family." Motion to Quash ("Motion") at p. 2. No one disputes this well is
11 located within Diversified's certificated area or that A.R.S. §40-281.A expressly provides:

12 "A public service corporation . . . shall not begin construction of . . .
13 a line, plant, service or system, or any extension thereof, without first
14 having obtained a certificate of public convenience and necessity."

15 Despite the clear and unequivocal language of this statute, Johnson Utilities
16 contends it may purchase the well because "the seller is entitled to sell it to whomever they
17 choose. Significantly, the well's owner is not a public service corporation." Motion at p. 2. The
18 order does not preclude the seller from selling the well, it prevents Johnson Utilities, which is a
19 public service corporation, from buying the well since Johnson Utilities has not obtained a
20 certificate of convenience and necessity encompassing the well's location.

21 At the hearing, questions were raised regarding the location of electric plants
22 outside the area encompassed by the certificate of convenience and necessity. Unlike water
23 utilities that usually have a ready access to water within its certificated area, electric utility plants
24 must be located near their fuel source and placed on the transmission grid in a manner to
25 facilitate system reliability. Thus, location of plants beyond their certificated area is "necessary
26 in the ordinary course of business," an express exception to the certification requirement.

1 Johnson Utilities provided no operational reason for acquiring the well and no one could
2 seriously contend an extension four miles beyond its existing certificated area is necessary in the
3 ordinary course of business. Water utilities build production and storage facilities adjacent to
4 their service lines to promote economical delivery of water.

5 Not only did Johnson Utilities seek to extend its plant unlawfully without first
6 obtaining the required certificate, it sought to invade the monopoly territory of Diversified and
7 offered to provide wholesale water service therein. Johnson Utilities is clearly interfering with
8 Diversified's property rights; rights the Commission is under an affirmative duty to protect:

9 "The Commission was under a duty to prohibit a private
10 utility under its jurisdiction from competing in that area,
11 unless, after notice and an opportunity to be heard, it shall
12 have been made to appear that [the existing certificating
13 utility] failed or refused to render satisfactory and adequate
14 service therein, at reasonable rates."

15 *Application of TRICO Electric Cooperative, Inc.*, 92 Ariz. 373, 387, 377 P.2d, 309, 319 (1962).

16 While the *TRICO* cased involved an electric utility, the same standard applies to
17 private water companies. *James P. Paul Water Company v. Arizona Corporation Commission*,
18 137 Ariz. 426, 428, 671 P.2d 404, 406 (1983).

19 If during the pendency of this action, Johnson Utilities is permitted to invade
20 Diversified's existing certificated area, acquire plant which is not "necessary in the ordinary
21 course of business," offer to provide wholesale water service through an agreement, not with
22 Diversified Water Utilities, Inc., but with individual property owners within Diversified's
23 certificated area and to continue to contact landowners within Diversified's certificated area for
24 the purpose of seeking to alienate them, the property right associated with the certificate becomes
25 totally illusory. Our Supreme Court has held that it is not illusory and in fact commands the
26 Commission to protect these important property rights. *Application of TRICO, supra.*; *James P.*
Paul Water Company, supra.

1 The Application seeks only to prohibit a public service corporation (Johnson
2 Utilities), its officers, directors, employees, agents and persons working in concert therewith
3 from taking overt actions to disrupt Diversified's property rights. The requested order constitutes
4 the minimum action the Commission should undertake to protect Diversified's rights.¹

5 It was argued at hearing that the application seeks redress for tortious interference
6 with contract or business expectations or defamation and that these issues were properly
7 addressed in the superior court. Although there may be similarities between the underlying basis
8 for such claims and the claims based upon A.R.S. §§ 40-281.A and B, the application and the
9 underlying First Amended Complaint properly invoke the jurisdiction of the Commission to
10 protect the property rights it is obligated by law to protect. Importantly, Diversified is not
11 seeking damages or a finding of tortious interference. Rather, Diversified seeks only the
12 protection of its monopoly rights; protection to which it is entitled under Arizona law. This is
13 the province of the Commission and this is why Diversified has filed its application for
14 protection with the Commission.

15 The Commission should be appalled by the cavalier willingness of Johnson
16 Utilities to invade the sanctity of another public service corporation's certificated area and
17 disregard for the public interest for self-serving, but undisclosed purposes. Diversified is a single
18 well system. It was on the verge of acquiring a second well for the benefit of its customers.
19 Johnson Utilities' actions have irreparably disrupted that transaction. Such conduct calls into
20 question whether Johnson Utilities is fit and proper to act as a public service corporation.

21 Johnson Utilities alleges Diversified misrepresents the service agreement. Yet,
22 Johnson Utilities admits that its ability to acquire the well was dependent upon its willingness to
23 "agree to sell water on a wholesale basis" within Diversified's certificated area. Motion at p. 3.
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1 In view of the blatant actions of Johnson Utilities, it would be appropriate to summarily dismiss Johnson Utilities' applications to further extend its certificated area to demonstrate that the Commission will not tolerate such interference with other certificated utilities.

1 The service agreement was drafted by Johnson Utilities and is with a individual to make water
2 available to a significant portion of Diversified's certificated area. The service agreement is
3 structured so water would be made available, on a wholesale basis, to groups other than
4 Diversified. Clearly, there is an attempt by Johnson Utilities to make water available within
5 Diversified's certificated area to enable its landowners to seek water service from others in
6 contravention of A.R.S. § 40-281 and the regulated monopoly concept; a concept that remains
7 the cornerstone of the Commission's jurisdiction over public service corporations providing
8 water service within the State of Arizona.²

9
10 Finally, Johnson Utilities claims that it has a right to discuss Diversified's service
11 with Diversified's customers. As the Administrative Law Judge noted there is no need to
12 conduct service investigations in this manner. Again, the after-the-fact justification for improper
13 activities does not ring true. Johnson Utilities admits it met with property owners within
14 Diversified's certificated area for the purpose of acquiring utility plant and offering wholesale
15 water service. At no point does Johnson Utilities deny contacting other landowners or
16 encouraging them to file complaints or seek deletion from Diversified's certificated area. The
17 absence of a denial rings loudly.

18 For the reasons stated in Diversified's original application, at hearing and herein,
19 Diversified Water Utilities, Inc. respectfully requests the Commission to deny Johnson Utilities'
20 Motion to Quash and protect this small utility fighting to maintain good and reliable service to its

21 ///

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23 ///

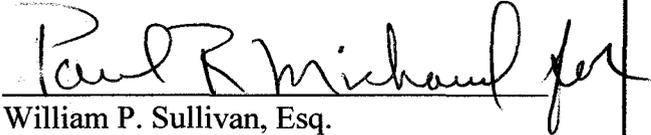
24
25 _____
26 2 The handwritten notes of Ms. Price relating to her contacts with Ms. Haberman (attached hereto as Exhibit A) coupled with the Affidavit of Mr. Gray regarding the phone call received from WIFA shortly after the contacts from Johnson Utilities (See, Affidavit of Scott Gray at ¶15), contradict the characterization of the WIFA contact on behalf of Johnson Utilities. This evidence, coupled with the other activities undertaken by Johnson Utilities in interfering with the operations of Diversified, indicates there was interference with Diversified's WIFA application.

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customers by keeping the Temporary Order in effect pending conclusion of the pending certification proceedings, subject, of course, to further Commission order.

Respectfully submitted this 19th day of December, 2000.

MARTINEZ & CURTIS, P.C.



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Attorneys for Diversified Water Utilities, Inc.

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**PROOF OF SERVICE AND
CERTIFICATE OF MAILING**

I hereby certify that on this 19th day of December, 2000, I caused the foregoing document to be served on the Arizona Corporation Commission by hand-delivering the original and ten (10) copies of said document to:

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With copies of the foregoing mailed/delivered this 19th day of December, 2000 to:

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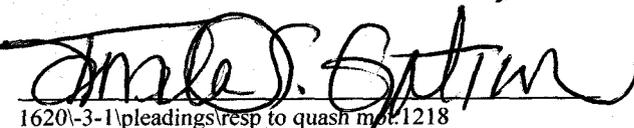
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1620\3-1\pleadings\resp to quash mot.1218

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Supreme.

10-12-2000

Here are the items
identified filed in the

HAO + Johnson Utilities

CA + N expansion sheets.

The hearing, originally set

for Oct. 19th, is being

rescheduled; the new

procedural order is due

today. If you could fax

the diversified application to

me, that would be great.

Thanks,
Marge

My notes from J + R conversation - STP

John Stevens (Branched) Wale
Fiscal Support --- ph. 364-9532
9137- Dennis Johnson fax: 364-2290

(Camp 202) 9134 150

11:17 - Marge Haberman 262-5351

Procedural Order acc
Filed Johnson H20 Docket.
explains each of companies
which company gets what territory

Utilities (two's)
Johnson - CA + N Grand combine
H20 - CA + N actual territory

Report -
Diverse had 0 Green Creek in same area
patent into problem
4 companies for same territory

ACC new procedural order - will reassemble 4
hearing - next Monday groups come together
Procedural Order has a docket
antitrust.
Strategy Developers.

Water Infrastructure Finance Authority of Arizona
202 East Earll Drive, Suite 480
Phoenix, Arizona 85012

From my files. - Suzanne Price
12/6/2000