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**BEFORE THE ARIZONA CORPORATION COMMISSION**

MARC SPITZER  
CHAIRMAN  
JIM IRVIN  
COMMISSIONER  
WILLIAM A. MUNDELL  
COMMISSIONER  
MIKE GLEASON  
COMMISSIONER  
JEFF HATCH-MILLER  
COMMISSIONER

AZ CORP COMMISSION  
DOCUMENT CONTROL

IN THE MATTER OF THE )  
APPLICATIONS OF H2O, INC. AND )  
JOHNSON UTILITIES COMPANY FOR )  
AN EXTENSION OF THEIR )  
CERTIFICATES OF CONVENIENCE AND )  
NECESSITY. )

DOCKET NOS. W-02234A-00-0371  
WS-02987A-99-0583

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 WATER AND WASTEWATER )  
SERVICE TO THE PUBLIC IN THE )  
DESCRIBED AREA IN PINAL COUNTY, )  
ARIZONA. )

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

**DIVERSIFIED WATER UTILITIES, INC.'S  
OPPOSITION TO JOHNSON UTILITIES COMPANY'S MOTION TO  
AMEND RECOMMENDED ORDER**

Diversified Water Utilities, Inc. ("Diversified"), through its attorneys,  
hereby files its Opposition to Johnson Utilities Company's ("JUL") Motion to Amend

1 Administrative Law Judge Stern's December 4, 2002 Recommended Order ("Motion")  
2 and requests that JUL's Motion be denied.

3 **I. JUL'S "COMPLIANCE PROGRAM" IS IRRELEVANT IN LIGHT**  
4 **OF JUL'S HISTORICAL LACK OF COMPLIANCE.**

5 The lynchpin of JUL's argument in its Motion is that it now has a  
6 "compliance program" in place. There are several reasons JUL's "compliance program" is  
7 not only too little, too late, but irrelevant to the issue at hand. To fully understand this  
8 matter, JUL's Motion must be placed in historical perspective. Arizona Corporation  
9 Commission ("Commission") Decision No. 63960 (September 4, 2001), as amended by  
10 Decision No. 64062 (October 4, 2001) (hereinafter jointly referred to as the "Decision"),  
11 was the culmination of a heavily contested certification proceeding. The Staff Report  
12 chronicled the significant repeated violations of the Arizona Department of Environmental  
13 Quality ("ADEQ") rules and regulations by JUL. See, excerpt from Staff Report, attached  
14 as Exhibit A. As a result, Staff recommended:

15  
16 "JUC [JUL] file within 30 days of the anniversary date of  
17 the Decision each year for the next two years documentation  
18 from ADEQ indicating that JUC [JUL] has been in  
19 compliance with ADEQ for each year, and that failure to  
20 submit this documentation in the Docket or failure to correct  
21 any major or minor violation within 30 days from the date of  
22 notice of violation should result in the Certificate authorized  
23 hereinafter becoming null and void without further order of  
24 the Commission."

25 The Decision adopted by the Commission, modified the Staff's  
26 recommendation only to provide JUL ninety (90) days from the date of a notice of  
violation to cure the defect or request an extension from the Commission in order to

1 remedy any violation. See, Decision, p. 34. Conclusion of Law 6 and 2nd Ordering  
2 paragraph.

3 On October 16, 2001, just two weeks after the adoption of the amended  
4 Decision, ADEQ issued a Notice of Violation against JUL, citing four (4) violations of  
5 ADEQ rules. By letter dated October 24, 2001, Staff notified JUL of receipt of the Notice  
6 of Violation and requested JUL comply with the Decision. When no filing was timely  
7 made, Commission Staff, by letter dated January 18, 2002, notified JUL that the  
8 certificates were null and void. JUL responded first by letter dated January 23, 2002 in  
9 which the Company's legal counsel stated:  
10

11 "The Company is very concerned with its regulatory  
12 reputation, and although there have been typical  
13 issues with regulatory agencies during the Company's  
14 startup period, the Company has worked diligently to  
15 correct all outstanding issues and legal requirements  
16 in a timely fashion. As indicated above, certain of  
17 the Company's problems came about due to  
18 consultants (who are no longer working with the  
19 Company) failing to file the appropriate documents,  
20 improperly advising the Company, and in some  
21 instances, outright lying to the Company and the  
22 regulators about certain matters. The Company  
23 believes it now has reorganized its team of  
24 consultants so that these incidents will not occur in  
25 the future. To that end, I will contact you and other  
26 Staff members in the near future to request a meeting  
so that the Company can "clear the air" by explaining  
its actions as well as seeking your input as to how the  
Company's actions and communications can be  
improved for this long-term relationship. In the event  
you have any questions regarding any of these  
matters, please do not hesitate to call."

1                   Shortly thereafter, JUL filed an Emergency Request for Extension of Time  
2 to Comply and Issuance of a Procedural Order Nunc Pro Tunc, dated January 28, 2002,  
3 asserting JUL, in fact, cured all violations at least two (2) days before the ninety (90) day  
4 deadline. The Procedural Order, dated February 22, 2002, noted the Notice of Violations  
5 remained unresolved and granted JUL an extension until March 29, 2002 to cure all  
6 violations. A copy of the Procedural Order is attached as Exhibit B.  
7

8                   Now, JUL has again failed to comply with the requirements of the Decision.  
9 JUL did not file evidence of compliance with ADEQ rules and regulations within thirty  
10 (30) days of the anniversary date of the Decision (November 3, 2002), but instead, in  
11 November 8, 2002, filed another request for retroactive extension of time to comply. As  
12 of December 13, 2002, JUL had "yet to file a copy of its documentation from ADEQ". At  
13 the Open Meeting conducted December 17, 2002, the Commission refused to act on the  
14 request resulting in the current Motion.

15                   Clearly, JUL knew at the time that the Decision was adopted, that it required  
16 JUL to remain in compliance with ADEQ rules and regulations and to file compliance  
17 documents with the Commission. JUL should have created its compliance program then,  
18 if it did not already have one. At a minimum, the promised "compliance program" should  
19 have been implemented in January 2002, when JUL, through its legal counsel, assured the  
20 Commission of JUL's "concern with its regulatory reputation," which resulted in a  
21 reorganization of its consultants "so that these incidents will not occur in the future."  
22 Now, JUL alleges it has began utilizing another "compliance program" on December 15,  
23 2002, obviously, several months too late to ensure compliance with the Decision and  
24  
25  
26

1 Order for the year 2002. JUL's failure to timely implement its various "compliance  
2 programs" only serves to demonstrate JUL's unfitness to hold the CC&N.

3 In addition, the new "compliance program" is merely another sales pitch to  
4 the Commission by JUL. JUL's past behavior does not give the Commission any  
5 assurance that JUL will be in compliance in the future. As noted above, this is not the  
6 first time that JUL asked for a retroactive extension of time to comply with the Decision.  
7 JUL's prior "assurance" of a reorganized team to ensure future compliance proved to be  
8 an empty promise. Likewise, the current compliance program will prove to be just  
9 another unfulfilled promise.  
10

11 Finally, discussion of the "compliance program" deflects attention from the  
12 fact that JUL has provided no proof certifying that no other ADEQ infractions against  
13 JUL exist or are outstanding. During the hearing on December 17, 2002, the Commission  
14 specifically requested that JUL provide proof of the lack of other infractions since the  
15 entry of the Decision. Yet, in its Motion, JUL has provided no such proof and did not  
16 even address the subject.  
17

18 **II. THE IMPORTANCE OF COMPLIANCE WITH COMMISSION**  
19 **ORDERS OUTWEIGHS JUL'S CLAIM OF DEVELOPER**  
20 **PREJUDICE.**

21 JUL argues cancellation of its certificate would temporarily prejudice  
22 various developments. However, there is no question that the developments can and will  
23 obtain water service, regardless of JUL's status. The question is which water service  
24 provider is the fit and proper entity to provide the residents with water service in  
25 compliance with the rules and regulations of the Commission ADEQ. The compliance  
26 requirements by the Commission contained in the Decision are to assure that the valuable

1 rights granted by the Decision are properly implemented and that water systems are  
2 operated in accordance with the rules and regulations for the protection of the consumers  
3 that will depend on the water service provided. There is no doubt that one or more other  
4 water companies that comply with ADEQ regulations and orders of the Commission are  
5 ready, willing and able to provide service to the developers. Finally, all developers were  
6 on notice by the clear provisions of the Decision that the certificate would automatically  
7 be rendered null and void under the conditions presented.  
8

9 The rules, regulations and orders of this Commission should take  
10 precedence over temporary inconvenience to a real estate developer. The inconvenience  
11 to a real estate developer cannot and should not be the standard under which the  
12 Commission operates. The priority of the Commission should be the protection of the  
13 consumers by providing them a water provider that will follow the necessary rules of  
14 operation.

15 **III. THE EQUITIES IN THIS CASE DICTATE THAT JUL'S MOTION**  
16 **TO AMEND BE DENIED.**

17 In its Motion, JUL continues to, in effect, ask to be treated with fairness and  
18 equity. JUL's continued noncompliance with the orders of the Commission is exemplary  
19 of its lackadaisical attitude toward the Commission and ADEQ. JUL's non-compliance is  
20 not the result of oversight; JUL is well aware of its compliance obligations. The  
21 Commission and ADEQ have a long history of attempting to obtain the compliance of  
22 JUL with the rules and regulations governing water and wastewater systems. JUL's non-  
23 compliance is not because JUL lacks resources. See, e.g., Diversified's Exceptions to  
24 Staff's Recommended Order Regarding Johnson Utilities Company's Request for  
25 Extension of Time to Comply, dated December 13, 2002 ("Exception Filing"), regarding  
26

1 this matter (discussing the considerable amount of money and effort expended to date by  
2 JUL attempting to deprive Diversified and its community of a much needed second well).  
3 If JUL instead focused its efforts on ensuring JUL's own system complies with  
4 Commission decisions, JUL would not be before the Commission on this matter.

5  
6 **IV. CONCLUSION**

7 JUL's behavior demonstrates a disregard for the decisions, orders and  
8 directives of the Commission. The orders of the Commission are for the well being of the  
9 consumers the Commission protects and the regulatory system it governs. JUL must  
10 understand that the orders of the Commission are important. Decision No. 64062 clearly  
11 specified the consequences of non-compliance. JUL was previously given the opportunity  
12 to take the steps necessary to ensure compliance. JUL's present Motion to Amend  
13 provides no basis to grant another such extension. The regulatory system does not  
14 function without enforcement. Denying this extension will send that message.

15 For all the foregoing reasons, and those set forth in the previous Exception  
16 Filing, Diversified requests that JUL's Motion to Amend Recommended Order be denied.

17 Respectfully submitted this 18 day of March, 2003.

18  
19 MARTINEZ & CURTIS, P.C.

20 

21 William P. Sullivan  
22 Paula A. Williams  
23 2712 North Seventh Street  
24 Phoenix, Arizona 85006-1090

1 PROOF OF SERVICE AND  
2 CERTIFICATE OF MAILING

3 I hereby certify that on this 18 day of March, 2003, I caused the foregoing  
4 document to be served on the Arizona Corporation Commission by hand-delivering the original  
and twenty (21) copies of said document to:

5 Docket Control  
6 Arizona Corporation Commission  
7 1200 West Washington Street  
Phoenix, Arizona 85007

8 With copies of the foregoing mailed and/or hand-delivered this 18 day of March, 2003 to:

9 Marc Stern, Administrative Law Judge  
10 Arizona Corporation Commission  
11 1200 West Washington Street  
12 Phoenix, Arizona 85007

13 Christopher Kempley, Chief Counsel  
14 Legal Division  
15 Arizona Corporation Commission  
16 1200 West Washington Street  
17 Phoenix, Arizona 85007

18 Ernest Johnson, Director  
19 Utilities Division  
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24 Sallquist & Drummond  
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Intervenor

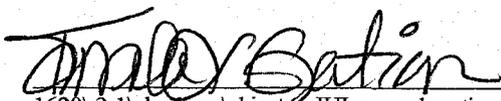
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1121 West Warner Road Suite 109  
Tempe, Arizona 85284  
Intervenor



1620\3-1\pleadings\object46 JUL amend motion.0227.03

**EXHIBIT A**

**FILE**

**BEFORE THE ARIZONA CORPORATION COMMISSION**

**DOCKETED**

OCT 04 2001

DOCKETED BY	JM
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1  
2 WILLIAM A. MUNDELL  
CHAIRMAN  
3 JIM IRVIN  
COMMISSIONER  
4 MARC SPITZER  
COMMISSIONER  
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6 IN THE MATTER OF THE APPLICATION OF  
H<sub>2</sub>O, INC., FOR AN EXTENSION OF ITS  
7 EXISTING CERTIFICATE OF CONVENIENCE  
AND NECESSITY.

DOCKET NO. W-02234A-00-0371

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

DOCKET NO. WS-02987A-99-0583

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

DOCKET NO. WS-02987A-00-0618

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

DOCKET NO. W-02859A-00-0774

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

DOCKET NO. W-01395A-00-0784

DECISION NO. 61062

**AMENDS DECISION NO. 63960  
OPINION AND ORDER**

23 DATES OF PRE-HEARING CONFERENCES: October 11, 2000 and March 11, 2001  
24 DATES OF HEARING: March 15, 16, 19, 20, and 21, 2001  
25 PLACE OF HEARING: Phoenix, Arizona  
26 PRESIDING ADMINISTRATIVE LAW JUDGE: Marc E. Stern  
27 APPEARANCES: Fennemore Craig, P.C. by Mr. Jay L. Shapiro  
and Ms. Karen Errant, on behalf of H<sub>2</sub>O, Inc.;

**RECEIVED**

OCT 9 2001

1 After submission of JUC's request for review, Staff shall have 120 days to file a report  
2 containing one of the following three recommendations:

- 3
- 4 ♦ final approval of the Certificate for all parcels approved in this proceeding;
- 5 ♦ final approval of the Certificate for portions of the parcels approved in this  
6 proceeding with the cancellation of the undeveloped portions of the parcels; or
- 7 ♦ disapproval of the Certificate for the parcel approved in this proceeding.

8 154. Staff further recommends that JUC file, within 30 days of the anniversary date of this  
9 Decision each year for the next two years, documentation from ADEQ indicating that JUC has been  
10 in compliance with ADEQ for each year, and that failure to submit this documentation in the Docket  
11 or failure to correct any major or minor violation within 30 days from the date of notice of violation  
12 should result in the Certificate authorized hereinafter becoming null and void without further order of  
13 the Commission.

14 155. Staff further recommends that JUC file, within 30 days from the effective date of this  
15 Decision, an amended waste water tariff schedule which includes language for its wastewater rates  
16 and charges to state that said charges shall not become effective until wastewater first flows into the  
17 collection system.

18 156. Staff further recommends that, if JUC fails to meet any of the aforementioned  
19 conditions within the time specified, the Certificate authorized hereinafter for the respective parcel be  
20 considered null and void without further order by the Commission.

21 H<sub>2</sub>O

22 157. With respect H<sub>2</sub>O's application for the extension of its Certificate to provide public  
23 water service, Staff is recommending the conditional approval of the application to extend service to  
24 that portion of parcel 14 not previously certificated and parcels 15, 16, 17, 18, 22 and Section 13,  
25 Township 2 South, Range 7 East in Maricopa County, Arizona.

# **EXHIBIT B**



1 On October 16, 2001, ADEQ issued and mailed to Mr. George Johnson, JUC's manager, a  
2 Notice of Violation ("NOV"). The NOV issued by ADEQ alleges four violations which were  
3 discovered during a review of JUC's file completed on October 5, 2001. The four violations relate to  
4 the provision of service by JUC with respect to its Sun Valley Farms Unit V, Public Water System as  
5 follows: the failure of JUC, on two occasions, to secure an Approval of Construction ("AOC"); the  
6 failure of JUC to secure an Approval to Construct ("ATC"); and the failure of JUC to maintain a log  
7 of all onloading, chlorine disinfectant additions and residual free chlorine measurements.

8 On October 24, 2001, Mr. Patrick C. Williams, the Manager of the Commission's Compliance  
9 and Enforcement Section for its Utilities Division ("Staff"), sent a letter to JUC requesting  
10 notification of compliance with ADEQ's NOV. Subsequently, the Commission did not receive any  
11 comments or responses from JUC.

12 On January 18, 2002, Mr. Williams sent another letter to JUC informing it that, pursuant to  
13 the Decision No. 63960 as amended, due to Applicant's failure to timely cure the deficiencies cited by  
14 ADEQ, JUC's extension of its Certificate granted therein was null and void as of January 16, 2002.  
15 In his letter, Mr. Williams cited a discussion he had with an ADEQ official.

16 On January 24, 2002, JUC responded stating that it believed it was in compliance with  
17 Decision No. 63960 as amended.

18 On January 28, 2002, JUC filed a request for a retroactive extension of time to comply with  
19 Decision No. 63960 as amended and for an Order declaring that the Decisions remained in full force  
20 and effect since their issuance. In its request, JUC stated that it did not receive Mr. Williams' letter  
21 of October 24, 2001 and that on January 23, 2002, counsel for JUC had written the Commission  
22 advising it that he believed that all violations had been "cured" prior to the expiration of the 90 day  
23 deadline required in the Commission's Decision as amended.

24 Attached to JUC's request for a retroactive extension were copies of an ATC and an AOC  
25 issued by ADEQ and what appears to be a partially complete chlorination log for the system in  
26 question. JUC also attached a copy of an affidavit of Mr. Michael L. Denby, an attorney for the  
27 Applicant who indicated that he had been informed by William DePaul, the Environmental  
28 Enforcement Coordinator at ADEQ who had signed the NOV and who Mr. Williams had spoken with

1 earlier, that ADEQ neither required nor expected JUC to undertake any additional actions to comply  
2 with the October 16, 2001 NOV. However, Mr. Denby went on to state in his affidavit that Mr.  
3 DePaul had further indicated the matter was not closed and ADEQ would continue to pursue some  
4 form of order to finalize and close the NOV. JUC failed to submit any documentation from ADEQ  
5 that the matter involving the October 16, 2001 NOV had been concluded. In closing, JUC requested  
6 a prompt resolution as certain developers, in order to secure their financing, will be required to show  
7 that the Company's Certificate is in full force and effect in order to secure financing.

8 On February 6, 2002, Staff filed a response to JUC's request for a retroactive extension of  
9 time in order to comply with Decision No. 63960 as amended. In its response, Staff indicates that it  
10 does not oppose a limited extension of time for JUC to document that the NOV has been  
11 satisfactorily resolved. Staff points out that, in order to do this satisfactorily, JUC will have to  
12 provide documentation from ADEQ that its October 16, 2001 NOV has or will be resolved to  
13 ADEQ's satisfaction. Staff is recommending that JUC be given a retroactive extension of time for  
14 compliance until February 22, 2002 and that JUC be ordered to notify all parties in the above-  
15 captioned proceeding of its requested extension by serving a copy of its request on all parties to the  
16 proceeding and to provide certification of same to the Commission. Additionally, Staff is  
17 recommending that, if JUC does not submit written documentation from ADEQ by February 22,  
18 2002 stating that all violations cited in the October 16, 2001 NOV have been cured, the Certificate  
19 issued to JUC in Decision No. 63960 as amended shall remain null and void.

20 On February 8, 2002, JUC filed its response to that of Staff. Therein, Applicant attached  
21 documentation in the form of a copy of a letter from Mr. DePaul to Mr. Williams. The letter states  
22 that events resulting in the violations "had been addressed and were no longer continuing to accrue  
23 daily penalties. However, the NOV identifying the violations remains unresolved . . ." because the  
24 parties have not yet held face to face meetings. JUC also attached a copy of an ADEQ Compliance  
25 Status Report dated January 24, 2002, for its Sun Valley Public Water System that is marked, "No  
26 Major Deficiencies," and that states the system's water met the requirements of the Safe Drinking  
27 Water Act.

1 As of February 22, 2002, Staff has filed no further comments on this matter<sup>1</sup>.

2 After a review of JUC's request herein, a reasonable extension of time is appropriate for Staff  
3 to review the documentation filed by JUC. The extension of time will be authorized retroactively and  
4 will extend beyond that date recommended by Staff in order to allow additional time for further Staff  
5 clarification of the status of JUC with respect to the violations cited in the NOV. Lastly, Staff's  
6 request that JUC notify all parties in the above-captioned proceeding of its request by providing them  
7 with a copy of same is reasonable and will be ordered hereinafter.

8 IT IS THEREFORE ORDERED that the request of Johnson Utilities, L.L.C. dba Johnson  
9 Utilities Company for an extension of time to comply with Decision No. 63960 as amended shall be  
10 granted until March 29, 2002.

11 IT IS FURTHER ORDERED that Johnson Utilities, L.L.C. dba Johnson Utilities Company  
12 shall provide to Staff a written statement from the Arizona Department of Environmental Quality that  
13 all violations cited in the October 16, 2001 Notice of Violation have been cured.

14 IT IS FURTHER ORDERED that the Utilities Division shall file, by March 15, 2002, its  
15 response to the documentation filed by Applicant and whether the violations cited by the Arizona  
16 Department of Environmental Quality in its Notice of Violation have been cured.

17 IT IS FURTHER ORDERED that, upon the filing of the Utilities Division's response to  
18 Applicant's documentation and further review, a further Procedural Order shall be issued to address  
19 whether the Arizona Department of Environmental Quality's violations have been cured or if other  
20 steps will have to be taken to resolve the issue of the validity of the Certificate.

21 ...

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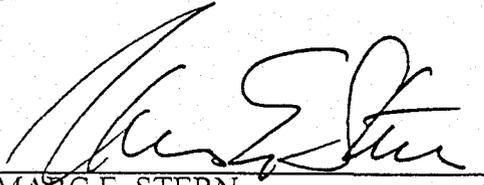
26 ...

27

28 <sup>1</sup> On February 11, 2002, Mr. Williams wrote a letter to Mr. DePaul requesting clarification whether the violations cited in the NOV had been "cured."

1 IT IS FURTHER ORDERED that Johnson Utilities, L.L.C. dba Johnson Utilities Company  
2 shall mail copies of its request herein to all parties of record and file certification of same within 20  
3 days of the date of this Procedural Order.

4 DATED this 22nd day of February, 2002.

5  
6  
7   
8 MARC E. STERN  
9 ADMINISTRATIVE LAW JUDGE

10 Copies of the foregoing mailed/delivered  
11 this 22nd day of February, 2002 to:

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13 Richard Tobin  
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15 ADEQ  
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16 Bill DePaul  
17 Enforcement Coordinator  
18 Drinking Water Compliance and Enforcement Unit  
19 ADEQ  
20 3033 N. Central Avenue  
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20 By:

  
\_\_\_\_\_  
21 Molly Johnson  
22 Secretary to Marc E. Stern  
23  
24  
25  
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