



0000117845

Arizona Corporation Commission

DOCKETED

AUG 03 2000

RECEIVED  
AZ CORP COMMISSION

4 02 PM '00

DOCKETED BY	
-------------	--

DOCUMENT CONTROL

1 FENNEMORE CRAIG, P.C.  
 2 Norman D. James (Arizona Bar No. 006901)  
 3 Karen E. Errant (Arizona Bar No. 016173)  
 3003 North Central Avenue, Suite 2600  
 4 Phoenix, Arizona 85012-2913  
 (602) 916-5000  
 Attorneys for H2O, Inc.

BEFORE THE ARIZONA CORPORATION COMMITTEE

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

DOCKET NO. W-02234A-00-0371

**H2O'S RESPONSE TO STAFF'S MOTION  
TO CONSOLIDATE AND REQUEST FOR  
PROCEDURAL ORDER**

10 H2O, Inc. ("H2O") hereby responds to Staff's Motion for Consolidate and  
 11 Request for Procedural Order and, for the reasons set forth below, submits that  
 12 such motion is ill-advised and should be denied. Staff has failed to demonstrate  
 13 that the requirements for consolidation set forth in A.A.C. R14-3-109(H) are  
 14 satisfied in this case. Indeed, Staff's motion is cursory at best, and if granted, will  
 15 result in extreme prejudice to H2O by unlawfully placing its application in  
 16 administrative limbo.

17 As a preliminary matter, it should be noted that Staff's summary of the  
 18 pending applications is incomplete and misleading. Although it is correct that  
 19 Johnson Utilities Company ("Johnson") originally filed an application requesting  
 20 authorization to extend its certificate of public convenience and necessity ("CC&N")  
 21 on October 18, 1999, Staff erroneously implies that Johnson's application included  
 22 certain land that is the subject of H2O's pending application. In reality, however,  
 23 Johnson's application was subsequently amended on November 1, 1999, on June  
 24 15, 2000, and again on July 3, 2000.<sup>1</sup> The June 15, 2000 and July 3, 2000

25 \_\_\_\_\_  
 26 <sup>1</sup> At the same time, Johnson filed a separate application on June 7, 2000 which was  
 subsequently withdrawn.

1 amendments dramatically altered Johnson's application, which now covers some  
2 21,000 acres of land in northern Pinal County.

3 In contrast, H2O filed an application on May 30, 2000, to extend its CC&N  
4 to include approximately 2,500 acres of contiguous land, substantial portions of  
5 which are already surrounded on three sides by H2O's existing CC&N. At the time  
6 H2O's application was filed, there was no conflict between Johnson's application  
7 and H2O's application. The conflict referenced in Staff's motion did not arise until  
8 Johnson amended its application on June 15, 2000 and again on July 3, 2000,  
9 adding more than 15,000 acres of land to its application.

10 In short, through a series of amendments (and a second application that was  
11 later withdrawn) filed within the past 60 days, Johnson now seeks to extend its  
12 CC&N for both water and wastewater service to include nearly 33 square miles of  
13 additional territory, creating a conflict with H2O's relatively modest application.  
14 H2O's application pertains only to water service (H2O does not provide wastewater  
15 service) and has been declared administratively complete by Staff. Johnson's  
16 application, to H2O's knowledge, has yet to have been accepted by Staff and,  
17 based on Johnson's conduct thus far, may well be amended again. This procedural  
18 background is important in understanding why Staff's motion is illogical and  
19 prejudicial to H2O.

20 Under A.A.C. R14-3-109(H), the Hearing Officer "may consolidate two or  
21 more proceedings in one hearing when it appears that the issues are substantially  
22 the same and that the rights of the parties will not be prejudiced by such  
23 procedure." This procedural rule is neither cited nor discussed in Staff's motion. It  
24 plainly permits (but does not require) consolidation when (1) the issues in both  
25 proceedings are substantially the same and (2) the rights of the parties will not be  
26

1 prejudiced by consolidation. Neither of these requirements are satisfied in this  
2 case.

3 In its motion, Staff expresses its "belief" that the issues involved in  
4 Johnson's application and H2O's application are related as a consequence of  
5 Johnson's belated amendments to the incomplete application originally filed by  
6 Johnson in 1999. However, as the foregoing summary indicates, Johnson seeks to  
7 extend its CC&N for both water and wastewater utility service to include  
8 approximately 33 square miles of additional territory. Of this vast area,  
9 approximately 2,500 acres overlaps H2O's application. Because the vast majority  
10 of the land included in Johnson's application does not conflict with H2O's  
11 application, and because H2O is seeking only to provide water utility service, the  
12 matters are not substantially the same and consolidation would be inappropriate.

13 Staff's solution to the foregoing problem makes no sense. According to  
14 Staff, separate hearings should first be held on the issues that are presently  
15 uncontested. Thereafter, at some future date, "a separate consolidated hearing  
16 should be held on the issues concerning the Contested Territory." Staff Motion at  
17 1. Staff makes no attempt to define or otherwise indicate what issues are  
18 "uncontested" and what are "contested" other than to indicate that "contested"  
19 issues pertain to the land that is in conflict.

20 It is difficult to conceive of a recommendation that would be more prejudicial  
21 to H2O, thereby violating the second requirement set forth in A.A.C. R14-3-109.  
22 Johnson's belated amendments to its application include ***the entire area covered by***  
23 ***H2O's application***. Thus, Staff's recommendation would elevate Johnson's  
24 application, which is still incomplete, to some sort of special, fast-track status,  
25 while H2O's application would be placed on hold, notwithstanding the fact that  
26 H2O's application was accepted as administratively complete on June 29, 2000,

1 and a decision on H2O's application must be issued within 150 days from that  
2 date. Staff has provided no basis for affording this special treatment to Johnson,  
3 which is anomalous at best given Johnson's history of non-compliance and ongoing  
4 difficulties with the Arizona Department of Environmental Quality.

5 For example, Centex Homes, which is building homes in three residential  
6 subdivisions located within the Johnson Ranch development area, has filed a  
7 complaint against Johnson alleging, among other things, that Johnson has failed to  
8 provide water and/or wastewater service in a timely manner, while billing Centex  
9 for service that Johnson is unable to provide. See Centex Homes v. Johnson  
10 Utilities, Docket No. WS-02987A-00-0387. Applying Staff's logic, this formal  
11 complaint proceeding should also be consolidated with Johnson's application given  
12 that Johnson's service problems will be relevant to its request to include an  
13 additional 33 square miles of land in Johnson's CC&N.

14 In summary, Staff's recommendation is poorly conceived and will clearly  
15 prejudice H2O. In effect, Staff asks the Hearing Officer to punish H2O for seeking  
16 to include approximately 4 square miles of additional land that is contiguous to  
17 H2O's existing service territory by placing H2O's application on hold. H2O's  
18 application is narrowly tailored and should generate little controversy. Its  
19 application should not be delayed or otherwise consolidated with the application of  
20 a rogue utility that continues to experience problems in its core service area.  
21 Accordingly, Staff's motion should be denied.

22 . . .  
23 . . .  
24 . . .  
25 . . .  
26 . . .

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

RESPECTFULLY SUBMITTED this 3rd day of August, 2000.

FENNEMORE CRAIG, P.C.

By Norman D. James  
Norman D. James  
Karen E. Errant  
3003 North Central Avenue  
Phoenix, Arizona 85012-2913  
Attorneys for H2O, Inc.

ORIGINAL and 10 copies of  
the foregoing filed this 3rd day  
of August, 2000, with:

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

COPY of the foregoing mailed  
this 3rd day of August, 2000, to:

Karen Nally  
Hearing Officer  
Hearing Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, Arizona 85007

Steve Olea  
Assistant Director, Utilities Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, Arizona 85007

Mark DiNunzio  
Utilities Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, Arizona 85007

1 Robert Metli  
2 Legal Division  
3 ARIZONA CORPORATION COMMISSION  
4 1200 West Washington Street  
5 Phoenix, Arizona 85007

6 Thomas H. Campbell  
7 Greg Y. Harris  
8 Lewis & Rocca, LLP  
9 40 N. Central Avenue  
10 Phoenix, Arizona 85004  
11 Attorneys for Johnson Utilities Company

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
By: Mary L. House