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BEFORE THE ARIZONA CORPORATION COMMISSION

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

DOCKET NO. W-02234A-00-0371

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

DOCKET NO. WS-02987A-99-0583

DOCKET NO. WS-02987A-00-0618

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

DOCKET NO. W-02859A-00-0774

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

DOCKET NO. W-01395A-00-0784

**JOHNSON UTILITIES' RESPONSE
 TO DIVERSIFIED MOTION TO
 LIMIT COMMISSION
 CONSIDERATION OF JOHNSON
 UTILITIES COMPANY'S
 APPLICATION FOR RETROACTIVE
 EXTENSION OF TIME TO COMPLY
 WITH COMMISSION DECISION NO.
 64062.**

Arizona Corporation Commission

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1 Johnson Utilities Company (“JUC” or “Company”) hereby files this Response to
2 Diversified Water Utilities, Inc.’s (“Diversified”) April 8, 2003 Motion to Limit
3 Commission Consideration to Items Raised in JUC’s Application for Retroactive
4 Extension of Time to Comply with Commission Decision No. 64062 (“Motion”). Put
5 bluntly, the arguments set forth in Diversified’s Motion are utterly without merit.

6 **I. INTRODUCTION**

7 When granting a certificate of convenience and necessity (“CC&N”), the Arizona
8 Corporation Commission (“Commission”) makes a determination whether there is a need
9 for service, and whether the Applicant is fit and able to provide that service. *See, e.g.,*
10 *James P. Paul Water Company v. Arizona Corporation Commission*, 137 Ariz. 426, 429,
11 671 P.2d 404, 407 (1983). In Decision No. 64062 (October 4, 2001)(the “Decision”), the
12 Commission found that the public interest would be served by, among other things,
13 granting JUC’s request to extend its CC&N to a number of properties in and around
14 Eastern Pinal County. Decision at 33-34. Notably, however, the Commission conditioned
15 the extension of JUC’s CC&N on certain conditions, including compliance with Arizona
16 Department of Environmental Quality (ADEQ) rules and regulations, in addition to a
17 timely reporting of such regulatory compliance with the Commission. JUC failed to
18 timely provide notice of ADEQ compliance and, on November 4, 2002, the CC&N
19 extension granted in the Decision was rendered null and void by operation of law.

20 JUC is not now seeking to justify its failure to timely act. In short, JUC was in the
21 process of negotiating a consent decree with ADEQ concerning what was essentially a
22 “record keeping” error occurring prior to the issuance of the Decision. *See Decision* at
23 27-28. The Consent Judgment has now been executed by JUC and the penalty tendered
24 to ADEQ.¹ Accordingly, JUC filed its request to have its extended CC&N reinstated.

25 ¹ In its March 28, 2003 Application, JUC sought reinstatement of its CC&N conditioned on the
26 subsequent execution of the Consent Judgment and payment of the penalty agreed to by JUC and ADEQ.
As a result of the Commission’s delaying consideration of this matter to ensure all parties had adequate

1 JUC respectfully suggests that the public interest will be served by the grant of this relief
2 as there is no evidence that the need for water and sewer utility service found by the
3 Commission in the Decision has dissipated, or that JUC stands unwilling or unable to
4 serve.

5 The sole voice of dissent is Diversified, which has made two separate filings in
6 opposition to reinstatement of JUC's CC&N. While it is unclear what interest Diversified
7 has in the requested relief, it is clear that Diversified offers no solution to the problem, an
8 immediate need for water and wastewater utility service in the subject area of Pinal
9 County. Instead, Diversified seems to have staked out some sort of utilities moral high
10 ground, demanding that the Commission protect the integrity of its prior orders, while in
11 reality seeking only to delay this matter without any regard for the public interest.

12 **II. DIVERSIFIED HAS RECEIVED ACTUAL NOTICE**

13 Candidly, Diversified's arguments regarding notice are nonsense. Essentially,
14 Diversified is arguing that the Commission should not hear public comment from property
15 owners and homebuilders claiming to be injured by the revocation of JUC's extended
16 CC&N because Diversified did not receive notice that such concerns would be voiced. It
17 is simply preposterous that notice of specific public comments to be made at open meeting
18 is somehow required. Any member of the public, including developers, landowners,
19 governmental representatives and any interested third parties have a right to provide
20 public comment during open meetings on matters before the Commission. *See, e.g.,*
21 *Arizona Open Meeting Law, A.R.S. § 38-431 et seq.* Moreover, the Commission is certainly
22 free to take administrative notice that the revocation of JUC's extended CC&N would
23 impact those relying on the Company to fulfill the need for water and wastewater service
24 the Commission previously addressed in the Decision.

25 In any event, Diversified's argument is a red-herring given that it has received
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notice, the Company has now had the opportunity to conclude this matter with ADEQ.

1 *actual* notice of the issues now pending before the Commission. The Application sets
2 forth the requested relief – a retroactive extension of time to comply with Decision No.
3 64062. In approving or denying this request, the Commission will be required to
4 determine whether the ADEQ compliance requirements of the Decision have now been
5 fulfilled, and if so, whether reinstatement of the CC&N is in the public interest.
6 Diversified has received the Company’s Application, and filed two pleadings for the
7 Commission to consider. Diversified also appeared at the April 1, 2003 Open Meeting
8 where the Commission postponed discussion of JUC’s Application despite the urging of
9 interested “developers” appearing and making public comment. The Commission did so
10 to ensure all parties would have ample notice and opportunity to be heard, and may now
11 exercise its considerable discretion in this matter and consider any reasonable factors it
12 deems relevant, including, of course, Diversified’s hollow opposition, in determining how
13 the public interest will best be served.

14 **III. DIVERSIFIED’S OPPOSITION IS CONTRARY TO THE PUBLIC**
15 **INTEREST**

16 Having first staked out its ground as the protector of the Commission’s orders,
17 Diversified next seeks to protect the public health and welfare of the general public in
18 Pinal County. While this might be a laudable goal, Diversified either lacks knowledge or
19 has misrepresented the circumstances giving rise to the Consent Judgment between JUC
20 and ADEQ. As the now executed Consent Judgment attached to the Application states:
21 “There are no allegations herein or in ADEQ’s civil complaint that there was ever a threat
22 to the public’s health, safety or welfare.” Consent Judgment at 2. Surely the Commission
23 can take notice of the finding of the state agency with primary jurisdiction over the subject
24 of JUC’s violations that there was never a health related concern arising from JUC’s
25 bookkeeping errors. Indeed, the underlying violations resulting in the October 16, 2001
26 NOV were known to the Commission at that time of the Decision and presumably were in

1 large part the reason for the compliance requirements contained in Decision No. 64062.
2 See *Decision* at 27-28. Thus, the only question now before the Commission is whether
3 JUC's compliance, albeit untimely, with these administrative requirements warrants
4 reinstatement of the CC&N extension.

5 The adjudication of that question does not require the Commission to engage in
6 some sort of competitive balancing test, as Diversified seemingly desires. It is well
7 established that Arizona's public policy respecting public service corporations, such as
8 water companies, is one of regulated monopoly over free-wheeling competition. See
9 *Corporation Commission of Arizona v. People's Freight Line, Inc.*, 41 Ariz. 158, 16 P.2d
10 420 (1932); *James P. Paul Water Company v. Arizona Corporation Commission*, 137
11 Ariz. 426, 429, 671 P.2d 404, 427 (1983). Moreover, Diversified's claims of business
12 interference by JUC were rejected by the Commission over two years ago. See *In the*
13 *Matter of the Complaint of Diversified Water Utilities, Inc. Against Johnson Utilities*
14 *Company and H2O, Inc. For Potential Interference with The Operations of an Existing*
15 *Line, Plant or System*, Docket Nos. W-02234A-00-0775, WS-02987A-00-0775 ("...and if
16 you're saying the company, one company is interfering with your company's business,
17 don't bring it to the Commission. Go to court.")²

18 **IV. CONCLUSION**

19 Based on the foregoing, the Commission should deny Diversified's Motion to
20 Limit Commission Consideration to Items Raised in JUC's Application for Retroactive
21 Extension of Time to Comply with Commission Decision No. 64062.

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26 ² See also *Diversified Exceptions to Recommended Order*, Exhibit B, page 3.

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RESPECTFULLY SUBMITTED this 15th day of April, 2003.

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