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BEFORE THE ARIZONA

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CORPORATION COMMISSION

AZ CORP COMMISSION
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Carl Kunasek
Chairman
Jim Irvin
Commissioner
William Mundell
Commissioner

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

DOCKET # W-02987A-00-0618

OBJECTION TO H2O's
APPLICATION FOR LEAVE
TO INTERVENE

Johnson Utilities, LLC, dba Johnson Utilities Company ("Johnson Utilities") opposes the application filed by H2O, Inc. ("H2O") for leave to intervene in the bifurcated uncontested certificate of convenience and necessity ("CC&N") extension proceeding filed by Johnson Utilities.

To intervene in Commission proceedings, the applicant must demonstrate that the outcome of the case may have a direct and substantial impact on the applicant and that it will not unduly broaden the issues in the proceeding. A.A.C. R14-3-105. H2O's application fails to meet the requirements legal requirements to intervene. First, granting the application will unnecessarily complicate and broaden a proceeding already bifurcated to separate contested issues from uncontested issues. Second, the law upon which H2O relies - A.R.S. § 40-281(B)

1 and an interpretive Supreme Court case – does not support the relief sought by H2O in its
2 application. Thus, H2O’s intervention effort should be denied because it conflicts with the
3 efficient processing of this administrative proceeding, it is based on a misreading of the
4 relevant law, and it fails to provide any facts to support its request.
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6 Introduction

7 Both H2O and Johnson Utilities hold separate CC&Ns to serve portions of Pinal
8 County, near Queen Creek, Arizona. While Johnson Utilities has both a water and sewer
9 CC&N, H2O holds only a water CC&N.
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11 The vicinity of Queen Creek has seen tremendous growth in recent years. As a
12 consequence of this growth, Johnson Utilities sought, starting last fall, to expand its area of
13 service. Following the submission of its initial CC&N expansion application, Johnson
14 Utilities filed a number of amendments, including most recently the fourth amended
15 application, owing to the substantial demand and substantial preference for Johnson Utilities
16 expressed by property owners in the area. Nearly seven months after Johnson Utilities began
17 the process to expand its CC&N, H2O filed its own CC&N extension application.
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19 A portion of the expansion application filed by Johnson Utilities overlaps with H2O’s
20 application and, in two instances, seeks to delete a portion of CC&N already held by H2O.
21 Johnson Utilities sought to intervene in the H2O proceeding because the resolution of the
22 conflicting portions of the applications would directly and substantially affect the rights of
23 Johnson Utilities. Rather than being permitted to intervene, Johnson Utilities received
24 permission to participate in a consolidated proceeding involving the contested claims. The
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1 consolidation order resulted in the bifurcation of the proceedings, with one portion – the
2 uncontested case – reserved to resolve aspects of the Johnson Utilities application with
3 respect to which H2O did not hold a CC&N and had not sought to include in its service area.
4 See Docket No. W-02987A-00-0618. The second proceeding – the contested case – would
5 address those areas in which the Johnson Utilities application and the H2O application or
6 certificate conflicted. See Docket Nos. W-02334A-00-0371 and W-02987A-99-0583.

8 Notably, H2O identifies only one reason for its intervention in the “uncontested
9 proceeding”. This reason stems from its claim of run-along rights arising from A.R.S. § 40-
10 281(B). Specifically, H2O alleges that some unidentified portions of the lands included in the
11 northern portion of Johnson’s uncontested application are contiguous to certain parcels in the
12 vicinity of H2O’s certificated area. Accordingly, H2O claims that it would be directly and
13 substantially affected by the proceedings in this docket because Johnson’s application, if
14 granted, would result in a situation in which Johnson may also claim to possess conflicting
15 run-along rights pursuant to A.R.S. § 40-281(B).
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18 H2O’s application should be denied because H2O has failed to demonstrate
19 entitlement to the relief it seeks.

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21 **1. H2O’s Intervention Application will unduly broaden this proceeding and**
22 **defeat the administrative efficiency created by the September 5**
Procedural Order.

23 H2O – a competitor of Johnson Utilities – seeks to inject itself into a proceeding with
24 respect to parcels that H2O has not sought to serve. Some of these parcels are located ten
25 miles or more from the area served by H2O. As such, its intervention would defeat the
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1 purpose of the bifurcation orders by the hearing officer; namely, the efficient processing of
2 the Johnson Utilities application for these parcels which H2O did not seek to serve. It will
3 unduly broaden the issues in this proceeding in violation of A.A.C. R14-3-105.

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5 H2O seeks to intervene in the uncontested proceeding because of its claim that the
6 run-along rights stemming from A.R.S. § 40-281(B) establish some kind of preferred right to
7 serve areas not covered by H2O's existing certificate. Curiously, H2O's intervention
8 application does not identify a single parcel in this proceeding to which its claimed run-along
9 rights apply or attach. H2O's intervention will result in the obstruction of proceedings to
10 which it is a complete stranger and in which it has no legal interest. Because H2O failed to
11 specifically articulate how, and in relation to what particular property, H2O might be
12 impacted by the Johnson Utilities application, its intervention application should be denied.

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14 At a minimum, H2O should be required to identify with specificity each parcel
15 included in the Johnson Utilities application to which the rights that H2O claims apply. To
16 the extent that the rights that H2O claims to exist have any connection to the parcels covered
17 by the Johnson Utilities application, those parcels could be transferred to the contested
18 proceeding without unduly broadening the uncontested proceeding. This approach would
19 allow the uncontested proceeding to run its course with only those parties having an interest
20 in that proceeding to participate.

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23 **2. The run-along rights that H2O claims do not exist in this case.**

24 Even if H2O has provided more specific factual assertions, Johnson Utilities
25 nonetheless disputes H2O's general assertion about the existence of run-along rights that
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1 might be impacted by the Johnson Utilities application. The statute relied upon by H2O in
2 support of its claim – A.R.S. § 40-281(B) – does not eliminate the need for an existing CC&N
3 holder to obtain permission from the Corporation Commission to extend its area of service
4 to areas that lie outside of its certificated service area. The proof of this first can be seen
5 from H2O’s having sought to extend its CC&N in its May filing. H2O, through its
6 application, seeks to extend its territory to parcels in the vicinity of H2O’s existing CC&N.
7 Using the logic applied by H2O to support its intervention application, its application did not
8 need to be filed, given the novel run-along rights concept that it now espouses. However, as
9 H2O implicitly acknowledged when it filed its extension application, the statute triggering the
10 existence of run-along rights has a much narrower meaning. The statute permits an existing
11 certificate holder to lawfully extend its service area without first having to seek permission
12 from the Commission only in the following circumstances:

- 13 1. For an ‘extension’ within a city, county or town within which it has
14 lawfully commenced operations, or
- 15 2. For an extension into territory either within or without a city, county or
16 town, ‘contiguous’ to its . . . line, plant or system, and not served by a
17 public service corporation of like character, or
- 18 3. For an extension within or to territory already served by it, necessary in
19 the ordinary course of its business.

20 *Electrical District No. 2 v. Arizona Corporation Commission*, 155 Ariz. 252, 256, 745 P.2d 1383, 1387
21 (1987)

22 H2O does not satisfy any of these three circumstances.
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1 First, no city or town is extending its municipal limits justifying H2O's application. As
2 noted above, both Johnson Utilities and H2O currently have authority to operate within Pinal
3 County. Clearly, neither possesses run-along rights to the entire county. The Supreme Court
4 would seem to have foreclosed a claim of this sort by its ruling in *Electrical District*. The court
5 determined that as a city extends its boundaries through annexation or otherwise, the holder
6 of a CC&N to serve the city enjoys a preferred right to service property within the revised
7 boundaries of a city without having to go back to the Corporation Commission to extend its
8 certificate. *Electrical District*, at 256, 734 P.2d at 1387. Yet, when the court rejected an effort
9 to extend these preferred rights to property just 50 feet beyond the border of that city, the
10 court necessarily determined that extensions falling within an existing county do not trigger
11 run-along rights. As such, the first prong of the run-along right preference created by A.R.S.
12 § 40-281(B) that H2O claims does not apply.

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15 The second prong likewise does not apply to the H2O application because its facilities
16 are not immediately contiguous to the parcels it seeks to serve. To account for this prospect,
17 the preferred rights created by A.R.S. § 40-281 allow the holder of a CC&N to extend the
18 breadth of that existing CC&N to areas contiguous to its existing "line, plant or system."
19 A.R.S. § 40-281(B); *Electrical District*, 155 Ariz. at 256-257, 734 P.2d at 1387, 1388. Thus, the
20 determination of whether a CC&N may be extended to property lies not on whether a
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1 certificated parcel abuts or touches an uncertificated parcel, but on the existing infrastructure
2 already in place to serve contiguous parcels.¹

3 Significantly, H2O has provided no information concerning the relative proximity of
4 its existing infrastructure to the areas for which it claims run-along rights. At the core of the
5 Johnson Utilities extension request rests the reality that H2O has made very little investment
6 in infrastructure and facilities to serve the pertinent portions of its existing service area. In
7 fact, H2O provides no service to the two parcels (*i.e.*, Pecan Farms and Johnson Farms)
8 within its certificated area that are closest to its requested expansion area. The absence of
9 service by H2O to these areas represents a principal reason Johnson Utilities seeks to delete
10 those areas from H2O's certificated area.

13 Third, the statute also permits extension to territories already served by the utility
14 necessary in the ordinary course of its business. Notably, H2O has sought permission to
15 serve some new areas in the vicinity of its existing CC&N, but H2O has not sought
16 permission to serve any of the areas falling within the scope of the uncontested proceeding.
17 More importantly for this third prong, H2O does not serve any of these areas at present.
18 Instead, H2O relies upon its claimed run-along rights to prevent its competitor – Johnson
19 Utilities – from serving the area. The *Electrical District* court examined whether APS had a
20 preferred right to serve property located a considerable distance from its existing service area.
21 The court concluded that the distance between the current service area covered by APS'
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25 ¹ "Contiguous" is strictly construed. As the Supreme Court held in *Electrical District*, a restaurant located a mere 50 feet outside of a utility's
26 service area was not contiguous with its existing certificated area. In reaching this holding, the court stated that although only 50 feet apart, the
restaurant property was nevertheless apart and not contiguous. *Id.* At 257, 734 P.2d at 1388.

1 existing certificate did not create a preferred right to provide service to a new subdivision
2 located several miles from its existing service area. *Id.* at 257-258, 734 P.2d at 1388-1389.
3 The court reached this conclusion because the property was not contiguous, was not being
4 served by APS, and was not in the existing APS service area.

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6 Because none of the three extension circumstances apply in this case, H2O's claim to
7 run-along rights must fail as a matter of law, and the intervention application filed by H2O
8 should be rejected.

9 Conclusion

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11 H2O claims a right to intervene in this uncontested proceeding because it suggests that
12 its A.R.S. § 40-281 run-along rights are threatened by this "uncontested" proceeding. No
13 portion of its application identifies the any property to which these claimed run-along rights
14 apply and, more importantly, as a matter of law there are no relevant run-along rights for
15 purposes of this proceeding. Consequently, H2O has not demonstrated that it would be
16 substantially and directly effected by the Johnson Utilities application in the uncontested
17 proceeding. Moreover, H2O's intervention will unduly broaden the issues of the uncontested
18 proceeding thereby defeating the administrative efficiencies achieved by the hearing officer's
19 bifurcation order.
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