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BEFORE THE ARIZONA CORPORATION

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Arizona Corporation Commission

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IN THE MATTER OF THE APPLICATION OF
JOHNSON UTILITIES L.L.C. FOR APPROVAL
TO EXPAND THE SERVICE AREA TO INCLUDE
BELLA VISTA NORTH AND MERRILL RANCH
EXPANSION #1.

DOCKET NO. WS-02987A-12-0136

STAFF'S NOTICE OF FILING
CLOSING BRIEF

During the evidentiary hearing in this matter held on April 18, 2013, an issue arose as to the nature of Staff's recommendation. In order to clarify Staff's position, Staff hereby provides notice of filing of this statement of Staff's position.

In its Staff Report, Staff recommended that the applicant, Johnson Utilities, LLC. ("Johnson" or "Company"), not receive a Certificate of Convenience and Necessity ("CC&N") for the Bella Vista North and Merrill Ranch territories. Rather, Staff is recommending that the Company receive an Order Preliminary ("OP") with varying conditions for all the territory encompassed by the application. An OP disposes of a CC&N application in a way that does not grant a CC&N but sets out the conditions upon which a utility may demonstrate that a CC&N ultimately will be appropriate. As will be discussed further, an OP is a lawful resolution to a CC&N application that is expressly provided for by statute. Consequently, Staff continues to recommend that the Company receive an OP for the Bella Vista North and Merrill Ranch expansion areas.

In the event that the Commission does not deny a CC&N application outright, the Commission has options for resolving the matter. The Commission may grant the CC&N with operating conditions. Alternatively, the Commission may grant a conditional CC&N that has outstanding compliance matters that must be resolved in order to perfect the grant of a CC&N. Finally, the Commission may issue an OP setting out how a future CC&N may be obtained if various compliance matters are resolved.

1 The most common outcome is the grant of a CC&N or an extension of an existing CC&N. In
2 such cases, an applicant has made a sufficient showing that it is fit and proper to provide the utility
3 service and that a need is present for the certification of a provider for the territory in question.
4 Pursuant to A.R.S. § 40-282(C), the Commission may “attach to the exercise of rights granted by the
5 certificate terms and conditions it deems that the public convenience and necessity require.” Such a
6 CC&N may have conditions attached to it, but the conditions are generally operational and ongoing
7 in nature rather than specific compliance conditions that may be resolved at some point. An example
8 of such conditions includes requiring that the utility charge the same rates within an extension area as
9 are approved in the original CC&N.

10 Alternatively, the Commission might award a conditional CC&N. As distinguished from a
11 CC&N that has conditions, in this instance the applicant receives a CC&N that is subject to explicit
12 compliance requirements that must be fulfilled in order to perfect the CC&N. Typical examples of
13 such conditions include obtaining Department of Water Resources Certificates of Assured Water
14 Supply or Department of Environmental Quality Approvals to Construct. Staff makes this
15 recommendation when an otherwise fit and proper applicant has demonstrated a sufficiently tangible
16 present need to provide utility service to the territory but has not acquired all preliminary approvals
17 necessary to provide such utility service.

18 In the event that the utility receives a conditional CC&N, it has a CC&N with all the
19 necessary rights to construct plant, serve customers and exclude competitors. If the utility does not
20 fulfill the compliance matters required within the conditional CC&N, the CC&N does not
21 automatically terminate. Instead, the conditional CC&N holder will be afforded due process and
22 notice that the conditional CC&N may be subject to termination for failure to achieve compliance
23 with the conditions.

24 Finally, the Commission may grant an OP pursuant to the authority granted in A.R.S. § 40-
25 282(D). When this occurs, the applicant does not receive a CC&N upon issuance of the order and
26 consequently does not receive a right to serve customers, exclude competitors or even construct plant
27 within the requested territory. A.R.S. § 40-281(C). The order charts out issues that must be resolved
28

1 before the Commission determines that a CC&N would be warranted. Upon achieving compliance
2 with the issues outlined in the OP, the utility may then make an application to obtain the CC&N
3 which may be a full CC&N or a conditional CC&N.

4 Orders preliminary are infrequently awarded but are generally recommended by Staff as an
5 alternative to recommending denial. The benefit to the utility applying for the CC&N is that it will
6 know what must occur for it to demonstrate the appropriateness of a CC&N and consequently the
7 process for acquiring the CC&N will be easier once those matters are dealt with. Likewise, as the OP
8 does not grant a CC&N, failure to comply with the conditions articulated within the order does not
9 require further process to terminate a CC&N. Instead, noncompliance generally results in a Staff
10 filing to the docket noting the noncompliance and requesting that the docket be administratively
11 closed.

12 Utilities large and small may receive orders preliminary in lieu of a CC&N. For example,
13 Arizona Water Company, a water utility with over 84,000 customers,¹ was awarded an OP rather than
14 a CC&N for portions of its CC&N application located within the town of Eloy. Decision No. 70379
15 (June 13, 2008). Arizona Water Company previously had received an OP in an additional CC&N
16 application for territory within Eloy as well. Decision No. 68607 (March 23, 2006). In both
17 instances, the reason for the grant of an OP rather than a CC&N was due to the uncertainty about
18 whether the utility would acquire a franchise from the municipality, an explicit statutory requirement
19 in order to obtain a CC&N. A.R.S. § 40-282(B).

20 Chaparral City Water Company has likewise received an OP rather than a requested CC&N.
21 In Docket No. W-02113A-05-0178, the Commission adopted a requirement that the CC&N be
22 awarded as an OP pending compliance with several outstanding issues. *See* Decision No. 68238
23 (October 25, 2005). In the event that the compliance terms were satisfied, Chaparral City was to file
24 a motion requesting a final order granting the CC&N, for which Staff would prepare a memorandum
25 and proposed order for Commission consideration. However, Chaparral City, after two separate
26 extensions, was unable to satisfy the compliance requirements, and the matter was closed by Staff's
27 motion to the Hearing Division for administrative closure.

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¹ See Docket No. W-01445A-11-0310, Application filed August 5, 2011 at 1:26 – 2:14.

1 While infrequent, the Commission has issued orders preliminary several times for other
2 utilities as well. The Livco water and wastewater utilities obtained an OP for CC&N extensions in
3 Decision No. 69258 (January 19, 2007). Although it was postured for administrative closure at one
4 point, the utilities requested and obtained an extension. Finally, the Livco utilities demonstrated that
5 they had achieved the required compliance and a final order issued awarding them the CC&N for the
6 originally requested territory. Decision No. 71314 (October 30, 2009). The Commission has also
7 issued orders preliminary for Emerita Water Company in Decision No. 69399 (March 29, 2007), for
8 the Green Acres utilities in Decision No. 69256 (January 1, 2007), for Cayetano, Inc. dba Lakewood
9 Water Company in Decision No. 71906 (September 28, 2010), for Keaton Development Company
10 (now Harrisburg Utility Company, Inc.) in Decision No. 70172 (February 27, 2008), for certain
11 parcels for the Perkins Mountain utilities in Decision No. 70663 (December 24, 2008), for Valley
12 Pioneer's Water Company in Decision No. 70621 (November 19, 2008), and for Vernon Valley
13 Water, Inc. in Decision No. 70464 (August 6, 2008).

14 In this case, Staff has recommended that the Company receive an OP rather than a denial of
15 the application, or a CC&N or a Conditional CC&N. Neither the evidence provided during the
16 hearing nor the subsequently docketed late filed exhibits changes Staff's position on this
17 recommendation. As clarified by Staff at hearing,² the two categories of conditions which must be
18 met in order for either a conditional CC&N or a CC&N with conditions to be granted are compliance
19 with the Arizona Department of Environmental Quality ("ADEQ") and submission of a complete
20 description of the proposed project, including a preliminary engineering report.

21 Although Johnson witness Daniel Hodges testified that the Company is now in compliance
22 with ADEQ requirements, ADEQ has not issued any notices or other confirmations of that assertion.
23 Indeed, a review of the Comments of Johnson Utilities on Staff Report docketed herein on April 12,
24 2013, Mr. Hodges' testimony, and the Company's late filed exhibits docketed on April 19, 2013, all
25 clarify that the Company has merely *submitted* documentation in response to the Notices of Violation
26 ("NOVs") issued by ADEQ in October and November of 2012. In its Comments, the Company
27 states only that:

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² Tr. at 89:2-6.

1 Johnson Utilities met twice with ADEQ to discuss the facts surrounding the NOV,
2 and the Company documented that no violations occurred in six letters to ADEQ
3 dated November 5, 2012, November 21, 2012, December 5, 2012, December 10,
4 2012, December 17, 2012, and January 2, 2013. Thus, contrary to the statement in the
5 Staff Report, there are no major deficiencies in the Company's operations or
6 maintenance. Johnson Utilities anticipates that ADEQ will shortly close the NOV
7 without any further action.³

8 At hearing, Mr. Hodges read this portion of the Company's comments into the record,
9 reiterated its position and testified as follows:

10 Q: So with respect to the NOV, is it your belief that there is no additional follow-up
11 that's required by the company at this point in time with ADEQ?

12 A. Yes, that's correct.

13 Q. You've done everything that ADEQ asked you to do in the NOV?

14 A. Yes, we have....

15 Q. Is it your testimony today that the company in fact did timely comply with the
16 notice requirement?

17 A. Yes, it is my testimony that we did comply with the notice requirement, and we
18 anticipate that DEQ will be closing the NOV shortly without any sort of - -

19 Q. Without a penalty or course of action?

20 A. Without a penalty or anything, correct.⁴

21 The Company's late-filed exhibits, docketed on April 19, 2013, consist of six letters from the
22 Company to ADEQ responding to the NOVs and only one item from ADEQ, a letter dated April 18,
23 2013. That letter is a monthly update on the status of the NOV of November 29, 2012, which states:

24 ADEQ has determined that the *Documenting Compliance* provisions of the Notice of
25 Violation ("NOV") issued to Johnson Utilities on October 12, 2012, have been met.

26 Even though the *Documenting Compliance* provisions of the NOV have been met,
27 ADEQ reserves the right to take additional action, including seeking civil penalties
28 for the violations alleged in the NOV. ADEQ will continue to keep you informed
29 about whether it will pursue further action through monthly action update letters.⁵

...

...

³ Comments of Johnson Utilities on Staff Report, p. 3, l. 13-18.

⁴ Tr. at 24:21-25:2 and 25:11-17.

⁵ Attachment 1, Notice of Filing Late Filed Exhibits.

1 What is missing from each of these is a statement from ADEQ that the 2012 NOVs are or can
2 be expected to be closed. The Company has submitted all necessary documentation, but that does not
3 indicate what ADEQ will conclude regarding the NOVs.

4 Nor has the Company provided the requisite project descriptions and engineering reports.
5 Such project descriptions have only been provided for Bella Vista Farms Phases One and Two.⁶ No
6 such project descriptions exist regarding the remaining Bella Vista Phases 3, 4 and 5 and the Merrill
7 Ranch expansion one, with beginning project dates ranging from June of 2015 to the third quarter of
8 2022.⁷ (Staff notes that at 4:53 p.m., on Tuesday May 21, 2013, the Company docketed its Notice of
9 Late Filing Updated Preliminary Engineering Analysis, a copy of which was received by counsel
10 undersigned on the morning of May 22, 2013. Staff has not has an opportunity to address this filing
11 and will not address the same here.) The Company does not oppose the recommendation by Staff
12 that updated and detailed engineering information be provided, and opposes only that the requirement
13 be part of a conditional CC&N rather than a requirement in an OP.⁸

14 Much of the testimony presented by the Company at hearing addressed the appropriateness of
15 this Company being awarded a CC&N due to, *inter alia*, the fact that the Company currently has a
16 CC&N to provide sewer services to Bella Vista Farms,⁹ provides both water and sewer services to
17 the initial portions of the development of Anthem at Merrill Ranch¹⁰ and has generally exhibited an
18 ability to engineer water and waste water systems.¹¹ However, this argument fails to address the
19 requirements of A.A.C. R14-2-402(B)(5)(n), which provides that any application for the extension of
20 a CC&N must also file such a descriptions, stating:

21 A complete description of the facilities proposed to be constructed, including a
22 preliminary engineering report with specifications in sufficient detail to describe each
23 water system and the principal components of each water system (e.g., source,
24 storage, transmission lines, distribution lines, etc.) to allow verification of the
25 estimated costs provided under subsection (B)(5)(o) and verification that the
26 requirements of the Commission and the Arizona Department of Environmental
27 Quality can be met.

26 ⁶ Tr. at 74:17-24.

27 ⁷ *Id.*

28 ⁸ Tr. at 36:7-13.

⁹ Tr. at 19:12-17.

¹⁰ Tr. 35:20-36:6.

¹¹ Tr. 78:2-5.

1 Without this information, a CC&N extension should not be requested, much less granted.
2 Consequently, Staff maintains that the issuance of an OP for the Belle Vista North and Merrill Ranch
3 extension areas is the appropriate recommendation and should be granted as being in the public
4 interest.

5 At hearing, a renumbering of Staff's recommendations was discussed which clarified the
6 relation of conditions to recommendations,¹² as follows:

- 7 1. Staff recommends the Commission grant an Order Preliminary for the Bella Vista
8 Farms areas requested by Johnson for water service and for the Merrill Ranch
9 Expansion One area requested by Johnson, for water and wastewater service, with
10 the following conditions:
 - 11 a. Staff recommends that the Company docket, as a compliance item in this
12 docket, within two years of the effective date of an order granting a
13 conditional CC&N, a copy of the ADEQ-ATC for water and wastewater
14 facilities needed to serve the first parcel in the requested extension areas.
 - 15 b. For Bella Vista Farms Phases One and Two, Staff recommends that the
16 Company file updated ADEQ Compliance Status Reports indicating that all
17 water systems are in compliance with ADEQ regulations by December 31,
18 2014.
 - 19 c. For Bella Vista Farms Phases Three, Four, and Five, Staff recommends that
20 the Company file updated ADEQ Compliance Status Reports indicating that
21 all water systems are in compliance with ADEQ regulations by December 31,
22 2014.
 - 23 d. Staff recommends that the Company docket as a compliance item in this
24 docket no later than January 1, 2015 for Phase Three, January 1, 2018 for
25 Phase Four, and January 1, 2022 for Phase Five of Bella Vista Farms (as
26 shown in the table on page 4 of Staff's engineering report), a complete
27 description of the facilities proposed to be constructed, including a
28 preliminary engineering report with specifications in sufficient detail to
describe each water system and the principal components of each water
system (e.g., source, storage, transmission lines, distribution lines, etc.) to
allow verification of the estimated costs provided under the Arizona
Administrative Code R14-2-402 subsection (B)(5)(o) and verification that the
requirements of the Commission and the Arizona Department of
Environmental Quality can be met.
 - e. For Merrill Ranch Expansion One, Staff recommends that the Company file
updated ADEQ Compliance Status Reports indicating that all water systems
are in compliance with ADEQ regulations by December 31, 2014.

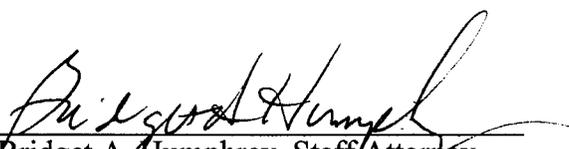
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¹² Tr. at 110:-111:16.

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- f. Staff recommends that the Company docket as a compliance item in this docket no later than January 1, 2015 for Unit 53A, January 1, 2015 for Unit 53B, January 1, 2016 for Unit 55A, January 1, 2016 for Unit 55C, January 1, 2017 for Unit 55B, January 1, 2017 for Unit 57A, January 1, 2018 for Unit 57B, January 1, 2018 for Unit 59B, January 1, 2019 for Unit 59A, January 1, 2019 for Unit 59D, January 1, 2020 for Unit 59C, January 1, 2020 for Unit 59E, and January 1, 2017 for Phase 3 of Merrill Ranch Expansion One (as shown in the table on page 5 of Staff's engineering report), a complete description of the facilities proposed to be constructed, including a preliminary engineering report with specifications in sufficient detail to describe each water/waste system and the principal components of each water/waste system to allow verification of the estimated costs provided under the Arizona Administrative Code R14-2-402 subsection (B)(5)(o) and verification that the requirements of the Commission and the Arizona Department of Environmental Quality can be met.
 - g. Staff further recommends that Staff be required to file, within thirty days of the Company's filings for each Phase or Unit described in recommendations 4, 5, 6, 7, and 8 above, a Staff response to the filings for each Phase or Unit, in the form of a Proposed Order confirming compliance and granting a conditional CC&N for an extension to include the areas included in the Order Preliminary; and that the Proposed Order confirming compliance should then be scheduled as soon as possible for a Commission vote.
 - h. Staff further recommends that if Johnson does not timely comply with the requirements contained in Staff recommendations 4, 5, 6, 7, and 8 for any Phases or Units, that the Order Preliminary approved herein shall be deemed null and void for those Phases or Units.
2. Staff recommends that the Company be required to provide separate wastewater descriptions for each wastewater system (for example, separate wastewater flows including peak flow and average flow) in future Commission Annual Reports, beginning with the 2013 Annual Report filed in 2014.

Staff continues to support these recommendations and requests that they be adopted in the Decision herein.

RESPECTFULLY SUBMITTED this 22nd day of May, 2013.


Bridget A. Humphrey, Staff Attorney
Matthew Laudone, Staff Attorney
Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007
(602) 542-3402

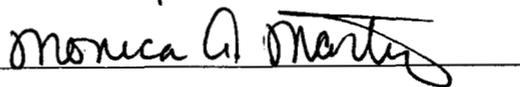
1 Original and thirteen (13) copies
2 of the foregoing were filed this
22nd day of May, 2013 with:

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

6 Copy of the foregoing mailed/and or emailed
7 this 22nd day of May, 2013 to:

8 Mr. Daniel Hodges
9 Johnson Utilities, LLC
5230 East Shea Boulevard
Scottsdale, AZ 85254

10 Jeffrey W. Crockett
11 BROWNSTEIN HYATT FARBER
12 SCHRECK, LLP
One E. Washington St., Suite 2400
13 Phoenix, AZ 85004
Attorneys for SSVEC

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