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COMMISSIONERS

SUSAN BITTER SMITH, <sup>Arizona Corporation Commission</sup> Chairman  
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AZ CORP COMMISSION  
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IN THE MATTER OF STAFF'S INQUIRY  
INTO THE TERMINATION OF  
STANDPIPE SERVICE BY JOHNSON  
UTILITIES, L.L.C.

DOCKET WS-02987A-15-0284

**JOHNSON UTILITIES' PETITION FOR  
DECLARATORY ORDER AND REQUEST  
FOR RELIEF**

ASU ALUMNI LAW GROUP  
Two North Central Avenue, Suite 1600  
Phoenix, Arizona 85004  
602.251.3620

Pursuant to A.R.S. § 40-202(A), A.R.S. § 40-246 and A.R.S. § 12-1831, Johnson Utilities, L.L.C. ("Johnson Utilities" or the "Company") hereby files this Petition for a Declaratory Order affirming that the Company does not have a standpipe service tariff and that the Company is not required to operate a standpipe.

INTRODUCTION

Johnson Utilities had a standpipe located at 27931 N. Edwards Road, San Tan Valley, Arizona 85143. The standpipe was installed in approximately 2003 to provide construction water to meet with demand associated with a housing construction industry.

In recent years, the standpipe has been vandalized repeatedly and the Company has repaired the standpipe each time at significant expense. The most recent act of vandalism occurred on July 29 or 30, 2015. Someone destroyed the computer which activates the standpipe. This was the second incident of vandalism this year. In January, someone damaged the computer and the standpipe was out of service for nearly two months while the Company replaced the computer and completed the necessary programming. (Johnson Utilities has, of course, reported the vandalism to law enforcement. Recently, the Pinal County Sheriff's Office has arrested a person for vandalizing another Johnson Utilities facility.)

A cottage industry has arisen around the standpipe where water haulers fill tank trailers

1 and tank trucks and deliver water to customers, likely both within and outside of the Johnson  
2 Utilities CC&N.<sup>1</sup> These water haulers appear to operate largely unregulated, and Johnson  
3 Utilities has become increasingly concerned about the legal liability that may accrue to the  
4 Company (and ultimately its ratepayers) for allowing these businesses to resell its potable water.  
5 Beyond liability, Johnson Utilities is concerned about the health and welfare of those who reside  
6 within the boundaries of its certificated territory.

7 For these and other reasons, Johnson Utilities recently notified users of the standpipe  
8 that the Company would be permanently closing the standpipe.<sup>2</sup>

9 At the August 18, 2015, Open Meeting of the Commission, Johnson Utilities agreed to  
10 allow professional water haulers access to a water source within one of its plants. Johnson  
11 Utilities has filed a proposed temporary order concerning this offer. In addition to matters  
12 addressed in the Temporary Order, Johnson Utilities informed the Commission that it was  
13 accelerating development of line extensions into the areas that appear to be most impacted by  
14 the standpipe situation. Thus, in a short time, pursuant to its existing tariff, Johnson Utilities  
15 will be able to provide service to many of those who will have access to connect to its system.

#### 16 PROCEDURAL STATUS

17 The Commission's Staff opened this docket to address complaints concerning the  
18 standpipe issue. At its Open Meeting on August 18, 2015, the Commission declined to enter an

19 \_\_\_\_\_  
20 <sup>1</sup> The August 20, 2015, Procedural Order, p. 1, line 20, refers to an August 11, 2015, petition  
21 filed in this docket. Initial review, which review is continuing, indicates that only 38 of the  
22 names on the petition have accounts with Johnson Utilities; many names appear to be connected  
with addresses outside the CC&N. This indicates that 82% of those petitioning are served by  
water haulers. Again, this is subject to review in an appropriate evidentiary proceeding.

23 <sup>2</sup> Current users of the standpipe will still have reasonable and multiple alternatives for obtaining  
24 potable water. The Town of Florence ("Town") operates a standpipe at 425 E. Ruggles Street,  
25 Florence, Arizona, 85132 and the Apache Junction Water Utilities Community Facilities District  
26 ("CFD") operates a standpipe at 725 E. Baseline Avenue, Apache Junction, Arizona, 85119.  
27 The Town's coin-operated standpipe provides potable water 24 hours-a-day, seven days-a-week.  
28 The Apache Junction CFD offers both potable and non-potable water to anyone establishing an  
account from two separate standpipes that are open 24 hours-a-day, seven days-a-week. In  
addition, there are a number of water haulers serving the area who will continue to deliver water  
for a fee. Thus, no one who has been using the Company's standpipe will go without potable  
water as a result of the closure of the standpipe.

1 emergency order as requested by Staff. The Commission directed that the Hearing Division  
2 establish a procedure leading to resolution of legal issues and an evidentiary hearing, if needed,  
3 on matters in this docket. The August 20, 2015 Procedural Order filed in this docket  
4 commenced that process with a procedural conference scheduled for August 25, 2015.

5 Consistent with its statements at the August 18, 2015 Open Meeting, Johnson Utilities  
6 has filed a proposed Temporary Order which may be entered by the Commission.

7 **STAFF'S VARYING POSITION**

8 As a result of the manner in which this docket was commenced, and the Commission's  
9 subsequent direction, it is useful to place the currently known factual and legal positions of the  
10 parties into the record.

11 On July 29, 2015, the Commission's Utilities Division Staff ("Staff") set forth the first  
12 of its many positions in this matter.

13 Staff's Position # 1:

14 It informed Johnson Utilities that it believes that water sold at the standpipe constituted a  
15 tariffed service and that the standpipe cannot be closed without approval by the Commission.

16 Staff's position is not based on any provision of the Company's current tariff (which  
17 was approved in 2010 in Decision 71854) because that tariff has no provision for standpipe  
18 service. Rather, Staff bases its flawed position on a superseded version of the tariff approved  
19 with the Company's original application for a CC&N in Decision 60223 dated May 27, 1997.<sup>3</sup>

20 <sup>3</sup> Part One, Section I, Subsection D of the superseded tariff sets forth the rates for  
21 standpipe service. The tariff required that those taking standpipe service pay a monthly  
22 minimum charge based upon the applicable meter size and a commodity charge of \$3.75 per  
23 thousand gallons. Thus, the tariff service approved under the Company's original tariff was one  
24 where a customer would (i) obtain a water meter, (ii) pay a monthly minimum charge for that  
25 meter, and (iii) pay a commodity charge based upon gallons used as measured by the meter. In  
26 marked contrast, the current use of the Company's standpipe is very different because users do  
27 not have individual meters, they do not pay a monthly minimum charge, and the commodity  
28 charge they pay is \$2.50 per thousand gallons. In fact, there is no way to charge current users of  
the standpipe in the way that is required under the defunct tariff. Moreover, the standpipe was  
installed a number of years after Decision 60223, so there was certainly no knowledge of the  
current standpipe when the old tariff was approved. The 1997 tariff did not require continuous  
standpipe service as Footnote 1 to Section D states that the "Company will attempt to provide  
60 days' notice of cessation of standpipe service." Thus, even the superseded tariff clearly  
allowed Johnson Utilities to unilaterally end the type of standpipe service that was authorized

1           On August 25, 2010, the Commission issued Decision 71854 approving new rates and  
2 charges for Johnson Utilities, and the tariff approved in Decision 60223 was superseded and  
3 replaced. The current tariff eliminated the section on standpipe service while retaining a tariff  
4 rate for construction water service.

5           The facts are clear that Johnson Utilities does not have a current tariff for standpipe  
6 service. Thus, the Company may discontinue operating the standpipe.

7           Faced with these uncontroverted facts, Staff began changing its position and creatively  
8 interpreting statutes, rules and practices in a dizzying manner.

9           Staff's Position # 2:

10          Staff says that it can find no language in Decision 71854, the testimony or exhibits in the  
11 underlying rate case which discusses eliminating standpipe service from the current tariff.<sup>4</sup>  
12 Staff argues that where there is no express language affirmatively terminating a specific service  
13 in a tariff, then that service carries forward by implication even though there is no mention of  
14 the service in the new tariff. Staff's position, if adopted, would lead down a never-ending rabbit  
15 hole where any provision of a tariff that is not expressly terminated would carry forward in  
16 future tariffs. The Commission and utilities will face incredible increases in costs and  
17 complexity if Staff's new found interpretation of the rules is adopted. Thus, anyone seeking to  
18 understand and comply with a utility's tariff would be forced to review each and every version  
19 of the tariff back to the utility's very beginning. Clearly, Staff's position would make very bad  
20 public policy.

21          Staff's Position # 3:

22          Staff now appears to take the position that as a public service corporation, Johnson  
23 under the tariff.

24          <sup>4</sup> Johnson Utilities has not had an opportunity to review all of the testimony and exhibits in  
25 Docket WS-02987A-08-0180 to confirm Staff's assertion that there is no discussion about  
26 eliminating the standpipe service provision of the old tariff. As noted at the August 18 Open  
27 Meeting, rather than dissecting an old case, rules and statutes, Johnson Utilities request that the  
28 Commission acknowledge that the solution it offers not only solves the immediate problem but  
puts in place a permanent solution that the Commission could not order. Such a process will  
avoid what will be a time consuming dispute concerning what appears to Johnson Utilities to be  
massive regulatory overreach which is an issue transcending this docket.

1 Utilities cannot stop doing anything it does without the regulator's approval. This position is  
2 not supported by statutes or rules. For example, in addition to the standpipe service, Johnson  
3 Utilities serves the community in myriad ways. One of those ways is its founding families  
4 foundation (which is not subject to Commission oversight). Another is line extensions not  
5 required and the working out on a case by case basis payment plans to assist people in their time  
6 of need (the costs of such endeavors should be allowed, not disallowed). Additionally, Johnson  
7 Utilities is active in support of school activities in its area, charitable activities and home owner  
8 activities through various HOAs and otherwise. The list goes on.

9 It is clear that the law only allows regulatory supervision of activities subject to the  
10 existing tariff of a public service corporation with a CC&N.

11 Staff 's Position # 4:

12 The Staff says that, essentially, the omission of the standpipe from Johnson Utilities'  
13 tariff was a typo. Johnson Utilities disagrees.

14 How does a powerful regulator fix a typo?

15 The Staff is saying that the Commission can use A.R.S. § 40-202, the general statute  
16 concerning supervising and regulating public service corporations, rather than more specific  
17 statutes such as Article 4, Chapter 2 of Title 40 which are the CC&N statutes.

18 The general statute, A.R.S. § 40-202(A) states, in part:

19 The commission may supervise and regulate every public service  
20 corporation in the state and do all things, whether specifically  
21 designated in this title or in addition thereto, necessary and  
convenient in the exercise of that power and jurisdiction.

22 A regulator ignores specific statutes in favor of the very general statutes only when it  
23 desires to expand its powers in an impermissible manner. Recent headlines and discussion  
24 about federal overreach and impermissible expansion of regulatory powers illustrate this all too  
25 common phenomenon.

26 The statutes regarding CC&N's and amendments must be applied, not the catch-all  
27 desperation citation to section 202.

28 Moreover, Staff's typo theory is exactly what A.R.S. § 40-252 is all about. That statute

1 allows the Commission to amend prior orders. If there is a typo, a matter of dispute, Staff  
2 should make the proper filing to seek correction. Staff takes the position that the amendment  
3 statute which most obviously applies to its current theory does not apply! This position is  
4 disingenuous.

5 Staff's Position # 5:

6 A "public service corporation" is defined in Article 15, Sec 2 of the Constitution as all  
7 "corporations other than municipal engaged in . . . furnishing water for irrigation, fire  
8 protection, or other public purposes . . ."

9 The water haulers are "public service corporations" pursuant to that definition in our  
10 Constitution yet the Staff does not want to suggest that they operate in a manner that serves the  
11 public by, at the very least, stopping profiteering by charging outlandish prices and prohibiting  
12 service outside of the Johnson Utilities CC&N.

13 As noted above, concurrent with this filing, Johnson Utilities is filing a suggested  
14 temporary order applying to all public service corporations involved in this situation.

15 In sum, the Staff wants to require examination of all tariffs ever issued to Johnson  
16 Utilities, ignore the statutes that apply, grossly extend the regulatory reach of the Commission  
17 through the use of a unique temporary order process, ignore the public service corporations  
18 gouging the public and require holders of CC&N's to seek permission for business decisions  
19 that are not governed by tariffs.

20 Staff's position, in other words, is massive regulatory overreach not supported by law,  
21 rule or custom.

## 22 SOLUTION

23 The solution to this situation is that proposed by Johnson Utilities and embodied in the  
24 proposed temporary order filed in this docket.

25 First, water haulers will have access to a secure standpipe upon compliance with the  
26 terms of the temporary order.

27 Second, Johnson Utilities will continue with its expedited line extension plan which will  
28 allow home owners to choose to connect to the system pursuant to the terms of the tariff.

1 Third, a procedural order will be issued setting reasonable times for the presentation of  
2 evidence on the issues brought forth in this matter, particularly, Staff's attempt to greatly  
3 expand the Commission's regulatory reach by use of general rather than specific statutes, rules  
4 and orders.

5 **CONCLUSION**

6 The Company's sale of water from the standpipe is not a tariffed service nor is it a  
7 regulated service. Thus, the Company may discontinue operating the standpipe.

8 However, the Company will consent to the Commission's entry of the temporary order  
9 that it has proposed.

10 **RELIEF REQUESTED**

11 Johnson Utilities hereby requests that the Commission issue its order:

12 A. Affirming that the sale of water from the standpipe is not a tariffed service under  
13 the Company's tariff nor is it a regulated service;

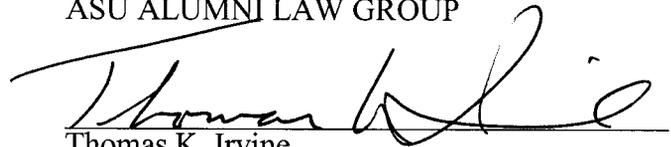
14 B. Affirming the Company's right to discontinue operating the standpipe;

15 C. Enter the proposed Temporary Order, and

16 D. Granting such other and further relief as the Commission determines just and  
17 proper.

18 FILED this 25<sup>th</sup> day of August, 2015.

19 ASU ALUMNI LAW GROUP

20 

21 Thomas K. Irvine  
22 Two North Central Avenue, Suite 1600  
23 Phoenix, Arizona 85004  
24 Attorney for Johnson Utilities, L.L.C.

ASU ALUMNI LAW GROUP  
Two North Central Avenue, Suite 1600  
Phoenix, Arizona 85004  
602.251.3620

1 ORIGINAL and thirteen (13) copies  
filed this 25<sup>th</sup> day of August, 2015, with:

2 Docket Control  
ARIZONA CORPORATION COMMISSION  
3 1200 West Washington Street  
Phoenix, Arizona 85007

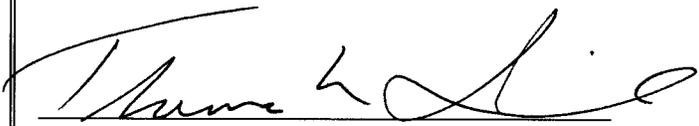
4 COPIES of the foregoing hand-delivered  
5 this 25<sup>th</sup> day of August, 2015, to:

6 Yvette B. Kinsey  
Administrative Law Judge  
7 Hearing Division  
ARIZONA CORPORATION COMMISSION  
8 1200 West Washington Street  
Phoenix, Arizona 85007

9 Janice Alward, Chief Counsel  
10 Legal Division  
ARIZONA CORPORATION COMMISSION  
11 1200 West Washington Street  
Phoenix, Arizona 85007

12 Thomas Broderick, Director  
13 Utilities Division  
ARIZONA CORPORATION COMMISSION  
14 1200 West Washington Street  
Phoenix, Arizona 85007

15 Jeffrey W. Crockett, Esq.  
16 CROCKETT LAW GROUP PLLC  
17 1702 East Highland Avenue, Suite 204  
Phoenix, Arizona 85016-4665  
Attorney for Johnson Utilities, L.L.C.

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