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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

- TOM FORESE, Chairman
- BOB BURNS
- ANDY TOBIN
- BOYD DUNN
- JUSTIN OLSON

No. WS-02987A-17-0392

**MOTION TO DISQUALIFY
COMMISSIONER ANDY TOBIN**

IN THE MATTER OF THE
APPLICATION OF JOHNSON
UTILITIES, LLC, FOR A
DETERMINATION OF THE FAIR
VALUE OF ITS WATER AND
WASTEWATER UTILITY PLANT AND
PROPERTY, FOR INCREASES IN ITS
RATES AND CHARGES FOR WATER
AND WASTEWATER UTILITY
SERVICE, AND FOR RELATED
APPROVALS.

Commissioner Tobin must be disqualified from further participation in this matter because he had at least one improper *ex parte* meeting with Pinal County Supervisor Mike Goodman discussing alleged water outages and pressure issues at Johnson Utility – issues that are highly material to deciding whether to impose outside management on Johnson.

I. STANDARDS FOR RECUSAL OF CORPORATION COMMISSIONER

The quasi-judicial nature of contested proceedings before the Arizona Corporation Commission has been long recognized. *State ex rel. Corbin v. Ariz. Corp. Comm'n*, 143 Ariz. 219, 225, 693 P.2d 362, 368 (App. 1984). Thus, a defendant in such a proceeding has a due process right to have an impartial commission decide his case.

1 We start from the premise that there are certain “fundamental” procedural requisites
2 which a person is entitled to receive at an administrative hearing which is quasi-judicial in
3 nature. One is a decision by an impartial decision maker.

4 *Rouse v. Scottsdale Unified School Dist.*, 156 Ariz. 369, 371, 752 P.2d 22, 24 (App.
5 1987). This means that such proceedings “must be attended, not only with every element of
6 fairness but with the very appearance of complete fairness.” *Horne v. Polk*, 242 Ariz. 226,
7 234, ¶ 28, 394 P.3d 651, 659 (2017) (internal quotation marks omitted).

8 “The United States Supreme Court has categorically stated that a ‘fair hearing’ is
9 denied in quasi-judicial administrative proceedings when the finder of fact reaches his
10 decision after *ex parte* communications from one side.” *Western Gillette, Inc. v. Ariz. Corp.*
11 *Comm’n*, 121 Ariz. 541, 543, 592 P.2d 375, 377 (App. 1979) (quoting *Morgan v. United*
12 *States*, 304 U.S. 1, 20 (1938). Thus, the results of an ACC rate-setting proceeding were
13 voided and the hearing officer disqualified in *Corbin* because there was improper *ex parte*
14 contact between the presiding hearing officer and counsel for the utility. *Corbin*, 143 Ariz.
15 at 232-34, 693 P.2d at 375-76.

16 Against this backdrop, such *ex parte* communications are expressly forbidden under
17 the Arizona Administrative Code. A.A.C. R14-3-113(C)(2) instructs in no uncertain terms:

18 No commissioner or commission employee involved in the decision-making
19 process of a contested proceeding . . . shall request, entertain or consider an
20 unauthorized communication concerning the merits of the proceeding

21 Unfortunately, as shown below, such an *ex parte* communication has occurred here.

22 **II. MR. TOBIN MUST BE DISQUALIFIED.**

23 On Friday July 6, 2018, Commissioner Andy Tobin, a long-standing critic of
24 Johnson Utilities, “met with” Pinal County Supervisor Mike Goodman and Arizona State
25 Representative T.J. Shope “regarding water outages and pressure issues experienced by
26 customers of Johnson Utilities in Pinal County.” *Shope Press Release* (July 6, 2018) (copy
27 attached as Exhibit “A”). This meeting was particularly inappropriate because Pinal County
28 is a also an intervenor in the WS-02987A-18-0050 docket, and in that capacity has strongly
29 advocated that “some form of independent oversight must be put in place by the

1 Commission.” *Initial Hearing Brief of Intervenor Pinal County* at 2:2 to 2:3 (May 29,
2 2018).¹

3 This June 6 meeting strongly suggests that Mr. Tobin and Mr. Goodman are
4 working behind the scenes to obtain a predetermined outcome in this proceeding. Just as in
5 *Corbin*, this necessarily taints any result in which Mr. Tobin would participate in a quasi-
6 judicial role. Only the immediate recusal of Mr. Tobin from further participation in this
7 matter, including informal communications with other Commissioners concerning this
8 matter, can begin to ameliorate that taint. *See Corbin*, 143 Ariz. at 232-34, 693 P.2d at 375-
9 76.

10 **III. CONCLUSION**

11 Johnson Utilities respectfully asks Mr. Tobin to voluntarily recuse himself from
12 further participation in this matter. Should he decline to do so, Johnson Utilities asks the
13 Commission to stay all further proceedings until an action to disqualify Mr. Tobin can be
14 brought in Superior Court.

15 RESPECTFULLY SUBMITTED this 16th day of July, 2018.

16 **FREDENBERG BEAMS**

17 By: _____

18 Daniel E. Fredenberg

19 Christian C. M. Beams

20 Attorneys for Johnson Utilities, LLC

21
22 ORIGINAL and thirteen (13) copies filed
23 this 16th day of July, 2018, with:

24 Docket Control
25 ARIZONA CORPORATION COMMISSION
26 1200 West Washington Street
27 Phoenix, Arizona 85007

28 COPIES of the foregoing e-mailed or mailed

¹ Pinal County has also been granted intervention in the WS-02987A-18-0151 docket. This Motion has also been simultaneously in both that docket and in WS-02987A-18-0050.

1 this 14th day of July, 2018, to:

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27
28

EXHIBIT A



T.J. Shope for Arizona is contacting T.J. Shope for Arizona with TJ Shope. 6 July at 17:21 ·

This Press Release was sent out about an hour ago regarding the ongoing issues with Johnson Utilities following a meeting at the State Capitol today...

Friday, July 6, 2018

FOR IMMEDIATE RELEASE

Representative Shope Meets with Commissioner Tobin on Pinal County Water Outages and Pressure Issues

STATE CAPITOL, PHOENIX – Representative [TJ Shope](#) (R-8), along with Pinal County Supervisor [Mike Goodman](#), today met with Arizona Corporation Commissioner Andy Tobin regarding water outages and pressure issues experienced by customers of Johnson Utilities in Pinal County.

Commissioner Tobin updated Representative Shope and Supervisor Goodman on the multiple dockets opened investigating Johnson Utilities issues and expressed hope that the Corporation Commission will hold a special meeting to expunge Johnson Utilities' Certificate of Convenience and Necessity for failing to meet a previous compliance deadline.

"We're in the middle of fire season, and firefighters in Pinal County are having to haul their own water because our hydrants don't have sufficient water pressure to meet code – that's completely unacceptable," said Representative Shope.

"I'm grateful to Commissioner Tobin for meeting with Supervisor Goodman and me today and for all his hard work addressing the water issues in San Tan Valley. I'll continue to monitor the situation and do what I can to ensure that these issues are resolved as expeditiously as possible."

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