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COMMISSIONERS

2008 DEC -2 P 2: 56

Arizona Corporation Commission

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ARIZONA CORPORATION COMMISSION  
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2008  
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IN THE MATTER OF THE APPLICATION  
OF JOHNSON UTILITIES, LLC, DBA  
JOHNSON UTILITIES COMPANY FOR AN  
INCREASE IN ITS WATER AND  
WASTEWATER RATES FOR CUSTOMERS  
WITHIN PINAL COUNTY, ARIZONA.

DOCKET NO. WS-02987A-08-0180

**JOHNSON UTILITIES  
COMPANY'S RESPONSE TO  
SWING FIRST GOLF L.L.C.'S  
MOTION TO COMPEL**

On November 21, 2008, Intervenor Swing First Golf LLC (“Swing First”) filed with the Arizona Corporation Commission (“Commission”) a Motion to Compel (“Motion”) against Johnson Utilities Company (“JU” or “Company”) in the above-captioned matter. Swing First’s Motion is a thinly veiled attempt by a disgruntled customer to inflict harm upon JU. Swing First is currently involved in a Commission complaint proceeding against the Company in Docket No. WS-02987A-08-0049 (“Complaint Proceeding”) and appears to be using this rate case to bolster its position in the Complaint Proceeding in the hope of JU capitulating to its demands. The tone and tenor of the Motion is one that is rarely seen at the Commission and should be considered an abuse of Commission process. The Motion is inflammatory, inappropriate, inaccurate, without merit, violates Rule 37(a)(2)(C) of the Arizona Rules of Civil Procedure, and is inconsistent with the spirit and intent of the Commission’s August 15, 2008, Rate Case Procedural Order (“Procedural Order”). Accordingly, for the reasons set forth in this Response, Swing First’s Motion should be denied.

Snell & Wilmer  
LLP  
LAW OFFICES  
One Arizona Center, 400 E. Van Buren  
Phoenix, Arizona 85004-2202  
(602) 382-6000



1 discovery for purposes of presenting its February 4, 2009, testimony and associated  
2 exhibits as required by the Procedural Order. Accordingly, the Commission should give  
3 no consideration or weight to this background section.

4 **The Motion Does not Comply with the Rules of Civil Procedure**  
5 **or the Procedural Order**

6 Rule 37(a)(2)(C) *requires* that:

7 No motion [to compel] brought under this Rule 37 will be  
8 considered or scheduled unless a separate statement of moving  
9 counsel is attached thereto certifying that, after personal  
10 consultation and good faith efforts to do so, counsel have been  
unable to satisfactorily resolve the matter.

11 The Procedural Order states:

12 IT IS FURTHER ORDERED that, in the alternative to filing a  
13 written motion to compel discovery, any party seeking resolution of  
14 a discovery dispute may telephonically contact the Commission's  
Hearing Division to request a date for a procedural hearing to  
15 resolve the discovery dispute; that upon such a request, a procedural  
hearing will be convened as soon as practicable; ....<sup>1</sup>

16 Footnote 2 of the Procedural Order states that "the parties are encouraged to  
17 attempt to settle discovery disputes through informal, good-faith negotiations before  
18 seeking Commission resolution of the controversy." (Emphasis added.)

19 The Motion does not contain a separate statement by Swing First certifying that it  
20 has been unable to satisfactorily resolve the matters relating to the data request responses  
21 for which Swing First takes issue. Instead, it spends nine (9) pages assiduously "bashing"  
22 JU before getting to any semblance of a legal argument. Moreover, despite the fact that  
23 Swing First's testimony is not due until February 4, 2009, it chose to ignore the  
24 Procedural Order's admonition for the parties to first try to resolve such matters between  
25

26 <sup>1</sup> Procedural Order at page 4, lines 13-16.

1 themselves and, if unsuccessful, to seek resolution through the Hearing Division before  
2 proceeding to file a motion to compel. Instead of attempting to resolve its issues, Swing  
3 First spent its time preparing and filing its 38-page Motion. Because Swing First failed to  
4 comply with Rule 37 of the Rules of Civil Procedure or first avail itself of the informal  
5 process to resolve its discovery issues, the Motion should be denied.

6 **The Company Has Not Waived Any Discovery Objections**

7 The Procedural Order provides that any objection to discovery requests shall be  
8 made within seven (7) calendar days of receipt. The Procedural Order does not provide  
9 that as a matter of law, a party is deemed to have waived its right to make an objection by  
10 not making an objection within the timeframe.

11 JU does not deny that it was late in providing its objections. However, it should be  
12 noted that with respect to 5 of the 14 data requests referenced in the Motion in which JU  
13 made an objection, to the extent JU did make an objection to preserve its rights, it also  
14 made a good-faith effort to still provide what it considered to be an appropriate response.<sup>2</sup>  
15 Moreover, JU has been trying to keep up with its responses to the numerous data requests  
16 propounded by Staff and Swing First. JU is doing the best it can to respond to data  
17 requests as soon as possible while conducting utility operations.

18 The Administrative Law Judge (“ALJ”) is not required to find that JU has waived  
19 its right to object to a data request by making its objection after the deadline. The ALJ  
20 has discretion to weigh the prejudicial effect of admitting the disclosure. The disclosure  
21 rules are not intended to create a “weapon” for dismissing cases on a technicality.  
22 *Zimmerman v. Shakman*, 204 Ariz. 231, 235, 62 P.3d 976, 980 (Ariz. Ct. App. 2003). The  
23 disclosure rules are designed to provide “a reasonable opportunity to prepare for trial or  
24 settlement – nothing more, nothing less.” *Bryan v. Riddell*, 178 Ariz. 472, 476, 875 P.2d

25 \_\_\_\_\_  
26 <sup>2</sup> It is unclear why Swing First included 1.5 in its Motion since JU provided the requested information five (5) weeks before Swing First filed its Motion.

1 131, 135 n.5 (1994). The disclosure rules “should be interpreted to maximize the  
2 likelihood of a decision on the merits.” *Allstate Ins. Co. v. O’Toole*, 182 Ariz. 284, 287,  
3 896 P.2d 254, 257 (1995). Each situation must necessarily be evaluated on its own facts.  
4 *Id.* at 288, 896 P.2d at 258 (noting that “[d]elay, standing alone, does not necessarily  
5 establish prejudice”). Finally, given the nature of the discovery process at the  
6 Commission, the Commission’s past practice has been flexible in providing parties  
7 additional time when necessary and appropriate.

8 The hearing in this matter is set for April 23, 2009. Swing First’s testimony is not  
9 due until February 4, 2009. Under the current facts and circumstances, even though JU  
10 made several objections subsequent to the seven (7) day timeframe, JU has not waived its  
11 right to raise relevant and appropriate objections to data requests nor is the ALJ required  
12 to make such a finding.<sup>3</sup>

### 13 The Company’s Objections are Not Meritless

14 To date, JU has received a total of 185 data requests (not counting subparts) from  
15 Staff and Swing First and has provided thousands of pages of documents in response. Of  
16 the 185 data requests, Swing First has propounded a total of 40 data requests to JU, of  
17 which the Company has only objected to 9 of those requests set forth in the Motion  
18 without providing a response. For each of those objections, JU has fully explained the  
19 legal basis for its objection. Those objections are set forth in the Motion.

20 As discussed above, Swing First has made no effort to enter into informal good-  
21 faith discussions with JU to try to resolve the objections. Some of the data requests solicit  
22 information not related to the scope of the rate case. Rather than go through each and  
23 every objection in this Response, JU will provide a representative example of a Swing  
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25 <sup>3</sup> It should be noted that JU responded to Swing First’s 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> sets of data requests on September 18, October  
26 1, and October 22, 2008, respectively. Yet, Swing First waited until November 21, 2008, to file its Motion, which  
covers objections to responses from all three sets of data requests.

1 First "legal" argument as to why it is entitled in a *rate case* to the information requested  
2 for which JU has objected.

3 Data Request 3.5, set forth in the Motion, asks JU to:

4 *Please admit or deny that Utility's affiliated entity and/or*  
5 *George Johnson filed a defamation lawsuit or counterclaim*  
6 *against Arizona Attorney General Terry Goddard and/or his*  
7 *office.*

8 JU's objection is as follows:

9 *Johnson Utilities objects to this data request on the grounds*  
10 *that legal action filed by affiliates of Johnson Utilities*  
11 *and/or George Johnson are not relevant to the rate case and*  
12 *are outside the scope of discovery. Johnson Utilities further*  
13 *asserts that legal pleadings filed in courts of law are public*  
14 *documents, which speak for themselves.*

15 Swing First's strained, inflammatory, and inappropriate attempt to justify the  
16 relevance in its Motion is as follows:

17 *As discussed above, Utility is part of the Johnson Group, all of*  
18 *which are controlled by George Johnson. Utility admits that Mr.*  
19 *Johnson is its ultimate decision maker. Therefore, Mr. Johnson's*  
20 *other activities-especially those consistent with Utility's use of the*  
21 *courts to harass and intimidate customers-are relevant to the*  
22 *inquiry as to whether Utility is a fit and proper entity to hold its*  
23 *CC&N and the amount of rate increase justified in light of Mr.*  
24 *Johnson's and Utility's conduct. For example, if Mr. Johnson had*  
25 *been convicted of a felony such as fraud, it is unlikely that the*  
26 *Commission would allow him to participate in Utility's*  
*management, or to allow him to continue to own Utility. Similarly,*  
*given Mr. Johnson's reckless management of his other companies,*  
*his disregard for Arizona's environment and his heritage, his*  
*shameful treatment of his own customers, and his continued flouting*  
*of Commission orders, the Commission may well conclude that it is*  
*time for Mr. Johnson to go. It is certainly not time to let Mr.*  
*Johnson profit from these actions.*

1 This "legal" justification to challenge JU's objection is nothing more than the  
2 "bashing" of JU and its affiliates as discussed above. It speaks to whether JU is a "fit and  
3 proper entity" to hold a CC&N which is irrelevant to the rate proceeding. It uses an  
4 inappropriate example such as "if Mr. Johnson had been convicted of a felony such as  
5 fraud," where no basis for such an inflammatory statement exists. It makes unsupported  
6 allegations regarding JU and Mr. Johnson. These statements, replete throughout the  
7 Motion, have no bearing whatsoever on whether JU has made an inappropriate objection  
8 under Arizona law or Commission practice.

9 JU's objections speak for themselves. All of JU's objections have proper legal  
10 foundation, and the Company was prepared to discuss each and every one of them with  
11 the ALJ had Swing First requested a procedural hearing to resolve this dispute. If the ALJ  
12 does not summarily dismiss the Motion, JU is prepared to defend each and every  
13 objection at a proceeding relating to the Motion.

14 **Conclusion**

15 On the basis of the foregoing, JU requests that Swing First's Motion be summarily  
16 denied. In the alternative, JU requests the opportunity for oral argument at a proceeding  
17 on the Motion to further demonstrate that its objections have been duly made and that the  
18 Motion should be denied.

19 RESPECTFULLY SUBMITTED this 2nd day of December, 2008.

20 SNELL & WILMER L.L.P.

21  
22 By Jeffrey W. Crockett  
23 Jeffrey W. Crockett  
24 One Arizona Center  
25 400 E. Van Buren  
26 Phoenix, AZ 85004-2202  
Attorneys for Johnson Utilities Company

1 ORIGINAL and 13 copies filed this  
2 2nd day of December, 2008, with:

3 Docket Control  
4 ARIZONA CORPORATION COMMISSION  
5 1200 West Washington Street  
6 Phoenix, Arizona 85004

7 COPIES of the foregoing hand-delivered this  
8 2nd day of December, 2008, to:

9 Teena Wolfe, Administrative Law Judge  
10 Hearing Division  
11 ARIZONA CORPORATION COMMISSION  
12 1200 W. Washington Street  
13 Phoenix, Arizona 85007

14 Robin Mitchell, Staff Attorney  
15 Legal Division  
16 ARIZONA CORPORATION COMMISSION  
17 1200 W. Washington Street  
18 Phoenix, Arizona 85007

19 Ernest Johnson, Director  
20 Utilities Division  
21 ARIZONA CORPORATION COMMISSION  
22 1200 W. Washington Street  
23 Phoenix, Arizona 85007

24 COPIES of the foregoing sent via e-mail and  
25 U.S. mail this 2nd day of December, 2008, to:

26 Craig A. Marks  
CRAIG A. MARKS, PLC  
10645 N. Tatum Blvd., Suite 200-676  
Phoenix, Arizona 85028  
Attorney for Swing First Golf, LLC



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