

ORIGINAL



0000091570

BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

COMMISSIONERS

- MIKE GLEASON, Chairman
- WILLIAM A. MUNDELL
- JEFF HATCH-MILLER
- KRISTIN K. MAYES
- GARY PIERCE

2008 DEC -5 P 3: 22

AZ CORPORATION COMMISSION
BUCKET CONTROL

Arizona Corporation Commission

DOCKETED

DEC -5 2008

DOCKETED BY *MM*

IN THE MATTER OF THE APPLICATION OF JOHNSON UTILITIES, L.L.C., 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

1 **REPLY TO JOHNSON UTILITIES' RESPONSE TO MOTION TO COMPEL**

2 Swing First Golf LLC ("Swing First") hereby replies to "Johnson Utilities' Response to
3 Swing First Golf LLC Motion to Compel." As more fully set forth below, Utility's arguments
4 amount to little more than hand waving and provide no basis to limit discovery.

5 **I The Tone of the Motion was Appropriate**

6 Although this is no basis for denying Swing First's Motion to Compel ("Motion"), Utility
7 first objects to the organization and tone of the Motion. The organization and tone were
8 regrettably necessary. Mr. Marks has practiced for 26 years, and before five state commissions
9 and the Federal Energy Regulatory Commission. In his extensive experience, he has never seen
10 or even heard of a utility and its owner engaging in so many egregious acts. Utility's acts are
11 beyond the pale and justify extreme punitive action by the Commission. Finally, these acts are
12 completely consistent with Utility's flouting of the Procedural Order and the Commission's
13 discovery practice.

14 **II All Issues Set Forth in the Motion are Relevant and Of Interest to the Commission**

15 Conspicuous by its absence, Utility never claims that any of the issues set forth in the
16 Motion are not relevant to this case or would not be of great interest to the Commission. Nor
17 does Utility argue that the requested information is not relevant to these issues.

1 **III Grounds in a Motion to Intervene Are Irrelevant**

2 In order to be considered for intervention, Swing First had to demonstrate that it would be
3 “directly and substantially affected by the proceeding.”¹ Swing First satisfied that threshold and
4 was granted intervenor status, without objection by Utility.

5 In its motion to intervene, an intervenor is not required to disclose all issues it expects to
6 cover in its testimony. Intervention comes first and then discovery. The intervenor is only
7 required to finalize and present its issues in testimony after evidence is gathered through the
8 discovery process. Utility would put the cart before the horse and require an intervenor to
9 submit a binding list of issues as part of its motion to intervene.

10 As an intervenor, Swing First has full party status and is entitled in a rate case to address
11 in its testimony any issues related to Utility’s rates and service. Utility will be provided a full
12 opportunity to respond to Swing First’s testimony in its rebuttal and rejoinder testimony and
13 other parties will also be able to weigh in. If Utility does not believe that any testimony should
14 be heard, it will have to opportunity to make its objections. At the hearing, testimony will be
15 presented and examined. All parties will then be allowed to brief their cases. Based on the
16 briefs and the record the Administrative Law Judge will prepare a recommended opinion and
17 order for the Commission’s consideration.

18 **IV Utility Admits That It Grossly Missed the Discovery-Objection Deadlines**

19 Utility admits that it was late providing discovery objections, although it fails to
20 acknowledge that it was grossly late—as much as 41 days too late. Despite the clear language of
21 the Procedural Order, Utility simply claims that the rules don’t apply.

22 Utility ignores the purpose of the objection deadline – to allow the parties a prompt
23 opportunity to resolve any disputes, and, if necessary to take them to the Administrative Law
24 Judge. This allows disputes to be resolved without significant delay to the discovery process. If
25 a party were allowed to wait to tender objections at the time discovery is due, only then would

¹ R14-3-105(A)

1 the requesting party be able to address the objection. This could add weeks or even months to
2 the discovery process.

3 This is precisely what Utility is trying to do. Today is December 5, 2008. Swing First is
4 still trying to get answers to legitimate discovery requests made as early as August 8, 2008—
5 almost four months ago. This means that follow-up discovery is still impossible.

6 Utility never asked Swing First for additional time to provide objections and never
7 moved for relief from the Procedural Order's discovery deadline. Consistent with its other
8 actions toward the Commission, Utility again decided it was above the law and the deadlines did
9 not apply.

10 **V The Motion Complies With the Civil Procedure Rules and the Procedural Order**

11 Although Utility flouts the law, it labors without effect to charge a violation of the Rules
12 of Civil Procedure and the Procedural Order. Utility first argues that Swing First was obligated
13 to try to resolve its discovery dispute. Given Utility's repeated bad faith, this argument is
14 amazing. Utility repeatedly ignored the objection deadlines, and the response deadlines. Then it
15 flatly refused to provide the requested information, often without even a good-faith basis.

16 These are not disputes about the completeness or relevance of the responses. In most
17 cases, Utility has simply determined, in its sole discretion, that Swing First is not entitled to the
18 requested information. Further discussion between counsels would have only further delayed
19 the discovery process.

20 Utility then misinterprets the Procedural Order. There is no requirement for a party to
21 engage in good-faith negotiations with a party who has flouted the Procedural Order's clear
22 deadlines and then flatly refused to provide the requested information. A party is not required to
23 use its good faith to deal with a party that has repeatedly demonstrated its bad faith.

24 **VI Swing First's Motion to Compel Should be Granted**

25 For all the reasons set forth in the Motion and in this pleading, Swing First's Motion to
26 Compel should be granted. Utility cannot be allowed to further thumb its nose at the
27 Commission.

1 RESPECTFULLY SUBMITTED on December 5, 2008.
2
3

4 
5

6 Craig A. Marks
7 Craig A. Marks, PLC
8 10645 N. Tatum Blvd.
9 Suite 200-676
10 Phoenix, AZ 85028
11 Craig.Marks@azbar.org
12 Attorney for Swing First Golf LLC
13

14 **Original and 13 copies filed**
15 on December 5, 2008, with:

16
17 Docket Control
18 Arizona Corporation Commission
19 1200 West Washington
20 Phoenix, Arizona 85007
21

22 **Copy of the foregoing mailed and e-mailed**
23 on December 5, 2008, to:

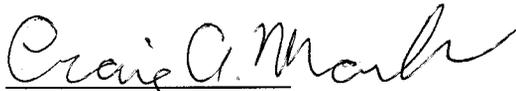
24
25 Teena Wolfe
26 Administrative Law Judge
27 Arizona Corporation Commission
28 1200 West Washington
29 Phoenix, Arizona 85007
30

31 Ernest G. Johnson, Director
32 Utilities Division
33 Arizona Corporation Commission
34 1200 West Washington Street
35 Phoenix, AZ 85007
36

37 Robin Mitchell, Attorney
38 Legal Division
39 Arizona Corporation Commission
40 1200 West Washington Street
41 Phoenix, AZ 85007
42
43

1 Jeffrey W. Crockett, Esq.
2 Bradley S. Carroll, Esq.
3 Kristoffer P. Kiefer, Esq.
4 Snell & Wilmer LLP
5 One Arizona Center
6 400 East Van Buren Street
7 Phoenix, Arizona 85004-2202

8
9
10
11
12

By: 
Craig A. Marks