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AZ CORP COMMISSION  
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FEB 24 2009

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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

RESPONSE OF JOHNSON  
UTILITIES TO EMERGENCY  
MOTION TO PROHIBIT  
INAPPROPRIATE CONTACT

Snell & Wilmer

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Pursuant to the February 19, 2009, Procedural Order in this docket, Johnson Utilities, LLC, dba Johnson Utilities Company ("Johnson Utilities" or the "Company") hereby responds to Swing First Golf, LLC's ("SFG") Emergency Motion to Prohibit Inappropriate Contact ("Emergency Motion") filed February 17, 2009, with the Arizona Corporation Commission ("Commission").

INTRODUCTION

The Emergency Motion arises out of a letter sent by Johnson Utilities to members of SFG dated February 9, 2009, (the "February 9 Letter") which SFG asserts was an "inappropriate contact" with SFG members containing a threat of legal action for defamation, attacks on the character of David Ashton (SFG's managing member), disparaging comments regarding Mr. Ashton's management of SFG, allegedly libelous insinuations regarding financial impropriety by Mr. Ashton, and statements intended to damage Mr. Ashton's business relationship with SFG members and investors. In

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1 addition, SFG asserts that Johnson Utilities inappropriately contacted SFG members  
2 and/or Johnson Utilities customers demanding that they submit to depositions. Each of  
3 these assertions is addressed below.

4 **ARGUMENT**

5 **1. The February 9 Letter.**

6 SFG states in its Emergency Motion that "Utility should not be attempting to  
7 intimidate another party or its customers through threats." However, the February 9  
8 Letter was not a threat but an understandable response by a utility under nonstop assault  
9 by David Ashton, the managing member of SFG. Former Commissioner Bill Mundell  
10 was known for his common-sense observation that "words mean something." Words do  
11 mean something; they cause harm and they carry consequences. In the Direct Testimony  
12 of David Ashton and other pleadings filed on his behalf in this docket and in the  
13 complaint case (Docket WS-02987A-08-0049), SFG has leveled many malicious and  
14 damaging accusations against George Johnson and Johnson Utilities, including the  
15 following, just to list a few:

- 16 • George Johnson has cheated and abused Swing First Golf.<sup>1</sup>
- 17 • Utility has been stealing money out of Swing First's pocket.<sup>2</sup>
- 18 • Utility is more adept at knowing how to defraud its customers than at most  
19 other activities.<sup>3</sup>
- 20
- 21 • George Johnson harassed other customers with frivolous defamation  
22 lawsuits.<sup>4</sup>
- 23
- 24

25 <sup>1</sup> Ashton Direct Testimony at 4, line 13 (emphasis added).

26 <sup>2</sup> *Id.* at page 8, lines 4-5 (emphasis added).

<sup>3</sup> *Id.* at page 8, lines 20-21 (emphasis added).

<sup>4</sup> *Id.* at page 17, lines 16-17 (emphasis added).

1           •       Mr. Johnson and his companies believe they are above the law, regularly  
2 flouting federal and state law.<sup>5</sup>

3           Johnson Utilities did not oppose SFG's intervention in this rate case, and the  
4 Company has no intention of opposing SFG's *bona fide* participation with regard to rate  
5 case issues legitimately before the Commission. However, the ugly accusations by Mr.  
6 Ashton on behalf of SFG go far beyond zealous advocacy in a legal proceeding and  
7 constitute vicious hyperbole calculated to inflict maximum harm on Johnson Utilities  
8 and Mr. Johnson. The February 9 Letter to owners<sup>6</sup> of SFG by Mr. Johnson was  
9 intended only to put each on notice that libelous comments and unsubstantiated  
10 accusations would not be disregarded by Johnson Utilities as mere "advocacy" by SFG  
11 in the prosecution of its complaint against the Company. Words do mean something,  
12 and they can cause real harm to persons and businesses.

13           SFG next states that SFG and Johnson Utilities are each represented by counsel,  
14 and then argues that "all communications between the parties should be made by  
15 counsel." However, there is simply no legal prohibition against one party directly  
16 contacting another party in a proceeding, a fact that is underscored by the complete lack  
17 of any legal authority or citations in SFG's Emergency Motion. Perhaps SFG has  
18 confused the ethical obligations of an attorney with the rights of the parties. Rule ER 4.2  
19 of the Arizona Ethics Rules states as follows:

20           In representing a client, a lawyer shall not communicate about the subject  
21 of the representation with a party the lawyer knows to be represented by  
22 another lawyer in the matter, unless the lawyer has the consent of the other  
23 lawyer or is authorized by law to do so. (emphasis added).

24           This rule does not prohibit one party from directly contacting another party. To  
25 the contrary, Comment 1 to Rule ER 4.2 specifically recognizes that "parties to a matter

25 <sup>5</sup> SFG Motion to Compel at page 1, lines 7-8.

26 <sup>6</sup> The members of SFG who received the February 9 Letter are the "owners" of SFG, with the authority to affect management decisions of the company. No customers of Johnson Utilities received a copy of the February 9 Letter.

1 may communicate directly with each other.<sup>7</sup> Clearly, Johnson Utilities and/or George  
2 Johnson have the right to communicate directly with Mr. Ashton, who is the managing  
3 member of SFG, which is the party in this rate case and in the complaint case. To the  
4 extent that the other members of SFG are also deemed to be "parties," then Johnson  
5 Utilities and/or George Johnson may clearly communicate directly with each of them. If  
6 the other members are deemed not to be parties, then obviously Johnson Utilities and/or  
7 George Johnson can directly contact each of them. SFG has not presented any authority  
8 to the contrary.

9 SFG also asserts that the February 9 Letter attacks Mr. Ashton's character by  
10 attaching "information concerning an irrelevant legal matter involving Mr. Ashton."  
11 However, SFG is the party that curiously filed supplemental testimony in this rate case  
12 discussing at some length the alleged "irrelevant legal matter" and attaching copies of  
13 the related court filings, not Johnson Utilities. Moreover, the legal matter and the court  
14 filings addressed in Mr. Ashton's supplemental direct testimony are matters of public  
15 record, so it is hard to imagine how providing copies of those court filings with the  
16 February 9 Letter could constitute an attack on Mr. Ashton's character as alleged. In any  
17 event, Johnson Utilities has opposed SFG's Motion for Leave to File Supplemental  
18 Testimony on the grounds that the testimony relates to matters that are outside the scope  
19 of the rate case.<sup>8</sup>

20 Lastly, SFG asserts that the February 9 Letter disparages Mr. Ashton's  
21 management of SFG, libels Mr. Ashton by insinuating financial impropriety, and seeks  
22 to damage Mr. Ashton's business relationship with SFG members. While Johnson  
23 Utilities emphatically denies these assertions, the Company notes that to the extent Mr.

24 \_\_\_\_\_  
25 <sup>7</sup> Arizona Ethics Rules, Rule ER 4.2, comment 1 (emphasis added).

26 <sup>8</sup> See Johnson Utilities' (1) Motion to Strike Pre-Filed Direct Testimony of David Ashton on Behalf of Intervenor Swing First Golf; and (2) Response to Swing First Golf's Motion for Leave to File Supplemental Direct Testimony filed February 19, 2009.

1 Ashton believes these claims have merit, they must be brought by him in a court of law  
2 and not before the Commission.

3 **2. Johnson Utilities Has Not Threatened SFG Members or Company**  
4 **Customers with Depositions.**

5 SFG states in its Emergency Motion that it is "informed and believes that Mr.  
6 Johnson has been contacting Swing First's members and/or Utility's customers, and  
7 demanding that they agree to be deposed or he will get an order forcing them to testify."<sup>9</sup>  
8 This is categorically untrue. SFG fails to identify any member of SFG or customer of  
9 Johnson Utilities who has received a demand to submit to a deposition in this rate case.  
10 In fact, on February 16, 2009, counsel for Johnson Utilities contacted counsel for SFG  
11 via e-mail requesting "specifics regarding what people have been contacted regarding  
12 the taking of their depositions." Approximately 20 minutes later, counsel for SFG  
13 responded to the e-mail stating "I don't know any more. I'm sure that George can tell  
14 you." There is simply no credible evidence to corroborate SFG's assertion.

15 Johnson Utilities does not intend to depose any person or party in the rate case, so  
16 further discussion of the issue in this rate case is unnecessary. Johnson Utilities has  
17 recently noticed two depositions in the complaint case—David Ashton and Michael  
18 White, a former employee of SFG.<sup>10</sup> However, in its Notice of Inappropriate Discovery  
19 and Litigation Tactics filed February 20, 2009, in this case and the complaint case, SFG  
20 states that it intends to file a motion to quash the two notices of deposition. Thus, the  
21 matter of depositions will be addressed in the complaint case, where the issue should be  
22 addressed.<sup>11</sup>

<sup>9</sup> Emergency Motion at page 2, lines 1-3 (emphasis added).

<sup>10</sup> SFG filed a formal complaint against Johnson Utilities in Docket No. WS-02987A-08-0049. The formal complaint involves whether SFG was correctly billed for the actual quantities of effluent and Central Arizona Project water delivered by Johnson Utilities, including applicable meter charges, Water Quality Assurance Revolving Fund taxes, and transaction privilege taxes.

<sup>11</sup> As a general rule, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action..." Rule 26(b), Rules of Civil Procedure. We further note that the purpose of discovery is to avoid surprise and prevent the trial from being a "guessing game." *Watts v. Superior Court*, 87 Ariz. 1, 5, 347 P. 2d 565, 567 (1959). Thus, depositions are appropriate in the complaint case.



1 COPY of the foregoing hand-delivered  
this 24<sup>th</sup> day of February, 2009 to:

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10 COPY of the foregoing sent via U.S. Mail and  
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