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BEFORE THE ARIZONA CORPORATION COMMISSION

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2009 MAY 11 P 1:43

AZ CORP COMMISSION
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Arizona Corporation Commission

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8 IN THE MATTER OF THE APPLICATION OF
9 JOHNSON UTILITIES, LLC FOR AN
10 INCREASE IN ITS WATER AND
11 WASTEWATER RATES FOR CUSTOMERS
12 WITHIN PINAL COUNTY, ARIZONA.

Docket No. WS-02987A-08-0180

11 **RUCO'S OPENING BRIEF**
12 **(REDACTED VERSION)**

13
14 The Residential Utility Consumer Office ("RUCO") submits this Brief on the issue of
15 Swing First Golf, LLC's ("Swing First") request to admit the tape recorded conversation
16 between [REDACTED]. RUCO has concluded, based on the following legal analysis, that
17 the transcript of the recording is admissible, and RUCO would therefore not object to its
18 admission. The redacted information is being provided to those parties who have signed the
19 Protective Agreement in this docket.

20 **1. INTRODUCTION**

21 [REDACTED]

22
23 At the hearing of Johnson's application for a rate increase held on April 27, 2009,
24 Swing First attempted to offer the transcript of the tape recording into evidence. The

1 Administrative Law Judge ("Judge") decided to suspend the proceedings and allow the
2 interested parties an opportunity to present legal briefs on the admissibility of the tape
3 recorded conversation.

4 Applying the facts to the law, RUCO believes that the tape recorded conversation is
5 admissible¹.

6
7 **2. IT IS PERMISSIBLE IN ARIZONA FOR A PARTY TO RECORD HIS/HER**
8 **CONVERSATION WITH ANOTHER PARTY WHO IS UNAWARE THAT THE**
9 **CONVERSATION IS BEING RECORDED.**

10 State and federal laws allow tape recorded conversations without the consent of all
11 parties under certain circumstances. Arizona Revised Statute, § 13-3005 provides:

12 13-3005. Interception of wire, electronic and oral communications;
13 installation of pen register or trap and trace device; classification;
14 exceptions

15 A. Except as provided in this section and section 13-3012, a person is
16 guilty of a class 5 felony who either:

17 1. Intentionally intercepts a wire or electronic communication to which
18 he is not a party, or aids, authorizes, employs, procures or permits
19 another to so do, without the consent of either a sender or receiver
20 thereof.

21 2. Intentionally intercepts a conversation or discussion at which he is
22 not present, or aids, authorizes, employs, procures or permits another
23 to so do, without the consent of a party to such conversation or
24 discussion.

3. Intentionally intercepts the deliberations of a jury or aids, authorizes,
employs, procures or permits another to so do.

B. Except as provided in sections 13-3012 and 13-3017, a person who
intentionally and without lawful authority installs or uses a pen register
or trap and trace device on the telephone lines or communications
facilities of another person which are utilized for wire or electronic
communication is guilty of a class 6 felony.

¹ At the hearing, the Company raised some procedural due process concerns. RUCO agrees that at the time, a decision on the admissibility of the Transcript would raise due process questions given that the Company had only a couple of days notice. RUCO believes that the due process concerns have been eliminated by the Judge's decision to suspend the proceedings.

1 The statute does not prohibit a person who is a party to a conversation from making a
2 recording of the conversation without the other party's consent. The Arizona Court of
3 Appeals has also recognized the legality of recording where one party has consented. In
4 *State v. Allgood*, 171 Ariz. 522, 523-24, 831 P.2d 1290 (App. 1992), the Court of Appeals
5 noted:

6 Monitoring and recording of a telephone conversation with the consent
7 of one party, sometimes referred to as "participant monitoring" or
8 "consent surveillance", is authorized by statute in Arizona.
9 Ariz.Rev.Stat. Ann. ("A.R.S.") § 13-3012.7...[which] exempts from the
10 general prohibition against interception of communications "... the
11 interception of any wire, electronic, or oral communication by any
12 person, *if the interception is effected with the consent of a party to the
13 communication* or a person present during the communication."
14 (Emphasis added.) See also A.R.S. § 13-3005. (penalizing as a class 5
15 felony interceptions effected "without the consent of either a sender or
16 receiver thereof.")

17 The case law and Arizona statute are consistent with the governing federal statute. 18
19 U.S.C. § 2511(2) (d) provides:

20 Sec. 2511. Interception and disclosure of wire, oral, or electronic
21 communications prohibited

22 (d) It shall not be unlawful under this chapter for a person not acting
23 under color of law to intercept a wire, oral, or electronic communication
24 where such person is a party to the communication or where one of the
parties to the communication has given prior consent to such
interception unless such communication is intercepted for the purpose
of committing any criminal or tortious act in violation of the Constitution
or laws of the United States or of any State.

Mr. Ashton was not acting under the color of the law when he engaged in
conversations with Mr. Larsen. The purpose of the tape recording was not to commit an

1 illegal act in violation of state and/or federal law. Accordingly, the taping of the conversation
2 is legal under both state and federal law².

3 **3. MR. LARSEN'S STATEMENTS ARE NOT HEARSAY**

4 The recording was legal. The next inquiry is whether Mr. Larsen's statements are
5 hearsay. Mr. Larsen is the general manager of Johnson who is a party in this rate case. As
6 an employee of Johnson, Mr. Larsen represents Johnson's interests. Swing First is offering
7 Mr. Larsen's' statements against the interests of Johnson.

8 Rule 801 (d) (2) of the Arizona Rules of Evidence, provides:

9 **(d) Statements which are not hearsay.** A statement is not hearsay
10 if—

11 (2) *Admission by party-opponent.* The statement is offered against a
12 party and is (A) the party's own statement, in either an individual or a
13 representative capacity, or (B) a statement of which the party has
14 manifested an adoption or belief in its truth, or (C) a statement by a
15 person authorized by the party to make a statement concerning the
subject, or (D) a statement by the party's agent or servant concerning a
matter within the scope of the agency or employment, made during the
existence of the relationship, or (E) a statement by a coconspirator of a
party during the course and in furtherance of the conspiracy.

16 Mr. Larsen's statements are admissions by a party-opponent and are, therefore, not
17 hearsay.

18 ...
19 ...
20 ...
21 ...

22
23 ² There are a variety of ethical opinions which provide that attorneys or his/her clients/agents can
24 surreptitiously record conversations with witnesses under certain circumstances. See Ethics Opinion 90-02
and 00-04 attached as Exhibit A.

1 **4. MR. LARSEN'S STATEMENTS ARE RELEVANT**

2 The last level of inquiry³ is whether Mr. Larsen's statements are relevant. Rule 401
3 and 402 of the Arizona Rules of Evidence, govern:

4 **Rule 401. Definition of "Relevant Evidence"**

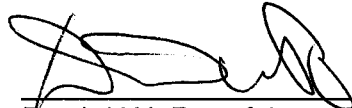
5 "Relevant evidence" means evidence having any tendency to make the
6 existence of any fact that is of consequence to the determination of the
7 action more probable or less probable than it would be without the
8 evidence.

8 **Rule 402. Relevant Evidence Generally**
9 **Admissible; Irrelevant Evidence Inadmissible**

10 All relevant evidence is admissible, except as otherwise provided by the
11 Constitution of the United States, by the Constitution of Arizona or by
12 applicable statutes or rules. Evidence which is not relevant is not
13 admissible.

12 [REDACTED]

14 RESPECTFULLY SUBMITTED this 11th day of May, 2009.

15 
16 _____
17 Daniel W. Pozefsky
18 Chief Counsel

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22
23 ³ Assuming the Judge determines that the recording is relevant, authentication is a pre-condition for its
24 admission. Arizona Rules of Evidence, Rule 901 (a) provides that authentication is satisfied by evidence
sufficient to support a finding that the recording is what its proponent claims. Rule 1002 further requires the
production of the original recording with certain exceptions.

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2 of May, 2009 with:

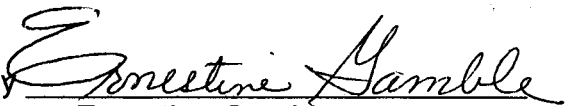
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