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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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COMMISSIONERS

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SWING FIRST GOLF, LLC,
COMPLAINANT,

VS.

JOHNSON UTILITIES, LLC,
RESPONDENT.

DOCKET NO. WS-02987A-08-0049

**PROCEDURAL ORDER DENYING
MOTION FOR SUMMARY
JUDGMENT AND SETTING
PROCEDURAL CONFERENCE**

BY THE COMMISSION:

I. Overview

On January 25, 2008, Swing First Golf, LLC, ("Swing First") filed with the Arizona Corporation Commission ("Commission") a Formal Complaint ("Complaint") against Johnson Utilities, LLC, dba Johnson Utilities Company ("Johnson" or "Utility"). On February 5, 2008, Swing First filed an Amended Complaint alleging that Johnson has violated a Utilities Service Agreement ("USA") executed between Swing First's predecessor¹ and Johnson; that Johnson has overcharged Swing First for water deliveries of both effluent and Central Arizona Project ("CAP") water; that Johnson has overcharged Swing First for monthly minimums; that Johnson owes Swing First for a billing credit related to a Management Services Agreement ("MSA"); that Johnson has illegally charged Swing First for the Water Quality Assurance Revolving Fund ("WQARF") Tax ("hereinafter Superfund Tax"); that Johnson has overcharged for the transaction and privilege tax; that Johnson has failed to properly read Swing First's meters; and that Swing First has experienced numerous service interruptions.² Swing First's Amended Complaint requests relief in the form of continued service by

¹ Swing First's predecessor was Johnson Ranch Holdings, LLC ("Holdings"), an affiliate of Sunbelt Holdings Management, Inc. Holdings acquired a master planned community known as Johnson Ranch through Sunbelt. (Swing First Amended Complaint at 1)

² Generally, Amended Complaint.

1 Johnson during the pendency of the Complaint proceeding; a determination of the amounts owed to
2 Swing First for overcharges occurring from the period of November 2004 to present; that Johnson be
3 ordered to stop charging for the Superfund Tax; and that Johnson render proper bills to Swing First
4 based on meter reads; that Johnson correct monthly minimum overcharges as well as the amount paid
5 for the Transaction Privilege Tax; and that the Commission order Mr. George Johnson to personally
6 apologize to Swing First and its members for poor customer service and abusive and obscene
7 language.

8 On February 13, 2008, Johnson filed its Answer and Counterclaim to Complainant's
9 Amended Formal Complaint. Johnson's Answer generally denies the allegations set forth in the
10 Complaint and seeks amounts on a counterclaim which Johnson alleges are delinquent and owed by
11 Swing First for water services deliveries.

12 On December 4, 2008, Johnson filed a Motion for Summary Judgment ("MSJ") and
13 Statement of Facts in Support of its MSJ (discussed below).

14 On December 16, 2008, Swing First filed its response to the MSJ requesting denial of the
15 MSJ and that a ruling on the MSJ be stayed until discovery had been completed and the Commission
16 had ruled on Johnson's rate application.³

17 On December 23, 2008, Johnson filed a Reply to Swing First's Response to the Motion for
18 Summary Judgment.

19 On February 2, 2009, oral argument on the MSJ was heard and the matter was taken under
20 advisement.

21 From February 2009 through March 2010, various discovery disputes were raised by the
22 parties and were resolved.

23 On March 29, 2010, by Procedural Order, Staff was directed to file a response to the MSJ,
24 specifically addressing the jurisdictional issues raised in the MSJ; Johnson and Staff were directed to
25 respond to Swing First's request for attorney's fees; Johnson and Swing First were directed to file
26

27 ³ On March 31, 2008, Johnson filed an application for a permanent rate increase for its water and wastewater utility
28 services. On August 25, 2010, the Commission issued Decision No. 71854 approving Johnson's rate application. *See*,
Docket WS-02987A-08-0180.

1 replies to Staff's response to the MSJ; and Swing First, Johnson, and Staff were directed to make a
2 joint filing outlining any areas where there was agreement between the parties.

3 On May 14, 2010, Staff filed a response to the MSJ recommending denial of the MSJ and
4 requesting that the Complaint proceeding be stayed pending the final order of the Commission in
5 Johnson's rate proceeding.

6 On the same date, Johnson filed a Response to Swing First's Request for Attorneys' Fees.

7 On June 15, 2010, Swing First filed a reply to Johnson's response to Swing First's request for
8 attorneys' fees and a reply to the Staff's response to the MSJ.

9 On the same date, Johnson filed a reply to Staff's response to the MSJ.

10 On July 6, 2010, Swing First filed a Report Concerning Agreement on Issues, stating that the
11 parties were not in agreement on any issues.

12 The Commission issued Decision No. 71854 in Johnson's rate case proceeding and therefore
13 it is appropriate to rule on the pending MSJ and set a procedural conference to discuss a procedural
14 schedule in this matter.⁴

15 **II. DISCUSSION**

16 **A. Standards for Summary Judgment**

17 Rule 56(c)(1) of the Arizona Rules of Civil Procedure establishes that summary judgment
18 shall be rendered "if the pleadings, deposition, answers to interrogatories, and admissions on file,
19 together with the affidavits, if any, show that there is no genuine issue as to any material fact and that
20 the moving party is entitled to a judgment as a matter of law." Arizona case law has established that
21 "the entire record" is to be examined in evaluating a motion for summary judgment. See *Chanay v.*
22 *Chittenden*, 115 Ariz. 32, 27 (1977) (citing *Krumtum v. Burton*, 111 Ariz. 448 (1975); *Stevens v.*
23 *Anderson*, 75 Ariz. 331 (1953)).

24 In *Orme School v. Reeves*, 166 Ariz. 301 (1990), the Arizona Supreme Court established the
25 Arizona standard for summary judgment in light of changes adopted by the U.S. Supreme Court. The
26

27 ⁴ The Commission subsequently voted to reconsider Decision No. 71854, pursuant to A.R.S. § 40-252, and has discussed
28 the matter at several Open Meetings. To date, no amendments to Decision No. 71854 have been approved by the
Commission.

1 *Orme* Court held that, although a trial judge considering a motion for summary judgment must
2 evaluate the evidence to some extent, the standard to be applied is the same as that used for a directed
3 verdict: “Either motion should be granted if the facts produced in support of the claim or defense
4 have so little probative value, given the quantum of evidence required, that reasonable people could
5 not agree with the conclusion advanced by the proponent of the claim or defense.” *Orme*, 166 Ariz.
6 at 309. The Court went on to clarify that it was not altering the traditional rule that while a court may
7 not grant summary judgment if the standard is not met, it can deny summary judgment even when
8 there does not appear to be a genuine dispute over any material fact. *Id.* The Court also explained
9 that the non-movant’s evidence is to be believed and that all justifiable inferences are to be drawn in
10 the non-movant’s favor. *Id.* at 309-10. Finally, the Court explained that a motion for summary
11 judgment should be granted if the party with the burden of proof on a claim or defense cannot show,
12 in response to the movant’s assertion that there is no evidence to support an essential element of the
13 claim or defense, that there is evidence creating a genuine issue of fact on the element in question.
14 *Id.* at 310.

15 **B. USA and MSA Contracts**

16 Swing First’s Amended Complaint raises claims against Johnson regarding two contracts.
17 The first contract is the USA which was executed between Swing First’s predecessor and Johnson
18 and governs the terms of the delivery of irrigation water to the Golf Course at Johnson Ranch, which
19 is owned by Swing First. Swing First contends that under the terms of the USA, Swing First has the
20 right to the first effluent generated by Johnson and, if effluent is not available, the delivery of CAP
21 water at effluent rates. Swing First also alleges that under the MSA executed between Swing First
22 and Johnson International, Swing First agreed to manage the Golf Club at Oasis in exchange for a
23 water credit and that Johnson has reneged on the MSA.

24 Article XV § 3 of the Arizona Constitution provides that:

25 “The Corporation Commission shall have full power to, and shall, prescribe just
26 and reasonable classifications to be used and just and reasonable rates and charges
27 to be made and collected, by public service corporations within the State for
28 service rendered therein, and make reasonable rules, regulations, and orders, by

1 which such corporations shall be governed in the transaction of business within
 2 the State, and may prescribe the forms of contracts and the systems of keeping
 3 accounts to be used by such corporations in transacting such business. . .”

4 **1. USA Contract**

5 Johnson’s MSJ states that Johnson is entitled to summary judgment as a matter of law
 6 regarding Swing First’s claims arising under the USA because the Commission does not have
 7 jurisdiction to resolve claims where interpretation of a contract is required.⁵

8 Johnson relies on the holding in *Trico v. Ralston* stating that “the construction and
 9 interpretation to be given to legal rights under a contract resides solely with the courts and not with
 10 the corporation commission.”⁶

11 In response, Staff and Swing First point to the Commission’s authority under the Arizona
 12 Constitution granting the Commission “[the] full and exclusive power in the field of prescribing rates
 13 which cannot be interfered with by the courts, the legislature, or the executive branch of state
 14 government.”⁷ Staff states that as part of the Commission’s executive and legislative functions, the
 15 Commission has the “exclusive, plenary authority to determine what is just and reasonable in terms
 16 of services offered by a public service corporation and the rates charged for such services.”⁸ Further,
 17 Staff states that with respect to matters solely and directly involving questions of the reasonableness
 18 of services, rates, and the classification of services, the Commission’s authority is exclusive and
 19 plenary.⁹ Based on the claims made by Swing First, Staff believes the USA by its terms contemplates
 20 the rates that Swing First would pay for effluent and CAP water and the type of services which Swing
 21 First would receive. Staff concludes that the USA is an agreement between a utility and one its
 22 customers regarding rates and terms of service; and therefore the Commission has jurisdiction to
 23 address the claims related to the USA.

24 Through powers granted to the Commission under the Arizona Constitution and A.R.S. § 40-
 25 246(A), the Commission has jurisdiction to address Swing First’s claims related to the USA.

26 ⁵ MSJ at 10.

27 ⁶ *Trico Electric Coop. v. Ralston et al.*, 67 Ariz. 358, 196 P.2d 470 (1948).

27 ⁷ Staff Response to MSJ at 4 and Swing First Response at 6.

28 ⁸ *Tucson Elec. Power Co. v Arizona Corp. Comm’n*, 132 Ariz. 240, 645 P.2d 231 (1982).

28 ⁹ *Id.* at 242.

1 Therefore, Johnson's MSJ related to claims involving the USA should be denied.

2 **2. MSA Contract**

3 Similarly, Johnson's MSJ asserts that the Commission is without jurisdiction to address the
4 claims raised by Swing First related to the MSA because the dispute requires interpretation of a
5 contract and it involves two entities that are not public service corporations.¹⁰ Swing First contends
6 that although additional discovery is needed, Johnson International and the Golf Club at Oasis are
7 essentially the same entity because: they are affiliates of Johnson; Mr. Johnson controls both
8 companies; Johnson provides services and funds for the other entities; Johnson doesn't deny that
9 Swing First managed the Golf Club at Oasis for Mr. Johnson; and the MSA must be interpreted as a
10 three-way management agreement between Swing First, and the two Johnson controlled entities.¹¹

11 Staff asserts that the MSA dispute appears to revolve around Swing First's allegation that it
12 did not receive payment for the management services it provided.¹² Staff contends that because
13 Swing First's claim does not involve a rate or term of service and is not in the nature of a consumer
14 complaint, but rather is a claim for non-payment of management services rendered, the claim is not
15 within the Commission's jurisdiction.¹³

16 It is not clear whether Swing First's claims regarding the MSA involves a rate or term of
17 service and therefore it is inappropriate to grant the MSJ related to the MSA at this time.

18 **C. Billing Dispute for Water Deliveries and Monthly Minimums**

19 Through the USA, Swing First has been receiving both effluent and CAP water from Johnson.
20 Swing First alleges that: under the USA it is entitled to the first effluent generated by Johnson to
21 irrigate the Golf Course at Johnson Ranch; since November 2004, Johnson has overcharged Swing
22 First for both effluent and CAP water; Johnson owes Swing First more than \$32,000 for the years
23 2006-2007, and \$29,000 for the years 2004-2005, due to overbilling; Swing First is entitled to pay the
24 effluent rate of \$0.62, irrespective of the type of water (effluent or CAP) Johnson delivers; and
25 Johnson has incorrectly billed Swing First for two six-inch meters when it only has one three-inch

26 _____
27 ¹⁰ MSJ at 15.

¹¹ Swing First Response to MSJ at 9-10.

¹² Staff Response to MSJ at 9.

28 ¹³ Id.

1 meter, resulting in overcharges to Swing First of as much as \$45,000.¹⁴

2 In the MSJ, Johnson alleges that it has billed Swing First for deliveries of effluent or CAP in
3 accordance with its Commission-approved tariff and that, although errors have occurred in the rates
4 Johnson charged Swing First for water deliveries, Johnson has corrected those billing errors by
5 making refunds to Swing First.¹⁵

6 Swing First's response states that the issues regarding billing remain in dispute. Swing First's
7 response states that Johnson has charged Swing First as much as \$3.75 per thousand gallons for CAP
8 water and that additional discovery is necessary to determine if Johnson has correctly reimbursed
9 Swing First for errors in billing and overcharges related to the monthly minimums.¹⁶

10 In its response, Staff points out that, during the rate case proceeding: Johnson stipulated that
11 there was a billing dispute between the parties; Johnson admitted that Swing First was charged an
12 incorrect amount for effluent; that mistakes had been made in the Swing First's bills and caused
13 Johnson to bill Swing First at incorrect rates; and that a dispute remains as to whether appropriate
14 corrections have been made to Swing First's accounts.¹⁷

15 It appears that issues of fact remain in dispute as to whether Johnson has charged, billed, and
16 correctly reimbursed Swing First for errors in billing related to water deliveries and monthly
17 minimums. Therefore, Johnson's MSJ should be denied related to the billing dispute issues raised by
18 Swing First.

19 **D. Superfund Tax**

20 Swing First alleges that Johnson has been illegally charging its customers for a "Superfund
21 Tax".

22 Johnson contends it has properly charged Swing First the Superfund Tax and that the
23 Superfund Tax is analogous to a transaction privilege or sales tax in that the customer is assessed an
24 amount based on the total amount of water delivered to the customer.¹⁸

25 Staff stated that during the rate case proceeding Staff had no objection to Johnson's collection

26 ¹⁴ Generally, Amended Complaint.

27 ¹⁵ MSJ pg. 9-13.

¹⁶ Swing First's Response to MSJ at 8.

¹⁷ Staff Response at 5.

28 ¹⁸ MSJ at 18.

1 and pass through of the Superfund Tax.¹⁹ Staff also stated that the Recommended Opinion and Order
2 issued in the rate case proceeding did not address the Superfund Tax issue.²⁰

3 Johnson asserts that Decision No. 71854 (rate case proceeding) resolved the Superfund Tax
4 issue by rejecting Swing First's recommendation that Johnson refund-in cash, not credits-its illegal
5 Superfund Tax collections.²¹

6 Decision No. 71854 does not make a finding regarding Swing First's claims related to the
7 Superfund Tax.²² The Decision states that Swing First's customer service and billing issues are best
8 addressed in the Complaint docket.²³ Therefore, Johnson's request for summary judgment related to
9 the Superfund Tax issue should be denied and the issue will be considered in this Complaint
10 proceeding.

11 **E. Customer Service Issues**

12 Swing First contends that Johnson has, in violation of Commission rules: failed to timely
13 read Swing First's meters; subjected Swing First to illegal service interruptions; over-delivered
14 effluent resulting in flooding at Swing First's golf course; and provided abysmal customer service to
15 Swing First.²⁴

16 In its response, Staff stated that, during the rate case proceeding, Johnson's witness testified
17 that Johnson has not acted in accordance with Commission rules regarding disconnect notices given
18 to Swing First, and that, for a period of time, Johnson did not read Swing First's meters in a timely
19 manner.²⁵

20 Although these customer service issues were not addressed in Johnson's MSJ, it is appropriate
21 to address these issues in this Complaint proceeding.

22 **F. Johnson Apology**

23 Swing First has requested that the Commission order Mr. George Johnson to personally
24 apologize for Swing First and its member for its "abysmal customer service." Johnson's MSJ states

25 ¹⁹ Staff Response to MSJ at 7.

26 ²⁰ Id.

27 ²¹ Johnson's Reply to Staff's Response to MSJ at pgs 3-5.

28 ²² Decision No. 71854 at pgs. 57-58.

²³ Id. at 58.

²⁴ Amended Complaint at 6.

²⁵ Staff Response to MSJ at 7, referencing Tr. at 835 and 389 (Docket No. WS-02987A-08-0180).

1 summary judgment is appropriate on Swing First's request for relief related to the apology because it
2 states a claim upon which relief cannot be granted. Because the underlying facts are not known,
3 Johnson should not be granted summary judgment at this time.

4 **G. Johnson's Counterclaim**

5 Johnson has requested summary judgment based on its claim that, as a matter of law, that it is
6 entitled to payment from Swing First related to non-payment for water deliveries in the amount of
7 \$106,086.52 as of November 30, 2008, including accrued interest and late fees.²⁶ Swing First claims
8 that it has withheld payment of the outstanding balance because: Swing First is entitled to be billed
9 for CAP water or ground water at effluent rates; Swing First is owed a credit of \$50,056 for its
10 management services at the Club at Oasis; and Swing First is entitled to a refund of payment for
11 Johnson's illegal Superfund Tax collection.

12 Because issues of fact remain in dispute regarding the various billing issues raised by
13 Johnson's counterclaim, summary judgment on Johnson's counterclaim should not be granted.

14 **III. CONCLUSION**

15 For the reasons set forth in the discussion above, summary judgment should not be granted.
16 All issues raised in the Complaint and counterclaim remain in dispute and therefore summary
17 judgment should be denied regarding those issues. Further, a procedural conference should be
18 scheduled to determine a procedural schedule to resolve the issues raised in Swing First's Amended
19 Complaint and Johnson's counterclaim.

20 IT IS THEREFORE ORDERED that Johnson Utilities, LLC's Motion for Summary
21 Judgment is hereby denied.

22 IT IS FURTHER ORDERED that all issues raised in Swing First's Amended Complaint and
23 Johnson's counterclaim shall be addressed during the Complaint proceeding.

24 IT IS FURTHER ORDERED that a **procedural conference** shall be held to determine a
25 procedural schedule in this matter on **September 22, 2011, at 10:00 a.m.** or as soon thereafter as is
26 practical, in the Commissioner's Conference Room, 2nd Floor of the Commission's office, 1200 West
27

28 ²⁶ MSJ at 19.

1 Washington, Phoenix, Arizona, 85007.

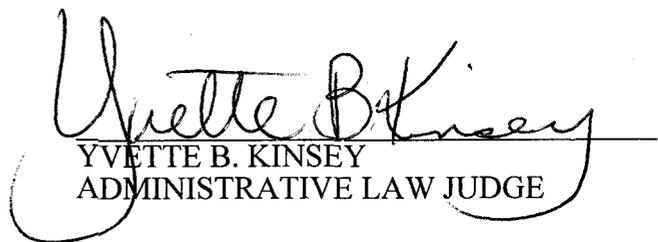
2 IT IS FURTHER ORDERED that Johnson Utilities, LLC, Swing First Golf, LLC, and the
3 Commission's Utilities Division Staff shall attempt to negotiate mutually agreeable dates for hearing
4 and other filings, and shall **each** prepare a proposed procedural schedule for the September 22, 2011,
5 procedural conference.

6 IT IS FURTHER ORDERED that withdrawal of representation must be made in compliance
7 with A.A.C. R14-3-104(E) and Rule 1.16 of the Rules of Professional Conduct (under Arizona
8 Supreme Court Rule 42). Representation before the Commission includes appearances at all hearings
9 and procedural conferences, as well as all Open Meetings for which the matter is scheduled for
10 discussion, unless counsel has previously been granted permission to withdraw by the Administrative
11 Law Judge or the Commission.

12 IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113 – Unauthorized
13 Communications) applies to this proceeding and shall remain in effect until the Commission's
14 Decision in this mater is final and non-appealable.

15 IT IS FURTHER ORDERED that the Presiding Officer may rescind, alter, amend, or waive
16 any portion of this Procedural Order either by subsequent Procedural Order or by ruling at hearing.

17 DATED this 31st day of August, 2011.

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21 YVETTE B. KINSEY
22 ADMINISTRATIVE LAW JUDGE

23 Copies of the foregoing mailed/delivered
24 this 31st day of August, 2011:

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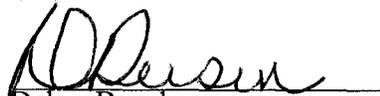
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