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BEFORE THE ARIZONA CORPORATION

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SWING FIRST GOLF, LLC,
COMPLAINANT,
VS.
JOHNSON UTILITIES, LLC,
RESPONDENT.

DOCKET NO. WS-02987A-08-0049

**JOHNSON UTILITIES'
(1) OPPOSITION TO SWING FIRST
GOLF'S MOTION FOR CONTINUANCE;
(2) PROPOSED PROCEDURAL
SCHEDULE; AND (3) NOTICE OF
CHANGE OF ADDRESS OF LEGAL
COUNSEL**

Brownstein Hyatt Farber Schreck, LLP
One East Washington Street, Suite 2400
Phoenix, AZ 85004

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On September 20, 2011, Swing First Golf, LLC ("SFG") filed a Motion for Continuance ("Motion") requesting to further delay a hearing in this complaint case until after a verdict is rendered in *Johnson Utilities, LLC v. Swing First Golf, LLC* (Maricopa County Superior Court Docket No. CV 2008-000141) (the "Superior Court Case"). For the reasons discussed herein, Johnson Utilities, LLC ("Johnson Utilities" or the "Company") strenuously opposes the Motion and urges that instead of further delaying this proceeding, SFG should withdraw its complaint against the Company to avoid what SFG itself acknowledges would be a waste of Arizona Corporation Commission ("Commission") resources. If SFG will not withdraw its complaint, then Johnson Utilities requests that the Commission set a hearing date and establish a procedural schedule in this case. For the Commission's consideration at the scheduling conference set for September 22, 2011, the Company has included a proposed procedural schedule for the remainder of the case. In addition, counsel undersigned hereby notifies the Commission and the parties of his new address, as set forth below.

1 **A. SFG's Motion for Continuance Should be Denied.**

2 Only three weeks ago, SFG made a filing in the Johnson Utilities rate case docket stating
3 as follows:

4 [A]s the Commissioners will recall, Swing First suggested at Open Meeting that
5 the current complaint case (Docket No. WS-02987A-08-0049) is **essentially moot**
6 given the pending trial in the lawsuit between Johnson and Swing First in
7 Superior Court. Therefore, **there was no reason to waste the Commission's**
8 **resources on a moot case.** In recognition of that fact, **Swing First further**
9 **suggested that it could withdraw the complaint, if Johnson would agree to**
10 **continue to provide irrigation service pending trial.** This would allow the
11 overburdened Hearing Division to avoid ruling on a long motion for summary
12 judgment, overseeing a lengthy case, and then preparing an extensive
13 recommended opinion and order for the Commissioners to consider at a future
14 Open Meeting.¹ (emphasis added).

15 At the August 11, 2011 Open Meeting, counsel for Johnson Utilities avowed before the
16 five commissioners and SFG that the Company would not disconnect utility service to SFG for
17 non-payment of the disputed portions of the SFG bills while the Superior Court Case is pending.
18 Counsel reasserted this avowal to the commissioners and SFG at the Open Meeting held
19 September 6, 2011. Johnson Utilities now affirms yet again, and in writing, that it will not
20 disconnect utility service to SFG while the Superior Court Case is pending so long as SFG
21 continues to pay the undisputed portion of its monthly bills.

22 The Superior Court Case is set for trial starting March 13, 2012. Given this fact, SFG
23 acknowledges that this formal complaint case is "essentially moot." Johnson Utilities agrees
24 with SFG that "there [is] no reason to waste the Commission's resources on a moot case." Thus,
25 Johnson Utilities urges SFG to withdraw its formal complaint in this docket based upon the
26 Company's representation on the record that it will not disconnect utility service to SFG for non-
27 payment of the disputed portions of its bills while the Superior Court Case is pending.

28 If SFG will not agree to withdraw the complaint case it describes as "essentially moot,"
then the case should proceed without further delays. SFG filed its Formal Complaint in this case
nearly four years ago, on January 25, 2008.² Shortly thereafter, Johnson Utilities filed its

¹ Swing First Golf LLC Update to Commissioners (August 20, 2011) at pp. 2-3 (filed in Docket WS-02987A-08-0049).

² SFG filed an Amended Formal Complaint on February 5, 2008.

1 Answer and Counterclaim on February 13, 2008, seeking payment in the amount of \$64,749.74
2 (as of January 31, 2008) for past due bills, which amount is still unpaid. In its December 15,
3 2008, response to Johnson Utilities' Motion for Summary Judgment in this case, SFG sought its
4 first major delay in this case, requesting the following relief:

- 5 1. Continue ruling on Utility's Motion for Summary Judgment until discovery
6 has been completed and the Commission has ruled on Utility's rate application
7 in Docket No. WS-02987A-08-0180; and
- 8 2. Continue hearings in this docket until discovery has been completed and the
9 Commission has ruled on Utility's rate application in Docket No. WS -2987A-
10 08-0180.³

11 The administrative law judge ("ALJ") has now ruled on Johnson Utilities' Motion for
12 Summary Judgment and the Commission has ruled on the Company's rate application in
13 Decision 71854 (August 25, 2010) as modified by Decision 72579 (September 15, 2011).
14 However, SFG seeks yet another delay to now await a verdict in the Superior Court Case. SFG
15 pre-filed its direct testimony in this case nearly two years ago on December 30, 2009. This case
16 is ready to proceed to a conclusion, and there is no legitimate reason for further delay. Johnson
17 Utilities is entitled to a ruling on the past-due amounts it claims are owed the Company by SFG.

18 Moreover, at the Open Meeting just a few weeks ago, counsel for SFG was critical of the
19 Commission's hearing division because the complaint case has not reached a conclusion after
20 nearly four years. At the Open Meeting, the Commission's Hearing Division rightly responded
21 that it was, in fact, SFG that had asked for a delay in the complaint case.⁴ Now, with the
22 Johnson Utilities rate case and subsequent A.R.S. §40-252 proceeding concluded, SFG has
23 reversed course and asks for another delay in the complaint case. SFG should not be permitted
24 to keep this complaint case hanging over the Company's head indefinitely. William Gladstone,
25 the nineteenth century British statesman and prime minister, said that "justice delayed is justice
26 denied." Johnson Utilities is entitled to a timely resolution of the issues raised by SFG and the
27 counterclaim for past-due amounts owed to the Company. Johnson Utilities requests that the

28 ³ SFG's Response to Motion for Summary Judgment (December 15, 2008) at p. 12, lines 17-23.

⁴ *See Id.*

1 ALJ deny the requested continuance and set a procedural schedule in this case. A proposed
2 schedule is set forth in the following section.

3 SFG asserts that "[i]t would waste the parties' and the Commission's resources to
4 simultaneously try these issues in two forums and would risk inconsistent results."⁵ SFG is
5 wrong on both counts. While there are claims by SFG which properly fall under the jurisdiction
6 of the superior court (namely, allegations of trespass to land, negligence, breach of covenant of
7 good faith and fair dealing, defamation, interference with business relationship, and
8 racketeering), the other claims asserted by SFG fall squarely within the Commission's
9 jurisdiction. These are:

- 10 • alleged overcharges for utility service and appropriate refunds
- 11 • alleged bill credits for management of The Oasis Golf Club
- 12 • alleged withholding of effluent
- 13 • alleged minimum bill overcharges
- 14 • alleged charges for over-delivery of effluent
- 15 • alleged overcharges for line-breaks
- 16 • requested assessment of penalties and fines

17 In its December 15, 2008 response to Johnson Utilities' Motion for Summary Judgment,
18 SFG argued that all issues raised in its complaint are within the Commission's jurisdiction.⁶
19 Specifically, SFG stated that:

20 The Corporation Commission is given broad authority in Arizona. Within the
21 sphere of its responsibilities, the Commission is empowered to exercise not only
22 legislative but also judicial, administrative, and executive functions of
23 government. Under the state constitution, the Commission is granted "full power"
24 to set just and reasonable rates by public service corporations and to "make
25 reasonable rules, regulations, and orders, by which such corporations shall be
26 governed in the transaction of business within the State...."⁷

27 SFG continued by quoting from Judge Dunevant's May 27, 2008, Minute Order in the
28 Superior Court Case in which the judge concluded that the court "should refrain from becoming

⁵ SFG's Motion for Continuance at p. 1, lines 5-6.

⁶ SFG's Response to Motion for Summary Judgment at p. 5, line 6.

⁷ *Id.* at p. 6, lines 8-13.

1 involved until the Corporation Commission has made its initial determination."⁸ SFG has now
2 reversed its course, perhaps because it wants a first bite at the apple with the superior court and a
3 second bite with the Commission. The issues listed above should be addressed by the
4 Commission in this complaint case. Johnson Utilities has waited nearly four years for a
5 resolution of the Company's claims for payment against SFG.

6 **B. Proposed Procedural Schedule.**

7 Johnson Utilities proposes the following schedule for the filing of pre-filed testimony
8 and the hearing:

9

Update (if any) of SFG Direct Testimony ⁹	Monday, October 24, 2011
Johnson Utilities Rebuttal Testimony	Friday, December 23, 2011
SFG Surrebuttal Testimony	Monday, January 23, 2012
End of Discovery ¹⁰	Wednesday, January 25, 2012
Johnson Utilities Rejoinder Testimony	Monday, February 6, 2012
Hearing (estimated three days)	Tuesday, February 14, 2012

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16 Earlier today, counsel for Johnson Utilities provided this proposed schedule via e-mail to
17 counsel for SFG and Utilities Division Staff. Counsel undersigned spoke to Staff counsel who
18 stated that Staff does not oppose the schedule. In a telephone conversation earlier this week,
19 counsel for SFG stated that SFG did not want to discuss a procedural schedule ahead of the
20 scheduling conference and a ruling on its Motion.

21 **C. Change of Address for Counsel.**

22 Counsel for Johnson Utilities has moved to a new office. Future pleadings,
23 correspondence and other communications should be directed to counsel at the following new
24 address:
25
26

27 ⁸ *Id.* at pp. 6-7.

28 ⁹ SFG filed the Direct Testimony of David Ashton on December 30, 2009.

¹⁰ No data requests may be sent after this date without leave of the administrative law judge.

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RESPECTFULLY submitted this 21st day of September, 2011.

BROWNSTEIN HYATT FARBER SCHRECK LLP



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Attorneys for Johnson Utilities LLC

ORIGINAL and thirteen (13) copies of the
foregoing filed this 21st day of September, 2011, with:

Docket Control
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

Copy of the foregoing hand-delivered
this 21st day of September, 2011, to:

Yvette B. Kinsey, Administrative Law Judge
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2 class mail this 21st day of September, 2011, to:

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