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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

GARY PIERCE, Chairman  
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BRENDA BURNS

IN THE MATTER OF THE FORMAL  
COMPLAINT OF SWING FIRST GOLF,  
LLC, AGAINST JOHNSON UTILITIES,  
LLC.

DOCKET NO. WS-02987A-08-0049

**JOHNSON UTILITIES' RESPONSE IN  
OPPOSITION TO SWING FIRST  
GOLF'S PLEADING CAPTIONED  
WITHDRAWAL OF COMPLAINT**

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On September 27, 2011, Swing First Golf, LLC, ("SFG") filed a three-paragraph pleading captioned "Withdrawal of Complaint" whereby SFG purports to withdraw its complaint in this docket with prejudice. SFG filed its pleading without prior discussion with Johnson Utilities, LLC ("Johnson Utilities" or the "Company") or, upon information and belief, Utilities Division Staff ("Staff"). Because Johnson Utilities has filed an answer and counterclaim to SFG's complaint, as well as a motion for summary judgment, SFG may not now withdraw its complaint without: (a) a stipulation of dismissal signed by Johnson Utilities; and (b) an order of the Commission. SFG has neither, and it may not simply "notify" the Arizona Corporation Commission ("Commission") that it is withdrawing its complaint. For the reasons discussed herein, Johnson Utilities opposes the withdrawal of SFG's complaint without a resolution by the Commission of the issues raised in the complaint and the Company's counterclaim, now almost four years ago.

**I. THE VOLUNTARY DISMISSAL OF SFG'S COMPLAINT IS NOT PERMITTED UNDER THE CIRCUMSTANCES OF THIS CASE.**

The rules of practice and procedure before the Commission are set forth in Arizona Administrative Code ("A.A.C.") R14-3-101 *et seq.* Specifically, Rule R14-3-101(A) and (B) states as follows:

- 1 A. Procedure governed. Except as may be otherwise directed by the  
2 Commission, and when not in conflict with law or the regulations or  
3 orders of this Commission, these Rules of Practice and Procedure  
4 shall govern in all cases before the Corporation Commission  
5 including but not limited to those arising out of Article XV of the  
6 Arizona Constitution, or Titles 10, 40, or 44 of the Arizona Revised  
7 Statutes. In all cases in which procedure is set forth neither by law,  
8 nor by these rules, nor by regulations or orders of the Commission,  
9 the Rules of Civil Procedure for the Superior Court of Arizona as  
10 established by the Supreme Court of the state of Arizona shall  
11 govern. Notwithstanding any of the above, neither these rules nor  
12 the Rules of Civil Procedure shall apply to any investigation by the  
13 Commission, any of its divisions or its staff.
- 14 B. Liberal construction—waiver. These rules shall be liberally  
15 construed to secure just and speedy determination of all matters  
16 presented to the Commission. If good cause appears, the  
17 Commission or the presiding officer may waive application of these  
18 rules when not in conflict with law and does not affect the  
19 substantial interests of the parties. (Emphasis added).

20 The Commission does not have its own separate rule of procedure governing the  
21 voluntary dismissal of a complaint by a complainant, so the Commission looks to the  
22 Arizona Rules of Civil Procedure. The Arizona Rule of Civil Procedure governing the  
23 voluntary dismissal of a complaint by a plaintiff is found in Rule 41(a), which states as  
24 follows:

25 **Rule 41(a). Voluntary dismissal; by plaintiff or by order of court;  
26 effect**

- 27 1. Subject to the provisions of Rule 23(c), or Rule 66(c), or of any  
28 statute, an action may be dismissed (A) by the plaintiff without order  
of court by filing a notice of dismissal at any time before service by  
the adverse party of an answer or of a motion for summary  
judgment, whichever first occurs, or (B) by order of the court  
pursuant to a stipulation of dismissal signed by all parties who have  
appeared in the action. Such an order may be signed by a judge, a  
duly authorized court commissioner, the clerk of court or a deputy  
clerk. Unless otherwise stated in the notice or order of dismissal, the  
dismissal is without prejudice, except that a notice of dismissal  
operates as an adjudication upon the merits when filed by a plaintiff

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who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

2. Except as provided in paragraph 1 of this subdivision of this Rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court an upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice. (Emphasis added).

SFG filed its complaint in this docket on January 25, 2008, and amended the complaint on February 5, 2008. Johnson Utilities filed its answer, which included counterclaims against SFG, on February 13, 2008. Thereafter, Johnson Utilities filed a motion for summary judgment on December 4, 2008, which motion was only recently denied by the Commission on August 31, 2011. Because Johnson Utilities filed an answer, a counterclaim and a motion for summary judgment, SFG may only dismiss its complaint at this late date if Johnson Utilities stipulates to a dismissal and the Commission issues its order authorizing the dismissal. SFG has no such stipulation from Johnson Utilities, so its complaint may not be voluntarily dismissed and its notice of Withdrawal of Complaint must be rejected.

Moreover, even if the Rules of Civil Procedure permitted the withdrawal and/or dismissal of the complaint at this late juncture, the Commission should decline to allow the withdrawal or order the dismissal because the withdrawal of SFG's complaint would both "conflict with law" and "affect the substantial interests" of Johnson Utilities in violation of A.A.C. R14-3-101(B) cited above. Johnson Utilities opposes the withdrawal and/or dismissal of the complaint for the reasons set forth below.

1     **II.    JOHNSON UTILITIES OPPOSES DISMISSAL OF THE COMPLAINT**  
2     **AND THE COMPANY'S COUNTERCLAIM.**

3             SFG's complaint should be addressed by the Commission in this docket because  
4     the Commission has exclusive and plenary jurisdiction, as well as the essential expertise,  
5     to address the issues raised. In addition, there has already been a substantial amount of  
6     work done regarding the claims asserted by SFG in this docket and in Johnson Utilities'  
7     rate case docket. It is simply too late in the process for SFG to attempt to switch  
8     jurisdictions.

9             **A.    Exclusive and Plenary Jurisdiction to Address the Issues Raised**  
10            **in the Complaint and Counterclaim Lies With the Commission**  
11            **and Not the Superior Court.**

12            After asserting a contrary position for nearly four years, SFG now believes that its claims  
13     and the counterclaims of Johnson Utilities should be addressed in the pending Maricopa County  
14     Superior Court case (Docket CV 2008-000141) (the "Superior Court Case"). However, the  
15     Commission has exclusive and plenary jurisdiction to address conflicts over customer service  
16     and rates and charges for utility service under a tariff, and therefore, must resolve the conflicts  
17     between Johnson Utilities and SFG. Article 15, Section 3, of the Arizona Constitution imbues  
18     the Commission with the following constitutional authority to prescribe just and reasonable rates  
19     and charges:

20            Section 3. The corporation commission shall have full power to, and shall,  
21            prescribe just and reasonable classifications to be used and just and reasonable  
22            rates and charges to be made and collected, by public service corporations within  
23            the state for service rendered therein, and make reasonable rules, regulations, and  
24            orders, by which such corporations shall be governed in the transaction of  
25            business within the state, and may prescribe the forms of contracts and the  
26            systems of keeping accounts to be used by such corporations in transacting such  
27            business, and make and enforce reasonable rules, regulations, and orders for the  
28            convenience, comfort, and safety, and the preservation of the health, of the  
              employees and patrons of such corporations.... (Emphasis added).

              The Commission's jurisdiction to exercise its authority under Article 15, Section 3 is  
exclusive and plenary.<sup>1</sup> In *Qwest Corporation v. Kelly*, 59 P.3d 789 (Ariz. App. Div. 2, 2002),

<sup>1</sup> *State v. Tucson Gas, Elec. Light and Power Co.*, 15 Ariz. 294, 138 P. 781 (1914).

1 the Arizona Court of Appeals described the Commission's exclusive jurisdiction under Article  
2 15, Section 3, as follows:

3 [I]t "has full and exclusive power in the field of prescribing rates which cannot be  
4 interfered with by the courts, the legislature or the executive branch of state  
5 government." *Morris v. Arizona Corp. Comm'n*, 24 Ariz. App. 454, 457, 539  
6 P.2d 928, 931 (1975); *see also Southwest Gas Corp. v. Arizona Corp. Comm'n*,  
7 169 Ariz. 279, 283, 818 P.2d 714, 718 (App. 1991) (with respect to ratemaking  
8 decisions that affect public services corporations, "the Commission is given full  
9 and exclusive powers to the preclusion of interference by the other branches of  
10 government"); *Arizona Pub. Serv. Co. v. City of Phoenix*, 149 Ariz. 61, 64, 716  
11 P.2d 430, 433 (App. 1986) ("[C]ommission has exclusive ratemaking authority,  
12 not to be invaded by any branch of government."). Thus, as part of its executive  
13 and legislative function, the Commission has the exclusive, plenary authority to  
14 determine what is just and reasonable in terms of services offered by a public  
15 service corporation and the rates charged for such services. *Tucson Elec. Power  
16 Co. v. Arizona Corp. Comm'n*, 132 Ariz. 240, 645 P.2d 231 (1982).

17 In addition to its constitutional authority, the Commission has statutory authority granted  
18 by the Arizona legislature. The Commission's statutory authority to address customer  
19 complaints is set forth in A.R.S. § 40-246(A), which states as follows:

20 Complaint may be made by the commission of its own motion, or by any person  
21 or association of persons by petition or complaint in writing, setting forth any act  
22 or thing done or omitted to be done by any public service corporation in violation,  
23 or claimed to be in violation, of any provision of law or any order or rule of the  
24 commission, but no complaint shall be entertained by the commission, except  
25 upon its own motion, as to the reasonableness of any rates or charges of any gas,  
26 electrical, water or telephone corporation, unless it is signed by the mayor or a  
27 majority of the legislative body of the city or town within which the alleged  
28 violation occurred, or by not less than twenty-five consumers or purchasers, or  
prospective consumers or purchasers, of the service. (Emphasis added).

The Commission's exclusive authority to prescribe reasonable rates and charges extends  
to the resolution of customer complaints involving the reasonableness of services, rates and  
charges. In *Qwest Corporation v. Kelly*, the Arizona Court of Appeals explained as follows:

As this court stated in *State ex rel. Corbin v. Arizona Corp. Comm'n*, 174 Ariz.  
216, 218, 848 P.2d 301, 303 (App. 1992), "[t]he [C]ommission's power goes  
beyond strictly setting rates and extends to enactment of the rules and regulations  
that are reasonably necessary steps in ratemaking." In addition to this executive  
and legislative authority, the Commission has the judicial jurisdiction to hear  
grievances and consumer complaints. *State ex rel. Woods; Southwest Gas Corp.*  
Not only does the Commission have judicial powers that are "inherent in its  
responsibility to make those decisions necessary to regulate public service  
corporations, pursuant to Article 15, Section 3, of the Arizona Constitution,"

1           *Southwest Gas Corp.*, 169 Ariz. at 284, 818 P.2d at 719, as previously noted, the  
2           legislature has expanded that authority by expressly authorizing it to address  
3           consumer complaints, including those that involve allegations of deceptive  
4           business and marketing practices. A.R.S. §§ 40-110, 40-202(C). **With respect to**  
5           **matters solely and directly involving questions of the reasonableness of**  
6           **services, rates, and the classification of services, the Commission's authority**  
7           **is exclusive and plenary.** See *Tucson Elec. Power Co.*, 132 Ariz. at 242, 645  
8           P.2d at 233. But, claims such as McMahon's that are unrelated to or attenuated  
9           from those matters over which the Commission has express constitutional or  
10          statutory authority do not fall within the Commission's exclusive jurisdiction.  
11          Campbell supports our conclusion. (Emphasis added)

12          Judge Dunevant, the original judge assigned in the Superior Court Case, appropriately  
13          recognized the exclusive jurisdiction of the Commission to address disputes over rates and  
14          charges and customer service. In his May 27, 2008, Minute Entry, Judge Dunevant stated that  
15          the court "should refrain from becoming involved until the Corporation Commission has made  
16          its initial determination." Judge Dunevant is correct, and SFG should be concerned that its  
17          claims against Johnson Utilities will not be heard in the Superior Court Case if they are  
18          withdrawn or dismissed in this proceeding.

19          At the procedural conference held September 22, 2011, the Commission's legal counsel  
20          agreed that the appropriate place to resolve SFG's disputes with Johnson Utilities over billing  
21          and customer service is the Commission. Thus, both the Superior Court and the Commission's  
22          legal division are in agreement with regard to the exclusive and plenary jurisdiction of the  
23          Commission in this case.

24          Even SFG itself has acknowledged, without any ambiguity, that jurisdiction properly lies  
25          with the Commission to resolve its complaint. In its December 15, 2008, response to Johnson  
26          Utilities' Motion for Summary Judgment, SFG stated that all issues<sup>2</sup> raised in its complaint are  
27          within the Commission's jurisdiction:

28                 The Corporation Commission is given broad authority in Arizona. Within the  
                  sphere of its responsibilities, the Commission is empowered to exercise not only  
                  legislative but also judicial, administrative, and executive functions of  
                  government. Under the state constitution, the Commission is granted "full power"  
                  to set just and reasonable rates by public service corporations and to "make

<sup>2</sup> SFG's Response to Motion for Summary Judgment at p. 5, line 6.

1 reasonable rules, regulations, and orders, by which such corporations shall be  
2 governed in the transaction of business within the State...."<sup>3</sup>

3 The Commission is unquestionably the appropriate and best forum to resolve the issues  
4 raised by SFG in its complaint and the issues raised by Johnson Utilities in its associated  
5 counterclaim. Thus, SFG's notice of Withdrawal of Complaint should be rejected by the  
6 Commission, and a procedural schedule should be set to move the case forward to a conclusion.

7 **B. This Case Has Proceeded Too Far at the Commission for SFG to**  
8 **Withdraw its Complaint at this Late Date.**

9 SFG filed its complaint on January 25, 2008, and amended the complaint on  
10 February 5, 2008. Johnson Utilities filed its answer and counterclaim on February 13,  
11 2008. Johnson Utilities thereafter filed a motion for summary judgment on December 4,  
12 2008, and after briefing by SFG and Staff, as well as oral argument, the motion was  
13 recently denied by the Commission on August 31, 2011. In addition, the parties and  
14 Staff briefed the issue of the availability of attorneys' fees in this case. Further, during  
15 the course of this case, the parties and Staff have propounded and responded to at least  
16 22 separate sets of data requests comprising nearly 300 questions exclusive of subparts—  
17 four sets from SFG to Johnson Utilities in this complaint docket; three sets from Johnson  
18 Utilities to SFG in this complaint docket; one set from Staff to Johnson Utilities in this  
19 complaint docket; eight sets from SFG to Johnson Utilities in the rate case docket; and five  
20 sets from Johnson Utilities to SFG in the rate case docket. In addition, Staff and the Residential  
21 Utility Consumers Office each propounded data requests to Johnson Utilities in the rate case  
22 docket regarding issues raised by SFG in its complaint docket.

23 Clearly, substantial time and energy has gone into this complaint proceeding, and the  
24 most expeditious and resource-efficient path for the parties at this point is to complete the  
25 complaint case at the Commission. Johnson Utilities has been waiting almost four years now to  
26 collect the amounts that are owed by SFG, and will suffer further prejudice if the case is delayed  
27 yet again by SFG.

28 <sup>3</sup> *Id.* at p. 6, lines 8-13.

1 **III. REPORT ON MEETING OF THE PARTIES FOLLOWING SEPTEMBER**  
2 **22, 2011 PROCEDURAL CONFERENCE.**

3 At the September 22, 2011, procedural conference, the administrative law judge  
4 encouraged the parties to remain after the procedural conference to see if they could reach  
5 agreement on a list of issues that should be addressed by the Commission and those that should  
6 be addressed by the Superior Court Case. Johnson Utilities, SFG and Staff did meet, but they  
7 were unable to reach an agreement. However, Johnson Utilities and Staff were in agreement  
8 that the following issues raised in SFG's complaint and Johnson Utilities' counterclaim should be  
9 addressed at the Commission in this docket:

- 10 • alleged overcharges for utility service and appropriate refunds, if applicable
- 11 • alleged withholding of effluent
- 12 • alleged minimum bill overcharges
- 13 • alleged charges for over-delivery of effluent
- 14 • alleged overcharges for line-breaks
- 15 • requested assessment of penalties and fines
- 16 • claims by Johnson Utilities for amounts alleged to be owed by SFG

17 SFG would not agree that any of the above-listed issues should be addressed by the  
18 Commission.

19 Regarding SFG's allegation that it is entitled to a bill credit from Johnson Utilities for the  
20 value of its management services allegedly provided to The Oasis Golf Club, the Company  
21 believes that a portion of this issue should be resolved by the Commission, although the parties  
22 did not agree on this point. Specifically, Johnson Utilities believes that the Commission should  
23 address whether or not it is permissible under the Commission's rules for a utility to provide a  
24 billing credit to a customer for services that the customer provided to another entity.<sup>4</sup> Thus,  
25 Johnson Utilities would urge the Commission to add this issue to the list above.

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28 <sup>4</sup> Johnson Utilities does not concede that it agreed to provide a billing credit to SFG for services that SFG  
alleged it performed for The Oasis Golf Club.

1 **IV. CONCLUSION.**

2 As discussed herein, the Arizona Rules of Civil Procedure and the Commission's  
3 own rules of procedure do not permit SFG to unilaterally withdraw its complaint at this  
4 late date, and its notice of Withdrawal of Complaint should be rejected. The  
5 Commission has exclusive and plenary jurisdiction to address the issues raised by SFG in  
6 its complaint and the counterclaims raised by Johnson Utilities. Accordingly, the issues  
7 raised must be addressed by the Commission and not the Superior Court. The Company  
8 urges the Commission to set a procedural schedule that will allow for the expeditious and  
9 efficient resolution of this case.

10 RESPECTFULLY submitted this 4th day of October, 2011.

11 BROWNSTEIN HYATT FARBER SCHRECK,  
12 LLP

13 

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16 Phoenix, Arizona 85004  
Attorneys for Johnson Utilities LLC

17 ORIGINAL and thirteen (13) copies of the  
18 foregoing filed this 4<sup>th</sup> day of October, 2011, with:

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

21 Copy of the foregoing hand-delivered  
22 this 4<sup>th</sup> day of October, 2011, to:

23 Yvette B. Kinsey, Administrative Law Judge  
24 Hearing Division  
25 ARIZONA CORPORATION COMMISSION  
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11 COPY of the foregoing sent via e-mail and first  
12 class mail this 4<sup>th</sup> day of October, 2011, to:

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