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BEFORE THE ARIZONA CORPORATION COMMISSION

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2011 DEC -6 P 3:45

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IN THE MATTER OF THE FORMAL COMPLAINT OF SWING FIRST GOLF LLC AGAINST JOHNSON UTILITIES LLC	DOCKET NO. WS-02987A-08-0049 **REPLY TO JOHNSON UTILITIES' SUPPLEMENTAL RESPONSE**

Swing First Golf LLC ("Swing First"), hereby replies to "Johnson Utilities' Supplemental Response in Opposition to Swing First Golf's Withdrawal of Complaint" dated November 30, 2011 ("Supplemental Response"). Johnson Utilities LLC ("Johnson") has filed an 18-page pleading (plus attachments) that purports to request "clarification" concerning the status of Swing First's withdrawal of its complaint in the above-captioned docket. In fact, the Supplemental Response is the latest bluster from a schoolyard bully.

The Supplemental Response is just more bad faith from Johnson. Johnson again breaks the clear promises it made to the Commission and to Swing First. Its motive is clear. Johnson wants the Commission to help it strain Swing First's resources by forcing it to litigate the same case in two different dockets. The Commission should not aid a bully.

I JOHNSON CONTINUES TO BREAK ITS PROMISES

A Johnson Broke Its Promise to Not Oppose Withdrawal of The ACC Complaint Case

On September 6, 2011, Johnson promised that it would not oppose Swing First's withdrawal of its Commission Complaint (Docket No. WS-02987A-08-0049):

Mr. Crockett promised:

> And I would also say as far as the update goes, Mr. Marks says in his pleading that the current complaint case "is essentially moot, given the pending trial in the lawsuit between Johnson and Swing First in Superior Court. Therefore, there is no reason to waste the Commission's resources on a moot case." We agree with

> that. I mean, if they want to withdraw the complaint, we will certainly not oppose that.[1]

Swing First heard Johnson's promise, and on September 27, 2011, withdrew its complaint. Yet, just seven days later, Johnson broke its promise to the Commission. On October 4, 2011, it filed a pleading strenuously opposing Swing First's withdrawal.[2] Johnson now follows this breach of promise with the Supplemental Response, another pleading opposing the withdrawal of the complaint. Mr. Crockett, who made the original promise to the Commission, signed both pleadings.

B Johnson Urged Swing First to Withdraw Its Complaint; Now It Opposes Withdrawal

In its September 21, 2011, omnibus pleading in this docket, Johnson urged Swing First to withdraw its complaint:

> 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."[3]

Johnson agreed with Swing First that "'there is no reason to waste the Commission's resources on a moot case.'"

Just six days later, Swing First agreed to withdraw its complaint. Incredibly, Johnson pivoted 180 degrees and now opposes Swing First's withdrawal.

C Johnson Will Not Honor Its Promise to Keep Providing Water Service While The Court Case Is Pending

Mr. Crockett also promised the Commission that Johnson would continue to provide water service until the Court case has been resolved:

> We've already averred on the record and will make whatever avowals in the docket that we need to that we will continue to provide water service until the issues raised by Swing First have been resolved either by, you know, this Commission or by the Superior Court.[4]

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[1] Audio recording of September 6, 2011, Open Meeting at 1:09:22. Emphasis added.
[2] Johnson Utilities' Response In Opposition To Swing First Golf's Pleading Captioned Withdrawal of Complaint.
[3] "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," dated September 21, 2011, at p. 1. Emphasis added.
[4] Audio Recording at 1:09:53. Emphasis added.

Again, the promises of Mr. Crockett and Johnson are meaningless. In the Supplemental Response, Johnson asserts that if the Commission allows the ACC complaint to be withdrawn, Johnson should be allowed to discontinue water service to Swing First.

> The Company would certainly be adversely affected if the Commission were to permit the withdrawal of SFGs complaint with prejudice without also releasing Johnson Utilities' from the prohibition against disconnecting water service to SFG for non-payment of the disputed bills.[5]

II THE SUPPLEMENTAL RESPONSE IS AGAINST THE RULES

The Court Rules and the Commission's Rules of Practice and Procedure do not allow a responding party to reply to another party's response or to supplement an earlier response. Johnson seeks to reply to the Staff's October 11, 2011, "Response to Swing First Golf Motion to Withdraw." Only the moving party (Swing First) is allowed to reply to a response.[6] Johnson also seeks to supplement its October 4, 2011, Response to Swing First. This is also not allowed by the Court Rules.

The Supplemental Response is against the rules and should be disregarded.

III THE COMMISSION HAS NO JURISDICTION OVER JOHNSON'S SO-CALLED COUNTERCLAIMS

Johnson ignores that the Commission is not a court of general jurisdiction. The Commission has "no implied powers and its powers do not exceed those to be derived from a strict construction of the Constitution and implementing statutes."[7]

The legislature provided the Commission jurisdiction to hear complaints from customers concerning violations by public service corporations.

> Complaint may be made by the commission of its own motion, or by any person or association of persons by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law or any order or rule of the commission ... .[8]

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[5] Supplemental Response at 6:24 – 7:1.
[6] Court Rule 7.1(a).
[7] *Commercial Life Insurance Co. v. Wright*, 64 Ariz. 129, 139, 166 P.2d 943, 949 (1946).
[8] A.R.S. § 40-246A.

The legislature did not enlarge the Commission's jurisdiction to hear complaints from public service corporations against customers. Nor is there anything in the Constitution that would allow the Commission to hear a complaint by a public service corporation against a customer. If a public service corporation has a claim against a customer, it can only be brought in court.

Johnson is indisputably a public service corporation.[9] Swing First is Johnson's customer. The Commission does not have jurisdiction to hear claims or counterclaims by Johnson against Swing First.

Again, Johnson knows that the Commission does not have jurisdiction to hear its claims against Swing First. For the Court, Johnson illustrated the consequences of a contrary view.

> The judicial system would be off-limits for every claim brought by a utility provider against a customer who was delinquent in paying his or her utility bill according to the terms of the applicable service contract. The ACC would need to hire an army of hearing officers to handle all the claims brought by [Johnson], Arizona Public Service, Qwest, and every other public service corporation trying to collect from those customers.[10]

IV WITHDRAWAL OF THE COMPLAINT WOULD NOT PREJUDICE JOHNSON

Johnson continues to argue that it would be somehow prejudiced if Swing First's complaint is dismissed. This is absurd.

Johnson's argument is belied by its own statements. On September 21, 2011, Johnson urged Swing First to withdraw its complaint, agreeing that it would be a waste of the parties' resources to try the case. Put another way, Johnson claimed that it would be prejudiced if Swing First did not withdraw its complaint. Now it claims that it would be prejudiced if Swing First does withdraw its complaint. Again, Johnson's word cannot be relied on.

V Trying Two Cases Simultaneously Would Severely Prejudice Swing First

[This section is repeated for convenience from Swing First's October 7, 2011, Reply to Johnson Utilities' Response.]

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[9] Constitution, Article 15, § 2.

[10] Plaintiff's Response to Defendants' Motion to Dismiss and Memorandum of Points and Authorities, dated May 7, 2008, at 5.

On September 9, 2011, Swing First filed a copy of the Court's scheduling order, which shows that trial is scheduled to begin on March 13, 2012, less than six-months from now. The Judge has stated that he is unlikely to allow any further delays. Until March, the parties will be quite busy with depositions, dispositive motions, mediation, and trial preparation.

Johnson is represented by one law firm at the Commission and two more firms in the Court case. Swing First is represented by the same sole practitioner in both dockets. Johnson is owned by a multi-millionaire. Swing First is owned by an LLC, managed by a young man just getting started in life. It would severely prejudice Swing First to force it to try these cases at the same time.

VI Swing First Does Not Need Johnson's Permission to Withdraw Its Complaint

[This section is repeated for convenience from Swing First's October 7, 2011, Reply to Johnson Utilities' Response.]

Swing First does not need Johnson's permission to withdraw its complaint. However, even assuming *arguendo* that Johnson's permission was required, that permission was granted. Johnson did much more than state that it agreed to a withdrawal, it urged Swing First to withdraw its complaint.

Further, as just discussed, the Commission lacks jurisdiction to consider Johnson's so-called counterclaims. The Commission is in the position of an Arizona court considering non-jurisdictional counterclaims (perhaps federal claims or claims barred by statutes of limitation). Non-jurisdictional counterclaims cannot be asserted to oppose a complaint withdrawal.

Essentially, Johnson is telling the Commission that Swing First cannot withdraw its own complaint because Johnson has filed non-jurisdictional counterclaims. Johnson would turn the legislature's limited grant of jurisdiction to hear customer complaints into a trap from which a customer cannot escape. This would have a chilling effect on the willingness of a customer to file a legitimate complaint if it would be forced to deal with utility counterclaims and could not withdraw its complaint.

VII CONCLUSION

The Supplemental Response is a deeply cynical attempt to manipulate the Commission's complaint process to bully Swing First. Johnson asks the Commission to assist Johnson's long-running campaign to bleed Swing First dry. Swing First is confident that the Commission will not allow itself to be used so transparently.

The Supplemental Response is meritless. The Supplemental Response violates the Court Rules and the Commission's Rules of Practice and Procedure. It should be rejected.

RESPECTFULLY SUBMITTED on December 6, 2011.

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Original and 13 copies **filed**
on December 6, 2011, to:

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Copies of the foregoing **e-mailed**
on December 6, 2011, to:

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