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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

GARY PIERCE – Chairman
BOB STUMP
SANDRA D. KENNEDY
PAUL NEWMAN
BRENDA BURNS

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Arizona Corporation Commission
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DEC 12 2011

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SWING FIRST GOLF, LLC,
Complainant,

v.

JOHNSON UTILITIES, LLC,
Respondent.

DOCKET NO. WS-02987A-08-0049

PROCEDURAL ORDER
SETTING ORAL ARGUMENT

BY THE COMMISSION:

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 Johnson during the pendency of the Complaint proceeding; a determination of the amounts owed to Swing First for overcharges occurring from the period of November 2004 to present; that Johnson be

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 ordered to stop charging for the Superfund Tax; and that Johnson render proper bills to Swing First
2 based on meter reads; that Johnson correct monthly minimum overcharges as well as the amount paid
3 for the Transaction Privilege Tax; and that the Commission order Mr. George Johnson to personally
4 apologize to Swing First and its members for poor customer service and abusive and obscene
5 language.

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

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

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

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

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

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

21 On March 29, 2010, by Procedural Order, Staff was directed to file a response to the MSJ,
22 specifically addressing the jurisdictional issues raised in the MSJ; Johnson and Staff were directed to
23 respond to Swing First's request for attorney's fees; Johnson and Swing First were directed to file
24 replies to Staff's response to the MSJ; and Swing First, Johnson, and Staff were directed to make a
25 joint filing outlining any areas where there was agreement between the parties.

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. Between August 2010 and October 2011, various amendments to Decision No. 71854 have
been raised by the parties.

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

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

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

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

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

10 On August 31, 2011, by Procedural Order, Johnson's MSJ was denied and a procedural
11 conference was scheduled for September 27, 2011, to determine a procedural schedule in this matter.

12 On September 7, 2011, Swing First filed a Notice of Filing Superior Court Trial Scheduling
13 Order. The Notice stated that the trial between Swing First and Johnson was scheduled to begin on
14 March 13, 2012.

15 On September 20, 2011, Swing First filed a Motion for Continuance. The motion requested
16 that the Complaint proceeding be continued for the second time until after such time as a verdict was
17 rendered in the Superior Court case because many of the issues raised in the Complaint and the
18 Superior Court case are the same.

19 On September 21, 2011, Johnson filed an Opposition to Swing First Golf's Motion for
20 Continuance and Proposed Procedural Schedule; and Notice of Change of Address of Legal Counsel.
21 Johnson's filing opposed any further delay in the Complaint proceeding; urged Swing First to
22 withdraw its Complaint against Johnson; and stated that if Swing First will not withdraw its
23 Complaint then the Commission should set a hearing date and establish a procedural schedule for this
24 matter.

25 On September 22, 2011, a procedural conference was held as scheduled. Staff, Johnson, and
26 Swing First appeared through counsel. During the procedural conference, Swing First reiterated its
27 request for a second continuance in the Complaint proceeding and Johnson continued to oppose any
28 delay in this matter. The parties and Staff discussed a proposed procedural schedule for the Complaint

1 proceeding and at the conclusion of the procedural conference, the discussions were taken under
2 advisement. Further, the parties were directed to continue settlement discussion of the issues.

3 On September 27, 2011, Swing First filed a Withdrawal of Complaint (“Withdrawal”). The
4 Withdrawal states that it is based on Johnson’s agreement that “there is no reason to waste the
5 Commission’s resources on a moot case” and that Johnson “will not disconnect utility service to
6 Swing First for non-payment of the disputed portions of its bills” during the pendency of the Superior
7 Court case. The Withdrawal also states that Swing First withdraws any pending motions and requests
8 that this docket be closed.

9 On October 4, 2011, Johnson filed a response opposing Swing First’s withdrawal of the
10 Complaint. Johnson asserts that the Arizona Rules of Civil Procedure (“A.R.C.P.”) do not allow for
11 withdrawal of the Complaint at this stage in the proceeding and that Swing First’s request should be
12 rejected. Johnson contends that Swing First may not withdraw its Complaint without a stipulation of
13 dismissal signed by Johnson and an order of the Commission. Johnson states that because the
14 Commission’s rules do not address the voluntary dismissal of a Complaint Rule 41(a) of the A.R.C.P.
15 applies. Johnson asserts that the Commission should deny withdrawal of the Complaint because to
16 do so would “conflict with [the] law” and “affect the substantial interests” of Johnson.

17 On October 7, 2011, Swing First filed a Reply to Johnson Utilities’ Response. Swing First
18 states that Johnson’s request for denial of its withdrawal of the Complaint should be denied and that
19 Johnson misstates the law governing dismissals. Further, Swing First states that Johnson urged
20 [emphasis added] Swing First to withdraw its Complaint and then changed its position and now
21 opposes the withdrawal. Regarding Johnson’s counterclaim, Swing First states that it is outside the
22 scope of the Commission’s jurisdiction to hear claims raised by a public service corporation against a
23 customer.

24 On October 11, 2011, Staff filed its Response to Swing First’s request to withdraw its
25 Complaint. Staff’s response states Staff has no objection to Swing First’s request to withdraw its
26 Amended Complaint. Staff states that it believes A.R.C.P. Rule 41(a) pertains only to dismissals
27 without prejudice and Swing First is requesting dismissal with prejudice. Further, Staff states that
28 based on case law, the Superior Court may have concurrent jurisdiction with the Commission to hear

1 the issues raised in the Amended Complaint and that Johnson’s counterclaim could stand on its own
2 as a complaint.

3 On November 30, 2011, Johnson filed a request for oral argument on Swing First’s request to
4 withdraw its Amended Complaint.

5 On December 5, 2011, Swing First filed objections to Johnson’s request for oral argument on
6 Swing First’s request to withdraw its Amended Complaint.

7 On December 8, 2011, a telephonic procedural conference was held with the parties and Staff
8 to discuss Johnson’s request for oral argument. Swing First, Johnson, and Staff appeared through
9 counsel. At the conclusion of the procedural conference, it was determined that Johnson’s request for
10 oral argument would be granted.

11 Accordingly, a date should be set to hear oral argument on Johnson’s objection to Swing
12 First’s request to withdraw its Amended Complaint with prejudice.

13 IT IS THEREFORE ORDERED that **oral argument** shall be held on **January 17, 2012, at**
14 **10:00 a.m.**, or as soon thereafter as is practicable at the Commission’s offices, 1200 West
15 Washington Street, Room100, Phoenix, Arizona.

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

22 IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113 - Unauthorized
23 Communications) continues to apply to this proceeding and shall remain in effect until the
24 Commission's Decision in this matter is final and non-appealable.

25 ...
26 ...
27 ...
28 ...

1 IT IS FURTHER ORDERED that the presiding Administrative Law Judge may rescind, alter,
2 amend, or waive any portion of this Procedural Order either by subsequent Procedural Order or by
3 ruling at hearing.

4 DATED this 12th day of December, 2011.

6 
7
8 YVETTE B. KINSEY
ADMINISTRATIVE LAW JUDGE

9 Copies of the foregoing mailed/delivered
10 this 12th day of December, 2011 to:

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25 By: 
26 Debra Broyles
Secretary to Yvette B. Kinsey