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BEFORE THE ARIZONA CORPORATION C  
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AZ CORP COMMISSION  
DOCKET CONTROL

IN THE MATTER OF THE APPLICATION  
OF JOHNSON UTILITIES, LLC, DBA  
JOHNSON UTILITIES COMPANY FOR  
AN INCREASE IN ITS WATER AND  
WASTEWATER RATES FOR  
CUSTOMERS WITHIN PINAL COUNTY,  
ARIZONA.

DOCKET NO. WS-02987A-08-0180

**RESPONSE TO SWING FIRST GOLF'S  
SECOND UPDATE TO  
COMMISSIONERS**

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Phoenix, AZ 85004

On December 5, 2011, Swing First Golf, LLC ("SFG") filed a pleading captioned Second Update to Commissioners. In its filing, SFG asserts that Johnson Utilities LLC ("Johnson Utilities" or the "Company") failed to honor what SFG describes as "promises" made to the Arizona Corporation Commission ("Commission") at the September 6, 2011, Open Meeting. Johnson Utilities hereby responds to SFG's filing.

**I. Johnson Utilities' Opposition to SFG's Withdrawal of Complaint.**

SFG asserts that Johnson Utilities broke a "promise" that it would not oppose SFG's withdrawal of its formal complaint in Docket WS-02987A-08-0049 (the "SFG Complaint Docket"). While it is true that legal counsel stated at the September 6, 2011, open meeting that Johnson Utilities would not oppose the withdrawal of SFG's formal complaint, circumstances subsequently changed which caused the Company to change its position, which it has the right to do. Until recently, SFG has asserted (erroneously) that the Agreement Regarding Utility Service (the "ARUS") dated September 17, 1999, between SFG's predecessor-in-interest, Johnson Ranch Holdings, LLC,<sup>1</sup> and Johnson Utilities conferred upon SFG: (i) a priority right to effluent produced by Johnson Utilities; and (ii) a right to purchase all water delivered by Johnson Utilities at the effluent rate, regardless of the type of water actually delivered. The

<sup>1</sup> Johnson Ranch Holdings, LLC, is not related to Johnson Utilities, LLC, or George Johnson.

1 ARUS forms the foundation of the claims raised by SFG in its formal complaint, making the  
2 agreement's validity, enforceability and construction central to SFG's case. However, as a result  
3 of discovery in this case and the recent deposition of complainant David Ashton in the Maricopa  
4 County Superior Court case, Johnson Utilities now knows that the ARUS was never assigned to  
5 SFG, and more importantly, that Johnson Ranch Holdings, LLC, and SFG never intended that  
6 the ARUS be assigned to SFG.<sup>2</sup> In fact, it is now quite clear that SFG knew that the ARUS had  
7 not been assigned, as evidenced by SFG's signature on the transaction documents with Johnson  
8 Ranch Holdings, LLC, and that SFG misrepresented the true facts to Johnson Utilities. Based  
9 upon this new information, the validity, enforceability and construction of the ARUS are no  
10 longer at issue in this complaint case. Instead, the claims raised in SFG's formal complaint  
11 involve pure tariff interpretation and application, and they should be addressed by the  
12 Commission which is best qualified to adjudicate the issues raised by SFG and Johnson Utilities.

13 In a recent pleading filed by Utilities Division Staff ("Staff"), Staff cited the case of  
14 *Trico Electric Cooperative v. Ralston*, 67 Ariz. 358, 196 P.2d 470 (1948) for the proposition that  
15 "the construction of a contract and the determination of its validity are judicial functions for the  
16 courts, not the Commission."<sup>3</sup> This case helped form the basis for Staff's position that the issues  
17 raised in SFG's formal complaint should be resolved in the Superior Court case, and not the  
18 Commission complaint case. However, Staff would not have been aware of the information  
19 discovered by Johnson Utilities in preparing for and conducting Mr. Ashton's deposition.  
20 Because the ARUS is neither applicable nor relevant in this complaint case, there is no basis for  
21 allowing SFG to shift claims which are clearly jurisdictional to the Commission to the Superior  
22 Court.

23 Johnson Utilities has the right to defend itself against the allegations of SFG in the way  
24 the Company and its legal counsel sees fit. This includes the right to modify case strategy as  
25 necessary and appropriate to address facts as they emerge more fully and clearly. Had SFG

26 <sup>2</sup> For a more detailed discussion of the information Johnson Utilities has obtained regarding Johnson  
27 Ranch Holdings, LLC, SFG and the ARUS, see Johnson Utilities' Request for Oral Argument and  
28 Supplemental Response in Opposition to Swing First Golf's Withdrawal of Complaint filed November  
30, 2011, in Docket WS-02987A-08-0049.

<sup>3</sup> Staff's Response to Swing First Golf Motion to Withdraw at page 2, lines 15-18.

1 forthrightly disclosed the true facts and circumstances surrounding the ARUS at the beginning  
2 of this case, valuable time and resources would have been saved by all parties. At this juncture,  
3 SFG would be better served by responding to the merits of the arguments raised by Johnson  
4 Utilities with regard to the Commission's jurisdiction in this case.

5 **II. Providing Water Service Pending Resolution of the Dispute.**

6 SFG asserts that Johnson Utilities has "backed away" from a promise to continue  
7 providing water service until the Superior Court case has been resolved. SFG's perception that  
8 Johnson Utilities backed away from a promise to continue utility service was apparently inferred  
9 by SFG from the following statement by Johnson Utilities in a November 30, 2011, filing in the  
10 formal complaint case docket:

11 The Company would certainly be adversely affected if the Commission were to  
12 permit the withdrawal of SFG's complaint with prejudice without also releasing  
13 Johnson Utilities' from the prohibition against disconnecting water service to SFG  
for non-payment of the disputed bills.<sup>4</sup>

14 This statement is true, and it is intended to identify one of several ways that Johnson  
15 Utilities would be adversely affected by allowing SFG to withdraw its formal complaint, as  
16 described in Johnson Utilities' November 30, 2011, filing. Johnson Utilities has not said that it  
17 would discontinue utility service to SFG without prior permission from the Commission.  
18 Rather, the Company only points out the very peculiar dilemma created by SFG's request to  
19 withdraw its complaint with prejudice without resolving the underlying claims (claims, by the  
20 way, which SFG now wants to pursue in another forum). SFG chose to file its formal complaint  
21 at the Commission, and this case has now been pending for almost four years. So long as the  
22 case is pending, Johnson Utilities is prevented from terminating utility service if SFG timely  
23 pays the undisputed portion of its current bills. However, it must not be forgotten that SFG has  
24 a large outstanding balance owing to Johnson Utilities which has remained unpaid for years.  
25 SFG should not be permitted to withdraw its complaint with prejudice and simultaneously ask  
26

27  
28 <sup>4</sup> Johnson Utilities' Request for Oral Argument and Supplemental Response in Opposition to Swing First  
Golf's Withdrawal of Complaint dated November 30, 2011 (Docket WS-02987A-08-0049) at 6-7.

1 the Commission to maintain the restriction on termination against Johnson Utilities. That would  
2 unfairly place Johnson Utilities in limbo.

3 **III. Good Faith Settlement Negotiations.**

4 SFG is critical of Johnson Utilities because "Swing First has not received even one  
5 settlement offer from Johnson, let alone any communications from Johnson that it wants to sit  
6 down and attempt in good faith to resolve the Superior court case short of litigation."<sup>5</sup> However,  
7 the very same things could be said of SFG, which has neither proffered a reasonable settlement  
8 proposal nor requested a settlement meeting since the September 6, 2011, Open Meeting.  
9 Candidly, SFG's constant personal attacks and vitriol against opposing counsel have worked  
10 against a settlement in this case. For example, SFG's legal counsel refers to one recent pleading  
11 filed by Johnson Utilities as "the latest bluster from a schoolyard bully."<sup>6</sup> Other comments in  
12 pleadings have been even more disparaging.

13 Earlier this year, Johnson Utilities made a good-faith settlement proposal to SFG, and  
14 SFG made a counter offer. However, the reality is that the parties remain so far apart that  
15 settlement seems unlikely. Moreover, recent comments by counsel for SFG to counsel for  
16 Johnson Utilities regarding SFG's positions on its claims in the complaint case underscore the  
17 great difficulty of reaching a settlement. Nevertheless, Johnson Utilities remains, as always,  
18 willing to meet with SFG to discuss settlement, with the understanding that Johnson Utilities  
19 must also confer with its insurance counsel and follow its advice on legal matters.

20 In addition, a settlement conference is scheduled in the Maricopa County Superior Court  
21 case for January 6, 2012, before a settlement judge. Johnson Utilities is preparing for that  
22 settlement conference and will participate in good faith in an attempt to resolve the remaining  
23 issues between the Company and SFG. Johnson Utilities presumes that SFG will come similarly  
24 prepared in a spirit of settlement.

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27 <sup>5</sup> SFG's Second Update to Commissioners dated December 5, 2011 at 3, lines 17-19.

28 <sup>6</sup> SFG's Reply to Johnson Utilities' Supplemental Response dated December 6, 2011 (Docket WS-02987A-08-0049) at 1, line 6.

1 **IV. Request for Order to Show Cause is Meritless.**

2 While SFG's filing was captioned as an "update" to the Commissioners, SFG requested  
3 that the Commission take action against Johnson Utilities up to and including a show cause  
4 proceeding. However, SFG has provided absolutely no basis for any type of action against  
5 Johnson Utilities in the rate case docket, much less an order to show cause. In this response,  
6 Johnson Utilities has addressed each of the assertions in SFG's filing. SFG and Johnson Utilities  
7 would both be better served if SFG would focus on the merits of its years-old claims and move  
8 forward with the formal complaint without further attempts to delay the Commission  
9 proceeding.

10 RESPECTFULLY submitted this 23<sup>rd</sup> day of December, 2011.

11 BROWNSTEIN HYATT FARBER SCHRECK LLP

12 

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16 ORIGINAL and thirteen (13) copies of the  
17 foregoing filed this 23<sup>rd</sup> day of December, 2011, with:

18 Docket Control  
19 ARIZONA CORPORATION COMMISSION  
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20 Copy of the foregoing hand-delivered  
21 this 23<sup>rd</sup> day of November, 2011, to:

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