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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

COMMISSIONERS

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DOCKETED

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

AZ CORP COMMISSION
DOCKET CONTROL

FEB 16 2012

DOCKETED BY

SWING FIRST GOLF, LLC,
Complainant,

DOCKET NO. WS-02987A-08-0049

V.

JOHNSON UTILITIES, LLC,
Respondent.

PROCEDURAL ORDER

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 On May 14, 2010, Staff filed a response to the MSJ recommending denial of the MSJ and
27

28 ³ On March 31, 2008, Johnson filed an application for a permanent rate increase for its water and wastewater utility services in Docket No. WS-02987A-08-0180 ("Rate Docket").

1 requesting that the Complaint proceeding be stayed pending the final order of the Commission in
2 Johnson's rate proceeding.

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

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

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

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

9 On August 25, 2010, the Commission issued Decision No. 71854, regarding Johnson's rate
10 application.⁴

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

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

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

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

26

27 ⁴ Subsequent Decisions issued in the Rate Docket are as follows: Decision No. 71910 (September 28, 2010), Order *Nunc*
28 *Pro Tunc*; Decision No. 72089 (January 20, 2011), Order ruling on GAGRD Adjustor; Decision No. 72533 (August 17,
2011), Order ruling on Compliance with Best Management Practices Tariffs; Decision No. 72579 (September 15, 2011),
Order Amending Decision No. 71854; and Decision No. 72634 (October 14, 2011) Order Approving New GAGRD Fees.

1 On September 22, 2011, a procedural conference was held as scheduled. Staff, Johnson, and
2 Swing First appeared through counsel. During the procedural conference, Swing First reiterated its
3 request for a second continuance in the Complaint proceeding and Johnson continued to oppose any delay
4 in this matter. The parties and Staff discussed a proposed procedural schedule for the Complaint
5 proceeding and at the conclusion of the procedural conference, the matter was taken under advisement.
6 Further, the parties were directed to continue settlement discussion of the issues.

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

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

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

27 On October 11, 2011, Staff filed its Response to Swing First’s request to withdraw its
28 Complaint. Staff’s response states Staff has no objection to Swing First’s request to withdraw its

1 Amended Complaint. Staff states that it believes A.R.C.P. Rule 41(a) pertains only to dismissals
2 without prejudice and Swing First is requesting dismissal with prejudice. Further, Staff states that
3 based on case law, the Superior Court may have concurrent jurisdiction with the Commission to hear
4 the issues raised in the Amended Complaint and that Johnson's counterclaim could stand on its own
5 as a complaint.

6 On November 30, 2011, Johnson filed a request for oral argument on Swing First's request to
7 withdraw its Amended Complaint.

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

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

14 On December 12, 2011, by Procedural Order, a procedural conference was scheduled for
15 January 17, 2012, to hear oral arguments on Johnson's opposition to Swing First's Withdrawal.

16 **Superior Court Filings**

17 On January 17, 2012, the procedural conference was held as scheduled. Staff, Johnson, and
18 Swing First appeared through counsel. Discussions were held on the issues raised. At the conclusion of
19 the procedural conference, Johnson and Swing First were directed to file supplemental documents related
20 to the Maricopa County Superior Court Case *Johnson Utilities, LLC, et al. v. Swing First Golf, LLC,*
21 *et al.* (Cause No. CV2008-000141) ("Superior Court Case").

22 On January 19, 2012, Johnson filed a copy of its November 23, 2011, Motion for Summary
23 Judgment filed in the Superior Court Case.

24 Also on January 19, 2012, Swing First filed a copy of Defendants'/Counter-Claimants'
25 Response to Motion of Summary Judgment and Contravening Statement of Facts filed in the Superior
26 Court Case.

27 On January 31, 2012, Johnson filed a copy of its January 27, 2012, Reply in Support of
28 Summary Judgment filed in the Superior Court Case.

1 It appears that subsequent to Johnson's January 31, 2012, filing, additional pleadings, orders,
2 or minute entries have been filed in the Superior Court Case. Because the Complaint before the
3 Commission and the Superior Court Case involve potentially common issues, the parties should file
4 with Docket Control all filings made after January 27, 2012, in the Superior Court Case, including all
5 pleadings, rulings, minute entries, or orders, issued by the court or filed by the parties. The parties
6 shall also be required to file with Docket Control, in this docket, such documents, rulings, minute
7 entries, or orders filed in or issued by Superior Court, within one business day of such documents
8 being filed or issued in the Superior Court Case.

9 **Pending Issues**

10 On September 20, 2011, Swing First filed a Motion to Continue which outlined the issues
11 Swing First believed were common to both the Complaint case and the Superior Court Case. Swing
12 First's pleading also stated which issues Swing First believed were unique to Superior Court.
13 Subsequently, on October 4, 2011, Johnson filed in its Response in Opposition to Swing First's
14 Withdrawal a list of issues raised in the Complaint which Johnson stated should be resolved by the
15 Commission. Johnson also stated in its pleading that Staff was in agreement with Johnson as to the
16 issues that should be addressed by the Commission.

17 Due to the passage of time, as well as the parties' shifting positions, it is appropriate to require
18 both parties to file an updated list of issues that each believes should be addressed by the Commission
19 and which issues should be addressed by Superior Court. Further, the parties' filing should include a
20 brief description of the reason each issue should be considered by the Commission or the Superior
21 Court.

22 **IT IS THEREFORE ORDERED that Johnson and Swing First shall docket, on or before**
23 **February 24, 2012, all pleadings, rulings, minute entries, and orders, filed or issued in the**
24 **Superior Court Case since January 27, 2012.**

25 **IT IS FURTHER ORDERED** that the filing requirement for documents in the Superior Court
26 Case shall continue until further order.

27 **IT IS FURTHER ORDERED** that Johnson and Swing shall each file an updated list of issues
28 that each believes should be addressed by the Commission and which should be addressed by

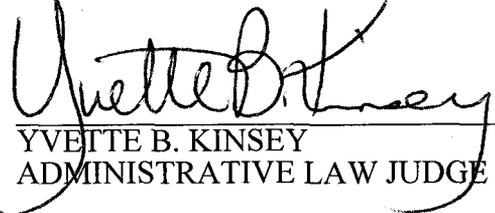
1 Superior Court. The filing shall include a brief description of the reason each issue should be
2 considered by the Commission or the Superior Court.

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

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

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

15 DATED this 16th day of February, 2012.

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18 
19 YVETTE B. KINSEY
20 ADMINISTRATIVE LAW JUDGE
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24 Copies of the foregoing mailed/delivered
25 this 16th day of February, 2012 to:

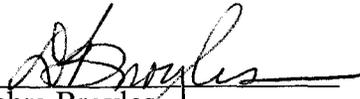
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