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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

BOB STUMP, Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH

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

DOCKET NO. WS-02987A-13-0053

**RESPONSE TO MOTION TO
DISMISS AND MOTION TO STRIKE**

1 Swing First Golf LLC ("Swing First") hereby responds to the April 2, 2013, Motion to
2 Dismiss and Motion to Strike filed by Johnson Utilities LLC, dba Johnson Utilities Company
3 ("Utility"). As set forth below, the Motions are meritless and should be dismissed.

4 **I Preliminary Response**

5 Utility should be ashamed of itself. In its Complaint, Swing First detailed Utility's long
6 history of ill deeds that forced Swing First to successfully defend itself in two lengthy trials.
7 Swing First then detailed how Utility's recent actions continue to injure Swing First. Swing First
8 has tried to resolve the matters that are the subject of this Complaint. Utility has refused to even
9 talk. Swing First therefore had no choice but to file this Complaint.

10 Swing First's Complaint gave Utility another opportunity to talk to Swing First and
11 fashion a solution to the problems that Utility caused. Rather than take this opportunity, Utility
12 chose to file these meritless motions, thereby running up further legal fees and further burdening
13 the Commission's limited resources.

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1 **II Substantive Response**

2 **A Res Judicata Does Not Bar Swing First's Claim Concerning Effluent**
3 **Deliveries**

4 Utility claims that the doctrine of *res judicata*, more modernly known as “claim
5 preclusion,” somehow bars Swing First from complaining that Utility is again threatening to
6 withhold effluent deliveries to Swing First’s Johnson Ranch Golf Course. This is nonsense.

7 *Res judicata* only bars “subsequent claims [that] arise out of the same nucleus of facts.”
8 *Howell v. Hodap* 221 Ariz. 543, 547; 212 P.3d 881, 885 (Ariz.App. Div. 1, 2009). Put another
9 way, “the relevant inquiry is whether [the new claim] could have been brought” in the prior
10 action. *Id.*, quoting *United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 909 (9th Cir.
11 1998).

12 Here each nucleus of facts is separated by five years. In January 2008, Utility had been
13 deliberately withholding Effluent deliveries for more than a year. Utility was instead delivering
14 more expensive CAP Water and often charging five times the lawful rate. Swing First’s 2008
15 Complaint was based on the Utility Services Agreement (“USA”) that both parties believed
16 applied to them. Swing First alleged that although the USA gave Utility the right to deliver at its
17 option either CAP Water, Effluent, or ground water, the USA capped the charge at the Effluent
18 rate of \$0.62 per thousand gallons. Swing First asked:

19 The Commission to hold a hearing to determine the actual amount that Utility
20 should have charged Swing First over the period of November 2004 to the
21 present, compare this to amount Swing First has provided Utility during this
22 period, and order Utility to provide a refund to Swing First, together with
23 appropriate interest.

24 It is important to understand what Swing First did not ask. Swing First did not ask the
25 Commission to order Utility to deliver sufficient effluent to meet all of Swing First’s needs.

26 It is true that in the course of discovery, Swing First did learn that Utility had been
27 deliberately withholding Effluent. Swing First learned further that Utility had been pumping
28 Effluent into the ground rather than deliver it to Swing First. Swing First also learned that Utility

1 had added a new Effluent customer, the Santan Heights Homeowners Association. And Mr.
2 Ashton did testify about Utility's ill deeds. But Swing First never amended the 2008 Complaint
3 to ask the Commission to declare that Swing First had a first right to Effluent deliveries. The
4 2008 Complaint was strictly about making Swing First financially whole from 2004 through
5 2007, based on its rights under the USA.

6 So, the 2008 Complaint concerned deliveries from 2005 through 2007. Utility mispriced
7 these deliveries contrary to the USA pricing requirements. Utility charged five times the lawful
8 rate for much of the water that it did deliver. Utility charged a minimum bill based on a six-inch
9 meter, when it only had a three-inch meter installed. Utility did not read meters. Swing First
10 could go on, but the 2008 Complaint speaks for itself.

11 Because Utility's Court Complaint was moving forward, Swing First voluntarily
12 dismissed the 2008 Complaint with prejudice. Strangely enough, Utility actually opposed Swing
13 First's withdrawal, which of course further ran up legal fees and wasted the resources of the
14 Staff, the Hearing Division, and the Commissioners. And it is important to note that hearing
15 were never scheduled, let alone held concerning the 2008 Complaint. In fact, Utility never even
16 filed testimony.

17 Based on these facts, *res judicata* (claim preclusion) does not apply. The 2008
18 Complaint concerned Utility's misdeeds from 2004-2008. The present Complaint concerns
19 Utility's misdeeds from 2012 through the present. In 2008, Swing First obviously could not
20 complain about Utility's misdeeds five years in the future.

21 *Res judicata* does not shield repeat offenders. A couple of examples may be helpful. In
22 2008, a woman is forced to go to court to get damages because her neighbor cut down a tree
23 located on her property. She is awarded \$10,000 in damages. Then in 2013, the neighbor cuts
24 down another tree. She must sue again. The misbehaving neighbor cannot argue that *res*
25 *judicata* shields him from her 2013 lawsuit. The two misdeeds involve entirely different nuclei
26 of facts.

1 Another example: A landlord may have to sue to force a tenant to pay rent. Assuming the
2 suit is successful, *res judicata* does not bar a second suit for a second failure to pay the rent.

3 Utility is a repeat offender, so *res judicata* does not bar the Complaint.¹ Swing First was
4 forced to file the 2008 Complaint because of Utility's misdeeds from 2004 through 2007. Those
5 issues have now been successfully resolved. Unfortunately, Utility began committing new
6 misdeeds in 2012 and 2013. These are the subject of the present Complaint. Specifically, Swing
7 First asks the Commission to "Order Utility to deliver Effluent in quantities sufficient to satisfy
8 Swing First's irrigation needs for its Johnson Ranch Golf Course." This part of the Complaint is
9 based entirely on recent threats and actions by Utility. Utility's 2012 Effluent deliveries into the
10 18th hole lake were insufficient to maintain lake levels and to allow Swing First to irrigate its golf
11 courses during periods of high demands, such as in the hot summer months and fall over-
12 seeding. Utility has also threatened that it will not have sufficient Effluent to satisfy Swing
13 First's irrigation requirements in 2013. The requested relief is also entirely different from that
14 requested in 2008. In 2008, Swing First sought monetary relief. In 2013, Swing First is asking
15 for prospective, non-monetary relief.

16 **Res Judicata Does Not Bar Swing First's Claim Concerning Minimum Bill**
17 **Overcharges**

18 Utility is just as confused about Swing First's new claims concerning minimum bill
19 overcharges as it was concerning Swing First's new claims concerning Effluent deliveries. The
20 2008 Complaint concerned minimum bill overcharges from 2004-2007. During that time period,
21 Utility was charging in many months a minimum bill based on a six-inch meter, even though the

¹ It is possible that Utility is confusing *res judicata* with collateral estoppel (claim preclusion with issue preclusion). Utility may be arguing that the issue of effluent deliveries cannot be raised in the present Complaint because the 2008 Complaint also concerned effluent deliveries. If Utility is making this argument, it is also misplaced. Collateral estoppel concerns legal issues. For collateral estoppel to apply, the legal issue must have been affirmatively resolved. "[T]he judgment in the first action precludes relitigation of only those issues actually and necessarily litigated and determined in the first suit. *Nelson v. QHG OF SOUTH CAROLINA INC.*, 354 S.C. 290, 305; 580 S.E.2d 171 (S.C. App., 2003), quoting *Beall v. Doe*, 281 S.C. 363, 369 n. 1; 315 S.E.2d 186, 190, n. 1 (S. C. App., 1984). Concerning the 2008 Complaint, no legal issues were actually litigated and the Commission made no determinations concerning any legal issues. Therefore, JU also could not make a good-faith motion based on collateral estoppel.

1 actual installed meter was a three-inch meter. The 2008 Complaint concerned these overcharges,
2 which have now been resolved by the Court action.

3 The 2013 Complaint concerns an entirely different issue. In January 2008, in what may
4 have been an attempt to cover up its mistakes, Utility came onto the golf course without notice
5 and replaced the three-inch meter with an eight-inch meter. For many years, Utility then charged
6 Swing First a minimum bill based on a four-inch or a six-inch meter. Swing First did think this
7 was fair, but did not object and paid all bills including the minimum bill. However, only recently
8 Utility began charging Swing First a minimum bill based on an eight-inch meter. Count 2 of the
9 2013 Complaint therefore asks the Commission to “Order Utility to charge a minimum bill for
10 Swing First’s Effluent deliveries based on a 3-inch water meter.”

11 Once again, each nucleus of facts is separated by at least five years. Once again, the
12 requested relief is different. Once again, *res judicata* does not apply.

13 **C The Flooding Claim Is Also Appropriate**

14 Utility certainly should not deliberately flood Swing First’s golf course. Utility should
15 have systems and procedures in place to prevent golf-course flooding. This is a fundamental
16 customer-service issue and it deserves investigation by the Commission and recommendations
17 concerning how to prevent future flooding. Utility’s flooding of Swing First’s golf course
18 should certainly not be “immaterial or impertinent” to the Commission.

19 **III Conclusion**

20 Rather that act in good faith to resolve what should be very simple issues, Utility
21 continues to stone-wall Swing First. Therefore, Swing First is incurring even more legal
22 expenses and now the Commission must waste precious resources to deal with Utility’s baseless
23 motions.

24 Utility has now asked the Commission for extraordinary rate relief under the
25 Commission’s new policy for income-tax recovery by LLC’s. Given this request, Swing First’s
26 observation in the Complaint bears repeating:

27 It would seem to be in Utility’s best interest to demonstrate to the Commission

1 that it has turned over a new leaf—that it is not the same old Johnson Utilities—
2 by equitably resolving its current issues with Swing First without forcing the
3 Commission to get involved. But if Utility still refuses to do the right thing by its
4 long-suffering customer, Swing First asks the Commission to provide the relief it
5 requests in this Complaint.

6 **IV Requested Relief**

7 Swing First asks the Commission to dismiss Utility's motions.

8 RESPECTFULLY SUBMITTED on April 12, 2013.

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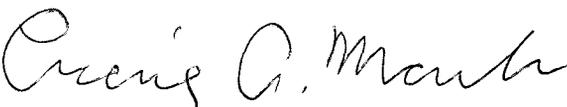
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