OPEN MEETING ITEM

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COMMISSIONERS
BOB STUMP – Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH

ORIGINAL

ARIZONA CORPORATION COMMISSION

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2013 JUL 30 P 3: 12

AZ CORP COMMISSION
DOCKET CONTROL

DATE: JULY 30, 2013

DOCKET NO: WS-02987A-13-0053

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Yvette B. Kinsey. The recommendation has been filed in the form of an Order on:

SWING FIRST GOLF LLC VS. JOHNSON UTILITIES LLC
(COMPLAINT)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

AUGUST 8, 2013

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Working Session and Open Meeting to be held on:

AUGUST 13, 2013 AND AUGUST 14, 2013

For more information, you may contact Docket Control at (602)542-3477 or the Hearing Division at (602)542-4250.

Arizona Corporation Commission
DOCKETED
JUL 30 2013
DOCKETED BY nr

Jodi A. Jerich

JODI JERICH
EXECUTIVE DIRECTOR

This document is available in alternative formats by contacting Shaylin Bernal, ADA Coordinator, voice phone number 602-542-3931, E-mail SABernal@azcc.gov.

BEFORE THE ARIZONA CORPORATION COMMISSION

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 DECISION NO. _____ **ORDER**

Open Meeting
August 13 and 14, 2013
Phoenix, Arizona

BY THE COMMISSION:

This Order comes before the Arizona Corporation Commission ("Commission") to resolve a disputed Motion to Dismiss, Motion to Strike, Motion for Order to Show Cause and Emergency Order and Motion to Require Swing First Golf, LLC to Comply with Rules 15(A) and 15 (D) of the Arizona Rules of Civil Procedure.

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Having considered the entire record herein and being fully advised in the premises, the Commission finds, concludes, and orders that:

FINDINGS OF FACT

I. Procedural History

1. On March 11, 2013, Swing First Golf, LLC ("SFG") filed with the Arizona Corporation Commission ("Commission") a Formal Complaint against Johnson Utilities, LLC ("Johnson" or "Utility") requesting that the Commission order Johnson to deliver effluent in quantities sufficient to satisfy SFG's irrigation needs for its Johnson Ranch Golf Course; charge a

minimum bill for SFG's effluent deliveries based on a 3-inch water meter; and sanction Johnson for failing to send monthly bills to SFG as required by A.A.C. R14-2-409(A)(1).

2. On April 2, 2013, Johnson filed a Motion to Dismiss ("MTD") and Motion to Strike ("MTS").

3. On April 12, 2013, SFG filed its response to Johnson's MTD and MTS.

4. On April 26, 2013, Johnson filed its reply in support of its MTD and MTS, and requested alternatively that SFG be required to file a more definite statement with respect to Count "D".

5. On May 8, 2013, SFG filed a Supplement to its Complaint.

6. On May 13, 2013, SFG filed a Second Supplement to its Complaint.

7. On May 14, 2013, Johnson filed its response to SFG's Supplement to Complaint and Johnson filed a Motion to Strike.

8. On May 15, 2013, SFG filed a Motion for Order to Show Cause ("OSC") and Motion for Emergency Order.

9. On May 16, 2013, by Procedural Order, a procedural conference was scheduled for May 20, 2013, to discuss the various pending motions and to determine a procedural schedule for the complaint proceeding.

10. On May 17, 2013, SFG file a Third Supplement to its Complaint.

11. On May 20, 2013, a procedural conference was held as scheduled. SFG, Johnson, and the Commission's Utilities Division ("Staff") appeared through counsel. Arguments were heard regarding the pending motions and a procedural schedule was discussed.

12. On May 22, 2013, SFG filed an Update to its Complaint.

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13. On May 31, 2013, Johnson filed a Motion to Require SFG to Comply with Rules 15(A) and 15 (D) of the Arizona Rules of Civil Procedure ("A.R.C.P"); Response and Motion to Strike Supplements and Update to Formal Complaint; and Notice Regarding Discovery.

II. SFG's 2013 Complaint

14. SFG's Complaint requests that the Commission order Johnson to deliver effluent in quantities sufficient to satisfy SFG's irrigation needs for its Johnson Ranch Golf Course; order Johnson to charge a minimum bill for SFG's effluent deliveries based only on a 3-inch water meter; and sanction Johnson for failing to send monthly bills to SFG as required by A.AC. R14-2-409(A)(1).

A. "Johnson Again Threatens to Witholds Effluent" (Count "A")

15. SFG's Complaint states that beginning in 2007, Johnson essentially refused to deliver treated effluent and delivered more expensive Central Arizona Project ("CAP") water to SFG, even though Johnson produced over 184 million gallons of treated effluent in 2007.[1] SFG contends that its total irrigation usage in 2007 was 79 million and that although Johnson could have supplied all of SFG's irrigation needs, Johnson only supplied 11 million gallons of effluent to SFG and the remainder of the water supplied was in the form of more expensive CAP water.[2]

16. SFG alleges that during the 2007 timeframe, Johnson pumped effluent into the ground instead of providing it to SFG and that Johnson began providing effluent to the Santan Heights Home Owners Association ("HOA").[3] SFG contends that because Johnson took on the Santan Heights HOA as a customer, Johnson no longer had sufficient effluent for both SFG and the HOA.[4]

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[1] Complaint at 9.
[2] Complaint at 9.
[3] Id.
[4] Id.

17. SFG alleges that Johnson has maximized effluent deliveries to the HOA by rationing deliveries to SFG.[5] SFG claims that Johnson created this problem in 2007 when it withheld effluent in 2007 from SFG and Johnson sold it to the HOA.[6] SFG contends Johnson knew it did not have enough effluent for two large customers, but that Johnson intentionally added the HOA as a customer.[7]

B. "Johnson Continues to Overcharge for Monthly Minimum Bills" (Count "B")

18. SFG claims that in 2006 and 2007, Johnson billed SFG for a six-inch effluent meter instead of the three-inch meter Johnson initially installed.[8] Further, SFG states that in January 2008, Johnson arbitrarily replaced SFG's three-inch effluent meter with an eight-inch effluent meter based on previously undisclosed delivery line problems.[9] SFG contends that prior to 2008 it had never experienced any service line interruptions; two months after Johnson installed the eight-inch meter SFG experienced two service line breaks (one at the peak of the summer demand and at a time when SFG required large irrigation deliveries).[10] SFG states it is possible that the timing of the outages were a coincidence, but that it is clear that the eight-inch meter did not correct the service line problems.[11] SFG's Complaint states that the issue related to the minimum bill overcharges were resolved by a jury and that SFG has been compensated and paid all minimum bills due.[12]

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[5] Complaint at 9.
[6] Id. at 10.
[7] Id.
[8] Id.
[9] Id.
[10] Id.
[11] Id. at 11.
[12] Id. referring to Maricopa County Superior Court case *Johnson Utilities, LLC et. al. v. Swing First Golf, LLC et. al* (Cause No. CV2008-000141 ("Superior Court Case").

19. SFG asserts that Johnson should be held to its initial meter size choice; customers should not be at risk of a meter "bait" and "switch"; and requiring a utility to abide by its initial meter choice will provide incentive for the utility to realistically size its meters in the first place.[13]

C. "Johnson Has Not Been Sending Water Bills" (Count "C")

20. SFG's Complaint states that Johnson has failed to send monthly bills to SFG in violation of A.A.C. R14-2-409(A)(1).[14] SFG attached to its Complaint a document which SFG states is a retroactive bill (in the amount of $38,000) purporting to demonstrate that Johnson had failed to bill SFG from August 2012 to February 25, 2013.[15]

D. "Johnson Again Flooded the Golf Course" (Count "D")

21. SFG alleges that when it filed a formal Complaint against Johnson in 2008 ("2008 Complaint"), Johnson retaliated against SFG and flooded its golf course with large quantities of effluent.[16] SFG contends that in 2012, Johnson again flooded its golf course and that Johnson provided SFG with a billing credit for the flooding.[17]

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[13] Complaint at 11.

[14] A.A.C. R14-2-409(A)(1-6) states:

A. Frequency and estimated bills

1. Each utility shall bill monthly for services rendered. Meter readings shall be scheduled for periods of not less than 25 days or more than 35 days.
2. If the utility is unable to read the meter on the scheduled meter read date, the utility will estimate the consumption for the billing period giving consideration to the following factors where applicable:
   a. The customer's usage during the same month of the previous year
   b. The amount of usage during the preceding month.
3. After the second consecutive month of estimating the customer's bill for reasons other than severe weather, the utility will attempt to secure an accurate reading of the meter.
4. Failure on the part of the customer to comply with a reasonable request by the utility for access to its meter may lead to the discontinuance of service.
5. Estimated bills will be issued only under the following conditions:
   a. Failure of a customer who read his own meter to deliver his meter reading card to the utility in accordance with the requirements of the utility billing cycle.
   b. Severe weather conditions which prevent the utility from reading the meter.
   c. Circumstances that make it dangerous or impossible to read the meter, i.e., locked gates, blocked meters, vicious or dangerous animals, etc.
6. Each bill based on estimated usage will indicate that it is an estimated bill.

[15] Complaint at Exhibit B.

[16] Complaint at 6.

[17] Id.

E. SFG's Supplemental Filings

22. SFG docketed three supplemental filings providing additional information/claims related to its 2013 Complaint.[18]

23. In its supplement, SFG alleges that Johnson is using the threat of withholding effluent; that "a castastrophe is looming" if SFG doesn't get sufficient effluent; that turf and fish will die; that the irrigation system will be damaged; and that the resulting expenses will be significant.[19] Further, SFG contends that if it is forced to take more expensive CAP water it, would result in an additional approximate cost of $84,000 for the months of May through October.[20]

24. In its second supplemental filing, SFG provides data for the month of May showing the daily effluent deliveries for 2013, 2012, 2011.[21] SFG contends that deliveries for 2013 are far below 2012 and 2011 and that the information shows that Johnson can deliver as much as 831,000 gallons of effluent per day to SFG because Johnson has done so in the past.

25. SFG filed a Motion for Order to Show Cause ("OSC") indicating Johnson's refusal to provide SFG with effluent may have caused untreated effluent to be provided to the HOA and may have caused environmental damage to the HOA's lake.[22] SFG requests that the Commission order Johnson to show cause why it should not deliver all quantities of effluent to SFG; and why Johnson

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[18] SFG's Supplement to Complaint (docketed May 8, 2013) and Second Supplement to Complaint (docketed May 13, 2013).
[19] SFG Supplement to Complaint at 2.
[20] Id.
[21] SFG Second Supplement to Complaint at 2.
[22] SFG's Motion for OSC and for Emergency Order at 1-2.

should not be required to supply alternative irrigation water at no additional cost.[23] SFG requests that Johnson be ordered to keep SFG whole until all evidence is heard in the 2013 Complaint and that if the Commission finds that SFG should have paid a higher rate, SFG will pay that amount.[24]

26. SFG filed a Motion for an Emergency Order to address Johnson's "recent environmental transgression." SFG states that it needs immediate relief and requests that the Commission order Johnson to begin delivering all requested quantities of effluent to SFG or in the alternative to deliver substitute irrigation water to SFG at no additional cost.[25]

27. SFG's third supplement to its 2013 Complaint requests an immediate Commission order requiring Johnson to provide effluent at the levels SFG received during the years 2011 and 2012.[26]

III. Johnson's Motion to Dismiss and Motion to Strike

28. Johnson filed a MTD and MTS requesting that the Commission dismiss counts "A" and "B" of the Complaint, pursuant to Rule 12(b)(6) of the Arizona Rules of Civil Procedure ("A.R.C.P.") and the doctrine of *res judicata* because these issues had been previously raised by SFG against Johnson in the 2008 Complaint, which was subsequently dismissed with prejudice in Decision No. 73137 (May 1, 2012).[27] Further, Johnson's MTD and MTS requests that count "D" be dismissed pursuant to Rule 12(b)(6) of the Arizona Rules of Civil Procedure, for the failure to state a claim upon which relief can be granted.[28] Johnson filed an Answer related to Count "C" of the Complaint.[29]

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[23] SFG's Motion for OSC and for Emergency Order at 4.
[24] Id.
[25] Id.
[26] SFG Third Supplement to Complaint at 4.
[27] Johnson's MTD and MTS at 1.
[28] Id.
[29] Id at 2.

29. In Count "A" SFG alleges that Johnson has withheld effluent from SFG. Johnson's MTD/MTS states that SFG raised the same issue in its 2008 Complaint, which was dismissed with prejudice, and therefore should be dismissed from the 2013 Complaint.[30] In support of its position, Johnson points to the pre-filed testimony filed in the 2008 Complaint by Mr. David Ashton, manager of SFG, where Mr. Ashton testified that it appeared that Johnson is deliberately withholding effluent from SFG; that it appeared Johnson had been selling effluent to other customers; that SFG could have satisfied essentially all of its irrigation requirements with treated effluent, but instead Johnson withheld effluent and delivered and billed for more expensive CAP water; and that SFG should be receiving as much effluent as Johnson can deliver, up to SFG's requirements.[31]

30. Johnson's MTD/MTS included the following chart comparing the claims raised in the 2008 and 2013 Complaints:

2008 Complaint Count "A"	2013 Complaint Count "A"
SFG "should be receiving as much effluent as Utility can deliver, up to our requirements"[32]	"Swing First asks the Commission to order Utility to deliver effluent to Swing First in the quantities requested by Swing First"[33]
"[D]espite Swing First's right to the first effluent generated in the certificated service area, Utility has rarely delivered effluent"[34]	"only after satisfying Swing First's requirements should Utility be allowed to sell Effluent to any other customers or to pump Effluent into the ground."[35]
"Utility has withheld effluent"[36]	"[T]his is a problem Utility created by deliberately withholding Effluent in 2007 from Swing First and selling Effluent to the San Tan HOA."[37]

[30] Johnson's MTD and MTS at 3.
[31] Id. at 4 referencing the Direct Testimony of David Ashton on Behalf of Swing First Golf LLC dated December 30, 2009 (Docket No. WS-02987A-08-0049) at 10-11.
[32] Id. at 5 referencing the Direct Testimony of David Ashton on Behalf of Swing First Golf, LLC dated December 30, 2009 (Docket No. WS-02987A-08-0049) at 5.
[33] Id., referencing 2013 Complaint at 9.
[34] Id., referencing 2008 Complaint at 2.
[35] Id., referencing 2013 Complaint at 9.
[36] Id., referencing the Direct Testimony of David Ashton on Behalf of Swing First Golf, LLC dated December 30, 2009 (Docket No. WS-02987A-08-0049) at 11.
[37] Id., referencing 2013 Complaint at 9.

"There are two customers connected to the Santan Waste Water Treatment Plant ("WWTP"): Swing First and the Santan HOA."[38] "Utility has been selling some effluent to other irrigation customers. . . , but has been pumping most of the effluent it produces into the ground."[39]	"Since 2007, Utility has tried to maximize Effluent deliveries to the [Santan] HOA by rationing deliveries to Swing First."[40]

31. Johnson argues that the above stated language demonstrates that the claims raised in the 2008 Complaint and the 2013 Complaint are materially the same.[41] Johnson argues that SFG should have fully litigated its claims in the 2008 Complaint instead of requesting that the Commission dismiss the Complaint with prejudice, and that SFG's claims are now barred pursuant to A.R.C.P. 12 (b)(6); the doctrine of *res judiciata*; and the express language in Decision No. 73137 which dismissed the 2008 Complaint with prejudice.[42]

32. Johnson provided a comparison of the claims raised by SFG in Count "B" of the 2008 Complaint and in Count "B" of the 2013 Complaint and summarized the claims in the following chart:

2008 Amended Complaint Count "B"	2013 Complaint Count "B"
"Swing First was served with a three-inch meter until 2008. The minimum bill for this size meter is only $270."[43]	"To meter effluent service, after the effluent line to the lake was completed Johnson installed a three-inch water meter."[44]
"In January 2008, Johnson replaced SFG's three-inch meter with an eight-inch meter."[45]	"Then, in January 2008, Johnson arbitrarily replaced SFG's three-inch effluent meter with

[38] Johnson's MTD and MTS at 3, referencing the Direct Testimony of David Ashton on Behalf of Swing First Golf, LLC dated December 30, 2009 (Docket No. WS-02987A-08-0049) at 11.
[39] Id., referencing the Direct Testimony of David Ashton on Behalf of Swing First Golf, LLC dated December 30, 2009 (Docket No. WS-02987A-08-0049) at 10.
[40] Complaint at 9.
[41] Johnson's MTD and MTS at 5.
[42] Id. at 6.
[43] Id. at 5 referencing the Direct Testimony of David Ashton on Behalf of Swing First Golf, LLC dated December 30, 2009 (Docket No. WS-02987A-08-0049) at 25.
[44] Complaint at 10.
[45] 2008 Complaint at 4.

"The purpose of the service was allegedly to reduce back pressure on the line and to reduce line breaks."[46]	an eight-inch meter, claiming that the change was needed to correct previously undisclosed delivery line problems."[47]
"Utility changed the meter size for its benefit, not at SFG's request. It did not otherwise affect the effluent system investment dedicated to serve SFG. Therefore, it is inappropriate for Utility to charge more than $270 per month for its monthly effluent minimum bill even after January 2008."[48]	"[G]oing forward SFG asks the Commission to order Utility to resume basing its minimum bills on the three-inch meter that was originally installed. This meter was selected and installed by Utility and no one alleges that it did not accurately read deliveries to SFG. Utility should be held to its initial meter choice."[49]
"SFG asks . . . [t]he Commission to order Utility to render proper bills to SFG each month, based on actual meter reads, one 3-inch meter, the effluent rate of $0.62 per thousand gallons, and the Transaction Priviledge Tax of $0.67 per thousand gallons."[50]	"SFG asks the Commission to [o]rder Utility to charge a minimum bill for SFG's effluent deliveries based on an 3-inch meter."[51]

33. Johnson contends that Count "B" of SFG's 2013 Complaint should be dismissed based same grounds as Count "A", that Count "B" is barred by Decision No. 73137, A.R.C.P. 12(b)(6), and the doctrine of *res judicata* because the claims were previously raised in the 2008 Complaint and dismissed with prejudice.[52] Further, Johnson requests that Count "B" be stricken under A.R.C.P. 12(f) because it is "immaterial and impertinent" to the resolution of any claim properly before the Commission in this docket.[53]

34. Johnson's MTD/MTS seeks to dismiss SFG's Count "D", stating it is defectively vague, ambiguous and lacking in facts.[54] Further, Johnson contends the claims in Count "D" fail to

[46] Johnson's MTD and MTS at 5 referencing the Direct Testimony of David Ashton on Behalf of Swing First Golf, LLC dated December 30, 2009 (Docket No. WS-02987A-08-0049) at 23.
[47] Complaint at 10.
[48] Johnson's MTD and MTS at 5 referencing the Direct Testimony of David Ashton on Behalf of Swing First Golf, LLC dated December 30, 2009 (Docket No. WS-02987A-08-0049) at 25.
[49] Complaint at 11.
[50] 2008 Complaint at 7.
[51] Complaint at 13.
[52] Johnson's MTD and MTS at 7-8.
[53] Id. at 9.
[54] Id. at 10.

state a claim under which relief can be granted pursuant to A.R.C.P. 12(b)(6).[55] Johnson argues that SFG's claim for flooding is a claim of trespass and the Commission lacks jurisdiction to address a claim for trespass or to award damages caused by a trespass; the claim does not involve a billing dispute and therefore fails to state a claim upon which relief can be granted; and the claim should be stricken because it is immaterial and impertinent to the resolution of any claim properly before the Commission in this docket.[56]

IV. SFG's Response to MTD/MTS

35. SFG argues that the doctrine of *res judicata* does not bar its claims in Count "A" because *res judicata* does not bar SFG from complaining that Johnson is again threatening to withhold effluent deliveries.[57] SFG contends that the facts alleged in the 2008 Complaint and the 2013 Complaint are separated by a five year time span.[58]

36. SFG argues that it did not ask the Commission to order Johnson to deliver sufficient effluent to meet all of SFG's needs in its 2008 Complaint; that the 2008 Complaint concerned deliveries from 2005 through 2007; that the 2013 Complaint concerns Johnson's "misdeeds" from 2012 through the present; and therefore *res judicata* does not apply.[59]

37. SFG stated that in its 2008 Complaint SFG sought monetary relief and in its 2013 Complaint SFG is seeking prospective, non-monetary relief.[60]

38. SFG argues that *res judicata* does not apply to its claim concerning minimum bill overcharges because SFG's claims in the 2013 Complaint relate to new effluent deliveries.[61]

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[55] Johnson's MTD and MTS at 10.
[56] Id.
[57] SFG Response to MTD and MTS at 2.
[58] Id.
[59] Id. at 3.
[60] Id. at 4.
[61] Id.

39. SFG states that in January 2008, Johnson replaced SFG's 3-inch meter with an 8-inch meter and for many years Johnson charged SFG with a 4-inch or 6-inch meter. SFG contends that although it did not think it was fair, SFG paid all the bills including the monthly minimum.[62] SFG alleges that recently Johnson has begun charging SFG for an 8-inch meter and SFG requests that the Commission order Johnson to bill SFG based on a 3-inch meter.[63]

40. Regarding its claim for flooding, SFG contends that the fact that Johnson flooded its golf course is "a fundamental customer-service issue and deserves investigation by the Commission and recommendations concerning how to prevent future flooding."[64]

41. SFG requests that the Commission dismiss Johnson's MTD and MTS.[65]

V. Johnson's Reply to SFG's Response to MTD/ MTS and Supplemental Filings

42. Johnson argues that each of the assertions made by SFG in its response are contradicted by the language in the 2008 Complaint and the supporting pre-filed testimony of Mr. Ashton.[66] Johnson reiterates that the language in the two complaints is virtually the same.[67]

43. Johnson contends that SFG has characterized the claims in Count "A" of the 2008 Complaint as a simple pricing dispute, related to a Utility Service Agreement ("USA"), but that the 2008 Complaint addressed substantive issues, including: 1) whether SFG is entitled, and on what basis, to as much effluent as it requests or requires from Johnson; 2) whether SFG has a right to the first effluent generated before the Company can sell effluent to another customer such as the SanTan HOA; and 3) whether Johnson was withholding effluent from SFG when the Company sold effluent

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[62] SFG Response to MTD and MTS at 2.
[63] Id.
[64] Id.
[65] Id. at 6.
[66] Johnson's Reply at 2.
[67] Id.

to another customer or pumped effluent into the ground.[68] Johnson argues that the above questions are the same issues raised in the 2013 Complaint.[69]

44. Further, Johnson argues that SFG's Count "A" in the 2013 Complaint is barred by the express language in Decision No. 73137, which dismissed the 2008 Complaint with prejudice. Johnson quotes Decision No. 73137 as stating:

> Swing First has stated it is aware that withdrawal of its Amended Complaint with prejudice will foreclose Swing First from raising those claims again before the Commission even if the Superior Court decides its claims are more appropriately with the Commission's jurisdiction. Therefore, Swing First has accepted the risk that [the] Superior Court may or may not address the common claims raised in the Amended Complaint and the Superior Court case.

45. Johnson contends that the Commission left no doubt about the preclusive and final effect of Decision No. 73137; it was incumbent upon SFG as the Complainant to prosecute the 2008 Complaint to completion and secure a decision in favor of SFG on Count A; and that when SFG agreed to withdraw its 2008 Complaint with prejudice it agreed that it would look solely to the Superior Court to resolve its claims under Count "A" against Johnson.[70]

46. Johnson argues that SFG withdrew its 2008 Complaint with prejudice and has failed to get a finding or ruling in the Superior Court Case that: 1) SFG has a priority right to the effluent generated by Johnson; 2) Johnson must satisfy the effluent requests or requirements of SFG before it can deliver effluent to other customers such as the HOA or pump effluent into the ground; 3) Johnson must deliver effluent in whatever quantities are requested or required by SFG; or 4) that Johnson withheld effluent from SFG.[71] Therefore, Johnson argues that SFG has come back to the Commission for "another bite at the apple" and this should not be allowed.[72]

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[68] Johnson's Reply 3.
[69] Id.
[70] Johnson's Reply at 5.
[71] Id.
[72] Id.

47. Johnson contends that SFG's argument that *res judicata* does not apply because a hearing was never scheduled and that Johnson never filed testimony in the 2008 Complaint is irrelevant.[73] In support of its position, Johnson relies on *Suttle v. Seely*, an Arizona Supreme Court case which ruled, in part that:

> A consent judgment entered by stipulation of the parties is just as valid as a judgment resulting from a trial on the merits, and a decree of dismissal with prejudice made upon that stipulation is a final determination and is res judicata as to all issues that were raised or could have been determined under the pleadings.[74]

48. Johnson states that even though there was no hearing held on the 2008 Complaint the docket spanned over four years; extensive discovery was conducted; motions for summary judgment were resolved; oral arguments were held; briefing on various issues were conducted; and that SFG intervened and asserted claims from the 2008 Complaint in Johnson's rate case.[75] Further, Johnson contends that SFG's assertion that it has rights under the USA was discredited in the 2008 Complaint; SFG cannot distinguish the 2013 Complaint from the 2008 Complaint on the grounds that Count "A" of the 2008 Complaint arose under the USA, when Mr. Ashton acknowledged in pre-filed testimony that Count "A" could also be litigated under the tariffs of Johnson.[76]

49. Regarding Count "B", Johnson argues that SFG's contention that its 2013 Complaint claims are not barred by *res judicata* because "each nucleus of facts is separated by five years" is not the determining factor whether *res judicata* applies, but the relevant factor is whether the subsequent claim arises "out of the same nucleus of facts," as the prior claim.[77] Johnson states that the crux of the claims raised in both the 2008 and 2013 Complaints is whether SFG is entitled to a three-inch effluent meter and/or whether SFG is entitled to pay a monthly minimum charge based on a three-inch meter

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[73] Johnson's Reply at 5.
[74] Id., citing *Suttle v. Seely*, 94 Ariz. 161, 163-164, 382 P.2d 570, 572(1963).
[75] Johnson's Reply at 6.
[76] Johnson's Reply at 6 and referencing Ashton's pre-filed testimony at 30, line 16-18.
[77] Id. at 7.

even though it has an eight-inch meter.[78] Johnson contends the facts are the same and that *res judicata* applies to the claims raised in Count "B." Further, Johnson argues that Count "B" is barred by the language of Decision No. 73137.[79]

50. Regarding Count "D," Johnson argues that SFG's claim should be dismissed for failure to state a claim upon which relief can be granted.[80] Johnson states that if Count "D" is not dismissed, SFG should be required to file a more definite statement under Rule 12(e) of the A.R.C.P.[81]

51. Johnson's response to SFG's supplemental filings requests that the Commission strike the pleadings pursuant to A.R.C.P. Rule 15(d). Johnson relies on Rule 15(d) which states in part that:

> Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of the claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

52. Johnson argues that SFG's Supplements are supplemental pleadings within the meaning of Rule 15 (d); SFG failed to seek permission to filing the supplemental pleadings; the supplement is a second response to the MTD and MTS and not permitted under Commission rules; it is improper for SFG to file the supplement before the Commission has ruled on the Company's MTD and MTS; and therefore the pleadings should be stricken.[82]

Johnson asserts that SFG's claim that a "castastrophe is looming" is being brought about because of SFG's refusal to accept any water source other than effluent and that SFG's accusation that Johnson is using the threat of withholding effluent deliveries to "try to extort huge

[78] Johnson's Reply at 7.
[79] Id. at 10.
[80] Id. at 10.
[81] Id. at 11.
[82] Johnson's Response to SFG's Supplement to Complaint at 2.

additional payments from SFG" is illustrative of why it is difficult for Johnson to work with SFG; that the email attached to SFG's Supplement as proof that Johnson engaged in "threats" and "extortion" acknowledges that Johnson can deliver as much water as SFG requests using a combination of water sources, that Johnson will continue to work with SFG even though existing constraints limit the Company's ability to only deliver effluent; and that SFG has no priority right over the HOA.[83]

53. Johnson states that in the Superior Court case, the jury awarded SFG $41,883.11 in its dispute with Johnson Utilities over bills for water deliveries from late 2004 to early 2013.[84] However, Johnson states that the jury did not find: that SFG has a priority right to the effluent of Johnson Utilities; that Johnson must satisfy the effluent requests of SFG before it can deliver effluent to any other customer such as the HOA; that Johnson must deliver effluent in whatever quantities requested by SFG; or that Johnson withheld effluent from SFG.[85]

54. Johnson asserts that SFG's request that the Commission grant Johnson's request to amend Decision No. 71854[86] is outside the scope of the 2013 Complaint and should be stricken.[87]

55. Johnson request that the Commission admonish SFG to cease and desist from making accusations of extortion against the Company.[88]

56. Johnson reiterated its request that SFG be ordered to comply with A.R.C.P. 15(A) and 15(D) because SFG failed to get permission to file its three supplements to the 2013 Complaint.

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[83] Johnson's Reply at 1-4.
[84] Id. at 4.
[85] Id.
[86] In Decision No. 73992 (July 16, 2013), the Commission approved Johnson's Petition involving the treatment of income taxes. Therefore, the issue raised by SFG is moot and will not be addressed herein.
[87] Johnson's Response to SFG's Supplement at 8.
[88] Id. at 9.

VI. Resolution

A. Counts "A" and "B"

57. Johnson's MTD and MTS argue that SFG's claims under Count "A" and "B" are barred by Decision No. 73137, by the doctrine of *res judicata* and therefore should be stricken under A.R.C.P. 12(b)(6).

58. Courts have stated that the doctrine of "res judicata protects litigants from the burden of relitigating an identical issue and promotes judicial economy by preventing needless litigation."[89] Arizona Courts have stated that *res judicata* "provides finality and deters harassment of former litigants."[90] Johnson argues that the doctrine of *res judicata* is well established in Arizona and points to the Arizona Supreme Court case *Roden v. Roden*, which held that "a judgment of dismissal with prejudice is the same as a judgment for the defendant upon the merits, and, of course, is res judicata as to every matter litigated."[91]

59. In the 2008 Complaint Decision No. 73137 stated:

> Swing First has stated it is aware that withdrawal of its Amended Complaint with prejudice will foreclose Swing First from raising those claims again before the Commission even if the Superior Court decides its claims are more appropriately within the Commission's jurisdiction. Therefore, Swing First has accepted the risk that [the] Superior Court may or may not address the common claims raised in the Amended Complaint and the Superior Court case.

60. In the above Decision, the Commission concluded that it was "appropriate to allow Swing First to withdraw its Amended Complaint, with prejudice, having acknowledged that if it does

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[89] *See, Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S.Ct. 645, 649, 58 L.Ed.2d 552(1979).
[90] *See, Circle K v. Industrial Comm'n*, 179 Ariz. 422, 426, 880 P.2d 642, 646 (App.1993).
[91] *Roden v. Roden*, 29 Ariz. 549, 553 243 P. 413 (1926).

not prevail in in its claims in Superior Court, it will be precluded from reasserting the claims it raised in this docket in any future proceeding."[92]

61. The 2008 Complaint between SFG and Johnson spanned more than four years and was vigorously litigated by the parties. During that proceeding, extensive discovery was conducted, motions resolved, and oral arguments held. SFG requested that the Commission allow SFG to dismiss its 2008 Complaint with prejudice, over the objections of Johnson, and SFG acknowledged that it understood that the claims in the 2008 Complaint could not be reasserted in a future proceeding before the Commission. We find that the claims raised in Count "A" and Count "B" of the 2013 Complaint and those raised in the 2008 Complaint are the same claims arising from the same set of operative facts. We do not find persuasive SFG's assertion that the doctrine of *res judicata* does not apply to its claims because the claims raised in the 2013 Complaint and the 2008 Complaint are separated by a five year span. Arizona courts have stated that res judicata will preclude a claim when a former judgment on the merits was rendered by the court of competent jurisdiction and **"the matter now at issue between the same parties or their privities was, or might have been, determined in the former action."**[93] SFG requested that its 2008 claims be dismissed with prejudice, knowing it would forego the opportunity to have the Commission decide those claims in any future proceeding. Therefore, we find that SFG's claims in Counts and "A" and "B" are barred by the doctrine of *res judicata*. Further, we find it appropriate and in the public interest to uphold Decision No. 73137 to

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[92] Decision No. 73137, pg. 23, line 25.
[93] *Hall v. Lalli*, 194 Ariz. 54, 977 P.2d 776 at 750 (1999).

provide finality and to promote judicial efficiency.[94] We find that Johnson's MTD and MTS as to Counts "A" and "B" should be granted.

62. SFG filed three supplements to its 2013 Complaint. The supplements provide additional information surrounding the same facts alleged in Count "A" of the 2013 Complaint. Based on our ruling that Count "A" should be dismissed, we find that SFG's two supplements should also be dismissed as the claims alleged arise from the same nucleus of facts raised in Count "A".

63. Although we have dismissed Count "A" herein, we believe it would be appropriate for Johnson to file a tariff, for Staff review and Commission approval, concerning its provision of effluent service, including the terms and conditions of service.

B. <u>Count C</u>

64. Regarding Count "C" of the 2013 Complaint, Johnson has filed an answer and there is a genuine issue of dispute regarding the issue. Therefore, Count "C" should remain a part of the Complaint and be resolved by the Commission.

C. <u>Count D</u>

65. Under Count "D" of the 2013 Complaint, SFG request that the Commission investigate the customer-service issues related to Johnson recently flooding SFG golf course. Johnson has requested that Count "D" be stricken for failure to state a claim or alternatively that SFG be required to file a more definite statement.

66. SFG has failed to allege sufficient facts to determine what relief SFG is requesting in Count "D" and if relief can be granted by the Commission. Therefore, it is appropriate to grant Johnson's request requiring SFG to file a more definite statement regarding Count "D".

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[94] In the Superior Court case a jury has awarded SFG approximately $42,000 for its claims against Johnson for overcharges on its water bill from the period of 2004 to early 2013. The award is not final and the decision is still appealable.

D. OSC

67. SFG's Motion for OSC, indicates that Johnson's refusal to provide SFG with effluent may have resulted in environmental damage to the HOA's lake. It also requests that the Commission order Johnson to show cause why it should not deliver all quantities of effluent to SFG, and why Johnson should not be required to supply alternative irrigation water at no additional cost. SFG seeks an order that will require Johnson to charge the effluent rate for all water deliveries until the OSC is resolved.

68. A.R.S. § 40-321(A) provides: "[W]hen the commission finds that the equipment, appliances, facilities or service of any public service corporation, or the methods of manufacture, distribution, transmission, storage or supply employed by it are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine what is just, reasonable, safe, proper, adequate or sufficient, and shall enforce its determination by order or regulation."

69. Further, under Article XV § 3 of the Arizona Constitution, the Commission may enter "orders for the convenience, comfort, and safety and preservation of health" of the customers of public service corporations.

70. Here, SFG's Motion for OSC asks for the same relief requested in Count "A" of the Complaint, which we have dismissed. Because we find that Count "A" should be dismissed and because we are requiring Johnson to file a tariff concerning its effluent delivery, terms and conditions it is not necessary to provide the relief SFG requests. Further, we expect Staff to review and monitor Johnson's operations and to file an OSC at any time it believes the conditions under A.R.S. §§ 40-321(A), 40-334 or Article XV of the Arizona Constitution exists.

E. Emergency Order

71. SFG has requested an Emergency Order requiring Johnson to deliver all quantities of effluent needed by SFG or to require Johnson to deliver substitute irrigation water to SFG at no

additional cost. SFG has failed to allege facts showing that there are not sufficient water sources available for it to maintain irrigation of its golf course. Therefore, we find that SFG's request for an emergency order should be denied.

CONCLUSIONS OF LAW

1. Johnson is a public service corporation pursuant to Article XV of the Arizona Constitution and A.R.S. § 40-246.

2. Pursuant to A.R.S. § 40-246 and A.A.C. R14-2-406, the Commission has jurisdiction over Johnson and the subject matter of the Complaint filed in this docket.

3. It is in the public interest to grant, in part, Johnson's Motion to Dismiss and Motion to Strike.

ORDER

IT IS THEREFORE ORDERED that Johnson Utilities, LLC's Motion to Dismiss Counts "A" and "B" of Swing First Golf's Complaint is hereby granted.

IT IS FURTHER ORDERED that Swing First Golf, LLC shall file within 60 days of this Decision, a more definite statement regarding Count "D" of the above-captioned Complaint. The failure by Swing First Golf, LLC to file a more definite statement within the timeframe established may result in a dismissal of the claims alleged under Count "D".

IT IS FURTHER ORDERED that the Hearing Division shall conduct proceedings related to Counts "C" and "D" of the Complaint.

IT IS FURTHER ORDERED that Swing First Golf's Motion for an Emergency Order is hereby denied.

IT IS FURTHER ORDERED that Swing First Golf's Motion for an Order to Show Cause is hereby denied.

IT IS FURTHER ORDERED that Johnson Utilities, LLC shall, within 90 days of the effective date of this Decision, make a tariff filing, for Staff's review and Commission approval, concerning its provision of effluent service, including the terms and conditions of service.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION

CHAIRMAN COMMISSIONER

COMMISSIONER COMMISSIONER COMMISSIONER

IN WITNESS WHEREOF, I, JODI A. JERICH, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this _____ day of_____, 2013.

_____
JODI A. JERICH
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____

SERVICE LIST FOR: SWING FIRST GOLF LLC AGAINST JOHNSON UTILITIES LLC

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