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BEFORE THE ARIZONA CORPORATION COMI.

Arizona Corporation Commission

COMMISSIONERS

DOCKETED

DOUG LITTLE, Chairman  
BOB STUMP  
ROBERT BURNS  
TOM FORESE  
ANDY TOBIN

JUL 27 2016

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

DOCKET NO. WS-02987A-16-0017

SWING FIRST RESPONSE TO  
MOTION FOR REHEARING

1 Swing First Golf, LLC ("Swing First") hereby responds to the Motion for Rehearing filed  
2 by Johnson Utilities, LLC ("Utility"). The Motion should be rejected for three reasons:

- 3 1. Granting the Motion would send troubling messages;
- 4 2. Utility's arguments ignore and misstate Court and Commission precedent; and
- 5 3. Utility did not timely file its Motion pursuant to the proper authority.

6 **I Granting the Motion would send troubling messages**

7 **A Granting the Motion would undermine Hearing Division and Legal Division**

8 Commission proceeding are normally quasi-judicial in nature.

9 A proceeding before the Commission that involves the required taking and  
10 weighing of evidence, determinations of fact based upon the consideration of the  
11 evidence, and the making of an order supported by such findings, has a quality  
12 resembling that of a judicial proceeding. Hence, it is frequently described as a  
13 proceeding of a quasi-judicial character

14 *State ex rel. Corbin v. Arizona Corp. Comm'n*, 143 Ariz. 219,224, 693 P.2d 362,367 (App. 1984),  
15 quoting *Morgan v. United States*, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 2d 1288 (1936) (citations  
16 omitted)). However, Utility's Motion to Dismiss was based solely on legal argument. No  
17 evidence was taken. Hence, the Commission's decision was purely a legal decision.

18 Three parties submitted various legal pleadings concerning Utility's motion to dismiss:  
19 Utility, Swing First, and the Commission's Legal Division. Swing First and Legal Division each  
20 submitted compelling legal arguments why the motion should not be granted.

1 The Commission's Hearing Division then evaluated the legal arguments. On June 1,  
2 2016, Judge Yvette Kinsey filed her Recommended Opinion and Order ("ROO"), which  
3 concluded that Utility's motion should be denied.

4 Utility's argued that the provision of effluent was not a service that made it a public  
5 service corporation and thereby subject to Commission jurisdiction. The ROO agreed with  
6 Swing First and Legal Division that the Constitution clearly supported Commission jurisdiction  
7 over effluent sales:

8 Article XV, Section 2, and the language articulated in the *Long* case, when read  
9 together make clear that Johnson's effluent service is "furnishing water for  
10 irrigation" and that Johnson's delivery of effluent is "collecting, transporting,  
11 treating, purifying and disposing of sewage through a system, for profit."

12 ROO at 18:4-7, referencing *Arizona Public Service Company v. John F. Long*, 160 Ariz. 429,  
13 773 P.2d 988 (1989).

14 The ROO, again agreed with Swing First and Legal Division that Utility's reliance on  
15 *Arizona Water Company v. City of Bisbee*, 172 Ariz. 176, 836 P.2d 389 (Ct. 14 App. 1991 was  
16 misplaced.

17 While the effluent generated by Bisbee was not subject to the Commission's  
18 jurisdiction because Bisbee is a municipality, the distinguishing factor in this  
19 matter is that Johnson is a PSC, authorized by the Commission to provide public  
20 utility wastewater/effluent service as part of its CC&N, and is therefore subject to  
21 the Commission's jurisdiction.

22 ROO at 18:16-20.

23 Finally, the ROO disposed of Utility's alleged Commission precedent. Decision No.  
24 74933 concerned a Liberty Utilities plan to sell excess effluent to the Central Arizona Water  
25 Conservation District. Utility inexplicably argued that a Liberty Utilities case supported a finding  
26 of no Commission jurisdiction. Yet, the Commission actually concluded that it did have subject-  
27 matter jurisdiction over the transaction.

28 Although the Commission found that the terms of the Development Agreement do  
29 not require Commission approval, such a conclusion is not the same as the  
30 Commission conceding jurisdiction over the subject matter of the application. In  
31 fact, the Commission concluded that it did have subject matter jurisdiction in the  
32 Liberty case. As a further exercise of the Commission's jurisdiction over Liberty's

1 application, the Commission placed conditions on its approval of Liberty's  
2 application, requiring Liberty to file with the Commission: any changes to the  
3 agreed-to effluent delivery fees; any changes to the agreed-to price for the sale of  
4 effluent and effluent-driven long-term storage credits; and notice of any  
5 significant events occurring which would materially impact Liberty's performance  
6 under the Agreement including, but not limited to, replacement or expansion of  
7 Liberty's Palm Valley Wastewater Reclamation Facility.

8 ROO at 19:5-14 (emphasis added).

9 The Commission considered and approved the ROO at its June 14, 2006, Open Meeting.  
10 Both Judge Kinsey and Chief Judge Dwight Nodes appeared at the Open Meeting to support the  
11 ROO and answer any questions concerning the ROO's legal analysis and conclusions. Robin  
12 Mitchell from Legal Division appeared on behalf of Commission Staff and also supported the  
13 ROO. Attorneys representing Utility and Swing First also appeared and answered Commissioner  
14 questions.

15 Utility now asks the Commission to ignore the legal analysis and conclusions of both its  
16 Legal Division and Hearing Division and to reverse its previous approval of the ROO. As  
17 discussed above, the motion to dismiss raised only legal issues. The top legal minds at the  
18 Commission reviewed and analyzed the legal issues and agreed that the motion should be denied.

19 It is likely that rehearing and reversal of these legal conclusions would be reversible error  
20 by the Commission. With all due respect, none of the Commissioners are attorneys, and no  
21 evidence was taken which required policy determinations. But perhaps more importantly,  
22 granting rehearing would send the unfortunate message that the Commission does not respect the  
23 legal judgment of its top legal employees.

24 **B Granting Utility's Motion would destroy Swing First Golf and ruin Johnson**  
25 **Ranch property values**

26 In Decision No. 75462, dated February 16, 2016, the Commission set Utility's 2016  
27 CAGR fee at \$2.52 per thousand gallons. The total non-potable water rate is now \$3.36 per  
28 thousand gallons, over five times the Effluent rate of \$0.63 per thousand gallons. If the  
29 Commission granted rehearing and allowed Utility to unilaterally discontinue its tariffed Effluent

1 sales, Swing First's annual irrigation bill would soar from approximately \$100,000 per year to  
2 over \$500,000 per year!

3 If the Commission granted Utility's requested rehearing it would be catastrophic. Swing  
4 First competes in the very competitive market for golf customers and it would be impossible for  
5 it to increase greens fees enough to recover quintupled water costs. Swing First would be forced  
6 out of business.

7 Further, as demonstrated by the numerous public comments in this docket, the damage  
8 would extend far beyond Swing First. Property values would plummet for the thousands of  
9 existing Johnson Ranch homeowners when their beautiful golf course degenerated to weeds,  
10 snakes, and bare dirt.

11 Finally, Utility's public-benefit arguments evaporate upon close scrutiny. Utility is  
12 owned by the George H Johnson Rev. Trust, Jana S Johnson, and George H Johnson. A nearby  
13 golf course, the Club at Oasis L.L.C. ("Oasis"), is owned by George Johnson's son, Chris  
14 Johnson and another affiliate, Hunt Management LLC. Utility, George Johnson, Chris Johnson,  
15 and Hunt Management LLC all share offices at 5310 E Shea Blvd, Scottsdale, AZ 85254.

16 In its November 2015 newsletter to its customers Utility bragged that it was providing  
17 Effluent to its Oasis golf course.

18 With conservation in mind, the grass at the Oasis Golf Course is irrigated with  
19 reclaimed water from the Johnson Utilities system. Instead of using our precious  
20 groundwater, we put the reclaimed water to beneficial use. Eventually, that  
21 reclaimed water reaches the aquifer and is recycled.

22 Yet, in the case of Swing First, Utility asks the Commission to ignore conservation, disregard the  
23 preciousness of ground water, and not put its reclaimed water to beneficial use.

24 At the April 6, 2016, Procedural Conference, Utility told the Commission that it would be  
25 discontinuing effluent sales to all effluent customers and would be recharging all effluent to  
26 receive water credits. These representations were false. Utility retracted its promises through an  
27 April 19, 2016, letter to the docket from Brad Cole, Utility's Chief Operating Officer. Mr. Cole  
28 stated that Utility intended, *with the exception of Swing First* to continue effluent sales to all

1 existing customers, including Utility’s own Oasis Golf Course. Utility asks the Commission to  
2 sanction this blatant anti-competitive discrimination.

3 Utility has falsely claimed that discontinuing effluent sales to Swing First will benefit  
4 customers by generating additional re-use credits. In fact, only Utility would benefit by driving a  
5 competitor out of business. Every credit generated through recharge would be offset by  
6 extracting an equivalent amount of groundwater, plus Utility would incur additional electricity  
7 costs to pump the groundwater. There would be no net benefit to customers.

8 **II Utility’s arguments ignore and misstate Court and Commission precedent**

9 Utility generally restates its prior arguments that the Commission, its Legal Division, and  
10 its Hearing Division all rejected. There is no overall reason to discuss again how Utility  
11 misstates the law. However, one amazing statement deserves a bit more discussion.

12 The very first sentence of Utility’s summary incredibly states: “For the first time,  
13 apparently, in Commission history, the Decision has the Commission asserting jurisdiction over  
14 the waste/byproducts of a utility’s provision of the regulated service.” This is incorrect for many  
15 reasons.

16 First, the Commission’s asserted jurisdiction over Utility’s effluent sales and service  
17 when Utility applied for and received a Certificate of Convenience and Necessity from the  
18 Commission in 1997 to provide water and wastewater service to the Johnson Ranch development  
19—including effluent service to the Johnson Ranch golf course. The Commission granted Utility  
20 a monopoly to provide these services, with the monopoly subject as always to “vigilant and  
21 continuous regulation by the Corporation Commission” . . . . *Davis v. Corporation Comm’n*, 96  
22 Ariz. 215, 218; 393 P.2d 909, 911 (1964).

23 Second, the Commission has routinely asserted jurisdiction over effluent sales in Utility’s  
24 rate cases, where the Commission approved revised effluent rates. See, e.g., Decision No.  
25 71854, dated August 25, 2010, and Decision No. 72579, dated September 15, 2011.

1 Third, the Commission again asserted jurisdiction over Utility's effluent sales in Decision  
2 No. 74036, dated October 16, 2013, when Utility was directed to make a tariff filing concerning  
3 effluent service in Docket WS-02987A-13-0053, which it did on November 15, 2013.

4 Finally, as discussed above, Utility completely misstates the Liberty Utilities decision.  
5 As recognized in the ROO, the Commission expressly asserted jurisdiction over the subject  
6 effluent sales.

7 Turning to Utility's res judicata argument, it again adds nothing new. Swing First  
8 discussed at length in its Brief why res judicata did not apply: This is a different claim based on  
9 new facts and circumstances. Legal Division agreed and concluded:

10 In the instant complaint, the nucleus of facts is different from the prior two  
11 complaints. Johnson has ceased all delivery of effluent from its San Tan  
12 wastewater treatment facility to SFG and its other effluent customer, electing to  
13 deliver only groundwater. ... This fact alone serves to defeat the claim by Johnson  
14 that the SFG complaint is barred by res judicata.

15 Staff's Response to Motion to Dismiss, dated April 29, 2016. Hearing Division agreed:

16 Johnson's notification that Johnson intends to permanently discontinue all effluent  
17 to SFG (and has apparently already done so) and only deliver groundwater to SFG  
18 are new facts not raised in the 2008 and 2013 Complaints. Further, the issue of  
19 whether Johnson can discontinue its Commission-authorized tariff effluent service  
20 was not an issue in the previous complaints. Therefore, we conclude that SFG's  
21 claims are not barred by res judicata.

22 ROO at 19:26 – 20:2.

23 **III Utility did not timely file its Motion pursuant to the proper authority**

24 Utility filed its Motion "pursuant to A.A.C. R17-1-512 ... for the grounds set forth in  
25 A.A.C. R17-1-512.D.8." These are the rehearing rules for the Department of Transportation, not  
26 for the Arizona Corporation Commission. To request rehearing of a Commission Decision, an  
27 "Application" must be made within 20 days of the entry of the Decision pursuant to A.R.S.  
28 §40.253 and A.A.C. R14-3-111. Decision No. 75616 was issued on June 30, 2016, and the  
29 deadline for rehearing pursuant to the correct Statute and Rule has now passed. This is yet  
30 another reason to reject Utility's Motion.

1 **IV Conclusion**

2 For the reasons stated above, the Commission should not grant rehearing, overrule its top  
3 legal employees, destroy Swing First, and ruin Johnson Ranch property values.

4 RESPECTFULLY SUBMITTED on July 27, 2016.

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7  
8 Craig A. Marks  
9 Craig A. Marks, PLC  
10 10645 N. Tatum Blvd., Ste. 200-676  
11 Phoenix, Arizona 85028  
12 (480) 367-1956 (Direct)  
13 (480) 304-4821 (Fax)  
14 Craig.Marks@azbar.org  
15 Attorney for Swing First Golf LLC  
16

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Docket Control  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, Arizona 85007

Copies **mailed**  
on July 27, 2016, to:

Jeffery W. Crockett  
Crockett Law Group PLLC  
2198 E. Camelback Road, Suite 305  
Phoenix, Arizona 85016-4747

Thomas K. Irvine  
ASU Alumni Law Group  
Two North Central, Suite 1600  
Phoenix, Arizona 85004

Robin Mitchell  
Legal Division  
Arizona Corporation Commission  
1200 W. Washington  
Phoenix, AZ 85007