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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

COMMISSIONERS

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AZ CORP COMMISSION
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DOUG LITTLE, Chairman
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SEP 16 2016

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DOCKETED BY *JK*

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

DOCKET NO. WS-02987A-16-0017

REPLY IN SUPPORT OF MOTION
FOR SANCTIONS

1 Swing First Golf, LLC (“Swing First”) hereby submits the following Reply in Support of
2 Motion for Sanctions.

3 On September 12, 2016, Johnson Utilities LLC (“Utility”) submitted its “Response to
4 Swing First Golf’s Motion for Sanctions and Johnson Utilities’ Request for Rule 11 Sanctions”
5 (“Response”). Utility’s defiant Response ignores the evidence, provides misleading statistics
6 and misstates Arizona and Commission law.

- 7 • Utility simply ignored the photographic evidence of the golf course lake’s low level.
- 8 • Utility totally failed to explain why it deliberately reduced effluent deliveries to its
- 9 irrigation customers by alleged testing during a peak month of Arizona’s scorching
- 10 summer.
- 11 • Utility never explained why it did not alert its effluent customers about the alleged
- 12 testing.
- 13 • Utility never explained why it did not provide alternative water supplies to make up
- 14 for the effluent allegedly diverted for testing.
- 15 • Utility’s water-delivery statistics were designed to mislead the Commission.
- 16 • Utility failed to apologize for its misbehavior and violations.
- 17 • Swing First’s requested penalties are consistent with Arizona law and Commission
- 18 precedent.

- 1 • The Commission has no authority to fine complainants under Rule 11.

2 **I Utility Ignored Swing First's Photographic Evidence.**

3 In its Motion for Sanctions, Swing First included a clear, color photograph of the golf
4 course lake taken late on August 25, 2016. If a picture is worth a thousand words, this picture is
5 worth more than all the words in Utility's Response.¹ Water levels were declining to dangerous
6 levels. The only way to prevent further declines would have been to stop watering portions of
7 the golf course. Swing First had no choice but to escalate the issue to its attorney for resolution.

8 **II Utility deliberately reduced effluent deliveries during the hottest time of the year.**

9 Utility never suggests that it was required to conduct the alleged recharge testing during
10 the peak of summer heat. Nor does it offer any operational justification for diverting effluent for
11 testing purposes in mid-August. Utility simply wanted to maximize water credits as soon as
12 possible, with not concern whatsoever about the consequences for its customers.

13 **III Utility never alerted its irrigation customers about the planned testing**

14 If Utility was actually forced to conduct recharge testing at a time when effluent was in
15 short supply, it had a duty to notify its effluent customers of the forthcoming testing, the
16 expected duration of the testing, and the potential effects on effluent deliveries. Yet no notice
17 was ever given.

18 Further, Utility continued to hide the alleged reason for its failure to deliver sufficient
19 effluent. Utility provides self-serving versions of four conversations between Utility employees
20 and Swing First employees. But nowhere does Utility report that it provided any information
21 whatsoever about the alleged recharge testing during any of these conversations. The first that
22 anyone heard about the alleged testing was in Mr. Crockett's referenced email.

23 **IV Utility could have delivered groundwater to replace effluent diverted for testing**

24 Decision 75616 provided Utility the option of delivering non-effluent (groundwater) to
25 Swing First in place of effluent. Utility does not explain why it did not choose this option. If

¹ "Who you gonna believe, me or your own eyes?" Chico Marx (impersonating Groucho), in *Duck Soup*.

Utility was recharging effluent it was generating credits equal to the amount recharged. These credits would have offset any charges for temporary groundwater deliveries, which should have made Utility whole. Instead, Utility chose to damage its irrigation customers and then profit from the credits it received from the effluent recharge.

V Utility deliberately misleads the Commission.

Utility presented monthly delivery statistics in a misleading effort to convince the Commission that it did not flout the Commission’s order.² These statistics are irrelevant. Grass is not watered once a month; in the summer it must be watered daily.

The following table presents actual daily deliveries for the two-week period from August 18 to August 31 for the last three years. The two-week period starts the day before Utility admits that Swing First contacted Utility to request more effluent. Utility admits that it promised to suspend testing late in the day of August 25, but the data show that it took a couple of days, until August 27, for deliveries to begin to refill the golf-course lake.

Date	Effluent Deliveries (Gallons)		2015 Effluent Deliveries (Gallons)		2015 Effluent Deliveries (Gallons)
18-Aug	9,000		564,000		1,054,000
19-Aug	310,000		561,000		117,000
20-Aug	332,000		1,081,000		360,000
21-Aug	336,000		0		208,000
22-Aug	613,000		286,000		904,000
23-Aug	408,000		553,000		181,000
24-Aug	208,000		623,000		388,000
25-Aug	418,000		1,298,000		1,059,000
26-Aug	489,000		560,000		313,000
27-Aug	534,000	10-day Total	3,657,000	990,000 10-day Total	6,516,000
28-Aug	1,239,000			676,000	
29-Aug	1,048,000			0	
30-Aug	912,000			257,000	
31-Aug	586,000	4-day Total	3,785,000	15,000 4-day Total	948,000
					0 4-day Total
					1,311,000
	10-Day Avg. (8/18 - 8/27)		365,700		651,600
	4-Day Avg. (8/28 - 8/31)		946,250		237,000
					508,400
					327,750

The data show that for this ten-day period, Utility delivered just 3,657,000 gallons of effluent, only one-half of comparable effluent deliveries in 2015 and approximately two-thirds of 2014 effluent deliveries. Then when confronted with its failure to comply with Decision No. 75616, Utility frantically delivered a million gallons a day for four days, more than it had

² “There are three kinds of lies: lies, damned lies and statistics.” Mark Twain citing Benjamin Disraeli.

1 delivered during the previous ten days. Only this subterfuge allowed Utility to mislead the
2 Commission by stating:

3 The facts are very clear that Johnson Utilities delivered effluent to SFG during the
4 month of August which exceed the quantities historically delivered.

5 (Response at 5:8-9.) By this logic, Utility would have fully complied with Decision No. 75616 if
6 it had delivered no effluent for 28 days, killed off the golf-course turf, and then delivered 15
7 million gallons during the last three days of the month.

8 **VI Swing First's requested penalties are consistent with Arizona law and Commission**
9 **precedent.**

10 Utility claims that the Commission cannot impose daily fines. Commission precedent
11 says otherwise. This very issue was decided in *Arizona Corporation Comm'n vs. Qwest Corp.*,
12 Decision No. 66949, dated April 30, 2004, (Docket No. T-0105 1B-02-0871 et. al.) The
13 Commission rebutted Qwest's claim that the Constitution would not allow the Commission to
14 impose Staff's recommendation of two separate fines of \$750 per day for 126 days (for a total of
15 \$189,000).

16 Article 15, Section 16 of the Arizona Constitution provides that:

17 If any public service corporation shall violate any of the rules, regulations,
18 orders, or decisions of the Corporation Commission such corporation shall forfeit
19 and pay to the State not less than one hundred nor more than five thousand dollars
20 *for each such violation*, to be recovered before any court of competent
21 jurisdiction. (emphasis added in original)

22 Qwest would have us read the italicized words of Section 16 as precluding a
23 finding that each day a violation is outstanding constitutes a separate violation.
24 The language of Article 15, Section 16 is not as restrictive as Qwest argues. It
25 does not preclude finding that a separate violation can occur for each day the
26 corporation is not in compliance with a rule, regulation or order of the
27 Commission. Neither do we believe that the legislative history of A.R.S. § 40-425
28 necessarily allows any conclusion to be made about the legislative intent behind
29 A.R.S. § 40-424, the statute at issue here. In any case, our interpretation of A.R.S.
30 § 40-424 has never been overruled. As a practical matter, interpreting the statute
31 as Qwest argues means that once a public service corporation fails to comply with
32 a Commission order or violates a statute, there is no incentive to comply because
33 the greatest a penalty would be is \$ 5,000 whether the violation lasted one day or
34 one thousand days.

1 Decision No. 66949 at 90-91. The same logic applies here. Utility would have the Commission
2 believe that it could purchase a get-out-of-jail-free card for no more than \$5,000 and then be free
3 to scorch Swing First's golf course.³

4 As to the requested daily amount, Utility's deliberate effluent withholding also affected
5 the San Tan Heights Homeowners Association, Utility's other customer that receives effluent
6 from the Santan Wastewater Treatment Plant. To account for two injured customers, twice the
7 \$5,000 per day Constitutional provision is exactly \$10,000 per day. A much larger amount could
8 be justified. The Constitution was approved in 1912, when \$5,000 per day would significantly
9 deter bad behavior. A \$5,000 fine in 1912 is equivalent to almost \$124,000 today.⁴

10 **VII Utility's unapologetic behavior further supports fines**

11 Utility could have told Swing First that it was sorry. It could have said that it should not
12 have scheduled testing during the heat of summer. It could have apologized for not notifying
13 Swing First of the impending testing. It could have admitted that it was poor customer service to
14 ignore Swing First's requests for more water.

15 Utility could have told the Commission that its violation of Decision No. 75616 was
16 inadvertent. It could have said that it takes the Commission's Decisions very seriously and that
17 it regrets the inadvertent violation.

18 But Utility did none of these things. Instead, Utility denied its obvious violations,
19 submitted misleading data, and attacked Swing First and its counsel. This unapologetic defiance
20 further justifies significant fines.

³ The Qwest case is not unique. See *In The Matter of the Application of the Commission on Its Own Motion Investigating the Failure of Carl Harvey Dba Golden Corridor Water Company, to Comply with Commission Rules and Regulations*, Decision No. 69723, dated July 30, 2007, where the Commission imposed two separate fines of \$100 per day for 680 days totaling \$136,000, and *Arizona Corporation Comm'n vs. Sabrosa Water Co.*, Decision No. 63136, dated November 15, 2000, where the Commission imposed an immediate fine of \$5,000, plus \$1,000 per day that the violations continued.

⁴ The calculation was made at <http://www.westegg.com/inflation/>.

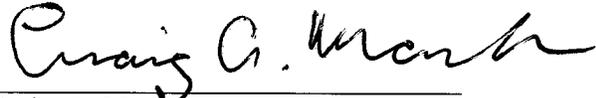
1 **VIII The Commission has no authority to fine complainants under Rule 11.**

2 Rule 11 of the Rules of Civil Procedure was approved by the Arizona Supreme Court to
3 apply to the Arizona Superior Courts. The Supreme Court has no jurisdiction to authorize
4 Commission sanctions and Utility cites no cases where the Commission has authorized Rule 11
5 sanctions. Further, Complainant has showed overwhelming support for its good-faith motion.
6 Finally, if Rule 11 did apply, Utility's attorneys are the ones that should be sanctioned for
7 submitting misleading data and failing to cite controlling Commission precedent.

8 **Requested Relief**

9 Swing First renews its request that the Commission fine Utility for its deliberate flouting
10 of the Commission's Order and for its callous (and now unapologetic) disregard for its
11 customer's wellbeing. Utility has offered no remotely compelling reasons why fines should not
12 imposed, and its defiant, misleading Response provides even more reasons for the Commission
13 to impose the maximum fines allowed by law. Utility must be sent a message.

14 RESPECTFULLY SUBMITTED on September 16, 2016.

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