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BEFORE THE ARIZONA CORPORATION COMMISSION

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ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MIKE GLEASON, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

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

DOCKET NO. WS-02987A-08-0049

**MOTION FOR SUMMARY
JUDGMENT**

(Oral Argument Requested)

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Pursuant to A.A.C. R14-3-106 and Rule 56, Ariz. R. Civ. P., Johnson Utilities LLC, doing business as Johnson Utilities Company ("Johnson Utilities" or the "Company") requests that the Arizona Corporation Commission ("Commission") enter its order granting the Motion for Summary Judgment of Johnson Utilities on the February 5, 2008, Amended Formal Complaint ("Complaint") of Swing First Golf LLC ("Swing First Golf" or "SFG") and dismissing the Amended Complaint as a matter of law. Additionally, Johnson Utilities requests that the Commission grant summary judgment in favor of Johnson Utilities on its counterclaim. This Motion for Summary Judgment ("Motion") is supported by the Memorandum of Points and Authorities set forth below, the attached Statement of Facts ("SOF") and the Affidavit of Brian Tompsett, Executive Vice President of Johnson Utilities.

Arizona Corporation Commission

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1 Johnson Utilities will not disconnect Swing First Golf's service during the
2 pendency of this proceeding. Therefore, Claim A above is moot. With respect to Swing
3 First Golf's last claim regarding an apology, Swing First Golf has failed to state a claim
4 upon which relief can be granted. Accordingly, Claim D should also be decided as a
5 matter of law pursuant to this Motion.

6 Finally, once the Commission determines that Johnson Utilities has charged Swing
7 First Golf in accordance with its Commission-approved tariffs, it may decide Johnson
8 Utilities' counterclaim as a matter of law and find that Swing First Golf is delinquent on
9 its account and should pay Johnson Utilities the amount of \$106,086.52, plus interest
10 from the date of the decision.

11 MEMORANDUM OF POINTS AND AUTHORITIES

12 I. THE LEGAL STANDARD: WHERE THERE ARE NO ISSUES OF
13 MATERIAL FACT IN DISPUTE, THE AMENDED COMPLAINT
14 SHOULD BE DECIDED AS A MATTER OF LAW AND THE
15 MOTION FOR SUMMARY JUDGMENT GRANTED.

16 Generally, summary judgment "shall be rendered forthwith if the pleadings,
17 deposition, answers to interrogatories, and admissions on file, together with the
18 affidavits, if any, show that there is no genuine issue as to any material fact and that the
19 moving party is entitled to a judgment as a matter of law." Ariz. R. Civ.P. 56(c)(1); Ariz.
20 Admin. Code R14-23-101(A). The Commission may grant summary judgment "if the
21 facts produced in support of the claim or defense have so little probative value, given the
22 quantum of evidence required, that reasonable people could not agree with the conclusion
23 advanced by the proponent of the claim or defense." *Orme School v. Reeves*, 166 Ariz.
24 301, 309, 802 P.2d 1000, 1008 (1990) quoted in *Chantel v. Mohave Electric Coop.*,
25 Docket No. E-01750A-04-0929, Decision 68592 at ¶ 51 (2006) (hereinafter, "Decision
26 68592"). "In applying the standard of review, '[t]he evidence of the non-movant is to be

1 believed, and all justifiable inferences are to be drawn in his favor.” Decision 68592
2 (quoting *Orme*, 166 Ariz. at 309-10, 802 P.2d at 1008-09). If after applying this
3 standard, the Commission determines that there are no issues of material fact in dispute, it
4 may make its determination as a matter of law without the necessity of conducting an
5 evidentiary hearing.

6 **II. FACTUAL BACKGROUND.**

7 Swing First Golf is the owner of The Golf Club at Johnson Ranch, a golf course
8 located within the Certificate of Convenience and Necessity ("CC&N") of Johnson
9 Utilities for water and wastewater service in Pinal County, Arizona.² Swing First Golf
10 acquired The Golf Club at Johnson Ranch on or about November 8, 2004, from Johnson
11 Ranch Holdings, L.L.C. ("Johnson Ranch Holdings").³ Johnson Utilities provided water
12 and wastewater services to The Golf Club at Johnson Ranch when Johnson Ranch
13 Holdings owned the golf course, and the Company has continued to provide water and
14 wastewater services to the golf course since Swing First Golf acquired the golf course in
15 2004. (SOF ¶ 7). Specifically, Johnson Utilities supplies Non-Potable Central Arizona
16 Project ("CAP") water and effluent to Swing First Golf to water the golf course pursuant
17 to tariffs filed with and approved by the Commission. (SOF ¶ 8). Johnson Utilities also
18 provides potable water and/or wastewater service to Swing First Golf's club house, pro
19 shop, hole 15 restroom facility, and maintenance facility. (SOF ¶ 8). Currently, Swing
20 First Golf has five accounts with Johnson Utilities, as follows:⁴

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25 ² Complaint at page 1, lines 13-14; page 2, lines 15-16; (SOF ¶¶ 1, 2, 4 and 6).

26 ³ Complaint at page 2, lines 15-16.

⁴ SOF ¶ 8.

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SWING FIRST GOLF ACCOUNTS		
ACCOUNT NO.	ACCOUNT ADDRESS	ACCOUNT TYPE
00102340-02	Club House & Pro Shop	Potable Water and Sewer
00102350-02	Maintenance Building	Potable Water and Sewer
00120917-01	Hole 15 Restroom	Potable Water
00119200-01 ⁵ 00119200-02	Golf Course	Central Arizona Project Non-Potable Water
00120362-01 ⁶ 00120362-02	Golf Course	Effluent

There are two primary bases underlying Swing First Golf's allegations in the Complaint that it has been overcharged for effluent and CAP water delivered by Johnson Utilities to SFG's golf course. First, Swing First Golf alleges that under an Agreement Regarding Utility Service between Johnson Utilities and SFG's predecessor, Johnson Ranch Holdings, Johnson Utilities is obligated to charge the \$0.62-per-thousand-gallons tariff rate for effluent regardless of whether the water delivered to SFG is effluent, CAP water or groundwater.⁷ Second, Swing First Golf alleges that it is entitled to a credit of \$50,056.50 from Johnson Utilities for services allegedly performed by SFG for the Golf Club at Oasis.⁸ The relevant facts underlying each of these allegations are set forth below.

⁵ The original account number was 00119200-01, but a new account number 00119200-02 was assigned in December 2006.

⁶ The original account number was 00120362-01, but a new account number 00120362-02 was assigned in December 2006.

⁷ Complaint at page 2, lines 19-28; SOF ¶ 2.

⁸ Complaint at page 4, lines 6-14; SOF ¶ 15.

1 **A. Agreement Regarding Utility Service.**

2 On or about September 17, 1999, Johnson Utilities and Johnson Ranch Holdings
3 entered into an Agreement Regarding Utility Service ("Utility Service Agreement" or
4 "Agreement") which set forth certain commitments, representations and warranties
5 regarding the provision of water and wastewater services within the Johnson Ranch
6 master planned development.⁹ The Golf Club at Johnson Ranch is one of two golf
7 courses located within Johnson Ranch. Swing First Golf was not an original party to the
8 Utility Service Agreement, but rather a successor-in-interest to Johnson Ranch Holdings
9 five years after the Agreement was signed.¹⁰ The Utility Service Agreement did not
10 require Commission approval, and it was not submitted to the Commission. (SOF ¶ 3).

11 Johnson Utilities supplies both effluent and CAP water to Swing First Golf's golf
12 course. (SOF ¶ 8). Effluent and CAP water are delivered to Swing First Golf through
13 two separate underground piped systems and measured through two separate meters.
14 (SOF ¶ 10). Johnson Utilities' tariff rate for effluent is \$0.62 per thousand gallons and its
15 tariff rate for CAP water is \$0.83 per thousand gallons. (SOF ¶ 9). Swing First Golf has
16 alleged in its Complaint that under the Utility Service Agreement, Johnson Utilities is
17 required to charge the tariff rate for effluent regardless of whether the Company delivers
18 effluent, CAP water or groundwater.¹¹ The specific provision of the Utility Service
19 Agreement at issue is Section 9, which provides in relevant part as follows:

20 9. Delivery of Effluent.

21 (a) Right to Purchase Effluent. Utility hereby grants Holdings and its
22 successors and assigns the right to purchase the first effluent
23 generated by Utility's treatment of wastewater collected within the
24 geographic area covered by Utility's Certificate, or Exchange Water
 (as hereinafter defined) in an amount required to irrigate the Johnson
 Ranch Golf Courses. The quantity of effluent that may be purchased

25 ⁹ Complaint at page 1, lines 11-12; SOF ¶ 2.

26 ¹⁰ Complaint at page 2, lines 15-16; SOF ¶¶ 2 and 6.

¹¹ Complaint at page 2, lines 19-28.

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annually with respect to the Johnson Ranch Golf Courses shall not exceed the annual allotments for turf-irrigation established for each golf course by the Arizona Department of Water Resources.

- (b) Purchase Price for Effluent. The purchase price for effluent sold to Holdings hereunder shall be as determined by the Commission.
- (c) Exchange Water Deliveries. Utility reserves the right to deliver the quantities of water that Holdings elects to purchase pursuant to Paragraph 9(a) from any of the following sources: (i) effluent from any wastewater treatment plant of Utility, (ii) any surface water available to Utility, or (iii) groundwater (the foregoing items (i) (ii) and (iii) being hereinafter defined as "Exchange Water"¹²). Election of such sources shall be at the sole discretion of Utility.

Since Swing First Golf purchased the golf course in November 2004, Johnson Utilities has rendered invoices to SFG for CAP water and effluent based upon the type of water delivered and the rate for that water specified in the Company's tariffs. (SOF ¶¶ 7, 8 and 9). In other words, when Johnson Utilities delivers CAP water, it applies the tariff rate for CAP water, and when it delivers effluent, it applies the rate for effluent. From time to time, errors occurred in the rates charged by Johnson Utilities for CAP water and effluent delivered to Swing First Golf, but these errors have been corrected by Johnson Utilities based upon communications with Swing First Golf and proper credits have been applied. (SOF ¶¶ 11-12). Thus, the question to be addressed in this case is whether Swing First Golf is entitled to pay the lower \$0.62 effluent rate for all water delivered by Johnson Utilities regardless of whether SFG receives effluent, CAP water or even groundwater. To decide that question, the Commission must determine whether the Utility Service Agreement somehow trumps Johnson Utilities' Commission-approved tariffs. This issue is appropriate for resolution based upon a motion for summary judgment, and for the reasons set forth further below, Johnson Utilities is entitled to a decision in its favor on the issue.

¹² Complaint at Exhibit A.

1 **B. Credit for Services Allegedly Provided to The Club at Oasis.**

2 The second primary basis underlying Swing First Golf's allegations that it has been
3 overcharged by Johnson Utilities is that Swing First Golf is entitled to a credit of
4 \$50,056.50 on its bills from Johnson Utilities for golf course marketing and management
5 services allegedly provided by SFG to Club at Oasis, LLC ("Club at Oasis") pursuant to
6 an unsigned letter of understanding ("LOU") purportedly between
7 Swing First Golf and Club at Oasis.¹³ Johnson Utilities is not identified as a party in the
8 unsigned LOU, nor is Johnson Utilities mentioned anywhere in the unsigned LOU. (SOF
9 ¶ 15). Moreover, neither of the parties identified in the LOU—Swing First Golf and Club
10 at Oasis—are public service corporations subject to the jurisdiction of the Commission.¹⁴
11 Thus, this issue is also appropriate for resolution based upon a motion for summary
12 judgment, and for the reasons set forth below, Johnson Utilities is entitled to a decision in
13 its favor on the issue.

14 **III. JOHNSON UTILITIES HAS NOT OVERCHARGED SWING FIRST**
15 **GOLF FOR EFFLUENT OR CAP WATER DELIVERED TO THE**
16 **GOLF CLUB AT JOHNSON RANCH BUT HAS CHARGED THE**
17 **RATES AND CHARGES AUTHORIZED IN THE COMPANY'S**
18 **COMMISSION-APPROVED TARIFFS.**

19 **A. Johnson Utilities must charge the rates and charges set forth in**
20 **its Commission-approved tariffs, and the Commission has not**
21 **authorized any exceptions to those rates and charges.**

22 Article XV, Section 3, of the Arizona Constitution provides as follows:

23 The corporation commission shall have full power to, and shall,
24 prescribe just and reasonable classifications to be used and just and
25 reasonable rates and charges to be made and collected, by public
26 service corporations within the state for service rendered therein, and
 make reasonable rules, regulations, and orders, by which such
 corporations shall be governed in the transaction of business within
 the state, and may prescribe the forms of contracts and the systems of

¹³ Complaint at page 4, lines 6-14; SOF ¶ 15).

¹⁴ See Commission public records of public service corporations.

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keeping accounts to be used by such corporations in transacting such business....

“More specifically, [the Commission] ‘has full and exclusive power in the field of prescribing rates which cannot be interfered with by the courts, the legislature or the executive branch of state government.’” *Qwest Corp. v. Kelly*, 204 Ariz. 25, 31, 59 P.3d 789, 795 (Ariz. Ct. App. 2002). “No public service corporation shall raise any rate, fare, toll, rental or charge, or alter any classification, contract, practice, rule or regulation to result in any increase thereof, except upon a showing before the commission and a finding by the commission that an increase is justified.” A.R.S. 40-250(A); *see generally, Scates v. Arizona Corp. Comm’n.*, 118 Ariz. 531, 578 P.2d 612 (Ariz. Ct. App. 1978).

Johnson Utilities' rate for effluent is \$0.62 per thousand gallons delivered as set forth in Part Three, Section I of the Company's wastewater service tariff, and the monthly charge for a 6-inch meter is \$900. (SOF ¶ 9). Johnson Utilities' rate for CAP water is \$0.83 per thousand gallons delivered as determined in accordance with Part One, Section I.F.4, of the Company's water service tariff, and the monthly charge for a 6-inch meter is \$900. (SOF ¶ 9). Johnson Utilities has charged Swing First Golf the tariffed effluent rate and monthly meter charge for all effluent delivered and the tariffed non-potable CAP water rate and meter charge for all CAP water delivered. (SOF ¶¶ 9-13). The Commission has not authorized any exceptions to these rates and charges set forth in the Company's tariffs, and the Company is legally bound to charge the Commission-approved rates and charges.

Swing First Golf apparently believes that the Utility Service Agreement is a "special contract" which supersedes Johnson Utilities' Commission-approved tariffs. However, there are two fatal problems with that argument in this complaint case. First, Johnson Utilities strongly disagrees that the Utility Service Agreement supports the

1 assertion that SFG is entitled to pay the \$0.62 effluent rate for all water delivered by
2 Johnson Utilities, regardless of whether the Company delivers effluent, CAP water or
3 groundwater.¹⁵ Resolving the party's disagreement over the Utility Service Agreement
4 requires an interpretation of the contract, and for the reasons discussed below, the
5 Commission does not have the authority or jurisdiction to interpret contracts. Thus,
6 whether Swing First Golf has a valid claim is an issue to be decided by the courts and not
7 the Commission. Johnson Utilities notes as an aside that Swing First Golf was not an
8 original party to the Agreement, so SFG cannot know the intent behind the Agreement.
9 (SOF ¶¶ 2, 6). Johnson Utilities, on the other hand, was an original party to the
10 Agreement. (SOF ¶ 2).

11 Second, the Utility Service Agreement was not submitted to the Commission for
12 approval as an exception or modification of the Company's approved rates and charges.
13 (SOF ¶ 3). Special contracts require Commission approval. Thus, the Utility Service
14 Agreement cannot be a special contract between the parties. Johnson Utilities has
15 properly charged Swing First Golf under the Company's Commission-approved rates and
16 charges. (SOF ¶¶ 8-13).

17 In this complaint proceeding, the Commission should rule in favor of Johnson
18 Utilities that the rates and charges applicable to effluent and CAP water delivered to
19 Swing First Golf are the rates and charges for each type of service that are set forth the
20 Company's approved tariffs.

21 **B. Swing First Golf has raised issues of contract interpretation,**
22 **which is outside the Commission's jurisdiction.**

23 The arguments raised by Swing First Golf necessarily require an interpretation of
24 the language and intent of the Utility Service Agreement and the Commission does not
25 have the jurisdiction or authority to interpret contracts. Rather, that authority lies

26 ¹⁵ Complaint at page 2, lines 19-28.

1 exclusively with the courts. The Arizona Constitution does not “confer upon the
2 commission the jurisdiction to pass upon the construction and validity of contracts.”
3 *Trico Electric Coop. v. Ralston*, 67 Ariz. 358, 363, 196 P.2d 470, 473 (1948); *General*
4 *Cable Corp. v. Citizens Utilities Co.*, 27 Ariz. Ct. App. 381, 385, 555 P.2d 350, 354
5 (Ariz. Ct. App. 1976) (holding that “the construction and interpretation to be given to
6 legal rights under a contract resides solely with the courts and not with the corporation
7 commission.”). Indeed, the Commission only has the authority expressly granted by the
8 Arizona Constitution. *Trico*, 67 Ariz. at 362-63, 196 P.2d 472-73 (citing *Arizona Corp.*
9 *Comm’n. v. Tucson Gas, Elec. L. & P. Co.*, 67 Ariz. 12, 189 P.2d 907; *Commercial Life*
10 *Ins. Co. v. Wright*, 64 Ariz. 129, 166 P.2d 943, 949). That express authority does not
11 include contract interpretation, which is “[c]learly ... a judicial function and the courts,
12 not the corporation commission, have the jurisdiction to determine the validity [of a
13 contract],” even if the validity of that contract “must have the sanction and approval of
14 the [Commission] before it becomes effective.” *Trico*, 67 Ariz. at 365, 196 P.2d at 474.

15 In *Trico*, the plaintiffs—utility customers—brought an action seeking a
16 declaratory judgment that an option contract for the purchase of utility infrastructure was
17 illegal. *Trico*, 67 Ariz. at 360, 196 P.2d at 471. The Arizona Supreme Court concluded
18 that the Commission lacked jurisdiction to determine the validity of the option contract
19 under the Arizona Constitution, even if the contract was subject to later review by the
20 Commission. *Id.* at 365, 196 P.2d at 474. Similarly, in *General Cable*, the plaintiff
21 customer filed a complaint with the Commission seeking relief from allegedly
22 discriminatory rates charged by defendant utility company. *General Cable*, 27 Ariz.
23 App. at 385, 555 P.2d at 354. The court in that case agreed with the Commission and the
24 Supreme Court’s ruling in *Trico*, finding that the Commission’s dismissal of the
25 complaint based upon its lack of jurisdiction to construe contractual rights was
26 appropriate. *Id.*

1 This case, as in *General Cable*, involves a formal complaint by a customer
2 alleging improper rate charges by a utility. Similar to *General Cable*, Swing First Golf is
3 asking the Commission to construe the terms and contractual rights of the parties under
4 the Utility Service Agreement, which is attached to the Complaint. As both *Trico* and
5 *General Cable* illustrate, the Commission is without jurisdiction to make such a
6 determination. Therefore, the Complaint fails to state a cause of action, as the contractual
7 issues are only appropriate before the court.

8 In fact, an action between Johnson Utilities and Swing First Golf is pending before
9 the Maricopa County Superior Court in Docket CV2008-000141. Thus, Swing First Golf
10 has a ready forum to address its allegations with regard to the Utility Service Agreement
11 if it believes Johnson Utilities has breached the Utility Service Agreement.

12 C. **Johnson Utilities has charged Swing First Golf consistent with the**
13 **terms of the Utility Service Agreement and its approved tariffs.**

14 Notwithstanding Swing First Golf's arguments to the contrary, Johnson Utilities'
15 charges for CAP water and effluent have been consistent with the Utility Service
16 Agreement. Section 9(c) of the Agreement states that:

17 [Johnson Utilities] reserves the right to deliver the quantities of water that
18 [Swing First Golf] elects to purchase pursuant to Paragraph 9(a) **from any**
19 **of the following sources:** (i) effluent from any wastewater treatment plant
20 of [Johnson Utilities]; (ii) any surface water available to [Johnson Utilities];
21 or (iii) groundwater (the foregoing items (i), (ii) and (iii) being hereinafter
22 referred to as "Exchange Water"). **Election of such sources shall be at the**
23 **sole discretion of [Johnson Utilities].** (emphasis added). (SOF ¶ 2).

24 Despite Swing First Golf's mischaracterization of Paragraph 9(c) of the Utility
25 Service Agreement,¹⁶ nowhere in the Agreement does it state that if Johnson Utilities
26 elects in its sole discretion to provide "Exchange Water," that the Company would charge
the effluent rate regardless of the type of water delivered. (*Id.*). Further, the very

¹⁶ Complaint at page 2, lines 25-28.

1 definition of "Exchange Water" includes effluent, and is clearly a term used to describe
2 the sources of water that may be delivered pursuant to Paragraph 9(a) of the Agreement.

3 Johnson Utilities has "sole discretion" under Section 9(c) of the Utility Service
4 Agreement to deliver effluent, CAP water or groundwater to Swing First Golf. For
5 effluent that was delivered to Swing First Golf, Johnson Utilities charged the effluent rate
6 of \$0.62 per thousand gallons as set forth in the Company's Commission-approved tariff,
7 and consistent with Paragraph 9(b) of the Agreement. (SOF ¶ 8-13). For CAP water that
8 was delivered to Swing First Golf, Johnson Utilities charged the CAP rate of \$0.83 per
9 thousand gallons as set forth in its Commission-approved tariff, and consistent with the
10 Agreement. (*Id.*). Johnson Utilities actions are wholly consistent with its tariffs and with
11 the Utility Service Agreement.

12 **D. Johnson Utilities has corrected prior billing errors.**

13 Swing First Golf alleges in its Complaint that it was charged CAP water rates for
14 effluent delivered by Johnson Utilities and that the Company made other billing errors on
15 invoices.¹⁷ Although some errors did error on Swing First Golf invoices for effluent and
16 CAP water, these errors have all been corrected. (SOF ¶ 11-12). With regard to Account
17 No. 00119200-01 (CAP water), Johnson Utilities provided account credits of \$1,260.43
18 in September 2007 and \$43,358.92 in December 2007. (*Id.*). With regard Account No.
19 00119200-02 (CAP water), Johnson Utilities provided an account credit of \$8,382.34 in
20 December 2007. (*Id.*). With regard to Account No. 00120362-01 (effluent), Johnson
21 Utilities provided account credits of \$1,938.86 in September 2007 and \$45,892.94 in
22 December 2007. (*Id.*). The credits above also reflect appropriate credits for associated
23 transaction privilege taxes and so-called superfund taxes. (*Id.*). Based upon these
24 credits, the account balances for Swing First Golf are correct, subject only to the SFG's
25 assertions that (i) it should be charged effluent rates for CAP water or groundwater under

26 ¹⁷ Complaint at page 2, lines 19-28.

1 the Utility Service Agreement; (ii) it is entitled to a credit of \$50,056.50 for services it
2 allegedly performed on behalf of Club at Oasis, as discussed below; and (iii) it is not
3 subject to the WQARF Tax (or Superfund tax), as discussed below.

4 **IV. JOHNSON UTILITIES HAS NOT OVERCHARGED SWING FIRST**
5 **GOLF FOR MONTHLY MINIMUMS AND HAS CHARGED IN**
6 **ACCORDANCE WITH ITS COMMISSION- APPROVED TARIFFS.**

7 Swing First Golf alleges that Johnson Utilities has charged for two meters instead
8 of one, and that only one meter is necessary.¹⁸ Swing First Golf states in its Complaint
9 that:

10 Utility has the option to deliver non-potable water from different services,
11 but the Utility Service Agreement requires that all deliveries should be
12 priced at the effluent rate of \$0.62 per thousand gallons. Thus, Utility
13 needs only one meter to measure deliveries of non-potable water to Swing
14 First.¹⁹

15 Pursuant to Johnson Utilities' tariffs, a monthly meter charge is applicable for each
16 type of service, and this includes both effluent service and CAP water service. (SOF ¶
17 10). CAP water and effluent are delivered to Swing First Golf through two entirely
18 separate pipeline conveyance systems, with each system having its own meter to measure
19 the effluent or the CAP water. (*Id.*).

20 Arizona Administrative Code R14-2-408.B.1 provides that "all water delivered by
21 a utility shall be billed upon the basis of metered volume sales...." Because both effluent
22 and CAP water are separate and distinct tariffed services authorized at different rates,
23 Johnson Utilities is legally required to separately meter for each of the services provided
24 to Swing First Golf. Johnson Utilities' Commission-approved tariffs require a monthly
25 minimum charge for each meter. (*Id.*). Swing First Golf's claim that Johnson Utilities
26 should be charging for one three-inch effluent meter instead of two six inch meters is

¹⁸ Complaint at page 3, lines 13-20.

¹⁹ Complaint at page 3, lines 13-16.

1 unfounded. Accordingly, Swing First Golf's claim that it has been overcharged by
2 approximately \$45,000 is wholly without merit.

3 Johnson Utilities and Swing First Golf agree that the Company is currently
4 charging Swing First Golf two separate meter charges for effluent and CAP water. The
5 issue of whether Johnson Utilities is doing so in accordance with its tariff and
6 Commission regulations should be decided as a matter of law pursuant to this Motion for
7 Summary Judgment.²⁰

8 **V. SWING FIRST GOLF IS NOT ENTITLED TO A BILLING CREDIT**
9 **FOR ALLEGED MARKETING AND MANAGEMENT SERVICES**
10 **PROVIDED TO THE CLUB AT OASIS.**

11 Swing First Golf alleges in the Complaint that it entered into a "management
12 arrangement" with Johnson International (not Johnson Utilities) to manage the Golf Club
13 at Oasis in exchange for a water credit of 150 million gallons per year to be provided by
14 Johnson Utilities.²¹ Swing First Golf is further seeking Commission enforcement of that
15 "management arrangement," claiming it is somehow owed a credit of \$50,056.50 by
16 Johnson Utilities.²²

17 **A. Johnson International is not a public service corporation, and is**
18 **therefore outside of the Commission's jurisdiction.**

19 The Commission's authority extends to regulation of public service corporations
20 within the State of Arizona. Ariz. Const. Art. XV, § 3; A.R.S. § 40-202. Public service
21 corporations include "[a]ll corporations other than municipal engaged ... in furnishing
22 water for irrigation, fire protection, or other public purposes." Ariz. Const. Art. XV, § 2.
23 Importantly, the Commission's complaint jurisdiction, as alleged in Swing First Golf's
24 Complaint, is specifically limited to the acts of public service corporations. *See* A.R.S.
25 §§ 40-246(A), 40-248(A). Johnson International is not a public service corporation, and

26 ²⁰ The appropriate amount for the Transaction Privilege Tax is determined by the amount that the
Utility is obligated to charge its customers for water service.

²¹ Complaint at page 4, lines 6-14.

²² Complaint at page 4, lines 6-14.

1 is therefore not within the Commission's jurisdiction. Moreover, the Commission
2 certainly does not have the authority to construe the "arrangement" between two non-
3 public service corporations, Johnson International and Swing First Golf. *See generally,*
4 *Trico*, 67 Ariz. 358, 196 P.2d 470.

5 **B. Even if the Club at Oasis "arrangement" somehow fell within the**
6 **Commission's jurisdiction, it does not constitute a valid and**
7 **enforceable agreement.**

8 A valid contract is formed when there is "a bargain in which there is a
9 manifestation of mutual assent to the exchange and a consideration." RESTATEMENT
10 (SECOND) OF CONTRACTS § 17(1979) *quoted with favor in Hill-Shafer Partnership v.*
11 *Chilson Family Trust*, 165 Ariz. 469, 474, 799 P.2d 810, 815 (1990). Mutual assent is
12 based upon "objective manifestations of assent by the parties." *Hill-Shafer Partnership*,
13 165 Ariz. at 474, 799 P.2d at 815 (citation omitted). It follows that "the policy of the law
14 favors enforcement [of a contract] when *it is clear that the parties intended themselves to*
15 *be bound.*" *AROK Const. Co. v. Indian Const. Services*, 174 Ariz. 291, 297, 848 P.2d
16 870, 876 (Ariz. Ct. App. 1993) (Emphasis added).

17 In the instant case, unlike the requirements of *Hill-Shafer* and *AROK*, there is no
18 objective and clear manifestation that Johnson International and Swing First Golf
19 mutually agreed to a bargained for exchange with regard to managing the golf course at
20 Oasis. Furthermore, there is no evidence that Johnson Utilities entered into the bargain,
21 nor is there evidence of any consideration that Johnson Utilities received in exchange for
22 delivering effluent to Swing First Golf. (SOF ¶ 15).

23 Moreover, as a regulated public service corporation, Johnson Utilities is required
24 to charge the rates set forth in its Commission-approved tariffs. It cannot exchange
25 utility services for in-kind services without prior Commission approval, and the LOU was
26 not even signed, much less submitted to the Commission for approval. Accordingly,
Johnson Utilities properly billed Swing First Golf for all water deliveries to SFG.

1 Finally, whether or not a valid and enforceable agreement actually existed is a
2 legal issue that may only be decided by the Courts. (See the legal analysis in Section
3 III.B above). If Swing First Golf believes that it is entitled to \$50,056.50 for purported
4 services performed, it should bring this claim in the pending Superior Court proceeding.

5 **VI. JOHNSON UTILITIES HAS PROPERLY BILLED THE WQARF**
6 **TAX IN ACCORDANCE WITH ARIZONA LAW.**

7 Johnson Utilities collects from all of its customers a Water Quality Assurance
8 Revolving Fund tax ("WQARF Tax") on water and effluent deliveries. (SOF ¶ 13). The
9 WQARF Tax (or so-called Superfund tax) is levied at the rate of .65 of one cent per one
10 thousand gallons of water and effluent delivered to customers.²³ The taxes collected by
11 Johnson Utilities are remitted to the State of Arizona in accordance with A.R.S. Article
12 42, Chapter 5 (Transaction Privilege and Affiliated Excise Taxes). (*Id.*). Johnson
13 Utilities was correct in charging Swing First Golf its proportionate share of the WQARF
14 Tax.

15 A.R.S. Title 42, Article 7, is entitled "Tax on Water Use." A.R.S. § 42-5302
16 provides:

- 17 A. There is levied and the department shall collect a tax on the business
18 of operating a municipal water delivery system for the purposes
19 prescribed in § 49-282. The tax is levied at the rate of .65 of one cent
20 per one thousand gallons of water delivered to customers, except that
21 water delivered to a customer for resale is exempt from the tax.
- 22 B. The owner or operator of a municipal water delivery system shall pay
23 the tax to the department at the same time as paying the transaction
24 privilege tax under §42-5014. If the system for any reason does not
25 pay transaction privilege tax, the tax imposed by this article is due
26 and payable to the department, and is delinquent if not paid, as
provided in §42-5014, subsection A.

Johnson Utilities operates a municipal water delivery system as defined in A.R.S.
§ 42-5301.2. Accordingly, the Company is obligated to pay the WQARF Tax to the State
of Arizona. The Company's water tariff provides:

²³ See A.R.S. § 42-5302

1 In addition to all other rates and charges authorized herein, the Company
2 shall collect from its customers all applicable sales, transaction, privilege,
3 regulatory or other taxes and assessments as may apply now or in the
4 future, per Rule R14-2-409(D)(5). (Emphasis added).

5 A.A.C. R14-2-409.D.5 provides:

6 In addition to the collection of regular rates, each utility may collect from
7 its customers a proportionate share of any privilege, sales or use tax, or
8 other imposition based on the gross revenues received by the utility.

9 The WQARF Tax is analogous to a transaction privilege or sales tax as it is levied
10 on the total amount of “water delivered to customers” as compared with a utility
11 assessment. However, Swing First Golf argues that the WQARF Tax cannot be passed-
12 through because it is not based on sales revenue.²⁴ In making this assertion, Swing First
13 Golf attempts to draw an analogy to the Commission’s denial of the pass-through of the
14 Central Arizona Groundwater Replenishment District tax (“CAGR Tax”) to water
15 customers, as discussed in Commission Decision 64598 in Docket No. SW-02987A-01-
16 0795 (“the Decision”).²⁵ However, the CAGR Tax is not at all analogous to the
17 WQARF Tax. The CAGR Tax is a fluctuating cost-recovery procedure for a special
18 taxing district established by A.R.S. § 48-3781 that is imposed based on a calculation of a
19 municipal provider’s annual groundwater withdrawals and the fees and expenses of
20 operating the CAGR. It is recalculated and assessed on all municipal providers within
21 the district each year. Moreover, per Decision 64598, the CAGR Tax constitutes an
22 “other imposition based on the gross revenues received by the utility” as set forth in
23 A.A.C. R14-2-608(D)(5). The WQARF Tax is not an imposition based on gross
24 revenues received by Johnson Utilities but falls within the realm of a “sales, transaction
25 or privilege” tax as it is based on the *customer’s* monthly water deliveries. Accordingly,
26 the tax does not have to be based on gross revenues in order for it to be passed through to
customers.²⁶

²⁴ Complaint at page 4, line 23.

²⁵ Complaint at page 5, lines 3-18.

²⁶ It should be noted that the CAGR Tax is a set amount based on an annual assessment. The amount of the WQARF Tax that is obligated to be remitted to the State is determined exclusively

1 Based upon Johnson Utilities' analysis as set forth above, contrasted against
2 Swing First Golf's analysis set forth in the Complaint, there is no issue of material of fact
3 in dispute regarding this claim. The Commission should decide this issue as a matter of
4 law and find that Johnson Utilities has properly charged the WQARF Tax.

5 **VII. THE COMMISSION DOES NOT HAVE JURISDICTION TO ORDER**
6 **GEORGE JOHNSON TO APOLOGIZE TO SWING FIRST GOLF.**

7 Although the Commission has jurisdiction over Johnson Utilities with respect to
8 its utility operations, it does not have the authority to order its member George Johnson to
9 apologize. This is a nonsensical request for relief that should be denied as a matter of law
10 as it fails to state a claim upon which relief can be granted.

11 **VIII. JOHNSON UTILITIES IS ENTITLED TO SUMMARY JUDGMENT**
12 **ON ITS COUNTERCLAIM.**

13 Swing First Golf has an outstanding balance with Johnson Utilities in the amount
14 of \$106,086.52 as of November 30, 2008, including accrued interest and late fees. (SOF
15 ¶ 14). Swing First Golf's basis for withholding payment of the outstanding balance is that
16 (i) SFG should be charged effluent rates for CAP water or groundwater delivered;
17 (ii) SFG is entitled to a credit of \$50,056.50 for services it allegedly performed on behalf
18 of Club at Oasis; and (iii) SFG is not subject to the WQARF Tax which has been
19 assessed by Johnson utilities.²⁷ In the event the Commission grants Johnson Utilities'
20 Motion for Summary Judgment and rejects these arguments, then the Company is entitled
21 to payment of the outstanding balance owed by Swing First Golf.

22 **IX. CONCLUSION.**

23 Swing First Golf's Complaint presents no genuine issue of material fact that is in
24 dispute that would require an evidentiary hearing to determine the core issue of the

25 by the water demand of the customer which is outside of the utility's control. Like a sales tax, the
26 more water or effluent a customer uses, the more the tax that is required to be paid.

²⁷ See Complaint, generally.

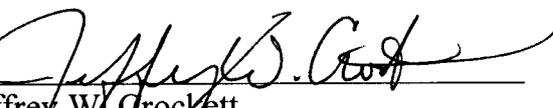
1 Complaint, *i.e.*, whether Johnson Utilities correctly charged Swing First Golf for effluent
2 and CAP water deliveries to the golf course. As set forth in this Motion, Johnson
3 Utilities has demonstrated that it charged Swing First Golf in accordance with its
4 Commission-approved tariffs. Johnson Utilities has also demonstrated that it passed
5 through duly authorized and required taxes pursuant to Arizona law. To the extent that
6 Swing First Golf believes that Johnson Utilities has violated the Utilities Service
7 Agreement or that Johnson Utilities is somehow liable for services allegedly provided by
8 Swing First Golf to Club at Oasis based upon the unsigned LOU, then SFG's remedy is to
9 proceed with the case currently pending in Maricopa County Superior Court as the
10 Commission does not have the authority to adjudicate those issues. Nor does the
11 Commission have the authority to order the requested apology. Accordingly, the
12 Complaint should be decided as a matter of law and Johnson Utilities' Motion for
13 Summary Judgment on Swing First Golf's Complaint should be granted.

14 Finally, Swing First Golf has failed to pay outstanding charges, accrued interest and
15 late fees totaling \$106,086.52, including accrued interest and late fees. Johnson Utilities
16 is entitled to Summary Judgment on its counterclaim as a matter of law. Johnson Utilities
17 requests that the Commission enter an Order finding that Swing First Golf must pay
18 Johnson Utilities the amount of \$106,086.52 within ten (10) days of the entry of the
19 Order by the Commission, and that if Swing First Golf fails to pay this amount, that
20 Johnson Utilities may disconnect Swing First Golf's CAP water and effluent service and
21 pursue collection of the delinquent account.

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1 RESPECTFULLY submitted this 4th day of December, 2008.

2 SNELL & WILMER

3
4 By: 

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10 ORIGINAL and thirteen (13) copies of the foregoing
11 filed this 4th day of December, 2008.

12 COPY of the foregoing hand-delivered
13 this 4th day of December, 2008 to:

14 Ernest Johnson, Director
15 Utilities Division
16 ARIZONA CORPORATION COMMISSION
17 1200 West Washington Street
18 Phoenix, Arizona 85007

19 Robin Mitchell, Staff Attorney
20 Legal Division
21 ARIZONA CORPORATION COMMISSION
22 1200 West Washington Street
23 Phoenix, Arizona 85007

24 Yvette B. Kinsey, Administrative Law Judge
25 Hearing Division
26 ARIZONA CORPORATION COMMISSION
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COPY of the foregoing sent via U.S. Mail and
E-Mail this 4th day of December, 2008 to:

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