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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

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

DOCKET NO. WS-02987A-08-0049
REPLY OF JOHNSON UTILITIES TO
STAFF'S RESPONSE TO MOTION FOR
SUMMARY JUDGMENT

Snell & Wilmer

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Pursuant to Arizona Administrative Code R14-3-106, Rule 56, Ariz. R. Civ. P., and the procedural order dated March 29, 2010, Johnson Utilities LLC, doing business as Johnson Utilities Company ("Johnson Utilities" or the "Company") hereby files its reply ("Reply") to the May 14, 2010, response ("Response") of Utilities Division Staff ("Staff") to the Company's Motion for Summary Judgment dated December 4, 2008 ("MSJ").

I. INTRODUCTION.

At the outset it should be noted that while Staff states in its Response that it recommends denial of the MSJ,¹ in fact, Staff's Response supports the Company's MSJ on the following two issues in this complaint case:

- (1) WQARF or Superfund Tax. Staff has no objection to the pass-through and collection of the so-called "superfund tax" by Johnson Utilities, as discussed in Section II below.²
- (2) Management Services Agreement. Staff correctly states that SFG's claim regarding the alleged Management Services Agreement: (i) "does not involve a rate or a term of service;" (ii) is not "in the

¹ Staff Response at 2, line 20.

² Staff Response at 7, line 7.

Arizona Corporation Commission
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1 nature of a consumer complaint;" (iii) "is a claim for non-payment
2 for services rendered;" and (iv) "[s]uch claims do not fall within the
Commission's jurisdiction."³ See Section III below.

3 Thus, with regard to these two claims of SFG, there are no genuine issues as to
4 any material fact and Johnson Utilities is entitled to judgment as a matter of law. The
5 Company requests that the Administrative Law Judge ("ALJ") prepare a recommended
6 opinion and order ("ROO") for consideration and adoption by the Commission
7 dismissing SFG's claims that: (i) the Company is illegally charging the Arizona Water
8 Quality Assurance Revolving Fund tax (also known as the superfund tax) and that SFG is
9 entitled to a refund of taxes paid;⁴ and (ii) SFG is entitled to billing credit of \$50,056.50
10 for services allegedly provided by SFG to The Golf Club at Oasis, LLC, under the
11 alleged Management Services Agreement.⁵

12 Further, Johnson Utilities submits that the claims now asserted by SFG, as
13 discussed in Section IV below, pertaining to the Utility Service Agreement are outside
14 the scope of the Commission's jurisdiction and should likewise be dismissed. While SFG
15 argued in its Amended Formal Complaint filed February 5, 2008, that the Utility Service
16 Agreement required Johnson Utilities to charge the \$0.62 effluent rate for all irrigation
17 water delivered to SFG, regardless of the type of water that is actually delivered or the
18 tariffed rate for that water, SFG now acknowledges that the Company is legally required
19 to charge tariffed rates for all water delivered. While SFG apparently now believes that
20 George Johnson is personally obligated to reimburse SFG for the \$0.21 differential
21 between the \$0.62 tariffed rate for effluent and the \$0.83 tariffed rate for CAP water
22 under the Utility Service Agreement, such a claim must be addressed in the Maricopa
23 County Superior Court case referenced below and not in this complaint case.

24
25 ³ Staff Response at 9, lines 8-10.

⁴ SFG Amended Formal Complaint at 4, 5 and 7 (line 23).

26 ⁵ SFG Amended Formal Complaint at 4, lines 5-14.

1 In addition, Johnson Utilities requests that the ALJ dismiss SFG's claim that the
2 Commission can order George Johnson to personally apologize to SFG and its members,
3 for the reasons discussed in Section V below.⁶ Staff's Response does not controvert the
4 Company's assertion in the MSJ that the Commission lacks authority to order George
5 Johnson to make a personal apology.⁷

6 Finally, Johnson Utilities agrees with Staff that the Commission does not have
7 authority to award SFG its attorneys' fees incurred in this complaint docket and in the
8 Johnson Utilities rate case docket, as discussed in Section VI below. Thus, the Company
9 requests that the ALJ issue an order that SFG is not entitled to an award of attorneys fees
10 as requested.

11 To the extent there are issues not directly discussed in this Reply, Johnson Utilities
12 hereby incorporates by reference its MSJ and supporting Statement of Facts and stands
13 by the factual and legal arguments contained therein.

14 **II. PASS-THROUGH OF WQARF (SUPERFUND) TAX IS LAWFUL.**

15 As set forth in its MSJ, Johnson Utilities collects from all of its customers a Water
16 Quality Assurance Revolving Fund ("WQARF") tax, or so-called "superfund tax," on
17 water and effluent deliveries.⁸ The bases and authority upon which the Company collects
18 WQARF taxes are discussed in the MSJ, which is incorporated herein by reference. In its
19 Amended Formal Complaint, SFG asserts that Johnson Utilities has illegally charged
20 SFG the WQARF taxes, and seeks an order from the Commission prohibiting the
21 Company from charging the tax.⁹ In its Response to Motion for Summary Judgment,
22 SFG asserts that the legality of passing through the WQARF tax will be resolved in the
23 Company's rate case:

24 _____
⁶ SFG Amended Formal Complaint at 8, lines 1-3.

25 ⁷ MSJ at 19, lines 5-10.

26 ⁸ MSJ at 17, lines 7-8.

⁹ SFG Amended Formal Complaint at 5, lines 19-21, and page 7, line 23.

1 Swing First alleges, both in this docket and in the rate case docket, that
2 Utility is knowingly and illegally passing through a usage-based tax, as
expressly prohibited in Decision No. 64598, dated March 4, 2002.

3 * * *

4 [N]ow that the Commission will be taking up this issue in Utility's rate
5 case, it would be inappropriate at this time to consider this issue in Swing
6 First's complaint case. The Commission's determination in the rate case
7 will bind both Utility and Swing First in this docket. Until the Commission
8 resolves this issue in the rate-case docket, hearings in this complaint docket
9 should be continued.¹⁰

10 SFG did, in fact, raise the pass-through of the WQARF tax in Johnson Utilities'
11 rate case in both pre-filed testimony and post-hearing briefing.¹¹ Specifically, SFG
12 argued that the "Utility should be ordered to calculate the amounts collected since
13 March 4, 2002, and make refunds to its customers."¹² However, Staff clearly disagreed,
14 as reported in its Response: "Staff had no objection to the collection and pass through of
15 this tax in the rate proceeding."¹³ In addition, the Response states that "Staff would note
16 that Arizona Administrative Code R14-2-209(D)(5) allows a utility to collect from its
17 customers a proportionate share of any privilege, sales or use tax."¹⁴

18 In its Response, Staff erroneously states that there is no mention of the WQARF
19 tax in the rate case Recommended Opinion and Order issued May 7, 2010.¹⁵ In fact, the
20 rate case ROO specifically cites and then rejects the recommendation of SFG witness
21 Sonn Rowell that "[t]he Company should be required to refund - in cash, not credits - its
22 illegal superfund tax collections."¹⁶ To date, there have been no amendments proffered

23 ¹⁰ SFG Response to Motion for Summary Judgment at 11, lines 10-12 and 17-21.

24 ¹¹ Post-Hearing Brief of Swing First Golf (Nov. 20, 2009) (Docket WS-02987A-08-0180) at 7; Revised
25 Direct Testimony of Sonn S. Rowell (March 2, 2009) (Docket WS-02987A-08-0180) at 7, 9, 12 and 15.

26 ¹² Post-Hearing Brief of Swing First Golf (Nov. 20, 2009) (Docket WS-02987A-08-0180) at 48, lines 17-
19.

¹³ Staff Response at 7, line 7 (emphasis added).

¹⁴ *Id.* at 7, lines 9-10.

¹⁵ *Id.* at 7, lines 8-9.

¹⁶ Recommended Opinion and Order (May 7, 2010) (Docket WS-02987A-08-0180) at 57, line 17, and
pages 58-59.

1 which would modify the ROO on this issue. The rate case ROO will be considered at the
2 Commission's Open Meeting on June 29-30, 2010. Upon adoption of the rate case ROO
3 without any change regarding the pass-through of WQARF taxes by Johnson Utilities,
4 the Commission will have addressed the issue.

5 In summary, (i) SFG presented testimony at the rate case hearing regarding its
6 opposition to the pass-through of WQARF taxes; (ii) the issue was briefed in post-
7 hearing briefs by SFG and Johnson Utilities; (iii) the ALJ considered the
8 recommendation of SFG witness Rowell in the rate case to require refunds of WQARF
9 taxes collected by the Company; (iv) the ALJ rejected SFG's recommendation; and
10 (v) SFG has specifically acknowledged in this complaint case that "[t]he Commission's
11 determination in the rate case will bind both Utility and Swing First in this docket."¹⁷
12 Thus, there is no genuine issue as to any material fact regarding WQARF taxes, and the
13 Commission should dismiss SFG's claim that the pass-through and collection of WQARF
14 taxes by Johnson Utilities is illegal.

15 **III. THE COMMISSION LACKS JURISDICTION TO ORDER BILLING**
16 **CREDIT FOR GOLF COURSE MANAGEMENT SERVICES**
17 **ALLEGEDLY PROVIDED UNDER ALLEGED MANAGEMENT**
18 **SERVICES AGREEMENT.**

19 In its Amended Formal Complaint, SFG alleges that it is entitled to a billing credit
20 from Johnson Utilities in the amount of \$50,056.50 for golf course management services
21 allegedly provided by SFG to The Golf Club at Oasis, LLC, ("Oasis") under an alleged
22 Management Services Agreement.¹⁸ In its Response, Staff properly rejects SFG's claim
23 for billing credit under the Management Services Agreement, citing the following
24 undisputed facts:

25 It appears that the gravamen of SFG's complaint regarding the Management
26 [Services] Agreement is that SFG did not receive "payment" for its

¹⁷ SFG Response to Motion for Summary Judgment at 11, lines 18-19.

¹⁸ SFG Amended Formal Complaint at 4, lines 5-14.

1 management services. The claim does not involve a rate or a term of
2 service. Nor is the claim in the nature of a consumer complaint. It is a
3 claim for non-payment for services rendered. Such claims do not fall
within the Commission's jurisdiction.¹⁹

4 Johnson Utilities agrees with Staff that the Commission lacks jurisdiction over
5 claims arising under the alleged Management Services Agreement.²⁰ As set forth in the
6 MSJ, Johnson Utilities is neither mentioned nor identified as a party in the Management
7 Services Agreement (which actually refers to an undated and unsigned letter of
8 understanding prepared by SFG, a copy of which is attached as Exhibit 4 to Johnson
9 Utilities' Statement of Facts filed in support of its MSJ).²¹ Rather, the alleged
10 Management Services Agreement identifies only Oasis and SFG, neither of which are
11 public service corporations subject to Commission jurisdiction.²² Moreover, the alleged
12 Management Services Agreement pertains to golf course management services, and does
13 not involve rates or terms of utility service. Accordingly, SFG's claim for a \$50,056.50
14 billing credit from Johnson Utilities based upon claims arising under the alleged
15 Management Services Agreement should be dismissed. Failure to do so will result in the
16 parties wasting more time addressing this non-jurisdictional claim.

17 **IV. THE COMMISSION LACKS JURISDICTION TO CONSIDER THE**
18 **UTILITY SERVICE AGREEMENT.**

19 The Agreement Regarding Utility Service dated September 17, 1999 ("Utility
20 Service Agreement") is an agreement between Johnson Utilities and Johnson Ranch
21 Holdings, LLC, which sets forth certain commitments, representations and warranties
22 regarding the provision of water and wastewater service within the Johnson Ranch master
23 planned development.²³ The main crux of SFG's Amended Formal Complaint is that the

24 ¹⁹ Staff Response at 9, lines 6-10.

25 ²⁰ Johnson Utilities denies SFG's allegations regarding the Management Services Agreement.

26 ²¹ MSJ at 8, lines 7-8.

²² MSJ at 8, lines 9-10.

²³ MSJ at 6, lines 2-6.

1 Utility Service Agreement requires Johnson Utilities to provide irrigation water to SFG at
2 the rate of \$0.62 per thousand gallons, regardless of the type of water that is actually
3 delivered or the tariffed rate for that water. While Johnson Utilities' current tariffed rate
4 for effluent is \$0.62 per thousand gallons,²⁴ the Company's current tariffed rate for
5 Central Arizona Project ("CAP") water is \$0.83 per thousand gallons.²⁵ Thus, SFG
6 effectively argued that the Utility Service Agreement superseded the Company's tariffed
7 rate for CAP water (or any class of water other than effluent) delivered to SFG. SFG
8 asserted as follows:

9 [T]he Utility Service Agreement provides Utility the right to deliver CAP
10 water to Swing First, but if effluent is available, the CAP water is
11 considered to be Exchange Water, which is to be priced at the \$0.62 per-
12 thousand-gallon-rate for treated effluent. Instead, Utility has charged \$0.83
13 or more per thousand gallons for all delivered CAP water.

14 Exhibit B summarizes Swing First's metered usages by month. For 2006-
15 2007, Utility overbilled Swing First at least \$0.21 per thousand gallons for
16 152,459,000 gallons. As a result, Utility overcharged Swing First by more
17 than \$32,000 during 2006-2007.

18 ... As shown on Exhibit B, Swing First estimates its monthly usage for the
19 13 months it owned the Golf Club during 2004-2005 to have been
20 10,734,792 gallons, with each gallon inappropriately billed at the \$0.83 per-
21 thousand-gallon rate. Thus, Swing First estimates that Utility overcharged
22 it more than \$29,000 during 2004-2005.

23 * * *

24 Utility has the option to deliver non-potable water from different services,
25 but the Utility Service Agreement requires that all deliveries should be
26 priced at the effluent rate of \$0.62 per thousand gallons.²⁶

27 However, since filing its Amended Formal Complaint in February 2008, SFG has
28 drastically changed its argument regarding the effect of the Utility Service Agreement in
29 this case. In an April 20, 2010, response to a motion to dismiss filed by George Johnson

24 SFG's Amended Formal Complaint at 2, lines 4-5.

25 Statement of Facts in Support of Motion for Summary Judgment at ¶ 9 and Exhibit 3.

26 SFG's Amended Formal Complaint at 2-3 (citations omitted; emphasis added).

1 (and spouse) in the Maricopa County Superior Court (Docket CV2008-000141), SFG
2 expressly acknowledged that the Company must charge the Commission-approved rates,
3 but then looked to George Johnson and his wife to personally cover the cost of the more
4 expensive CAP water delivered to SFG:

5 Swing First certainly agrees that Utility cannot sell water at anything but its
6 tariffed rate.

7 * * *

8 [A]s a party to the Utility Services Agreement, the Johnsons could have
9 provided Swing First the benefit of the agreed-upon promise to deliver
10 irrigation water at no more than the effluent rate.²⁷ The Johnsons could
11 either have paid Utility the balance of the amount owed for more expensive
12 irrigation water or reimbursed Swing First the difference between the
13 amount billed by Utility for irrigation water and Utility's effluent rate.
14 Either method would lawfully preserve Utility's obligation to sell water
15 only at its tariffed rate, while preserving Swing First's benefit of the
16 bargain.²⁸

17 A copy of the relevant pages from SFG's response is attached hereto as Attachment 1.

18 Similarly in this complaint case, SFG acknowledged that Johnson Utilities must
19 follow its Commission-approved tariffs, as set forth in SFG's Response to Motion for
20 Summary Judgment:
21

22 Utility argues that it could not discriminate in favor of Swing First by
23 providing irrigation water at anything less than tariff rates. Swing First
24 does not dispute that Utility is obligated to charge its tariffed rates for
25 tariffed services. However, the tariffs do not prevent a third party, such as
26 Oasis Golf or Johnson International, from agreeing to pay Utility for Swing
First's water usage in return for Swing First's management services. This is
particularly the case when all three entities are controlled by one person,
George Johnson.²⁹

²⁷ George Johnson and his spouse have denied that they have any personal liability under the Utility Service Agreement, and have asserted that they executed the Utility Service Agreement in their representative capacities only on behalf of Johnson Utilities.

²⁸ SFG's Response to Johnson and Tompsett Motions (April 20, 2010) (Docket CV2008-000141) at 3, lines 13-14 and 19-25.

²⁹ SFG's Response to Motion for Summary Judgment at 10, lines 11-16 (emphasis added).

1 In its Response, Staff erroneously focused on SFG's initial theory of its case,
2 rather than its more recent acknowledgement that Johnson Utilities is bound to provide
3 irrigation water to SFG at the tariffed rates. For example, Staff asserts as follows:

4 SFG contents that the terms of the agreement require Johnson to deliver
5 CAP water at the effluent rate.

6 * * *

7 The Utility Services Agreement, by its terms, contemplates the rates that
8 SFG would pay for effluent and CAP water and the type of services which
9 SFG would receive. Rates and services fall within the exclusive
10 jurisdiction of the Commission.

11 * * *

12 In the instant case, we have an agreement between the utility and one of its
13 customers regarding rates and terms of service.³⁰

14 These statements by Staff are inconsistent with SFG's most recent statements that
15 Johnson Utilities must charge its tariffed rates. Thus, because the Utility Service
16 Agreement does not set the "rates and terms of service," the agreement does not fall
17 within the jurisdiction of the Commission. To the extent that SFG believes that George
18 Johnson is personally obligated to reimburse SFG for the \$0.21 differential between the
19 \$0.62 tariffed rate for effluent and the \$0.83 tariffed rate for CAP water under the Utility
20 Service Agreement, such a claim must be addressed in the Maricopa County Superior
21 Court case referenced above and not in this complaint case.

22 Despite Staff's argument to the contrary, Arizona law is very clear that issues of
23 contract interpretation are outside the scope of the Commission's jurisdiction. *See Trico*
24 *Electric Coop. v. Ralston*, 67 Ariz. 358, 363, 196 P.2d 470, 473 (1948); *Trico General*
25 *Cable Corp. v. Citizens Utilities Co.*, 27 Ariz. Ct. App. 381, 385, 555 P.2d 350, 354 (Ct.
26 App. 1976). Staff attempts to distinguish the *Trico* case by asserting that in *Trico*, "there
was no dispute over the conditions of service or rates to be charged."³¹ However, as

³⁰ Staff's Response at 7-8

³¹ Staff Response at 8, lines 11-12.

1 discussed above, SFG has now acknowledged that there is no question that Johnson
2 Utilities must charge its tariffed rates for irrigation water delivered to SFG, and that the
3 Utility Service Agreement does not modify the rates to be charged. The issue, according
4 to SFG, is whether George Johnson must personally reimburse SFG for the \$0.21 rate
5 differential based upon SFG's interpretation of the Utility Services Agreement.³² That
6 issue clearly falls outside the scope of the Commission's jurisdiction and must be
7 addressed by the court.

8 *Trico*, specifically dealt with the Commission's jurisdiction to interpret or enforce
9 a contract for the purchase of utility infrastructure. *Trico*, 67 Ariz. at 360, 196 P.2d at
10 471. However, Staff did not even attempt to distinguish or refute *Trico General Cable*
11 *Corp. v. Citizens*, which did involve a dispute over allegedly discriminatory rates charged
12 by a utility company. *General Cable*, 27, Ariz. App. at 385, 555 P.2d at 354. In *General*
13 *Cable*, the plaintiff customer filed a complaint with the Commission seeking relief from
14 allegedly discriminatory rates charged by defendant utility company. *General Cable*, 27
15 Ariz. App. at 385, 555 P.2d at 354. The court in that case agreed with the Commission
16 and the Supreme Court's ruling in *Trico*, finding that the Commission's dismissal of the
17 complaint based upon its lack of jurisdiction to construe contractual rights was
18 appropriate. *Id.*

19 In this Complaint matter currently before the Commission, as in *General Cable*,
20 SFG is asking the Commission to construe the legal rights of the parties to the Utility
21 Services Agreement. But as both *Trico* and *General Cable* illustrate, the Commission is
22 without jurisdiction to undertake such a review.³³

23
24

³² Johnson Utilities denies SFG's allegations regarding the Utility Service Agreement.

25 ³³ Even if the Commission found that it was within its jurisdiction to interpret the Utility Service
26 Agreement, for the reasons set forth in the MSJ, the language in the Utility Services Agreement is
unambiguous as it relates to what Johnson Utilities is required to charge for utility services.

1 Finally, Johnson Utilities would note that the Utility Service Agreement was not
2 approved by the Commission.³⁴ Thus, to the extent that the agreement purports to modify
3 any charge, term or condition of service, it is not effective because it lacks Commission
4 approval. Arizona Revised Statutes § 40-365 provides as follows:

5 Under rules and regulations the commission prescribes, every public
6 service corporation shall file with the commission, and shall print and keep
7 open to public inspection, schedules showing all rates, tolls, rentals, charges
8 and classifications to be collected or enforced, together with all rules
9 regulations, contracts, privileges and facilities which in any manner affect
10 or relate to rates, tolls, rentals, classifications or service. The commission
11 may, from time to time, approve or fix rates, tolls, rentals or charges in
12 excess of or less than those shown by the schedules. The commission may,
13 from time to time, determine and prescribe by order, such changes in the
14 form of the schedules as it finds expedient, and modify the requirements of
15 any of its orders, rules, or regulations. (emphasis added).

16 SFG' has not alleged that the Utility Service Agreement was approved by the
17 Commission pursuant to A.R.S. §40-365 as a modification or exception (a so-called
18 special contract) to Johnson Utilities' approved tariffs. Without such approval, the Utility
19 Service Agreement is unenforceable and void as against public policy. *See Landi v.*
20 *Arkules*, 172 Ariz. 126, 135, 835 P.2d 458, 467 (App. 1992) (finding that illegal contracts
21 are void as against public policy); *see also Gaertner v. Sommer*, 148 Ariz. 421, 423, 714
22 P.2d 1316, 1318 (App. 1986) ("If the acts to be performed under the contract are
23 themselves illegal or contrary to public policy ... then recovery should be denied.").

24 V. AUTHORITY TO ORDER PERSONAL APOLOGY.

25 In its Amended Formal Complaint, SFG asks the Commission to order George
26 Johnson to personally apologize to SFG and its members. In its MSJ, Johnson Utilities
argues that the Commission is without jurisdiction to order George Johnson—a
member/shareholder of the Company—to personally apologize to SFG or its members.
In its Response to Motion for Summary Judgment, SFG acknowledges that "the

³⁴ Statement of Facts in Support of Johnson Utilities' Motion for Summary Judgment at 2, ¶ 3.

1 Commission has no personal jurisdiction over Mr. Johnson" and also fails to cite any
2 legal authority to support its claim for a personal apology.³⁵ There is nothing in the Staff
3 Response which controverts Johnson Utilities' argument that the Commission lacks
4 jurisdiction to order a personal apology. Thus, Johnson Utilities requests that SFG's
5 claim seeking a personal apology from Mr. Johnson be dismissed. Failure to do so will
6 result in the parties wasting more time addressing this baseless and frivolous claim.

7 **VI. AUTHORITY TO ORDER AWARD OF ATTORNEYS' FEES.**

8 Regarding SFG's request for an award of attorneys' fees incurred in this complaint
9 docket and in the rate case docket (Docket No. WS-02987A-08-0180),³⁶ Staff rightfully
10 recognizes in its Response that SFG has not provided any legal authority to support an
11 award of attorneys' fees by the Commission.³⁷ Further, the Response states that "Staff
12 could find no authority that authorizes the Commission to award attorneys' fees in a
13 complaint proceeding."³⁸ With respect to SFG's assertion that it provided information in
14 the rate case that would not otherwise have considered by the Commission, Staff states
15 that "[t]his assertion hardly forms the basis for the award of attorney's fees."³⁹ Finally,
16 Staff correctly notes in its Response that as complainant, SFG "bears the burden to
17 support its request for attorney's fees."⁴⁰ SFG has utterly failed to meet that burden, and
18 for good reason. There is no statutory provision, constitutional provision, Commission
19 decision, Commission rule or case law precedent that authorizes the Commission to
20 award attorneys' fees in this complaint case or in the rate case. Thus, for the reasons set
21 forth in Staff's Response, as well as the reasons set forth in the Company's Response to
22 Swing First Golf's Request for Attorneys' Fees dated May 14, 2010, Johnson Utilities

23 ³⁵ SFG Response to Motion for Summary Judgment (Dec. 15, 2008) at 12, line 2.

24 ³⁶ Direct Testimony of David Ashton (Dec. 30, 2009) at 29-31.

25 ³⁷ Staff Response at 9, lines 13-20.

26 ³⁸ *Id.* at lines 16-18.

³⁹ *Id.* at lines 18-20.

⁴⁰ *Id.* at line 16.

1 requests that the Commission reject SFG's claim that it is entitled to an award of
2 attorneys' fees incurred in this complaint case and in the rate case.

3 **VII. CONCLUSION.**

4 In its MSJ and this Reply, Johnson Utilities has clearly demonstrated the legal and
5 factual basis in order for the Commission to consider and grant the MSJ. Thus, Johnson
6 Utilities requests that the Commission grant the MSJ for the reasons set forth therein, as
7 supplemented by the Company's Reply to Swing First Golf's Response to Motion for
8 Summary Judgment dated December 23, 2009, and this Reply.

9 RESPECTFULLY submitted this 15th day of June, 2010.

10 SNELL & WILMER

11
12 By: 
13 Jeffrey W. Crockett
14 Robert J. Metli
15 400 East Van Buren
16 One Arizona Center
17 Phoenix, Arizona 85004-2202
18 Attorneys for Johnson Utilities, LLC

17 ORIGINAL and thirteen (13) copies of the foregoing
18 filed this 15th day of June, 2010.

18 COPY of the foregoing hand-delivered
19 this 15th day of June, 2010 to:

20 Ernest Johnson, Director
21 Utilities Division
22 ARIZONA CORPORATION COMMISSION
23 1200 West Washington Street
24 Phoenix, Arizona 85007

24 Robin Mitchell, Staff Attorney
25 Legal Division
26 ARIZONA CORPORATION COMMISSION
1200 West Washington Street
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1 Yvette B. Kinsey, Administrative Law Judge
Hearing Division
2 ARIZONA CORPORATION COMMISSION
1200 West Washington Street
3 Phoenix, Arizona 85007

4 COPY of the foregoing sent via U.S. Mail and
5 E-Mail this 15th day of June, 2010 to:

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10 

11 _____
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ATTACHMENT 1

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Attorney for Defendants

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
COUNTY OF MARICOPA

JOHNSON UTILITIES, LLC d/b/a
JOHNSON UTILITIES COMPANY, an
Arizona limited liability company

Plaintiff,

v.

SWING FIRST GOLF, LLC, an Arizona
limited liability company, DAVID
ASHTON and JANE DOE ASHTON,
husband and wife

Defendants.

et. al.

NO. CV2008-000141

**DEFENDANTS' RESPONSE TO
JOHNSON AND TOMPSETT
MOTIONS**

(The Honorable Dean M. Fink)

1 Defendants Swing First Golf, LLC, David Ashton, and Jane Doe Ashton ("Swing
2 First") hereby respond to the March 30, 2010, Motion to Dismiss and the Motion to Strike
3 filed by George and Jana Johnson, and Brian and Jane Doe Tompsett ("Johnson
4 Individuals").¹ As more specifically discussed in the following Memorandum of Facts
5 and Authorities, Swing First agrees that some of the counts should be dismissed as to
6 certain of the Johnson Individuals, but much of the Motion is meritless and should be
7 denied.

¹ Through an exchange of e-mails, the parties stipulated on March 31, 2010, that Swing First's Response would be due on April 20, 2010, and that the moving parties would have until April 30, 2010, to reply to the Response.

1 status.

2 **C. Swing First Does Not Object to Dismissing the Tompsetts as to Count 1**

3 Swing First agrees that Count 1 should be dismissed as to Mr. and Mrs. Tompsett.

4 **D. Swing First Does Not Base Count 1 on Mr. Johnson's Status as an**
5 **Officer or on Piercing the Corporate Veil**

6 Swing First does not base Count 1 on Mr. Johnson's status as an officer or on
7 somehow piercing the corporate veil. The Johnson Individuals' arguments concerning
8 these issues are moot.

9 **E. The Utility Services Agreement is Enforceable**

10 The Johnson Individuals misinterpret the Utilities Services Agreement and claims
11 that it is not enforceable. However, as just discussed, the Johnsons are also a parties to and
12 responsible for the obligations undertaken in the Utility Services Agreement.

13 Swing First certainly agrees that Utility cannot sell water at anything but its tariffed
14 rate. But this straw-man argument does not make that the Utility Services Agreement
15 illegal. First, a fundamental purpose was to ensure that Utility provided "effluent in an
16 amount required to irrigate to the Johnson Ranch Golf Course."³ Utility has failed to do
17 this, even when it had ample effluent available.⁴ By failing to deliver effluent, Utility
18 violated the Utility Services Agreement.

19 Second, as a party to the Utility Services Agreement, the Johnsons could have
20 provided Swing First the benefit of the agreed-upon promise to deliver irrigation water at
21 no more than the effluent rate. The Johnsons could either have paid Utility the balance of
22 the amount owed for more expensive irrigation water or reimbursed Swing First the
23 difference between the amount billed by Utility for irrigation water and Utility's effluent
24 rate. Either method would lawfully preserve Utility's obligation to sell water only at its
25 tariffed rate, while preserving Swing First's benefit of the bargain.

³ Amended Counterclaim at ¶ 18.

⁴ *Id.* at ¶ 33.