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2 BEFORE THE ARIZONA CORPORATI...

3 COMMISSIONERS

Arizona Corporation Commission

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AZ CORP COMMISSION  
DOCKET CONTROL

TOM FORESE

DOCKETED BY

7 ANDY TOBIN

8 IN THE MATTER OF THE FORMAL  
9 COMPLAINT OF SWING FIRST GOLF  
10 LLC AGAINST JOHNSON UTILITIES  
11 LLC

DOCKET NO. WS-02987A-16-0017

12 JOHNSON UTILITIES' MOTION TO  
13 DISMISS SWING FIRST GOLF'S  
14 FORMAL COMPLAINT

15 On January 19, 2016, Swing First Golf, LLC, ("SFG") filed a formal complaint ("Formal  
16 Complaint #3") against Johnson Utilities, L.L.C. ("Johnson Utilities" or the "Company"). This is  
17 the third formal complaint filed by SFG arising out of the very same claim to the effluent of  
18 Johnson Utilities. The first two formal complaints filed in Dockets WS-02987A-08-0049  
19 ("Formal Complaint #1") and WS-02987A-13-0053 ("Formal Complaint #2") have previously  
20 been dismissed with prejudice in Decisions 73137 and 74036, respectively. SFG's Formal  
21 Complaint #3 should likewise be dismissed because the claims alleged therein are barred by the  
22 doctrine of *res judicata* as a result of the Arizona Corporation Commission's prior orders. In  
23 addition, dismissing SFG's Formal Complaint #3 is appropriate because it is in the public interest  
24 to uphold Decisions 73137 and 74036 to provide finality and to promote judicial efficiency.

25 Further, even if the claims of SFG set forth in Formal Complaint #3 were not barred by  
26 the doctrine of *res judicata*, the Commission lacks jurisdiction to direct how Johnson Utilities uses  
27 its effluent. Thus, SFG's Formal Complaint #3 should be dismissed for lack of subject matter  
28 jurisdiction pursuant to Rule 12(b)(1) of the Arizona Rules of Civil Procedure.

Finally, there is no legal basis upon which to award attorneys' fees to SFG and its request  
for attorneys' fees should be dismissed.

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1 A motion to dismiss based upon Rule 12(b)(1) must be made before an answer is filed.  
2 Thus, Johnson Utilities is filing this Motion to Dismiss in compliance with Rule 12(b) and in lieu  
3 of an answer.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. FACTUAL BACKGROUND.**

6 **A. Formal Complaint #1.** Formal Complaint #3 is the third formal complaint filed  
7 by SFG against Johnson Utilities alleging that SFG has a right to the effluent of Johnson Utilities.  
8 Formal Complaint #1 was filed in 2008 in Docket WS-02987A-08-0049 and it included 10 counts,  
9 one of which is directly relevant in this proceeding. In Count A of Formal Complaint #1, SFG  
10 alleged among other things, the following:

11 Utility has been generating and treating effluent within its certificated service area  
12 since at least 2005. Utility's tariffed rate for effluent is \$0.62 per thousand gallons.  
13 However, despite Swing First's right to the first effluent generated in the  
14 certificated service area, Utility has rarely delivered effluent. Instead, it has  
15 delivered CAP water to Swing First and charged it \$0.83 per thousand gallons.  
Further, when Utility has delivered effluent to Swing First, Utility has still billed at  
\$0.83 per thousand gallons.<sup>1</sup>

16 SFG alleged that it possessed a right to the first effluent generated by Johnson Utilities  
17 under an Agreement Regarding Utility Service executed on or about September 17, 1999, between  
18 Johnson Utilities and Johnson Ranch Holdings LLC, an affiliate of Sunbelt Holdings  
19 Management, Inc. Neither Johnson Ranch Holdings LLC nor Sunbelt Holdings Management,  
20 Inc., are legally related to Johnson Utilities.

21 On September 27, 2011, SFG filed a pleading captioned Withdrawal of Complaint  
22 withdrawing its Formal Complaint #1 and all pending motions with prejudice and requesting that  
23 the docket be closed. SFG explained in its motion that its claims against Johnson Utilities were  
24 being addressed in the Maricopa County Superior Court case captioned *In the matter of Johnson*  
25 *Utilities L.L.C. v. Swing First Golf, L.L.C.* (Maricopa County Superior Court Docket No. CV  
26 2008-000141) ("Superior Court Case") which was set for trial on March 13, 2012. On October 4,

27  
28 <sup>1</sup> Formal Complaint #1 (WS-02987A-08-0049) at p. 2, lines 19-24 (emphasis added).

1 2011, Johnson Utilities filed a response strongly opposing the Withdrawal of Complaint filed by  
2 SFG.

3 On March 13, 2012, the Administrative Law Judge (“ALJ”) docketed a recommended  
4 opinion and order (“ROO”) that would grant SFG’s request to dismiss Formal Complaint #1 with  
5 prejudice, with the following cautionary words to SFG:

6 Swing First has stated it is aware that withdrawal of its Amended Complaint with  
7 prejudice will foreclose Swing First from raising those claims again before the  
8 Commission even if the Superior Court decides its claims are more appropriately  
9 within the Commission’s jurisdiction. Therefore, Swing First has accepted the risk  
10 that Superior Court may or may not address the common claims raised in the  
11 Amended Complaint and the Superior Court case.<sup>2</sup>

12 SFG did not file exceptions to the recommended opinion and order. On May 1, 2012, the  
13 Commission docketed Decision 73137 adopting the ROO and dismissing Formal Complaint #1,  
14 ordering as follows:

15 IT IS THEREFORE ORDERED that Swing First Golf, LLC’s request to withdraw  
16 its Amended Complaint with prejudice as well as its pending motions, is hereby  
17 granted.<sup>3</sup>

18 SFG did not request rehearing so Decision 73137 became final and non-appealable on May  
19 21, 2012.

20 **B. Formal Complaint #2.** On March 11, 2013, SFG filed its second formal complaint  
21 against Johnson Utilities, asserting once again that SFG had a right to the effluent of Johnson  
22 Utilities. Count A of Formal Complaint #2 states, in relevant part, as follows:

23 [I]n 2007, Utility essentially refused to deliver treated effluent and instead  
24 unilaterally delivered more expensive and less desirable CAP Water. Utility  
25 produced over 184 million gallons of treated effluent in 2007. Swing First’s total  
26 irrigation usage in 2007 was just 79 million gallons. Utility could easily have  
27 supplied all of Swing First’s 2007 irrigation requirements with Effluent from the  
28 San Tan Wastewater Treatment Plant. Yet, Utility delivered fewer than 11 million  
gallons of Effluent in 2007. The rest was more expensive, less desirable CAP  
Water.<sup>4</sup>

<sup>2</sup> Decision 73137 at FOF 114, p. 23, lines 10-14 (citation omitted) (emphasis added).

<sup>3</sup> *Id.* at p. 25, lines 2-3 (emphasis added).

<sup>4</sup> Formal Complaint #2 (Docket WS-02987A-13-0053) at p. 9, lines 2-8 (emphasis added).

1        Utility pumped most of the withheld Effluent into the ground. However, Utility  
2        also began selling a portion of the withheld Effluent to the Santan Heights HOA.  
3        This created an unrealistic expectation by the HOA that Utility had sufficient  
4        Effluent to satisfy all the HOA's irrigation requirements. Unfortunately, when the  
5        Commission forced<sup>5</sup> Utility to resume Effluent deliveries to Swing First in 2008,  
6        Utility no longer had sufficient Effluent for both customers.<sup>6</sup>

7        Swing First asks the Commission to order Utility to deliver Effluent to Swing First  
8        in the quantities requested by Swing First. Because deliveries are made into the  
9        lake, the time of day for deliveries does not matter. Only after satisfying Swing  
10       First's requirements should Utility be allowed to sell Effluent to any other  
11       customers or to pump Effluent into the ground.<sup>7</sup>

12        On April 2, 2013, Johnson Utilities filed a Motion to Dismiss and Motion to Strike  
13        ("Motion to Dismiss") requesting that the Commission dismiss Counts "A" and "B" of Formal  
14        Complaint #2 pursuant to Rule 12(b)(6) of the Arizona Rules of Civil Procedure and the doctrine  
15        of *res judicata* because the issues had been previously raised by SFG against Johnson in Formal  
16        Complaint #1, which was dismissed with prejudice in Decision 73137. In its reply filed in support  
17        of its Motion to Dismiss, Johnson Utilities argued that SFG withdrew its Formal Complaint #1  
18        with prejudice and thereafter failed to obtain a finding or ruling in the Superior Court Case that:  
19        (i) SFG has a priority right to effluent; (ii) Johnson Utilities must satisfy the effluent requests or  
20        requirements of SFG before it can deliver effluent to other customers or pump effluent into the  
21        ground; (iii) Johnson Utilities must deliver effluent to SFG in whatever quantities are requested  
22        or required; or (iv) Johnson Utilities withheld effluent from SFG. Therefore, SFG had come back  
23        to the Commission for "another bite at the apple" and this should not be allowed.<sup>8</sup>

24        In Decision 74036 docketed August 16, 2013, the Commission granted Johnson Utilities'  
25        Motion to Dismiss with regard to Counts "A" and "B" of Formal Complaint #2, ruling as follows:

26        <sup>5</sup> Johnson Utilities agreed to supply effluent to SFG only during the pendency of the formal complaint  
27        proceeding in Docket WS-02987A-08-0049.

28        <sup>6</sup> Formal Complaint #2 at p. 9, lines 9-13 (emphasis added).

<sup>7</sup> *Id.* at p. 9, lines 22-25.

<sup>8</sup> Reply in Support of Motion to Dismiss and Motion to Strike, or in the alternative, Motion for a More  
Definite Statement of Claim with Respect to Count "D" (Docket WS-02987A-13-0053) at p. 5, lines 3-12.

1 The 2008 Complaint [Formal Complaint #1] between SFG and Johnson spanned  
2 more than four years and was vigorously litigated by the parties. During that  
3 proceeding, extensive discovery was conducted, motions resolved, and oral  
4 arguments held. SFG requested that the Commission allow SFG to dismiss its 2008  
5 Complaint with prejudice, over the objections of Johnson, and SFG acknowledged  
6 that it understood that the claims in the 2008 Complaint could not be reasserted in  
7 a future proceeding before the Commission. We find that the claims raised in Count  
8 “A” and Count “B” of the 2013 Complaint [Formal Complaint #2] and those raised  
9 in the 2008 Complaint are the same claims arising from the same set of operative  
10 facts. We do not find persuasive SFG’s assertion that the doctrine of *res judicata*  
11 does not apply to its claims because the claims raised in the 2013 Complaint and  
12 the 2008 Complaint are separated by a five year span. Arizona courts have stated  
13 that *res judicata* will preclude a claim when a former judgment on the merits was  
14 rendered by the court of competent jurisdiction and **“the matter now at issue**  
15 **between the same parties or their privities was, or might have been,**  
16 **determined in the former action.”** SFG requested that its 2008 claims be  
17 dismissed with prejudice, knowing it would forego the opportunity to have the  
18 Commission decide those claims in any future proceeding. Therefore, we find that  
19 SFG’s claims in Counts and “A” and “B” are barred by the doctrine of *res judicata*.  
20 Further, we find it appropriate and in the public interest to uphold Decision No.  
21 73137 to provide finality and to promote judicial efficiency. We find that Johnson’s  
22 [Motion to Dismiss] and [Motion to Strike] as to Counts “A” and “B” should be  
23 granted.<sup>9</sup>

24 SFG did not request rehearing so Decision 74036 became final and non-appealable on  
25 September 5, 2013.

26 C. **Formal Complaint #3.** On January 19, 2016, SFG filed its third formal complaint  
27 against Johnson Utilities alleging a right to the Company’s effluent. In its complaint, SFG  
28 reasserted its now-familiar claims regarding Johnson Utilities’ effluent:

- 20 ● “Utility has informed Swing first that it will soon unilaterally discontinue  
21 providing Effluent to Swing First and other Effluent customers. Utility’s  
22 proposed unilateral action would be unlawful and not in the public  
23 interest.”<sup>10</sup>
- 24 ● “Swing First asks that the Commission issue an order requiring Utility to  
25 first receive authorization from the Commission, as required by A.A.C.  
26 R14-2-402(C), before it discontinues tariffed Effluent service.”<sup>11</sup>

27 <sup>9</sup> Decision 74036, FOF 61 at pp. 18-19 (emphasis in original).

28 <sup>10</sup> Formal Complaint #3 at p. 1, lines 4-5 and 9.

<sup>11</sup> *Id.* at lines 10-12.

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- “Utility provides Effluent to Swing First and other customers under the terms of a tariff approved by the Commission. A Commission-approved tariff is a contract between a utility and its customers.”<sup>12</sup>
- “A.A.C. R14-2-402(C) required Utility to apply to the Commission for authorization before it discontinues the provision of Effluent or other tariffed water services.”<sup>13</sup>
- SFG asks the Commission to “[o]rder Utility to recognize that its current customers have a priority for Effluent produced from Utility’s Santan Wastewater Treatment Plant.”<sup>14</sup>

This is the third time that SFG has raised the same claim to the effluent of Johnson Utilities. For the reasons set forth below, SFG’s Formal Complaint #3 should be dismissed with prejudice.

**II. LEGAL ARGUMENT.**

**A. The Claims alleged in SFG’s Formal Complaint #3 are barred by the Doctrine of Res Judicata Pursuant to Decisions 73137 and 74036.**

The following table compares the claims alleged by SFG in Count “A” of Formal Complaint #1, Count “A” of Formal Complaint #2, and Formal Complaint #3:

Formal Complaint #1 Count “A”	Formal Complaint #2 Count “A”	Formal Complaint #3
SFG “should be receiving as much effluent as Utility can deliver, up to our requirements” <sup>15</sup>	“Swing First asks the Commission to order Utility to deliver Effluent to Swing First in the quantities requested by Swing First” <sup>16</sup>	SFG asks the Commission to “[o]rder Johnson Utilities ... to continue providing Effluent to Swing First and other customers at its tariffed rate until such time, if ever, that it receives authorization from the Commission, after an application under A.A.C. R14-2-402(C), to discontinue tariffed Effluent service.” <sup>17</sup>

<sup>12</sup> *Id.* at lines 16-18.  
<sup>13</sup> *Id.* at p. 2, lines 1-3.  
<sup>14</sup> *Id.* at p. 5, lines 25-26.  
<sup>15</sup> Formal Complaint #1 at p. 5, lines 6-9.  
<sup>16</sup> Formal Complaint #2 at p. 9, lines 22-23.  
<sup>17</sup> Formal Complaint #3 at p. 5, lines 21-24.

Formal Complaint #1 Count "A"	Formal Complaint #2 Count "A"	Formal Complaint #3
"[D]espite Swing First's right to the first effluent generated in the certificated service area, Utility has rarely delivered effluent" <sup>18</sup>	"Only after satisfying Swing First's requirements should Utility be allowed to sell Effluent to any other customers or to pump Effluent into the ground" <sup>19</sup>	SFG asks the Commission to "[o]rder Utility to recognize that its current customers have a priority for Effluent produced from Utility's Santan Wastewater Treatment Plant." <sup>20</sup>
"Utility has withheld effluent" <sup>21</sup>	"[T]his is a problem Utility created by deliberately withholding Effluent in 2007 from Swing First and selling Effluent to the Santan HOA" <sup>22</sup>	"Utility has informed Swing first that it will soon unilaterally discontinue providing Effluent to Swing First and other Effluent customers." <sup>23</sup>
"Utility has been selling some effluent to other irrigation customers..., but has been pumping most of the effluent it produces into the ground" <sup>24</sup>	"Utility pumped most of the withheld Effluent into the ground." <sup>25</sup>	"Utility intend[s] to discontinue providing Effluent altogether to its existing customers and would instead recharge that Effluent into the ground in order to receive large recharge credits, which would financially benefit Utility." <sup>26</sup>

The Commission has left no shadow of a doubt regarding the preclusive effect of Decisions 73137 and 74036 on the claim of SFG to the effluent of Johnson Utilities. All claims previously raised by SFG in Dockets WS-02987A-08-0049 and WS-02987A-13-0053 have been dismissed with prejudice twice now in Decisions 73137 and 74036. The dismissal of a claim with prejudice bars a party from raising the same claim in a subsequent action under the long-established judicial

<sup>18</sup> Formal Complaint #1 at p. 2, lines 20-22.

<sup>19</sup> Formal Complaint #2 at p. 9, lines 24-25.

<sup>20</sup> Formal Complaint #3 at p. 5, lines 25-26.

<sup>21</sup> Direct Testimony of David Ashton dated December 30, 2009 (Docket WS-02987A-08-0049) at p. 11, line 11.

<sup>22</sup> Formal Complaint #2 at p. 9, line 9, through p. 10, line 2.

<sup>23</sup> Formal Complaint #3 at p. 1, lines 4-5.

<sup>24</sup> Formal Complaint #1 at p. 10, lines 9-11.

<sup>25</sup> Formal Complaint #2 at p. 9, line 9.

<sup>26</sup> Formal Complaint #3 at p. 3, lines 22-25.

1 doctrine known as *res judicata*. In *Roden v. Roden*, 29 Ariz. 549, 243 P. 413 (1926), the Arizona  
2 Supreme Court held that “[a] judgment of dismissal ‘with prejudice’ is the same as a judgment for  
3 defendant upon the merits, and, of course, is *res judicata* as to every matter litigated.”<sup>27</sup> More  
4 recently, in *Torres v. Kennecott Copper Corp.*, 15, Ariz. App. 272, 488 P.2d 477 (1971), the  
5 Arizona Court of Appeals held that “a dismissal with prejudice is a judgment on the merits, ...  
6 and is therefore Res judicata as to every issue reasonably framed by the pleadings.”<sup>28</sup>

7 In Decision 73137, the Commission placed SFG squarely on notice that “withdrawal of its  
8 Amended Complaint with prejudice [in Docket WS-02987A-08-0049] will foreclose Swing First  
9 from raising those claims again before the Commission even if the Superior Court decides its  
10 claims are more appropriately within the Commission’s jurisdiction.”<sup>29</sup> SFG saw this cautionary  
11 language in the recommended opinion and order yet made the informed choice that it would not  
12 file exceptions. Nor did SFG elect to request rehearing on Decision 73137, an essential  
13 prerequisite to appealing a decision of the Commission to the courts.

14 Similarly, in Decision 74036, the Commission reiterated its earlier findings, stating as  
15 follows:

16 We do not find persuasive SFG’s assertion that the doctrine of *res judicata* does  
17 not apply to its claims because the claims raised in the 2013 Complaint and the  
18 2008 Complaint are separated by a five year span. Arizona courts have stated that  
19 *res judicata* will preclude a claim when a former judgment on the merits was  
20 rendered by the court of competent jurisdiction and **“the matter now at issue  
21 between the same parties or their privities was, or might have been,  
22 determined in the former action.”** SFG requested that its 2008 claims be  
23 dismissed with prejudice, knowing it would forego the opportunity to have the  
24 Commission decide those claims in any future proceeding. Therefore, we find that  
25 SFG’s claims in Counts and “A” and “B” are barred by the doctrine of *res judicata*.  
26 Further, we find it appropriate and in the public interest to uphold Decision No.  
27 73137 to provide finality and to promote judicial efficiency.<sup>30</sup>

28 The Commission’s rules clearly authorize the dismissal of a formal complaint, as described  
in A.A.C. R14-3-109(C):

<sup>27</sup> *Roden v. Roden*, 29 Ariz. 549, 553, 243 P. 413, 415 (1926).

<sup>28</sup> *Torres v. Kennecott Copper Corporation*, 15, Ariz. App. 272, 274, 488 P.2d 477, 479 (1971).

<sup>29</sup> Decision 73137 at FOF 114, p. 23, lines 10-12 (citation omitted).

<sup>30</sup> Decision 74036 at FOF 61, pp. 18-19 (citing *Hall v. Lalli*, 194 Ark. 54, 977 P.2d 776 at 750 (1999) (emphasis added)).

1 Dismissal of Proceeding. The Commission may dismiss the application or  
2 complaint with or without prejudice or may recess said hearing for a further period  
3 to be set by the Commission. A single Commissioner or a Hearing Officer may  
4 adjourn or recess a hearing at any time to submit a recommendation to the  
5 Commission to dismiss the proceeding or may recess said hearing for a further  
6 period to be set by the Commission.

7 Dismissing SFG's Formal Complaint #3 including all claims contained therein is  
8 appropriate because the claims are barred by the doctrine of *res judicata*. Further, dismissing  
9 SFG's Formal Complaint #3 is appropriate because it is in the public interest to uphold Decisions  
10 73137 and 74036 to provide finality and to promote judicial efficiency.

11 Johnson Utilities would also like to highlight the error in SFG's assertion that the recharge  
12 of effluent by Johnson Utilities will "financially benefit Utility." Johnson Utilities has a  
13 designation of assured water supply and its service territory is enrolled as member lands in the  
14 Central Arizona Groundwater Replenishment District ("CAGRDR"). Johnson Utilities has an  
15 approved adjuster mechanism which allows the Company to pass through to its customers the  
16 taxes imposed by the CAGRDR in the form of a gallonage charge. When Johnson Utilities  
17 recharges effluent in the aquifer, it accrues storage credits which can be used to offset tax  
18 assessments from the CAGRDR. The reduction of taxes paid to the CAGRDR will accrue directly  
19 to all of the customers of Johnson Utilities in the form of lower adjuster fees on water sales. Thus,  
20 the recharge of effluent benefits all of the customers of Johnson Utilities, and not just those few  
21 which have been purchasing effluent.

22 **B. SFG's Claims Should be dismissed Pursuant to Rule 12(b)(1) of the Arizona**  
23 **Rules of Civil Procedure because the Commission Lacks Jurisdiction to Direct**  
24 **How Johnson Utilities must Use its Effluent.**

25 Even if the claims of SFG set forth in Formal Complaint #3 were not barred by the doctrine  
26 of *res judicata* pursuant to Decisions 73137 and 74036, the claims should be dismissed pursuant  
27 to Rule 12(b)(1) of the Arizona Rules of Civil Procedure because the Commission lacks  
28 jurisdiction to direct how Johnson Utilities must use the effluent it produces.

The Arizona Corporation Commission's powers are described in Article 15, Section 3 of  
the Arizona Constitution, as follows:

1 The corporation commission shall have full power to, and shall, prescribe just and  
2 reasonable classifications to be used and just and reasonable rates and charges to  
3 be made and collected, by public service corporations within the state for service  
4 rendered therein, and make reasonable rules, regulations, and orders, by which such  
5 corporations shall be governed in the transaction of business within the state, and  
6 may prescribe the forms of contracts and the systems of keeping accounts to be  
7 used by such corporations in transacting such business, and make and enforce  
8 reasonable rules, regulations, and orders for the convenience, comfort, and safety,  
9 and the preservation of the health, of the employees and patrons of such  
10 corporations; Provided, that incorporated cities and towns may be authorized by  
11 law to exercise supervision over public service corporations doing business therein,  
12 including the regulation of rates and charges to be made and collected by such  
13 corporations; Provided further, that classifications, rates, charges, rules,  
14 regulations, orders, and forms or systems prescribed or made by said corporation  
15 commission may from time to time be amended or repealed by such commission.  
16 (emphasis added).

17 Public service corporations are defined in Article 15, Section 2 of the Arizona  
18 Constitution, as follows:

19 All corporations other than municipal engaged in furnishing gas, oil, or electricity  
20 for light, fuel, or power; or in furnishing water for irrigation, fire protection, or  
21 other public purposes; or in furnishing, for profit, hot or cold air or steam for heating  
22 or cooling purposes; or engaged in collecting, transporting, treating, purifying and  
23 disposing of sewage through a system, for profit; or in transmitting messages or  
24 furnishing public telegraph or telephone service, and all corporations other than  
25 municipal, operating as common carriers, shall be deemed public service  
26 corporations.

27 Effluent is not “water” within the meaning of the phrase “furnishing water for irrigation,  
28 fire protection, or other public purposes” in Article 15, Section 2. Nor does effluent fall within  
the scope of “collecting, transporting, treating, purifying and disposing of sewage through a  
system, for profit” in Article 15, Section 2. Rather, effluent is a byproduct of the sewage treatment  
service provided by a public service corporation and the Commission may not direct how that  
public service corporation must use its effluent. As the Arizona Supreme Court has said, effluent  
is neither surface water nor groundwater—effluent is effluent.

In *Arizona Public Service Company v. John F. Long*, 160 Ariz. 429, 773 P.2d 988 (1989),  
a group of downstream landowners challenged contracts that were entered into between a group  
of cities and a group of public utilities for the purchase and sale of effluent for use at the Palo  
Verde Nuclear Generating Station, arguing that the contracts deprived them of appropriative water

1 rights because the cities were no longer discharging effluent into the river bed. In determining the  
2 nature of effluent, the *Long* court concluded as follows:

3 In summary, we hold that the effluent in question is neither groundwater nor surface  
4 water. Whether diverted by appropriation or withdrawn from the ground, after use  
5 by the municipalities the water loses its original character as groundwater or surface  
6 water and becomes, instead, just what the statute describes--effluent. See A.R.S. §  
7 45-402(6). The Cities' expenditure of tens if not hundreds of millions of dollars for  
8 sewer lines, purification plants and equipment does not transform the water and  
9 change it back into groundwater or surface water. It remains effluent.

10 Neither the statutes dealing with groundwater nor those dealing with appropriation  
11 of surface water control or regulate the Cities' use or disposition of effluent. Thus,  
12 the Cities are free to contract for the disposition of that effluent and the utilities,  
13 having purchased the right to use the effluent, may continue to use it.<sup>31</sup>

14 Two years later, in the case of *Arizona Water Company v. City of Bisbee*, 172 Ariz. 176,  
15 836 P.2d 389 (Ct. App. 1991), the Arizona Court of Appeals considered a lawsuit brought by  
16 Arizona Water Company challenging the right of the City of Bisbee to deliver effluent from the  
17 City's wastewater treatment plant to Phelps Dodge for use in its copper leaching operation, within  
18 the certificated territory of Arizona Water Company. The Court described the facts as follows:

19 The city processes sewage through its Mule Gulch Wastewater Treatment Facility,  
20 which is located within Arizona Water's service area. In 1986, after the United  
21 States Environmental Protection Agency notified the city that the discharge from  
22 the facility did not meet federal requirements, the city contracted with [Phelps  
23 Dodge ("PD")] to deliver 100,000 to 300,000 gallons of sewage effluent per day to  
24 the PD leaching operation. In return, PD leased two pumps and a pipeline to the  
25 city for transporting the effluent from the treatment facility to the leaching  
26 operation. The effluent contains pathogenic bacteria, fecal coliform bacteria, and  
27 metals such as arsenic and cadmium. It is not fit either for irrigation purposes or  
28 for human consumption.

When Arizona Water learned of the city's effluent delivery, it demanded that the  
city cease "providing water service" within Arizona Water's service area. After the  
city refused, Arizona Water filed suit seeking a declaratory judgment, injunctive  
relief, and damages for inverse condemnation. It then moved for partial summary  
judgment. At the hearing, the city made an oral motion for summary judgment,  
which the trial court later granted.

Arizona Water contends on appeal that the city's delivery of water within Arizona  
Water's certificated area constitutes a competing service in violation of A.R.S. §§

<sup>31</sup> *Long*, 160 Ariz. 434, 438, 773 P.2d 993, 997 (emphasis added).

1 9-515 and 9-516. As a result, Arizona Water contends that the city has taken its  
2 property without just compensation.<sup>32</sup>

3 The *Bisbee* court correctly recognized that Article 15, Section 2 of the Arizona  
4 Constitution “distinguishes between public service corporations furnishing water and those  
5 ‘collecting, ... treating, ... and *disposing* of sewage.’”<sup>33</sup> After considering the Arizona Supreme  
6 Court’s discussion of the nature of effluent in *Long*, the *Bisbee* court ruled that “[b]ecause effluent  
7 is not the same as the water that Arizona Water provides to its service area, we find no merit to  
8 Arizona Water’s contention that the city is illegally competing with it.”<sup>34</sup>

9 What these decisions make clear is that effluent is not water. Thus, the delivery of effluent  
10 is not “furnishing water for irrigation, fire protection, or other public purposes” which would  
11 subject the deliverer to regulation as a water public service corporation. Nor is the delivery of  
12 effluent “collecting, transporting, treating, purifying and disposing of sewage through a system,  
13 for profit,” which would subject the deliverer to regulation as a sewer public service corporation.  
14 As the Arizona Supreme Court ruled in *Long*, effluent is effluent and the owner is free to choose  
15 how it will use that effluent. The Commission is without jurisdiction to direct how Johnson  
16 Utilities must use its effluent.

17 While Johnson Utilities has a rate for effluent contained in its wastewater tariff, it does not  
18 have an effluent tariff. As evidence of this fact, Johnson Utilities notes that in Decision 74036 the  
19 ALJ ordered the Company “to make a tariff filing, for Staff’s review and Commission approval,  
20 concerning its provision of effluent service, including the terms and conditions of service.”<sup>35</sup>  
21 Although Johnson Utilities made the required filing of a proposed effluent tariff in Docket WS-  
22 02987A-13-0053 on November 15, 2013, no action has been taken on the filing in the two-plus  
23 years that it has been filed. In light of the Commission’s lack of jurisdiction to direct how Johnson  
24 Utilities uses its effluent, the Company intends to seek a modification of Decision 74036 to delete  
25 the requirement regarding the tariff filing.

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27 <sup>32</sup> *Bisbee*, 172 Ariz. 176, 177, 836 P.2d 389, 390.

28 <sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 178, 836 P.2d at 391.

<sup>35</sup> Decision 74036 at p. 22, lines 1-3.

1 SFG asks the Commission in its Formal Complaint #3 to issue an order requiring Johnson  
2 Utilities to first obtain authorization from the Commission pursuant to A.A.C. R14-2-402(C)  
3 before it discontinues “tariffed Effluent service.”<sup>36</sup> However, because the delivery of effluent is  
4 not a public utility service within the meaning of Article 15, Section 2 of the Arizona Constitution,  
5 there is no legal basis for requiring Johnson Utilities to make a filing pursuant to A.A.C. R14-2-  
6 402(C).

7 Arizona Administrative Code R14-3-101(A) states, in relevant part, as follows:

8 In all cases in which procedure is set forth neither by law, nor by these rules, nor  
9 by regulations or orders of the Commission, the Rules of Civil Procedure for the  
10 Superior Court of Arizona as established by the Supreme Court of the state of  
11 Arizona shall govern.

12 Accordingly, pursuant to A.A.C. R14-3-101(A), the Commission may grant Johnson  
13 Utilities’ Motion to Dismiss SFG’s Formal Complaint #3 pursuant to Rule 12(b)(1) of the Arizona  
14 Rules of Civil Procedure. For the reasons set forth above, the Commission lacks jurisdiction to  
15 direct how Johnson Utilities uses its effluent and SFG’s Formal Complaint #3 should be dismissed  
16 for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). Further, for the reasons set forth  
17 herein, SFG’s Formal Complaint #3 is barred by the doctrine of *res judicata* pursuant to Decisions  
18 73137 and 74036.

19 **C. SFG Is Not Entitled to Attorneys’ Fees in a Formal Complaint Proceeding.**

20 In Formal Complaint #3, SFG asks the Commission to order Johnson Utilities to pay  
21 SFG’s costs and attorneys’ fees. However, SFG fails to cite any legal authority to support its  
22 request. In *United States Fidelity & Guaranty Co. v. Frohmiller*, 71 Ariz. 377, 227 P.2d 1007  
23 (1951), the Arizona Supreme Court held that if “the legislature intended under the statute to  
24 authorize the payment of attorneys’ fees ... it would have included such a provision in plain and  
25 unambiguous terms.”<sup>37</sup> “[W]ithout a clearly expressed legislative mandate to make [an  
26 individual] liable for attorneys’ fees,” the courts declined to extend the burden “beyond that  
27 imposed under the terms of the statute.”<sup>38</sup> Similarly, in *Semple v. Tri-City Drywall, Inc.*, 172 Ariz.

28 <sup>36</sup> Formal Complaint #3 at p. 1, lines 10-12.

<sup>37</sup> *Frohmiller*, 71 Ariz. 377, 381, 227 P.2d 1007, 1009 (emphasis added).

<sup>38</sup> *Id.* (emphasis added).

1 608, 838 P.2d 1369, (Ct. App. 1992), the Arizona Court of Appeals declined to allow attorneys’  
2 fees in an administrative proceeding under A.R.S. §40-341.01 because “there simply is no  
3 indication that the legislature intended section 12-341.01 to apply to attorney’s fees incurred by  
4 the prevailing party in an administrative proceeding.”<sup>39</sup>

5 SFG brought its Formal Complaint #3 “[p]ursuant to the provisions of A.R.S. §§ 40-246  
6 and 40-248, and A.A.C. R14-3-106(L).”<sup>40</sup> Neither of these statutes nor the cited Arizona  
7 Administrative Code provision make any mention of attorneys’ fees, let alone provide a “clearly  
8 expressed legislative mandate” authorizing the award of attorneys’ fees. Consistent with the  
9 holdings in *Frohmler* and *Semple*, “there is simply no indication that the legislature intended” to  
10 authorize recovery of attorneys’ fees in Commission complaint cases under A.R.S. §§ 40-246 and  
11 40-248. Absent such express statutory authority, the Commission may not award attorneys’ fees  
12 to SFG in this case.

13 **III. CONCLUSION.**

14 SFG’s Formal Complaint #3 should be dismissed because the claims alleged therein are  
15 barred by the doctrine of *res judicata* as a result of the Commission’s prior rulings in Decisions  
16 73137 and 74036. In addition, dismissing SFG’s Formal Complaint #3 is appropriate because it  
17 is in the public interest to uphold Decisions 73137 and 74036 to provide finality and to promote  
18 judicial efficiency.

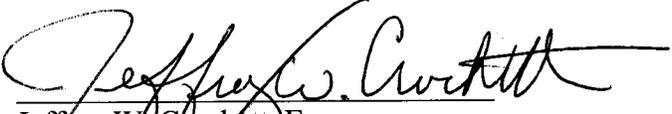
19 Further, even if the claims of SFG set forth in Formal Complaint #3 were not barred by  
20 the doctrine of *res judicata*, the Commission lacks jurisdiction to direct how Johnson Utilities  
21 must use its effluent so the claims in Formal Complaint #3 should be dismissed for lack of subject  
22 matter jurisdiction pursuant to Rule 12(b)(1) of the Arizona Rules of Civil Procedure.

23 . . . .  
24 . . . .  
25 . . . .  
26 . . . .

27 \_\_\_\_\_  
28 <sup>39</sup> *Semple*, 172 Ariz. 608, 611, 838 P.2d 1369, 1372 (emphasis added).  
<sup>40</sup> Formal Complaint #3 at p. 1, line 1.

1 Finally, there is no legal basis upon which to award attorneys' fees to SFG and its request  
2 for attorneys' fees should be dismissed.

3 RESPECTFULLY submitted this 22<sup>th</sup> day of February, 2016.

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9 ORIGINAL and thirteen (13) copies filed  
10 this 22<sup>th</sup> day of February, 2016, with:

11 Docket Control  
12 ARIZONA CORPORATION COMMISSION  
13 1200 West Washington Street  
14 Phoenix, Arizona 85007

15 COPY of the foregoing hand-delivered  
16 this 22<sup>th</sup> day of February, 2016, to:

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