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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

Arizona Corporation Commission

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

DOCKET NO. WS-02987A-16-0017  
JOHNSON UTILITIES' REPLY IN  
SUPPORT OF MOTION TO DISMISS

On January 19, 2016, Swing First Golf, LLC, ("SFG") filed its third formal complaint ("Formal Complaint #3") against Johnson Utilities, L.L.C. ("Johnson Utilities" or "Company"). On February 22, 2016, Johnson Utilities filed a Motion to Dismiss SFG's Formal Complaint #3 ("Motion to Dismiss") on the grounds that: (i) SFG's claims are barred by the doctrine of *res judicata* as a result of Arizona Corporation Commission ("Commission") Decisions 73137 and 74036; and (ii) even if the claims are not barred by the doctrine of *res judicata*, SFG's claims should be dismissed because the Commission lacks the jurisdiction to direct how Johnson Utilities uses the effluent it owns pursuant to Rule 12(b)(1) of the Arizona Rules of Civil Procedure. On March 21, 2016, SFG filed a Response to the Company's Motion to Dismiss ("Response"). Johnson Utilities now files its Reply in Support of its Motion to Dismiss and requests that the Commission dismiss SFG's Formal Complaint #3 with prejudice.

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

In its Response, SFG argues that its Formal Complaint #3 is not barred by the doctrine of *res judicata* because it "is based on an entirely new nucleus of facts and theories."<sup>1</sup> However, this argument is easily and quickly discredited by the following comparison of the allegations contained in Formal Complaint #3 with those contained in SFG's 2008 formal complaint ("Formal Complaint #1") filed in Docket WS-02987A-08-0049 and its 2013 formal complaint ("Formal Complaint #2") filed in Docket WS-02987A-13-0053:

<sup>1</sup> SFG Response at 2, line 6.

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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>2</sup>	"Swing First asks the Commission to order Utility to deliver Effluent to Swing First in the quantities requested by Swing First" <sup>3</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>4</sup>
"[D]espite Swing First's right to the first effluent generated in the certificated service area, Utility has rarely delivered effluent" <sup>5</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>6</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>7</sup>
"Utility has withheld effluent" <sup>8</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>9</sup>	"Utility has informed Swing first that it will soon unilaterally discontinue providing Effluent to Swing First and other Effluent customers." <sup>10</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>11</sup>	"Utility pumped most of the withheld Effluent into the ground." <sup>12</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>13</sup>

<sup>2</sup> Formal Complaint #1 at 5, lines 6-9.

<sup>3</sup> Formal Complaint #2 at 9, lines 22-23.

<sup>4</sup> Formal Complaint #3 at 5, lines 21-24.

<sup>5</sup> Formal Complaint #1 at 2, lines 20-22.

<sup>6</sup> Formal Complaint #2 at 9, lines 24-25.

<sup>7</sup> Formal Complaint #3 at 5, lines 25-26.

<sup>8</sup> Direct Testimony of David Ashton (December 30, 2009) in Docket WS-02987A-08-0049 at 11, line 11.

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

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

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

<sup>12</sup> Formal Complaint #2 at 9, line 9.

<sup>13</sup> Formal Complaint #3 at 3, lines 22-25.

1 The core issue in all three SFG complaints, and the “nucleus of facts and theories”  
2 pertaining thereto, is whether or not Johnson Utilities is required as a public service corporation  
3 to deliver effluent to SFG. SFG’s attempt to distinguish this complaint from its prior complaints  
4 by arguing that Johnson Utilities is now “permanently discontinuing all effluent deliveries”<sup>14</sup> is a  
5 distinction without a difference. Whether Johnson Utilities delivers all, some or none of the  
6 effluent requested by SFG, the claim that Johnson Utilities is required to provide effluent to SFG  
7 has been raised and dismissed with prejudice in two prior complaints. SFG specifically  
8 acknowledges as much in its Response when it states that Formal Complaint #1 and Formal  
9 Complaint #2 each dealt with effluent “withholding.”<sup>15</sup> Whether Johnson Utilities can withhold  
10 the effluent it owns from SFG is once again the subject of Formal Complaint #3.

11 SFG cites *Howell v. Hodap*, 221 Ariz. 543, 212 P.3d 881 (App. 2009) for the proposition  
12 that *res judicata* only bars “subsequent claims [that] arise out of the same nucleus of facts” and  
13 that “the relevant inquiry is whether [the new claim] could have been brought” in the prior action.<sup>16</sup>  
14 However, the *Howell* decision fully supports Johnson Utilities’ Motion to Dismiss. Clearly, the  
15 claims raised by SFG in Formal Complaint #3 arise out of the “same nucleus of facts” raised in  
16 the prior two complaints. Further, not only could the claims of Formal Complaint #3 have been  
17 brought in the prior complaints, they actually were brought in the prior complaints. Finding of  
18 Fact 61 from Decision 74036 dismissing Counts “A” and “B” of SFG’s Formal Complaint #2 with  
19 prejudice is directly on point and should apply in this case:

20 The 2008 Complaint between SFG and Johnson spanned more than four years and  
21 was vigorously litigated by the parties. During that proceeding, extensive  
22 discovery was conducted, motions resolved, and oral arguments held. SFG  
23 requested that the Commission allow SFG to dismiss its 2008 Complaint with  
24 prejudice, over the objections of Johnson, and SFG acknowledged that it  
understood that the claims in the 2008 Complaint could not be reasserted in a future  
proceeding before the Commission. We find that the claims raised in Count “A”

25 <sup>14</sup> SFG Response at 2, line 7. Johnson Utilities notes that SFG has previously asserted a claim that the  
26 Company has effectively discontinued the delivery of all effluent. In Count “A” of Formal Complaint #1,  
SFG alleged that “despite Swing First’s right to the first effluent generated in the certificated service area,  
Utility has rarely delivered effluent.” (Formal Complaint #1 (WS-02987A-08-0049) at 2, lines 19-24)

27 <sup>15</sup> SFG Response at 2, lines 17-20 (“The facts in the first Complaint concerned Utility’s partial withholding  
of Effluent in 2007.... The facts in 2013 concerned Utility’s ... effluent withholding....”).

28 <sup>16</sup> SFG Response at 1-2 citing *Howell v. Hodap*, 221 Ariz. 543, 547, 212 P.3d 881 (App. 2009) (quoting  
*United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 909 (9<sup>th</sup> Cir. 1998)).

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

16 Dismissing SFG’s Formal Complaint #3 is warranted because the claims are barred by the  
17 doctrine of *res judicata*. The Commission left absolutely no doubt regarding the preclusive effect  
18 of Decisions 73137 and 74036 on the claim of SFG to effluent owned by Johnson Utilities. All  
19 claims previously raised in Dockets WS-02987A-08-0049 and WS-02987A-13-0053 have been  
20 dismissed with prejudice in Decisions 73137 and 74036. SFG did not file exceptions nor did it  
21 request rehearing on either decision. Thus, Decisions 73137 and 74036 are final and non-  
22 appealable.

23 **B. SFG’s Claims Must be Dismissed Under Rule 12(b)(1) because the**  
24 **Commission Lacks Jurisdiction to Direct How Johnson Utilities Uses the**  
25 **Effluent it Owns.**

26 Even if the claims of SFG in Formal Complaint #3 are not barred by the doctrine of *res*  
27 *judicata*, the claims must be dismissed pursuant to Rule 12(b)(1) of the Arizona Rules of Civil  
28 Procedure because the Commission lacks jurisdiction to direct how Johnson Utilities uses the  
effluent it owns. SFG is entirely wrong in its assertion that the Arizona Constitution “provides  
the Commission full authority to oversee and regulate Utility’s provision of effluent for irrigation  
purposes....”<sup>18</sup> SFG cites the definition of “public service corporation” in Article 15, Section 2  
of the Arizona Constitution, yet there is no mention of the word “effluent” in the definition and  
“effluent” is certainly not “water” under the Arizona Constitution or Arizona law for purposes of

<sup>17</sup> Decision 74036, FOF 61 at pp. 18-19 (emphasis added).

<sup>18</sup> SFG Response at 4, lines 3-4.

1 vesting jurisdiction in the Commission to regulate Johnson Utilities as a public service  
2 corporation. Because the sale of effluent does not make the owner of that effluent a public service  
3 corporation under the Arizona Constitution, the Commission has no jurisdiction to direct how the  
4 effluent is used. While Johnson Utilities is a public service corporation with regard to the  
5 provision of water service and wastewater service, that fact does not and cannot create jurisdiction  
6 which does not otherwise flow from the Arizona Constitution.

7 Glaringly absent from SFG's pleading are any cases supporting its assertion regarding  
8 jurisdiction or any response to the cases cited by Johnson Utilities in its Motion to Dismiss. In  
9 *Arizona Public Service Company v. John F. Long*, 160 Ariz. 429, 773 P.2d 988 (1989), the Arizona  
10 Supreme Court described the unique nature of effluent:

11 In summary, we hold that the effluent in question is neither groundwater nor surface  
12 water. Whether diverted by appropriation or withdrawn from the ground, after use  
13 by the municipalities the water loses its original character as groundwater or surface  
14 water and becomes, instead, just what the statute describes—effluent. See A.R.S.  
15 § 45-402(6). The Cities' expenditure of tens if not hundreds of millions of dollars  
16 for sewer lines, purification plants and equipment does not transform the water and  
17 change it back into groundwater or surface water. It remains effluent.

18 Neither the statutes dealing with groundwater nor those dealing with appropriation  
19 of surface water control or regulate the Cities' use or disposition of effluent. Thus,  
20 the Cities are free to contract for the disposition of that effluent and the utilities,  
21 having purchased the right to use the effluent, may continue to use it.<sup>19</sup>

22 In *Arizona Water Company v. City of Bisbee*, 172 Ariz. 176, 836 P.2d 389 (Ct. App. 1991),  
23 the Arizona Court of Appeals considered a lawsuit brought by Arizona Water Company  
24 challenging the right of the City of Bisbee to deliver effluent from the City's wastewater treatment  
25 plant to Phelps Dodge for use in its copper leaching operation located within the certificated  
26 territory of Arizona Water Company. After considering the Arizona Supreme Court's description  
27 of the nature of effluent in the *John F. Long* case, the *Bisbee* court ruled that "[b]ecause effluent  
28 is not the same as the water that Arizona Water provides to its service area, we find no merit to  
Arizona Water's contention that the city is illegally competing with it."<sup>20</sup>

<sup>19</sup> *John F. Long*, 160 Ariz. 434, 438, 773 P.2d 993, 997 (emphasis added).

<sup>20</sup> *Id.* at 178, 836 P.2d at 391.

1           These cases make clear the fact that effluent is not water within the meaning of Article 15,  
2 Section 2 of the Arizona Constitution. Thus, the sale of effluent is not “furnishing water for  
3 irrigation, fire protection, or other public purposes” which would subject the seller to regulation  
4 as a *water* public service corporation. Nor is the sale of effluent “collecting, transporting, treating,  
5 purifying and disposing of sewage through a system, for profit,” which would subject the seller to  
6 regulation as a *sewer* public service corporation.<sup>21</sup> As the Arizona Supreme Court ruled in *John*  
7 *F. Long*, effluent is effluent and the owner is free to choose how it will use that effluent. SFG’s  
8 claim that the Commission has constitutional authority to direct how Johnson Utilities uses the  
9 effluent it owns is without merit and should be rejected.

10           Last year, in a case that is instructive for purposes of SFG’s Formal Complaint #3, the  
11 Commission considered an application by Liberty Utilities (Litchfield Park Water & Sewer Corp.)  
12 (“Liberty”) in Dockets SW-01428A-14-0369 and W-01427A-14-0369 regarding an Agreement  
13 for Development of Effluent Recharge Facility, Effluent Disposal and Purchase and Sale of  
14 Effluent (“Development Agreement”) between Liberty and the Central Arizona Water  
15 Conservation District (“CAWCD”). Under the terms of the Development Agreement, Liberty  
16 agreed to sell CAWCD (i) 2,400 acre-feet of effluent per year for 100 years at rates set forth in  
17 the Development Agreement; and (ii) long-term effluent storage credits accrued and offered to  
18 CAWCD by Liberty for a period of 100 years. In its application, Liberty asserted that due to  
19 CAWCD’s substantial financial commitment to the effluent recharge project, CAWCD sought  
20 assurances from the Commission that Liberty had the right and authority to commit the 2,400  
21 acre-feet of effluent to CAWCD annually for 100 years and to sell long-term storage credits to  
22 CAWCD. However, in filing the application, Liberty also made clear its position that Commission  
23 approval of the Development Agreement was neither necessary nor required under Arizona law.

24           In its analysis of Liberty’s application, Utilities Division Staff concluded that a utility’s  
25 use of the effluent it owns is a matter of “management discretion,” stating as follows:  
26

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27 <sup>21</sup> Effluent is not itself a public utility service but a byproduct of the treatment of sewage by a public service  
28 corporation. A wastewater provider is the owner of the effluent generated in its sewage treatment facilities  
and the Commission lacks authority to regulate the use of effluent as a public utility service.

1 Staff also agrees with Liberty that entering into the underlying Development  
2 Agreement and selling effluent to CAWCD are matters of management discretion.  
3 Staff further agrees with Liberty that specific Commission approval of any isolated  
4 elements of this Arrangement or the Agreement as a whole is not required based on  
5 the circumstances of this case. While Staff does not recommend that the  
6 Commission approve the Agreement or any isolated elements of the Agreement,  
7 Staff does recommend that the Commission express its general support for the  
8 Arrangement due to the public benefits to be derived.<sup>22</sup>

9 Following Staff's recommendation, the Commission ruled in Conclusion of Law No. 4  
10 that "[t]he terms of the Development Agreement, as currently stated, do not require Commission  
11 approval."<sup>23</sup>

12 SFG asserts that "pursuant to its Constitutional authority" the Commission authorized  
13 Johnson Utilities to provide effluent service and that Johnson Utilities has not received  
14 authorization from the Commission to "discontinue the tariffed Effluent sales previously  
15 authorized by the Commission."<sup>24</sup> There are two fatal flaws in this argument. First, for the reasons  
16 that are discussed above, the Commission has no authority under the Arizona Constitution to direct  
17 how Johnson Utilities uses its effluent, a byproduct of the treatment of wastewater. Thus, SFG's  
18 assertions that Johnson Utilities "could not sell Effluent without Commission authorization" and  
19 that "it certainly cannot stop selling Effluent altogether without Commission authorization" are  
20 without any merit or support. In fact, the assertions are directly at odds with the Commission's  
21 recent ruling in Decision 74993 in the Liberty case discussed above.

22 Second, while Johnson Utilities has a price for effluent stated in its wastewater tariff, this  
23 does not constitute an "effluent tariff" and the Company emphatically rejects SFG's  
24 characterization of a "price" as a tariff. As discussed at length herein, the sale of effluent is not  
25 the sale of water which subjects the seller to regulation as a public service corporation for  
26 "furnishing water for irrigation, fire protection, or other public purposes." Nor is the sale of  
27 effluent "collecting, transporting, treating, purifying and disposing of sewage through a system,  
28 for profit." Thus, there is no reason or requirement for Johnson Utilities to seek Commission

<sup>22</sup> Decision 74993, Finding of Fact 32, lines 13-19 (emphasis added).

<sup>23</sup> *Id.* at Conclusion of Law No. 4.

<sup>24</sup> SFG Response at 4, lines 22-23 and 30-31.

1 authorization under A.A.C. R14-2-402(C) in order for the Company to recharge the effluent it  
2 owns instead of selling that effluent to SFG or any other purchaser.

3 Johnson Utilities notes that Liberty sells its effluent at a negotiated price not to exceed  
4 \$430 per acre-foot as described in its tariff.<sup>25</sup> Notwithstanding the fact that Liberty has market-  
5 based pricing described in its tariff, the Commission still ruled that the Development Agreement  
6 between Liberty and CAWCD for the sale of effluent was a matter of “management discretion”  
7 and that “specific Commission approval of any isolated elements of [the] Arrangement or the  
8 Agreement as a whole is not required based on the circumstances of [the] case.”<sup>26</sup>

9 SFG argues that Johnson Utilities’ decision to change what it does with the effluent it owns  
10 “is no more lawful than if Southwest Gas were to discontinue gas sales to (existing) customer  
11 number one in favor of (new) customer number two and justify it because the gas was no longer  
12 ‘available’ to customer number one.”<sup>27</sup> Much to the contrary, the two scenarios are as different  
13 as chalk and cheese. Unlike effluent, “gas” is expressly identified in Article 15, Section 2 of the  
14 Arizona Constitution and the sale of gas to retail customers clearly subjects the seller to regulation  
15 as a public service corporation. Johnson Utilities’ decision to recharge its effluent is nothing at  
16 all like a decision by Southwest Gas to discontinue gas sales to customers without a Commission  
17 order. Johnson Utilities is a public service corporation because it provides water and wastewater  
18 service, not because it sells or recharges the effluent it owns. Moreover, the fact that Johnson  
19 Utilities is a public service corporation by virtue of the water and wastewater service it provides  
20 does not and cannot vest jurisdiction in the Commission over the sale or use of effluent where  
21 such authority does not exist under the Arizona Constitution or Arizona statutes.<sup>28</sup>

22 Pursuant to A.A.C. R14-3-101(A), the Commission may grant the Motion to Dismiss  
23 SFG’s Formal Complaint #3 pursuant to Rule 12(b)(1) of the Arizona Rules of Civil Procedure.  
24 For all of the reasons set forth above, as well as the reasons set forth in the Motion to Dismiss, the  
25

26 <sup>25</sup> Decision 74993, Finding of Fact 42, lines 3-4.

27 <sup>26</sup> *Id.* at Finding of Fact 32, lines 14-16.

28 <sup>27</sup> SFG Response at 5, lines 10-12.

<sup>28</sup> SFG has not identified any statute which confers jurisdiction upon the Commission to regulate the owner of effluent as a public service corporation.

1 Commission lacks jurisdiction to direct how Johnson Utilities uses the effluent it owns and SFG's  
2 Formal Complaint #3 should be dismissed for lack of jurisdiction pursuant to Rule 12(b)(1).

3 C. **The Claims that SFG Cannot Increase Greens Fees to Recover Increased**  
4 **Water Costs and that it will be Forced Out of Business Unless it Continues to**  
5 **Receive Effluent Are Not Supported by any Financial Data or Other Evidence**  
6 **Provided by SFG.**

7 SFG asserts that it "competes in the very competitive market for golf course customers  
8 and it would be impossible for it to increase greens fees enough to recover quintupled water  
9 costs."<sup>29</sup> However, SFG has failed to provide any financial data or other evidence to support its  
10 claim. Likewise, SFG failed to provide any financial data or other evidence to support the claim  
11 that it will be "forced out of business" if it does not continue to receive low-cost effluent from  
12 Johnson Utilities.<sup>30</sup> However, even assuming *arguendo* that its claims could be proved, SFG still  
13 has no legal right to effluent that is owned by Johnson Utilities and there is no legal basis to force  
14 the Company to continue to supply effluent to SFG or any other purchaser without a contract.

15 Johnson Utilities notes also that if SFG truly believed that a permanent right to effluent  
16 was the only way the golf course could succeed financially, then it was incumbent upon SFG to  
17 secure a written agreement for effluent before it purchased the golf course. SFG did not do so and  
18 it cannot now seek control over effluent that is owned by Johnson Utilities where no right to such  
19 effluent exists under the Arizona Constitution, statutes or case law.

20 D. **Johnson Utilities' Use of the Effluent it Owns is Fully Consistent with Sound**  
21 **Policy and Precedent.**

22 SFG asserts in its Response that "Utility's discontinuation of Effluent sales is not only  
23 unlawful, but contrary to established Commission policy."<sup>31</sup> In support of this assertion, SFG  
24 cites several decisions issued between 2005 and 2009 which purport to prohibit the sale of  
25 groundwater by a water utility for golf course irrigation. However, to the extent such a prohibition  
26 was ever a policy of the Commission, it is certainly not the policy today as evidenced by the fact  
27 that the Commission no longer includes such a prohibition in its orders, nor has it for a number of

28 <sup>29</sup> SFG Response at 5, lines 23-25.

<sup>30</sup> *Id.* at 5, lines 25-26.

<sup>31</sup> *Id.* at 6, lines 3-4.

1 years. Moreover, Johnson Utilities submits that the Commission lacks the legal authority to  
2 prohibit a water company from selling groundwater to a golf course where the use of groundwater  
3 on the golf course is otherwise lawful under Arizona law. Simply put, there is no “established  
4 Commission policy” that precludes Johnson Utilities from discontinuing the sale of effluent that  
5 the Company owns to SFG.

6 Johnson Utilities would also point out that the recharge of its effluent will benefit all of its  
7 existing water customers in the form of lower water charges because the recharged effluent will  
8 provide an offset against the Company’s replenishment obligation to the Central Arizona  
9 Groundwater Replenishment District (“CAGR D”) and thereby reduce its annual CAGR D tax  
10 assessment. Additionally, the Commission has expressly acknowledged the public benefits of  
11 recharging effluent in Decision 74993 as discussed above. Thus, Johnson Utilities’ decision to  
12 recharge its effluent is fully consistent with sound policy and recent Commission decisions.

13 **E. SFG’s Claim of Discrimination Under A.R.S. § 40-243 is Without Merit.**

14 SFG alleges that the decision by Johnson Utilities to discontinue the sale of effluent to  
15 SFG is discriminatory pursuant to A.R.S. § 40-243 which prohibits rates, fares, tolls, rentals,  
16 charges or classifications that are unjust, preferential or discriminatory.<sup>32</sup> However, this statute  
17 does not and cannot apply to the sale, recharge or other disposition of effluent because providing  
18 effluent is not “furnishing water for irrigation, fire protection, or other public purposes” within  
19 the meaning of Article 15, Section 2 of the Arizona Constitution. In other words, the sale, recharge  
20 or other disposition of effluent owned by Johnson Utilities is not providing a public utility service  
21 and A.R.S. § 40-243 does not apply. Thus, even if SFG could somehow prove that the Company’s  
22 use of its effluent is discriminatory or preferential, SFG would still not be entitled to relief under  
23 A.R.S. § 40-243 and SFG’s claim must fail.

24 **F. SFG is Not Entitled to Attorneys’ Fees.**

25 Although SFG asked the Commission to order Johnson Utilities to pay SFG’s costs and  
26 attorneys’ fees in Formal Complaint #3, SFG has failed to cite any legal authority whatsoever to  
27 support its request. In fact, SFG completely ignores the arguments against an award of attorneys’  
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<sup>32</sup> SFG Response at 7.

1 fees outlined in the Motion to Dismiss. SFG's request for attorneys' fees is without merit and  
2 should be dismissed.

3 **G. Response to SFG's Supplement to Formal Complaint.**

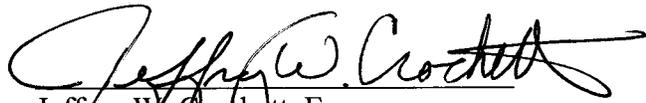
4 SFG filed a Supplement to Formal Complaint ("Supplement") on February 25, 2016, three  
5 days after Johnson Utilities filed its Motion to Dismiss. SFG's Supplement was fully incorporated  
6 into its Response to the Motion to Dismiss. Thus, Johnson Utilities has addressed in this Reply  
7 the issues raised in SFG's Supplement.

8 **CONCLUSION**

9 SFG's Formal Complaint #3 should be dismissed because the claims alleged therein are  
10 barred by the doctrine of *res judicata* as a result of the Commission's prior rulings in Decisions  
11 73137 and 74036. In addition, dismissing SFG's Formal Complaint #3 is appropriate because it  
12 is in the public interest to uphold Decisions 73137 and 74036 to provide finality and to promote  
13 judicial efficiency. Further, even if the claims of SFG set forth in Formal Complaint #3 were not  
14 barred by the doctrine of *res judicata*, the Commission lacks jurisdiction to direct how Johnson  
15 Utilities uses the effluent it owns so the claims in Formal Complaint #3 should be dismissed for  
16 lack of jurisdiction pursuant to Rule 12(b)(1) of the Arizona Rules of Civil Procedure. Finally,  
17 SFG's claim of discrimination under A.R.S. § 40-243 is without merit and there is no legal basis  
18 upon which to award attorneys' fees to SFG and its request for attorneys' fees. For all of these  
19 reasons, Johnson Utilities requests that SFG's Formal Complaint #3 be dismissed with prejudice.

20 RESPECTFULLY submitted this 4<sup>th</sup> day of April, 2016.

21 CROCKETT LAW GROUP PLLC

22 

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25 Phoenix, Arizona 85016-4747  
26 Attorneys for Johnson Utilities, L.L.C.

1 ORIGINAL and thirteen (13) copies filed  
2 this 4<sup>th</sup> day of April, 2016, with:

3 Docket Control  
4 ARIZONA CORPORATION COMMISSION  
5 1200 West Washington Street  
6 Phoenix, Arizona 85007

7 COPY of the foregoing hand-delivered  
8 this 4<sup>th</sup> day of April, 2016, to:

9 Dwight D. Nodes, Chief Administrative Law Judge  
10 Hearing Division  
11 ARIZONA CORPORATION COMMISSION  
12 1200 West Washington Street  
13 Phoenix, Arizona 85007

14 Janice M. Alward, Chief Counsel  
15 Legal Division  
16 ARIZONA CORPORATION COMMISSION  
17 1200 West Washington Street  
18 Phoenix, Arizona 85007

19 Thomas M. Broderick, Director  
20 Utilities Division  
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23 Phoenix, Arizona 85007

24 COPY of the foregoing sent via First Class U.S.  
25 Mail and e-mail this 4<sup>th</sup> day of April, 2016, to:

26 Craig A. Marks, Esq.  
27 CRAIG A. MARKS, PLC  
28 10645 N. Tatum Blvd., Suite 200-676  
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