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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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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,
L.L.C.

DOCKET NO. WS-02987A-16-0017

**JOHNSON UTILITIES' SUPPLEMENTAL
REPLY IN SUPPORT OF MOTION TO
DISMISS**

After considering the Motion to Dismiss filed by Johnson Utilities, L.L.C. ("Johnson Utilities" or the "Company") on February 22, 2016 ("Motion to Dismiss"), the Response to Motion to Dismiss filed by Swing First Golf, LLC ("SFG") on March 21, 2016, and Johnson Utilities' Reply in Support of Motion to Dismiss filed April 4, 2016, the administrative law judge ("ALJ") at the April 6, 2016, procedural conference directed SFG and Utilities Division Staff ("Staff") to file responses addressing the issues raised in Johnson Utilities' filings. The ALJ also allowed Johnson Utilities to reply to the filings by SFG and Staff. This filing is Johnson Utilities' Supplemental Reply in Support of its Motion to Dismiss ("Supplemental Reply").

In this Supplemental Reply, Johnson Utilities will not repeat what it has already presented in its Motion to Dismiss and initial Reply; rather, those filings are incorporated herein and should be considered to fully understand the Company's factual and legal positions.

I. JURISDICTION

A. Johnson Utilities is a Public Service Corporation, but Not on the Basis of the Effluent it Produces.

Of course Johnson Utilities is a public service corporation ("PSC"). The Company has a Certificate of Convenience and Necessity ("CC&N") for water service in its authorized water service territory and a CC&N for sewer service in its authorized sewer service territory. While SFG and Staff spend considerable time in their filings on the issue of whether Johnson Utilities is

1 a public service corporation, their arguments miss the point. The sale of effluent is not “furnishing
2 water for irrigation, fire protection, or other public purposes” which would subject the seller to
3 regulation as a *water* public service corporation. Nor is the sale of effluent “collecting,
4 transporting, treating, purifying and disposing of sewage through a system, for profit,” which
5 would subject the seller to regulation as a *sewer* public service corporation.¹ The fact that Johnson
6 Utilities is a public service corporation with regard to the provision of water service and
7 wastewater service, does not and cannot create jurisdiction in the Arizona Corporation
8 Commission (“ACC”) which does not otherwise exist under Article XV, Section 2 of the Arizona
9 Constitution.

10 Staff’s discussion of Article XV, Section 2 is particularly inapposite.² Staff contends that
11 “the disposal of effluent and its sale for irrigation purposes” is “clothed in the public interest” and,
12 therefore, Johnson Utilities is acting as a PSC. However, the case that Staff cites in support of its
13 statement, *Natural Gas Serv. Co. v. Serv-Yu Coop.*, 69 Ariz. 328, 213 P.2d 677 (1950) (*Serv-Yu*
14 *I*), does not support Staff’s argument. The “clothed in the public interest” language is cited as
15 only one of eight factors used to determine if a company falls under the Constitution’s definition
16 of a PSC in *Natural Gas Serv. Co. v. Serv-Yu Coop.*, 70 Ariz. 235, 238, 219 P.2d 324 (1950) (*Serv-*
17 *Yu II*). Among the other factors are whether a service is a monopoly and does the provider have
18 to accept “substantially all requests for service.”

19 In *Arizona Water Company v. City of Bisbee*, 172 Ariz. 176, 836 P.2d 389 (App. 1991)
20 (“*Bisbee*”), which SFG and Staff claim is irrelevant, the Arizona Court of Appeals holds that
21 service of effluent by the City of Bisbee within Arizona Water Company’s CC&N is allowed—
22 *i.e.*, effluent is not a monopoly service. Both SFG and Staff ignore the critical statute which
23 renders their distinctions of *Bisbee* to be frivolous. Arizona Revised Statutes § 9-516(A) states
24 that “[i]t is declared as the public policy of the state that when adequate public utility service under
25 authority of law is being rendered in an area, within or without the boundaries of a city or town, a
26 competing service and installation shall not be authorized, instituted, made or carried on by a city

27 ¹ Effluent is not itself a public utility service but a byproduct of the treatment of sewage by a public service
28 corporation.

² Staff Response to Motion to Dismiss at 2-4.

1 or town unless or until that portion of the plant, system and business of the utility used and useful
2 in rendering such service in the area in which the city or town seeks to serve, has been acquired.”
3 Had the Bisbee court found that the City’s delivery of effluent was a “public utility service under
4 authority of law,” then Arizona Water Company could have successfully blocked the City from
5 supplying effluent to Phelps Dodge under A.R.S. § 9-516(A).

6 Proof that Staff and SFG’s reliance on Bisbee and Phoenix being municipalities is not well
7 taken is found in *Town of Marana v. Pima County*, 230 Ariz. 142, 281 P.3d 1010 (App. 2012)
8 (“*Marana*”). In *Marana*, the Town of Marana and Pima County had an inter-governmental
9 agreement (“IGA”) regarding sewer issues. Pima County installed and ran the sewer system, even
10 after the Town incorporated in 1977. In 2007, the Town properly terminated the IGA so it could
11 run its own sewage system. One of the reasons given for the Town’s conduct was to obtain
12 additional effluent.³ Pursuant to the IGA, Marana acquired some of the sewer lines originally
13 installed and run by Pima County, but not all—it acquired only the property necessary to transport
14 the sewage, not the property necessary to treat the sewage. One of the key issues in *Marana* was
15 whether or not the town and county were competitors. Citing *Bisbee*, the Court of Appeals noted
16 that providing effluent was not competition. However, pursuant to A.R.S. § 9-516(A), the Town
17 could not purchase or build a new treatment facility because that would create competition with
18 the existing public utility services already in operation. The Town first had to purchase the
19 County’s sewer plant.

20 If SFG and Staff are correct, then Arizona Water Company would have been able to stop
21 the City of Bisbee from supplying effluent to Phelps Dodge. The import of the *Bisbee* case is that
22 Bisbee was not stopped from providing effluent within Arizona Water Company’s CC&N, nor
23 was it required to acquire the utility’s system, because effluent is not “public utility service under
24 authority of law” subject to ACC jurisdiction.

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28 ³ *Marana* at ¶ 6.

1 **B. This is an “Article XV, Section 3 Plus a Lack of Statutes and Rules” Case.**

2 When a corporation is also a PSC, it is subject to specific, reasonable, regulation pursuant
3 to statutes and rules. Article XV, Section 3 of the Arizona Constitution is very clear about what
4 is required:

5 The corporation commission shall have full power to, and **shall . . . make**
6 **reasonable rules**, regulations, and orders, **by which such corporations shall be**
7 **governed** in the transaction of business within the state . . . (emphasis supplied).

8 There is no mention of effluent in Title 40. There are no ACC rules regarding the sale of
9 effluent. Rather, the mentions of effluent or reclaimed water in the rules are to merely require
10 descriptions of how effluent will be dealt with and to identify disposal areas.⁴

11 The Johnson Utilities sewer tariff merely sets a price for effluent. There are no terms of
12 service, no obligation to serve effluent to anyone, or any of the other terms and conditions typical
13 of a regulated utility service. Rather, effluent is the byproduct of the regulated service—which is
14 the collection, transportation, treatment, purification and disposal of sewage through a system.⁵

15 Even if the ACC might have jurisdiction, which it does not, the failure to have a statute or
16 rule to support the exercise of jurisdiction over effluent bars the ACC from asserting such
17 jurisdiction.

18 As the Company noted in its Motion to Dismiss,⁶ it was directed to make a tariff filing
19 concerning effluent service⁷ in Docket WS-02987A-13-0053, which it did on November 15, 2013.
20 The Company believes that in light of the ACC’s lack of jurisdiction, and the comprehensive

21 ⁴ See R14-2-602(B)(cc) and (n); R14-2-402(B)(5)(cc)(iv).

22 ⁵ Staff and the parties have loosely used the term “tariff” to describe the price set for effluent in Johnson’s
23 sewer tariff. However, A.A.C. R14-2-601(29) defines tariffs for sewer utilities as:

24 The documents filed with the Commission which list the services and products offered by
25 the sewer company and which set forth the terms and conditions and a schedule of the rates
26 and charges for those services and products.

27 Without the terms and conditions, the price itself is not a tariff. As noted in Johnson Utility’s Motion to
28 Dismiss, the ALJ directed that the Company file an effluent “tariff” in 2013, which supports the conclusion
that no effluent tariff exists, as the ACC defines that term. A.A.C. R14-2-401(34) contains the same
definition of “tariffs” in the water utilities rules.

⁶ Johnson Utilities Motion to Dismiss at 12, 20-25.

⁷ See footnote 5, *supra*.

1 regulation of effluent by other agencies of State government which preclude the ACC's
2 involvement, no action was ever taken on that filing (which the Company is withdrawing).

3 **C. Only Essential and Integral Services Can Be Regulated.**

4 SFG and Staff seem to be saying that *anything* related to the sewer or water businesses is
5 subject to what SFG constantly intones as "vigilant and continuous regulation" by the ACC. First,
6 it is important to acknowledge that the effluent price is contained in the Johnson Utilities sewer
7 tariff. It is not a provision of the water service tariff. Second, the ACC is not in the business of
8 regulating byproducts of a regulated monopoly service, in this case, sewer service. The ACC's
9 typical tariff requires compliance with terms and conditions of service, etc.⁸ The bare setting of
10 a price is not a tariff. This is well trod ground.

11 Back when the "phone company" was the "phone company," there was a requirement that
12 all phones be rented from the phone company. Ultimately, potential competitors won the right to
13 sell phone equipment that would be connected to the phone company's lines and services. The
14 ACC struggled with that change as the ACC had a similar rule which had been declared illegal at
15 the federal level.

16 In *Mountain States Telephone and Telegraph Co. v. Arizona Corporation Commission*,
17 132 Ariz. 109, 116, 644 P.2d 263 (App. 1982), the Court held that Article XV, Section 3 only
18 allowed regulation for [1] a "service rendered" that "is an essential and integral part of the public
19 service performed" by the PSC "or [2] is now primarily a matter of private contract between the
20 Company and its customers." Thus, the Court held that the telephones were not "essential and
21 integral" to the provision of telecommunications services.

22 So it is with effluent. Effluent is not "essential and integral" to the collection and treatment
23 of sewage. It is a byproduct of that essential service, as is sludge and other leftovers.

24 SFG and Staff completely ignore the "essential and integral" test. The ACC does not have
25 jurisdiction over the disposal of the leftovers of the essential service. This is particularly true
26 when the Arizona Department of Water Resources and the Arizona Department of Environmental
27 Quality ("ADEQ") thoroughly occupy that regulatory space.

28 ⁸ See footnote 5, *supra*.

1 Also, effluent is “primarily a matter of private contract between the Company” and those
2 who would receive that effluent. SFG attaches a memorandum decision of the Court of Appeals
3 in *Johnson Utilities v. Swing First Gold*, 1 CA-CV 13-0625, ¶13 (2015) (“*Johnson v. Swing*”)⁹
4 as Exhibit A to its Brief Opposing Motion to Dismiss. In that case, the Court of Appeals held
5 that:

6 [A]lthough the ACC has broad jurisdiction over “public service corporations”
7 pursuant to Article 15 of the Arizona Constitution, the provision does not give the
8 ACC jurisdiction to entertain and resolve contract claims.¹⁰

9 While SFG’s position in the litigation was that the alleged contracts were a matter for the
10 courts, in this matter, SFG changes its spots and now demands that the ACC resolve not just one,
11 but three contract claims.¹¹ In fact, as a true example of the lack of substance, jurisdiction and the
12 incredulity of SFG’s claims and assertions is its inclusion of what it claims to be its first contract,
13 the Utility Services Agreement.¹² In *Johnson v. Swing*, the Court of Appeals noted that the trial
14 court had found that contract to be unenforceable.¹³ SFG did not appeal that huge loss. Now SFG
15 wants to again present that failed claim as a key part of its third ACC complaint, a claim that it
16 has lost in Court. SFG should not be allowed to present contract claims to the ACC after the Court
17 of Appeals held that such claims cannot be adjudicated by the ACC.

18 This situation is exactly what *res judicata* and collateral estoppel are meant to stop.

19 **D. The Managerial Interference Doctrine Bars SFG’s Claim.**

20 The “managerial interference doctrine” “is a judicial construct designed to protect
21 regulated corporations from over-reaching and micro-management of their internal affairs by the

22 ⁹ The procedural situation of the *Johnson v. Swing* case is set out in footnote 5 of the decision. Basically,
23 the Company filed a bill collection case with counts relating to certain conduct of SFG (four counts). SFG
24 responded with a 13-count counterclaim. There was trial # 1, which the judge vacated, except for a \$20,000
25 award to SFG (another golf course was ordered to pay SFG \$54,600 for management fees). The contract
26 claims that were presented to a jury related to disputes concerning past payments and considerations; they
27 did not relate to the length of any alleged effluent contract. In trial # 2, “the jury only found for SFG on
28 its breach of contract claim and awarded it \$41,883.11.” Decision at ¶ 8. During the course of the Superior
Court case, SFG filed its first two ACC complaints concerning effluent. The end result is that after years
of litigation in court and at the ACC, SFG has not been found to have any long term contract for effluent.

¹⁰ *Johnson v. Swing* at ¶ 13.

¹¹ See Section III of SFG’s Brief Opposing Motion to Dismiss (pp. 1-2 and 11-16).

¹² *Id.* at 11-12.

¹³ *Johnson v. Swing* at ¶ 35.

1 Commission.” *Miller v. Arizona Corporation Commission*, 277 Ariz. 21, ¶ 23, 251 P.3d 400
2 (2011) (“*Miller*”). The *Miller* court noted that in another case, the Court of Appeals had rejected
3 the ACC’s adopted rule to require very detailed administrative practices related to open access to
4 transmission and distribution facilities.¹⁴

5 In this case, there is no rule so there is no jurisdiction. If the ACC were to promulgate a
6 rule detailing how a PSC deals with the residue of its services—in this case, effluent—it would
7 fail pursuant to the managerial interference doctrine. The doctrine is, therefore, a restriction on
8 the ACC’s jurisdiction as is the “essential and integral” test discussed above.

9 **E. The Company’s Jurisdictional Motion is Timely.**

10 Jurisdiction is an issue that is always timely. SFG first two formal complaints were
11 dismissed with prejudice. Formal complaint # 3 in this docket is based on the same situation—
12 SFG’s desire to obtain effluent from Johnson Utilities. The factual analysis contained in the earlier
13 filings will not be repeated here. However, the case law concerning the ability to challenge the
14 ACC’s jurisdiction will be set out.

15 A “decision of the Commission which goes beyond its power as prescribed by the
16 Constitution and statutes is vulnerable for lack of jurisdiction and may [even] be questioned in a
17 collateral proceeding.” *Tucson Warehouse & Transfer Co., Inc. v. Al’s Transfer, Inc.*, 77 Ariz.
18 323, 325, 271 P.2d 477 (1954) (cited in *Miller, supra*, ¶ 10; *Ariz. Pub. Serv. Co. v. S. Union Gas*
19 *Co.*, 76 Ariz. 373, 381, 265 P.2d 435 (1954) (The test of jurisdiction is whether or not the tribunal
20 has power to enter upon the inquiry; not whether its conclusion in the course of it is right or
21 wrong,” quoting *Tube City Mining & Milling Co. v. Otterson*, 16 Ariz. 305, 146 P. 203 (1916)
22 (also cited in *Miller, supra*)).

23 It is the general rule that lack of jurisdiction over the subject matter can be raised at any
24 time and parties cannot waive the requirement that the court have subject matter jurisdiction or by
25 consent confer subject matter jurisdiction upon the court. *In re Baxter’s Estate*, 22 Ariz. 91, 194
26 P. 333 (1921); *Kelly v. Kelly*, 24 Ariz. App. 582, 540 P.2d 201 (1975). *Dassinger v. Oden*, 124

27 _____
28 ¹⁴ *Miller* at ¶ 20 (citing *Phelps Dodge Corp. v. Arizona Electric Power Coop.*, 207 Ariz. 95, ¶ 60,
83 P.3d 573 (App. 2004).

1 Ariz. 551, 606 P.2d 41 (Ariz. App., 1979). Subject matter jurisdiction cannot be conferred by
2 waiver, estoppel or consent. *Guminski v. The Arizona State Veterinary Medical Examining Board*,
3 33 P.3d 514, 201 Ariz. 180 (Ariz. App., 2001).

4 All tribunals must continually evaluate their jurisdiction and the ACC is no exception.

5 **II. ISSUES RAISED IN STAFF'S BRIEF**

6 In addition to the issues mentioned above concerning the Staff's response, the following
7 additional replies to that filing are required.

8 As part of Staff's discussion of what is "water" at page 3 of its Response, Staff fails to cite
9 to the key paragraph in *Bisbee* which states that because "effluent is not the same as the water that
10 Arizona Water provides to its service area, we find no merit to Arizona Water's contention that
11 the city is illegally competing with it."¹⁵ Thus, while Staff tries to make much of the fact that the
12 City of Bisbee is a municipality, Arizona Water Company was pointing to its ACC-issued
13 CC&N.¹⁶ *Bisbee* is clearly relevant.

14 Staff points to the very general statute, A.R.S. § 40-321(A), to confer jurisdiction. Again,
15 Article XV, Section 3 of the Arizona Constitution and the case law and practices of the ACC
16 require a rule to regulate the terms and conditions of the sale of effluent. As noted, the Company
17 does not believe that such a rule is within the ACC's authority, but without such a rule there can
18 be no jurisdiction.

19 Staff's citation to *In the Matter of Verde Santa Fe*, is odd. Verde Santa Fe Wastewater
20 Company's application was to lower its price. Price is not an issue in this matter.

21 Staff also cites to the Liberty Utilities matter which Johnson Utilities discussed in its April
22 4, 2016, Reply in Support of Motion to Dismiss.¹⁷ The ALJ also asked that it be addressed. Staff
23 attempts to use Liberty Utilities as an example of the need of a regulated utility to seek ACC
24 approval of its management decisions regarding the disposal of effluent, stating that "Liberty,
25 unlike Johnson, presented its plans to the Commission for review."¹⁸ However, Liberty Utilities

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27 ¹⁵ *Bisbee*, 172 Ariz. at 178.

28 ¹⁶ *See also*, Section 1.A, *supra*, and A.R.S. § 9-516(A).

¹⁷ Johnson Utilities' Reply in Support of Motion to Dismiss at 6-7.

¹⁸ Staff's Response to Motion to Dismiss at 6, lines 8-9.

1 submitted its plan based upon the request of the Central Arizona Water Conservation District
2 (“CAWCD”) as it was entering into a 100-year agreement with pricing and other terms and
3 conditions. Liberty Utilities told the ACC that submission of the agreement was not required by
4 law, as set forth in Sections 23-24 of Liberty’s Application in Dockets SW-01428A-14-0369 and
5 SW-01427A-14-0369:

6 23. As set forth in the Development Agreement, because of its substantial
7 financial commitment for the Effluent Recharge Project, **CAWCD seeks**
8 **assurances** from the Arizona Corporation Commission that Liberty has the right
9 and authority to commit the Effluent Entitlement to CAWCD for 100 years,
10 including approval of the agreed upon rates and rate-adjustment mechanisms for
11 delivery and disposal of Effluent to the Effluent Recharge Project and purchase of
12 Long-Term Storage Credits by CAWCD.

13 24. Liberty asserts and believes that Commission approval of the Development
14 Agreement or sale of effluent to CAWCD **is not necessary or required under**
15 **Arizona law**. In making this filing, Liberty is not waiving any arguments relating
16 to Commission jurisdiction, future sales of effluent, or any other similar issues
17 relating to the Effluent Recharge Project and the Development Agreement. As
18 stated above, Liberty is making this filing because CAWCD, a public entity, seeks
19 certainly that the Effluent Entitlement from Liberty will be available to meet
20 CAWCD’s replenishment obligations at the agreed charges set forth above. CAWCD
21 also seeks assurances from the Arizona Corporation Commission as to Liberty’s
22 provision of the Effluent Entitlement to CAWCD for 100 years as provided in the
23 Development Agreement, and that the rates for the Effluent Entitlement and
24 purchase of Long-Term Storage Credits in the Development Agreement do not
25 violate any Commission rules, policies and decisions and/or tariffs of Liberty.

26 The import of Liberty Utilities, and the reason that Johnson Utilities cited it, is that Staff
27 took the position that a utility’s use of the effluent it owns (as phrased above, the leftovers from
28 the regulated service) is a matter of “management discretion.” Staff, as described in Finding of
Fact 32 of Decision 74993, expressed its agreement with Liberty Utilities that the disposition of
the effluent did not require Commission approval (“Staff also agrees with Liberty that entering
into the underlying Development Agreement, and selling effluent to CAWCD are matters of
management discretion.”).

Staff, therefore, also changes its spots. Liberty Utilities supports Johnson Utilities’
exercise of its management discretion in the sale or other disposition of its effluent.

1 Finally, Staff's discussion of *res judicata* at page 6 of its Reply is completely rebutted in
2 the Company's earlier filings.

3 **III. ISSUES RAISED IN SFG'S BRIEF**

4 The jurisdictional theory of SFG is that any corporation that has a CC&N must be micro-
5 regulated without regard to the lack of statutes or rules that give a company notice of what is
6 required. "Vigilant and continuous regulation" is the terminology first used on page 1 of SFG's
7 Brief Opposing Motion to Dismiss and used frequently thereafter. No authority supports such a
8 theory, starting with Article XV, Section 3 of the Arizona Constitution which absolutely requires
9 rules. The authorities cited above in the jurisdiction section will not be repeated here. However,
10 several other issues SFG raises must be addressed.

11 As an initial matter, almost all of SFG's brief reads like a trial memorandum in which the
12 litigant screams about the so-called equities while ignoring the law and many of the facts.
13 Particularly troublesome examples are SFG's invocation of a "contract" that the Court ruled
14 unenforceable and its attempt to have the ACC rule on contract disputes, after invoking the
15 Superior Court's exclusive jurisdiction to handle such matters. SFG's 28-page brief is rife with
16 such examples of overreach and matters that do not relate to the issue at hand.

17 The relevant issues are set forth in Johnson Utilities' Motion to Dismiss. The fact of the
18 two prior formal complaints. *Res Judicata*. Lack of Jurisdiction. And, if the SFG's Formal
19 Complaint # 3 is not dismissed, strike the claim for attorneys' fees.

20 On pages 1 and 2 of its brief, SFG sums up its responses as:

21 • Johnson Utilities has a CC&N and must be regulated in a "vigilantly and
22 continuous" manner.

23 [Summary Response: See above. The case law is clear. The ACC needs
24 statutes/rules/orders to regulate. SFG's desire to keep its greens fees low by prohibiting Johnson
25 Utilities from moving in the direction of the public policy of Arizona favoring recharge of effluent
26 has no statutory/rules/orders basis. In fact, when recently presented with a request from Liberty
27 Utilities regarding a long-term effluent with the CAWCD, the Staff and the ACC said that the
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1 ACC did not deal with such issues. As stated in the authorities cited above and in *Johnson v.*
2 *Swing*, “subject matter jurisdiction cannot be vested in a court solely by waiver or estoppel.”^{19]}

3 • Even if Johnson Utilities did not have a CC&N, the Constitution provides
4 jurisdiction for the ACC to regulate effluent sales.

5 [Summary Response: Statutes/rules/orders are required as a basis for regulatory action.
6 SFG’s filings, and the Court of Appeals Decision, make clear that SFG’s problem is that it mal-
7 practiced itself. It purchased a golf course with no contractual right to the long term supply or
8 price of water. It has engaged in years of wasteful litigation to cover up and attempt to remedy its
9 own failure.]

10 • SFG has a least three contracts with Johnson Utilities which must be enforced.

11 [Summary Response: The ACC has no jurisdiction over contract disputes between a utility
12 and a customer.²⁰ Strikingly, SFG grossly misrepresents the existence of an enforceable contract
13 that the trial court in *Johnson v. Swing* ruled to be unenforceable.²¹

14 • Johnson “blatantly” misrepresented its future intent re effluent sales (involving
15 entities not involved in this case).

16 [Summary Response: The supposed misrepresentation is Exhibit B to SFG’s brief. It is a
17 letter filed in this docket by Johnson Utilities’ Chief Operating Officer in response to a filing by
18 Ms. Karen Christian. In that response, Mr. Cole pointed out that the disposal of effluent is
19 governed by many different arrangements. For example, SFG complains that Johnson Utilities is
20 favoring another golf course over SFG. Mr. Cole explains that the Golf Club at Oasis not only
21 has an effluent delivery agreement in place, the type of agreement that SFG does not have, but
22 that Oasis is an effluent recharge facility utilizing ten recharge ponds that have been constructed.
23 Likewise, other entities that receive effluent have differing arrangements. It does not conflict with
24 statements made at the procedural conference. More importantly, it is not relevant to the Motion
25 to Dismiss.]

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27 ¹⁹ *Johnson v. Swing* at ¶ 12.

28 ²⁰ *Id.* at ¶ 13.

²¹ *Id.* at ¶ 2, footnote 2.

1 • Johnson Utilities will not save money by disposing of effluent by recharge.

2 [Summary Response: It is clear that the policy of Arizona favors using effluent for
3 something other than golf courses. Recharge of groundwater is highly favored. Johnson Utilities,
4 like all sewer companies, has arrangements for the disposal of effluent that range from long to
5 short terms to no terms, except price – like SFG. SFG offers nothing approaching evidence to
6 claim that recharge will save no money. As with most of its response, the issue is not relevant to
7 either the motion to dismiss or the complaint.]

8 Johnson Utilities must also address SFG's false claims about the ADEQ notice of
9 violation. ADEQ performed an audit that found that three effluent users did not have end user
10 agreements on file. The end user agreement is an ADEQ requirement that has the user of effluent
11 sign indicating that it knows the uses and restrictions imposed on effluent. The end user agreement
12 is not in any way a contract for the delivery of effluent. ADEQ wanted the Company to cease
13 effluent deliveries to the three entities. Johnson Utilities went the extra mile to provide end user
14 agreements to the entities and attempt to have them signed. (One end user did not sign, initially,
15 and Johnson Utilities was required to cease providing effluent in order to comply with ADEQ
16 regulations and the ACC's requirement that it be in compliance with ADEQ regulations.)
17 Characterizing the end user agreement as a contract is not correct. Nor, is it relevant to this matter
18 or within the jurisdiction of the ACC.

19 Other things raised by SFG are not relevant to the Motion to Dismiss and will not be
20 addressed. Johnson Utilities denies any of SFG's allegations and characterizations that it has not
21 admitted or addressed in this reply.

22 **IV. PUBLIC POLICY**

23 Not a week goes by without headlines about drought and its implications. SFG is
24 dismissive of the overall public policy urgency of using effluent to recharge groundwater. Not
25 only is this not relevant to the Motion to Dismiss, or any matter related to its Formal Complaint,
26 it is completely off base and self-centered.

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1 An example of the public discussion is the thoughtful recent comments of the Director of
2 the Arizona Department of Water Resources, Mr. Tom Buschatzke, who stated in the Arizona
3 Republic on April 22, 2016:

4 If Lake Mead declines further, planned reductions in deliveries to Arizona agreed
5 to in 2007 will kick in. Although Arizona has prepared for those reductions by
6 storing water underground, conserving water and carefully managing its
groundwater and other supplies, even more must be done.

7 The article can be found at <http://www.azcentral.com/story/opinion/oped/2016/04/22/lake-mead-water-arizona/83399918/>.
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10 There is also a very long history of Arizona Supreme Court and Court of Appeals opinions
11 which relate to the use of effluent (reclaimed water) to recharge groundwater. For example, see,
12 *Arizona Water Co. v. Ariz. Dep't of Water Resources*, 208 Ariz. 147, 91 P.3d 990 (2004), citing
13 *Ariz. Mun. Water Users Ass'n v. Ariz. Dep't of Water Res.*, 181 Ariz. 136, 139-40, 888 P.2d 1323,
14 1326-27 (App.1994) ("Water Users"). *Arizona Water Co.* has extensive discussion of
15 amendments to the Groundwater Code, Ariz.Rev.Stat. ("A.R.S.") §§ 45-401 to -704 (2003 &
16 Supp. 2003) that include "effluent." The amendments excluded "spillwater and effluent that is
17 not recovered effluent" in the calculation of water use.

18 In sum, prudent golf course operators are reducing water usage, converting lakes into
19 recharge facilities and taking other steps to deal with the reality of Arizona's water situation.
20 Johnson Utilities is attempting to do its part. It believes that increasing its recharge capabilities,
21 using non-potable water when available, conservation and taking other measures are the right
22 thing to do. This case is about one golf course that did not plan for its needs wanting to keep its
23 fees artificially low. It cannot be allowed to so manipulate Arizona's public policy.

24 V. CONCLUSION

25 SFG made a terrible mistake when it purchased a golf course without a contractually
26 guaranteed supply of water. As the Court of Appeals noted, the agreement that was in place with
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1 the prior owner was not assigned to SFG.²² Rather than deal with its error, SFG has engaged in
2 years of litigation.

3 It is important to note that the issue in this matter is not having water. Johnson Utilities
4 has a well that produces non-potable water, pursuant to a tariff, which it is currently supplying the
5 golf course. The issues in this matter relate to SFG wanting to get the cheapest water it can.

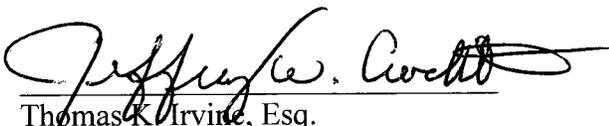
6 No statute/rule/order that applies to the ACC supports SFG's invocation of the jurisdiction
7 of the ACC. In fact, SFG's complaint sounds in contract, over which the ACC has no jurisdiction.

8 Also, this is SFG's third effort at the ACC. Dismissal of the first two SFG complaints is
9 *res judicata* as to the third. The doctrine of collateral estoppel also bars this matter both due to
10 the earlier ACC matters and the court rulings that the key contract relied on by SFG is
11 unenforceable and other rulings.

12 For all of the reasons set forth herein, Johnson Utilities respectfully requests that its motion
13 to dismiss be granted.

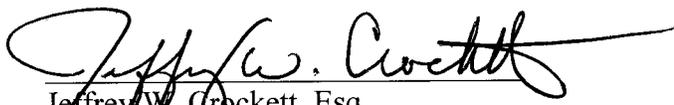
14 RESPECTFULLY submitted this 9th day of May, 2016.

15 ASU ALUMNI LAW GROUP

16
17 *for* 
18 Thomas K. Irvine, Esq.
19 Two North Central, Suite 1600
20 Phoenix, Arizona 85004

21 and

22 CROCKETT LAW GROUP PLLC

23 
24 Jeffrey W. Crockett, Esq.
25 2198 E. Camelback Road, Suite 305
26 Phoenix, Arizona 85016-4747
27 Attorneys for Johnson Utilities, L.L.C.

28 ²² *Johnson v. Swing* at ¶ 2, footnote 2.

1 ORIGINAL and thirteen (13) copies filed
2 this 9th day of May, 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 9th day of May, 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
21 ARIZONA CORPORATION COMMISSION
22 1200 West Washington Street
23 Phoenix, Arizona 85007

24 COPY of the foregoing sent via First Class U.S.
25 Mail and e-mail this 9th day of May, 2016, to:

26 Craig A. Marks, Esq.
27 CRAIG A. MARKS, PLC
28 10645 N. Tatum Blvd., Suite 200-676
Phoenix, Arizona 85028