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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

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

IN THE MATTER OF THE APPLICATION OF JOHNSON UTILITIES, LLC, DBA JOHNSON UTILITIES COMPANY FOR AN INCREASE IN ITS WATER AND WASTEWATER RATES FOR CUSTOMERS WITHIN PINAL COUNTY, ARIZONA.	DOCKET NO. WS-02987A-08-0180 **NOTICE OF INAPPROPRIATE DISCOVERY AND LITIGATION TACTICS**

Swing First Golf LLC ("Swing First") hereby provides notice of inappropriate discovery and litigation tactics by Johnson Utilities LLC ("Utility"). Because Utility's tactics are common to both of the above-captioned dockets, this notice is being docketed in each docket.

I Introduction

"Bury them with paper!" This is a bad-faith strategy used all too often by large law firms with well-heeled clients when facing a litigant with limited resources. The big firm knows that it has far more resources for protracted litigation—partners, associates, and support staff—than does a small firm. And if the client is willing to fund those resources, then it is all too tempting to try to bury the small firm with paper.

Two weapons are used to implement this bad-faith strategy.

The first weapon is the shield – used to fend off discovery as much as possible. The big firm delays responding to discovery requests as much as possible, raises objections, provides incomplete or erroneous information, or hides the responsive information deep within a mound of unresponsive documents. To get around the shield, a small firm must continually communicate concerning delayed responses, send follow-up discovery concerning incomplete or

erroneous responses, file and argue motions to compel, and sift through hundreds of pages of non-responsive material to locate the few kernels buried in the chaff. This is incredibly resource intensive, but that only hurts the small firm. For the big firm, it's just more money in their pockets.

The second weapon is the club – used to try to beat the small firm into submission. As the hearing approaches, the big firm suddenly sends out hundreds of data requests, many of them irrelevant, and demands immediate responses. The big firm aggressively schedules depositions, knowing full well that neither the attorney nor the deponent can be available at the scheduled time and place. The big firm ties up the small firm with numerous motions and other pleadings. Finally, the big firm complains that it cannot go to hearing, because it has not received answers to each of its hundreds of data requests or been allowed to conduct depositions when and where it demanded.

In these dockets, the big firm is Snell & Wilmer, the largest law firm in the Southwest, with over 400 attorneys practicing in eight offices. The well-heeled client is millionaire developer George Johnson and his Utility. By contrast, the small firm is Craig A. Marks PLC, a one-member, one-office law firm. The client is Swing First. Swing First's sole business is managing a small-town golf course in Pinal County.

Because Snell & Wilmer's inappropriate tactics are common to both of the above-referenced dockets, Swing First will discuss each docket in turn.

II <u>Complaint Case (WS-02987A-08-0049)</u>

On April 11, 2008, Swing First tendered its first data requests to Utility. On April 25, 2008, Utility responded by e-mail to Swing First's data requests by objecting to each question and providing none of the requested data. Utility's stonewalling of Swing First required Swing First to file a Motion to Compel on May 2, 2008. Utility's May 13, 2008, Reply to Motion to Compel continued its stonewalling.

On June 18, 2008, Administrative Law Judge Yvette B. Kinsey ordered Utility to provide the majority of the requested information.[1] She provided a very generous August 15, 2008, deadline for Utility's responses.[2] Utility simply ignored this deadline. It did not complete its responses until October 7, 2008, almost six months after it received the data requests.

Utility's belated responses were deliberately evasive and incomplete. The very first question (1-1) asked:

> For each month during the period of 2005 to the present, please provide by treatment facility the amount of treated effluent generated within Utility's Certificate of Convenience and Necessity ("CC&N).

Utility first refused to provide the information. Then, after further discussions between the attorneys, Utility finally provided data for just one year (2007) and for just one plant (the Santan Water Reclamation Plant). The document provided was approximately 220 pages long, but the relevant information was actually contained on just four pages. In less time than it took to copy this huge non-responsive attachment, Utility could have pulled the relevant data off these four pages (quarterly reports of average daily flows) and included it directly in the response. Instead Utility opted to bury Swing First with paper.

Swing First attempted to follow-up DR 1-1 with DR 3-2. Because of the difficulty in sifting through the irrelevant data, Swing First asked Utility to confirm that it had collected the correct information. DR 3-2 asked:

> For the months of January through December 2007, please confirm the following average daily reclaimed water flows from Utility's Santan Water Reclamation Plant:

Month	**Avg. Daily Flows (MGD)**	**Monthly Total (MG)**
January	0.527	16.337
February	0.519	14.532
March	0.517	16.027
April	0.513	15.39
May	0.489	15.159
June	0.457	13.71

[1] Tr. at 41-43.
[2] Tr. at 51.

July	0.431	13.361
August	0.504	15.624
September	0.509	15.27
October	0.513	15.903
November	0.547	16.41
December	0.551	17.081

> If Utility disagrees with any of these figures (taken from ADEQ Self Monitoring Reports) please provide any changes, with an explanation.

Although it had forced Swing First to dig out the relevant information from a pile of documents, Utility simply refused to answer DR 3-2. "Objection: The Self Monitoring Report Forms which SFG used to prepare the included table speak for themselves. Utility is not required to verify SFG's work product for accuracy."

Follow-up DR 3-3 then asked for average daily flows for 2004-2006 and 2008. To avoid again getting buried in irrelevant paper, Swing First's request was very specific:

> Please provide the average daily reclaimed water flows from Utility's Santan Water Reclamation Plant for the months of December 2004 through December 2006, and January 2008 through the present. If Utility alleges that it would be burdensome to provide this data directly, then provide the relevant pages from the ADEQ Self Monitoring Reports for the years in question. For example, <u>the data in the table above was taken from the four quarterly summaries of reclaimed water included in Utility's revised response to Data Request 1.1</u>. (Emphasis added.)

Yet, Utility still could not be forthcoming. Instead of providing the <u>average</u> daily flows, or the four (one-page) quarterly summaries for each year, Utility provided the <u>actual</u> daily flows for each day from April 1, 2006 through December 31, 2006, and from January 1, 2008, through December 31, 2008. This required Swing First's counsel to create a spreadsheet, key in the reported flows for every one of the 640 days, and then calculate the average daily flows for each of the 21 months. This was even more bad faith by Utility and more burden for Swing First.

And still the data were still not complete. In response to another data request, Utility stated that it sold 11.0866 million gallons of treated effluent to Swing First in March 2006, yet as part of its response to DR 3-3 Utility claimed: "The San Tan Plant was not operating prior to 4/1/06." This contradiction has required additional follow-up with Utility's counsel in hope of

obtaining all the data, but yet to no avail. In summary, thanks to Utility's bad-faith stonewalling, Swing First has still not obtained, as of February 20, 2009, all the information that it originally requested over nine months earlier, on April 11, 2008.

Finally, Swing First was forced to file a second motion to compel to obtain answers to other very simple questions that Utility refuses to answer.

While doing everything it could to avoid providing timely, concise, and accurate data responses, Utility has done its best to tie up Swing First with unprecedented motions, irrelevant data requests, and unreasonable deposition notices.

The Administrative Law Judge is currently considering Utility's massive motion for summary judgment. Summary judgment motions are virtually never used at the Commission and Utility's motion was filed long before discovery has been completed. Nevertheless, Swing First was forced to devote an enormous amount of time to responding to and arguing against the motion.

Utility also filed a motion to stay discovery while its summary judgment motion was being considered. Swing First was also forced to respond to this motion, which was denied.

While dealing with Utility's summary judgment motion and its motion to stay discovery, Swing First also responded to Utility's extensive data requests. Utility then propounded an outrageous data request concerning an unfortunate incident involving Mr. Ashton, which had absolutely nothing to do with Mr. Ashton's relationship with Utility as a customer. Of course, this required Swing First to submit objections to Utility.

Now Utility has filed two notices of depositions: one for David Ashton on March 3, 2009, in Phoenix, Arizona, and the other for Michael White on March 13, 2009, in Salt Lake City Utah. Utility's filings are clearly in bad faith. Utility inquired about an early deposition date for Mr. Ashton and Swing First replied that this was impossible for a number of reasons. A copy of counsel's February 9, 2009, letter to Mr. Crockett is attached as Exhibit A. The letter stated:

> I am responding to your February 4, 2009, request to depose Mr. Ashton within the next month. As I explained to you on the phone, this is not possible. Mr. Ashton resides and works in Europe. Other than his travel here to testify in the Johnson Utilities Rate Case, he will not be in the United States until June.
>
> Further, preparing for and representing Mr. Ashton at a deposition would be very burdensome for me, a sole practitioner, over the next three months. Along with my normal workload, I will be participating in three rate cases during that time period, including representing Arizona-American in its seven-district rate case, which will go to hearing next month.
>
> It is difficult for me to understand your sudden zeal to conduct discovery in this case, given you and your client's incredible delays (up to six months) in replying to data requests, your bad-faith responses, and you having twice forcing me to file motions to compel.
>
> Finally, I do not see the need for you to depose Mr. Ashton at this time, if at all. As you know, depositions are rarely part of discovery practice at the Commission. If you still feel that you need to take a deposition after Mr. Ashton has actually filed testimony in this case, and you have conducted whatever additional discovery you believe is warranted, then we could revisit this issue.

Utility simply ignored four very valid reasons why depositions cannot be taken at this time:

1. Mr. Ashton works and lives in Europe, so he is unavailable;
2. Preparing for and participating in depositions at this time would be unduly burdensome for Swing First's counsel;
3. Utility has unduly delayed discovery in this case and has shown no need for an immediate deposition; and
4. Depositions are rarely used at the Commission.

Utility makes no excuses for its continued bad faith and provides no reason why it suddenly needs depositions. Now Swing First's counsel will be forced to draft and file motions to quash the notices of deposition. This is a further, completely unnecessary waste of counsel's time and resources. But that is all part of Utility's strategy.

III <u>Rate-Case (Docket WS-02987A-08-0180)</u>

Utility has employed exactly the same bad-faith tactics in the rate case: resist providing information at all costs, drain counsel's resources with burdensome, irrelevant, discovery, and

then complain that it cannot prosecute its case without information that it has made impossible to provide.

Swing First's First Data Requests were tendered to Utility by e-mail on August 8, 2008. In accordance with the Procedural Order, objections were due on August 15, 2008. Only after being threatened with a motion to compel, did Utility finally "respond" to the First Data Requests, but not until September 18, 2008, 41 calendar days after receipt.

Following discussions between counsels, Utility supplemented several of its responses, but some responses remained incomplete. Swing First's Second Data Requests were tendered to Utility through counsel by e-mail on September 17, 2008. Objections were due on September 24, 2008. Utility finally responded to these requests on October 17, 2008, including an untimely objection and a partial response one question.

Swing First's Third Data Requests were tendered to Utility through counsel by e-mail on October 3, 2008. Utility finally responded to these requests on October 22, 2008, including untimely objections to most of the questions.

Utility's foot-dragging required Swing First to prepare, file, and argue a motion to compel. On January 28, 2009, Administrative Law Judge Teena Wolfe ordered Utility to provide additional responses within two weeks, including a response to DR 1-3. On February 10, Utility purported to comply with Judge Wolfe's order, but still provided only an incomplete response to DR 1-3 – which had been originally submitted to Utility on August 8, 2008, <u>over six months earlier</u>.

DR 1-3 was a very simple request, which was not limited by Judge Wolfe:

> For each month during the period of 2005 to the present, please provide, by customer the amount of treated effluent delivered and sold by Utility. Please also specify the rate paid by each customer. (Swing First does not require specific identifying information for any customer, such as name or address. Utility may identify the customer by letter, number, or other consistent designation.)

Yet, Utility still has not provided all the requested information. Utility instead decided to provide only information for two customers, each supplied with effluent from just one of

Utility's four treatment plants. Utility also decided to provide data only from March 2006 through July 2008. Utility also did not identify the rate actually paid for each month. On February 12, 2009, Swing First's counsel e-mailed Mr. Crockett to notify Utility of its insufficient response. As of the date of this pleading, Swing First has still not provided all the requested information. Of course, all the time spent by Swing First's counsel trying to get Utility to timely provide data is time that cannot be spent on other matters. Again, this is consistent with Utility's bad-faith strategy.

Then on February 9, 2009, Utility mailed a libelous letter to Swing First's members. The letter threatened to sue the member if the member continues to support Swing First's activities at the Corporation Commission. This required Swing First to prepare and then file three documents on February 17, 2009:

1. Emergency Motion to Prohibit Inappropriate Contact;[3]
2. Motion for Leave to file Supplemental Testimony; and
3. Supplemental Direct Testimony of David Ashton.

This was a significant burden on Swing First's counsel, requiring him to juggle other client's matters and work on the weekend, the President's Day Holiday, and evenings. Again, working on these pleadings, which were only necessary because of Utility's malfeasance, displaced time that could have been spent on other case matters, such as responding to discovery requests.

Like it has in the Complaint Case, Utility has used also used discovery as a weapon against Swing First. On June 11, 2008, Swing First filed its Motion to Intervene in this docket, which was granted by a Procedural Order dated June 23, 2008. Not until three weeks ago, on January 27, 2009, did Utility submit its <u>first</u> set of data requests to Swing First. These data requests largely concern a pleading that was filed on November 21, 2008, <u>over two months before</u>. Utility does not explain why it waited so long to submit these data requests, which consist of over 30 questions, including subparts.

[3] By Procedural Order dated February 19, 2009, Judge Wolfe ordered Utility to respond to Swing First's Emergency Motion and set a procedural conference for February 26, 2009, to consider the Emergency Motion.

Utility then followed up with a massive second set of data requests on Friday, February 6, 2009. The data requests consist of between 200 and 300 questions, depending on how the subparts are counted.

Swing First recognizes that it has an obligation to timely respond to data requests. However, Utility also has an obligation to timely submit data requests and to allow Swing First sufficient time to respond, without distraction from other Utility matters. However, just since January 27, 2009, the date of Utility's first data requests, Swing First has been required to complete the following significant documents:

February 3, 2009 –	Direct Testimony of David Ashton;
February 6, 2009 –	Fourth Rate Case Data Requests to Utility;
February 6, 2009 –	Motion for Date Certain;
February 6, 2009 –	E-mail to Mr. Crockett concerning Utility's incomplete data responses;
February 6, 2009 –	Second Motion to Compel (Complaint Case)
February 9, 2009 –	Letter to Mr. Crockett objecting to proposed deposition dates:
February 10, 2009 –	Objections to inappropriate data requests;
February 12, 2009 –	Fifth Rate Case Data Requests to Utility;
February 17, 2009 –	Emergency Motion to Prohibit Inappropriate Contact;
February 17, 2009 –	Motion for Leave to file Supplemental Testimony;
February 17, 2009 –	Supplemental Direct Testimony of David Ashton;
February 18, 2009 –	E-mail to Mr. Crockett concerning Utility's incomplete data responses;
February 20, 2009 –	Notice of Inappropriate Discovery and Litigation Tactics.

This is thirteen documents in 17 days! Not all of these documents took hours to prepare, but several of them required many hours of work.

As discussed above, Swing First's counsel does have other clients. For one of those clients, Arizona-American Water Company, counsel spent weeks during the last month supervising and editing testimony from eleven witnesses. That testimony was just completed and filed on February 11, 2009, in Docket No. SW-01303A-08-0227.

In addition to providing Swing First sufficient time to respond to data requests, Utility also has an obligation at this stage of the rate case to carefully focus its discovery to just what it legitimately needs to prepare its rebuttal testimony. Most of the 200-300 data requests in Utility's second set are really designed to gather information for cross-examination, which will not occur until Mr. Ashton's date certain of April 27, 2009, over two months from now.

Now, on February 19, 2009, Utility has filed three more pleadings, each of which will require responses by Swing First: Motion to Strike Ashton Testimony; Response to Motion to File Supplemental Testimony; and Motion to Compel Discovery. Between the two dockets, Swing First must now prepare seven significant additional documents in response to Utility. In the next section, Swing First will discuss the order in which it proposes to respond to these documents.

IV Planned Response to Utility's Documents

Based on counsel's work load and normal due dates, Swing First plans to deal with Utility's pleadings and other documents as follows:

	Swing First Activity	Completion Date
1	Reply to Response to Motion to Compel	February 22 (five days)
2	Reply to Response to Motion to For Leave to File Supplemental Testimony	February 25 (five days)
3	Prepare for and Attend Procedural Conference concerning Emergency Motion	February 26
4	Responses to Utility's First Rate Case DRs	Approximately February 27 (assuming no other Utility issues to deal with other than those listed in this table)
5	Motion to Quash Notices of Depositions	March 2 (ten days)
6	Response to Motion to Compel Discovery	March 3 (ten days)

7	Response to Motion to Strike Ashton Testimony	March 3 (ten days)
8	Responses to Utility's Second Rate Case DRs	Week of March 9 (assuming no other Utility issues to deal with other than as listed in this table)

This is a very aggressive schedule, which Swing First will do its best to meet. Of course, unforeseen events could affect Swing First's ability to hold to the schedule.

V **Conclusion**

Utility has consistently abused accepted discovery practice at the Commission. It has done everything possible to delay providing information, some of which is now almost seven months overdue. This has required Swing First to devote a far too many hours to this process. Utility has also used discovery and motions to try to hammer Swing First into submission. Just in the first three weeks of February, Swing First has had to prepare 13 significant documents in these dockets, only one of which was anticipated at the beginning of the month – Mr. Ashton's Direct Testimony. Swing First will have to prepare at least seven other major documents and attend a procedural conference in the next three weeks. That will be an amazing 20 major documents—pleadings and discovery documents—that a single attorney will have to prepare in just six weeks for just one case.

Once again Utility's conduct—this time by and through its attorneys—has been far outside the standard for utilities regulated by this Commission. Utility's owner, George Johnson, has been characterized as a rogue developer. It is now clear that the Commission has a rogue utility on its hands.

In this pleading, Swing First is not asking the Commission to take any specific actions to deal with Utility's discovery and procedural abuse. In the rate-case docket, the Commission will have a full opportunity to deal with Utility.

RESPECTFULLY SUBMITTED on February 20, 2009.

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Exhibit A

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February 9, 2009

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Re: Swing First Golf v. Johnson Utilities, LLC
Docket WS-02987A-08-0049 (Complaint Proceeding)

Dear Jeff:

I am responding to your February 4, 2009, request to depose Mr. Ashton within the next month. As I explained to you on the phone, this is not possible. Mr. Ashton resides and works in Europe. Other than his travel here to testify in the Johnson Utilities Rate Case, he will not be in the United States until June.

Further, preparing for and representing Mr. Ashton at a deposition would be very burdensome for me, a sole practitioner, over the next three months. Along with my normal workload, I will be participating in three rate cases during that time period, including representing Arizona-American in its seven-district rate case, which will go to hearing next month.

It is difficult for me to understand your sudden zeal to conduct discovery in this case, given you and your client's incredible delays (up to six months) in replying to data requests, your bad-faith responses, and you having twice forcing me to file motions to compel.

Finally, I do not see the need for you to depose Mr. Ashton at this time, if at all. As you know, depositions are rarely part of discovery practice at the Commission. If you still feel that you need to take a deposition after Mr. Ashton has actually filed testimony in this case, and you have conducted whatever additional discovery you believe is warranted, then we could revisit this issue.

Very truly yours,

/s/ Craig A. Marks

Cc: Robin Mitchell