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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

2009 NOV 20 A D 08

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IN THE MATTER OF THE APPLICATION OF
JOHNSON UTILITIES, L.L.C., 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 FILING
POST-HEARING BRIEF**

1 Swing First Golf LLC ("Swing First") hereby files its post-hearing brief in the above-
2 captioned docket.

3 RESPECTFULLY SUBMITTED on November 20, 2009.
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POST-HEARING BRIEF OF SWING FIRST GOLF LLC

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I **INTRODUCTION – THE NOTORIOUS GEORGE JOHNSON**

A **Utility and Its Affiliates Are Under George Johnson’s Common Control**

George H. Johnson is Utility’s majority owner and is Utility’s ultimate decision maker.¹ George Johnson also controls several other companies that have been in the headlines in recent years, including Johnson International, Inc. (“Johnson International”); and General Hunt Properties, Inc. (“General Hunt”).² (Mr. Johnson, Utility, and the other Johnson companies may be referred to for convenience as the “Johnson Group.”)

B **George Johnson and His Companies Paid the Largest Civil Environmental Settlement in Arizona History for Bulldozing Archeological Sites, Razing Protected Vegetation, Discharging Pollutants into Arizona Rivers, and Blinding Protected Bighorn Sheep**

In 2005 the Arizona Attorney General brought a lawsuit on behalf of the Arizona Department of Environmental Quality (“ADEQ”), the Arizona State Land Department, the Department of Agriculture, the Arizona State Museum, and the Arizona Game and Fish Commission.³ The suit charged George Johnson, Johnson International, General Hunt, and several Johnson contractors with numerous violations of state law and destruction of natural and archeological resources, including:

- Bulldozing and clearing nearly 270 acres of State Trust Lands located in and near the Ironwood National Monument and the Los Robles Archeological District;
- Bulldozing and clearing an estimated 2,000 acres of private lands in the Santa Cruz River Valley without obtaining permits required by state law;
- Destroying portions of seven major Hohokam archeological sites, circa A.D. 750-1250;
- Destroying more than 40,000 protected native plants on State Trust Lands, including Saguaro, Ironwood, Mesquite, Palo Verde and other protected species;

¹ Ex. SF-1; Tr. at 59:14-23.

² See Commission’s corporate records; Tr. at 58:12-19.

³ This paragraph, see generally Ex. SF-40 at 3-4. A copy of the ADEQ press release is attached as Exhibit SSR-2 to Ex. SF-40. Utility did not dispute the accuracy of the ADEQ press release. Tr. at 454:6 – 457:10.

- Violating the state’s clean water laws by failing to secure required permits and discharging pollutants into the Little Colorado River, the South Fork of the Little Colorado River and tributaries of the Santa Cruz River; and
- Negligently causing a disease epidemic that resulted in the death of at least 21 rare Arizona desert bighorn sheep and serious injury to numerous others.

Ultimately, George Johnson and the other defendants agreed to pay a fine of 12.1 million dollars — the largest civil environmental settlement in Arizona history — to settle these charges.⁴

C George Johnson and His Companies Paid One of the Largest Settlements in Federal History for Bulldozing the San Juan River

In a related case, the United States Environmental Protection Agency (“EPA”) sued George Johnson, his companies, and his contractor for bulldozing, filling, and diverting approximately five miles of the Santa Cruz River.⁵ In October 2008, George Johnson and the other defendants agreed to pay a fine of \$1.25 million, the largest penalty in the history of EPA’s Pacific Southwest Region, and one of the largest in EPA’s history under Section 404 of the Clean Water Act.

II GEORGE JOHNSON’S ROGUE UTILITY

A George Johnson also runs Johnson Utilities

The same George H. Johnson that has been subject to some of Arizona’s largest environmental fines is also Utility’s majority owner and Utility’s ultimate decision maker.⁶ As might be expected, George Johnson’s Utility is equally arrogant toward the environment, its customers, and Commission rules.

⁴ Utility may argue that it is significant that Mr. Johnson’s insurance company actually paid the fine and that the defendants admitted no liability. However, it is unlikely that a sophisticated insurance company would agree to pay a \$12.1 million fine — the largest in Arizona history — if it did not believe that a court would likely find liability and award significant damages.

⁵ This paragraph, see generally Ex. SF-40 at 5. A copy of the DOJ press release is attached as Exhibit SSR-4 to Ex. SF-40. Utility did not dispute the accuracy of the DOJ press release. Tr. at 457:24 – 458:13.

⁶ Ex. SF-1; Tr. at 59:14-23.

1 **Utility Has Incurred an Unprecedented Number of Environmental Fines and**
2 **Notices of Violations**

3 In 2003, ADEQ fined Utility \$80,000 for building and operating a water system without
4 obtaining the necessary permits.⁷ This followed a \$6,000 fine in 2001 for modifying a water
5 treatment plant without obtaining construction approvals.⁸

6 The Arizona Department of Water Resources has also had its issues with Utility. In
7 2003, it fined Utility \$90,000 for using far more groundwater than it was entitled to.⁹

8 Since 2003, ADEQ has issued Utility an amazing 14 NOVs for various environmental
9 infractions.¹⁰ Six of these NOVs are still open and unresolved.¹¹

10 Despite the previous records of both Mr. Johnson and his Utility concerning other
11 environmental matters, Utility amazingly claims that its unprecedented number of NOVs result
12 from “selective enforcement” by ADEQ.¹²

13 **Utility Discharged Raw Sewage into a Neighborhood Wash**

14 During the weekend of May 17 and 18, 2008, Utility’s Pecan Water Reclamation Plant
15 (“WRP”) had two sanitary sewer overflows (SSOs), with a combined estimate of 10,000 gallons
16 or more of untreated raw sewage flowing through a spillway into Queen Creek.¹³ As a result,
17 the Queen Creek Wash was contaminated with E-coli bacteria. Utility failed to notify ADEQ,
18 which only found out about the discharge because of e-mails from local residents. The discharge
19 allegedly occurred as a result of the failure of undersized sewage pumps. The Arizona
20 Department of Environmental Quality (“ADEQ”) issued Notice of Violation (“NOV”) 97512
21 after it evaluated the discharge.

⁷ Ex. SF-45.

⁸ Ex. SF-46.

⁹ Ex. SF-40 at SSR-3.

¹⁰ Ex. SF-9; Tr. at 1025:22-24.

¹¹ Tr. at 377:22 – 382:9.

¹² Tr. at 809:9-21.

¹³ Ex. SF-9, NOV 97512.

1 This NOV has not yet been resolved. The 2008 discharges were only months after a
2 December 2007 discharge from the same plant and were the latest in a long series of
3 environmental violations and sewage spills by Utility.¹⁴

4 A construction flaw may have contributed to the discharges. Page 2 of NOV 97512
5 alleges that Utility installed far smaller pumps than what were called for in the design. This
6 design deviation troubled then Commissioner William Mundell:

7 On page 2 of the NOV, the second alleged violation caught my attention.
8 According to the NOV, the lift station at the Pecan WRP was approved
9 based on an engineering design report that described the installation of
10 two 75 horsepower pumps. However, at the time of the SSOs, 35
11 horsepower pumps were operating at the lift station. I would like to know
12 why that was the case and if the difference in pumps was a contributing
13 factor to the SSOs.¹⁵

14 At some time after the spills, which would have been well after the 2007 test year, Utility
15 replaced the too-small pumps with two 100-horsepower pumps.¹⁶

16 **D Utility Illegally Stored Dangerous Sewage Sludge**

17 Utility had barely finished contaminating the Queen Creek Wash, when a surprise
18 inspection on September 25, 2008, by ADEQ caught Utility storing dangerous sewage sludge on
19 the site of one of Utility's waste disposal plants.¹⁷ The inspection found a large six-foot-deep
20 depression, where biosolids had been buried along with plastic and concrete debris. When the
21 inspectors walked onto this area, they were below grade and the biosolids were covered with
22 only a few inches of soil. They could see dried biosolids above ground, but the biosolids below
23 ground were "moist and very odorous." Test borings found that "The biosolids had a strong
24 sewage odor and were black in color." The surface area was very unstable and in several
25 locations, the surface collapsed under the weight of the inspectors, dropping them several feet
26 into the hidden biosolids.

¹⁴ Ex. SF-9, NOV 92021.

¹⁵ June 10, 2008, letter to the Docket from Commissioner Mundell (attached to Ex. SF-40 at Exhibit SSR-6.

¹⁶ Tr. at 77:8-20.

¹⁷ This paragraph, Ex. SF-11

1 ADEQ took the results of the inspection very seriously. In total, ADEQ has issued three
2 NOVs to Utility concerning its dangerous, unauthorized burial of sewage sludge.¹⁸ Together, the
3 three NOVS allege that Utility has incurred an amazing 17 statutory or code violations.

4 **E Utility Ignored a Commission Deadline and Deliberately Delayed this Rate**
5 **Filing So It Could Continue Overcharging Its Customers Millions of Dollars**
6 **per Year.**

7 In Decision No. 68235, dated October 25, 2005, the Commission ordered Utility to file a
8 rate case for its water and wastewater divisions by May 1, 2007, using a 2006 test-year.¹⁹ Utility
9 made a series of dilatory filings requesting relief from that requirement.²⁰ However, the
10 Commission never granted Utility's request.²¹

11 Utility decided to just ignore the Commission's Order. Despite never having obtained
12 Commission relief from the filing deadline, Utility delayed its rate filing until March 31, 2008,
13 and it is now based on a 2007 test year.

14 The following table summarizes the major parties' final revenue-requirement positions.

	Staff	RUCO	Utility
Water	(\$3,016,800)	(\$73,718)	(\$2,875,022)
Wastewater	(\$895,100)	(\$515,397)	\$2,326,532

15 Even based on Utility's calculations, Utility over-collected almost \$3,000,000 from its water
16 customers in 2007. This could not have been a surprise to Utility. Most likely, it also
17 substantially overcharged its water customers in 2006. If it had filed when it was ordered to,
18 Utility would likely have had to reduce water rates a year earlier. Two of the three parties also
19 calculate that Utility over-collected from its wastewater customers in 2007. If the Commission
20 agrees, then wastewater customers were also harmed by the delay.

¹⁸ Ex. SF-9, NOVs 102722, 103357, and 103956.

¹⁹ Ex. SF-2.

²⁰ Ex. SF-3, SF-4, SF-5, and SF-6.

²¹ Utility has argued that September 18, 2007, letter from Commission Chief Counsel Chris Kempley somehow authorized the delay. (The letter is attached to SF-6.) However, this is not the case. As the Commission well knows, Staff cannot provide relief from a Commission order, imposing a deadline. Further, the letter only stated that Staff would support a motion to delay the filing. It did not state in any way that Staff purported to waive or delay the filing deadline.

1 Utility simply wanted to keep its illegal gains and hoped no one would notice that it had
2 ignored a Commission order. The delay has cost customers millions of dollars. Utility's
3 unauthorized delay must be dealt with harshly.

4 **F Utility's Employees are Afraid of George Johnson and Do What They Are**
5 **Told**

6 Sadly, even Utility's own employees are afraid of Mr. Johnson. Until recently, Gary
7 Larsen was Utility's Field Manager.²² Mr. Larsen was also known as Utility's Operations
8 Manager.²³ Mr. Larsen reported directly to Brian Tompsett.²⁴ Mr. Tompsett is Utility's
9 Executive Vice President.²⁵

10 Mr. Ashton recorded a lengthy conversation with Mr. Larsen. Among other things, Mr.
11 Larsen stated that Utility's employees do what they are told because they were afraid of Mr.
12 Johnson:

13 MR. ASHTON: Let me ask you, why -- Gary, why wasn't -- why wasn't
14 the utility not that honest with me before? Why?

15 MR. LARSEN: Well, you know how this worked for George
16 (indiscernible), okay? He has gotten -- everything goes around. People are
17 doing what they're told to do. And we don't ask no questions about that.
18 We don't ask George about it. He tells you certain things.²⁶

19 The Commission can now try to repair this kind of horrendous work environment.

20 **G George Johnson Believes that the Commission is Afraid of Him**

21 In response to a question from David Ashton, Mr. Larsen stated Mr. Johnson believed
22 that the Corporation Commission was afraid of him:

23 MR. ASHTON: They're -- the ACC is afraid of George?

24 MR. LARSEN: Everybody is.²⁷

25 The Commission now has the opportunity to show Mr. Johnson that it is not afraid of
26 him.

²² Tr. at 57:14-15.

²³ Tr. at 89:10-15.

²⁴ Tr. at 57:24-25.

²⁵ Tr. at 7:15-17; 50:7-9.

²⁶ Ex. SF-32 at 44:15-22.

²⁷ Ex. SF-32 at 49:16-18.

1 **H George Johnson “Gets High” off Abusing His Customers and Employees**

2 Mr. Larsen stated that Mr. Johnson “got high” off abusing his customers and employees:

3 MR. ASHTON: ... And the issue I have, Gary, is, you know, I understand
4 why they want to f*** me now. I don't understand why they wanted to
5 f*** me two years ago or three years ago, when it was happening.

6 MR. LARSEN: George gets high off of this, you know? It happens to me
7 and it happens to you. It happens to everyone.

8 The Commission has the power to put an end to Mr. Johnson’s gleeful abuse of his
9 customers and employees.

10 **I Utility Withheld Damaging Information from the Commission**

11 In Docket No. WS-02987A-07-0487, Utility applied to extend its wastewater CC&N. At
12 the Commission’s March 3, 2009, Open Meeting the Commission approved Johnson’s
13 application in this docket on a 3-2 vote. Commissioners were greatly concerned about a number
14 of issues involving Johnson, particularly about an incident where raw sewage from Johnson’s
15 Pecan Water Reclamation Plant overflowed manholes, contaminated the Queen Creek Wash with
16 E. coli and coliform, and endangered the safety of nearby residents of the Pecan Creek North
17 subdivision. Commissioners sought assurance that these types of incidents would not happen
18 again. Johnson assured the Commissioners that it had taken a number of steps to ensure that
19 these had been isolated incidents that would not recur.

20 Subsequently, on March 17, 2009, the Commission issued Decision No. 70849. In the
21 Decision the Commission expressed specific concern about Utility’s continuing sewer spills:

22 However, Johnson’s two recent SSOs raise serious concerns regarding
23 public safety. The Company experienced two SSOs in the same location
24 within a short time span. The homeowners in the Pecan Creek North
25 subdivision, living adjacent to the concrete channel where the sewage
26 from the SSOs was contained, were subjected to viewing sewage from
27 their homes and test results of the storm water in the Queen Creek wash
28 adjacent to where the SSOs occurred continue to test positive for the
29 presence of E. coli and coliform.²⁸

30 However, at the Open Meeting Utility had failed to disclose to the Commissioners that
31 another very similar contamination incident had just occurred. According to published reports,

²⁸ Decision No. 70849 at 11:11-16.

1 on the morning of Feb. 22, 2009, just nine days before Open Meeting, about 9,000 gallons of
2 wastewater backed up in Utility's system, leaked out of two manholes, and spilled over into two
3 retention basins at the Cambria subdivision near Ironwood and Ocotillo roads in Pinal County.

4 Commission Staff was very concerned that Utility had failed to tell the Commissioners
5 about recent spill and moved for rehearing of Decision No. 70849. Staff's strong language
6 deserves to be repeated:

7 [I]n this case Staff believes that a rehearing may be warranted in light of
8 Johnson Utilities, L.L.C.'s ("Company") failure to disclose information
9 concerning wastewater spills that occurred a few days before the
10 Commission voted to grant the Company a Certificate of Convenience and
11 Necessity ("CCN") extension. Even though the Company knew or should
12 have known from the Commission's questions at the March 3, 2009 Open
13 Meeting that the Company's past and present actions and standing with
14 the Arizona Department of Environmental Quality were important factors
15 in the Commission's deliberations, the Company did not discuss its most
16 recent wastewater spill problems.

17 Staff's recommendations may not have been any different if Staff had
18 known of these new wastewater spills prior to the March 3, 2009 Open
19 Meeting. Similarly, the Commissioners' votes may not have been different
20 if the wastewater spills information had been disclosed. However, Staff is
21 concerned, and believes the Commission may be equally concerned, that
22 the Company did not disclose the occurrence of these new wastewater
23 spills prior to the Open Meeting, or at a minimum, disclose the
24 information during the Open Meeting when the Company heard the
25 Commission's discussion.²⁹

26 Utility's failure to disclose material information to the Commission is completely
27 consistent with its four-step regulatory strategy:

- 28 1. Ignore laws and regulations.
- 29 2. Volunteer no information.
- 30 3. If caught, claim that it was an honest mistake and it won't happen again.
- 31 4. Repeat steps 1-3.

²⁹ Docket No. WS-02987A-07-0487, Staff's A.R.S. § 40-253 Application For Rehearing, dated March 31, 2009.
(Emphasis added).

1 **J Utility Knowingly and Illegally Charges Its Customers For Taxes**

2 Utility bills its water and effluent customer each month for a Superfund "Tax" at the rate
3 of \$0.0065/1000 gallons.³⁰ Utility's water tariff does not authorize this charge.

4 Utility's water tariff only states the following:

5 In addition to all other rates and charges authorized herein, the Company shall
6 collect from its customers all applicable sales, transaction, privilege, regulatory or
7 other taxes and assessments as may apply now or in the future, per Rule R14-2-
8 409(D)(5).

9 Rule R14-2-409(D)(5) states: "In addition to the collection of regular rates, each utility may
10 collect from its customers a proportionate share of any privilege, sales or use tax." However,
11 Rule R14-2-409(D)(5) only allows Utility to recover taxes based on revenue, not usage.

12 In 2002, the Commission explicitly told Utility that it could not pass through to its
13 customers another tax that was also based on usage, just like the Superfund tax. In Docket No.
14 SW-02987A-01-0795, Utility asked the Commission to clarify that Rule R14-2-608(D)(5)
15 provided tariff authority to pass through to its water customers its Central Arizona Groundwater
16 Replenishment District ("GRD") Taxes. Like the Superfund tax, the GRD Tax was not based on
17 sales revenue. The Commission denied Utility's request:

18 Staff determined that the GRD tax cannot be treated as a pass-through tax within the
19 Arizona Administrative Code R14-2-409.D.5 because it is not a "privilege, sales or
20 use tax" since GRD taxes are not based on sales revenue. Therefore, GRD taxes do
21 not fall within the scope of the Company's current tariff. ... The Commission having
22 reviewed the application and Staff's Memorandum dated January 31, 2002,
23 concludes that the GRD tax is not the type of tax that can be passed through within
24 Arizona Administrative Code, R14-2-409.D.5 and is, therefore, not included in the
25 Company's current tariff.³¹

26 Despite being explicitly told that it could not pass through usage-based taxes, Utility has
27 knowingly passed through another usage-based tax to its customers: the Superfund tax.
28 Apparently Utility does not believe that this Commission's decisions mean anything. It has
29 deliberately ignored the Commission's Order and for seven years has passed through another
30 usage-based tax to its customers. Deliberate, illegal acts like this must be punished.

³⁰ Exhibit SF-40 at 7:15-22; Tr. at 72:6-73:9. Utility also refers to this tax as the Water Quality Assurance Revolving Fund tax. Tr. at 72:13-18.

³¹ Decision No. 64598, dated March 4, 2002, at 2:1-15.

1 **K Utility Illegally Provided Free Water for its Affiliate**

2 A.R.S. 40-334(A) provides that:

3 A public service corporation shall not, as to rates, charges, service, facilities or in
4 any other respect, make or grant any preference or advantage to any person or
5 subject any person to any prejudice or disadvantage.

6 Despite this clear prohibition, Utility has provided free water for the benefit of another
7 member of the Johnson Group. Since 2006, Utility has been providing free irrigation water for
8 the Oasis Golf Course, owned by its affiliate, the Club at Oasis LLC (“Oasis”).³² Swing First
9 was aware of this practice and sent a data request to Utility asking it to confirm that it had not
10 been charging the Oasis for irrigation water. In the data response, Utility admitted that it had
11 been providing free water to its affiliate, which Mr. Tompsett confirmed, but in a very
12 misleading way: “Johnson Utilities has discovered that it was not charging the Oasis Golf Course
13 for the effluent the golf course was receiving.”³³ In fact, Utility did not discover that it was
14 illegally providing free water to its affiliate – it got caught. Consistent with its four-part
15 regulatory strategy, Utility now seeks to portray its illegal act as an honest mistake that it will
16 correct and never happen again.

17 **L Utility Tried to Hide Incriminating Information**³⁴

18 A key issue in this case is that Utility deliberately withheld treated effluent from its large
19 irrigation customer, Swing First. Utility did everything it could to hide the extent of its effluent
20 production and sales.

21 **1 Utility’s Effluent Production**³⁵

22 In Docket No. WS-02987A-08-0049, Swing First sought to establish, among other things,
23 Utility’s monthly effluent production. To this end, Swing First tendered its first data requests to
24 Utility on April 11, 2008. The very first question (1-1) asked:

25 For each month during the period of 2005 to the present, please provide
26 by treatment facility the amount of treated effluent generated within
27 Utility’s Certificate of Convenience and Necessity (“CC&N”).³⁶

³² Exhibit A-6 at 16:5-13.

³³ *Id.* At 16:12-13. (Emphasis added.)

³⁴ See generally Swing First’s February 20, 2009, Notice of Inappropriate Litigation Practices, in this Docket.

³⁵ Tr. at 135:15 – 155:10.

1 On April 25, 2008, Utility responded by e-mail to Swing First's data requests by
2 objecting to each question and providing none of the requested data. Utility's stonewalling of
3 Swing First required Swing First to file a Motion to Compel on May 2, 2008. Utility's May 13,
4 2008, Reply to Motion to Compel continued its stonewalling.

5 On June 18, 2008, Administrative Law Judge Yvette B. Kinsey ordered Utility to provide
6 the majority of the requested information.³⁷ She provided a very generous August 15, 2008,
7 deadline for Utility's responses.³⁸ Utility simply ignored this deadline. It did not complete its
8 responses until October 7, 2008, almost six months after it received the data requests.

9 Utility's belated responses were deliberately evasive and incomplete. Utility first refused
10 to provide the information. Then, after further discussions between the attorneys, Utility finally
11 provided data for just one production year (2007) and for just one plant (the San Tan Water
12 Reclamation Plant). The document provided was approximately 210 pages long, but the relevant
13 information was actually contained on just four pages.³⁹ In less time than it took to copy this
14 huge non-responsive attachment, Utility could have pulled the relevant data off these four pages
15 (quarterly reports of average daily flows) and included it directly in the response. Instead Utility
16 opted to bury Swing First with paper.

17 Swing First attempted to follow-up DR 1-1 with DR 3-2.⁴⁰ Because of the difficulty in
18 sifting through the irrelevant data, Swing First asked Utility to confirm that it had collected the
19 correct information. DR 3-2 asked:

20 For the months of January through December 2007, please confirm the
21 following average daily reclaimed water flows from Utility's Santan
22 Water Reclamation Plant:
23

³⁶ Ex. SF-34.

³⁷ Tr. at 41-43.

³⁸ Tr. at 51.

³⁹ Ex. SF-34; Tr. at 134:21 – 145:19.

⁴⁰ Ex. SF-15.

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
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

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

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

7 Follow-up DR 3-3 then asked for average daily flows for 2004-2006 and 2008.⁴¹ To
8 avoid again getting buried in irrelevant paper, Swing First's request was very specific:

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

17 Yet, Utility still could not be forthcoming. Instead of providing the average daily flows,
18 or the four (one-page) quarterly summaries for each year, Utility provided the actual daily flows
19 for each day from April 1, 2006 through December 31, 2006, and from January 1, 2008, through
20 December 31, 2008.⁴² This required Swing First's counsel to create a spreadsheet, key in the

⁴¹ SF-16.

⁴² Tr. at 151:13 – 153:2

1 reported flows for every one of the 640 days, and then calculate the average daily flows for each
2 of the 21 months. This was even more bad faith by Utility and more work for Swing First.

3 **2 Utility's Effluent Sales**

4 In the rate case docket, Swing First sought to tie together effluent production with
5 effluent sales. Swing First's First Data Requests in the rate case docket were tendered to Utility
6 by e-mail on August 8, 2008.⁴³ They included DR 1-3, which was a very simple request:

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

13 In accordance with the Procedural Order, objections were due on August 15, 2008. Only
14 after being threatened with a motion to compel, did Utility finally "respond" to the First Data
15 Requests, but not until September 18, 2008, 41 calendar days after receipt.

16 Following discussions between counsels, Utility supplemented several of its responses,
17 but some responses remained incomplete. Swing First's Second Data Requests were tendered to
18 Utility through counsel by e-mail on September 17, 2008. Objections were due on September
19 24, 2008. Utility finally responded to these requests on October 17, 2008, including an untimely
20 objection and a partial response to one question.

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

24 Utility's foot-dragging required Swing First to prepare, file, and argue a motion to
25 compel. On January 28, 2009, Administrative Law Judge Teena Wolfe ordered Utility to
26 provide additional responses within two weeks, including a response to DR 1-3. On February
27 10, Utility finally purported to comply with Judge Wolfe's order, but still provided only an

⁴³ Ex. SF-33.

1 incomplete response to DR 1-3 – which had been originally submitted to Utility on August 8,
2 2008, over six months earlier.

3 Yet, Utility still had not provided all the requested information. Utility instead decided to
4 provide only information for two customers, each supplied with effluent from just one of
5 Utility's four treatment plants. Utility also decided to provide data only from March 2006
6 through July 2008. Utility also did not identify the rate actually paid for each month. This
7 required additional discussions until February 23, 2009, when Utility's counsel finally e-mailed a
8 satisfactory spreadsheet of the data.

9 Amazingly, it took six months of concerted effort by Swing First before Utility could
10 provide monthly sales information for just two customers. It appears that Utility was desperately
11 afraid of having this information see the light of day.

12 **3 Utility's Failure to File Ordered Rate Case**

13 As discussed above, in Decision No. 68235, dated October 25, 2005, the Commission
14 ordered Utility to file a rate case for its water and wastewater divisions by May 1, 2007, using a
15 2006 test-year.⁴⁴ Swing First sought to confirm this simple fact in a data request to Utility:

16 3.11 Please admit or deny that in Decision 68235, the Commission
17 ordered Utility to file a rate case for its water and wastewater divisions by
18 May 1, 2007, using a 2006 test year. If your answer is "deny," please
19 explain your answer.⁴⁵

20 One would think that Utility would be able to answer such a simple question with a
21 simple answer. One would be wrong. Here is Utility's response:

22 **Response:** In Decision 68235, the Arizona Corporation Commission
23 ordered that Johnson Utilities file a rate case for the water and wastewater
24 divisions using a 2006 test year by May 1, 2007. On March 30, 2007,
25 counsel for Johnson Utilities filed a motion requesting that the deadline
26 for filing the rate case be extended to June 1, 2008, and that the company
27 be permitted to use a 2007 test year. On April 13, 2007, Utilities Division
28 Staff filed a staff report recommending that the deadline for filing the rate
29 case be extended to December 31, 2007, utilizing a June 30, 2007, test
30 year. Thereafter, in a letter from the Commission's Chief Counsel to

⁴⁴ Ex. SF-2.

⁴⁵ Ex. SF-7

1 Johnson Utilities' legal counsel dated September 18, 2007, Staff agreed to
2 support a 2007 test year but required that the company file a rate case by
3 March 31, 2008. In accordance with its agreement with Staff, Johnson
4 Utilities filed a rate application for its water and wastewater divisions on
5 March 31, 2008, using a 2007 test year.⁴⁶

6 None of the words "admit," "deny," "yes," or "no" appear anywhere in Utility's 168-
7 word response.

8 Even on the stand, Utility did not want to answer the simple question:

9 Q. (Mr. Marks) Now, Mr. Tompsett, do you have what has been marked
10 as Exhibit SF-7 in front of you?

11 A. Yes, I do.

12 Q. Take a moment to look over question 3.11 and your answer.

13 A. Okay.

14 Q. The question -- I will read the question: "Please admit or deny that in
15 Decision 68235 the Commission ordered Utility to file a rate case for its
16 water and wastewater divisions by May 1, 2007 using a 2006 test year. If
17 your answer is deny, please explain your answer."

18 And in your response I don't see any admission that the Commission
19 ordered Utility to file a rate case by May 1, 2007 using a 2006 test year.

20 Am I missing something here?

21 A. No, Mr. Marks. The response did not deny that the Commission
22 issued the order, and it actually laid out the timeline of events that
23 followed that decision.

24 Q. Well, I believe, Mr. Tompsett -- and you could have this read back if
25 you would like to -- but I believe you just admitted that the Commission
26 ordered Utility in Decision 68235 to file a rate case for its water and
27 wastewater divisions by May 1, 2007 using a 2006 test year.

28 Did I miss something?

29 A. No, I don't think so.

30 Q. So are you changing your answer at this point, Mr. Tompsett?

31 A. No.

32 Q. Help me out here, Mr. Tompsett. You were asked to admit something
33 in the data request that you just admitted on the stand, as I understand it; is
34 that correct?

35 A. That the decision ordered us to file a rate case, yeah. That's correct.

36 Q. But your response does not admit that, does it?

⁴⁶ Exhibit SF-7.

1 A. The response doesn't have the word admit or deny in it, no.

2 Q. And it doesn't state anywhere yes or any way affirmatively say that
3 the Commission did, in fact, issue that order, does it?

4 A. In the response, no.

5 Q. Did your counsel review this response?

6 A. I assume so.

7 Q. Thank you.⁴⁷

8 Swing First has quoted the data request, response, and transcript at length, because they
9 illustrate the larger point of just how difficult it was to get information from Utility, even to
10 simply "admit" or "deny" the plain language of a Commission order. Apparently, Utility
11 believes it not only doesn't have to obey a Commission Order, it doesn't even have to
12 acknowledge its direction.

13 **4 Utility's Sewer System Overflows**

14 Utility also tried to hide the number of its Sewer System Overflows. Data request SF-13
15 follows:

16 7-1 Please refer to Utility's March 30, 2009, letter to the
17 Commissioners in Docket No. WS-02987-07-0487. For each of the years
18 2005 through 2008, and the year 2009 to date, please provide the number
19 of sewer system overflows ("SSOs") experienced by Utility.⁴⁸

20 The data request was e-mailed to Utility's counsel on April 14, 2009. In accordance with
21 Judge Wolfe's Procedural Order, Utility's response was due one week later on April 21, 2009.
22 Instead of providing the information, Utility objected to the question just before 5:00 p.m. on
23 Friday, April 17, 2009, six days before hearings were to resume.

24 Q. (Mr. Marks) The question asks, "Please refer to Utility's March 30,
25 2009 letter to the Commissioners in Docket No. WS-02987-07-0487."

26 Is that the letter we just admitted and you reviewed?

27 A. (Mr. Tompsett) Yes, it is.

28 Q. And then the question asks, "For each of the years 2005 through 2008
29 and year 2009 to date, please provide the number of sewer system
30 overflows experienced by Utility."

⁴⁷ Tr. at 69:16 – 71:11.

⁴⁸ Ex. SF-13.

1 Is that correct?

2 A. Yes.

3 Q. And you saw this; correct?

4 A. Yes.

5 Q. If you turn to the next page, please. Are you there?

6 A. Yes.

7 Q. That is an e-mail from your -- a copy of an e-mail from your counsel

8 to me dated Friday, April 17th; is that correct?

9 A. Yes.

10 Q. And it states, "Johnson Utilities hereby objects to Swing First Golf

11 data request 7-1 in the rate case on the grounds that (i) the information

12 requested is not relevant in the rate case; and (ii) the number of sewer

13 system overflows is publicly available at the Arizona Department of

14 Environmental Quality."

15 Did you see this e-mail?

16 A. Yes.

17 ...

18 Q. Now, you just provided me, Mr. Tompsett, your information for 2007

19 and 2008 that you had ten SSOs. You said you had that information some

20 time ago; is that correct?

21 A. Yes. My people compiled it, and I reviewed it earlier this week, yes.

22 Q. Did you have it on Friday, April 17, six days ago?

23 A. No. I didn't review it until earlier this week. And I only -- I did not

24 look at the years '05 and '06 at all.

25 Q. But you did not provide the information for 2007 and 2008 to me, did

26 you?

27 A. No.

28 Q. Now, you suggested that [I] could go and get this information from

29 the Arizona Department of Environment Quality or Mr. Crockett

30 suggested that; is that correct?

31 A. Yes.

32 Q. Do you know how a member of the public goes about getting

33 information from ADEQ?

34 A. I assume there are a number of ways. You either go fill out a request

35 or you apparently obtain the NOV's from ADEQ. I mean, it's either a

36 request to read a file or a FOIA, Freedom of Information Act.

1 Q. Have you ever gone down to get copies of files from ADEQ as a
2 member of the public, not as a member -- not on behalf of your utility?

3 A. Yes, we have -- or yes, I have. It's been a few years now, but I have
4 in the past.

5 Q. They don't have anything like E-docket here, like here at the
6 Commission, do they?

7 A. No, they don't have anything like E-docket. They have ICE, I think is
8 what it's called, system.

9 Q. That isn't current, is it?

10 A. It probably isn't, no.

11 Q. If, in fact, a member of the public has to make a document request --
12 first of all, is the first thing that someone has to do to get a file is to send
13 an e-mail or letter to ADEQ requesting particular documents?

14 A. That would be one way to do it. I am sure they could do it by e-mail
15 or voicemail or message.

16 Q. I said e-mail or a letter.

17 A. I think you can request it verbally too, but the other two would
18 suffice.

19 Q. And then you have to wait to be contacted that they located the
20 material; is that correct?

21 A. Typically, yes.

22 Q. And then you have to arrange a time to go down there and view the
23 requested documents; is that correct?

24 A. Yes.

25 Q. And then if you view them and you find that they are the right
26 documents, you have to then further copy request; is that correct?

27 A. Depends on the number of documents. I think they give you a grace
28 of X amount of copies.

29 ...

30 Q. Mr. Crockett's e-mail to me, what is the date shown of when that was
31 sent?

32 A. The letter?

33 Q. Mr. Crockett's e-mail of April 17th.

34 A. Oh, well, it's date Friday, April 17th.

35 Q. What time?

36 A. 4:59.

1 Q. P.m.?

2 A. Yes.

3 Q. All right. There was no way I was going to contact ADEQ on Friday
4 afternoon, was there?

5 A. No.⁴⁹

6 Utility was clearly trying to avoid making its number of SSOs part of this record. Its
7 objection was baseless; a utility's SSOs are clearly relevant in a rate case. And suggesting that
8 Swing First could go down to ADEQ to get the information was an abuse of the discovery
9 process. Utility reported its SSOs to ADEQ and obviously had the information. It could have
10 easily provided the information, or at worst, asked for a couple of additional days to compile the
11 information. Further, Utility knew full well that there was no way that Swing First could get the
12 requested information from ADEQ in time for the hearing.

13 One can readily conclude that if Utility had good news to report it would have quickly
14 provided it. Utility should also be required to report bad news, particularly when it previously
15 failed to provide that information to the Commission.⁵⁰

16 **M Utility Harassed its Customers with Frivolous Lawsuits**

17 Residents in the Pecan Ranch North subdivision were justifiably concerned with their
18 health and safety as a result of Utility discharging raw sewage from the Pecan Plant into their
19 neighborhood.⁵¹ Residents organized a protest against Utility and posted pointed comments on a
20 community web page. In retaliation, Utility sued the residents for defamation.⁵²

21 This was not an isolated incident. Swing First filed a complaint at the Commission
22 against Utility concerning utility's rates and charges. Utility retaliated against Swing First's
23 manager, David Ashton, by suing him and his wife for defamation.⁵³

⁴⁹ Tr. at 124:16 – 129:20.

⁵⁰ Tr. at 120:8 – 123:14.

⁵¹ Tr. at 75:14-23.

⁵² Tr. at 78:1-19; Ex. SF-27.

⁵³ Ex. SF-26.

1 This is not a new tactic from the Johnson Group. They also sued Attorney General Terry
2 Goddard and his wife Monica for defamation, because Mr. Goddard had the temerity to try to
3 bring the Johnson Group to justice for its outrageous environmental pillaging.⁵⁴

4 Utility's abusive lawsuits are obviously intended to chill protests by forcing defendants to
5 endure the emotional burden of defending a lawsuit and incur the expense of hiring attorneys to
6 defend the lawsuits. These lawsuits are unprecedented. To counsel's knowledge, no other utility
7 in the United States has ever sued a customer for defamation. The Commission should not allow
8 this type of white-collar thuggery from one of its regulated utilities.

9 N **Utility Deliberately Withheld Available Effluent and Instead Delivered**
10 **Expensive CAP Water**

11 This Commission has established a strong policy of encouraging golf courses to use
12 effluent for their irrigation needs as much as possible. Utility is well aware of this policy:

13 Q. (Mr. Marks) Do you know what the Commission's policy is towards
14 the use of effluent for irrigation needs?

15 A. (Mr. Tompsett) Whether -- in past orders, yes. The Commission as a
16 whole has -- I don't know if it's specific policy or rule, but they do want
17 them to use effluent rather than groundwater on golf courses or it's their
18 desire, put it that way.

19 Q. And Chairman Mayes has been one of the biggest advocates of using
20 effluent for golf course irrigation, has she not?

21 A. I would say that is accurate, yes.⁵⁵

22 Swing First wants to use effluent for its irrigation needs to the fullest extent possible:

23 We want to use effluent for all of our irrigation and it appears that Utility
24 generates sufficient effluent for all our irrigation needs. We have a lake
25 on the course, which we can use to store effluent. This allows us to take
26 effluent at night to use during the day.

27 Further, it is not good public policy to irrigate a golf course with CAP
28 water unless it is absolutely necessary. With treatment, CAP water can be
29 delivered to customers as potable-water. Because it is a renewable
30 resource and does not deplete groundwater supplies, it should be the first
31 choice for potable-water service. In contrast, treated effluent can normally
32 be used directly only for irrigation.⁵⁶

⁵⁴ Ex. SF-40 at SSR-3.

⁵⁵ Tr. at 260:23 – 261:8.

⁵⁶ Ex. SF-38 at 4:11-13.

1 As discussed above, Utility did everything it could to prevent Swing First from obtaining
2 Utility's effluent production and sales records. Now that the information has finally been
3 obtained and compiled, we can see why Utility tried so hard to keep this information from seeing
4 the light of day. Utility has been caught again. Although it was well aware of the
5 Commission's policy that golf courses should irrigate with effluent, we now know that Utility
6 deliberately thwarted that policy.

7 On the next page, Swing First has reprinted Exhibit SF-42, which summarizes effluent
8 production and sales from Utility's San Tan Wastewater Treatment Plant:⁵⁷

⁵⁷ Source: Ex. SF-15 – SF-18; Tr. at 242:23 – 248:8, 386:25 – 388:23.

	Swing First	Santan HOA	Total Sales	Effluent Produced	Unsold Effluent
	(Million Gallons)				
2006					
Mar	11.0886		11.0866	11.0866	0.0000
Apr	5.841		5.8410	10.917	5.0760
May	10.646		10.6460	11.318	0.6720
Jun	11.352		11.3520	11.543	0.1910
Jul	9.744		9.7440	12.497	2.7530
Aug	11.647		11.6470	13.335	1.6880
Sep	3.889		3.8890	13.297	9.4080
Oct	6.052		6.0520	14.127	8.0750
Nov	0		0.0000	14.794	14.7940
Dec	15.407		15.4070	13.3295	-2.0775
Total 2006	85.6666		85.6646	126.2441	40.5795
2007					
Jan	2.181	10.9120	13.0930	16.337	3.2440
Feb	1.4040	3.8320	5.2360	14.532	9.2960
Mar	0.0000	0.0000	0.0000	16.027	16.0270
Apr	0.3220	6.4950	6.8170	15.39	8.5730
May	0.0000	4.1850	4.1850	15.159	10.9740
Jun	0.0000	1.7660	1.7660	13.71	11.9440
Jul	0.0000	0.2060	0.2060	13.361	13.1550
Aug	0.0000	3.3400	3.3400	15.624	12.2840
Sep	0.0000	5.1000	5.1000	15.27	10.1700
Oct	0.0000	5.8240	5.8240	15.903	10.0790
Nov	0.0000	7.2810	7.2810	16.41	9.1290
Dec	7.0370	8.3450	15.3820	17.081	1.6990
Total 2007	10.944	57.2860	68.2301	184.804	116.5739
2008					
Jan	2.535	6.1350	8.6700	16.814	8.1440
Feb	5.469	3.0730	8.5420	16.652	8.1100
Mar	7.392	3.6500	11.0420	17.341	6.2990
Apr	14.417	5.0880	19.5050	16.658	-2.8470
May	14.309	0.0000	14.3090	16.898	2.5890
Jun	13.613	0.0000	13.6130	16.371	2.7580
Jul	11.877	2.6680	14.5450	17.196	2.6510
Aug	15.955	0.4890	16.4440	17.302	0.8580
Sep	13.276	0.2450	13.5210	16.968	3.4470
Oct	10.834	0.0930	10.9270	17.404	6.4770
Nov	12.065	0.0000	12.0650	17.89	5.8250
Dec	5.447	0.0000	5.4470	18.958	13.5110
Total 2008	127.189	21.4410	148.6300	206.452	57.8220
2009					
Jan	2.950		2.950	19.320	16.370
Feb	4.600		4.600	18.050	13.450
Mar	5.850	1.230	7.080	19.180	12.100
Apr	12.131	2.469	14.600	15.391	0.791
May	17.005		17.005	16.967	-0.038
Jun	14.273		14.273	15.836	1.563
Jul	16.846		16.846	16.618	-0.228
Aug	15.159		15.159	15.482	0.323
Sep	0.000		0.000		0.000
Oct	0.000		0.000		0.000
Nov	0.000		0.000		0.000
Dec	0.000		0.000		0.000
Total 2009 (8 mo.)	88.814	3.699	92.513	136.844	44.331
Total 2006-09	312.6136	82.4260	395.0377	654.3441	259.3064

Data Sources: Production from March 2006 through December 2008 - Exhibits SF-15 and SF-16
Sales from March 2006 through December 2008 - Exhibit SF-17
Production and Sales from January through March 2009 - Exhibit SF-19
Production and Sales from April through August 2009 - DR 8.1

1 Exhibit SF-42 established two key facts. First, from March 2006 through August 2009,
2 Utility produced far more effluent than it sold. Second, in 2007, Utility sold virtually no effluent
3 to Swing First.

4 Instead of delivering effluent, Utility wrongly delivered CAP water to Swing First. This
5 was wrong for two reasons. First, delivering CAP water instead of effluent violated Commission
6 policy. Effluent cannot be the source of potable water. In contrast, CAP water is from a
7 renewable source, is arsenic free and, with appropriate treatment, can be delivered to customers
8 as potable water. It should be used for irrigation only if no other source is available. Second, the
9 tariffed rate for CAP water is higher than for effluent. This alone would cause higher water bills
10 for Swing First.

11 In December 2006, Utility changed Swing First's account number for CAP water from
12 00119200-01 to 0019200-02.⁵⁸ The initial read on November 1, 2006, for this account number
13 was 408,189,000 gallons.⁵⁹ The last read in 2007 was on December 19, with a meter reading of
14 484,477,000 gallons. This means that from November 2006, through December 2007, Utility
15 delivered 76,288,000 gallons of CAP water. From Exhibit SF-42, we can calculate that Utility
16 produced 239,943,000 gallons of effluent from the San Tan Plant over the same time period.
17 Utility could easily have supplied all of Swing First's irrigation needs with effluent.

18 So the big question is: Why didn't Utility deliver effluent to Swing First? There are two
19 answers. The first is that Utility was deliberately trying to harm Swing First. As we will discuss
20 further, this was part of Utility's multi-front campaign to drive Swing First out of business. The
21 second reason that Utility did not deliver effluent is that it was profiting at the expense of Swing
22 First and the people of Arizona.

23 Because Swing First already has a complaint pending against Utility concerning George
24 Johnson's and Utility's outrageous campaign against Swing First,⁶⁰ we will not go into much

⁵⁸ Tr. at 1218:7 – 1219:8.

⁵⁹ Ex. SF-22, Bates No. SF0000234.

⁶⁰ Docket No. WS-02987A-08-0049.

1 detail concerning what seems to have caused George Johnson to begin his attacks. Mr. Ashton
2 summarized Swing First's 2006 business relationship with Mr. Johnson:

3 In April 2006, Swing First agreed to manage the Golf Club at Oasis ("the
4 Oasis"), which was owned by another company controlled by George
5 Johnson. Mr. Johnson said that for business purposes, it would be
6 advantageous for him to not pay us cash. Instead he proposed that we
7 work together using irrigation water credits as currency. We ultimately
8 agreed that Utility would provide Swing First with a water credit of 150
9 million gallons per year in exchange for us managing his course. As soon
10 as we began providing management services, Mr. Johnson fired his
11 employees that had been managing the Oasis.

12 On May 1, 2006, Swing First began managing the Oasis. In turn, Utility
13 provided the agreed-upon water credit. Swing First discontinued the Oasis
14 management relationship on Nov 16, 2006, retroactive to October 31,
15 2006.⁶¹

16 This November 16, 2006, date is the key to this case and the complaint case. This is the
17 date that Swing First terminated its management services for George Johnson. From this date
18 forward, George Johnson began to act like a jilted lover and used his Utility for revenge.

19 As just discussed, within days of Swing First's termination of the Oasis Management
20 Services, Utility changed Swing First's account number, began withholding effluent, and instead
21 started delivering more expensive, precious CAP water. As we will discuss below, Utility also
22 started charging Swing First far more than its lawful tariff rates for effluent and CAP water.
23 Utility's actions certainly appear to have been deliberate retaliation.

24 From January through November 2007, Utility essentially delivered no effluent to Swing
25 First. Then on December 7, 2007, Utility lied outright to Swing First about why it was not been
26 delivering effluent. In an e-mail that day to Swing First, Mr. Tompsett claimed that Utility
27 would continue to deliver as much effluent to the golf course as it could, but that deliveries were
28 limited to effluent generated from the subdivision (presumably served by the San Tan Plant):

29 We will continue to try to deliver as much effluent to the golf course as we
30 can, but the other part of the equation is that the golf course does not

⁶¹ Ex. SF-38 at 8:5-15.

1 generate any wastewater. All effluent delivery is based on flows
2 generated from the subdivision.⁶²

3 But, as SF-42 shows and as Mr. Tompsett has now admitted, Utility had not been trying to
4 deliver as much effluent to the golf course as it could. In fact, in each month of 2007, Utility
5 was generating more than enough effluent to satisfy the needs of both of its effluent customers,
6 Swing First and the San Tan Homeowners Association.⁶³

7 Mr. Tompsett also provided a whopping red herring for the Commission's diversion. Mr.
8 Tompsett testified: "Moreover, I am not familiar with any rule that would permit Johnson
9 Utilities to discriminate against the San Tan HOA in favor of SFG."⁶⁴ This is a red herring
10 because there were never any effluent shortages that would have required Utility to discriminate
11 against one effluent customer in favor of another:

12 Q. (Mr. Marks) Well, I'm asking you to look at this exhibit, SF-42, and
13 you show me somewhere in SF-42 where you were asked or forced or
14 somehow or another constrained to discriminate against the San Tan HOA
15 in favor of Swing First Golf.

16 A. (Mr. Tompsett) I guess I'm still not exactly understanding the
17 question. There was effluent that was delivered to the San Tan HOA in
18 2007. But I don't know as the discrimination applied directly to that
19 specific month and that specific year.

20 Q. Well, can you show me any month in 2007 where you did not have
21 effluent available after deliveries to San Tan HOA to provide to Swing
22 First Golf if they had wanted effluent?

23 A. Oh, okay. No -- I understand that question. No, there was effluent
24 available. However, as I stated earlier, CAP water was being delivered to
25 Swing First Golf based on a prior commitment for CAP water.

26 Q. Again, I'm asking you about this statement about discrimination.

27 A. Yes.

28 Q. Did you in any way have to discriminate against the San Tan HOA in
29 2007 because of commitments to deliver effluent to Swing First Golf?

30 A. No. There was effluent available.

31 Q. Similarly in 2008, you had adequate effluent available all months
32 except for, there's 2008, April of 2008, and I believe you testified earlier

⁶² Ex. SF-20 (E-mail dated December 3, 2007).

⁶³ Tr. at 256:11 – 260:9.

⁶⁴ Ex. A-6 at 12:26 – 13:1.

1 that there was probably a meter, billing months not matching consumption
2 months. But essentially you had additional effluent every month in 2008
3 after providing effluent to the San Tan HOA and to Swing First Golf,
4 correct?

5 A. Yes. It looks like there's unsold effluent available.

6 Q. Similarly in the first eight months of 2009, you had excess effluent
7 essentially every month?

8 A. Yes.⁶⁵

9 Mr. Tompsett's lies continued in the very next sentence of Exhibit A-6: "As a result,
10 Johnson Utilities was unable to provide SFG with all effluent produced at the San Tan WWTP,
11 as a portion of that effluent was needed by the San Tan Heights HOA."⁶⁶ Again, Exhibit SF-42
12 shows the truth – after delivering effluent to the San Tan Heights HOA, Utility had more than
13 enough effluent available in 2007 to satisfy all of Swing First's irrigation needs, just as it was
14 able to do in 2008 and 2009.

15 Mr. Tompsett also appears to have lied about another excuse he gave for not delivering
16 effluent. He claimed on redirect that Swing First ordered CAP water for 2007, so Utility was
17 obligated to deliver this instead of effluent:

18 Q. (Mr. Crockett) And do you recall whether Johnson Utilities had a
19 discussion with Swing First Golf in the fall of 2006 for delivery of CAP
20 water in 2007?

21 A. (Mr. Tompsett) They would have, yes.

22 Q. And does Johnson Swing First Golf request CAP water for delivery in
23 2007?

24 A. That is my understanding, yes.⁶⁷

25 These are pretty slim reeds upon which to hang the truth: "They would have;" "That is my
26 understanding."

27 Mr. Tompsett's testimony must be disregarded entirely. First, throughout the hearing he
28 demonstrated that his memory was very poor. For example, the conversation with Mr. Crockett

⁶⁵ Tr. at 469:10 – 470:21.

⁶⁶ Ex. A-6 at 13:1-3.

⁶⁷ Tr. at 966:8-14.

1 that is quoted above occurred on October 1, 2009. Just five days later Mr. Tompsett was asked
2 some questions about his redirect testimony and could barely recall the specifics:

3 Q. (Mr. Marks) Mr. Tompsett, you were asked some questions about a
4 purported meeting that took place with Swing First Golf where Swing
5 First Golf requested CAP water for 2007 deliveries.

6 Do you remember that?

7 A. (Mr. Tompsett) Not specifically, but I think so.⁶⁸

8 Second, Mr. Tompsett's testimony made no sense. He is asking the Commission to believe that
9 Swing First would have ordered more expensive CAP water in preference to less expensive
10 effluent:

11 Q. (Mr. Marks) And I believe you also testified that that commitment to
12 purchase CAP water was the result of a meeting in the fall of 2006 where
13 Swing First requested CAP water delivery for 2007; is that correct?

14 A. (Mr. Tompsett) Yes. I believe that is correct.

15 Q. Now, CAP water is more expensive than effluent, is it not, at its
16 tariffed rate?

17 A. Yes.

18 Q. It's the Commission's policy -- I believe you agreed to this previously
19 -- to use effluent for irrigation purposes at a golf course to the extent
20 available in preference to other sources; is that correct?

21 A. Yes. I believe that is correct.

22 Q. Given that CAP water was more expensive and that using CAP to
23 irrigate -- CAP water to irrigate a golf course instead of effluent was
24 contrary to Commission policy, why would Swing First Golf request CAP
25 water instead of effluent?

26 A. Well, we are back to the same discussion again. The volume of
27 effluent produced or the volume of effluent that was going to be available
28 in 2007 to Swing First Golf or to San Tan HOA or any other use was
29 unknown. And, in fact, in '06 the CAP water wasn't ordered. The CAP
30 once ordered needs to be paid for, and I would think it would be against
31 good business practices to have CAP water that had been ordered for
32 Swing First be the burden of the rest of the customers out there that are
33 within the existing utility service area.⁶⁹

⁶⁸ Tr. at 1257:19-24.

⁶⁹ Tr. at 1275:1 - 1276:3.

1 Mr. Tompsett obviously did not answer the question of why any sane customer would
2 order CAP water in preference to effluent, so Swing First had to ask it again:

3 Q. Again, with Utility having the best knowledge of effluent production
4 at the facility and having produced -- and having reached a phase of
5 producing in September, October, 14 million gallons a month of effluent,
6 why would Swing First Golf agree that it would supply the vast majority
7 of its effluent needs for 2007 from CAP water?

8 A. I don't know.

9 Q. But it's your testimony today that they did do that?

10 A. I don't know what they were thinking when those took place. I don't
11 know what Swing First was thinking.

12 Q. And you have no evidence at all of them making that election, do
13 you?

14 A. I couldn't find anything in writing, no.⁷⁰

15 The Commission should give no credence to the vague testimony of a witness,
16 unsupported by any other evidence, that a business would deliberately elect to buy more
17 expensive CAP water in favor of abundant, less expensive treated effluent that could not be used
18 for potable purposes.

19 Finally, even if Mr. Tompsett's far-fetched tale were true, the burden was on Utility to
20 explain all the options to Swing First and then only offer CAP water for irrigation if there were
21 no other options. Mr. Tompsett appears to be asking the Commission to believe that Swing First
22 forced Utility to secure and deliver CAP water during 2007.

23 We have discussed one reason why Utility withheld effluent from Swing First; George
24 Johnson and his Utility were trying to put Swing First out of business. The second reason is that
25 Utility also benefitted at Swing First's expense by withholding effluent. Any effluent that Utility
26 does not sell from its San Tan Plant is recharged into the ground.⁷¹ This allowed Utility to create
27 recharge credits that it can later use to pump more groundwater in the Phoenix Active
28 Management Area.⁷² So not only did Utility force Swing First to irrigate its golf course with

⁷⁰ Tr. at 1277:6-19.

⁷¹ Tr. at 237:22 - 238:21.

⁷² Tr. at 239:3: - 242:22.

1 renewable CAP water that could have been used for drinking water, but, as a result, Utility will
2 now be able to pump more groundwater and further lower the water table in the Southwest
3 Valley.

4 There is one final point on this subject that needs to be brought to the Commission's
5 attention. Exhibit SF-42 shows that Utility delivered no effluent whatsoever to Swing First from
6 May through November 2007. Utility then began delivering substantial quantities of effluent to
7 Swing First in December 2007. There is a clear reason for this. The Commission was now
8 watching.

9 On November 20, 2007, Swing First filed an informal complaint with the Commission
10 concerning Utility's irrigation water deliveries and their appropriate charges.⁷³ In December,
11 2007, Utility turned the effluent supplies back on and, with two minor exceptions, has supplied
12 all of Swing First's irrigation needs with effluent over the last two years.⁷⁴ With the
13 Commission now watching, Utility has been forced to behave:

14 MR. ASHTON: What happens if George tells you to come and turn off my
15 water again?

16 MR. LARSEN: That's a legit thing. You can take him to the commission,
17 okay?⁷⁵

18 Swing First thanks the Commission for forcing Utility to do the right thing.

19 **O Utility Deliberately Charged Irrigation Customers Far More than the Lawful**
20 **Tariff Rates**

21 In the previous section we discussed how Utility in December 2006 deliberately changed
22 Swing First's account numbers and began withholding effluent in favor of CAP water. At that
23 same time, Utility began charging Swing First \$3.75/1000 gallons for CAP water instead of the
24 lawful tariff rate of \$0.827/1000.⁷⁶ For the little effluent delivered, Utility charged Swing First

⁷³ Ex. SF-24.

⁷⁴ Ex. SF-39 at 3:14-16.

⁷⁵ Ex. SF-32 at 39:22-25

⁷⁶ Tr. at 281:5 - 283:21.

1 \$0.827/1000 gallons instead of the tariff rate of \$0.62/1000 gallons.⁷⁷ The illegal billing
2 continued from December 31, 2006, through June 1, 2007.⁷⁸

3 Mr. Ashton testified that Mr. Johnson personally directed an employee to raise Swing
4 First's CAP water rate to \$3.75/1000 gallons.

5 [T]he thing that concerns me most is that Utility's own employees have
6 personally told me that they don't bill according to the law, but according
7 to what Mr. Johnson tells them to bill. In 2007, when I asked the Utility
8 why it was billing me \$3.75 per thousand gallons for CAP water, the
9 response was "Because George told us to change the rate in our
10 computers, and when George tells you to do something you do it."⁷⁹

11 Swing First was not the only irrigation customer charged an illegal rate. Exhibit SF-42
12 shows that San Tan Heights HOA began receiving effluent deliveries in January 2007. From
13 January through June 2007, Utility charged the HOA \$3.75/1000 gallons instead of the lawful
14 rate of just \$0.62/1000 gallons.⁸⁰

15 Utility will argue that its errors were not deliberate and that it has now fixed them. This
16 is Utility's strategy now that it has been caught:

17 MR. ASHTON: ... But if you have to -- if you feel like you have to lie in
18 front of the Corporation Commission, then, as a separate party with you
19 and Gary and -- and Brian and George, as the other side, I have to do
20 everything I can to say, "Well, the law is this, and this is what they did."
21 You know, so --

22 MR. LARSEN: And a mistake isn't a lie.

23 MR. ASHTON: You mean that's -- that's how it'll be positioned?

24 MR. LARSEN: Yeah. That would be the case.⁸¹

25 However, the timing of Utility's corrections belies any claim that the overcharges were not
26 deliberate.

⁷⁷ Tr. at 274:24 – 278:15.

⁷⁸ Tr. at 278:4-13; 283:16-21.

⁷⁹ Ex. SF-38 at 5:25 – 6:4. Emphasis added.

⁸⁰ Ex. SF-25; Tr. at 306:20 – 307:6.

⁸¹ Ex. SF-32 at 55:6-15.

1 First, in July 2007, Utility began charging Swing First the correct rate for CAP water and
2 the San Tan Heights HOA the correct rate for effluent. However, it made no attempt to provide
3 credits to correct for its illegal billing until November 2007, four months later.

4 In the case of the HOA, Utility provided bill credits on November 12, 2007, and January
5 8, 2008. Why did Utility finally provide credits? The short, consistent answer is that Utility got
6 caught.

7 Mr. Ashton testified that the he had several discussions with the San Tan Heights HOA
8 and reviewed their invoices.⁸² His conclusion was that they were being enormously overcharged
9 – six times the lawful rate.⁸³ Utility only provided bill credits after Mr. Ashton reported his
10 conclusion to the HOA.⁸⁴

11 Similarly, Utility has provided Swing First credits in three accounts:⁸⁵

12 **Table 1 – Summary of Utility Refunds**

Date	Account No.	Type of Account	Amount of Credit
September 2007	00119200-01	CAP Water (Old Account)	\$1,260.43
September 2007	0120362-01	Effluent (Old Account)	\$1,938.86
December 2007	0120362-01	Effluent (Old Account)	\$45,892.94
December 2007	00119200-01	CAP Water (Old Account)	\$43,358.92
December 2007	00119200-02	CAP Water (New Account)	\$8,382.34

13 Once again, Utility did not provide Swing First any appreciable credits until it got caught – after
14 Swing First filed its informal complaint with the Commission on November 20, 2007. And, as
15 will be discussed next, Utility has still not provided any material credits to Swing First for its
16 massive over-billing in Account Number 00119200-2, where for six months it charged Swing
17 First \$3.75/1000 gallons for CAP water with a tariff rate of just \$0.827/1000 gallons.

⁸² Ex. SF-38 at 10:9-12; Tr. at 523:24 – 524:5.

⁸³ Tr. at 524:5-9.

⁸⁴ Ex. SF-39 at 4:7-8.

⁸⁵ Ex. A-6 at 11:7-14.

1 **P As a Result of Overcharging Swing First, Utility Created an Enormous Past-**
2 **due Balance for Irrigation Water, which it Used as a Pretext to Shut-off**
3 **Service**

4 As discussed above, from December 2006 through June 2007, Utility charged Swing First
5 \$3.75/1000 gallons for CAP water with a tariff rate of just \$0.827/1000 gallons. This created an
6 enormous phony past-due balance that was carried forward into subsequent months in 2007.⁸⁶
7 By September 30, 2007, the phony past-due balance in Account No. 00119200-2 had grown to
8 \$125,716.⁸⁷

9 Exhibit A-23A was offered by Utility to show the amount that it claimed Swing First was
10 in arrears as of November 6, 2007.⁸⁸ It included three balances: \$45,892.94 in Account No.
11 00120362-01; \$43,353.93 in Account No. 00119200-1, and the \$125,716 in Account No.
12 00119200-2 that was just discussed in the previous paragraph.

13 In Table 1, above, we see that Utility has now admitted that two of the three amounts in
14 Exhibit A-23A were incorrect and has provided appropriate credits. The \$45,892.94 in Account
15 No. 00120362-01 was credited to Swing First in December 2007. Similarly, the \$43,353.93 in
16 Account No. 00119200-1 was also credited to Swing First in December 2007.⁸⁹ However,
17 Utility has not provided any material credit for the largest alleged past-due amount of \$125,716
18 in Account No. 00119200-2. If Utility had timely corrected its billing in Account No. 0019200-
19 2, it would have had no reason to disconnect Swing First on November 6, 2007. In fact, for all of
20 2007, Swing First actually paid Utility far more than it actually owed.

21 **Q Utility Still Owes Swing First over \$80,000 and Refuses to Pay**

22 In the previous section Swing First established that Utility charged it far more than the
23 lawful rate for CAP water for six months. Swing First also established that Utility has never
24 provided any meaningful credits for its massive overbillings. In this section, Swing First will
25 calculate the approximate correct balance for its CAP account.

⁸⁶ Tr. at 283:25 – 285:5.

⁸⁷ Tr. at 284:15-19.

⁸⁸ Tr. at 827:25 -

⁸⁹ Actually \$43,358.92.

1 First, Swing First and Utility agree that Utility has provided appropriate credits for the
2 old effluent and CAP water accounts, and for the current effluent account.⁹⁰ The only account
3 remaining in dispute is the new CAP account, No. 0119200-2.⁹¹

4 Table 2 follows on the next page. It incorporates all consumption and payments from SF-
5 21 for December 2006 through December 2007. Instead of \$3.75/1000 gallons, all consumption
6 is billed at \$0.827/1000 gallons for CAP water. Table 2 takes the most conservative approach in
7 that it ignores that Utility withheld effluent and instead delivered CAP water. The correct bills
8 for the period would have been \$81,246.66 and actual payments totaled \$110,446.97. This
9 means that, even taking the most conservative approach, Swing First overpaid Utility
10 \$29,200.31. Utility has been billing Swing First 1.5% per month in interest on the phony past-
11 due balance. If we apply the same interest rate to the total amount Swing First overpaid for the
12 22 months from December 2007 through October 2009, then the total amount Utility owes
13 Swing First would be \$40,517.29.

⁹⁰Tr. at 1211:11 – 1219:20.

⁹¹Tr. at 1219:14-20.

Table 2									
Sales and Payments from November 2006 (Account Onset) through December 2007									
CAP Meter	Volumetric Charge at CAP Rate (\$0.8278/1000)	Minimum Bill (6-in. meter)	Superfund Assessment	Transaction Privilege Tax	Correct Bills	Payments	CAP Overpayment		
Nov-06	\$ 5,266	\$ 4,359.19	\$ 34.23	\$ 347.11	\$ 5,640.53				
Dec-06	\$ 2,901	\$ 2,401.45	\$ 18.86	\$ 217.90	\$ 3,538.20				
Jan-07	\$ 0,744	\$ 615.88	\$ 4.84	\$ 100.05	\$ 1,620.77	\$ 9,200.00			
Feb-07	\$ 0,000	\$ -	\$ -	\$ 59.40	\$ 959.40	\$ 4,200.00			
Mar-07	\$ 0,000	\$ -	\$ -	\$ 59.40	\$ 959.40	\$ 5,200.00			
Apr-07	\$ 3,374	\$ 2,793.00	\$ 21.93	\$ 243.74	\$ 3,958.67	\$ 8,200.00			
May-07	\$ 9,557	\$ 7,911.28	\$ 62.12	\$ 581.54	\$ 9,454.95	\$ 8,420.97			
Jun-07	\$ 11,516	\$ 9,532.94	\$ 74.85	\$ 688.57	\$ 11,196.37	\$ 5,250.00			
Jul-07	\$ 13,521	\$ 11,192.68	\$ 87.89	\$ 798.12	\$ 12,978.69	\$ -			
Aug-07	\$ 8,794	\$ 7,279.67	\$ 57.16	\$ 539.86	\$ 8,776.69	\$ -			
Sep-07	\$ 11,043	\$ 9,141.40	\$ 71.78	\$ 662.73	\$ 10,775.91	\$ 4,501.00			
Oct-07	\$ 3,007	\$ 2,489.19	\$ 19.55	\$ 223.69	\$ 3,632.43	\$ -			
Nov-07	\$ 6,565	\$ 5,434.51	\$ 42.67	\$ 418.08	\$ 6,795.26	\$ 52,850.00			
Dec-07	\$ 0,000	\$ -	\$ -	\$ 59.40	\$ 959.40	\$ 12,625.00			
2006-07 Total					\$ 81,246.66	\$ 110,446.97	\$ 29,200.31		
Interest at 1.5%/month from January 2008 through October 2009 (22 months)									
Total Due Swing First									
							\$ 11,316.98		
							\$ 40,517.29		

1 Table 3 follows on the next page. Again, it incorporates all consumption and payments
2 from SF-21 for December 2006 through December 2007. Instead of \$3.75/1000 gallons, all
3 consumption is billed at \$0.62/1000 gallon, which is the rate for the effluent that utility should
4 have delivered. The correct bills for the period would have been \$50,916.14 and actual
5 payments again totaled \$110,446.97. This means that because Utility illegally withheld effluent,
6 Swing First overpaid Utility \$59,530.83. Utility has been billing Swing First 1.5% per month in
7 interest on the phony past-due balance. If we apply the same interest rate to the total amount
8 Swing First overpaid for the 22 months from December 2007 through October 2009, then the
9 total amount Utility owes Swing First is \$82,602.82.

Table 3										
Correct Bills at Effluent Rate										
	CAP	Volumetric Charge	Minimum Bill	Superfund	Transaction	Correct	Payments	CAP		
	Meter at Effluent Rate (\$0.62/1000)		(Already paid)	Assessment	Privilege Tax	Bills		Overpayment		
Nov-06	5.266 \$	3,264.92		\$ 34.23	\$ 215.48	\$ 3,514.63				
Dec-06	2.901 \$	1,798.62		\$ 18.86	\$ 118.71	\$ 1,936.19				
Jan-07	0.744 \$	461.28		\$ 4.84	\$ 30.44	\$ 496.56	\$ 9,200.00			
Feb-07	0.000 \$	-		\$ -	\$ -	\$ -	\$ 4,200.00			
Mar-07	0.000 \$	-		\$ -	\$ -	\$ -	\$ 5,200.00			
Apr-07	3.374 \$	2,091.88		\$ 21.93	\$ 138.06	\$ 2,251.88	\$ 8,200.00			
May-07	9.557 \$	5,925.34		\$ 62.12	\$ 391.07	\$ 6,378.53	\$ 8,420.97			
Jun-07	11.516 \$	7,139.92		\$ 74.85	\$ 471.23	\$ 7,686.01	\$ 5,250.00			
Jul-07	13.521 \$	8,383.02		\$ 87.89	\$ 553.28	\$ 9,024.19	\$ -			
Aug-07	8.794 \$	5,452.28		\$ 57.16	\$ 359.85	\$ 5,869.29	\$ -			
Sep-07	11.043 \$	6,846.66		\$ 71.78	\$ 451.88	\$ 7,370.32	\$ 4,501.00			
Oct-07	3.007 \$	1,864.34		\$ 19.55	\$ 123.05	\$ 2,006.93	\$ -			
Nov-07	6.565 \$	4,070.30		\$ 42.67	\$ 268.64	\$ 4,381.61	\$ 52,850.00			
Dec-07	0.000 \$	-		\$ -	\$ -	\$ -	\$ 12,625.00			
2006-07 Total						\$50,916.14	\$ 110,446.97	\$ 59,530.83		
Interest at 1.5%/month from January 2008 through October 2009 (22 months)										
Total Due Swing First										
\$82,602.82										
(No minimum bill is included because Swing First was already being charged the Effluent Minimum Bill.)										

1 Swing First is not asking the Commission to order Utility to refund the \$82,602.82
2 calculated on Table 3. The actual amount will be determined, along with other amounts, in
3 Swing First's complaint case. The main purpose of calculating the amount that Utility owes
4 Swing First is to show the Commission how Utility used a phony past-due balance as a pretext to
5 illegally shut-off Swing First's service. The secondary purpose is to again show the Commission
6 that Utility will only come clean if it is caught. For that reason, the Commission needs to at a
7 minimum keep its eye on Utility and really needs to take more drastic actions.

8 MR. ASHTON: Is he going to tell you to change my rates again?

9 MR. LARSEN: No. He can't.

10 MR. ASHTON: So you don't think there's any more shenanigans that are
11 going to go on?

12 MR. LARSEN: He can't. Not when we're under the eye of the Corporation
13 Commission. He cannot.⁹²

14 **R Utility Created Other Phony Effluent Bills**

15 In the previous sections, Swing First has demonstrated how Utility created phony bills to
16 try to drive Swing First out of business and to victimize the San Tan Heights HOA. These
17 victims were not alone. Utility also victimized its own employee with a phony bill.

18 The last page of Exhibit SF-30 is an invoice that either George Johnson or Brian
19 Tompsett caused to be sent to Utility employee, Gary Larsen, for water that was actually
20 delivered to Swing First.⁹³ The total bill was \$915.12.⁹⁴ The bill was for effluent delivered to
21 Swing First after Utility first shut off service on November 6, 2007, until it again shut off service
22 on November 20, 2007.⁹⁵ Utility singled-out Mr. Larsen as the fall guy for Swing First's water
23 being turned back on, and Utility wanted him to pay the price.

24 Q. (Mr. Marks) ... So your view was Mr. Larsen, somehow or another that
25 water got turned on again, and because that's in your area of responsibility,
26 we're going to make you responsible for that water that was sent; is that
27 your testimony?

⁹² Ex. SF-32 at 40:2-8.

⁹³ See generally Tr. at 434:1 - 453:6

⁹⁴ Tr. at 439:25 - 440:2.

⁹⁵ Tr. at 448:24 - 449:11

1 A. (Mr. Tompsett) Yes.⁹⁶

2 There is really nothing much to add to this. Utility's conduct was clearly despicable.
3 No employee should be treated this way. More generally, Utility's liberal use of phony bills
4 calls into question all its billing practices. The Commission needs to closely examine Utility's
5 billing practices. If Swing First has been able to discover three victims with its limited
6 resources, there have likely been many other victims of Utility's intentional or negligent billing
7 errors.

8 **S Utility Shut-Off of Swing-First's Irrigation Service Flouted the Commission's**
9 **Rules**

10 Utility twice attempted to shut-off Swing First's Irrigation Service. To shut off
11 wastewater service, Utility was required to follow Commission Rule 14-2-509(D - E). Utility
12 simply ignored the Commission's rules.

13 Utility's only notice that it intended to shut off Swing First's irrigation service came in a
14 November 6, 2007, e-mail from Mr. Tompsett to Mr. Ashton.⁹⁷ Utility does not dispute that it
15 did not comply with the Commission's rules

16 Q. (Ms. Mitchell) Prior to this series of e-mails, had a notice that complied
17 with the notice requirements by the Commission rule have been sent to
18 Swing First?

19 A. (Mr. Tompsett) I don't recall. I don't know.

20 Q. That's all for this particular document. Well, let me ask a follow-up
21 question. But you are familiar with what is required by Commission rule
22 for termination notice to a customer?

23 A. Yes.

24 Q. And you know that it is supposed to include the reason for the
25 termination, the alleged violation, you know, a contact name and address,
26 you do realize it is supposed to contain all of that type of information?

27 A. Yes. The statute we looked at had a number of items that should be
28 on there, on the shut-off notice, that were not in the e-mail.

29 Q. And you would agree with me that this series of exchanges really
30 doesn't comply with what is required for termination notices by
31 Commission rule?

⁹⁶ Tr. at 453:1-6.

⁹⁷ Exhibit SF-23.

1 A. Per the Commission statute we looked at, no.

2 Again, Utility does not believe that it needs to follow Commission rules. The
3 Commission should take steps to insure that Utility is familiar with the Commission's rules and
4 is willing to follow them.

5 **T Utility Failed to Read Swing-First Meters**

6 Utility often fails to read Swing First's meters.⁹⁸ During one six-month stretch in 2007,
7 Utility did not read Swing First's effluent meter even once.⁹⁹

8 **U Utility Charged Swing First a Demand Charge For CAP Water Even Though**
9 **It Could Not Deliver CAP Water**

10 In the summer of 2009, Utility's CAP line to Swing First was cut by an adjacent
11 landowner and is currently not operational.¹⁰⁰ Despite no consumption by Swing First, and
12 Utility's inability to even deliver CAP water, Utility continued to bill a monthly demand charge
13 (minimum bill) to Swing First.¹⁰¹

14 **V Utility Illegally Charges Swing First for Minimum Bills**

15 Utility's wastewater tariffs do not really authorize a minimum bill for effluent service.
16 Nonetheless, Utility has been charging a \$900/month minimum bill to Swing First for effluent
17 service, apparently based on its water minimum bill for a six-inch meter.¹⁰² However, Swing
18 First was served with a three-inch meter until 2008. The minimum bill for this sized meter is
19 only \$270.

20 In January 2008, Utility changed Swing First's effluent meter from a three-inch meter to
21 a six-inch meter.¹⁰³ However, this was done for Utility's benefit, not at Swing First's request. It
22 did not otherwise affect the effluent system investment dedicated to serve Swing First.
23 Therefore, it is inappropriate for Utility to charge more than \$270 per month for its monthly
24 effluent minimum bill, even after January 2008.

⁹⁸ Ex. SF-38 at 5:13-14.

⁹⁹ Ex. SF-36.

¹⁰⁰ Tr. at 802:11-17; 1231:6-19.

¹⁰¹ Ex. A-32.

¹⁰² Water tariff, sheet 2; Exhibit SF-21 at Bates SF000009.

¹⁰³ Tr. at 992:4 – 996:15.

1 Further, from the time that Utility's San Tan Plant began producing effluent, Swing First
2 has had no need for CAP water. Utility should be charging Swing First for only one minimum
3 bill, \$270 per month for effluent service.

4 **W Utility Deliberately Flooded Swing First's Golf Course**

5 On Friday, January 25, 2008, Swing First filed a formal complaint with the Commission
6 (Docket No. WS-02987A-08-0049) concerning Utility's service and billing issues.¹⁰⁴ Utility
7 received a copy of the Complaint on Friday, February 1.¹⁰⁵

8 The week beginning on Sunday January 27 had been extremely rainy.¹⁰⁶ As a result,
9 Swing First needed no irrigation water for its golf course.¹⁰⁷

10 On the same day it received the Complaint, Utility retaliated against Swing First by
11 delivering significant amounts of effluent to Swing First, despite requests that they not do so.¹⁰⁸
12 This caused the lake bordering the 18th hole to overflow, which damaged the golf course.¹⁰⁹
13 Swing First employees asked the Utility several times to stop delivery, but they ignored the
14 requests.¹¹⁰ The employees then escalated the issue to Mr. Ashton, who then asked Utility
15 several times in writing to stop the deliveries.¹¹¹

16 Utility's response was simply outrageous. Mr. Tompsett sent an e-mail to Mr. Ashton
17 that clearly showed that Utility was retaliating against Swing First's complaint by flooding the
18 golf course:

19 You have now filed a formal complaint with the Arizona Corporation
20 Commission alleging, among other things, service interruptions. You even
21 requested relief asking that "The Commission to order Utility to continue
22 providing service during the pendency of this matter". We were served
23 with that complaint on Friday February 1, 2008. Now a mere 3 days later

¹⁰⁴ Ex. SF-38 at 11:2.

¹⁰⁵ Tr. at 404:25 – 405:2.

¹⁰⁶ Ex. SF-38 at 11:5.

¹⁰⁷ *Id.* at 11:5-6.

¹⁰⁸ *Id.* at 11:6-8.

¹⁰⁹ *Id.* at 11:8-9.

¹¹⁰ *Id.* at 11:9-10.

¹¹¹ *Id.* at 11:10-11.

1 you now demand that "WE STOP THE DELIVERY OF WATER". **Which**
2 **way do you want it?**¹¹²

3 Mr. Tompsett also blamed the flooding on the recent rains, but still went on to argue that Utility
4 had the right to flood the golf course.¹¹³

5 Mr. Ashton e-mailed photographs to Mr. Tompsett that showed the extent of the
6 flooding.¹¹⁴ The photographs were taken on Saturday, February 2, after the Utility over-
7 deliveries and before additional rain on Sunday February 3.¹¹⁵ As Mr. Ashton stated in his e-
8 mail, the over-deliveries created a hazard to public health and safety.¹¹⁶

9 Mr. Ashton testified further about the threat to public health and safety and the damage to
10 the golf course caused by Utility's flooding:

11 Unfortunately, golfers drove golf carts and walked through the effluent,
12 and this caused significant damage to the golf course. My employees also
13 came in contact with the effluent as part of their efforts to repair and clean
14 up the course.¹¹⁷

15 Finally, Utility actually billed Swing First for all effluent delivered in February 2008,
16 including the deliveries responsible for the golf-course flooding.¹¹⁸

17 Utility's deliberately flooded Swing First's golf course in clear retaliation for Swing First
18 exercising its legal right to file a complaint with the Commission. Utility obviously believes that
19 it is above the law. The Commission needs to hold Utility accountable.

20 **X Utility Tried to Intimidate Swing First from Participating in this Case**

21 On June 11, 2008, Swing First filed a motion to intervene in this docket, which was
22 granted by a procedural order dated June 23, 2008. On February 3, 2009, Swing First filed
23 testimony in Utility's rate case docket. The Swing First testimony generally opposed the
24 requested rate increase and sought to bring many of Utility's outrageous activities to the attention
25 of the Commission.

¹¹² Ex. SF-28. Emphasis in original.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Tr. at 531:12-16.

¹¹⁸ Ex. SF-38 at 11:12-13.

1 In clear retaliation, just six days later (February 9, 2009) George Johnson and Utility sent
2 an outrageous letter to Swing First's members ("Utility Letter").¹¹⁹ In the second paragraph of
3 the Utility Letter, Mr. Johnson and Utility threatened to sue the Swing First members if Mr.
4 Ashton did not stop participating in Utility's rate case docket:

5 I am writing to you now for two reasons. First, Mr. Ashton, purportedly
6 acting on behalf of SFG, continues to make libelous remarks and
7 unsubstantiated filings with the ACC in effort to slander me personally
8 and damage Johnson Utilities. I do not know whether you are aware of
9 Mr. Ashton's actions on your behalf or whether you support those actions.
10 However, because Mr. Ashton claims to be acting for SFG, and therefore
11 on your behalf, we are considering adding all members of SFG personally
12 as defendants in the pending Superior Court case. If you do not support
13 Mr. Ashton's actions. please let me know as soon as possible. If I do not
14 hear from you, we will assume that you support Mr. Ashton's actions, and
15 will proceed accordingly. (Emphasis added.)

16 The Commission should sanction Utility for threatening parties and witnesses in a rate
17 case. The penalty should be harsh enough to send an appropriate message that the Commission
18 will not tolerate this kind of brazen interference by a regulated utility with the rate-case process.

19 **Y Utility Disparaged Mr. Ashton's Character**

20 In the third paragraph of the Utility Letter, Johnson and Utility disparaged Mr. Ashton's
21 character:

22 The second reason for this letter is to make you aware of the nature of the
23 character of Mr. Ashton who is your appointed representative of SFG.
24 Attached you will find copies of complaints filed against Mr. Ashton in
25 the Superior Court of Arizona. These complaints are unrelated to Johnson
26 Utilities but, in my humble opinion, show "the nature of the beast" we are
27 all dealing with in Mr. Ashton.

28 The Commission should sanction Utility for disparaging the character of a witness in a
29 rate case. The penalty should be harsh enough to send an appropriate message that the
30 Commission will not tolerate this kind of brazen interference by a regulated utility with the rate-
31 case process.

¹¹⁹ Ex. SF-29.

1 **Z Utility Defamed Mr. Ashton by Alleging Financial Impropriety**

2 In the fourth paragraph of the Utility Letter, Johnson and Utility impugned the financial
3 integrity of Mr. Ashton, both as the managing member of Swing First and as an individual:

4 A cursory review of the financials that we understand have been provided
5 to you would strongly suggest that an outside independent management
6 and financial audit be performed on SFG since Mr. Ashton has been
7 managing member. We would also suggest the independent financial audit
8 should not be limited to SFG, but in light of the other superior court
9 complaints, be extended to Mr. Ashton's personal tax returns.

10 The Commission should sanction Utility for defaming the character of a witness in a rate
11 case. The penalty should be harsh enough to send an appropriate message that the Commission
12 will not tolerate this kind of brazen interference by a regulated utility with the rate-case process.

13 **AA Utility Used Undocumented Line Breaks as Pretexts to Withhold Deliveries**
14 **during Periods of Critical Irrigation Needs**

15 In 2008, Utility claimed twice that line breaks prevented it from delivering effluent to
16 Swing First during times of high irrigation demands.¹²⁰ The timing was clearly suspicious and
17 Utility has never disclosed the cause or extent of the “line breaks.” Given Utility’s history of
18 retaliatory behavior, the “line-breaks” certainly appear to have been additional Utility
19 harassment.

20 Mr. Tompsett’s redirect testimony made it seem even more likely that the “line breaks”
21 were as phony as Utility’s bills. Mr. Tompsett testified that in January 2008, Utility removed a
22 flow restrictor on the effluent line and replaced the three-inch meter with a six-inch meter.¹²¹
23 The purpose of the service was to reduce back pressure on the line and to reduce line breaks.¹²²
24 However, on re-cross examination, Mr. Tompsett could not recall if there had actually been any
25 line breaks on the effluent line in either 2006 or 2007.¹²³ Yet, he did acknowledge that there
26 were two line breaks in 2008, just after the maintenance designed to prevent line breaks.¹²⁴

¹²⁰ Ex. SF-38 at 12:6-10.

¹²¹ Tr. at 992:4 – 995:15.

¹²² Ex. A-33.

¹²³ Tr. at 1298:3-10.

¹²⁴ Tr. at 1298:11 – 1300:7.

1 **III THE COMMISSION SHOULD SEND A STRONG MESSAGE TO UTILITY**

2 **A The Commission Needs to Deal Harshly with Utility's Blatant Disregard for**
3 **its Customers, Public Safety, the Environment, and Its Public Service**
4 **Obligations**

5 Utility's behavior is simply unprecedented in Arizona. To demonstrate just how far
6 outside the pale Utility's conduct has been, it is worthwhile to compare Utility's conduct to what
7 is expected from a utility regulated by the Commission, for example Arizona Public Service
8 Company ("APS").

- 9
- 10 • APS would never provide free electricity to an affiliate. Utility has admitted to
11 providing free water to an affiliate.
 - 12 • APS CEO Don Brandt would never direct that an APS billing rate be illegally
13 increased. Mr. Ashton testifies that Mr. Johnson directed an employee to raise Swing
14 First's CAP water rate from the lawful \$0.827/1000 gallons to \$3.75/1000 gallons.
 - 15 • When it learned that it had overbilled one or more customers, APS would provide the
16 appropriate credits. Utility only provides credits for overbillings when it gets caught.
 - 17 • APS would never withhold available low-cost, environmentally-friendly electricity
18 from a customer. Utility deliberately withheld treated effluent from Swing First in
19 favor of high-priced water better suited for its potable water customers.
 - 20 • APS would never sue a protestor for defamation to silence the protestor and
21 intimidate future protest. Utility has done just this.
 - 22 • APS would never create a phony invoice and bill an employee for consumption by a
23 customer. Utility believes that it is absolutely appropriate to single-out an employee
24 for an alleged mistake, create a phony invoice, and then bill him for consumption by a
25 customer.
 - 26 • APS would never deliberately damage a customer's property, even after being asked
27 to stop. Utility deliberately flooded Swing First's golf course and refused to stop
when asked.

- 1 • Don Brandt would never send an intimidating letter to a party's shareholders or
2 members, threatening to sue them for defamation if they did not proactively oppose
3 the party's participation in a rate case. George Johnson sent just such a letter to
4 Swing First's members.
- 5 • Don Brandt would never deliberately expose an irrelevant embarrassing incident from
6 a witness' past. George Johnson sent copies of embarrassing, irrelevant court
7 pleadings to Swing First's members.
- 8 • Don Brandt would never harass a witness by falsely alleging financial impropriety by
9 that witness. George Johnson falsely alleged financial impropriety by Mr. Ashton in
10 his letter to the Swing First members.
- 11 • APS is a much larger company than is Utility, but on a per-capita basis (and maybe
12 even on an absolute basis) APS has far fewer environmental issues than does Utility.

13 Swing First witness Sonn Rowell made nine recommendations to deal with Utility's
14 blatant disregard for its customers, public safety, the environment, and its public service
15 obligations:¹²⁵

- 16 1. Utility should not be allowed to increase its rates until its management and financial
17 practices are investigated.
- 18 2. Utility should be required to immediately reduce its water rates and make refunds.
- 19 3. Utility should be required to refund – in cash, not credits – its illegal superfund tax
20 collections.
- 21 4. Utility's Pecan Wastewater Treatment Plant should not be included in rate base.
- 22 5. Utility should be required to dismiss all pending defamation lawsuits against its
23 customers, and pay all of their court costs and legal fees.
- 24 6. Utility should be fined for its blatant disregard of its public service obligations,
25 environmental laws, and explicit commission orders.
- 26 7. Utility should be penalized with a reduced rate of return on equity.

¹²⁵ Ex. SF-40.

1 8. Following the completion of the independent management and financial audits, the
2 Commission should require Utility to demonstrate why it should not surrender its
3 certificate of convenience and necessity.

4 9. The Commission should bifurcate this case into two phases.

5 Swing First will next discuss each of these recommendations.

6 **Utility Should Not Be Allowed to Increase Its Rates until Its Books and**
7 **Management Practices Have Been Thoroughly Investigated**

8 Swing First is only one of Utility's many customers, and is also only one of hundreds or
9 thousands of companies that has dealt with Utility. It is possible that Swing First is not the only
10 entity that has been treated unfairly by Utility.

11 If Mr. Ashton is personally aware of illegal affiliate transactions, there potentially could
12 be many more.

13 George Johnson has tried to intimidate Swing First and other customers through
14 defamation lawsuits. How many other similar actions has George Johnson taken to intimidate
15 and silence customers?

16 If ADEQ has uncovered issued six serious unreported NOVs in just the last year, how
17 many more threats to public health and safety have gone undiscovered?

18 Based on Mr. Johnson's possible use of Utility to fund non-regulated activities, and
19 Utility's intentional delay in filing its rate case, it is evident the Utility's financial records warrant
20 further scrutiny.

21 Swing First understands that the Commission's resources are strained, especially given
22 the State's current budget crisis. Therefore, Swing First suggests that that the Commission order
23 Staff to select a firm or firms to perform independent management and financial audits on
24 Utility. These audits should be funded by Utility.

1 Utility transacts extensively with affiliates and companies controlled by other family
2 members.¹²⁶ The financial audit should not be limited to Utility, but should also investigate all
3 transactions the affiliated and family-owned companies have had with Utility.

4 The management audit should also be conducted at Utility's expense to help the
5 Commission to determine whether Utility is a fit and proper entity to continue to hold its CC&N.

6 As part of the audit process, the management auditors should hold a series of well
7 publicized customer open houses, where customers can discuss their customer-service
8 experiences. Utility would not be allowed to attend these meetings to ensure that customers are
9 not intimidated. Utility should also be required to provide notice of these open houses by direct
10 mail or bill insert. The notice should include a phone number, address, and e-mail address where
11 customers could directly contact the auditors. Swing First also recommends that the auditors
12 interview present and former utility employees, as well as Arizona environmental regulators.

13 The management auditors should at least investigate the following incidents:

- 14 • Prior activities and fines related to George Johnson and his companies;
- 15 • Utility's discharges of raw sewage into the Queen Creek Wash;
- 16 • Utility's illegal storage of sewage sludge on site;
- 17 • Utility's harassment of customers through defamation lawsuits;
- 18 • Utility's billing and meter-reading practices;
- 19 • Other customer service issues;
- 20 • Utility's disregard of Commission Orders;
- 21 • Utility's provision of free water to its affiliates; and
- 22 • Other illegal transactions, if any, between Utility and its affiliates.

23 The Commission should not allow any rate increase for Utility until it has had the
24 opportunity to evaluate the results of the financial and management audits.

¹²⁶ Tr. at 845:18 – 870:12; 890:13 – 907:11

1 **C Utility Should Be Required to Immediately Reduce Its Water Rates and**
2 **Make Refunds**

3 Utility disregarded a Commission Order to file a rate case by May 1, 2007, using a 2006
4 test-year. When Utility finally filed this rate case with a 2007 test year, the reason became
5 apparent. Utility was substantially over-earning from its water customers during the 2007 test
6 year, even based on Utility's own calculations. This would have been discovered much earlier, if
7 Utility had filed its rate case when ordered to. Utility almost certainly benefited from this
8 unauthorized delay to the detriment of its customers.

9 To remedy this, the Commission should order that any rate decrease found in this case be
10 given retroactive effect to December 31, 2008. If Utility had timely filed its rate case by May 1,
11 2007, the Commission would have likely issued its rate order by that date.

12 Swing First understands that the Commission is not ordinarily allowed to retroactively
13 reduce rates. However, because Utility violated a clear Commission order by delaying its rate
14 filing for one year, the ban on retroactive rate-making should not bar the Commission's activity.

15 **D Utility Should Be Required to Refund Its Illegal Superfund Tax Collections**

16 As of March 4, 2002, Utility knew that it could not lawfully charge its customers a tax
17 based on usage. Yet, it apparently disregarded this Commission Order. Utility should be
18 ordered to calculate the amounts collected since March 4, 2002, and make refunds to its
19 customers.

20 **E Utility's Pecan Wastewater Treatment Plant Should Not Be Included in Rate**
21 **Base**

22 The NOV's have still not been resolved for this plant, even two years after the test year. It
23 should be disallowed until Utility's next rate case, where Utility would have the opportunity to
24 demonstrate that the plant is no longer a threat to public safety.

25 First, we know that the plant (or at least its pumps) was not built to design specifications.
26 This likely contributed to the Pecan Wastewater Treatment Plant's performance issues.

27 In Docket No. WS-02987A-07-0487, Utility applied to extend its sewer CC&N. The
28 Pecan Wastewater Treatment Plant's performance issues were closely considered in that case. ,

1 on March 17, 2009, the Commission issued Decision No. 70849. In the Decision the
2 Commission expressed specific concern about Utility's continuing sewer spills:

3 However, Johnson's two recent SSOs raise serious concerns regarding
4 public safety. The Company experienced two SSOs in the same location
5 within a short time span. The homeowners in the Pecan Creek North
6 subdivision, living adjacent to the concrete channel where the sewage
7 from the SSOs was contained, were subjected to viewing sewage from
8 their homes and test results of the storm water in the Queen Creek wash
9 adjacent to where the SSOs occurred continue to test positive for the
10 presence of E. coli and coliform.¹²⁷

11 The Commission did not believe that Utility had fully dealt with all the Pecan Plant
12 issues, so the Decision contains three additional ordering paragraphs.

13 IT IS FURTHER ORDERED that Johnson Utility L.L.C., shall file by
14 December 31, 2009, with Docket Control, as a compliance item in this
15 docket, documentation from the Arizona Department of Environmental
16 Quality demonstrating that Johnson Utility L.L.C.'s Pecan Water
17 Reclamation Plant (ADEQ Inventory #105324) is in full compliance and
18 that the Notice of Violation issued on March 4, 2008, and June 5, 2008,
19 have been closed.

20 IT IS FURTHER ORDERED that if Johnson Utility L.L.C. fails to meet
21 the above timeframe, the Utilities Division Staff shall file a pleading
22 requesting the Commission to order Johnson Utility L.L.C. to appear and
23 show cause why the conditional extension of its wastewater Certificate of
24 Convenience and Necessity granted herein, should not be considered null
25 and void.

26 IT IS FURTHER ORDERED that if Johnson Utility L.L.C. achieves full
27 compliance with the Arizona Department of Environmental Quality for its
28 Pecan Water Reclamation Plant (ADEQ Inventory #105324) on or before
29 December 31, 2009, the extension of Johnson Utility L.L.C.'s Wastewater
30 Certificate of Convenience and Necessity shall become effective on the
31 first day of the month following Johnson Utility L.L.C.'s filing with
32 Docket Control proof of its compliance and the Utilities Division Staff's
33 confirmation of such compliance with Docket Control.¹²⁸

34 The Commission showed that it was still seriously concerned in 2009 with the Pecan
35 Plant's health and safety issues. This case involves a 2007 test year. It would be premature to
36 determine that the Pecan Plant was used and useful in 2007, when it was still having issues well

¹²⁷ Decision No. 70849 at 11:11-16.

¹²⁸ Id. at 13:25 - 14:11.

1 after the test year and the plant's pumps were undersized and had to be replaced after the test
2 year. Excluding the plant from rate base is appropriate under the circumstances.

3 **F Utility Should Be Required to Dismiss All Pending Defamation Lawsuits**
4 **against Its Customers, and Pay All of Their Court Costs and Legal Fees**

5 Utility is using the courts to intimidate its customers. Swing First is not aware of any
6 other Arizona utility that has ever filed a defamation lawsuit against a customer. Yet Mr.
7 Johnson has sued at least three customers for defamation, and even filed a defamation lawsuit
8 against the Arizona Attorney General.

9 It is a huge expense, both in time and money, to defend against a lawsuit, even one that is
10 frivolous. The Commission needs to stop any practice designed to intimidate customers from
11 speaking out against their monopoly utility provider. The Commission needs to hear from any of
12 Utility's customers who feel they have been wronged, and needs to order Utility to dismiss all
13 pending defamation lawsuits against its customers, and pay all of their court costs and legal fees.

14 **G Utility Should Be Fined for Its Blatant Disregard of Its Public Service**
15 **Obligations, Environmental Laws, and Explicit Commission Orders**

16 Fines are clearly warranted for Utility. The Commission needs to send a clear message to
17 Utility that it cannot continue to incorrectly charge customers, disregard Commission Orders,
18 and endanger the public health and safety. However, the Commission should consider that
19 neither Mr. Johnson nor the Utility's behavior appear to be impacted by normal fines. Therefore,
20 the fines should be large enough to get Utility's attention. Certainly, fines may set an example
21 for other utilities, but if the goal is to change Mr. Johnson's behavior, and ultimately protect the
22 public interest, the action most likely to make a difference is to revoke or suspend his CC&N.

23 Appropriate fines could be determined in a second phase of this case, as outlined below.

24 **H Utility Should Be Penalized with a Reduced Rate of Return on Equity**

25 In addition to imposing fines, the Commission should penalize Utility by reducing the
26 allowed rate of return on equity when new rates are set. This may be a rare penalty, but the
27 Utility's behavior is unprecedented.

1 Utility believes that the Commission cannot penalize a utility with a reduced return on
2 equity. Utility is wrong.

3 The Commission has Constitutional jurisdiction over rate-making. Reducing an allowed
4 return on equity is certainly allowed, as long as the result is "fair." In any rate case, there will be
5 testimony from many sources that will allow the Commission to determine a large zone of "fair"
6 returns on equity. As long as the Commission's final allowed return is within the zone of
7 fairness, the result will satisfy the Constitution

8 For example, the evidence in a case may establish a zone of fair rates of return on equity
9 from 8.0 to 12.0%. Ordinarily, the Commission might set the allowed return somewhere in the
10 middle of the zone, perhaps at 10%. However, for a Utility with significant public-service
11 issues, the Commission could set the allowed return at the lowest "fair" return, or 8.0%.

12 In other states, utility commissions — with much more prescribed jurisdiction than this
13 Commission's broad jurisdiction — have in fact reduced returns on equity to address utility
14 misfeasance. Here are three citations:

- 15 • In re Citizens Utilities Co., 171 Vt. 447, 769 A.2d 19 (Vt., 2000); ROE reduced by
16 525 basis points;
- 17 • Gulf Power Co. v. Wilson, 597 So.2d 270 (Fla., 1992); ROE reduced from 12.5% to
18 12.05%; and
- 19 • Mountain Fuel Supply Co. v. Public Service Com'n of Utah, 861 P.2d 414 (Utah,
20 1993); ROE reduced from 12.2 to 12.1%.

21 The Commission should impose the ROE penalty in this phase of the case.

22 **I Following Completion of the Independent Management and Financial**
23 **Audits, the Commission Should Require Utility to Demonstrate Why It**
24 **Should Not Surrender Its Certificate of Convenience and Necessity**

25 There seems to be substantial evidence that Utility's management should not be allowed
26 to continue running the Utility as they have in the recent past. However, before making this
27 determination, the Commission should be able to consider the findings of the financial and

1 management audits and Utility's responses. This could be done as a "show cause" portion of the
2 second phase for this case.

3 **J The Commission Should Bifurcate this Case into Two Phases**

4 Because of the apparent over-earning, Utility would clearly benefit from, and customers
5 would be harmed by, any delays in the case needed to allow the financial and management audits
6 to proceed. On the other hand, the Commission and Utility's customers will just as clearly
7 benefit if the auditors are provided as much time as necessary to complete their tasks. To protect
8 customers, Swing First recommends a two-phase procedure for the balance of this case.

9 In Phase I, the Commission would set water and wastewater rates and determine the
10 amount of refunds due customers for Utility's overcharges, including the illegal Superfund
11 charges. Rates would reflect an appropriate reduction to Utility's ROE. Any rate reductions
12 would be effective as of December 31, 2008. The Commission would also order the financial
13 and management audits. The Commission would also order that the record in this case be held
14 open for the purpose of receiving further evidence in Phase II of the case. Finally, the
15 Commission would order Utility to dismiss all pending defamation lawsuits against its customers
16 and pay all of their court costs and legal fees.

17 In Phase II, the Commission would:

- 18 • Evaluate the results of the financial and management audits;
- 19 • Determine the amount of any fines to be paid by Utility;
- 20 • Determine whether to further reduce Utility's allowed rate of return on equity;
- 21 • Set new rates if the ROE is further reduced; and
- 22 • Require Utility to show cause that it is a fit and proper entity to continue holding
23 its CC&N.

24 **IV CONCLUSION**

25 In return for being allowed to operate legally as a monopoly, a utility takes on certain
26 important obligations when it is awarded a CC&N. Among other things, the utility subjects itself
27 to rate regulation by the Commission, and takes on the mantle of a "public service

1 corporation.”¹²⁹ As the record shows, Utility has pushed its monopoly status to and beyond the
2 legal limit, but has disregarded its requirement to charge lawful rates and flouted its public-
3 service obligations. Utility has gone rogue.

4 The Commission needs to deal harshly with Utility’s blatant disregard for its regulators,
5 its customers, the public safety, the environment, and its public-service obligations. A rogue
6 utility must face the consequences.

7 RESPECTFULLY SUBMITTED on November 20, 2009.

8
9 

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¹²⁹ Const. Art 15, §2.