

ORIGINAL
OPEN MEETING AGENDA ITEM



BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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AZ CORP COMMISSION
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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

**SWING FIRST GOLF LLC
RESPONSE TO PETITION TO AMEND DECISION**

Swing First Golf LLC ("Swing First") hereby responds to the "Petition to Amend Decision Pursuant to A.R.S. §40-252" filed on February 28, 2011, by Johnson Utilities, LLC ("Utility"). Utility raises issues that could be appropriate for reconsideration if they had been brought by a different company. However, Utility has done nothing to correct or even show remorse for its horrible customer service, abominable environmental record, contempt for Commission Orders, and egregious billing errors. Until such time that Utility has demonstrated that it can act as a responsible corporate citizen, the Commission should stand by its existing order and deny rehearing.

If the Commission does determine that it should at least grant rehearing to consider Utility's petition, then due process requires that Utility provide its customers notice that the rates previously approved by the Commission could be significantly increased. The Commission should also rehear whether the Pecan Wastewater Treatment Plant should be included in rate base, whether the Commission should order a penalty return on equity, whether Utility should pay fines, and whether the Commission should open a new docket where the Utility should show cause why an independent manager should not be appointed.

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I REHEARING IS NOT APPROPRIATE UNTIL UTILITY DEMONSTRATES A CHANGED ATTITUDE TOWARD THE ENVIRONMENT, THE COMMISSION, AND ITS CUSTOMERS

A George Johnson Consistently Puts His Interests Ahead of the Environment

1 George H. Johnson is Utility's majority owner and is Utility's ultimate decision maker.¹
2 George Johnson also controls several other companies that have been in the headlines in recent
3 years, including Johnson International, Inc. ("Johnson International"); and General Hunt
4 Properties, Inc. ("General Hunt").²

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

- 11 • Bulldozing and clearing nearly 270 acres of State Trust Lands located in and near the
12 Ironwood National Monument and the Los Robles Archeological District;
- 13 • Bulldozing and clearing an estimated 2,000 acres of private lands in the Santa Cruz
14 River Valley without obtaining permits required by state law;
- 15 • Destroying portions of seven major Hohokam archeological sites, circa A.D. 750-
16 1250;
- 17 • Destroying more than 40,000 protected native plants on State Trust Lands, including
18 Saguaro, Ironwood, Mesquite, Palo Verde and other protected species;
- 19 • Violating the state's clean water laws by failing to secure required permits and
20 discharging pollutants into the Little Colorado River, the South Fork of the Little
21 Colorado River and tributaries of the Santa Cruz River; and

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.

- 1 • Negligently causing a disease epidemic that resulted in the death of at least 21 rare
2 Arizona desert bighorn sheep and serious injury to numerous others.

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

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

11 The same George H. Johnson that has been subject to some of Arizona’s largest
12 environmental fines is also Utility’s majority owner and Utility’s ultimate decision maker.⁶ As
13 might be expected, George Johnson’s Utility has also consistently disregarded its environmental
14 responsibilities.

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

17 ADEQ’s issues with Utility also go back to at least 2003. In that year, ADEQ fined
18 Utility \$80,000 for building and operating a water system without obtaining the necessary
19 permits.⁸ This followed a \$6,000 fine in 2001 for modifying a water treatment plant without
20 obtaining construction approvals.⁹

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.

⁷ Ex. SF-40 at SSR-3.

⁸ Ex. SF-45.

⁹ Ex. SF-46.

1 Since 2003, ADEQ has issued Utility an amazing 14 Notices of Violations (“NOVs”) for
2 various environmental infractions.¹⁰ Six of these NOVs are still open and unresolved.¹¹

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

6 During the weekend of May 17 and 18, 2008, Utility’s Pecan Water Reclamation Plant
7 had two sanitary sewer overflows (SSOs), with a combined estimate of 10,000 gallons or more
8 of untreated raw sewage flowing through a spillway into Queen Creek.¹³ As a result, the Queen
9 Creek Wash was contaminated with E-coli bacteria. Utility failed to notify ADEQ, which only
10 found out about the discharge because of e-mails from local residents. The discharge allegedly
11 occurred as a result of the failure of undersized sewage pumps.

12 The Arizona Department of Environmental Quality (“ADEQ”) issued NOV 97512 after it
13 evaluated the 2008 Pecan Plant discharges. This NOV has not yet been resolved. The 2008
14 discharges were only months after a December 2007 discharge from the same plant and were the
15 latest in a long series of environmental violations and sewage spills by Utility.¹⁴

16 Utility had barely finished contaminating the Queen Creek Wash, when a surprise
17 inspection by ADEQ on September 25, 2008, caught Utility storing dangerous sewage sludge on
18 the site of one of Utility’s waste disposal plants.¹⁵ The inspection found a large six-foot-deep
19 depression, where biosolids had been buried along with plastic and concrete debris. When the
20 inspectors walked onto this area, they were below grade and the biosolids were covered with
21 only a few inches of soil. They could see dried biosolids above ground, but the biosolids below
22 ground were “moist and very odorous.” Test borings found that “The biosolids had a strong
23 sewage odor and were black in color.” The surface area was very unstable and in several

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.

¹⁴ Ex. SF-9, NOV 92021.

¹⁵ This paragraph, Ex. SF-11

1 locations, the surface collapsed under the weight of the inspectors, dropping them several feet
2 into the hidden biosolids.

3 ADEQ took the results of the inspection very seriously. In total, ADEQ has issued three
4 NOV's to Utility concerning its dangerous, unauthorized burial of sewage sludge.¹⁶ Together, the
5 three NOV's allege that Utility was guilty of an amazing 17 statutory or code violations.

6 Utility still remains unrepentant. The Commission ordered Utility to resolve the
7 outstanding NOV's. On May 6, 2011, it filed a "Petition to Amend Decision 70849 Pursuant to
8 A.R.S. § 40-252." The Commission will search the Petition in vain for any acknowledgement of
9 wrongdoing or expression of remorse. Instead, Utility again blames ADEQ for its inability to
10 resolve all the outstanding NOV's.¹⁷ Instead, Utility is also asking for relief from this
11 requirement.

12 This is not a utility that is coming to the Commission with clean hands to ask for special
13 relief. Nor is this a utility that shows any remorse for its past environmental violations. These
14 NOV's are serious and until they are resolved to ADEQ's satisfaction, it would send the wrong
15 message to amend Decision No. 71854.

16 The Commission should not ignore Utility's amazing record of environmental
17 transgressions. Nor should the Commission rely on Utility to provide an unbiased report on the
18 status of the outstanding NOV's. Before even considering whether to grant rehearing, the
19 Commission should hear from ADEQ concerning what Utility still must do to resolve the
20 outstanding NOV's.

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

21 In Decision No. 68235, dated October 25, 2005, the Commission ordered Utility to file a
22 rate case for its water and wastewater divisions by May 1, 2007, using a 2006 test-year.¹⁸ Utility

¹⁶ Ex. SF-9, NOV's 102722, 103357, and 103956.

¹⁷ Petition at p. 3.

¹⁸ Ex. SF-2.

1 made a series of dilatory filings requesting relief from that requirement.¹⁹ However, the
2 Commission never granted Utility's request.²⁰

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

6 Decision No. 71854 reduced Utility's authorized gross revenues for its water division by
7 \$3,398,960 and \$1,667,019 for its wastewater division. This means that Utility's total over-
8 collection for the 2007 test year was over five million dollars. This could not have been a
9 surprise to Utility. Most likely, it also substantially overcharged its water customers in 2006.

10 If it had filed a rate case when it was ordered to, Utility would likely have had to reduce
11 water rates at least one year earlier. Instead, Utility simply ignored a Commission Order. The
12 delay likely cost customers millions of dollars. This is hardly the kind of behavior that warrants
13 the extraordinary relief that Utility now seeks.

C Utility Illegally Provided Free Water for its Affiliate

14 A.R.S. § 40-334(A) provides that:

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

18 Despite this clear prohibition, Utility has provided free water for the benefit of another
19 member of the Johnson Group. Beginning in at least 2006, Utility began providing free
20 irrigation water for the Oasis Golf Course, owned by its affiliate, the Club at Oasis LLC
21 ("Oasis").²¹ Swing First was aware of this practice and sent a data request to Utility asking it to
22 confirm that it had not been charging the Oasis for irrigation water. In the data response, Utility

¹⁹ Ex. SF-3, SF-4, SF-5, and SF-6.

²⁰ 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.

²¹ Exhibit A-6 at 16:5-13.

1 admitted that it had been providing free water to its affiliate, which Mr. Tompsett confirmed, but
2 in a very misleading way: “Johnson Utilities has discovered that it was not charging the Oasis
3 Golf Course for the effluent the golf course was receiving.”²² In fact, Utility did not discover
4 that it was illegally providing free water to its affiliate – it got caught.

5 As shown over and over in Decision No. 71854, the Commission was extremely troubled
6 by the extent of Utility’s inappropriate affiliate transactions. Utility’s provision of free water to
7 an affiliate is further evidence why the Commission was justified in providing just a three
8 percent operating margin for Utility. This is yet another reason why Decision No. 71854 should
9 not be amended.

D Utility Harassed its Customers with Frivolous Lawsuits

10 Residents in the Pecan Ranch North subdivision were justifiably concerned with their
11 health and safety as a result of Utility discharging raw sewage from the Pecan Plant into their
12 neighborhood.²³ Residents organized a protest against Utility and posted pointed comments on a
13 community web page. In retaliation, Utility sued the residents for defamation.²⁴

14 This was not an isolated incident. Swing First filed a complaint at the Commission
15 against Utility concerning utility’s rates and charges. Utility retaliated against Swing First’s
16 manager, David Ashton, by suing him and his wife for defamation.²⁵

17 This is not a new tactic from George Johnson. His companies also sued Attorney General
18 Terry Goddard and his wife Monica for defamation, because Mr. Goddard had the temerity to try
19 to bring the Johnson companies to justice for its outrageous environmental record.²⁶

20 Utility’s abusive lawsuits are obviously intended to chill protests by forcing defendants to
21 endure the emotional burden of defending a lawsuit and incur the expense of hiring attorneys to
22 defend the lawsuits. These lawsuits are unprecedented. To counsel’s knowledge, no other utility

²² *Id.* At 16:12-13. (Emphasis added.)

²³ Tr. at 75:14-23.

²⁴ Tr. at 78:1-19; Ex. SF-27.

²⁵ Ex. SF-26.

²⁶ Ex. SF-40 at SSR-3.

1 in the United States has ever sued a customer for defamation. The Commission should not allow
2 this type of white-collar thuggery from one of its regulated utilities. This is not the kind of
3 behavior the Commission should reward by amending a past decision.

E Utility Deliberately Withheld Available Effluent and Instead Delivered Expensive CAP Water

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

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

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

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

14 A. I would say that is accurate, yes.²⁷

15 Although it was well aware of the Commission's policy that golf courses should be
16 irrigated with effluent, we now know that Utility deliberately thwarted that policy. Exhibit SF-
17 42 established two key facts. First, from March 2006 through August 2009, Utility produced far
18 more effluent than it sold. Second, in 2007, Utility sold virtually no effluent to Swing First.

19 Instead of delivering effluent, Utility wrongly delivered CAP water to Swing First. This
20 was wrong for two reasons. First, delivering CAP water instead of effluent violated Commission
21 policy. Effluent cannot be lawfully transformed into potable water. In contrast, CAP water is
22 from a renewable source, is arsenic free, and, with appropriate treatment, can be delivered to
23 customers as potable water. It should be used for irrigation only if no other source is available.
24 Second, the tariffed rate for CAP water is higher than for effluent. This alone resulted in higher
25 water bills for Swing First.

26 Since Decision No. 71854 was issued, Utility has done nothing to correct its deliberate
27 withholding of effluent. Utility still claims that it was entitled to withhold effluent, deliver more-

²⁷ Tr. at 260:23 – 261:8.

1 expensive CAP water, and expect Swing First to pay the difference. Utility's unrepentant
2 flouting of Commission and State water policy is yet another reason that rehearing is not
3 appropriate.

**F Utility Deliberately Charged Irrigation Customers Far More than the Lawful
Tariff Rates**

4 As just discussed, in December 2006 Utility deliberately changed Swing First's account
5 numbers and began withholding effluent in favor of CAP water. At that same time, Utility began
6 charging Swing First \$3.75/1000 gallons for CAP water instead of the lawful tariff rate of
7 \$0.827/1000.²⁸ For the little effluent delivered, Utility charged Swing First \$0.827/1000 gallons
8 instead of the tariff rate of \$0.62/1000 gallons.²⁹ The illegal billing continued from December
9 31, 2006, through June 1, 2007.³⁰

10 Swing First was not the only irrigation customer charged an illegal rate. Exhibit SF-42
11 shows that San Tan Heights HOA began receiving effluent deliveries in January 2007. From
12 January through June 2007, Utility charged the HOA \$3.75/1000 gallons instead of the lawful
13 rate of just \$0.62/1000 gallons.³¹

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

17 Mr. Ashton testified that he had several discussions with the San Tan Heights HOA
18 and reviewed their invoices.³² His conclusion was that they were being enormously overcharged
19 – six times the lawful rate.³³ Utility only provided bill credits after Mr. Ashton reported his
20 conclusion to the HOA.³⁴

²⁸ Tr. at 281:5 – 283:21.

²⁹ Tr. at 274:24 – 278:15.

³⁰ Tr. at 278:4-13; 283:16-21.

³¹ Ex. SF-25; Tr. at 306:20 – 307:6.

³² Ex. SF-38 at 10:9-12; Tr. at 523:24 – 524:5.

³³ Tr. at 524:5-9.

³⁴ Ex. SF-39 at 4:7-8.

1 After it got caught, Utility provided Swing First credits in three accounts for its past
2 billing errors:³⁵ However, Utility has still not provided any material credits to Swing First for its
3 massive over-billing in Account Number 00119200-2, where for six months it charged Swing
4 First \$3.75/1000 gallons for CAP water with a tariff rate of just \$0.827/1000 gallons. This
5 created an enormous phony past-due balance that was carried forward into subsequent months in
6 2007.³⁶ By September 30, 2007, the phony past-due balance in Account No. 00119200-2 had
7 grown to \$125,716.³⁷

8 Utility still has Swing First's money, yet refuses to provide Swing First any meaningful
9 credits or refunds for its enormous overcharges for CAP water. The Commission should not
10 provide any extraordinary relief to Utility until it has resolved its past billing issues and provided
11 appropriate refunds.

G Utility Shut-Off of Swing-First's Irrigation Service Flouted the Commission's Rules

12 Based on the phony past-due balance for CAP Water, Utility twice attempted to shut-off
13 Swing First's Irrigation Service. To shut off wastewater service, Utility was required to follow
14 Commission Rule 14-2-509(D - E). Utility simply ignored the Commission's rules.

15 Utility's only notice that it intended to shut off Swing First's irrigation service came in a
16 November 6, 2007, e-mail from Mr. Tompsett to Mr. Ashton.³⁸ Utility does not dispute that it
17 did not comply with the Commission's rules

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

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

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

25 A. Yes.

³⁵ Ex. A-6 at 11:7-14.

³⁶ Tr. at 283:25 - 285:5.

³⁷ Tr. at 284:15-19.

³⁸ Exhibit SF-23.

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

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

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

8 A. Per the Commission statute we looked at, no.³⁹

9 Again, Utility does not believe that it needs to follow Commission rules. The
10 Commission should not grant rehearing until Utility can demonstrate that it is familiar with the
11 Commission's rules and is willing to follow them.

12 **H Utility Deliberately Flooded Swing First's Golf Course**

13 On Friday, January 25, 2008, Swing First filed a formal complaint with the Commission
14 (Docket No. WS-02987A-08-0049) concerning Utility's service and billing issues.⁴⁰ Utility
15 received a copy of the Complaint on Friday, February 1.⁴¹

16 On the same day it received the Complaint, Utility retaliated against Swing First by
17 delivering huge amounts of effluent to Swing First, despite requests that they not do so.⁴² This
18 caused the lake bordering the 18th hole to overflow, which damaged the golf course.⁴³ Swing
19 First employees asked the Utility several times to stop delivery, but they ignored the requests.⁴⁴
20 The employees then escalated the issue to Mr. Ashton, who then asked Utility several times in
21 writing to stop the deliveries.⁴⁵

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

25 You have now filed a formal complaint with the Arizona Corporation
Commission alleging, among other things, service interruptions. You even

³⁹ Tr. at 835-36.

⁴⁰ Ex. SF-38 at 11:2.

⁴¹ Tr. at 404:25 - 405:2.

⁴² *Id.* at 11:6-8.

⁴³ *Id.* at 11:8-9.

⁴⁴ *Id.* at 11:9-10.

⁴⁵ *Id.* at 11:10-11.

1 requested relief asking that 'The Commission to order Utility to continue
2 providing service during the pendency of this matter". We were served with that
3 complaint on Friday February 1, 2008. Now a mere 3 days later you now demand
4 that 'WE STOP THE DELIVERY OF WATER". **Which way do you want it?**⁴⁶

5 Mr. Tompsett also blamed the flooding on the recent rains, but still went on to argue that Utility
6 had the right to flood the golf course.⁴⁷ Then, Utility actually billed Swing First for all effluent
7 delivered in February 2008, including the deliveries responsible for the golf-course flooding.⁴⁸

8 Utility's deliberately flooded Swing First's golf course in clear retaliation for Swing First
9 exercising its legal right to file a complaint with the Commission. Utility obviously believes that
10 it is above the law. The Commission should not grant rehearing until Utility demonstrates that it
11 understands that it cannot use its Commission-granted monopoly powers to deliberately retaliate
12 against a customer for exercising its legal right to file a complaint.

I Utility Tried to Intimidate Swing First from Participating in this Case

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

18 In clear retaliation, just six days later (February 9, 2009) George Johnson and Utility sent
19 a contemptible letter to Swing First's members ("Utility Letter").⁴⁹ In the second paragraph of
20 the Utility Letter, Mr. Johnson and Utility threatened to sue the Swing First members if Mr.
21 Ashton did not stop participating in Utility's rate case docket:

22 I am writing to you now for two reasons. First, Mr. Ashton, purportedly acting on
23 behalf of SFG, continues to make libelous remarks and unsubstantiated filings
24 with the ACC in effort to slander me personally and damage Johnson Utilities. I
25 do not know whether you are aware of Mr. Ashton's actions on your behalf or
26 whether you support those actions. However, because Mr. Ashton claims to be
27 acting for SFG, and therefore on your behalf, we are considering adding all

⁴⁶ Ex. SF-28. Emphasis in original.

⁴⁷ *Id.*

⁴⁸ Ex. SF-38 at 11:12-13.

⁴⁹ Ex. SF-29.

1 members of SFG personally as defendants in the pending Superior Court case. If
2 you do not support Mr. Ashton's actions. please let me know as soon as possible.
3 If I do not hear from you, we will assume that you support Mr. Ashton's actions,
4 and will proceed accordingly. (Emphasis added.)

5 The Commission should not grant rehearing until Utility demonstrates that it understands
6 that it cannot use its Commission-granted monopoly powers to deliberately retaliate against a
7 customer for exercising its legal right to participate in a rate case.

8 **II THE COMMISSION SHOULD NOT GRANT REHEARING, BUT IF IT DOES, IT**
9 **SHOULD ALSO GRANT REHEARING CONCERNING SEVERAL OTHER**
10 **ISSUES**

8 In Decision No. 71854, the Commission sent a strong message to Utility. However,
9 Utility has clearly not received that message. If the Commission does determine to grant
10 rehearing, it should also grant rehearing concerning the following issues:

11 **A Utility's Pecan Wastewater Treatment Plant Should Not Be Included in Rate**
12 **Base**

11 The NOV's have still not been resolved for this plant, even four years after the test year.
12 The plant should be excluded from rate base until Utility's next rate case, where Utility would
13 have the opportunity to demonstrate that the plant is no longer a threat to public safety.

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

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

18 On March 17, 2009, the Commission issued Decision No. 70849. In the Decision the
19 Commission expressed specific concern about Utility's continuing sewer spills:

20 However, Johnson's two recent SSOs raise serious concerns regarding public
21 safety. The Company experienced two SSOs in the same location within a short
22 time span. The homeowners in the Pecan Creek North subdivision, living adjacent
23 to the concrete channel where the sewage from the SSOs was contained, were
24 subjected to viewing sewage from their homes and test results of the storm water
25 in the Queen Creek wash adjacent to where the SSOs occurred continue to test
26 positive for the presence of E. coli and coliform.⁵⁰

⁵⁰ Decision No. 70849, dated March 17, 2009, at 11:11-12. Emphasis added.

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

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

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

14 IT IS FURTHER ORDERED that if Johnson Utility L.L.C. achieves full
15 compliance with the Arizona Department of Environmental Quality for its Pecan
16 Water Reclamation Plant (ADEQ Inventory #105324) on or before December 31,
17 2009, the extension of Johnson Utility L.L.C.'s Wastewater Certificate of
18 Convenience and Necessity shall become effective on the first day of the month
19 following Johnson Utility L.L.C.'s filing with Docket Control proof of its
20 compliance and the Utilities Division Staff's confirmation of such compliance
21 with Docket Control.⁵¹

22 The Commission showed that it was still seriously concerned in 2009 with the Pecan
23 Plant's health and safety issues. This case involves a 2007 test year. It would be premature to
24 determine that the Pecan Plant was used and useful in 2007, when it was still having issues well
25 after the test year and the plant's pumps were undersized and had to be replaced after the test
26 year. Excluding the plant from rate base is appropriate under the circumstances.

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

27 Fines are clearly warranted for Utility. The Commission needs to send a clear message to
28 Utility that it cannot continue to incorrectly charge customers, disregard Commission Orders,
29 and endanger the public health and safety. However, the Commission should consider that
30 neither Mr. Johnson nor the Utility's behavior appear to be impacted by normal fines. Therefore,
31 the fines should be large enough to get Utility's attention. Certainly, fines may set an example

⁵¹ Id. at 13:25 – 14:11.

1 for other utilities, but if the goal is to change Mr. Johnson's behavior, and ultimately protect the
2 public interest, the action most likely to make a difference is to revoke or suspend his CC&N.

3 Appropriate fines could be determined in a second phase of this case..

4 **C Utility Should Be Penalized with a Reduced Rate of Return on Equity**

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

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

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

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

19 If the Commission decides to grant rehearing, it should also grant rehearing as to the
20 appropriate ROE penalty for Utility.

21 **D The Commission Should Require Utility to Demonstrate Why It Should Not**
22 **Surrender Its Certificate of Convenience and Necessity**

23 The Arizona Supreme Court set the standard a utility should be subject to if it is to be
24 awarded a CC&N. "The monopoly is tolerated only because it is to be subject to vigilant and
25 continuous regulation by the Corporation Commission, and is subject to rescission, alteration or

1 amendment at any time upon proper notice when the public interest would be served by such
2 action.”⁵²

3 There is substantial evidence that it is not in the public interest for Mr. Johnson to
4 continue running Utility. Swing First is informed that Mr. Tompsett is no longer with Utility,
5 but Mr. Tompsett was not primarily responsible for Utility’s transgressions. George Johnson is
6 the one common thread running from ADEQ’s \$12 million fine, through EPA’s \$1.25 million
7 fine, through ADEQ’s multiple fines and NOV’s, through Utility’s abuse of its customers,
8 through Utility’s flouting of Commission rules and orders, and through Decision No. 71854.

9 If the Commission decides to grant rehearing, it should consider whether to order a
10 “show cause” phase for this case.

**III CUSTOMER NOTICE IS REQUIRED IF THE COMMISSION GRANTS
UTILITY’S REQUEST TO AMEND DECISION NO. 71854.**

11 Decision No. 71854 is a final Order by the Commission. The time provided for rehearing
12 or appeal of this Decision has long past. If the Commission determines to act in accordance with
13 its authority under A.R.S. § 252 and amend the Decision, then due process requires that Utility
14 provide full notice to its customers.

15 If the Commission were to provide the relief Utility requests, it would be ruling on rate
16 changes—changes that would affect each of Utility’s customers. In this case, public notice to all
17 affected parties, including customers, would be required. Where the Commission “is ruling on
18 rate changes or property valuations of a public service corporation that will directly affect the
19 public ... due process requires that the Commission give the affected parties notice and an
20 opportunity to be heard.”⁵³

21 The Commission cannot change Utility’s filed rates without notice to all affected persons:

22 A public utility is entitled to due process when a ratemaking body undertakes to
23 calculate a reasonable return for the use of its property and services by the public.
24 See Simms, Conversely, the public is entitled to the same level of protection when

⁵² *Davis v. Arizona Corporation Com'n*, 96 Ariz. 215,218; 393 P.2d 909, 911 (1964).

⁵³ *Arizona Public Service Co. v. Arizona Corp. Com'n*, 155 Ariz. 263,271; 746 P.2d 4, 12 (Ariz.App. 1987)

1 the government seeks to increase the utility rates that the public is obligated to
2 pay.⁵⁴

3 **IV CONCLUSION**

3 In return for being allowed to operate legally as a monopoly, a utility takes on certain
4 important obligations when it is awarded a CC&N. Among other things, the utility subjects itself
5 to rate regulation by the Commission, and takes on the mantle of a “public service
6 corporation.”⁵⁵ As the record shows, Utility has pushed its monopoly status to and beyond the
7 legal limit, has disregarded its requirement to charge lawful rates, and flouted its public-service
8 obligations.

9 In Decision No. 71854, the Commission sent a strong message concerning Utility’s
10 blatant disregard for its regulators, its customers, the public safety, the environment, and its
11 public-service obligations. Certainly, Utility has done nothing to show that it has altered or even
12 regrets its behavior since the Decision. George Johnson still controls and directs Utility and
13 continues to battle both ADEQ and Swing First, one of Utility’s largest customers.

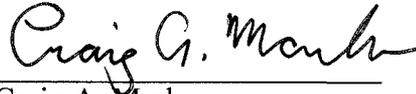
14 Until such time as Utility has resolved its long-running, multiple environmental and
15 customer-service issues, the Commission should not amend Decision No. 71854.

⁵⁴ *Residential Utility Consumer Office v. Arizona Corp. Com’n*, 199 Ariz. 588,593: 20 P.3d 1169, 1174 (Ariz.App. 2001). Emphasis added.

⁵⁵ Const. Art 15, §2.

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RESPECTFULLY SUBMITTED on June 1, 2011.



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on June 1, 2011, to:

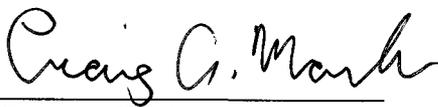
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