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BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE
APPLICATION OF BLACK
MOUNTAIN SEWER
CORPORATION, AN ARIZONA
CORPORATION, FOR A
DETERMINATION OF THE FAIR
VALUE OF ITS UTILITY PLANT
AND PROPERTY AND FOR
INCREASES IN ITS RATES AND
CHARGES FOR UTILITY SERVICE
BASED THEREON.

No. SW-02361A-08-0609

CLOSING BRIEF OF INTERVENOR TOWN OF CAREFREE

Arizona Corporation Commission

DOCKETED

DEC 14 2009

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1 **I. INTRODUCTION**

2 In the previous rate proceeding of Black Mountain Sewer Corporation (“Black
3 Mountain”), Docket No. SW-02361A-05-0657, the Arizona Corporation Commission
4 (the “Commission”) issued an Opinion and Order (the “Decision”) addressing Black
5 Mountain’s refund of hook-up fees collected by Black Mountain from its customers.
6

7 The Decision concluded as follows:

8 The record supports a finding that customers should be
9 refunded \$833,367 for hook-up fees that were used to
10 purchase land and that have not been expended. The refunds
11 should be distributed in the manner proposed by the
12 Company, on a per customer basis irrespective of customer
13 class. The rates granted in this Decision should not go into
14 effect until the refunds have been distributed.

15 *Decision No. 69164 at 40 (emphasis added).* The Decision ordered Black Mountain as
16 follows:

17 IT IS FURTHER ORDERED that the revised schedules of
18 rates and charges shall be effective for all service rendered on
19 and after December 1, 2006, subject to the requirement that
20 Black Mountain Sewer Corporation has mailed to each
21 customer prior to that date a refund check for the hook-up
22 fee funds, consistent with and in the manner described
23 hereinabove. The new rates may not go into effect until the
24 Company has provided, to the satisfaction of the Director of
25 the Utilities Division, sufficient information to show that the
26 refunds have been issued in accordance with the discussion
27 set forth herein.

28 *Decision No. 69164 at 42 (emphasis added).*

 Carefree Estates is a residential neighborhood within the Town of Carefree (the
“Town”) consisting of thirty-three single-family homes, each of which is served by
Black Mountain. (See Direct Testimony of Brian Kincaid) Black Mountain bills the

1 Carefree Estates Homeowners Association (the "Association") for the sewer services
2 Black Mountain provides to each of the thirty-three homes within Carefree Estates.
3
4 (*Id.*) The Association, on behalf of the homeowners of Carefree Estates, pays Black
5 Mountain for the sewer services provided to each of the thirty-three homes of Carefree
6 Estates. (*Id.*) Each Carefree Estates homeowner is contractually obligated by the
7 underlying covenants, conditions, and restrictions to pay an assessment to the
8 Association for his or her proportionate share of sewer costs. (*Id.*)
9

10 Because Black Mountain bills only the Association as its customer, Black
11 Mountain made a single refund to the Association. Per the Notice filed by Black
12 Mountain in the previous rate proceeding, each of Black Mountain's customers received
13 \$412.15 from the hook-up fee refunds. The Association received a single refund of
14 \$412.15, but the individual Carefree Estates homeowners received no refund. (*Id.*) The
15 fact that each Carefree Estates homeowner would not receive a refund did not become
16 apparent to the Town, the Association, or the Carefree Estates homeowners until after
17 Black Mountain paid the refunds.
18
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20 The Town sought clarification and an amendment to the Decision with respect to
21 the Carefree Estate homeowners in the prior proceeding after Black Mountain paid the
22 refunds. Without admitting or conceding any position on the relief requested by the
23 Town, Black Mountain offered a revenue neutral means of resolving the issue by
24 refunding approximately \$405.73 to each of the homeowners within Carefree Estates,
25 and debiting its other customers' accounts for approximately \$6.62. (*Id.*) The debit to
26 the other customers' accounts would allow Black Mountain to make the thirty-three
27
28

1 additional refunds without paying more than originally ordered by the Commission (i.e.
2 \$833,367.00 to 2,055 individuals instead of 2,022 individuals). (*Id.*) The Town and
3 Residential Utility Consumer Office (“RUCO”) agreed to stipulate to Black Mountain’s
4 proposed solution, and a stipulation between the Town, Black Mountain, and RUCO
5 was filed with Administrative Law Judge Dwight D. Nodes on December 7, 2007 (the
6 “Stipulation”). (*Id.*) Eight months later, the parties learned through informal means that
7 Judge Nodes did not believe he had the authority to enter the proposed order stipulated
8 to by the parties. (*Id.*) The Town requested Black Mountain to submit a formal
9 stipulation to the Commission, but Black Mountain felt it would be more appropriate to
10 address the Carefree Estates hook-up refund issue in this proceeding.
11
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14 Accordingly, the Town intervened in this proceeding and offered the testimony
15 of Brian Kincaid, a member and President of the Association, who testified consistently
16 with the foregoing facts. Black Mountain has no objection to the proposed solution in
17 this proceeding, but has suggested that modification of the proposal is necessary now
18 that some customers that received refunds have left the Black Mountain system, and
19 others have become customers after the refund was made. Accordingly, Black
20 Mountain has suggested that it issue a refund to each of the thirty-three Carefree Estates
21 homeowners in the amount of \$404.64, and debit the accounts of 1,671 customers that
22 previously received a refund by the amount of \$7.51. The net result would be that
23 everyone that received a refund would receive the same amount, with the exception of
24 the customers that have since left the system which received \$412.15.
25
26

27 No party to this proceeding has objected to Black Mountain’s proposed
28

1 resolution of the hook-up fee refund issue. Judge Nodes, however, requested the parties
2 to consider whether the prohibition against retroactive ratemaking may apply to Black
3 Mountain's proposed resolution. This closing brief addresses that issue and concludes
4 that the proposed resolution would not violate the retroactive ratemaking prohibition.
5

6 **II. DISCUSSION**

7 Arizona law discussing the prohibition against retroactive ratemaking is slim, if
8 not non-existent. The Colorado Supreme Court, however, has set forth the following
9 discussion of retroactive ratemaking which can be applied in Arizona:
10

11 The fixing of utility rates is a legislative function that the
12 General Assembly has delegated to the Public Utilities
13 Commission. Ratemaking is thus subject to the prohibition
14 against retrospective legislation found in article II, section 11,
15 of the Colorado Constitution. This provision of the
16 constitution prohibits legislation that "takes away or impairs
17 vested rights acquired under existing laws, or creates a new
18 obligation, imposes a new duty, or attaches a new disability,
19 in respect to transactions or considerations already passed."
20 In the context of utility regulation, a charge by a utility is
21 retrospective and constitutionally prohibited if it is connected
22 to the past performance of the utility.

19 *Colo. Office of Consumer Counsel v. Pub. Serv. Co.*, 877 P.2d 867, 870 (Colo. 1994)
20 (citations omitted). Like Colorado, in Arizona, the Commission's ratemaking power is
21 a legislative power. *See Ariz. Corp. Comm'n v. State*, 171 Ariz. 286, 292, 830 P.2d 807,
22 813 (1992) (stating that "[t]he Commission exercises its executive, administrative
23 function in adopting rules and regulations, its judicial jurisdiction in adjudicating
24 grievances, and its legislative power in ratemaking.") While not as explicit as the
25 Colorado Constitution, the Arizona Constitution has been held to prohibit legislation
26 that "disturb[s] vested substantive rights." *San Carlos Apache Tribe v. Superior Court*,

1 193 Ariz. 195, 205 ¶ 14, 972 P.2d 179, 189 (1999). Specifically, the Arizona Supreme
2 Court has stated as follows:

3
4 A statute that is merely procedural may be applied
5 retroactively. A statute may not, however, "attach[] new legal
6 consequences to events completed before its enactment." In
7 other words, legislation may not disturb vested substantive
8 rights by retroactively changing the law that applies to
completed events. A vested right "is actually assertable as a
legal cause of action or defense or is so substantially relied
upon that retroactive divestiture would be manifestly unjust."

9 *Id.* Disturbing a vested right would constitute a violation of the due process clause of
10 the Arizona Constitution, Ariz. Const. Art. II § 4. *Id.* Accordingly, the Commission
11 should follow the Colorado Supreme Court's reasoning that "[i]n the context of utility
12 regulation, a charge by a utility is retrospective and constitutionally prohibited if it is
13 connected to the past performance of the utility."
14

15 In this case, the issue is the equal distribution of a refund, not a charge for past
16 service or performance. The amount of the total refund to Black Mountain's customers
17 will not be affected, and all customers will receive an equal refund. Similarly, the rates
18 of Black Mountain will not be affected either prospectively or retroactively by the
19 proposed resolution. The triggering act that prompted the Town to initially request a
20 redistribution was not the Decision itself, the rates therein, the rates sought in this
21 proceeding, nor Black Mountain's provision of sewer services, but rather the payment
22 of the hook-up fee refund by Black Mountain. Accordingly, Black Mountain's
23 proposed solution to the issue would not constitute retroactive ratemaking.
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27 Put another way, it would be hard to believe, for example, that if BMSC had
28 unknowingly distributed the hook-up fee refund to only customers with phone numbers

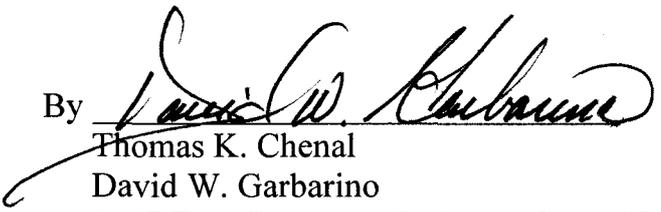
1 ending in odd numbers, the Commission could not, upon proposal of the parties, order
2 that the refund be redistributed to all Black Mountain customers. This case is no
3 different. There would be no manifest injustice created by the proposed solution to
4 resolve the hook-up fee issue.
5

6 **III. CONCLUSION**

7 The Town requests that the Commission adopt Black Mountain's revenue neutral
8 proposal of resolving the hook-up fee refund issue an order refunding approximately
9 \$404.64 to each of the homeowners within Carefree Estates, and debiting the other
10 1,671 customers that previously received a refund by the amount of \$7.51, thereby
11 permitting Black Mountain to make the thirty-three refunds to the Carefree Estates
12 homeowners without paying more than originally ordered by the Commission.
13
14

15 RESPECTFULLY SUBMITTED THIS 14th day of December, 2009.

16 **SHERMAN & HOWARD L.L.C.**

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