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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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AZ CORP COMMISSION
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COMMISSIONERS

- GARY PIERCE – Chairman
- BOB STUMP
- SANDRA D. KENNEDY
- PAUL NEWMAN
- BRENDA BURNS

IN THE MATTER OF THE INVESTIGATION OF
 THE FAILURE OF BELLEMONT WATER
 COMPANY, AN ARIZONA PUBLIC SERVICE
 CORPORATION, AND BELLEMONT WATER
 COMPANY SHAREHOLDERS BRAD NESS,
 GLORIA NESS, ERIK NESS, DIANAH NESS (AKA
 DIANA NESS), OPERATING AS AN ARIZONA
 PUBLIC SERVICE CORPORATION IN FACT, TO
 COMPLY WITH ARIZONA STATUTES AND
 COMMISSION RULES AND REGULATIONS.

DOCKET NO. W-02526A-10-0499

AMENDED COMPLAINT

Staff of the Utilities Division (“Staff”) of the Arizona Corporation Commission (“Commission”), for its Complaint against Bellemont Water Company, Inc. (“BWC” or “Company”), an Arizona public service corporation, and against Brad Ness, Gloria Ness, Erik Ness, and Dianah Ness (AKA Diana Ness), operating as an Arizona public service corporation in fact, alleges:

JURISDICTION

1. The Commission has jurisdiction to hear complaints against public service corporations pursuant to A.R.S. § 40-246. The Commission has jurisdiction to supervise and regulate public service corporations pursuant to Article XV of the Arizona Constitution and Title 40 of the Arizona Revised Statutes.

2. BWC is a public service corporation as defined by Article XV, § 2 of the Arizona Constitution and A.R.S. §§ 40-281 and -282.

3. Brad Ness, Gloria Ness, Erik Ness, and Dianah Ness (AKA Diana Ness) are serving as a public service corporation in fact by virtue of their disregard for the corporate form, their use of company revenue for personal expenses, and their co-mingling of corporate and personal funds.

BACKGROUND

4. BWC, a subchapter “C” Corporation, was incorporated in Arizona in 1989.

1 5. BWC has operated under a certificate of convenience and necessity ("CC&N") which
2 was originally granted in Decision No. 58079, dated November 12, 1992. The CC&N was
3 conditioned upon compliance with Arizona law and Commission rules.

4 6. The Company is a Class D utility providing water service to eight metered commercial
5 customers approximately 10 miles west of Flagstaff in Coconino County, Arizona.

6 7. BWC's shareholders are Brad Ness, Gloria Ness, Erik Ness, Dianah Ness (AKA Diana
7 Ness), Elliot Ness, and Klaudia Ness.

8 8. Upon information and belief, the Estate of George Wong is also a BWC shareholder.

9 9. BWC's listing in the Arizona Corporation Commission State of Arizona Public
10 Access System shows that BWC's officers are Brad Ness (President), Erik Ness (Vice President),
11 Elliot Ness (Treasurer), and Klaudia Ness (Secretary).

12 10. BWC's directors are Brad Ness, Erik Ness, Elliott Ness, and Klaudia Ness.

13 11. Upon information and belief, BWC has recently changed its officers. The new
14 officers are Erik Ness (President), Elliot Ness (Vice President), Gloria Ness (Treasurer), and Klaudia
15 Ness (Secretary). This change of officers is not yet reflected in the Company's Corporations
16 Division filings.

17 **STANDPIPE REVENUE ACCOUNT**

18 12. On September 3, 2008, Commission Decision No. 70482 authorized the Company to
19 charge a standpipe water service rate of \$15.00 per 1,000 gallons.

20 13. This authorization to provide standpipe service contained several conditions designed
21 to ensure the Company's continued water supply and to provide the Company a source of funds to be
22 used in securing a new water source. Specifically, the Commission stated, "[a]ll revenue collected
23 from the standpipe service shall be deposited in a separate interest bearing account and such funds
24 shall be used exclusively for the design, approval and construction of a new water source[.]"

25 **MOST RECENT RATE CASE**

26 14. On September 3, 2009, the Company filed an application for a rate increase and an
27 application for approval to incur long-term debt from the Water Infrastructure Finance Authority of
28 Arizona. The Staff Report was filed on February 10, 2010, recommending a rate decrease and a

1 denial of the request to incur long-term debt.

2 15. On March 5, 2010, the recommended opinion and order (“ROO”) was filed generally
3 agreeing with Staff’s recommendations. The item was scheduled to be heard at the March 31, 2010
4 open meeting.

5 16. On March 26, 2010, Rodney Wilson, certified public accountant for the Company,
6 contacted the Commission, requesting that the Commission’s consideration of the ROO be postponed
7 due to potential management changes in the Company. The item was pulled from the March 31,
8 2010 open meeting and was eventually heard at the July 27-28, 2010 open meeting and the August
9 24-25, 2010 open meeting, as discussed below.

10 17. The item was heard by the Commission on July 27, 2010. No Company officer
11 appeared at the open meeting. Rodney Wilson appeared telephonically and mentioned ongoing
12 lawsuits and other issues but did not provide specific information. The Commission did not vote on
13 the item and moved it to the August open meeting in order to have a representative of the Company
14 present.

15 18. At the August 24, 2010 open meeting, Company President Brad Ness and Company
16 Vice President Erik Ness were present. Additionally, Rodney Wilson, the Company’s certified
17 public accountant, and Klaudia Ness, BWC’s Secretary, appeared telephonically.

18 19. Klaudia Ness alleged that there had been some mishandling of Company funds.
19 Specifically, Klaudia Ness stated that BWC funds had been used by Brad Ness to make payments on
20 the Ness Family Members’ personal debt to the McClains.

21 20. Klaudia Ness also stated that the standpipe service meter was within Brad Ness’ sole
22 control and that she was concerned that standpipe revenue was not being deposited into the separate
23 standpipe service meter bank account. She stated that approximately \$6,000 of standpipe revenue
24 was unaccounted for.

25 21. The Commission voted on the rate and financing applications and issued Decision No
26 71868. That Decision specifically reaffirmed the Commission’s previous order “that all revenue
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1 collected from the standpipe service shall be deposited in a separate interest bearing account and such
2 funds shall be used exclusively for the design, approval and construction of a new water source[.]”¹

3 22. Additionally, the Commission directed Staff to investigate the allegations of
4 mismanagement made at the open meeting.

5 **STAFF INVESTIGATION**

6 23. On September 13, 2010, Staff mailed data requests via certified mail to BWC, Klaudia
7 Ness, Brad Ness, Elliott Ness, and Erik Ness. Return receipts were received from Klaudia Ness and
8 Brad Ness. Mailings were returned unclaimed by Elliott Ness and Erik Ness.

9 24. On October 1, 2010, Staff received a response to the data request via fax from Klaudia
10 Ness. In her written response, Klaudia Ness reiterated allegations of inappropriate handling of
11 Company funds.

12 25. On October 13, 2010, Staff met with Klaudia Ness and Rodney Wilson at the offices
13 of Rodney Wilson in Flagstaff, AZ, and conducted a limited review of the Company’s books and
14 records.

15 **LONG-TERM DEBT INCURRED BY BWC IN 2010**

16 26. In approximately 2006, individual members of the Ness family purchased 118,179
17 shares of BWC stock from various members of the McClain family through a stock purchase
18 agreement. The purchase price of the 118,179 shares of BWC stock included an initial down
19 payment, a promissory note for a single payment one year later, and long-term debt in the form of a
20 promissory note.

21 27. From December 17, 2007, to September 23, 2009, BWC funds were used to pay
22 approximately \$16,590.90 of the Ness Family Members’ personal indebtedness to the McClains.

23 28. In June of 2010, the McClains filed a Superior Court complaint against the Ness
24 Family Members, alleging a breach of contract for failure to pay in full a promissory note and a
25 violation of the security agreement associated with the original stock purchase.

26 29. Subsequently, a settlement of the Ness Family Members’ personal debt to the
27 McClains was negotiated and refinanced by a loan from Steven and Janet Adams, entered on August
28

¹ Commission Decision No. 71868 at 9:22-24 and 12:10-12.

1 31, 2010. Per stipulation, the McClain lawsuits were dismissed. The Adams loan, which originally
2 named BWC, as well as Brad Ness, Gloria Ness, Erik Ness, and Dianah Ness (AKA Diana Ness), as
3 borrowers, was amended on September 13, 2010, to name BWC as the sole borrower.

4 30. BWC incurred this long-term debt without Commission approval and for the purpose
5 of settling the Ness Family Members' personal debt related to the original stock purchase from the
6 McClains.

7 **USE OF STANDPIPE SERVICE REVENUES**

8 31. The standpipe service is a cash-only service in which customers take water from the
9 standpipe after depositing cash in a lock-box placed by the standpipe service location. The standpipe
10 has a meter on it similar to an odometer on a car so that the Company will have a record of
11 cumulative activity.

12 32. The log of the meter activity provided by Klaudia Ness indicates that \$15,274 is
13 unaccounted for during the period July 23, 2010, through October 9, 2010.

14 33. An updated log of the meter activity provided by Klaudia Ness indicates that \$26,190
15 is unaccounted for during the period July 23, 2010, through February 2, 2011.

16 34. On November 4, 2010, Staff conducted a telephonic meeting with Brad Ness. Brad
17 Ness stated that he had used monies collected from the standpipe service to pay attorney's fees
18 related to foreclosure litigation with the McClain family. Brad Ness was unable to explain how the
19 attorney's fees were related to the "design, approval and construction of a new water source" as
20 required by Decision Nos. 70482 and 71868. The attorney's fees paid out of the Company standpipe
21 revenues were related to litigation involving the Ness Family Members' shares of BWC stock.

22 35. From July 23, 2010, to November 29, 2010, Brad Ness collected monies from the
23 standpipe service meter sales, but did not deposit those funds into the separate interest-bearing
24 account established for that purpose.

25 36. From December 1, 2010, to February 1, 2011, Erik Ness collected monies from the
26 standpipe service meter sales, but did not deposit those funds into the separate interest-bearing
27 account established for that purpose.

28 37. Contrary to the provisions of Decision Nos. 70482 and 71868 that restrict the use of

1 standpipe revenues, Brad Ness and Erik Ness have used standpipe revenues in a manner inconsistent
2 with Commission orders.

3 **COMPLAINT**

4 **Count One**

5 **(Violation of A.R.S. § 40-301(B))**

6 38. Staff incorporates the foregoing allegations as if they were fully set forth herein.

7 39. Arizona Revised Statutes ("A.R.S.") § 40-301(B) states, "A public service corporation
8 may issue stocks and stock certificates, bonds, notes and other evidences of indebtedness payable at
9 periods of more than twelve months after the date thereof, only when authorized by an order of the
10 commission."

11 40. On August 31, 2010, and September 13, 2010, BWC incurred long term debt in the
12 form of a loan from Steven and Janet Adams.

13 41. Brad Ness, Gloria Ness, Erik Ness, and Dianah Ness (AKA Diana Ness) were the
14 shareholders, officers, and/or directors who caused BWC to incur long-term debt in the form of a
15 loan from Steven and Janet Adams.

16 42. This loan was not incurred for any utility purpose but was instead used to satisfy the
17 personal debt owed by certain Ness family members to the McClains.

18 43. This long-term debt was incurred without Commission approval in violation of A.R.S.
19 § 40-301(B).

20 **Count Two**

21 **(Violation of A.R.S. § 40-302(A))**

22 44. Staff incorporates the foregoing allegations as if they were fully set forth herein.

23 45. A.R.S. § 40-302(A) states, "Before a public service corporation issues stocks and
24 stock certificates, bonds, notes and other evidences of indebtedness, it shall first secure from the
25 commission an order authorizing such issue and stating the amount thereof, the purposes to which the
26 issue or proceeds thereof are to be applied, and that, in the opinion of the commission, the issue is
27 reasonably necessary or appropriate for the purposes specified in the order, pursuant to § 40-301, and
28 that, except as otherwise permitted in the order, such purposes are not, wholly or in part, reasonably

1 chargeable to operative expenses or to income.”

2 46. On August 31, 2010, and September 13, 2010, BWC incurred long-term debt in the
3 form of a loan from Steven and Janet Adams.

4 47. Brad Ness, Gloria Ness, Erik Ness, and Dianah Ness (AKA Diana Ness) were the
5 shareholders, officers, and/or directors who caused BWC to incur long-term debt in the form of a
6 loan from Steven and Janet Adams.

7 48. This loan was not incurred for any utility purpose but was instead used to satisfy the
8 personal debt owed by certain Ness family members to the McClains.

9 49. This long-term debt was incurred without Commission approval in violation of A.R.S.
10 § 40-302(A).

11 **Count Three**

12 **(Violation of A.R.S. § 40-202(L) and Commission Decision Nos. 70482 and 71868)**

13 50. Staff incorporates the foregoing allegations as if they were fully set forth herein.

14 51. A.R.S. § 40-202(L) states, “A public service corporation shall comply with every
15 order, decision, rule or regulation made by the commission in any matter relating to or affecting its
16 business as a public service corporation and shall do everything necessary to secure compliance with
17 and observance of every such order, decision, rule or regulation.”

18 52. Decision Nos. 70482 (page 7, lines 22-24) and 71868 (page 9, lines 23-24, and page
19 12, lines 11-12) state that “[a]ll revenue collected from the standpipe service shall be deposited in a
20 separate interest bearing account and such funds shall be used exclusively for the design, approval
21 and construction of a new water source[.]”

22 53. Metered activity has occurred at the standpipe for which monies have not been
23 deposited into the standpipe bank account.

24 54. Brad Ness admitted using money collected from the standpipe to pay attorney’s fees
25 for litigation that is unrelated to the design, approval, and construction of a new water source.

26 55. BWC and Brad Ness have violated A.R.S. § 40-202(L) as well as Commission
27 Decision Nos. 70482 and 71868.

28

1 **Count Four**

2 **(Violation of A.R.S. § 40-202(L) and Commission Decision No. 71868)**

3 56. Staff incorporates the foregoing allegations as if they were fully set forth herein.

4 57. A.R.S. § 40-202(L) states, "A public service corporation shall comply with every
5 order, decision, rule or regulation made by the commission in any matter relating to or affecting its
6 business as a public service corporation and shall do everything necessary to secure compliance with
7 and observance of every such order, decision, rule or regulation."

8 58. Decision Nos. 70482 (page 7, lines 22-24) and 71868 (page 9, lines 23-24, and page
9 12, lines 11-12) state that "[a]ll revenue collected from the standpipe service shall be deposited in a
10 separate interest bearing account and such funds shall be used exclusively for the design, approval
11 and construction of a new water source[.]"

12 59. Erik Ness collected monies from the standpipe from December 1, 2010 through
13 February 1, 2010.

14 60. Metered activity has occurred at the standpipe between December 1, 2010 and
15 February 1, 2010 for which monies have not been deposited into the standpipe bank account.

16 61. Erik Ness violated A.R.S. § 40-202(L) and Decision No. 71868 by failing to deposit
17 revenue collected from the standpipe service into a separate interest bearing account and using such
18 funds for purposes other than the design, approval, and construction of a new water source.

19 **Count Five**

20 **(Violation of A.R.S. § 40-204 and A.A.C. R14-2-411.D.4)**

21 62. Staff incorporates the foregoing allegations as if they were fully set forth herein.

22 63. Pursuant to A.R.S. § 40-204 and Arizona Administrative Code ("A.A.C.") R14-2-
23 411.D.4, all public service corporations in Arizona are required to file with the Commission on or
24 before April 15 of each year for the preceding year, a Utilities Division Annual Report.

25 64. BWC has failed to provide a complete Utilities Division Annual Report for calendar
26 year 2009.

27 65. The failure of BWC to provide a complete 2009 Annual Report represents a violation
28 of both A.R.S. § 40-204 and A.A.C. R14-2-411.D.4.

1 **RELIEF**

2 66. Wherefore, Staff requests that the Commission issue an order that provides the
3 following relief:

- 4 • Finding that BWC has violated A.R.S. § 40-301(B).
- 5 • Finding that Brad Ness, Gloria Ness, Erik Ness, and Dianah Ness (AKA Diana Ness),
6 operating as a public service corporation in fact, have violated A.R.S. § 40-301(B).
- 7 • Finding that BWC has violated A.R.S. § 40-302(A).
- 8 • Finding that Brad Ness, Gloria Ness, Erik Ness, and Dianah Ness (AKA Diana Ness),
9 operating as a public service corporation in fact, have violated A.R.S. § 40-302(A).
- 10 • Finding that BWC has violated A.R.S. § 40-202(L).
- 11 • Finding that Brad Ness, operating as a public service corporation in fact, has violated
12 A.R.S. § 40-202(L).
- 13 • Finding that Erik Ness, operating as a public service corporation in fact, has violated
14 A.R.S. § 40-202(L).
- 15 • Finding that BWC has violated Commission Decision Nos. 70482 and 71868.
- 16 • Finding that Brad Ness, operating as a public service corporation in fact, has violated
17 Commission Decision Nos. 70482 and 71868.
- 18 • Finding that Erik Ness, operating as a public service corporation in fact, has violated
19 Commission Decision Nos. 71868.
- 20 • Finding that BWC has violated A.R.S. § 40-204.
- 21 • Finding that BWC has violated A.A.C. R14-2-411(D)(4).
- 22 • Ordering the appointment of a qualified Interim Manager, selected by Staff, if the
23 Company cannot demonstrate that it has taken all actions necessary to remedy the
24 violations.
- 25 • Ordering that the Company establish protocols to ensure that all shareholders,
26 directors, employees, or officers of BWC are prohibited from using Company
27 revenues for personal expenses, including payments on personal debt.
- 28 • Ordering BWC to pursue whatever action may be necessary to refinance the loan from
Steven and Janet Adams, thereby removing BWC as the obligor.
- Ordering Brad Ness, Gloria Ness, Erik Ness, and Dianah Ness (AKA Diana Ness) to
refinance the loan from Steven and Janet Adams removing BWC as the obligor.

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- Entering a preliminary injunction to enjoin the Company from allowing Brad Ness, Gloria Ness, Erik Ness, or Dianah Ness (AKA Diana Ness) access to Company funds and bank accounts
- Permanently enjoining the Company from allowing Brad Ness, Gloria Ness, Erik Ness, or Dianah Ness (AKA Diana Ness) access to Company funds and bank accounts until further order of the Commission.
- Entering a preliminary injunction to enjoin Brad Ness, Gloria Ness, Erik Ness, or Dianah Ness (AKA Diana Ness) from accessing Company funds and bank accounts.
- Permanently enjoining Brad Ness, Gloria Ness, Erik Ness, or Dianah Ness (AKA Diana Ness) from accessing all Company revenues and bank accounts until further order of the Commission.
- Ordering BWC to pursue whatever action may be necessary to obtain reimbursement from any shareholder, officer, director, or employee who has used Company funds for personal obligations or has otherwise taken funds from the Company.
- Ordering Brad Ness, Gloria Ness, Erik Ness, and Dianah Ness (AKA Diana Ness) to repay any Company funds used by him/her to pay personal expenses, including but not limited to payments on the long-term debt owed to the McClains and payments on the long-term debt owed to Steven and Janet Adams.
- Ordering Brad Ness, Gloria Ness, Erik Ness, and Dianah Ness (AKA Diana Ness) to repay all standpipe revenues used for purposes other than the design, approval, and construction of a new water source.
- Ordering the Company to pursue whatever action may be necessary to obtain repayment of all standpipe revenues used by Brad Ness and Erik Ness for purposes other than the design, approval, and construction of a new water source.
- Ordering BWC to provide information to the Commission explaining how BWC intends to operate in the future, whether BWC intends to continue to operate as a corporation, and if so, what controls will be utilized to prevent further disregard of the corporate form, co-mingling of funds, and further violation of applicable statutes, rules, and orders.
- Imposing fines and penalties for each violation pursuant to Article XV, Sections 16 and 19 of the Arizona Constitution and A.R.S. §§ 40-424 and -425 in an amount to be determined by the Commission after a hearing.
- Ordering such other relief as the Commission may find just and reasonable.

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RESPECTFULLY SUBMITTED this 18th day of April, 2011.


Ayesha K. Vohra, Staff Attorney
Bridget A. Humphrey, Staff Attorney
Legal Division
Arizona Corporation Commission
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Original and thirteen (13) copies of the foregoing were filed this 18th day of April, 2011 with:

Docket Control
Arizona Corporation commission
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Copies of the foregoing were mailed this 19th day of April, 2011 to:

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