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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

Arizona Corporation Commission

DOCKETED

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

MAY 27 2011

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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

DECISION NO. 72376

**OPINION AND ORDER**

- DATE OF HEARING: May 3, 2011
- PLACE OF HEARING: Phoenix, Arizona
- ADMINISTRATIVE LAW JUDGE: Marc E. Stern
- APPEARANCES: Bellemont Water Company, Brad Ness, Gloria Ness, Erik Ness and Dianah Ness, *pro per*; and Ms. Ayesha Vohra and Ms. Bridget Humphrey, Staff Attorneys, Legal Division, on behalf of the Utilities Division of the Arizona Corporation Commission.

**BY THE COMMISSION:**

On December 16, 2010, the Utilities Division (“Staff”) of the Arizona Corporation Commission (“Commission”) filed a Complaint against Bellemont Water Company (“Bellemont”) and certain of its shareholders as follows: Brad Ness, Gloria Ness; Erik Ness; and Dianah Ness (aka Diana Ness) (collectively “Respondents”) for alleged violations of Arizona law and Commission Decisions.

On January 6, 2011, a Joint Answer was filed by Bellemont, Brad Ness, Gloria Ness, Erik Ness and Dianah Ness.

On January 12, 2011, a separate response was filed by Klaudia Ness who was not named as a Respondent in the Complaint.

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1 On January 14, 2011, by Procedural Order, a procedural conference was scheduled on  
2 February 8, 2011.

3 On February 8, 2011, Staff appeared with counsel and Respondents appeared on their own  
4 behalf at the procedural conference. The parties discussed the issues in the proceeding, but they were  
5 unable to reach a satisfactory resolution of the Complaint. At the conclusion of discussions, Staff  
6 requested that a hearing be scheduled.

7 On February 14, 2011, a response was filed by Erik Ness as president of Bellemont.

8 On February 16, 2011, by Procedural Order, a hearing was scheduled on May 3, 2011, and  
9 other procedural filing dates were established for the Staff Report (April 8, 2011) and a response by  
10 Respondents (April 22, 2011).

11 On April 5, 2011, Brad, Gloria, Erik and Dianah Ness filed a response to Counts 1 through 4  
12 of the Complaint.

13 On April 8, 2011, Staff filed a Motion for Extension of Time ("Motion") in which to file its  
14 report, which was due to be filed on the date. Staff requested an extension of time until April 15,  
15 2011, in which to file its report due to the discovery of new facts and the complicated nature of the  
16 proceeding. Staff further stated Respondents' response to the Staff Report should be extended to  
17 April 29, 2011.

18 On April 12, 2011, by Procedural Order, Staff's Motion was granted and extensions were  
19 authorized for Staff to file its report and for Respondents to file their response.

20 On April 18, 2011, Staff filed a Motion to Amend Complaint to add an additional Count to  
21 the Complaint herein based on recently discovered evidence. Additionally, Staff filed a Motion for  
22 "Preliminary Injunction".

23 On April 28, 2011, Brad, Gloria, Erik and Dianah Ness filed a request for an extension of time  
24 to respond to the amended Complaint together with a request for a continuance of the proceeding.

25 On April 29, 2011, by Procedural Order, Staff's Motion to Amend Complaint was granted.  
26 Staff's Motion for Preliminary Injunction was taken under advisement. Respondents' request for an  
27 extension of time to respond to the amended Complaint was granted. However, with respect to the  
28 request for a continuance of the proceeding, it was taken under advisement pending a discussion at

1 the scheduled outset of the evidentiary hearing on May 3, 2011.

2 On May 3, 2011, a hearing was convened before a duly authorized Administrative Law Judge  
3 of the Commission at its offices in Phoenix, Arizona. Staff appeared with counsel and Respondents  
4 appeared for Bellemont and on their own behalf. At the beginning of the proceeding, the parties  
5 discussed Staff's requested relief in the form of injunctive relief and Respondents indicated they did  
6 not oppose this action. Subsequently, a brief hearing was conducted and Bellemont's president  
7 testified that Staff's initial requested form of relief was not opposed by the Respondents after which  
8 the proceeding was taken under advisement pending submission of a recommended Opinion and  
9 Order to the Commission.

10 \* \* \* \* \*

11 Having considered the entire record herein and being fully advised in the premises, the  
12 Commission finds, concludes, and orders that:

13 **FINDINGS OF FACT**

14 1. Pursuant to authority granted by the Commission in Decision No. 58077 (November  
15 12, 1992), Bellemont is an Arizona corporation engaged in the business of providing water service to  
16 eight metered commercial customers and to a number of standpipe customers approximately ten  
17 miles west of Flagstaff in Coconino County, Arizona.

18 2. The issuance of Bellemont's Certificate was conditioned upon compliance with  
19 Arizona law and Commission rules.

20 3. Bellemont's shareholders are Brad Ness, Gloria Ness, Erik Ness, Dianah Ness (aka  
21 Diana Ness), Elliot Ness, Klaudia Ness, and George Wong.<sup>1</sup>

22 4. Although the Commission's Corporations Division records indicate that Bellemont's  
23 officers are Brad Ness (President), Erik Ness (Vice President), Elliot Ness (Treasurer), and Klaudia  
24 Ness (Secretary), it was disclosed at the hearing that Erik Ness was recently selected as president of  
25 the Company and that Brad Ness is no longer an officer. Bellemont's directors are Brad Ness, Erik  
26 Ness, Elliot Ness, and Klaudia Ness.

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28 <sup>1</sup> The Ness family controls approximately 75 percent of Bellemont's stock. It is believed that George Wong is deceased and his estate is believed to hold the remainder of the outstanding stock.

1           5.       Erik Ness testified, that he is now President, Elliot Ness is now Vice President, Gloria  
2 Ness is now Treasurer, and Klaudia Ness remains the Secretary.

3           6.       During the August 24, 2010, Commission Open Meeting which resulted in Decision  
4 No. 71868 (September 1, 2010), the Commission directed Staff to investigate allegations made by  
5 Klaudia Ness that Bellemont's funds were being misused.<sup>2</sup>

6           7.       On December 16, 2010, Staff filed a Complaint alleging that Bellemont, Brad Ness,  
7 Gloria Ness, Erik Ness, and Dianah Ness (aka Diana Ness) violated A.R.S. §§ 40-301(B), 40-302(A),  
8 40-202(L), 40-204, Commission Decision Nos. 70482 and 71868, as well as A.A.C. R14-2-411.D.4.

9           8.       On April 18, 2011, Staff filed an Amended Complaint which included additional  
10 allegations that Erik Ness had violated A.R.S. § 40-202(L) and Commission Decision No. 71868.

11          9.       Based on the allegations in the amended Complaint, Brad Ness, Gloria Ness, Erik  
12 Ness, and Dianah Ness (aka Diana Ness) are serving as a public service corporation in fact by virtue  
13 of their disregard for the corporate form, their use of company revenue for personal expenses, and  
14 their co-mingling of corporate and personal funds

15          10.      The Amended Complaint requested relief in the form of an injunction "to enjoin the  
16 Company from allowing Brad Ness, Gloria Ness, Erik Ness, or Dianah Ness (aka Diana Ness) access  
17 to Company funds and bank accounts."<sup>3</sup> The Complaint additionally requested relief "to enjoin Brad  
18 Ness, Gloria Ness, Erik Ness, or Dianah Ness (aka Diana Ness) from accessing Company funds and  
19 bank accounts."<sup>4</sup>

20          11.      On April 15, 2011, Staff filed a Staff Report which provides the factual basis for the  
21 alleged violations.

22          12.      On April 18, 2011, Staff filed a Motion for Preliminary Injunction again requesting  
23 that the Commission approve injunctive relief against the Respondents.

24          13.      Although the Respondents deny the misuse of Bellemont's funds, Brad Ness, Gloria  
25 Ness, Erik Ness, and Dianah Ness (aka Diana Ness) do not oppose the issuance of injunctive relief as  
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27 <sup>2</sup> Decision No. 71868 was the result of the Company's last rate case. In that proceeding, the Commission also denied  
Bellemont's application for financing approval for \$1.75 million to develop another water source for the utility.

28 <sup>3</sup> Docket No. W-02526A-10-499, Complaint at 9:9-10.

<sup>4</sup> Docket No. W-02526A-10-0499, Complaint at 9:13-14.

1 requested by Staff.

2 14. There is a significant possibility of irreparable injury and further violation of  
3 Commission Decisions if Brad Ness, Gloria Ness, Erik Ness, or Dianah Ness (aka Diana Ness) are  
4 not prohibited from accessing Bellemont's funds and bank accounts.

5 15. The balance of hardships favors the granting of the relief requested by Staff in this  
6 matter.

7 16. Public policy favors the granting of the requested relief in this matter.

8 **CONCLUSIONS OF LAW**

9 1. Bellemont is a public service corporation within the meaning of Article XV of the  
10 Arizona Constitution and A.R.S. §§ 40-281 and 40-282.

11 2. Pursuant of Article XV of the Arizona Constitution and A.R.S. § 40-246, the  
12 Commission has jurisdiction to hear complaints against public service corporations.

13 3. The Commission has jurisdiction over Bellemont, Brad Ness, Gloria Ness, Erik Ness,  
14 and Dianah Ness (aka Diana Ness) and the subject matter of this Complaint.

15 4. Staff's requested relief which has been agreed to by Brad Ness, Gloria Ness, Erik  
16 Ness, and Dianah Ness (aka Diana Ness) is warranted in this instance and should be issued.

17 **ORDER**

18 IT IS THEREFORE ORDERED that Bellemont Water Company shall not allow Brad Ness,  
19 Gloria Ness, Erik Ness, and Dianah Ness (aka Diana Ness) access to any funds and bank accounts of  
20 Bellemont Water Company until further order of the Commission.

21 IT IS FURTHER ORDERED that Brad Ness, Gloria Ness, Erik Ness, and Dianah Ness (aka  
22 Diana Ness) shall not access any of the revenues and bank accounts of Bellemont Water Company  
23 until further order by the Commission.

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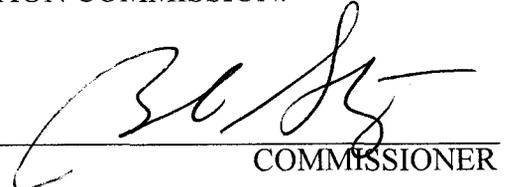
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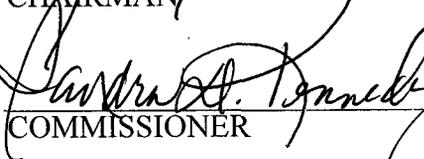
1 IT IS FURTHER ORDERED that the Hearing Division shall issue a Procedural Order to  
2 schedule further proceedings in the matter in order to address the material issues raised by the  
3 Complaint as amended.

4 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

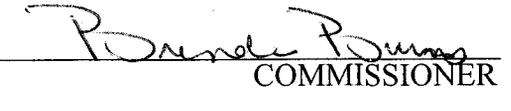
5 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

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CHAIRMAN

  
COMMISSIONER

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COMMISSIONER

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12 IN WITNESS WHEREOF, I, ERNEST G. JOHNSON,  
13 Executive Director of the Arizona Corporation Commission,  
14 have hereunto set my hand and caused the official seal of the  
15 Commission to be affixed at the Capitol, in the City of Phoenix,  
16 this 27<sup>th</sup> day of MAY, 2011.

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18 ERNEST G. JOHNSON  
19 EXECUTIVE DIRECTOR

20 DISSENT \_\_\_\_\_

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22 DISSENT \_\_\_\_\_

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SERVICE LIST FOR:

BELLEMONT WATER COMPANY

DOCKET NO.

W-02526A-10-0499

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