

ORIGINAL



0000143585

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

BEFORE THE ARIZONA CORPORATION CO

COMMISSIONERS

BOB STUMP - Chairman  
GARY PIERCE  
BRENDA BURNS  
BOB BURNS  
SUSAN BITTER SMITH

RECEIVED

2013 MAR 19 A 9:35

ARIZONA CORPORATION COMMISSION  
SECRET CONTROL

Arizona Corporation Commission  
DOCKETED

MAR 19 2013

DOCKETED BY *JM*

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

**THIRTEENTH**  
**PROCEDURAL ORDER**  
**(Continues Status Conference)**

**BY THE COMMISSION:**

On December 16, 2010, the Utilities Division ("Staff") of the Arizona Corporation Commission ("Commission") filed a Complaint against Bellemont Water Company ("BWC" or "Company") 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 BWC, 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.

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

On February 8, 2011, Staff appeared with counsel and Respondents appeared on their own behalf. The parties discussed the issues between the parties, but were unable to reach a satisfactory resolution of the Complaint. Staff indicated that it may seek injunctive relief in the proceeding and may require a court order. At the conclusion of the procedural conference, Staff requested that a

1 hearing be scheduled.

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

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

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

8 On April 8, 2011, Staff filed a Motion for Extension of Time ("Motion") in which to file its  
9 report, which was due to be filed on the date. Staff requested an extension of time until April 15,  
10 2011, in which to file its report due to the discovery of new facts and the complicated nature of the  
11 proceeding. Staff further stated Respondents' response to the Staff Report should be extended to  
12 April 29, 2011.

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

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

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

20 On April 29, 2011, by Procedural Order, Staff's Motion to Amend Complaint was granted.  
21 Staff's Motion for Preliminary Injunction was taken under advisement. With respect to Respondents'  
22 request for an extension of time to respond to the amended Complaint, Respondents' request was  
23 granted. Respondent's request for a continuance of the proceeding was taken under advisement  
24 pending a discussion to be held at the outset of the hearing on May 3, 2011, to determine whether  
25 additional time was required for Respondents' defense to the allegation in the amended Complaint.

26 On May 3, 2011, at what was to be the initial hearing in the proceeding, Staff appeared with  
27 counsel and Respondents appeared on their own behalf. Klaudia Ness, who is not a named  
28 Respondent, but is BWC's corporate secretary and a part owner, also appeared.

1           Subsequently, Respondent Erik Ness testified that he is now the president of BWC replacing  
2 his father, Respondent Brad Ness. Respondent Erik Ness stated that neither he nor any of the other  
3 individually named Respondents who own the majority of the stock in BWC would access any of  
4 BWC's bank accounts or revenues. He acknowledged that the Respondents did not oppose the  
5 issuance of a preliminary injunction by the Commission which orders the Respondents to refrain  
6 from taking any part in BWC's financial dealings or taking part in its management. He also stated  
7 that the majority of the shareholders in BWC wished to sell their stock in the Company to a  
8 prospective purchaser who will need to see BWC's records and bank statements.

9           BWC's corporate secretary, Klaudia Ness, testified that she works as the Company's day-to-  
10 day operator. She stated that her husband, Elliot Ness, who also has not been named as a  
11 Respondent, wished to sell his shares in BWC, but she does not wish to sell her shares. Ms. Ness  
12 further stated that she would notify Staff if she becomes aware of any of the individually named  
13 Respondents accessing any of BWC's accounts or revenues, and will continue to cooperate with Staff  
14 during the pendency of the proceeding. Because Erik Ness had explained that the prospective  
15 purchaser of BWC will need to review the Company's records and bank statements, Klaudia Ness  
16 was directed to make copies of the documents for the past two years available through Rodney  
17 Wilson, BWC's accountant, by the middle of the following week.

18           At the conclusion of the proceeding on May 3, 2011, Respondents were granted leave, until  
19 June 1, 2011, to file their response to the amended Complaint.

20           On May 27, 2011, the Commission issued Decision No. 72376 which orders the named  
21 Respondents to not access the Company's funds or revenues.

22           On June 1, 2011, Respondents filed their response to the amended Complaint and noted that  
23 BWC's accountant had not provided copies of BWC's bank statements for the past two years and had  
24 reported that Klaudia Ness had instructed him not to give them to the Respondents.

25           On June 24, 2011, by Procedural Order, a status conference was scheduled on July 26, 2011.

26           On July 14, 2011, Staff filed a Motion for a Continuance of the Status Conference because  
27 Staff's counsel had a schedule conflict due to another proceeding having been scheduled previously.

28           On July 18, 2011, by Procedural Order, the status conference was continued to August 22, 2011.

1 On August 22, 2011, at the status conference, Staff appeared with counsel, and Respondents  
2 Brad, Erik and Dianah Ness appeared on their own behalf. Klaudia Ness, who is managing the utility  
3 on a day-to-day basis, appeared telephonically.

4 Respondents Brad, Erik and Dianah Ness indicated that Klaudia Ness had still not turned over  
5 copies of BWC's records and bank statements as previously ordered. Klaudia Ness responded that  
6 she had been confused, and was again directed to provide copies of the documents to the Respondents  
7 by August 25, 2011.

8 Staff indicated that there have been no complaints from customers regarding the provision of  
9 service. However, Staff had learned that notice had been given of a Trustee's Sale on November 3,  
10 2011, for the sale of BWC's assets which it was believed would include the utility's well site, storage  
11 facilities and related assets. The sale arose due to the alleged unauthorized long-term debt incurred by  
12 Respondents who used the proceeds of a loan from third parties to pay for their stock in BWC as set  
13 forth in the Complaint which was filed by Staff on December 16, 2010. Staff was to investigate  
14 possible legal options with respect to the impending Trustee's Sale.

15 On August 23, 2011, by Procedural Order, a status conference was scheduled on October 6,  
16 2011.

17 On October 6, 2011, at the status conference, Staff appeared with counsel. Erik and Dianah  
18 Ness appeared on their own behalf. Klaudia Ness also appeared. Staff's attorney indicated that Staff  
19 had been in contact with Pioneer Title and a Flagstaff attorney. Staff believed that the Trustees' Sale  
20 had been placed on hold, and Staff agreed to follow this matter closely.

21 Erik Ness indicated that a realtor had approached him concerning the possible sale of the  
22 Company or its stock. Mr. Ness also requested some additional records from Klaudia Ness who was  
23 to provide copies of the records at BWC's accountant's office.

24 The parties agreed that an additional status conference was to be scheduled in approximately  
25 60 days.

26 On October 7, 2011, by Procedural Order, another status conference was scheduled on  
27 January 5, 2012.

28 On January 5, 2012, at the status conference, Staff appeared with counsel and Erik and

1 Dianah Ness appeared on their own behalf. Klaudia Ness, the Company's corporate secretary, did  
2 not enter an appearance. Staff was continuing to monitor the situation and BWC remained for sale.  
3 Staff reported that the Trustee's Sale had been delayed until April 2, 2012, and other legal issues  
4 involving title insurance were pending. Erik Ness requested that Staff contact Klaudia Ness to direct  
5 her to send bank statements directly to him to help facilitate BWC's sale. Staff concluded by  
6 requesting that another status conference be scheduled before the pending Trustee's sale on April 2,  
7 2012.

8 On January 6, 2012, by Procedural Order, another status conference was scheduled to be held  
9 on March 12, 2012.

10 On March 12, 2012, at the status conference, Staff appeared with counsel. Erik Ness  
11 appeared as the president of BWC and on his own behalf telephonically. Klaudia Ness, BWC's  
12 corporate secretary, who is not a party, also appeared telephonically. Staff believed that the Trustee's  
13 Sale would be vacated or continued in April. Klaudia Ness was also directed to be sure to provide  
14 any past and future bank statements of BWC to Erik Ness in a timely fashion. Staff further requested  
15 that another status conference be scheduled in approximately six months to review the Company's  
16 status and its prospects for sale.

17 On March 15, 2012, by Procedural Order, another status conference was scheduled on  
18 September 13, 2012.

19 On September 7, 2012, Steven D. Adams and Jane A. Adams, husband and wife (collectively  
20 "Adams"), filed an application to intervene in the above-captioned proceeding pursuant to A.A.C.  
21 R14-3-105. Their application described the facts surrounding a September 13, 2010, loan agreement  
22 between Adams and BWC and the majority of its shareholders. The loan funds were used to resolve  
23 litigation involving the purchase of BWC from its former owner. Adams stated further that one day  
24 before the close of the loan transaction, several of the Ness family members executed an amended  
25 loan agreement which substituted BWC as the sole borrower with the loan secured by a deed of trust  
26 on real property that is owned by BWC. Subsequently, after BWC defaulted on the loan, Adams was  
27 advised that the subject loan had not been approved previously by the Commission as required by law  
28 pursuant to A.R.S. § 40-301, et seq. and therefore the loan was void. As a result, Adams stated that

1 they have a direct interest in this proceeding, and Adams further stated that a lawsuit for monies  
2 owed and other relief had been filed in the Coconino County Superior Court against BWC and the  
3 individual members of the Ness family who are shareholders.

4 On September 10, 2012, Adams filed notice with the Commission of the related civil  
5 Complaint which had been filed against BWC and the Ness family shareholders in the Coconino  
6 County Superior Court, Case No. CV2012-00590.

7 On September 12, 2012, the status conference was continued, and the parties herein were  
8 ordered to file responses to the application by Adams to intervene in this proceeding by September  
9 26, 2012.

10 On February 5, 2013, Mr. Rodney C. Wilson, a Certified Public Accountant ("CPA") who  
11 provides professional services to BWC, filed a letter which requested Commission authorization for  
12 the Company to pay his accounting fees from the Company's restricted separate interest bearing  
13 account that was a result of Decision No. 70482 (September 3, 2008).

14 On February 19, 2013, Dianah Ness, a BWC shareholder and a named Respondent in this  
15 proceeding, filed a letter of complaint against Klaudia Ness, BWC's corporate secretary and day-to-  
16 day operator. Dianah Ness alleged in her letter that Klaudia Ness was refusing to turn over corporate  
17 minutes and Company records as previously ordered. Additionally, Dianah Ness alleged that Klaudia  
18 Ness was misusing Company funds for personal purposes. It was not indicated whether a copy of  
19 this letter was sent to Klaudia Ness. Additionally, there had been no responses filed to the  
20 application for intervention filed by Adams in this proceeding.

21 On February 26, 2013, by Procedural Order, a copy of Dianah Ness' letter of complaint  
22 against Klaudia Ness was attached to the Procedural Order as Exhibit "A" and sent to Klaudia Ness  
23 who is not a party in this proceeding, but was ordered to file a response to Dianah Ness' allegations  
24 by March 18, 2013. Further, the application to intervene which was filed by Adams, was granted,  
25 and lastly, a status conference was scheduled on March 20, 2013.

26 On March 15, 2013, Klaudia Ness filed a letter requesting an "extension" of time to prepare  
27 for the status conference, but the letter failed to contain any information whether service was made on  
28 the other parties to the proceeding. Klaudia Ness did indicate that she had spoken to Staff and that

1 Staff did not oppose the requested extension.

2 Accordingly, the request for additional time should be granted, but in the future all filings  
3 should be made with an original and 13 copies when filed at the Commission. Additionally, the filing  
4 party must send copies of the filing to all parties to the proceeding as it appears at page eight of this  
5 Procedural Order, except Arizona Reporting Service, Inc.

6 IT IS THEREFORE ORDERED that a status conference shall be continued from **March 20,**  
7 **2013, to April 25, 2013 at 11:00 a.m.**, at the Commission's offices, 1200 West Washington St., 2<sup>nd</sup>  
8 Floor Conference Room, Phoenix, Arizona.

9 IT IS FURTHER ORDERED that Bellemont Water Company's corporate secretary, Klaudia  
10 Ness, shall provide copies of the Company's records and any additional bank statements for the past  
11 two years and on an on-going basis provide same to Erik Ness herein as previously ordered.

12 IT IS FURTHER ORDERED that all parties and Klaudia Ness shall file, in any Commission  
13 filings, an original and 13 copies and also mail copies of said filing to the respective parties of their  
14 counsel as they appear on the service list of this Procedural Order concerning this proceeding.

15 IT IS FURTHER ORDERED that all parties must comply with Rules 31 and 38 of the Rules  
16 of the Arizona Supreme Court and A.R.S. § 40-243 with respect to the practice of law and admission  
17 *pro hac vice*.

18 IT IS FURTHER ORDERED that withdrawal or representation must be made in compliance  
19 with A.A.C. R14-3-104(E) and Rule 1.16 of the Rules of Professional Conduct (under Rule 42 of the  
20 Rules of the Arizona Supreme Court). Representation before the Commission includes appearances  
21 at all hearings and procedural conferences, as well as all Open Meetings for which the matter is  
22 scheduled for discussion, unless counsel has previously been granted permission to withdraw by the  
23 Administrative Law Judge or the Commission.

24 IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113-Unauthorized  
25 Communications) is in effect and shall remain in effect until the Commission's Decision in this  
26 matter is final and non-appealable.

27 ...

28 ...

1 IT IS FURTHER ORDERED that the Presiding Administrative Law Judge may rescind, alter,  
2 amend, or waive any portion of this Procedural Order either by subsequent Procedural Order or by  
3 ruling at hearing.

4 DATED this 19<sup>TH</sup> day of March, 2013.



MARC E. STERN  
ADMINISTRATIVE LAW JUDGE

9 Copies of the foregoing mailed/delivered  
10 this 19<sup>th</sup> day of March, 2013 to:

11 Brad Ness  
12 Gloria Ness  
13 Erik Ness  
14 Dianah Ness  
15 3960 North Pinal Street  
16 Kingman, AZ 86409

Janice Alward, Chief Counsel  
Legal Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, AZ 85007

14 Klaudia Ness  
15 BELLEMONT WATER COMPANY  
16 P.O. Box 31176  
17 Flagstaff, AZ 86003

Steve Olea, Director  
Utilities Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, AZ 85007

17 Mary Keller Wong  
18 10426 West Harmont Dr.  
19 Peoria, AZ 85345

ARIZONA REPORTING SERVICE, INC.  
2200 North Central Avenue, Suite 502  
Phoenix, AZ 85004-1481

19 Andrew Abram  
20 David M. Villadolid  
21 Steven J. Lippman  
22 BURCH & CRACCHIOLO, P.A.  
702 E. Osborn Rd., Suite 200  
Phoenix, AZ 85014  
Attorneys for Steven D. and Janet A. Adams

By:   
Debbi Person  
Assistant to Marc E. Stern

23  
24  
25  
26  
27  
28