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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

BOB STUMP, CHAIRMAN
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2014 OCT 20 PM 2 42

ORIGINAL

IN THE MATTER OF CAREFREE 34,
INC./OFFICE ON EASY STREET INC.,
dba VENUES CAFÉ,

COMPLAINANT.

vs.

LIBERTY UTILITIES CORPORATION
f/k/a BLACK MOUNTAIN SEWER
CORPORATION,

RESPONDENT.

) DOCKET NO. SW-02361A-13-0359
)
) MOTION FOR CONTINUENCE OF
) RESCHEDULED HEARING

Arizona Corporation Commission

DOCKETED

OCT 20 2014

DOCKETED BY

Carefree 34, Inc. and Office on Easy Street, Inc., doing business as Venues Café (Complainant), respectfully requests a continuance of the rescheduled hearing currently set for October 28, 2014 for the following reasons:

1. Attorney Lawrence V. Robertson retained as an advisor to the Complainant in this matter is in Australia on an annual trail ride and seriously unavailable for consultation on the short notice provided for the hearing now scheduled on October 28th.
2. Managing Partner, Catherine Marr, has been mostly in Connecticut attending to urgent management needs of their small restaurant in Brookfield and unavailable for meaningful discussions to strategize or comply with onerous disclosure demands by Respondent's attorney within five (5) calendar days.
3. The Utility spent over \$250,000, and hundreds (perhaps thousands) of work hours and many years evaluating, strategizing and creating exhibits to justify the last rate case

1 that provided inputs for the Commission leading to Decision No. 71865. The
2 demands placed upon Complainant by the attorney for the Respondent are an
3 unreasonable burden (given the available time to respond) and Respondent's attorney
4 is threatening legal sanctions; Complainant will not have the time or resources to
5 begin to review available documentation for Exhibits necessary to adequately address
6 the many Respondent's questions prior to the October 28th hearing date and, based
7 upon the copious amounts of time the Utility takes in preparing their application for
8 rate increase it would seem reasonable for the Administrative Law Judge to continue
9 this proceeding, pending the outcome of the Commission's decision to reopen the rate
10 case pursuant to A.R.S. § 40-252.

- 11 4. The Respondent seems to be willing (EXHIBIT "A") to consider a continuance,
12 underscoring the lack of urgency in addressing this issue by the Utility, if the
13 restaurant pays \$9197.84 in disputed charges, over and above the \$4,088.02 paid
14 since the commencement of the process.
- 15 5. The restaurant has increased payments of its historic \$87.32 monthly sewage charge
16 to an average \$177.74 per month for the last 22 months—an amount commensurate to
17 Rates per meal served, authorized in Engineering Bulletin 12's meal count and the
18 rates charged in Phoenix, Scottsdale and Cave Creek—to pay its fair share. The
19 Respondent's parent is a publicly held Canadian Company; the disputed sums will
20 have any almost zero effect on its cash flow or US\$ 1.8 billion market value, and will
21 not jeopardize the economic viability of the Utility.
- 22 6. Liberty Utilities f/k/a BMSC's attorney refuses to cooperate in properly answering
23 Discovery questions by stonewalling any questions regarding the historic/arbitrary
24 Billing Practices of the Utility or perceived/alleged misrepresentations to the
25 Commission by employees of the Utility claiming Decision No. 71865. is final and
26 not subject to appeal or modification; these legal questions can only be properly
27 addressed by consulting an attorney specializing in Public Utilities and most respected
28 firms in Phoenix have a representation conflict or require major (\$25,000) retainers,
29 leaving no reasonable options for advice until Attorney Robertson returns.

1 **BACKGROUND**

2 On September 1, 2010 the Commission issued Decision No. 71865 in the above-
3 captioned and docketed proceeding granting Black Mountain Sewer Corporation (“BMSC”) an
4 increase in rates and charges for sewer services. One of the authorized increases was for sewer
5 service provided to commercial restaurant establishments, such as the one owned and operated by
6 Complainant. In that regard, Complainant did not purchase the restaurant business which it
7 operates as Venues Café until August of 2010. Thus, Complainant had zero knowledge of the
8 crippling rate increase requested by the Utility and was not a party to the proceedings before the
9 Commission in Docket No. SW-02361A-08-0609, including the hearings held in November of
10 2009, which resulted in the Commission’s issuance of Decision No. 71865.

11 Following the issuance of Decision No. 71865, Complainant was billed a flat monthly
12 rate of \$87.06 for wastewater service provided to the Venues Café by BMSC until April 2013.
13 However, in January of 2013, Complainant received a “courtesy letter” from Liberty Utilities
14 (“Liberty”), which apparently had acquired BMSC in the interim, advising Complainant that
15 Complainant was going to be switched from the aforesaid flat monthly rate for wastewater
16 service to a monthly per gallon/per day flow rate of to \$805.90, or an increase on the order of
17 approximately 925%! Stated differently, the annual rate to which the Venues Café is now subject
18 for wastewater service exceeds the annual property tax rate for the premises in which the
19 restaurant is located by approximately 350%!

20 Subsequent to receipt of the “courtesy letter,” representatives of Complainant contacted
21 the Commission, attended a mediation session arranged by the Commission’s Staff and
22 participated in a least three (3) meetings with representatives of Liberty in an effort to reach a
23 mutually acceptable resolution of the above egregious situation. Unfortunately, despite the
24 efforts of all concerned, such a resolution was not forthcoming.

25 Accordingly, on October 22, 2013, Complainant filed a Formal Complaint with the
26 Commission. In that regard, Complainant’s Formal Complaint was assigned Docket No. SW-
27 02361A-13-0359.

28 On November 4, 2013, the Commission issued a Procedural Order scheduling a
29 Procedural Conference in Docket No. SW-02361A-13-0359 “to explore the issues involved in
the proceeding.” The Procedural Conference was conducted on November 19, 2013; and,

1 representatives of Complainant, Liberty and the Commission's Staff were in attendance. On
2 January 14, 2014, Administrative Law Judge Marc E. Stern issued a Procedural Order setting a
3 hearing for April 24, 2014, further clarifying that "in the event the Complainant files a request for
4 action by the Commission in Docket No. SW-02361A-08-0609 pursuant to A.R.S. § 40-252 than
5 this hearing will be continued pending the outcome of Complainant's request to reopen the rate
6 case."

7 During the November 19, 2013 Procedural Conference, it was suggested that
8 Complainant might want to consider also filing a petition and request asking the Commission to
9 exercise its jurisdiction and authority pursuant to A.R.S. § 40-252 so as to address the rate
10 situation which is of concern to Complainant. This petition and request was filed on or about
11 April 23, 2014 and pending a Decision.

12 II.

13 DISCUSSION

14 A. Role of Engineering Bulletin No. 12 and Rate Design in Decision No. 71865.

15 Accepting for purposes of discussion Liberty's representation in its October 30, 2013
16 Response to Formal Complaint that Complainant was not billed at the aforementioned per
17 gallon/per day monthly flow rate until April 2013, because Liberty (and/or BMSC) had
18 erroneously classified Complainant's business as an office rather than a restaurant, the underlying
19 rate and flow rate assumption(s) and methodology upon which monthly bills for wastewater
20 service are calculated under that rate are suspect when applied to a business such as
21 Complainant. Accordingly, the Commission has the opportunity to exercise its jurisdiction and
22 authority under A.R.S. § 40-252 and address and resolve the situation at this time.

23 More specifically, as the following excerpt from Decision No. 71865 clearly
24 demonstrates, the per gallon/per day flow rate of Liberty (and previously BMSC) under which
25 Complainant has been billed for wastewater service since April of 2013 is predicated upon what
26 was then believed to be a regulation of the Arizona Department of Environmental quality
27 ("ADEQ"):

28 "Mr. Sorenson testified that because wastewater flows
29 cannot be metered efficiently, except at high volumes, BMSC's
current tariff for commercial customers uses ADEQ Engineering
Bulletin No. 12 ("Bulletin No. 12") to determine flow levels for
various types of commercial establishments. (Ex. A-2, at 5-6.) The

1 Company argues that although it is unclear why this approach was
2 initially used, absent a viable alternative proposal Bulletin No. 12
3 should continue to be the basis for determining rates charged to the
4 more than 130 commercial customers in BMSC's service area.
(*Id.* at 6.)" [Decision No. 71865 at page 57, lines 3-8.]

5 However, an individual intervenor (Dr. Dennis Doelle, D.D.S.) successfully challenged
6 the proposed application of a rate and rate design predicated upon Bulletin No. 12 to his
7 wastewater service situation, as may be noted from the following:

8 "Dr. Dennis Doelle, D.D.S., requested intervention in this
9 case to express his concern with the significant increase that he
10 believes would be imposed on his dental practice as a result of
11 BMSC's rate application and proposed rate design. Dr. Doelle
12 submitted pre-filed testimony and testified at the hearing regarding
13 his concerns with BMSC's use of Bulletin No. 12 as the basis for
14 establishing rates for his practice. (Doelle Exs. 1, 2, and 3.)

15 "Dr. Doelle stated that Bulletin No. 12 is based on
16 assumptions from the 1970s regarding water usage, and thus
17 sewage flows, that are no longer applicable in a modern dental
18 practice. He testified that ADEQ's Bulletin No. 12 established
19 sewage flows at 500 gpd, per dental chair, based on the assumption
20 that each chair had a "cuspidor" (*ie.*, a chair-side sink) with
21 continuously circulating water. Dr. Doelle added that modern
22 dental practices use no more water than any other health care
23 provider because in addition to discontinuance of the use of
24 continuous flow cuspidors, x-ray technology is digitized rather than
25 using circulating water tanks, and dentists now use sterile gloves
26 and waterless hand sanitizer rather than constantly washing their
27 hands with harsh soaps. (Tr. 94-95.)

28 "Dr. Doelle produced exhibits that were introduced in his
29 prior complaint case, including a 1997 affidavit by one of the
authors of Bulletin No. 12 and a 1996 letter from a hydrologist at
ADEQ. In the affidavit, the affiant states that the sewage flow rate
for dental practices was based on his incorrect assumption that
dental chairs had constantly running cuspidors. The letter from the
ADEQ hydrologist, dated August 30, 1996, stated that "Bulletin
No. 12 is being rewritten because of some existing technical
problems within the document," and suggested that Dr. Doelle's
wastewater discharge amounts should be calculated based on water
usage. Dr. Doelle attached to his testimony one of his water bills
from Carefree Water Company showing actual water usage at his
office of 11,650 gallons for the month. (Doelle Ex. 2.) This
compares to the 60,000 gallons of sewage flows that would be

1 assumed for a dental practice with 4 dental chairs, using Bulletin
2 No. 12 as a guideline.” [Decision No. 71865 at page 57, line 15 –
3 page 58, line 12] [emphasis added]

4 * * *

5 “We agree with Dr. Doelle that, at least with respect to
6 dental offices, the assumptions contained in ADEQ’s Engineering
7 Bulletin No. 12 are outdated and do not reflect modern practices
8 that are in effect due to improvements in technology and
9 conservation efforts. Therefore, BMSC should bill Dr. Doelle, and
10 a health care provider for purposes of wastewater flow levels.”
11 [Decision No. 71865 at page 58, line 22 - page 59, line 1]
[emphasis added]

12 In addition, while Decision No. 71865 allowed BMSC to continue to rely on Bulletin No.
13 12 for wastewater flow assumptions in connection with the design of wastewater service rates,
14 the Commission expressed reservations about the contemporaneous nature of its assumptions vis-
15 à-vis current customer practices and/or the appropriateness of exclusive reliance upon that
16 regulation for rate design purposes:

17
18 “With the exception discussed above, the Company may, for now,
19 continue to rely on Bulletin No. 12 for flow assumptions.
20 However, the evidence presented by Dr. Doelle shows that the
21 assumptions made in Bulletin No. 12 regarding dental offices is
22 extremely outdated and needs to be revised. The obvious
23 inaccuracy of the assumptions made in that document raises the
concern that other assumptions in Bulletin No. 12, on which the
Company relies for billing all of its commercial customers, may
also be outdated.

24 “Although we understand that BMSC does not currently
25 have access to actual water usage data from the unaffiliated water
26 utilities in its service area, it is not clear why Bulletin No. 12 has
27 not been revised for more than 20 years. Therefore, in its next rate
28 application, we direct BMSC to present evidence regarding
29 alternative methods for calculating sewage flow assumptions used
for billing its commercial customers. The Company should
consider, at a minimum: contacting ADEQ regarding plans for
revising Bulletin No. 12; other sewage flow data based on

1 technological improvements and conservation assumptions; and
2 whether it is possible to obtain actual water usage data from the
3 water utilities in BMSC's service area for purposes of calculating
4 more accurate wastewater flows on its system." [Decision No.
5 71865 at page 59, lines 9-23] [emphasis added]

6 **B. ADEQ Replacement of Engineering Bulletin No. 12 Prior to Issuance of Decision**
7 **No. 71865.**

8 The Commission's aforementioned reservations with respect to the usefulness of Bulletin
9 No. 12 for rate design purpose were well-founded.

10 First, Bulletin No. 12 was not in existence at either the time evidentiary hearings were
11 held in Docket No. SW-02361A-08-0609 in November 2009, or when Decision No. 71865 was
12 issued on September 1, 2010 in that docket. Rather, ADEQ had issued a replacement regulation,
13 which became initially effective on January 1, 2001 and effective in amended form on November
14 12, 2005 . . . or a number of years in advance of when Decision No 71865 was issued and the
15 underlying evidentiary hearings conducted! Why BMSC and its witness relied upon Bulletin No.
16 12 at that time to support BMSC's proposed rate design, in light of this earlier regulatory change,
17 is puzzling.

18 Second, as Decision No. 71865 correctly observed, a comprehensive analysis of the
19 design of rates for wastewater service should include consideration of

20 ". . . sewage flow data based on technological improvements and
21 conservation assumptions. . ." [Decision No. 71865 at page 59,
22 lines 19-20]

23 In that regard, the "Note" appearing immediately below the aforesaid replacement Table 1
24 suggests the willingness of ADEQ to consider such data, as the same pertains to both utility
25 industry and user practices, in connection with the design and permitting of wastewater facilities.
26 Further, that is precisely what the Commission did in Decision No. 71865 in connection with Dr.
27 Doelle and other similarly situated dental practices serviced by BMSC.

28 **C. Availability of Actual Water Usage Data for Purpose of Calculating More Accurate**
29 **Wastewater Flows.**

 In Decision No. 71865, the Commission also directed BMSC to prospectively ascertain

 ". . . whether it is possible to obtain actual water usage data from
 the water utilities in BMSC's service area for purposes of

1 calculating more accurate wastewater flows on its system.”
2 [Decision No. 71865 at page 59, lines 21-23]

3 In that regard, it is Complainant’s understanding that Liberty (as successor to BMSC) could have
4 access to such actual water usage data for its wastewater service customers located within
5 Carefree.

6 More specifically, the Town of Carefree owns and operates Carefree Water Company,
7 and it is Complainant’s understanding that the Town of Carefree is willing to provide Liberty
8 with metered inflows of water to its various water customers, such as Complainants, upon
9 request of such customer(s). This information, in turn, would enable Liberty (and the
10 Commission) to calculate imputed wastewater outflows which more accurately reflected the
11 wastewater customer’s actual water consumption and usage practices. In that regard, according
12 to Complainant’s calculation, Bulletin No. 12 imputed a sewage outflow of 30 gallons per day
13 per chair in a restaurant, which is unreasonably by any stretch of imagination; and, under its
14 current tariff, Liberty would be allowed to charge Complainant for almost 1,000,000 gallons
15 more of imputed wastewater outflow than the amount of water actually purchased and used by
16 Complainant during the last 12 months. The unreasonableness of this situation is demonstrated
17 by Complainant’s estimate of wastewater services charges, for restaurants with assumed water
18 consumption equal to Complainant’s average of 29,253 gallons per month, when calculated on
19 the basis of published rates and charges in the following localities:

- 20 • Carefree: \$808.27 (based upon the number of chairs counted by Liberty Utilities)
- 21 • Cave Creek: \$102.75 (\$45.00, plus \$3.00 per 1,000 gallons over 10,000 gallons)
- 22 • Scottsdale: \$134.55 (\$4.60 per 1,000 gallons)
- 23 • Phoenix: \$189.11 (4.8352 x 39.11 per hundred cubic feet actual usage)

24 **D. Fairness and Rational Ratemaking Require that the Commission Not Wait Until**
25 **Liberty Files its Next Rate Application to Address the Rate Design Situation Which**
26 **is the Subject of this Petition and Request.**

27 While the rate situation which is the subject of this petition and request conceivably could
28 be addressed in a future rate case involving Liberty’s wastewater customers, there is great
29 uncertainty as to when such a rate proceeding and corrective decision by the Commission might
be forthcoming. In the interim, Complainant and other similarly situated restaurants in Carefree

1 will continue to be subject to the economic burden(s) imposed on them by Liberty's existing rate
2 for wastewater service to restaurants, absent ameliorative action by the Commission in response
3 to this petition and request.

4 More specifically, in Decision No. 71865, in connection with its discussion and approval
5 of a rate surcharge related to the then contemplated closure of The Boulders Wastewater
6 Treatment Plant, the Commission ordered that

7 "BMSC will be required to file a full rate application no later than
8 12 months after completion of the closure project. The treatment
9 plant closure project shall be considered to have reached
10 completion upon issuance of a Commission Order approving
11 Staff's recommendation for implementation of a closure
12 surcharge." [Decision No. 71865 at page 54, line 25 – page 55,
13 line 1]

14 However, 3 years and 4 months following the issuance of Decision No. 71865, the closure of The
15 Boulders Wastewater Treatment Plant has yet to occur. To the contrary, it is Complainant's
16 understanding that litigation is currently pending in Maricopa County Superior Court challenging
17 the legality of the Commission's order that the plant be closed; and, it is conceivable that a
18 decision by the Superior Court could be appealed. Thus, the issuance of that Commission order
19 contemplated by Decision No. 71865, which would "trigger" a subsequent filing of a rate
20 application by Liberty may be years into the future.

21 Against the above background, Complainant respectfully submits that fairness and
22 rational ratemaking require that the Commission not wait until Liberty files its next rate
23 application to address the rate design situation which is the subject of this petition and request.
24 Rather, the Commission should adopt that course of action requested of it by Complainant in
25 Section III below.

26 III.

27 CONCLUSION

28 Based upon the preceding discussion, Complainant believes that Decision No. 71865 has
29 resulted in charges for wastewater service for users, such as Complainant and other restaurants in
30 Carefree, which are (i) not "just and reasonable," and thus in violation of Arizona law, and (ii)
31 financially onerous, and thus threatening to the ability of Complainant and similarly impacted
32 other restaurants in Carefree to be viable business enterprises.

1 appropriate continuance to allow the Commission to decide a "fair and reasonable" solution
2 when the time is appropriate.

3 RESPECTFULLY SUBMITTED this 20th day of October, 2014.

4 VENUES CAFÉ

5 
6 By: Catherine Marr

7 
8 By: Al Swanson

9
10 **ORIGINAL** and thirteen (13) copies
11 Of the foregoing were filed
12 this 20th day of October 2014, with:

13 Docket Control
14 Arizona Corporation Commission
15 1200 W. Washington Street
16 Phoenix, AZ 85007

17 **COPY of the foregoing was emailed**
18 This 20th day of October 2014, to:

19 Greg Sorenson
20 Liberty Utilities
21 12725 W. Indian School Road, Suite D-101
22 Avondale, Arizona 85392-9524

23 Jay L. Shapiro
24 Norman D. James
25 Fennemore Craig, PC
26 2394 East Camelback Road, Suite 600
27 Phoenix, AZ 85016-3429
28 Attorneys for Liberty Utilities f/k/a Black Mountain Sewer Corp.

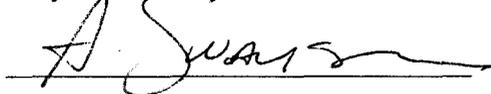
29 By: 

EXHIBIT A



BMSC (13-0359) - Mr. Shapiro's response Continuance

Catherine Marr <venuescafe@gmail.com>
To: Catherine Marr <VenuesCafe@gmail.com>

Mon, Oct 20, 2014 at 11:41 AM

FYI

Venues Café
(480) 595-9909

----- Forwarded message -----

From: **SHAPIRO, JAY** <JSHAPIRO@fclaw.com>
Date: Thu, Oct 16, 2014 at 8:02 AM
Subject: Re: BMSC (13-0359) - Continuance
To: Venues Cafe <venuescafe@gmail.com>
Cc: "BIRK, WHITNEY" <WBIRK@fclaw.com>, Robin Mitchell <rmitchell@azcc.gov>

If you pay your past due bill in full and stay current, the Company would consider a continuance. Absent that, Liberty is being forced into being a credit line for your business.

Thx,

Jay

On Oct 16, 2014, at 6:55 AM, "Venues Cafe" <venuescafe@gmail.com> wrote:

Please forgive us, the "Season" is starting in Carefree and our calendar is dictated by Community events much of which we have zero control and/or dates were scheduled long before we knew about this hearing.

Again, we are requesting you to agree to a continuance...

Sent from an iPad; please excuse Apple's automated typos...

On Oct 14, 2014, at 12:52 PM, "SHAPIRO, JAY" <JSHAPIRO@FCLAW.COM> wrote:

Ms Marr - I am not going to argue with you. The fact is that you have chosen to file a complaint and as such have a burden to respond to discovery in a timely way. These questions are not complicated - you should know who you are calling at a hearing in two weeks and you certainly know whether you have paid your bill. Therefore, if you do not comply by Noon tomorrow, which is more than two weeks after the data requests were served, we will file a motion to compel.

Thx,

Jay

On Oct 14, 2014, at 12:33, "Venues Cafe" <venuescafe@gmail.com> wrote:

Mr. Shapiro,