



0000158140

RECEIVED

2014 NOV 18 P 2: 36

Arizona Corporation Commission

DOCKETED

NOV 18 2014

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

FENNEMORE CRAIG, P.C.
Jay L. Shapiro (No. 014650)
2394 East Camelback Road
Suite 600
Phoenix, Arizona 85016
Attorneys for Liberty Utilities (Black Mountain Sewer) Corp.

ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

DOCKETED BY	
-------------	--

BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE FORMAL
COMPLAINT AGAINST BLACK
MOUNTAIN SEWER CORPORATION
FILED BY CAREFREE 34 INC. / OFFICE
ON EASY STREET, INC. dba VENUES
CAFE.

DOCKET NO: SW-02361A-13-0359

MOTION TO STRIKE

ORIGINAL

Liberty Utilities (Black Mountain Sewer) Corp. (“Liberty”) hereby files this Motion to Strike the Ratepayer’s Post-Hearing Position Statement (“Closing Brief”) filed by Al Swanson and Catherine Marr on behalf of Complainant Carefree 34 Inc./Office on Easy Street, Inc. dba Venues Café’s (“Complainant” or the “Café”).

The Café agreed not to file closing briefs and informed Judge Stern that it had an adequate opportunity to present its case.¹ Additionally, Mr. Swanson is engaged in the unauthorized practice of law. On the merits, the Café’s Closing Brief is unsupported by citation to the evidentiary record and misstates the evidence that was (and was not) in the record. Indeed, the accusatory, rambling and sanctimonious statements in the Closing Brief are nothing more than a desperate attempt to persuade the Commission to modify Decision No. 71865 (September 1, 2010). The Café’s Closing Brief brief should be stricken from the record in this docket.

¹ The transcripts of the November 6, 2014 hearing are not yet available. In some instances herein, Liberty has referenced the time on the videotape of the hearing (“ACC Hearing Video”) in the following format XX:XX:XX.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **A. Procedural Infirmities.**

3 Near the end of the daylong hearing in this docket, Judge Stern asked both parties
4 whether they wished to file closing briefs.² Liberty declined. Mr. Swanson, acting as the
5 representative of the Café, stated only that he had additional questions for Liberty's
6 witness. When asked by Judge Stern, Ms. Marr declined closing briefs, stating that she
7 only wanted to make a closing statement, which she did. Obviously, had Liberty and
8 Judge Stern known that the Café wanted to file closing briefs, the parties would have
9 agreed on a briefing schedule, with filing dates after the transcripts were available and
10 proper briefing that affords all parties due process.

11 From the start, Mr. Swanson took the lead in representing the Complainant in this
12 proceeding, and Liberty assumed he was one of the Café's principals, officers and/or
13 management employees. Shortly before the hearing, Judge Stern directed the Café to file
14 something indicating that the corporation had authorized Mr. Swanson and Ms. Marr to
15 represent the Café's interests in this proceeding. The Café made a filing stating that
16 Ms. Marr was authorized by the corporation to represent its interests.³ The filing further
17 stated that Mr. Swanson is a "Stakeholder 'Silent Partner'" who is also authorized to
18 speak on behalf of the Café.⁴ Then, at hearing, Ms. Marr testified that Swanson is not an
19 employee, shareholder or officer of the corporations.⁵ Thus, he cannot be authorized to
20 represent the Complainant.⁶ Mr. Swanson certainly should not be allowed to file a post-

21 ² This discussion took place at 04:11:55 and then again at 04:18:04 of the ACC Hearing
22 Video.

23 ³ Complainant's Response to Second Set Data Requests (filed October 27, 2014) at 1.

24 ⁴ *Id.*

25 ⁵ ACC Hearing Video at 02:02:50-02:04:00 (testimony of C. Marr).

26 ⁶ Rule 31, Ariz. R. Sup. Ct. Prior to hearing, Liberty opted not to contest Mr. Swanson's
representation of the Café because Liberty believed that Mr. Swanson was an officer,
employee or shareholder (i.e., partner) in the complainant corporations. As it turns out,
however, Mr. Swanson is none of those things.

1 hearing brief, arguing the Café's case based on an unsupported and misstated view of the
2 evidence.

3 **B. Misrepresentation of the Record.**

4 Given Mr. Swanson's conduct throughout this proceeding, it is hard to conclude
5 that the Café's repeated misstatements of the record are anything but a deliberate attempt
6 to mislead the Commission. For instance, Mr. Swanson alleges that Liberty's President
7 testified that Liberty implemented chair counts to help the Town of Carefree.⁷ There is no
8 basis for or truth in this statement. Liberty's President, Mr. Sorensen, actually testified
9 that Liberty has always used a chair count, at least since he joined in 2005 and, it appears,
10 the entire time Engineering Bulletin No. 12 has been used in Liberty's rate design.
11 The evidence plainly reflected the inherent difficulties in using "meal counts."

12 For one thing, contrary to its bold pronouncement, the Café did not prove that it
13 maintains an "irrefutable/accurate" meal count;⁸ it merely showed that it could produce a
14 meal count. Liberty has no way to verify the information produced by the Café, nor does
15 Liberty know whether all of its restaurant customers have similar sophisticated inventory
16 tracking software. Utility rate designs are not set to accommodate the individual
17 inventory tracking systems of each sewer customer in order to allow for self-reporting.
18 Moreover, "meals" is an inherently vague and ambiguous term. How big does a salad
19 have to be before it counts as a meal? What about two customers sharing an entrée – is
20 that one or two meals? And what about spirituous beverages – customers that only
21 consume alcohol may use the rest rooms, and their glasses require washing. Does each
22 glass count as one meal? These are the problems and inherent difficulties with which
23 Liberty would be left to wrestle, clearly contradicting the Café's audacious decree that
24

25 ⁷ Closing Brief at 2:11-13.

26 ⁸ Closing Brief at 5:27.

1 ordering Liberty to switch to meal counts is the “easiest” thing to do.⁹ In fact, the
2 evidence shows that there are good reasons why Liberty has always billed using a chair
3 count to implement the Commission-approved tariff that incorporates Engineering
4 Bulletin No. 12.

5 After misstating the origin and purpose of the chair count, the Café goes on to
6 contradict one falsehood with another by alleging that Liberty uses a chair count to
7 maximize revenue.¹⁰ Again, chair count is the only way Liberty has ever billed known
8 restaurants for sewer utility service. The test year revenues were calculated based on
9 chair count billings. There is no evidence, in the rate case or this case, about the impact
10 on Liberty’s revenues if billings were to be based on meal numbers, not chairs, except the
11 bill the Café prepared for itself using its unverified meal count. Nor does it make sense
12 that sewer bills would change dramatically based on whether one counts “meals” or
13 “chairs.” Engineering Bulletin No. 12 is a planning document for engineers and a
14 restaurant will generate a certain amount of estimated flows. That estimate does not
15 change if you count the meals it will serve versus the number of chairs it will have in the
16 establishment. It is the same restaurant, and meals and chairs are supposed to be two
17 ways of counting the same thing.¹¹

18 Customers should not be allowed to jump back and forth between column A and
19 column B to lower their bill at Liberty’s expense. Liberty would be surprised were the
20 Commission or the customers to support a request by the utility to change the manner in
21

22 ⁹ Closing Brief at 7.

23 ¹⁰ Closing Brief at 3:4-6.

24 ¹¹ If the use of a meal count truly resulted in less revenues than a chair count, then the rate
25 charged (\$0.248734) would have to be higher to generate the revenue requirement.
26 For this reason, ordering Liberty to use only a meal count without raising the rate would
be tantamount to depriving the utility of a reasonable opportunity to earn its authorized
revenue requirement. And Liberty is already falling short of that revenue limit using chair
counts.

1 which it bills customers between rate cases in order to maximize its revenue. Yet, that is
2 exactly what Liberty will do if the relief the Café seeks is granted. As stated at the
3 hearing, the Café would be billed for the restaurant portion of the business based on meal
4 counts, and for the bar portion based on number of patrons, consistent with Engineering
5 Bulletin No. 12. If tariffs really give “options” as the Café claims, such options must
6 work both ways.

7 The Café’s attempt to bootstrap a claim for some sort of discrimination also fails.
8 It does appear true that Liberty “missed” some restaurants. As Mr. de Szendeffy’s
9 testimony showed, places change hands often, and he, as the landlord, leaves it to the
10 tenants to notify the utility of their new business. Liberty will obviously have to conduct
11 further inspections, and may need to change the billing to some of its customers in light of
12 the evidence that Mr. Swanson introduced. Liberty has a legal obligation not to
13 knowingly discriminate between like customers, and if it becomes aware of customers
14 being billed incorrectly, it makes the necessary changes. This is not a frequent problem,
15 nor is it surprising that Liberty, with over 60,000 customers in the state, might “miss” a
16 few. It certainly is not discrimination. Liberty makes an effort to properly classify all
17 customers and when a change is necessary, it makes the change based on known facts and
18 consistent with Commission rules and approved tariffs. The Café produced no evidence
19 that Liberty has ever knowingly discriminated.

20 Likewise, the Café produced no evidence that Liberty’s chair counts were “grossly
21 inaccurate.”¹² Mr. Swanson and Ms. Marr again are playing fast and loose with the
22 evidence. There was no evidence of “special deals,” nor evidence of anything except that
23 one property owner, Mr. de Szendeffy, changes tenants often and never informs the utility
24 when he leases to a different type of business establishment. Liberty produced evidence

25
26 ¹² Closing Brief at 4:10.

1 of its quarterly chair counts, which is a reasonable means of ensuring billing accuracy
2 under the circumstances. Two other restaurant owners testified that they are also billed
3 based on a chair count, and that they pay their bills, unlike the Café. Certainly, Liberty
4 cannot be held responsible for the failure of customers to inform it of changes in their
5 property uses, whether by neglect or intent to deceive.

6 The Café's attempt to turn public comment into evidence must also be rejected.
7 Mr. Swanson attempted to call each of the persons whose public comment he now relies
8 on in his brief, but Judge Stern determined that their testimony would not be relevant to
9 the proceeding. Judge Stern also explained to Mr. Swanson that public comment is not
10 evidence. Demonstrating yet again why there are rules against the unauthorized practice
11 of law, Mr. Swanson now seeks to persuade the Commission that the Town of Carefree
12 agrees with his position. But that was not the Town's position. The Town's position is
13 summed up in its Resolution asking the Commission to order Liberty to file a rate case.
14 The Commission has the power to do that. However, the Town did not ask the
15 Commission to find that one of the rates approved in Decision No. 71865 is unjust and
16 unreasonable and should not have been and no longer can be used. That is the finding the
17 Commission must make to grant the relief the Café seeks in this docket.¹³

18 **C. The Café's Case is an Impermissible Collateral Attack.**

19 There can be no mistake that the Café's whole case is an impermissible collateral
20 attack on Decision No. 71865. The over \$10,000 the Café has pilfered from Liberty was
21 billed per the tariff. This is not even in dispute. Instead, the Café believes utility billing

22 ¹³ There are other factual assertions in the Café's Closing Brief equally unsupported and
23 outrageous, most notably the Café's unprovoked attack on Commission Staff.
24 Staff presented no witnesses, took no position, and at the end of trial, Ms. Mitchell shook
25 hands with Liberty's representatives, a gesture of courtesy amongst collegial adversaries
26 at the Commission. No lawyer, subject to Rule 11, Ariz. R. Civ. P., or with simple
common sense and decency, would file a closing brief and try to further the client's cause
by attacking Staff in the manner the Café has here. Again, it shows the desperation of
Mr. Swanson and Ms. Marr to win this case and avoid paying their bill, at any cost.

1 comes in “options” and the Café wants to pick the option it thinks will save its business
2 thousands of dollars annually. Liberty has already discussed that it has never viewed the
3 tariff as providing “options.” It has always billed using chairs. Mr. Swanson’s notion that
4 any post-test year change that increases revenue constitutes a “windfall” stands
5 ratemaking on its head.¹⁴ Customers change all the time. Businesses open and close and
6 new ones that use services differently come on to the system. A single family home may
7 go from one occupant to a family of six, increasing water use and the toll on the sewer
8 system. Ratemaking does not try to capture these revenue changes after rates are set.
9 The new customer that builds a new salon after the rates go into effect is not a “windfall”
10 to the utility any more than a post rate case increase in chemical expense is a “bane,”
11 “curse,” “plague” or “scourge.” Ratemaking just does not work the way Mr. Swanson and
12 his “client” appear to perceive it.

13 The relief the Café seeks would require a finding that billing based on chair counts
14 is and was unjust and unreasonable. Such a finding cannot be made – as a matter of law –
15 and certainly not on the actual evidence before the Commission. The Café does not and
16 cannot complain that Liberty has charged the Café contrary to the tariff; the Café simply
17 does not like the rates and rate design approved in Decision No. 71865. But the
18 Commission gave specific consideration to the continued use of Engineering Bulletin
19 No. 12 in the rate case approving the current tariff, and the Café, or any other customers
20 with similar concerns, is free to intervene in the next rate case and advance such concerns.
21 The Commission has already ordered Liberty to consider alternative rate designs in that
22 next rate case.¹⁵ Liberty is required to file a rate case within 12 months of the closure of
23 the East Boulders Wastewater Treatment Plant pursuant to Decision No. 71865.
24 The Commission could order another rate case sooner if it believes it necessary and in the

25 ¹⁴ See Closing Brief at 3:17-22.

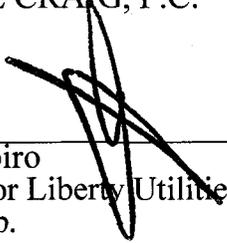
26 ¹⁵ Decision No. 71865 at 67:1-7.

1 public interest. But the Commission cannot, as a matter of law, change the rates for
2 restaurants or other customers outside of a rate case. *See Scates v. Ariz. Corp. Comm'n*,
3 118 Ariz. 531, 534, 578 P.2d 612, 615 (App. 1978).

4 Accordingly, Liberty asks that Judge Stern issue an order (1) striking the Café's
5 Ratepayer's Post-Hearing Position Statement; and (2) directing that the Café can no
6 longer be represented by Mr. Swanson before the Commission, unless and until, he is
7 licensed to practice law in the State of Arizona. Liberty further urges Judge Stern to
8 promptly send his recommendation to the Commission that the Café's complaint is denied
9 and no relief be granted upon it.

10 RESPECTFULLY SUBMITTED this 18th day of November, 2014.

11 FENNEMORE CRAIG, P.C.

12
13 By 
14 Jay L. Shapiro
15 Attorneys for Liberty Utilities (Black Mountain
Sewer) Corp.

16 **ORIGINAL** and thirteen (13) copies
17 of the foregoing were filed
this 18th day of November, 2014, with:

18 Docket Control
19 Arizona Corporation Commission
1200 W. Washington Street
Phoenix, AZ 85007

20 **Copy of the foregoing was hand delivered**
21 this 18th day of November, 2014, with:

22 Marc Stern, ALJ
23 Hearing Division
Arizona Corporation Commission
24 1200 W. Washington Street
Phoenix, AZ 85007

25
26

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

Wes Van Cleve, Esq.
Legal Division
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, AZ 85007

Copy of the foregoing mailed/e-mailed
this 18th day of November, 2014, to:

Al Swanson
Catherine Marr
Venues Café
34 Easy Street
Carefree, AZ 85377-2000

By: 

9731422.1/035227.0003