

INTERVENTION



0000158303

BEFORE THE ARIZONA CORPORATION COMMISSION

**BOB STUMP, CHAIRMAN
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH**

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AZ CORP COMMISSION
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<p>IN THE MATTER OF CAREFREE 34, INC./OFFICE ON EASY STREET INC., d/b/a VENUES CAFE, COMPLAINANT, v. LIBERTY UTILITIES CORPORATION f/k/a BLACK MOUNTAIN SEWER CORPORATION, RESPONDENT.</p> <hr/> <p>TOWN OF CAREFREE, A MUNICIPAL CORPORATION OF THE STATE OF ARIZONA, INTERVENOR-COMPLAINANT.</p>	<p>DOCKET NO. SW-02361A-13-0359</p> <p>TOWN OF CAREFREE'S MOTION TO INTERVENE</p> <p>-AND-</p> <p>MOTION TO RE-OPEN EVIDENCE</p> <p>Arizona Corporation Commission DOCKETED NOV 25 2014</p> <p>DOCKETED BY </p>
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The Town of Carefree ("Carefree"), by and through its counsel, hereby moves to intervene as a Complainant in this case. Carefree moves to intervene as of right, pursuant to Rule 24(a)(2), Arizona Rules of Civil Procedure, and R14-3-105, Rules of Practice and Procedure of the Arizona Corporation Commission.

Carefree has an interest in the subject matter of this action, and the disposition of this action may have a direct adverse effect on the continued viability of Carefree. The existing parties, namely Venues Café, cannot adequately represent Carefree's interests. Carefree is unique since it is comprised virtually and entirely of personal residences, with very few commercial businesses and no industrial businesses. The issues presented by Venues Café, in its complaint, and the resolution of those issues, have the potential to cause economic hardship among some of the Respondent's commercial

1 customers, e.g. restaurants in Carefree. The rate structure approved in 2008 is a
2 detriment to economic development in Carefree, particularly for restaurants.

3 Alternatively, Carefree seeks to intervene pursuant to Rule 24(b). Carefree's
4 claims and the claims in this action have questions of law and fact in common, and
5 Carefree seeks the same relief as Complainant, namely that the Arizona Corporation
6 Commission enter its Order requiring Liberty Utilities Corporation, f/k/a Black
7 Mountain Sewer Corporation ("Liberty" or "Respondent"), Respondent, to base sewer
8 fees on a "meal count," in accordance with ADEQ Engineering Bulletin 12 and
9 Decision No. 31065. Carefree, accordingly, requests this tribunal to grant its Motion to
10 Intervene either as of right or permissively.

11 Additionally, Carefree respectfully requests that this tribunal re-open evidence to
12 allow the Administrative Law Judge Stern to consider the Opinion and Order of
13 Administrative Law Judge Dwight D. Nodes, approved by the Arizona Corporation
14 Commission on August 31, 2010, a copy of which is attached hereto as Exhibit "A" and,
15 by this reference, made a part hereof.

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **I. SUMMARY OF FACTS.**

18 On November 6, 2014, this matter was heard before Administrative Law Judge
19 Stern. At that time, the Mayor and Vice Mayor of Carefree provided "public comment"
20 to Judge Stern, expressing the concerns of Carefree that the utilization by Respondent of
21 a "chair count" method to determine sewer rates is unfair and unequitable, and is
22 creating economic hardships among all of Liberty's ratepayers.

23 Subsequent to the hearing held on November 6, 2014, Carefree discovered a
24 copy of Administrative Law Judge Dwight D. Nodes' Opinion and Order, which
25 directly addressed the utilization by Liberty of Bulletin No. 12 and specifically
26 indicated in that Opinion and Order that Bulletin No. 12 was "extremely outdated and
27 needs to be revised." Judge Nodes' Opinion and Order went on to conclude:
28

1 “The obvious inaccuracy of the assumptions made in that
2 document raises the concern that other assumptions in
3 Bulletin No. 12, on which the Company relies for billing all
 of its commercial customers, may also be outdated.”

4 Judge Nodes specifically noted that Bulletin No. 12 had not been revised for more than
5 twenty years and directed Respondent, in the next rate application, to present evidence
6 regarding alternative methods for calculating sewage flow assumptions used for billing
7 its commercial customers.

8 Accordingly, due to the importance of Judge Nodes’ Opinion and Order, it is
9 submitted that Judge Stern should re-open the evidence to allow the admission and
10 consideration of Judge Nodes’ Opinion and Order in this case.

11 On May 9, 2014, Carefree adopted Resolution 2014-05, specifically requesting
12 that the Arizona Corporation Commission require Liberty to immediately initiate a rate
13 case to address the allocation of costs in the current rate schedule. In that Resolution,
14 Carefree pointed out that the existing rate structure being utilized by Respondent is
15 creating economic hardships among all of Liberty’s ratepayers, specifically restaurants.

16 **II. CAREFREE MUST BE PERMITTED TO INTERVENE.**

17 **A. Intervention is Appropriate as a Matter of Right Under Rule**
18 **24(a).**

19 Upon timely application anyone shall be permitted to
20 intervene in an action...when the applicant claims an interest
21 relating to the property or transaction which is the subject of
22 the action and the applicant is so situated that the disposition
23 of the action may as a practical matter impair or impede the
24 applicant’s ability to protect that interest, unless the
25 applicant’s interest is adequately represented by existing
26 parties.

27 Arizona Rules of Civil Procedure, Rule 24(a). “Rule 24 is remedial and should be
28 construed liberally in order to assist parties seeking to obtain justice in protecting their
 rights. *Dowling v. Stapley*, 221 Ariz. 251, 270, 211 P.3d 1235, 1254 (Ct. App. 2009).
 Intervention is appropriate under Rule 24(a). Carefree has a direct interest in the case.
 Disposition of this action may impair or impede Carefree’s ability to protect its interests
 and the existing parties cannot adequately represent its interests.

1 **III. INTERVENTION IS ALTERNATIVELY APPROPRIATE UNDER**
2 **RULE 24(b).**

3 Rule 24(b) allows anyone to intervene in an action “[w]hen an applicant’s claim
4 or defense and the main action have a question of law or fact in common.” Ariz. R. Civ.
5 P. 24(b). Under the liberal standard of Rule 24, “the intervenor-by-permission does not
6 even have to be a person who would have been a proper party at the beginning of the
7 suit.” *Bechtel v. Rose in & for Maricopa Cnty.*, 150 Ariz. 68, 72, 722 P.2d 236, 240
8 (1986) (quotation omitted). If the conditions in Rule 24(b) have been satisfied, the court
9 may consider factors such as “the nature and extent of the intervenor’s interest, their
10 standing to raise relevant legal issues, the legal position they seek to advance, and its
11 probable relation to the merits of the case.” *Id.* (quotation omitted).

12 Here, Carefree and Complainant both seek an Order from this tribunal requiring
13 Respondent to assess sewer rates based on “meal count” instead of “chair count.”
14 Carefree’s claims and position in this matter are the same as those in the main action
15 and will have almost all questions of law and in common questions of fact. Carefree
16 would have been a proper party from the start of this case. Carefree satisfies the
17 requirements of Rule 24(b)(2). The additional factors from *Bechtel* also support
18 allowing intervention – the nature and extent of their interests, going forward, will be
19 equal. Carefree’s interest is very closely aligned with Complainant’s interests. Carefree
20 would have had standing as a Complainant to raise the issues it raises now and it seeks
21 to advance the same legal position as Complainant, and because it seeks the same relief
22 as Complainant, it will directly address the merits of the case.

23 Intervention will not cause delay or prejudice the original parties. Carefree will
24 not be adding new, extraneous claims to the case or diverting the focus from the original
25 issues. Rather, it seeks the same relief as the current Complainant, based on the same
26 theories, against the same Respondent. If the Arizona Corporation Commission denies
27 intervention under Rule 24(a), it should grant Carefree’s Motion to Intervene under
28 Rule 24(b).

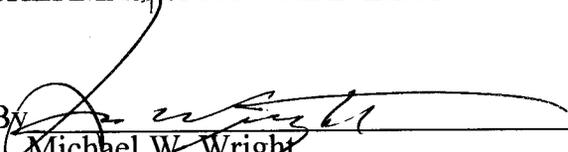
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IV. CONCLUSION.

For all of the foregoing reasons, Carefree respectfully requests leave to intervene in this proceeding, and respectfully requests Administrative Law Judge Stern to re-open the evidence and allow for the admission and consideration of Judge Nodes' Opinion and Order dated August 31, 2010, which has a direct bearing on the issues presented by the Complainant, Venues Café, in this matter.

RESPECTFULLY SUBMITTED: November 25, 2014.

SHERMAN & HOWARD L.L.C.

By 
Michael W. Wright
7033 East Greenway Parkway, Suite 250
Scottsdale, AZ 85254-2046
Attorneys for Intervenor Town of Carefree

ORIGINAL and thirteen (13) copies filed on November 25, 2014, with:

Docket Control
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

COPY hand delivered this same date to:

Marc Stern, ALJ
Hearing Division
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

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

COPY of the foregoing mailed this same date to:

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Attorneys for Liberty Utilities, f/k/a
Black Mountain Sewer Corp.

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


Marla McGhee

Exhibit "A"

1 BEFORE THE ARIZONA CORPORATION COMMISSION

2 COMMISSIONERS

3 KRISTIN K. MAYES, Chairman
4 GARY PIERCE
5 PAUL NEWMAN
6 SANDRA D. KENNEDY
7 BOB STUMP

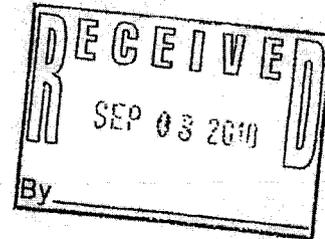
Arizona Corporation Commission

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7 IN THE MATTER OF THE APPLICATION OF
8 BLACK MOUNTAIN SEWER CORPORATION,
9 AN ARIZONA CORPORATION, FOR A
10 DETERMINATION OF THE FAIR VALUE OF ITS
UTILITY PLANT AND PROPERTY AND FOR
INCREASES IN ITS RATES AND CHARGES FOR
UTILITY SERVICE BASED THEREON.

DOCKET NO. SW-02361A-08-0609

DECISION NO. 71865

OPINION AND ORDER

11 DATES OF HEARING:

September 21, 2009 (Public Comment), November 11,
2009 (Pre-Hearing Conference), November 18, 23, 24
12 and 25, 2009.

13 PLACE OF HEARING:

Phoenix, Arizona

14 ADMINISTRATIVE LAW JUDGE:

Dwight D. Nodes

15 APPEARANCES:

16 Mr. Jay L. Shapiro, FENNEMORE CRAIG, P.C., on
behalf of Black Mountain Sewer Corporation;

17 Ms. Michelle Wood, on behalf of the Residential Utility
Consumer Office;

18 Mr. Scott S. Wakefield, RIDENOUR, HIENTON &
19 LEWIS, P.L.L.C., on behalf of the Boulders
Homeowners Association;

20 Mr. Thomas K. Chenal, SHERMAN & HOWARD,
21 L.L.C., on behalf of the Town of Carefree;

22 Dr. Dennis Doelle, D.D.S., in propria persona;

23 Mr. M.M. Schirtzinger, in propria persona; and

24 Mr. Kevin O. Torrey, Staff Attorney, Legal Division, on
25 behalf of the Utilities Division of the Arizona
26 Corporation Commission.

1 flow levels.

2 We agree with the Company's request to discontinue the special rates that currently exist for
3 13 specific customers. It is uncertain from the record why certain customers were afforded special
4 rates in the past, but in the future all commercial customers should be assessed the same standard
5 commercial rate established in this case. Because the remaining five special tariff rate customers will
6 now be combined under a single standard commercial rate, the effect of the authorized increase will
7 be greater on those customers because they have historically been served under rates that were lower
8 than the vast majority of current commercial standard rate customers.

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

15 Although we understand that BMSC does not currently have access to actual water usage data
16 from the unaffiliated water utilities in its service area, it is not clear why Bulletin No. 12 has not been
17 revised for more than 20 years. Therefore, in its next rate application, we direct BMSC to present
18 evidence regarding alternative methods for calculating sewage flow assumptions used for billing its
19 commercial customers. The Company should consider, at a minimum: contacting ADEQ regarding
20 plans for revising Bulletin No. 12; other sewage flow data based on technological improvements and
21 conservation assumptions; and whether it is possible to obtain actual water usage data from the water
22 utilities in BMSC's service area for purposes of calculating more accurate wastewater flows on its
23 system.

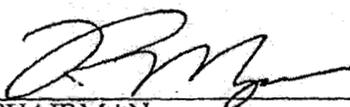
24 D. Hook-Up Fee Tariff

25 In its application, BMSC proposed approval of a hook-up fee as a means of requiring growth
26 to pay for growth. (Ex. A-1, at 13.) Mr. Sorenson stated that future treatment capacity requirements
27 would need to be purchased from Scottsdale or new plant constructed when the current Scottsdale
28 Agreement expires in 2016. He claimed that new capacity needs could be very expensive and a

IT IS FURTHER ORDERED that Black Mountain Sewer Corporation shall, in its next rate application, present evidence regarding alternative methods for calculating sewage flow assumptions used for billing its commercial customers. The Company shall consider, at a minimum: contacting ADEQ regarding plans for revising Bulletin No. 12; other sewage flow data based on technological improvements and conservation assumptions; and whether it is possible to obtain actual water usage data from the water utilities in the Company's service area for purposes of calculating more accurate wastewater flows on its system.

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

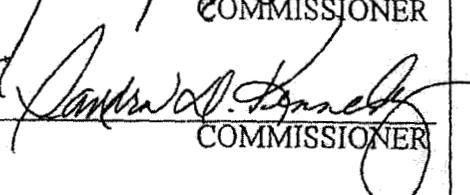
BY ORDER OF THE ARIZONA CORPORATION COMMISSION.


CHAIRMAN

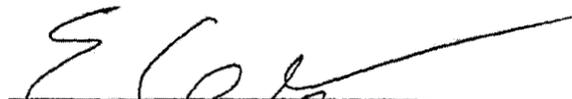

COMMISSIONER


COMMISSIONER


COMMISSIONER

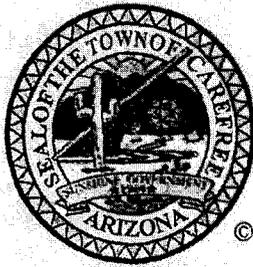

COMMISSIONER

IN WITNESS WHEREOF, I, ERNEST G. JOHNSON, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 31st day of August, 2010.


ERNEST G. JOHNSON
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____



TOWN OF CAREFREE

8 Sundial Circle
P.O. Box 740
Carefree, AZ 85377
(480) 488-3686 • Fax (480) 488-3845



OFFICE OF THE MAYOR

To: Bob Stump, Chairman
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007-2996

Subject: Sewer Rates in the Town of Carefree

Date: October XX, 2013

DRAFT

Dear Chairman Stump:

The Town of Carefree wishes to provide a successful business environment which maximizes the opportunities for all of the businesses operating within the Town. Part of the business environment is the cost of utilities including sewer service.

The Town of Carefree also recognizes that all the payers of sewer services should pay a different rate for the cost of sewer service that is appropriate for the sewer service provided. However, for some user groups, the historical methods used in calculating sewer usage may not reflect their current actual usage.

When Liberty Utilities next comes before the Arizona Corporation Commission with a new Rate Case for rates impacting Black Mountain Sewer Company, the Town Council of Carefree requests that the Commission examine the entire rate design structure for sewer service across all user groups to ensure that each class of rate payer is assessed a fair and equitable portion of the entire rate.

Sincerely,

Mayor David Schwan
Town of Carefree