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AZ CORP COMMISSION
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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

**LIBERTY'S RESPONSE IN
OPPOSITION TO TOWN OF
CAREFREE'S MOTION TO
INTERVENE AND MOTION TO
RE-OPEN EVIDENCE**

Liberty Utilities (Black Mountain Sewer) Corp. ("Liberty") hereby opposes the Town of Carefree's ("Town") Motion to Intervene and Motion to Re-Open Evidence in the above-captioned matter. As explained below, the Town's motion lacks any merit and should be denied.

I. INTRODUCTION.

Although Liberty understands the Town's goal of furthering business development in Carefree, that goal does not justify filing a legally meritless and procedurally improper motion for intervention and request to reopen the evidentiary hearing in this complaint proceeding. The Town's motion should be denied for a variety of reasons, both factual and legal.

For starters, the Town is simply too late. This case has been pending for more than a year, and the Administrative Law Judge has ordered Liberty to continue to provide sewer utility service despite Complainant's non-payment. The case has already gone to hearing and Judge Stern is preparing a recommendation to the Commission. There is

1 simply no compelling reason to reopen the evidentiary portion of a complaint docket so
2 that the municipality in which the Complainant does business can advance the “same
3 theories” in pursuit of the “same relief” as the Complainant.¹ The prejudice to Liberty far
4 outweighs the Town’s interest in promoting its tax base and commercial business.

5 Aside from those issues, the Town does not even have a legally protectable interest
6 in the present complaint proceeding. This case is not about the rates approved in Decision
7 No. 71865.² That decision was final and non-appealable more than four years ago, and as
8 such, all parties are bound by the decision. That’s especially true for the Town who
9 intervened and appeared in that prior rate case. The sole issues for determination in this
10 complaint proceeding are whether Liberty has billed Complainant under Liberty’s tariff
11 and whether Complainant has paid the bills for services provided. This complaint
12 proceeding is not an invitation for the Town to relitigate the rate design from Decision
13 No. 71865. The Commission should not now give the Town consent to launch an
14 impermissible collateral attack when it would be unlawful for the Commission to modify
15 the applicable rates outside of a rate case.

16 For these reasons, the Town’s motion must be denied.

17 **II. THE TOWN DOES NOT MEET THE APPLICABLE STANDARDS FOR**
18 **INTERVENTION.**

19 In relevant part, the Commission’s rule for intervention provides as follows:

20 **R14-3-105. Intervention as party and other appearances**

21 A. Intervention. Persons, other than the original parties to the proceedings,
22 who are directly and substantially affected by the proceedings, shall secure
23 an order from the Commission or presiding officer granting leave to
24 intervene before being allowed to participate.

25 ¹ Motion at 4:24-27.

26 ² As explained below, the Town was a party to the last rate case, casting serious doubt on
the Town’s claim that it just discovered the last rate order after the November 6, 2014
evidentiary hearing in this docket. Motion at 2:23-27.

1 B. Application. An application for leave to intervene shall be in writing and
2 must state the basis for the application. Such application shall be served and
3 filed by an applicant at least five days before the proceeding is called for
4 hearing. No application for leave to intervene shall be granted where by so
5 doing the issues theretofore presented will be unduly broadened, except
upon leave of the Commission first had and received. Upon the granting of
an application to intervene by the Commission or the presiding officer, the
intervening person shall thereafter be designated an "Intervenor".

6 The Town is very late. This case has been pending for more than one year, and the
7 hearing was held on November 6, 2014. The Town's legal counsel (undersigned on its
8 motion) contacted undersigned counsel for Liberty before the hearing to discuss the
9 matter, and was present at the hearing along with the Mayor and Vice-Mayor, both of
10 whom gave public comment. Thus, the Town cannot claim it did not know of the
11 proceedings.

12 Nor can the Town legitimately claim that its intervention will not delay and unduly
13 broaden the proceedings.³ That is exactly what the Town seeks by asking the Commission
14 to reopen the matter and take additional evidence regarding the propriety of Liberty's use
15 of Engineering Bulletin No. 12. As Liberty has asserted throughout, the tariff ordered by
16 the Commission in Decision No. 71865, including the use of Engineering Bulletin No. 12,
17 is beyond the scope of this proceeding. Judge Stern agreed, and specifically granted
18 Liberty's objections at trial when Complainant sought to call the Mayor, Vice-Mayor, and
19 other representatives from the Town as witnesses. Their testimony was precluded because
20 they have no evidence to offer on the narrow issues before the Commission in this docket
21 – has the customer been billed per the tariff and has the customer paid the bill. The Town
22 must not be allowed to now circumvent Judge Stern's ruling or collaterally attack the
23 Commission's prior order in Decision No. 71865.

24
25
26 ³ Motion at 4:22-24.

1 Ultimately, the Town does not have an interest in the subject matter of this action.
2 Throughout this proceeding, Judge Stern has repeatedly stated that he does not have the
3 power to reconsider the Commission's order in Decision No. 71865 that Liberty use
4 Engineering Bulletin No. 12 and that this is not the question before the Commission in this
5 docket. Therefore, the Town's claim that it has an interest in the subject matter is simply
6 wrong. The subject matter of this case is not the tariff or anything in it, and the Town
7 does not have any interest in whether the Complainant has been billed properly per the
8 tariff or whether Complainant has paid its bill any more than Liberty has an interest in
9 whether the Complainant has paid taxes levied by the Town.

10 Accordingly, the Town has failed to satisfy any of the requirements set forth in the
11 Commission's rule for intervention and the Town's motion must be denied.

12 **III. THE TOWN WAS A PARTY TO DECISION NO. 71865.**

13 In its motion, the Town claims that it wasn't until after the November 6, 2014
14 hearing that the Town "discovered a copy of Administrative Law Judge Dwight D. Nodes'
15 Opinion and Order, which directly addressed the utilization by Liberty of Bulletin
16 No. 12."⁴ The Commission issued Decision No. 71865 on September 1, 2010, and that
17 final order supersedes any recommendations or rulings by Judge Nodes in that docket.⁵
18 Moreover, the Town intervened as a party in Docket No. SW-02361A-08-0609.⁶ Thus,
19 the Town did not recently discover that the Commission discussed Engineering Bulletin
20 No. 12 in Docket No. SW-02361A-08-0609; the Town was a party to the case when the
21 Commission discussed Engineering Bulletin No. 12. The Town could have presented

22 ⁴ Town Motion at 2:23-27.

23 ⁵ Judge Nodes did not make any specific rulings regarding the rate design during the
24 prosecution of Liberty's last rate case, nor does Liberty believe the Commission
25 materially altered Judge Nodes' Recommended Order before voting unanimously to
26 approve Decision No. 71865.

⁶ The Town is listed as a party on the first page of Decision No. 71865, along with its
attorneys, the same ones that filed the Town's motion.

1 evidence on the subject of Engineering Bulletin No. 12 at that time, as well as make an
2 alternative recommendation for the Commission to consider. As a matter of law, the
3 Town cannot come back after four years and attack the Commission's order that Liberty
4 continue to use Engineering Bulletin No. 12 to bill commercial customers. This sort of
5 impermissible collateral attack is exactly why litigants are precluded by A.R.S. § 40-252,
6 as well as the doctrines of collateral estoppel and res judicata, from relitigating issues after
7 the action has ended and can no longer be appealed.

8 **IV. THE RELIEF SOUGHT IS NOT LAWFUL.**

9 As noted, the Town states that it seeks the same relief as the Complainant based on
10 the same theories.⁷ If that were true, the Town would not need to intervene and the
11 hearing would not need to be reopened. The Complainant's representatives both stated on
12 the record at the close of the hearing that they had been given an adequate opportunity to
13 present their case and did not require the opportunity to submit more evidence. If the
14 Complainant is satisfied that it had an opportunity to assert its claims and argue its
15 theories, it would be entirely redundant and unnecessary to reopen the matter and allow
16 the Town to go back over the same ground.

17 Again, neither the Complainant nor the Town has a right to challenge Decision
18 No. 71865 or seek an order directing Liberty to modify its existing tariff in this docket.
19 It has been nearly six full years since the test year used to set the current rates ended.
20 No provision is or can be made in a complaint docket to find fair value and use it in
21 setting rates. Proper ratemaking requires consideration of revenues, expenses and the
22 impact of one rate design versus another on the utility and all ratepayers. Rate relief
23 directed at one small subset of customers is simply not a legally available remedy. A rate
24 case is required.

25 _____
26 ⁷ Motion at 4:24-25.

1 **V. CONCLUSION.**

2 As reflected hereinabove, Liberty is troubled by the Town's motion. Liberty
3 understands the desire of the Town and its citizens for closure of the treatment plant.
4 To date, Liberty has invested nearly \$1 million dollars in that plant closure, all of which is
5 currently stranded because the plant remains open. Unfortunately, Liberty was surprised
6 by the Town's eleventh hour motion and is troubled by the Town's support for a customer
7 that has avoided paying more than \$10,000 in utility bills, not to mention the Town's
8 attempt to directly benefit the Complainant and other commercial businesses by reducing
9 Liberty's revenues from utility services to those businesses. One also wonders whether
10 the Town would agree that its citizens and commercial businesses can likewise decide to
11 stop paying fees and sales taxes owed to the Town in order to stimulate business
12 development. Boiled down, the Town has no basis or right to request that Liberty provide
13 an economic enhancement through lowered rates in order to help the Town appease local
14 restaurants.

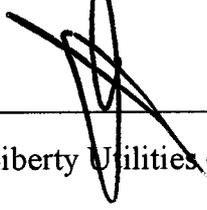
15 The Town has twice asked the Commission to order Liberty to file a rate case.
16 If the Commission believes the public interest requires a rate case before the plant is
17 closed, it has the power to order Liberty to file a rate case. The Commission has already
18 held that the continued use of Engineering Bulletin No. 12 and rate design alternatives be
19 addressed in that case.⁸ At that time, the Town will again be able to participate as a party
20 and it can then express its desire to promote business by keeping utility rates down.
21 The Commission can also reconsider whether the order to close the plant remains in the
22 public interest given the delays due to litigation by Wind P1 Mortgage Borrower, L.L.C.,
23 doing business as The Boulders Resort, and the rising price tag. These and other issues
24 can be considered in a rate case if the Commission chooses to order one be filed.
25 What the Commission should not do is grant the Town's improper request to intervene,

26 ⁸ Decision No. 71865 at 59.

1 belatedly, in a billing complaint to take additional evidence on issues that can only be
2 lawfully addressed in a rate case.

3 RESPECTFULLY SUBMITTED this 3rd day of December, 2014.

4 FENNEMORE CRAIG, P.C.

5
6 By 
7 Jay L. Shapiro
8 Attorneys for Liberty Utilities (Black Mountain
Sewer) Corp.

9 **ORIGINAL** and thirteen (13) copies
10 of the foregoing were filed
this 3rd day of December, 2014, with:

11 Docket Control
12 Arizona Corporation Commission
1200 W. Washington Street
13 Phoenix, AZ 85007

14 **Copy of the foregoing was hand delivered**
this 3rd day of December, 2014, with:

15 Marc Stern, ALJ
16 Hearing Division
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18 Wes Van Cleve
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21 **Copy of the foregoing mailed/e-mailed**
22 this 3rd day of December, 2014, to:

23 Al Swanson
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26

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6 9764682.1/035227.0003

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