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BEFORE THE ARIZONA CORPORATION COMMISSION

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

DOCKET NO: SW-02361A-13-0359
LEGAL BRIEF

11 Pursuant to the Commission's request at the February 3, 2015 Open Meeting,
 12 Liberty Utilities (Black Mountain Sewer) Corp. ("Liberty") hereby files this Legal Brief
 13 to provide the Commission additional information before it makes a decision in this
 14 docket. In summary, this brief focuses on the relief requested by the Complainant in this
 15 case and explains why such relief is not available as a matter of law.

16 **I. THIS IS A COMPLAINT PROCEEDING ABOUT ALLEGED RATE**
 17 **DISCRIMINATION.**

18 The Formal Complaint filed on October 22, 2013 in this docket alleges that the
 19 rates being charged by Liberty amount to "rate discrimination/unreasonable difference in
 20 rate between classes of service" in violation of Ariz. Const. art. 15, § 12 and A.R.S. § 40-
 21 334, and that such rates are "unreasonable and unaffordable."¹ The nature of the relief
 22 sought was stated as follows:

- 23 1. Stipulation by Liberty Utilities/BMSC, with approval by The
 24 Arizona Corporate Commission to permit charging Ratepayer a fee
 25 equating to the average Water Purchases, in direct correlation with
 ratios charged other classifications of Service. For example:

26 ¹ Formal Complaint at 1.

1 Residential Ratepayers are charged a flat rate of \$60.00 per month,
2 with average monthly water purchases of 14,051 gallons per month,
3 Restaurants using twice the average monthly consumption (during
peak season) should pay not more than twice the average residential
rate monthly, Ceteris Paribus.

- 4 2. Stipulation the Utility shall not request unreasonable charges on
5 Business Ratepayers in future rate increases.²

6 It is undisputed that since April 2013 Liberty has billed Complainant in accordance
7 with the tariff of rates and charges approved by the Commission in Decision No. 71865
8 (Sept. 1, 2010).³ Specifically, Liberty uses seat counts to bill restaurants pursuant to
9 ADEQ Engineering Bulletin No. 12 (“Bulletin No. 12”) consistent with Decision No.
10 71865.⁴ Before that, Complainant’s restaurant was incorrectly being billed as an “office
11 space.” The error only came to Liberty’s attention in December 2012 when it conducted a
12 chair count to update its records of the restaurants then within its service area.⁵
13 Complainant was notified of the mistake in January 2013 and billed based on the number
14 of seats in its restaurant starting in April 2013. It is also undisputed that Complainant has
15 refused to pay the amount billed by Liberty per the tariff, and as a result, now owes more
16 than \$12,000 for utility services already provided.

17 Given these undisputed facts, the ROO correctly recommends that Complainant’s
18 case be dismissed. Complainant did not and cannot show that its bill is based on anything
19 but the Commission’s order that Liberty bill commercial customers using Bulletin No. 12
20 in accordance with the decision.⁶ Because all restaurants are billed using seat counts,

21 ² Formal Complaint at 1.

22 ³ See Recommended Opinion and Order (“ROO”) at 10:21-23.

23 ⁴ Bulletin No. 12 at 8 (Table 1 Average Daily Sewage Flow).

24 ⁵ Response to Recommended Opinion and Order – Statement to Clarify Facts
25 (filed Jan. 26, 2015) at 1; Reporter’s Transcript of Proceedings (Ariz. Corp. Comm’n,
26 Nov. 6, 2014) (“Tr.”) at 184:6-10, 185:2-5 (Sorensen).

⁶ See Notice of Filing Tariff (filed Sept. 2, 2010 in Docket No. SW-02361A-08-0609),
Exhibit A at Sheet No. 1.

1 there can be no showing of rate discrimination. Moreover, the relief Complainant seeks is
2 unavailable as a matter of law.⁷

3 For one thing, Liberty does not have access to any of its customers' monthly water
4 use data, so such a billing method is currently impossible. Billing based on water use
5 would also require modification of Liberty's tariff. The same is true of Complainant's
6 request to have its bill based on its own unaudited meal counts. However, as discussed,
7 the Commission cannot modify Liberty's rates without ensuring that the new rates allow
8 for the recovery of operating expenses and a return on the fair value rate base.⁸

9 **II. THIS COMPLAINT DOCKET IS NOT THE PLACE FOR RATEMAKING.**

10 **A. Fair Value Ratemaking.**

11 "In Arizona, the Corporation Commission is the body charged with the
12 responsibility for establishing utility rates which are 'just and reasonable.'"⁹ "When
13 setting rates for public utilities, the Commission should focus on the principle that 'total
14 revenue, including income from rates and charges, should be sufficient to meet a utility's
15 operating costs and to give the utility and its stockholders a reasonable rate of return on
16 the utility's investment.'"¹⁰ "To achieve this, the Commission must first determine the
17 'fair value' of a utility's property and use this value as the utility's rate base. (Citation
18 omitted). The Commission then must determine what the rate of return should be, and
19 then apply that figure to the rate base in order to establish just and reasonable tariffs."¹¹

20 ⁷ As the Commission is aware, Complainant has shifted away from the relief sought in its
21 Formal Complaint (billing based on water use) and now seeks an order of the Commission
directing Liberty to bill Complainant based on meal counts generated by the Complainant.

22 ⁸ *Scates v. Arizona Corp. Comm'n*, 118 Ariz. 531, 533-34, 578 P.2d 612, 614-15
23 (App. 1978); *Residential Util. Consumer Office v. Arizona Corp. Comm'n*, 199 Ariz. 588,
591, ¶ 10, 20 P.3d 1169, 1172 (App. 2001) ("Rio Verde").

24 ⁹ *Scates*, 118 Ariz. at 533-34, 578 P.2d at 614-15 citing Ariz. Const. art. 15, § 3; A.R.S.
§ 40-250.

25 ¹⁰ *Rio Verde* 199 Ariz. at 591, ¶ 10, 20 P.3d at 1172 citing *Scates*, 118 Ariz. at 533-34,
578 P.2d at 614-15.

26 ¹¹ *Scates*, 118 Ariz. at 533-34, 578 P.2d at 614-15 citing *Arizona Corp. Comm'n v.*

1 The matter that is before the Commission is not a rate case. There is no evidence
2 concerning Liberty's rate base from which to make a fair value finding. There is no
3 evidence concerning Liberty's current operating revenues and expenses, except that
4 Liberty is not earning the revenue requirement authorized in Decision No. 71865.¹² Nor is
5 there any evidence of the impacts of changing Liberty's revenue in the manner suggested
6 by Complainant. The circumstances in which the Commission can change utility rates
7 without finding fair value are limited to emergencies and automatic adjusters, neither of
8 which is present here.¹³ Put simply, what the Complainants seek is a single change in the
9 rate design without consideration of the impact on any other aspect of the ratemaking
10 formula. The courts frown upon this kind of piecemeal ratemaking because it is "fraught
11 with potential abuse."¹⁴

12 **B. Complainant Seeks a Change in Rates.**

13 The relief sought in the Formal Complaint—a bill based on water usage—would
14 undoubtedly change the amount of revenue Liberty can receive. By how much is
15 unknown. Liberty does not have access to customer water usage, and no evidence was
16 presented in the rate case concerning the amount of water used by any of Liberty's
17 customers.¹⁵ Nor did Complainant present evidence in this docket to show the impact of
18 changing Liberty's rate design and tariff in the manner requested in the Formal
19 Complaint. Instead, Complainant changed the relief sought and now requests an order
20 that Liberty accept unaudited monthly meter count data from the customer in order to
21 calculate a lower monthly bill.

22

23 *Arizona Pub. Serv. Co.*, 113 Ariz. 368, 370, 555 P.2d 326, 328 (1976).

24 ¹² Tr. at 168:1-16 (Sorensen).

25 ¹³ *Rio Verde* 199 Ariz. at 591, ¶ 11, 20 P.3d at 1172.

26 ¹⁴ *Id.* at 593, ¶ 20, 20 P.3d at 1174 citing *Scates*, 118 Ariz. at 534, 578 P.2d at 615.

¹⁵ ROO at 11:9-12.

1 An order that Liberty use meal counts supplied by one restaurant customer,
2 as opposed to the alternative seat count provided for in Bulletin No. 12 and used in the last
3 rate case to set the current rates, is tantamount to setting new rates. It would mean the
4 establishment of a revenue requirement without the benefit of any data—any testimony or
5 other analyses—on the impact of this revised rate design. Again, such an order would be
6 improper piecemeal ratemaking. The Commission would be modifying the rate design for
7 one customer and not examining rate base, revenues, expenses, rate of return, or any other
8 element of Liberty’s overall rate design. This is clearly unlawful.¹⁶

9 Complainant is unconcerned with the reduction to Liberty’s revenues by using its
10 meal count, at times, seeking to portray Liberty as pursuing a windfall because
11 Complainant was not being billed as a restaurant in the last test year.¹⁷ This argument is
12 specious. The historic test year provides a snapshot of the utility’s customers, plant,
13 revenue and expenses. It is not fixed in time. Every factor in the determination of a
14 revenue requirement is subject to change after the test year, including customer numbers
15 and property uses. A family of eight moving into a house that sat unoccupied during the
16 test year is not a windfall any more than a large commercial customer leaving the system
17 after rates are set is a tragedy. These are normal operational changes, and customers are
18 billed based on the current use of their property, not their test year use.

19 In this case, Liberty mistakenly billed the Complainant as an office space until
20 Liberty found out Complainant was a restaurant.¹⁸ Obviously, Complainant would have
21 paid more for sewer service and Liberty would have earned more revenue had it
22

23 ¹⁶ *Rio Verde*, 199 Ariz. at 593, ¶ 20, 20 P.3d at 1174 citing *Scates*, 118 Ariz. at 534, 578
P.2d at 615.

24 ¹⁷ *E.g.*, Ratepayer’s Post-Hearing Position Statement (filed Nov. 12, 2014) at 2:14-17,
25 3:17-24; Tr. at 208:5-12, 211:3-6 (Swanson); Ratepayer’s Pre-Hearing Position Statement
(filed Nov. 5, 2014) at 2:8-10, 4:21-25, 5:19-22.

26 ¹⁸ ROO at 11:17-22.

1 discovered the error sooner. Nevertheless, Liberty waited to correct the bill for three
2 months after discovering the error as a courtesy to the customer, and made no effort to
3 recoup amounts under billed before the change took place.¹⁹ This change does not
4 provide a basis for a rate change outside a rate case.

5 Presumably, Staff, based on comments made by its Director and Chief Counsel at
6 Open Meeting, would respond that the tariff already allows for billing based on seats or
7 meals, and therefore ordering Liberty to bill based on meals is not a change in the tariff.
8 This argument is also erroneous. The purpose of Bulletin No. 12 is to provide estimated
9 wastewater flows for various types of commercial establishments, not to create a la carte
10 pricing choices for the customers.²⁰ Bulletin No. 12 provides an assumed amount of
11 wastewater flows by which to multiply the commercial rate to generate the customer's
12 bill.²¹ The flows from Complainant's establishment are not going to be lower if Liberty
13 uses meals instead of seats.²² Only Liberty's revenues will go down.²³

14 There is no evidence that Liberty has ever used meal counts to bill restaurants.
15 There is no historical data available from any of Liberty's rate cases. There is nothing in
16 the record and nothing in the tariff that supports the notion that customers get a choice of
17 meals or seats. And there is certainly nothing to support the notion that the customer can
18 produce its own meal count data. There are no guidelines concerning the production of
19 information by the customer that will now be critical to determining the monthly bill.

20
21 ¹⁹ ROO at 4:23 – 5:2, 22-26.

22 ²⁰ See Bulletin No. 12 at 8 (Table 1 Average Daily Sewage Flow); Tr. at 159:2-12
(Sorensen).

23 ²¹ The rate of \$.24 per gallon was determined using revenues generated by seat count
based bills because Liberty has never used meal counts. ROO at 5:17-21, 11:9-12.

24 ²² See ROO at 8:21-27; Tr. at 159:13 – 160:13 (Sorensen).

25 ²³ Complainant's bill is roughly \$800 per month using the current tariff and Complainant
26 wants the bill to be around \$200 per month, a reduction of approximately seventy-five
percent. See February 3, 2015 Open Meeting Video at 00:06:11 – 00:06:30.

1 There is no definition of “meal” in the tariff or order. There is no explanation as to how
2 restaurants that also have bars should be billed since the tariff has a listing for both a bar
3 and a restaurant.²⁴ There is also no guidance regarding the type of independent, third
4 party verification the customer must obtain in order to ensure the accuracy of the meal
5 counts. There are no guidelines on what to do if the customer does not provide the
6 information in time for the billing cycle, or not at all. There is nothing in the record below
7 Decision No. 71865 to answer any such questions, and thus, no basis to speculate, as Staff
8 has done here, that the tariff gives the customer the option to determine its own bill.

9 In contrast, Liberty’s interpretation of the tariff is intended to ensure that customers
10 are billed fairly, consistently, and without discrimination. To illustrate the point, assume
11 that the tariff does give the option to pick and choose meals or seats. Does that mean that
12 Liberty can charge some restaurants—the ones it likes better—based on meals, and the
13 rest on seats, in order to give a competitive advantage to preferred customers? Obviously
14 not. Likewise, if the entire rate case was based on revenues generated by counting meals,
15 and then afterwards Liberty wanted to change to counting seats because it would generate
16 more revenue, would that be acceptable? Again, Liberty suggests this Commission would
17 frown upon such intentional antics. And they should, which is why Liberty has
18 consistently used a chair count to bill restaurants. Chairs are chairs, they can be counted,
19 and counting chairs takes into account both the dining and bar aspects of a restaurant
20 business.

21 Ironically, it is Complainant that now seeks an order that would require Liberty to
22 discriminate in favor of Complainant. To begin with, once Liberty became aware that
23 Complainant was a restaurant, it was legally obligated to bill accordingly.²⁵ Moreover,
24 Liberty serves roughly a dozen other restaurants besides Complainant. Presumably, if

25 ²⁴ See Tr. at 177:22 – 178:21 (Sorensen).

26 ²⁵ ARS §§ 40-334, -425 and -436.

1 Complainant receives the benefit of a new rate design that reduces its bill, the other
2 restaurants would expect the same rate treatment. Otherwise, Liberty may face multiple
3 claims of rate discrimination, not just this one. Certainly a change in the rates charged to
4 restaurants will impact Liberty's opportunity to realize its revenue requirement.
5 The restaurants generate total annual revenues of approximately \$125,000, so any order
6 that changes the revenue from the restaurants would have adverse financial consequences
7 to Liberty. Again, this is why ratemaking should be done in rate cases where the
8 Commission can ensure that piecemeal ratemaking does not occur.

9 **III. CONCLUSION – THE COMPLAINT IS WITHOUT LEGAL BASIS AND**
10 **SHOULD BE DISMISSED.**

11 Complainant is being billed per the tariff of rates and charges approved by the
12 Commission. No discrimination has taken place and the Formal Complaint should be
13 dismissed as recommended in the Recommended Opinion and Order. The alternative
14 outcome requested by Complainant—an order that Liberty accept meals counts from the
15 Complainant to determine their bill—is not available as a matter of law.

16 RESPECTFULLY SUBMITTED this 2nd day of March, 2015.

17 SHAPIRO LAW FIRM, P.C.

18
19 By  _____
20 Jay L. Shapiro
21 Attorneys for Liberty Utilities (Black Mountain
Sewer) Corp.

22 **ORIGINAL** and thirteen (13) copies
23 of the foregoing were filed
this 2nd day of March, 2015, with:

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1 **COPY** of the foregoing was hand-delivered
this 2nd day of March, 2015, to:

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COPY of the foregoing mailed/e-mailed
this 2nd day of March, 2015, to:

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