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BEFORE THE ARIZONA CORPORATION COMMISSION

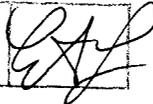
Arizona Corporation Commission

COMMISSIONERS

DOCKETED

SUSAN BITTER SMITH – Chairman
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DOUG LITTLE
TOM FORESE

APR 23 2015

DOCKETED BY 

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

DOCKET NO. SW-02361A-13-0359

DECISION NO. 75042

COMPLAINANT,

vs.

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

OPINION AND ORDER

RESPONDENT

DATES OF PROCEDURAL CONFERENCES: November 19, 2013 and October 23, 2014

DATE OF HEARING: November 6, 2014

PLACE OF HEARING: Phoenix, Arizona

ADMINISTRATIVE LAW JUDGE: Marc E. Stern

APPEARANCES: Ms. Catherine Marr and Mr. Al Swanson, *in Propria Persona*, on behalf of Venues Cafe;

Mr. Jay L. Shapiro, Fennemore Craig, P.C., on behalf of Liberty Utilities Corporation, f/k/a Black Mountain Sewer Corporation; and

Mr. Robin Mitchell, Staff Attorney, Legal Division, on behalf of the Utilities Division of the Arizona Corporation Commission.

BY THE COMMISSION:

Carefree 34, Inc./Office on Easy Street, Inc. dba Venues Café (“Café” or “Complainant”) operates a restaurant in the Town of Carefree, Arizona (“Town”). On October 22, 2013, it filed with the Arizona Corporation Commission (“Commission”) a Complaint against Liberty Utilities Corporation f/k/a Black Mountain Sewer Corporation (“Company” or “Respondent”) alleging rate discrimination. The complaint came about after a rate increase was authorized by the Commission

1 for the Respondent's charges for sewage service. Complainant further alleges that the increase is
2 unaffordable and unreasonable.

3 On October 30, 2013, Respondent filed an Answer to the Complaint stating that the Company
4 is charging the Café the tariff rate authorized by Decision No. 71865 (September 8, 2010).¹

5 On November 4, 2013, by Procedural Order, a Procedural Conference was scheduled on
6 November 19, 2013, to discuss the issues presented in the Complaint.

7 On November 19, 2013, Ms. Catherine Marr, who owns the Café, appeared and the Company
8 and the Commission's Utilities Division ("Staff") appeared with counsel. The Café's owner and the
9 Company's counsel indicated that they had previously tried to resolve the issues and had gone
10 through mediation with Staff without a successful resolution of the issues raised in the Complaint.
11 Further, the attorney for the Company stated that it is charging the approved tariff rate which was
12 established for a particular type of commercial establishment, a restaurant, based on the then current
13 Arizona Department of Environmental Quality ("ADEQ") Engineering Bulletin No. 12 ("Bulletin
14 No. 12") pursuant to Decision No. 71865.² Staff counsel added that it is very difficult to change an
15 approved rate absent a rate case.

16 It was further discussed that the Complainant could file a request with the Commission
17 pursuant to A.R.S. § 40-252, to reopen the rate case proceeding in order to reconsider and/or modify
18 the rates established in Decision No. 71865 in Docket No. SW-02361A-08-0609. Subsequently,
19 after further discussions, the Complainant and the Company were unable to resolve the Complaint
20 and since an action had not been filed by the Complainant pursuant to A.R.S. § 40-252, a hearing was
21 to be scheduled.

22 On January 14, 2014, by Procedural Order, a hearing was scheduled on April 24, 2014.

23 On April 21, 2014, the Complainant filed a petition and request for action by the Commission
24 in Docket No. SW-02361A-08-0609, pursuant to A.R.S. § 40-252.

25 ...

26 ¹ Decision No. 71865 was the result of Docket No. SW-02361A-08-0609 that involved a full rate proceeding before the
27 Commission.

28 ² Bulletin No. 12 established sewage rates to be charged for restaurants based on either the "seat count," the number of
seats in the establishment, or the "meal count," the number of meals served per day. Decision No. 71865 did not specify
which methodology was to be used for billing purposes, and the Company is billing restaurants based on their seat counts.

1 On April 23, 2014, by Procedural Order, the hearing was continued pending the outcome of
2 Complainant's request to reopen the rate case pursuant to A.R.S. § 40-252.

3 On September 19, 2014, the Complainant filed a Motion to Reschedule Hearing ("Motion")
4 because there had been no action taken on the Complainant's petition to reopen the rate case pursuant
5 to A.R.S. § 40-252. Attached to the Complainant's Motion as an exhibit was a copy of a September
6 10, 2014, letter from the Company to the Café that announced a "Notice of Termination" based on
7 the disputed billing charges (\$9,197.84) which had accumulated from unpaid sewage bills under the
8 tariff established in Decision No. 71865.

9 On September 23, 2014, by Procedural Order, a hearing was scheduled on October 28, 2014.
10 It was further ordered that no disconnection of service be effectuated, if at all, until after a
11 Commission Decision was rendered in this proceeding. Further, Staff was directed to be present at
12 the proceeding and to be prepared to participate if required.

13 On October 17, 2014, Respondent filed a Motion to Compel Response to Data Requests
14 ("Motion to Compel"). The Respondent requested an expedited ruling based on the upcoming
15 hearing date.

16 On October 20, 2014, by Procedural Order, a telephonic procedural conference was scheduled
17 for October 23, 2014, to address the Motion to Compel.

18 On October 20, 2014, Complainant filed a Motion for Continuance of Rescheduled Hearing
19 citing numerous reasons why more time was required to prepare for the hearing.

20 On October 22, 2014, the Company filed its response to the Complainant's motion and
21 requested that the Complainant be ordered to pay its bill.

22 On October 23, 2014, at the procedural conference, Complainant appeared through its officers
23 and the Company and Staff appeared with counsel. The parties discussed the issues related to
24 preparing for the hearing and it was agreed that Complainant would file its responses to the
25 Company's data requests by the end of the business day on October 27, 2014. It was further agreed
26 that the proceeding would be continued to November 6, 2014.

27 On November 6, 2014, a full public hearing was commenced before a duly authorized
28 Administrative Law Judge of the Commission at its offices in Phoenix, Arizona. The Complainant

1 appeared through Ms. Catherine Marr, its sole shareholder and officer. An investor with Ms. Marr,
2 Al Swanson, also appeared. The Company and Staff appeared with counsel. At the outset of the
3 proceeding, the Town Attorney, Michael Wright, entered an appearance, but stated that he did not
4 intend to intervene in the proceeding on behalf of the Town. Additionally, five members of the
5 public including the mayor and vice-mayor of the Town made public comment. At the conclusion of
6 the proceeding, the matter was taken under advisement following closing statements and the parties
7 agreed that they would not file closing briefs.

8 On November 12, 2014, despite the agreement at the hearing, a filing was made by the
9 Complainant titled "Rate Payer's Post-Hearing Position Statement" ("Rate Payer's Statement").

10 On November 18, 2014, the Company filed a Motion to Strike the Rate Payer's Statement.

11 On November 25, 2014, the Town filed a Motion to Intervene and to Re-Open Evidence in
12 the Proceeding ("Motion").

13 On December 3, 2014, the Company filed a Response in opposition to the Motion of the
14 Town filed on November 25, 2014. No responses were filed by either the Complainant or Staff.

15 On December 9, 2014, by Procedural Order, the Town's Motion was denied.

16 * * * * *

17 Having considered the entire record herein and being fully advised in the premises, the
18 Commission finds, concludes, and orders that:

19 **FINDINGS OF FACT**

20 1. Pursuant to authority granted by the Commission, the Company is a public wastewater
21 treatment utility which provides sewage utility service in the vicinity of the Town in Maricopa
22 County, Arizona.

23 2. On January 8, 2013, the Company sent a courtesy letter to the Complainant notifying it
24 that the Company had conducted a routine audit of the Complainant's establishment in December
25 2012 and verified that the restaurant had 108 chairs available for service and had previously been
26 billed for only 12 chairs, and as a result, their charge for sewage service would be changing. The
27 Company's letter of notification stated that the Complainant's rate for sewage service would be
28

1 increasing from \$87.06 per month to \$805.90 per month pursuant to the Company's tariff which had
2 been approved by the Commission in Decision No. 71865. (Ex. R-1)

3 3. On October 22, 2013, the Complainant, a restaurant, filed a formal Complaint against
4 the Company in which the Complainant alleges that it is being discriminated against and being
5 charged an unreasonable sum for sewage service provided by the Company.

6 4. Pursuant to Decision No. 71865, the Company was authorized to continue to utilize
7 Bulletin No. 12 to determine flow levels for various types of commercial establishments as the basis
8 for determining sewage rates. At that time, there were more than 130 commercial customers in the
9 Respondent's certificated service area. Bulletin No. 12 is used because wastewater flows cannot be
10 metered efficiently.

11 5. The Complaint did not allege there were mathematical errors in the computation of the
12 monthly bill.

13 6. A letter from the Company to the Complainant dated April 4, 2013, states that
14 pursuant to Decision No. 71865, the rates established under its tariff are calculated by using ADEQ's
15 Bulletin No. 12 wherein water flows are based on either the number of meals served or the number of
16 chairs in an establishment. (Ex. C-3)

17 7. According to Bulletin No. 12, which establishes wastewater flows for commercial
18 establishments, restaurants are to be billed in one of two ways: either by multiplying the number of
19 seats in the restaurant times 30 (gallons) times the commercial rate of \$0.248734 per gallon; or by
20 multiplying the number of meals served times 7 (gallons) times the commercial rate of \$0.248734 per
21 gallon to determine the monthly billing for sewage service. (Ex. R-6)

22 8. After the Company determined that it was billing the Complainant in error due to the
23 miscount of seats, in April 2013, the Company began billing the Complainant \$805.90 a month under
24 the correct tariff for the Company. The Company did not attempt to collect for underbilling the
25 Complainant for the months since the effective date of the Company's current rates resulting from
26 Decision No. 71865.³

27

28 ³ At this point in time, the Complainant had been underbilled for 30 months.

1 9. The Complainant, in support of its allegations, called the following witnesses: Ms.
2 Catherine Marr, the owner of the Café; Rod De Szendeffy, a property owner and landlord in the
3 Town; Jan Sevela, a restaurant owner in the Town; and Alberto Liani, another restaurant owner in the
4 Town.

5 **BACKGROUND/Catherine Marr**

6 10. Ms. Marr testified that the two corporate entities which comprise the Complainant
7 herein, Carefree 34, Inc. and Office on Easy Street, Inc. represent the entities that own the building
8 and own the Café, respectively.⁴ Ms. Marr stated that she is the sole shareholder of Office on Easy
9 Street, Inc. and that she is an officer of the corporation which operates the Café and manages its
10 operations. (Tr. 111)

11 11. The Café and the building where it is located were purchased by Ms. Marr in 2010 and
12 prior to the purchase, Ms. Marr, in performing her “due diligence” determined that her restaurant’s
13 monthly sewage bill was approximately \$60 before the increase in rates authorized in Decision No.
14 71865.⁵

15 12. When Ms. Marr purchased the restaurant and the building, she notified the Company
16 of the change in ownership, but there was no mention made of any seat counts. After Decision No.
17 71865 became effective in September 2010, Ms. Marr testified her restaurant received approximately
18 a 43 percent rate increase to \$87 per month. (Tr. 115)

19 **FINANCIAL BURDEN**

20 13. After receiving the Company’s letter of January 8, 2013, which notified Ms. Marr of
21 the Company’s “routine audit,” Ms. Marr testified that the first bill which she received from the
22 Company at the increased rate was in April 2013 and that with “assessments” the bill totaled \$808.27.
23 (Tr. 113)

24 14. After the Café’s sewage bill increased in April 2013, Ms. Marr testified that a
25 Company representative suggested to her that she could lower the restaurant’s sewage bills by
26

27 ⁴ According to Commission records, Ms. Marr incorporated Carefree 34, Inc. and is its CEO and a director of the
corporation. She is also the president of Office on Easy Street, Inc.

28 ⁵ According to Ms. Marr, she believed that the building was once an office, but that the Café had been located there since
2005.

1 adjusting the number of chairs seasonally by either closing off an area of the restaurant or by
2 removing chairs from the service area when there were fewer customers, as in the summer. (Tr. 53-
3 54)

4 15. According to Ms. Marr, she did not pay the April 2013 bill, but instead paid \$87.32
5 because she was having discussions about the bill with the Company. (Tr. 113)

6 16. Ms. Marr termed the amount which she paid on the first bill at the higher rate as the
7 “undisputed amount.” (Tr. 114:1-6)

8 17. According to Ms. Marr, she spoke with fellow restaurant owners in the Town and they
9 all received higher bills beginning in 2013 after the seat audit had been conducted by the Company at
10 the end of 2012. (Tr. 117-118:9-7)

11 18. Ms. Marr testified that she is unfamiliar with the operations of the Commission in
12 determining the rates of a public utility. (Tr. 118:8-10)

13 19. Ms. Marr stated that she does not believe that it is reasonable to determine sewage
14 rates based on the number of seats in a restaurant whose business is seasonal in nature.

15 20. Ms. Marr acknowledged that the difference between the amount the Respondent has
16 billed her restaurant since April 1, 2013, less the amount she has paid in protest leaves a balance in
17 excess of \$10,000. (Tr. 121:19-22)

18 21. Ms. Marr testified that she believes “that it should be fairly easy to be able to put a
19 new rate hearing together and try to figure out an accurate way to determine charges so that
20 everybody pays their fair share.” (Tr. 133-134:24-4)

21 22. Ms. Marr did not dispute the fact that it would be difficult to attempt to determine
22 sewage rates based on meal counts.⁶ (Tr. 135:5-8)

23 23. Since the Complainant’s billing dispute with the Company began, Ms. Marr has been
24 paying approximately \$88 per month for sewage service, except for a period of four months where
25 she paid \$643 a month when the Company was threatening to terminate sewage service to the
26 Complainant. (Tr. 139)

27

28 ⁶ ADEQ Bulletin No. 12 does not define what constitutes a meal.

1 24. Based on Ms. Marr's testimony, the Complainant has been billed approximately
2 \$13,900 for sewage service since April 2013 and has only paid approximately \$3,800 of these
3 charges leaving a balance owed to the Respondent of approximately \$10,000. (Ex. R-4)

4 **COMPLAINANT'S PROPOSED RESOLUTION**

5 25. According to Ms. Marr, averaging peak and low season customer counts, her
6 restaurant serves approximately 100 meals a day.

7 26. The Complainant tracks its business through a computer system using a Point of Sale
8 System ("POS") which can give an exact count of the meals served.

9 27. Ms. Marr estimated that the Complainant uses approximately 20 to 22 thousand
10 gallons of water per month.

11 28. According to Ms. Marr, the Complainant's records indicate that 42,264 customers
12 came into the restaurant in 2012. (Tr. 25:10-13)

13 29. Further testifying, Ms. Marr indicated that the Complainant's records show the
14 difference between what individual customers would order for breakfast, lunch or dinner, but she
15 would be willing to stipulate that everyone who sat in the restaurant and bought something is counted
16 as a meal. (Tr. 25:16-24)

17 30. Ms. Marr believes that a more accurate billing could be made by the Respondent if a
18 meal count methodology would be employed versus a seat count methodology which is presently
19 employed by the Company because she believes that in this manner it would more closely follow
20 water usage at the restaurant.

21 31. Ms. Marr indicated that using her stipulated number of meals based on the customers
22 who came into her restaurant, her expenses for sewage treatment would be less than what the
23 Company would charge. However, if the Commission would accept Ms. Marr's contention, the
24 42,264 meals served would equate to 116 meals per day. Multiplying these meals by seven (7)
25 gallons per day results in sewage flow rate of 812 gallons per day. Multiplying this flow rate by the
26 tariffed rate per gallon per day of \$0.248734 equates to \$201.97. Therefore, if Ms. Marr were to be
27 billed on a per meal basis, her bill would be approximately \$202 per month.

28 ...

1 32. According to Ms. Marr, the Town experiences a significant loss of business due to
2 seasonality, losing approximately 60 percent of the Café's customers when it is "out of season . . .
3 literally impossible to serve as many meals as are calculated by a chair calculation." (Tr. 33:12-19)

4 33. Ms. Marr stated that if her Complaint is not granted, she will do whatever she can to
5 pay the Complainant's past due bill. (Tr. 144:4-8)

6 34. Ms. Marr did not deny that the Company's tariff authorizes deferred payment charges
7 and late charges. (Tr. 144:19-24)

8 **Rod De Szendeffy**

9 35. Mr. Rod De Szendeffy, a local landlord, testified that he owns three buildings in the
10 Town which contain approximately 20,000 to 30,000 square feet of rental space. (Tr. 58-59)

11 36. Mr. De Szendeffy further testified that during the time that he has owned these
12 properties he has leased to approximately 8 to 10 restaurants and paid the sewage bills for these
13 tenants. (Tr. 60)

14 37. Mr. De Szendeffy stated that there is a wine bar in one of his buildings, but he does
15 not believe that it serves meals, only some appetizers. (Tr. 61)

16 38. Mr. De Szendeffy further testified that the building in which the wine bar known as
17 Cellar 13 is located, he receives only one bill for the entire building and not a separate one for the
18 wine bar alone. (Tr. 64)

19 39. Mr. De Szendeffy stated that several years ago he only paid one bill for 2 buildings he
20 owned, one of which contained Duke's Restaurant, a full service restaurant that was a tenant in one of
21 the buildings along with several other tenants. (Tr. 68-70)

22 40. According to Mr. De Szendeffy, when a new tenant moved into his building if it was a
23 restaurant, he told the business owner to contact the Company because he did not want to get stuck
24 with an additional bill. The business owner was directed to tell the Company that their business was
25 a restaurant. (Tr. 71-72)

26 **Jan Sevela**

27 41. Mr. Jan Sevela testified that he owns a 4,150 square foot building where he operates a
28 restaurant that occupies 1,200 square feet of the building. (Tr. 75)

1 42. Mr. Sevela testified that his average sewer bill for his 88 seat restaurant is about \$700
2 a month. (Tr. 75)

3 43. Mr. Sevela further testified that he closes his restaurant in the summer months of June,
4 July and August due to the seasonality of the business, but he reached an agreement with the
5 Respondent to pay only \$20 per month when the restaurant is closed for the summer months. (Tr. 77)

6 44. Although Mr. Sevala stated that he had some office space in his building, he is
7 currently not paying any separate sewage fees for that part of the building.

8 45. Testifying further, Mr. Sevala stated that he reduced his bill at the building for sewage
9 service from the Respondent to \$429 per month after he put over 30 chairs in storage. (Tr. 87)

10 **Alberto Liani**

11 46. Mr. Alberto Liani, another restaurant owner, testified that he operates an Italian
12 restaurant under his name and that the Respondent provides his restaurant sewage service. He further
13 testified that his restaurant is only open for dinner 6 days a week. (Tr. 93)

14 47. Mr. Liani stated that he originally operated his restaurant with 60 seats, but after
15 learning his sewage bill was based on the number of chairs in the restaurant, he removed 28 seats and
16 that he currently operates his restaurant with only 32 seats and pays a sewage treatment fee of \$261
17 per month. (Tr. 94)

18 **COMPANY POSITION**

19 48. Mr. Gregory Sorenson, the Company's president for Texas and Arizona, testified on
20 behalf of the Respondent.

21 49. According to Mr. Sorenson, the Company is charging those rates previously
22 authorized in Decision No. 71865 which directed that the Company utilize Bulletin No. 12 to
23 determine flow rates in order to ascertain wastewater charges. (Tr. 154)

24 50. Mr. Sorenson testified that the Company has been utilizing Bulletin No. 12 to
25 determine flow rates to determine sewage charges for at least 20 years. (Tr. 155:1-11)

26 51. Mr. Sorenson stated that in the Company's next rate application, consistent with the
27 Commission's order in Decision No. 71865, the Company will address alternative methods to
28 determine rate design. (Tr. 156:1-9)

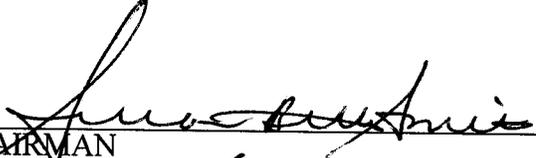
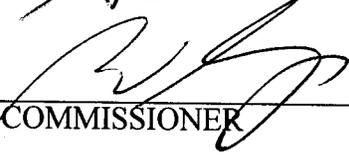
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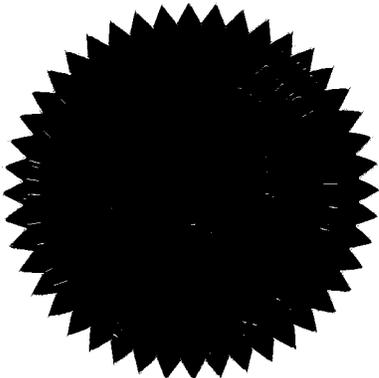
ORDER

IT IS THEREFORE ORDERED that the Complaint filed by Carefree 34, Inc./Office on East Street, Inc., d/b/a Venues Café is hereby dismissed.

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

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

	
CHAIRMAN	COMMISSIONER
	
COMMISSIONER	COMMISSIONER



IN WITNESS WHEREOF, I, JODI JERICH, 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 23rd day of April 2015.



JODI JERICH
EXECUTIVE DIRECTOR

DISSENT No force

DISSENT _____
MS:tv

1 SERVICE LIST FOR: CAREFREE 34, INC./OFFICE ON EASY STREET,
2 INC., dba VENUES CAFE

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