

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Application of GOLDEN HILLS SANITATION COMPANY (U 438-SWR) for Authority to Increase Rates Charged for Sewer Service by \$148,076 or 120% in January 2012, \$148,076 or 54% in January 2013, and \$148,076 or 35% in January 2014.

Application 11-08-019
(Filed August 26, 2011)

**COMMENTS OF
GOLDEN HILLS SANITATION COMPANY (U 438-SWR)
ON ALJ'S RULING EMAILED ON FEBRUARY 16, 2012**

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Dated: February 23, 2012

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GOLDEN HILLS SANITATION COMPANY
In A.11-08-019

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Golden Hills Sanitation Company, Inc. (GHSC) (U 438-SWR), a Class D sewer system corporation, submits these Comments on ALJ Wilson's Ruling emailed to the service list in this application on February 16, 2012 (February 16 ALJ's Ruling). These comments are filed and served pursuant to the Commission's Rules of Practice and Procedure and the February 16 ALJ's Ruling.

GHSC COMMENTS

On February 16, 2012, GHSC moved for a stay of A.11-08-019 based on "insufficient funds and personnel to continue to advance and participate in this proceeding."¹ By that motion, GHSC also stated: "To the extent that circumstances change that permit GHSC to resume participation in this proceeding, GHSC will immediately inform the Commission."² The February 16 ALJ's Ruling (email) sought comments to be filed today "as to whether Application 11-08-019 should be dismissed without prejudice instead of staying."

To begin with, GHSC did not seek a dismissal of this application, but instead requested a stay. GHSC is concerned that dismissal of this application, should service continue (see below), could result in an untenable reduction in its already, wholly inadequate current rates.

¹ GHSC Motion, at p. 1.

² GHSC Motion, at p. 2.

In this regard, GHSC has demonstrated since 2008, in both A.08-08-011 and A.11-08-019, that its existing rates, even with the interim rate relief authorized by the ALJ's Ruling of December 16, 2011 (and made effective by Advice Letter 3-SWR-A), are insufficient to sustain sewer service to its customers. Further, the commitment by the estates of GHSC's principal shareholders to provide the additional revenue required for this service ended on September 30, 2011, and, due to the insolvency of these estates, no further funds are available from the estates effective February 29, 2012. In addition, despite GHSC's longstanding efforts to increase its rates in the manner provided for Class D sewer utilities to provide adequate revenues to sustain its service, its requests have been met with rejection or delay by the Commission.³

The impact of this funding shortfall on GHSC's ability to continue to provide this service has been well known to Commission staff for months. As early as November 3, 2011, Commission staff in fact scheduled a conference call for November 9, 2011, to address this situation. In the November 9 call, staffs of this Commission, Kern County, and the State Water Resources Control Board (SWRCB) were informed by representatives of the estate of Carlie Smith, which holds a substantial portion of the outstanding shares of GHSC, that the decedents' estates of Lillian Smith and Carlie Smith (collectively GHSC's principal shareholders) no longer had funds available to offset GHSC's persistent operating deficits and that the supplemental funding from these estates, committed only through September 30, 2011, would cease as soon as November 30, 2011. The representatives of the Carlie Smith estate, however, specifically offered to stipulate to a receiver for GHSC under Public Utilities (PU) Code Section 855. At the conclusion of the call, the staffs of this Commission and Kern County asked that they be given some time to address the situation with GHSC.

³ See, A.11-08-019, at pp. 2-6.

Unfortunately, months have passed without any action, direction, or assistance by either agency, until yesterday's issuance of an Assigned Commissioner's Ruling (ACR) issuing a temporary restraining order requiring GHSC to continue to operate until a receiver is assigned, a ruling that is not only untimely, but defective for the reasons noted below. Nevertheless during these months, GHSC has continued to the best of its ability and limited resources to seek both ratemaking remedies and transfer of the utility to either a private or public entity to sustain the sewer service, none of which has met with success. On that point, on February 8, 2012, in response to a proposal by the Estate of Carlie Smith for Kern County to acquire GHSC or its assets, Kern County advised GHSC that it would not take custody or control of GHSC or its waste water treatment plant.

Finally, on February 10, 2012, GHSC received a letter from the Domiciliary Executor of the Estate of Carlie Smith advising GHSC that, effective February 29, 2012, it would no longer be providing supplemental funding to GHSC and that GHSC would need to look elsewhere to fund its operating shortfall. As repeatedly confirmed by GHSC in pleadings in this application and advice letters, its rates, even with recent, limited interim rate relief, are woefully inadequate to cover the costs of operating GHSC, and GHSC has no other funding sources available to it to offset this undercollection.

As a consequence of the foregoing, GHSC has had no option, but to prepare for a closure of its wastewater sewage facility, since it certainly cannot incur debts to vendors and employees without a means of paying for them. Following receipt of the letter advising GHSC that funding from the estates would end effective February 29, 2012, GHSC's insolvency counsel made extensive efforts, both by phone and email, to contact and advise DWA staff that GHSC no longer had funds sufficient to continue its sewer service beyond February 29, 2012. Following

on these actions, on February 16, 2012, insolvency counsel for GHSC sent a letter to DWA staff advising the Commission that, despite having done everything possible to maintain the operation of GHSC, GHSC would not be able to continue to provide service after February 29, 2012. In that letter, GHSC renewed its request for the Commission to appoint a receiver immediately.

On February 17, 2012, a copy of the February 16 letter to DWA staff was forwarded to another representative of the Commission staff by GHSC's insolvency counsel under cover of an email advising DWA staff that GHSC would be preparing a draft notice to GHSC's customers of cessation of service on February 29, 2012, *unless* that step could be averted with the appointment of a receiver. A draft of the customer notice was then circulated to Kern County representatives and to representatives of the Commission and DWA staff later in the day on Friday, February 17, 2012. Kern County provided some input to the draft, but the Commission did not, instead indicating on February 21, 2012, that it would not be providing any comments. To ensure that customers had sufficient time to respond and find alternatives to this cessation of service, GHSC had no choice but to send the notice with appropriate contact information.

These actions and circumstances do not constitute an unwillingness to serve or an abandonment of service, but rather an inability to serve, a separate basis for relief under Section 855. Yet, after months of inaction, the Commission has finally sought to respond to GHSC's dire circumstances by issuing yesterday's ACR, which wholly neglects the provisions of Section 855 and the facts specific to GHSC. In this regard, this ACR, which orders GHSC to continue to operate "until such time as a receiver is assigned," might have had some relevance if this were a case of an "unwillingness" to serve, but, instead, GHSC is "unable" to provide service because it does not have the funds or revenues to do so.⁴

⁴ PU Code Section 855.

Apart from the inability of a ruling such as the ACR to generate wealth where none exists, there are several other troublesome issues with the ACR, not the least of which is that it seeks to impose directives that ignore the one PU Code section applicable to the current circumstances (PU Code §855) and, more importantly, GHSC's longstanding request to Commission staff for advice and direction on the appointment of a receiver pursuant to Section 855 since November 2011 (see, e.g., Attachment A hereto). While the ACR now "directs" GHSC to "meet with the Commission's Division of Water and Audits (DWA) to discuss a schedule for appointment of a receiver,"⁵ this instruction completely disregards the facts, as summarized above, that this is precisely what GHSC has done and has requested from DWA staff since November 2011 without any action having been taken by either staff or the Commission in response. GHSC is nevertheless willing to meet with DWA staff to put a receiver in place, but such a meeting will need to take place quickly and likely by phone to have any effect by the February 29 closure.

Finally, while the ACR asserts code sections that will permit "fines or imprisonment" to be imposed on GHSC, none of these code sections are relevant to Section 855 or the circumstances that confront GHSC today. In addition, the ACR does not even meet the Commission's own standards for imposing a "temporary restraining order," which require more than simply "maintaining" a "status quo." Specifically, a demonstration must also be made that the order will result in "no substantial harm to other interested parties" and "no harm to the public interest."⁶ In this case, for GHSC to "obey" the ACR's TRO would certainly adversely affect the public interest and substantially harm the interests of others by requiring GHSC to knowingly incur a debt that cannot be repaid, effecting a fraud on creditors.

⁵ ACR, at p. 3.

⁶ D.05-04-040, at p. 3.

It is well documented, despite the tone of the ACR, that GHSC has taken its obligations as a public utility very seriously and, since receiving a certificate of public convenience and necessity (CPCN) in D.10-05-025, has taken all steps to meet Commission requirements for a sewer public utility and seek rate relief commensurate with its revenue requirement. GHSC's efforts have been repeatedly frustrated by Commission directives and inaction. Thus, no action or direction has ever been offered by Commission staff (i.e., DWA and Legal Division) on the multiple requests dating from November 2011 from counsel for the estates of its principal shareholders or insolvency counsel for GHSC on appointing a receiver for GHSC.

Further, as documented in A.11-08-019, at pages 2 through 6, GHSC, a Class D sewer corporation, was required by DWA staff to forego months of work and even a public hearing on an *accepted* advice letter appropriate to general ratemaking for a Class D sewer corporation and, instead, pursue this request in this costly, much-delayed formal application, for which the interim rate relief finally authorized was not as requested or needed, as to timing or amount, to sustain operations. Yet, during this period since the end of the shareholders' commitment of revenue (September 2011), GHSC has nevertheless continued its efforts to move its request for needed rate relief forward, despite inadequate funding to do so, and actively pursued an ultimately fruitless search for a private or public owner for the utility.

By the beginning of this month, it became clear to GHSC that all options had failed, and without alternative ownership, an appointed receiver, or revenues to provide sewer service, GHSC has had no choice, but to close its doors. This is not "abandonment," but, as recognized by Section 855, a case of the corporation being "unable," despite best efforts and no assistance from this or other affected public agencies, to continue in business

In these circumstances, and regardless of its other shortcomings, the real problem with the ACR is that it fails to take the action that is required in the current circumstances. Threatening an insolvent corporation with sanctions if it does not continue a service that it has no funds to provide is no solution (and, as noted above, would perpetrate a fraud on creditors) and, more importantly, provides no assistance to GHSC's customers. What is required is the appointment by the Commission of a receiver by February 29, 2012.

In this regard, in the event a receiver is appointed and the desire is for GHSC to continue to operate with that receiver, the receiver, just like GHSC, will also still require adequate revenues to sustain the sewer service.⁷ The Commission should, therefore, take no steps to jeopardize currently effective rates or needed rate relief in these circumstances by dismissing this application or altering the currently effective rates.

Respectfully submitted,

February 23, 2012

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⁷ In D.05-07-010, the Commission specifically authorized the receiver to “apply, by advice letter, for general ratemaking in the manner provided for Class D water utilities.” (D.05-07-010, at p. 69). Of course, GHSC also sought general ratemaking through advice letter in May 2011, which, if it had been acted on by the Commission, could have averted the current situation by providing adequate revenues for GHSC to sustain its sewer service. Instead, despite being originally accepted by DWA Staff and the subject of a local public hearing, the advice letter was then rejected by DWA Staff, and GHSC was required to file the instant application, which has been subject to delays from its filing in August 2011. That history is repeated in detail in A.11-08-019 at pages 2-6.

ATTACHMENT A
November 2011 Email Correspondence
From Maria Pum (Attorney for Smith Estate) to Bruce DeBerry (DWA)

From: Maria Pum
Sent: Friday, November 11, 2011 11:52 AM
To: 'BMD@CPUC.ca.gov'
Cc: A Franklin Berry Jr (fberry@berrylawfirm.com); 'dlongest@BBandT.com' (dlongest@BBandT.com)
Subject: FW: Golden Hills Sanitation

Mr. DeBerry—

I just learned that the email address I used for you was incorrect. I hope my error did not create any problems that could have been avoided.

Regards,

Maria K. Pum
Partner

Henderson, Caverly, Pum & Charney LLP

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From: Maria Pum
Sent: Wednesday, November 09, 2011 12:23 PM
To: BMD@ThePUC.CA.Gov
Cc: A Franklin Berry Jr (fberry@berrylawfirm.com)
Subject: Golden Hills Sanitation

Dear Mr. DeBerry:

As you know from my earlier email, I am one of the attorneys retained by Branch Banking & Trust in its capacity as domiciliary executor of the Estate of Carlie Smith (“BB&T”). As you also know from our call this morning, we were of the belief that today’s call was going to primarily about a smooth transition of the operation of the Golden Hills Sanitation Company to a new operator or receiver. It appears that progress toward that objective was not as great as we had believed.

In light of the need for further analysis by all participants on the call this morning of what steps must be taken to achieve the objective of obtaining a new operator for the GHSC given its own inability to generate enough revenues to fund operation of the sewage plant, BB&T has authorized me to advise you that the Estate of Carlie Smith, despite its own evident insolvency, is willing between now and November 30, 2011 to make up the operating deficit for the

operation of GHSC during that period. It is BB&T's hope that in funding operations through that period, a thoughtful resolution of the matters that were discussed this morning can be accomplished. It is also important for all to understand that although the Estate of Carlie Smith is willing to fund the operating deficit through the end of this month, it is not obligating itself to continue to fund the operation of GHSC after that date.

Best regards,

Maria K. Pum
Partner

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