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Arizona Corporation Commission

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

NO. DOCKET NO. SW-02361A-08-0609

**BOULDERS HOMEOWNERS'
ASSOCIATION'S INITIAL CLOSING
BRIEF**

The Boulders Homeowners' Association ("BHOA"), by and through undersigned counsel, submits this Initial Closing Brief.

INTRODUCTION

In Black Mountain Sewer Corporation's ("BMSC" or "Company") last rate case, the Arizona Corporation Commission ("Commission") responded to customers' complaints about odor issues in the BMSC system and ordered the Company to operate its sewer system to reasonably mitigate odors, including undertaking certain specific improvements to its collection system and removing a lift station. BMSC undertook the required upgrades, and continued to work to remedy further odor issues arising from the sewer collection system. However, odors also originate from the Boulders Wastewater Treatment Plant that sits within one hundred feet of homes in the Boulders community, and BHOA is again asking this Commission to bring relief from pervasive odors. Additionally, this time the Company agrees that there are ongoing odors that should be remedied, and agrees with BHOA how to eliminate the odors originating from the treatment plant. Customers have indicated through the Commission's public comment

1 process that they want to the treatment plant closed to alleviate the odors they experience,
2 that they recognize such closure will result in increased costs of service, and that they are
3 willing to pay increased rates that may result. The BHOA and the Company have reached
4 a Settlement Agreement to accomplish closure of the Boulders Wastewater Treatment
5 Plant and provide fair and timely recovery of the costs the Company incurs. BHOA urges
6 the Commission to approve the Settlement Agreement to permit the treatment plant to be
7 closed, and the odors and noises that emanate from it to be eradicated forever.

8 **HISTORY OF PROBLEM, PARTIAL SOLUTION OF LAST RATE CASE**

9 In the middle of the Boulders residential community sits the Boulders Wastewater
10 Treatment Plant that was originally constructed in 1969. Exh. BHOA-4 at 2. The
11 treatment plant sits less than one hundred feet from three homes, and there are 200-300
12 homes within one thousand feet of plant. *Id. at 4.* The plant is permitted to treat 120,000
13 gallons per day of wastewater, and it treats about twenty percent of the Company's total
14 wastewater flows. Tr. at 115-16 (Sorenson).

15 The Treatment Plant at the site was originally intended to serve only the residents
16 of the Boulders and the golf courses. Exh. BHOA-4 at 2. Further, it was intended that
17 the site was only a temporary location for treatment of wastewater, and that another
18 location would be secured, further away from homes, for a more permanent treatment
19 facility. *Id.* But, forty years later, treatment plant remains at the original site, the middle
20 of a residential neighborhood.

21 In the Company's last rate case in 2005, BHOA intervened and brought to the
22 Commission's attention the odor issues related to BMSC's sewer operations. Decision
23 No. 69164. The Town of Carefree also intervened in the rate case and testified about the
24 odor issues. The odor problem was so pervasive that some thought corrections to
25 collection system were all that was necessary to solve the odor problems. *Id.*

26 The Commission's decision required Company to implement one of the two

1 solutions that had been proposed by the Town's witness in order to "mitigate" the odor
2 problems. *Id* at 43. The Decision expressed the Commission's desired goal as "odor
3 remediation in the Boulders community." *Id.* at pg. 37, fn 13. The Commission further
4 indicated that it believed that action should be taken to advance a solution "that will
5 enable all customers...to enjoy fully their property without enduring offensive odors." *Id*
6 at 37.

7 In response to Decision No. 69164, Company upgraded its collection system and
8 removed the CIE lift station. Exh. A-1 at 2-3. In this case, the Company proposes to
9 include in rate base its investment to implement those measures, and no party has opposed
10 that request. Tr. at 109. More than one-third of the increase the Company is requesting
11 in this proceeding is related to improvements that Commission required in last rate case to
12 address odors from the collection system. *See*, Exh. A-1 at 10 (nearly 22% of the almost
13 total 60% rate increase request).

14 **CURRENT STATUS OF ODOR PROBLEM AND EFFORTS TO ADDRESS**
15 **ODORS**

16 Despite the Company's improvements to the collection system, the odor problems
17 persist. Over five hundred public comments have been lodged with the Commission in
18 this docket (letters, petitions, appearances at the public comment portion of the hearing)
19 confirming the ongoing odor problems. Commenters indicated the impacts of the odors
20 on their lifestyle, including interruption of Thanksgiving dinner on the patio, inability to
21 leave windows open to enjoy fresh air, noises from operation of the plant disturbing sleep,
22 embarrassment to host guests who may experience intense odors, and golfers who must
23 hold their breath as they pass the treatment plant. Now it is clear that odor problem
24 identified by the Commission in Decision No. 69164 in fact was originating in both the
25 collection system and Boulders Wastewater Treatment Plant.

26 In the last rate case, the Company disputed whether the Commission had authority

1 to require it to resolve odor problems when there was no finding of violation of Maricopa
2 County Environmental Services Department odor regulations. The Commission
3 concluded that it did have such authority. Decision No. 69164 at 36-37, 40 (Conclusion
4 of Law No. 3). Since the last rate case, the Company has been noticeably more
5 cooperative in working with the residents to address odor issues. Exh. BHOA-4 at 5.
6 The Company has met regularly with the BHOA and representatives of the Town to
7 discuss ongoing odor issues, identify the source of such odors, and explore alternatives to
8 eliminate such odors. Tr. at 356, 362-63, 371, 373 (Peterson).

9 BHOA could have intervened in this proceeding and merely identified the ongoing
10 odor problems and asked the Commission come up with a workable solution. However,
11 in light of the cooperative posture the Company had evidenced since the last rate case,
12 BHOA attempted to work with the Company to identify a specific solution to the odor
13 problem that was acceptable to the Company. The Company was open to the concept of
14 closing the treatment plant, but several issues stood in the way that would need to be
15 resolved.

16 First, the Company has an agreement with the Boulders' Resort, to sell the Resort
17 all of the effluent treated at the Boulders Wastewater Treatment Plant for irrigation of the
18 Resort's golf courses.¹ That Agreement is in effect through 2021, and prevents the
19 Company from unilaterally closing the plant and cutting off the Resorts' supply of the
20 effluent. Exh. BHOA-3. Second, the Company would require some other way to treat the
21 120,000 gpd of effluent that is currently treated at the Boulders Wastewater Treatment
22 Plant. The Company has right to purchase additional treatment capacity from the City of
23 Scottsdale, which treats the remaining 80% of the Company's wastewater. Exh. BHOA-2;
24 Exh. BHOA-4 at 3-4, 7. Third, the Company was unwilling to incur costs of closing the

25
26 ¹ The Resort obtains approximately ten percent of its irrigation water for the Boulders Wastewater Treatment Plant.
Tr. At 121 (Sorenson)

1 plant and obtaining alternative treatment capacity from Scottsdale if there is a risk of
2 Commission later saying it wasn't prudent and denying recovery, and also was unwilling
3 to wait until next rate case to begin recovery of its increased investment to close plant and
4 acquire capacity from Scottsdale.

5 **THE SETTLEMENT AGREEMENT SOLVES THE ODOR ISSUES**
6 **ORIGINATING FROM THE TREATMENT PLANT**

7 To address the Company's concerns, BHOA and the Company entered into the
8 Settlement Agreement that is attached to Mr. Peterson's direct testimony. The Settlement
9 Agreement provides for BMSC to shut down the Boulders Wastewater Treatment Plant
10 within 15 months of certain conditions being satisfied. Those conditions include (1)
11 modifying its agreement with the City of Scottsdale to confirm that the Company will
12 have continued access to capacity at the Scottsdale Treatment Plant after closure of the
13 Boulders Wastewater Treatment Plant and beyond the term of its current agreement with
14 the City; (2) modifying BMSC's collection system to accommodate sending the additional
15 flows to the Scottsdale Treatment Plant on a permanent basis; (3) the Resort agreeing to
16 termination of its agreement with BMSC for the effluent from the Boulders Wastewater
17 Treatment Plant; and (4) the Commission approving a cost recovery mechanism for the
18 costs associated with the closure of the Boulders Wastewater Treatment Plant. Once
19 operations of the treatment plant have ceased, the Company will remove the structures
20 and equipment from the site, perform any necessary hazardous substance remediation,
21 and restore the site so that residential structure(s) may be constructed on the site. The
22 Company will sell the site for residential use, and share the gain on the property equally
23 with its customers.

24 **RUCO'S TESTIMONY ON THE SETTLEMENT AGREEMENT**

25 RUCO agrees with BHOA that there should be a successful resolution to the odor
26 issues in the Boulders community. Tr. at 544; Exh. R-7 at 3. However, RUCO has

1 expressed objections to the Settlement Agreement. First, RUCO does not know whether
2 closing the plant will in fact solve the odor problem. Exh. R-7 at 4. RUCO has not
3 offered any evidence suggesting that the odors that customers experience would not be
4 eliminated if the plant is removed, however. Further, if the treatment plant were
5 eliminated, all that would remain at the site would be underground pipes and potentially a
6 sealed manhole. Tr. At 139, 114.

7 RUCO's second objection is based on its philosophical objection to the sort of cost
8 recovery mechanism the Settlement contemplates. Exh. R-7 at 4-5; Tr. at 547. RUCO
9 objects to the recovery mechanism, in part, because it contravenes the "matching
10 principle." Tr. at 547; Exh. R-7 at 6. However, the Commission does not strictly adhere
11 to the matching principle. Tr. at 548-49. Specifically, the Commission regularly includes
12 in rate base post-test year plant which is in service by the time of the Commission's
13 hearing, even though a hearing may be well beyond the end of a test year. Tr. at 548;
14 Decision No. 66849 at 4. The recovery mechanism of the Settlement Agreement will
15 similarly provide an opportunity for the Commission to fully evaluate the actual costs of
16 closing the plant prior to implementing rates that begin to recover those costs. Tr. at 248,
17 252-53 (Bourassa).

18 **STAFF TESTIMONY ON ODOR ISSUES**

19 Staff does not oppose closing the Boulders Wastewater Treatment Plant on an
20 ideological level. Tr. at 82 (Opening Statement). Staff did not provide any pre-filed
21 testimony regarding the Settlement Agreement, and therefore Staff's position on it is not
22 entirely clear to the BHOA at this time. However, Staff's witnesses did provide some
23 testimony in the hearing regarding aspects of the Settlement Agreement.

24 First, Staff witness Crystal Brown testified that the Settlement Agreement was not
25 relevant to the Company's rate proceeding. Tr. at 727-28 (Brown). This is a curious
26 position, given that Ms. Brown testified that she did not even read the Settlement

1 Agreement (Tr. at 728), and given that the Commission found it appropriate in the last
2 rate case to address the odor issues raised by BHOA and the Town at that time. If Staff
3 maintains in its closing brief that the Settlement Agreement and resolution of the odor
4 issues are not appropriately raised in this rate case, BHOA will respond further in its reply
5 brief.

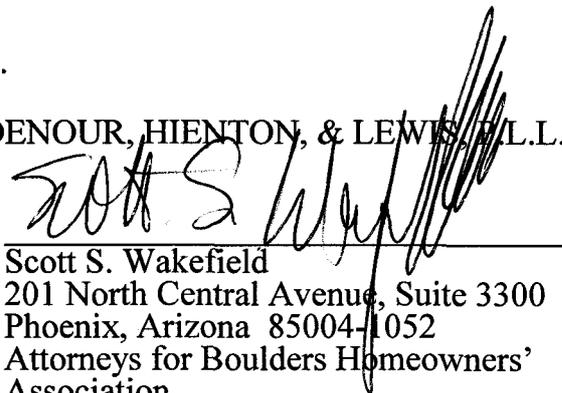
6 Second, Staff witness Dorothy Haines testified that the Company should remedy
7 odor issues. Tr. at 652. Though Ms. Haines could not conclude that removing the
8 treatment plant would eliminate all of the odors that customers experience, she did agree
9 that the treatment plant was the largest source of odor and noises, and that closing the
10 plant would eliminate those odors and noises. Tr. at 657-58.

11 **CONCLUSION**

12 The Commission has already ordered the Company to resolve the odor issue in the
13 Boulders community. The Settlement Agreement is a way to accomplish that goal within
14 bounds of the various constraints that prevent the Company from just shutting the
15 treatment plant on its own, and avoiding potential litigation by the Company if the
16 Commission were to impose plant closure on the Company without the recovery
17 mechanism. The Homeowners urge the Commission to approve the Settlement
18 Agreement.

19 Dated this 4th day of December, 2009.

20 RIDENOUR, HIENTON, & LEWIS, P.L.L.C.

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