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BEFORE THE ARIZONA CORPORATIO

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Arizona Corporation Commission

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JUN 12 2012

ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

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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.

DOCKET NO. SW-02361A-08-0609

**STAFF'S OPENING BRIEF
REGARDING REHEARING OF
DECISION NO. 71865**

The Utilities Division ("Staff") of the Arizona Corporation Commission ("Commission") hereby files its closing brief in the above-captioned matter.

I. INTRODUCTION.

Black Mountain Sewer Company ("Black Mountain" or "Company") filed a rate application on December 19, 2008, seeking relief based on a test year ending June 30, 2008. As the Commission noted in the prior proceeding in 2006, the problem of system odors was "the most contentious issue in this proceeding."¹ In the current docket, odor control remained an issue, as hundred of public comments were submitted to the docket. Black Mountain entered into negotiations with the Boulders Home Owners Association ("BHOA") an intervenor in the current docket, in an attempt to resolve the odor issues, which culminated in a settlement agreement ("Closure Agreement").

Under the terms of the Closure Agreement, Black Mountain would agree to close the Boulders Wastewater Treatment Plant ("WWTP") within 15 months of certain conditions being met. Those conditions are: (i) acquire additional capacity rights with the City of Scottsdale to replace the treatment plant capacity; renegotiate the Effluent Agreement with the Boulders Resort ("Boulders") to allow termination of the agreement; (ii) obtain regulatory approvals from applicable regulatory

¹ Decision No. 69164 at 30.

1 agencies; (iii) undertake engineering and other analyses necessary to complete the closure; (iv)
2 complete system upgrades required as a result of the closure and/or delivery of the flows to
3 Scottsdale previously treated at the plant; and (v) the approval of a cost recovery mechanism that
4 would allow the Company to recover, among other things, return on and of the capital costs of
5 closure, including costs of procuring additional capacity from the City of Scottsdale, costs of
6 engineering and other analyses necessary to complete the closure, system upgrades required as a
7 result of the closure and/or delivery of the flows to Scottsdale previously treated at the plant.²
8 Following restoration of the plant property, Black Mountain would retain full ownership of the site
9 and would be required to sell the site as residential property, with the gain on the sale being split
10 evenly between shareholders and ratepayers for ratemaking purposes.³

11 In Decision No. 71865, the Commission recognized that “[t]his case presents an extraordinary
12 set of facts and circumstances that calls for an extraordinary remedy that we believe is achieved by
13 the Closure Agreement.”⁴ The Commission also approved a cost recovery mechanism that allows
14 Black Mountain to receive a return on and of its capital costs.

15 On June 15, 2011, the BHOA filed a motion for plant closure, asserting that Black Mountain
16 had reached an impasse in its negotiations with the Boulders in an effort to end the Effluent
17 Agreement. The Commission granted the BHOA’s motion as a motion for rehearing under A.R.S. §
18 40-252. The Boulders filed a motion to intervene, which was granted. The Boulders asserts that
19 there is no reasonable alternative for it to obtain replacement effluent.

20 While Staff does not make a recommendation regarding closure of the WWTP, given the
21 overwhelming desire of the community to close the plant whose odors and presence in the
22 community continue to pose a problem, Staff would nevertheless maintain that the Commission has
23 the authority to order the closure of the WWTP. Staff believes that recommending the closure of a
24 facility that is used and useful and that is operating in compliance with all applicable rules and
25 regulations creates a difficult situation because it is included in the rate base, as such, it is part of
26

27 ² Decision No. 71865 at 42-43.

28 ³ *Id.*

⁴ *Id.* at 56.

1 setting the revenue requirement.⁵ Staff, in an effort to assist the Administrative Law Judge, provides
2 the following discussion of the Commission's authority.

3 **II. DISCUSSION.**

4 Specifically, Article XV, Section 3 of the Arizona Constitution grants the Commission
5 sweeping authority:

6 The Corporation Commission shall have full power to, and shall, prescribe just and
7 reasonable classifications to be used and just and reasonable rates and charges to be
8 made and collected, by public service corporations within the State for service
9 rendered therein, and make reasonable rules, regulations, and orders, by which such
10 corporations shall be governed in the transaction of business within the State and
11 may...make and enforce reasonable rules, regulations, and orders for the convenience,
12 comfort, and safety, and the preservation of the health, of the employees and patrons
13 of such corporations

14 A.R.S. § 40-321(A) provides:

15 When the commission finds that the equipment, appliances, facilities or service of any
16 public service corporation, or the methods of manufacture, distribution, transmission,
17 storage or supply employed by it are unjust, unreasonable, unsafe, improper,
18 inadequate or insufficient, the commission shall determine what is just, reasonable,
19 safe, proper, adequate or sufficient, and shall enforce its determination by order or
20 regulation.

21 Thus, the State constitution along with the foregoing statute provide the power for the
22 Commission to act in the public interest to require the public service corporations that it regulates to
23 take certain actions with its plant and facilities should the Commission make a finding as set forth in
24 the statute.

25 A.R.S. § 40-331 (A) provides in part:

26 When the commission finds that additions or improvements to or changes in the
27 existing plant or physical properties of a public service corporation ought reasonably
28 to be made, or that a new structure or structures should be erected, to promote the
security or convenience of its employees or the public, the commission shall make and
serve an order directing that such changes be made or such structure be erected in the
manner and within the time specified in the order.

28 ⁵ Ex. S-10 at 4.

1 Under the statutory scheme, the Commission is empowered to require utilities to either add plant or
2 make changes in plant. In Decision No. 69184, the Commission pursuant to its statutory and
3 constitutional authority, ordered Black Mountain to implement certain system changes. The
4 Company, among other things, removed a lift station, rerouted sewer lines and installed air-jumper
5 pipelines at four locations along the street between manholes to allow air to flow with the sewage and
6 stop it from being released into the atmosphere.⁶ Having exercised its authority to order the
7 installation of additional plant to remedy the odors, it follows logically that the Commission can order
8 plant removed and in this instance plant closure. A.R.S. § 40-331(A) contemplates that the
9 Commission can order the installation of new plant as well as order "changes" to existing plant to
10 "promote security or convenience" of the public.

11 There is no dispute that the Company is operating the WWTP in accordance with Commission
12 rules and in accordance with other regulatory authorities.⁷ But despite this fact, there is
13 overwhelming community support for the closure. During the public comment, the Mayor of the
14 Town of Carefree indicated the Town's support of plant closure.⁸ The community has indicated that
15 it is willing to bear the burden of the costs of the closure.

16 Additional support for the Commission's authority to order plant closure is found in *Arizona*
17 *Corp. Comm'n v. Palm Springs Utility Co., Inc.* 24 Ariz. App. 124, 128, 536 P.2d 245, 249 (App.
18 1975).⁹ In that case, the court held that "the regulatory powers of the Commission are not limited to
19 making orders respecting the health and safety, but also include the power to make orders respecting
20 comfort, convenience, adequacy and reasonableness of service..."¹⁰ Palm Springs involved a water
21 company that was providing water that was the subject of several customer complaints regarding taste
22 and hardness. The water, while found to be safe to drink, was neither palatable nor aesthetically
23 pleasing. The water was found to have met all mandatory requirements set by the State Health
24 Department, The Commission ordered Palm Springs to improve the quality of the water, including

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26 ⁶ Decision No. 71865 at 40.

27 ⁷ Ex. S-1 at 2.

28 ⁸ Tr. at 8:15-20. In addition, the Town of Carefree filed in the docket, on November 9, 2011, a resolution of the Town council supporting plant closure.

⁹ 24 Ariz. App. 124, 128, 536 P.2d 245, 249 (App. 1975).

¹⁰ *Id.*

1 the acquisition of a new water source if necessary. The court noted that the Commission was
2 authorized by statute to deal with specialized situations so long as there exists a rational statutory or
3 constitutional basis for the action, and the action is not so discriminatory as to constitute a denial of
4 the equal protection clause.¹¹

5 A.R.S. § 40-361(B) provides:

6 Every public service corporation shall furnish and maintain such service, equipment
7 and facilities as will promote the safety, health, comfort and convenience of its
8 patrons, employees and the public, and as will be in all respects adequate, efficient and
9 reasonable.

10 The foregoing constitutional and statutory language provides the Commission with broad
11 authority to act in protecting the public health and safety and ensure the comfort and convenience of
12 the ratepayers.

13 **III. CONCLUSION.**

14 While Staff is concerned about the closure and removal of plant that is used and useful, the
15 Commission would be acting within its authority should it order the WWTP to be closed.

16 RESPECTFULLY SUBMITTED this 12th day of June, 2012.

17 

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26 12th day of June, 2012 with:

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28 ¹¹ *Id.*

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