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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

COMMISSIONERS

DOCKETED

JUN 12 2012

9 GARY PIERCE, Chairman
10 SANDRA D. KENNEDY
11 PAUL NEWMAN
12 BOB STUMP
13 BRENDA BURNS

DOCKETED BY [Signature]

Docket No. SW-02361A-08-0609

14 IN THE MATTER OF THE APPLICATION OF
15 BLACK MOUNTAIN SEWER CORPORATION,
16 AN ARIZONA CORPORATION, FOR A
17 DETERMINATION OF THE FAIR VALUE OF
18 ITS UTILITY PLANT AND PROPERTY AND
19 FOR INCREASES IN ITS RATES AND
20 CHARGES FOR UTILITY SERVICE BASED
21 THEREON

Initial Closing Brief

22 Wind P1 Mortgage Borrower L.L.C., doing business as The Boulders Resort and Golden
23 Door Spa (the "Resort"), by and through its undersigned attorneys, respectfully submits the
24 following initial closing brief in the above-referenced matter.

25 **I. BACKGROUND AND FACTS**

26 The current proceeding is a reopening pursuant to Arizona Revised Statutes ("A.R.S.")
27 section 40-252 of Black Mountain Sewer Corporation's ("Black Mountain" or the "Company")
28 September 1, 2010 rate case Decision No. 71865 to determine whether the decision should be
amended to grant the relief requested in the Boulders Homeowners' Association's ("BHOA's")
Motion for Plant Closure Order docketed June 15, 2011 ("BHOA's Motion").

1 **1. History of Odor Issues at the Plant**

2 Black Mountain owns and operates a wastewater reclamation plant (the “Plant”) that
3 serves an area of North Scottsdale and Carefree that includes the Resort, numerous residents in
4 and near The Boulders community, and other businesses and residents in Carefree. The Plant is
5 in full compliance with all applicable legal and industry standards.¹ Commission Decision No.
6 69164 (December 5, 2006) and Decision No. 71865 (September 1, 2010) both contain detailed
7 background descriptions regarding customer odor complaints relating to Black Mountain’s
8 sewer collection system and the Plant, and the Commission’s prior actions, that are not repeated
9 here. Briefly, there were numerous customer odor complaints regarding Black Mountain’s
10 sewer service area preceding Decision No. 69164, and the Commission concluded in 2006 that
11 “there appeared to be a general agreement that the odor problems reported by customers came
12 from two separate sources in Black Mountain’s system, the CIE Lift Station and the wastewater
13 line that flows under Boulder drive in the Boulders subdivision.”² The Commission ordered the
14 Black Mountain to report back to the Commission on the Company’s planned project to remove
15 the CIE Lift Station, and ordered it to “pursue one of the remedies proposed by the Town of
16 Carefree in order to mitigate the odor problems that currently exist in the Boulders
17 community...”³ In Decision No. 69164, the Commission determined that Black Mountain had a
18 fair value rate base of \$1,472,969.⁴

19
20 Remedial measures Black Mountain undertook are summarized in Decision No. 71865 at
21 pages 40-41, and included installation of an odor scrubber at the Plant, heavy rubber mats over
22 grate openings covering treatment basins at the Plant, and various noise reduction
23
24

25
26 _____
¹ See section I.2 at pp. 3-4 below.

² Decision No. 71865 at 38; Decision No. 69164 at 30-31.

³ Decision No. 71865 at 42-43.

⁴ Decision No. 69164 at 39.

1 improvements.⁵ The primary reason for the 2008 rate case was to seek recovery in rates for
2 remedial measures taken by Black Mountain to address odor complaints within its service
3 territory.⁶ In Decision No. 71865, the Commission determined that Black Mountain had a fair
4 value rate base of \$3,606,767.⁷ The Commission determined the Plant was used and useful, and
5 that the facility investments in odor and noise control improvements since the last rate case were
6 used and useful.⁸

7
8 Since Decision No. 71865 was issued, the Company has received and logged 23 odor
9 complaints from customers (including a lawsuit filed in Maricopa County Superior Court by a
10 resident living next to the Plant), but many of these complaints related to collection system
11 odors or other matters, and not to Plant odors.⁹ Only one recent noise complaint was logged by
12 the Company from a resident of the home closest to the Plant.¹⁰

13 **2. The Plant's Compliance Status**

14 The Plant is permitted to operate by the Arizona Department of Environmental Quality
15 ("ADEQ") through an Aquifer Protection Permit to treat 120,000 gallons per day of
16 wastewater.¹¹ Through a delegation agreement with ADEQ, the Maricopa County
17 Environmental Services Division ("MCESD") inspects the Plant and collection system
18 periodically for compliance with ADEQ's and the County's rules and ordinances, including
19

20
21 ⁵ Decision No. 71865 at 40-41; see also Exhibit ("Ex.") A-1, Sorenson Direct, at pp. 2:17-8:25. (Exhibit numbers
22 cited in this brief refer to exhibits admitted in either or both the prior hearings held in this docket on November
23 18, 23, 24, and 25, 2009 and May 8, 2012.)

24 ⁶ Ex. A-1, pp. 2:17-8:25; Transcript of Hearing, November 18, 2009, SW-02361A-08-0609, Volume I ("Tr.I") at
25 109:3-11 (21.7 percent of the rate increase, or approximately one million dollars, was attributable to two
26 changes previously ordered by the Commission in Decision No. 69164); Tr.I at 132:3-133:17 (roughly \$1.25
27 million).

28 ⁷ Decision No. 71865 at 63.

⁸ *Id.* See also Transcript of Hearing, November 25, 2009, SW-02361A-08-0609, Volume IV ("Tr.IV") at 616:14-
21.

⁹ Ex. W-6. See also Transcript of Hearing, May 8, 2012, SW-02361A-08-0609 ("New Tr.") at 157:2-159:21.

¹⁰ *Id.*

¹¹ See Tr.I at 103:24-104:6 (capacity of plant is 120,000 gpd). Ex. S-1 (Staff engineering report).

1 rules and ordinances regarding odors, usually in response to complaints.¹² As previously noted,
2 the Plant is operated in full compliance with all applicable legal and industry standards.¹³

3 The Plant is located within less than 100 feet of approximately 3 homes and within 1,000
4 feet of roughly 200-300 homes.¹⁴ The Plant, since it is an existing facility, is not subject to
5 ADEQ's design setback requirements for new plants in Arizona Administrative Code section
6 R18-9-B201(I). A new plant built today with a 120,000 gpd capacity that has no odor, noise, or
7 aesthetic controls would require a minimum setback of at least 500 feet, and a new facility with
8 full noise, odor, and aesthetic controls would require a minimum setback of 100 feet.¹⁵ The
9 Plant currently has an odor scrubber, so has partial noise, odor, and aesthetic controls.

10 3. The Settlement Agreement and Conditions Precedent

11 Even though Black Mountain made significant odor and noise improvements prior to the
12 2008 rate case, concerns about odors continued and were pursued by the BHOA in this case. As
13 a result, Black Mountain and BHOA entered into a settlement agreement, the Wastewater
14 Treatment Plant Closure Agreement ("Settlement Agreement") that is described starting on page
15 42 of Decision No. 71865. The Settlement Agreement included a number of conditions
16 precedent that must be satisfied before Black Mountain is obligated to close the Plant. One of
17 the conditions precedent is protective of the Resort's interests in the Effluent Delivery
18 Agreement in that the Resort's consent is required to change the contract terms. Condition
19 precedent 2.a.iv. of the Settlement Agreement requires as follows:
20

21 iv. Effluent Agreement with the Resort. BMSC currently has an agreement with
22 the Resort which requires BMSC to deliver all effluent generated at the Plant to the
23

24 ¹² Maricopa County's delegation agreement #06-0024 with ADEQ can be viewed at
25 <http://www.azdeq.gov/function/permits/download/delegation/maricopa.pdf>.

26 ¹³ See Stipulation of Facts docketed March 6, 2012 ("Stipulation of Facts") no. 11. See Ex. S-1, p. 4:10-14; Ex. A-
27 1, pp. 11:11-12:7, Tr.I. at 142:13-144:5, Tr.IV at 616:14-21; see Ex. S-1, p. 4:10-14 (Staff engineer concluded
28 that Company is in full compliance).

¹⁴ Stipulation of Facts, no. 2.

¹⁵ A.A.C. R18-9-B201(I). See rule for detail on measurements and odor, noise, and aesthetic controls.

1 Resort through March 2021. In the agreement, BMSC covenanted to continue to
2 operate the Plant and to not reduce the amount of effluent produced by the Plant.
3 BMSC must sign an agreement with the Resort whereby the Resort agrees to allow
4 the termination of the Effluent Agreement at no or limited cost to BMSC.¹⁶

5 During the hearing on November 18, 2009, when asked what would be the cost to the Company
6 for the Boulders to receive water from a source other than the Treatment Plant, Black Mountain
7 testified that “the intent would be then the cost of that replacement effluent supply would be
8 borne by the Boulders.”¹⁷ Black Mountain has since determined that finding a replacement
9 water supply is more difficult than it previously anticipated.¹⁸

10 Despite agreeing to the condition quoted above from paragraph 2.a.iv of the Settlement
11 Agreement, the BHOA filed the BHOA Motion seeking closure of the Plant on June 15, 2011.
12 The Resort moved to intervene on July 6, 2011, and intervention was granted on January 26,
13 2012.

14 **4. The Commission’s Approval of a Surcharge Mechanism Did Not Include a
15 Finding that Plant Closure Was Reasonably Necessary.**

16 The Commission’s determination that the Settlement Agreement “represents a reasonable
17 resolution of the current odor concerns...”¹⁹ did not go so far as to find that closure of the Plant
18 was reasonably necessary, nor was the Plant’s closure presented to the Commission in the
19 manner now presented by BHOA’s Motion. The Commission’s decision to adopt the proposals
20 in the Settlement Agreement was based in part upon unsworn public comments,²⁰ and was
21 secured with the settling parties’ representation that approval of the terms did not require the
22 Commission to make a determination of whether the plant closure, an arguable management
23 decision, was in the public interest – only whether the surcharge should be implemented.²¹

24 ¹⁶ Ex. BHOA-7, p. 3.

25 ¹⁷ Tr.I at 146:11-22.

26 ¹⁸ New Tr. at 151:16-152:14.

27 ¹⁹ Decision No. 71865 at. 49:13-18.

28 ²⁰ Decision No. 71865 at 49:19-51:4.

²¹ Tr.I at 185:23-187:8; Decision No. 71865 at 45:11-20, 53:7-54:1.

1 As is discussed in more detail below, after Decision No. 71865 was issued, the parties
2 and the Resort have worked to find a way to satisfy the condition precedent in the Settlement
3 Agreement relating to Black Mountain's obligation to provide effluent to the Resort for golf
4 course irrigation, but have not yet found a resolution acceptable to both parties.

5 **5. BHOA's Motion**

6 BHOA's Motion requests that "In light of the apparent impossibility of this condition [the
7 condition precedent described above] to be satisfied, BHOA asks that the Commission order
8 BMSC to close the Treatment Plant, thereby relieving BMSC of its contractual obligation to
9 provide effluent to the Resort and allowing BMSC to expeditiously close the Treatment Plant."²²

10 **II. THE RESORT'S REQUESTED RELIEF**

11 BHOA's Motion should be denied. The requested remedy, if granted, would be an
12 unlawful, arbitrary, and unreasonable decision that would deprive the Resort of its contractual
13 rights. The Plant is used and useful in the service it provides to all customers.

14 **III. EVEN ASSUMING THE COMMISSION HAS THE LEGAL AUTHORITY TO**
15 **ORDER CLOSURE OF A USED AND USEFUL PLANT THAT OPERATES IN**
16 **FULL COMPLIANCE WITH ALL APPLICABLE LEGAL AND REGULATORY**
17 **REQUIREMENTS, THE RECORD DOES NOT SUPPORT A CLOSURE ORDER**
18 **AT THIS TIME.**

19 **1. Plant Closure would have Significant Negative Impacts Because the Resort**
20 **Relies on Effluent Provided by Black Mountain to Maintain Its Golf Courses.**

21 The closure order urged by BHOA will have significant negative impact on the Resort
22 because closure will cause the Resort to lose a critical portion of its golf course water supply
23 that cannot currently be reasonably replaced. In addition to treating wastewater, one of the
24 original purposes of the Plant was to provide treated water to the Resort's golf course.

25 The Resort consists of a hotel with 160 high-end casitas, meeting spaces, a spa, tennis
26 courts, four swimming pools, and seven restaurants.²³ Adjacent to the Resort there are privately-

27 ²² BHOA Motion for Plant Closure Order docketed June 15, 2011, p. 1:23-26.

28 ²³ Ex. W-1, p. 3.

1 owned villas and hacienda units.²⁴ The Resort also has two 18-hole championship golf courses,
2 the North Course and the South Course.²⁵ The Resort is located in the foothills of Black
3 Mountain near Carefree and the two golf courses are located in areas that include small hills and
4 large granite boulder formations.²⁶ The Resort is branded as one of Hilton's Waldorf Astoria
5 hotels.²⁷ The Resort employs approximately 550 people, and annually generates revenues of
6 approximately \$40 million for the surrounding communities, including the Towns of Cave
7 Creek, Carefree, and the City of Scottsdale.²⁸

8
9 The Resort is a destination golf resort.²⁹ Many visitors come for the primary purpose of
10 golfing.³⁰ Both of the Resort's golf courses are world class courses that are designed and
11 operated to compete with courses at other luxury properties, both in the United States and
12 internationally.³¹ One of the 18-hole golf courses is dedicated primarily to the use of Resort
13 customers.³² The other 18-hole golf course is dedicated primarily for the use of members of The
14 Boulders Club, a private golf club whose members include some members of the BHOA.³³ If
15 the Resort is not able to maintain the golf courses in world-class condition, it will have a
16 negative impact on the Resort's ability to continue attracting visitors and golf club members.³⁴

17 The Resort has two contracts through which it obtains its golf course non-potable water
18 supplies.³⁵ The Resort has an Effluent Delivery Agreement with Black Mountain that entitles
19 the Resort to purchase all effluent generated by operation of the Plant or a new wastewater
20

21 ²⁴ Ex. W-1, p. 3.

22 ²⁵ Ex. W-1, p. 3.

23 ²⁶ Ex. W-1, p. 3.

24 ²⁷ Ex. W-1, p. 3.

25 ²⁸ Ex. W-1, p. 3.

26 ²⁹ Ex. W-1, p. 4.

27 ³⁰ Ex. W-1, p. 4.

28 ³¹ Ex. W-1, p. 4.

³² Ex. W-1, p. 4.

³³ Ex. W-1, p. 4.

³⁴ Ex. W-1, p. 4.

³⁵ Ex. W-1, p. 5.

1 treatment facility constructed by Black Mountain through March 2021.³⁶ The quantity of water
2 typically purchased under this agreement is approximately 130 to 135 acre-feet per year.³⁷ The
3 parties agreed that the cost for this water is set by the Commission, and that amount is currently
4 in Black Mountain's tariff at \$0.460510 per thousand gallons (approximately \$150 per acre-
5 foot).³⁸

6 The second water supply agreement is between Wind P1 Mortgage Borrower, LLC and
7 the City of Scottsdale and includes the Pipeline Capacity Agreement dated February 3, 1992, the
8 First Amendment to Pipeline Capacity Agreement No. 920004 dated December 19, 1994, and
9 the Second Amendment to Agreement No. 920004 Pipeline Capacity Agreement dated April 1,
10 2008 (collectively, the "RWDS Agreement").³⁹ The RWDS Agreement authorizes the Resort to
11 use 1.25 MGD of capacity in the City's Reclaimed Water Distribution System ("RWDS")
12 pipeline.⁴⁰

13 The Resort obtains approximately 15 percent of its irrigation water from the Plant,⁴¹ and
14 needs Black Mountain's effluent for at least six months each year⁴² during peak water use times.
15 Most water use in the golf courses occurs to keep turf healthy and growing.⁴³

16 Recognizing the residents' support for closure of the Plant, the Resort has worked with
17 Black Mountain and the residents, and on its own, to find a solution that might allow early
18 termination of the Effluent Delivery Agreement, including possibly finding a replacement water
19 supply, but has not yet identified a reasonable solution. The Resort has investigated a number of
20 options, including operating without the Black Mountain supply through additional
21
22

23 ³⁶ Ex. BHOA-3, sections 2(a), 11.

24 ³⁷ Ex. W-1, p. 5.

25 ³⁸ Ex. W-1, p. 5.

26 ³⁹ Ex. W-1, p. 5.

27 ⁴⁰ Ex. W-1, p. 5.

28 ⁴¹ Ex. W-3, p. 3.

⁴² Ex. W-4, p. 4.

⁴³ Ex. W-3, p. 4.

1 conservation, replacement water supplies, and has discussed with Black Mountain the potential
2 replacement of the Plant with a closed plant facility that could be located elsewhere within the
3 Resort property.⁴⁴

4 The Resort determined by experimentation with reduced flows that the Resort will be
5 unable to operate at an acceptable level without a replacement water supply for the Black
6 Mountain water.⁴⁵ The Resort's golf courses are already both constructed as desert courses, and
7 have a minimum amount of turf needed for playing surfaces.⁴⁶ Removal of additional turf would
8 significantly impact the size of the playing surfaces, which would not be acceptable.⁴⁷ Removal
9 of additional low water use landscaping around the playing surfaces would have a noticeable
10 negative effect on the appearance of the courses without a sufficient corresponding water
11 savings benefit.⁴⁸ The Resort evaluated new sprinkler and irrigation equipment that could be
12 installed at a cost in excess of \$1.9 million that might be more efficient, but the companies
13 providing such equipment were unable to confirm the amount of water savings that would be
14 available in the Resort's desert environment.⁴⁹

15
16 The Resort considered reducing overseeding as a way to reduce water use. The only way
17 the Resort could continue to operate without the Black Mountain water is to stop overseeding all
18 the roughs on both courses every year and all the fairways on one or possibly both courses every
19 year.⁵⁰ This would leave one or both golf courses brown for several months each winter.⁵¹ In
20 addition, the reduction of water demand in the winter does not necessarily eliminate the need to
21 apply additional water in the spring as the Bermuda grass is reestablished, so the turf playing
22

23 ⁴⁴ Ex. W-1, p. 8.

24 ⁴⁵ See New Tr. at 97:4-19.

25 ⁴⁶ Ex. W-3, p. 4.

26 ⁴⁷ Ex. W-3, p. 4.

27 ⁴⁸ Ex. W-3, p. 4.

28 ⁴⁹ Ex. W-3, p. 4.

⁵⁰ Ex. W-3, p. 5. See also New Tr. at 90:2-91:14 (describing current overseeding practices).

⁵¹ *Id.*

1 quality could suffer in the spring too.⁵² The Resort expects that allowing the turf to go brown
2 during the peak tourist season in the winter months would have a significant if not devastating
3 impact on the Resort's ability to attract seasonal vacation golfers, and may even cause the Resort
4 to lose local golf club members to competing courses.⁵³ In general, such changes will not be
5 good for the Resort's business or the neighboring property owners, who expect to be located
6 next to a world-class Resort.⁵⁴

7 The Resort considered adding water storage capacity as a means to stretch the Scottsdale
8 RWDS water supply, but has been unable to find a feasible storage solution.⁵⁵ The Resort is
9 restricted to its existing RWDS pipeline capacity due to pipeline capacity constraints and
10 objections to exceeding the RWDS Agreement capacity from another RWDS user.⁵⁶

11 The Resort investigated use of potable water provided by Scottsdale, and, while
12 Scottsdale is willing to provide potable water as an emergency backup source for outages, the
13 City is not willing to commit potable water long term.⁵⁷

14 It may be possible for the Resort to purchase additional capacity in an "IWDS" pipeline
15 through a water exchange agreement with Desert Mountain, but the estimated costs are too high,
16 requiring an upfront payment of approximately \$10 million plus substantially higher water costs
17 and unknown future infrastructure obligations.⁵⁸

18 The Resort also reviewed the availability of groundwater within a reasonable area around
19 the property, and located one well owned by Carefree that might have sufficient capacity, but
20 the Resort is prohibited from using groundwater on most of the Resort golf course property per
21 the RWDS Agreement.⁵⁹

22
23 ⁵² *Id.*

24 ⁵³ *Id.*

25 ⁵⁴ *Id.*

26 ⁵⁵ Ex. W-3, pp. 5-6; Ex. W-4, pp 3-4.

27 ⁵⁶ Ex. W-2, pp. 3-4; New Tr. at 104:4-20.

28 ⁵⁷ Ex. W-1, p. 9. New Tr. at 99:24-17.

⁵⁸ Ex. W-2, p. 4.

⁵⁹ Ex. W-1, p. 8.

1 The Resort investigated whether effluent is available from the new Cave Creek
2 Wastewater Treatment Plant, but no effluent is available from the new plant unless Black
3 Mountain provides raw sewage for treatment at that plant.⁶⁰ Use of Cave Creek effluent would
4 also require construction of an expensive approximately four-mile long pipeline through rocky
5 terrain.⁶¹

6 The Resort also suggested to Black Mountain that it might be possible to locate a new
7 closed package wastewater reclamation plant on a parcel within the Resort property, but it does
8 not appear Black Mountain feels this option is feasible.⁶²

9 While the Resort staff have spent a significant amount of time working to identify a
10 reasonable alternative that would work for all parties, until that solution is identified, the Resort
11 is relying on its current contractual right to receive service from Black Mountain through March
12 2021. In the Effluent Agreement, Black Mountain has covenanted to “Not restrict, reduce or
13 otherwise limit the quantity of Effluent produced by the Boulders East Plant or take any action
14 that would reduce the plant’s treatment capacity...”⁶³ If economic considerations, technical
15 requirements or regulatory changes require BCSC to close or relocate the Boulders East Plant,
16 BMSC under the Effluent Agreement must “attempt, in good faith and to the extent technically
17 feasible, to relocate the Boulders East Plant or construct a new wastewater treatment plant at a
18 site that is a[s] close as reasonably possible...to the Golf Courses.”⁶⁴ Although it is not for the
19 Commission to interpret contractual rights as between the Resort and Black Mountain, Gen.
20 Cable Corp. v. Citizens Utilities Co., 27 Ariz. App. 381, 386, 555 P.2d 350, 355 (1976) (internal
21 citations omitted) (“We agree with the trial court that the construction and interpretation to be
22 given to legal rights under a contract reside solely with the courts and not with the Corporation
23 Commission.), we ask the Commission to respect the promises made by Black Mountain to the
24

25 ⁶⁰ New Tr. at 140:22-141:21.

26 ⁶¹ Ex. W-1, p. 9.

27 ⁶² Ex. W-1, p. 9.

28 ⁶³ Tr.I at 124:4-11.

⁶⁴ Ex. BHOA-3, section 6.

1 Resort, and not to use the Commission's authority in the inappropriate manner urged by the
2 BHOA with the intent to terminate the contract early. Such an intentional action to thwart a
3 contractual right would be a shocking abuse of governmental power, and the Commission
4 should not grant such a request.

5 The Resort's Golf Club members include BHOA members, and the Resort has significant
6 incentive to continue working cooperatively with them toward a reasonable solution for all
7 parties.⁶⁵

8 **2. The City of Scottsdale is Entitled to Terminate its Wastewater Treatment**
9 **Agreement with Black Mountain if Black Mountain Closes the Plant without**
10 **Scottsdale's Further Agreement.**

11 Black Mountain currently sends all wastewater that it does not treat in the Plant,
12 approximately 80 percent of its collected wastewater,⁶⁶ to the City of Scottsdale pursuant to the
13 Wastewater Treatment Agreement between Black Mountain and the City dated April 1, 1996
14 ("City Agreement").⁶⁷ Black Mountain has purchased 400,000 gpd of capacity under the City
15 Agreement.⁶⁸ The term of the City Agreement extends to December 31, 2016, and may be
16 renewed in five-year increments "upon the mutual agreement of the parties."⁶⁹

17 The Settlement Agreement includes a condition precedent that prohibits closure of the
18 Plant without Scottsdale's consent. Black Mountain must successfully negotiate a new or
19 amended agreement with Scottsdale that contains the following provisions:

- 20 ● Allows Black Mountain to purchase 120,000 gpd of additional wastewater
21 treatment capacity;
- 22 ● Extends Black Mountain's right to purchase additional capacity beyond December
23 21, 2016;

24
25 ⁶⁵ New Tr. at 64:1-20.

26 ⁶⁶ Tr.I at 116:4-6.

27 ⁶⁷ Ex. BHOA-2.

28 ⁶⁸ Tr.I at 104:3-6.

⁶⁹ Ex. BHOA-2, section 12.

- States that Scottsdale cannot terminate the City Agreement if Black Mountain closes the Plant; and
- Provides Black Mountain the long term right to purchase additional capacity at market rates.⁷⁰

The condition precedent requiring a new agreement that states Scottsdale cannot terminate the City Agreement was included because Scottsdale appears to have the right to do so should Black Mountain close the treatment plant.⁷¹ The City Agreement provides that, “In the event [Black Mountain] elects to permanently cease operation of its treatment plant, then Scottsdale, in its sole discretion, may elect to terminate this Agreement and Scottsdale shall not be obligated to accept wastewater” from Black Mountain.⁷² If the City Agreement is terminated by Scottsdale, then Black Mountain is obligated to “promptly disconnect its collection and transmission system from Scottsdale’s transmission main...”⁷³ Since Black Mountain requested closure of the Plant as part of the Settlement Agreement with the BHOA, Scottsdale could seek to avoid the current terms of the City Agreement and renegotiate for higher charges.⁷⁴ Black Mountain has proposed a new agreement with the City to allow for the purchase of additional capacity and other associated rights beyond 2016, but the City has not yet accepted the proposed agreement.⁷⁵ Black Mountain is not waiving any of the above conditions precedent, nor any of the other conditions precedent in the Settlement Agreement.⁷⁶ The Commission cannot order closure of the Plant without addressing the risks caused by these contractual requirements. The

⁷⁰ Ex. BHOA-7, section 2.a.iii.

⁷¹ New Tr. at 146:6-148:5.

⁷² Ex. BHOA-2, section 8(d).

⁷³ Ex. BHOA-2, section 11(b).

⁷⁴ *See, for example*, New Tr. at 129:21-131:3, 164:21-165:8 (Scottsdale has informed Black Mountain that treatment capacity is being sold to others at \$12 per gallon more than the \$6 per gallon cost in the current Wastewater Treatment Agreement).

⁷⁵ New Tr. at 149:11-17.

⁷⁶ New. Tr. at 153:10-13.

1 Commission should also determine what Scottsdale's terms will be before the Commission
2 makes a determination that Plant closure is a reasonable solution to resolve odor and noise
3 issues.

4 **IV. THE COMMISSION'S AUTHORITY TO REGULATE A PUBLIC UTILITY'S**
5 **PLANT EXTENDS ONLY TO REASONABLE ACTIONS SUPPORTED BY**
6 **CREDIBLE EVIDENCE THIS CASE RECORD LACKS.**

7 The Commission derives its legal authority from the Arizona Constitution and from
8 statutes passed by the Arizona Legislature. While the Commission has broad authority to
9 regulate public utilities, its legal authority is limited by the plain language of these provisions.
10 In addition, as with any governmental action, Commission decisions, even if authorized by the
11 plain language of the Arizona Constitution or Arizona statutes, may be further restricted by
12 independent constitutional limitations, such as the requirements of due process, equal protection,
13 and other constitutional protections. All of these limitations strongly militate in favor of
14 upholding the protection of the condition precedent that Black Mountain and the BHOA
15 previously agreed to, requiring the Resort's consent before seeking Plant closure.

16 **1. The Arizona Constitution and Arizona Statutes Give the Commission Broad**
17 **Powers with Little Guidance Regarding Appropriate Levels of Public Utility**
18 **Customer Service.**

19 The legal authority cited by the Commission in previous Decision Nos. 69164 and 71865
20 to support the Commission's adoption of earlier orders requiring upgrades to the Black
21 Mountain collection system and the subsequent adoption of portions of the Settlement
22 Agreement between Black Mountain and the BHOA in this case included A.R.S. sections 40-
23 321(A), 40-331(A), 40-361(B), and 40-202(A) (see Decision No. 71865, pp. 39-40), each of
24 which are old statutes enacted prior to the Commission's authority over sewer companies,⁷⁷ and

25 ⁷⁷ A.R.S. §§ 40-321(A), 40-331(A), 40-361(B) are virtually unchanged since adopted shortly after Arizona's
26 statehood in May 1912. See Arizona Laws, Ch. 90, §§ 35, 36, 42 (1912), portions of which are attached as
27 Exhibit A. At that time, sewer companies were not even included in the definition of "public service
28 corporations." *Id.* at §2(z). The Commission's authority over sewer companies was not added to the Arizona
Constitution until 1974. See H.C.R. 2001, §1 (1974), attached as Exhibit B.

1 each of which contain broad statements of general regulatory power over public utilities and
2 their facilities. A.R.S. section 40-321(A) provides:

3 A. When the commission finds that the equipment, appliances, facilities or service
4 of any public service corporation, or the methods of manufacture, distribution,
5 transmission, storage or supply employed by it, are unjust, unreasonable, unsafe,
6 improper, inadequate or insufficient, the commission shall determine what is just,
7 reasonable, safe, proper, adequate or sufficient, and shall enforce its determination
8 by order or regulation.

9 A.R.S. section 40-331(A) provides:

10 A. When the commission finds that additions or improvements to or changes in the
11 existing plant or physical properties of a public service corporation ought
12 reasonably to be made, or that a new structure or structures should be erected, to
13 promote the security or convenience of its employees or the public, the
14 commission shall make and serve an order directing that such changes be made or
15 such structure be erected in the manner and within the time specified in the order.
16 If the commission orders erection of a new structure, it may also fix the site
17 thereof.

18 A.R.S. section 40-361(B) provides:

19 B. Every public service corporation shall furnish and maintain such service,
20 equipment and facilities as will promote the safety, health, comfort and
21 convenience of its patrons, employees and the public, and as will be in all respects
22 adequate, efficient and reasonable.

23 And finally, A.R.S. section 40-202(A), to the extent it is applicable, provides:

24 A. The commission may supervise and regulate every public service corporation in
25 the state and do all things, whether specifically designated in this title or in
26 addition thereto, necessary and convenient in the exercise of that power and
27 jurisdiction... [remainder of section specific to telecommunications industry]

28 The Commission's appeal statute also requires the Commission's decision must be
"reasonable." A.R.S. § 40-254.

Arizona Constitution Article 15, section 3 states very generally that the Commission may
"... make and enforce reasonable rules, regulations, and orders for the convenience, comfort,
and safety, and the preservation of the health, of the employees and patrons of such
corporations..."

Other than broad instructions regarding "convenience," "comfort," "safety," and
"health," the above-quoted provisions fail to specify in any detail what standards of public
utility service are reasonable, necessary, and convenient for the maintenance of sewer facilities.

1 Counties' statutes regulating air pollution, A.R.S. §§ 49-421 *et seq.*, 49-471 *et seq.*, and ADEQ
2 is specifically authorized to abate odors, A.R.S. §49-104(10).⁷⁹ No such specific authority has
3 been delegated to the Commission, nor has the Commission historically regulated such technical
4 issues or developed the expertise to do so. ADEQ through specialized technical expertise of its
5 own and working closely with the United States Environmental Protection Agency has
6 established rules and permit conditions specifically addressing permissible odor levels from
7 sewage facilities (or levels addressing odor-causing pollutants more specifically in various
8 standards). *See, for example*, A.A.C. R18-2-730. The Commission's reliance on ADEQ's
9 standards for wastewater treatment facilities in these circumstances is reasonable.

10 The parties do not dispute that the Plant complies with ADEQ's requirements.⁸⁰ No
11 credible scientific or technical information has been offered by any party to establish that the
12 odors emanating from the Plant exceed industry standards or the health and safety levels
13 authorized or recommended by ADEQ or EPA, nor have any credible scientific measurements
14 of the existing odor and noise levels even been offered. No study of the Plant has been offered
15 by a qualified expert to assist the Commission to determine if closing the Plant will result in
16 reduced odors to the vast majority of Black Mountain's customers.⁸¹ The Commission has in
17 front of it no evidence comparing the engineering feasibility of closure versus the engineering
18 feasibility of other less drastic changes that might be made to the Plant or its operations to
19 reduce Plant odors.⁸²

22 ⁷⁹ ADEQ has also been given more general statutory authority to regulate environmental nuisances, A.R.S. § 49-
23 141 *et seq.*

24 ⁸⁰ *See* section I.2, *above*.

25 ⁸¹ Tr.IV at 654:25-655:14 (no engineering study submitted). *See also* New Tr. at 142:3-146:5 (discussing current
26 status of engineering plans and costs for system changes needed for plant closure, and concluding that it is not
27 yet known whether costs might be prohibitively expensive), New Tr. at 162:24-164:10. The Staff's witness,
28 Dorothy Hains, was the only engineering witness that testified in either hearing, and she was not even sure
elimination of the plant will address all odor concerns due to collection system challenges. *See generally* Tr.I at
639:20-641:16, 655:19-659:1.

⁸² *Id.*

1 Further, there is insufficient evidence in the record for the Commission to conclude that
2 Plant closure costs will be reasonable. If the Plant is closed, portions of the pipes
3 interconnecting with Scottsdale's collection system must be increased in size so that wastewater
4 can flow continuously on peak days.⁸³ The interconnection changes have not yet been designed
5 or built, but would be designed and built as part of the plant closure process. Currently, Black
6 Mountain anticipates constructing or replacing piping to bypass the sewer, with planning-level
7 estimates of cost of roughly \$803,000-\$942,000.⁸⁴ However, additional surveys are needed to
8 determine if additional changes are needed, and Black Mountain has not yet concluded whether
9 the changes will be prohibitively expensive.⁸⁵

10 The Commission is requested by BHOA to make a technical determination regarding the
11 sufficiency of the Plant to meet the Commission's facility requirements in R14-2-607 based
12 solely on a number of public comments and non-expert subjective opinions that the odors are
13 essentially "too much." There is no defensible, credible evidence the Commission can rely upon
14 to support a reasonable finding that the Plant should be closed and that the costs are reasonable
15 as opposed to other options.

16 **4. This is Not a Customer Service Issue: Common Law Nuisance**

17 The Commission's decision in this case, and especially the effect of the Commission's
18 decision regarding the impact on customer rates, is complicated considerably by the fact that
19 only a subset of Black Mountain's customers close in proximity to the Plant are affected by
20 Plant odors. Even though odors have been characterized as a customer service issue, the odor
21 produced by the Plant is really is not a customer service issue. There is no dispute that adequate
22 sewer collection and treatment services are being provided. Instead, a subset of customers are
23 essentially asking the Commission to find that, apart from the sewer services they receive from
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26 ⁸³ Tr.I at 122:23-123:18, 165:14-166:6 (rough cost estimates); Tr.IV at 665:15-666:12 (plant is being used as
equalization basin for flows to Scottsdale);

27 ⁸⁴ Ex. W-5.

28 ⁸⁵ New Tr. at 142:7-.146:5.

1 Black Mountain, the Plant is creating a private or public nuisance to a subset of Black
2 Mountain's customers, and are requesting a remedy similar to an injunction in closing the Plant.
3 As the surcharge is currently structured, the requested remedy will have rate impacts on many
4 Black Mountain customers who have no odor concerns whatsoever,⁸⁶ and will also have
5 significant negative impact on the Resort's water supply as described above.

6 Although the Commission does not have legal authority to adjudicate whether Black
7 Mountain's customers living near the Plant might bring claims for common law or statutory
8 nuisance against Black Mountain, the Commission should consider common law standards
9 regarding nuisances and the remedies available in court.

10 In City of Phoenix v. Johnson, 51 Ariz. 115, 75 P.2d 30 (Ariz. 1938), the Arizona
11 Supreme Court considered a resident's claim of private nuisance, a tort, against the City of
12 Phoenix for odors emanating from the sewer plant and untreated waste discharged periodically
13 near the resident's property. The Court provided the following definition of a nuisance:

14 The term 'nuisance' signifies in law such a use of property or such a course of
15 conduct, irrespective of actual trespass against others, or of malicious or actual
16 criminal intent, which transgresses the just restrictions upon use or conduct which
17 the proximity of other persons or property in civilized communities imposes upon
18 what would otherwise be rightful freedom. It is a class of wrongs which arises
19 from an unreasonable, unwarranted, or unlawful use by a person of his own
20 property, working an obstruction or injury to the right of another, or to the public,
21 and producing such material annoyance, inconvenience, and discomfort that the
22 law will presume a resulting damage. 46 C.J. 645, and cases cited.

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24 City of Phoenix v. Johnson, 51 Ariz. 115, 123, 75 P.2d 30, 34 (1938). The Johnson case makes
25 clear that residents offended by sewage odors may pursue a private action for nuisance in an
26 Arizona court despite a company's legally compliant operation of a plant. *Id.* However, the
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⁸⁶ Black Mountain has approximately 2100 residential customers (homes) in its service area. New Tr. at 203:20-204:21. Less than 300 homes are estimated to be located within even 1000 feet of the Plant. *See* Stipulation of Facts docketed March 6, 2012. [Note also that it does not appear that all of Black Mountain's customers have received notice of the potential for closure of the plant and associated costs. The last notice evident in the docket was docketed June 5, 2009, prior to the rate case decision and this follow-up proceeding. New Tr. at 170:7-16. *see also* Tr.I at 182:10-23 (no application for closure was made in this docket until settlement agreement was presented)]

1 definition of nuisance indicates that the offending odors or noises must arise from an
2 “unreasonable, unwarranted, or unlawful,” use of property that causes “such material
3 annoyance, inconvenience, and discomfort” that the law will presume a resulting damage. *Id.*

4 The Arizona Supreme Court has further relied on Restatement (Second) of Torts as a
5 guide to determine whether an invasion of interest is reasonable or unreasonable so as to
6 constitute a nuisance. Among the factors examined are whether a criminal violation occurred⁸⁷;
7 whether the conduct involves a significant interference with the public health, the public safety,
8 the public peace, the public comfort or the public convenience; whether the conduct is
9 proscribed by a statute, ordinance, or administrative regulation; and whether the conduct is of a
10 continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or
11 has reason to know, has a significant effect upon the public right. Armory Park Neighborhood
12 Ass'n v. Episcopal Cmty. Services in Ariz., 148 Ariz. 1, 9, 712 P.2d 914, 922 (1985) (internal
13 citations omitted). Although there are court decisions in various states finding whether
14 nuisances exist in sewer odor and pollution cases are matters for a jury to decide based upon the
15 facts, court rulings indicate the facts in the present case are insufficient to support a finding of a
16 public nuisance. *See generally*, 92 ALR5th 517 (2001). In this case, there is no evidence the
17 Plant has been improperly operated in recent years;⁸⁸ no evidence Black Mountain has
18 discharged untreated sewage near residents' homes; no evidence of environmental pollution
19 causing odors or vector presence; and no evidence of ill health effects or imminent dangers
20 created by the continued operation of the plant. *See, for example*, Bader v. Iowa Metopolitan
21 Sewer Co., 178 N.W.2d 305 (Iowa 1970) (allegations of diminution in neighboring property
22 value not enough); Andrea v. Metro. Dist., 2000 WL 1868211 (Conn. Super. Ct. Nov. 28, 2000)
23 (no danger or injury to person or property alleged). Courts finding sewage odors to be nuisances
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25
26 ⁸⁷ Arizona's criminal code, A.R.S. section 13-2917(A) defines a public nuisance as an interference “with the
27 comfortable enjoyment of life or property by an entire community or neighborhood or by a considerable
28 number of persons.” This statute may be enforced by the state, county, or city.

⁸⁸ *See section I.2, above.*

1 generally made such findings on the basis of evidence of health problems or pollution of
2 streams, usually caused by the release of improperly treated waste, no evidence of which has
3 been presented by the parties in this proceeding. *See generally*, 92 ALR5th 517, § 12 (2001)
4 (cases making factual determinations regarding nuisance related to sewage plants).

5 Even if a common law nuisance arguably occurs to those residents located in very close
6 proximity to the Plant, a significant defense to a private or public nuisance claim in this case
7 could be asserted by Black Mountain because it is undisputed that the Plant has been in the same
8 location for over 40 years,⁸⁹ and the nearby residents in newer homes therefore “came to the
9 nuisance.” *See Spur Industries, Inc. v. Del E. Webb Development Co.*, 108 Ariz. 178, 494 P.2d
10 700 (Ariz. 1972) (citing “coming to the nuisance” case law).

11 Although the Commission cannot know whether residents would be able to offer new
12 evidence not present here to a Court that would entitle them to a remedy, the Commission
13 should consider that the common law requires evidence of more significant interference than is
14 in the present record.

15 **5. Constitutional Requirements: Reasonable Basis for Decision**

16 The Legislature’s police power and the Commission’s power, whether Constitutional or
17 delegated by the Legislature, are both limited by constitutional provisions such as the guarantees
18 of due process and equal protection. *See ACC v. Palm Springs Utility Co., Inc.*, 24 Ariz.App.
19 124, 536 P.2d 245 (Ariz.App. Div. 1 1975) (Commission can deal with specialized cases on a
20 case-by-case approach so long as there exists a rational statutory or constitutional basis for the
21 action and the action is not so discriminatory as to constitute a denial of the equal protection
22 clause); *see also* 58 Am.Jur.2d *Nuisances*, §§53, 54, 56; *Constitutional Law*, §§368, 393, 926,
23 965, 968 (due process prohibits unreasonable or arbitrary action) (2012). In this case, a
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27 ⁸⁹ Evidentiary Hearing Transcript, SW-02361A-08-0609, November 18, 2009, Volume II (“Tr.II”) at 345:20-
348:6.

1 decision to grant closure on the current record would be arbitrary because there is insufficient
2 evidence to support the reasonableness or necessity of such an order, as is discussed above.

3 **6. BHOA Urges Bad Governmental Practice.**

4 In addition to the potential for a constitutional challenge, and in addition to seeking to
5 override conditions precedent to closure that the BHOA previously agreed to in the Settlement
6 Agreement, the BHOA urges an action that simply does not comport with good government
7 practice. Good government practice requires that the Commission's decisions be supported with
8 credible, admissible technical evidence, and that the Commission not set standards for issues of
9 general applicability in piecemeal fashion in its decisions. If the Commission finds that
10 ADEQ's and the County's standards for odors and noises are insufficient to address nuisances
11 caused by water reclamation facilities, and if the Commission determines it has the authority to
12 require more, then the Commission should promulgate rules only after careful consideration of
13 available scientific information, and after input of stakeholders regarding the potential costs and
14 impacts of the proposed rules.

15 These principles can be illustrated by comparing the circumstances in the present case to
16 the circumstances in the Palm Springs case. The Commission in Palm Springs, 24 Ariz.App. at
17 126, 536 P.2d at 247, considered whether to order the water utility in that case to treat water
18 delivered to customers to a standard greater than was required at that time by state drinking
19 water laws. In making its decision in Palm Springs, the Commission relied on the opinion of a
20 State Health Department engineer regarding technical drinking water aesthetics issues and the
21 corrosive nature of the water delivered by the utility. *Id.* The same engineer also presented
22 alternatives and costs for solving the situation. *Id.* In this case, in contrast, the only engineering
23 opinion provided by any party regarding the appropriate measures to address odors and noises
24 was provided by the ACC Staff's engineer, who testified she was unsure that closure of the Plant
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1 will even address the odor issues noted in public comments.⁹⁰ The Commission has no credible
2 evidentiary basis here to rely upon to support the reasonableness of a closure order.

3 Further, after considering the engineering testimony regarding alternatives in the Palm
4 Springs case, the Commission did not make an order requiring the water company to do
5 anything specific with its facilities, but instead ordered the company to produce drinking water
6 of the desired quality in the most economical means possible. *Id.* In order to make a similar
7 order in this case that Black Mountain address odors in the most economical means possible, it
8 would be helpful to support the reasonableness of the Commission's decision to first have good
9 evidence regarding the alternatives and costs.

10 The Commission should also resist the BHOA's invitation to issue a piecemeal order
11 regarding odor issues that likely affect other existing sewer utilities throughout Arizona. In
12 Palm Springs, although the decision was split, all judges agreed that, while the Commission's
13 order requiring the utility to improve water quality was within the Commission's power, the
14 Commission should instead promulgate rules and regulations regarding water quality rather than
15 making piecemeal individual adjudicatory orders. *See, for example, ACC v. Palm Springs*
16 *Utility Co., Inc.*, 24 Ariz.App. 124, 128-30, 536 P.2d 245, 249-51 (Ariz.App. Div. 1 1975)
17 ("Unquestionably, as a general principle of administrative law, the promulgation of rules and
18 regulations of general applicability is to be favored over the generation of policy in a piecemeal
19 fashion through individual adjudicatory orders.") (internal citation omitted), *and dissenting*
20 *opinion* (no justification for singling out one utility for a specialized order). If the Commission
21 wishes to address odors and noises emanating from existing wastewater reclamation plants, it
22 should promulgate a rule that specifically addresses these issues.

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27 ⁹⁰ Ex. R-7, p. 4:11-18; Ex. A-3, pp. 7:15-8:12; Tr.I at 113:10-23, 114:24-115:18, 159:5-163:18, Tr.IV at 618:22-
619:4, 640:6-18, 655:18-658:23.

1 **V. CONCLUSION**

2 For all the reasons stated above, the Commission should deny the BHOA's Motion.

3 DATED this 12th day of June, 2012.

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A

Sec. 10. No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

Sec. 11. All Acts and parts of Acts in conflict herewith are hereby repealed.

WHEREAS, the State Constitution commands the enactment of an Employers' Liability law by the Legislature at its first session; and

WHEREAS, this Act being said Employers' Liability law is immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, and this Act shall be in full force and effect from and after its passage and its approval by the Governor, and is hereby exempt from the operation of the Referendum provision of the State Constitution.

Approved May 24, 1912.

CHAPTER 90.

AN ACT

Relating to Public Service Corporations, Providing for the Regulation of the Same, Fixing Penalties for the Violation Thereof, and Repealing Certain Acts; With an Emergency Clause.

Be it Enacted by the Legislature of the State of Arizona:

Sec. 1. This Act shall be known as the "Public Service Corporation Act" and shall apply to the public service corporations herein described and to the Commission herein referred to.

Sec. 2. (a) The term "Commission", when used in this Act means the Corporation Commission of the State of Arizona.

operated or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing, carriage, apportionment, or measurement, or water for power, fire protection, irrigation, reclamation, or manufacturing, or for municipal, domestic, or other beneficial use.

(x) The term "Water corporation", when used in this Act, includes every corporation or person, their lessees trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating, or managing any water system for compensation within this State.

(y) The term "Warehouseman", when used in this Act, includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating, or managing any building or structure in which property is regularly stored for compensation within this State, in connection with or to facilitate the transportation of property by a common carrier, or the loading or unloading of the same.

(z) The term "Public service corporation", when used in this Act, includes every common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, and warehouseman, as these terms are defined in this section, and each thereof is hereby declared to be a public service corporation and to be subject to the jurisdiction, control, and regulation of the Commission and to the provisions of this Act.

Sec. 3. (a) The Corporation Commission shall consist of three members, who shall be elected and hold office for such time as prescribed in Section 1, Article XV of the Constitution of the State of Arizona. The Commissioners shall elect one of their number chairman of the Commission.

(b) Whenever a vacancy in the office of Commissioner shall occur, the Governor shall forthwith appoint a qualified person to fill the same. Such appointed Commissioner shall fill such vacancy until a Commissioner shall be elected at a general election as provided by law, and shall qualify.

ing approved by the Commission, upon claims therefor to be audited by the board of control. No Commissioner and no officer or employee of the Commission shall be denied the right to travel upon any railroad, car, or other vehicle of such common carrier whether such railroad, car or other vehicle be used for the transportation of passengers or freight, and regardless of its class.

Sec. 12. The Commission shall make and submit to the Governor on or before the first day of December of each year subsequent to the year nineteen hundred and twelve, a report containing a full and complete account of its transactions and proceedings for the preceding fiscal year, together with such other facts, suggestions, and recommendations as it may deem of value to the people of the State.

Sec. 13. (a) All charges made, demanded or received by any public service corporation, or by any two or more public service corporations, for any product or commodity furnished or to be furnished, or any service rendered to (or) to be rendered, shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful.

(b) Every public service corporation shall furnish, provide, and maintain such service, instrumentalities, equipment, and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees and the public, and as shall be in all respects adequate, efficient, just and reasonable.

(c) All rules and regulations made by a public service corporation affecting or pertaining to its charges or service to the public shall be just and reasonable.

Sec. 14. (a) Every common carrier shall file with the Commission and shall print and keep open to the public inspection schedules showing the rates, fares, charges and classifications for the transportation between termini, within this

lish such division; provided, that where any railroad corporation which is made a party to a through route has itself over its own line an equally satisfactory through route between the termini of the through route established, such railroad corporation shall have the right to require as its division of the joint rate, fare or charge, its local rate, fare or charge over the portion of its lines comprised in such through route, and the Commission may, in its discretion, allow to such railroad corporation more than its local rate, fare or charge, whenever it will be equitable so to do. The Commission shall have the power to establish and fix through routes and joint rates, fares or charges over common carriers and stage or auto stage lines and to fix the division of such joint rates, fares or charges.

Sec. 34. The Commission shall have the power to investigate all existing or proposed interstate rates, fares, tolls, charges and classifications, and all rules and practices in relation thereto, for or in relation to the transportation of persons or property or the transmission of messages or conversations, where any act in relation thereto shall take place within this State; and when the same are, in the opinion of the Commission, excessive or discriminatory or in violation of the Act of Congress entitled, "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and the Acts amendatory thereof and supplementary thereto, or of any other Act of Congress, or in conflict with the rulings, orders or regulations of the Interstate Commerce Commission, the Commission may apply by petition or otherwise to the Interstate Commerce Commission or to any court of competent jurisdiction for relief.

Sec. 35. Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rules, regulations, practices, equipment, appliances, facilities or service of any public service corporation, or the methods of manufacture, distribution, transmission, storage or supply employed by it, are unjust, unreasonable, unsafe, improper, in-

adequate or insufficient, the Commission shall determine the just, reasonable, safe, proper, adequate or sufficient rules, regulations, practices, equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced or employed and shall fix the same by its order, rule or regulation. The Commission shall prescribe rules and regulations for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public service corporation, and upon proper demand and tender of rates, such public service corporation shall furnish such commodity or render such service within the time and upon the conditions provided in such rules.

Sec. 36. Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public service corporation or of any two or more public service corporations ought reasonably 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, or in any other way to secure adequate service or facilities, the Commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes be made or such structure or structures be erected in the manner and within the time specified in said order. If the Commission orders the erection of a new structure, it may also fix the site thereof. If any additions, extensions, repairs, improvements or changes, or any new structure or structures which the Commission has ordered to be erected, require joint action by two or more public service corporations, the Commission shall notify the said public service corporations that such additions, extensions, repairs, improvements or changes or new structures have been ordered and that the same shall be made at their joint cost, whereupon the said public service corporations shall have such reasonable time as the Commission may grant within

which to agree upon the portion or division of cost of such additions, extensions, repairs, improvements or changes or new structure or structures, which each shall bear. If at the expiration of such time such public service corporations shall fail to file with the Commission a statement that an agreement has been made for a division or apportionment of the cost or expense of such additions, extensions, repairs improvements or changes, or new structure or structures, the Commission shall have the authority, after further hearing, to make an order fixing the proportion of such cost or expense to be born (borne) by each public service corporation and the manner in which the same shall be paid or secured.

Sec. 37. Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any railroad corporation or street railroad corporation does not run a sufficient number of trains or cars, or possess or operate sufficient motive power, reasonably to accommodate the traffic, passenger or freight, transported by or offered for transportation to it, or does not run its trains or cars with sufficient frequency or at a reasonable or proper time having regard to safety, or does not stop the same at proper places, or does not run any train or trains, car or cars, upon a reasonable time schedule for the run, the commission shall have power to make an order directing any such railroad corporation or street railroad corporation to increase the number of its trains or of its cars or its motive power or to change the time for starting its trains or cars or to change the time schedule for the run of any train or cars, or to change the stopping place or places thereof, or to make any other order that the commission may determine to be reasonably necessary to accomodate (accommodate) and transport the traffic, passenger or freight, transported or offered for transportation.

Sec. 38. Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the public convenience and necessity would be subserved by having connections made between the tracks of any two or more

Sec. 41. Whenever the Commission, after a hearing had upon its own motion or upon complaint of a public service corporation affected, shall find that public convenience and necessity require the use by one public service corporation of the conduits, sub-ways, tracks, wires, poles, pipes or other equipment, or any part thereof, on, over, or under any street or highway, and belonging to another public service corporation, and that such use will not result in irreparable injury to owner or other users of such conduits, subways, tracks, wires, poles, pipes or other equipment or in any substantial detriment to the service, and that such public service corporations have failed to agree upon such use or the terms and conditions or compensation for the same, the Commission may by order direct that such use be permitted and prescribe a reasonable compensation and reasonable terms and conditions for the joint use. If such use be directed, the public service corporation to whom the use is permitted shall be liable to the owner or other users of such conduits, sub-ways, tracks, wires, poles, pipes or other equipment for such damage as may result therefrom to the property of such owner or other users thereof.

Sec. 42. The Commission shall have power, after a hearing had upon its own motion or upon complaint, by general or special orders, rules or regulations, or otherwise, to require every public service corporation to maintain and operate its line, plant, system, equipment, apparatus, tracks and premises in such manner as to promote and safeguard the health and safety of its employees, passengers, customers, and the public, and to this end to prescribe, among other things, the installation, use, maintenance and operation of appropriate safety or other devices or appliances, including interlocking and other protective devices at grade crossings or junctions and block or other systems of signalling, to establish uniform or other standards of equipment, and to require the performance, of any other act which the health or safety of its employees, passengers, customers or the public may demand.

B

LAWS OF ARIZONA

To accomplish these aims this Legislature must take the first step toward a continuing philosophy of limitation, rather than continual expansion and perpetuation of once-needed but perhaps presently outdated and outmoded programs.

Therefore

Be it resolved by the House of Representatives of the State of Arizona:

That all legislation presently being considered by this Legislature be reviewed by the legislative council as to the appropriateness of adding, where possible, expiration clauses, so that once the purposes of such legislation are accomplished or are not expediently accomplished the instrumentality charged with the duty to carry out the purposes of such legislation and the legislation itself ceases to exist.

Passed the House April 1, 1974 by the following vote: 54 Ayes, 0 Nays, 6 Not voting.

Approved by the Governor—April 2, 1974

Filed in the Office of the Secretary of State—April 2, 1974

HOUSE CONCURRENT RESOLUTION 2001

A CONCURRENT RESOLUTION

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF ARIZONA RELATING TO PUBLIC SERVICE CORPORATIONS; AMENDING THE DEFINITION OF PUBLIC SERVICE CORPORATION TO INCLUDE CERTAIN PRIVATE SEWAGE DISPOSAL CORPORATIONS, AND AMENDING ARTICLE 15, SECTION 2, CONSTITUTION OF ARIZONA.

Be it resolved by the House of Representatives of the State of Arizona, the Senate concurring:

LAWS OF ARIZONA

1. The following amendment of article 15, section 2, Constitution of Arizona, is proposed, to become valid when approved by a majority of the qualified electors voting thereon and upon proclamation of the governor:

2. "Public service corporations" defined

Section 2. All corporations other than municipal engaged in carrying persons or property for hire; or in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; OR ENGAGED IN COLLECTING, TRANSPORTING, TREATING, PURIFYING AND DISPOSING OF SEWAGE THROUGH A SYSTEM, FOR PROFIT; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations.

2. The proposed amendment (approved by a majority of the members elected to each house of the legislature, and entered upon the respective journals thereof, together with the ayes and nays thereon) shall be by the secretary of state submitted to the qualified electors at the next regular general election (or at a special election called for that purpose), as provided by article 21, Constitution of Arizona.

Passed the House April 26, 1974 by the following vote: 55 Ayes, 2 Nays, 3 Not Voting.

Passed the Senate April 25, 1974 by the following vote: 24 Ayes, 5 Nays, 1 Not Voting.

Filed in the Office of the Secretary of State—April 26, 1974