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Arizona Corporation Commission

DOCKETED

JUN 26 2012

DOCKETED BY

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

Docket No. SW-02361A-08-0609

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

Final Closing Brief

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

I. RESPONSE TO BHOA'S OPENING BRIEF

22 The arguments made by the Boulders Homeowners' Association ("BHOA") in its
 23 Opening Brief on Plant Closure have already been addressed by the Resort in the Resort's Initial
 24 Closing Brief docketed on June 12, 2012. There are just two statements in the BHOA Opening
 25 Brief that the Resort would like to address.

26 First, on page 4 of its Opening Brief, BHOA makes the statement that "If the Treatment
 27 Plant were constructed today, it would require a setback of 500 to 1,000 feet ..." That statement
 28

1 is attributed to Mr. Sorenson in the 2009 hearing, but is inconsistent with the requirements in
2 Arizona Department of Environmental Quality's rule number R18-9-B201(I). When asked if he
3 was aware of any other setback requirements for new plants in the most recent hearing, Mr.
4 Sorenson was unable to identify other requirements, and stated that he would rely on an engineer
5 to inform him of the requirements.¹ Under ADEQ's rule R18-9-B201(I), a new plant built today
6 with the same 120,000 gpd capacity as the existing Plant that has no odor, noise, or aesthetic
7 controls would require a minimum setback of at least 500 feet, and a new facility with full noise,
8 odor, and aesthetic controls would require a minimum setback of 100 feet.² The existing Plant
9 has an odor scrubber, so has partial noise, odor, and aesthetic controls.
10

11 Second, BHOA concludes on page 8 of its Opening Brief that "The only thing standing in
12 the way of closure of the Treatment Plant is BMSC's contractual obligation to provide the
13 effluent from the Treatment Plant to the Resort..." This statement ignores the other conditions
14 precedent to which the BHOA agreed in the Settlement Agreement³ and that Black Mountain is
15 not waiving, including changes needed to the Scottsdale Agreement that would allow closure of
16 the Plant without subjecting Black Mountain to potential unknown higher charges or contract
17 termination.⁴ Please refer to pages 12-13 of the Resort's Initial Opening Brief for a more
18 detailed description of the conditions precedent that were incorporated into the Settlement
19 Agreement.
20

21 **II. RESPONSE TO STAFF'S OPENING BRIEF**

22 The arguments made by the Staff in its Opening Brief regarding Rehearing of Decision
23 No. 71865 have already been addressed by the Resort in the Resort's Initial Closing Brief
24
25

26 ¹ Transcript of Hearing, May 8, 2012, SW-02361A-08-0609 ("New Tr.") at 162:14-15, 170:24-173:23.

27 ² A.A.C. R18-9-B201(I). See rule for detail on measurements and odor, noise, and aesthetic controls.

28 ³ See Ex. BHOA-7, section 2(a) (list of conditions precedent).

⁴ New Tr. at 149:11-17, 153:10-13 and Resort's Initial Brief at pp. 12-13.

1 docketed on June 12, 2012. There is just one statement in the Staff's Opening Brief that the
2 Resort would like to address.

3 On page 4 of the Staff's Opening Brief, Staff broadly concludes that "The Community
4 has indicated that it is willing to bear the burden of the costs of the closure." The Resort is
5 aware of no admissible evidence that leads to this conclusion. Although certainly a number of
6 Black Mountain's customers have been active participants in the rate proceedings, and BHOA
7 on behalf of its members agreed to the surcharge plan as part of the Settlement Agreement
8 between BHOA and the Company, there is no admissible evidence that the majority of Black
9 Mountain's customers (1) were notified of the proposed Plant closure and potential associated
10 costs or (2) that a majority agreed to bear the burden of the costs of closure. The last
11 Commission-required notice was docketed June 5, 2009, prior to the Settlement Agreement,
12 prior to the rate case decision, and prior to this follow-up proceeding.⁵ Black Mountain has
13 approximately 2,100 residential customers (homes) in its service area.⁶ Less than 300 homes are
14 estimated to be located within even 1,000 feet of the Plant.⁷ BHOA members represent only a
15 portion of Black Mountain's customers. There is no way to know from the current record what
16 the bulk of Black Mountain's customers think about bearing Plant closure costs.
17

18 **III. RESPONSE TO BLACK MOUNTAIN'S OPENING BRIEF**

19 The legal arguments made by Black Mountain in its Closing Brief (Phase 2) that are
20 germane to the Commission's decision in this matter have already been addressed by the Resort
21 in the Resort's Initial Closing Brief docketed on June 12, 2012.

22 In its brief, Black Mountain also includes a number of exaggerated negative opinions that
23 mischaracterize or omit evidence regarding the Resort's efforts and intentions in reaching a
24

25 ⁵ New Tr. at 170:7-16. *See also* Tr.I at 182:10-23 (no application for closure was made in this docket until
26 settlement agreement was presented).

27 ⁶ New Tr. at 203:20-204:21.

28 ⁷ *See* Stipulation of Facts docketed March 6, 2012.

1 reasonable solution to address all parties' concerns in this case. These opinions are designed to
2 unfairly place blame on the Resort. Black Mountain, the same company that agrees it is bound
3 to the promises it made to the Resort in the Effluent Delivery Agreement, now blames the
4 Resort for failing to quickly enough abandon those promises without replacement water or even
5 compensation.⁸ This sort of inflammatory rhetoric is not helpful to finding a resolution in this
6 matter and should be disregarded. Even though the Resort is not legally obligated to do so
7 under the Effluent Delivery Agreement, the Resort has dedicated countless staff hours and
8 incurred significant costs to find a reasonable way to replace the effluent currently delivered by
9 Black Mountain prior to the end of the existing Effluent Delivery Agreement in March 2021.
10

11 Black Mountain similarly accuses the Resort of "...suddenly and without any explanation
12 or rationale" stopping discussions with Black Mountain when the Resort sent a June 3, 2011,
13 demand letter to Black Mountain.⁹ This statement is false. The Resort has always expressed a
14 willingness to discuss potential solutions that would allow Black Mountain to terminate the
15 Effluent Delivery Agreement prior to its current termination date in March 2021, and remains
16 open to pursuing those discussions today. The demand letter cited by Black Mountain on page 2
17 of its Closing Brief was sent to Black Mountain's attorney, as is described in the letter, pursuant
18 to Paragraph 14(a) in the Effluent Delivery Agreement, to invoke the requirement for the parties
19 to meet and confer in good faith to attempt to resolve the matter. As a result of that letter, Black
20 Mountain and the Resort met on August 12, 2011, and had discussions regarding options that
21 included replacement of the Plant with a new closed plant at another location on the property.
22 The August 12, 2011, meeting was cordial, and was followed by a site visit and further
23 discussions between the parties after that date as the parties looked at the options. There is no
24

25 ⁸ Black Mountain Closing Brief (Phase 2), June 12, 2012, p. 5:18-19 ("Black Mountain was never going to agree
26 to foot the bill for a workable solution for the Resort in order to remove a fully compliant, used and useful asset
27 from service.")

28 ⁹ Black Mountain Closing Brief (Phase 2), June 12, 2012, p. 2:12-14; *see also* p. 4:18-5:1.

1 evidence that the Resort has ever refused negotiations with Black Mountain. Although the
2 Resort in its June 3, 2011, demand letter reserved its rights and remedies, including rights under
3 the arbitration clause in the Effluent Delivery Agreement, the Resort does not believe the
4 process of good faith discussions has been exhausted and hopes that it will not be necessary to
5 pursue the reserved remedies. For example, Black Mountain presented a new option at the
6 hearing in this matter (the potential for diversion and treatment of some of Black Mountain's
7 wastewater at the Cave Creek Wastewater Treatment Plant) that deserves a closer look as a
8 potential long term solution.
9

10 As it stands today, the Resort has a valid and binding Effluent Delivery Agreement with
11 Black Mountain for delivery through March 2021 that must be honored by Black Mountain
12 whether or not the Commission orders closure.¹⁰ The Effluent Delivery Agreement, although it
13 contemplates that the laws, regulations, orders or other regulatory requirements might prevent or
14 materially limit the operation of the Plant, did not contemplate that Black Mountain would seek
15 an order of the Commission doing so. The determination of any legal claims the Resort or Black
16 Mountain may have against each other regarding the Effluent Delivery Agreement obligations,
17 is premature and beyond the scope of the Commission's determination in this present matter.
18

19 Finally, Black Mountain suggests in its footnote 34 on page 10 of its Closing Brief that, if
20 the Commission does deny closure, BHOA will request the Commission to raise the effluent
21 price to a high level that might make the Resort terminate the Effluent Delivery Agreement.
22

23 ¹⁰ For example, the Effluent Delivery Agreement does not excuse Black Mountain's contractual obligations to the
24 Resort if the Commission orders closure. In that circumstance, Black Mountain must still attempt to relocate or
25 build a new plant if "technically feasible" and not "uneconomic" as defined in the contract: "The obligations of
26 [Black Mountain] under this Paragraph shall terminate if physical conditions at the Boulders East Plant or any
27 laws, regulations, orders or other regulatory requirements prevent or materially limit the operation of the
28 Boulders East Plant or render the operation of such plant uneconomic. If economic considerations, technical
requirements or regulatory changes require [Black Mountain] to close or relocate the Boulders East Plant,
[Black Mountain] will attempt, in good faith and to the extent technically feasible, to relocate the Boulders East
Plant or construct a new wastewater treatment plant at a site that is as close as reasonably possible (taking into
account the economics of such relocation or construction) to the Golf Courses."

1 This alternative suggestion of a way to breach the Effluent Delivery Agreement through a
2 warped use of the Commission's rate setting authority is wrong on a number of levels, and
3 deserves no consideration by the Commission. The Commission is charged with setting just and
4 reasonable rates, and has already determined the Plant is used and useful in providing
5 wastewater treatment service to Black Mountain's customers, not just the Resort. Customers'
6 wastewater must be treated whether or not the Resort purchases the resulting effluent, and the
7 Resort's purchases are already offsetting costs the customers would otherwise have to bear in
8 order for Black Mountain to properly treat and dispose of the effluent in compliance with
9 applicable legal requirements. To shift all the costs of treatment to the Resort with the intent to
10 induce a breach of contract is certainly not a just or reasonable exercise of the Commission's
11 governmental authority.
12

13 **IV. CONCLUSION**

14 The Commission should deny the BHOA Motion to close the Plant because the closure is
15 not necessary and will cause the Resort to lose a critical portion of its golf course water supply
16 that currently cannot be reasonably replaced. The plant meets the Commission's rule standard
17 for sewer facilities in rule R14-2-607. The Commission has not been presented with sufficient
18 evidence regarding the odors and noise levels emitted from the Plant and the alternatives
19 available to address such odors and noise to conclude that closure of the Plant and its associated
20 costs are reasonable and just.
21

22 DATED this 26th day of June, 2012.

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