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AZ CORP COMMISSION
DOCKET CONTROL

BEFORE THE ARIZONA CORPORATION COMMISSION

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

BLACK MOUNTAIN SEWER CORPORATION

REPLY BRIEF (PHASE 2)

June 29, 2012

Arizona Corporation Commission

DOCKETED

JUN 29 2012

DOCKETED BY

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TABLE OF ABBREVIATIONS AND CONVENTIONS

Black Mountain Sewer Corporation uses the following abbreviations in citing to the pre-filed testimony and hearing transcripts in this brief. Other documents that were admitted as exhibits during the hearing are cited by hearing exhibit number. There were no final schedules required to be filed in this phase. Other citations to testimony and documents are provided in full, including (where applicable) the Corporation Commission’s docket number and filing date.

Other Abbreviations

Full term	Abbreviation
Boulders East Plant	Plant
Decision No. 71865 (Sept. 1, 2010)	Decision
Black Mountain Sewer Corporation	BMSC or Company
Boulders Homeowners Association	BHOA
Wastewater Treatment Plant Closure Agreement dated September 17, 2009	Closure Agreement
Wind P1 Mortgage Borrower, LLC dba The Boulders Resort	Resort
Effluent Delivery Agreement dated March 2001	Effluent Agreement
Arizona Corporation Commission Staff	Staff
Town of Carefree	Town
Wastewater Treatment Agreement dated April 1, 1996	Scottsdale Agreement

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BMSC Pre-Filed Testimony

Pre-Filed Testimony	Hearing Exhibit	Abbreviation
Direct Testimony of Greg Sorensen	BMSC-1	Sorensen Phase 2 Dt.
Responsive Testimony of Greg Sorensen	BMSC-2	Sorensen Phase 2 Rt.

The Resort - Pre-filed Testimony

Pre-Filed Testimony	Hearing Exhibit	Abbreviation
Direct Testimony of Susan Madden	W-1	Madden Dt.
Direct Testimony of Tom McCahan	W-2	McCahan Dt.
Direct Testimony of Dean Hunter	W-3	Hunter Dt.
Responsive Testimony of Dean Hunter	W-4	Hunter Rt.

Staff - Pre-filed Testimony

Pre-Filed Testimony	Hearing Exhibit	Abbreviation
Direct Testimony of Elijah Abinah	S-10	Abinah Dt.

Other Portions of the Record

	Hearing Exhibit	Abbreviation
Hearing Transcript May 8, 2012		Tr.
McBride Engineering Solutions Memorandum	BMSC-3	
Deposition Transcript of Susan Madden	BMSC-4	

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	Hearing Exhibit	Abbreviation
Boulders' Updated Response to 3rd Set of DRs by BMSC (3.1)	BMSC-5	
Deposition Transcript of Tom McCahan	BMSC-6	
Deposition Transcript of Dean Hunter	BMSC-7	
BMSC Response to Boulders 1st DRs (1.18)	W-5	
BMSC Response to Boulders 1st DRs (1.12)	W-6	
ADEQ's Administrative Code, Title 18, Chapter 9	W-7	
Stipulation of Facts filed on March 6, 2012	BHOA-6	
Wastewater Treatment Plant Closure Agreement	BHOA-7	

7060066.3/016040.0038

1 BMSC hereby replies to the closing briefs filed by Staff, the BHOA, and the Resort
2 in Phase 2 of this docket.¹ In summary, the briefs further establish and confirm that the
3 Company and the Commission are caught between the BHOA's desire to close a
4 wastewater treatment plant in the middle of a residential community and the Resort's
5 desire to maintain the status quo. Given the impasse that brought the BHOA back to the
6 Commission, it is now time for a final decision. The customers, the Resort, and the
7 Company need to have finality so that each can move forward and prepare for the future
8 of the community.

9 BMSC respectfully requests that the Commission should either order the Company
10 to close the Plant subject to certain conditions, or decline to issue such an order but only
11 after clearly expressing on the record that the Commission finds that the Company's
12 continued operation of the Plant is reasonable, sufficient and necessary, and will not
13 adversely impact the public comfort, convenience or interest.²

14 **I. The View From The Middle**

15 There is one consistent and notable theme to be taken from the closing briefs and
16 the entire record before the Commission—BMSC is trying to do the right thing. While
17 the other parties in this case have opposite views of the proper *resolution*, they uniformly
18 agree that BMSC has acted reasonably and in good faith with all the parties in this matter.

19 First, everyone agrees that the Company operates the Plant in full compliance with
20 all governing rules and regulations.³ There has never been a violation related to noise or
21 odors since Algonquin (now Liberty Utilities) took over in 2001.⁴

22 ¹ In this reply brief, BMSC uses the same citation format, abbreviations and conventions as utilized in its
23 closing brief dated June 12, 2012. Additionally, the parties' closing briefs will be identified as "BMSC
24 Br.," "Resort Br.," "Staff Br.," and "BHOA Br.," respectively.

25 ² See BMSC Br. at 11:5 – 13:2.

26 ³ BMSC Br. at 9:19-20; Resort Br. at 2:4-5; Staff Br. at 4:11-12; Ex. BHOA-6 at ¶ 11.

⁴ Since it took over, the Company has operated the Plant in the same manner as its predecessor, which
operator was also the Resort's owner and the developer of the entire Boulders community. See Sorensen

1 Second, the parties agree that BMSC made significant improvements to the Plant to
2 reduce noise and odors.⁵ At this time, the only ways to reduce noise and odor further are
3 to remove the plant, enclose the plant, or rebuild the plant.⁶ Enclosing or rebuilding the
4 plant, however, requires permits that may not be possible to obtain and costs that are
5 prohibitive and unsustainable.⁷

6 Third, when a large and vocal subset of its customers supported directly by the
7 Town demanded that the Plant be closed, despite its being used, useful and compliant, the
8 Company agreed to a course of action for possibly closing the Plant.⁸ It has always been
9 the Company's view that its customers can have what they want if it is possible and if the
10 customers are willing to pay for it in their rates.

11 Fourth, the condition precedent in the Closure Agreement regarding the Resort was
12 intended to and did provide the Resort a fair chance to cooperate in closing the Plant and
13 finding a replacement water source for the Resort's own needs.

14 Fifth, when the Commission concluded that the Closure Agreement was in the
15 public interest, the Company set out in good faith to fulfill its obligations.⁹ Since then,
16 BMSC has explored closure options by expending funds, evaluating options, working
17 with engineers, and considering, primarily, the impacts of closure on its single effluent
18 customer – the Resort.¹⁰

19
20 Phase 2 Dt. at 6:25 – 7:2; Tr. at 193:3-12. The Company treats 120,000 gallons, about 20 percent of its
total flows, at the Plant and all of the reclaimed water is delivered to the Resort.

21 ⁵ See BMSC Br. at 9:20-21; Resort Br. at 2:20 – 3:1; Staff Br. at 4:3-6; BHOA Br. at 3:5-7.

22 ⁶ See Sorensen Phase 2 Dt. at 3:21 – 4:7, 5:24 – 6:6; Resort Br. at 4:3-9; BHOA Br. at 4:9-18; Ex. BHOA-
6 at ¶¶ 12 – 14.

23 ⁷ Sorensen Phase 2 Dt. at 3:21 – 4:7, 5:24 – 6:6; Sorensen Phase 2 Rt. at 11:21 – 12:3; Tr. at 162 – 164.

24 ⁸ Ex. BHOA-7. See also BMSC Br. at 1:12-13; Resort Br. at 4:11-15; Staff Br. at 1:18-21; BHOA Br. at
3:5-21.

25 ⁹ BMSC Br. at 5:11-13; Tr. at 79:14-22, 94:16-19; Ex. BMSC-4 at 38:13-23.

26 ¹⁰ BMSC Br. at 1:13 – 2:2, 2:8-12, 3:17 – 4:1; Ex. BMSC-3; Resort Br. at 8:17 – 9:3.

1 In summary, since the 2006 rate case, the Commission has made it clear that the
2 Company needs to be responsive to its customers including, specifically, addressing
3 concerns over noise and odors.¹¹ There is no question that the Company has been
4 responsive, including but not limited to, entering into the Closure Agreement, which the
5 Commission found to be a reasonable remedy to an extraordinary situation.¹² So far, the
6 Company's good faith efforts and steadfast commitment to finding a solution regarding
7 the Plant have been rewarded by escalating litigation costs in Superior Court and before
8 the Commission, as well as other costs and lost time as it explores options. Meanwhile,
9 the BHOA and Town are still demanding closure and the Resort is threatening everyone
10 while doing nothing.¹³ At this point, BMSC has run out of options. Only the Commission
11 can break the impasse and give the Company the direction it needs.

12 **II. Replies To The Parties**

13 **A. The BHOA**

14 The BHOA asserts that it is "impossible" to fulfill the condition for closure related
15 to the Resort so the Commission should order the Plant closed, which "order" will have
16 the effect of relieving BMSC of its obligations under the Effluent Agreement, thus
17 eliminating that condition precedent.¹⁴ To the extent the Resort is impacted, the BHOA
18 asserts that is the cost of fulfilling the public interest.¹⁵ The BHOA again fails to
19 acknowledge that much of the cost of serving the public interest has been borne by and
20

21 ¹¹ See Resort Br. at 2:5-18; Staff Br. at 1:16-21, 2:11-13, 4:2-6; BHOA Br. at 2:15 – 3:4, 4:1-3; Tr. at
200:17-20.

22 ¹² Decision at 49:13-18.

23 ¹³ See Resort Br. at 6:6-13. Arguing that an order closing the Plant is an "unlawful, arbitrary and
24 unreasonable decision" sounds eerily consistent with the Resort's prior threat to sue if closure is ordered.
Sorensen Phase 2 Dt. at Exhibit GS-DT2-B; Reporter's Transcript of Proceedings, Procedural Conference,
February 7, 2012 at 13 – 14, 18 – 19, 33 - 34.

25 ¹⁴ See, e.g., BHOA Br. at 1:15-26, 7:18 – 8:3.

26 ¹⁵ BHOA Br. at 6:11-17.

1 continues to fall on BMSC. However, the BHOA has not sought to modify any of the
2 other conditions to Plant closure, which conditions include an amendment to the
3 Scottsdale Agreement and certain provisions for cost recovery.¹⁶ The BHOA and the
4 Company appear to remain in accord on the remaining steps to be taken before the Plant
5 could be closed, and on the Company's expectations concerning cost recovery.

6 Concerning the legality of the order it seeks, the BHOA asserts that the Company
7 would be required to comply with an order of the Commission directing it to close the
8 Plant.¹⁷ The Company agrees that compliance with a Commission order would terminate
9 its obligations under the express terms of paragraph 6 of the Effluent Agreement.¹⁸
10 However, *Arizona Water*, which the BHOA relies upon, merely confirms that a public
11 service corporation must comply with a Commission order; it does not create that
12 authority. Instead, as the BHOA also recognizes, the authority to make orders regarding a
13 public service corporation's plant and operations is largely statutory.¹⁹ The Resort,
14 however, disagrees that the Commission can and/or should exercise such authority in this
15 case.²⁰

16 **B. The Resort**

17 Because it has done nothing, the Resort is in a difficult position. Its utter lack of
18 planning for replacement water, unjustified reliance on the perpetual availability of
19 effluent from the Plant, and unwillingness to invest in any solution, combined with its

20 ¹⁶ Ex. BHOA-7 at ¶ 2(a)(iii).

21 ¹⁷ BHOA Br. at 7:11-17 citing *Ariz. Water Co. v. Ariz. Corp. Comm'n.*, 161 Ariz. 389, 778 P.2d 1285
22 (App. 1989).

23 ¹⁸ BHOA Br. 7:21 – 8:3 citing Ex. BHOA-3 at ¶ 5. (BMSC's obligation to continue to operate the Plant is
24 terminated if "any laws, regulations, orders or other regulatory requirements prevent or materially limit the
25 operation of" the Plant. The correct cite is Ex. BHOA-3 at ¶ 6.) BMSC discussed this same contract
26 provision in its closing brief. BMSC Br. at n.20. The Resort intentionally ignored it. See Resort Br. at
11:14-18 discussing provisions of the agreement just below this language.

¹⁹ See BHOA Br. at 6:19 – 7:6. See also BMSC Br. at 6:22 – 7:10; Staff Br. at 3:4 – 5:10.

²⁰ Resort Br. at 14:6 – 15:28.

1 “hide-the-authority” strategy have left it on the defensive in this proceeding. In that
2 defense, the Resort overstates its rights to the effluent from the Plant, understates the
3 Commission’s authority to act on the record before it, and offers no alternative to the
4 status quo.

5 1. The Resort Only Has The Right To “Available” Effluent.

6 BMSC is a certificated provider of sewer utility service. BMSC is obligated to
7 collect and treat wastewater flows from all customers in its certificated service area
8 according to the tariff of rates and charges approved by the Commission.²¹ BMSC’s tariff
9 includes a rate for effluent set by the Commission. However, the tariff does not obligate
10 the Company to make its effluent available for sale, nor is BMSC aware of any Arizona
11 law that requires a public service corporation providing sewer utility service to sell its
12 effluent. Instead, the Resort’s right to buy the Company’s effluent is a contractual right.

13 In the Effluent Agreement, BMSC agreed to “sell and deliver,” and the Resort
14 agreed to “purchase and accept delivery of all Effluent generated” from the Plant.²² As
15 the Resort admitted at trial, its right to effluent is subject to the availability of effluent.²³
16 This is also clear from the Effluent Agreement itself. First, the Company only agreed to
17 sell and deliver all effluent “generated” at the Plant. Second, the Company’s obligation to
18 operate the Plant so that effluent would be generated was further qualified.²⁴ Specifically,
19 the agreement reads:

20 The obligations of BCSC under this Paragraph shall terminate if
21 physical conditions at the Boulders East Plant or any laws,
22 regulations, orders or other regulatory requirements prevent or
23 materially limit the operation of the Boulders East Plant or render
the operation of such plant uneconomic. If economic considerations,

24 ²¹ *E.g.*, Ariz. Const. art. XV, § 3.

25 ²² Ex. BHOA-3 at ¶ 1.

26 ²³ *See* Tr. at 64:7-20.

²⁴ Ex. BHOA-3 at ¶ 6.

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technical requirements or regulatory changes require BCSC to close or relocate the Boulders East Plant, BCSC 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. In the event the Boulders East Plant is relocated or a new facility constructed, User will be responsible for the costs of constructing additional pipelines and other facilities necessary to transport the Effluent from such new location to the Resort’s delivery point, which upon request of BCSC shall be considered a contribution in aid of construction.²⁵

In its brief, the Resort states it is relying on the language in the second sentence from the excerpt above.²⁶ That sentence does obligate BMSC to make good faith efforts to relocate the Plant if technically feasible, and if the Plant is to be closed due to “economic considerations, technical requirements or regulatory changes.” The Resort’s reliance on this provision is of no use. It is the first sentence in the above-quoted provision that applies—the provision that unequivocally says the Company’s obligations “terminate” if any “orders or other regulatory requirements prevent or materially limit the operation” of the Plant. This is the provision the BHOA relied upon when it sought an order that the Plant be closed because it is this provision that terminates the Resort’s right to effluent under the Effluent Agreement without qualification.²⁷

The Resort fails to mention this provision of the contract in its brief. That omission is clearly intentional as the Resort expresses its reliance on the very next provision of the same agreement. That reliance too is fatally flawed. In other words, *even if* the first sentence of the paragraph did not exist and a Commission closure order did not terminate BMSC’s obligations, the Resort’s argument is *still* without merit. First, the Company’s obligation to relocate the Plant or build a new plant is subject to technical feasibility and economic considerations. The Resort has not presented *any* evidence of a technically

²⁵ *Id.*
²⁶ Resort Br. at 11:12-18.
²⁷ BHOA Br. at 7:21 – 8:3.

1 feasible and economically viable alternative, nor can it rebut the Company's
2 determination of what is not feasible or viable.²⁸

3 Second, if the Plant were to be moved to a different site, the Resort is responsible
4 for funding the cost of facilities to transport the effluent.²⁹ Yet, at no time has the Resort
5 expressed its willingness to fund effluent delivery facilities, or any of the costs that would
6 result from closure of the Plant. This is true, despite the Company's exploration of the
7 Cave Creek alternative that would require a new effluent delivery line.³⁰

8 In sum, before the Resort urges "the Commission to respect the promises made by"
9 the Company,³¹ it should be honest about what BMSC actually promised, and show that it
10 will honor its own promises. In particular, the Company did not promise to provide
11 effluent in the event of an order closing the plant. To the contrary, the parties agreed that
12 the Company's obligations would "terminate" in the event of such an order.

13 2. This Is No Place For A Rulemaking

14 After reviewing much of the same legal authority as the other parties, the Resort
15 concludes the Commission should undertake to promulgate rules regarding acceptable
16 odor levels for public service corporations.³² As the Resort recognizes, ADEQ, EPA
17 and/or Maricopa County already regulate the Company's operations, including setting
18 levels for plant emissions.³³ Additional rules are unnecessary, even assuming the
19 Commission has the authority to promulgate odor and noise levels for all regulated sewer
20 utility providers in the first place.

21
22 ²⁸ See Tr. at 55:5 – 56:21, 57:13-16, 60:14-18; Ex. BMSC-4 at 86:3 – 88:12.

23 ²⁹ Ex. BHOA-3 at ¶ 6.

24 ³⁰ Ex. BMSC-3.

25 ³¹ Resort Br. at 11:23.

26 ³² Resort Br. at 23:20-22.

³³ Resort Br. at 16:19 – 17:9.

1 The Company further agrees with the Resort that (1) “[n]o evidence has been
2 presented that establishes that [BMSC’s] handling of sewage from the customer’s point of
3 collection is unsafe, unsatisfactory or non-continuous;”³⁴ and (2) “[n]o credible scientific
4 or technical information has been offered by any party to establish that the odors
5 emanating from the Plant exceed industry standards or the health and safety levels
6 authorized or recommended by ADEQ or EPA.”³⁵ The Company also agrees with the
7 Resort that, based on the record related to the Plant, no valid claim of common law
8 nuisance exists.³⁶ But all of that misses the point. The question in this case is whether the
9 Commission can and should issue an order to close a used and useful, fully compliant
10 facility that is operated reasonably and sufficiently because the community no longer
11 wants the Plant and the inherent challenges and problems involved in having a wastewater
12 treatment plant in the middle of a residential community. That authority seemingly rests
13 on what the Resort dismisses as “broad instructions regarding ‘convenience,’ ‘comfort’,
14 ‘safety,’ and ‘health.’”³⁷ There does not appear to be any reason the Commission can’t
15 conclude that the Plant is to be closed to promote the public convenience, as long as the
16 Company is given the opportunity to be made whole for its cost of compliance.³⁸

17 The Commission was presented with a somewhat analogous set of circumstances in
18 the 1997 Far West Water & Sewer water rate case. In that case, the Commission received
19 a petition signed by over 500 Far West customers and heard considerable public
20

21 ³⁴ Resort Br. at 16:8-10.

22 ³⁵ Resort Br. at 17:10-14. *See also* Resort Br. at 20:16-20 asserting there is no evidence that Plant has
23 been improperly managed, no evidence that an unlawful discharge has occurred, and no evidence of
24 environmental pollution. Again, BMSC agrees.

24 ³⁶ Resort Br. at 21:11-14.

25 ³⁷ Resort Br. at 15:26-28.

26 ³⁸ *See Scates v. Ariz. Corp. Comm’n*, 118 Ariz. 531, 533-34, 578 P.2d 612, 614-15 (App. 1978). *See also*
Far West Water & Sewer, Inc., Decision No. 62649 (June 13, 2000) at 5:7-9.

1 comments regarding water quality.³⁹ Customers were expressing “dissatisfaction with
2 appearance and taste, complaining about the salt content, an offensive odor and taste, sand
3 in the pipes, and that the mineral content shortened appliance life.”⁴⁰ However, the
4 Company was in substantial compliance with governing regulations, including those for
5 water quality, and its water had not exceeded any of the applicable contaminant levels or
6 otherwise run afoul of the Safe Drinking Water Act.⁴¹ Nevertheless, Far West was
7 ordered “to work with Staff to determine the source of customer dissatisfaction, to
8 investigate possible solutions and communicate these options, including estimated costs
9 and the resulting effects on rates, with Staff and customers.”⁴²

10 In the Far West situation, like this one, the Commission was faced with specific
11 circumstances involving one utility and its customers. The Commission did not attempt to
12 fashion a remedy that required changes that would impact all public service corporations
13 because Far West’s situation did not impact all water providers. It impacted only Far
14 West, whose customers lived in an area where the groundwater had high salinity, and the
15 Commission ordered that utility to take steps to address its customers’ concerns. When
16 Far West did, the Commission authorized rate recovery, finding “it is unreasonable for the
17 Commission to order the Company to make such an investment that triples its rate base
18 and to approve financing, but reject the request for rates that would support the investment
19 and provide a fair and reasonable return.”⁴³

20 The Far West situation appears little different than the situation in *Arizona*
21 *Corporation Commission v. Palm Springs Utility Company*, 24 Ariz. App. 124, 536 P.2d
22

23 ³⁹ *Far West Water Company, Inc.*, Decision No. 60437 (September 29, 1997) at 18 – 19.

24 ⁴⁰ *Id.* at 18:14-17.

25 ⁴¹ *Id.* at 18:18-27.

26 ⁴² *Id.* at 19:14-17.

⁴³ Decision No. 62649 at 5:7-9.

1 245 (1975) discussed in more detail in Staff's and BMSC's briefs.⁴⁴ In *Palm Springs*,
2 customers sought improvements to water quality even though the water did not violate
3 any applicable standards. 24 Ariz. App. 124, 126, 536 P.2d 245, 247. The Commission
4 ordered the utility to supply "satisfactory water" and the court upheld the Commission's
5 exercise of authority under the same constitutional and statutory framework relied upon
6 by the BHOA in this case. *Id.* at 129, 536 P.2d at 250. The Commission was not required
7 to conduct a rulemaking to promulgate additional water quality standards, nor should it do
8 so here with respect to more stringent odor requirements for sewer utilities.

9 3. The Status Quo Is Unsustainable

10 Citing common membership with the BHOA, the Resort asserts that it "has
11 significant incentive to continue working cooperatively with them toward a reasonable
12 solution for all parties."⁴⁵ This record belies this hollow claim: The Resort has done
13 virtually nothing to seek a solution and cut off all discussions after it threatened to sue the
14 Company.⁴⁶ The Resort has also refused to bring anyone of authority to the table or to
15 agree to fund any of the costs to provide it with replacement water. These facts are at the
16 core of the BHOA's motion for an order to close the Plant; it is well past the time to find
17 and agree to a solution that the Resort finds "workable" and "reasonable." The Resort
18 should not be permitted to kick the proverbial can down the road given that it has
19 presented no credible evidence that it is seeking a solution.

20 The Resort's efforts to delay the closing of the Plant pending completion of an
21 agreement with Scottsdale are likewise without any basis.⁴⁷ The BHOA and BMSC
22 recognized from the outset that certain changes to the Company's agreement with the City

23 _____
24 ⁴⁴ Staff Br. at 4:16 – 5:4.

25 ⁴⁵ Resort Br. at 12:5-7.

26 ⁴⁶ Tr. at 56:8 – 572, 60:14-20, 80:18 – 81:10, 198:3-16.

⁴⁷ Resort Br. at 12 – 14.

1 of Scottsdale were going to be needed.⁴⁸ As stated, BMSC does not believe the BHOA
2 seeks to eliminate that condition. Nor does the Company intend to do so, as clearly
3 evidenced by its request for recognition of this condition precedent in any order of the
4 Commission directing closure.⁴⁹ In short, it should be obvious that the Company is not
5 going to close the Plant unless it has a place for all of its flows to be treated. That's why
6 amendment of the Scottsdale Agreement is and must continue to be a condition precedent
7 to closure. But it does not justify denying the relief sought.

8 Also not persuasive is the Resort's desire to postpone closure pending
9 consideration of the "engineering feasibility" of closure versus other "less drastic changes
10 that might be made."⁵⁰ For one thing, the Commission has already determined that
11 closure is in the public interest.⁵¹ Moreover, there is no evidence before the Commission,
12 in Phase 1 or in this phase, that "other less drastic" options exist. In fact, the record
13 proves otherwise. The Company has taken steps to reduce odors, but some odors are
14 inevitable, making the problem one of the Plant's location rather than any wrongdoing by
15 BMSC.⁵²

16 While the Resort is full of amorphous ideas that would delay or avoid closure, the
17 Resort has no suggestion for what to do in the meantime. One lawsuit seeking closure of
18 the Plant and substantial damages is already pending.⁵³ Even if the Commission were to
19 find that the Plant is necessary for BMSC to provide reasonable, safe and sufficient sewer
20 utility service, and that the operation of the Plant does not harm or pose a threat to harm
21

22 ⁴⁸ Ex. BHOA-7 at ¶ 2(a)(iii); Tr. at 146:6 – 149:17.

23 ⁴⁹ BMSC Br. at 11 – 13.

24 ⁵⁰ Resort Br. at 17:16-19.

25 ⁵¹ See Decision at 49:13-18.

26 ⁵² Ex. BHOA-6 at ¶¶ 11 – 13.

⁵³ See BMSC Br. at 2:2-6; BHOA Br. at 6:2-4.

1 the public health, safety, comfort or convenience, more lawsuits may follow. In that
2 scenario, those lawsuits become part of the cost of service, and it may not be sufficient, as
3 the Resort seems to think, for the Company to defend those suits by asserting that the
4 plaintiffs came to the nuisance.⁵⁴

5 In the end, the Resort is acting in its own self-interest. That is its prerogative, but
6 for a party that wants the Plant to stay open for its sole benefit, the Resort offers very little
7 in return. For example, if the Resort is going to force the Company to keep the Plant
8 open, then shouldn't the Resort be funding the defense and paying the damages, if any,
9 from the Marshall lawsuit and any others? Shouldn't the Resort also be funding the
10 search for the so-called "other less drastic measures" like additional odor and noise
11 controls? And shouldn't the rate for effluent reflect the cost of operating the Plant for the
12 Resort and only the Resort? The Resort has had three years to pursue a workable,
13 reasonable solution.⁵⁵ It should be clear by now that it isn't going to do anything but sit
14 on its hands, ignore its community, and hope to maintain the status quo until 2021.

15 **C. Staff**

16 Staff's brief could give one the impression that Staff would rather not be
17 participating in this second phase of this rate case. The Company also shares Staff's
18 concerns over "closure and removal of plant that is used and useful."⁵⁶ That is why the
19 Company has proceeded in the manner it has from the outset, including bringing the
20 Closure Agreement to the Commission and requesting approval of certain unique
21 ratemaking measures. But, as Staff also notes, the Commission has already found this to
22 be an "extraordinary" situation requiring an "extraordinary remedy," and given what has
23

24 _____
⁵⁴ Resort Br. at 21:5-10.

25 ⁵⁵ Tr. at 74:12-17.

26 ⁵⁶ Staff Br. at 5:12-14.

1 transpired, the Company believes an order to close the Plant would be within the
2 Commission's authority.⁵⁷

3 **III. Final Comments On Relief Requested**

4 The Commission will determine whether the record before it provides a reasonable
5 basis to order closure of the Plant, or whether the Resort's histrionic "shocking abuse of
6 governmental power" argument is justified by the facts and law.⁵⁸ BMSC does not
7 foresee challenging such an exercise of Commission authority so long as the Commission
8 takes the steps suggested concerning cost recovery and the other prerequisites to closure.⁵⁹
9 The Company also does not envision the Commission needing to interpret the Effluent
10 Agreement as part of the exercise of that authority, or in order to understand the impact of
11 its decision.⁶⁰ If the Commission determines that the public interest requires an order to
12 close the Plant, the Company will notify the Resort that the Effluent Agreement is to be
13 terminated pursuant to paragraph 6. In other words, it is the effect of the Commission
14 acting within its authority that will trigger termination of the Effluent Agreement, but only
15 because the Resort expressly agreed to termination if such an order were issued.

16 In the alternative, if the Commission determines, for whatever reason, that the
17 relief sought by the BHOA should be denied, then the Company again urges the
18 Commission to include language in its order concluding, among other things, that the
19 Company's continued operation of the Plant is reasonable, sufficient and necessary, and
20 will not adversely impact the public comfort, convenience or interest, and that BMSC is
21
22

23 _____
24 ⁵⁷ Staff Br. at 2:11-13 *citing* Decision at 42 – 43.

25 ⁵⁸ Resort Br. at 12:3.

26 ⁵⁹ BMSC Br. at 9:9-17, 11:6 – 13:2. *See also* Tr. at 188:23 – 190:23.

⁶⁰ Resort Br. at 11:18 – 12:4.

1 authorized an accounting order to accrue all litigation costs brought seeking either closure
2 of the Plant and/or damages resulting from its operation.⁶¹

3 RESPECTFULLY SUBMITTED this 29th day of June, 2012.

4 FENNEMORE CRAIG, P.C.

5
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12 of the foregoing were filed
13 this 29th day of June, 2012, with:

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⁶¹ See BMSC Br. at 11:9 – 12:3.

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