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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

DOCKETED

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

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

**BOULDERS HOMEOWNERS'
ASSOCIATION'S OPENING BRIEF
ON PLANT CLOSURE**

The Boulders Homeowners' Association ("BHOA"), by and through undersigned counsel, submits this Opening Brief on Plant Closure.

I. INTRODUCTION

To address the public outcry in response to odors from Black Mountain Sewer Corporation's ("BMSC" or "Company") Boulders Wastewater Treatment Plant (the "Treatment Plant" or "Plant"), the Arizona Corporation Commission, in Decision No. 71865 (September 1, 2010), approved an agreement for closure of the Plant upon the occurrence of certain conditions, including BMSC reaching an agreement with the Boulder's Resort ("Resort") for the termination of an Effluent Delivery Agreement ("Effluent Agreement") by which the Resort purchases all the effluent from the Plant. BMSC and the Resort have negotiated in an attempted to reach an agreement for the termination of the Effluent Agreement, but their negotiations have reached an impasse. In light of the apparent impossibility of this condition to be satisfied, BHOA in June 2011 filed a Motion for Plant Closure Order ("Motion"), requesting that the Commission order BMSC to close the Treatment Plant. The Commission granted intervention to the Resort,

1 and held a hearing on the Motion in May 2012. At the conclusion of the hearing, the
2 Commission established a schedule for the filing of post-hearing briefs.

3 **II. BACKGROUND**

4 The Treatment Plant, which was originally constructed in 1969, sits in the middle
5 of the Boulders residential community, which straddles the border of the Town of
6 Carefree and the City of Scottsdale.¹ The Plant sits less than one hundred feet from three
7 homes, and within one thousand feet of Treatment Plant there are 200-300 homes and
8 dining and conference facilities of the Resort.²

9 In 2001, BMSC entered an agreement (the “Effluent Agreement”) with the Resort
10 to sell to the Resort all of the effluent generated by the Treatment Plant.³ The effluent
11 which the Resort receives pursuant to the Effluent Agreement is about 15 percent of the
12 total effluent the Resort requires to irrigate its golf courses.⁴ The Effluent Agreement is
13 in effect through 2021, and prevents the Company from unilaterally closing the plant and
14 cutting off the Resorts’ supply of the effluent.

15 In the Company’s 2005 rate case, BHOA intervened and brought to the
16 Commission’s attention the odor issues related to BMSC’s sewer operations. The odor
17 problem was severe and pervasive throughout a broad portion of the Boulders
18 subdivision. Testimony and public comment suggested that the odors arose from both the
19 Treatment Plant and the collection system, but some thought corrections to the collection
20 system would be the most efficient initial steps to take to see if those less costly
21 corrections could solve the odor problems. In Decision No. 69164 in that rate case, the
22 Commission required Company to implement one of the two proposed solutions in order

23 _____
24 ¹ Exhibit BHOA-4 at 2; Exhibit BHOA-6 at ¶1.
25 ² Exhibit BHOA-6 at ¶2.
26 ³ Exhibit BHOA-3.
⁴ Exhibit BHOA-3; Exhibit BHOA-6 at ¶16; 2012 Tr. at 30. (“2012Tr.” refers to the transcript of the May 8, 2012 hearing in this docket unless otherwise noted.) The Resort obtains the remainder of its effluent requirements from the City of Scottsdale.

1 to “mitigate” the odor problems.⁵ The Decision expressed the Commission’s desired goal
2 as “odor remediation in the Boulders community.”⁶ The Commission further indicated
3 that it believed that action should be taken to advance a solution “that will enable all
4 customers...to enjoy fully their property without enduring offensive odors.”⁷

5 Despite the Company’s improvements to the collection system in response to
6 Decision No. 69164, which did alleviate a small portion of the pervasive odors, strong
7 odor problems persisted. In the Company’s 2008 rate case, over five hundred public
8 comments were lodged with the Commission (letters, petitions and appearances at the
9 public comment portion of the hearing) confirming the ongoing odor problems.
10 Commenters indicated the impacts of the odors on their lifestyle, including interruption of
11 Thanksgiving dinner on the patio, inability to leave windows open to enjoy fresh air,
12 noises from operation of the plant disturbing sleep, embarrassment to host guests who
13 may experience intense odors, and golfers who must hold their breath as they pass the
14 Plant while playing the course. It had become clear that odor problem identified by the
15 Commission in Decision No. 69164 in fact was originating in both the collection system
16 and the Treatment Plant and that upgrades to the collection system alone had not
17 remedied the full problem.

18 BHOA intervened in the Company’s 2008 rate case, and prior to the filing of direct
19 testimony, negotiated a Wastewater Treatment Plant Closure Agreement (the “Closure
20 Agreement”) setting forth terms and conditions under which BMSC agreed to close the
21 Treatment Plant.⁸ One of the conditions to the Company closing the Treatment Plant was
22 the Resort agreeing to termination of the Effluent Agreement (the “Effluent Condition”).⁹

24 ⁵ Decision No. 69164 at 43.

25 ⁶ *Id.* at pg. 37, fn 13.

26 ⁷ *Id.* at 37.

⁸ Exhibit BHOA-7.

⁹ The Effluent Condition is set forth in paragraph 2(a)(iv) of the Closure Agreement.

1 In Decision No. 71865 (September 1, 2010) (the “Decision”), the Commission
2 found that the Closure Agreement, as modified and clarified in the Decision, represented
3 a reasonable resolution of the ongoing odor concerns.¹⁰

4
5 **III. THE COMMISSION SHOULD ORDER THE COMPANY TO CLOSE THE**
6 **TREATMENT PLANT TO ACCOMPLISH THE COMMISSION’S**
7 **PREVIOUSLY STATED GOAL OF ODOR REMEDIATION.**

8 A. The Commission has already concluded that the odor problem was so egregious
9 that the Treatment Plant should be closed.

10 It would be impossible to operate a wastewater treatment plant without producing
11 some odors.¹¹ If the Treatment Plant were constructed today, it would require a setback of
12 500 to 1,000 feet,¹² but the Treatment Plant is located only 100 feet from three homes, and
13 there are 200-300 homes within 1,000 feet of the Plant.¹³

14 When the Treatment Plant was constructed, the site was originally intended to
15 serve only the residents of the Boulders and the golf courses.¹⁴ Further, it was intended
16 that the site was only a temporary location for treatment of wastewater, and that another
17 location would be secured, further away from homes, for a more permanent treatment
18 facility.¹⁵ But, forty years later, treatment plant remains at the original site, the middle of
19 a residential neighborhood.

20 Complaints have been received that odors from the Treatment Plant are noticeable
21 by and objectionable to Boulders residents. Such residents have also complained that
22 odors from the Treatment Plant can be irritating and sometimes interfere with residents’

23 ¹⁰ Decision No. 71865, Finding of Fact No. 34.
24 ¹¹ Exhibit BHOA-6 at ¶12; 2009 Tr. at 144 (Sorenson). “2009 Tr.” refers to the September
25 2009 hearing in this docket.
26 ¹² 2009 Tr. at 161-162 (Sorenson).
¹³ Exhibit BHOA-6 at ¶2.
¹⁴ Exhibit BHOA-4 at 2.
¹⁵ *Id.*

1 opportunity to leave their windows open to enjoy fresh air in the immediate vicinity of the
2 facility. Residents of the Boulders have complained to the Boulders' community manager
3 about odors from the Treatment Plant.¹⁶

4 Golfers on the north Boulders golf course also complain at times of noticeable
5 odors from the Treatment Plant.¹⁷ Noises from the Treatment Plant are also noticeable
6 from homes within 400 feet of the Treatment Plant.¹⁸ There is periodic traffic (service
7 vehicles, pumper trucks, sub-contractor vehicle parking, dumpsters, etc.) in the Boulders
8 community associated with the Treatment Plant's operations.¹⁹

9 In 2006, the Commission concluded that the odors in the Boulders community
10 should be remediated and that all customers should be able to fully enjoy their homes
11 without enduring offensive odors.²⁰ In 2010, the Commission concluded that closure of
12 the Treatment Plant was appropriate in light of the "overwhelming and extraordinary
13 level of participation and comment in support of closure of the Boulders WWTP."²¹ The
14 Commission went on to state that "[w]e do not believe that customers should be required
15 to endure offensive odors at levels and frequencies that have been described in the public
16 comments provided in this case."²²

17 The Resort and BMSC attempted to reach an agreement for a termination of the
18 Effluent Agreement, but they have been unsuccessful.²³ Though progress on the
19 negotiations has ceased, unfortunately the odors have not. Odors from the Treatment
20 Plant over the last several years have been as severe, if not worse, than ever. Since the
21

22
23 ¹⁶ Exhibit BHOA-6 at ¶5.
24 ¹⁷ Exhibit BHOA-6 at ¶8.
25 ¹⁸ Exhibit BHOA-6 at ¶9.
26 ¹⁹ Exhibit BHOA-6 at ¶10.
²⁰ Decision No. 69164 at 34 (lines 24-26), 37.
²¹ Decision No. 71865 at 49.
²² *Id.*
²³ Exhibit BHOA-6 at ¶17.

1 Commission issued Decision No. 71865 in 2010, customers have continued to complain
2 to the Company about odors.²⁴ In fact, one nearby resident filed a lawsuit against the
3 Company, seeking, among other remedies a preliminary injunction ordering BMSC to
4 close the Treatment Plant pending trial on the merits.²⁵ And several residents have
5 recently filed public comment letters in this docket indicating the ongoing nature of the
6 odors from the Treatment Plant, which letters they had delayed in sending to the
7 Commission in the hopeful expectation that BMSC and the Resort would reach an
8 agreement to terminate the Effluent Agreement.²⁶ In the fall of 2011, the Town of
9 Carefree unanimously adopted a resolution urging the Commission to order the Treatment
10 Plant to be closed.²⁷

11 The Commission has already recognized that closure of the Plant is appropriate to
12 protect the public interest, and that a negotiated termination of the Effluent Agreement
13 would be preferred. But the Company and the Resort have been unable to reach an
14 agreement to terminate their contract. While it may be unfortunate that the Resort would
15 have to incur higher costs to replace 15 percent of the water it currently uses to irrigate its
16 golf courses, the Commission should protect the greater public interest by ordering
17 BMSC to close the Plant.

18 B. The Commission has the authority to order closure of the Treatment Plant.

19 The Commission's decision in the Company's 2005 rate case recognized its
20 authority under A.R.S. §§ 40-321(A), -331(A), -361(B), -202(A) and Article VX § 3 of
21

22 _____
23 ²⁴ Exhibit BHOA-6 at ¶7.

24 ²⁵ CV2011-004077, Maricopa County Superior Court. BHOA understands that after the suit was filed, the
25 homeowner was forced to move out of his home due to the strong and persistent odors and that the parties thereafter
26 stipulated to vacating the preliminary injunction hearing, but that the remainder of the lawsuit is pending. The
27 plaintiffs in that case, Mr. & Mrs. Marshall, provided public comment at the May 2012 hearing in this matter.

²⁶ See, Public Comment letters docketed in June 2011, attached as Attachment "F" to Motion.

²⁷ Resolution filed with Commission on November 9 and November 22, 2011 in Docket No. SW-02361A-08-0609).

1 the Arizona Constitution to require actions by the Company to resolve odor problems.²⁸
2 There, the Company disputed that the Commission had authority to require it to resolve
3 odor problems when there was no finding of violation of Maricopa County Environmental
4 Services Department odor regulations. The Commission disagreed, and concluded that it
5 had its own independent authority, regardless of whether the County's rules and
6 regulations were implicated.²⁹ At the recent hearing, Staff reaffirmed that the
7 Commission does possess the authority to order closure of the Treatment Plant at this
8 time.³⁰ The Company is no longer asserting that the Commission lacks authority to order
9 closure.

10 C. Ratepayers as a whole benefit by closure of the Treatment Plant now.

11 BMSC would be required to comply with an order of the Commission ordering
12 closure of the Treatment Plant. *See, Ariz. Water Co, v. Ariz. Corp. Comm'n.*, 161 Ariz.
13 389, 778 P.2d 1285 (App.1989) (confirming Commission's authority to order a public
14 service corporation to modify its plant facilities for the benefit of its existing customers).
15 Therefore, upon the Commission's order to close the Treatment Plant, BMSC would be
16 required to comply, and the Treatment Plant, and the odors it creates, would be
17 eliminated.

18 In addition to alleviating the odors from the Treatment Plant, a Commission order
19 to close the Treatment Plant would release BMSC from its obligation to provide effluent
20 to the Resort. The Effluent Agreement includes BMSC's agreement that it will not "take
21 any action that would reduce the plant's treatment capacity."³¹ But BMSC's obligation to
22 continue to operate the Treatment Plant is terminated if "any laws, regulations, order or
23 other regulatory requirements prevent or materially limit the operation of" the Treatment
24

25 ²⁸ Decision No. 69164 at 36-37, 40 (Conclusion of Law No. 3).

26 ²⁹ *Id.*

³⁰ Exhibit S-10 at 4.

³¹ Exhibit BHOA-3 at 5.

1 Plant.³² Thus, if the Commission ordered BMSC to close the Treatment Plant, BMSC
2 would be relieved of its obligations under the Effluent Agreement to provide effluent to
3 the Resort.

4 Further, closure of the Treatment Plant at this time will save the Company, and
5 ultimately its customers, money in the long run. Even if the Commission did not order
6 closure of the Treatment Plant, BMSC does not intend to renew or extend the Effluent
7 Delivery Agreement with the Resort beyond its current 2021 termination date and would
8 decommission the Plant at that time.³³ If the Treatment Plant were closed now, BMSC
9 can acquire replacement treatment capacity at the Scottsdale Treatment Plant for \$6 per
10 gallon pursuant to the terms of the Scottsdale Agreement. However, the Scottsdale
11 Agreement is only in effect through 2016. Therefore, if the Company waited until 2021
12 to acquire that replacement capacity, it would pay a then-market price to secure capacity
13 at the Scottsdale Treatment Plant, at a projected cost that is at least 3 times higher than the
14 current cost to purchase that capacity.³⁴

15 **IV. CONCLUSION**

16 Customers and the general public are continuing to suffer from the noxious odors
17 generated by the Treatment Plant. The Commission has already concluded that the
18 Treatment Plant should be closed and that it has the authority to order that it be closed.
19 The only thing standing in the way of closure of the Treatment Plant is BMSC's
20 contractual obligation to provide the effluent from the Treatment Plant to the Resort, but
21 the Commission's order that the Plant be shuttered would relieve BMSC of that
22 contractual commitment.

23 Based on the factual record previously developed in this docket and as
24

25 ³² Exhibit BHOA-3 at 5.

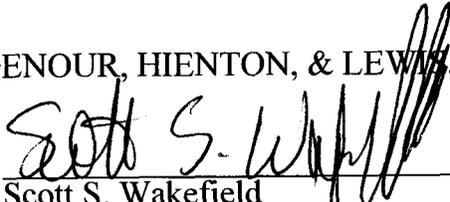
26 ³³ 2012 Tr. at 127 (Sorenson).

³⁴ 2012 Tr. at 129-131 (Sorenson); 2009 Tr. at 118-119 (Sorenson).

1 supplemented at the May 2012 hearing, the Commission should order BMSC to close the
2 Plant to protect the public interest.

3 Dated this 2nd day of June, 2012.

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

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