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ARIZONA CORPORATION COMMISSION

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DATE: FEBRUARY 6, 2013

ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

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

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Dwight D. Nodes. The recommendation has been filed in the form of an Opinion and Order on:

BLACK MOUNTAIN SEWER CORPORATION
(RATES/PHASE 2)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

FEBRUARY 15, 2013

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Open Meeting to be held on:

MARCH 12, 2013 AND MARCH 13, 2013

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

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JODI JERICH
EXECUTIVE DIRECTOR

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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

BOB STUMP - Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH

IN THE MATTER 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 DECISION NO. _____ **PHASE 2** **OPINION AND ORDER**

DATE OF HEARING: May 8, 2012

PLACE OF HEARING: Phoenix, Arizona

ADMINISTRATIVE LAW JUDGE: Dwight D. Nodes

APPEARANCES: Mr. Jay L. Shapiro, FENNEMORE CRIAG, P.C., on behalf of Black Mountain Sewer Corporation;

Ms. Michele L. Van Quathem, RYLEY, CARLOCK & APPLEWHITE, P.A., on behalf of Wind P1 Mortgage Borrower, LLC, dba The Boulders Resort and Golden Door Spa;

Mr. Scott S. Wakefield, RIDENOUR, HIENTON & LEWIS, P.L.L.C., on behalf of Boulders Homeowners Association; and

Ms. Robin Mitchell, Staff Attorney, Legal Division, on behalf of the Utilities Division of the Arizona Corporation Commission.

BY THE COMMISSION:

I. Procedural History

On December 19, 2008, Black Mountain Sewer Corporation ("BMSC" or "Company") filed with the Arizona Corporation Commission ("Commission") an application for a rate increase.

On September 1, 2010, the Commission issued Decision No. 71865 in this matter which granted the Company an increase in rates and, among other things, found that a Closure Agreement between BMSC and the Boulders Homeowners Association ("BHOA") concerning the Boulders

wastewater treatment plant ("Boulders WWTP" or "treatment plant") provided "an appropriate and creative solution" to address ongoing odor issues related to the plant. (Decision No. 71865, at 53.) The Closure Agreement between BMSC and BHOA provided that the Company would be permitted to implement a surcharge to recover capital expenditures for closure of the plant. BMSC's obligations under the Agreement were subject to a number of conditions including "[s]uccessful renegotiation of the Effluent Agreement with the Boulders Resort to allow termination of the agreement with little or no cost to BMSC upon closure of the treatment plant." (*Id.* at 42.)

Since issuance of Decision No. 71865, a number of customers have submitted public comments generally expressing concern with ongoing plant odors and requesting that the Boulders treatment plant be closed.

On June 15, 2011, BHOA filed a Motion for Plant Closure Order requesting that the Commission order BMSC to close the treatment plant to "thereby [relieve] BMSC of its contractual obligation to provide effluent to the Resort and [allow] BMSC to expeditiously close the Treatment Plant." (BHOA Motion, at 1.)

On July 6, 2011, Wind P1 Mortgage Borrower, LLC, dba The Boulders Resort ("Boulders Resort" or "Resort") filed a Motion to Intervene and requested a hearing to present evidence and legal arguments regarding issues related to the treatment plant and an Effluent Agreement between the Boulders Resort and BMSC.

On July 18, 2011, BHOA filed a Response to the Motion to Intervene opposing the Boulders Resort's request for intervention.

On July 25, 2011, intervenor M.M. Schirtzinger filed a letter expressing his opinion regarding the treatment plant.

On November 9, 2011, the Town of Carefree ("Carefree" or "Town") filed a copy of a unanimous Resolution adopted by the Town Council on November 1, 2011, urging the Commission to take appropriate steps to close the treatment plant.

On November 22, 2011, BHOA filed a full copy of the same Resolution including a final page that was omitted from the Town's November 9, 2011 filing.

On January 24, 2012, the Commission voted during a Staff Open Meeting to reopen this matter pursuant to A.R.S. § 40-252[1], and directed the Hearing Division to conduct proceedings to address the treatment plant closing issue and to issue a Recommended Opinion and Order.

On January 26, 2012, a Procedural Order was issued scheduling a procedural conference for February 7, 2012, and granting the Boulders Resort's Motion to Intervene.

On February 7, 2012, the procedural conference was held, as scheduled, during which various procedural issues were discussed regarding the need for a hearing and the scope of the A.R.S. § 40-252 proceeding. At the conclusion of the procedural conference, the parties were directed to discuss a mutually agreeable procedural schedule and to file the proposed schedule.

On February 16, 2012, the Residential Utility Consumer Office ("RUCO"), an intervenor in this matter, filed a letter stating that it would not be participating in the "Phase 2" portion of the proceeding.

On March 1, 2012, the Town filed a Notice of Substitution of Counsel.

On March 6, 2012, the participating parties filed a Joint Proposed Procedural Schedule for Phase 2.

On March 6, 2012, BMSC and BHOA filed a Stipulation of Facts in lieu of testimony by BHOA.

On March 7, 2012, a Procedural Order was issued scheduling a hearing for May 8, 2012, and setting other procedural deadlines.

On March 8, 2012, a Procedural Order was issued setting a date for filing responsive testimony.

On March 16, 2012, BMSC filed the Phase 2 direct testimony of Gregory S. Sorenson; and the Resort filed the Phase 2 direct testimony of Susan Madden, Tom McCahan, and Dean Hunter.

On March 19, 2012, BMSC filed a Notice of Appearance of additional counsel.

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[1] A.R.S. § 40-252 states "[t]he commission may at any time, upon notice to the corporation affected, and after opportunity to be heard as upon a complaint, rescind, alter or amend any order or decision made by it. When the order making such a rescission, alteration or amendment is served upon the corporation affected, it is effective as an original order or decision. In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.

On April 6, 2012, BMSC filed the responsive testimony of Mr. Sorenson and the Boulders Resort filed the responsive testimony of Mr. Hunter.

On May 8, 2012, the Phase 2 hearing was held as scheduled. BMSC, BHOA, the Boulders Resort, and Staff appeared through counsel. At the conclusion of the hearing a post-hearing briefing schedule was established with the agreement of the parties.

On May 8, 2012, Robert B. Marshall filed the Public Comment of Robert B. Marshall, along with a number of attachments.[2]

On May 11, 2012, Mr. Schirtzinger filed a "Response" stating his opinions about BMSC and the treatment plant. Because he did not pre-file testimony or participate in the hearing, Mr. Schirtzinger's "Response" will be considered as public comment, consistent with the treatment accorded to a statement he gave at the beginning of the initial hearing. (*See*, Decision No. 71865, at 51, fn 21.)

On June 5, 2012, the Company filed an Unopposed Motion to Extend Briefing Schedule.

On June 12, 2012, BMSC, BHOA, the Boulders Resort, and Staff filed their initial post-hearing briefs.

On June 26, 2012, Staff filed a Request for Extension of Time to file its reply brief.

On June 26, 2012, the Resort filed its reply brief.

On June 29, 2012, BMSC, BHOA, and Staff filed their reply briefs.

On June 29, 2012, Mr. Marshall filed the Second Public Comment of Robert B. Marshall. This so-called "Second Public Comment" is comprised of a number of legal arguments and case law citations, and was again filed under the letterhead of the law firm representing the Marshalls in their Superior Court lawsuit.

On July 5, 2012, BMSC filed a Motion to Strike Mr. Marshall's Second Public Comment, arguing that it is not public comment but rather an attempt to present expert testimony and legal

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[2] Mr. Marshall's public comment was filed under the letterhead of a law firm that apparently represents Mr. Marshall and his wife in a pending lawsuit filed against BMSC in Maricopa County Superior Court. Mr. Marshall and his wife, Kathy Marshall, also gave oral public comment at the beginning of the Phase 2 hearing. (Tr. 9-14.) [Unless otherwise indicated, all citations to the transcript and exhibits refer to the Phase 2 proceeding.]

arguments on issues that are not before the Commission in this proceeding.[3]

II. History of Boulders WWTP

In BMSC's 2005 rate case (Docket No. SW-02361A-05-0657), we identified the problem of the Company's system odors as "the most contentious issue in this proceeding." (Decision No. 69164 (December 5, 2006), at 30.) In BMSC's subsequent rate case (*i.e.*, Phase 1 of this docket), we indicated that the issue of odor control was again the most important concern expressed by customers of BMSC, as evidenced by the hundreds of public comments submitted in the docket and the intervention of the BHOA to address the odor issue. In recognition of the concerns expressed by many of the Company's customers, BMSC entered into negotiations in Phase 1 to find a remedy to the ongoing odor issues and a settlement agreement was ultimately executed by BMSC and BHOA. (Decision No. 71865, at 36.)

Given the passage of time since the issuance of the Phase 1 Order, we believe it is useful to recount the background of the odor issues related to BMSC's system in general, and specifically with respect to the Boulders WWTP, as described in Decision No. 71865.

As indicated in the Phase 1 testimony of the BHOA's president, Les Peterson, the BHOA is an association of 332 home and property owners located in the Boulders community, in the northern part of BMSC's service area in the Town of Carefree. The southern part of the Boulders community, which is located within the City of Scottsdale's ("Scottsdale") city limits, has a separate homeowners association, the Owners' Association of Boulders Scottsdale ("OABS"). (Decision No. 71865, at 36.)

According to Mr. Peterson, the Boulders WWTP was originally constructed in 1969 to serve homes within the Boulders community. (*Id.*) In 1980, BMSC's predecessor, Boulders Carefree Sewer Corporation ("Boulders Carefree"), acquired the sewer assets of Carefree Water Company, Inc. ("Carefree Water") and Boulders Carefree was granted a Certificate of Convenience and Necessity ("CC&N"). (*Id.*; Decision No. 50544, January 3, 1980.) Decision No. 50544 indicated that although the Boulders WWTP was originally intended to serve only the Boulders Carefree development and golf course, by 1980 it was processing all the treated sewage in Carefree which, at

[3] Mr. Marshall's post-hearing filings will be treated as public comment. However, any legal arguments or purported expert technical analysis will be disregarded in our consideration of this case.

that time, consisted of approximately 200 customers including 15 commercial users. (Decision No. 50544, at 2.) That Decision stated that the WWTP was operating at its 120,000 gallons per day ("gpd") capacity, and Boulders Carefree was authorized to construct an additional "package plant" on the same site to add 60,000 gpd of capacity.[4]

Mr. Peterson testified that the Boulders WWTP remains in the same location where it was originally constructed, and residences were constructed in close proximity to the plant during a period of rapid expansion. He stated that the WWTP is located less than 100 feet from 3 homes, less than 300 feet from 10 homes, less than 500 feet from 17 homes, and within 1,000 feet of 200 to 300 homes, as well as the primary dining and conference facilities of the Boulders Resort. (*Id.* at 37.) Mr. Peterson claimed that the rapid expansion caused severe financial problems for Boulders Carefree, and required several interim and permanent rate increases in 1981 (Decision No. 52585), 1982 (Decision No. 53300), and 1985 (Decision No. 54537). He indicated that since 1989, flows in excess of the WWTP's 120,000 gpd capacity have been sent to Scottsdale for treatment, and currently only 20 percent of BMSC's total annual raw sewage is treated at the Boulders WWTP. (*Id.*)

In 1996, Boulders Carefree entered into a new Wastewater Treatment Agreement with Scottsdale ("Scottsdale Agreement") that permitted Boulders Carefree (and now BMSC) to purchase increments of capacity of up to 1,000,000 gpd for Scottsdale's treatment facilities at a rate of $6.00 per thousand gallons. (*Id.*) The Company's wastewater flows not treated at the Boulders WWTP are diverted into Scottsdale's wastewater treatment system and ultimately delivered to the City of Phoenix Regional 91st Avenue wastewater treatment plant. The Scottsdale Agreement has a term of 20 years and expires at the end of 2016. (*Id.*) BMSC also has a 20-year Effluent Delivery Agreement with the Boulders Resort ("Effluent Agreement"), executed in 2001, that requires BMSC to deliver all effluent produced by the Boulders WWTP to the Boulders Resort for landscaping and golf course irrigation. (*Id.* at 38.)

A. <u>Background of BMSC Odor Issues</u>

The subject of odor problems on BMSC's system has been an ongoing concern for residents

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[4] It appears from the record that the 60,000 gpd package plant was never constructed.

in the Boulders community for a number of years. The nature and depth of customer complaints was described in BMSC's 2005 rate case and a proposed remedy was identified and approved in Decision No. 69164. For purposes of establishing a background for the issue, it is necessary to recount the facts and findings presented in Decision No. 69164, as described in Decision No. 71865.

In its 2005 case, the Company initially took the position that any odor problems that may exist were not related to the BMSC system. However, the Company later conceded that there was an odor problem being experienced by certain of its customers. Based on the public comments and sworn testimony presented by various witnesses in the prior case, there appeared to be general agreement that the odor problems reported by customers came from two separate sources, the CIE Lift Station and the wastewater line that flows under Boulders Drive in the Boulders subdivision. (Decision No. 69164, at 30-31.)

With respect to the CIE lift station, BMSC recognized the problems associated with the CIE Lift Station and indicated that it was studying ways to bypass or eliminate the facility. The Company subsequently entered an agreement with an engineering company to eliminate and bypass the lift station and ultimately closed the lift station. (Decision No. 71865, at 38.)

As described in Decision No. 69164, the more complicated odor issue involved ongoing complaints by residents in the Boulders subdivision, especially along Boulders Drive where the sewer line flowed to the Boulders WWTP. Testimony given in that case indicated that it was likely that the odors in the Boulders community were attributable to two problems: the long retention time that sewage sits in the Boulders line, thereby allowing the sewage to become septic; and "positive pressure" between the CIE Lift Station and the Boulders WWTP due to the fact that the lines between the lift station and discharge manholes in the Boulders community are pressurized, but were gravity lines from the Boulders manholes to the WWTP. (*Id.* at 32.)

In the 2005 case, BMSC asserted that it would be unfair for the Commission to impose additional odor remediation requirements, beyond compliance with Arizona Department of Environmental Quality ("ADEQ") and Maricopa County Environmental Services Division

("MCESD") standards,[5] especially when such requirements may be beyond the Commission's jurisdiction. The Company argued that ordering additional remedial steps to be taken was not related to ratemaking, and absent evidence that BMSC's operations violated the governing odor standards, additional requirements would constitute improper interference with management of the utility. (*Id.* at 33.)

In Decision No. 69164, we rejected BMSC's jurisdictional arguments, finding that "the evidentiary record in this case amply supports the appropriateness of, and the need for, imposition of odor remediation requirements as a condition of granting the rate relief approved herein." (*Id.* at 34.) Citing to several statutes granting the Commission broad powers to remedy problems, in addition to its ratemaking authority, we directed BMSC to undertake certain specified actions. Specifically, we indicated that, with respect to a public service corporation's adequacy of service, A.R.S. §40-321(A) states:

> When the commission finds that the 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, inadequate or insufficient, the commission shall determine what is just, reasonable, safe, proper, adequate or sufficient, and shall enforce its determination by order or regulation.

We also cited to A.R.S. §40-331(A), which states:

> When the Commission finds that additions or improvements to or changes in the existing plant or physical property of a public service corporation 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, the commission shall make and serve an order directing that such changes be made or such structure be erected in the manner and within the time specified in the order. If the commission orders erection of a new structure, it may also fix the site thereof.

Finally, we referenced the authority granted to the Commission in A.R.S. §40-361(B), which provides as follows:

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

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[5] MCESD is responsible for compliance inspections for BMSC's treatment plant and system, including odor complaint monitoring, through a delegation agreement with ADEQ.

Based on these statutes, we concluded the Commission has the authority and the duty to protect the health, safety and welfare of a public service corporation's customers, and that in order to protect the security or convenience of the public, the Commission may specify not only the type of facilities that are required, but the timeframe in which the facilities must be constructed. (*Id.* at 35-36.)

In addition to the specific statutes cited above, we found that A.R.S. §40-202(A), provides supervisory authority to the Commission for regulation of public service corporations.[6] We also pointed out that the authority granted to the Commission under these statutes, as well as the Commission's constitutional powers pursuant to Article 15, §3 of the Arizona Constitution, were discussed in *Arizona Corp. Comm'n v. Palm Springs Utility Co., Inc.*, 24 Ariz. App. 124, 128, 536 P.2d 245, 249 (App. 1975). In that case, the court held that "the regulatory powers of the Commission are not limited to making orders respecting the health and safety, but also include the power to make orders respecting comfort, convenience, adequacy and reasonableness of service...." (*Id.*). Accordingly, we directed BMSC to implement the system changes recommended by Carefree's witness, or undertake alternative solutions agreed to by the parties to the case, in order to enable all customers on the BMSC system to enjoy fully their property without enduring offensive odors. (*Id.* at 37.)

B. <u>Actions Taken by BMSC Following Decision No. 69164</u>

In Phase 1 of this case, Mr. Sorenson testified that BMSC deactivated the CIE lift station and, to address the odor problems along Boulders Drive, the Company rerouted sewer lines and installed air-jumper pipelines at four locations along the street between manholes to allow air to flow with the sewage and stop it from being released into the atmosphere. (Decision No. 71865, at 40.) To remedy additional odor problems later discovered on Quartz Valley Court, the Company constructed a new sewer line and grinder pump station to permit sewage to flow freely. (*Id.*) Mr. Sorenson added that BMSC installed an odor scrubber at the plant, placed heavy rubber mats over grate openings covering

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[6] A.R.S. § 40-202(A), provides in relevant part: "The commission may supervise and regulate every public service corporation in the state and do all things, whether specifically designated in this title or in addition thereto, necessary and convenient in the exercise of that power and jurisdiction."

treatment basins, and commissioned a noise study to determine the source of noises emanating from the plant. The noise study led to several projects aimed at reducing noises coming from the treatment plant. (*Id.* at 41.)

According to Mr. Sorenson's direct testimony in Phase 1, the Company's odor remediation efforts resulted in reduced odors in the areas leading to the sewer plant, and BMSC had not received a single odor complaint from surrounding neighbors since the projects were completed. He added, however, that there continue to be occasional odor events and the Company meets regularly with officials from Carefree and the BHOA to address their ongoing concerns. (*Id.*) Mr. Sorenson claimed that the Company has worked with Carefree and Scottsdale to enforce commercial grease trap cleaning requirements, and to implement a fats, oils and grease disposal program to reduce dumping of those wastes into the sewer system. He indicated that BMSC has also introduced chemical additives into the collection system and installed Odor Loggers at the plant to detect and measure hydrogen sulfide levels. Mr. Sorenson stated that MCESD conducted one inspection since the last rate case, and the treatment plant was found to have only one minor violation, related to a signage issue that has since been corrected. (*Id.*)

C. <u>Boulders Community</u>

The Boulders WWTP is situated in the midst of, and in close proximity to, a number of residences. According to the BHOA, odor problems persist in the community despite the Company's efforts to reduce odors from the collection system. The BHOA argues that the many letters, petitions and in-person public comment provided by residents confirm the existence of ongoing odor problems that directly affect their lifestyle, including an inability to leave windows open, noises that disturb sleep, embarrassment in hosting guests at their homes, and putting up with noxious odors on parts of the Boulders Resort golf course. (*Id.*) The BHOA claimed that it is now clear that the odors experienced by Boulders residents were caused not only by the collection system, but also by the treatment plant. The BHOA also contends that BMSC has been much more cooperative since the Company's 2005 rate case, when the Commission asserted its authority to require that odor remediation efforts be undertaken by BMSC. Mr. Peterson explained that BMSC has met regularly with the BHOA since that case to identify and attempt to resolve ongoing odor issues. (*Id.*)

The BHOA also pointed out in the Phase 1 proceeding that although it could have intervened to complain about the odor issues and looked to the Commission to fashion a remedy, it instead worked in cooperation with BMSC to come up with a solution for the odor issues. As a result of those discussions, BMSC and the BHOA came to an agreement that provides for closing of the Boulders WWTP, subject to several conditions. (*Id.* at 42.)

D. Wastewater Treatment Plant Closure Agreement

The Wastewater Treatment Plant Closure Agreement ("Closure Agreement") is a settlement agreement negotiated in Phase 1 between the Company and the BHOA that requires BMSC to shut down the Boulders WWTP within 15 months of certain conditions being satisfied. Under the terms of the Closure Agreement, the conditions summarized below must be met before BMSC is obligated to close the treatment plant:

a. Existence of sufficient downstream collection system line capacity and flow-through capacity to the Scottsdale plant sufficient to accommodate the additional 120,000 gpd from the current treatment plant;

b. Successful negotiation of the purchase by BMSC from Scottsdale of 120,000 gpd of additional capacity, and including renegotiation of the Scottsdale Agreement to allow purchase of the additional capacity beyond 2016, and a long-term right by BMSC to purchase additional capacity at market rates;

c. Successful renegotiation of the Effluent Agreement with the Boulders Resort to allow termination of the agreement with little or no cost to BMSC upon closure of the treatment plant;

d. Approval to close the treatment plant from applicable regulatory agencies; and

e. Approval by the Commission of a cost recovery mechanism that permits BMSC to recover a return on and of the capital costs of closure, including costs of procuring additional capacity from the City of Scottsdale, costs of engineering and other analyses necessary to complete the closure, system upgrades required as a result of the closure and/or delivery of the flows to Scottsdale previously treated at the plant. BMSC must also be authorized to recover reasonable costs of reaching agreements with BHOA, Scottsdale, and the Boulders Resort as required under the agreement, and costs of obtaining approval from the Commission. BMSC has no obligation under the agreement if the Commission does not approve a recovery mechanism in a form acceptable to the Company.

The Closure Agreement also requires BMSC to use all commercially reasonable efforts to

complete termination of treatment plant operations within 15 months of satisfaction of the conditions, and remove all of the treatment plant's structures and equipment not needed for continued operation of the Company's collection or transportation systems. Following restoration of the plant property, BMSC would retain full ownership of the site and would be required to sell the site as residential property, with the gain on the sale being split evenly between shareholders and ratepayers for ratemaking purposes. (*Id.* at 42-43.)

E. Phase 1 Positions of the Parties Regarding Closure Agreement

1. BMSC

BMSC contended that approval of the Closure Agreement is in the public interest and is a reasonable response to an extraordinary situation that exists currently on the Company's system. The Company pointed to the nearly unanimous support expressed by more than 500 customers, as well as the Mayor of Carefree, where approximately three-quarters of the Company's customers reside, through letters, petitions, and live statements, including support for the surcharge mechanism contained in the Closure Agreement. BMSC noted that support for the plant closure was also received from residents in the Boulders South community who are members of the OABS rather than the BHOA.

BMSC argued in Phase 1 that it complied fully with the directives issued by the Commission in the Company's prior case to take remedial actions to mitigate odors on its collection and transportation system, and it has taken other steps beyond those directives such as installing an odor scrubber at the plant. According to the Company, it has taken all reasonable measures to eliminate odors on its system, but the presence of the treatment plant within the Boulders community presents an extraordinary challenge given the age of the plant and its close proximity to residential structures. (*Id.*)

The Company also stated in Phase 1 that the treatment plant meets all applicable regulations and that no party disputes that it is used and useful in the provision of service to customers. However, according to Mr. Sorenson, BMSC attempted to accommodate its customers and the Town of Carefree by agreeing to a mechanism that would enable the Company to close the plant. Mr. Sorenson stated that BMSC would agree to close the plant, reroute sewage flows currently treated at

the plant, and acquire additional treatment capacity only if it received assurance from the Commission that the Company would not have to wait for a return on and of its investment, or that it would be second-guessed as to why it agreed to invest more than $1 million closing a treatment plant that is currently deemed used and useful. (*Id.* at 44.) Mr. Sorenson claimed that the plant closure project is estimated to cost in excess of $1.5 million, and replacement capacity from Scottsdale for the plant flows would require approximately $720,000 (at $6.00 per gallon). (*Id.*)

BMSC witness Bourassa explained at the Phase 1 hearing how the Company envisioned that the surcharge mechanism would operate, and presented an exhibit containing an illustration of the surcharge calculation. (*Id.*) As described in Decision No. 71865, once the cost of the plant closure project is known and measurable, an annual amortization would be computed and the return component, gross revenue conversion, and incremental income tax factors would be employed to calculate the additional revenue requirement associated with the project. (*Id.*) Under the Company's proposal, the plant closure revenue requirement would be divided by 12 to determine the overall monthly surcharge requirement, and that amount would then be divided by the number of customers to calculate the monthly surcharge per customer. (*Id.*) The same process would be undertaken after the plant site is sold to reflect the reduction to rate base associated with the sharing of the gain on sale of the property. Mr. Bourassa suggested that it would also be appropriate to require an annual true-up of the surcharge amount to avoid under or over-collection of the plant closure costs. (*Id.*)

For verification purposes, BMSC agreed in Phase 1 that the surcharge should not go into effect until Staff (as well as other interested parties) have an opportunity to review documentation submitted by the Company in support of the surcharge, to ensure that the claimed costs were spent for the purposes intended and necessary for closure of the plant. BMSC asserted that the process it proposed is similar to that used by the Commission for arsenic surcharge mechanisms ("ACRMs") during the past several years, and the Company contemplates that the Staff review process could be accomplished within 60 days after submission of the necessary documentation, followed by the issuance of a Commission Order approving the surcharge. (*Id.*) Mr. Bourassa testified that the requested surcharge would be comprised only of capital costs related to the plant decommissioning, and no operation and maintenance ("O&M") expenses would be included in the surcharge

calculation. (*Id.*)

The Company disputed RUCO's claim in Phase 1 that the proposed surcharge is not justified because it does not address an extraordinary situation.[7] BMSC argued that RUCO's philosophical opposition to adjustor and surcharge mechanisms should not override the desire expressed by a multitude of customers that they are willing to pay a surcharge in exchange for relief from ongoing odors caused by the treatment plant. The Company also claimed that the Commission can limit the requested relief to the unique facts presented in this case in order to prevent the surcharge mechanism from being cited as precedent in future cases.

BMSC contended that RUCO did not offer any viable alternatives to the Company/BHOA proposal, and requiring BMSC to wait until after the closure project is completed, requiring rerouting of flows and the purchase of additional capacity, waiting for an additional year to ascertain changes in operating expenses, and then filing another rate case, is not a reasonable means of remedying the problems identified in this case. The Company argued that, contrary to RUCO's suggestion in Phase 1, it is not clear that the Commission has the legal authority to order BMSC to remove plant that is used and useful, and which is operating within regulatory requirements, because the decision of whether to close the treatment plant should be considered a decision within management's discretion. BMSC claimed that the statutes cited by the Commission in the Company's 2005 rate case as authority for ordering odor remediation measures do not expressly authorize the Commission to order the Company to make a substantial investment to retire used and useful plant. Citing *Southern Pacific Co. v. Arizona Corp. Comm'n*, 98 Ariz. 339, 346-48, P.2d 692, 694 (Ariz. 1965), BMSC contended that the Commission may not interfere with a utility company's management decisions absent clear statutory language.

The Company also suggested in Phase 1 that the debate over the Commission's authority should not overshadow the important concerns expressed by BMSC's customers, and the plant closure proposal presented in Phase 1 was not meant to diminish the Commission's broad powers. Rather, according to BMSC, its arguments on this point were intended to reflect that there exists a

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[7] As noted above, RUCO did not participate in Phase 2 of this proceeding.

reasonable question as to whether the Commission has the authority to require the Company to spend substantial funds to decommission used and useful plant without a funding mechanism. BMSC contended that it was not necessary to reach that issue in Phase 1 because its customers overwhelmingly support paying a reasonable fee to eliminate the presence of the treatment plant in their community. (*Id.*)

2. BHOA

The BHOA also supported approval of the Closure Agreement for many of the same reasons cited by the Company. Mr. Peterson testified that, since the 2005 rate case, BMSC had taken a more cooperative stance in working with the BHOA and Carefree in addressing the odor issues and that the Company meets regularly with the BHOA and the Town regarding odor concerns. (Decision No. 71865, at 46.)

The BHOA also claimed that RUCO's skepticism about whether removing the treatment plant would resolve the odor problems is misplaced. The BHOA pointed out that the Closure Agreement requires that the entire plant be removed, as well as the associated lift station, which would leave only underground pipes and possibly a sealed manhole at the site. (*Id.*)

The BHOA disputed RUCO's assertion in Phase 1 that the implementation of a surcharge would violate the matching principle. According to the BHOA, the Commission regularly allows in rate base post-test year plant that is in service before the hearing in the case, and the Closure Agreement would allow review by the parties and the Commission of the actual closure costs before they are included in a surcharge mechanism. (*Id.*)

The BHOA claimed in Phase 1 that the reasons for Staff's opposition to the Closure Agreement were less clear. BHOA pointed out that the Staff witness claimed that the Agreement was not relevant to BMSC's rate case, despite the Commission's lengthy discussion in the 2005 rate case regarding odor issues. (*Id.*) The BHOA also asserted that the Staff engineer agreed that the Company should remedy the odor issues and, although she did not know if closing the plant would eliminate all of the odor and noise problems, she believed the closure would reduce the odors at the current plant site. (*Id.*)

The BHOA stated in Phase 1 that no party truly opposed closure of the treatment plant, and

the only real opposition to the Closure Agreement was RUCO's concern with the approval of a surcharge mechanism absent extraordinary circumstances. The BHOA argued that, contrary to RUCO's assertion, the ongoing odor problems do represent an extraordinary situation that calls for an extraordinary solution. The BHOA claimed that the remedy afforded by the Closure Agreement, including implementation of a surcharge mechanism, is justified as a proportional response to the demand by customers to eliminate the treatment plant in order to solve the odor problems. As outlined by the BHOA, the level and magnitude of concern about this issue is evidenced by customer claims that the plant odors are extremely offensive and interfere with enjoyment of their property. BHOA concluded that given the Commission's prior expressions of a need to remedy odor issues, as well as the customers' overwhelming support for closure of the plant and willingness to pay increased rates for that purpose, the Commission should approve the mechanism proposed in the Closure Agreement.

3. RUCO

RUCO contended in Phase 1 that it does not oppose closure of the treatment plant, as provided for in the Closure Agreement, but it does oppose the funding mechanism contained in that agreement. RUCO witness Rigsby stated that RUCO's primary concern "is whether or not the terms of the proposed Agreement will actually solve the odor problem." (*Id.* at 47) He claimed that RUCO was also concerned about "the broader ratemaking impacts and precedents that the Agreement may have on those BMSC residential ratepayers that are not directly affected by the odor problems and on Arizona residential ratepayers in general." (*Id.*)

According to Mr. Rigsby's Phase 1 testimony, there is no definitive agreement as to the source of the odor problems and the Commission should ascertain the actual source of the odors before adopting the Closure Agreement. (*Id.*) With respect to the ratemaking implications of approving a surcharge, Mr. Rigsby cited to two prior cases involving Arizona Water Company wherein the Commission discussed potential concerns with "automatic adjustment mechanisms." (*Id.*)[8] Mr. Rigsby claimed that the same type of "mismatch" concerns would be presented with the

[8] In Decision No. 66849 (March 19, 2004), at 13-14, the Commission discussed automatic purchased power and water adjustment mechanisms for Arizona Water and stated that such automatic pass-throughs could provide a disincentive to

mechanism proposed in the Closure Agreement. He distinguished the proposed surcharge mechanism in this case from arsenic cost recovery mechanisms on the basis that the arsenic reduction requirements were imposed by federal regulations and had a substantial impact on certain water utilities in Arizona. (*Id.*) Mr. Rigsby recommended that the Commission reject the Closure Agreement's recovery mechanism, and only if "the treatment facility is found to be the source of the odor problem [should] the Commission allow BMSC to retire the treatment facility and require the Company to file a general rate case application twelve months after the retirement." (*Id.* at 48.)

Mr. Rigsby testified in Phase 1 that he was not aware of any prior cases where a substantial number of a company's customers came forward and agreed to imposition of a surcharge in exchange for remedial action, but indicated that the situation does not rise to the level of an extraordinary event that would justify a recovery mechanism. (*Id.*) He explained that because it is RUCO's role to represent residential ratepayers, "yeah, I guess it's – you want to put it that way, that we are trying to save people from themselves or we are trying to put forth an alternative that might work out better in their interest in the long run." (*Id.*) He admitted, however, that the "alternative" RUCO was suggesting (*i.e.,* allowing deferral of the capital costs associated with the closure project through an accounting order), would likely not actually help the Company or its customers, or cause BMSC to voluntarily decommission the plant. (*Id.*)

RUCO argued in its Phase 1 brief that it was concerned with the unintended consequences of approving a recovery mechanism because it would not limit the monetary impact on customers, and the Company did not identify when it plans to file its next rate case. RUCO theorized that BMSC could continue to assess the Closure Agreement surcharge indefinitely, thereby producing a windfall for shareholders at the expense of ratepayers. (*Id.*)

4. <u>Staff</u>

Staff asserted in Phase 1 that odors are an unavoidable byproduct of the sewer business and it is not certain that removing the treatment plant and lift station would resolve all of the odor problems

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obtain the lowest possible costs for those commodities. In Decision No. 68302 (November 14, 2005), at 45-46, the Commission expressed concerns with adjustment mechanisms because they allow automatic adjustments without a simultaneous review of unrelated costs. The Commission concluded that such mechanisms should only be used in "extraordinary circumstances."

that currently exist. Staff's engineer testified at the Phase 1 hearing that odors could come from other parts of the Company's system, including other lift stations, although she agreed that the public comment by customers indicated that the odors were caused by the treatment plant. (*Id.*)

The Staff witness testified at the Phase 1 hearing that because houses in Arizona typically have air conditioning, residents could keep their windows shut to avoid unpleasant odors because the odors are not constant. (*Id.*) She suggested that BMSC could place additional odor control equipment on the plant or completely enclose the plant, and the customers may "have to [choose between] the odor problem or looking pretty around there." (*Id.* at 49.)

Staff contended that the proposed decommissioning presented a unique set of circumstances, but that it is difficult to justify removal of the plant since the plant is currently used and useful, it is functioning normally, and the complaints regarding odors and noises at the plant are due to its proximity to homes rather than mechanical problems. Staff argued that despite the near unanimous desire of the Company's customers to close the treatment plant, "where reliability and compliance are being met, it is difficult to justify such an exorbitant price tag [estimated $1.5 to $2 million] as a simple gesture of good will." (*Id.*) Staff then stated in its Phase 1 brief that although there is no "down side" to the project, except for the cost and possibility that all odors will not be eliminated, "[i]t is Staff's position that a consideration of the circumstances yields no clear choice." (*Id.*)

F. <u>Resolution of WWTP Closure Issue in Decision No. 71865</u>

In Decision No. 71865, we found that "[b]ased on the unique facts and circumstances presented in this case through testimony and exhibits, and upon consideration of the overwhelming and extraordinary level of customer participation and comment in support of closure of the Boulders WWTP, we find, subject to the clarifications and modifications discussed herein, that the Closure Agreement proposed by the Company and the BHOA represents a reasonable resolution of the current odor concerns expressed by hundreds of BMSC's customers." (*Id.*)

We indicated that customers should not be required to endure offensive odors at levels and frequencies that have been described in the public comments provided in this case. We also stated that although public comment is not considered "evidence" in a proceeding, "it provides useful insight to the Commission regarding customer experiences, both observational and, in this instance,

olfactory." (*Id.*) As described in Decision No. 71865, in addition to the more than 500 public comment letters and petitions filed in this case requesting closure of the treatment plant, and expressing agreement with implementation of a surcharge, a number of customers traveled to the Commission to offer in-person public comment on the first day of the Phase 1 hearing.[9] The Mayor of Carefree, David Schwann, stated in his Phase 1 public comment that he believes the citizens of the Town support the agreement negotiated by the BHOA, even those residents not directly affected by the odors from the treatment plant. (*Id.*) Other residents described dealing with odor issues for more than 20 years, and the level of frustration with not having a solution to the problem; the need to apologize to guests for having to endure "third world [odor] conditions in a first class resort;" ongoing odor issues despite improvements along Boulders Drive after the prior case; not being to eat meals on the patio due to odors; the almost unbearable smell on parts of the golf course; and an inability to barbecue because of the treatment plant odor, and continuous blower noises from the plant. (*Id* at 50.) A resident of the South Boulders community, and member of the OABS, indicated that visitors to the Boulders Resort golf course are "amazed and disgusted" by the smell from the treatment plant that is located near several holes on the course, while another resident described having to move Thanksgiving dinner indoors from his patio due to the treatment plant odors. (*Id.*) A former reporter indicated that he did not live close to the plant but experienced odors when passing by the vicinity of the plant, and another resident stated that the odors from the plant are hurting home values and, despite BMSC's efforts to solve the problem, there does not appear to be a solution short of decommissioning the plant. (*Id.*) Another resident claimed that the treatment plant was intended as a temporary facility to serve a small number of homes and the plant is more than 40 years old and is obsolete. He added that because an alternative is available through rerouting of flows to the Scottsdale treatment facility, and because the odors are "a blight on real estate titles in the area," the only viable solution is closure of the plant. (*Id.*) A customer that lives adjacent to the treatment plant stated that he has been awakened during the night by loud banging noises from the plant, that he is

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[9] We also note that numerous additional public comment letters were filed between November 2012 and January 2013, all of which have reiterated the ongoing odor problems and urging the Commission to order that the treatment plant be closed.

embarrassed to invite guests over, and he must keep his doors and windows closed to block odors from the treatment plant. He also expressed health-related concerns with living near the treatment plant due to the use of chemicals at the site. (*Id.*) A mother with young children indicated that the treatment plant should be decommissioned because the equipment is antiquated and inefficient, and that closure is necessary to provide a healthy environment for families living in the community. (*Id.*) Numerous other customers appeared at the Phase 1 hearing and signed slips indicating that they did not wish to speak but supported closure of the treatment plant and the Closure Agreement, including the surcharge mechanism.[10]

As stated in Decision No. 71865, the public comments offered in Phase 1 of this proceeding made clear that customers in BMSC's service area, especially those living in close proximity to the treatment plant, have endured and continue to endure offensive odors related to the Boulders WWTP. The unrefuted evidence established that: the treatment plant is more than 40 years old; the plant was not intended to be a permanent sewage treatment solution and was not designed to serve more than a fraction of the Company's current customer base; and houses were built closer to the plant than was initially intended and closer than current regulations would permit. The record also indicated that despite its age, the treatment plant operates within regulatory limits imposed by ADEQ and MCESD with respect to odors and noises, and that the plant is considered used and useful for purposes of setting rates. Given these established facts, and considering the almost unanimous support by customers for closing the plant, we indicated that it was entirely appropriate for the Company to engage affected parties in settlement discussions to find an acceptable solution to the odor problems. (Decision No. 71865, at 51.) The product of those discussions was the Closure Agreement, which was executed by the Company and the BHOA.

As summarized in Decision No. 71865, the Closure Agreement provides that BMSC will,

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[10] The only opposing public comment at the Phase 1 hearing was from Max Schirtzinger, an intervenor who stated that he is a professional engineer. Although Mr. Schirtzinger was granted intervention, he did not pre-file testimony. At the Phase 1 hearing, Mr. Schirtzinger agreed that his "opening statement" would be treated as public comment. He offered a number of comments related to alleged deficiencies in the Company's operation of the treatment plant, and suggested that the plant should remain in operation as a "water reclamation facility." Mr. Schirtzinger added that: if the plant is decommissioned, the entire Company should be decommissioned and the City of Scottsdale should assume operational control; customers should not bear the costs of decommissioning; and he suggested that instead of decommissioning, the treatment plant could be upgraded to treat 240,000 gpd of wastewater flows. (*Id.* at 51, fn 21.)

among other things: close the Boulders WWTP within 15 months of satisfaction of the listed conditions; acquire additional capacity rights with the City of Scottsdale to replace the treatment plant capacity; renegotiate the Effluent Agreement with the Boulders Resort to allow termination of the agreement; obtain regulatory approvals from applicable regulatory agencies; undertake engineering and other analyses necessary to complete the closure; and complete system upgrades required as a result of the closure and/or delivery of the flows to Scottsdale previously treated at the plant. (*Id.*)

As was stated in the Phase 1 Order, Staff's position on the Closure Agreement was not entirely clear, but it appeared Staff's only concern was that there may still be odors on BMSC's system even if the treatment plant is closed and therefore the cost of decommissioning the plant is too high. However, we found in Phase 1 that although it is likely some odors will continue to be noticed on occasion from other parts of the Company's system, as is the case with virtually any wastewater system, the treatment plant appears to be the primary source of the ongoing and frequent noxious odors described by customers. (*Id.* at 52.) The odors, as well as loud noises, are experienced not only by residents that live near the plant, but also by visitors to the golf course and Boulders Resort. We stated that it was not sufficient, as suggested by the Staff witness, to require residents and visitors alike to simply deal with the odors and noises from the plant by being forced inside with closed windows and doors.

We also indicated that we were not persuaded by the arguments made by RUCO. Mr. Rigsby indicated in Phase 1 that, similar to Staff's assertion, RUCO's primary concern was that the odor problem would not be solved by the plant closure. (*Id.*) However, Mr. Rigsby admitted in his Phase 1 testimony that closure of the plant and lift station at the plant site, along with placing all remaining pipes underground, would likely resolve the odor issues at the current plant site. We found that there was no evidence that excessive, persistent odors have been experienced on other areas of BMSC's system (following completion of the CIE and Boulders Drive work) and, to the extent that future odor complaints are received following the treatment plant's closure, those issues may be addressed in a future proceeding. (*Id.*)

As discussed in the Phase 1 Order, RUCO's other concern was that approval of the surcharge mechanism proposed in the Closure Agreement would open the door for other companies to seek

similar relief. Mr. Rigsby cited to two prior Decisions involving Arizona Water in which the Commission denied proposals for automatic adjustment mechanisms. Mr. Rigsby conceded, however, that those adjustors were distinguishable from the mechanism proposed in this case because they involved automatic adjustors for purchased water and electricity that would have continued in perpetuity unless ended by the Commission, compared with the temporary surcharge that would end after the first rate case following completion of the treatment plant's closure. We found in Decision No. 71865 that the proposed closure surcharge was much more similar to the ACRMs that have been approved in a number of prior cases, and which were agreed to by RUCO. We concluded that the proposed surcharge in this case was actually more benign than the ACRM to the extent that the closure surcharge would allow only capital costs to be recovered, whereas the ACRMs allowed multiple recovery filings and permitted recovery of some O&M costs in addition to capital costs. (*Id.*)

Moreover, Mr. Rigsby agreed that he had never in his many years of experience witnessed a case in which more than 500 customers submitted and expressed support for closure of a plant, as well as a willingness to pay a surcharge to complete the closure. He also agreed that to avoid the possibility that other companies would seek to use the closure surcharge as a means of obtaining adjustment mechanisms, the Commission could, as it often does, limit the approval to the specific facts in this case. (*Id.* at 53.)

As was stated in Decision No. 71865, "[w]e believe that allowance of a reasonable surcharge to permit BMSC to collect legitimate capital costs, for the narrow and explicit purpose of affording relief from noxious odors, is within the Commission's constitutional and statutory authority and is consistent with our obligation to balance the interests of public service corporations and their customers." (*Id.*) We added that "being responsive to the concerns expressed by customers in this case will [not] open the floodgates to a spate of adjustment mechanism applications, given the unique characteristics of this case." (*Id.*) We also indicated that there is no other instance recounted in the record in which customers of a company have so overwhelmingly supported a solution to a quality of life issue, as well as a willingness to pay a reasonable charge to bring that solution to fruition; and that RUCO's attempt to "save BMSC's customers from themselves" appeared to be contrary to the wishes of the very customers RUCO represents. (*Id.*) Moreover, we stated that RUCO's position

failed to give recognition to the real world experiences that were described so forcefully by customers regarding the inability to enjoy their own property, the embarrassment of inviting guests to their homes, and the possibility that treatment plant odors and noises have an effect on community property values. (*Id.*)

In conclusion we stated that:

> All of these facts, and the broad support shown by customers for decommissioning of the treatment plant, lead us to the conclusion that the Closure Agreement signed by BMSC and the BHOA provides an appropriate and creative solution for what we believe is a unique set of circumstances that is not likely to be repeated. Absent the strong community support for closure, including the willingness of customers to offset the closure costs through the surcharge mechanism, as well as the ability of the Company to divert the current treatment plant flows by acquiring additional capacity from Scottsdale under an existing agreement, it is likely that the Boulders WWTP would have remained in operation for the foreseeable future. (Decision No. 71865, at 53-54.)

G. <u>Surcharge Mechanism</u>

After approving the surcharge mechanism, as outlined in the Closure Agreement, we determined that the function of the surcharge process should be similar to that employed in the prior ACRM cases. (*Id.*) However, in addition to the conditions set forth in the Closure Agreement, we required the Company to comply with the following requirements:

a. BMSC will be required to collect and track all surcharge revenues and expenditures in a separate account to allow expedited review.

b. In order to effectuate the surcharge, BMSC will be required to file a set of schedules (and provide copies to the other parties) that includes the type of information required by Staff to review the ACRM step increase requests.

c. Only a single surcharge filing request will be permitted and no additional "true-ups" will be permitted until the Company's post-completion rate case.

d. The Company shall cooperate with Staff and provide all information requested by Staff to perform its review of the revenues and expenditures that support the requested surcharge, in accordance with the terms of the Closure Agreement.

e. Upon completion of its review, Staff shall prepare a recommendation for the Commission's consideration and approval. Staff should attempt to complete its review and recommendation within 60 days of the surcharge request filing, but no specific deadline will be imposed for completion of Staff's review.

f. The closure surcharge shall not exceed $15 per month, per customer, and shall be discontinued upon issuance of a Decision in the Company's first rate case following completion of the closure project.

g. BMSC will be required to file a full rate application no later than 12 months after completion of the closure project. The treatment plant closure project shall be considered to have reached completion upon issuance of a Commission Order approving Staff's recommendation for implementation of a closure surcharge.

h. The methodology for calculating the surcharge shall be consistent with, although not necessarily identical to, that described in Ex. A-11 in the evidentiary record of this proceeding.

i. The surcharge shall not go into effect until the Commission has approved the amount of the surcharge following Staff's review and recommendation. (*Id.* at 54-55.)

In conclusion, we found that, with the additional requirements set forth above, the Closure Agreement and surcharge mechanism properly balanced the needs of BMSC and its customers for the provision of wastewater service in a safe, reliable and, to the extent possible, odor-free manner. (*Id.* at 55.)

III. Phase 2 Positions of Parties

A. BMSC

According to Mr. Sorenson, shortly after Decision No. 78165 was issued in September 2010 the Company and BHOA met with representatives of the Boulders Resort to discuss termination of the Effluent Agreement between BMSC and the Resort. (BMSC Ex. 1, at 2.)[11] Mr. Sorenson testified that the Company engaged in a number of discussions with the Resort in an attempt to find alternatives to the approximately 120,000 gpd of effluent that the Resort currently purchases from BMSC under the 2001 Effluent Agreement. (*Id.*) Mr. Sorenson stated that the Company and the Resort explored the following alternatives:

- Additional storage for the Resort's irrigation water needs;
- Building a new wastewater treatment plant on the Resort's property;

[11] As discussed above, "renegotiation of the Effluent Agreement with the Boulders Resort to allow termination of the agreement with little or no cost to BMSC upon closure of the treatment plant" is one of the conditions of the Closure Agreement that must be satisfied before BMSC is required to move forward with closure of the Boulders WWTP. (Decision No. 78165, at 42-43.)

- Buying replacement treatment capacity and effluent water from the Town of Cave Creek;
- Expanding the City of Scottsdale's reclaimed water system to provide the Resort with replacement water; and
- Buying replacement water from a Town of Carefree well. (*Id.* at 3.)

With respect to the first alternative, providing additional storage, Mr. Sorenson indicated that BMSC engineers explored the possibility of placing storage on the existing WWTP site or deepening the Resort's existing lakes. However, he claims that the Company received no response from the Resort regarding these storage options. (*Id.*) Mr. Sorenson testified that the option of building a new treatment plant on the Resort's property would not only be expensive (approximately $3.6 million), but would be fraught with the same concerns that currently exist regarding a neighborhood treatment plant (*i.e.*, close proximity of the plant to existing homes). (*Id.* at 3-4.) The options of buying capacity from Cave Creek, or bringing effluent from Cave Creek's plant to the Resort, were deemed too expensive ($35 per gallon, plus $4.50 per gallon treated). (*Id.* at 4.) Mr. Sorenson stated that an effluent interconnection with Cave Creek is estimated to cost $1 million, with a cost of $318 per acre foot for effluent purchased. (*Id.*)

BMSC contends that in June 2011 the Resort stopped working with the BHOA and the Company to find a solution to the WWTP closure when it sent a letter to BMSC alleging that the Company was in breach of the Effluent Agreement by attempting to terminate the contract, and the Resort threatened BMSC with legal action to enforce continuation of the terms of the agreement. (*Id.* at Ex. GS-DT2-B.) BMSC argues that the Resort's lack of cooperation with the Company and the BHOA prompted the BHOA's request for the Commission to order that the plant be closed. BMSC claims that it is caught in the middle of the struggle between the BHOA members who want the plant closed, and the Resort which refuses to work towards finding a viable solution to the problem. The Company asserts that it cannot agree to remove a used and useful plant from service without recovering its costs, and it therefore seeks direction from the Commission regarding how to proceed.

B. <u>BHOA</u>

The BHOA states that when the Boulders WWTP was constructed it was intended to serve only the residents of the Boulders community and the golf courses; and was expected to be a temporary wastewater treatment solution until another location could be secured further away from

homes. (2009 Tr. At 144, 161-162.) However, the BHOA points out that the treatment plant remains in place in its original location more than 40 years later, and if it were to be constructed today the plant would require a setback of 500 to 1,000 feet with no odor, noise and aesthetic controls (and at least 100 feet for a facility with full odor, noise and aesthetic controls). (BHOA Ex. 6, ¶14.)[12]

The BHOA states that numerous complaints have been raised by residents in the Boulders community regarding objectionable odors from the treatment plant, which odors interfere with the residents' ability to leave their windows open. (*Id.* at ¶5.) The BHOA also cites to the following issues associated with the Boulders WWTP: golfers on the north Boulders Resort golf course have complained about noticeable odors when they are in the vicinity of the treatment plant; complaints about the odors are more frequent between October and April; since the issuance of Decision No. 71865, BMSC has received 23 odor complaints from customers (as well as the filing of the Marshall lawsuit referenced above); at times, noises from the treatment plant are noticeable at homes within 400 feet of the treatment plant; and there is periodic traffic in the Boulders community related to the treatment plant (*e.g.*, service vehicles, pumper trucks, sub-contractor vehicle parking, and dumpsters). (*Id.* at ¶ 8-10.)

The BHOA points out that the Commission previously found, in 2006, that the odors in the Boulders community should be remediated so that customers would be able to enjoy their homes without enduring offensive odors; and that, in 2010, the Commission determined that closure of the plant was appropriate in light of the "overwhelming and extraordinary level of participation and comment in support of closure of the Boulders WWTP." (Decision No. 69164, at 34, 37; Decision No. 71865, at 49.) The BHOA states that the Resort and BMSC have attempted to negotiate an agreement that would terminate the Effluent Agreement, but have been unsuccessful. However, according to the BHOA, the offensive odors continue to be as severe, if not worse, since the issuance of Decision No. 71865 in 2010, and customers have continued to complain about the odors since this docket was reopened. (BHOA Ex. 6, at ¶ 7.) In addition to the many public comment complaints received regarding the odors, the Town of Carefree unanimously adopted a resolution urging the

[12] The Boulders WWTP is located less than 100 feet from 3 homes and within 1,000 feet of 200-300 homes, as well as dining and conference facilities of the Resort. (BHOA Ex. 6, ¶2.)

Commission to order closure of the treatment plant. The BHOA argues that although the Boulders Resort may incur higher costs to replace the 15 percent of its effluent needs received from the Boulders WWTP, the Commission should order closure of the plant to protect the greater public interest.

C. Boulders Resort

Although the Resort did not participate in Phase I of this proceeding, it was granted intervention in Phase 2 after the Commission reopened the case under A.R.S. § 40-252 to consider the BHOA's request for the Commission to order that the treatment plant be closed. The Resort asserts that granting the BHOA's request would have a significant negative effect on the Resort's operations because it would have to replace a portion of the water supply for its golf courses at a prohibitive cost.

As described in its testimony, the Boulders Resort consists of a hotel with 160 high-end casitas, meeting spaces, a spa, tennis courts, four swimming pools, and seven restaurants. (Ex. W-1, at 3.) Adjacent to the Resort are privately owned villas and hacienda units. The Resort is one of Hilton's Waldorf Astoria hotels, and is considered a destination golf resort with two championship golf courses located in the foothills of Black Mountain near Carefree. (*Id.*) The Resort's Finance Director, Susan Madden, testified that the golf courses compete with courses at other luxury properties, both in the United States and internationally; that one of the Resort's courses is dedicated primarily to the use of the Resort's customers, while the other course is used primarily by members of the Boulders Club, a private golf club whose members include some members of the BHOA. (*Id.* at 4.) Ms. Madden stated that if the Resort is not able to maintain the courses in world-class condition, it would have a negative impact on the Resort's ability to attract visitors and golf club members. (*Id.*)

The Resort obtains non-potable reclaimed water for its golf courses through two separate contracts, the Effluent Agreement with BMSC and a second agreement with the City of Scottsdale (the Reclaimed Water Distribution System ("RWDS") Agreement). The Effluent Agreement with BMSC entitles the Resort to purchase all of the effluent generated by the Boulders WWTP (approximately 130-135 acre-feet per year), which represents approximately 15 percent of the

Resort's golf course watering needs. The price of the effluent under the contract with BMSC is set by a Commission-approved tariff (currently $0.460510 per thousand gallons).[13] The RWDS Agreement authorizes the Resort to purchase up to 1.25 million gallons per day ("MGD") of effluent from Scottsdale, to make up the remaining 85 percent of the Resort's watering requirements. (*Id.*)

According to Ms. Madden, the Resort attempted to work with BMSC and local residents to find a solution that would allow early termination of the Effluent Agreement, but the resort has been unable to identify a reasonable solution. (*Id.* at 8.) She states that the Resort looked into a number of options, including operating without Boulders WWTP effluent supply through conservation measures; finding replacement water supplies; and the possibility of building a closed treatment plant elsewhere on the Resort's property. (*Id.*)

The Resort's Golf Superintendent, Dean Hunter, testified that these options were determined to not be workable because the courses are already desert courses with minimal turf for playing surfaces, and the Resort could not maintain the courses in an acceptable condition if the BMSC effluent were not available. (Ex. W-3, at 4.) He claims that more efficient irrigation equipment could be installed, at a cost of more than $1.9 million, but the vendors could not confirm the level of additional water savings that would result from such equipment. (*Id.*) Mr. Hunter also stated that the Resort considered reducing winter over-seeding, but it was determined that the roughs on both courses and the fairways on one or both would be brown for several months during the peak tourist season which would have a devastating impact on the Resort's business. (*Id.* at 5.)

Mr. Hunter stated that the Resort looked at increasing storage capacity to store water acquired during off-peak times, but for various reasons the storage options were found not feasible due to capacity constraints under the RWDS Agreement. (*Id.* at 5-6; Ex. W-2, at 3-4.) The possibility of acquiring potable water from Scottsdale for watering was dismissed because Scottsdale will only provide potable water for irrigation as an emergency backup measure. (Ex. W-1, at 9.) The Resort's Director of Club Operations, Tom McCahan, testified that the Resort also considered purchasing capacity from Desert Mountain Club ("Desert Mountain") through a water exchange program, but he

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[13] Approximately $150 per acre foot. (*Id.* at 5.)

stated that this option was found to be cost prohibitive because Desert Mountain would require an upfront payment of $10 million, as well as requiring future infrastructure payments and rates that are nearly twice the Resort's current RWDS rates. (Ex. W-2, at 4.) Another option considered was purchasing groundwater from a well owned by the Town of Carefree. However, Ms. Madden testified that the Resort is prohibited from using groundwater on most of the golf course property under the RWDS Agreement. (Ex. W-1, at 8.) The possibility of acquiring effluent from the Cave Creek WWTP was considered, but rejected, because there is no capacity currently available and such an option would require construction of a four-mile pipeline through rocky terrain. (*Id.* at 9.) The option of a small, fully enclosed treatment plant was also considered (*Id.*) but, according to BMSC witness Sorenson, it would be difficult to get another treatment plant sited in the Boulders community and such a plant would cost approximately $3.6 million (BMSC Ex. 2, at 11-12.)

The Resort argues that although it spent a significant amount of time working to identify a reasonable alternative, it has been unable to achieve a workable solution. The Resort contends that BMSC has agreed under the terms of the Effluent Agreement not to restrict or reduce the amount of effluent produced by the Boulders WWTP, and the Company has also agreed that if economic, technical or regulatory changes require BMSC to close the plant, the Company is obligated to attempt to relocate the existing plant or construct a new treatment plant in reasonable proximity to the Resort. The Resort asserts that although the Commission does not have the authority to interpret contractual rights between BMSC and the Resort, the Commission should not use its authority in an inappropriate manner, as suggested by the BHOA, because such action "would be a shocking abuse of government power..." (Boulders Resort Initial Brief, at 11-12.)

IV. Commission's Authority to Order Closure of the Plant

A. BMSC

BMSC argues that the Commission has broad authority under Article 15, § 3 of the Arizona Constitution to make orders for the "convenience" and "comfort" of customers of public service corporations. The Company also cites to the Commission's statutory authority under A.R.S. § 40-202(A) to "do all things...necessary and convenient in the exercise" of its powers to supervise and regulate public service corporations. In addition, according to BMSC, the Commission can

determine, pursuant to A.R.S. § 40-321(A), what plant is "just, reasonable, safe, proper, adequate or sufficient," and may enforce such a determination by its Orders.

The Company also cites *Arizona Corporation Commission v. Palm Springs Utility Co.*, 24 Ariz. App. 124, 128, 536 P.2d 245, 249 (App. 1975), wherein the court held that "the regulatory powers of the Commission are not limited to making orders respecting the health and safety, but also include the power to make orders respecting the comfort, convenience, adequacy and reasonableness of service...." BMSC points out that the court in *Palm Springs* stated that the Commission had the authority to address "specialized situations on a case by case approach, so long as there exists a rational statutory or constitutional basis for the action, and the action is not so discriminatory as to constitute a denial of the equal protection clause." *Id.* at 129, 536 P.2d at 250.

BMSC contends that this case presents a situation that justifies such a remedy. According to the Company, although no dispute exists that the Boulders WWTP is used and useful, and compliant with applicable regulations governing its operation, the Commission could and has already effectively concluded in prior orders that the BHOA and customers in general: want the plant closed; understand that there are costs associated with plant closure; and are willing to pay for the costs of closure. Therefore, according to BMSC, the Commission could issue an order finding that closing the WWTP would promote the public interest, and is consistent with the Commission's constitutional and statutory powers, as reinforced by legal precedent.

The Company claims that the Commission is not being asked to abridge the contract between BMSC and the Boulders Resort. Rather, according to the Company, the Commission is being asked by the BHOA to issue an order directing BMSC to take action (*i.e.*, close the treatment plant) that promotes the public's comfort and convenience. BMSC asserts that the issuance of such an order would result in the termination of BMSC's obligation to deliver effluent to the Resort under paragraph 6 of the Effluent Agreement, a risk that the Company states was acknowledged by the Resort when it entered into the contract. BMSC adds that it expects to be entitled to recover the costs of defending a lawsuit by the Resort as part of the plant closure costs in the event the Commission orders closure of the plant. Finally, the Company claims that BHOA's request in this proceeding leaves the Company, the Commission, and other customers with three options: grant the relief

requested and order the WWTP to be closed; take no action and maintain the status quo; or require BMSC to spend whatever it takes satisfy the Resort and close the plant.

B. BHOA

The BHOA contends that the Commission, as a separate, constitutionally created body, has broad authority to act in the public interest and is not required to defer to standards established by ADEQ and MCESD with respect to odors associated with the treatment plant. BHOA points to the Commission's constitutional power to issue orders for the "convenience, comfort, safety and the preservation of health" of customers. (Ariz. Const. Art. 15 § 3.)

As indicated above, the BHOA contends that the Commission has previously determined, in Decision No. 69164, that it has both constitutional and statutory authority to require BMSC to take action to resolve odor problems in the Boulders community.[14] The BHOA notes that the Commission previously found, in Decision No. 69164, that it does not need to find a violation of the ADEQ/MCESD standards before it may order a utility to take action to mitigate odors. The BHOA also asserts that, contrary to arguments raised by the Resort, the Commission is not constrained from taking action only in the event that a nuisance exists because of the Commission's constitutional authority cited above. However, according to the BHOA, even if the nuisance standard were applicable, as the Resort argues, interference with the public health, comfort or convenience is an adequate basis for the Commission to find a nuisance exists that would warrant ordering closure of the plant.

The BHOA claims that if the Commission orders that the Boulders WWTP be closed in this proceeding, BMSC would be required to comply with such an order thereby eliminating or reducing substantially the odors affecting the Boulders community.[15] Further, according to the BHOA, a Commission order to close the plant would release BMSC from its obligation under the Effluent Agreement that it will not "take any action that would reduce the plant's treatment capacity," because

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[14] Decision No. 69164, at 36-37, 40, citing Ariz. Const. Art. 15 § 3; A.R.S. §§ 40-321(A), 40-331(A), 40-361(B), and 40-202(A).

[15] *Ariz. Water Co. v. Ariz. Corp. Comm'n*, 161 Ariz. 389, 778 P.2d 1285 (App. 1989) (confirming Commission's authority to order a public service corporation to expand its plant facilities for the benefit of its existing customers pursuant to A.R.S. § 40-331(A), and obligation of utility company to comply with Commission's order).

the Company's obligation to continue to operate the plant would be terminated under the Effluent Agreement "if any laws, regulations, order or other regulatory requirements prevent or materially limit the operation" of the Boulders WWTP. (BHOA Ex. 3, ¶ 6.)

The BHOA contends that closure of the treatment plant now would result in savings for the Company, and ultimately its customers, in the long run because BMSC does not intend to renew the contract with the Resort after the 2021 termination date and, according to Mr. Sorenson, the Company would likely decommission the plant at that time. (Tr. 127-128.) The BHOA contends that BMSC could acquire replacement treatment capacity from Scottsdale at $6 per gallon until 2016, but higher market rates would apply (projected to be approximately $18 per gallon) if the Company must wait until later to decommission the plant. (*Id.* at 129-131.)

The BHOA claims that the only remaining obstacle to closure of the treatment plant is BMSC's contractual obligation with the Resort. Therefore, in accordance with the factual record in this case and the Commission's existing constitutional and statutory authority, BHOA argues that the Commission should act in the public interest and order closure of the Boulders WWTP to alleviate the odors experienced for many years by residents in the Boulders community.

C. <u>Staff</u>

Although Staff does not take a position as to whether the treatment plant should be closed, Staff contends that the Commission possesses ample authority, both constitutional and statutory, to order closure of the plant. Staff cites to the Commission's authority under Article 15, § 3 of the Arizona Constitution to: "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 [public service corporations]."

Staff also points to the following previously cited statutes in support of its argument of broad Commission authority to order closure of the treatment plant:

> When the commission finds that the 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, inadequate or insufficient, the commission shall determine what is just, reasonable, safe, proper, adequate or sufficient, and shall enforce its determination by order or regulation. (A.R.S. §40-321(A).)

> When the Commission finds that additions or improvements to or changes in the existing plant or physical property of a public service corporation 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, the commission shall make and serve an order directing that such changes be made or such structure be erected in the manner and within the time specified in the order. If the commission orders erection of a new structure, it may also fix the site thereof. (A.R.S. §40-331(A).)
>
> Every public service corporation shall furnish and maintain such service, equipment and facilities as will promote the safety, health, comfort and convenience of its patrons, employees and the public, and as will be in all respects adequate, efficient and reasonable. (A.R.S. §40-361(B).)

In addition to these statutes, Staff cites *Arizona Corp. Comm'n v. Palm Springs Utility Co., Inc.*, 24 Ariz. App. 124, 128, 536 P.2d 245, 249 (App. 1975), which held that "the regulatory powers of the Commission are not limited to making orders respecting the health and safety, but also include the power to make orders respecting comfort, convenience, adequacy and reasonableness of service...." (*Id.*). Staff points out that *Palm Springs* involved a water company that received a number of complaints regarding the taste and hardness of the water provided to customers. Staff claims that the court upheld the Commission's authority to order improvement of the quality of water, even though the water was found safe to drink under existing water quality standards. (*Id.*)

D. <u>Boulders Resort</u>

The Resort argues that the Commission's powers are derived from constitutional and statutory provisions, but even such authority may be limited by other constitutional requirements such as due process and equal protection. The Resort first points out that the statutory provisions cited by the other parties remain virtually unchanged since their original enactment in 1912; however, sewer companies such as BMSC were not included in the Arizona Constitution's definition of a public service corporation until 1974. (H.C.R. 2001, §1 (1974).) The Resort claims that the constitutional provision and statutes cited by the closure proponents (*i.e.*, Art. 15, §3; A.R.S. §§40-321(A), -331(A), -361(B)) contain only broad statements of the Commission's general regulatory powers over utilities and their facilities, with terms such as "convenience," "comfort," "safety," and "health" without specifying what standards of utility service are reasonable, necessary, and convenient for the maintenance of facilities.

The Resort also contends that the Commission's rule governing the level of service to be provided by a sewer company is set forth in Arizona Administrative Code ("A.A.C.") R14-2-607, which states that each sewer utility "shall be responsible for the safe conduct and handling of the sewage from the customer's point of collection," and has a duty to "make reasonable efforts to supply a satisfactory and continuous level of service." (A.A.C. R14-2-607(A)(1) and (C).) The Resort asserts that there is no evidence that BMSC's provision of service is unsafe, unsatisfactory, or non-continuous. The Resort claims that the Commission's rule also requires that a sewer utility's facilities "design, construction and operation" must "conform to the requirements of the Arizona Department of Health Services or its successors" (now subject to ADEQ/MCESD standards). (A.A.C. R14-2-607(E).)

The Resort argues that although the Commission's statutory authority to regulate utility service is broadly stated, more recent specific powers have been delegated by the Arizona Legislature to ADEQ/MCESD over health and safety issues related to sewage collection and treatment facilities. The Resort points to ADEQ and County authority over "air contaminants" (including odors) and the specific authority to abate odors. (A.R.S. §§49-421 *et seq.*, 49-471 *et seq.*, 49-104(A)(10).) According to the Resort, because there is no specific delegation of air quality authority to the Commission, the Commission should rely on ADEQ's expertise in such matters. The Resort states that there is no evidence that odors from the plant exceed health and safety standards recommended by ADEQ or the County, and no specific engineering study has been conducted to determine if closure of the plant would result in reduced odors for the majority of BMSC's customers. The Resort also points out that Staff's engineering witness testified in Phase 1 of this proceeding that she was not certain that removing the treatment plant would resolve all of the odor problems that currently exist. (*See*, Decision No. 71865 at 47-48.)

The Resort further contends that there is insufficient evidence in the record for the Commission to determine that the closure costs will be reasonable because if the plant is closed, certain of BMSC's pipes must be increased in size to accommodate sewage flows to the Scottsdale system on peak days. Current estimates are that the pipeline upgrades will cost between $803,000

$942,000. (Ex. W-5.) The Resort claims there is no credible evidence that supports a finding that the plant should be closed or that the costs for doing so are reasonable compared to other options.

The Resort further argues that the BHOA's request for a closure order is complicated by the fact that only a portion of BMSC's customers are located near the plant and are affected by the odors. The Resort asserts that the Commission is being asked by the BHOA to find that the plant is creating a private or public nuisance to a subset of BMSC's customers, and thus a remedy similar to an injunction is being requested. The Resort claims that the Commission does not have legal authority to adjudicate whether BMSC's customers living near the plant may pursue claims for common law or statutory nuisance against the Company. However, according to the Resort, in considering the BHOA's request the Commission should consider common law standards regarding nuisances and remedies available through the courts. The Resort cites *City of Phoenix v. Johnson*, 51 Ariz. 115, 75 P.2d 30 (1938), in which the Arizona Supreme Court considered a resident's tort claim of private nuisance regarding odors and waste discharge from a nearby sewer plant. In *Johnson*, the court defined nuisance in the following terms:

> The term 'nuisance' signifies in law such a use of property or such a course of conduct, irrespective of actual trespass against others, or of malicious or actual criminal intent, which transgresses the just restrictions upon use or conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom. It is a class of wrongs which arises from an unreasonable, unwarranted, or unlawful use by a person of his own property, working an obstruction or injury to the right of another, or to the public, and producing such material annoyance, inconvenience, and discomfort that the law will presume a resulting damage. (51 Ariz. at 123, 75 P.2d at 34, internal citations omitted.)

The Resort cites *Johnson* for the proposition that "residents offended by sewage odors may pursue a private action for nuisance in an Arizona court despite a company's legally compliant operation of a plant." (Boulders Resort Initial Brief, at 19.) The Resort also contends that under the definition provided by the court, damages for nuisance may only be recovered if the odors or noises are "unreasonable, unwarranted, or unlawful...and producing such material annoyance, inconvenience, and discomfort that the law will presume a resulting damage." (*Id.* at 20, quoting *Johnson, supra*, at 123.)

The Resort also cites *Armory Park v. Episcopal Community Services*, 148 Ariz. 1, 712 P.2d 914 (1985), to support its contention that a nuisance is determined based on an examination of factors including whether a criminal violation has occurred; whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience; whether the conduct is proscribed by a statute, ordinance, or administrative regulation; whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect; and the actor knows or should have known that there is a significant impact on the public right. (148 Ariz. at 9, 712 P.2d at 922.) The Resort argues that there is no evidence that the treatment plant has been operated improperly; no evidence that BMSC has discharged untreated sewage near homes; and no evidence of ill health effects or imminent dangers from continued operation of the plant. The Resort points to 92 ALR5th 517 (2001) for the citation of court cases in various states which find that odor and pollution nuisances are matters for juries to decide, and that the evidence presented in this case would not support a nuisance finding under the case law cited therein. The Resort further claims that even if a common law nuisance occurs as to the customers in close proximity to the plant, BMSC could assert a defense that those customers "came to the nuisance" because they purchased their homes with knowledge that a sewage treatment plant was located there. The Resort cites *Spur Industries, Inc. v. Del E. Webb Development Co.*, 108 Ariz. 178, 494 P.2d 700 (1972) to support this position. The Resort states that the Commission cannot know whether residents could offer evidence to a court that would provide a remedy, but the Commission should consider that common law requires more evidence of a significant interference than has been presented here. (Boulders Resort Initial Brief, at 20-21.)

The Resort next argues that adoption of the BHOA's request for a closure order represents bad public policy. According to the Resort, "good government practice" requires that Commission decisions be supported by credible, admissible technical evidence, and that the Commission should not set standards on issues of general applicability in a piecemeal fashion. (Boulders Resort Initial Brief, at 22.) The Resort argues that if the Commission finds that the ADEQ and Maricopa County odor and noise standards do not adequately address sewer plant nuisances, the Commission should promulgate rules after receiving input from stakeholders and reviewing scientific information.

The Resort compares the circumstances in this case to those presented in the *Palm Springs* case cited by the plant closure proponents, and asserts that the Commission's finding that the Palm Springs Utility Company should be required to treat water above state mandated requirements was based on the recommendations of a State Health Department engineer. (24 Ariz. App. At 126, 536 P.2d at 247.) The Resort claims that, in contrast, Staff's engineer testified in the Phase I hearing that she was unsure whether closure of the plant would remedy the odor issues contained in public comments submitted in this case. The Resort argues that there is no credible evidence to support the reasonableness of a closure order by the Commission.

Finally, the Resort contends that the Commission should resist the BHOA's request for a closure order because such a decision would likely affect other sewer utilities in Arizona. The Resort argues that the court in *Palm Springs* found that although the Commission had authority to order the drinking water improvements, it would be better if the Commission promulgated rules and regulations of general applicability rather than issuing individual orders.

V. **Resolution of Phase 2 Issues**

Having reviewed all of the evidence and legal arguments, and taking into consideration the written and verbal public comments presented in this proceeding, we find that the BHOA's Motion for a Plant Closure Order should be granted.

As we found in Decision No. 71865, at page 51:

> [C]ustomers in BMSC's service area, especially those living in close proximity to the treatment plant, have endured and continue to endure offensive odors related to the Boulders WWTP. The unrefuted evidence established that: the treatment plant is more than 40 years old; the plant was not intended to be a permanent sewage treatment solution and was not designed to serve more than a fraction of the Company's current customer base; and houses were built closer to the plant than was initially intended and closer than current regulations would permit. The record also indicated that despite its age, the treatment plant operates within regulatory limits imposed by ADEQ and MCESD with respect to odors and noises, and that the plant is considered used and useful for purposes of setting rates.

We believe that the facts, evidence, and circumstances presented herein support the conclusion that continued operation of the Boulders WWTP, which is located within a residential neighborhood, would have a detrimental effect on the quality of life for a number of BMSC's customers and residents within the Boulders community. We find that ample legal authority exists

for an order to close the treatment plant under the Commission's constitutional and statutory powers, as well court decisions that have interpreted that authority. We are not persuaded by the arguments presented by the Boulders Resort that the Commission is precluded from acting in the broader public interest to remedy a situation that affects not only customers in close proximity to the treatment plant, but also a broader group of residents and visitors in the vicinity of the plant.

We begin with an examination of the Commission's powers enumerated in Article 15 § 3 of the Arizona Constitution. In relevant part, this section of the Constitution provides:

> *The Corporation Commission shall have full power to, and shall*...make reasonable rules, regulations, and orders, by which such [public service] corporations shall be governed in the transaction of business within the State, and may prescribe the forms of contracts and systems of accounts to be used by such corporations in transacting such business, and *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.... (emphasis added)

The Resort attempts to diminish this authority by claiming it merely provides "broad instructions" without specifying "in any detail what standards of public utility service are reasonable, necessary, and convenient for the maintenance of sewer facilities." (Boulders Resort Initial Brief, at 15.) However, case law interpreting this section does not support the Resort's argument. In *Arizona Corp. Com'n v. Tucson Gas, Electric Light & Power Co.*, 67 Ariz. 12, 19 (1948), the Arizona Supreme Court found that, pursuant to Article 15 § 3 and the statute that is now A.R.S. § 40-331 (Section 69-222, A.C.A. 1939), "[a] public utility...is under the duty and subject to the orders of the Corporation Commission to make such extensions, improvements, and betterments as may be required to render adequate service to the communities it serves."

In *Arizona Corp. Commission v. Palm Springs Utility Co., Inc.*, *supra*, the court found that Article 15 § 3 "vests in the Corporation Commission broad regulatory powers over public service corporations..." and stated that the language quoted above in Article 15 § 3 "indicate[s] a contemplation by the drafters of the Constitution that the Commission might exercise its regulatory powers through orders as well as through rules and regulations of general applicability." (24 Ariz. App. at 127, 128, 536 P.2d at 248, 249.) In upholding the Commission's power to order a utility company to provide water that exceeded the applicable quality standards for total dissolved solids

and chlorides, the court in *Palm Springs* held that the Commission's constitutional authority, in conjunction with other statutory powers (*i.e.*, A.R.S. §§ 40-202(B), -321(A), -361(B)), reflected that "the regulatory powers of the Commission are not limited to making orders respecting the health and safety, but also include the power to make orders respecting comfort, convenience, adequacy and reasonableness of service..." and that "both in the Constitution and the statutes, the lawmakers recognized that in regulating public service corporations the Commission might accomplish some goals by the use of rules and regulations of general applicability but *would have to accomplish others by the use of orders pertaining to particular situations or to particular public service corporations.*" (*Id.* at 128, 249, emphasis added.)

The Resort cites *Palm Springs* for the proposition that the Commission should not order closure of the Boulders WWTP because it would reflect "piecemeal" treatment of a broader public policy issue and that administrative agencies should act through rules and regulations rather than individual orders on such matters. Referencing *Securities and Exchange Commission v. Chenery Corporation*, 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed.1995 (1947), the court in *Palm Springs* agreed that, "as a general principle of administrative law," promulgation of rules and regulations is preferable to policy created through individual adjudicatory orders. (*Id.*) In *Chenery*, the United States Supreme Court stated that because the Securities and Exchange Commission ("SEC"), unlike a court, had the ability to make new law prospectively through its rulemaking powers, "it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct within the framework of the Holding Company Act." (67 S.Ct. at 1580.) However, the Court in *Chenery* recognized that problems may arise in a case that could not reasonably be foreseen by an administrative agency, or the problem to be addressed is "so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule." (*Id.*) The Supreme Court held that:

> In those situations, the agency must retain power to deal with problems on a case-by-case basis if the administrative process is to be effective...And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency. (*Id.*; internal citations omitted.)

The court in *Palm Springs* also recognized that because the Corporation Commission possesses both constitutional and specific statutory powers to address issues related to the operations

of public service corporations, the general administrative principle that rules and regulations should be preferred over case-by-case adjudication is not necessarily applicable in matters before the Commission. (24 Ariz. App. at 129, 536 P.2d at 250.) The court held that A.R.S. § 40-321(B):[16]

> ...does not expressly or impliedly prohibit the Commission from dealing with specialized situations on a case by case approach, so long as there exists a rational statutory or constitutional basis for the action, and the action is not so discriminatory as to constitute a denial of the equal protection clause. *Any other interpretation would require that we ignore the previously discussed constitutional and statutory provisions, thereby imparting an unintended rigidity to the administrative process, rendering it inflexible and incapable of dealing with many of the complex and specialized problems which arise within the area of its constitutionally and statutorily invested competence.* (*Id.*, emphasis added.)

Even the dissenting justice in *Palm Springs* agreed that "under the constitution and applicable statutes, the *Arizona Corporation Commission has the power to enter specialized orders affecting the quality of service provided by a public utility* without the necessity of adopting a general industry-wide regulation covering the subject." (*Id.* at 131, 251, emphasis added.) The dissenting justice's principal concern was that the issue of dissolved solids and chlorides was not peculiar to the utility company in question, but rather was a regional and statewide problem that would be more appropriately addressed through industry-wide rules.

In the instant case, the issue before us relates to odors and noises emitted from a 40-year old treatment plant that is situated squarely within a residential neighborhood, a location that would not be permitted under current siting regulations. This is precisely the type of specialized problem that the court in *Palm Springs* suggested may best be addressed by the Commission on a case-by-case basis, and for which the U.S. Supreme Court in *Chenery* recognized "may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule" and is a choice "that lies primarily in the informed discretion of the administrative agency." (67 S.Ct. at 1580.) The persistence of noxious odors in the Boulders neighborhood, despite prior mitigation

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[16] A.R.S. § 40-321(B) provides that "[t]he commission shall prescribe regulations for the performance of any service or the furnishing of any commodity, and upon proper demand and tender of rates, the public service corporation shall furnish the commodity or render the service within the time and upon the conditions prescribed."

efforts, is a matter that is uniquely local in nature and is best addressed by a narrowly tailored remedy rather than a broad rule or policy.

In Phase 1, RUCO and Staff opposed the Closure Agreement due primarily to the broader implications they perceived would be associated with approval of the surcharge mechanism to fund decommissioning of the plant. However, the RUCO witness conceded that in his many years of regulatory experience he had never seen a case where there was such overwhelming support for closure of the plant, as well as a willingness by customers to pay a surcharge to complete the closure. (*See*, Decision No. 71865, at 48.) In approving the Closure Agreement and surcharge mechanism, we indicated that "[t]his case presents an extraordinary set of facts and circumstances that calls for an extraordinary remedy that we believe is achieved by the Closure Agreement." (*Id.* at 54.) We also stated that approval of the surcharge mechanism was based solely on the facts of the case and was not a precedent for other surcharge or adjustment mechanisms. (*Id.*) We continue to believe that the situation presented in this proceeding is extremely unusual, is not likely to be repeated, and represents precisely the type of unforeseen problem that the courts in *Chenery* and *Palm Springs* recognized could be addressed by an administrative agency on an individual basis, tailored to a specific set of facts.

As discussed above, in addition to the Commission's constitutional authority, the Arizona Legislature has enacted several laws that not only allow the Commission to act in protection of the public interest but, indeed, mandate that the Commission take action to protect that interest. For example, A.R.S. § 40-321(A) states:

> When the commission finds that the 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, inadequate or insufficient, *the commission shall determine what is just, reasonable, safe, proper, adequate or sufficient, and shall enforce its determination by order or regulation.* (emphasis added)

A.R.S. §40-331(A) provides:

> When the Commission finds that additions or improvements to or changes in the existing plant or physical property of a public service corporation 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, *the commission shall make and serve an order directing that such*

> *changes be made* or such structure be erected in the manner and within the time specified in the order. If the commission orders erection of a new structure, it may also fix the site thereof. (emphasis added)

Further, A.R.S. §40-361(B) states:

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

Even the Resort concedes that the Commission possesses broad constitutional and statutory regulatory powers over public service corporations. However, the Resort attempts to minimize the effect of the statutes on the basis that they have been in existence since statehood, and the Arizona Legislature has given ADEQ other specific authority over the regulation of odors. However, under the logic advanced by the Resort, the statutes cited above would be rendered meaningless despite remaining on the books for more than 100 years. Moreover, the authority set forth in the relevant statutes is unambiguous and that authority grants the Commission the flexibility to craft remedies, by either regulation *or order*, to protect the health, safety and welfare of a utility's customers and, more broadly, the overall public interest.[17]

Nor are we persuaded by the Resort's attempt to frame the issue in terms of a common law nuisance. The Resort relies on *City of Phoenix v. Johnson,* 51 Ariz. 115, 75 P.2d 30, to support its argument that residents may sue BMSC on a nuisance theory, a point that no party disputes. Although a nuisance complaint in Superior Court may be available to area residents as a forum to pursue damages (and the Marshalls have apparently availed themselves of that opportunity already), the Commission's constitutional and statutory powers are clearly not superseded by the nuisance standards cited by the Resort. The appropriate analysis is based on those enumerated powers, as the court in *Palm Springs* recognized.

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[17] The Arizona Supreme Court has stated that unambiguous language in a statute should be given its plain meaning. *See, Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d1222, 1223 (1991) (best and most reliable index of a statute's meaning is its language); *Mid Kansas Fed. Sav. & Loan Ass'n v. Dynamic Dev. Corp.*, 167 Ariz. 122, 128, 804 P.2d 1310, 1316 (1991) (where the language is plain and unambiguous, courts generally must follow the text as written); *Canon School Dist. v. W.E.S. Constr. Co.*, 177 Ariz. 526, 529 (1994) (absent a clear indication of legislative intent to the contrary, we are reluctant to construe the words of a statute to mean something other than what they plainly state).

However, even if nuisance laws were applied in this situation, the cases cited by the Resort are less than persuasive. For example, the Resort cites *Spur Industries, Inc. v. Del E. Webb Development Co.*, 108 Ariz. 178, 494 P.2d 700 (1972), to support its contention that BMSC would have a "significant defense" to a nuisance claim because the Boulders residents "came to the nuisance." (Boulders Resort Initial Brief, at 21.) In *Spur Industries,* the Arizona Supreme Court considered whether a residential real estate developer could force a commercial cattle feeding business, that had operated at the same location for many years, to shut down because the company's operations presented a nuisance to the developer's customers who bought houses adjacent to the cattle company. The court rejected the coming to the nuisance defense and upheld an injunction that had forced the company to close its business because its continued operation was a nuisance to the new residents. (108 Ariz. at 185-186.)

The Resort also relies on *Armory Park v. Episcopal Community Services,* 148 Ariz. 1, 712 P.2d 914 (1985), to support its arguments. In *Armory Park*, the Arizona Supreme Court found that the existence in a residential area of a neighborhood center that served meals to transients was a public nuisance because the transients drawn to the center trespassed into nearby residents' yards, drank alcohol, littered and asked residents for handouts. Although there was no dispute that the neighborhood center's activities did not violate any zoning ordinance or health provision, the court held that "conduct which unreasonably and significantly interferes with the public health, safety, peace, comfort or convenience is a public nuisance within the concept of tort law, even if that conduct is not specifically prohibited by the criminal law." (*Id.* at 10.) Given the court's holding, even if we applied the theory of a public nuisance in this case, ordering closure of the plant would be justified as the plant is a "significant interference with the public health, safety, peace, comfort or convenience" of a number of BMSC's customers, based on the entirety of the record and the history of odor and noise complaints generated by the location of the treatment plant.

The Resort also takes issue with the quality of the record to support closure, claiming that "[n]o evidence has been presented that establishes that [BMSC's] handling of sewage from the customer's point of collection is unsafe, unsatisfactory, or non-continuous." (Boulders Resort Initial Brief, at 16.) First, the Stipulation of Facts (BHOA Ex. 6), that was admitted into evidence without

objection (Tr. 30), is replete with references to odor and noise complaints related to the treatment plant. For example, the Stipulation of Facts states, in part:

> 5. Complaints have been received that odors from the Treatment Plant are noticeable by and objectionable to Boulders residents. Such residents have also complained that odors from the Treatment Plant can be irritating and sometimes interfere with residents' opportunity to leave their windows open to enjoy fresh air in the immediate vicinity of the facility. Residents of the Boulders have complained to the Boulders' community manager about odors from the Treatment Plant.
>
> 6. Complaints from residents regarding odors from the Treatment Plant appear more frequent from October through April.
>
> 7. Since Decision No. 71865 was issued, the Company has received and logged 23 odor complaints (including a lawsuit filed in Maricopa County Superior Court by a resident living adjacent to the Treatment Plant).
>
> 8. A portion of the north Boulders golf course is adjacent to the Treatment Plant. Golfers playing the north Boulders golf course have also complained at times of noticeable odors as they pass by the Treatment Plant.
>
> 9. At times, noises from the operation of the Treatment Plant are noticeable from homes within approximately 400 feet of the Treatment Plant.
>
> 10. There is periodic traffic (service vehicles, pumper trucks, sub-contractor vehicle parking, dumpsters, etc.) in the Boulders community associated with the Treatment Plant's operations.
>
> 11. The Treatment Plant is operated in full compliance with all applicable law and industry standards. In addition, BMSC has taken steps to minimize odors and noises from the operation of the facility, including, among other improvements, the installation of an odor-scrubber.
>
> 12. It is not feasible to completely eliminate odor and noise from the operation of the Treatment Plant.

(BHOA Ex. 6, at 2.) These facts were uncontested at the hearing and are part of the evidentiary record of the Phase 2 proceeding.

As indicated above, the Commission received more than 500 customer comments during the Phase 1 proceeding requesting that the Treatment Plant be closed, and reflecting a willingness to pay a surcharge related to the closure. Many customers gave oral public comments at the Phase 1 hearing, which were described in Decision No. 71865 (at 49-51). Between November 2012 and

January 2013, the Commission has received more than 30 additional public comment letters from Boulders residents requesting that the Commission order closure of the plant.[18] Although public comment is not evidence *per se*, as we have stated previously "[public comment] provides useful insight to the Commission regarding customer experiences." (*Id.* at 49.) The record created in BMSC's 2005 rate case (*See*, Decision No. 69164, at 30-37), in Phase I of this docket (*See*, Decision No. 71865, at 36-55), and in Phase 2, provides ample support for an order that the plant be closed under the Commission's broad constitutional and statutory powers. Despite the Resort's claim that such an order would represent "bad government practice" and "would be a shocking abuse of governmental power," we believe that leaving the frustrated customers in the Boulders community - who are the ones directly affected by the plant's operations – without a remedy, would be bad government practice when the constitutional framers have granted, and the Arizona Legislature has recognized, the Commission's authority to protect the public interest on behalf of customers of a public service corporation in cases such as this.

VI. **Conclusion**

In dealing with the longstanding odor complaints in the Boulders community, we have previously taken incremental and measured steps to offer relief to the affected customers. In BMSC's 2005 rate case (Decision No. 69164), we ordered the Company to take remedial measures to improve parts of its collection and distribution system. Unfortunately, odors continued to persist in the area surrounding the treatment plant despite the system improvements undertaken by BMSC. In Phase 1 of this docket (Decision No. 71865), we took a further step by approving a negotiated agreement between the Company and the BHOA that would allow the treatment plant to be decommissioned subject to certain conditions precedent. However, despite efforts to resolve the Effluent Agreement issue, an impasse was reached and we are now asked to order closure of the

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[18] It is interesting that throughout its post-hearing briefs, the Resort attempted to minimize the import of public comment odor complaints received by the Commission when its own witness in this case (Mr. McCahan) provided public comment at the hearing in BMSC's 2005 rate case (Docket No. SW-02361A-05-0657), *as the representative of the Boulders Resort*, and requested that the Commission act to eliminate odors on behalf of the Resort and area residents. Mr. McCahan stated in his public comments that "[o]ver the past several years the Golden Door Spa, Club, Resort and various locations around the golf course have experienced intermittent smells and odors...*We believe this issue must completely be remedied for the future of our resort as well as our members and homeowners.*" (2006 Tr. 65-68, emphasis added.) We take administrative notice of the transcript in that docket.

treatment plant by the organization that represents the people most affected by the ongoing odors. Thus, rather than reflecting an overreach of government power, our actions over the years to address ongoing odor complaints were taken in a manner that reflects the least amount of governmental intrusion possible on the Company's operations, while at the same time attempting to provide for the "convenience, comfort, and safety" of the Company's customers by protecting them from noises and noxious odors that have pervaded the community for years. Our order in this proceeding to move forward with closure of the treatment plant is hopefully the final step in this lengthy process and will provide relief for customers in the Boulders community.

* * * * * * * * * *

Having considered the entire record herein and being fully advised in the premises, the Commission finds, concludes, and orders that:

FINDINGS OF FACT

1. On December 19, 2008, BMSC filed with the Commission an application for a rate increase.

2. On September 1, 2010, the Commission issued Decision No. 71865 in this matter which granted the Company an increase in rates and, among other things, found that a Closure Agreement between BMSC and the BHOA concerning the Boulders WWTP provided "an appropriate and creative solution" to address ongoing odor issues related to the plant.

3. The Closure Agreement between BMSC and BHOA provided that the Company would be permitted to implement a surcharge to recover capital expenditures for closure of the plant. BMSC's obligations under the Agreement were subject to a number of conditions including "[s]uccessful renegotiation of the Effluent Agreement with the Boulders Resort to allow termination of the agreement with little or no cost to BMSC upon closure of the treatment plant."

4. Since issuance of Decision No. 71865, a number of customers have submitted public comments generally expressing concern with ongoing plant odors and requesting that the Boulders treatment plant be closed.

5. On June 15, 2011, BHOA filed a Motion for Plant Closure Order requesting that the Commission order BMSC to close the treatment plant to "thereby [relieve] BMSC of its contractual

obligation to provide effluent to the Resort and [allow] BMSC to expeditiously close the Treatment Plant."

6. On July 6, 2011, the Boulders Resort filed a Motion to Intervene and requested a hearing to present evidence and legal arguments regarding issues related to the treatment plant and an Effluent Agreement between the Boulders Resort and BMSC.

7. On July 25, 2011, intervenor M.M. Schirtzinger filed a letter expressing his opinion regarding the treatment plant.

8. On November 9, 2011, the Town of Carefree filed a copy of a unanimous Resolution adopted by the Town Council on November 1, 2011, urging the Commission to take appropriate steps to close the treatment plant.

9. On November 22, 2011, BHOA filed a full copy of the same Resolution including a final page that was omitted from the Town's November 9, 2011 filing.

10. On January 24, 2012, the Commission voted during a Staff Open Meeting to reopen this matter pursuant to A.R.S. § 40-252, and directed the Hearing Division to conduct proceedings to address the treatment plant closing and to issue a Recommended Opinion and Order.

11. On February 16, 2012, RUCO filed a letter stating that it would not be participating in the "Phase 2" portion of the proceeding.

12. On March 6, 2012, BMSC and BHOA filed a Stipulation of Facts in lieu of testimony by BHOA.

13. On March 7, 2012, a Procedural Order was issued scheduling a hearing for May 8, 2012, and setting other procedural deadlines.

14. On March 16, 2012, BMSC filed the Phase 2 direct testimony of Gregory S. Sorenson; and the Resort filed the Phase 2 direct testimony of Susan Madden, Tom McCahan, and Dean Hunter.

15. On April 6, 2012, BMSC filed the responsive testimony of Mr. Sorenson and the Boulders Resort filed the responsive testimony of Mr. Hunter.

16. On May 8, 2012, the Phase 2 hearing was held as scheduled. BMSC, BHOA, the Boulders Resort, and Staff appeared through counsel.

17. The Boulders WWTP is operated by BMSC, was originally constructed in 1969, and

is located in a residential community in Carefree known as the Boulders.

18. The Boulders WWTP is permitted to treat 120,000 gpd of sewage, which amounts to approximately 20 percent of the sewage generated by BMSC's system. The remainder of the sewage on BMSC's system is sent to Scottsdale for treatment.

19. The Boulders WWTP is situated less than 100 feet from three homes, and within 1,000 feet of 200 to 300 homes, as well as the dining and conference facilities of the Boulders Resort.

20. Complaints have been received that odors from the Treatment Plant are noticeable by and objectionable to Boulders residents. Such residents have also complained that odors from the Treatment Plant can be irritating and sometimes interfere with residents' opportunity to leave their windows open to enjoy fresh air in the immediate vicinity of the facility. Residents of the Boulders have complained to the Boulders' community manager about odors from the Treatment Plant.

21. Complaints from residents regarding odors from the Treatment Plant appear more frequent from October through April.

22. Since Decision No. 71865 was issued, the Company has received and logged 23 odor complaints (including a lawsuit filed in Maricopa County Superior Court by a resident living adjacent to the Treatment Plant).

23. A portion of the north Boulders golf course is adjacent to the Treatment Plant. Golfers playing the north Boulders golf course have also complained at times of noticeable odors as they pass by the Treatment Plant.

24. At times, noises from the operation of the Treatment Plant are noticeable from homes within approximately 400 feet of the Treatment Plant.

25. There is periodic traffic (service vehicles, pumper trucks, sub-contractor vehicle parking, dumpsters, etc.) in the Boulders community associated with the Treatment Plant's operations.

26. The Treatment Plant is operated in full compliance with all applicable law and industry standards. In addition, BMSC has taken steps to minimize odors and noises from the operation of the facility, including, among other improvements, the installation of an odor-scrubber.

27. It is not feasible to completely eliminate odor and noise from the operation of the

Treatment Plant.

28. BMSC has an Effluent Agreement with the Boulders Resort to sell all of the effluent generated by the Boulders WWTP to the Resort for irrigation of the Resort's golf courses. The Resort obtains approximately 15 percent of its irrigation water from the Boulders WWTP.

29. More than 500 BMSC customers have filed written or verbal requests in support of closing the treatment plant.

30. BMSC and the Boulders Resort have been unable to reach agreement for the termination of the Effluent Agreement at little or no cost to the Company.

31. The record supports a finding that due to its location, the Boulders WWTP can no longer be operated in a manner consistent with the public interest, and therefore the BHOA's Motion for Plant Closure should be granted, and BMSC should be ordered to move forward with closure of the Boulders WWTP in accordance with the findings made herein and Decision No. 71865.

32. The resolution of issues made in the discussion hereinabove is fully incorporated as part of the Findings of Fact.

CONCLUSIONS OF LAW

1. BMSC is a public service corporation within the meaning of Article XV of the Arizona Constitution and A.R.S. §§40-250, 40-251, 40-367, 40-202, 40-321, 40-331, and 40-361.

2. The Commission has jurisdiction over BMSC and the subject matter contained in the Company's rate application, as well as the issues raised in the BHOA's Motion for Plant Closure.

3. The Commission properly reopened consideration of the issues raised by the BHOA's Motion for Plant Closure pursuant to the requirements of A.R.S. §§40-252.

4. Pursuant to Article 15 of the Arizona Constitution, A.R.S. §§40-202(A), 40-321(A), 40-331(A), 40-361(B), as well as applicable Arizona case law interpreting those provisions, the Commission has jurisdiction and authority to order closure of a treatment plant if it is determined to be necessary to protect the health and safety of the public, and provide for the comfort and convenience of customers.

ORDER

IT IS THEREFORE ORDERED that due to its location, the Boulders WWTP can no longer be operated in a manner consistent with the public interest, and therefore the Boulders Homeowners Association's Motion for Plant Closure Order is hereby granted and Black Mountain Sewer Corporation is ordered to move forward with closure of the Boulders Wastewater Treatment Plant in accordance with the findings made herein and Decision No. 71865.

IT IS FURTHER ORDERED that before closing the Boulders Wastewater Treatment Plant, Black Mountain Sewer Corporation shall ensure that whatever option for obtaining replacement capacity is ultimately selected, such option will not result in the Company having to cease deliveries of wastewater to the City of Scottsdale under its existing or an amended agreement.

IT IS FURTHER ORDERED that nothing in this Decision is intended to eliminate or abrogate any of the conditions precedent set forth in the Closure Agreement between Black Mountain Sewer Corporation and the Boulders Homeowners Association, except that the condition regarding modification of the Effluent Agreement is rendered moot by our Order that the treatment plant shall be closed. However, the parties to the Closure Agreement may amend their agreement consistent with this Decision and prior Orders pertaining to this matter, as well as applicable law.

IT IS FURTHER ORDERED that nothing in this Decision is intended to modify, and does not so modify, the Surcharge Mechanism approved in Decision No. 71865, including the maximum $15 per month per customer provision, even in the event that the closure costs exceed the estimated costs upon which the Surcharge was based.

IT IS FURTHER ORDERED that in the rate case that is required to be filed no more than 12 months after the Surcharge goes into effect, Black Mountain Sewer Corporation may seek recovery of any and all costs it believes have been reasonably incurred in compliance with this Decision and Decision No. 71865 related to the Closure Agreement, including litigation costs, and the Company may seek accounting orders for costs it believes will be incurred post-test year.

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IT IS FURTHER ORDERED that nothing in this Decision shall be construed as a guarantee of any specific rate base treatment of capital costs incurred with closure of the Boulders WWTP, which rate treatment will be determined in the rate case that is required to be filed within 12 months following commencement of the Surcharge.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN COMMISSIONER

COMMISSIONER COMMISSIONER COMMISSIONER

IN WITNESS WHEREOF, I, JODI JERICH, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this _____day of _____ 2013.

JODI JERICH
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____

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