

ORIGINAL

OPEN MEETING AGENDA ITEM



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2013 FEB 11 P 4: 23 Arizona Corporation Commission  
**DOCKETED**  
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DOCKET CONTROL



BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

9 BOB STUMP, Chairman  
10 GARY PIERCE  
11 BRENDA BURNS  
12 BOB BURNS  
13 SUSAN BITTER SMITH

Docket No. SW-02361A-08-0609

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

**WIND P1 MORTGAGE BORROWER,  
L.L.C.'S OBJECTION TO  
ADMISSION OF PUBLIC  
COMMENTS AS EVIDENCE AND  
MOTION TO STRIKE PUBLIC  
COMMENT REFERENCES FROM  
RECOMMENDED ORDER AND  
OPINION**

22 Wind P1 Mortgage Borrower L.L.C., doing business as The Boulders Resort (the  
23 "Resort"), by and through its undersigned attorneys, hereby objects to the admission of public  
24 comment testimony summaries into evidence in this matter because they are unsworn. This  
25 Motion is filed in response to the Administrative Law Judge's filing of the Recommended Order  
26 and Opinion ("ROO"), the first notice to the Resort that the hearing officer intends to rely on the  
27 substance of such public comments to support the ROO. The Resort objects to the admission of  
28 public comments as evidence in this matter because it violates the Commission's rules regarding  
submission of unsworn testimony, and, even if characterized in the ROO as something that  
cannot be relied upon for the Commission's decision, the very inclusion of the detailed  
summaries demonstrates *de facto* reliance and prejudices a fair consideration of the evidence.

1 Pursuant to Commission rule, the Resort will file separate and additional exceptions to  
2 the ROO within the allotted time, but makes this Motion immediately in order to preserve its  
3 objections to the proposed admission into evidence of unsworn matters outside the hearing  
4 record.

5 The Resort moves to strike the following references to the substantive content of public  
6 comments from the ROO prior to the Commission's consideration of the ROO:

- 7 • page 2: lines 8-10
- 8 • page 2: lines 23-27
- 9 • page 4: lines 6-7 and footnote 2
- 10 • page 4: lines 19-24 through page 5: line 1 and footnote 3
- 11 • page 18: line 25 through page 20: line 11, including footnotes<sup>1</sup>
- 12 • page 26: line 25 through p. 27:line 1<sup>2</sup>
- 13 • page 45: lines 2-4
- 14 • page 46: lines 24-26
- 15 • page 47: lines 8-12

16 The Resort's objection and Motion are supported by the following Memorandum of Law  
17 in Support of Motion.

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21 <sup>1</sup> This section summarizes the substance of public comment summaries included in the prior Commission decision  
22 in this docket, but is included in the Resort's objection because, since that time, this case changed from a rate  
23 case in which approval of a last-minute surcharge agreement between parties was considered, to a different  
24 proceeding with a new party to determine whether the Commission should invoke its non-rate legal authority to  
order closure of a used and useful facility solely on the basis of public convenience. The Commission provided  
the parties a formal hearing format to establish an evidentiary record for the new decision, and there is no  
permissible reason for inclusion of unsworn evidence in the ROO.

25 <sup>2</sup> The Town of Carefree intervened in Phase 1, but, although it has been represented by an attorney in this matter,  
26 did not request admission of its public comment into evidence. As noted in the ROO, BHOA's attorney "filed"  
27 a full copy in the docket on November 22, 2011, but did not request admission of the public comment into  
evidence at the subsequent hearing on May 8, 2012. The Resort objects to admission of the Resolution because  
28 no foundation has been offered for the assertions made by the Town in the Petition.

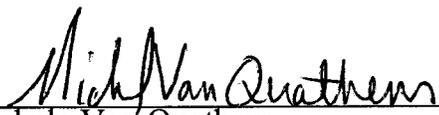


1  
2 **CONCLUSION**

3 For the reasons stated above, the Administrative Law Judge should deny admission of  
4 public comment into evidence, and remove references to such public comments from the ROO  
5 prior to its consideration by the Commissioners.

6 RESPECTFULLY REQUESTED this 11th day of February, 2013.

7 RYLEY CARLOCK & APPLEWHITE

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16 ORIGINAL and 13 copies of the foregoing  
17 filed this 11th day of February, 2013, with:

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22 COPY of the foregoing mailed this  
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