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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

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

**WIND P1 MORTGAGE BORROWER,
L.L.C.'S EXCEPTIONS TO
RECOMMENDED ORDER AND
OPINION**

18 Wind P1 Mortgage Borrower L.L.C., doing business as The Boulders Resort (the
19 "Resort"), by and through its undersigned attorneys, respectfully submits the following
20 exceptions to the Recommended Order and Opinion dated February 6, 2013 (the "ROO") in this
21 matter. The Resort witnesses explained in their testimony and in the Resort's closing briefs how
22 *vital* the effluent water supply served by Black Mountain is to the Resort's business operations,
23 and how the Commission's decision, if made in accordance with the current recommended
24 order, will likely result in lost business and ability to compete in a highly competitive market,
25 and/or millions of dollars in unplanned costs if it is even possible to replace that water supply.
26 Access to sufficient water is critical.

27 The Resort has been criticized in this proceeding for intervening to oppose the residents'
28 request to obtain a Commission order to close the plant. The Resort believes, however, that it

1 has no choice – it made a significant investment in a resort business and has responsibilities to
2 its customers, employees, golf club members, and investors. In addition, the Resort could be
3 subjected to claims of property value diminution if the Resort is unable to maintain the golf
4 courses in a condition acceptable to nearby residents. The Resort currently employs 559
5 employees, three of whom testified in Phase 2 of these proceedings. The Resort appreciates the
6 opportunity to state its case.

7 Black Mountain already made improvements to the collection system, the Black
8 Mountain wastewater reclamation facility (the “WWTP”), and customer service operations, and
9 those changes reduced odors and noises. It has never been the law that no odors or noises are
10 allowed to escape from a utility facility. The Resort requests that the Commission reject the
11 proposed ROO, or amend it to reverse the proposed decision with conforming changes
12 throughout. The Resort makes the following additional exceptions:

13 **I. EXCEPTION: THE PROPOSED ORDER IS UNCONSTITUTIONAL**

14 The proposed order would deprive the Resort of its contractual rights. Article I of the
15 United States Constitution and Article 2, Section 25 of the Arizona Constitution prohibit the
16 State from passing any law that impairs the obligation of a contract. The State can only impair
17 contract obligations in the exercise of its inherent police power to safeguard vital public
18 interests. *Phelps Dodge Corp. v. Arizona Elec. Power Co-op, Inc.*, 207 Ariz. 95, 119, 83 P.3d
19 573, 597 (App.Div.1 2004), *review den'd* (internal citations omitted) (“*Phelps Dodge*”). Here,
20 the Commission’s powers are further limited to those derived expressly from the Constitution or
21 through express legislative delegation; the Commission has no implied powers. *Id.* at 111, 589
22 (internal citations omitted); *Trico Elec. Co-Op. v. Ralston*, 67 Ariz. 358, 365, 196 P.2d 470, 474
23 (1948) (“The Corporation Commission has no implied powers and its powers are limited to
24 those derived from a strict construction of the Constitution and implementing statutes.”); *see*
25 *also Tonto Creek Estates Homeowners Ass’n v. Ariz. Corp. Comm’n*, 177 Ariz. 49, 55, 864 P.2d
26 943, 949 (1946) (“The Corporation Commission’s powers are limited and do not exceed those to
27 be derived from a strict construction of the Constitution and implementing statutes.”); *US West*
28

1 *Communications, Inc. v. Ariz. Corp. Comm'n*, 197 Ariz. 16, 23, ¶28, 3 P.3d 936, 943 (App.
2 1999) (The Commission's powers are limited to those declared in the constitution and
3 implementing statutes.”).

4 To determine whether the Commission exercises its powers properly under constitutional
5 contract impairment provisions, a court will look at a three-part test. *Id.* at 119, 597, *citing*
6 *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410, 103 S.Ct. 697,
7 74 L.Ed.2d 569 (1983); *McClead v. Pima County*, 174 Ariz. 348, 359, 849 P.2d 1378, 1389
8 (App. 1992). First, the Court will determine whether the order substantially impairs a
9 contractual relationship. *Id.* The severity of the impairment will increase the level of scrutiny of
10 the impairment. *Energy Reserves*, 459 U.S. at 411. Second, if there is substantial impairment,
11 then the Commission would need to identify a significant and legitimate purpose to justify the
12 order. *Phelps Dodge*, at 119, 597. Finally, if such a purpose exists, then the Commission would
13 need to demonstrate that the adjustment of the parties' contractual obligations is reasonable and
14 appropriate to the public purpose justifying the order. *Id.*

15 The first part of this test is substantial impairment of a contract, and this test is easily met
16 by the proposed ROO. An impairment occurs “when the legislative enactment changes the
17 obligation in favor of one party against another, either by enlarging or reducing the obligation.”
18 *Phelps Dodge*, 418 Ariz. at 122, 83 P.3d at 600, *quoting from Picture Rocks Fire District v.*
19 *Pima County*, 152 Ariz. 442, 444, 733 P.2d 639, 641 (App. 1986). In this case, there is no
20 question that the ROO proposes substantial impairment of a contract – it is a primary purpose of
21 the proposed order to provide a means by which Black Mountain may terminate the core
22 obligation in a private contract to deliver effluent, the Effluent Agreement (the “Agreement”),
23 “at little or no cost” to Black Mountain. *See* ROO, p. 2:11-14 (BHOA's motion requests closure
24 of the WWTP to “thereby [relieve] BMSC of its contractual obligation to provide effluent to the
25 Resort...”); p. 32:11 (“BHOA claims that the only remaining obstacle to closure of the plant is
26 BMSC's contractual obligation with the Resort.”); p. 49:7-8 (“BMSC and the Boulders Resort
27 have been unable to reach agreement for the termination of the Effluent Agreement at little or no
28 cost to the Company.”) In the Agreement, Black Mountain has covenanted to “[n]ot restrict,

1 reduce or otherwise limit the quantity of Effluent produced by the Boulders East Plant or take
2 any action that would reduce the plant's treatment capacity..."¹ If the ROO is adopted as
3 recommended, the ROO will be used by Black Mountain to justify terminating the Resort's right
4 to receive water from the WWTP from the closure date through March 2021, the remaining term
5 of the Agreement.² The undisputed evidence demonstrated the Resort's right to continued
6 water deliveries for the remaining years in the Agreement is a valuable contract right. Evidence
7 was presented that the costs of obtaining replacement supplies and the associated infrastructure,
8 if such replacement supplies are even available given the difficulties explained in the evidence,
9 are in the millions of dollars.³

10 The second part of the test for unconstitutional impairment of contracts requires that the
11 Commission identify a significant and legitimate purpose for the impairment. In this case, the
12 ROO proposes the Commission make a decision that is not supported by the evidence. *See*
13 Section II.1, *below*. The ROO proposes to rely upon the Commission's powers in Article XV,
14 section 3 of the Arizona Constitution, and A.R.S. sections 40-202(A),⁴ 40-321(A), 40-331(A),
15 and 40-361(B) that identify public "health," "safety," "comfort," "convenience," and "security"
16 interests.⁵ As an initial matter, the evidence demonstrates no health and safety endangerment,
17 and no security threat.⁶ If the Commission adopts the ROO as proposed, it will be relying on
18 the "public comfort" and "public convenience" language in the cited authorities, but such
19 authorities do not extend to the facts in this case because adequate and reasonable utility service
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22 ¹ November 18, 2009 Hearing Tr., Vol. I, SW-02361A-08-0609 ("Phase I Tr., Vol. I") at 123:19-124:11.

23 ² ROO at 30:22-25.

24 ³ Wind P1 Mortgage Borrower, LLC Initial Closing Brief, docketed June 12, 2012, pp. 9:12-11:5.

25 ⁴ A.R.S. § 40-202(A) has been held to grant the Commission no power in addition to those powers it already
26 possesses under the Constitution. *Phelps Dodge Corp. v. Ariz. Elec. Power Co-Op., Inc.* 207 Ariz. 95, 112, 83
27 P.3d 573, 590 (2004) (internal citation omitted).

28 ⁵ ROO at p. 49:22-26.

⁶ ROO at pp. 10:13-15 and 44:18-21.

1 is being provided.⁷ The Commission is being asked to determine that, even though the WWTP,
2 a used and useful off-site facility providing adequate wastewater treatment service, is being
3 operated in accordance with all laws and industry standards, including the Commission's own
4 rules regarding sewer facilities and the adequacy of sewer service, because there are customer
5 complaints regarding odors in the neighborhood nearest the plant, it is therefore no longer
6 convenient or comfortable for residents or the public to have a WWTP in the current location
7 (even though both the WWTP and nearby homes have co-existed in the same location for over
8 25 years). It is questionable whether the Commission is empowered by any language in the
9 Constitution or statutes to order the closure of the WWTP when the service to the utility's
10 customers is adequate and reasonable. *See also Phelps Dodge*, 207 Ariz. at 112,83 P.2d at 590,
11 *citing Southern Pac. Co. v. Arizona Corp. Comm'n*, 98 Ariz. 339, 343, 404 P.2d 692, 694-95
12 (Ariz. 1965) (Commission may not interfere with utility management decisions).

13 Even assuming that the Commission is empowered to order closure of the WWTP for
14 "public convenience" or "public comfort" however, the third requirement of the impairment test
15 is that exercise of such power must be based upon reasonable conditions of a character
16 appropriate to the public purpose justifying the Order's issuance. *Energy Reserves*, 459 U.S. at
17 413; *Phelps Dodge*, 207 Ariz. at 119, 83 P.3d at 597. Even though there is usually a
18 presumption favoring legislative judgment as to the necessity and reasonableness of a particular
19 measure, when legislation impairs one specific existing contract as in this case, there must be a
20

21 ⁷ The ROO relies on *Arizona Corp. Comm'n v. Palm Springs Utility Co., Inc.*, 24 Ariz.App. 124, 536 P.2d 245
22 (1975) as support for the Commission's authority to make the closure order, but that case involved the quality
23 of water that customers were purchasing from the utility, and there was evidence the water was damaging the
24 residents' property. The claims asserted in this case do not assert a defect in sewer collection and treatment
25 service provided to customers. Rather, this case is in the nature of a public nuisance dispute between
26 neighboring property owners, one of whom is a regulated public utility. Viewed in another context, consider a
27 case where a power plant's customers/neighbors might request closure of a nearby power generation facility
28 because they can smell sulfur compound emissions and hear noises, or perhaps even because the plant is
contributing to global warming. While it certainly makes sense to investigate and try to address BHOA's
concerns by reasonable means, the Commission should not order facilities closed in response to such concerns
without compelling evidence. *Palm Springs* further did not involve the impairment of contract issue such as in
this case.

1 demonstration in the record that the severe disruption of contractual expectations is necessary to
2 meet an important general social problem. *See Allied Structural Steel Company v. Spannus*, 438
3 U.S. 234-51, 242-98 S.Ct. 2716, 2721-26 (1978); *see also U.S. Trust Co. of New York v. New*
4 *Jersey*, 431 U.S. 1, 23, 97 S.Ct. 1505, 1518 (1977). This is a targeted order involving one
5 facility and one contract that will have a severe disruptive effect on contract expectations. Here,
6 the record does not demonstrate that it is necessary to close the WWTP in order to ameliorate
7 odors to a reasonable level, or to meet an important general social problem.

8 Although the Resort may not agree that any action is reasonable or necessary, closure is
9 not the only option here to address the residents' concerns. The Commission could reject the
10 ROO and allow the parties to continue working on an agreed solution that addresses all parties'
11 interests. The Commission can order the Company to reduce odors and noises further and let
12 the Company determine how best to comply. The evidence indicated that it may be possible to
13 further reduce odors at the plant by enclosing it,⁸ but that installation of an additional or larger
14 odor scrubber is probably the most cost effective solution.⁹ The Commission could order Black
15 Mountain to pursue an alternative that includes Black Mountain's continued provision of
16 effluent to the Resort. Black Mountain suggested that it could send wastewater to the new Cave
17 Creek treatment plant so that effluent could be made available to the Resort.¹⁰ The ROO
18 proposes no remedy whatsoever for taking the Resort's valuable contract right and eliminating
19 its effluent service.

20 The Commission took the position some time ago that the Resort is an effluent customer
21 of Black Mountain and set rates for Black Mountain's effluent deliveries on its tariff,¹¹ yet the
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23
24 ⁸ November 25, 2009 Hearing Tr., Vol. IV, SW-02361A-08-0609 ("Phase I Tr., Vol. IV") at 653:4-24.

25 ⁹ *Id.* at 652:19-654:24. *See also* May 8, 2012 Hearing Transcript ("Phase 2 Tr.") at 162:16-164:10, 186:5-16., Ex.
26 BMSC-3.

27 ¹⁰ Phase 2 Tr. at 116:23-120:2, 128:17-23, 140:22-141:21.

28 ¹¹ Black Mountain also provides sewer treatment services to the Resort. *See* Ex. W-1, p.5. *See also* Decision No.
50544 (prior effluent agreement approved in 1980).

1 ROO proposes to end effluent water service altogether, raising questions about the
2 Commission's jurisdiction to regulate effluent deliveries, service obligations, and the ROO's
3 proposed decision to terminate one customer's service to make a facility change in favor of
4 another customer group. These issues may subject the decision to less deference under the
5 above-quoted constitutional requirements. *See also* Ariz. Const. Art. XV, §12 (prohibiting
6 discrimination in charges, service, or facilities between persons or places for rendering a like
7 and contemporaneous service).

8 The Commission should not adopt the ROO as written because it is unconstitutional.

9 **II. EXCEPTION: THE PROPOSED ORDER IS NOT IN ACCORDANCE WITH**
10 **GOVERNING LAW**

11 **1. Proposed Decision is Unreasonable and Arbitrary**

12 Commission decisions must be supported by substantial evidence and not speculation.
13 *Arizona Corp. Comm'n. v. Citizens Utilities Co.*, 120 Ariz. 184, 187, 584 P.2d 1175, 1178 (App.
14 1978). Decisions must also be reasonable. Ariz. Const., Art. 15, §3; A.R.S. § 40-254. The
15 Commission determined in Decision No. 71865 that the Settlement Agreement entered into
16 between Black Mountain and the BHOA "represents a reasonable resolution of the current odor
17 concerns..."¹² but did not go so far as to find that closure of the Plant was necessary. The
18 Commission's Decision No. 71865 to adopt the proposals in the Settlement Agreement was
19 based largely upon unsworn public comments,¹³ and was secured with the settling parties'
20 representation that approval of the Settlement Agreement terms did not require the Commission
21 to make a determination of whether the plant closure, an arguable Black Mountain management
22 decision, was in the public interest – only whether the surcharge should be implemented.¹⁴

23 The parties to the first phase of the rate case provided the Commission with no objective
24 and reliable information from which the Commission can conclude today what is causing the

25 _____
26 ¹² Decision No. 71865 at 49:13-18.

27 ¹³ Decision No. 71865 at 49:19-51:4.

28 ¹⁴ Phase 1, Vol. I Tr. at 185:23-187:8; Decision No. 71865 at 45:11-20, 53:7-54:1.

1 odors and noises noted in public comments, what the noise and odor levels are, and how many
2 of Black Mountain's customers in proximity the WWTP are still affected at unreasonable
3 levels.¹⁵ Despite the fact noise studies¹⁶ and odor studies¹⁷ were conducted in the past, no such
4 objective studies of the current level of odors or noises or the radius impacted have been offered
5 into evidence.¹⁸ Black Mountain undertook a number of remedial measures as are summarized
6 in Decision No. 71865 at pages 40-41, and witnesses indicated the measures helped,¹⁹ but the
7 Commission has been provided with no objective measurements of the improvement or lack
8 thereof.²⁰

9 In this case, the Commission is asked to rely on the former record in Phase 1 of this
10 docket, and additional stipulated facts offered by BHOA and Black Mountain²¹ that make very
11 general statements regarding odor complaints and occasional noises. Subsequent testimony at
12 the Phase 2 hearing indicated that many of the Company's 23 odor complaints reflected in the
13 stipulated facts were unrelated to the WWTP, and there had been only one noise complaint from
14 the homeowner closest to the WWTP.²² There is no objective or reliable basis in the record for
15

16 ¹⁵ The parties' attorneys discussed the status of the Phase 1 evidentiary record in a Procedural Conference prior to
17 the Phase 2 hearing. *See* Transcript of February 7, 2012 Procedural Conference at pp. 33:20-45:19.

18 ¹⁶ ROO, p. 10:1-3; Decision 71865, p. 41:1-2; *see also* Exhibit 3 to BMSC 6 (email from McBride Engineering
19 indicates preliminary noise evaluation was conducted with equipment and report was to be prepared.)

20 ¹⁷ *See* Exhibit 2 to BMSC 6 (via e-mail on December 17, 2008, Les Peterson (BHOA witness in Phase 1
21 proceeding) states "The 4 odor sensors around the Processing Plant indicate that the current odor is not coming
22 from the [WWTP]." He then goes on to explain that odor sensors will be installed in a location in the collection
23 system.) *See also* Decision No. 64267, pp. 31:25-26 ("Carter Burgess Report"); 32:21-22 ("LTS Report") (two
24 studies made prior to most recent noise and odor improvements). *See also* ROO, p.10:13-15 (odor loggers were
25 installed at plant at some point).

26 ¹⁸ Decision 71865, pp. 40:19-41:6 (description of changes made to the WWTP to resolve odor and noise
27 complaints noted in prior case and results); *see also* ROO, pp. 16:21-17:7 (Mr. Rigsby, a regular RUCO witness
28 in ACC matters, also expressed a concern that the Commission should ascertain the source of the odors before
adopting the Settlement Agreement in Phase 1.).

¹⁹ *See, for example*, BHOA-4 at 5:14-21 (Les Peterson testified odors are less frequent).

²⁰ Decision No. 71865 at 40-41; *see also* Exhibit A-1, Sorenson Direct, at pp. 2:17-8:25.

²¹ ROO at 44:4-22.

²² Ex. W-6. *See also* Phase 2 Tr. at 157:2-159:21.

1 the Commission to determine the extent of the problem or whether WWTP closure is a
2 reasonable remedy.

3 **2. Proposed Order Violates R14-3-109(F) and 105(C)**

4 By a Motion to Strike filed on February 11, 2013, the Resort objected to the admission of
5 public comments as evidence in this matter because admission violates the Commission's rules
6 regarding submission of unsworn testimony, and, even if characterized in the ROO as something
7 that cannot be relied upon for the Commission's decision, the very inclusion of the detailed
8 summaries demonstrates *de facto* reliance and prejudices a fair consideration of the evidence.

9 The Resort moved to strike the following references to the substantive content of public
10 comments from the ROO prior to the Commission's consideration of the ROO (and has added to
11 the list below):

- 12 • page 2: lines 8-10
- 13 • page 2: lines 23-27
- 14 • page 4: lines 6-7 and footnote 2
- 15 • page 4: lines 19-24 through page 5: line 1 and footnote 3
- 16 • page 18: line 25 through page 20: line 11, including footnotes²³
- 17 • page 26: line 25 through p. 27: line 1²⁴
- 18 • page 44: lines 27-28

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20
21 ²³ This section summarizes the substance of public comment summaries included in the prior Commission
22 decision in this docket, but is included in the Resort's objection because, since that time, this case changed from
23 a rate case in which approval of a last-minute surcharge agreement between parties was considered, to a
24 different proceeding with a new party to determine whether the Commission should invoke its non-rate legal
25 authority to order closure of a used and useful facility solely on the basis of public comfort and convenience.
26 The Commission provided the parties a formal hearing format to establish an evidentiary record for the new
27 decision, and there is no permissible reason for inclusion of unsworn evidence in the ROO.

28 ²⁴ The Town of Carefree intervened in Phase 1, but, although it has been represented by an attorney in this matter,
did not request admission of its public comment into evidence. As noted in the ROO, BHOA's attorney "filed"
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
no foundation has been offered for the assertions made by the Town in the Petition and the Resort has not had
an opportunity to cross-examine the witness.

- 1 • page 45: lines 2-4
- 2 • page 46: lines 24-26
- 3 • page 47: lines 8-12

4 Prior to issuing the ROO in this matter on February 6, 2013, the Resort was provided
5 with no notice that the Administrative Law Judge intended to rely on the substantive content of
6 unsworn public comments as evidence to support a recommended order in this matter. In the
7 ROO, the names of certain public commenters are named (see list of pages and line numbers in
8 the Motion above for references), and the substance of their comments and positions are being
9 used in the ROO to support the proposed decision. *See, for example*, pp. 18:27-19:1 (public
10 comment provides “useful insight”); *see also* p. 20:9-11 (“...the public comments ... made clear
11 that customers ... have endured and continue to endure offensive odors...”); pp. 44:25-28 through
12 4 (proposes Commission rely on public comments for its decision). Some references are to
13 comments docketed years ago with no foundation provided regarding the commenter or the
14 basis of the opinion. The Resort objects to the admission into evidence of any of such
15 comments as the public comments are (1) unsworn and (2) even though the comments are
16 summarized in the ROO to justify a decision adverse to the Resort, the Resort has been provided
17 no opportunity to cross examine the persons providing those comments.

18 The Commission’s rules require that “[a]ll testimony to be considered by the Commission
19 in formal hearings shall be under oath, except matters of which judicial notice is taken or
20 entered by stipulation.” A.A.C. R14-3-109(F). The rules further make clear that consumers
21 appearing and making public comments “shall not be deemed a party to the proceedings.” R14-
22 3-105(C). There is a good reason for these rules as they provide the means to ensure evidence to
23 be relied upon by the Commission is reliable and presented in an orderly fashion. Public
24 comments, on the other hand, can be submitted by anyone at any time, and repeatedly by the
25 same person, whether or not they have any standing or interest in the matter, and the
26 Commission makes no effort to verify the veracity of the statement or the foundation for the
27 statements per evidentiary rules. Although public comment may certainly encourage the
28 Commission to conduct an investigation and open a proceeding to consider the evidence, public

1 comments do not qualify as evidence under the Commission's rules, and reliance on them by
2 including them in the ROO prejudices the parties against whom they are offered who have no
3 opportunity to cross-examine the witnesses.

4 **3. The Proposed Order is Not in Accordance with the Commission's Rules for**
5 **Sewer Facilities and Service**

6 The Commission's regulation interpreting the level of service to be provided by a sewer
7 utility is Arizona Administrative Code section R14-2-607. Section R14-2-607 provides that
8 each "utility shall be responsible for the safe conduct and handling of the sewage from the
9 customer's point of collection," along with a duty to "make reasonable efforts to supply a
10 satisfactory and continuous level of service." In this case, Black Mountain's provision of
11 service to its customers through use of the Plant is in compliance with all of the rules'
12 requirements. No evidence has been presented that establishes that Black Mountain's handling
13 of sewage from the customer's point of collection is unsafe, unsatisfactory, or non-continuous.

14 As to the standard required for a sewer provider's facilities, the same Commission rule
15 requires that the "design, construction and operation of all sewer plants shall conform to the
16 requirements of the Arizona Department of Health Services or its successors and any other
17 governmental agency having jurisdiction thereof." *Id.* Through the Arizona Environmental
18 Quality Act of 1986, the Arizona Department of Health Services' regulatory authority over
19 sewer treatment facilities was assumed by the newly-created Arizona Department of
20 Environmental Quality ("ADEQ").²⁵ There is no evidence indicating that noise or odor levels
21 exceed ADEQ's or MCESD's standards. The Commission must follow its own rules. *Clay v.*
22 *Arizona Interscholastic Ass'n, Inc.*, 161 Ariz. 474, 476, 779 P.2d 349, 351 (1989), *citing*
23 *Gibbons v. Ariz. Corp. Comm'n*, 95 Ariz. 343, 390 P.2d 582 (1964) (other internal citations
24 omitted).

25
26 _____
27 ²⁵ See history at <http://www.azdeq.gov/function/about/history.html>.
28

1 **III. OTHER EXCEPTIONS**

2 **1. Page 6: Lines 6-7 and Page 20, Lines 14-15**

3 Lines 6 through 7 on page 6 assert that Mr. Peterson testified that “residences were
4 constructed in close proximity to the plant during a period of rapid expansion.” A similar
5 phrase, “houses were built closer to the plant that was initially intended,” appears at page 20,
6 lines 14 through 15, and quotes from page 51:7 of Decision 71865. The undersigned could not
7 locate this statement in Mr. Peterson’s Phase 1 testimony.²⁶ Mr. Peterson testified in his Direct
8 Testimony in Phase 1 the “[r]esidences were built around and in relatively close proximity to the
9 [WWTP] *prior* to the time its use and service area were dramatically expanded.”²⁷ (emphasis
10 added). Mr. Peterson’s references to “rapid expansion” were to the expansion of Black
11 Mountain’s *service territory*.²⁸

12 The evidence showed the WWTP to be in compliance with all legal requirements, and
13 there is no evidence the WWTP was sited inappropriately per requirements in effect at the time
14 it was constructed. These phrases should be changed to match Mr. Peterson’s Phase 1
15 testimony.

16 **2. Page 21: Lines 12-13**

17 The statement “the treatment plant appears to be the primary source of the ongoing and
18 frequent noxious odors described by customers” on page 21, lines 12 through 13, is a conclusion
19 based upon the substance of inadmissible public comments and should be removed for the
20 reasons explained above in Section II.2.

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25 ²⁶ It does not appear to be a correct inference either. Online Maricopa County records indicate the nearest
26 residential lot was included in the same 1974 “The Boulders Carefree Unit Four Phase One” subdivision plat as
27 the WWTP parcel. *See* Maricopa County MCR No. 173-38.

28 ²⁷ Ex. BHOA-4 at 3:8-9.

²⁸ Ex. BHOA-4 at 3:10-15.

1 **3. Page 26: Lines 1-4; Page 37: Line 21**

2 The statement on page 26 at lines 1 through 4, and page 37, line 21 is inaccurate, and the
3 inaccuracy should be noted in a footnote. The statement is a summary of lay witness testimony
4 offered in the Phase 1 hearing regarding an ADEQ setback rule for new wastewater treatment
5 plants. In the Phase 2 hearing, the ADEQ rule was entered into evidence, and Mr. Sorenson
6 testified that the WWTP is 120,000 gpd capacity. The table in ADEQ’s rule indicates that a new
7 120,000 gpd plant that has no odor, noise, or aesthetic controls would require a minimum
8 setback of at least 500 feet, and a new facility with full noise, odor, and aesthetic controls would
9 require a minimum setback of 100 feet.²⁹ The Plant currently has an odor scrubber, so has
10 partial noise, odor, and aesthetic controls. The rule is not applicable to the Plant because it is an
11 existing facility.

12 **4. Page 28: Lines 11-12**

13 The statement on page 28, lines 11 and 12 that Mr. Hunter “testified that these options
14 were determined not to be workable ...” appears to refer to all of the alternatives listed by Ms.
15 Madden in the prior paragraph. The statement should be revised to indicate that Mr. Hunter
16 “testified that the conservation option was determined not to be workable...”³⁰

17 **IV. RESERVATION OF RIGHTS**

18 To the extent any objection raised in the Resort’s Initial Closing Brief or Final Closing
19 Brief is not covered in the above exceptions, the Resort incorporates them specifically into these
20 exceptions by reference and re-asserts all arguments herein.

21 **V. CONCLUSION**

22 For all the reasons stated above, the Commission should reject the ROO and deny
23 BHOA’s motion requesting closure of the WWTP.

24
25
26

²⁹ A.A.C. R18-9-B201(I). *See* Phase 2 Tr. at 175:5-7.

27 ³⁰ Ex. W-3 at p. 4.

1 RESPECTFULLY SUBMITTED this 15th day of February, 2013.

2 RYLEY CARLOCK & APPLEWHITE

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