

ORIGINAL OPEN MEETING AGENDA ITEM



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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

2013 FEB 15 PM 4:42

Arizona Corporation Commission

DOCKETED

FEB 15 2013



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

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

BOULDERS HOMEOWNERS' ASSOCIATION'S RESPONSE TO RESORT'S MOTION TO STRIKE PUBLIC COMMENT REFERENCES

The Boulders Homeowners' Association ("BHOA"), by and through undersigned counsel, submits this Response to Wind P1 Mortgage Borrower, L.L.C.'s ("Resort") Objection to Admission of Public Comments as Evidence and Motion to Strike Public Comment References From Recommended Order and Opinion (sic) ("Motion to Strike"). BHOA does not believe that the Arizona Corporation Commission ("Commission") has treated the public comment received in this matter as evidence, nor does the Recommended Opinion and Order's ("ROO") recitation of such public comment indicate that the ROO relies on such comment as the basis for its recommendation. Rather, the evidentiary record in this matter (including the facts to which the Resort stipulated) overwhelmingly supports the ROO's recommendation to order closure of the Boulders Wastewater Treatment Plant (the "Treatment Plant" or "Plant").

I. BACKGROUND

The Commission's rules expressly permit any consumer to appear at a proceeding and make a statement on his or her own behalf. A.A.C. R14-3-105(C). Many customers of BMSC have availed themselves of this opportunity by filing written statements or attending the hearing in this proceeding to make oral statements. The ROO makes

1 reference to a number of such statements from consumers, and specifically recognizes
2 that public comment is not evidence. ROO at 45. In addition to its reference to public
3 comment, the ROO sets forth the evidence in the record supporting an order to close the
4 Treatment Plant.

5 **II. THE EVIDENTIARY RECORD CONTAINS SUBSTANTIAL EVIDENCE**
6 **TO SUPPORT AN ORDER TO CLOSE THE PLANT.**

7 The evidentiary record in this proceeding contains abundant evidence supporting a
8 plant closure order. Most notably, the Stipulation of Facts, admitted as Exhibit BHOA-6
9 at the May 8, 2012 hearing (attached hereto as Exhibit A) (the “Stipulation”), provide
10 ample support for the Commission to order that the Treatment Plant be closed. All the
11 parties at the hearing, including the Resort, stipulated to the admission of the Stipulation.
12 May 12, 2012 Tr. at 30-31. The ROO specifically recites 8 of the 17 factual statements
13 from the Stipulation in support of its recommendation. ROO at 44. The Stipulation
14 includes the fact that more than 500 customers, including residents within the Boulders
15 and others, have expressed support for closing the Plant. Stipulation No. 16.

16 In addition, at the 2009 Hearing in Phase 1 of this proceeding BHOA witness Les
17 Peterson provided sworn testimony regarding the extent of odors being experienced by
18 residents of and visitors to the Boulders, and the history of the Treatment Plant. Exh.
19 BHOA-4 at 2-5. Finally, the Resort’s own witnesses testified of their own experience
20 with odor issues from the Treatment Plant. Exh. W-1 at 4 (Madden); May 8, 2012 Tr. at
21 95-96 (Hunter).

22 Where the evidentiary record contains reasonable evidence to support the
23 Commission’s decision, the decision will be upheld on appeal. *Ariz. Water Co. v. Ariz.*
24 *Corp. Comm’n*, 217 Ariz. 652, 656 ¶ 10, 177 P.3d 1224, 1228 (App.2008). The
25 Commission’s recitation of comments received from the public does not detract from the
26 weight of the evidentiary record that supports closure of the Plant.

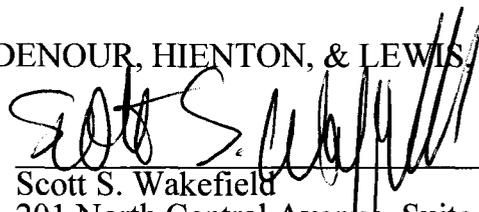
1 The public comments to which the ROO refers, and the reference to which the
2 Resort objects, concern the odors from the Treatment Plant. The Resort's objection to the
3 recitation of public comment in the ROO is curious, because the Resort never offered any
4 evidence that the Treatment Plant does not emit offensive odors. Rather, the Resort
5 supported the admission of evidence regarding such odors by stipulating to the Stipulation
6 of Facts, a number of which demonstrated the frequency, severity and lifestyle impacts of
7 the odors experienced by customers. Stipulation of Facts, Nos. 5-8, 12. In addition, one
8 of the facts included in the Stipulation is that 500 customers of BMSC expressed support
9 to close the Treatment Plant.

10 **III. CONCLUSION**

11 The Commission should deny the Resort's Motion to Strike. The Commission's
12 Rules expressly permit customers to make statements to the Commission concerning
13 matters before it. The fact that the Commission might refer to such comments in its
14 written decision does not diminish the weight of the evidence admitted in the record in
15 support of the Commission's resolution of a matter. Here, there is overwhelming
16 evidence in the record that customers experience odors from the Plant, and that customers
17 support closure of the Plant. The evidentiary record supports the ROO's recommendation
18 to order closure of the Treatment Plant, regardless of whether the Commission's decision
19 recounts some of the comments made by members of the public.

20 Dated this 15th day of February, 2013.

21 RIDENOUR, HENTON, & LEWIS, P.L.L.C.

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EXHIBIT A

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BEFORE THE ARIZONA CORPORATION COMMISSION

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GARY PIERCE, Chairman
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP
BRENDA BURNS

IN THE MATTER OF THE
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NO. DOCKET NO. SW-02361A-08-0609
STIPULATION OF FACTS

The Boulders Homeowners' Association ("BHOA") and Black Mountain Sewer Corporation ("Black Mountain" or "Company") (collectively, the "Stipulating Parties") by and through undersigned counsel, submit the following Stipulation of Facts. The Stipulating Parties believe that the facts included herein are undisputed. This Stipulation of Facts is being offered in lieu of testimony from BHOA.

1. In the midst of the Boulders residential community sits the Boulders Wastewater Treatment Plant (the "Treatment Plant") that was originally constructed in 1969.

2. The Treatment Plant sits less than 100 feet from three homes, and within 1,000 feet of the Treatment Plant there are 200-300 homes and dining and conference facilities of the Resort.

3. The Treatment Plant is permitted to treat 120,000 gallons per day of wastewater.

4. The Treatment Plant treats about 20 percent of the Company's total wastewater flows.

BHOA-6

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

7 6. Complaints from residents regarding odors from the Treatment Plant appear
8 more frequent from October through April.

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

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

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

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

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

24 12. It is not feasible to completely eliminate odor and noise from the operation
25 of the Treatment Plant.

26

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By


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