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TRANSMISSION LINE SITING COMMITTEE

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COMMISSIONERS

2005 JUL -7 P 2: 37

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Arizona Corporation Commission

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CASE NO. 126

DOCKET NO. L-00000B-04-0126

IN THE MATTER OF THE APPLICATION OF SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT ON BEHALF OF ITSELF AND ARIZONA PUBLIC SERVICE COMPANY, SANTA CRUZ WATER AND POWER DISTRICTS ASSOCIATION, SOUTHWEST TRANSMISSION COOPERATIVE, INC. AND TUCSON ELECTRIC POWER IN CONFORMANCE WITH THE REQUIREMENTS OF ARIZONA REVISED STATUTES SECTION 40-360, et. seq., FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AUTHORIZING CONSTRUCTION OF THE PINAL WEST TO SOUTHEAST VALLEY/BROWNING PROJECT INCLUDING THE CONSTRUCTION OF TRANSMISSION LINES FROM PINAL WEST TO THE BROWNING SUBSTATION AND OTHER INTERCONNECTION COMPONENTS IN PINAL AND MARICOPA COUNTIES, ARIZONA.

STAFF'S RESPONSE TO REQUESTS FOR REVIEW

Staff Supports the Siting Committee's Decision.

Staff of the Utilities Division ("Staff") of the Arizona Corporation Commission ("Commission") hereby responds to the Requests for Review filed by the intervenors Save Our Valley Association ("SOVA") and Walker Butte *et al* ("Walker Butte"). Staff respectfully requests that this Commission deny the requests and grant the Certificate of Environmental Compatibility ("CEC") issued by the Power Plant and Transmission Line Siting Committee ("Committee") for the reasons set forth below. The Committee's grant of a CEC to Applicant(s) is supported by the record, which demonstrates the need for adequate, economical and reliable transmission of electricity in accordance with A.R.S. § 40-360.07(B).

The SOVA Request for Review alleges that the Siting Committee failed to properly consider its proposed route. However, the Committee's decision not to take a vote on SOVA's proposed alternate route is supported by the record. Tr. 4047:2-8. Additionally, Walker Butte's

1 review request and attack against the decision-making integrity of the Siting Committee is
2 unfounded, especially considering the entire record before the Committee, which included 17
3 hearing days and 13 intervenors' presentations and the Committee's deliberations.

4 Standard of Review

5 The Committee has the statutory authority to consider an application, and impose
6 reasonable conditions upon a CEC it issues. A.R.S. § 40-360.06(A). In reaching its decision on
7 an application, it is required to consider various factors identified in A.R.S. § 40-360.06. These
8 factors cover a broad range of areas, including but not limited to the project's impact on the
9 environment and its technical practicability.

10 A party dissatisfied with the Committee's decision may request review of the decision by
11 the Commission. By statute, the Commission reviews the record before the Committee, considers
12 the same factors listed in A.R.S. § 40-360.06 and balances the broad public interest with the need
13 for an adequate, economical and reliable energy supply of electric power with the desire to
14 minimize the effect thereof on the environment and ecology of the state. A.R.S. § 40-360.07(B).
15 Additionally, even without the filing of a Request for Review, the Commission reviews the
16 record on its own accord. When the Commission votes on the Committee's recommended CEC
17 at an Open Meeting, the Commission determines whether the project is in the public interest by
18 meeting the need for an adequate, economical and reliable supply of electric power balanced
19 with its effect on the environment and ecology of the state. A.R.S. § 40-360.07(B).

20 Both SOVA and Walker Butte's Requests for Review argue that because they provided
21 evidence in support of their positions on these various factors, the Siting Committee wrongfully
22 denied their respective proposed routes. Both these parties' positions miss the point. Cherry-
23 picking the record does not advance either parties' requests to overturn the Siting Committee's
24 decision.

25 SOVA Request for Review

26 Although SOVA views the Committee's actions as being non-responsive to its proposed
27 route, Staff views the Committee's vote in Area A as a reasoned determination on Staff's
28 reliability concerns. The Committee's deliberation for Area A was thorough and arrived at a

1 Committee consensus without significant dissenting discussion. The idea that the Committee was
2 anything but reasonable in its consideration of the issues involved in Area A even goes against
3 SOVA's own representation. "But again, I want to reiterate the appreciation of SOVA and its
4 members for the Committee's attention throughout, and your consideration of that proposal."
5 Larry Robertson, Tr 4064:7 to 4064:10; Tr. 4047:10-16. SOVA also complains that the Siting
6 Committee was not in full attendance at all times. However, as noted by Siting Chair Laurie
7 Woodall at the first day of hearing in this case "he (Mr. Rasmussen) like every other member
8 who is absent for a portion of the hearing or an entire day, will get a copy of the transcript, which
9 our fine court reporter is preparing for us. And folks, we do review those." Tr. 8:3-10.

10 The Committee vote adopting the Area A route was unanimous. On April 15, 2005 the
11 issue of whether to consider SOVA's route was before the Committee. No committee member
12 even supported a motion to consider the SOVA route versus other Area A routes.

13 CHMN. WOODALL: I will at this time inquire if there is anyone who wishes
14 to move to consider the SOVA route as part of the CEC.

15 (No response.)

16 CHMN. WOODALL: I hear no motion, and accordingly, Mr. Robertson, I
17 believe the SOVA route has been rejected.

18 Tr. 4047:2-8

19 Staff would also like to note its objection to SOVA's characterization of Staff and SRP as
20 not being able to "leave the nineteenth and early twentieth centuries and embrace proven, cost-
21 saving modern technology." SOVA Review, p. 8. In reply, Staff believes that failure to
22 perpetuate historical engineering practices is not the equivalent of failing to embrace modern
23 technology. Staff has made all of its recommendations in light of appropriate engineering
24 standards and circumstances that have evolved within the past few years, including such events
25 as post September 11, 2001, the Northeast blackout of August 14, 2003 and the Arizona
26 Westwing disturbance of June 14, 2004. These types of new contingencies that must now enter
27 into Staff's recommendations were explained to the Committee and intervenors during the
28 hearing. Tr. 3450: 9-19.

1 Walker Butte's Attack Against Siting Committee Members is not Supported by the Record

2 Walker Butte alleges that Siting Committee members Ray Williamson, Mike Whalen,
3 Sandie Smith and Mike Palmer abused their discretion by relying on "extraneous consideration"
4 when voting in Area C. (Walker Butte Review at 2). Walker Butte then cites to certain references
5 in the record. (Id. at 3-5). However, review of these references and the record as a whole
6 demonstrates that Walker Butte's allegations against the individual Committee members are
7 unfounded.

8 Even assuming for purposes of argument that some irregularities existed (and none did in
9 this matter), the mere presence of procedural irregularities does not require setting aside the
10 decision of the Committee, unless a party is actually prejudiced. Walker Butte has not
11 demonstrated any such prejudice. *Pavlik v. Chinle Unified School District*, 195 Ariz. 148, 157,
12 958 P.2d 633, 642 (App. 1999). No transcript reference cited by Walker Butte provides any
13 reason to assume that the mentioned Committee members (or any other Siting Committee
14 member) did not fairly consider evidence proposed by the parties.

15 In this case, the record includes a 17-day hearing before the Siting Committee (plus an
16 additional three days that were spent touring the proposed routes). There are volumes of
17 transcripts, extensive comments by members of the public, testimony by numerous witnesses,
18 and the Committee's deliberations. In the context of this voluminous record, the selected
19 Committee members' questions and comments do not indicate any animosity towards Walker
20 Butte, nor do they show any favoritism toward other parties. At most, they reflect professional
21 concerns by Siting Committee members about the issues before the Siting Committee under
22 A.R.S. § 40-360.06.

23 Walker Butte's position is inconsistent with the law because it assumes the worst about
24 the selected Committee comments. To the contrary, administrative officers are presumed to be
25 unbiased. *Withrop v. Larkin*, 421 U.S. 35, 47 (1975) (noting that the general rule is that
26 government officials have a "presumption of honesty and integrity" that is a "difficult burden of
27 persuasion" to overcome); *Martin v. Super. Ct.*, 135 Ariz. 258, 260, 660 P.2d 859, 861 (1983)
28 (holding that administrative hearing officers are assumed to be fair); *Ison v. Western Vegetable*

1 *Distributors*, 48 Ariz. 104, 119, 59 P.2d 649, 656 (1936) (stating that “we must assume that [the
2 governor] will choose honest, intelligent, and competent [industrial] commissioners.” Further, a
3 party asserting bias has the burden of rebutting the presumption of fairness). *Pavlik*, at 152, 958
4 P.2d at 637.

5 The general standard for evaluating the bias of an administrative officer acting in a
6 legislative capacity is the “irrevocably closed mind” test. *See United States v. Morgan*, 313 U.S.
7 409, 421 (1941) (noting that an administrative decision maker’s public expression of strong
8 opinions on matters at issue before him “did not unfit him for exercising his duty”). A party
9 establishes administrative bias only when “there has been a clear and convincing showing that
10 the agency member has an unalterably closed mind on matters critical to the disposition of the
11 proceeding.” *Association of National Advertisers v. Federal Trade Commission*, 627 F.2d 1151,
12 1170 (D.C. Cir. 1979); *see also Tennessee Cable Television Ass’n.*, 844 S.W.2d 165 (noting that
13 “bias in the form of a crystallized point of view about issues is rarely, if ever, sufficient to require
14 an agency member’s disqualification”).

15 None of the Committee members’ comments or actions referred to by Walker Butte meet
16 the standard necessary to demonstrate an irrevocably closed mind. In *Association of National*
17 *Advertisers*, the Chairman of the FTC had repeatedly - in a speech, in newspaper and magazine
18 interviews, and in a television appearance – supported a ban on certain types of advertising
19 aimed at children. Nonetheless, the court found that “he remained free, both in theory and in
20 reality, to change his mind upon consideration of the presentations made by those who would be
21 affected.” 627 F.2d at 1172.

22 In these kinds of proceedings, Staff believes the Siting Committee and the Commission
23 act both legislatively and adjudicatively in determining siting matters. Staff’s position is based
24 on the fact that decisions are issued by the Siting Committee and Commission that reflect both
25 policy and action on an individual CEC application. However, even if a Siting Committee
26 proceeding is considered solely an adjudicative proceeding, Arizona courts have adopted a
27 combination test in adjudicative cases: bias may be shown by an “irrevocably closed mind” or by
28 “prejudgment of the specific facts that are at issue.” *Havasu Heights Ranch and Development*

1 *Corp. v. Desert Valley Wood Products, Inc.*, 167 Ariz. 383, 387, 807 P.2d 119, 1124 (App. 1990);
2 *see also City of Phoenix v. 3613 LTD*, 191 Ariz. 58, 63, 952 P.2d 296, 301 (App. 1997) (holding
3 that member of liquor board did not have an irrevocably closed mind despite inappropriate
4 remarks and apparent lack of understanding of hearing procedures); *Industrial Comm'n v. Chuck*
5 *Westenburg Concrete Contractors, Inc.*, 193 Ariz. 260, 267-268, 972 P.2d 244, 251-52 (App.
6 1998). None of the Committee members' questions and comments establishes prejudgment of
7 specific issues.

8 Additionally, rejection – even total rejection – of a party's views does not by itself
9 impugn the integrity or competence of the trier of fact. *NLRB v. Pittsburgh S.S. Co.*, 337 U.S.
10 656 660 (1949). In *Pittsburgh*, a hearing officer had found all company witnesses to be dishonest
11 and all union witnesses to be trustworthy. Despite this one-sidedness, the Court upheld the
12 NLRB's decision after reviewing the transcript and concluding that the record showed a
13 thoughtful and appropriate evaluation of the facts. *Id.*

14 A decision-maker may develop opinions about a party based upon his exposure to the
15 evidence in the record. Courts recognized that a decision-maker can overcome these feelings and
16 properly perform his duties. *See Withrow*, 421 U.S. at 53-55; *United States v. Grennel Corp.*, 384
17 U.S. 563, 583 (1996). The record demonstrates that all Committee members properly performed
18 their duties. Considering the length and complexity of these proceedings, it would be
19 unreasonable to expect any Siting Committee member to be completely without opinion. The
20 record shows that the entire Siting Committee gave thoughtful and careful consideration to this
21 case.

22 Other Considerations

23 Staff feels the Committee's decision in every aspect of this case is supported by the
24 evidence and that both requests for reviews are without legal merit. However, if the Commission
25 chooses to reconsider routes for this CEC, Staff would like to raise certain reliability concerns
26 not specifically addressed in the review requests. Staff takes this opportunity to explain its
27 testimony and why it believes that some extremely vital opportunities were missed in the CEC as
28 passed by the Committee. The Committee selected the southern route in Area B. Staff believes

1 that had the northern route in Area B been chosen instead of the southern route, then current and
2 future reliability concerns could have been better addressed. For example, Staff testified that the
3 northern Area B route would help solve interconnective issues with Desert Basin and Sundance
4 power plants. Tr. 3490:19-21. Staff also testified that if the southern route in Area B was chosen,
5 a northern route would still be needed - and built - to serve future needs. Tr. 3452:22-15
6 Committee Members Ray Williamson, Wayne Smith and Mike Whalen commented on the
7 significance of this issue and effectively articulated the merits of siting the northern route now
8 and the southern route later. Tr. 4190-4220.

9 Moreover, Staff's testimony made it clear that it did not support the "backwards C" in
10 Area C for a variety of reasons, including that Coolidge does not need additional transmission
11 lines, as it already has seven in its backyard. Tr. 3485:11, 15-16. By avoiding future
12 developments, the "backwards C" fails to "serve the system in any fashion" (Tr. 3485:19) and
13 leaves one of the largest active developments in northern Pinal County – Anthem at Merrill
14 Ranch – without sufficient access to needed transmission infrastructure. It does not appear to
15 Staff that this is the most efficient or desirable result under the circumstances presented on the
16 record.

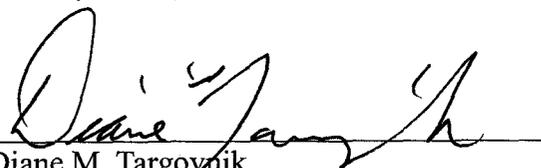
17 Conclusion

18 Based upon the foregoing and the record before the Siting Committee, Staff believes that
19 a balancing of the public interest concerning the environment and the need for adequate,
20 economic and reliable electric service supports granting the CEC issued by the Committee to
21 Applicant(s) for the project. However, if the Commission considers modifying the CEC, Staff
22 requests that the reliability matters discussed above concerning Staff's preference for the

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1 northern route in Area B, as well as the elimination of the "backwards C" for Area C, also be
2 considered by the Commission.

3
4 RESPECTFULLY SUBMITTED this 7th day of July 2005.

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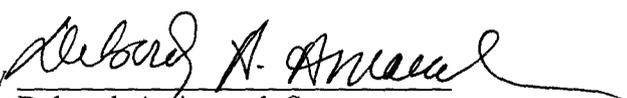
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