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JUN 25 2007

KRISTIN K. MAYES
Commissioner

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nr

GARY PIERCE
Commissioner

In the Matter of the Application of
Southern California Edison Company
And Its Assignees In Conformance With
The Requirements of A.R.S. § 40-252,
For An Amendment of ACC Decision
Nos. 51170 And 49226 Or, In The
Alternative, A Declaration of No
Substantial Change.

Docket No. E-20465A-06-0457

APPLICATION FOR REHEARING
AND RECONSIDERATION

I. INTRODUCTION

Pursuant to A.R.S. § 40-253 and A.A.C. R14-3-111 and, to the extent applicable,
A.R.S. § 40-360.07.C, Southern California Edison Company ("SCE") respectfully applies
for rehearing and reconsideration of Arizona Corporation Commission ("Commission")
Decision No. 69639 ("the Decision") for the reasons set forth below.

II. BACKGROUND

On August 3, 1978, the Commission approved a decision of the Arizona Power
Plant and Transmission Line Siting Committee ("Line Siting Committee" or "Committee")
to issue a Certificate of Environmental Compatibility ("CEC") authorizing SCE to build a
500kV transmission line between the Palo Verde Nuclear Generating Station and the

1 Devers substation – the DPV1 line (Line Siting Case No. 34, Decision No. 49226).
2 Subsequently, on February 1, 1980, the Bureau of Land Management (“BLM”) issued a
3 federal right-of-way grant for the DPV1 route on BLM land. Two segments of the DPV1
4 route approved by the BLM differed from the route approved by the Commission.

5 As a result, SCE filed a new application for a CEC requesting that the two new
6 segments of the route be approved. On July 23, 1980, the Commission approved a new
7 CEC issued by the Committee in Decision No. 51170 (Line Siting Case No. 48). In that
8 decision, the Commission, based on the recommendation of the Committee, approved the
9 two new route segments for DPV1.

10 SCE constructed 382 transmission towers in Arizona as part of the DPV1 project.
11 Fourteen, approximately 3% of the total number of Arizona towers, were double-circuit
12 towers. There is no mention in Decision Nos. 49226 or 51170 of the type of towers to be
13 used in construction of the DPV1 transmission line.

14 In May 2006, SCE filed an application for a CEC to construct the Devers to Palo
15 Verde No. 2 transmission line (“DPV2”). Line Siting Case No. 130. In that application,
16 SCE proposed that DPV2 use the second circuit on the 13 double-circuit towers
17 constructed in Copper Bottom Pass as part of DPV1. The BLM anticipated SCE using
18 these double-circuit towers for DPV2. This would minimize environmental impacts
19 because no new structures or construction would be necessary for DPV2 in the Copper
20 Bottom Pass area.

21 On June 13, 2006, the Chairman of the Line Siting Committee sent an electronic
22 communication to all parties of record in Line Siting Case No. 130, identifying a
23 procedural issue involving the prior decisions issued in Line Siting Case Nos. 34 and 48.
24 As a result, on July 10, 2006, SCE filed an application, pursuant to A.R.S. § 40-252, for a
25 declaration of no substantial change to the authorization granted in Decision No. 51170
26 issued in Line Siting Case No. 48 or, in the alternative, an amendment of that decision to

1 authorize the construction of the 13 double-circuit structures in Copper Bottom Pass.¹
2 SCE subsequently amended that application to address the decision issued in Line Siting
3 Case No. 34, Decision No. 49226, and to include a fourteenth double-circuit structure
4 constructed at the Palo Verde Nuclear Generating Station.

5 At an Open Meeting held on October 17, 2006, the Commission asked the Line
6 Siting Committee to serve as its hearing officer to make recommendations on whether the
7 use of the double-circuit structures constituted a substantial change, whether the CEC
8 should be amended and whether other remedies were appropriate.

9 The Line Siting Committee held hearings on December 7, 2006, January 8, 2007,
10 and February 27, 2007. On February 27, 2007, the Line Siting Committee recommended
11 by a 9-to-1 vote to amend Decision No. 51170 (and to the extent necessary, Decision No.
12 49226) to authorize the 14 double-circuit towers and to impose no fine or other penalty
13 given the facts and circumstances of the case.

14 In its June 6, 2007 Decision, the Commission denied SCE's application to amend,
15 amended Decision No. 51170 (and to the extent necessary, Decision No. 49226) to
16 authorize the 14 double-circuit towers, ordered SCE to pay a fine of \$4.8 million, and
17 ordered SCE to remove equipment from the existing 14 double-circuit towers that could
18 energize a second circuit.

19 Although the Commission ordered SCE to pay a fine of \$4.8 million, Decision No.
20 69639 does not mention the statutory basis for the fine amount. Based on the arguments
21 of the Commission Utility Division Staff ("Staff"), SCE presumes that it is A.R.S. § 40-

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25 ¹ Despite the fact that Decision No. 51170 is silent on the type of tower to be used and the fact that SCE believed the
26 use of the double-circuit towers was not a substantial change, to insure clarity about the use of the towers for DPV2,
SCE included an amendment of the decision as one of its alternatives for relief in response to the Line Siting
Committee Chairman's procedural question.

1 424.² However, there is no finding of contempt in the Decision and the notice for the
2 hearing did not mention that the hearing was to determine whether SCE was in contempt.

3 III. DISCUSSION

4 A. Decision Nos. 49226 and 51170 Lack Sufficient Specificity to Be the 5 Basis for a Finding of Contempt.

6 Decision Nos. 49226 and 51170 did not specifically prohibit SCE from constructing
7 double-circuit towers.³ An unspecific order, which fails to apprise a party of the
8 prohibited conduct, cannot be used to establish that a party is in contempt. *See In re Dual-*
9 *Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993) (defining
10 “[c]ivil contempt” as a “party’s disobedience to a *specific and definite* court order by
11 failure to take all reasonable steps within the party’s power to comply.”) (emphasis
12 added). If an order “does not clearly describe prohibited or required conduct, it is not
13 enforceable by contempt.” *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996). “Thus, to
14 support a contempt motion, the order alleged to have been disobeyed must be *sufficiently*
15 *specific.*” *Id.* at 472 (emphasis added).

16 SCE may be punished for contempt only if the decisions were clear and specific
17 and left no doubt that double-circuit towers were prohibited. In this case, Decision Nos.
18 49226 and 51170 do not specifically preclude the use of double-circuit towers. No tower
19 types were specified or described. In fact, the term “tower” was not used in either order.
20 Accordingly, the decisions failed to apprise SCE of the alleged prohibited conduct and
21 cannot support a finding of contempt.

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25 ² In its Brief on Remedies for Violations of Commission Decisions, Statutes, and Rules, Staff “did not recommend a
fine under A.R.S. § 40-425” (p 12).

26 ³ In the Decision, the Commission also found that SCE violated A.R.S. § 40-360.07. It too does not prohibit double-
circuit towers. *See* Section III.D.

1 **B. The Fine Exceeds the Legal Limits Under Section 40-424.**

2 Even assuming that construction of the double-circuit towers justified a finding of
3 contempt for violating a statute or a Commission order, the fine assessed exceeds the
4 statutory maximum. Section 40-424, in plain language, limits the maximum fine to
5 \$5,000. Although it allows for remedies pursuant to other statutes (such as A.R.S. § 40-
6 425), fines pursuant to A.R.S. § 40-424 expressly are limited to a total of \$5,000, not
7 \$5,000 “per day.”

8 It is a simple, straightforward maxim that penalty provisions must be strictly
9 construed. *See State v. Davis*, 830 S.W.2d 27, 29 (Mo. Ct. App. 1992) (“Penal provisions
10 of a statute, or of a statute penal in nature are always strictly construed, and can be given
11 no broader application than is warranted by its plain and unambiguous terms.”) (quoting
12 *City of Charleston v. McCutcheon*, 164, 227 S.W.2d 736, 738 (Mo. 1950)). Attempts to
13 interpret the statute to allow continuing violations run contrary to both the plain language
14 of the statute and case law. In *Van Dyke v. Geary*, the U.S. District Court for Arizona
15 concluded that Chapter 90 of the Laws of the First Legislature of the State of Arizona
16 (which included the forerunners to A.R.S. §§ 40-424 and 40-425) was unconstitutional
17 because it allowed continuing accrual of penalties. *See* 218 F. 111, 121 (D. Ariz. 1914).
18 Subsequently, Arizona redrafted A.R.S. § 40-425. Where it once had specifically
19 authorized continuing fines for multiple day violations, it now states that violations
20 continuing day-to-day are considered to be “one offense.” A.R.S. § 40-424 cannot be read
21 today in a manner inconsistent with its plain language, A.R.S. § 40-425, and the *Van Dyke*
22 decision.

23 If the Commission believes that it should be authorized to impose larger fines for
24 contempt, it must ask the legislature to amend the statute.

25 Even assuming that A.R.S. § 40-424 allowed cumulative penalties, the Decision’s
26 calculation of the time of noncompliance also is legally incorrect. Fines for contempt only

1 accrue starting with a finding of contempt. *See, e.g., Shuffler v. Heritage Bank*, 720 F.2d
2 1141, 1148-49 (9th Cir. 1983). Alternatively, if penalties started to accrue at the time
3 construction of the double-circuit towers commenced, the time period of noncompliance
4 ended once construction was complete. *United States v. Cinergy Corp.*, 397 F. Supp. 2d
5 1025, 1030 (S.D. Ind. 2005) (“failure to obtain a preconstruction permit is a discrete
6 violation that occurs at the time of construction”) (quoting *United States v. Southern*
7 *Indiana Gas & Electric Co.*, 2002 WL 1760752, at *4 (S.D. Ind. July 26, 2002) (internal
8 citations omitted)).

9 **C. SCE Is Not Subject to A.R.S. § 40-425 and the Penalty Exceeds the**
10 **Statutory Limit.**

11 As noted in Section II., SCE assumes that the claimed statutory basis for the \$4.8
12 million penalty is A.R.S. § 40-424. However, to the extent that the Decision relies on
13 A.R.S. § 40-425: (1) SCE is not a public service corporation subject to that statute, (2)
14 SCE did not neglect “to obey or comply with any order . . . of the Commission,” and (3)
15 the penalty exceeds the statutory limit.

16 **1. SCE is not an Arizona public service corporation.**

17 Under A.R.S. § 40-425 and the Arizona Constitution, Article 15, Section 16, the
18 Commission has authority to penalize public service corporations up to \$5,000 for each
19 offense, “but violations continuing from day to day are one offense.” Arizona’s
20 Constitution defines a public service corporation as a corporation “other than municipal
21 engaged in furnishing gas, oil, or electricity for light, fuel, or power. . . .” ARIZ. CONST.
22 art. 2, §12. Meeting this textual definition is just the first step to determine whether an
23 entity is a public service corporation. The Commission must then use an eight-factor test
24 to determine whether an “entity’s business and activity are such ‘as to make its rates,
25 charges, and methods of operations a matter of public concern. . . .’” *Sw. Transmission*
26 *Coop., Inc. v. Arizona Corp. Comm’n*, 213 Ariz. 427, 430, 142 P.3d 1240, 1242 (Ct. App.

1 2006) (quoting *Natural Gas Serv. Co. v. Serv-Yu Coop.*, 70 Ariz. 235, 237-38, 219 P.2d
2 324, 325-26 (1950)).

3 Those eight factors are:

- 4 1. What the Corporation actually does.
- 5 2. A dedication [of the entity's property] to public use.
- 6 3. Articles of incorporation, authorization, and purposes.
- 7 4. Dealing with the service of a commodity in which the public has been
8 generally held to have an interest.
- 9 5. Monopolizing, or intending to monopolize the territory with a public service
10 commodity.
- 11 6. Acceptance of substantially all requests for service.
- 12 7. Service under contracts and reserving the right to discriminate is not always
13 controlling.
- 14 8. Actual or potential competition with other corporations whose business is
15 clothed with public interest.

16 *Natural Gas*, 70 Ariz. at 237-38, 219 P.2d at 325-26 (internal citations omitted).

17 The purpose of this fact-intensive inquiry is to avoid subjecting to Commission
18 regulation businesses "in which the public might be incidentally interested." *Arizona*
19 *Corp. Comm'n v. Nicholson*, 108 Ariz. 317, 321, 497 P.2d 815, 819 (1972) (internal
20 quotations omitted).

21 Two recent cases offer guidance on how to apply this eight-factor test. In the first,
22 the Arizona Court of Appeals found that Southwest Transmission Cooperative ("SWTC")
23 was a public service corporation. 213 Ariz. at 433, 142 P.3d at 1246. SWTC provided
24 wholesale transmission services between electric generation and distribution cooperatives.
25 Thus, SWTC provided a commodity in which the public has an interest. Beyond that and
26 critical to the court's conclusion was the fact that SWTC "deliver[ed] . . . the electricity on
which thousands of retail consumers rely." *Id.* at 432, 142 P.2d at 1245. Thus, SWTC's
actions affected "so considerable a fraction of the public that it is public in the same sense
in which any other may be called so." *Id.* The court relied on this same fact to find that
SWTC dedicated its property to public use. *Id.*

1 In *Southwest Gas Corporation v. ACC*, the court of appeals reached the opposite
2 conclusion and determined that El Paso Natural Gas (“El Paso”) was not a public service
3 corporation. 169 Ariz. 279, 288, 818 P.2d 714, 723 (Ct. App. 1991). The court based its
4 conclusion on two critical facts. First, the company had a “small static number of Arizona
5 direct sales customers, representing only three to five percent of its total sales.” *Id.* at 287,
6 818 P.2d at 722. Therefore, it could not be said that the company had dedicated its
7 property to public use in Arizona. Moreover, since the company was not seeking to enter
8 into further contracts for the sale of natural gas, and had not for several years, it was not
9 seeking to monopolize gas sales in Arizona, and it did not “accept substantially all
10 requests for service.” *Id.*

11 SCE’s operations are more analogous to El Paso’s than SWTC’s. Unlike SCE,
12 SWTC is based in Arizona, and it operates and maintains numerous power delivery
13 systems in the state. In addition, SWTC was created as a result of the Arizona Electric
14 Power Cooperative split, in which distribution services and transmission services were
15 divided between different entities. SWTC, therefore, can truly be said to be an integral
16 part of the electric infrastructure of Arizona, even if it does not engage in retail sales. SCE
17 is not similarly situated. In addition, like El Paso, any wholesale sales to Arizona utilities
18 and marketers make up a small fraction of SCE’s business. SCE is even further removed
19 than El Paso because it does not engage in direct sales to Arizona end users.

20 Under the eight-factor test, SCE is not an Arizona public service corporation.
21 SCE’s primary charge is to provide electricity in Southern California and its activities in
22 Arizona are incidental to that purpose. If every company that owns interstate transmission
23 lines in Arizona or sells into the wholesale power market where Arizona utilities may buy
24 power is an Arizona public service company, virtually all utilities within Western Electric
25 Coordinating Council (“WECC”) would be regulated by the Commission.

26

1 **2. SCE did not neglect to obey or comply with any order of the**
2 **Commission.**

3 As further discussed in Section III.A, Decision Nos. 49226 and 51170 did not
4 specifically prohibit SCE from constructing double-circuit towers, did not specify the
5 types of towers to be used, and did not use the term “towers.” Accordingly, SCE did not
6 fail or neglect to obey or comply with the decisions.

7 **3. Section 40-425 does not authorize continuing penalties.**

8 Section 40-425.B states “[e]ach violation is a separate offense, but violations
9 continuing from day to day are one offense.” Therefore, assuming that construction of 14
10 double-circuit towers constitutes 14 separate violations of Decision Nos. 49226 and
11 51170, the maximum penalty under A.R.S. § 40-425 would be \$70,000.

12 **D. SCE Did Not Violate A.R.S. § 40-360.07.A Because It Constructed**
13 **DPV1 on the Site Authorized by Its CEC.**

14 Under the plain language of A.R.S. § 40-360.07.A, no utility may construct a
15 transmission line until it has received a CEC “with respect to the proposed *site*. . .”
16 (emphasis added). This comports with the Legislature’s Declaration of Policy that
17 accompanied the enactment of the Line Siting Committee statutes, which states: “The
18 legislature therefore declares that it is the purpose of this article to provide a single forum
19 for the expeditious resolution of all matters concerning the *location* of electric generating
20 plants and transmission lines in a single proceeding. . .” Laws 1971, ch. 67, § 1 (emphasis
21 added).

22 SCE constructed DPV1 after receiving two CECs approving the proposed site,
23 which in this case was the transmission line route. The site approved and affirmed by the
24 Commission order was the precise route on which the line was constructed. As a result,
25 there was no violation of this statute.

26

1 **E. The Record Does Not Support a Finding that Construction of the 14**
2 **Double-Circuit Towers Violated a Commission Decision.**

3 **1. Decision Nos. 49226 and 51170 do not specify tower types.**

4 The construction of the double-circuit towers in Copper Bottom Pass did not violate
5 Commission Decision Nos. 49226 or 51170 because the decisions neither identify a
6 particular type of tower to be used in constructing the line nor prohibit the use of double-
7 circuit towers. In accordance with A.R.S. §§ 40-360.06.C and D, and 40-360.07.A,
8 Decision Nos. 49226 and 51170 contain a description of the proposed site, along with two
9 conditions. The term “tower” is not written in either of the concise decisions. The only
10 mention in the orders to “single-circuit” are found in SCE-prepared exhibits, which
11 provide maps of the proposed site and reference a “single circuit transmission line system”
12 in the maps’ legends. DPV1 as constructed by SCE is a single-circuit transmission line
13 system.

14 **2. The use of 14 double-circuit towers was not a substantial change.**

15 Even if the Commission decisions could be interpreted to presume single-circuit
16 towers, the construction of these 14 double-circuit towers did not constitute a substantial
17 change from those decisions and, therefore, did not violate the decisions.⁴ Accordingly,
18 no amendment of these decisions is necessary.

19 All parties agreed that the “substantial change” framework adopted by the
20 Commission in the *Whispering Ranch* decision (Line Siting Case 70, Decision No. 58793)
21 should be used to assess whether the use of double-circuit towers required a CEC
22 amendment or modification. In *Whispering Ranch*, the Commission held that whether a
23 change is substantial should be based on the facts of each particular case, using the tests

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25 ⁴ Staff bore the burden to prove that there was a substantial change. *See Travelers Ins. Co. v. Greenough*, 190 A.
26 129, 131 (N.H. 1937) (The “[b]urden of proof is not imposed according to priority in taking legal steps to determine
issues”). However, the Committee may have erroneously concluded that SCE bore that burden. The burden,
however, was Staff’s, and Staff did not meet it for the reasons stated herein.

1 set forth in the Administrative Procedures Act (A.R.S. § 41-1025). Decision No. 58793 at
2 25:1-4.

3 The three factors described in the Administrative Procedures Act for determining
4 substantial change are set forth below in paraphrased fashion to relate to a CEC change
5 rather than a rule change. The following analysis focuses on the 13 double-circuit towers
6 in Copper Bottom Pass. Staff acknowledged that the double-circuit tower at the Palo
7 Verde switchyard "probably does not need . . . some kind of amendment from this
8 Committee or the Commission." (Testimony of Steven Olea, Hearing Transcript at 233:4-
9 6).

10 Factor One: The extent to which persons affected understood that the initial CEC
11 would have affected their interest.

12 The fundamental question under this factor is: Which individuals had an interest in
13 the line if double-circuit towers were used and therefore would have participated but did
14 not because they did not understand that their interest was affected? The answer to that
15 question is that there were none.

16 The double-circuit towers in Copper Bottom Pass are located within a utility
17 corridor designated by the BLM, the land management agency for the federal land on
18 which the double-circuit towers are located. The BLM was well aware of the CEC process
19 and in fact, participated in the CEC hearings and authorized the use of double-circuit
20 towers in its amended right-of-way grant. The general public also was aware of the CEC
21 proceeding and had the opportunity to comment and intervene. Several members of the
22 public did.

23 Factor Two: The extent to which the subject matter of the proposed change is
24 different from the subject matter of the initial CEC.

25 In this case, the subject matter is identical, *i.e.*, authorization to construct a 500 kV
26 single-circuit transmission line on the site granted by the Committee, approved by the

1 Commission, and designated by the BLM. There was no voltage changed, no second
2 circuit energized, no site amended, or and no corridor widened.

3 Factor Three: The extent to which the effects of the change differ from the effects
4 of the initial CEC.

5 The Line Siting Committee did not consider the effects of double-circuit towers
6 versus single-circuit towers to be significant in this case. (Decision No. 69639, Findings
7 of Fact No. 34.)

8 In summary, under these circumstances, the double-circuit towers do not constitute
9 a substantial change using the Commission's *Whispering Ranch* framework.⁵ The towers
10 are in the existing, approved and designated corridor; the federal land management agency
11 had knowledge of, and consented to, the placement of the double-circuit structures; and
12 the use of the structures would reduce the ultimate environmental impact of future
13 transmission lines in the Copper Bottom Pass.

14 **F. The Fine is Not Supported by the Evidence.**

15 As acknowledged by the Staff and the Line Siting Committee, the burden of proof
16 is on the party seeking the fine. To impose a penalty or to find contempt, the Commission
17 and Staff must establish by clear and convincing evidence that SCE violated a specific and
18 definite order. *See FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999)
19 (noting that “[t]he moving party has the burden of showing by clear and convincing
20 evidence that the contemnors violated a specific and definite order of the court”); *Dep’t of*
21 *Banking & Fin. v. Osborne Stern & Co.*, 670 So. 2d 932, 935 (Fla. 1996) (applying a clear
22 and convincing standard to administrative fines because such fines “are penal in nature
23

24 ⁵ Similarly, the use of the double-circuit towers is not a substantial change under federal law. Under 40 C.F.R. §
25 1502.9(c)(1)(i), a federal agency must prepare a supplement to a final environmental impact statement if “[t]he
26 agency makes substantial changes in the proposed action that are relevant to environmental concerns.” In 1981, the
BLM issued the amended right-of-way without preparing a supplemental environmental impact statement. The BLM
could not have done so if the agency had concluded that the use of double-circuit towers was a substantial change.

1 and implicate significant property rights.”); *Beehive Tel. Co. v. Pub. Serv. Comm’n*, 89
2 P.3d 131 (Utah 2004).⁶

3 Staff did not meet its burden of proof that SCE was in contempt of a specific or
4 definite order and should pay a \$4.8 million fine.⁷

5 The Line Siting Committee, serving as the trier of fact in this case, after listening
6 and reviewing all the evidence, concluded that SCE did not act willfully or with evil intent
7 and that it was not appropriate to impose a fine or other remedy. The Commission
8 disregarded those findings in issuing Decision 69639.

9 The record does not support any fine.⁸ In particular, it should be noted that:

10 1. SCE consulted the BLM and the BLM approved construction of the thirteen
11 double-circuit towers built on federal land under its management.

12 2. The BLM had direct contact with the Line Siting Committee, which raises
13 the possibility that double-circuit towers may have been discussed directly by the BLM
14 and the Line Siting Committee.

15 3. No individuals were harmed by the use of the double-circuit towers. No
16 people lived near the towers and the land manager approved the towers. Even the Utility
17 Division Staff admits that the use of the fourteenth tower at the Palo Verde Nuclear
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19 ⁶ One jurisdiction requires the moving party to bear the burden of establishing contempt beyond a reasonable doubt.
20 *Farace v. Superior Court*, 196 Cal. Rptr. 297, 298-99, 148 Cal. (Ct. App. 1983) (stating that “[c]ivil contempt
21 proceedings are quasi-criminal because of the penalties which may be imposed . . . the contempt must be proved
22 beyond a reasonable doubt.”)

23 Staff’s penalty calculation was based on an assumption concerning the differing costs of single-circuit and double-
24 circuit towers. Given that double-circuit towers are more expensive than single-circuit towers, Staff was unable to
25 prove during the hearings how SCE might have benefited from spending more money. Not until its pleading dated
26 February 2, 2007, did Staff raise the question of whether these increased costs might have been included in SCE’s rate
base. Staff provided and sought no testimony on this point. Even assuming that these additional costs were included
in SCE’s rate base, the return on equity would be approximately 25% of the imposed fine of \$4.8 million. Open
Meeting Transcript at 6:13-15.

⁸ In support of this statement, SCE incorporates by reference the following: its Application dated July 10, 2006, its
Reply in Support of its Request dated August 18, 2006, its Amendment dated November 9, 2006, its Direct
Testimony filed November 29, 2006, its Brief on the Legal Standard for Substantial Change dated January 3, 2007, its
Proposed Findings of Facts, Conclusions of Law and Order dated January 26, 2007; and Hearing Transcript vols. 1-3,
and accompanying exhibits.

1 Generating Station makes operational sense and would not, by itself, be a basis for this
2 action.

3 4. SCE never connected, energized, or used the additional conductors and
4 associated equipment placed on one side of the double-circuit towers in Copper Bottom
5 Pass to transmit electricity.

6 5. SCE did not try to hide the fact that these double-circuit towers were
7 constructed. The towers have been up and visible for over 25 years. The towers were
8 disclosed in a 1987 filing with the Commission and the Line Siting Committee when SCE
9 initially sought approval for the DPV2 line. That CEC application (Line Siting Case No.
10 76) discussed the double-circuit towers. Copies of such applications are circulated to all
11 members of the Line Siting Committee and the Commission.⁹

12 6. Exhibit B of the CEC applications in Line Siting Cases Nos. 34 and 48 not
13 only provided drawings of double-circuit towers but also disclosed that such towers might
14 be used in the Copper Bottom Pass. The Staff states that the drawing of the double-circuit
15 towers should have been in Exhibit G rather than Exhibit B and that certain contested
16 language in Exhibit B was an explicit commitment by SCE to amend its application. SCE
17 respectfully submits that this is not a sufficient basis for a \$4.8 million fine. In fact, the
18 language identified by Staff also may be construed as disclosure that double-circuit towers
19 would be used.

20 7. SCE had different senior management and engineers who oversaw the
21 Project and testified in Line Siting Case Nos. 34 and 48. In Line Siting Case No. 34,
22 SCE's witnesses were Al Arenal, Vice President of SCE's Systems Development
23 Department; Gary Dudley, Environmental Engineer; and Larry Hinton, Transmission
24 Engineer. In Line Siting Case No. 48, SCE's witnesses were Glenn Bjorkland, Vice

25 ⁹ SCE also filed 10-year plans that identified these double-circuit towers. The 10-year plans tend to be reviewed by
26 the Commission Staff and are not routinely circulated to the Line Siting Committee or the Commissioners. The plans
are further evidence that SCE did not hide the double-circuit towers.

1 President of SCE's Systems Development Department; and Fred Klumb, Chief of
2 Transmission Design Engineering. The fact that different individuals were involved
3 should be viewed as a mitigating factor as suggested by Commissioner Mundell. (Open
4 Meeting Transcript at 81:4-10.)

5 8. Because Line Siting Case 34 explicitly identified the route for DPV1, SCE
6 recognized the need to seek an amendment of the decision to change the route. As a
7 result, when the BLM changed the route in 1980, SCE filed a new application (Line Siting
8 Case No. 48) to amend the route. Since the subsequent use of double-circuit towers was
9 not a route change and was not explicitly precluded, it was reasonable to assume that
10 another amendment was not necessary in 1981.

11 **G. The Commission's Order to Remove Certain Equipment from the**
12 **Double-Circuit Towers Is Not Supported by the Evidence.**

13 The Line Siting Committee determined that there was no basis for ordering the
14 removal of the equipment from the double-circuit towers. In addition to the evidence
15 discussed in Sections III.E and F, the evidentiary record shows that no parties have been or
16 will be harmed by the continued existence of this equipment on the double-circuit towers.
17 Conversely, some negative environmental impacts will be inevitable when removing the
18 equipment and other materials that otherwise cause no harm or damage. The existing
19 equipment cannot be connected or energized without subsequent regulatory approval.¹⁰

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24 ¹⁰ The Decision not only is contrary to the evidence, but also is outside the Commission's jurisdiction. Under A.R.S.
25 § 40-422, the Commission may seek mandamus or injunctive relief but must do so by bringing an action in Superior
26 Court. Accordingly, the Commission must bring an action in Superior Court to remove certain wires, conductors and
ancillary equipment from the double-circuit towers.

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H. The Remedies are Barred by the Doctrine of Laches.

Finally, remedies for the alleged violations are barred by the doctrine of laches. As stated by the Arizona Supreme Court in *Harris v. Purcell*, 193 Ariz. 409, 973 P.2d 1166 (1998):

Laches is the equitable counterpart of a statute of limitations. A claim is considered unenforceable in an action in equity where, under the totality of circumstances, the claim, by reason of delay in prosecution, would produce an unjust result.

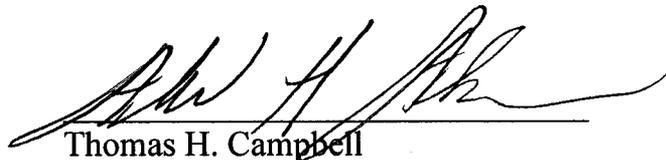
193 Ariz. at 410 n.2, 973 P.2d at 1167. This is a fitting case for the doctrine to apply. SCE constructed the double-circuit towers openly in 1981 and disclosed the towers to the Commission and the Line Siting Committee in its 1987 application seeking approval for the DPV2 line and in its 10-year plans. Under the Staff's methodology for calculating penalties, the requested fine actually increased due to the Commission's delay in seeking remedies. As such, this fine is barred under A.R.S. § 40-253 by the doctrine of laches.

IV. CONCLUSION

For the reasons set forth above, SCE respectfully requests that the Commission reconsider and rehear this matter to ensure an equitable result.

RESPECTFULLY SUBMITTED this 25th day of June, 2007.

LEWIS AND ROCA LLP



Thomas H. Campbell
Albert H. Acken
40 N. Central Avenue
Phoenix, Arizona 85004

Attorneys for Southern California Edison
Company

1 ORIGINAL and twenty-five (25) copies
2 of the foregoing filed this 25th day of
3 June, 2007, with:

4 The Arizona Corporation Commission
5 Utilities Division – Docket Control
6 1200 W. Washington Street
7 Phoenix, Arizona 85007

8 COPY of the foregoing hand-delivered
9 this 25th day of June, 2007, to:

10 Chairman Mike Gleason
11 The Arizona Corporation Commission
12 1200 W. Washington Street
13 Phoenix, Arizona 85007

14 Commissioner William A. Mundell
15 The Arizona Corporation Commission
16 1200 W. Washington Street
17 Phoenix, Arizona 85007

18 Commissioner Jeff Hatch-Miller
19 The Arizona Corporation Commission
20 1200 W. Washington Street
21 Phoenix, Arizona 85007

22 Commissioner Kristin K. Mayes
23 The Arizona Corporation Commission
24 1200 W. Washington Street
25 Phoenix, Arizona 85007

26 Commissioner Gary Pierce
The Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

1 Lyn Farmer, Chief Administrative Law Judge
2 Arizona Corporation Commission
3 1200 W. Washington Street
4 Phoenix, Arizona 85007

4 Keith Layton, Legal Division
5 Arizona Corporation Commission
6 1200 W. Washington Street
7 Phoenix, Arizona 85007

7

8

8 **COPY** of the foregoing mailed/served electronically
9 this 25th day of June, 2007, to:

10

10 Laurie A. Woodall, Chairman
11 Arizona Power Plant and Transmission Line Siting Committee
12 Office of the Attorney General
13 1275 W. Washington Street
14 Phoenix, Arizona 85007

14

14 Timothy M. Hogan, Executive Director
15 Arizona Center for Law in the Public Interest
16 202 E. McDowell Road
17 Phoenix, Arizona 85004-4533

17

18

19

20 Jayne Williams

21

22

23

24

25

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