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7 **BEFORE THE ARIZONA POWER PLANT
AND TRANSMISSION LINE SITING COMMITTEE**

8 IN THE MATTER OF THE APPLICATION
OF ARIZONA PUBLIC SERVICE
9 COMPANY, IN CONFORMANCE WITH
THE REQUIREMENTS OF ARIZONA
10 REVISED STATUTES §§40-360, *et seq.*, FOR
A CERTIFICATE OF ENVIRONMENTAL
11 COMPATIBILITY AUTHORIZING THE
TS-5 TO TS-9 500/230kV TRANSMISSION
12 LINE PROJECT, WHICH ORIGINATES AT
THE FUTURE TS-5 SUBSTATION,
13 LOCATED IN THE WEST HALF OF
SECTION 29, TOWNSHIP 4 NORTH,
14 RANGE 4 WEST AND TERMINATES AT
THE FUTURE TS-9 SUBSTATION,
15 LOCATED IN SECTION 33, TOWNSHIP 6
NORTH, RANGE 1 EAST, IN MARICOPA
16 COUNTY, ARIZONA

Docket No. L-00000D-08-0330-00138

Case No. 138

**INTERVENOR, SURPRISE GRAND
VISTA JV I, LLC'S LEGAL
MEMORANDUM RE CORRIDOR
WIDTH DETERMINATION**

17 At the hearing held on August 19, 2008, the Chairman requested certain of the parties
18 submit a Memorandum addressing the significance of a transmission line corridor designation
19 upon properties located within the designated corridor. This Memorandum is submitted on
20 behalf of Surprise Grand Vista JV I, LLC ("Surprise Grand Vista") in response to that request.

21 **I. INTRODUCTION.**

22 The impact of a utility corridor designation for the prospective location of a
23 transmission line may be summarized in three paragraphs:

24
25 Arizona Corporation Commission
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- 1 • There is no dispute that properties located within a transmission line corridor
2 are effectively rendered unmarketable and undevelopable until such time as
3 the corridor is abandoned or reduced in size to reflect the width of the actual
4 easement required by the utility service provider.
- 5 • Various statutes, authorities and court decisions throughout the United States
6 have recognized that the designation of such corridors-- and, specifically, the
7 potential for condemnation of property within a designated public project
8 area -- results in a substantial diminution in the value of the impacted
9 properties (often referred to as "condemnation blight"). In some states, this
10 impact requires the payment of just compensation to the affected landowners.
- 11 • In Arizona, however, it is clear that a corridor designation -- while having the
12 same adverse value and marketability impact as in any other state -- does not
13 result in a legally compensable injury and does not give rise to a claim for
14 just compensation under the Arizona Constitution (Art. 2, Section 17). Thus,
15 in this State, it is imperative that any designated and approved corridor be
16 limited to the narrowest width reasonably possible so as to avoid unnecessary
17 and uncompensated injury to affected landowners.

18 Each of the foregoing issues is discussed further below, with citations to relevant authorities
19 provided.

20 **II. PROPERTIES LOCATED WITHIN A DESIGNATED AND APPROVED
21 TRANSMISSION LINE CORRIDOR ARE EFFECTIVELY RENDERED
22 UNMARKETABLE AND UNDEVELOPABLE.**

23 The first witness in this proceeding was Michael DeWitt, the Senior Project Manager
24 Transmission and Facility Siting, for Applicant Arizona Public Service Company. Mr. DeWitt
25 candidly conceded, during the course of cross-examination on August 19, 2008, that in his
26 experience, the location of property within a designated transmission line corridor effectively
renders that property unmarketable and undevelopable. Transcript, Cross-Examination of
Michael DeWitt, August 17, 2008 (hereafter "DeWitt Transcript") at, p. 330, ln. 14-p. 331, ln.
4. Mr. DeWitt's testimony is not only logical, but it is also consistent with the view of Surprise
Grand Vista's representatives, and, the anticipated testimony of every other
developer/intervenor in this case.¹ As part of its case in-chief, Surprise Grand Vista will call a

¹ As of the date of this submittal, the Arizona Land Department's representative (Mr. Dietrich) has testified, on this subject, consistent with the testimony of Mr. DeWitt.

1 prominent local appraiser to present expert appraisal testimony confirming this indisputable
2 impact.

3
4 **III. THE ADVERSE IMPACT OF A PROSPECTIVE CONDEMNATION UPON**
5 **VALUE AND MARKETABILITY OF REAL PROPERTY HAS BEEN**
6 **RECOGNIZED BY COURTS AND LEGISLATURES THROUGHOUT THE**
7 **UNITED STATES.**

8 The potential adverse impact of a transmission line corridor designation or, more
9 specifically, the possibility of condemnation of land within a designated area for a future
10 transmission line or other public works project, has been recognized in numerous federal and
11 state decisions. *See, e.g., Kohl v. Indus. Park Co. v. County of Rockland*, 710 F.2d 895 (2d
12 Cir. 1983); *United States v. 320.0 Acres of Land*, 605 F.2d 762 (5th Cir. 1979); *Barsky v.*
13 *Wilmington*, 578 F. Supp. 170 (D. Del. 1983); *Thompson v Tualatin Hills Park & Rec. Dist.*,
14 496 F. Supp. 530 (D. Or. 1980); *Nat'l By-Products v. Little Rock Reg'l Airport Comm'n*, 916
15 S.W.2d 745 (Ark. 1996); *Savage v. Palm Beach County*, 912 So.2d 48 (Fla. Ct. App. 2005);
16 *Dep't of Highways v. Bitterwolf*, 415 So.2d 196 (La. 1982); *Bd. of Educ. v. Clarke*, 280
17 N.W.2d 574 (Mich. Ct. App. 1979); *Fitger Brewing Co. v. State*, 416 N.W.2d 200 (Minn. Ct.
18 App. 1987); *Clay County Realty Co. v. City of Gladstone*, 254 S.W.3d 859 (Mo. 2008);
19 *Fusegni v. Portsmouth Hous. Auth.*, 317 A.2d 580 (N.H. 1974); *Township of Windsor v.*
20 *Nierenberg*, 695 A.2d 1344 (N.J. 1997); *Dep't of Highways v. Cook*, 542 P.2d 1405 (Okla.
21 1975); *State v. Hewitt Prof'l Group*, 895 P.2d 755 (Or. 1995); *In re De Facto Condemnation*
22 *& Taking of Lands of WFB Assocs., L.P.*, 903 A.2d 1192 (Pa. 2006); *Thurrow v. Dallas*, 499
23 S.W.2d 347 (Tex. Civ. App. 1973); *Pearsall v. Richmond Redev. & Housing Auth.*, 242 S.E.2d
24 228 (Va. 1978); *Lange v. State*, 547 P.2d 282 (Wash. 1976); and *Maxey v. Redev. Auth.*, 288
25 N.W.2d 794 (Wis. 1980).
26

1 While the Applicant urges that a wide corridor provides "flexibility" to the utility
2 provider, the adverse effect of the corridor designation upon the impacted lands is of far
3 greater significance. The power of eminent domain is granted to utilities for limited purposes.
4 If the Committee and the ACC authorize the project, the Applicant in this case will have the
5 power to acquire private property needed for construction of the project. The power of
6 eminent domain will be exercisable anywhere within the approved corridors. Consequently,
7 until APS decides exactly where it wants to locate its line within the corridors, properties
8 inside the corridors will be effectively "frozen" in terms of development and sale potential.²

9 A number of states, by statute or by judicial decision, have specifically recognized that
10 the announcement of a prospective project, and the possibility of acquisition of property by
11 eminent domain for purposes of that project, results in compensable damage to the impacted
12 land owner. In California, for example, a category of damages (often referred to as "Klopping
13 damages") has been recognized as resulting from the announcement of a public project and the
14 inability of the impacted landowner to market and/or develop his property pending an actual
15 taking (or project abandonment) by the condemning agency. In *Klopping v. City of Whittier*,
16 500 P.2d 1345, 1356-57 (Ca. 1972) the California Supreme Court observed:

17 The importance of allowing recovery for incidental losses has increased
18 significantly since condemnation powers were initially exercised in this country.
19 During the early use of such power, land was usually undeveloped and takings
20 seldom created incidental losses. Thus the former interpretation of the 'just
21 compensation' provision of our constitution seldom resulted in the infliction of
22 incidental losses. The rule allowing fair market value for only the physical
23 property actually taken created no great hardship. In modern society, however,
24 condemnation proceedings are necessitated by numerous needs of society and
25 are initiated by numerous authorized bodies. Due to the fact people are often
26 congregated in given areas and that we have reached a state wherein re-
development is necessary, commercial and industrial property is often taken in
condemnation proceedings. When such property is taken, incidental damages
are very apt to occur and in some cases exceed the fair market value of the actual

² Properties located adjacent to corridor boundaries may also be impacted due to the possibility that they would be adversely impacted in the event that the final transmission line location is selected on the corridor boundaries.

1 physical property taken The rule making consequential damages *damnum*
2 *absque injuria* is, under modern constitutional interpretation, discarded. . . .

3 Similar conclusions have been reached by courts in other states and by noted
4 commentators. *See, e.g., Clay County Realty Co. & Edith Inv. Co. v. City of Gladstone*, 254
5 S.W.3d 859 (Mo. 2008); *Dep't of Transp. V. Barsity*, 941 P.2d 971 (Nev. 1997), *overruled on*
6 *other grounds* by *GES, Inc. v. Corbitt*, 21 P.3d 11 (Nev. 2001); *Lincoln Loan Co. v. State*
7 *Highway Comm'n*, 545 P.2d 105 (Or. 1976); *Luber v. Milwaukee County*, 177 N.W.2d 380
8 (Wis. 1970); *City of Detroit v. Cassesse (In re Elmwood Park Project Section 1, Group B)*,
9 136 N.W.2d 896 (Mich. 1965); 8A, Patrick J. Rohan *et al*, *Nichols on Eminent Domain*, §
10 18.02 ("Rationale for Compensation for Condemnation Blight") (3d ed. 2007). Some states
11 have addressed this same concern through statutory enactments or constitutional provisions.

12 For example, the Louisiana Constitution provides:

13 In every expropriation or action to take property pursuant to the provisions of
14 this Section, a party has the right to trial by jury to determine whether the
15 compensation is just, and the owner shall be compensated to the full extent of his
16 loss. Except as otherwise provided in this Constitution, the full extent of loss
shall include, but not be limited to, the appraised value of the property and all
costs of relocation, inconvenience, and any other damages actually incurred by
the owner because of the expropriation.

17 La. Const. Art. 1, § 4(B)(5) (emphasis added).

18 In sum, in certain jurisdictions, the designation and approval of a transmission line
19 corridor in which properties are subject to acquisition through the power of eminent domain is
20 recognized as having such a severe impact upon property values and marketability as to give
21 rise to a claim for just compensation; a claim which may accrue long before the actual
22 institution of any eminent domain proceeding. Indeed, in some jurisdictions, the landowner
23 may be entitled to compensation based upon the announcement of the project, even if the
24 project is never actually constructed.

1 **III. CORRIDOR DESIGNATION AND APPROVAL (WITH THE CONCOMITANT**
2 **POWER TO ACQUIRE LAND THROUGH THE EXERCISE OF THE POWER**
3 **OF EMINENT DOMAIN) IS PARTICULARLY SIGNIFICANT IN ARIZONA**
4 **WHERE THE IMPACTED LANDOWNER IS ENTITLED TO NO**
5 **COMPENSATION UNLESS AND UNTIL AN ACTUAL TAKING OCCURS.**

6 Notwithstanding the logic of the authorities cited above, in Arizona, landowners within
7 a designated and approved transmission line corridor are entitled to no compensation unless
8 and until an actual taking occurs. Indeed, if a corridor is designated and then subsequently
9 reduced in width, owners of property within the originally designated corridor (property
10 effectively “frozen” in terms of marketability and development), but outside the easement
11 ultimately acquired, are entitled to no compensation whatsoever. This principle is established
12 by a decision of the Arizona Supreme Court.

13 In *Weintraub v. Flood Control Dist.*, 104 Ariz. 566, 456 P.2d 936 (1969), the
14 Weintraubs’ property was the subject of a recorded resolution proposing future condemnation
15 of property for flood control purposes. 104 Ariz. at 567-68, 456 P.2d at 937-38. The
16 resolution was rescinded by subsequent resolution and the Flood Control District of Maricopa
17 County (“District”) filed an action for declaratory judgment that the adoption and recording of
18 the resolutions did not constitute a taking or damaging of the Weintraubs’ property. 104 Ariz.
19 at 568, 46 P.2d at 938. The Weintraubs counterclaimed for damages to their land.

20 The trial court granted summary judgment in favor of the District. That decision was
21 reversed by the Court of Appeals 104 Ariz. at 567, 456 P.2d at 937. On review, the Supreme
22 Court reversed the decision of the Court of Appeals and granted judgment in favor of the
23 District:

24 It is clear from this line of cases that notice of preliminary proceedings of
25 proposed actions which may result in taking land for public use is not a
26 damaging of a property which would entitle the owner to compensation therefor.

1 We hold there was no taking in this case, as a matter of law, and that no cause of
2 action for damages arose by the recording of the instrument.

3 104 Ariz. at 571, 456 P.2d at 941 (emphasis added).³ *Weintraub* is controlling.⁴

4 The Committee has already heard testimony in this matter that portions of Segment 3 of
5 the Preferred Route border (on the north) the Surprise Grand Vista property. If the Preferred
6 Route is adopted in this area, a corridor width of 200 feet (the likely easement width required
7 by Applicant), or even 1,000 feet or 2,000 feet, would not directly impact the Surprise Grand

8
9 ³ Notwithstanding the holding of *Weintraub*, it is unclear whether the designation of an area in which
10 condemnation may or may not take place in the future is even permissible under Art. 2, § 17 of the Arizona
11 Constitution – because, as noted, doing so damages the designated property without providing just
12 compensation to the owner. In *Willey v. Griggs*, 89 Ariz. 70, 358 P.2d 174 (1960), the Arizona Supreme Court
found unconstitutional a statute that authorized the State Highway Commission (“Commission”) to pass a
resolution stating that certain property was to be condemned, but provided a two-year window in which the
Commission could decide whether to condemn the property and pay the owner for the taking, or change its
mind and not pursue the project. 89 Ariz. at 76, 358 P.2d at 177. The Supreme Court in *Griggs* noted:

13 [The offending statute] gives the State two years in which to decide whether or not to condemn
14 the property, during which time the landowner’s rights may be greatly inhibited
15 Moreover, the State need not act to condemn the property at all; it can abandon entirely the
plans announced in the resolution, leaving the *landowner* to suffer whatever loss has been
occasioned by the State’s delay in deciding whether or not to file [a condemnation] action.

16
17 While, as the State points out, the need for highways is pressing, the property of appellees may
not be taken without compensation, nor may they be deprived of the use and enjoyment of such
property for an indefinite period, *in the guise of regulation*, even for a public purpose.

18
19 We also believe the deprivation and depreciation of the landowner’s rights caused by [the
20 offending statute], without payment of compensation, to be in violation of Article 2, section 17
of the Arizona Constitution, insofar as that provision requires just compensation for any private
property taken or damaged for public use. [The offending statute] gives the Commission a two
year *locus penitentiae* in taking or damaging private property for highways – two years to
change their mind or pay. This the State cannot have.

21
22 89 Ariz. at 74, 75, 76, 358 P.2d at 176, 177 (internal citation omitted).

23 The Supreme Court’s holding in *Griggs* makes clear that, at the very least, to avoid unconstitutionally damaging
24 private property without payment of just compensation, a transmission line corridor designation must be limited
to the narrowest width reasonably possible to balance the interest of the utility service provider and the rights
and interests of private landowners.

25 ⁴ This conclusion is wholly consistent with those reached by both APS and amicus curiae, SRP. There is no dispute,
26 therefore, regarding the law. The dispute, if any, relates to how the Committee should apply this legal principle in its
considerations with regard to corridor approval/establishment. Surprise Grand Vista respectfully submits that the foregoing
principles militate in favor of the narrowest corridor possible in the circumstances.

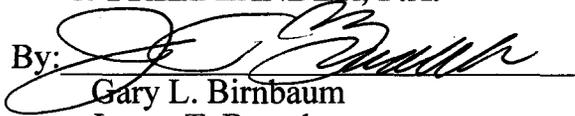
1 Vista master planned (PAD-approved) property. If, however, the 3,000-foot corridor width
2 requested by Applicant were approved, a portion of the Master Planned Development would
3 be effectively “frozen.” Development and sales within this area would likely cease until the
4 final easement area is identified and the required acreage acquired, either by purchase or
5 through exercise of eminent domain. By APS’ own admission, this period will likely exceed
6 the two year period at issue in Griggs. Indeed, if the easement area ultimately acquired is
7 outside the master planned area, the landowner (in this case, Surprise Grand Vista) would
8 nevertheless be entitled to no compensation under Arizona law because no real property rights
9 will ultimately be acquired by the condemnor (APS) from this landowner.

10 **IV. CONCLUSION.**

11 The impact of a transmission line corridor designation on the marketability,
12 development and value of properties located within the designated corridor is not subject to
13 serious debate. Courts and legislatures throughout the United States have recognized the
14 impact of the announcement of future public works projects and the potential exercise of
15 eminent domain power in connection with those projects. In Arizona, such announcements
16 (such as transmission line corridor designations and approvals) have precisely the same
17 impact. However, in this State, neither the Constitution, the statutes nor the common law
18 provide any compensation or redress for adversely impacted landowners. As a consequence,
19 the width of any designated utility corridor is a critical matter and it is the responsibility of the
20 Applicant, the Committee, and the Commission to limit any designated corridor to the
21 narrowest width reasonably possible to reduce the inevitable detrimental consequences of the
22 corridor designation.

1 Respectfully submitted this 24th day of October, 2008.

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8 Copies are being provided simultaneously to
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10 all parties at the initial day of the hearing, August 18, 2008.

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