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ORIGINAL

BEFORE THE ARIZONA POWER PLANT AND TRANSMISSION LINE SITING COMMITTEE

IN THE MATTER OF THE APPLICATION OF ARIZONA PUBLIC SERVICE COMPANY, IN CONFORMANCE WITH THE REQUIREMENT OF ARIZONA REVISED STATUTES §§ 40-360, *et seq.*, FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AUTHORIZING THE TS-5 TO TS-9 500/230kV TRANSMISSION LINE PROJECT, WHICH ORIGINATES AT THE FUTURE TS-5 SUBSTATION, LOCATED IN THE WEST HALF OF SECTION 29, TOWNSHIP 4 NORTH, RANGE 4 WEST AND TERMINATES AT THE FUTURE TS-9 SUBSTATION, LOCATED IN SECTION 33, TOWNSHIP 6 NORTH, RANGE 1 EAST, IN MARICIPA COUNTY, ARIZONA	DOCKET NO. L-00000D-08-0330-00138 CASE NO. 138 **DLGC AND LAKE PLEASANT GROUP'S BRIEF ON AUTHORITY TO APPROVE ROUTE THAT WAS NOT NOTICED**

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Intervenors DLGC II, LLC and Lake Pleasant Group, LLP (collectively, "DLGC") hereby file their brief on the authority of the Arizona Power Plant and Transmission Line Siting Committee ("Committee") and the Arizona Corporation Commission ("Commission") to approve a transmission line siting for a route that varies from the route that was noticed by the applicant. In addition, DLGC responds to the Chairman's request to brief the issue of whether other members of the public could challenge the Committee's decision on the basis that its adopted a corridor that was more harmful to public trust lands than the originally-noticed corridor.

Arizona Corporation Commission
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INTRODUCTION

Arizona Public Service Company ("APS") has filed an application in this matter for approval of a transmission line that would connect the TS-5 and TS-9 substations in the northwest portion of the Phoenix metropolitan area. APS's application indicated its Preferred Route, which included five segments, and three Alternative Routes, which could replace various segments of the Preferred Route. DLGC owns property on the north side of APS's Alternative Route 3. As modified by APS in its rebuttal case, Alternative Route 3 includes only the south side of State Route 74 from milepost 9.3 to the east.

Several parties have proposed a modification to Alternative Route 3, which they have named Alternative Route 3 North ("Alt. 3 North"). Alt. 3 North consists of a corridor that is narrower than APS's Alternative Route 3, and entirely within the boundaries of Alternative Route 3. In the area of DLGC's property, the Alt. 3 North route would be on the south side of SR 74, beginning 500 feet south of the centerline of SR 74, and continuing 1,000 feet south, to a point that is 1,500 feet south of the centerline of the roadway. The transmission line would be extremely visible from DLGC's property if it were constructed within the Alt. 3 North corridor; however, DLGC has identified screening opportunities that would be available if the corridor were widened an additional 500 feet, to a point that is 2,000 feet south of the centerline of the roadway.

Specifically, DLGC requests that the Committee approve a corridor that includes an additional 500 feet beyond the corridor included in APS's public notice of the hearing in this proceeding, beginning at the eastern boundary of Township 6 North, Range 1 West, and continuing east until the route turns south (approximately from milepost 8.3 to 10.3 of Alternative Route 3). The Arizona State Land Department ("ASLD") manages all of the land on south side of SR 74 from milepost 8.3 to 10.3. Exh. A-2 to APS's hearing Exhibit A-1 (also depicted on the placement APS had provided to the Committee).

Therefore, only one landowner would be directly impacted by the footprint of this additional 500 feet corridor. Further, most of the potential viewshed impacts that could be experienced by lands beyond the footprint of the additional corridor are managed by ASLD. ASLD manages all of the land south of SR 74 from milepost 8.3 to 10.3 (and for at least another mile to the east), from SR 74 south to at least the Cloud Road alignment. Id. In addition, ASLD manages most of the property immediately west of milepost 8.3 on the south side of SR 74 to the Cloud Road alignment (BLM manages the land immediately south of SR 74 west of milepost 8.3, but only to approximately the Joy Ranch Road alignment; ASLD manages the land south of that point, to the Cloud Road alignment). Id. BLM, which manages property immediately west of milepost 8.3 on the south side of SR 74, is the only non-party whose property abuts the 500 foot additional corridor that DLGC is requesting. Id. Further, the nearest private landowner (other than DLGC) to the additional 500 foot corridor would be about a mile away from the corridor.[1]

At the hearing, Chairman Foreman requested that interested parties file a brief on the authority of the Committee to approve a route that was outside the boundaries of the routes APS included in its application and its public notice of the proceeding. In addition, Chairman Foreman requested briefing on whether a decision approving such a route could be challenged by members of the public based on a claim that it harmed public trust lands administered by the ASLD.

THE COMMITTEE MAY APPROVE A ROUTE THAT IS AN INSUBSTANTIAL DEVIATION FROM A NOTICED ROUTE

Arizona Revised Statutes § 40-360.04(A) requires that "public notice" be provided of the hearing to consider an application before the Committee, and that "[i]f the

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[1] The nearest privately owned tract to the additional corridor is the land that is southwest of the intersection of the Cloud Road alignment and the 115th Avenue alignment. Exh. A-2 to APS Exhibit A-1. DLGC is the only private landowner north of SR 74, east milepost 8.3, and south of Lake Pleasant. Exhibit G-3 at 9.

[C]ommittee subsequently proposes to condition the certificate on the use of a site other than the site or alternative sites generally described in the notice and considered at the hearing," further notice and hearing are required. The Committee's rules of practice further provide that if an amendment to an application "constitutes a substantial deviation" from the public notice given, additional hearings shall be held. A.A.C. R14-2-207(B).

When determining whether a change is substantial, the Commission utilizes the three criteria set forth in A.R.S. § 41-1025 for determining whether an adopted rule is substantially different from the proposed rule that had been published as part of the rulemaking process. Decision No. 68189 (2005). The three criteria set forth in A.R.S. § 41-1025 are:

1. The extent to which all persons affected by the rule should have understood that the published proposed rule would affect their interests.
2. The extent to which the subject matter of the rule or the issues determined by that rule are different from the subject matter or issues involved in the published proposed rule.
3. The extent to which the effects of the rule differ from the effects of the published proposed rule if it had been made instead.

As discussed below, the additional 500 feet that DLGC has requested at the east end of Alt. 3 North or Alternative Route 3 is not a substantial deviation under these factors, and therefore the Committee and the Commission can approve a route that includes the additional 500 feet corridor width.

DLGC'S ADDITIONAL 500 FEET IS AN INSUBSTANTIAL DEVIATION FROM THE NOTICED CORRIDOR

Application of the three factors to the facts of this matter demonstrates that the additional 500 feet is an insubstantial deviation from the originally noticed corridor. The first factors to be considered looks at the universe of persons who would be impacted by

the originally-noticed corridor. There are two sets of persons who could be impacted – those directly impacted by footprint of the corridor, and those "offsite" parties who might have viewshed or other environmental impacts from the placement of the line. Here, only one party would have been impacted by the actual footprint of the originally noticed corridor in this area—ASLD. No additional parties would be directly impacted by the footprint of DLGC's expanded corridor, as the entire additional 500 feet is also on ASLD property. Thus there are no additional persons who could be directly impacted by the footprint of the line in the expanded corridor.

Likewise, the persons who could be indirectly impacted by the additional corridor are the same as those could be impacted by the originally noticed corridor. DLGC, ASLD and BLM are the only landowners within a mile of the additional 500 foot corridor. Two of these entities (DLGC and ASLD) recognized that the original application potentially impacted them, and they intervened in the proceeding. The third, BLM, also received notice of the project, and provided comment on it. BLM was briefed by APS about the forthcoming application (Exh. B-2 to APS Exhibit A-1, at Meeting/Briefing Summary Log tab), received two letters from APS regarding the project (Id. at Agency Correspondence tab), and provided a letter to APS regarding the project (Exh. A-8). While BLM has not intervened in this proceeding, it will have an opportunity to address any concerns it might have regarding the impacts of either the originally noticed corridor, or the expanded corridor, when it considers an application for right of way across its lands for the project.

It is also possible that landowners more than a mile from DLGC's expanded corridor could have some degree of visual impact from the project. But their interests would be substantially the same as for the originally noticed corridor, because the expanded corridor is only an additional 500 feet in width. Therefore, any such landowners would have understood that the expanded corridor could affect their property.

The second factor considers the extent to which the expanded corridor and the originally-noticed corridor involve different issues. The issues raised by the siting of a transmission line in either the narrower or wider corridor are exactly same. Those issues involve the potential for actual infringement on the land by the transmission line, and the potential for viewshed or other environmental impacts. The degree of impacts might differ, based on the siting of the line closer to particular location, but the types of impacts are the same. The different degrees of impacts is considered within the third factor.

The final factor examines the difference in effects of the expanded corridor and the originally noticed corridor. Here, only one party would experience different direct impacts based on the actual infringement of the line. Because ALSD manages all the property within either corridor south of SR 74 and east of milepost 8.3, placement of the line in any of the potential corridors would only directly affect ASLD. While the impacts to ALSD might be slightly different for placement of the line in one location compared to another, ASLD is a party to this proceeding and has an opportunity to raise concerns about those different impacts to the Committee. Thus, any potential harm ASLD might suffer based on the consideration of DLGC's expanded corridor is alleviated by the opportunity ASLD has to bring those potential harms to the attention of the Committee.

BLM is the only other party (besides DLGC and ASLD) that has property within a mile of the proposed additional corridor. There could conceivably be some difference in the degree of impact on BLM for a siting within the additional corridor. But, as stated above, BLM will have an opportunity to address any of its concerns when APS files its right of way application with BLM.

To the extent there are any other entities who would be impacted differently by routing the line in the original corridor or the extended corridor in this area, the difference in the degree of impact on them would be minimal. Any such entities are at least a mile from the originally noticed corridor. At worst, the additional corridor could result in the

line be constructed 500 feet closer to them. The views from a mile away or a mile less 500 feet way are not substantially different. Therefore, the effect on such entities from the additional corridor is not significant enough that the Committee would be required to provide additional notice prior to approving the expanded corridor.

THE COMMITTEE'S AND COMMISSION'S DECISIONS APPROVING THE ADDITIONAL 500 FEET WOULD NOT BE SUBJECT TO APPEAL ON THE BASIS THAT THE BENEFICIARIES OF STATE TRUST LANDS WERE HARMED

The Committee's and Commission's decisions approving a corridor that included the additional 500 feet would not be subject to being overturned on the basis that it harmed public trust lands, for several reasons.

First, only parties to these proceedings, or the Attorney General, can bring an appeal of a CEC decision. A.R.S. § 40-253(A). The Commission's decision is not subject to collateral attack in other proceedings. *Ariz. Public Serv. v. Southern Union Co.*, 76 Ariz. 373, 377, 265 P.2d 435, 438 (1954).

Second, APS will be required to pay ALSD for whatever right of way it receives over ALSD-administered properties. *Deer Valley Unified School Dist. No. 97 of Maricopa County v. Superior* Court, 157 Ariz. 537, 760 P.2d 537 (Ariz. 1988) (citing *Lassen v. Arizona ex rel. Arizona Highway Department*, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967)). Because the trust which ASLD administers would be compensated for the value of the right of way, there would be no claim that the trust was harmed.

CONCLUSION

The Committee can approve a corridor that is not a "substantial deviation" from the originally-noticed corridor. A modification to a corridor is not a substantial deviation if the impacts of the modified corridor are substantially the same as those of the original corridor, such that the original notice alerted those entities that entities impacted by the

amended corridor that their interests could be affected by the Committee's action. Here, the only party directly impacted by the expanded corridor is the ALSD, a party which has actual notice of the Committee's consideration of the additional corridor, and has the opportunity to provide input to the Committee on that matter. As for indirect impacts, BLM is the only landowner within a mile of the proposed additional corridor, and any impacts to BLM can be addressed by BLM when it considers APS's application for right of way. The impacts on other potentially affected landowners are only insubstantially different from the impacts of the line in the originally-noticed corridor, due to their distance from the transmission line. Therefore, the Committee can act consider the additional 500 foot corridor without providing additional notice.

The Committee can approve the additional corridor without fear that it is opening the door to a challenge that its actions harm the public trust administered by ASLD, because APS would be required to pay compensation to the trust for whatever right of way it acquires.

If the Committee adopts a corridor in the area of Alternative 3 or Alt. 3 North, DLGC encourages the Committee to adopt a corridor that includes the additional 500 feet south of the corridor originally noticed by ASP, to take advantage of additional screening opportunities.

Dated this 26 day of November, 2008.

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