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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 REQUIREMENTS OF ARIZONA REVISED STATUTES §§ 40-360, *et seq.*, FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AUTHORIZING THE TS-5 TO TS-9 500/230 kV 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 MARICOPA COUNTY, ARIZONA.

DOCKET NO. L-00000D-08-0330-00138
CASE NO. 138

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I. INTRODUCTION

A formal evidentiary hearing for the above-captioned matter was held over the course of 16 days between August 18, 2008, and December 2, 2008, before the Arizona Power Plant and Line Siting Committee ("Committee"). On December 29, 2008, Committee Chairman John Foreman filed with the Arizona Corporation Commission ("Commission") the Committee's decision and order approving Arizona Public Service Company's ("Applicant" or "APS") request for a Certificate of Environmental Compatibility ("CEC") for a double circuit 500/230 kV power line ("Project").

On January 13, 2009, Commission Utilities Division Staff ("Staff") filed a request for review of the CEC. Likewise, APS, and interveners 10,000 West, LLC ("10,000 West"), Arizona State Land Department ("ASLD"), and DLGC II, LLC and the Lake Pleasant Group LLP ("DLGC") filed requests for review. 10,000 West's filing takes issue with the claimed need for the Project as well as certain alleged procedural irregularities. In APS's request for review, it requests three changes to the CEC that reflect a potential inability or difficulty in constructing the Project subject to the existing CEC conditions. Staff will respond to these issues in turn.

II. DISCUSSION

A. Need and Reliability Benefits.

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1 10,000 West has expressed substantial concerns with the showing of need offered by APS.
2 For the most part, 10,000 West argues that APS has not made a sufficient showing of need to justify
3 approval of the application. In particular, 10,000 West argues that the Project is unnecessary to
4 improve reliability; that it is unnecessary to increase import capability into the Phoenix metropolitan
5 area; that it is unnecessary to increase export capability out of the Palo Verde Hub; that it is not
6 necessary to the completion of the 500 kV loop connecting Pinnacle Peak substation to the Browning
7 substation; and that the under-slung 230 kV component is not necessary to serve load growth in the
8 area.¹ Additionally, 10,000 West notes APS' reduction to capital expenditures and the resulting
9 adjustment of the anticipated construction dates for the Project.² Further, 10,000 West alleges that
10 Staff's evaluation contributed to the perceived failure of the applicant to meet its burden by not
11 performing an independent analysis.³

12 Staff performed an analysis of the materials submitted by APS in its application and
13 documents provided by APS during the course of the hearing. Staff also reviewed information
14 provided in the Biennial Transmission Assessment ("BTA"). Additionally, Staff participated in
15 informal prehearing technical meetings with APS to review extreme contingency related issues.⁴
16 These are the precise same materials and information relied upon by 10,000 West in developing its
17 conclusions.⁵ However, Staff's evaluation was further informed by participation in regional planning
18 forums, including those that developed the BTA.

19 Based on Staff's evaluation of the application, Staff concluded that there is a need for the
20 Project. Staff's analysis focused on exploring the public need for adequate, economical and reliable
21 power. Based on that analysis, Staff ultimately concluded that, on the basis of the available
22 information the Project is needed and will contribute to the delivery of power in an adequate,
23 economical and reliable manner.

24 Staff identified several points that support this conclusion. First, the Project, if authorized,
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26 1 10,000 West's Request for Review at 2:10-16.

27 2 *Id.* at 3:8-14.

28 3 *Id.* at 4:9-10.

 4 Tr. at 1159:25-1160:22.

 5 *See e.g.* Exhibits 10W-3, 10W-26.

1 will complete a continuous 500 kV path from the Palo Verde Hub to the Pinnacle Peak substation.⁶
2 Also, the Project will improve the Palo Verde Hub's transfer capability into the Metropolitan
3 Phoenix area by 600 MW.⁷ Coincidentally, the additional transfer capability will contribute to APS'
4 ability to access renewable generation that is anticipated to interconnect through the Palo Verde Hub,
5 thereby facilitating APS' ability to comply with its Renewable Energy Standard requirements.⁸ As a
6 final point, the Project will strengthen the Metropolitan Phoenix area extra high voltage transmission
7 system, thereby improving the reliable delivery of power.⁹ All of these factors support approval of
8 the requested CEC.

9 **1. The Project Closes The Last Gap In The Valley 500kV Loop.**

10 Completion of a continuous extra high voltage transmission path from the Palo Verde Hub to
11 the Pinnacle Peak substation has been contemplated by several CEC applications. It will bridge the
12 segment between the Pinnacle Peak to TS-9 transmission line approved in case 131 (Decision No.
13 69343 (Feb. 20, 2007)) to the Palo Verde to TS-5 line approved in case 128 (Decision No. 68063
14 (Aug. 17, 2005)). This set of lines will complete the northwestern arc of a 500 kV loop around the
15 Phoenix metropolitan area. From Palo Verde, that arc travels southeast along the Palo Verde to Pinal
16 West transmission line approved in case 124 (Decision No. 67012 (May 24, 2004)). The remaining
17 segment of the loop is the Pinal West to the Browning substation line approved in case 126
18 (Decision No. 68291 (Nov. 14, 2005)). These projects connect to form a 500 kV loop around the
19 Phoenix area that is closed on the east by seven 230 kV lines.¹⁰

20 10,000 West argues that the Project is unnecessary to close the loop as it will "merely add a
21 third line to a section of the loop that already has two lines."¹¹ Additionally, 10,000 West offers the
22 proposition that the loop does not actually exist, principally because components approved in other
23

24 ⁶ Exhibit CC-1 at 10; Tr. at 973-76, 1143:4-7.

⁷ Exhibit CC-1 at 10, Tr. at 1143:7-11.

⁸ Tr. at 1146:12-22.

⁹ Tr. at 1147:12-18.

¹⁰ Tr. at 146:12-21; 193:5-7. Cumulatively, these separate transmission lines connect the interests of APS, Salt River Project ("SRP"), Tucson Electric Power Company, and various Electrical Districts as well as other interested parties. Tr. at 973:13-17; *See also* Docket No. L-00000D-08-0330-00138, Letter from Larry Dozier on behalf of Central Arizona Project dated November 17, 2008 filed in support of the Project; Letter from Gary Harper on behalf of SRP dated November 18, 2008 filed in support of the Project.

¹¹ 10,000 West Request for Review at 10:15-16.

1 CEC applications have not yet been built, or because the northeastern arc of the loop is made up of
2 seven 230 kV transmission lines connecting Browning to Pinnacle Peak.¹²

3 Staff acknowledges that not all components of the loop have yet been built. That fact is not
4 relevant to the discussion of whether it is advisable to authorize completion of that loop. As
5 discussed more fully below, a complete 500 kV loop around Metropolitan Phoenix will supply
6 reliability benefits. Likewise, the testimony of APS witness Mike Dewitt explained that the seven
7 230 kV transmission lines connecting Browning to Pinnacle Peak provide a sufficient substitute for a
8 single 500 kV line and thereby adequately completes that segment of the loop.¹³

9 2. The Project Improves Power Transfer Capability.

10 Approving the CEC will also improve the Phoenix metro area's access to resources available
11 through the Palo Verde Hub. Standing alone, the transmission line will contribute another 600 MW
12 of transfer capability from the Hub into the Phoenix metro area.¹⁴ 10,000 West has argued that the
13 Palo Verde Hub already has more transmission capability than actual generation present.¹⁵ However,
14 APS witness John Lucas explained that APS does not own all of that transmission.¹⁶ Moreover, Staff
15 witness Ray Williamson noted,

16 And I might comment on here I have had an opportunity to participate in the SWAT
17 renewable transmission task force work. They have been meeting for over a year
18 now. And as was mentioned by Mr. Lucas this morning, there are in fact well over
19 4,000 megawatts of projects that are lined up just to the southwest of the Phoenix
20 area. In Arizona in total there are around 9,000 megawatts in the queue trying to get
21 into the system.¹⁷

22 In this context, while there is arguably an aggregate net surplus of transmission capability
23 from the Palo Verde Hub, 10,000 West's argument is flawed in that it does not account for the
24 addition of these projected renewable projects. Furthermore, 10,000 West does not consider what
25 direction the transmission is heading or whether APS has use of all transmission available at the Palo
26 Verde Hub. As Mr. Lucas explained, "Only a portion of that east transmission comes into the
27 Phoenix metropolitan area and then we only have a portion of those rights. So we need to increase
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26 12 *Id.* at 11:15-23.

13 Tr. at 193:17-25.

14 Exhibit A-4 at slide 5.

15 10,000 West Request for Review at 11-14.

16 Tr. at 1079:13-15.

17 Tr. at 1145:23-1146:6.

1 our rights.”¹⁸ Likewise, the ability to move this energy eastward from the Hub into the Phoenix area
2 is a substantial concern that 10,000 West’s argument does not address.

3 **3. The Project Improves Access To Renewable Energy.**

4 As explained in the testimony, there are plans in the queue for significant renewable energy
5 development in the area that would interconnect through the Palo Verde Hub.¹⁹ In order for APS or
6 any other Commission-regulated utility to take advantage of those opportunities pursuant to the
7 Renewable Energy Standard (“RES”), it is necessary to demonstrate that the renewable energy can
8 actually be transported to the market area.²⁰

9 10,000 West contends that in absolute terms, there is adequate transfer capability at the Palo
10 Verde Hub to move all energy generated there. To support that assertion, 10,000 West relies on the
11 2006 BTA for the proposition that there is already more than sufficient transfer capability at the Hub
12 and that there will be a substantial surplus of 4,500-5,000 megawatts by 2012.²¹ As was explained
13 in the testimony, APS has insufficient eastward transport capability from the Palo Verde Hub into the
14 Phoenix area.²² In fact, not all of the eastward flowing transmission is directed to Phoenix.²³
15 Moreover, 10,000 West relies upon the generation figures in Table 5 to support the notion that there
16 is an excess of generation capacity at the Hub; however, these figures do not account for renewable
17 projects anticipated to interconnect at the Hub.

18 Q. Right. And is that an accurate representation of what Table 5 is, that it shows
19 what is coming in and out of Palo Verde now and in the future up to 2012?

20 A. Yes, as far as I know, other than it doesn't include all the interconnection
21 requests that are being studied, nor the Solana, I don't believe it includes the
22 Solana solar.

23 Q. Okay. When we look at the 2012 line there at the bottom of the table, it
24 shows that in 2012 the Palo Verde hub is expected to have a generation
25 capability of 10,230 megawatts, is that right?

26 A. Yes, excluding any additional. It doesn't include Solana or any other
27 interconnections, but yes, your statement is correct to 10,230.²⁴

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18 Tr. at 1080:18-22.

19 See Tr. at 982:13-22; 1145:20-1146:22.

20 See Exhibit CC-1 at Slide 13; A.A.C. R14-2-1803(F)

21 Tr. at 1077-81 discussing Exhibit 10W-3 Table 5 at page 59.

22 Tr. at 1080:18-22.

23 See Tr. at 1079:11-13 noting that some eastward transmission capacity is heading for Tucson.

24 Tr. at 1078:6-19.

1 As Mr. Williamson stated, there are more than 4,000 megawatts of potential renewable projects
2 southwest of Phoenix that may interconnect at the Palo Verde Hub.²⁵ In that context, the
3 approximate 4,500-5,000 megawatts of surplus transmission anticipated to be available at the Hub in
4 2012 leaves an insubstantial margin of excess capacity after accounting for the addition of another
5 4,000 megawatts of renewable generation, even assuming APS has rights to all available
6 transmission. However, the facts are that APS does not own all transmission rights flowing east into
7 Phoenix, that not all of the eastward transmission even goes to Phoenix, and that the generation
8 figures for the Palo Verde Hub do not account for the many projected renewable projects that are
9 contemplated for the near future. Consequently, the public interest lies in favor of encouraging APS
10 to access the renewable projects anticipated to develop southwest of Phoenix.

11 4. The Project Provides Reliability Benefits.

12 APS and Staff both identified reliability benefits related to the Project. However, 10,000
13 West disputes whether there is a need for the Project on reliability grounds. In particular, 10,000
14 West argues that the N-1 standard, which has already been satisfied, is the governing reliability
15 criteria.²⁶ On that basis, 10,000 West argues that APS' system is already sufficiently reliable and
16 approval of the Project is unwarranted for reliability purposes. 10,000 West further argues that
17 completion of the 500 kV loop is not a reliability benefit.²⁷

18 Staff and APS agree that closing a 500 kV loop around the valley will contribute to improved
19 reliability. As was explained by Mr. Lucas, a complete loop allows power to be moved to an area
20 from the opposite direction in the event that a break in the line occurs in another direction:

21 Well, with the loop, at any point where a line opens up for whatever reason, it
22 provides a path of flowability from the opposite direction if so much is needed. So it
is a loop that provides a path for power into the valley.²⁸

23 Mr. Williamson concurred. "In the long run this makes perfect sense. The ability to be able to get
24 generation into the Phoenix area load pocket will be greatly enhanced by the TS-5 to TS-9 500kV
25 segment."²⁹

26 ²⁵ Tr. at 1145:23-1146:6.

27 ²⁶ 10,000 West Request for Review at 9-10.

²⁷ *Id.* at 10-11.

²⁸ Tr. at 974:25-975:4.

28 ²⁹ Tr. at 1149:17-20.

1 Further, the Commission has required the construction of additional transmission lines to
2 remote load pockets specifically to improve transmission capabilities.³⁰ Moreover, as Case 111
3 demonstrates, the Commission has both the authority and obligation to require that regulated utilities
4 construct adequate facilities to perform their utility service.³¹ Providing a full transmission path for
5 power to flow adequately around Phoenix even in the event of disruption to one component of that
6 path is reasonable and furthers the public interest in reliability.

7 Likewise, as Case 111 illustrates, the Commission is not bound to setting reliability standards
8 that are no more stringent than federal standards. 10,000 West acknowledges that the federal
9 standards represent the minimum applicable standard.³² However, 10,000 West's proposal to target
10 the minimum transmission necessary to meet reliability criteria flies in the face of the sound public
11 policies that drove the Commission to require the line approved in Case 111. Rather, 10,000 West
12 argues that the Project is unjustified from a reliability standpoint because it is not until reaching an
13 N-2-1 condition, where one line is already out of service and then simultaneous unplanned loss of
14 two additional lines occurs, that the system would realize substantial load dropping.³³ Consequently
15 10,000 West advocates using an N-1 standard, which is the federal minimum, as the ruling
16 standard.³⁴

17 The Commission has frequently placed requirements on new transmission lines that exceed
18 the federal minimum standards. As acknowledged by 10,000 West, through federal statutes, the
19 standards articulated by the Western Energy Coordinating Council ("WECC") and the North
20 American Electric Reliability Corporation ("NERC") have been adopted as minimums to be applied
21 to transmission lines in Arizona.³⁵ However, the Commission regularly orders two conditions be
22 applied to transmission line CECs that exceed the standards set by WECC/NERC.³⁶ Likewise, in

23 30 See e.g. Decision No. 62011 (November 2, 1999)(ordering construction of a transmission line to resolve quality
24 of service issues); (Decision No. 64356 (Line Siting Case 111)(January 15, 2002))(authorizing construction of line
required by Decision No. 62011)("Case 111").

25 31 See, e.g., A.R.S. §40-331.

26 32 Tr. at 1610:11-21.

27 33 Tr. at 1595:5-14.

28 34 10,000 West Request for Review at 10:1-6.

35 Tr. at 1577:7-14.

36 See Staff Notice of Filing and Request for Judicial Notice dated November 20, 2008, Docket No. L-00000D-08-0330, citing the requirement to meet N-1 contingency without reliance on remedial action schemes which WECC permits and the requirement to site power lines at least 100 feet away from natural gas pipelines.

1 Case 111, the Commission ordered the construction of a new transmission line for service adequacy
2 and reliability purposes that would not have been necessary to meet WECC/NERC's N-1 minimum
3 standard.³⁷ Indeed, 10,000 West conceded that more stringent standards may be applied as well.³⁸
4 The Commission has the authority to require reliability standards that are greater than the federal
5 minimum and it has consistently demonstrated through its orders a desire and a willingness to do so.

6 **B. Pole Separation.**

7 Likewise, Staff has frequently advocated a pole separation condition that is clearly in excess
8 of relevant minimum reliability standards. In this case, Staff evaluated the appropriateness of a line
9 separation condition as an additional means with which to improve the reliability benefits associated
10 with the Project. Staff's condition is intended to prevent the loss of multiple lines due to one event.
11 For example, if a transmission tower on one line were damaged, it could fall into the other line,
12 thereby taking both lines out of service. Staff has proposed such a condition in several recent cases
13 whenever a proposed new transmission line would be in such close physical proximity to an existing
14 high voltage transmission line that it could be within the height of the tallest tower of either line.
15 Because there are preexisting transmission lines that also connect into the TS5 and TS9 substations
16 or run parallel to the Project path,³⁹ Staff believes that this condition is appropriate in this case.

17 **C. APS' Proposed Changes.**

18 As discussed in its Request for Review, APS asserts that the CEC, as written, would prevent
19 APS from constructing a complete transmission line owing to a provision that bars construction on
20 lands owned by one of the interveners to this proceeding, Diamond Ventures, Inc. ("Diamond
21 Ventures").⁴⁰ As explained by APS, the provision was premised on an assumption that APS could
22 construct the line so as to cross SR 74 from south to north at the 163rd Avenue alignment without
23 placing any transmission structures or conductors on Diamond Ventures' property.⁴¹ APS contends
24 that this provision should be removed. APS further explains that, if the Commission adopts the
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26 ³⁷ *Id.*

27 ³⁸ Tr. at 1577:15-19.

28 ³⁹ Tr. at 993:12-20.

⁴⁰ APS Request for Review at 5:20-6:10.

⁴¹ *Id.*

1 widening of the SR 74 corridor in the alternative, this problem can be eliminated.⁴² Specifically,
2 APS suggests widening the corridor surrounding SR 74 to 500 feet on each side for a total corridor
3 width of 1,000 feet.⁴³

4 The challenging issue related to APS' request is whether it can be entertained given the
5 procedural posture of the proceeding. APS' request raises issues of a factual nature suggesting that
6 the line cannot be constructed under the conditions of the CEC that issued from the Committee.⁴⁴

7 However, the factual record for this proceeding is now closed. A.R.S. §40-360.07(B)
8 provides in pertinent part that

9 [t]he grounds for review shall be stated in a written notice filed with the commission
10 ... the committee shall transmit to the commission the complete record, including a
certified transcript, and the review shall be conducted on the basis of the record.

11 The record has been transmitted and is thus closed.⁴⁵ Consequently, APS is confined to the
12 evidentiary record produced at the Committee level to demonstrate the appropriateness of the
13 requested changes. To the best of Staff's knowledge, the record in this matter does not address
14 whether it is possible for APS to build this line in compliance with this condition. However, Staff
15 would not object to adoption of the changes if APS can identify evidence in the record that supports
16 the factual assertion that the Project cannot be constructed as approved by the Committee. By
17 contrast, if APS cannot identify such evidence, its requested change should be denied.

18 APS has also requested an opportunity to extend the authorized corridor in one segment so as
19 to move approximately 850 feet beyond the boundaries of the noticed corridor.⁴⁶ A similar deviation
20 from the noticed corridor was precipitated by a request to accommodate DLGC. In that
21 circumstance, a 500 foot expansion of the corridor beyond the noticed boundaries was deemed an
22 insubstantial deviation owing to the fact that it affected only one landowner and the landowner,
23 ASLD, was present in the proceedings and able to express its acquiescence to the change.⁴⁷

24 When the issue of the DLGC proposed change was considered, Staff explained that the

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⁴² *Id.* at 6:11-14.

26 ⁴³ *Id.* at 7-13.

27 ⁴⁴ *Id.* at 6:5-8.

28 ⁴⁵ *See e.g.* Docket No. L-00000D-08-0330 Notice to the Arizona Corporation Commission filed January 27, 2009
by Chairman Foreman.

⁴⁶ APS's Request for Review at 13-15.

⁴⁷ Tr. at 3173:20-3174:14.

1 Committee Chairman, acting in the capacity of presiding officer, is authorized to approve
2 amendments to CEC applications that do not constitute substantial deviations.⁴⁸ What constitutes a
3 substantial deviation requires an examination of whether all affected persons should have understood
4 that the subject of the notice affected their interests, the degree to which there is a difference in
5 subject matter between the proposed change and what was described in the original notice, and the
6 degree of difference in impact between the proposed change and what was described in the original
7 notice.⁴⁹

8 Staff believes that determining what constitutes a substantial deviation requires a fact specific
9 analysis. For instance, moving a line only a few feet could be the threshold that motivates a
10 homeowner to intervene in a siting case if it means the difference between a transmission pole sited
11 across the street from a transmission pole sited in the front yard. However, in an undeveloped
12 expanse, moving a line a thousand feet may be insignificant to all parties concerned. In either case, it
13 is clear that the factual circumstances are of crucial significance to the final determination.

14 APS asserts that there is only one landowner affected by its request, ASLD, and opines that
15 ASLD will likely support the change. As Staff explained in relation to the discussion of the DLGC
16 request, the existence of a substantial deviation is an intensely factual inquiry that examines whether
17 affected persons should have understood from the notice that their interests would be affected.⁵⁰
18 APS appears to acknowledge that the existence of a substantial deviation is a factual matter insofar
19 as it requested an express finding by the Committee of no substantial deviation in relation to the
20 DLGC request.⁵¹

21 Because APS' request for a finding of no substantial deviation has occurred after the close of
22 the record, it is unlikely that APS will be able to identify record evidence to specifically support this
23

24 48 See A.A.C. R14-3-207(B) If the Presiding Officer determines an applicant's amendment of an application or
25 accompanying information constitutes a substantial deviation from the public notice given pursuant to R14-3-208(A),
26 within three days of his decision to allow amendment he shall notify the members of the Committee, and subject to being
27 overruled by a majority of the Committee within ten days of notice of his decision, further hearings shall be held thereon
28 after public notice, as provided in R14-3-208(A), in which event the 180-day period specified in R14-3-213(A) shall be
deemed to run from the date of such public notice.

49 See Decision No. 58793 (September 21, 1994) ("Whispering Ranch"); See also, Tr. at 2942-44; Commission
Staff's Brief on Substantial Deviation filed on November 28, 2008, Docket No. L-00000D-08-0330

50 *Id.*

51 See e.g. Tr. at 2946:14-16.

1 request. Although Staff has no position with respect to the bases for the request, Staff reiterates that
2 the evidentiary record is now closed. It therefore falls to the Applicant to demonstrate the absence of
3 substantial deviation from the noticed corridor on the record evidence. If it cannot do so, Staff
4 recommends denying the request.

5 **D. Procedural Issues**

6 Despite concerns related to certain procedural irregularities, Staff does not believe these
7 irregularities necessarily preclude the Commission from approving the CEC. Additional arguments
8 have been made by 10,000 West regarding alleged Open Meeting Law (“OML”) and *Ex Parte*
9 violations. Staff will address in further detail these procedural issues which include the route tour,
10 the use of emails, and a procedural conference held in a separate proceeding.

11 At the outset, Staff notes that it does not believe that the procedural irregularities that may
12 have occurred in this case should be taken lightly or that this case provides an ideal model for the
13 procedural conduct of future proceedings. Although procedural irregularities have unfortunately
14 been present in other recent line siting matters, no party objected to the Commission’s approval of
15 the CECs in those other cases. In this matter, 10,000 West has raised such objections, and this
16 circumstance places this case in a somewhat different posture. Nonetheless, it is important to
17 recognize that 10,000 West has failed to raise these contentions in the proceeding before the
18 Committee, despite the fact that these issues were identified therein by Staff. Finally, these various
19 procedural concerns should be balanced against both the merits of the project and the substantial
20 resources expended by Staff through its participation in this proceeding, which involved seventeen
21 parties and lasted sixteen days.

22 **1. The tour was properly noticed as an open meeting pursuant to the**
23 **August 12, 2008 open meeting notice.**

24 10,000 West claims that the July 2, 2008 Notice of Hearing, which mentions the proposed
25 August 20, 2008 tour, “violates Section 38-431.02(G) and (H) of the Arizona Open Meeting Laws”
26 because “[t]he July 2 Notice . . . does not set forth an agenda listing the specific matters to be
27
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1 discussed, considered, or decided on by the Committee during the August 20 Tour.”⁵² However,
2 10,000 West overlooks the August 12, 2008 Open Meeting Notice and Agenda issued in this docket,
3 which specifically addresses the tour, among other things.⁵³

4 **2. The record does not contain any information about what occurred on the**
5 **tour.**

6 10,000 West alleges that the August 20th tour violated not only Arizona’s open meeting laws
7 but also the Committee’s *ex parte* rule. These allegations are difficult to evaluate because the record
8 does not reflect what occurred on the tour. Rather than discussing the tour on the record, the
9 Committee Chairman instructed the Committee to disregard the tour:

10 Because there are civil and criminal, potential civil and criminal liability that
11 is associated with that, I have taken the position in the previous cases that the
12 better fix, rather than subjecting the Committee Members to questioning over
13 something that no one has any factual basis for concluding occurred, would
14 be simply to instruct the Committee Members to disregard anything that
15 occurred on the Tour⁵⁴

16 The record thus contains no information about what occurred on the tour, so allegations of any kind
17 regarding the tour—whether favorable, unfavorable, or indifferent—are merely speculative. Any
18 party asserting that an Open Meeting Law violation has occurred bears the burden of proof.⁵⁵ 10,000
19 West cannot point to facts to meet its burden.

20 10,000 West also argues that ratification is the only remedy for an open meeting violation and
21 that the Chairman’s instruction to the Committee to disregard the tour is not an adequate remedy for
22 an open meeting violation. This argument presupposes that an open meeting violation actually
23 occurred, which is an assertion that the record does not address. Furthermore, when the Committee
24 Chairman instructed the Committee Members to disregard the tour, he also asked, on the record,
25 whether that treatment would be acceptable.⁵⁶ No party indicated that it was not.⁵⁷

26

52 10,000 West’s Request for Review at 16-17

53 A copy of the August 12, 2008 Open Meeting Notice and Agenda is included as Attachment A.

54 (Tr. at 956:17-25).

55 *Tanque Verde Unified Sch. Dist. No. 13 v. Bernini*, 206 Ariz. 200, 76 P.3d 874 (App. 2003); *Fisher v. Maricopa County Stadium Dist.*, 185 Ariz. 116, 912 P.2d 1345 (App. 1995); *City of Prescott v. Town of Chino Valley*, 166 Ariz. 480, 803 P.2d 891 (1990).

56 Tr. at 957-964.

1 These events occurred on October 20, 2008, which was the fifth day of a sixteen day hearing.
2 10,000 West had ample opportunity to raise this issue before the Committee for the purpose of
3 developing a record or seeking a remedy. The proceeding before the Committee—as well as the
4 record for that proceeding—is now closed. There is nothing in the record to support 10,000 West’s
5 allegations regarding the tour, and it is not permissible to reopen that record at this point in the
6 proceedings. Furthermore, by choosing to wait and raise this issue after the Committee proceeding
7 has closed, 10,000 West has waived its opportunity to develop a factual record on this issue, has
8 prevented others from developing a corresponding factual record to examine those allegations, and
9 has prevented the Committee from considering whether the allegations warrant any sort of remedy.
10 In these circumstances, 10,000 West’s allegations should not require denial of APS’ request for a
11 CEC.

12 Lastly, the appropriate remedy for violations of Open Meeting Law is for the concerned party
13 to file a written complaint with the Attorney General or County Attorney for determination of
14 whether to investigate alleged violations.⁵⁸ 10,000 West therefore has another remedy available to it
15 should it wish to pursue these issues.

16 **3. The existence of the various e-mails does not require denial of APS’ request for**
17 **a CEC.**

18 10,000 West also argues that the emails between the Committee Chairman and parties to this
19 proceeding violate both Open Meeting Law and the *ex parte* rule. To illustrate, it supplies copies of
20 several emails, including one that was identified in Staff’s Request for Review.⁵⁹

21 In relation to Open Meeting Law, 10,000 West appears to argue that the mere existence of
22 any e-mail that involved the Chairman and was related to this case establishes a violation of
23 Arizona’s Open Meeting Law. The applicable inquiry, however, is more fact specific. As explained
24 by the Attorney General,

25 [t]he available case law and Arizona’s statutory language indicate that a one-way
26 communication by one board member to other members that form a quorum, with no

27 ⁵⁷ *Id.*

28 ⁵⁸ A.R.S. §38-431.06(A).

28 ⁵⁹ 10,000 West Request for Review, Exhibits E, G, I, and J.

1 further exchanges between members, is not a *per se* violation of the OML.
2 Additional facts and circumstances must be evaluated to determine if the
3 communication is being used to circumvent the OML. A communication that
4 proposes legal action to a quorum of the board would, however, violate the OML,
5 even if there is no exchange among the members concerning the proposal.⁶⁰

6 10,000 West's Request for Review does not attempt to factually analyze these e-mails. In addition,
7 10,000 West did not raise this issue before the Committee in order to develop a record or allow the
8 Committee to determine whether a remedy would be necessary or appropriate. Instead, 10,000 West
9 actually participated in the e-mails by sending its own e-mail correspondence to the Committee
10 Chairman.⁶¹

11 In relation to the *ex parte* issues, 10,000 West appears to argue that any *ex parte*
12 communication would require denial of APS' request for a CEC. Staff, however, does not believe
13 that *ex parte* communications should necessarily preclude the Commission from approving the
14 CEC.⁶² As noted in *Corbin*,

15 the Commission has discretion in dealing with any defilement or corruption of the
16 quasi-judicial process that may arise. Under appropriate circumstances it may
17 fashion remedies less drastic than dismissal, which will accord to all parties the
18 fairness essential to fundamental notions of due process, while at the same time
19 preserving the integrity of the adjudicative body, considering the interests of that
20 body and the duties imposed upon it.⁶³

21 The mere presence of procedural irregularities in an administrative proceeding does not necessitate
22 the nullification of an administrative finding where the complaining party suffers no prejudice.⁶⁴

23 Most significantly, the emails in question were publicly filed in the docket. As this filing
24 occurred prior to the conclusion of the hearing phase of the Committee's proceedings, the public
25 interest in the preservation of a complete record of the proceeding was satisfied. Further, as
26 demonstrated by the e-mails included in 10,000 West's Request for Review, it received and, in some
27 instances, responded to some of the e-mail communications purported to be *ex parte*.⁶⁵ 10,000 West
28 not only failed to complain about the e-mail communications during the Committee's proceedings

60 Op. Att'y Gen. I05-004 (2005) at 8.

61 See, e.g., 10,000 West Request for Review, Exhibit I.

62 See *Corbin v. Arizona Corp. Comm'n*, 143 Ariz. 219, 227 (App. 1984).

63 *Id.*

64 *Pavlik v. Chinle Unified School District No. 24*, 195 Ariz. 148, 157 (App. 1999).

65 10,000 West Request for Review, Exhibit I.

1 but also participated in them.⁶⁶

2 **3. The October 17, 2008⁶⁷ meeting did not violate Open Meeting Law or *Ex Parte***
3 **rules.**

4 Finally, Staff disputes 10,000 West's unfounded allegation that a procedural conference
5 between the Chairman, the Arizona Corporation Commission's Chief Counsel, and another attorney
6 regarding a separate and wholly unrelated line siting matter (Case 141, Docket No. L-00000HH-08-
7 0422-00141) violated either Open Meeting Law or the *ex parte* rule.⁶⁸ Open Meeting Law does not
8 apply to the October 17, 2008 procedural conference primarily because Ms. Alward, the Chairman,
9 and the other attorney do not constitute "a quorum of members of a public body" and hence, not an
10 Open Meeting. The Committee is composed of eleven members and consequently, at least six
11 members would need to be present in order to achieve the minimum necessary to hold an open
12 meeting. Furthermore, Ms. Alward is not a Committee member. As the transcript of that procedural
13 conference reflects, the sole Committee member present was the Chairman, acting in his capacity of
14 presiding officer.⁶⁹ Consequently, there was no Open Meeting.

15 With respect to the unfounded allegation of *ex parte* violations from the same event, the
16 communications between the Chief Counsel, Chairman Foreman, and the other attorney do not
17 constitute a violation of A.A.C. R14-3-220. An examination of the docketed transcripts for Case 141
18 reveals that the meeting was in fact a procedural conference that involved representatives of all
19 parties to that docket. Moreover, the transcript of that procedural conference (in Case 141) makes
20 clear that this proceeding (Case 138) was mentioned only with respect to scheduling issues in Case
21 141.⁷⁰ It is thus clear that the October 17th procedural conference (1) was publicly transcribed and
22 therefore not an off-the-record communication, (2) occurred in the presence of all parties to that case,
23 (3) did not in any way involve the substantive merits of the present siting case, (4) involved purely
24 procedural matters in another case, and (5) was related to a wholly separate and unrelated matter.

25 ⁶⁶ *Id.*

26 ⁶⁷ Although 10,000 West's request for review indicates that the meeting took place on October 15, 2008, the
27 meeting did in fact occur on October 17, 2008. Tr. at 963:24-964:2; 10,000 West request for review at 26:6-9;
28 Transcript of Procedural Conference filed on October 27, 2008, Docket No. L-00000HH-08-0422.

⁶⁸ 10,000 West Request for Review at 26.

⁶⁹ See Transcript of Procedural Conference held October 17, 2008, Docket No. L-00000HH-08-0422.

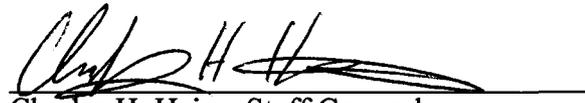
⁷⁰ See Transcript of Procedural Conference held October 17, 2008 at 51:10-22, Docket No. L-00000HH-08-0422.

1 Consequently, there was no *ex parte* violation from that proceeding, much less one that would have a
2 bearing on the matters at issue in this proceeding.

3 **III. CONCLUSION**

4 For the above stated reasons, Staff believes that the procedural irregularities identified in this
5 matter do not necessarily preclude approval of the application although Staff remains concerned by
6 these issues. On the merits, Staff believes that the project would promote the overall reliability of
7 APS' system and thereby would serve the public interest. Staff is, however, concerned that the
8 changes that APS has requested are not supported by the underlying record.

9 RESPECTFULLY SUBMITTED this 12th day of February, 2009.

10
11 

12 Charles H. Hains, Staff Counsel
13 Ayesha Vohra, Staff Counsel
14 Janet Wagner, Assistant Chief Counsel
15 Legal Division
16 Arizona Corporation Commission
17 1200 West Washington Street
18 Phoenix, Arizona 85007
19 (602) 542-3402

20 Original and twenty-five (25)
21 copies of the foregoing filed this
22 12th day of February, 2009 with:

23 Docket Control
24 Arizona Corporation Commission
25 1200 West Washington Street
26 Phoenix, Arizona 85007

27 Copies of the foregoing
28 mailed/e-mailed this 12th day of
February, 2009 to:

John Foreman, Chairman
Arizona Power Plant and
Transmission Line Sitting Committee
Office of the Attorney General
1275 West Washington Street

Phoenix, Arizona 85007
john.foreman@azag.gov
susan.ellis@azag.gov

Meghan Gabel

1 Pinnacle West Capital Corporation
P.O. Box 53999, Mail Station 8602
2 Phoenix, Arizona 85072-3999
meghan.grabel@pinnaclewest.com

3 Edward W. Dietrich
Senior Project Manager
4 Real Estate Division Planning Section
Arizona State Land Department
5 1616 West Adam Street
Phoenix, Arizona 85007
6 edietrich@land.az.gov

7 James T. Braselton
Gary L. Birnbaum
8 Mariscal Weeks McIntyre & Friedlander, PA
2901 North Central Avenue, Suite 200
9 Phoenix, Arizona 85012-2705
Counsel for Intervenor Surprise Grand Vista
10 JVI, LLC and Counsel for Sunhaven Property
Owners
11 james.braselton@mwmf.com
gary.birnbaum@mwmf.com

12 Thomas H. Campbell
13 Albert Acken
40 North Central Avenue
14 Phoenix, Arizona 85007
Counsel for Applicant, APS
15 tcampbell@lrlaw.com
aacken@lrlaw.com
16 Lawrence Robertson Jr.
2247 East Frontree Rd., Suite 1
17 P.O. Box 1448
Tubac, Arizona 85646-0001
18 Counsel for Intervenor Diamond Ventures
tubaclawyer@aol.com

19 Steve Burg
20 Chief Assistant City Attorney
City of Peoria
21 Office of the City Attorney
8401 West Monroe Street
22 Peoria, Arizona 85345
Counsel for City of Peoria, Arizona
23 steve.burg@peoriaaz.gov

24 Robert N. Pizorno
Beus Gilbert, PLLC
25 4800 North Scottsdale Rd., Suite 6000
Scottsdale, Arizona 85251-7630
26 rpizorno@beusgilbert.com

27 Court S. Rich
Ryan Hurley
28 Rose Law Group, PC

6613 North Scottsdale Rd., Suite 200
Scottsdale, Arizona 85250-0001
Counsel for Intervenor Lake Pleasant 5000,
LLC
crich@roselawgroup.com
rhurley@roselawgroup.com

Scott McCoy
Earl Curley Legarde, PC
3101 North Central Avenue, Suite 1000
Phoenix, Arizona 85012-2654
Counsel for Intervenor Elliot Homes, Inc.
smccoy@ecllaw.com

Andrew Moore
Earl Curley Legarde, PC
3101 North Central Avenue, Suite 1000
Phoenix, Arizona 85012-2654
Counsel for Intervenor Woodside Homes of
Arizona, Inc.
amoore@ecllaw.com

Joseph A. Drazek
Michelle De Blasi
Roger K. Ferland
Quarles Brady
One Renaissance Square
Two North Central Avenue
Phoenix, Arizona 85004-2391
Counsel for Intervenor Vistancia, LLC
jdrazek@quarles.com
mdeblasi@quarles.com
rferland@quarles.com

Michael D. Bailey
City of Surprise Attorney's Office
12425 West Bell Road
Surprise, Arizona 85374
Counsel for Intervenor City of Surprise
michael.bailey@surpriseaz.com

Jay Moyes
Steve Wene
Moyes, Sellers, & Sims
1850 North Central Avenue, Suite 1100
Phoenix, Arizona 85004
Counsel for Vistancia HOA's
swene@lawms.com
jimoyes@lawms.com

Scott S. Wakefield
Ridenour, Hienton, Kelhoffer & Lewis, PLLC

1 201 North Central Avenue, Suite 3300
Phoenix, Arizona 85004-1052
2 Counsel for DLGC II and Lake Pleasant
Group
3 sswakefield@rhhklaw.com

4 Garry D. Hays
Law Office of Garry D. Hayes, PC
1702 East Highland Avenue, Suite 400
5 Phoenix, Arizona 85016
Counsel for Arizona State Land Department
6 ghays@lawgdh.com

7
8
9
10 Christopher S. Welker
Holm Wright Hyde & Hayes, PLC
10201 South 51st Street, Suite 285
11 Phoenix, Arizona 85044
cwelker@holmwright.com

12 John Paladini
13 Dustin C. Jones
Tiffany & Bosco, PA
14 2525 East Camelback Rd., Third Floor
Phoenix, Arizona 85016
15 Counsel for Intervenor Anderson Land
Development, Inc
16 jmp@tblaw.com
dcj@tblaw.com

17 Jeanine Guy
18 Town Manager
Town of Buckeye
19 1101 East Ash Avenue
Buckeye, Arizona 85326
20 Intervenor Town of Buckeye
jguy@buckeyeaz.gov

21 Chad R. Kaffer
22 Fredrick E. Davidson
The Davidson Law Firm, PC
23 8701 East Vista Bonita Drive, Suite 220
P.O. Box 27500
24 Scottsdale, Arizona 85255
Counsel for Quintero Association
25 fed@davidsonlaw.net
crk@davidsonlaw.net

26
27 Mark A. Nadeau
Shane D. Gosdis
28 DLA Piper US LLP

2415 East Camelback Rd., Suite 700
Phoenix, Arizona 85016-4246
Counsel for 10,000 West, LLC
mark.nadeau@dlapiper.com
shane.gosdis@dlapiper.com

Copies of the foregoing
mailed this 12th day of
February, 2009 to:

Mike Biesemeyer
3076 East Blue Ridge Place
Chandler, Arizona 85249

Art Othon
Office of the Attorney
8401 West Monroe Street
Peoria, Arizona 85345

Charles W. and Sharie Civer (Realtors)
42265 North Old Mine Rd.
Cave Creek, Arizona 85331-2806
Intervenor on behalf of DLGC II and Lake
Pleasant Group



ATTACHMENT A

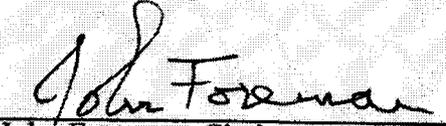
- 1 3. Public Comment;
- 2
- 3 4. The Committee will travel along the route, following an itinerary which will be
- 4 available at the hearing. A detailed description of the tour routes and itinerary,
- 5 including a map, will be on file at the Arizona Corporation Commission.
- 6 Members of the public may follow the Committee's tour by use of their own
- 7 private vehicles. The Committee will not conduct discussions or any verbal
- 8 deliberations during the tour. The Chairman of the Committee will make any
- 9 procedural decisions concerning stops at different points of interest.
- 10 5. Discussion of proposed Findings of Fact, Conclusions of Law and Certificate of
- 11 Environmental Compatibility; and,
- 12 6. Vote and decision concerning forms Findings of Fact, Conclusions of Law and
- 13 Certificate of Environmental Compatibility.

14 DATED this 12th day of August, 2008.

15 ARIZONA POWER PLANT AND

16 TRANSMISSION LINE SITING

17 COMMITTEE

18 

19 John Foreman, Chairman

20 Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting Linda

21 Hogan, voice phone number (602) 542-3931, E-Mail linda.hogan@azcc.gov. Requests should be made as early as possible

22 to arrange the accommodation.

23

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25 267869