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ORIGINAL

BEFORE THE ARIZONA POWER PLANT AND Arizona Corporation Commission
TRANSMISSION LINE SITING COMMITTEE DOCKETED

FEB 13 2009

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4 IN THE MATTER OF THE APPLICATION)
OF ARIZONA PUBLIC SERVICE COMPANY,)
5 IN CONFORMANCE WITH THE REQUIREMENTS)
OF ARIZONA REVISED STATUTES §§ 40-360,)
6 *et seq.*, FOR A CERTIFICATE OF ENVIRONMENTAL)
COMPATIBILITY AUTHORIZING THE TS-5 TO TS-9)
7 500/230kV TRANSMISSION LINE PROJECT, WHICH)
8 ORIGINATES AT THE FUTURE TS-5 SUBSTATION,)
LOCATED IN THE WEST HALF OF SECTION 29,)
9 TOWNSHIP 4 NORTH, RANGE 4 WEST AND)
TERMINATES AT THE FUTURE TS-9 SUBSTATION,)
10 LOCATED IN SECTION 33, TOWNSHIP 6 NORTH,)
11 RANGE 1 EAST, IN MARICOPA COUNTY, ARIZONA)

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

Case No. 138

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CITY OF SURPRISE'S BRIEF

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13
14 Intervenor City of Surprise files this brief in accordance with the Arizona Corporation
15 Commission's Procedural Order requesting such action in the commission's review of the Certificate
16 of Environmental Compatibility granted by the Arizona Power Plant and Transmission Line Siting
17 Committee on December 28, 2008.

18 The City of Surprise ("Surprise") supports the language contained in the Certificate of
19 Environmental Compatibility recommended by the Arizona Power Plant and Transmission Line
20 Siting Committee in this case, but in the event the Arizona Corporation Commission believes that this
21 application is troubled by additional procedural or evidentiary matters— such as (1) whether open
22 meeting laws were violated or (2) the "need" for the project— Surprise urges the commission to deny
23 the certificate or return the case to the committee, rather than attempt to address or cure those issues.

24 I. Open Meeting Law

25 The Arizona Power Plant and Transmission Line Siting Committee (the "Line Siting
26 Committee") appears to have violated Arizona's Open Meeting Law, and if the Arizona Corporation

1 Commission (the "Commission") concludes that the violation rendered the Line Siting Committee's
2 recommendation regarding the Certificate of Environmental Compatibility ("CEC") null and void,
3 then Surprise urges the Commission to deny the CEC or return this matter to the Line Siting
4 Committee so that the committee can grant a new CEC. *See* A.R.S. §§ 38-431.01(A), 38-431.05(A).
5 The October 3, 2008 e-mail from the Line Siting Committee chairman to the applicant and copying a
6 quorum of members of the committee regarding the form of the proposed CEC likely violated the
7 Arizona Open Meeting law (a copy of the e-mail is attached as Exhibit "A" to this Brief). An e-mail
8 exchange between members of a public body in which legal action is proposed concerning a matter
9 that may foreseeably come before the body for action constitutes a violation of the Arizona Open
10 Meeting Law. *See* Ariz. Att'y Gen. Ops. I05-004 at 2. Here, the Line Siting Committee chairman
11 exchanged an e-mail with the applicant— copying the members of the committee— and proposed the
12 adoption or incorporation of draft CEC language into the final CEC. This action likely violated the
13 Arizona Open Meeting law, regardless of the fact that none of the other committee members
14 responded to the chairman's e-mail. *See* Ariz. Att'y Gen. Ops. I05-004 at 5-6 ("an e-mail from a
15 board member to enough other board members to constitute a quorum that proposes legal action
16 would be a meeting within the OML, even if there is only a one-way communication, and no other
17 members reply to the e-mail.") The violation was never ratified, and the legal action transacted in
18 that meeting is therefore null and void. A.R.S. § 38-431.05.

19
20 In the event the Commission concludes that the violation of the Arizona Open Meeting Law
21 tainted the validity of the CEC granted by the Line Siting Committee to the applicant, Surprise urges
22 the Commission to return this matter to the Line Siting Committee for new consideration.
23

24 **II. Need for the Project.**

25 The record developed before the Line Siting Committee is scant with respect to the necessity
26 of the proposed TS-5 to TS-9 500/230kV Transmission Line Project (the "TS-5 to TS-9 Project"),
and in the event the Arizona Corporation Commission believes additional evidence on this topic is
necessary, the Commission should return this case to the Line Siting Committee or deny the
Certificate of Environmental Compatibility. The application for the TS-5 to TS-9 Project refers
almost solely to population growth as necessitating the project when it mentions the applicant's

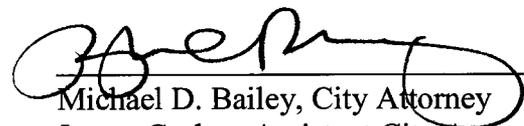
1 desire to deliver electric power to “the growing communities [it] serves” for use “as the far northwest
2 valley develops,” and when it discusses the use for a 230kV line to “serve future load in portions of
3 the Town of Buckeye, City of Surprise, City of Peoria, and unincorporated Maricopa County...” APS
4 TS-5 to TS-9 500/230kV Transmission Line Project Application for a Certificate of Environmental
5 Compatibility at IN-1, IN-2, 3.

6 Despite the reliance in the application on population growth as a driver for the TS-5 to TS-9
7 Project, particularly the 230kV line, the applicant made almost no mention of such purported growth
8 before the Line Siting Committee and declined to address any aspect of need for the project in its
9 rebuttal case. See Docket No. L-00000D-08-0330-00138, Transcript of Hearing at 3027:14-17.
10 Surprise believes this Commission could conclude that a need for the TS-5 to TS-9 Project,
11 particularly the 230kV line, was not established in the record, and if so, Surprise urges the
12 Commission to return this matter to the Line Siting Committee for resolution of that issue rather than
13 attempt to sort out the matter before the Commission with a closed record and only the briefs and oral
14 argument of the parties on which to rely.

14 **Conclusion**

15 Assuming the Arizona Corporation Commission is not troubled by the evidentiary or
16 procedural issues described above, Surprise believes the Commission should adopt the Certificate of
17 Environmental Compatibility as it is written. However, in the event the Commission believes that a
18 violation of the Arizona Open Meeting Law or a failure on the part of the applicant to adequately
19 demonstrate a “need” for the TS-5 to TS-9 Project renders the CEC defective, Surprise urges the
20 Commission to either deny the CEC or return the matter to the Line Siting Committee to correct such
21 defects.

22 RESECPTFULLY SUBMITTED this 12th day of February, 2009.

23
24 
25 Michael D. Bailey, City Attorney
26 James Gruber, Assistant City Attorney
City of Surprise Attorney's Office

1 Pursuant to A.A.C. R14-3-204,
2 the Original and 25 copies were
3 filed on February 12, 2009, with:

4 Docket Control
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8 Copy of the above mailed this
9 12th day of February, 2009, to:

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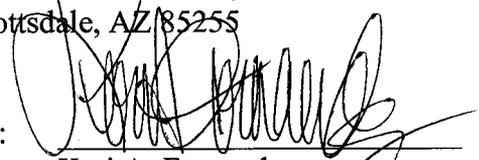
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EXHIBIT

A

Charles Hains

From: John Foreman [John.Foreman@azag.gov]
Sent: Friday, October 03, 2008 10:29 AM
To: Albert Acken
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Subject: RE: CEC CONDITIONS

Bert,

Thank you for your response to the proposed conditions. Your comments were constructive and very helpful. I have been asked to include the draft conditions in the docket so all members of the Commission will be able to view them. I think that is a good idea. I will also file your response and my reply. All future comments should be filed with docket control in this file.

Let me reply to some of the concerns you raise by paragraph:

1. The conflict between allowing the companies a longer time frame on the one hand and the changing proof regarding the factors in the statute remains. A longer time frame will allow longer range planning that I believe should be encouraged. However, granting a CEC for a longer time frame means that when the project is actually built, the statutory factors may have changed from the time the CEC was granted. I do not know how to solve this problem without using the renewal process. The renewal process will allow the Commission to decide if a change in circumstance has occurred that requires new findings or balancing. The renewal process has been used in the past on multiple occasions, but no rules exist for its use. Certainly an application to renew should be "timely". The Commission will have to decide what is "timely" until the process is better defined by rule or statutory change. Five years is rough approximation of the event horizon for the most credible expert predictions about the factors now listed in the statute.

2. Your response raises an interesting general point. What is the power of the Commission to regulate on going operation of a project? I think they do have the power and I think using the conditions as a way to sculpt that regulation is reasonable. If they have other ways of regulating and would rather use those other ways, I do not have a problem deleting some of the conditions. If they do not or if they want to use the conditions, I see no reason to change that practice in this case. Long term review and reform is not something we can accomplish in this application.

In addition, some of the Committee's findings and conclusions may be based upon the assumption the project will be constructed or operated according to a condition. It is not unreasonable to incorporate some of those understandings into the CEC.

3. Draft Condition #2 is more inclusive than A.R.S. § 40-360.06D and it was intended to be. The applicant should follow all laws and regulations. If local ordinances etc. are too restrictive, the notice and potential override provisions of § 40-360.06D should be implemented before not after the CEC is granted.

4. I understood some of the provisions were crafted by individual commissioners and that tells me they view the imposition of "conditions" as something they support. The reason to review the conditions is to determine whether each individual makes sense for that CEC (see your comments #5 and #8, below) and to see if we can draft the language in a way that is clear and covers exactly what we want covered.

5. If Draft Condition #8 is no longer necessary, let us have some testimony on that subject--I missed it if we did. It should not be used if it is unnecessary.

6. You raise a couple of good points here. The Applicant obviously cannot post a sign unless they have a legal right to enter. I agree the language should reflect that limitation.

7. I think your points here are also well taken. The burden of "revegetation" for damage to the land and plants not caused by the Applicant should not be automatically placed upon

the Applicant. It may be the construction mitigation plan process will give the Commission the authority to deal with this problem.

8. If the route ultimately selected will not cross or approach within 100' of a gas pipe line, Draft Condition 15 should not be used. I would like to hear from the Commission Staff about whether they believe the language changes are a problem.

I look forward to hearing from other parties. I would like all future responses to be filed with docket control in this file.

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>>> "Acken, Albert" <AAcken@lrlaw.com> 9/29/2008 5:19 PM >>>
Chairman Foreman

Thank you for the opportunity to comment on your draft CEC conditions. The concept you have presented, to have clear and appropriate CEC conditions, is a good one. Over the years, as various conditions have been modified and new conditions added, many conditions have become somewhat duplicative, unclear in meaning, or simply outdated. While the Applicant makes a good faith effort before filing a draft CEC to tailor standard conditions to the specific project at issue, identify and eliminate outdated conditions, and add new conditions as warranted, it is an ongoing effort.

Following are our specific comments to some of the draft conditions you have proposed:

1. In recent cases, term limits imposed in CECs have varied from five years (see, e.g., Case 129) to nearly 20 years (see, e.g., Cases 126, 132, and 137), depending on the specifics of each case. The Applicant agrees with this ongoing practice of evaluating term length on a case by case basis. As a result of numerous case-specific factors, limiting the term to five years in this case will likely impose additional burdens on the Applicant, Commission Staff, the Commission and perhaps others.

Additionally, the Applicant and other utilities have heard repeatedly from the Commission, local jurisdictions, and other stakeholders that they want utilities to engage in long-term transmission planning. As we have heard in this case, the affected jurisdictions do not include future electric facilities (and their proposed locations) as part of their general plans. Limiting the CEC to a five-year term would likely discourage utilities from planning utility corridors well in the advance of future development and would result in identifying facilities on a "just in time" basis which could result in limited routing options with greater impacts.

Finally, the term "timely" is unclear because neither statutes nor rules impose a specific deadline for submittal of an application requesting a CEC extension.

2. A number of the proposed conditions impose obligations during the operation of the Project. This approach departs from the statutory regime, which applies to the construction of facilities, not ongoing operations. See, e.g., 40-360.03 and 40-360.07.A. A CEC is issued with conditions that assure the Commission and public that the construction of the project is done in a manner that limits impacts to the environment. If the CEC imposes operational requirements in addition to construction requirements, then it could be argued that the Applicant must seek an extension at the end of the term of the

CEC to authorize continued operations, even if construction is complete.

The imposition of operating requirements, in conjunction with a short CEC term, could result in an obligation to file extension requests every five years during the Project's lifetime. This would impose significant burdens on the Applicant, the Commission, the Commission Staff, and any other interested party.

3. Draft Condition 2 differs somewhat from the statutory language found in 40-360.06.D.

4. Some standard conditions, such as Applicant's Draft Conditions 4,

6

and 11, reflect conditions crafted by current Commissioners.

5. Draft Condition 8 is no longer necessary. As a result of this condition in earlier CECs, APS' high voltage transmission structure and line designs have incorporated the necessary measures to minimize impacts to raptors.

6. Draft Condition 10 eliminates the "to the extent practicable" for the placement of signs. This is an important limitation given access difficulties and potentially applicable approval processes on state and federal land. Additionally, the original sign condition dealt only with the actual acquisition of the ROW. In Case 120 Commissioner Mundell requested a condition be added to inform potential homeowners of a future transmission line. In this case, even on much of the private property, the land is undeveloped, not accessible and lacks public rights of way.

7. Draft Condition 11 could be interpreted to mandate the revegetation of disturbed areas and the use of existing access roads. However, in many portions of the route, there are no existing access roads. Even in corridors with existing roads, those roads may not provide access, depending on the final placement of the line. Additionally, APS must work with existing landowners and it may not make practical or economic sense to revegetate disturbed areas, depending on the landowners'

plans

for those areas in the future. In addition, the Applicant's proposal to file a construction mitigation and restoration plan with the ACC before construction begins will provide the ACC the opportunity to review and approve that plan.

8. Draft Condition 15 revises a carefully crafted agreement between Commission Staff and several utilities. While perhaps intended only to clarify, it does change the meaning and scope of the condition. For example, the concerns that this condition was originally drafted to address are limited to situations where pipelines parallel transmission lines and the lines are within 100 feet of each other. Please note, the Applicant does not believe that the current project will be constructed within 100 feet of an existing gas or petroleum line but is agreeing to include it at the request of Staff.

Thank you again for providing your draft conditions for review and comment.

Bert Acken

-----Original Message-----

From: John Foreman [mailto:John.Foreman@azag.gov]

Sent: Thursday, September 11, 2008 12:03 PM

To: Lawrence Robertson; Charles Hains; Janet Stone; Robert Pizorno; Frederick Davidson; Laurie Ehlers; Mark Nadeau; Charles & Sharie Civer; Andrew Moore; Scott McCoy; Edward Dietrich; Garry Hays; Jay Moyes; Steve Wene; Griffin, Betty Jean; Campbell, Tom; Gary Birnbaum; Jim Braselton; Steve Burg; Joseph Drazek; Michelle De Blasi; Roger Ferland; Scott Wakefield, Esq.; Court Rich; Michael Bailey; Dustin Jones

Cc: Marta Hetzer

Subject: CEC CONDITIONS

I have attached a draft of Conditions for CECs generally that I would propose be applied in Application #138. I am soliciting suggestions about how the language could be adapted for use in #138 and suggestions about how it could be improved in general. Please give me your thoughts.

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