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BEFORE THE ARIZONA POWER PLANT AND TRANSMISSION LINE SITING COMMITTEE

IN THE MATTER OF THE APPLICATION OF HUALAPAI VALLEY SOLAR LLC, IN CONFORMANCE WITH THE REQUIREMENTS OF ARIZONA REVISED STATUTES §§ 40-360.03 AND 40-360.06, FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AUTHORIZING CONSTRUCTION OF THE HVS PROJECT, A 340 MW PARABOLIC TROUGH CONCENTRATING SOLAR THERMAL GENERATING FACILITY AND AN ASSOCIATED GEN-TIE LINE INTERCONNECTING THE GENERATING FACILITY TO THE EXISTING MEAD-PHOENIX 500kV TRANSMISSION LINE, THE MEAD-LIBERTY 345kV TRANSMISSION LINE OR THE MOENKOPI-EL DORADO 500kV TRANSMISSION LINE.

Docket No.: L-00000NN-09-0541-00151

Case No. 151

NOTICE OF FILING E-MAIL COMMUNICATION

The Chairman of the Arizona Power Plant and Transmission Line Siting Committee is providing notice of filing the attached e-mail communications, pertaining to this case, that have occurred between the Committee Members involved and the Chairman, or his staff, up to this date, since the previous filing on February 12, 2010.

DATED: April 19, 2010

John Foreman, Chairman
Arizona Power Plant and Transmission
Line Siting Committee
Assistant Attorney General
john.foreman@azag.gov

Arizona Corporation Commission
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1 Pursuant to A.A.C. R14-3-204,
2 The Original and 25 copies were
filed April 19, 2010 with:

3 Docket Control
4 Arizona Corporation Commission
5 1200 W. Washington St.
Phoenix, AZ 85007

6
7 Copy of the above was mailed
this 19th day of April to:

8
9 Janice Alward, Chief Counsel
Arizona Corporation Commission
10 1200 West Washington Street
Phoenix, AZ 85007
11 Counsel for Legal Division Staff

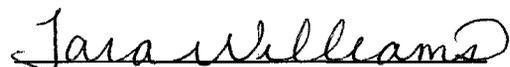
12 Thomas H. Campbell
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18 Susan Bayer
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20 Golden Valley, AZ 86413

21 Denise Bensusan
22 4811 East Calle Bill
Kingman, AZ 86409

23 Robert A. Taylor
24 Chief Civil Deputy County Attorney
P.O. Box 7000
25 Kingman, AZ 86402

26 

From: Tara Williams
To: Doorenbos, Billie; Eberhart, David; Houtz, Gregg; Marshall, Brenda; ...
Date: 3/18/2010 9:18 AM
Subject: Fwd: #151 filing by Janice Alward

Committee Members,

Please see the message from Chairman Foreman below. Here is the link to the Brief he discusses:
<http://images.edocket.azcc.gov/docketpdf/0000108407.pdf>

Thank you,
Tara

>>> John Foreman 3/18/2010 9:09 AM >>>

Committee Members:

Janice Alward on behalf of the Commission Staff filed a "Brief" on March 16, 2010, in the recent Kingman case, #151. As you can see from the service page, she did not send a copy to any member of the Committee. However, I call it to your attention because it criticizes at length the actions of the Committee. Tara will provide a link to it. Because the issues may occur again, you may wish to read it. The legal conclusions in her Brief are wrong for the reasons discussed at the hearings we held after the Committee made its decision. Unfortunately, the Committee's position on the law and the facts is not fully or accurately described. Neither the Committee or the Chairman of the Committee is a party to the future proceedings as you know.

John Foreman
Assistant Arizona Attorney General
Chair, Arizona Power Plant and Transmission Line Siting Committee
1275 W. Washington
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john.foreman@azag.gov

In order to avoid any potential question about an Open Meetings Law violation, please do not reply to any of the recipients of this e-mail except the sender.

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From: Tara Williams
To: Barry Wong; Billie Doorenbos; Brenda Marshall; Gregg Houtz; Janet St...
CC: David Eberhart
Date: 4/2/2010 1:50 PM
Subject: #151 - Hualapai Valley Solar Project
Attachments: Re: Updated Committee Contact Information

Committee Members,

Per Mr. Eberhart, please view the attached e-mail.

In order to avoid any potential question about an Open Meetings Law violation, please do not reply to any of the recipients of this e-mail except the sender.

Thank you,
Tara Williams
Assistant
Consumer Protection & Advocacy Section
Office of the Attorney General
Tel: (602) 542-7759
Fax: (602) 542-4377
tara.williams@azag.gov

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From: "Dave Eberhart" <tbirdgroup@cox.net>
To: "Tara Williams" <Tara.Williams@azag.gov>
Date: 4/2/2010 11:24 AM
Subject: Re: Updated Committee Contact Information

Tara,

I thought Chairman Foreman and the other committee members might be interested in the attached article from the Kingman Arizona newspaper. If OK with Chairman Foreman, would you please forward to the others?

<http://www.kingmandailyminer.com/main.asp?SectionID=1&SubsectionID=797&ArticleID=37092>

Thanks,

Dave Eberhart

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

From: "Tara Williams" <Tara.Williams@azag.gov>
To: "Janet Stone" <janets@azcommerce.com>; "Jessica Youle" <jessicay@azcommerce.com>; "Paul Rasmussen" <PWR@azdeq.gov>; "Brenda Marshall" <BrendaM@azroc.gov>; "William Mundell" <wmundell@azroc.gov>; "Gregg Houtz" <GAHoutz@azwater.gov>; "Barry Wong" <Barry@barrywong.com>; "Mike Whalen" <Centurian@cox.net>; "David Eberhart" <TBirdGroup@cox.net>; "Patricia Noland" <panoland@hotmail.com>; "Mike Palmer" <MightyMikeBisbee@peoplepc.com>; "Jeff McGuire" <JMcGuire@q.com>; "Billie Doorenbos" <BillieDoorenbos@qwest.net>
Sent: Friday, April 02, 2010 10:27 AM
Subject: Updated Committee Contact Information

Committee Members,

I do not know if everyone received Ms. Youle's information. Also, Mr. Rasmussen provided some updates this morning. Please see the attached document.

In order to avoid any potential question about an Open Meetings Law violation, please do not reply to any of the recipients of this e-mail except the sender.

Thank you,
Tara Williams
Assistant
Consumer Protection & Advocacy Section
Office of the Attorney General
Tel: (602) 542-7759
Fax: (602) 542-4377
tara.williams@azag.gov

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message.

From: John Foreman
To: Eberhart, David; Houtz, Gregg; McGuire, Jeff; Mundell, William; Palm...
CC: Ellis, Susan; Williams, Tara
Date: 4/14/2010 9:26 AM
Subject: #151 COMMITTEE INTERVENTION MEMO
Attachments: EMAIL - 786582 - #151 COMMITTEE INTERVENTION MEMO - 1 - PHX.DOC

Line Siting Committee Members,

Attached is a memo I have prepared that addresses the issues raised by the Commission in its review of our CEC in the Hualapai Valley case, #151. In a separate e-mail I will send you a copy of the transcript of the hearing. In the hearing Chair Mayes says she is sending us a message on page 101. If enough members of the Committee are interested in scheduling a meeting to discuss the "message" and the actions of the Commission, I will be happy to set one up. If not, we can address the issue of intervention the next time it arises.

Please let me know individually your thoughts. A response to other Committee members might raise open meetings law issues that I know we would all like to avoid.

John Foreman
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OFFICE OF THE ATTORNEY GENERAL
CONSUMER PROTECTION & ADVOCACY SECTION

MEMORANDUM

TO: Arizona Power Plant and Transmission Line Siting Committee Members

FROM: John Foreman, Chairman, Arizona Power Plant and Transmission Line Siting Committee

DATE: April 19, 2010

RE: Arizona Corporation Commission Legal Staff Brief in #151

A previous email called your attention to a "Brief" filed by the legal Staff of the Arizona Corporation Commission which advocates the position of Denise Bensusan who attempted to intervene in the hearing of line siting case #151. The Staff Brief has been joined by the attorney for Ms. Bensusan from the Arizona Center for Law in the Public Interest. This response for Committee members will address the claims made in the Brief that appear to be unsupported by the law or the factual record before the Committee. I expect these issues may arise again in the future and this memo may serve as a departure point for future discussion by the Committee. Some were raised by the Applicant at the hearing on March 31, 2010, some were not. Dave Eberhart and Greg Houtz were present for the hearing. The Reporter's Transcript shows they were not given a meaningful opportunity to respond to the issues raised.

1. The Committee is not required to make findings on procedural rulings.

The Staff Brief complains that the "Committee did not provide reasons for the denial" of Ms. Bensusan's request to intervene. Brief, p. 3, l.1. As a preliminary matter, the Brief does not cite any authority that requires the Committee to give reasons for making any procedural decision much less denying a request for intervention. No legal authority exists that requires the Committee or the Commission to provide reasons for their respective procedural rulings. The rules of procedure drafted by the Commission for the Committee do not require findings, nor do the rules of procedure drafted by the Commission for itself. See, R14-3-201 et seq. and R14-3-101 et seq.

Later, the Brief says that "comments were made by various Committee members regarding the Committee's previous failure to act on the intervention requests. However, the Committee as a whole did not determine or state its reasons for denial for the reconsideration of intervention." Brief, p. 3, ll. 18-21. Again, no law required "the Committee as a whole" to "state its reasons for denial", but it is interesting to note that

Ms. Bensusan's counsel argued the reconsideration of the denial of the request to intervene and witnessed the unanimous vote by the Committee without once asking for findings of fact or conclusions of law to be made by the Committee. Nor did counsel for Ms. Bensusan indicate he did not understand why the Committee denied the original request to intervene or the motion to reconsider. Any claim that the Committee had a legal responsibility to make findings was waived by Ms. Bensusan and her counsel's repeated failure to request findings at the evidentiary hearing on January 12 and 13, and at the motion to reconsider hearing on January 27, 2010. *Trantor v. Frederikson*, 179 Ariz. 299, 878 P.2d 657 (1994)(Failure of a party to object to lack of findings of fact and conclusions of law "precludes that party from raising the absence of findings as error on appeal." 179 Ariz. at 301.)

2. The Committee members explained the reasons for their votes.

Despite the legal claim that the Committee was required to provide an explanation for its procedural decision implied in the Brief, the claim in the Staff Brief that no reasons were given for its decision is inconsistent with the record. Member Houtz commented when the issue of intervention was discussed at the very beginning of the evidentiary hearing and the Chair commented on the denial of the request to intervene shortly after the decision by the Committee. Transcript of Hearing of January 12 and 13, 2010 ("TR"), p. 11, ll. 20-25 and p. 14, l. 1 through p. 18, l. 9. At the end of the explanation of the affect of the denial of the motion to intervene and what opportunity she would have to present evidence as a witness, Ms. Bensusan thanked the Committee members "for that very thorough explanation." Id. p. 18, ll. 8-9. In addition, the transcript of the hearing on the motion to reconsider on January 27, 2010, contains a very thorough discussion of the sentiments of the members of the Committee in which seven of the nine members present participated about the intervention issue. Transcript of Hearing of January 27, 2010, pp. 18-54. After the discussion, the Committee unanimously denied the motion to reconsider. Id.

The transcript also contains information that the chief counsel for Staff was the person who initiated a discussion with counsel for the Applicant that was not on the public record about filing the motion to reconsider with the Committee on behalf of Ms. Bensusan and the other potential intevenor, Ms. Susan Bayer. See, R14-3-113(C); Transcript of Hearing of January 27, p. 38, ll. 11-23.

3. The Commission's own rules and A.R.S. § 40-360.05 not the Rules of Civil Procedure control intervention in line siting.

The heart of the Staff Brief says: "Neither A.R.S. § 40-360.05(A)(4) nor any Committee rule provides a standard for determining the 'appropriateness' of interventions. However, Line Siting Rule R14-3-216 states that Rules of Civil Procedure apply in absence of a Committee rule." Brief, page 5, lines 7-9. This position is contrary to the language of A.R.S. § 40-360.05(A)(4) that sets a standard, and the Committee

rule on intervention that has existed for 40 years since it was adopted by the Commission itself.

The Commission's rule adopted for the Committee, R14-3-216 cited by the Staff Brief and adopted effective February 1970 states: "...In all cases in which procedure is not set forth either by law or by these rules, the Rules of Civil Procedure for the Superior Courts of Arizona, as established by the Supreme Court of Arizona, shall govern...." (Emphasis added.) In order for R14-3-216 to allow the Rules of Civil Procedure for the Superior Courts of Arizona to apply to a decision about the intervention of parties, neither the "law" (A.R.S. § 40-360.05(A)(4)) nor any rule of procedure adopted by the Commission could "set forth" any "procedure" to intervene. Contrary to the Brief's claim, A.R.S. § 40-360.05(A) discusses at length who may be a party at a Committee hearing, and R14-3-204 is explicitly titled, "Intervention". In order for the Staff Brief's argument to make sense, the "intervention" rule adopted by the Commission for the Committee, R14-3-204, would have to say: Any person entitled by Rule 24 of the Arizona Rules of Civil Procedure to become a party. Instead, it says: "Any person entitled by A.R.S. § 40-360.05(A)...to become a party." (Emphasis added.)

In addition to being inconsistent with the clear language of R14-3-204, the Staff Brief argument assumes the statute has no standard for determining intervention requests and, therefore, the rules of civil procedure must apply. To the contrary, A.R.S. § 40-360.05(A) has a detailed list of persons and entities who "shall" have mandatory party status. Subsection (A)(1) requires the Applicant to be a party. It also grants mandatory party status to a list of governmental entities in subsection (A)(2) and a broad list of non-governmental entities in subsection (A)(3) when they affirmatively request intervention. Ms. Bensusan does not fit into any of those categories. She fits into the subsection (A)(4) category of potential parties and the granting of party status to anyone in that category is not mandatory but explicitly discretionary with the "committee." A.R.S. § 40-360.05(A)(4) does have a standard for granting party status to those persons who do not have the right to become parties: "The parties to a certification proceeding shall include: ... 4. Such other persons as the committee ... may at any time deem appropriate." (Emphasis added.) When the legislature uses the terms "shall" and "may" in the same paragraph of a statute as it did in A.R.S. § 40-360.05(A), the courts of Arizona infer that the legislature acknowledged the difference between the terms and intended each word to carry its ordinary meaning. *HCZ Construction, Inc. v. First Franklin Financial Corp.*, 199 Ariz. 361, 365 ¶ 15, 18 P.3d 155 (App. 2001). The mandatory right to intervene indicated by use of the word "shall" for persons described in A.R.S. § 40-360.05(A)(1), (2) and (3) is explicit as is the discretionary right to intervene indicated by use of the word "may" of persons listed in subsection (4). The conclusion is inescapable that the legislature intended the Committee to have the discretion to grant or deny party status to persons listed in subsection (A)(4) because they used the term "may" instead of "shall."

The term “appropriate” as it is used in A.R.S. § 40-360.05(A)(4) means “especially suitable or compatible.” Merriam-Webster’s Collegiate Dictionary, 11th Ed. (2008). In the absence of a statutory definition, courts apply the ordinary meaning found in dictionaries. *Sun City Grand Community Ass. V. Maricopa County*, 216 Ariz. 173, 176, ¶ 12, 164 P.3d 679, 682 (App. 2007). What makes an “appropriate” applicant “especially suitable” can easily be inferred from the preceding three subsections of A.R.S. § 40-360.05(A). Section 40-360.05(A) lists categories of persons as defined by A.R.S. § 40-360(8) who have some interest in the application from the person who files the application to governments or governmental agencies “interested in the proposed site” to a very broad list of non-governmental entities that might have an interest in the “areas in which the facilities are to be located.” A.R.S. § 40-360.05(A)(1), (2) and (3).

So the issue becomes, is a legislative grant of authority to the Committee of the power to make decisions on intervention on persons not listed in the other subsections of A.R.S. § 40-360.05(A) on the basis of what the Committee “may ... deem appropriate” legally sufficient? The Staff Brief implies it is not. Again, it cites no supporting legal authority. The Commission should think carefully about the unintended legal consequences of adopting the Staff Brief’s position. The Commission has taken the position in various courts and in its own proceedings that a statutory grant of power to the Commission to act as it deems “appropriate” is legal. For example, if the Commission decides “appropriate” as used in A.R.S. § 40-360.05(A)(4) is not legal, would it be forced to admit in future litigation it lacks the legal authority to enter orders granting public service corporations the right to issue “stock and stock certificates, bonds, notes and other evidences of indebtedness” when “in the opinion of the commission” it finds the issuance is “reasonably necessary or appropriate”? A.R.S. § 40-302(A). See, *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 190 ¶ 66, 181 P.3d 219, 237 (App. 2008) (Equitable estoppel may under some circumstances be applied against the state). The Arizona Constitution and the Arizona Revised Statutes contain too many uses of the word “appropriate”, used in exactly the same sense as it is used in A.R.S. § 40-360.05, to list in this memo. But here are just a few that would have to be changed if the Staff Brief’s position were adopted by the courts. Arizona Constitution: Art. 6, § 38(A) and (B); Art. 28, § 1(1); Art. 28, § 6(C); Arizona Revised Statutes: § 3-102(C)(2); § 3-106(C); § 3-190.01(B); § 3-113(A); § 3-215.01(B); § 3-217(A)(2); § 40-302(A); § 40-360.03; as well as § 40-360.05(A).

The Commission is also granted the authority by the legislature to determine “fair value” and a “just and reasonable rate.” See, *Phelps Dodge Corp. v. Arizona Electric Power Coop., Inc.*, 207 Ariz. 95, ¶ 26, 83 P.3d 573 (App. 2004). The Staff Brief position is consistent with an argument that the terms “fair value” and a “just and reasonable rate”, like the term “appropriate”, do not set legally sufficient standards. The Staff Brief position consistently applied would dramatically reduce the Commission’s power and be inconsistent with well-settled law.

4. The Staff Brief is inconsistent with the Commission's rules for itself.

The Staff Brief also appears to be inconsistent with the statutes governing the Commission and its own rules for hearings. A.R.S. § 40-247 deals with other types of hearings held by the Commission. In subsection (A) it identifies proper parties to hearings before the Commission as "The complainant and the party complained of, and such persons as the commission allows to intervene...." (Emphasis added.) Apparently the Commission does not even need to deem persons "appropriate" to allow them to intervene. R14-3-103 which is entitled "Parties" paraphrases A.R.S. § 40-247(A) in its subsection D describing an intervenor for its own hearings as: "Any person permitted to intervene in any proceeding...." A later rule, R14-3-105 is entitled, "Intervention as party and other appearances." Its subsection A says: "Intervention. Persons ... who are directly and substantially affected by the proceedings, shall secure an order ... granting leave to intervene before being allowed to participate." It is not clear whether the words "directly and substantially affected by the proceedings" are meant to refer to all intervenors or those who must secure an order before being allowed to participate. But, subsection B follows with a limitation: "... No application for leave to intervene shall be granted where by so doing the issues theretofore presented will be unduly broadened...." It is very hard to rationally claim that the contradictory language in the statutes and rules relating to the Commission's own hearings sets any more definite standard than the statutes and rules relating to the Committee's hearings. The Commission's rules for itself like the Commission's rules for the Committee refer to the rules of civil procedure if a procedure is: "... set forth neither by law, nor by these rules, nor by regulations or orders of the Commission...." But, the Commission's rules contemplate that its rules not the rules of civil procedure will govern its own intervention decisions. The inconsistency between the application of the rules the Commission drafted for itself and the application of the rules the Commission drafted for the Committee is not acknowledged or explained in the Brief.

The courts would interpret the phrases, "in a manner that gives effect to each provision so as to derive the legislative intent manifested by the entire statute." *Sun City Grand Community Ass. V. Maricopa County*, 216 Ariz. 173, 177 ¶ 12, 164 P.3d 679, 682 (App. 2007). In the *Sun City Grand* opinion the court of appeals used those principles to construe the term "in general". The courts would have no more difficulty construing the terms "directly and substantially affected", "fair value", "just and reasonable rate" or "appropriate" than they did interpreting the term "in general."

It is also important to note that although the Commission is authorized to make rules for the Committee (see, A.R.S. § 40-360.01(D)) it is not granted the power to interpret the laws passed by the legislature or the rules it makes for the Committee and force those interpretations on the Committee. The Committee is a separate state agency formed by the legislature not the Commission, and the Commission should extend to the Committee the same deference that it expects other agencies to grant it.

5. Ms. Bensusan was given Due Process.

The Staff Brief also makes the claim: "Ms. Bensusan was not afforded due process." Brief, p. 6, l. 5. Again, no citation of supporting authority is made. The Brief does not even say what process Ms. Bensusan was not afforded that was due. It is difficult to respond to empty legal conclusions that have no factual reference and no citation of legal authority. "Substantive due process protects an individual from government interference with 'rights implicit in the concept of ordered liberty'.... Procedural due process guarantees that permissible governmental interference is fairly achieved." *Simpson v. Owens*, 207 Ariz. 261, 267 ¶ 17, 85 P.3d 478, 484 (App. 2004) citing *United States v. Salerno*, 481 U.S. 739, 746, 95 S. Ct. 2095, 95 L.Ed2d 697 (1987); see also, *Hernandez v. Lynch*, 216 Ariz. 469, 475 ¶ 19 fn. 6, 167 P.3d 1264, 1270 (App. 2007)(*Hernandez* cites with approval both *Salerno* and *Simpson* in its discussion of substantive due process. All three cases involve analysis of whether pre-trial detention improperly affects the substantive due process right to liberty.) Ms. Bensusan had no right to "life, liberty or property" interest that was affected by the denial of her request to intervene within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution or Art. 2, § 4 of the Arizona Constitution.

Ms. Bensusan did have the statutory right to request to be allowed to intervene as a party. She made a request and her request was denied. The Staff Brief, Ms. Bensusan, and her attorney did not argue that the procedure followed by the Committee for denying her request was a denial of due process. Ms. Bensusan, her attorney, Staff and the Commission just disagree with the decision made and reaffirmed by the Committee. Ms. Bensusan could, of course, have asked the courts review whether she was denied due process by filing a special action. Rule 4, Rules of Procedure for Special Actions. See, generally, Arizona Appellate Handbook, Vol. I, Chapter 7 and Vol. II, Chapter 25, 3d Ed. She made no attempt to ask the courts to intervene. The courts would, of course, have deferred to the procedural decision of the Committee just like they would have deferred to a similar decision made by the Commission in one of its hearings.

Contrary to the inference in the Staff Brief, the nonbinding language contained in the session laws quoted in part on page 4 of the Brief does not say that public participation of individuals means intervention in the proceedings as parties. The statute sets forth a specific opportunity for persons who are not allowed to intervene as parties to participate in line siting decisions by making a "limited appearance" and filing a statement in writing with the Chairman of the Committee. A.R.S. § 40-360.05(B). Ms. Bensusan decided not to take advantage of the option given to her for participation in the line siting hearing by the statute and rules if she was not a party.

She was, in fact, given a greater opportunity to provide information than that explicitly granted by the statute or rules. She was invited to testify under oath and she did, at length. Everything that she says she wanted the Committee to hear was placed

on the record. Hearing Transcript of January 12 and 13, 2010, p. 468, l. 21 to p. 469, l. 3. Most telling is the fact that neither her present attorney nor the Staff Brief were able to allege a single fact that was left out of the record that was important to the decision by the Committee to grant the CEC or impose the conditions. She suffered no prejudice and, equally as important, the statutory line siting process suffered no prejudice.

6. The record made by the Committee is fair, balanced and complete.

The Staff Brief then makes the false claim that the “record is one-sided and incomplete.” (Brief, page 7, line 11). As support for this serious charge, the Staff Brief claims that during “public comment, only local officials who supported the Application without reservation were sworn in by the Committee to provide testimony in the evidentiary record.” (Brief, page 7, lines 17-19). Two local officials testified, John Salem, the Mayor of Kingman, and Ron Walker, the Mohave County Manager. Both spoke at length about the consideration given to the application by the Kingman City Council and the Mohave County Board of Supervisors. Transcript of January 12 and 13, 2010, pp. 34-45 and 46-61. Their testimony was essential to understanding the water use issues that are at the heart of the case. Kingman and Mohave County were the two most important governmental entities affected by the application and both conducted extensive hearings concerning the merits of the application and its impact upon the people they represent. To fail to put their factual testimony in the record so the Committee and the Commission could refer to it in making their respective decisions would have been unfair to the Committee and Commission. Ms. Bensusan had an extended opportunity to give her version of what action was taken by Kingman and Mohave County. Transcript of January 12 and 13, 2010, pp. 427-469. Again, despite its advocacy for Ms. Bensusan, Staff legal counsel was unable to articulate a single fact that should have been in the record that was not, and unable to identify a single fact in the record that should not have been in it. The Committee carefully weighed Ms. Bensusan’s testimony and found it unpersuasive.

7. The law does not allow the Commission to review any Committee decision unless a Request for Review is filed.

None of the briefs that have been filed with the Commission address two serious preliminary issues. First, the Commission has no legal authority to review the Committee’s decisions when no legally authorized Request for Review has been filed. No timely request for review was filed by a party to the proceedings before the Committee in this case. A.R.S. § 40-360.07(A) says: “[A] certificate of environmental compatibility from the committee with respect to the proposed site, affirmed and approved by an order of the commission ... shall be issued not less than thirty days nor more than sixty days after the certificate is issued by the committee... except that ... any party to a certification proceeding may request a review of the committee’s decision by the commission.” (Emphasis added.) A.R.S. § 40-360.07(B) says that if a request for review is filed, “the review shall be conducted on the basis of the record.” Id. If a review

is requested, the Commission then has the option to “confirm, deny or modify any certificate granted by the committee....” *Id.* Before October of 2000, no CECs were modified by the Commission unless a timely Request for Review was filed. Since 2000, sixteen and counting CECs have been modified by the Commission without a timely Request for Review being filed.

No Applicant has as yet challenged this change in practice by the Commission in the courts. However, in *Grand Canyon Trust v. Arizona Corporation Commission*, 210 Ariz. 30, 35, ¶¶ 18, 107 P.3d 356, 361 (App. 2005) the Arizona Court of Appeals said: “In this case, no party requested that the Commission review the Siting Committee’s issuance of the CEC, and the Commission thus ‘affirmed and approved’ the CEC subject to conditions without making the review in subsection [A.R.S. § 40-361.07](B).” The same reading of A.R.S. §§ 40-360.06 and 40-360.07 occurred in *Save Our Valley Ass. v. Arizona Corporation Commission*, 216 Ariz. 216, 219, ¶¶ 9, 165 P.3d 194, 197 (App. 2007)(If a timely request for review is made after a Committee decision, the Commission may review the CEC). It is clear the Arizona appellate courts that have been asked to review the application of the line siting statute believed the Commission had no legal authority to review a CEC granted by the Committee without a legally sufficient request for review being filed.

8. The law allows the Commission to review only Certificates of Environmental Compatibility.

The second preliminary problem is that the Commission has no authority to review procedural rulings of the Committee even if a timely request for review is made by a party to the proceedings before the Committee. A.R.S. 40-360.07(A) and (B) refer to review of the certificate of environmental compatibility not any of the procedural rulings made by the Committee. *Grand Canyon Trust v. Arizona Corporation Commission*, above; *Save Our Valley Ass. v. Arizona Corporation Commission*, above. The Staff Brief’s advocacy for Ms. Bensusan is based upon a belief the Commission can procedurally control the Committee. The legislature did not grant the Commission the power to review procedural decisions of the Committee. *Williams v. Pipe Trades Ind. Prog. Of Az.*, 100 Ariz. 14, 409 P.2d 720 (1966)(“We have said about Article 15 of the Constitution[] that the Corporation Commission’s powers do not exceed those to be derived from a strict construction of the Constitution and implementing statutes.” 100 Ariz. at 17.); *Arizona State Board of Regents v. Arizona State Personnel Bd.*, 195 Ariz. 173, 985 P.2d 1032 (1999)(“Administrative agencies have no common law or inherent powers-their powers are limited by their enabling legislation.” 195 Ariz. at 173, ¶ 12.) Unless and until the legislature changes A.R.S. § 40-360 et seq., the Committee must discharge its legislatively granted responsibilities to act as an agency of the government of the State of Arizona not a subordinate body of the Arizona Corporation Commission.

9. The only cases cited in the Staff Brief do not support its conclusions.

The few cases that are cited in the Staff Brief support conclusions contrary to the Staff legal position. In *Allen v. Chon-Lopez*, 214 Ariz. 361, 153 P.3d 382 (App. 2007) cited on page 5 of the Brief at line 23, the court of appeals applied Rule 24 of the Arizona Rules of Civil Procedure in a juvenile court severance proceeding because Rule 37(A) of the Arizona Rules of Procedure in Juvenile Courts explicitly refers to Rule 24 of the Arizona Rules of Civil Procedure when it discusses proper parties to severance proceedings. Accord, *Bechtel v. Rose*, 150 Ariz. 68, 722 P.2d 236 (1986) and *William Z. v. Ariz. Dep't of Econ. Sec.*, 192 Ariz. 385 965 P.2d 1224 (App. 1998) Brief, p. 5, fn. 2. (Rule 24 of the Arizona Rules of Civil Procedure is applied in juvenile cases because Rule 37(A) of the Arizona Rules of Procedure in Juvenile Court explicitly refers to Rule 24.) A.R.S. § 40-360.05(A) and R14-3-204 are different than Rule 37(A) of the Arizona Rules of Procedure in Juvenile Court because they do not explicitly or implicitly refer to Rule 24 of the Arizona Rules of Civil Procedure. Presumably the Arizona Legislature in drafting the statute and the Commission in adopting the rules without reference to Rule 24 understood what they were doing.

The only other citation of legal authority by the Staff Brief was *California Trout v. FERC*, 572 F.3d 1003 (9th Cir. 2009). The Staff Brief cites this case for the proposition that a “[d]enial of intervention is open to appeal.” Staff Brief, p. 7, fn. 4. Nowhere does the Brief admit that the Federal Power Act and the rules promulgated by the Federal Energy Regulatory Commission are different from Arizona law and do not apply to Arizona’s line siting process.

In the actual holding in *California Trout* the Ninth Circuit affirmed the FERC denial of intervention to two private entities that were tardy in filing motions to intervene. It found that FERC did not abuse its discretion by determining the entities lacked “good cause” for their untimely motions. *Id.* The Staff Brief does not explain why “good cause” as used in the Federal Power Act and as applied by FERC is any more precise a standard than “appropriate” as used in A.R.S. § 40-360.05(A) and applied by the Committee.

However, in the *California Trout* opinion the Ninth Circuit starts with general language from the United States Supreme Court that does have relevance to this matter:

The Supreme Court has long stressed ... [a]gencies must have the ability to manage their own dockets and set reasonable limitations on the processes by which interested persons can support or contest proposed actions....
Id., 572 F.3d at 1007.

10. The Committee is an independent agency.

The Arizona Power Plant and Transmission Line Siting Committee is an independent, legislatively created agency of the government of the State of Arizona and its decisions deserve to be treated by other agencies of Arizona's government, the federal government, and the courts with the respect and deference the decisions of all other agencies of this state are treated.

From: John Foreman
To: Eberhart, David; Houtz, Gregg; McGuire, Jeff; Mundell, William; Palm...
CC: Ellis, Susan; Williams, Tara
Date: 4/14/2010 9:28 AM
Subject: Fwd: FINAL 03-31-2010 Hualapai Valley Solar OM U-14 Case No. 151
Attachments: FINAL 03-31-2010 Hualapai Valley Solar OM U-14 Case No. 151

Line Siting Committee Members,
Attached is the transcript to which I referred in my earlier e-mail.

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(All ACC Commissioners' aides, Committee Members, and Executive Director's Assistant included in this transmission.)

Attached to this e-mail is the final transcription of the reporter's transcript of proceedings of the above-referenced Open Meeting Agenda Item U-14, in the following formats:

- ASCII, plain text, page image .txt
- e-transcripts(tm) .ptx
- Adobe Acrobat PDF .pdf

The original transcript will be filed with Docket Control tomorrow, Wednesday April 14, 2010.

If you have any questions, please let us know.

Thank you,

Jamie Stewart

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