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RECEIVED Executive Director

ARIZONA CORPORATION COMMISSION

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May 11, 2010

AZ CORP COMMISSION
DOCKET CONTROL

Mr. John Foreman
Assistant Arizona Attorney General
Chair, Arizona Power Plant and
Transmission Line Siting Committee
1275 West Washington Street
Phoenix, Arizona 85007

Arizona Corporation Commission

DOCKETED

MAY 11 2010

DOCKETED BY	<i>MM</i>
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David L. Eberhart
Paul W. Rasmussen
Jessica Youle
Gregg Houtz
Patricia Noland
Jeff McGuire
Mike Whalen
Mike Palmer
Barry Wong
William Mundell

Re: In The Matter of The Application of Hualapai Valley Solar, L.L.C.
L-00000NN-09-0541-00151

Dear Chairman Foreman and Siting Committee Members:

In a recent Memorandum filed in this docket, the Chairman of the Arizona Power Plant and Line Siting Committee ("Committee") raised certain issues about the Commission's authority to review a Committee decision in the absence of a Request for Review, filed pursuant to A.R.S. § 40-360.07(A). I would like to take this opportunity to provide you with some information related to these issues.

In 2002, the Commission was sued in Maricopa County Superior Court by Toltec Power Station, LLC ("Toltec") over the Commission's decision to deny Toltec's two Committee-approved CECs, one for a power plant and another for a related transmission line. Toltec argued that the Commission was without authority to deny the transmission-line CEC, because a Request for Review had not been filed. The Superior Court disagreed, concluding that a statutory requirement for the "Commission's approval and affirmation necessarily invests the Commission with discretion."¹

Toltec then challenged the Superior Court's conclusion by filing a special action in the Arizona Court of Appeals. The Court of Appeals declined to accept jurisdiction. Toltec then filed a Petition for Review in the Arizona Supreme Court, challenging the Court of Appeals' denial of special action jurisdiction. The Supreme Court denied Toltec's Petition for Review.

¹ Minute Entry at 9.

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I have enclosed copies of the relevant pleadings and other documents from the Toltec case, because I believe that they will be helpful as we continue to exercise our respective roles under Arizona's siting statutes. Because I want to be sure that each Committee member receives these materials, I have asked Docket Control to forward this information to all Committee members.

The Chairman's Memorandum also addresses a number of other issues, apparently in the expectation that these issues may recur. The Chairman mentions that he is willing to schedule an open meeting for Committee discussion of the Commission's actions in Case No. 151. Please consider this letter as my request to be informed of any such open meeting where these or related issues will be discussed, whether it is a separately scheduled open meeting or an open meeting that occurs in concert with a hearing on an application for a CEC. I would like to exercise my option to attend any such meeting in my capacity as a member of the Committee pursuant to A.R.S. § 40-360.01(B)(5).

I look forward to the opportunity to discuss any ongoing issues, and I thank you all for your continued service.

Sincerely,



Kristin K. Mayes
Chairman, Arizona Corporation Commission

KKM:rbo

Att.

cc: Commissioner Gary Pierce
Commissioner Paul Newman
Commissioner Sandra D. Kennedy
Commissioner Bob Stump

May 11, 2010

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Copy of the foregoing mailed this
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10 Attorneys for: Toltec Power Station, L.L.C.

11
12 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

13 TOLTEC POWER STATION, L.L.C., a
14 Delaware limited liability company,

15 Plaintiff,

16 vs.

17 ARIZONA CORPORATION
COMMISSION,

18 Defendant.

Case No. CV2002 006785

COMPLAINT PURSUANT TO
A.R.S. § 40-254 AND
A.R.S. § 40-360.07

19 For its Complaint, Plaintiff Toltec Power Station, L.L.C., alleges as follows:

20 **PARTIES, JURISDICTION AND VENUE**

21 1. Plaintiff Toltec Power Station, L.L.C. ("Toltec") is a Delaware limited
22 liability company, and is qualified to do and does business in the State of Arizona.
23 Toltec's offices are in Maricopa County, Arizona.

24 2. Defendant Arizona Corporation Commission ("Commission") is created by
25 Article XV of the Constitution of the State of Arizona, and derives its authority and
26 jurisdiction as to various matters from Article XV and Title 40 of the Arizona Revised
27 Statutes. The Commission's principal offices are in Maricopa County, Arizona.
28

COPY

APR 16 2002



MICHAEL K. JEANES, CLERK
K. GAUSS
DEPUTY CLERK

1 10. On June 4, 2001, public hearings before the Siting Committee commenced
2 in Case No. 113. Subsequent public hearings in that case were conducted by the Siting
3 Committee on July 10, 2001, August 6-7, 2001, September 24-26, 2001, November 8-9,
4 2001, and on November 27, 2001.

5 11. On July 9, 2001, Case No. 112 and Case No. 113 were consolidated for
6 hearing.

7 12. On or about September 4, 2001, Toltec amended its Application in Case
8 No. 112 to request a CEC for an 1800 MW (nominal) natural gas-fired combined cycle
9 electric power plant ("Modified Power Plant"), with duct-firing and steam injection
10 capabilities.

11 13. In its Application and evidentiary presentation in Case No. 112, Toltec did
12 everything required of it by A.R.S. § 40-360 *et seq.* and all applicable regulations
13 pertaining to issuance of CECs for proposed electric power plants. Toltec's proposed
14 Modified Power Plant project is reasonable and meets all requirements for the issuance of
15 a CEC for the proposed siting.

16 14. In its Application and evidentiary presentation in Case No. 113, Toltec did
17 everything required of it by A.R.S. § 40-360 *et seq.* and all applicable regulations
18 pertaining to issuance of CECs for proposed electric transmission lines. Toltec's
19 proposed Transmission Lines project is reasonable and meets all requirements for the
20 issuance of a CEC for the proposed siting and routings.

21 15. On November 27, 2001, following consideration of (i) the evidentiary
22 record, (ii) the closing arguments of the parties, and (iii) the legal requirements of A.R.S.
23 §§ 40-360 through 40-360.13 and A.A.C. R14-3-213, and after deliberations among its
24 members, the Siting Committee unanimously voted to grant CECs for the proposed
25 sitings for both the Modified Power Plant and the Transmission Lines. The vote was 11-0
26 in Case No. 112; and it was 9-0 in Case No. 113, with two members of the Siting
27 Committee having left before the vote was taken in the latter case, due to other
28 commitments.

1 16. In arriving at their respective votes on November 27, 2001, the members of
2 the Siting Committee carefully considered the evidentiary record before them in Case No.
3 112 and Case No. 113; and, in each instance, used the decision-making factors set forth in
4 A.R.S. § 40-360.06 in a deliberative and correct manner. The evidence considered
5 included evidence relating to (i) the markets for electric power in Central and Southern
6 Arizona which would be served by the Modified Power Plant and Transmission Lines, (ii)
7 the impact of such facilities on the environment and ecology in the area of the proposed
8 sitings and (iii) available avoidance and mitigation measures.

9 17. In many respects, the language of the CEC conditions incorporated into the
10 Siting Committee's Decisions literally tracks those statutory factors set forth in A.R.S.
11 § 40-306.06 that were determined to be applicable in Case No. 112 and Case No. 113.
12 Where mitigation or preventive measures were determined to be appropriate, the Siting
13 Committee made provision for these within the CEC conditions. In so doing, the Siting
14 Committee drew upon its experience from previous cases and the expertise its members
15 have acquired. It also utilized suggestions made by the Commission's Staff and some of
16 the other parties to the proceeding. The end result was a Decision and CEC in each case
17 which represented the Siting Committee's exercise of its discretion and expertise in a
18 lawful and responsible manner.

19 18. On December 6, 2001, the Siting Committee issued its written decision in
20 Case No. 112, and therein granted Toltec a CEC for the proposed Modified Power Plant
21 siting. A copy of that Decision and CEC is attached hereto as Appendix "1," and is
22 incorporated herein by reference.

23 19. On December 6, 2001, the Siting Committee also issued its written decision
24 in Case No. 113, and therein granted Toltec a CEC for the proposed Transmission Lines
25 sitings. A copy of that Decision and CEC is attached hereto as Appendix "2," and is
26 incorporated herein by reference.

1 20. On December 20, 2001, Jon Shumaker ("Shumaker") filed a Request for
2 Review with the Commission, pursuant to A.R.S. § 40-360.07(A), therein requesting that
3 the Commission deny the CEC granted by the Siting Committee in Case No. 112.

4 21. On December 21, 2001, the Arizona Center for Law in the Public Interest
5 ("Center") filed a Request for Review with the Commission, pursuant to A.R.S.
6 § 40-360.07(A), therein requesting that the Commission deny the CEC granted by the
7 Siting Committee in Case No. 112.

8 22. No Requests for Review were filed with regard to the CEC granted by the
9 Siting Committee in Case No. 113.

10 23. On or about January 16, 2002, written briefs were filed with the
11 Commission in Case No. 112 by Toltec; the Commission's Staff; Center; Shumaker;
12 Mary-Louise Pasutti; and Electrical District No. 4 of Pinal County, Electrical District No.
13 5 of Pinal County, and Central Arizona Irrigation and Drainage District (collectively
14 "Districts") pursuant to a January 3, 2002, Procedural Order issued by the Commission.

15 24. On January 23, 2002, the Commission heard oral argument from the parties
16 in Case No. 112 pursuant to the aforesaid Procedural Order.

17 25. On January 24, 2002, the Commission received oral and written comments
18 from members of the public at a Special Open Meeting of the Commission convened for
19 that purpose in Casa Grande, Arizona.

20 26. On or about January 24, 2002, the Chairman of the Commission and one or
21 more members of his personal staff conducted a private visit to and inspection of the
22 proposed site for the Modified Power Plant in Pinal County, Arizona.

23 27. On January 30, 2002, the members of the Commission met in a Special
24 Open Meeting for the purpose of considering and acting upon the CECs which had been
25 granted by the Siting Committee in Case No. 112 and Case No. 113.

26 28. During the Special Open Meeting on January 30, 2002, Chairman Mundell
27 of the Commission indicated that he personally visited the proposed Modified Power
28 Plant site after the January 24, 2002, Special Open Meeting. He also indicated that he

1 had spent a portion of the preceding evening reading a book on President Theodore
2 Roosevelt and his designation of the Grand Canyon as a National Monument. Chairman
3 Mundell further indicated that he took these events into consideration in making his
4 decisions in Case No. 112 and Case No. 113. These events are not part of the record
5 before the Siting Committee, and are not properly a subject of "official notice" that may
6 be taken by the Commission pursuant to A.A.C. R14-3-109(T).

7 29. A.R.S. § 40-360.07(B), which governs Commission review of Siting
8 Committee Decisions, provides:

9 In arriving at its decision, the commission shall comply with
10 the provisions of § 40-360.06 and shall balance, in the broad public
11 interest, the need for an adequate, economical and reliable supply
12 of electric power with the desire to minimize the effect thereof on
 the environment and ecology of this state.

13 30. In its review of the Siting Committee's Decision in Case No. 112 granting a
14 CEC for the Modified Power Plant, the Commission made no findings that the Siting
15 Committee committed any procedural or substantive errors, failed to comply with A.R.S.
16 § 40-360.06 in making its decision, or that its decision was unsupported by the
17 evidentiary record before the Siting Committee or was in any way deficient. The
18 Commission made no findings of fact as to how or why the Modified Power Plant Siting
19 would have any detrimental effect on the environment or ecology of Arizona. The
20 Commission made no findings of fact as to how or why the Modified Power Plant would
21 not be adequate, economical or reliable for purposes of generating electric power for the
22 intended markets. However, the Commission denied the CEC for the Modified Power
23 Plant on February 6, 2002. In its Decision No. 64446, the Commission stated:

- 24
- 25 1. the record reflects that sufficient need is not established for
26 the proposed power plant and related facilities to be
27 constructed at the proposed site in Pinal County, Arizona;
 - 28 2. the record compels balancing the competing public interests
 in favor of protection of the environment and ecology of the

1 State of Arizona by denying Applicant a Certificate of
2 Environmental Compatibility ("CEC"); and

- 3 3. the CEC issued by the Arizona Power Plant and
4 Transmission Line Siting Committee ("Committee") should
5 not be confirmed and approved by the Commission.

6 31. In its review of the Siting Committee's Decision in Case No. 113 granting a
7 CEC for the Transmission Lines, the Commission made no findings that the Siting
8 Committee committed any procedural or substantive errors, failed to comply with A.R.S.
9 § 40-360.06 in making its decision, or that its decision was unsupported by the
10 evidentiary record before the Siting Committee or was in any way deficient. The
11 Commission made no findings of fact as to how or why the proposed Transmission Lines
12 would have any detrimental effect on the environment or ecology of Arizona. The
13 Commission made no findings of fact as to how or why the proposed Transmission Lines
14 would not be adequate, economical or reliable for purposes of transmitting electric power
15 to the intended markets. However, the Commission denied the CEC for the Transmission
16 Lines on February 6, 2002. In its Decision No. 64445, the Commission stated:

17 1. the record reflects that sufficient need is not established for
18 the proposed transmission lines to be constructed in association with
19 the proposed construction of the Toltec Power Station in Pinal
20 County, Arizona;

21 2. the record compels balancing the competing public interests
22 in favor of protection of the environment and ecology of the State of
23 Arizona by denying Applicant a Certificate of Environmental
24 Compatibility ("CEC"); and

25 3. the CEC issued by the Arizona Power Plant and Transmission
26 Line Siting Committee ("Committee") should not be confirmed and
27 approved by the Commission.

28 32. At the conclusion of the January 30, 2002, Special Open Meeting, by a 3-0
vote, the members of the Commission decided to deny the CECs previously granted by
the Siting Committee in Case No. 112 and Case No. 113.

1 33. On February 6, 2002, the Commission issued its Decision Nos. 64445 and
2 64446, which reflected the results of its action during the January 30, 2002, Special Open
3 Meeting. Decision No. 64446 relates to Case No. 112; and Decision No. 64445 relates to
4 Case No. 113. Copies of those decisions are attached hereto as Appendices "3" and "4,"
5 and are incorporated herein by reference.

6 34. On February 26, 2002, Toltec filed an Application for Rehearing and
7 Reconsideration of Decision No. 64445 with the Commission in Case No. 113. A copy
8 of that Application for Rehearing and Reconsideration is attached hereto as Appendix
9 "5," and is incorporated herein by reference.

10 35. On March 7, 2002, Toltec filed an Application for Rehearing and
11 Reconsideration of Decision No. 64446 with the Commission in Case No. 112. A copy
12 of that Application for Rehearing and Reconsideration is attached hereto as Appendix
13 "6," and is incorporated herein by reference.

14 36. The Commission did not grant either of the aforesaid Applications for
15 Rehearing and Reconsideration within 20 days following the dates of filing; nor at any
16 other time thereafter. Accordingly, pursuant to A.R.S. § 40-253(A), each Application for
17 Rehearing and Reconsideration is deemed to have been denied by the Commission, by
18 operation of law.

19 **ALLEGATIONS AS TO APPLICABLE**
20 **LEGAL PRINCIPLES**

21 37. In proceedings conducted pursuant to A.R.S. § 40-360 *et seq.*, the
22 Commission's jurisdiction and authority derive solely from, and are governed by, the
23 specific provisions of that statutory scheme.

24 38. Neither A.R.S. § 40-360.06 or § 40-360.07, nor A.A.C. R14-3-213, requires
25 an applicant to prove the "need" for either a power plant or transmission lines, or
26 authorizes or requires the Commission to make a determination of whether sufficient
27 evidence of "need" has been presented. In enacting A.R.S. § 40-360 *et seq.*, the Arizona
28 Legislature found and declared that "there is at present and will continue to be a growing

1 need for electric service which will require the construction of major new facilities.”
2 Laws 1971, Ch. 67, § 1. However, the Arizona Legislature has not defined “need” or
3 established time or geographical parameters for “the need for an adequate, economical
4 and reliable supply of electric power” upon which the Commission could make such a
5 determination.

6 39. The statutory scheme set forth at A.R.S. § 40-360 *et seq.* presumes “the
7 need for an adequate, economical and reliable supply of electric power.” The
8 Commission is required to assume the existence of such “need” in its balancing under
9 A.R.S. § 40-360.07(B).

10 40. The statutory scheme set forth at A.R.S. § 40-360 *et seq.* contemplates that
11 the “need” for an “adequate, economical and reliable supply of electric power” is not
12 limited to the State of Arizona. To the extent any need determination contemplated by
13 A.R.S. § 40-360 *et seq.* is limited to need within the State of Arizona, such determination
14 constitutes an undue and unconstitutional burden upon interstate commerce.

15 41. A.R.S. § 40-360.07(B) expressly provides that any review of a decision of the
16 Siting Committee conducted by the Commission thereunder “shall be conducted on the basis of
17 the record” developed in the proceedings before the Siting Committee, which record the Siting
18 Committee “shall transmit to the Commission.” A.R.S. § 40-360.07(B) also provides that the
19 Commission may “require written briefs or oral argument” in connection with its consideration
20 of a request for review of a Siting Committee decision. However, A.R.S. § 40-360.07(B) neither
21 contemplates nor provides that the Commission shall or may conduct any public comment
22 sessions of its own in connection with the Commission’s consideration of a request for review.
23 Nor does the statute contemplate or provide for private or public visits to proposed sites by one
24 or more members of the Commission in connection with consideration of a pending request for
25 review.

26 42. A.R.S. § 40-360.07(B) authorizes the Commission to review decisions by
27 the Committee and to balance the need for electric power with the desire to minimize
28 environmental and ecological effects only upon receipt of a request for review by a party

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1 to the certification proceeding. The Arizona Legislature has not authorized the
2 Commission to conduct such balancing in the absence of a request for review. Rather,
3 the Commission is only directed to "affirm and approve" the CEC issued by the Siting
4 Committee where review has not been requested.

5 43. Once the time period allowed under A.R.S. § 40-360.07(B) for review and
6 decision by the Commission has expired, the Commission has no further jurisdiction if its
7 decision is subsequently set aside by judicial order.

8 **COUNT I**
9 **(Reversal of Commission Decision No. 64446 in Case No. 112)**
10 **(Modified Power Plant)**

11 44. Toltec realleges the allegations contained in paragraphs 1 through 43 of this
12 Complaint.

13 45. The Commission, in denying the Siting Committee's Decision and CEC in
14 Case No. 112, acted arbitrarily, capriciously, without authority and in violation of A.R.S.
15 § 40-360.07(B) in receiving and considering evidence and public comment outside of the
16 record developed before the Siting Committee.

17 46. The Commission, in denying the Siting Committee's Decision and CEC in
18 Case No. 112, acted arbitrarily, capriciously, without authority and in violation of A.R.S.
19 § 40-360.07 in that it failed to fully and properly consider the record developed before the
20 Siting Committee in Case No. 112.

21 47. The Commission, in denying the Siting Committee's Decision and CEC in
22 Case No. 112, acted arbitrarily, capriciously, without authority and in violation of A.R.S.
23 § 40-360.07 in rejecting the findings and recommendations made by the Siting
24 Committee without an explanation of how or why such findings and recommendations
25 were in violation of A.R.S. § 40-360.06 or otherwise in error.

26 48. The Commission, by conducting the January 24, 2002, Special Open
27 Meeting and considering new evidence and public comment outside the record developed
28 in the Siting Committee proceeding, in connection with its review of the Siting

1 Committee's Decision and CEC in Case No. 112, acted arbitrarily, capriciously, without
2 authority and in violation of the stated purpose of A.R.S. § 40-360 *et seq.* and its enacting
3 Laws 1971, Ch. 67, § 1, to "provide a single forum for the expeditious resolution of all
4 matters concerning the location of electric generating plants and transmission lines in a
5 single proceeding." In addition, in so doing, the Commission acted in violation of A.R.S.
6 § 40-360.07(B)'s requirement that its review be based on the record developed before the
7 Siting Committee.

8 49. The Commission, in concluding that "sufficient need is not established," in
9 connection with its review of the Siting Committee's Decision and CEC in Case No. 112,
10 acted (i) arbitrarily, capriciously, without authority and in violation of A.R.S. § 40-360 *et*
11 *seq.* and also (ii) in excess of its authority and in violation of enacting Laws 1971, Ch. 67,
12 § 1, in which the Arizona Legislature found and declared that "there is at present and will
13 continue to be a growing need for electric service which will require the construction of
14 major new facilities."

15 50. The Commission's conclusion that "sufficient need is not established" in
16 denying the Siting Committee's Decision and CEC in Case No. 112 is not supported by
17 substantial evidence and is contrary to clear and convincing evidence that construction
18 and operation of the Modified Power Plant would materially contribute toward satisfying
19 the need for an adequate, economical and reliable supply of electric power.

20 51. The Commission, in denying the Siting Committee's Decision and CEC in
21 Case No. 112, acted arbitrarily and capriciously and unreasonably discriminated against
22 Toltec in (i) concluding that "sufficient need is not established," (ii) placing the burden of
23 proving "sufficient need" on Toltec, (iii) placing the burden upon Toltec to present
24 evidence of executed power sales contracts or equivalent commitments to purchase,
25 which the Commission has not imposed upon previous applicants similarly situated in
26 previous cases, and (iv) placing such burden upon Toltec without notice during the course
27 of the proceedings before it. The Commission's actions thus violated Toltec's
28

1 constitutional rights to due process and equal protection of the laws under U.S. Const.
2 Amend. 14 and Ariz. Const. art. 2, § 13 and art. 2, § 4.

3 52. The Commission, in denying the Siting Committee's Decision and CEC in
4 Case No. 112, acted contrary to the statute to the extent it limited any determination of
5 "need" to the State of Arizona, thereby placing an undue and unconstitutional burden on
6 interstate commerce.

7 53. The Commission, in denying the Siting Committee's Decision and CEC in
8 Case No. 112, failed to correctly discharge its statutory responsibilities under A.R.S.
9 § 40-360.07(B) and acted contrary to the statutorily declared public policy of the State of
10 Arizona that a competitive market shall exist in the sale of electric generation service, as
11 set forth in A.R.S. § 40-202.

12 54. The Commission, in denying the Siting Committee's Decision and CEC in
13 Case No. 112, acted arbitrarily and capriciously, and unreasonably discriminated against
14 Toltec, in failing to inquire whether the CEC issued by the Siting Committee could be
15 modified to address any environmental or ecological impacts identified in the record to
16 the Commission's satisfaction. In previous proceedings involving similarly situated
17 applicants, the Commission has actively investigated such additional mitigation
18 measures. The Commission's actions thus violated Toltec's constitutional rights to due
19 process and equal protection of the laws under U.S. Const. Amend. 14 and Ariz. Const.
20 art. 2, § 13 and art. 2, § 4.

21 55. The Commission, in denying the Siting Committee's Decision and CEC in
22 Case No. 112, acted arbitrarily and capriciously, and committed legal error, to the extent
23 it based its decision on matters outside the record, including (i) the Chairman of the
24 Commission's personal visit to the site of the proposed Modified Power Plant and/or (ii)
25 his reading of a book about President Theodore Roosevelt.

26 56. Toltec's Application and evidentiary presentation for a CEC in Case 112
27 merited approval by the Commission; and the Commission's failure to so approve
28 Toltec's Application is arbitrary, capricious, unreasonable and unlawful.

COUNT II
(Reversal of Commission Decision No. 64445 in Case No. 113)
(Transmission Line)

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4 57. Toltec realleges the allegations contained in paragraphs 1 through 56 of this
5 Complaint.

6 58. The Commission acted without authority or jurisdiction, and in violation of
7 A.R.S. § 40-360.07(A) in denying a CEC to Toltec for the Transmission Lines in the
8 absence of any request for review by a party to the Siting Committee proceeding in Case
9 No. 113.

10 59. The Commission, in denying the Siting Committee's Decision and CEC in
11 Case No. 113, acted arbitrarily, capriciously, without authority and in violation of A.R.S.
12 § 40-360.07(B) in receiving and considering evidence and public comment outside of the
13 record developed before the Siting Committee.

14 60. The Commission, in denying the Siting Committee's Decision and CEC in
15 Case No. 113, acted arbitrarily, capriciously, without authority and in violation of A.R.S.
16 § 40-360.07 in that it failed to fully and properly consider the record developed before the
17 Siting Committee in Case No. 113.

18 61. The Commission, in denying the Siting Committee's Decision and CEC in
19 Case No. 113, acted arbitrarily, capriciously, without authority and in violation of A.R.S.
20 § 40-360.07 in rejecting the findings and recommendations made by the Siting
21 Committee, without an explanation of how or why such findings and recommendations
22 were in violation of A.R.S. § 40-360.06 or otherwise in error.

23 62. The Commission, by conducting the January 24, 2002, Special Open
24 Meeting and considering new evidence and public comment outside the record developed
25 in the Siting Committee proceeding, in connection with its review of the Siting
26 Committee's Decision and CEC in Case No. 113, acted arbitrarily, capriciously, without
27 authority and in violation of the stated purpose of A.R.S. § 40-360 *et seq.* and its enacting
28

1 Laws 1971, Ch. 67, § 1, to "provide a single forum for the expeditious resolution of all
2 matters concerning the location of electric generating plants and transmission lines in a
3 single proceeding." In addition, in so doing, the Commission acted in violation of A.R.S.
4 § 40-360.07(B)'s requirement that its review be based on the record developed before the
5 Siting Committee.

6 63. The Commission, in concluding that "sufficient need is not established," in
7 connection with its review of the Siting Committee's Decision and CEC in Case No. 113,
8 acted (i) arbitrarily, capriciously, without authority and in violation of A.R.S. § 40-360 *et*
9 *seq.* and also (ii) in excess of its authority and in violation of enacting Laws 1971, Ch. 67,
10 § 1, in which the Arizona Legislature found and declared that "there is at present and will
11 continue to be a growing need for electric service which will require the construction of
12 major new facilities."

13 64. The Commission's conclusion that "sufficient need is not established" in
14 denying the Siting Committee's Decision and CEC in Case No. 113 is not supported by
15 substantial evidence and is contrary to clear and convincing evidence that construction
16 and operation of the Transmission Lines would materially contribute toward satisfying
17 the need for an adequate, economical and reliable supply of electric power.

18 65. The Commission, in denying the Siting Committee's Decision and CEC in
19 Case No. 113, acted arbitrarily and capriciously and unreasonably discriminated against
20 Toltec in (i) concluding that "sufficient need is not established," (ii) placing the burden of
21 proving "sufficient need" on Toltec, (iii) placing the burden upon Toltec to present
22 evidence of executed power sales contracts or equivalent commitments to purchase,
23 which the Commission has not imposed upon previous applicants similarly situated in
24 previous cases, and (iv) placing such burden upon Toltec without notice during the course
25 of the proceedings before it. The Commission's actions thus violated Toltec's
26 constitutional rights to due process and equal protection of the laws under U.S. Const.
27 Amend. 14 and Ariz. Const. art. 2, § 13 and art. 2, § 4.
28

1 71. Toltec realleges the allegations contained in paragraphs 1 through 70 of this
2 Complaint.

3 72. If A.R.S. § 40-360.07(B) requires the Commission to assess the need for
4 electric power within the State of Arizona and to restrict the construction of power plants
5 and transmission lines based on the need for electric power to be retained within the state
6 or substantially within the state, it violates Article I, § 8, cl. 3 of the United States
7 Constitution, which prohibits states from burdening interstate commerce.

8 73. If A.R.S. § 40-360.07(B) does not have the effect of requiring the
9 Commission to assess the need for electric power within the State of Arizona, but the
10 Commission has imposed such a requirement as it did in Case No. 112 and Case No. 113,
11 the Commission has acted in violation of Article I, § 8, cl. 3 of the United States
12 Constitution, which prohibits states from burdening interstate commerce.

13 WHEREFORE, Plaintiff Toltec Power Station, L.L.C. prays for judgment as
14 follows:

15 A. Setting aside the decision of the Commission in Decision No. 64446 in
16 Docket No. L-00000Y-01-0112 (Case No. 112) (Modified Power Plant) as unreasonable
17 and unlawful.

18 B. Setting aside the decision of the Commission in Decision No. 64445 in
19 Docket No. L-00000Y-01-0113 (Case No. 113) (Transmission Lines) as unreasonable
20 and unlawful.

21 C. Affirming, approving and confirming the Certificate of Environmental
22 Compatibility granted and issued by the Siting Committee with respect to Toltec's
23 Modified Power Plant in Docket No. L-00000Y-01-0112 (Case No. 112), and declaring
24 that Toltec may construct the Modified Power Plant as provided by said Certificate of
25 Environmental Compatibility.

26 D. In the alternative, vacating the Commission's Decision No. 64446 and
27 remanding with instructions to the Commission to affirm, approve and confirm the
28 Certificate of Environmental Compatibility granted and issued by the Siting Committee

1 with respect to Toltec's Modified Power Plant in Docket No. L-00000Y-01-0112 (Case
2 No. 112).

3 E. Affirming, approving and confirming the Certificate of Environmental
4 Compatibility granted and issued by the Siting Committee with respect to Toltec's
5 Transmission Lines in Docket No. L-00000Y-01-0113 (Case No. 113), and declaring that
6 Toltec may construct the Transmission Lines as provided by said Certificate of
7 Environmental Compatibility.

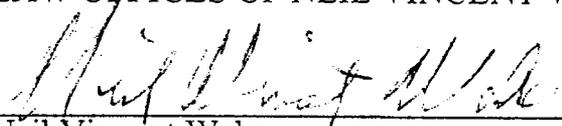
8 F. In the alternative, vacating the Commission's Decision No. 64445 and
9 remanding with instructions to the Commission to affirm, approve and confirm the
10 Certificate of Environmental Compatibility granted and issued by the Siting Committee
11 with respect to Toltec's Transmission Lines in Docket No. L-00000Y-01-0113 (Case No.
12 113).

13 G. An award of taxable costs and attorney's fees incurred in bringing this
14 action, pursuant to A.R.S. § 12-348 and other applicable statutes.

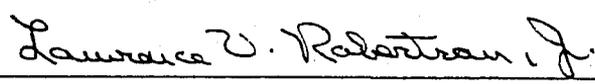
15 H. Such further relief as the Court deems just and equitable.

16 Dated this 16th day of April, 2002.

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LEGAL DIV.
ARIZ. CORPORATION COMMISSION

10
11 Attorneys for Plaintiff Toltec Power Station, L.L.C.

12
13 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
14 IN AND FOR THE COUNTY OF MARICOPA

15 TOLTEC POWER STATION, L.L.C., a
Delaware limited liability company,

Case No. CV2002-006785

17 Plaintiff,

**PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT ON
JURISDICTIONAL GROUNDS**

18 vs.

19 ARIZONA CORPORATION
COMMISSION,

(Assigned to the Hon. Michael D. Jones)

20 Defendant.

(Oral argument Requested)

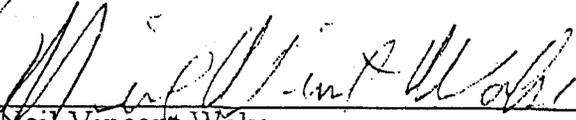
21
22 Plaintiff Toltec Power Station, L.L.C., moves pursuant to Ariz. R. Civ. P. 56(a) for
23 summary judgment reversing Defendant Arizona Corporation Commission's order denying
24 Plaintiff the Certificates of Environmental Compatibility issued to it by the Siting
25 Committee in Case No. 112 and Case No. 113 for lack of jurisdiction of the Commission
26 to deny those certificates. This motion is supported by the attached Memorandum of
27 Points and Authorities, the separate Statement of Facts and supporting appendix filed on
28 November 15, 2002, and the portions of the record of the Siting Committee cited herein,

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1 and the other evidence submitted herewith.

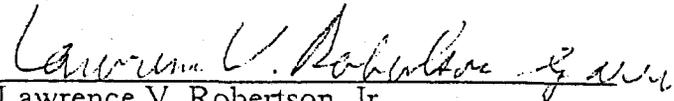
2 Dated this 10th day of December, 2002.

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1 STATEMENT OF THE CASE

2 On March 2, 2001, Toltec Power Station, L.L.C. ("Toltec") filed an Application for
3 a Certificate of Environmental Compatibility ("CEC") with the Arizona Power Plant and
4 Transmission Line Siting Committee ("Siting Committee") to site an electric power plant
5 (Case No. 112).¹ (SOF ¶ 1.) On April 16, 2001, Toltec filed another application to site
6 transmission lines to interconnect Toltec's proposed power plant with currently existing
7 transmission facilities (Case No. 113).² (SOF ¶ 2.)

8 The Siting Committee held numerous public hearings to receive evidence and
9 deliberate on each of the cases from May through November 2001, unanimously voted to
10 grant both CECs on November 27, 2001, and issued the CECs on December 6, 2001. (SOF
11 ¶¶ 3, 4.) In December 2001 Jon Shumaker and the Arizona Center for Law in the Public
12 Interest filed requests for review by the Arizona Corporation Commission ("Commission")
13 of the Siting Committee's decision in Case No. 112. (112 IR B2; 112 IR B4.)³ No requests
14 for review of the Siting Committee's decision were filed in Case No. 113. (SOF ¶ 5.)

15 On January 23, 2002, the Commission heard oral argument from the parties in Case
16 No. 112 and on January 24, 2002, received oral and written comments from members of
17 the public at a Special Open Meeting for Case No. 112. (112 IR B26.) On January 30,
18 2002, the members of the Commission met in a Special Open Meeting for the purpose of
19 considering whether to confirm, deny, or modify the CECs issued by the Siting Committee
20 in Case Nos. 112 and 113 and voted to deny Toltec's CECs. (112 IR B29, SOF ¶ 6.) On
21 February 6, 2002, the Commission issued Decision No. 64446 for Case No. 112 and
22 Decision No. 64445 for Case No. 113 (SOF ¶ 6), which stated in parallel findings: (1) the
23 record reflects that sufficient need is not established for the proposed power plant and
24

25 ¹ Docket No. L-00000Y-01-0112.

26 ² Docket No. L-00000Y-01-0113.

27 ³ On May 30, 2002, the Commission submitted the Index of Record to the Superior
28 Court in Case Nos. 112 and 113. References to documents from Case No. 112 will be "112
IR[document no.]." References to documents from Case No. 113 will be "113
IR[document no]."

1 related facilities (Case No. 112) or for the proposed transmission lines (Case No. 113) for
2 the Toltec Power Station to be constructed at the proposed site in Pinal County, Arizona;
3 (2) the record compels balancing the competing public interests in favor of protection of
4 the environment and ecology of the State of Arizona by denying Applicant CECs; and (3)
5 the CECs issued by the Siting Committee should not be confirmed and approved by the
6 Commission.

7 Toltec filed an Application for Rehearing and Reconsideration in Case No. 113 on
8 February 26, 2002, and in Case No. 112 on March 7, 2002. (SOF ¶ 7). The Commission
9 did not grant either application for rehearing within twenty days, nor at any time thereafter,
10 and the applications therefore were deemed denied. On April 16, 2002, Toltec filed a
11 Complaint pursuant to A.R.S. §§ 40-254 and 40-360.07.

12 **JURISDICTIONAL ISSUES PRESENTED**

13 1. Does A.R.S. § 40-360.07(B)'s grant of jurisdiction to the Commission to
14 deny a CEC granted by the Siting Committee to a non-public service corporation applicant
15 exceed the Commission's jurisdiction and authority under Ariz. Const. art. 15, § 6?

16 2. Did the failure of any party to request review of the Siting Committee's
17 issuance of the CEC for Toltec's transmission lines preclude Commission jurisdiction under
18 A.R.S. § 40-360.07(B) to deny the certificate?

19 3. Does A.R.S. § 40-253's mandatory rehearing and limitation on judicial
20 review apply to review under A.R.S. § 40-360.07(C) or to a challenge to the Commission's
21 jurisdiction? If so, would such a limitation itself unconstitutionally extend the jurisdiction
22 of the Commission?

23 **ARGUMENT**

24 **I. POWER PLANT AND TRANSMISSION LINE SITING COMMITTEE ACT.**

25 This is the first court action to arise out of the Power Plant and Transmission Line
26 Siting Committee Act, A.R.S. § 40-360 *et seq.* ("Act"), enacted in 1971 and amended in
27 1996. The legislature expressly stated its findings and the Act's purpose:
28

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1 The legislature hereby finds and declares that there is at present and will continue
2 to be a growing need for electric service which will require the construction of
3 major new facilities. It is recognized that such facilities cannot be built without in
4 some way affecting the physical environment where the facilities are located.... The
5 lack of adequate statutory procedures may result in delays in new construction and
6 increases in costs which are eventually passed on to the people of the state in the
7 form of higher electric rates and which may result in the possible inability of the
8 electric suppliers to meet the needs and desires of the people of the state for
9 economical and reliable electric service.... The legislature therefore declares that it
is the purpose of this article to provide a single forum for the expeditious
resolution of all matters concerning the location of electric generating plants
and transmission lines in a single proceeding to which access will be open to
interested and affected individuals, groups, county and municipal governments and
other public bodies to enable them to participate in these decisions.

10 Ariz. Laws 1971, ch. 67, § 1 (emphasis added). Seeking to prevent delays in construction
11 and increased cost to the public, the legislature established a single proceeding and
12 prescribed the criteria and decision-making factors to be used.

13 **A. Siting Committee Procedures and Commission Review.**

14 The Siting Committee is composed of the attorney general, the directors of
15 environmental quality, water resources, and the energy office of the department of
16 commerce, the chairman of the Commission (or their designees), and six members
17 appointed by the Commission, three to represent the public and one each to represent cities
18 and towns, counties, and agriculture. A.R.S. § 40-360.01(B). The Siting Committee also
19 may use staff of the constituent agencies and consultants. A.R.S. § 40-360.01(F).

20 The Act prohibits construction of power plants or transmission lines by a utility (*i.e.*,
21 a "person engaged in the generation or transmission of electric energy") "until it has
22 received a certificate of environmental compatibility from the committee ... affirmed and
23 approved by an order of the commission." A.R.S. §§ 40-360(11), 40-360.07(A). After an
24 application is filed, the Committee must notice a hearing within ten days, conduct a hearing
25 within 70 days, and issue or deny the certificate within 180 days. A.R.S. § 40-360.04(A),
26 (D). Unsworn statements of parties or counsel are not received by the Committee as
27 evidence. A.R.S. § 40-360.04(C).

1 The Commission must affirm the Siting Committee's order within 60 days of its
2 issuance unless within 15 days a party "request[s] a review of the committee's decision by
3 the commission." A.R.S. § 40-360.07(A).^① Absent a request for review within 15 days, the
4 Commission has no jurisdiction to reject the Siting Committee's action. A.R.S.
5 § 40-360.07(A). "The grounds for review shall be stated in a written notice," and "the
6 review shall be conducted on the basis of the record." A.R.S. § 40-360.07(B). The
7 Commission must complete its review within 60 days from the date the notice is filed.
8 A.R.S. § 40-360.07(B). If missed, the time limits are fatal to the Siting Committee's
9 authority and the Commission's authority. "If the committee or the commission fails to act
10 on an application within the applicable time period prescribed in this article, the applicant
11 may, in its discretion and in the interest of providing adequate, reliable and economical
12 electric service to its customers, immediately proceed with the construction of the planned
13 facilities at the proposed site" A.R.S. § 40-360.08(B).

14 From 1971 to 1996 the Commission lacked ^②jurisdiction under the language of the
15 Act, even upon timely request for review, to deny a CEC issued by the Siting Committee.
16 The Commission could only "confirm or modify any certificate granted by the committee,
17 or in the event the committee refused to grant a certificate, the commission may issue a
18 certificate to the applicant." A.R.S. § 40-360.07(B) (1996). The Commission could
19 modify the stipulations in the CEC, but the Siting Committee's decision to issue rather than
20 deny was conclusive. In 1996 the statute was amended to allow the Commission also to
21 "deny" a CEC issued by the Siting Committee. A.R.S. § 40-360.07(B) (Supp. 2000). The
22 Toltec proceeding is the first time—in more than 100 cases in over 30 years—that the
23 Commission has rejected a Siting Committee decision that a CEC be granted.

24 **B. Standards for Siting Committee Action and Commission Review.**

25 In approving or denying an application, the Siting Committee is directed to consider
26 specific environmental, technical, and economic factors, none of which requires proof of
27 the need for electric power. The application must be in a form prescribed by the
28 Commission, and the Commission's rules and regulations that govern applications and

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3

1 exhibits to be submitted to the Committee do not contemplate or require information or
2 evidence concerning need for electric power. A.R.S. § 40-360.03; A.A.C. R 14-3-201 *et*
3 *seq.* The statutory factors are: existing plans for other developments near the site; fish,
4 wildlife, and plant life; noise and radio interference; availability of the site to the public for
5 recreation; scenic, historic, and archeological sites and structures; total environment of the
6 area; technical practicability and previous experience with the equipment and methods;
7 estimated cost of the facility; and additional factors to be considered under state or federal
8 laws pertaining to the site. A.R.S. § 40-360.06(A). Special consideration is given to
9 protection of rare and endangered species. A.R.S. § 40-360.06(B). The Siting Committee
10 must require compliance with nuclear radiation and air and water pollution control
11 standards of agencies having primary jurisdiction of those subjects, as well as applicable
12 land use regulations unless the Committee finds them to be unreasonably restrictive or
13 unfeasible in view of technology available. A.R.S. § 40-360.06(C), (D).

4

14 Upon timely request for review by the Commission, "the commission shall comply
15 with the provisions of § 40-360.06 [the factors to be weighed by the Siting Committee and
16 summarized above] and shall balance, in the broad public interest, the need for an adequate,
17 economical and reliable supply of electric power with the desire to minimize the effect
18 thereof on the environment and ecology of this state." A.R.S. § 40-360.07(B).

19 **C. Advent of Independent Power Producers or Merchant Plants in 1999.**

20 The Act applies to any "any person engaged in the generation or transmission of
21 electric energy" "planning to construct a plant, transmission line or both in this state,"
22 which extends beyond "public service corporations" as defined in Ariz. Const., Art. 15, § 3.
23 A.R.S. §§ 40-360(11), 40-360.03. A "utility" includes the Salt River Project Agricultural
24 Improvement and Power District, which generates and transmits electricity, and, since
25 1999, independent power producers or merchant plants intending to participate in the
26 competitive wholesale market. *See* A.R.S. § 40-202 (1998 amendment establishes public
27 policy favoring competitive market in sale of electric generation service). In late 1999, the
28 first application for a CEC was filed by an independent power producer. The issue of

5

1 whether the Legislature exceeded its constitutional power in 1996 by granting the
2 Commission jurisdiction to deny a CEC issued by the Siting Committee to non-public
3 service corporations arises now because of Arizona's movement toward electric
4 competition, and the resulting participation of independent power producers.

5 **II. THE COMMISSION LACKS JURISDICTION TO DENY A CEC**
6 **APPROVED BY THE SITING COMMITTEE FOR AN APPLICANT THAT**
7 **IS NOT A PUBLIC SERVICE CORPORATION.**

8 (b) The Commission lacked constitutional jurisdiction to deny Toltec the CECs granted
9 by the Siting Committee because the Legislature may not give the Commission jurisdiction
10 to deny a CEC granted by the Siting Committee to a non-public service corporation. The
11 Commission's action was void, and the Siting Committee's action must be affirmed.

12 **A. Toltec Is Not a Public Service Corporation.**

13 The Arizona Constitution, art. 15, § 2, defines a "public service corporation" as:

14 All corporations other than municipal engaged in furnishing gas, oil, or electricity
15 for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other
16 public purposes; or in furnishing, for profit, hot or cold air or steam for heating or
17 cooling purposes; or engaged in collecting, transporting, treating, purifying and
18 disposing of sewage through a system, for profit; or in transmitting messages or
19 furnishing public telegraph or telephone service, and all corporations other than
20 municipal, operating as common carriers, shall be deemed public service
21 corporations.

22 Public service corporations are subject to the Commission's general supervision and
23 continuing regulation and must obtain certificates of public convenience and necessity from
24 the Commission before providing service. A.R.S. § 40-281. Whether a given business
25 enterprise constitutes a public service corporation subject to the Commission's regulatory
26 jurisdiction is a question of law. *Southwest Gas Corp. v. Arizona Corp. Comm'n*, 169 Ariz.
27 279, 285, 818 P.2d 714, 720 (App. 1991).

28 Independent power producers or merchant power plants like Toltec are not public
service corporations under either the plain language of the Constitution or the interpretive
case law. While Toltec may "furnish ... electricity," it literally does not do so "for light,
fuel, or power." Ariz. Const. art. 15, § 2. It does so for resale. The producer and

1 wholesale seller of electric power is no more a public service corporation than the natural
2 gas driller who sells it to a gas company for distribution and retail sale.

3 Moreover, Arizona courts consider eight characteristics to determine whether an
4 entity is a public service corporation: (1) what the corporation actually does; (2) a
5 dedication to public use; (3) articles of incorporation, authorization, and purposes—what
6 the corporation is authorized to do; (4) dealing with the service of a commodity in which
7 the public has been generally held to have an interest; (5) monopolizing or intending to
8 monopolize the territory with a public service commodity; (6) acceptance of substantially
9 all requests for service; (7) service under contracts and reserving the right to discriminate is
10 not always controlling; (8) actual or potential competition with other corporations whose
11 business is clothed with the public interest. *Natural Gas Serv. Co. v. Serv-Yu Coop.*, 70
12 Ariz. 235, 237-38, 219 P.2d 324, 325-26 (1950). To establish “a dedication to public use,”
13 the owner of a plant “must at least have undertaken to actually engage in business and
14 supply at least some of his commodity to some of the public.” *Id.* at 237-38, 219 P.2d at
15 325-26. “To state that property has been devoted to public use is to state also that the
16 public generally ... has the *right* to enjoy service therefrom.” *Id.* at 239, 219 P.2d at 326
17 (emphasis added). More than a public interest in a commodity or service is required:

18 It was never contemplated that the definition of public service corporations as
19 defined by our constitution be so elastic as to fan out and include businesses in
20 which the public might be incidentally interested The public interest
21 contemplated depends on the nature of the business, the means by which it touches
22 the public, and the abuses which may reasonably be anticipated if not controlled....
23 So construed, it is only in the interest of the convenience and necessity of the public,
24 of the nature and to the degree herein stated, that a business may be supervised and
25 controlled, rates fixed or monopolies granted.

26 *General Alarm v. Underdown*, 76 Ariz. 235, 238-39, 262 P.2d 671, 672-73 (1953) (alarm
27 system company was not public service corporation because not in “*business* of sending
28 messages for the *public*” but in business of property protection for individual owners).

Toltec will not supply any of its commodity to retail customers, will not vest any
person with a right to enjoy its service and so will not dedicate its service to public use, will

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1 not compete with anyone in serving the retail consumer public, will not accept
2 "substantially all requests for service," will not monopolize any territory, and has no legal
3 authority or obligation to do any of the foregoing. (SOF ¶ 8.) It will sell its output to one
4 or a few retailers or wholesale resellers solely on negotiated bases. Plainly, Toltec is not a
5 public service corporation. See *Arizona Corp. Comm'n v. Nicholson*, 108 Ariz. 317, 497
6 P.2d 815 (1972) (trailer park furnishing water to tenants was not public service corporation
7 and not subject to Commission's jurisdiction; park's incidental but necessary water service,
8 while engaged in private enterprise of renting trailer spaces, did not bring park under
9 Commission regulation); *Southwest Gas Corp.*, 169 Ariz. at 287, 818 P.2d at 722 (interstate
10 transmitter of natural gas not public service corporation where few Arizona direct sales
11 customers, not monopolizing gas sales in Arizona, did not accept substantially all requests
12 for service, and did not intend to add any new direct sales customers in Arizona); *Arizona*
13 *Water Co. v. Arizona Corp. Comm'n*, 161 Ariz. 389, 778 P.2d 1285 (App. 1989) (well
14 owners did not become public service corporation by providing water to two non-owners).

15 Moreover, as a practical matter, if merchant power plants were treated as public
16 service corporations, then the whole scheme of wholesale power competition adopted in
17 Arizona would fail because, under Arizona law, their rates and charges then would be fixed
18 by the Commission, thus destroying wholesale competition by its very nature.⁴

19 **B. The Legislature Cannot Enlarge the Jurisdiction of the Commission, Nor**
20 **Can It Alter the Legal Nature of a "Public Service Corporation."**

21 "The Corporation Commission has no implied powers and its powers do not exceed
22 those to be derived from a strict construction of the Constitution and implementing
23 statutes." *Commercial Life Ins. Co. v. Wright*, 64 Ariz. 129, 139, 166 P.2d 943, 949
24 (1946); accord *Burlington Northern & Santa Fe Ry. Co. v. Arizona Corp. Comm'n*, 198
25 Ariz. 604, 606, ¶ 11, 12 P.3d 1208, 1210 (App. 2000). "A decision rendered by the

26 ⁴ The Constitution requires the Commission to prescribe a public service
27 corporation's rates and charges, and it must do so based on the fair value of the
28

1 Commission which goes beyond its powers as prescribed by the constitution and statutes is
2 subject to attack for lack of jurisdiction.” *Tonto Creek Estates Homeowners Ass’n v.*
3 *Arizona Corp. Comm’n*, 177 Ariz. 49, 57, 864 P.2d 1081, 1089 (App. 1993).

4 “Article 15 [of the Arizona Constitution] confers very full and complete power on
5 the corporation commission over public service corporations—powers formerly exercised
6 by the Legislature, such as fixing rates and charges for services, forms of contracts, sanitary
7 conditions, etc., and it is these powers and duties of public utilities ‘the law-making power
8 may enlarge ... and extend.’” *Wylie v. Phoenix Assur. Co.*, 42 Ariz. 133, 139, 22 P.2d 845,
9 847 (1933). But the Commission’s jurisdiction over other corporations is limited to
10 sections 4 and 5, pertaining to offering securities for sale to the public and qualification to
11 do business in the state. *Wylie*, 42 Ariz. at 136-37, 22 P.2d at 846 (statute authorizing
12 Commission to make exceptions to legislatively-mandated insurance contract forms
13 unconstitutional); *State ex rel. Bullard v. Jones*, 15 Ariz. 215, 137 P. 544 (1914).

14 Although article 15, § 6 of the Arizona Constitution permits the legislature to
15 enlarge or extend the *powers and duties* of the Commission over the subject matter of
16 which it has already been given jurisdiction, and other matters of the same class not
17 expressly or impliedly exempt by other provisions of the Constitution, the constitution does
18 not permit the legislature to expand the Commission’s *jurisdiction* to include additional
19 subject matter. *Rural/Metro Corp. v. Arizona Corp. Comm’n*, 129 Ariz. 116, 117, 629 P.2d
20 83, 84 (1981)⁵. Nor does it allow the legislature to give the “public service corporation”
21 designation to corporations not listed in Article 15, § 2. *Id.* at 118, 629 P.2d at 85 (statute
22 extending Commission jurisdiction to providers of fire protection services
23 unconstitutional); *American Bus Lines, Inc. v. Arizona Corp. Comm’n*, 129 Ariz. 595, 599,
24

25
26 corporation’s property. Ariz. Const. art. 14 and 15; *US West Communications v. Arizona*
Corp. Comm’n, 201 Ariz. 242, 34 P.3d 351 (2001).

27 ⁵ “Jurisdiction,” when referring to a government body’s authority, refers to subject
28 matter, whereas “power” relates to administrative and enforcement characteristics of a
particular governmental body or agency. *Rural/Metro*, 129 Ariz. at 118, 629 P.2d at 85.

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1 633 P.2d 404, 408 (1981) (legislature cannot grant Commission additional control over
2 carriers as exercise of police power without constitutional grant of power). “[T]he
3 legislature may only enact statutes conferring powers upon the Commission which give
4 practical effect to and ensure the actual fulfillment of the pertinent constitutional provisions
5 governing the authority of the Commission.” *Rural/Metro*, 129 Ariz. at 117, 629 P.2d at
6 84; accord *Menderson v. City of Phoenix*, 51 Ariz. 280, 285, 76 P.2d 321, 323 (1938).

7 C. The Legislature’s 1996 Attempt to Vest the Commission with Jurisdiction to
8 Deny CECs Granted by the Siting Committee to an Applicant That Is Not a
9 Public Service Corporation Unconstitutionally Attempts to Expand the
Commission’s Jurisdiction.

10 Though the Act has always facially applied to a “utility,” as defined at A.R.S.
11 § 40-360(11), which includes both public service corporations and some other entities
12 building power plants or transmission lines, the overbreadth was (i) not theoretically
13 meaningful until the 1996 amendment and (ii) not practically meaningful until the
14 Commission first attempted in this case to deny a CEC issued by the Siting Committee.
15 The 1996 amendment of § 40-360.07(B) to empower the Commission to deny a CEC
16 granted by the Siting Committee to a non-public service corporation attempts to enlarge the
17 role of the Commission to include jurisdiction over “utility” applicants that are not “public
18 service corporations” in violation of the Arizona Constitution. The Commission’s denials
19 of Toltec’s CECs in reliance on § 40-360.07(B) therefore are null and void.

20 **III. THE COMMISSION LACKED JURISDICTION TO DENY TOLTEC A CEC**
21 **FOR THE TRANSMISSION LINES IN CASE NO. 113 BECAUSE REVIEW**
22 **WAS NOT REQUESTED.**

23 The Court may not imply any power of the Commission beyond those derived from
24 a strict construction of the Constitution and implementing statutes. *Commercial Life*, 64
25 Ariz. at 139, 166 P.2d at 949; *Burlington Northern*, 198 Ariz. at 606, ¶ 11, 12 P.3d at 1210.
26 A.R.S. § 40-360.07(B) authorizes the Commission to review a Siting Committee decision
27 only upon a timely written request for review. A.R.S. § 40-360.07(B) further limits
28 Commission review to the grounds stated in the written notice requesting review, so if no

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1 review is sought, no grounds for reversal are available. A.R.S. § 40-360.07(A) requires
2 the Commission to affirm and approve a CEC granted by the Siting Committee within sixty
3 days except when such a review is timely requested:

4 No utility may construct a plant or transmission line within this state until it has
5 received a certificate of environmental compatibility from the committee with
6 respect to the proposed site, affirmed and approved by an order of the
7 commission which shall be issued not less than thirty days nor more than sixty
8 days after the certificate is issued by the committee, except that within fifteen days
9 after the committee has rendered its written decision any party to a certification
10 proceeding may request a review of the committee's decision by the commission.

11 (Emphasis added.) If no party seeks review of the Siting Committee's decision and the
12 Commission fails to affirm and approve the CEC within sixty days, the applicant may
13 immediately proceed with the construction of the planned facilities. A.R.S. § 40-360.08.

14 No party filed a request for review of the Siting Committee's decision in Case No.
15 113, which authorized Toltec to site and construct a 500 kV transmission line and two 345
16 kV transmission lines with specific conditions. (Complaint ¶ 22; Commission's Answer
17 ¶ 18; Shumaker's Answer ¶ 1.) The Commission therefore lacked power to take any action
18 other than affirming and approving the CEC from the Siting Committee, and Decision No.
19 64445, purporting to deny the CEC, is void and must be reversed with direction to affirm
20 and approve the Siting Committee's decision in Case No. 113.

21 **IV. TOLTEC WAS NOT REQUIRED TO SEEK REHEARING BEFORE THE
22 COMMISSION AS A PRECONDITION FOR CHALLENGING THE
23 CONSTITUTIONALITY OF COMMISSION DENIAL OF A CEC GRANTED
24 BY THE SITING COMMITTEE.**

25 **A. A.R.S. § 40-253's Mandatory Rehearing and Limitation of Judicial
26 Review to Issues Argued on Rehearing Does Not Apply to Siting
27 Decisions, For Which A.R.S. § 40-360.07(C) Explicitly Makes Rehearing
28 Optional with the Applicant.**

The Commission asserts that its decision is shielded from judicial review except for
issues argued on rehearing, which did not include the unconstitutional grant of jurisdiction
argued in section II of this motion. The Commission's assertion is grounded in the
mistaken view that the optional rehearing provision and the separate judicial review

1 authorization of § 40-360.07 for siting decisions are ousted by the rehearing provisions of
2 § 40-253 for Commission orders concerning public service corporations in general. In fact,
3 the rehearing requirements and limitations of § 40-253 are nowhere incorporated in the
4 special review authorization of §§ 40-360.07 and 40-360.11. To the contrary, as amended
5 in 1996, § 40-360.07(C) contains its own rehearing provision, which is explicitly optional
6 and not a mandatory precondition to judicial review.

7 Chapter 2 of Title 40, Arizona Revised Statutes, concerns "Public Service
8 Corporations" generally. Article 3 of Chapter 2 concerns "Investigations, Hearings and
9 Appeals" of public service corporations. The general authorization of judicial review
10 appears in § 40-254(A).⁶ This judicial review statute reflects the broad authority of the
11 Commission over public service corporations and is perhaps unique in Arizona
12 administrative law in several respects. First, it allows the Commission unilaterally to
13 rescind, alter, modify or amend its order at any time during the pendency of the court
14 action. A.R.S. § 40-254(B). Second, the case is tried "as other trials in civil actions," and
15 new evidence may be admitted at trial, though the burden is on the plaintiff "to show by
16 clear and satisfactory evidence that [the Commission order] is unreasonable or unlawful."
17 A.R.S. § 40-254(C), (E). *Tucson Electric Power Co. v. Arizona Corp. Comm'n*, 132 Ariz.
18 240, 243, 645 P.2d 231, 234 (1982). Third, § 40-254(F) states, "Except as provided by this
19 section no court of this state shall have jurisdiction to ... review any order or decision of
20 the commission ... but a writ of mandamus shall lie ... in cases authorized by law." That
21 former exclusivity was supplemented in later legislation concerning judicial review of
22

23 ⁶ "Except as provided in § 40-254.01, any party in interest, or the attorney general on
24 behalf of the state, being dissatisfied with an order or decision of the commission, may
25 within thirty days after a rehearing is denied or granted, and not afterwards, commence an
26 action in the superior court in the county in which the commission has its office, against the
27 commission as defendant, to vacate, set aside, affirm in part, reverse in part or remand with
28 instructions to the commission such order or decision on the ground that the valuation, rate,
joint rate, toll, fare, charge or finding, rule, classification or schedule, practice, demand,
requirement, act or service provided in the order or decision is unlawful, or that any rule,
practice, act or service provided in the order is unreasonable." A.R.S. § 40-254(A).

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1 ratemaking and rate design, A.R.S. § 40-254.01, and of siting decisions. A.R.S.
2 §§ 40-360.07, 40-360.11. Finally, as a precondition to seeking judicial review under
3 § 40-254(A), a party must make “application to the commission for a rehearing” under
4 § 40-253(A) within 20 days, and no person “shall in any court urge or rely on any ground
5 not set forth in the application.” A.R.S. § 40-253(B), (C).

6 For three independent reasons the rehearing requirements and limitations on judicial
7 review of § 40-253 do not apply to siting decisions under A.R.S. § 40-360 *et seq.* First, the
8 legislature amended § 40-360.07 in 1996 to provide its own rehearing provision, which is
9 expressly optional: “The committee or any party to a decision by the commission pursuant
10 to subsection B of this section may request the commission to reconsider its decision
11 within thirty days after the decision is issued.” (Emphasis added.) “[U]nless a statute
12 specifically directs otherwise, one need not seek rehearing before an agency in order to
13 seek judicial review.” *Southwestern Paint & Varnish Co. v. Arizona Dep't of Env'tl.*
14 *Quality*, 194 Ariz. 22, ¶ 1, 976 P.2d 872, ¶ 1 (1999). This specific authorization of optional
15 rehearing cannot by implication be ousted by the more general § 40-253.

16 Second, while the Act has always referenced “the rights to judicial review
17 recognized in § 40-254,” A.R.S. § 40-360.11, it has never referenced or incorporated the
18 rehearing requirement or the limitation on judicial review of § 40-253. If the authorization
19 of judicial review under § 40-254 were deemed incorporated into the Act, only the review
20 authorization of § 40-254, not the rehearing strictures of § 40-253, would be incorporated.

21 Third, §§ 40-360.07 and 40-360.11 establish a separate judicial review authorization
22 in addition to the general review referenced in § 40-254. The Act provides, “The decision
23 of the commission is final with respect to all issues, subject only to judicial review as
24 provided by law in the event of an appeal by a person having a legal right or interest that
25 will be injuriously affected by the decision.” A.R.S. § 40-360.07(C). That this is an
26 independent authorization of judicial review is confirmed in § 40-360.11, which refers to
27 “the rights to judicial review recognized in §§ 40-254 and 40-360.07.” As a distinct
28 authorization of judicial review, §§ 40-360.07(C) and 40-360.11 are independent of the

1 terms and limitations of § 40-254 except to the extent the terms and limitations of § 40-254
2 are incorporated in § 40-360.07(C) and § 40-360.11 review. Toltec is free to pursue
3 judicial review under both statutes with whatever liberality is found in either.⁷

4 B. In Any Event, A.R.S. § 40-253 Does Not Require, and Could Not
5 Constitutionally Require, Commission Rehearing of Challenges to
6 Commission Jurisdiction as a Precondition to Judicial Challenge.

6 (10) A.R.S. § 40-253 cannot apply to jurisdictional challenges to Commission action:

7 [A]ny order which the Commission has power to make is conclusive unless the
8 statutory procedure for review is followed. On the other hand, a decision of the
9 Commission which goes beyond its power as prescribed by the Constitution and
10 statutes is vulnerable for lack of jurisdiction and may be questioned in a collateral
11 proceeding.

11 *Tucson Warehouse & Transfer Co. v. Al's Transfer, Inc.*, 77 Ariz. 323, 325, 271 P.2d 477,
12 478 (1954) (citation omitted) (*ex parte* order without notice purporting to set aside earlier
13 order is beyond Commission jurisdiction); *accord Tucson Rapid Transit Co. v. Old Pueblo*
14 *Transit Co.*, 79 Ariz. 327, 289 P.2d 406 (1955); *Dallas v. Arizona Corp. Comm'n*, 86 Ariz.
15 345, 347-48, 346 P.2d 152, 153 (1959) (certificate cancellation in excess of jurisdiction
16 subject to collateral attack); *Walker v. DeConcini*, 86 Ariz. 143, 151, 341 P.2d 933, 938
17 (1959) (any certificate not issued as deliberate and considerate act of Commission after
18 consideration of evidence, is void for want of jurisdiction and subject to collateral attack);
19 *Pacific Greyhound Lines v. Sun Valley Bus Lines, Inc.*, 70 Ariz. 65, 68, 216 P.2d 404, 406
20 (1950).

21 ⁷ It is doubtful that mere reference to § 40-254(A) as "judicial review as provided by
22 law" incorporates all the ancillary terms of § 40-254 for judicial review of Siting
23 Committee cases under § 40-360 *et seq.* Some terms of § 40-254 are incompatible with the
24 express terms of the Act. *E.g.*, § 40-254 allows trial *de novo* with new evidence, but the
25 Commission's review of the Siting Committee's action "shall be conducted on the basis of
26 the record [before the Committee]." A.R.S. § 40-360.07(C). It would be irrational to limit
27 the Commission to the Siting Committee record but open the Superior Court to any new
28 evidence. The delay and expense of new evidence freely admitted would be incompatible
with the Act's stringent requirements of speed in approving or denying power plant and
transmission line siting. A.R.S. § 40-360.11 explicitly bars court proceedings "to stop or

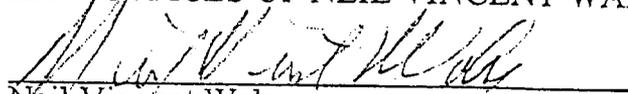
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1 This is but an example of the general principle of administrative law that "an
2 agency's actions that go beyond its statutory power can be challenged for lack of
3 jurisdiction in a collateral proceeding." *Southwest Ambulance v. Arizona Dep't of Health*
4 *Servs.*, 183 Ariz. 258, 263, 902 P.2d 1362, 1367 (App. 1995); *Arizona Bd. of Regents v.*
5 *State ex rel. Arizona Public Safety Retirement Fund Manager Administrator*, 160 Ariz.
6 150, 156, 771 P.2d 880, 886 (App. 1989). If § 40-253 were construed to limit jurisdictional
7 challenges to Commission actions, it too would be unconstitutional as applied to actions
8 beyond the Commission's constitutionally defined jurisdiction. The legislature could no
9 more create unconstitutional Commission jurisdiction by a rule of procedural default than it
10 could by direct grant of such jurisdiction.

11 **CONCLUSION**

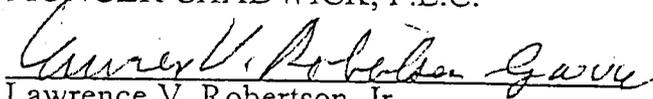
12 The Court should grant summary judgment reversing the Commission's order
13 denying the CECs granted to Toltec by the Siting Committee. The Commission had no
14 jurisdiction but to affirm those CECs.

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delay the construction or operation of any facility, except to enforce compliance through
the procedures established by article 3 of this chapter."

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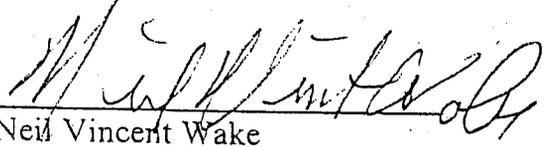
1 Copy of the foregoing hand delivered
2 this 11th day of December 2002, to:

3 Hon. Michael D. Jones
4 Maricopa County Superior Court
5 201 West Jefferson
6 Phoenix, Arizona 85003-2243

7 and a copy mailed on the 10th day
8 of December 2002, to:

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7
8 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
9 **IN AND FOR THE COUNTY OF MARICOPA**

10 TOLTEC POWER STATION, L.L.C., a Delaware
limited liability company,
11
Plaintiff,
12
vs.
13
ARIZONA CORPORATION COMMISSION,
14
Defendant.

Case No. CV2002-006785
**COMMISSION'S RESPONSE TO
TOLTEC'S MOTION FOR
SUMMARY JUDGMENT**

15
16
17 Defendant Arizona Corporation Commission ("Commission") hereby responds to the
18 Motion for Summary Judgment filed by Plaintiff Toltec Power Station, L.L.C. ("Toltec").

19 Commission Decision Nos. 64445 and 64446 denied Toltec's applications for
20 Certificates of Environmental Compatibility ("CECs") to build an electric generation plant
21 and related transmission line in Pinal County, Arizona. The Commission found that the
22 environmental impact of Toltec's proposed plant and transmission lines outweighed the
23 alleged need for the power. Toltec's arguments that the Commission lacks jurisdiction to
24 deny Toltec's CEC applications are without merit. The Commission acted pursuant to its
25 statutory siting authority, lawfully enacted under the Arizona Constitution.

26 The Commission requests that the Court deny Toltec's Motion for Summary Judgment
27 and affirm the Commission's jurisdiction. The Commission's Response is supported by its
28

1 Memorandum of Points and Authorities, its separate Statement of Facts, and the certified
2 record of the Commission's proceedings.

3
4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5
6 **I. STATEMENT OF THE CASE.**

7 This case is an appeal of two Commission orders that deny Toltec the authority to
8 construct a power plant and a related transmission line adjacent to the Ironwood National
9 Monument and near Picacho Peak State Park. SOF 21.¹ The Commission denied Toltec's
10 applications because it concluded that the need for power failed to outweigh the
11 environmental impacts of the proposed facilities. SOF 28-44.

12 **A. Description of the statutory scheme that governs the process for approving**
13 **the siting of power plants and transmission lines.**

14 Each proposed project for an electric generation plant or transmission line has the
15 potential to significantly impact the environment. To deal with the environmental impact
16 issues and to balance those issues with the need for electric service, the Arizona Legislature
17 enacted the Power Plant and Line Siting Committee Statutes, A.R.S. §§ 40-360 through
18 360.13, in 1971. The siting statutes provide a single forum to deal with all of the issues in an
19 efficient manner, and to provide for notice and opportunity for all concerned parties to
20 participate. See Ariz. Laws 1971, Ch. 67, § 2. Since enactment, the process has been
21 conducted under the auspices of the Commission, which makes the ultimate determination on
22 whether to approve or deny an application for a Certificate of Environmental Compatibility
23 ("CEC").

24 The purpose of the siting process is to give the Commission evidence on the record to
25 perform the public interest balancing between the environmental impact and the need for the
26 power from a particular project. Because each proposed project is unique, there are no bright
27 line standards that can be applied to every application. The Commission examines each

28

¹ Citations to "SOF" refer to the Commission's separately filed Statement of Facts.

1 project individually and on its own merits, and no Commission decision on a project can be
2 pre-determined. This is because the specific location and design of a proposed project have
3 unique impacts on the environmental factors listed in A.R.S. § 40-360.06. *See* SOF 7-22.
4 The Commission must take these particular environmental impacts into account in
5 determining whether to grant a CEC, and must determine whether the project can meet the
6 need for reliable and adequate electric service. *See* SOF 23-27. The location of a proposed
7 project may make certain projects environmentally incompatible such that no condition(s)
8 will minimize the impact sufficiently to tip the public interest in favor of granting a CEC.

9 The siting process includes an evidentiary hearing before the Arizona Power Plant and
10 Line Siting Committee ("Siting Committee"). The Siting Committee evaluates the proposed
11 project in light of the environmental factors identified in A.R.S. § 40-360.06 and makes its
12 decision on the application. The Commission then considers the Siting Committee decision
13 and determines whether to grant or deny a CEC to the applicant under A.R.S. § 40-360.07.
14 A.R.S. § 40-360.07 sets forth two different time periods for Commission action on a CEC
15 application, based upon whether a written request for review of the Siting Committee
16 decision has been filed. *See* A.R.S. § 40-360.07(A) and (B). Under either time frame, the
17 Commission is vested with the ultimate authority to determine whether to grant or deny a
18 CEC for a project.

19 If a party wishes to seek judicial review of the Commission's siting order, it must do
20 so pursuant to A.R.S. § 40-254. *See* A.R.S. § 40-360.11. Under A.R.S. § 40-254, a timely
21 rehearing request to the Commission setting forth the specific grounds for rehearing is a
22 prerequisite to any judicial appeal. *See* A.R.S. § 40-253.

23 B. The proceedings before the Commission.

24 The Commission accepts Toltec's description of the procedural history of the case but
25 disputes Toltec's interpretation of the siting statutes. Toltec claims that the Commission
26 lacks the authority to review Siting Committee decisions. The siting statutes do not mandate
27 that the Commission grant a CEC for each project that receives a preliminary approval from
28 the Siting Committee. Contrary to Toltec's position, the siting statutes constitutionally vest

1 the Commission with the authority to make the final decision on whether to grant a CEC for a
2 particular project. The Commission lawfully exercised its statutory authority to deny Toltec's
3 requested CECs for its proposed plant and transmission line.

4 In this case, the Commissioners voted unanimously to deny Toltec's CECs. At the
5 time of the vote, the Commission balanced the environmental impact with the need for the
6 power. Commissioner Spitzer commented that there was insufficient evidence to show a
7 serious market for the power to balance against the impacts to an already environmentally
8 sensitive area. SOF 28-33. Commissioner Irvin concluded that there was insufficient
9 evidence to show that Toltec's additional power would provide an impact on pricing due to
10 existing excess capacity in Toltec's intended market area. SOF 34-38. He further indicated
11 that there were subsidences, flooding, environmental concerns, and a potential to impair the
12 aesthetic beauty of the environment. SOF 39-42. Chairman Mundell commented that the
13 environment should be protected from the possible long-term repercussions of Toltec's
14 project. SOF 44. If the court finds that the Commission lacks jurisdiction to deny Toltec's
15 applications, as Toltec is urging the court to do, this balancing will not take place at all.

16 **C. Standard of review.**

17 Toltec faces a heavy burden in its constitutional challenge to the Commission's
18 decisions entered under the siting statutes. Every legislative act is presumed constitutional.
19 *Austin v. Campbell*, 91 Ariz. 195, 203, 370 P.2d 769, 775 (1962) (citing *Hudson v. Kelly*, 76
20 Ariz. 255, 259, 263 P.2d 362, 364 (1953)). The party asserting unconstitutionality of a
21 legislative enactment bears the burden of overcoming the presumption. *Eastin v. Broomfield*,
22 116 Ariz. 576, 580, 570 P.2d 744, 748 (1977). If it is possible to construe a statute as
23 constitutionally valid, the court is required to do so. *Mardian Construction v. Superior Ct.*,
24 113 Ariz. 489, 557 P.2d 526 (1976); *Schechter v. Killingsworth*, 93 Ariz. 273, 380 P.2d 136
25 (1963); *Hernandez v. Frohmiller*, 68 Ariz. 242, 204 P.2d 854 (1949). Finally, a party
26 challenging a Commission order has the burden of proving "by clear and satisfactory
27 evidence" that an order of the Commission is "unreasonable or unlawful." A.R.S. § 40-
28

1 254(E); *Tucson Elec. Power Co. v. Arizona Corp. Comm'n*, 132 Ariz. 240, 645 P.2d 231
2 (1982). Toltec's jurisdictional arguments fail to meet these burdens.

3 **II. THE COMMISSION HAS THE AUTHORITY UNDER THE SITING**
4 **STATUTES TO DECIDE WHETHER TO DENY A CEC. THE STATUTES**
5 **GRANTING THE COMMISSION AUTHORITY OVER CECs ARE**
6 **CONSTITUTIONAL.**

7 Toltec asserts that it is not a public service corporation ("PSC"). Toltec then asserts
8 that, since it is not a PSC, the Commission may not exercise its statutory siting jurisdiction
9 over Toltec, because the legislature cannot extend siting jurisdiction to a non-PSC. Assuming
10 arguendo that Toltec is not a PSC, Toltec's argument must fail because the legislature may,
11 under its well-established police power, grant the Commission jurisdiction over non-PSCs.
12 Therefore, whether Toltec is or is not a PSC is irrelevant. It is still subject to the
13 Commission's statutory siting authority.

14 **A. The Legislature can enlarge the Commission's powers as long as it does not**
15 **alter the Constitution.**

16 Under the Arizona Constitution, the "law-making power may enlarge the powers and
17 extend the duties of the Corporation Commission, and may prescribe rules and regulations to
18 govern proceedings instituted by and before it." Ariz. Const. art. XV, § 6. In the
19 Commission's case, the legislature was given an express grant of constitutional authority to
20 give additional powers to the Commission. These powers are constitutional as long as they
21 do not give the Commission "functions wholly alien to its constitutional charter." *See Clean*
22 *Elections Commission v. Myers*, 196 Ariz. 516, 520, 1 P.3d 706, 710 (2000). It cannot
23 reasonably be argued that siting electric power plants and transmission lines is wholly alien to
24 the Commission's constitutional powers over electric service in Arizona. Moreover, the
25 "wholly alien" standard only applies if the Constitution does not grant the legislature the
26 power to extend an agency's authority. Here, there is an express grant of that very power in
27 Article XV, Section 6.

28 Toltec's arguments are based on an expansive misreading of *Rural/Metro v. Arizona*
Corp. Comm'n, 129 Ariz. 116, 629 P.2d 83 (1981). *Rural/Metro* holds that the legislature

1 may not "give 'public service corporation' designation to corporations not listed in Article 15,
2 § 2." *Rural/Metro*, 129 Ariz. at 118, 629 P.2d at 85. *Rural/Metro* established that the
3 legislature cannot subject non-PSCs to Article XV's regulatory burden simply by changing a
4 constitutional definition, an act that would essentially amend the state Constitution.
5 *Rural/Metro* does not, however, establish that the legislature cannot delegate other aspects of
6 the state's police power to the Commission.

7 The siting statutes apply to "utilities," not "public service corporations." For purposes
8 of the statutory siting scheme, "utility" means any person engaged in the generation or
9 transmission of electric energy, and clearly includes Toltec. SOF 2, 4-6, 25, 27; *see also*
10 A.R.S. § 40-360.11. Toltec argues that this statutory definition is unconstitutional because it
11 enlarges the Commission's constitutional powers over non-public service corporations. But
12 although *Rural/Metro* arguably prevents the legislature from expanding the Constitution's
13 definition of "public service corporation," it does not prevent it from delegating to the
14 Commission its police power over "utilities," a term that is expressly defined in the siting
15 statutes. Toltec is a utility as defined by these statutes and is therefore subject to the
16 Commission's siting authority.

17 Toltec prominently cites *Wylie v. Phoenix Assurance Co.* to support its position. *Wylie*
18 holds that the Commission cannot use its statutory power to modify a form prescribed by the
19 legislature. *See Wylie*, 42 Ariz. 133, 140-141, 22 P.2d 845, 847 (1933). But Toltec's reliance
20 on *Wylie* is misplaced because *Wylie* expressly acknowledges the Commission's former
21 statutory authority over insurance companies – an authority over non-PSCs granted by the
22 legislature under its police power. *See Wylie*, 42 Ariz. at 138, 22 P.2d at 847 ("The
23 commission's power to regulate the insurance business... is statutory... and receives its
24 sanction under the police power of the state.") (emphasis added). *Wylie* cannot be used to
25 support the proposition that the legislature cannot delegate its police powers over non-PSCs
26 to the Commission.

27 Toltec also broadly asserts that new rules which favor competition for electric
28 generation have led to the Commission overstepping its jurisdictional boundaries to include

1 non-PSCs. However, Toltec has not demonstrated how the Commission's authority to grant
2 or deny a CEC has been decreased by rule or legislation as a result of the recent move
3 towards competition. The Commission has long-exercised various statutory, non-Article XV
4 powers over non-PSCs. For example, the Commission has certain limited jurisdiction over
5 the Salt River Project, a non-PSC. *See, e.g.* A.R.S. § 38-2465(B); A.R.S. § 40-360.02.
6 Likewise, the Commission's statutory authority over pipeline safety extends to all pipelines,
7 regardless of whether the pipeline is owned by a PSC or a non-PSC. *See* A.R.S §§ 40-441,
8 442. The Commission's statutory "blue-stake" authority extends to all who excavate near
9 underground utility facilities, regardless of whether the excavator is a PSC, and regardless of
10 whether the utility that owns the facility is a PSC. *See, e.g.*, A.R.S. §§ 40-360.21 to -360.32.
11 Toltec's argument, if adopted, would eviscerate all of these long-standing statutory powers.

12 Further, Toltec's arguments lead to the absurd result that final authority over CECs
13 could be vested in any agency except the Commission. Toltec's argument is particular to the
14 Commission: it claims that the Commission cannot have final authority over CECs for non-
15 PSCs. Both the CEC and Siting Committee decisions are creatures of statute. The legislature
16 could therefore create a new agency to review the Siting Committee and give that agency
17 final power over CECs. In fact, when the siting statutes were adopted, the Arizona legislature
18 contemplated placing the siting authority under the jurisdiction of a different state agency. At
19 the time, Senator Alexander proposed placing the bill under the jurisdiction of the
20 Department of Economic Planning and Development. *See* SOF 45 (Senate Natural Resource
21 Committee Minutes on S.B. 98, 42nd Legislature 2/9/71).

22 Presumably, the legislature could also vest this authority in any existing agency
23 created by statute. But if the Arizona Acupuncture Board of Examiners or the Arizona Board
24 of Cosmetology could be given final authority over CECs, why shouldn't the Commission be
25 able to exercise this power? The Commission has considerable expertise in technical issues
26 relating to the electric industry. Moreover, the Commissioners are constitutional officers,
27 selected in state-wide elections. They are uniquely qualified to set public policy on siting
28 issues. The legislature's decision to grant final authority over CECs to the Commission was

1 well-founded. This court should not adopt a view of Arizona law that imposes a special
2 disability on the one agency that is the most logical choice to exercise siting authority.

3 **B. Toltec is a PSC under Article XV, Section 2 of the Arizona Constitution.**

4 Toltec asserts that it is not a PSC. But under the definition set forth in the Arizona
5 Constitution, Toltec probably is a PSC. The Arizona Constitution provides that “[a]ll
6 corporations other than municipal engaged in furnishing gas, oil or electricity for light, fuel,
7 or power...shall be deemed public service corporations.” Ariz. Const. art. XV, § 2. Here, if
8 the Toltec plant is built, Toltec will furnish power to the electric grid. SOF 5. Toltec's power
9 will be sold on a wholesale basis to local distribution companies, such as APS or SRP, or to
10 other wholesale purchasers of power. SOF 2, 4-6, 25, 27.

11 Toltec asserts that it will not meet the definition of a PSC because it will not sell
12 directly to retail customers. But Article XV, Section 2 does not mention retail customers at
13 all. Clearly, Toltec meets the textual definition of Article XV, Section 2; accordingly, if
14 Toltec is to escape classification as a PSC, it must justify its claim by reference to some non-
15 textual exception.

16 Arizona courts have recognized two non-textual exceptions to Article XV, Section 2:
17 the “merely incidental” doctrine and the *Serv-Yu* test. The “merely incidental” doctrine holds
18 that, if a business provides a utility service, it is not a PSC if the utility service is incidental to
19 its main business. *See Arizona Corp. Comm'n v. Nicholson*, 108 Ariz. 317, 320, 4979 P.2d
20 815, 819 (providing water incidental to trailer park business). Providing electricity is not
21 incidental to the business of a merchant power plant: it is its very purpose. SOF 2, 4-6, 25,
22 27.

23 The second non-textual exception to Article XV, Section 2 is the *Serv-Yu* test, an eight
24 factor test developed in *Natural Gas Service Co. v. Serv-Yu Coop.*, 70 Ariz. 235, 237-38, 219
25 P.2d 324, 325-326 (1950). *See Southwest Gas Corp. v. Arizona Corp. Comm'n*, 169 Ariz.
26 279, 286, 818 P.2d 714, 721 (App. 1991) (applying *Serv-Yu* test); *Petrolane-Arizona Gas*
27 *Service v. Arizona Corp. Comm'n*, 119 Ariz. 257, 259, 580 P.2d 718, 720 (1978) (applying
28

1 *Serv-Yu* test). Only some of the factors need to be present to determine that an entity is a
2 PSC. *Southwest Gas Corp.*, 169 Ariz. 286, P2d at 721.

3 Four of the *Serv-Yu* factors support finding that Toltec is a PSC:

4 1. What the corporation actually does.

5 This factor looks at the corporation's actual practices, rather than its stated intentions.
6 The court in *Serv-Yu* noted that this factor points in favor of the corporation being a public
7 service corporation when the corporation's service affects "so considerable a fraction of the
8 public that it is public in the same sense in which any other may be called so... The public
9 does not mean everybody all the time." *Serv-Yu.*, 70 Ariz. at 240, 219 P.2d at 327. Here,
10 Toltec will sell power to any wholesale purchaser. SOF 2, 4-6, 25, 27. While wholesale
11 purchasers do not constitute all of the public, they are sufficiently numerous to constitute a
12 sizable or "considerable" fraction of the public.

13 2. A dedication to public use.

14 Dedication to public use is shown by the "circumstances of each case," looking to
15 "substance not form." *Nicholson*, 108 Ariz. at 320, 497 P.2d at 818. Here, Toltec will
16 provide power to the grid, which in turn serves all of the public. SOF 2, 4, 6.

17 3. Dealing with a service of a commodity in which the public has been
18 generally held to have an interest.

19 Electricity is indisputably a commodity in which the public has been generally held to
20 have an interest.

21 4. Actual or potential competition with other corporations whose business
22 is clothed with a public interest.

23 Toltec will compete with other corporations whose business is clothed with a public
24 interest, including the wholesale operations of PSCs. SOF 2, 4-6, 25-27.

25 Of the eight *Serv-Yu* factors, four point in favor of Toltec being a PSC. Moreover,
26 these four are likely to be the most persuasive factors. Therefore, on balance, the *Serv-Yu* test
27 indicates that Toltec is a PSC.

28

1 Toltec asserts that, if it is found to be a PSC, "then the whole scheme of wholesale
2 power competition adopted in Arizona" would fail because the Commission would have to fix
3 its rates and charges based on the fair value of its property. (Toltec's MSJ at 13). This
4 argument is flatly wrong. Under the Federal Power Act, rates for wholesale power
5 transactions are regulated by the Federal Energy Regulatory Commission ("FERC"). 16
6 U.S.C. § 792 *et seq.* Therefore, if Toltec is found to be a PSC, the Commission's ratemaking
7 authority over Toltec would be preempted by FERC, which allows the type of competitive,
8 contract-based pricing that Toltec desires. Even if the Commission's ratemaking authority
9 were not preempted, rate setting can be reconciled to the demands of competition. *See US*
10 *West Communications, Inc. v. Arizona Corp. Comm'n*, 201 Ariz. 242, 247, 34 P.3d 351, 356
11 (2001) (holding that the Commission's ratemaking authority is consistent with competition).

12 In the absence of federal preemption of a topic, the Commission may exercise its
13 constitutional and statutory authority over PSCs. FERC's power over wholesale generators is
14 not boundless, and does not include siting. In *New York v. Federal Energy Regulatory*
15 *Comm'n*, 531 U.S. 1189, 122 S.Ct. 1012, 152 L.Ed.2d 47 (2002), the United States Supreme
16 Court pointed out that "FERC has recognized that the States retain significant control over
17 local matters." *See, e.g.*, Order No. 888 at 31,782, n. 543 (Congress left to the states authority
18 to regulate generation and transmission siting).

19 **III. THE OUTCOME OF THE COMMISSION'S VOTE CANNOT BE**
20 **PREDETERMINED, AND THE AUTHORITY TO VOTE TO GRANT A CEC**
21 **OF NECESSITY INCLUDES THE AUTHORITY TO VOTE TO DENY A CEC.**

22 Toltec also argues that the Commission lacks statutory jurisdiction to deny a CEC if no
23 requests for review are filed pursuant to A.R.S. § 40-360.07(A). In this case, there were no
24 requests for review filed for Toltec's transmission line. Toltec claims that, in the absence of a
25 request for review, the Commission must approve whatever decision is made by the Siting
26 Committee.

27 This argument runs contrary to common sense. The Commission has the power to
28 evaluate the findings of the Siting Committee even when there has not been a request for
review. A.R.S. § 40-360.07(A) provides that no utility may construct its proposed plant until

1 it has a CEC approved or affirmed by the Commission. "Affirm" has a different meaning
2 than "approve." "Affirm" means to "ratify, make firm, confirm, establish, reassert."
3 *BLACK'S LAW DICTIONARY 81* (REV. 4th ed. 1968). In other words, "affirm" carries with
4 it an element of discretion that is missing from "approve."

5 To interpret the statute as requiring the Commission to automatically approve every
6 Siting Committee decision would render the Commission's role meaningless. The
7 Commission would simply be rubber-stamping the Siting Committee's findings. Moreover,
8 the Commission acts through its orders, which are voted on at public "Open Meetings."
9 A.R.S. § 40-102. By requiring a CEC to be granted to an applicant by "order of the
10 Commission," the Arizona Legislature is requiring the Commission to vote on every
11 proposed project. The outcome of this vote cannot be predetermined without running afoul of
12 the Open Meeting Laws. See A.R.S. §§ 38-431 to 431.09.

13 Finally, arguing that the Commission was required to automatically grant Toltec's
14 transmission line CEC, even if Toltec's plant CEC was denied, is nonsensical. The need for
15 the transmission line clearly evaporates once the CEC for the plant is denied. Under this
16 scenario, the Commission would be required to grant a CEC for a transmission line that
17 would serve no purpose.

18 **IV. TOLTEC FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES.**

19 In its Applications for Rehearing of the Commission's orders, Toltec did not allege (1)
20 that it was not a public service corporation, (2) that the legislature cannot enlarge the
21 jurisdiction or powers of the Commission, (3) that the legislature cannot vest the Commission
22 with jurisdiction to deny CECs, (4) that the Commission has no jurisdiction to deny Toltec a
23 CEC for the transmission lines, (5) that A.R.S. § 40-253's mandatory rehearing requirement
24 is inapplicable to siting decisions, and (6) that A.R.S. § 40-253 does not apply to challenges
25 to Commission jurisdiction. SOF 3. Nonetheless, all six of these arguments are included in
26 Toltec's Motion for Summary Judgment.

27 A.R.S. § 40-253(C) specifically provides that a motion for rehearing must "set forth
28 specifically the grounds on which it is based, and no person, nor the state, shall in any court

1 urge or rely on any ground not set forth in the application.” Under the plain words of this
2 statute, Toltec’s jurisdictional challenges must be rejected because Toltec’s Motion for
3 Rehearing failed to raise these issues.² See SOF 3.

4 A.R.S. § 40-253 is applicable to siting decisions because it is part of the judicial
5 review authorization outlined in A.R.S. §§ 40-254, -360.07(C), and -360.11. Under A.R.S.
6 § 40-360.11, A.R.S. § 40-254 is identified as the vehicle by which parties may appeal the
7 Commission’s siting decisions. A.R.S. § 40-253 must be construed with the siting statutes
8 because A.R.S. § 40-254(A) mandates that any action in superior court must be commenced
9 “within thirty days after a rehearing is denied or granted.” (Emphasis added). Although
10 parties who have previously requested review pursuant to Section 40-360.07(B) may choose
11 not to file a motion for reconsideration under A.R.S. § 40-360.07(C), all parties wishing to
12 commence an action in superior court on a line siting case must file an application for
13 rehearing pursuant to A.R.S § 40-253.³

14 Toltec argues that *Southwestern Paint & Varnish Co. v. Arizona Dep’t of Env’tl.*
15 *Quality*, 194 Ariz. 22, 976 P.2d 872 (1999), supports its claim that an application for
16 rehearing was not necessary to preserve its claims. In *Southwestern Paint*, however, the
17 Arizona Supreme Court held that, “[u]nless a statute specifically directs otherwise, one need
18 not seek rehearing before an agency in order to seek judicial review.” *Id.* at 22, 976 P.2d at
19 872 (emphasis added). In the present case, A.R.S. § 40-253(B) specifically directs that “no
20 claim arising from any order or decision of the commission shall accrue in any court to any
21

22 ² Toltec asserts that jurisdictional challenges are allowed in “collateral” proceedings. But
23 even if this were true, this is not a “collateral” proceeding, but a direct appeal of the
24 Commission’s orders.

25 ³ Arizona courts have determined that “the ripeness doctrine has been utilized in many
26 instances to justify non-intervention by the courts when the complained of administrative
27 action has not become final because of failure to exhaust appropriate administrative
28 remedies.” *Arizona Downs v. Turf Paradise, Inc.*, 140 Ariz. 438, 445, 682 P.2d 443, 450
(1984). In *State ex rel. Church v. Arizona Corp. Comm’n*, 94 Ariz. 107, 382 P.2d 222
(1963), the court found that, “under [the] doctrine of exhaustion of administrative remedies,
the corporation commission must be given an opportunity to correct its errors before resort is
had to provisions for judicial review”

1 party . . . unless the party . . . makes . . . application to the commission for a rehearing.”
2 Thus, Toltec was required to seek rehearing before the Commission prior to seeking judicial
3 review of the Commission’s decisions under A.R.S. § 40-254. Its failure to do so prohibits it
4 from raising claims not preserved in its motion for rehearing.

5 **V. NEITHER THE SITING COMMITTEE NOR THE COURT CAN GRANT A**
6 **CEC TO CONSTRUCT A POWER PLANT OR TRANSMISSION LINE. IF**
7 **THE COURT DOES NOT AFFIRM THE COMMISSION’S ORDERS, THE**
8 **CASES SHOULD BE REMANDED TO THE COMMISSION FOR FURTHER**
9 **PROCEEDINGS.**

10 Toltec’s claim for relief in this case is made pursuant to A.R.S. § 40-254. Under
11 A.R.S. § 40-254, Toltec can ask the superior court to “vacate, set aside, affirm in part, reverse
12 in part or remand with instructions to the commission such order or decision” In its
13 Complaint, Toltec asks this court to either (1) set aside the decisions and affirm, approve, and
14 confirm the CECs or (2) vacate the decisions and remand them with instructions to the
15 Commission. In its Motion for Summary Judgment, Toltec asks this court to reverse the
16 Commission’s orders denying the CECs, and instead somehow affirm the Siting Committee’s
17 decisions as final decisions in lieu of the Commission’s orders. Toltec’s request for relief is
18 contrary to the explicit statutory language vesting the final determination on a CEC with the
19 Commission, not the Siting Committee.

20 Toltec is asking the Court to strike down the part of the statute concerning
21 Commission review, but uphold the portion concerning the Siting Committee. A statute will
22 not be severed if the invalid and valid parts are “so intimately connected as to raise the
23 presumption the legislature would not have enacted one without the other” or where the
24 provisions are so connected that the legislature clearly intended them as whole. *State Comp.*
25 *Fund v. Symington*, 174 Ariz. 188, 195, 848 P.2d 273, 280 (1993) (citations omitted); *see also*
26 *Miller v. Frohmiller*, 66 Ariz. 339, 343, 188 P.2d 457, 460 (1948). Here, Commission review
27 is an important and interconnected feature of the statutory scheme; accordingly, severance of
28 the siting statutes is not appropriate.

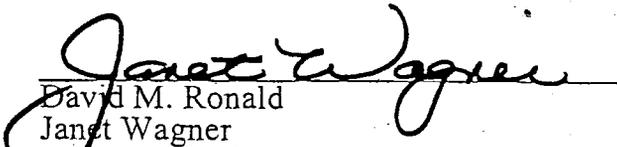
Asking the Court to substitute its judgment for that of the Commission as to whether a
CEC should be granted or denied will also violate the separation of powers doctrine. *See*

1 *Arizona Corp. Comm'n v. Fred Harvey Transportation Co.*, 95 Ariz. 185, 190-91, 388 P.2d
2 236, 239 (1964) (courts must not invade "essential function of another public body" and may
3 not grant certificate under Section 254); *see also Maricopa County v. Corp. Comm'n*, 79
4 Ariz. 307, 313, 283 P.2d 183, 187 (1955) (under Section 254, court may not "render an
5 entirely new judgment"). Even if this Court chooses to set aside the Commission's orders, it
6 must remand back to the Commission for further proceedings.

7 **VI. CONCLUSION.**

8 For the foregoing reasons, the Commission requests that the Court deny Toltec's
9 Motion for Summary Judgment and instead affirm the Commission's jurisdiction to enter
10 Decision Nos. 64445 and 64446.

11 RESPECTFULLY SUBMITTED this 15th day of January, 2003.

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14 IN AND FOR THE COUNTY OF MARICOPA

15 TOLTEC POWER STATION, L.L.C., a
16 Delaware limited liability company,

17 Plaintiff,

18 vs.

19 ARIZONA CORPORATION
20 COMMISSION,

21 Defendant.

Case No. CV2002-006785

PLAINTIFF'S REPLY TO
RESPONSES TO MOTION FOR
SUMMARY JUDGMENT ON
JURISDICTIONAL GROUNDS

(Assigned to the Hon. Michael D. Jones)

(Oral argument Requested)

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<i>Mail Boxes v. Indus. Comm'n</i> , 181 Ariz. 119, 888 P.2d 777 (1995)	8 ✓
<i>Martin v. Martin</i> , 182 Ariz. 11, 893 P.2d 11 (App. 1994)	8 ✓
<i>Menderson v. City of Phoenix</i> , 51 Ariz. 280, 76 P.2d 321 (1938)	3, 4, 5
<i>Natural Gas Serv. Co. v. Serv-Yu Coop.</i> , 70 Ariz. 235, 219 P.2d 324 (1950).....	6, 7
<i>Rural/Metro Corp. v. Arizona Corp. Comm'n</i> , 129 Ariz. 116, 629 P.2d 83 (1981).....	3, 4, 5
<i>Southern Pac. Transp. Co. v. Arizona Corp. Comm'n</i> , 173 Ariz. 630, 845 P.2d 1125 (App. 1992).....	8, 9 ✓
<i>State v. Tucson Gas, Elec. Light & Power Co.</i> , 15 Ariz. 294, 138 P. 781 (1914)	1 ✓
<i>State Compensation Fund v. Symington</i> , 174 Ariz. 188, 848 P.2d 273 (1993).....	9 ✓
<i>Tonto Creek Estates Homeowners Ass'n v. Arizona Corp. Comm'n</i> , 177 Ariz. 49, 864 P.2d 1081 (App. 1993)	8
<i>Trico Elec. Co-op. v. Ralston</i> , 67 Ariz. 358, 196 P.2d 470 (1948).....	4
<i>Tucson Rapid Transit Co. v. Old Pueblo Transit Co.</i> , 79 Ariz. 327, 289 P.2d 406, (1955).....	8
<i>Tucson Warehouse & Transfer Co. v. Al's Transfer, Inc.</i> , 77 Ariz. 323, 271 P.2d 477 (1954).....	8

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1 *Wylie v. Phoenix Assur. Co.*, 42 Ariz. 133, 22 P.2d 845 (1933) 5

2 CONSTITUTIONS AND STATUTES

3 Arizona Constitution

4 art. 15 2, 4, 5, 6
5 art. 15, § 2 2, 6
6 art. 15, § 3 2, 6
7 art. 15, § 4 2, 5
8 art. 15, § 5 2, 5
9 art. 15, § 6 1, 2, 3, 4, 5
10 art. 15, § 13 2
11 art. 15, § 14 2
12 art. 15, § 15 2
13 art. 15, § 16 2
14 art. 15, § 17 2
15 art. 15, § 18 2
16 art. 15, § 19 2

17 Arizona Revised Statutes

18 § 40-202 7
19 § 40-253 7
20 § 40-360.07 9
21 § 40-360.07(A) 8
22 § 40-360.07(B) 8, 9, 10

1 I. GRANTING THE COMMISSION POWER TO DENY CECs APPROVED BY
2 THE SITING COMMITTEE FOR NON-PUBLIC SERVICE
3 CORPORATIONS EXCEEDS THE LEGISLATURE'S CONSTITUTIONAL
4 PERMISSION TO "ENLARGE THE POWERS" OF THE COMMISSION.¹

5 The Commission and Intervenor err both by setting the constitutional standard for
6 legislative delegation to the Commission too low, *i.e.*, permitting delegation of anything
7 less than "functions wholly alien to its constitutional charter," and by misconstruing the
8 Commission's constitutional charter. *See Citizens Clean Elections Comm'n v. Myers*, 196
9 Ariz. 516, 522, 1 P.3d 706, 712 (2000). Neither Ariz. Const. art. 15, § 6 nor the doctrine of
10 implied limitations authorizes the legislature to grant the Commission a new power not
11 expressly granted by the Arizona Constitution.

12 A. The Arizona Constitution Expressly Defines the Commission's Powers.

13 The framers of the Arizona Constitution created the Commission as a separate,
14 popularly-elected branch of state government. *Arizona Corp. Comm'n v. State ex rel.*
15 *Woods*, 171 Ariz. 286, 290, 830 P.2d 807, 811 (1992). "While it is not so named, it is, in
16 fact, another department of government, with powers and duties as well defined as any
17 branch of the government" *State v. Tucson Gas, Elec. Light & Power Co.*, 15 Ariz.
18 294, 306, 138 P. 781, 786 (1914); *accord Arizona Corp. Comm'n v. Superior Court*, 107
19 Ariz. 24, 26, 480 P.2d 988, 990 (1971); *Woods*, 171 Ariz. at 292, 830 P.2d at 813. Deep-
20 rooted dissatisfaction with legislative efforts to regulate public service corporations
21 ("PSCs") led the framers to provide a constitutional basis for popular control of corporate
22 regulation by creating an elected commission with broad powers:

23 The founders expected the Commission to provide both effective regulation of
24 public service corporations and consumer protection against overreaching by those
25 corporations. The progressive and labor forces ... combined to promote strong
26 commission authority to regulate corporations, although the strongest power
27 ultimately was limited to regulation of public service corporations.

28 *Woods*, 171 Ariz. at 290-91, 830 P.2d at 811-12 (citations omitted).

1 Paragraphs 3-44 of the Commission's Separate Statement of Facts generally lack
2 relevance to the legal issues raised on this jurisdictional motion; many are incomplete
3 and/or misleading and raise issues of disputed fact. For the purposes of this motion,
4 however, Toltec specifically objects to ¶¶ 10, 15, and 24 as incomplete
5 mischaracterizations of the record.

1 Article 15 of the Arizona Constitution grants four powers to the Commission. First,
2 art. 15, § 3 grants "full *power* to ... prescribe just and reasonable classifications to be used
3 and just and reasonable rates and charges to be made and collected" by PSCs (as defined in
4 § 2); rules governing PSCs' business transactions, forms of contracts, and systems of
5 keeping accounts; and regulations for the health and safety of employees and patrons of
6 PSCs. Second, art. 15, § 4 grants "*power* to inspect and investigate the property, books, ...
7 and affairs of any corporation whose stock shall be offered for sale to the public and of any
8 public service corporation doing business within the State" with related powers to enforce
9 attendance of witnesses and production of evidence and to take testimony. Third, art. 15,
10 § 5 grants the Commission "the sole *power* to issue certificates of incorporation to
11 companies organizing under the laws of this State, and to issue licenses to foreign
12 corporations to do business in this State, except as insurers." Fourth, art. 15, § 19 grants
13 "the *power* and authority to enforce its rules, regulations, and orders by the imposition of
14 such fines as it may deem just" within limits defined by § 16. Section 6 authorizes the
15 legislature to "enlarge the *powers* and extend the duties of the Corporation Commission."

16 The remainder of article 15 does not apply to non-PSCs.² The only provisions in
17 article 15 applicable to non-PSCs are §§ 4, 5, and 13, and they do not apply to
18 unincorporated businesses. These sections authorize the Commission to regulate who may
19 conduct business in Arizona with corporate protection against individual liability and to
20 inspect the books of publicly held corporations and investigate corporate fraud. Article 15
21 does not suggest that the Commission has jurisdiction beyond §§ 4, 5, and 13 to regulate
22 entities other than those defined as PSCs under § 2, and the Court may not imply that the
23 Constitution grants the Commission any powers not expressly stated. *Commercial Life Ins.*
24 *Co. v. Wright*, 64 Ariz. 129, 139, 166 P.2d 943, 949 (1946).

25
26
27 ² Section 13 requires all PSCs and publicly held corporations to report to the
28 Commission, § 14 requires the Commission to determine the fair value of property of every
PSC, and § 15 declares rights of existing PSCs. Section 16 authorizes fines against PSCs
for violation of Commission rules or orders, and § 17 provides PSCs the right of judicial
appeal from Commission orders. The repealed § 18 provided salaries for Commissioners.

1 B. Art. 15 § 6 Does Not Authorize the Legislature to Delegate Police Power
2 Over "Utilities" Other Than PSCs to the Commission.

3 Under art. 15, § 6, the legislature may "enlarge the powers and extend the duties" of
4 the Commission—the plain language of which means that the legislature may *enlarge* the
5 four powers expressly granted to the Commission by the constitution, but may not grant
6 new powers. Section 6 means that the legislature "may enlarge or extend the powers and
7 duties of the commission *over the subject matter of which it has already been given*
8 *jurisdiction*, and other matters of the same class, not expressly or impliedly exempt by
9 other provisions of the Constitution." *Menderson v. City of Phoenix*, 51 Ariz. 280, 285, 76
10 P.2d 321, 323 (1938) (emphasis added); accord *Rural/Metro Corp. v. Arizona Corp.*
11 *Comm'n*, 129 Ariz. 116, 117, 629 P.2d 83, 84 (1981) (statutes enlarging Commission's
12 powers must give practical effect to and ensure actual fulfillment of Commission's
13 constitutional authority). Article 15, § 6 "allows the legislature to extend the powers and
14 duties of the Commission only with regard to those powers already granted by the
15 constitution." *Rural/Metro*, 129 Ariz. at 118, 629 P.2d at 85.

16 Under art. 15, § 6, therefore, the legislature may enlarge only the Commission's four
17 express constitutional powers: (1) to regulate PSCs; (2) to inspect and investigate
18 corporate records of PSCs and publicly held corporations; (3) to certify incorporations; and
19 (4) to impose fines to enforce its rules and regulations. The Commission's argument that
20 the legislature can delegate to the Commission its police power over "utilities" because the
21 siting statutes apply to "utilities" and the legislature defined "utility" to include non-public
22 service corporations misses the point. (*See Comm'n Resp.* at 6.) Even for entities
23 statutorily defined as "utilities," the Commission has no regulatory power over non-PSCs
24 that may be enlarged to include power to deny CECs issued by the Siting Committee. The
25 Commission's "constitutional charter" with regard to non-PSCs is limited to certifying their
26 incorporation and inspecting and investigating their books if they are incorporated, neither
27 of which is related to prohibiting a non-PSC from building a manufacturing facility. *See*
28 *Myers*, 196 Ariz. at 522, 1 P.3d at 712.

 Even a "careful" reading of *Myers* does not support Intervenor's argument that art.

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1 15, § 6 means the legislature may grant the Commission additional powers *unrelated* to the
2 Commission's constitutional functions so long as the additional powers are not impliedly
3 prohibited by some other constitutional provision. (See Interv. Resp. at 10.) *Myers* held
4 that expanding the duties of the Commission on Appellate Court Appointments to include
5 nominating candidates for the Citizens Clean Elections Commission was unconstitutional
6 because it expanded the commission's duties to functions wholly unrelated to its
7 constitutional charter. 196 Ariz. at 522, 1 P.3d at 712. *Myers* decided only whether the
8 constitution permits legislative delegation to a constitutionally created entity where the
9 constitution does *not* expressly grant the legislature power to enlarge the function or scope
10 of the entity. *Id.* at 519, ¶ 8, 1 P.3d at 709. *Myers* did not interpret any constitutional
11 provision affirmatively granting legislative authority to "enlarge the powers" of a
12 constitutionally created body. In dictum, *Myers* cautioned that even express constitutional
13 authorization to enlarge the jurisdiction of a court or entity is not unlimited. 196 Ariz. at
14 520 n.1, ¶ 10, 1 P.3d at 710 n.1. *Myers* further explained that "the express grant of power
15 to expand the scope of an article VI entity of necessity must be related to, and not impair,
16 an article VI function." *Id.* Here, then, the express grant of power to enlarge the
17 Commission's powers of necessity must be related to its article 15 functions. *Myers* did not
18 overrule or even cast doubt on the frequently quoted language from *Menderson* that
19 legislative enlargement of the Commission's powers is limited not only by express or
20 implied constitutional prohibitions, but also limited to "the subject matter of which it has
21 already been given jurisdiction, and other matters of the same class." See *Menderson*, 51
22 Ariz. at 285, 76 P.2d at 323; *Rural/Metro*, 129 Ariz. at 117, 629 P.2d at 84; *Trico Elec. Co-*
23 *op. v. Ralston*, 67 Ariz. 358, 364, 196 P.2d 470, 473 (1948); *Commercial Life Ins.*, 64 Ariz.
24 at 140, 166 P.2d at 950.

25 Intervenor illogically reasons that if *Myers* permits legislative delegation to a
26 constitutionally created body of duties that are *related* to the body's constitutionally
27 defined powers *without* express permission stated in the constitution, then § 6 must permit
28 more—delegation of powers that are *unrelated* to its constitutional charter, as long as not

1 expressly prohibited by some other constitutional provision. (See Interv. Resp. at 10.)
2 Interpreting § 6 as authorization of legislative delegation without regard to the
3 Commission's constitutional powers directly conflicts with *Menderson* and *Rural/Metro*
4 and would render most of article 15 mere surplus. Using similar logic, the Commission
5 reasons that *Rural/Metro* only prevented the legislature from adding the words "fire
6 protection services" to the constitutional definition of PSCs, but that the legislature could
7 have obtained the same result by delegating its "police power" over non-PSCs to the
8 Commission, even without express constitutional authority. (Comm'n Resp. at 6.) Both
9 lines of reasoning ask this Court to ignore Supreme Court precedent.³

10 C. The Doctrine of Implied Limitations Does Not Authorize the Legislature
11 to Delegate Police Power Over Non-PSC Utilities to the Commission.

12 Intervenor attempts to sidestep clear Arizona law interpreting art. 15, § 6 by the
13 doctrine of implied limitations and *Myers*, but neither supports his position. (See Interv.
14 Resp. at 5-7.) As *Myers* explained, "any exercise of legislative power is subject to the
15 limitations imposed by the constitution" and "[a] limitation may be implied by the text of
16 the constitution or its structure taken as a whole." 196 Ariz. at 520-21, 1 P.3d at 710-11.
17 Article 15 defines the Commission's four powers and thereby sets the limits for legislative
18 delegation. See *American Bus Lines, Inc. v. Arizona Corp. Comm'n*, 129 Ariz. 595, 599,
19 633 P.2d 404, 408 (1981) ("[U]nless there is a constitutional grant of power over carriers,
20 the legislature cannot grant to the Commission additional control over carriers as an
21 exercise of police power or otherwise."⁴)

22 The Commission and Intervenor err by focusing on the nature of discrete activities

23 ³ Toltec did not argue that the federal and state shift to a competitive wholesale
24 electric market decreased the Commission's constitutional powers. (See Comm'n Resp. at
25 6-7.) The shift merely explains why until recently only PSCs sought to build power plants.

26 ⁴ *Wylie v. Phoenix Assur. Co.*, 42 Ariz. 133, 22 P.2d 845 (1933), did not approve
27 legislative delegation of power to regulate non-PSCs to the Commission under state police
28 power without a constitutional basis. (See Comm'n Resp. at 6.) As a preface, *Wylie* stated
that the Commission's power to regulate the insurance business was limited to that
expressly stated in art. 15, §§ 4 and 5 and in statute. 42 Ariz. at 138-39, 22 P.2d at 847. It
then held unconstitutional a statute purporting to delegate legislative power to the
Commission beyond art. 15, §§ 4 and 5 because art. 15, § 6 does not permit the legislature
to delegate a "new and independent power" to the Commission. *Id.*

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1 rather than the Commission's constitutional charter defined by article 15. They reason that
2 since § 2 defines PSCs to include corporations that furnish electricity and § 3 requires the
3 Commission to set rates to be charged by PSCs, anything related to electrical power is not
4 "wholly alien" to the Commission's constitutional powers. (See Interv. Resp. at 8.)
5 Following this logic, the legislature could authorize the Commission to regulate drilling for
6 oil or water or the manufacturing of electric turbines. But the Commission's constitutional
7 charter, which is carried out through four specific powers, is to protect Arizona's
8 consumers and investors from overreaching by regulated monopolies and publicly held
9 corporations. The framers never intended to make the Commission responsible for all
10 activities that bear some relationship to electricity, oil, gas, or water—only to regulate those
11 who furnish those services to relatively powerless consumers.

12 Whether the Commission is more qualified than any other entity to review Siting
13 Committee decisions involving non-PSCs is irrelevant. In fact, the Commission has no
14 expertise in environmental regulation—a subject that is "wholly alien" to the
15 Commission's constitutional powers. The Siting Committee Act collects environmental
16 expertise in the Siting Committee itself, and there was no compelling reason to have the
17 Siting Committee's environmental judgments about non-PSCs' construction activities
18 reviewed by the Commission rather than some other agency, or to have them reviewed by
19 any other agency at all.

20 **D. Merchant Power Plants Are Not Public Service Corporations Merely
21 Because They Generate Electric Power.**

22 Intervenor does not argue that Toltec is a PSC, arguing instead that whether Toltec
23 is a PSC is irrelevant. (Interv. Resp. at 9.) The Commission argues that under the
24 constitutional definition, "Toltec *probably* is a PSC" and that four of eight factors under
25 *Serv-Yu* favor Toltec being considered a PSC. (Comm'n Resp. at 8-9, emphasis added.) In
26 reality, however, none of the *Serv-Yu* factors indicates that Toltec is a PSC. See *Natural
27 Gas Serv. Co. v. Serv-Yu Coop.*, 70 Ariz. 235, 237-38, 219 P.2d 324, 325-26 (1950).

28 Regarding the first factor, what the corporation actually does, the Commission
falsely asserts that "Toltec will sell power to any wholesale purchaser" and that wholesale

1 purchasers "are sufficiently numerous to constitute a sizable or 'considerable' fraction of
2 the public." (See Comm'n Resp. at 9.) In fact, Toltec will sell power only "to one or more
3 electric utilities or wholesale resellers solely on negotiated bases." (Plaintiffs' SOF 8.)

4 The second factor, dedication to public use, is not established by Toltec's sale of
5 power to a utility or wholesale reseller. (See Comm'n Resp. at 9.) Toltec must be likely to
6 "supply at least some of his commodity to some of the public," but Toltec will not be
7 supplying any of its power to the public. *Serv-Yu*, 70 Ariz. at 238, 219 P.2d at 326.

8 The fourth *Serv-Yu* factor is "dealing with the service of a commodity in which the
9 public has generally been held to have an interest." 70 Ariz. at 239, 219 P.2d at 326. The
10 Commission argues that this factor is satisfied by the public's interest in electricity, but
11 Toltec is not dealing with the "service" of electricity, only with its generation.

12 Finally, regarding the eighth factor, the Commission argues summarily that "Toltec
13 will compete with other corporations whose business is clothed with a public interest,
14 including the wholesale operations of PSCs." (*Id.*) *Serv-Yu*, 70 Ariz. at 238, 219 P.2d at
15 326, adopted this factor from *Industrial Gas Co. v. Public Util. Comm'n*, 135 Ohio St. 408,
16 412, 21 N.E.2d 166, 168 (1939), where a gas company sought to serve only selected
17 industrial consumers, avoid serving less profitable customers within its territory as it would
18 be required if designated a "public utility," and escape commission regulation. The court
19 reasoned that "a corporation, calculated to compete with public utilities and take away
20 business from them, should be under like regulatory restriction." *Id.* Toltec will not
21 compete with PSCs in furnishing retail electric services and, as a matter of state and federal
22 policy, competition in the wholesale generation market now is considered to favor the
23 public interest. See A.R.S. § 40-202. The purpose of this *Serv-Yu* factor is to protect
24 regulated utilities from unfair competition by unregulated entities—a concern not raised by
25 Toltec's participation in the wholesale generation market.

26 Therefore, Toltec does not satisfy any of the *Serv-Yu* factors that identify a PSC.

27 **II. A CHALLENGE TO THE COMMISSION'S ORDERS AS VOID FOR LACK**
28 **OF JURISDICTION CANNOT BE LIMITED BY A.R.S. § 40-253 OR THE**
EXHAUSTION OF ADMINISTRATIVE REMEDIES DOCTRINE.

1 A jurisdictional defect renders a Commission order void rather than voidable.
2 *Southern Pac. Transp. Co. v. Arizona Corp. Comm'n*, 173 Ariz. 630, 633, 845 P.2d 1125,
3 1128 (App. 1992). Any decision of the Commission that goes beyond its powers as
4 prescribed by the constitution and statutes is subject to attack for lack of jurisdiction on
5 direct appeal or in a collateral proceeding.⁵ *Tonto Creek Estates Homeowners Ass'n v.*
6 *Arizona Corp. Comm'n*, 177 Ariz. 49, 57, 864 P.2d 1081, 1089 (App. 1993) (direct appeal);
7 *Tucson Rapid Transit Co. v. Old Pueblo Transit Co.*, 79 Ariz. 327, 332, 289 P.2d 406, 410
8 (1955) (collateral proceeding; compliance with statutory review procedure was not required
9 where Commission order was void for lack of jurisdiction); *Tucson Warehouse & Transfer*
10 *Co. v. Al's Transfer, Inc.*, 77 Ariz. 323, 325, 271 P.2d 477, 478 (1954) (same). A decision
11 rendered by the Commission in excess of its jurisdiction cannot have any more validity
12 than a court order which must be vacated as void if the court lacked jurisdiction over the
13 subject matter or person involved or to render the particular order entered. *See Martin v.*
14 *Martin*, 182 Ariz. 11, 15, 893 P.2d 11, 15 (App. 1994).

15 **III. WITHOUT A REQUEST FOR REHEARING, THE COMMISSION MAY**
16 **ONLY AFFIRM AND APPROVE SITING COMMITTEE DECISIONS.**

17 Even if constitutional, § 40-360.07(B) limits Commission review of Siting
18 Committee decisions to those for which a written request for review is submitted, and
19 § 40-360.07(A) provides no mechanism for the Commission to reverse a Siting Committee
20 decision without a request for review. The general principle that the Court must interpret a
21 statute by looking first to its words and giving them their ordinary meaning, *Mail Boxes v.*
22 *Indus. Comm'n*, 181 Ariz. 119, 124, 888 P.2d 777, 779 (1995), holds even more true here
23 where the Court must strictly construe the Commission's authority. *Commercial Life Ins.*,
24 64 Ariz. at 139, 166 P.2d at 949; *Burlington Northern & Santa Fe Ry. Co. v. Arizona Corp.*
25 *Comm'n*, 198 Ariz. 604, 606, ¶ 11, 12 P.3d 1208, 1210 (App. 2000). Moreover, the
26 Commission generally lacks jurisdiction to enter an order when it has failed to follow

27 ⁵
28 If Toltec would be permitted to collaterally attack the Commission's jurisdiction to
deny the CECs, public policy requires that Toltec be permitted to do so in a direct appeal to
avoid multiple lawsuits. (*See Comm'n Resp. at 12 n.2.*)

1 statutory procedural requirements. *Southern Pac. Transp. Co. v. Arizona Corp. Comm'n*,
2 173 Ariz. 630, 633, 845 P.2d 1125, 1128 (App. 1992).

3 The Commission and Intervenor argue that the plain language interpretation of
4 § 40-360.07 "runs contrary to common sense," "is nonsensical," and a "plainly absurd
5 notion." (Comm'n Resp. at 10-11; Interv. Resp. at 12.) Neither refutes the longstanding
6 case law that prohibits the Court from interpreting a statute to imply Commission authority
7 that the legislature did not expressly grant. Both summarily claim that Toltec would have
8 no purpose for transmission lines alone, but cite no evidence to support that conclusion.

9 **IV. THE UNCONSTITUTIONAL PORTION IS SEVERABLE FROM THE REST
10 OF THE SITING COMMITTEE ACT.**

11 Upon finding that the Commission lacks jurisdiction to deny CECs issued by the
12 Siting Committee to non-PSCs, the Court must invalidate the provisions that purport to
13 grant that specific authority rather than strike down the entire Siting Committee Act. The
14 Court may not declare all of a statute unconstitutional if constitutional portions can be
15 separated. *State Compensation Fund v. Symington*, 174 Ariz. 188, 195, 848 P.2d 273, 280
16 (1993). "The test for severability requires ascertaining legislative intent." *Id.* "[I]f the
17 valid and invalid portions are not so intimately connected as to raise the presumption the
18 legislature would not have enacted one without the other, and the invalid portion was not
19 the inducement of the act," the Court must not disturb the valid law. *Id.*

20 Here, the legislature plainly would have enacted the Siting Committee Act to resolve
21 issues regarding the siting of power plants and transmission lines even if it could not assign
22 reversal powers to the Commission. The Senate Natural Resource Committee Minutes
23 demonstrate that the legislature had developed its plan for resolving all matters concerning
24 siting of power plants and transmission lines in a single proceeding before deciding to
25 involve the Commission: "Senator Alexander moved to hold the bill until they can find an
26 existing department or commission for this bill; he suggested the Department of Economic
27 Planning and Development." (Attachment to Comm'n SOF 45.)

28 It also is not just likely but certain that the legislature would have enacted the Act
even if the Commission's balancing function provided in § 40-360.07(B) was limited to

1 applications by PSCs. Indeed, from 1971 to 1996 the Commission's balancing function
2 even for PSCs under § 40-360.07(B) was limited to granting CECs denied by the Siting
3 Committee or modifying the conditions of CECs granted by the Committee. The
4 Commission was given no power to deny any CEC granted by the Committee. This shows
5 conclusively that Commission authority to deny a CEC granted by the Committee could not
6 have been essential to the entire statutory scheme. It was not even part of the scheme.

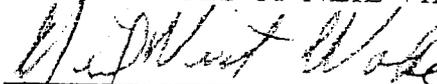
7 The remedy in this case is primarily to strike down as applied to non-PSCs the one
8 word "deny" inserted by the 1996 amendment into § 40-360.07(B). Though the issue does
9 not arise here because the Commission did not modify any Siting Committee conditions to
10 the CECs granted to Toltec, the 1971 Act's attempt to vest the Commission with that
11 authority also is unconstitutional as applied to non-PSCs. Invalidating those two provisions
12 as to non-PSCs would leave the statute almost exactly in its pre-1996 form for non-PSC
13 applicants and exactly in its current form for PSCs. That differential treatment of PSC and
14 non-PSC applicants best fits the legislature's intentions while hewing to the Constitution.
15 Because Commission oversight perhaps is justified to protect captive consumers from the
16 cost and environmental consequences of unjustified power plant construction by PSCs,
17 review of Siting Committee decisions regarding PSCs may be considered within the
18 Commission's "full power" to regulate PSCs. For non-PSCs, however, market forces are
19 more likely to deter unjustified construction.

20 **V. CONCLUSION.**

21 The Court should grant summary judgment vacating the Commission's order
22 denying the CECs granted to Toltec by the Siting Committee because the Commission
23 lacked jurisdiction to do so.

24 Respectfully submitted,

25 LAW OFFICES OF NEIL VINCENT WAKE

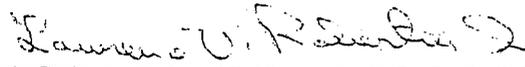
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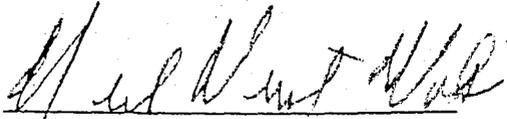
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this 7th day of February 2003, to:

Hon. Michael D. Jones
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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TOLTEC POWER STATION LLC

ARIZONA CORPORATION COMMISSION

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v.

MINUTE ENTRY

This Court previously took under advisement the issues presented in Plaintiff's Motion for Summary Judgment (Jurisdiction Issue) after oral argument. The Court has considered the excellent memoranda and oral arguments presented.

This motion arises out of an appeal of two Arizona Corporation Commission ("Commission") orders that deny Toltec Power Station, L.L.C. ("Toltec") the authority to construct a power plant and a related transmission line adjacent to the Ironwood national Monument and near Picacho Peak State Park.¹ The Commission denied Toltec's applications because it concluded that the need for power failed to outweigh the environmental impacts of the proposed facilities.² Plaintiff Toltec filed a motion pursuant to Ariz. R. Civ. P. 56(a) for summary judgment reversing the Commission's order denying Plaintiff Certificates of Environmental Compatibility ("CEC") in connection with the construction of the power plant and related transmission line. Toltec challenges A.R.S. § 40-360.07(B)'s grant of jurisdiction to the Commission to deny a CEC to Toltec as an unconstitutional grant of jurisdiction and authority to the Commission.

¹ Commission Statement of Facts ("SOF") 21.

² Commission SOF 28-44.

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1. Standard of Review

Every legislative act is presumed constitutional.³ The party asserting a legislative enactment is unconstitutional bears the burden of overcoming the presumption.⁴ If it is possible to construe a statute as constitutionally valid, the court is required to do so.⁵ If a party wishes to seek judicial review of the Commission's siting order, it must do so pursuant to A.R.S. §40-254.⁶ A party challenging a Commission order has the burden of proving "by clear and satisfactory evidence" that an order of the Commission is "unreasonable or unlawful."⁷

The law in Arizona is well settled that summary judgment is appropriate only where there are no genuine issues of material fact, and one party is entitled to judgment, as a matter of law.⁸ Summary judgment is inappropriate unless the facts are clear and undisputed.⁹ Motions for summary judgment pursuant to Rule 56, Arizona Rules of Civil Procedure, are not designed to resolve factual issues. Summary judgment is not appropriate where there is the slightest dispute as to the facts.

2. Factual and Procedural Background

On March 2, 2001, Toltec filed an Application for a CEC with the Arizona Power Plant and Transmission Line Siting Committee ("Siting committee") to site an electric power plant.¹⁰ On April 16, 2001, Toltec filed another application to site transmission lines to interconnect Toltec's proposed power plant with currently existing transmission facilities.¹¹ After public hearings, the Siting Committee granted both CECs on November 27, 2001, and issued the CECs on December 6, 2001.¹² In December 2001 Jon Shumaker and the Arizona Center for Law in the Public Interest filed requests for review by the Commission of the Siting committee's decision

³ *Austin v. Campbell*, 91 Ariz. 195, 203, 370 P.2d 769, 775 (1962).

⁴ *Eastin v. Broomfield*, 16 Ariz. 576, 580, 570 P.2d 744, 748 (1977).

⁵ *Mardian Construction v. Superior Ct.*, 113 Ariz. 489, 557 P.2d 526 (1976).

⁶ See, A.R.S. § 40-360.11.

⁷ A.R.S. § 40-254(E); *Tucson Elec. Power Co. v. Arizona Corp. Comm'n*, 132 Ariz. 240, 645 P. 2d 231 (1982). "Clear and satisfactory" standard of proof within meaning of statute governing appeals from Commission' orders means same standard as "clear and convincing" evidence. *Consolidated Water Utilities, LTD. v. Arizona Corp Comm'n*, 178 Ariz. 478, 875 P2d 137 (App. 1993).

⁸ *Fire Insurance Exchange v. Beray*, 143 Ariz. 429, 694 P.2d 259, approved as modified, 143 Ariz. 361, 694 P.2d 191 (App. 1983)

⁹ *Colby v. Bank of Douglas*, 91 Ariz. 85, 370 P.2d 56 (1962); *City of Phoenix v. Space Data Corporation*, 111 Ariz. 528, 534 P.2d 428 (1975).

¹⁰ Toltec Statement of Facts ("SOF") ¶ 1.

¹¹ Toltec SOF ¶ 2.

¹² Toltec SOF ¶¶ 3,4.

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regarding the power plant.¹³ No requests for review of the Siting Committee's decision were filed in the transmission line case.¹⁴

The Commission heard oral argument from the parties and received oral and written comments from members of the public. On January 30, 2002, the Commission met in a Special Open Meeting for the purpose of considering whether to confirm, deny, or modify the CECs issued by the Siting committee in Case Nos. 112 and 113 and voted to deny Toltec's CECs.¹⁵ On February 6, 2002, the Commission issued Decision No. 64446 for Case No. 112 and Decision No 64445 for Case No. 113 which stated the findings of the Commission. The commission found:

(1) the record reflects that sufficient need is not established for the proposed power plant and related facilities [or for the proposed transmission lines] for the Toltec Power Station to be constructed at the proposed site in Pinal County, Arizona; and (2) the record compels balancing the competing public interests in favor of protection of the environment and ecology of the State of Arizona by denying applicant CECs; and (3) the CECs issued by the Siting Committee should not be confirmed and approved by the Commission."¹⁶

Toltec timely filed an Application for Rehearing and Reconsideration in Case No. 113 and in Case No. 112.¹⁷ The Commission did not grant either application for rehearing. On April 16, 2002, Toltec filed a Complaint pursuant to A.R.S. §§ 40-254 and 40-360.07 to appeal the Commission's orders. Toltec seeks summary judgment on its claim that the Commission lacked jurisdiction to deny its CECs for the Pinal County power plant and transmission lines.

3. Discussion of issues.

Toltec's concedes that A.R.S. § 40-360.07(B) purports to authorize the Commission to deny it a CEC approved by the Siting Committee. It contends that the statute that empowers the Commission to deny a CEC issued by the Siting Committee to a nonpublic service corporation attempts to enlarge the role of the Commission to include jurisdiction over "utility" applicants that are not public service corporations in violation of the Arizona Constitution. Toltec argues that the Commission's denials of Toltec's CECs argues, are null and void.¹⁸

¹³ Case No. 112. Toltec SOF ¶ 5.

¹⁴ Case No. 113. Toltec SOF ¶ 5.

¹⁵ Toltec SOF ¶ 6.

¹⁶ Decision No. 64446, Decision No. 64445. Toltec SOF ¶ 6.

¹⁷ Toltec's SOF ¶ 7

¹⁸ Plaintiff's Motion for Summary Judgment on Jurisdictional Grounds, December 11, 2002, ("Plaintiff's Motion") p. 10.

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a. **The statutory scheme for siting power plants and transmission lines.**

The statute challenged is part of the Power Plant and Transmission Line Siting Committee Act enacted in 1971 and amended in 1996 and 2001.¹⁹ Under the Act, a utility may not construct a power plant or transmission line until it has received a CEC from the Siting Committee affirmed and approved by the Commission.²⁰ The purpose of the Act was to provide a single forum for the expeditious resolution of all matters concerning the location of electric generating plants and transmission lines and to provide notice and opportunity for all concerned parties to participate.²¹ The process is conducted under the auspices of the Commission.

The siting process begins with an application for a CEC filed with the Commission by a utility contemplating construction of a power plant or transmission line.²² The Siting Committee then holds an evidentiary hearing in which it evaluates the proposed project in light of specified environmental factors.²³ The Siting Committee decides whether to issue or deny a CEC and the Commission then considers the Siting Committee's decision and determines whether to grant or deny a CEC to the applicant.²⁴ In arriving at its decision, the Commission must consider the specified environmental factors and "shall balance, in the broad public interest, the need for an adequate, economical and reliable supply of electric power with the desire to minimize the effect thereof on the environment and ecology of this state."²⁵

In this case, the Siting Committee decided to approve Toltec's application for CECs for construction of the power plant and the transmission line and the Commission voted unanimously to deny Toltec CECs for the construction.²⁶

b. **Application of the siting statutes to Toltec, a nonpublic service corporation.**

Toltec challenges A.R.S. § 40-360(07) as applied to nonpublic service corporations. Toltec does not dispute that the state can properly create a siting authority and require any utilities that intend to construct power plants and transmission lines to obtain permission to build on a particular site. Nor does Toltec dispute that the Commission could lawfully be the state entity that determines siting certificates providing that the prospective builder is a public service corporation under the jurisdiction of the Commission. Toltec argues that it is not a public service corporation and that it is an unconstitutional enlargement of the Commission's authority to give

¹⁹ A.R.S. §§ 40-360 *et seq.*

²⁰ A.R.S. § 40-360.07(A).

²¹ Ariz. Laws 1971, Ch. 67, § 1.

²² A.R.S. § 40-360.02. The article applies to utilities and defines utility to be "any person engaged in the generation or transmission of electric energy." A.R.S. § 40-360(11).

²³ A.R.S. § 40-360.06.

²⁴ A.R.S. § 40-360.04; A.R.S. § 40-360.07.

²⁵ A.R.S. § 40-360.07(B).

²⁶ Toltec SOF ¶¶ 4, 6.

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it power to make siting determinations with respect to nonpublic service corporations.²⁷ The Commission contends that the legislature may, under its well-established police power, grant the Commission certain power over nonpublic service corporations including the power to grant or deny CECs.²⁸

The Corporation Commission was established in Article XV of the Arizona Constitution. The Constitution provides that the "law-making power may enlarge the powers and extend the duties of the corporation commission, and may prescribe rules and regulations to govern proceedings instituted by and before it."²⁹ Such powers and duties are constitutional as long as they do not give the Commission "functions wholly alien to its constitutional charter."³⁰ Siting electric power plants and transmission lines is related to and certainly is not wholly alien to the Commission's constitutional powers over electric service in Arizona. "[W]here the constitution intends that the legislature have the power to expand the duties of a constitutional entity, the constitution will so state."³¹ Here, there is an express grant of legislative power to extend the Commission's authority. Although such power is not unlimited, an enactment pursuant to an express grant to expand the scope of the Commission's power is valid if it is related to and does not impair the Commission's function.³² Even under the "wholly alien" standard applied where no express grant to expand authority is found, the Commission's role in the siting scheme would survive. With the Article XV, section 6 express legislative authorization, the test is whether the Commission's role in the siting scheme is related to and does not impair the Commission's function.

The Commission has exercised various statutory, non-Article XV powers over nonpublic service corporations. The most telling example is the application of the siting statutes involved in this appeal to Salt River Project, a nonpublic service corporation.³³ Other examples include the Commission's statutory authority over pipeline safety regardless whether a public service corporation or other entity owns the pipeline.³⁴ The Commission's statutory authority regarding

²⁷ Plaintiff's Motion for Summary Judgment On Jurisdictional Grounds, December 11, 2002 ("Toltec's Motion") pp. 6-10.

²⁸ Commission's Response to Toltec's Motion for Summary Judgment, January 15, 2003 (Commission's Response") p. 5. The Commission does not concede that Toltec is not a public service corporation but argues that the Commission's authority over it pursuant to the siting scheme is constitutional regardless. Commission's Response, p. 5.

²⁹ Ariz. Const. Art. XV, section 6.

³⁰ See, *Citizens Clean Elections Commission v. Myers*, 196 Ariz. 516, 523, 1 P.3d 706, 712. In *Myers*, the court struck down an enactment that gave the Commission on Appellate Court Appointments involvement in the appointment of members to the Citizens Clean Elections Commission. The court held that the expansion of the duties of the Commission on Appellate Court Appointments to include functions wholly alien to its constitutional charter violate the constitution. It is significant that the court in *Myers* contrasted the constitutional provisions regarding the Commission on Appellate Court Appointments with article XV, section 6, under which the legislature is granted authority to enlarge the powers of the Corporation Commission. *Myers*, 196 Ariz. at 519, 1 P.3d at 709.

³¹ *Myers*, 196 Ariz. at 519, 520, 1 P.3d at 709, 710.

³² *Myers*, 196 Ariz. at 520, 1 P.3d at 710, n.1.

³³ A.R.S. §§ 40-360, 360.02.

³⁴ A.R.S. §§ 40-441, 442.

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excavation and underground utility facilities extends to all who excavate near underground utility facilities regardless whether the utility that owns the facility is a public service corporation.³⁵ The Commission's authority in these examples is statutory, granted by the legislature under its police power.³⁶

Toltec contends that the express grant to extend the agency's authority does not permit the legislature to expand the Commission's jurisdiction to include additional subject matter.³⁷ Toltec relies on Rural/Metro Corp. v. Arizona Corp. Comm'n³⁸ in which the court held that a statute extending Commission jurisdiction over public service corporations to providers of fire protection services was an unconstitutional extension of the Commission's jurisdiction. The issue addressed by the court in Rural/Metro was whether the legislature could expand the Commission's jurisdiction so as to give public service corporation designation to businesses not specifically mentioned in Article XV, section 2 of the Constitution.³⁹ In essence, Rural/Metro established that the legislature cannot expand the constitutional designation of public service corporations.

Rural/Metro and other cases Toltec relies on for limiting statutory expansion of the Commission's power involve attempts to have the Commission exercise traditional public service corporation regulation over nonpublic service corporations.⁴⁰ However, the siting statutes apply to utilities, not public service corporations. These cases do not establish that the legislature cannot delegate other aspects of the state's police power to the Commission. "The reasonable and natural construction of § 6...is that it may enlarge or extend the powers and duties of the commission over the subject matter of which it has already been given jurisdiction, and other matters of the same class, not expressly or impliedly exempt by other provisions of the constitution."⁴¹ Authority over the siting of new power plants is a matter of the same class as the regulation of electricity service and it is not expressly or impliedly exempt by any other provision of the constitution.

³⁵ A.R.S. §§ 40-360.21 *et seq.*

³⁶ See, Wylie v. Phoenix Assurance Co., 42 Ariz. 133, 138-139, 22 P.2d 845 (1933) ("The commission's power to regulate the insurance business [apart from sections 4 and 5 of Article XV] is statutory ... and receives its sanction under the police power of the state.") Toltec contends that under Wylie, the Commission's power to regulate the insurance business was limited to that expressly stated in Art. XV, sections 4 and 5. Although the Court in Wylie struck down the Commission's action because it was deemed to be legislative, this Court reads Wylie to recognize Commission regulation granted pursuant to the police power of the state.

³⁷ Toltec's Motion, p. 9.

³⁸ 129 Ariz. 116, 117, 629 P.2d 83, 84 (1981).

³⁹ Rural/Metro, 129 Ariz. at 117, 629 P.2d at 84.

⁴⁰ Rural/Metro ("Article XV, § 6 does not allow the legislature to give public service corporation designation to corporations [fire protection] not listed in Article 25, § 6."); Menderson v. City of Phoenix, 51 Ariz. 280, 76 P.2d 321 (1938) (Municipally owned transportation system could not be regulated as a public service corporation because Art. XV, section 2 expressly excludes municipal corporations from the list of public service corporations.); American Bus Lines, Inc. v. Arizona Corp. Comm'n, 129 Ariz. 595, 633 P.2d 404 (1981) (The Commission's attempt to continue in effect certificates of convenience and necessity of motor carriers after the deregulation of transportation was not valid.)

⁴¹ Menderson, 51 Ariz. at 285, 76 P.2d at 323.

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Toltec's challenge is unique to the Commission. It would not apply to any other state agency. Further, Toltec's challenge applies only to the Commission's having final authority over CECs for nonpublic service corporations. The Commission argues that Toltec's reasoning leads to an absurd result. Final authority over CECs could be vested in any state agency except the Commission and such a result imposes a special disability on the one state agency that is the most logical choice to exercise siting authority.⁴²

Toltec does not argue that the siting authority should be under the auspices of another state agency. Instead, Toltec contends that the siting statutes are valid except as they grant the Commission authority over nonpublic service corporations. Under Toltec's reasoning, the legislature silently created two different siting schemes. The siting scheme as it is written is valid for public service corporations and a different scheme is applicable to nonpublic service corporations. Under the scheme for nonpublic service corporations, there is no review at all of the Siting Committee's decision.⁴³ This result is not possible, however, because there is no statutory authority for constructing a power plant or transmission line within this state with just the Siting Committee's decision.⁴⁴ The statute requires a CEC "from the committee, affirmed and approved by ...the Commission."⁴⁵ In addition, "[t]he decision of the commission's is final with respect to all issues...."⁴⁶

The Commission is given various responsibilities under the siting statutes. The Commission establishes the Siting Committee.⁴⁷ Persons contemplating construction of any transmission line or power plant must file a ten-year plan with the Commission. The Commission reviews the plans biennially and issues a written decision regarding existing and planned transmission facilities.⁴⁸ Applications for a CEC must be filed with the commission.⁴⁹ CECs must be affirmed and approved by the Commission and the Commission's decision is final.⁵⁰ The Commission is directed to balance the "need for an adequate, economical and reliable supply of electric power with the desire to minimize the effect thereof on the environment and ecology of this state."⁵¹ It is clear that the siting scheme is entirely under the auspices of the Commission although Toltec challenges only the provision that authorizes the Commission to deny a CEC to a nonpublic service corporation.

⁴² Commission's Response, pp. 7-8.

⁴³ Toltec's Reply, pp. 9-10.

⁴⁴ A.R.S. § 40-360.07(A).

⁴⁵ *Id.*

⁴⁶ A.R.S. § 40-360.07(C).

⁴⁷ A.R.S. § 40-360.01.

⁴⁸ A.R.S. § 40-360.02.

⁴⁹ A.R.S. § 40-360.03.

⁵⁰ A.R.S. § 40-360.07.

⁵¹ A.R.S. § 40-360.07.

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Toltec argues that by eliminating the words “deny” and “modify” from A.R.S. § 40-360.07(B), the remainder of the act is constitutional.⁵² Toltec would leave intact the Commission’s authority to approve and affirm and that action would still be required for a CEC. However, if the Commission has no siting authority over nonpublic service corporations, the Commission could no more exercise its approve and affirm authority than the authority about which Toltec complains. Toltec’s attempt to parse the statute tailored to its particular desires—to denounce the portion that empowers the Commission to deny it a CEC but require the Commission to approve or affirm its CEC—is untenable.

Under the siting scheme, the Siting Committee and the Commission exercise different functions. The Siting Committee receives evidence regarding enumerated environmental factors.⁵³ The Commission considers those factors and conducts a balancing of the environmental impact and the energy needs of the state.⁵⁴ Under Toltec’s analysis, the balancing would not take place at all if the applicant were a nonpublic service corporation. Toltec’s proposal is contrary to the stated purpose of the legislation: one favoring a single forum for the siting process and one requiring the balancing of energy needs with the environmental impact of these facilities.⁵⁵

c. Is Toltec is a public service corporation under Article XV, Section 2, of the Arizona Constitution?

The Commission contends that Toltec “probably is a public service corporation under the definition set forth in the Arizona Constitution.”⁵⁶ Toltec contends that it is not a public service corporation.⁵⁷ Indeed, Toltec’s status as a nonpublic service corporation is the lynchpin of its challenge to the siting statute. Although they reach different conclusions, both the Commission and Toltec analyze Toltec’s status under the eight factor test Arizona courts use to determine whether an entity is a public service corporation.⁵⁸ This Court does not reach the question whether Toltec can be considered a public service corporation under the eight prong test because it concludes that the siting statute is constitutional as applied to nonpublic service corporations. In addition, the parties rely on disputed facts for their conclusions in applying the test rendering that exercise inappropriate for summary judgment.⁵⁹

⁵² Toltec Reply, pp. 9-10. Toltec construes A.R.S. § 40-360(A) to require Commission approval of the Siting Committee’s decision.

⁵³ A.R.S. §§ 40-360.04, 360.06.

⁵⁴ A.R.S. § 40-360.07.

⁵⁵ Ariz. Laws 1971, Ch. 67, § 1.

⁵⁶ Commission’s Response, p. 5.

⁵⁷ Toltec’s Motion, pp. 6-8.

⁵⁸ *Natural Gas Service Co. v. Serv-Yu Coop.*, 70 Ariz. 235, 237-238, 219 P.2d 324, 325-326. (1950); Toltec’s Motion, pp. 6-8; Commission’s Response pp. 8-10.

⁵⁹ E.g., Commission’s Response, p.8; Toltec’s Reply, p. 1, n.1.

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d. Can the Commission deny a CEC issued by the Siting Committee without a request for review of the committee's decision?

In this case, there were no requests for review filed with respect to the Siting Committee's decision regarding to Toltec's transmission line.⁶⁰ Although a party requested review of the Siting Committee's order regarding the power plant, no review was requested with respect to the order regarding the transmission line. The Commission reviewed both decisions and denied both CECs. In both cases, the Commission purported to act pursuant A.R.S. § 40-360.07(B).⁶¹

Toltec contends that the Commission has authority to deny a CEC only after review requested by a party pursuant to A.R.S. § 40-360.07(B).⁶² Because no party requested review of the transmission line decision, Toltec argues, the Commission could not deny that CEC. The commission contends that A.R.S. § 40-360.07 establishes two procedures for review of Siting Committee decisions depending on whether a party requests review. Both procedures give the commission ultimate authority to grant or deny the CEC.⁶³ According to the Commission, the statute authorizes it to deny a CEC when it requires Commission action to approve and affirm a CEC before a CEC is effective.⁶⁴ Requiring the Commission's approval and affirmation necessarily invests the commission with discretion. Each word or phrase of a statute must be given meaning "so that no part is rendered void, superfluous, contradictory or insignificant."⁶⁵ If the Commission is required by statute to automatically approve every Siting Committee decision, its role is meaningless and the "approve and affirm" requirement of the statute is superfluous.

In addition, the Commission's order regarding the transmission line provided that the CEC "should not be confirmed and approved by the commission."⁶⁶ Accordingly, by its language, the transmission line CEC was denied or was not "affirmed and approved" pursuant to the Commission's authority to act without a request for review.

e. Is the challenged provision severable from the statutory scheme?

Because this Court concludes that the challenged provision of the siting statute is constitutional, it does not address the question whether the challenged portion of the statutory scheme is severable.

⁶⁰ Toltec's SOF ¶ 5.

⁶¹ Toltec's SOF, Appendices 6, 7.

⁶² Toltec's Motion, pp. 10-11.

⁶³ Commission Response, pp. 10-11.

⁶⁴ A.R.S. § 40-360.07(A).

⁶⁵ *Welch-Doden v. Roberts*, 42 P3d 1166, 1171 (Ariz. App. 2002).

⁶⁶ Decision 64445, Toltec SOF, Appendix 7.

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4. Conclusion

The Arizona Constitution provides an express grant of legislative authority to expand the powers of the Arizona Corporation Commission. That authority can be exercised unless it is not related to or it impairs the agency in its function. The Commission's role in the siting process is related to and does not impair its function regarding regulation of electric service in Arizona. The Commission's authority in the siting statute is statutory, granted by the legislature pursuant to the police power and is not dependent on an express grant of authority to the Commission in the constitution. Accordingly, this Court concludes that the siting statutes that authorize the Commission to deny CECs granted to nonpublic service corporations is constitutional.

IT IS THEREFORE ORDERED denying Plaintiff's Motion For Summary Judgment.

IT IS FURTHER ORDERED that a Status Conference will be set for **August 18, 2003 at 2:00 p.m.** as ordered by this Court in its minute entry dated February 19, 2003.

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COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

TOLTEC POWER STATION, L.L.C., a
Delaware limited liability company

Plaintiff/Petitioner,

vs.

HONORABLE MICHAEL D. JONES,
Judge of the Superior Court of the State of
Arizona, in and for the County of
Maricopa,

Respondent,

and

ARIZONA CORPORATION
COMMISSION

Respondent/Real Party in Interest.

1 CA-CV

Maricopa County Superior Court
Case No. CV2002-006785

PETITION FOR SPECIAL ACTION

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JURISDICTIONAL STATEMENT

This Special Action presents two pure issues of law. The first is whether the legislature constitutionally may grant the Arizona Corporation Commission (“Commission”) power to veto power plant and transmission line siting for non-public service corporations (“non-PSCs”). The second is whether the Commission has authority to review and deny a decision of the Arizona Power Plant and Transmission Line Siting Committee (“Siting Committee”) in the absence of a party’s timely request for review, which A.R.S. § 40-360.07 requires on its face. Because the Arizona Constitution establishes the Commission as a separate, popularly elected branch of state government, the legislature may not delegate its police powers generally to the Commission, as it might to legislatively created agencies. This Special Action raises as an issue of first impression construction of Ariz. Const. Article 15, § 6, permitting legislative enlargement of the Commission’s constitutional powers, but not the creation of new powers, in light of *Citizens Clean Elections Commission v. Myers*, 196 Ariz. 516, 1 P.3d 706 (2000), which the trial court interpreted as creating a new standard for testing the constitutionality of power delegated to the Commission. (6/25/03 ME 5, APP 28.) This application of *Myers* significantly expands legislative authority previously limited by *Menderson v. City of Phoenix*, 51 Ariz. 280, 285, 76 P.2d 321, 323 (1938), and *Commercial Life Insurance Co. v. Wright*, 64 Ariz. 129, 140, 166 P.2d 943, 950 (1946), and effectively circumvents *Rural/Metro Corp. v. Arizona Corporation Commission*, 129 Ariz. 116, 118, 629 P.2d 83, 85 (1981).

Toltec Power Station, LLC (“Toltec”) filed two applications for Certificates of Environmental Compatibility (“CECs”) to site an electric power plant in rural Pinal County and to site transmission lines to interconnect the proposed power plant with existing transmission facilities. (6/25/03 ME 2, APP 28.) The Siting Committee held public hearings to receive evidence and assess environmental and

economic factors related to both applications and unanimously voted to grant both CECs. (*Id.*) Jon Shumaker and the Arizona Center for Law in the Public Interest filed requests for review by the Commission of the Siting Committee's decision regarding the power plant, but no request for review of the Siting Committee's decision was filed in the transmission line case. (6/25/03 ME 3, APP 28.)

After hearing oral argument and receiving public comment, the Commission voted to deny both CECs. (*Id.*) Toltec timely filed an application for rehearing in both cases, and the Commission did not grant either application for rehearing. (*Id.*) Toltec then filed a Complaint pursuant to A.R.S. §§ 40-254 and 40-360.07 to appeal the Commission's orders. (*Id.*) On June 25, 2003, the trial court denied Toltec's motion seeking summary judgment reversing the Commission's orders for lack of jurisdiction to deny the two CECs. (*Id.*)

Special action review of the trial court's June 25, 2003 ruling is appropriate because there is no equally plain, speedy, and adequate remedy by appeal. *See* Ariz. R. P. Spec. Act. 1; A.R.S. § 12-120.21(A)(4). Several factors strongly favor exercise of special action jurisdiction, including the following:

1. Summary judgment in favor of Toltec that the Commission lacked jurisdiction to reverse CECs granted by the Siting Committee will dispose of this lawsuit in its entirety. *See Cardon v. Cotton Lane Holdings, Inc.*, 173 Ariz. 203, 205, 841 P.2d 198, 200 (1992) (special action relief would effectively terminate the litigation); *Emmons v. Superior Court (Warner Lambert Co.)*, 192 Ariz. 509, 510-11, ¶ 1, 968 P.2d 582, 583-84 (App. 1998) (same).

2. Review by appeal would be available only after litigation on Toltec's substantive claims, which will require the trial court to review the extensive evidence (over twelve days testimony and other hearings) presented to the Siting Committee and the Commission regarding the environmental impact of the proposed power plant and transmission lines, the complex requirements upon

which the CECs are conditioned to mitigate potential environmental harm, and the basis for the Commission's conclusion that the need for electric power is insufficient to permit Toltec to continue developing the proposed power plant and transmission lines. This litigation on the merits and the subsequent appeal process would be lengthy and costly for all parties, and it is unnecessary if the Commission's denials are void for lack of jurisdiction.

3. Issues of jurisdiction are especially appropriate for special action review to protect against the prejudice, delay, and cost of government action to which the party was never supposed to have been subjected. *Taylor v. Jarrett*, 191 Ariz. 550, 551-52, 959 P.2d 807, 808-09 (App. 1998).

4. The questions posed are pure issues of law. *Demarce v. Willrich*, 203 Ariz. 502, 504, ¶ 5, 56 P.3d 76, 78 (App. 2002) (pure question of law); *Haas v. Colosi*, 202 Ariz. 56, 57, ¶ 2, 40 P.3d 1249, 1250 (App. 2002) (purely legal issue of first impression and statewide importance).

5. Whether the Commission has jurisdiction to deny CECs to non-PSCs, or to overturn CECs granted by the Siting Committee absent timely request for review by any party, are issues of great public significance and statewide importance that are likely to arise again if not addressed at this time. *See Boynton v. Anderson*, 205 Ariz. 45, 46, ¶ 3, 66 P.3d 88, 89 (App. 2003) (previously uninterpreted matter of statutory construction that is likely to arise again).

6. The principal issue posed is a constitutional one, the validity of the 1996 amendment of the Siting Committee Act. *See State ex rel. Woods v. Block*, 189 Ariz. 269, 942 P.2d 428 (1997) (constitutionality of statute decided in original special action).

7. Perhaps most importantly, declination of special action review will cause the very harm—substantial delay in disposition of CEC applications—that the legislature expressly stated the Siting Committing Act is intended to prevent.

The Power Plant and Transmission Line Siting Committee Act expressly establishes public policy favoring “expeditious resolution of all matters concerning the location of electric generating plants and transmission lines” to avoid delays that may cause “higher electric rates and which may result in the possible inability of electric suppliers to meet the needs and desires of the people of the state for economical and reliable electric service.” Ariz. Laws 1971, ch. 67, § 1. As discussed below, the Act establishes short and rigid time limits for the Siting Committee to review an application for a CEC, conduct a hearing, and issue or deny the CEC and requires the Commission to affirm a CEC issued by the Siting Committee within 60 days. A.R.S. §§ 40-360.04(A), (D); 40-360.07(A). If review is requested, the Commission must complete it within 60 days. A.R.S. § 40-360.07(B). If either the Siting Committee or the Commission fails to meet the specified deadlines, A.R.S. § 40-360.08(B) permits the applicant to “immediately proceed with the construction of the planned facilities at the proposed site” “in its discretion and in the interest of providing adequate, reliable and economical electric service to its customers.” Requiring Toltec to complete trial court litigation on the merits and to obtain review of the trial court’s ruling on the jurisdictional issues by appeal—which could take several years—would defeat the expressly stated public policy of expedient and time-limited resolution of power plant siting applications.

STATEMENT OF THE ISSUES

1. The Arizona Constitution authorizes the Commission to regulate public service corporations but not non-public service corporations, and Ariz. Const. Art. 15, § 6, as long construed, permits the legislature to enlarge and extend the Commission's powers "over the subject matter of which it has already been given jurisdiction, and other matters of the same class." Under that section, may the legislature give the Commission regulatory power over wholesale electric generation and transmission by non-public service corporations by empowering the Commission to deny applications to locate generation and transmission facilities granted to non-PCSs by the Siting Committee?

2. A.R.S. § 40-360.07(A) ministerially requires the Commission to approve and affirm a CEC issued by the Siting Committee except when a party timely requests the Commission to review the Siting Committee's decision, and § 40-360.07(B) limits review to the grounds stated in the written request. If no party files a written request for review, does the Commission have authority to review and deny a CEC issued by the Siting Committee and after the statutory time for seeking review has expired?

STATEMENT OF THE FACTS

In March 2001 Toltec filed an Application for a CEC in Case No. 112 with the Siting Committee to site and build a gas-fired, combined cycle electric power plant, switchyard, and related facilities at a proposed site in a rural portion of Pinal County, Arizona. (March 2, 2001 CEC, APP 12.) In April 2001 Toltec filed an Application for a CEC in Case No. 113 to site and construct 500 kV and 345 kV electric transmission lines to interconnect Toltec's proposed power plant with existing electric transmission facilities. (April 16, 2001 CEC, APP 13.)

Toltec will be a private generator of electric power, will sell its entire output at wholesale to one or more electric utilities or wholesale resellers on competitive bid or negotiated bases, will not supply any of its commodity to retail end-use customers, will not vest any person with a right to enjoy its service and so will not dedicate its service to public use, will not compete with anyone in serving the retail consumer public, will not accept "substantially all requests for service," and will not monopolize any territory. (Declaration of Tom Wray, ¶¶ 5-8, APP 15.)

LEGAL ARGUMENT

I. THE POWER PLANT AND TRANSMISSION LINE SITING COMMITTEE ACT.

This is the first court action to arise out of the Power Plant and Transmission Line Siting Committee Act, A.R.S. § 40-360 *et seq.* ("Act"), enacted in 1971 and amended in 1996. The legislature expressly stated its findings and the Act's purpose:

The legislature hereby finds and declares that there is at present and will continue to be a growing need for electric service which will require the construction of major new facilities. It is recognized that such facilities cannot be built without in some way affecting the physical environment where the facilities are located.... The lack of adequate statutory procedures may result in delays in new construction and increases in costs which are eventually passed on to the people of the state in the form of higher electric rates and which may result in the possible inability of the electric suppliers to meet the needs and desires of the people of the state for economical and reliable electric service.... The legislature therefore declares that it is the **purpose of this article to provide a single forum for the expeditious resolution of all matters concerning the location of electric generating plants and transmission lines in a single proceeding to which access will be open to interested and affected individuals, groups, county and municipal governments and other public bodies to enable them to participate in these decisions.**

Ariz. Laws 1971, ch. 67, § 1 (emphasis added). Seeking to prevent delays in construction and increased cost to the public, the legislature established a single proceeding and prescribed the criteria and decision-making factors to be used.

A. Siting Committee Procedures and Commission Review.

The Siting Committee is composed of the attorney general, the directors of environmental quality, water resources, and the energy office of the department of commerce, the chairman of the Commission (or designee), and six members appointed by the Commission, three to represent the public and one each to represent cities and towns, counties, and agriculture. A.R.S. § 40-360.01(B). The Siting Committee also may use staff of the constituent agencies and consultants. A.R.S. § 40-360.01(F).

The Act prohibits construction of power plants or transmission lines by a utility (*i.e.*, a “person engaged in the generation or transmission of electric energy”) “until it has received a certificate of environmental compatibility from the committee ... affirmed and approved by an order of the commission.” A.R.S. §§ 40-360(11), 40-360.07(A). After an application is filed, the Committee must notice a hearing within ten days, conduct a hearing within 70 days, and issue or deny the certificate within 180 days. A.R.S. § 40-360.04(A), (D).

The Commission must affirm the Siting Committee’s order within 60 days of its issuance unless within 15 days a party “request[s] a review of the committee’s decision by the commission.” A.R.S. § 40-360.07(A). “The grounds for review shall be stated in a written notice,” and “the review shall be conducted on the basis of the record.” A.R.S. § 40-360.07(B). The Commission must complete its review within 60 days from the date the notice is filed. A.R.S. § 40-360.07(B). If missed, the time limits are fatal to the Siting Committee’s authority and the Commission’s authority. “If the committee or the commission

fails to act on an application within the applicable time period prescribed in this article, the applicant may, in its discretion and in the interest of providing adequate, reliable and economical electric service to its customers, immediately proceed with the construction of the planned facilities at the proposed site....” A.R.S. § 40-360.08(B).

From 1971 to 1996 the Commission lacked jurisdiction under the language of the Act, even upon timely request for review, to deny a CEC issued by the Siting Committee. The Commission could only “confirm or modify any certificate granted by the committee, or in the event the committee refused to grant a certificate, the commission may issue a certificate to the applicant.” A.R.S. § 40-360.07(B) (1996). The Commission could modify the conditions in the CEC, but the Siting Committee’s decision to issue rather than deny was conclusive. Plainly, the legislature was satisfied if either the Siting Committee or the Commission found the CEC appropriate. In 1996 the statute was amended to allow the Commission also to “deny” a CEC issued by the Siting Committee. A.R.S. § 40-360.07(B) (Supp. 2000). The Toltec proceeding is the first time—in more than 100 cases in over 30 years—that the Commission has rejected a CEC granted by the Siting Committee.

B. Standards for Siting Committee Action and Commission Review.

In approving or denying an application, the Siting Committee is directed to consider specific environmental, technical, and economic factors, none of which requires proof of the need for electric power. The application must be in a form prescribed by the Commission, and the Commission’s rules and forms do not call for evidence concerning need for electric power. A.R.S. § 40-360.03; A.A.C.R. 14-3-201 *et seq.* The statutory factors are: existing plans for other developments near the site; fish, wildlife, and plant life; noise and radio interference; availability

of the site to the public for recreation; scenic, historic, and archeological sites and structures; total environment of the area; technical practicability and previous experience with the equipment and methods; estimated cost of the facility; and additional factors to be considered under state or federal laws pertaining to the site. A.R.S. § 40-360.06(A). Special consideration is given to protection of rare and endangered species. A.R.S. § 40-360.06(B). The Siting Committee must require compliance with nuclear radiation and air and water pollution control standards of agencies having primary jurisdiction of those subjects, as well as applicable land use regulations unless the Committee finds them to be unreasonably restrictive or unfeasible in view of technology available. A.R.S. § 40-360.06(C), (D).

Upon timely request for review by the Commission, “the commission shall comply with the provisions of § 40-360.06 [the factors to be weighed by the Siting Committee and summarized above] and shall balance, in the broad public interest, the need for an adequate, economical and reliable supply of electric power with the desire to minimize the effect thereof on the environment and ecology of this state.” A.R.S. § 40-360.07(B). However, as noted above, before the 1996 statutory amendment, even this authority to “balance need” could not be invoked to deny a CEC that the Siting Committee thought warranted.

C. Advent of Independent Power Producers or Merchant Plants in 1999.

The Act applies to a “utility,” i.e., “any person engaged in the generation or transmission of electric energy” “planning to construct a plant, transmission line or both in this state,” which extends beyond “public service corporations” (“PSCs”) as defined in Ariz. Const., Art. 15, § 2. A.R.S. §§ 40-360(11), 40-360.03. A “utility” under this definition includes municipal retailers of electric power, whose activities would make them PSCs but for their exclusion for their municipal status, and, since 1999, independent power producers or merchant plants, which do not

engage in the activities of PSCs and therefore do not come within the definition of PSCs at all. Merchant plants participate in the competitive wholesale market. See A.R.S. § 40-202 (1998 amendment establishes public policy favoring competitive market in sale of electric generation service). In late 1999, the first application for a CEC was filed by an independent power producer. The issue of whether the legislature exceeded its constitutional power in 1996 by attempting to grant the Commission jurisdiction to deny CECs issued by the Siting Committee to non-PSCs arises now because of Arizona's movement toward wholesale electric competition, and the resulting participation of independent power producers.

II. THE CONSTITUTION DOES NOT PERMIT THE LEGISLATURE TO ENLARGE THE POWERS OF THE COMMISSION OVER PUBLIC SERVICE CORPORATIONS TO INCLUDE DENYING A CEC GRANTED BY THE SITING COMMITTEE TO A NON-PUBLIC SERVICE CORPORATION.

A. The Arizona Constitution Expressly Defines the Commission's Four Powers.

The framers of the Arizona Constitution created the Commission as a separate, popularly elected branch of state government. *Arizona Corp. Comm'n v. State ex rel. Woods*, 171 Ariz. 286, 290, 830 P.2d 807, 811 (1992). "While it is not so named, it is, in fact, another department of government, with powers and duties as well defined as any branch of the government...." *State v. Tucson Gas, Elec. Light & Power Co.*, 15 Ariz. 294, 306, 138 P. 781, 786 (1914); accord *Arizona Corp. Comm'n v. Superior Court*, 107 Ariz. 24, 26, 480 P.2d 988, 990 (1971); *Woods*, 171 Ariz. at 292, 830 P.2d at 813. Deep-rooted dissatisfaction with legislative efforts to regulate PSCs led the framers to provide a constitutional basis for popular control of corporate regulation by creating an elected commission with broad powers:

The founders expected the Commission to provide both effective regulation of public service corporations and consumer protection against overreaching by those corporations. The progressive and labor forces ... **combined to promote strong commission authority to regulate corporations, although the strongest power ultimately was limited to regulation of public service corporations.**

Woods, 171 Ariz. at 290-91, 830 P.2d at 811-12 (citations omitted).

“The Corporation Commission has no implied powers and its powers do not exceed those to be derived from a strict construction of the Constitution and implementing statutes.” *Commercial Life Ins. Co. v. Wright*, 64 Ariz. 129, 139, 166 P.2d 943, 949 (1946); accord *Burlington Northern & Santa Fe Ry. Co. v. Arizona Corp. Comm’n*, 198 Ariz. 604, 606, ¶ 11, 12 P.3d 1208, 1210 (App. 2000).

Article 15 confers very full and complete power on the corporation commission **over public service corporations**—powers formerly exercised by the Legislature, such as fixing rates and charges for services, forms of contracts, sanitary conditions, etc., and **it is these powers and duties of public utilities ‘the law-making power may enlarge ... and extend.’**

Wylie v. Phoenix Assurance Co., 42 Ariz. 133, 139, 22 P.2d 845, 847 (1933) (emphasis added). But the Commission’s jurisdiction over other types of corporations is limited to sections 4 and 5, pertaining to offering securities for sale to the public and qualification to do business in the state. *Wylie*, 42 Ariz. at 136-37, 22 P.2d at 846 (statute authorizing Commission to make exceptions to legislatively-mandated insurance contract forms exceeds the legislature’s constitutional power to enlarge the powers of the Commission); *State ex rel. Bullard v. Jones*, 15 Ariz. 215, 137 P. 544 (1914).

Article 15 of the Constitution grants four powers to the Commission. First, Article 15, § 3 grants “full power to ... prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected” by PSCs (as defined in § 2); to prescribe rules governing PSCs’ business transactions, forms of contracts, and systems of keeping accounts; and to prescribe regulations

for the health and safety of employees and patrons of PSCs. Second, Article 15, § 4 grants “*power* to inspect and investigate the property, books, ... and affairs of any corporation whose stock shall be offered for sale to the public and of any public service corporation doing business within the State” with related powers to enforce attendance of witnesses and production of evidence and to take testimony. Third, Article 15, § 5 grants the Commission “the sole *power* to issue certificates of incorporation to companies organizing under the laws of this State, and to issue licenses to foreign corporations to do business in this State, except as insurers.” Fourth, Article 15, § 19 grants “the *power* and authority to enforce its rules, regulations, and orders by the imposition of such fines as it may deem just” within limits defined by § 16. Section 6 authorizes the legislature to “enlarge the *powers* and extend the duties of the Corporation Commission.”

The remainder of Article 15 does not apply to non-PSCs.¹ The only provisions in Article 15 applicable to non-PSCs are §§ 4, 5, and 13, and they do not apply to unincorporated businesses. These sections authorize the Commission to regulate who may conduct business in Arizona with corporate protection against individual liability and to inspect the books of publicly held corporations and investigate corporate fraud. Article 15 does not suggest that the Commission has jurisdiction beyond §§ 4, 5, and 13 to regulate entities not defined as PSCs under § 2, and the Court may not infer that the Constitution grants the Commission any powers not expressly stated. *Commercial Life Ins. Co. v. Wright*, 64 Ariz. 129, 139, 166 P.2d 943, 949 (1946).

¹ Section 13 requires all PSCs and publicly held corporations to report to the Commission, § 14 requires the Commission to determine the fair value of property of every PSC, and § 15 declares rights of existing PSCs. Section 16 authorizes fines against PSCs for violation of Commission rules or orders, and § 17 provides PSCs the right of judicial appeal from Commission orders.

B. Article 15 § 6 Authorizes the Legislature Only to Enlarge the Powers and Extend the Duties of the Commission Over the Subject Matter of Which It Already Has Been Given Jurisdiction and Other Matters of the Same Class.

Under Article 15, § 6, the legislature may “enlarge the powers and extend the duties” of the Commission—the plain language of which means that the legislature may *enlarge* the four powers expressly granted to the Commission by the Constitution, but may not grant new powers. Section 6 means that the legislature “may enlarge or extend the powers and duties of the commission *over the subject matter of which it has already been given jurisdiction*, and other matters *of the same class*, not expressly or impliedly exempt by other provisions of the Constitution.” *Menderson v. City of Phoenix*, 51 Ariz. 280, 285, 76 P.2d 321, 323 (1938) (emphasis added); *accord Rural/Metro Corp. v. Arizona Corp. Comm’n*, 129 Ariz. 116, 117, 629 P.2d 83, 84 (1981). The legislature may enact only statutes enlarging the Commission’s powers that “give practical effect to and ensure the actual fulfillment” of the Commission’s constitutional authority. *Rural/Metro*, 129 Ariz. at 117, 629 P.2d at 84. Article 15, § 6 “allows the legislature to extend the powers and duties of the Commission only with regard to those powers already granted by the constitution.” *Rural/Metro*, 129 Ariz. at 118, 629 P.2d at 85.

The constitution does not permit the legislature to expand the Commission’s jurisdiction to include additional subject matter. *Rural/Metro Corp. v. Arizona Corp. Comm’n*, 129 Ariz. 116, 117, 629 P.2d 83, 84 (1981). Nor does it allow the legislature to give the Commission jurisdiction to regulate businesses as PSCs if they are not designated as PSCs by Article 15, § 2. *Id.* at 118, 629 P.2d at 85 (statute extending Commission jurisdiction to providers of fire protection services unconstitutional); *American Bus Lines, Inc. v. Arizona Corp. Comm’n*, 129 Ariz. 595, 599, 633 P.2d 404, 408 (1981) (legislature cannot grant Commission

additional control over carriers as exercise of police power without constitutional grant of power).

Under Article 15, § 6, therefore, the legislature may not expand the Commission's subject matter jurisdiction and may enlarge only the Commission's four express constitutional powers: (1) to regulate PSCs; (2) to inspect and investigate corporate records of PSCs and publicly held corporations; (3) to certify incorporations; and (4) to impose fines to enforce its rules and regulations. The Commission's constitutional charter with regard to non-PSCs is limited to certifying their incorporation and inspecting and investigating their books if they are incorporated. Under the long-settled test, the legislature's 1996 amendment of the Siting Act to allow denial of CECs granted by the Siting Committee is clearly unconstitutional as applied to CECs granted to non-PSCs.²

C. Delegation of Power to the Commission Is Not Constitutional Merely Because The Power Is Generally Related to and Not "Wholly Alien" to the Commission's Constitutional Charter.

The trial court concluded that the legislature may constitutionally delegate to the Commission authority over the siting of power plant and transmission lines by non-PSCs by reading *Citizens Clean Elections Commission v. Myers*, 196 Ariz. 516, 1 P.3d 706 (2000), too broadly and *Rural/Metro Corp. v. Arizona Corp. Comm'n.*, 129 Ariz. 116, 118, 629 P.2d 83, 85 (1981), too narrowly.

Myers did not overrule or even cast doubt on the *Menderson* standard that legislative enlargement of the Commission's powers is limited not only by express

² The fact that the Commission has not been challenged on other attempted non-Article 15 delegations over both PSCs and non-PSCs, such as pipeline safety and excavation near underground utility facilities, does not mean those statutes--or this one--are valid. (See 6/25/03 ME 5, APP 28.) Those other statutes would have to be scrutinized on their own facts and circumstances, which may be materially similar to or different from those of the Siting Committee Act. To date, that has not been done by any court.

or implied constitutional prohibitions, but also limited to “the subject matter of which it has already been given jurisdiction, and other matters of the same class.” See *Menderson*, 51 Ariz. at 285, 76 P.2d at 323; *Rural/Metro*, 129 Ariz. at 117, 629 P.2d at 84; *Trico Elec. Co-op. v. Ralston*, 67 Ariz. 358, 364, 196 P.2d 470, 473 (1948); *Commercial Life Ins.*, 64 Ariz. at 140, 166 P.2d at 950. *Myers*, which did not deal with the Corporation Commission, held that an initiative charging the Commission on Appellate Court Appointments with nominating candidates for the Citizens Clean Elections Commission was unconstitutional because it expanded the commission’s duties to functions wholly unrelated to its constitutional charter. 196 Ariz. at 522, 1 P.3d at 712. *Myers* decided only whether the constitution permits legislative delegation to a constitutionally created entity where the constitution does *not* expressly define the legislature’s power to enlarge the function or scope of the entity. *Id.* at 519, ¶ 8, 1 P.3d at 709. *Myers* did not interpret any constitutional provision affirmatively granting legislative authority to “enlarge the powers” of a constitutionally created body, so *Myers* has no relevance to Article 15, § 6’s express and therefore exclusive standard for legislative enlargement and extension of Commission powers. *Myers* is irrelevant to this case, which is governed by numerous cases directly construing the enlargement authority of Article 15, § 6.

Myers did caution that even express constitutional authorization to enlarge the jurisdiction of a court or entity is not unlimited. 196 Ariz. at 520 n.1, ¶ 10, 1 P.3d at 710 n.1. *Myers* further explained that “the express grant of power to expand the scope of an article VI entity of necessity must be related to, and not impair, an article VI function.” *Id.* Applying that thought here would mean only that an enlargement of the Commission’s powers of necessity must be related to its Article 15 functions—not that the relationship may be so attenuated as to include subject matter outside of its constitutional powers or duties not of the same class as

those constitutionally imposed.

The trial court, however, misinterpreted *Myers* dictum as establishing two standards for reviewing legislative delegation of powers to constitutionally created bodies: (1) permitting any delegation that is not “wholly alien to its constitutional charter” where the constitution does not expressly authorize legislative enlargement of powers; and (2) permitting any delegation “related to” and that “does not impair” constitutional functions where the constitution expressly authorizes enlargement of powers. (6/25/03 ME 5, APP 28.) Thus, the trial court erroneously concluded: “the test is whether the Commission’s role in the siting scheme is related to and does not impair the Commission’s function.” (*Id.*)

The Superior Court’s new test stands the old one on its head. Before, the legislature only could “enlarge and extend” the Commission’s constitutionally granted powers, which, as relevant here, are only powers *over PSCs*. Now the trial court would have the legislature vest the Commission with *any power over any entity*, provided only that the new power is “related to and does not impair the Commission’s function” over PSCs.

Attempting to accommodate *Menderson*, the trial court characterized the Commission’s power to regulate and set rates *for PSCs* that furnish electricity as a general “regulation of electricity service” and reasoned that authority over the siting of new power plants is a matter of the same class—even for power plants to be built by non-PSCs that do not furnish electricity to the public. (6/25/03 ME 5, APP 28.) The trial court further reasoned that “[s]iting electric power plants and transmission lines is related to and certainly is not wholly alien to the Commission’s constitutional powers over electric service in Arizona.” (*Id.*) Under the trial court’s standard, the legislature may delegate any power to the Commission that is generally related to corporations, securities, gas, oil, electricity, water, irrigation, fire protection, heating, air conditioning, sewage, trash, or

communications and “does not impair the Commission’s function.”

In fact, the Commission’s constitutional charter, which is carried out through four specific powers, is to protect Arizona’s consumers from overreaching by those regulated monopolies, defined as PSCs (and from investment abuse by publicly held corporations). The Constitution does not authorize giving the Commission responsibility for any activity of non-PSCs which are not monopolies, parallel to activities of PSCs, nor does it give the Commission a general power “over electric service in Arizona.” The Constitution only gives the Commission power over electric service *by PSCs* in Arizona. By redefining the Commission’s core constitutional power as being “over electric service in Arizona” rather than over PSCs providing electric service, the trial court closes the circle of its circular reasoning and erroneously eliminates PSC status as the constitutional prerequisite for Commission jurisdiction.

D. Legislative Delegation of “Police Power” to Deny CECs Granted by the Siting Committee to Non-PSCs Both Exceeds the Legislature’s Constitutional Authority to “Enlarge and Extend” Commission Powers and Affirmatively Violates Separation of Powers.

The trial court not only concluded that delegation of authority over siting of new power plants is permissible under Article 15, § 6’s express grant of authority to enlarge the Commission’s powers, it also found it to be a constitutionally permissible delegation of the state’s police power over “utilities,” which would extend to non-PSCs. (6/25/03 ME 6, APP 28.) The trial court thus concluded that the Commission’s authority in the siting statute is “granted by the legislature pursuant to the police power and is not dependent on an express grant of authority to the Commission in the constitution.” (6/25/03 ME 10, APP 28.)

The trial court attempted to distinguish *American Bus Lines, Inc. v. Arizona Corp. Comm’n*, 129 Ariz. 595, 633 P.2d 404 (1981), and *Rural/Metro Corp. v.*

Arizona Corp. Comm'n., 129 Ariz. 116, 629 P.2d 83 (1981), as involving “attempts to have the Commission exercise traditional public service corporation regulation over nonpublic service corporations” and concluded that these and other cases “do not establish that the legislature cannot delegate other aspects of the state’s police power to the Commission.” (6/25/03 ME 6, APP 28.) Thus, the trial court fashioned a new rule that the legislature can delegate to the Commission anything within the State’s police power over non-PSCs as long as it is not too similar to the Commission’s “traditional” utility regulation of PSCs.

This reasoning errs on multiple grounds. First, the notion that the legislature has an enlarging authority independent of Article 15, § 6’s textual source to enlarge and extend the Commission’s power is unprecedented and wrong. While the legislature has a general police power over non-PSCs, it has no general authority to delegate police power to the Commission. There is only the Article 15, § 6 power to enlarge and extend. The trial court’s reasoning renders Article 15, § 6 largely meaningless in light of the newfound and non-textual power to delegate under the State’s inherent police power itself.

Second, the trial court’s reasoning is directly contradicted by *American Bus Lines*, which expressly stated:

This court is compelled by the language of *Rural/Metro Corp. v. Arizona Corporation Commission*, 129 Ariz. 116, 629 P.2d 83 (1981) to hold that unless there is a constitutional grant of power over carriers, **the legislature cannot grant to the Commission additional control over carriers as an exercise of police power or otherwise.**

129 Ariz. at 599, 633 P.2d at 408 (emphasis added). Third, even if these cases only precluded delegating “traditional” utility regulation of non-PSCs, *Wylie v. Phoenix Assurance Co.*, 42 Ariz. 133, 138-39, 22 P.2d 845 (1933), still does not authorize the legislature to delegate to the Commission the State’s general police power over non-PSCs. (6/25/03 ME 6 n.6.)

Wylie struck down as unconstitutional a statute that permitted the Commission to modify the standard fire insurance policy permitted by Arizona statute. 42 Ariz. at 140, 22 P.2d at 847. *Wylie* stated that the *only* powers conferred upon the Commission over non-PSCs are found in Article 15, §§ 4 and 5, which pertain to the right to investigate corporations when they are offering their stock for sale to the public and when they seek to do business in the state. *Id.* at 136-37, 22 P.2d at 846. *Wylie* further explained that the constitution does not confer on the Commission power to regulate the insurance business and Article 15, § 6, does not authorize the legislature to delegate to the Commission the new and independent power of making laws. *Id.* at 138-39, 22 P.2d at 847. Because the Commission's power to regulate the insurance business, except to the limited extent authorized by Article 15, §§ 4 and 5, was statutory and could only be sanctioned under the police power of the state, the legislature was prohibited from delegating lawmaking authority to the Commission, a separate branch of government. *Id.* at 140, 22 P.2d at 847. Since the Commission *is* the constitutional legislative body of State government for its PSC regulation, for such regulation no issue of excessive delegation from the legislature can arise.

To determine whether the delegation violated the constitutional separation of powers, *Wylie* evaluated whether the law was complete when it left the legislative branch of government, leaving nothing to the judgment of the Commission. *Id.* Although *Wylie* recognized that the legislature may delegate administrative duties to the Commission pursuant to the police power of the state, *Wylie* expressly held that the legislature may not delegate functions requiring legislative discretion. *Id.* The prohibition against excessive legislative delegation applied in *Wylie* is well established in Arizona law:

Under the Constitution the legislative authority of the state is vested in the legislature with the reservation that the people at the polls may enact or

reject laws. It is fundamental that the legislative power thus entrusted cannot be relinquished nor delegated. The line of demarcation between what is a legitimate granting of power for administrative regulation and an illegitimate delegation of legislative power is often quite dim.... The difficulty is to properly mark the boundary between administrative and legislative power. It may safely be said that a statute which gives unlimited regulatory power to a commission, board or agency with no prescribed restraints nor criterion nor guide to its action offends the Constitution as a delegation of legislative power. The board must be corralled in some reasonable degree and must not be permitted to range at large and determine for itself the conditions under which a law should exist and pass the law it thinks appropriate.

State v. Marana Plantations, 75 Ariz. 111, 113-14, 252 P.2d 87, 89 (1953) (citations omitted; holding statutory provisions vesting Board of Health with power to regulate sanitation practices, protect and promote public health, and prevent disability and mortality, without limits or guides, unconstitutional delegation of legislative power). Proper delegation must define discretion with sufficient clarity to enable the agency or board to know its legal bounds. *Hernandez v. Frohmler*, 68 Ariz. 242, 254, 204 P.2d 854, 862 (1949).

Fourth, A.R.S. § 40-360.07(B) purports to authorize the Commission to deny a CEC granted by the Siting Committee if the Commission complies with the provisions of § 40-360.06 (considering environmental factors) and “balance[s], in the broad public interest, the need for an adequate, economical and reliable supply of electric power with the desire to minimize the effect thereof on the environment and ecology of this state.” Other than stating that “there is at present and will continue to be a growing need for electric service which will require the construction of major new facilities,” Ariz. Laws 1971, ch. 67, § 1, the legislature provided no criteria or guidance for determining the need for electric power: Does “need” refer to need within the state, a particular region of the state, region of the country, or outside of the country? Does “need” refer to the present need or

anticipated need in the next five years, ten years, or twenty years? Does “need for an adequate, economical and reliable supply of electric power” refer to what is adequate and economical if wholesale electricity is to be obtained in a competitive market or within a regulated monopoly? The Commission’s authority to deny Toltec’s CECs cannot rest on legislative delegation of state police power because, as to non-PSCs, the unchanneled discretion granted to the Commission under § 40-360.07(B) would violate the constitutional separation of powers.

Fifth, the trial court’s ruling circumvents *Rural/Metro*’s prohibition against legislative expansion of the constitutional definition of public service corporations. See *Rural/Metro Corp. v. Arizona Corp. Comm’n.*, 129 Ariz. 116, 629 P.2d 83 (1981). *Rural/Metro* was a privately owned corporation engaged in providing fire protection services, and the Commission prohibited it from providing first aid and community service calls. *Id.* at 117, 629 P.2d at 84. The Supreme Court held unconstitutional the statute authorizing the Commission to issue certificates of public convenience and necessity to such fire protection providers since it attempted to expand the Commission’s jurisdiction to regulate businesses as PSCs that were not defined as such under Article 15, § 2—even though § 2 defines corporations engaged in furnishing water for fire protection as PSCs. *Id.* at 118, 629 P.2d at 85.

Under the trial court’s reasoning here, the legislature could have delegated state “police power” to regulate *Rural/Metro*’s services, rather than “traditional public service regulation,” or as an enlargement of Commission power under Article 15, § 6, merely because *Rural/Metro* provided services that are “related to” furnishing water for fire protection and the delegation would not impair the Commission’s function. The trial court makes the marking of the constitutional boundaries on “enlarging and extending” the Commission’s powers a mere word game--one the legislature can never lose.

III. TOLTEC IS NOT A PUBLIC SERVICE CORPORATION.

The trial court expressly did not reach the question of whether Toltec can be considered a PSC under Arizona law because it concluded that the siting statute is constitutional as applied to non-PSCs. (6/25/03 ME 8, APP 28.) For the sake of completeness, Toltec demonstrates below that it is not a PSC and therefore is outside the Commission's powers that can apply only to PSCs.

Intervenor Shumaker did not argue below that Toltec was a PSC, only that the distinction was irrelevant. (Interv. Resp. at 9, APP 26.) The Commission argued that, under the constitutional definition of PSC, Toltec "probably" is a PSC and that four of eight factors under *Natural Gas Serv. Co. v. Serv-Yu Coop.* favor Toltec being considered a PSC. (Comm'n Resp. at 8-9, , APP 16.) In reality, none of the *Serv-Yu* factors indicates that Toltec is a PSC. See *Natural Gas Serv. Co. v. Serv-Yu Coop.*, 70 Ariz. 235, 237-38, 219 P.2d 324, 325-26 (1950).

The Arizona Constitution, Article 15, § 2, defines a "public service corporation" as:

All corporations other than municipal engaged in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or engaged in collecting, transporting, treating, purifying and disposing of sewage through a system, for profit; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations.

PSCs are subject to the Commission's general supervision and continuing regulation and must obtain certificates of public convenience and necessity from the Commission before providing service. A.R.S. § 40-281. Whether a given business enterprise constitutes a PSC subject to the Commission's regulatory jurisdiction is a question of law. *Southwest Gas Corp. v. Arizona Corp. Comm'n*, 169 Ariz. 279, 285, 818 P.2d 714, 720 (App. 1991).

Independent power producers or merchant power plants like Toltec are not PSCs under either the plain language of the Constitution or the interpretive case law. Toltec will produce and transmit electricity to those who furnish electricity to users for light or power, but Toltec itself will not furnish electricity for light, fuel, or power. The producer and wholesale seller of electric power is no more a PSC than the natural gas driller who sells gas to a gas company for distribution and retail sale.

Moreover, Arizona courts consider eight characteristics to determine whether an entity is a PSC: (1) what the corporation actually does; (2) a dedication to public use; (3) articles of incorporation, authorization, and purposes—what the corporation is authorized to do; (4) dealing with the service of a commodity in which the public has been generally held to have an interest; (5) monopolizing or intending to monopolize the territory with a public service commodity; (6) acceptance of substantially all requests for service; (7) service under contracts and reserving the right to discriminate is not always controlling; (8) actual or potential competition with other corporations whose business is clothed with the public interest. *Natural Gas Serv. Co. v. Serv-Yu Coop.*, 70 Ariz. 235, 237-38, 219 P.2d 324, 325-26 (1950). To establish “a dedication to public use,” the owner of a plant “must at least have undertaken to actually engage in business and supply at least some of his commodity to some of the public.” *Id.* at 237-38, 219 P.2d at 325-26. “To state that property has been devoted to public use is to state also that the public generally ... has the *right* to enjoy service therefrom.” *Id.* at 239, 219 P.2d at 326 (emphasis added). More than a public interest in a commodity or service is required:

It was never contemplated that the definition of public service corporations as defined by our constitution be so elastic as to fan out and include businesses in which the public might be incidentally interested....

General Alarm v. Underdown, 76 Ariz. 235, 238-39, 262 P.2d 671, 672-73 (1953) (alarm system company was not PSC because not in “business of sending messages for the public” but in business of property protection for individual owners).

Toltec will not supply any of its commodity to retail customers, will not vest any person with a right to enjoy its service and so will not dedicate its service to public use, will not compete with anyone in serving the retail consumer public, will not accept “substantially all requests for service,” will not monopolize any territory, and has no legal authority or obligation to do any of the foregoing. (SOF ¶ 8, APP 11.) It will sell its output to one or a few retailers or wholesale resellers on competitive bid or negotiated bases. Plainly, Toltec is not a PSC. *See Arizona Corp. Comm’n v. Nicholson*, 108 Ariz. 317, 497 P.2d 815 (1972) (trailer park furnishing water to tenants was not PSC and not subject to Commission’s jurisdiction; park’s incidental but necessary water service, while engaged in private enterprise of renting trailer spaces, did not bring park under Commission regulation); *Southwest Gas Corp.*, 169 Ariz. at 287, 818 P.2d at 722 (interstate transmitter of natural gas not PSC where few Arizona direct sales customers, not monopolizing gas sales in Arizona, did not accept substantially all requests for service, and did not intend to add any new direct sales customers in Arizona); *Arizona Water Co. v. Arizona Corp. Comm’n*, 161 Ariz. 389, 778 P.2d 1285 (App. 1989) (well owners did not become PSC by providing water to two non-owners).

IV. A.R.S. § 40-360.07(A) REQUIRES THE COMMISSION TO APPROVE AND AFFIRM A CEC ISSUED BY THE SITING COMMITTEE EXCEPT WHEN A PARTY REQUESTS REVIEW.

No party filed a request for review of the Siting Committee’s decision in Case No. 113, which authorized Toltec to site and construct transmission lines with specific conditions. (6/25/03 ME 9, APP 28.) Even if Commission denial of CECs

granted by the Siting Committee to non-PSCs is otherwise constitutional, the plain terms of § 40-360.07 require the Commission as a ministerial duty to approve and affirm Siting Committee decisions for which no party submitted a timely written request for review. The general principle that the Court must interpret a statute by looking first to its words and giving them their ordinary meaning, *Mail Boxes v. Indus. Comm'n*, 181 Ariz. 119, 124, 888 P.2d 777, 779 (1995), holds even more true here where the Court must strictly construe the Commission's authority. *Commercial Life Ins. Co. v. Wright*, 64 Ariz. 129, 139, 166 P.2d 943, 949 (1946); *Burlington Northern & Santa Fe Ry. Co. v. Arizona Corp. Comm'n*, 198 Ariz. 604, 606, ¶ 11, 12 P.3d 1208, 1210 (App. 2000). Moreover, the Commission generally lacks jurisdiction to enter an order when it has failed to follow statutory procedural requirements. *Southern Pac. Transp. Co. v. Arizona Corp. Comm'n*, 173 Ariz. 630, 633, 845 P.2d 1125, 1128 (App. 1992).

A.R.S. § 40-360.07(A) requires the Commission to affirm and approve a CEC granted by the Siting Committee within sixty days except when such a review is timely requested:

No utility may construct a plant or transmission line within this state until it has received a certificate of environmental compatibility from the committee with respect to the proposed site, **affirmed and approved by an order of the commission which shall be issued** not less than thirty days nor more than sixty days after the certificate is issued by the committee, **except that** within fifteen days after the committee has rendered its written decision **any party** to a certification proceeding **may request a review of the committee's decision by the commission.**

(Emphasis added.) If no party seeks review of the Siting Committee's decision and the Commission fails to affirm and approve the CEC within sixty days, the applicant may immediately proceed with the construction of the planned facilities.

A.R.S. § 40-360.08.

The trial court, however, reasoned that requiring the Commission's approval and affirmation under § 40-360.07(A) necessarily invests the Commission with discretion to deny a CEC even without request for review because if the Commission is statutorily required "to automatically approve every Siting Committee decision, its role is meaningless and the 'approve and affirm' requirement of the statute is meaningless." (6/25/03 ME 9, APP 28.) But the Commission is not required "to automatically approve every Siting Committee decision"--only those not timely appealed and those for non-PSCs. That result is consistent with the act's directive for prompt and definitive action.

The trial court further reasoned that because the Commission literally ordered that the CEC "should not be confirmed and approved by the commission," the CEC was disapproved pursuant to an implied authority of the Commission to act without a request for review. (*Id.*) The trial court's elusive reasoning and conclusion directly conflict with Arizona law that the "Corporation Commission has no implied powers and its powers do not exceed those to be derived from a strict construction of the Constitution and implementing statutes." *Commercial Life Ins. Co. v. Wright*, 64 Ariz. 129, 139, 166 P.2d 943, 949 (1946); *accord Burlington Northern & Santa Fe Ry. Co. v. Arizona Corp. Comm'n*, 198 Ariz. 604, 606, ¶ 11, 12 P.3d 1208, 1210 (App. 2000). Rather than find an implied power, the trial court was required to strictly construe the Commission's statutory authority as limited to a ministerial act of approval in cases where the Siting Committee has issued a CEC and no party to the proceeding has requested review of the Siting Committee's decision.

In the absence of a request for review, the Commission lacked power under § 40-360.07 to take any action other than affirming and approving the CEC from the Siting Committee, and the Commission's order purporting to deny the CEC is

void and must be reversed with direction to affirm and approve the Siting Committee's decision in Case No. 113.

V. TOLTEC WAS NOT REQUIRED TO SEEK REHEARING BEFORE THE COMMISSION AS A PRECONDITION FOR CHALLENGING THE COMMISSION'S JURISDICTION TO DENY A CEC GRANTED BY THE SITING COMMITTEE.

The Commission argued that its decision is shielded from judicial review except for issues argued on rehearing, which did not include the jurisdictional challenge presented in the first Question Presented in this Special Action. The trial court implicitly rejected this argument, but for the sake of completeness, Toltec will address it.

A. A.R.S. § 40-253's Mandatory Rehearing and Limitation of Judicial Review to Issues Argued on Rehearing Does Not Apply to Siting Decisions, For Which A.R.S. § 40-360.07(C) Explicitly Makes Rehearing Optional with the Applicant.

The Commission's argument is grounded in the mistaken premise that the optional rehearing provision and the separate judicial review authorization of § 40-360.07 for siting decisions are ousted by the rehearing provisions of § 40-253 for Commission orders concerning PSCs in general. In fact, the rehearing requirements and limitations of § 40-253 are nowhere incorporated in the special review authorization of §§ 40-360.07 and 40-360.11. To the contrary, as amended in 1996, § 40-360.07(C) contains its own rehearing provision, which is explicitly optional and not a mandatory precondition to judicial review.

Chapter 2 of Title 40, Arizona Revised Statutes, concerns "Public Service Corporations" generally. Article 3 of Chapter 2 concerns "Investigations, Hearings and Appeals" of public service corporations. The general authorization of judicial review appears in § 40-254(A) and reflects the broad authority of the Commission over public service corporations and is perhaps unique in Arizona administrative

law in several respects. First, it allows the Commission unilaterally to rescind, alter, modify or amend its order at any time during the pendency of the court action. A.R.S. § 40-254(B). Second, the case is tried “as other trials in civil actions,” and new evidence may be admitted at trial, though the burden is on the plaintiff “to show by clear and satisfactory evidence that [the Commission order] is unreasonable or unlawful.” A.R.S. § 40-254(C), (E). *Tucson Electric Power Co. v. Arizona Corp. Comm'n*, 132 Ariz. 240, 243, 645 P.2d 231, 234 (1982). Third, § 40-254(F) states, “Except as provided by this section no court of this state shall have jurisdiction to ... review any order or decision of the commission ... but a writ of mandamus shall lie ... in cases authorized by law.” That former exclusivity was supplemented in later legislation concerning judicial review of ratemaking and rate design, A.R.S. § 40-254.01, and of siting decisions. A.R.S. §§ 40-360.07, 40-360.11. Finally, as a precondition to seeking judicial review under § 40-254(A), a party must make “application to the commission for a rehearing” under § 40-253(A) within 20 days, and no person “shall in any court urge or rely on any ground not set forth in the application.” A.R.S. § 40-253(B), (C).

For three independent reasons the rehearing requirements and limitations on judicial review of § 40-253 do not apply to siting decisions under A.R.S. § 40-360 *et seq.* First, the legislature amended § 40-360.07 in 1996 to provide its own rehearing provision, which is expressly optional: “The committee or any party to a decision by the commission pursuant to subsection B of this section may request the commission to reconsider its decision within thirty days after the decision is issued.” “[U]nless a statute specifically directs otherwise, one need not seek rehearing before an agency in order to seek judicial review.” *Southwestern Paint & Varnish Co. v. Arizona Dep't of Env'tl. Quality*, 194 Ariz. 22, ¶ 1, 976 P.2d 872 (1999). This specific authorization of optional rehearing cannot by implication be ousted by the more general § 40-253.

Second, while the Act has always referenced “the rights to judicial review recognized in § 40-254,” A.R.S. § 40-360.11, it has never referenced or incorporated the rehearing requirement or the limitation on judicial review of § 40-253. If the authorization of judicial review under § 40-254 were deemed incorporated into the Act, only the review authorization of § 40-254, not the rehearing strictures of § 40-253, would be incorporated.

Third, §§ 40-360.07 and 40-360.11 establish a separate judicial review authorization in addition to the general review referenced in § 40-254. The Act provides, “The decision of the commission is final with respect to all issues, subject only to judicial review as provided by law in the event of an appeal by a person having a legal right or interest that will be injuriously affected by the decision.” A.R.S. § 40-360.07(C). That this is an independent authorization of judicial review is confirmed in § 40-360.11, which refers to “the rights to judicial review recognized in §§ 40-254 and 40-360.07.” As a distinct authorization of judicial review, §§ 40-360.07(C) and 40-360.11 are independent of the terms and limitations of § 40-254 except to the extent the terms and limitations of § 40-254 are incorporated in § 40-360.07(C) and § 40-360.11 review. Toltec is free to pursue judicial review under both statutes with whatever liberality is found in either.

B. Even if It Applies in This Case, A.R.S. § 40-253 Does Not Require, and Could Not Constitutionally Require, Commission Rehearing of Challenges to Commission Jurisdiction as a Precondition to Judicial Challenge.

A jurisdictional defect renders a Commission order void rather than voidable. *Southern Pac. Transp. Co. v. Arizona Corp. Comm'n*, 173 Ariz. 630, 633, 845 P.2d 1125, 1128 (App. 1992). Any decision of the Commission that goes beyond its powers as prescribed by the constitution and statutes is subject to attack

for lack of jurisdiction on direct appeal or in a collateral proceeding. *Tonto Creek Estates Homeowners Ass'n v. Arizona Corp. Comm'n*, 177 Ariz. 49, 57, 864 P.2d 1081, 1089 (App. 1993) (direct appeal); *Tucson Rapid Transit Co. v. Old Pueblo Transit Co.*, 79 Ariz. 327, 332, 289 P.2d 406, 410 (1955) (collateral proceeding; compliance with statutory review procedure was not required where Commission order was void for lack of jurisdiction); *Tucson Warehouse & Transfer Co. v. Al's Transfer, Inc.*, 77 Ariz. 323, 325, 271 P.2d 477, 478 (1954) (same). A decision rendered by the Commission in excess of its jurisdiction cannot have any more validity than a court order which must be vacated as void if the court lacked jurisdiction over the subject matter or person involved or to render the particular order entered. See *Martin v. Martin*, 182 Ariz. 11, 15, 893 P.2d 11, 15 (App. 1994).

A.R.S. § 40-253 cannot apply to jurisdictional challenges to Commission action:

[A]ny order which the Commission has power to make is conclusive unless the statutory procedure for review is followed. On the other hand, a decision of the Commission which goes beyond its power as prescribed by the Constitution and statutes is vulnerable for lack of jurisdiction and may be questioned in a collateral proceeding.

Tucson Warehouse & Transfer Co. v. Al's Transfer, Inc., 77 Ariz. 323, 325, 271 P.2d 477, 478 (1954) (citation omitted; *ex parte* order without notice purporting to set aside earlier order is beyond Commission jurisdiction); accord *Tucson Rapid Transit Co. v. Old Pueblo Transit Co.*, 79 Ariz. 327, 289 P.2d 406 (1955); *Dallas v. Arizona Corp. Comm'n*, 86 Ariz. 345, 347-48, 346 P.2d 152, 153 (1959) (certificate cancellation is in excess of jurisdiction and subject to collateral attack); *Walker v. DeConcini*, 86 Ariz. 143, 151, 341 P.2d 933, 938 (1959) (any certificate not issued as deliberate and considerate act of Commission after consideration of evidence is void for want of jurisdiction and subject to collateral attack); *Pacific*

Greyhound Lines v. Sun Valley Bus Lines, Inc., 70 Ariz. 65, 68, 216 P.2d 404, 406 (1950).

This is an example of the general principle of administrative law that “an agency’s actions that go beyond its statutory power can be challenged for lack of jurisdiction in a collateral proceeding.” *Southwest Ambulance v. Arizona Dep’t of Health Servs.*, 183 Ariz. 258, 263, 902 P.2d 1362, 1367 (App. 1995); *Arizona Bd. of Regents v. State ex rel. Arizona Public Safety Retirement Fund Manager Administrator*, 160 Ariz. 150, 156, 771 P.2d 880, 886 (App. 1989). If § 40-253 were construed to limit jurisdictional challenges to Commission actions, it too would be unconstitutional as applied to actions beyond the Commission’s constitutionally defined jurisdiction. The legislature could no more create unconstitutional Commission jurisdiction by a rule of procedural default than by direct grant of such jurisdiction.

VI. THE UNCONSTITUTIONAL PORTION IS SEVERABLE FROM THE REST OF THE SITING COMMITTEE ACT.

Upon finding that the Commission lacks jurisdiction to deny CECs issued by the Siting Committee to non-PSCs, the Court must invalidate the provisions that purport to grant that specific authority rather than strike down the entire Siting Committee Act. Even if it appears that legislature should not have assigned any siting authority to the Commission, the Court is not free to declare all of a statute unconstitutional if constitutional portions can be separated. *State Compensation Fund v. Symington*, 174 Ariz. 188, 195, 848 P.2d 273, 280 (1993). “The test for severability requires ascertaining legislative intent.” *Id.* “[I]f the valid and invalid portions are not so intimately connected as to raise the presumption the legislature would not have enacted one without the other, and the invalid portion was not the inducement of the act,” the Court must not disturb the valid portion. *Id.*

Here, the legislature plainly would have enacted the Siting Committee Act to centralize and expedite the siting of power plants and transmission lines by non-PSCs even if it could not assign reversal powers to the Commission. The Senate Natural Resource Committee Minutes demonstrate that the legislature had developed its plan for resolving all matters concerning siting of power plants and transmission lines in a single proceeding before deciding to involve the Commission: "Senator Alexander moved to hold the bill until they can find an existing department or commission for this bill; he suggested the Department of Economic Planning and Development." (Attachment to Comm'n SOF 2, APP 25.)

It also is not just likely, but certain, that the legislature would have enacted the Act even if the Commission's balancing function provided in § 40-360.07(B) did not extend to applications by non-PSCs. Indeed, from 1971 to 1996 the Commission's balancing function under § 40-360.07(B) even for PSCs was limited to granting CECs denied by the Siting Committee or modifying the conditions of CECs granted by the Committee. The Commission had no power to deny any CEC granted by the Committee. This shows conclusively that Commission authority to deny a CEC granted by the Committee could not have been essential to the statutory scheme for applications by non-PSCs. It was not even part of the scheme for any applicant for the first 25 years.

Moreover, the legislature did not "silently create[] two different siting schemes," one for PSCs as written and a different scheme for non-PSCs without Commission review of CECs issued by the Siting Committee. (See 6/25/03 ME 7, APP 28.) The legislature ostensibly crafted one siting scheme in 1971, when *only* PSCs and municipal utilities were able to build power plants and transmission lines. The Commission was given no power to deny a CEC approved by the Siting Committee, whether to a PSC or a municipal utility. When the legislature amended the Act in 1996 to add the word "deny," the legislative history gives no

hint that the legislature considered the implications of that new regulation of non-PSCs.

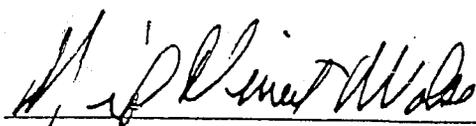
The least restrictive remedy in this case is to strike down as applied to non-PSCs the one word "deny" inserted by the 1996 amendment into § 40-360.07(B). Though the issue does not arise here because the Commission did not modify any Siting Committee conditions to the CECs granted to Toltec, the 1971 Act's attempt to vest the Commission with that authority also is unconstitutional as applied to non-PSCs. Invalidating those two provisions as to non-PSCs would leave the statute almost exactly in its pre-1996 form for non-PSC applicants and exactly in its current form for PSCs. This different treatment of PSC and non-PSC applicants best fits the legislature's intentions while hewing to the Constitution. Because Commission oversight perhaps is justified to protect captive consumers from the cost and environmental consequences of unjustified power plant construction by PSCs, review of Siting Committee decisions regarding PSCs may be considered within the Commission's "full power" to regulate PSCs. For non-PSCs, however, the Commission may not be granted that reversal power.

CONCLUSION

The Petition for Special Action should be granted, and the Court should reverse the trial court's June 25, 2003 denial of Toltec's Motion for Summary Judgment on Jurisdictional Grounds. The Court should direct entry of summary judgment in favor of Toltec that the Commission lacks jurisdiction to deny the CECs issued to Toltec by the Siting Committee.

Respectfully submitted,

LAW OFFICES OF NEIL VINCENT WAKE



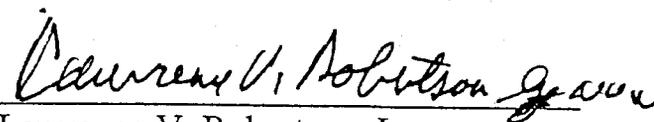
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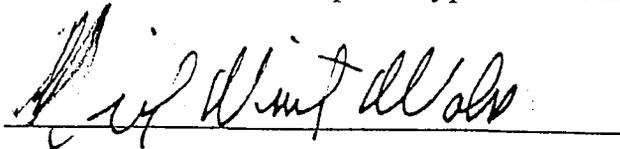
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L.L.C.

CERTIFICATE OF COMPLIANCE

Pursuant to the Specifications of Rules of Procedure for Special Actions, Rule 7(e), the text of this Petition for Special Action is double spaced, quotations more than two lines are indented and single spaced, and headings and footnotes are single spaced. This Petition is proportionately spaced in 14 point type and contains 10,389 words.



Neil Vincent Wake

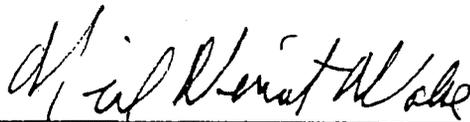
CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2003, I caused two copies of the foregoing Petition for Special Action and Appendices to be served by hand delivery on:

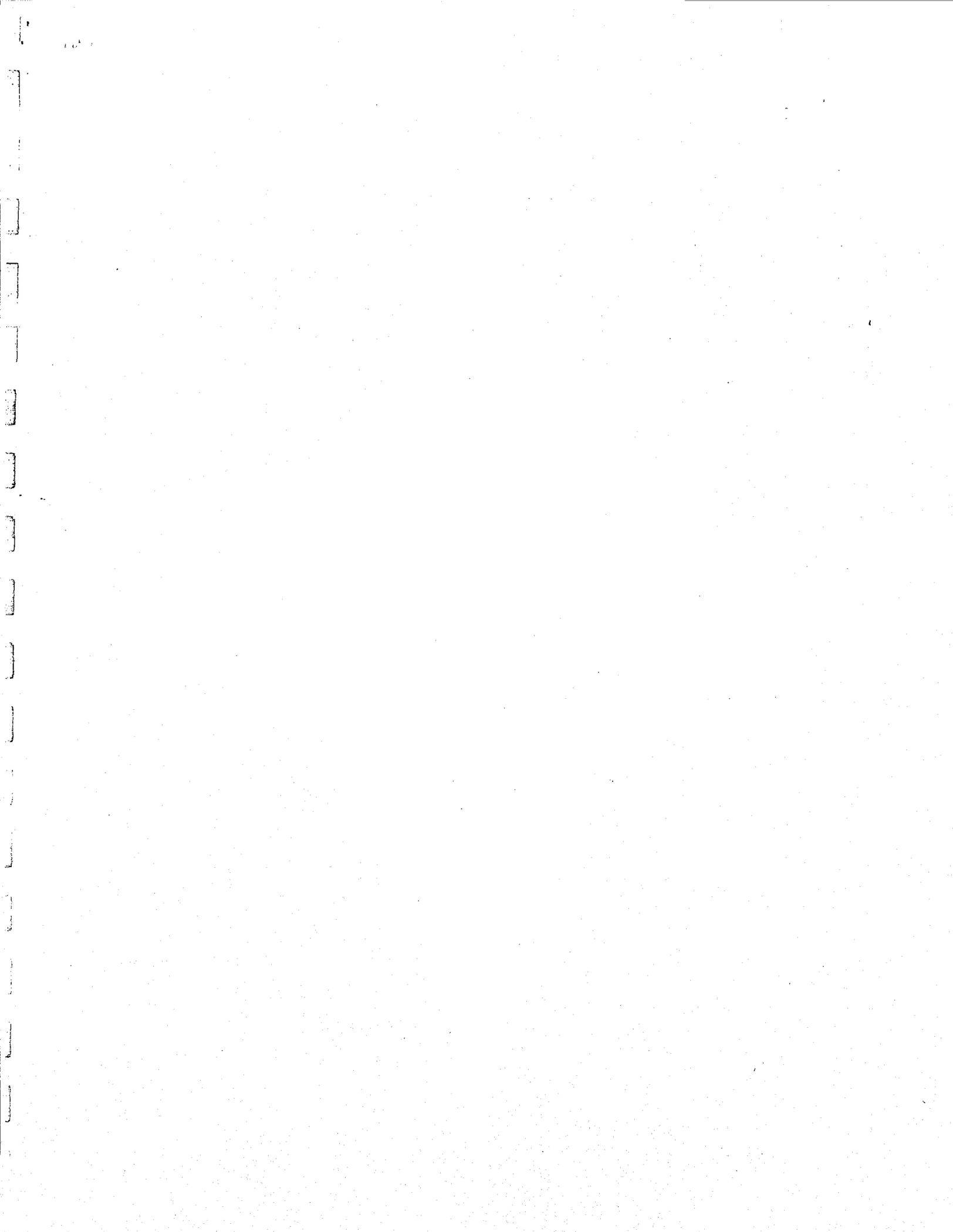
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Neil Vincent Wake



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TOLTEC POWER STATION, L.L.C. a
Delaware limited liability company,

Petitioner,

v.

THE HONORABLE MICHAEL D.
JONES, Judge of the SUPERIOR
COURT OF THE STATE OF
ARIZONA, in and for the County of
MARICOPA,

Respondent Judge,

ARIZONA CORPORATION
COMMISSION,

Real Party in Interest.

1 CA-SA 03-0166
Maricopa County
Superior Court
No. CV 2002-006785

**RESPONSE TO PLAINTIFF/PETITIONER'S PETITION FOR
SPECIAL ACTION**

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Arizona Corporation Commission

The Arizona Corporation Commission ("Commission") hereby responds to the petition for special action filed by Toltec Power Station, L.L.C. ("Toltec"). The Commission requests that the court decline jurisdiction in this matter. Alternatively, if jurisdiction is accepted, the Commission requests that the court affirm the findings of the Superior Court.

I. STATEMENT OF FACTS.

This litigation concerns an appeal of two Commission orders that deny Toltec the authority to construct a power plant and a related transmission line adjacent to the Ironwood National Monument and near Pichaco Peak State Park. (Excerpts from 05/10/01 Recorder's Transcript, Case No. 112, Pet'r App. 18). The Commission denied Toltec's applications because it concluded that the need for power failed to outweigh the environmental impacts of the proposed facilities. (Excerpts from 01/30/02 Recorder's Transcript, Pet'r App. 14). Toltec seeks special action review of a superior court minute entry upholding the constitutionality of A.R.S. § 40-360.07(B)'s grant of jurisdiction to the Commission to decide these matters.

A. Background.

Each proposed project for an electric generation plant or transmission line has the potential to significantly impact the

environment. To deal with the environmental impact issues and to balance those issues with the need for electric service, the Arizona Legislature enacted the Power Plant and Transmission Line Siting Committee statutes, A.R.S. §§ 40-360 through 360.13, in 1971. The siting statutes provide a single forum to deal with all of the issues in an efficient manner, and to provide for notice and opportunity for all concerned parties to participate. *See* Ariz. Laws 1971, Ch. 67, § 2. Since enactment, the process has been conducted under the auspices of the Commission, which makes the ultimate determination on whether to approve or deny an application for a Certificate of Environmental Compatibility (“CEC”).

The purpose of the siting process is to give the Commission evidence on the record to perform the public interest balancing between the environmental impact and the need for the power from a particular project. Because each proposed project is unique, there are no bright line standards that can be applied to every application. The Commission examines each project individually and on its own merits, and no Commission decision on a project can be pre-determined. This is because the specific location and design of a proposed project have unique impacts on the environmental factors listed in A.R.S. § 40-360.06. (Excerpts from 05/11/01, 07/09/01, 09/24/01, 09/25/01 Recorder’s Transcripts, Pet’r App. 19, 20, 22, 23). The Commission must take these particular environmental impacts into account in

determining whether to grant a CEC, and must determine whether the project can meet the need for reliable and adequate electric service. (Appendix A, Excerpts from 05/10/01 and 08/07/01 Recorder's Transcripts, Pet'r App. 18, 21). The location of a proposed project may make certain projects environmentally incompatible such that no condition(s) will minimize the impact sufficiently to tip the public interest in favor of granting a CEC.

The siting process includes an evidentiary hearing before the Arizona Power Plant and Transmission Line Siting Committee ("Siting Committee"). The Siting Committee evaluates the proposed project in light of the environmental factors identified in A.R.S. § 40-360.06 and makes its decision on the application. The Commission then considers the Siting Committee decision and determines whether to grant or deny a CEC to the applicant under A.R.S. § 40-360.07. A.R.S. § 40-360.07 sets forth two different time periods for Commission action on a CEC application, based upon whether a written request for review of the Siting Committee decision has been filed. *See* A.R.S. § 40-360.07(A) and (B). Under either time frame, the Commission is vested with the ultimate authority to determine whether to grant or deny a CEC for a project.

If a party wishes to seek judicial review of the Commission's siting order, it must do so pursuant to A.R.S. § 40-254. *See* A.R.S. § 40-360.11. Under A.R.S. § 40-254, a timely rehearing request to the

Commission setting forth the specific grounds for rehearing is a prerequisite to any judicial appeal. *See* A.R.S. § 40-253.

B. Procedural History.

The Commission accepts Toltec's description of the procedural history of the case but disputes Toltec's interpretation of the siting statutes. Toltec claims that the Commission lacks the authority to review Siting Committee decisions. The siting statutes do not mandate that the Commission grant a CEC for each project that receives a preliminary approval from the Siting Committee. Contrary to Toltec's position, the siting statutes constitutionally vest the Commission with the authority to make the final decision on whether to grant a CEC for a particular project. The Commission lawfully exercised its statutory authority to deny Toltec's requested CECs for its proposed plant and transmission line.

In this case, the Commissioners voted unanimously to deny Toltec's CECs. At the time of the vote, the Commission balanced the environmental impact with the need for the power. Commissioner Spitzer commented that there was insufficient evidence to show a serious market for the power to balance against the impacts to an already environmentally sensitive area. (Excerpts from 01/30/02 Recorder's Transcript, Pet'r App. 14). Commissioner Irvin concluded that there was insufficient evidence to show that Toltec's additional power would provide an impact on pricing due to existing excess capacity in Toltec's

intended market area. (Excerpts from 01/30/02 Recorder's Transcript, Pet'r App. 14). He further indicated that there were subsidences, flooding, environmental concerns, and a potential to impair the aesthetic beauty of the environment. (Excerpts from 01/30/02 Recorder's Transcript, Pet'r App. 14). Commissioner Mundell commented that the environment should be protected from the possible long-term repercussions of Toltec's project. (Excerpts from 01/30/02 Recorder's Transcript, Pet'r App. 14). If the court finds that the Commission lacks jurisdiction to deny Toltec's applications, as Toltec is urging the court to do, this balancing in the public interest will not take place at all.

C. Standard of Review.

Toltec faces a heavy burden in its constitutional challenge to the Commission's decisions entered under the siting statutes. Every legislative act is presumed constitutional. *Austin v. Campbell*, 91 Ariz. 195, 203, 370 P.2d 769, 775 (1962) (citing *Hudson v. Kelly*, 76 Ariz. 255, 259, 263 P.2d 362, 364 (1953)). The party asserting unconstitutionality of a legislative enactment bears the burden of overcoming the presumption. *Eastin v. Broomfield*, 116 Ariz. 576, 580, 570 P.2d 744, 748 (1977). If it is possible to construe a statute as constitutionally valid, the court is required to do so. *Mardian Constr. v. Super. Ct.*, 113 Ariz. 489, 557 P.2d 526 (1976); *Schecter v. Killingsworth*, 93 Ariz. 273, 380 P.2d 136 (1963); *Hernandez v. Frohmiller*, 68 Ariz. 242, 204 P.2d 854 (1949). Finally, a party

challenging a Commission order has the burden of proving “by clear and satisfactory evidence” that an order of the Commission is “unreasonable or unlawful.” A.R.S. § 40-254(E) ; *Tucson Elec. Power Co. v. Ariz. Corp. Comm’n*, 132 Ariz. 240, 645 P.2d 231 (1982). Toltec’s jurisdictional arguments fail to meet these burdens.

II. ISSUES PRESENTED.

A. Can the legislature vest the siting of power plant and transmission facilities in the Arizona Corporation Commission regardless of whether the applicant for siting approval is a public service corporation (PSC)?

B. Does the Commission have authority to review and deny a CEC issued by the Siting Committee regardless of whether a party has requested review?

III. THE COURT SHOULD DECLINE JURISDICTION IN THIS SPECIAL ACTION.

Toltec argues that special action review of the trial court’s June 25, 2003 ruling is appropriate because it claims that there is no “equally plain, speedy, and adequate remedy by appeal.” *Cronin v. Sheldon*, 195 Ariz. 531, 533, 991 P.2d 231, 233 (1999). The extraordinary remedy of special action should not be available when traditional appellate review is adequate. *King v. Super. Ct. of the State of Ariz.*, 138 Ariz. 147, 149. 673 P.2d. 787, 789 (1983). In the current instance, traditional appellate review provides a more than adequate remedy to Toltec. In fact,

contrary to Toltec's assertions, judicial efficiency will be better served by denying special action review, rather than taking jurisdiction of this special action petition.

It is interesting to note at the outset, that Toltec's view of the need for extraordinary relief didn't occur until its Motion for Summary Judgment was denied by the trial court. So, traditional appellate review was equally plain, speedy and adequate until such time as the superior court disagreed with Toltec's unusual reading of the Arizona Constitution and cases surrounding Commission authority in power plant and transmission line siting matters. If Toltec's assertions about the benefits to judicial economy and the other stated rationales supporting special action relief were of such consequence, it is difficult to imagine why Toltec didn't seek resolution of its narrow jurisdictional issue by special action in the first instance. Of course, the simple fact is that special action relief is not appropriate in this instance.

A. **Granting special action relief will not conclude this litigation.**

Toltec appears to believe that if this court takes special action jurisdiction over this matter and directs the superior court to grant its motion for summary judgment based on a finding that the Commission doesn't have jurisdiction to deny a CEC, the litigation will be concluded and there will be no triable issue before the superior court. Toltec

ignores the statutory scheme and argues for a result that is contrary to its own position.

Let us assume *arguendo* that this court granted special action jurisdiction, agreed with Toltec's position and found that the Commission is without authority to deny Toltec's CECs. That action cannot have the result of granting Toltec a CEC, which can only occur by the Commission's action affirming and approving the grant of a CEC issued by the Siting Committee. See A.R.S. § 40-360.07 (A). In fact, while Toltec believes the provision specifically authorizing the Commission to deny a CEC to a non-PSC is unconstitutional, the remaining statutory provisions would support the Commission "confirm(ing) or modify(ing) any certificate granted by the Committee". In other words, if the court found the 1996 amendment to the Power Plant and Transmission Line Siting statute unconstitutional, the remedy would be to remand the matter to the Commission. The Commission would then have the authority, unchallenged by Toltec, to "comply with the provisions of A.R.S. § 40-360.06 and [shall] balance, in the broad public interest, the need for an adequate, economical and reliable supply of electric power with the desire to minimize the effect thereof on the environment and ecology of this state." A.R.S. § 40-360.07(B). Even under Toltec's formulation of the siting statutes, the Commission would have the authority and obligation to issue an order that would either "confirm or modify" the certificate issued by the Committee.

Nor can Toltec avoid this result by any claim that the Commission's authority requires that a party request review of the Siting Committee decision. With regard to the decision in Case No. 112, the power plant matter, Toltec admits that a timely request for review was submitted. As explained later in this Response, the legislature's grant of Commission authority over CECs is both constitutional and logical. It is neither logical nor necessary to construe that authority as being substantive when the Line Siting applicant is a PSC but strictly ministerial when the applicant is arguably not a PSC. Of course, as Toltec notes in its special action petition, the question of whether it is a PSC is as yet unresolved. Thus, there is an additional issue that would have to be addressed before this litigation could be concluded in its entirety, even if Toltec's special action petition were granted. In any event, accepting jurisdiction over this special action petition offers no opportunity for judicial economy.

B. This case is not appropriate for Special Action relief.

In this case, Toltec's petition for special action is challenging the trial court's denial of its motion for summary judgment. Granting special action jurisdiction as a substitute for appellate review of summary judgment is discouraged by the courts. *Piner v. Super. Ct. of Maricopa County*, 192 Ariz. 182, 184, 962 P.2d 109, 110; *Samaritan Health Sys. v. Super. Ct. of the State of Ariz.*, 194 Ariz. 284, 287, 981 P.2d 584, 587 (App.1998); *Moore v. Browning*, 203 Ariz. 102, 104, 50

P.3d 852, 854 (App.2002). The rationale behind this is judicial economy. *Munroe v. Galati*, 189 Ariz. 113, 115, 938 P.2d 1114, 1116 (1997). Summary judgment is a method of resolving meritless claims, and this goal would be limited if special actions were granted to review denials of those motions. *Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 466, 957 P.2d 1009 (App.1997). Granting special actions in such cases “often frustrates the expeditious resolution of claims, unnecessarily increases both appellate court caseload and interference with trial judges, harasses litigants with prolonged and costly appeals, and provides piecemeal review.” *City of Phoenix v. Yarnell & Smith*, 184 Ariz. 310, 315, 909 P.2d 377, 382 (1995). As was demonstrated above, judicial economy would not be served by granting jurisdiction of special action jurisdiction in this matter, rather the interests of judicial economy are better served by denying such jurisdiction, consistent with the courts’ traditional treatment of special action petitions involving denial of summary judgment.

Toltec complains that if the court doesn’t take special action jurisdiction, it will be required to pursue its litigation through a trial and regular appellate procedures, which will take time and cost money. Nearly every petitioner may make these same arguments. Special action jurisdiction is not available merely because traditional appellate review may be more lengthy or costly. *Glenda v. Super. Ct.*, 103 Ariz. 240,

242, 439 P.2d 811, 813 (1968) (noting that expense and delay of a trial alone does not justify jurisdiction in extraordinary writ).

In a final attempt to bootstrap special action jurisdiction, Toltec alleges that the delay from traditional appellate review of this matter is particularly egregious because the siting statutes are intended to provide prompt review of siting applications. However, it is clear that the Commission provided the prompt review of Toltec's applications that the statutes require. There is no claim that the Commission failed to meet the short and rigid time requirements of the statutes. The availability of the judicial system to review Commission decisions does not come without cost in time and expense. There is no reason to believe that the judicial system will fail to treat Toltec's claims expeditiously. In fact, the requirement for prompt consideration is carried over into the appellate procedures for Commission decisions. As this court is well aware, A.R.S. § 40-255 provides that appeals from Commission decisions take precedence over all other civil matters except election cases. Toltec has a plain, speedy, and adequate remedy by appeal. This court should deny jurisdiction of Toltec's petition.

IV. THE COMMISSION HAS THE AUTHORITY UNDER THE SITING STATUTES TO DECIDE WHETHER TO DENY A CEC. THE STATUTES GRANTING THE COMMISSION AUTHORITY OVER CECS ARE CONSTITUTIONAL.

Under the Arizona Constitution, the "law-making power may enlarge the powers and extend the duties of the Corporation

Commission, and may prescribe rules and regulations to govern proceedings instituted by and before it.” Ariz. Const. art. XV, § 6. In the Commission’s case, the legislature was given an express grant of constitutional authority to give additional powers to the Commission. These powers are constitutional as long as they do not give the Commission “functions wholly alien to its constitutional charter.” See *Clean Elections Comm’n v. Myers*, 196 Ariz. 516, 502, 1 P.3d 706, 710 (2000) . It cannot reasonably be argued that siting electric power plants and transmission lines is wholly alien to the Commission’s constitutional powers over electric service in Arizona. The trial court affirmed this point when it pointed out that “[a]uthority over the siting of new power plants is a matter of the same class as the regulation of electricity service and it is not expressly or impliedly exempt by any other provision of the constitution.” (6/25/03 ME 6). Moreover, the “wholly alien” standard only acts as a restriction if the Constitution does not grant the legislature the power to extend an agency’s authority. Here, there is an express grant of that very power in Article XV, Section 6.

Toltec's arguments are based on an unreasonably expansive misreading of *Rural/Metro v. Ariz. Corp. Comm’n*, 129 Ariz. 116, 629 P.2d 83 (1981). *Rural/Metro* holds that the legislature may not “give ‘public service corporation’ designation to corporations not listed in Article 15, § 2.” *Rural/Metro*, 129 Ariz. at 118, 629 P.2d at 85. *Rural/Metro* established that the legislature cannot subject non-PSCs to

Article XV's regulatory burden simply by changing a definition, an act that would essentially amend the state Constitution. *Rural/Metro* does not, however, establish that the legislature cannot delegate other aspects of the state's police power to the Commission.

The siting statutes apply to "utilities," not "public service corporations." For purposes of the statutory siting scheme, "utility" means any person engaged in the generation or transmission of electric energy, and clearly includes Toltec. See A.R.S. § 40-360.11. Toltec argues that this statutory definition is unconstitutional because it enlarges the Commission's constitutional powers over non-public service corporations. But although *Rural/Metro* arguably prevents the legislature from expanding the Constitution's definition of "public service corporation," it does not prevent it from delegating to the Commission its police power over "utilities," a term that is expressly defined in the siting statutes. Toltec is a utility as defined by these statutes and is therefore subject to the Commission's siting authority.

Toltec cites *Wylie v. Phoenix Assurance Co.*, 42 Ariz. 133, 22 P.2d 845 (1933) to support its position. *Wylie* holds that the Commission cannot use its statutory power to modify a form prescribed by the legislature. See *Wylie* at 140-141, 22 P.2d at 847. But Toltec's reliance on *Wylie* is misplaced because *Wylie* expressly acknowledges the Commission's former statutory authority over insurance companies – an authority over non-PSCs granted by the legislature under its police

power. *See Wylie* at 138, 22 P.2d at 847 ("The commission's power to regulate the insurance business... is statutory... and receives its sanction under the police power of the state.") (emphasis added). *Wylie* cannot be used to support the proposition that the legislature cannot delegate its police powers over non-PSCs to the Commission.

Toltec also broadly asserts that new rules which favor competition for electric generation have led to the Commission overstepping its jurisdictional boundaries to include non-PSCs. However, Toltec has not demonstrated how the Commission's authority to grant or deny a CEC has been decreased by rule or legislation as a result of the recent move towards competition. The Commission has long-exercised various statutory, non-Article XV powers over non-PSCs. For example, the Commission has certain limited jurisdiction over the Salt River Project, a non-PSC. *See, e.g.*, A.R.S. § 38-2465(B); A.R.S. § 40-360.02. Likewise, the Commission's statutory authority over pipeline safety extends to all pipelines, regardless of whether the pipeline is owned by a PSC or a non-PSC. *See* A.R.S §§ 40-441, 442. The Commission's statutory "blue-stake" authority extends to all who excavate near underground utility facilities, regardless of whether the excavator is a PSC, and regardless of whether the utility that owns the facility is a PSC. *See, e.g.*, A.R.S. §§ 40-360.21 to -360.32. Toltec's argument, if adopted, would eviscerate all of these long-standing statutory powers.

Toltec's arguments ignore the fundamental premises on which the Arizona constitution has formulated the government of the state. In most states, a tri-partite form of government is established, comprising judicial, executive, and legislative branches. The organic law defines the parameters of each branch, just as is true in Arizona. The power that is being partitioned is the "police power" within the state, the authority under which every sovereignty passes laws for the internal regulation and government of the state, *Elfbrandt v. Russell*, 94 Ariz. 1, 381 P.2d 554 (1963). In Arizona, the legislature holds all residual power, that is, all power not expressly reserved or granted to another branch of government resides in the legislature, *Adams v. Bolin*, 74 Ariz. 269, 247 P.2d 617 (1952).

The Commission was created by Article XV of the Arizona Constitution and granted jurisdiction over public service corporations, creating, in effect, a fourth branch of government in Arizona, *See State v. Tucson Gas, Electric Light & Power Co.*, 15 Ariz. 294, 138 P. 781 (1914). The *Tucson Gas* case contains a discussion of the reasons behind the formation of the Commission by the Constitution, explaining that the framers of the constitution took the powers of supervision, regulation, and control of public service corporations from the legislature because of a long established and deep-rooted dissatisfaction with the results obtained by legislatures of the country in their attempts to regulate public service corporations. The effect of Article XV is to

remove certain power that the legislature would otherwise hold, and place that power in the Commission. To the extent powers are not granted to the Commission, they are retained by the legislature.

Aside from the strained and patently erroneous interpretations of *Rural/Metro*, *Wylie*, and *Myers*, described above, Toltec's argument misapprehends the nature of the constitution. As explained immediately above, Article XV, taken as a whole, acts to limit authority that the legislature would otherwise possess. In its argument, Toltec is contending that the constitutional provision of Article XV § 6, expressly returning power to the legislature, somehow acts instead to limit the legislature's authority. In short, the constitution provides the Commission full authority in the areas to which it speaks. It further provides that the legislature may, from its residual police powers, further extend those powers and extend those duties. Toltec offers no argument or case from which this court should conclude that the legislature's authority should be restricted in the way it requests.

Further, Toltec's arguments lead to the absurd result that final authority over CECs could be vested in any agency except the Commission. Toltec's argument is particular to the Commission: it claims that the Commission cannot have final authority over CECs for non-PSCs. Both the CEC and Siting Committee are creatures of statute. The legislature could therefore create a new agency to review the Siting Committee and give that agency final power over CECs. In fact, when

the siting statutes were adopted, the Arizona legislature contemplated placing the siting authority under the jurisdiction of a different state agency. At the time, Senator Alexander proposed placing the bill under the jurisdiction of the Department of Economic Planning and Development. (Excerpts from Minutes of the Natural Resources Committee re SB 98, Pet'r App. 25).

Presumably, the legislature could also vest this authority in any existing agency created by statute. But if the Arizona Acupuncture Board of Examiners or the Arizona Board of Cosmetology could be given final authority over CECs, why shouldn't the Commission be able to exercise this power? The Commission has considerable expertise in technical issues relating to the electric industry. Moreover, the Commissioners are constitutional officers, selected in state-wide elections. They are uniquely qualified to set public policy on siting issues. The legislature's decision to grant final authority over CECs to the Commission was well-founded. This court should not adopt a view of Arizona law that imposes a special disability on the one agency that is the most logical choice to exercise siting authority.

V. THE OUTCOME OF THE COMMISSION'S VOTE CANNOT BE PREDETERMINED, AND THE AUTHORITY TO VOTE TO GRANT A CEC OF NECESSITY INCLUDES THE AUTHORITY TO VOTE TO DENY A CEC.

Toltec also argues that the Commission lacks statutory jurisdiction to deny a CEC if no requests for review are filed pursuant to A.R.S. §

40-360.07(A). In this case, there were no requests for review filed for Toltec's transmission line. Toltec claims that, in the absence of a request for review, the Commission must approve whatever decision is made by the Siting Committee.

This argument runs contrary to common sense. The Commission has the power to evaluate the findings of the Siting Committee even when there has not been a request for review. A.R.S. § 40-360.07(A) provides that no utility may construct its proposed plant until it has a CEC approved or affirmed by the Commission. "Affirm" has a different meaning than "approve." "Affirm" means to "ratify, make firm, confirm, establish, reassert." *BLACK'S LAW DICTIONARY 81* (REV. 4th ed. 1968). In other words, "affirm" carries with it an element of discretion that is missing from "approve."

To interpret the statute as requiring the Commission to automatically approve every Siting Committee decision would render the Commission's role meaningless. The Commission would simply be rubber-stamping the Siting Committee's findings. As the trial court correctly pointed out, "[i]f the Commission is required by statute to automatically approve every Siting Committee decision, its role is meaningless and the 'approve and affirm' requirement of the statute is superfluous." (6/25/03 ME 9). Moreover, the Commission acts through its orders, which are voted on at public "Open Meetings." A.R.S. § 40-102. By requiring a CEC to be granted to an applicant by "order of the

Commission,” the Arizona Legislature is requiring the Commission to vote on every proposed project. The outcome of this vote cannot be predetermined without running afoul of the Open Meeting Laws. See A.R.S. §§ 38-431 to 431.09.

Finally, arguing that the Commission was required to automatically grant Toltec’s transmission line CEC, even if Toltec’s plant CEC was denied, is nonsensical. The need for the transmission line clearly evaporates once the CEC for the plant is denied. Under this scenario, the Commission would be required to grant a CEC for a transmission line that would serve no purpose.

VI. CONCLUSION

The Commission requests that this court decline jurisdiction of Toltec’s petition for special action. In the alternative, the Commission requests that the Court affirm the findings of the Superior Court.

RESPECTFULLY SUBMITTED this 7 day of August 2003.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Specifications of Rules of Procedure for Special Actions, Rule 7(e), the text of this Response to Petition for Special Action is double spaced, quotations more than two lines are indented and single spaced, and headings and footnotes are single spaced. This Response to Petition for Special Action is proportionately spaced Times New Roman in 14 point type and contains 4,286 words.

David M. Ronald
Christopher C. Kempley

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2003, I caused the original and six (6) copies of the foregoing to be hand-delivered to:

Glen D. Clark, Clerk
Arizona Court of Appeals
Division One
1501 West Washington Street, Room 203
Phoenix, Arizona 85007-3329

and on the 7 day of August 2003, I caused two copies of the foregoing Response to Petition for Special Action to be mailed to:

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COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TOLTEC POWER STATION, L.L.C., a
Delaware limited liability company

Plaintiff/Petitioner,

vs.

HONORABLE MICHAEL D. JONES,
Judge of the Superior Court of the State of
Arizona, in and for the County of
Maricopa,

Respondent,

and

ARIZONA CORPORATION
COMMISSION

Respondent/Real Party in Interest.

Supreme Court No. CV03-0322-PR

1 CA-SA-03-0166

Maricopa County Superior Court
Case No. CV2002-006785

PETITION FOR REVIEW

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ISSUES PRESENTED FOR REVIEW

1. Does the legislature's power under Ariz. Const. Art. 15, § 6 to "enlarge and extend" the Corporation Commission's powers granted in the constitution itself permit Commission veto of construction of electric generation and transmission facilities by non-public service corporations, over which the Commission lacks constitutionally granted power? Subsumed in this question is whether *Citizens Clean Elections Commission v. Myers*, 196 Ariz. 516, 1 P.3d 706 (2000), adopts a new rule for enlargement of Commission powers, permitting any power "unless it is not related to or it impairs" the Commission's constitutionally granted powers.

2. May the legislature delegate to the Commission any power within the legislature's police power, independent of the express grant of enlargement authority in Ariz. Const. Art. 15, § 6?

3. Under A.R.S. § 40-360.07, which requires the Commission to approve and affirm a siting approval granted by the Arizona Power Plant and Transmission Line Siting Committee except when a party timely requests review of the Siting Committee's decision, may the Commission reverse a decision when no party files a written request for review?

FACTS MATERIAL TO THE ISSUES

In 2001 Toltec Power Station, LLC ("Toltec") filed two separate applications for Certificates of Environmental Compatibility ("Certificates"), one to site an electric power plant and the other to site transmission lines to interconnect Toltec's proposed power plant with existing facilities. (1 6/25/03 Minute Entry ("Order") at 2.) Toltec will be a private generator of electric power, will sell its entire output at wholesale to electric utilities or wholesale resellers on competitive bid or negotiated bases, will not supply any power to retail end-use customers, and will not monopolize any territory. (Declaration of Tom Wray, ¶¶

5-8, APP 1.)

The Siting Committee held extensive public hearings to receive and assess evidence regarding Toltec's applications and unanimously voted to grant both Certificates. (Order at 2.) Two parties filed requests for Commission review of the Siting Committee's power plant decision, but no request for review was filed in the transmission lines case. (*Id.* at 3.) The Commission voted to deny both Certificates. (*Id.*) Toltec timely filed an application for rehearing in both cases, and the Commission did not grant either. (*Id.*)

Toltec initiated this action to appeal the Commission's orders vetoing the Siting Committee's granting of both Certificates and sought summary judgment on grounds that (1) the Commission lacked jurisdiction to deny a Certificate issued to a non-public service corporation ("non-PSC") by the Siting Committee, and (2) the Commission lacked jurisdiction to deny a Certificate issued by the Siting Committee where no party requested review. (*Id.*) On June 25, 2003, the trial court denied Toltec's motion for summary judgment, concluding that the siting statute authorizing the Commission to deny Certificates granted by the Siting Committee to non-PSCs is constitutional. Although whether Toltec is a PSC was briefed, the trial court did not reach that issue. (*Id.* at 8.) On August 21, 2003, the Court of Appeals declined to accept special action jurisdiction to review the June 25, 2003 Order. (Attached 8/21/03 Order.)

REASONS THE PETITION SHOULD BE GRANTED

I. MYERS DID NOT EXPAND LEGISLATIVE AUTHORITY TO ENLARGE COMMISSION POWERS UNDER ART. 15, § 6.

The trial court misinterpreted *Citizens Clean Elections Commission v. Myers*, 196 Ariz. 516, 1 P.3d 706 (2000), as expanding the legislature's authority under Ariz. Const. Art. 15, § 6 to enlarge the Commission's powers. Since 1938, § 6 has been construed as permitting the legislature to "enlarge or extend the

powers and duties of the commission *over the subject matter of which it has already been given jurisdiction*, and other matters of the same class, not expressly or impliedly exempt by other provisions of the Constitution.” *Menderson v. City of Phoenix*, 51 Ariz. 280, 285, 76 P.2d 321, 323 (1938) (emphasis added). In 1981 the Court affirmed *Menderson’s* construction of § 6 and explained that § 6 allows the legislature to extend Commission powers and duties “only with regard to those powers already granted by the constitution” and only by giving practical effect to and ensuring the actual fulfillment of the Commission’s constitutional charter. *Rural/Metro Corp. v. Arizona Corp. Comm’n*, 129 Ariz. 116, 117-18, 629 P.2d 83, 84-85 (1981).

But the trial court concluded that, under *Myers*, the legislature may grant the Commission authority “unless it is not related to or it impairs the agency in its function.” (Order at 10.) This interpretation of *Myers* would mean that the legislature may give to the Commission *any power over any entity* unless it bears *no* relationship to Commission functions regardless of whether it enlarged one of the Commission’s constitutional powers.

Myers did not overrule or even cast doubt on *Menderson’s* construction. *Myers* held unconstitutional an initiative expanding duties of the Commission on Appellate Court Appointments to include nominating candidates for the Citizens Clean Elections Commission because the new function was wholly unrelated to its constitutional charter. 196 Ariz. at 522, 1 P.3d at 712. *Myers* decided only whether the constitution permits legislative delegation to a constitutionally created entity where the constitution does *not* expressly grant the legislature power to enlarge the powers of the entity. *Id.* at 519, ¶ 8, 1 P.3d at 709. *Myers* cautioned that even express constitutional authorization to enlarge the jurisdiction of a court or entity is limited, used Article 15, § 6 as an example, and explained that “the express grant of power to expand the scope of an article VI entity of necessity must

be related to, and not impair, an article VI function.” *Id.* at 519, ¶ 9, 520 n.1, ¶ 10, 1 P.3d at 709, 710 n.1. The only relevant principle is that an “enlargement” of the Commission’s powers must enlarge one of its Article 15 functions.

II. VETO POWER OVER POWER PLANT AND LINE SITING BY NON-PSCS IS NOT THE SAME SUBJECT MATTER, OR A MATTER OF THE SAME CLASS, AS PRESCRIBING PSC RATES AND CLASSIFICATIONS.

A. The Constitution Expressly Defines the Commission’s Powers.

The constitutional framers created the Commission as a separate, popularly elected branch of state government “with powers and duties as well defined as any branch of the government,” provided the Commission with strong authority to regulate corporations, and granted the Commission’s strongest power to provide both effective regulation of PSCs and consumer protection against overreaching by those PSCs. *Arizona Corp. Comm’n v. State ex rel. Woods*, 171 Ariz. 286, 290-91, 830 P.2d 807, 811-12 (1992), *State v. Tucson Gas, Elec. Light & Power Co.*, 15 Ariz. 294, 306, 138 P. 781, 786 (1914). “The Corporation Commission has no implied powers and its powers do not exceed those to be derived from a strict construction of the Constitution and implementing statutes.” *Commercial Life Ins. Co. v. Wright*, 64 Ariz. 129, 139, 166 P.2d 943, 949 (1946).

The Commission’s four powers under Article 15 include judicial, executive, and legislative functions. *Woods*, 171 Ariz. at 291, 830 P.2d at 812. First, § 3 grants “full power” to prescribe classifications to be used and rates and charges to be made and collected by PSCs; rules governing PSCs’ business transactions, contract forms, and accounting systems; and regulations for the health and safety of PSC employees and patrons. Second, § 4 grants “power to inspect and investigate” property and records of any corporation whose stock shall be offered for public sale and any PSC doing business within the state. Third, § 5 grants the Commission “the sole power” to issue certificates of incorporation and to license

foreign corporations to do business in the state. Fourth, § 19 grants power to enforce Commission orders by imposing fines.

B. The Power Plant and Transmission Line Siting Committee Act.

The Act's purpose is to expedite siting of electric generating plants and transmission lines to meet the growing need for electric service:

The legislature hereby finds and declares **that there is at present and will continue to be a growing need for electric service which will require the construction of major new facilities.** It is recognized that such facilities cannot be built without in some way affecting the physical environment where the facilities are located.... The lack of adequate statutory procedures may result in delays in new construction and increases in costs which are eventually passed on to the people of the state in the form of higher electric rates and which may result in the possible inability of the electric suppliers to meet the needs and desires of the people of the state for economical and reliable electric service.... The legislature therefore declares that it is the **purpose of this article to provide a single forum for the expeditious resolution of all matters concerning the location of electric generating plants and transmission lines in a single proceeding** to which access will be open to interested and affected individuals, groups, county and municipal governments and other public bodies to enable them to participate in these decisions.

Ariz. Laws 1971, ch. 67, § 1 (emphasis added). The Act prohibits construction of power plants or transmission lines by a utility (*i.e.*, a "person engaged in the generation or transmission of electric energy") until it has received a Certificate from the Siting Committee "affirmed and approved by an order of the commission." A.R.S. §§ 40-360(11), 40-360.07(A). After an application is filed, the Siting Committee, composed of the attorney general, directors of environmental quality, water resources, and the energy office of the department of commerce, the Commission chairman, and six Commission appointees, must notice a hearing within ten days, conduct a hearing within 70 days, and issue or deny the Certificate within 180 days. A.R.S. § 40-360.04(A), (D). The Siting Committee must consider specific factors, including fish, wildlife, and plant life; scenic, historic, and archeological sites; estimated cost; and protection of rare and

endangered species. A.R.S. § 40-360.06.

The Commission must affirm the Siting Committee's order within 60 days of its issuance unless within 15 days a party requests the Commission to review the Siting Committee's decision. A.R.S. § 40-360.07(A). The Commission must complete its review within 60 days from the date the notice is filed. A.R.S. § 40-360.07(B). If either the Siting Committee or the Commission fails to act within the statutory time limits, the applicant may immediately proceed with the construction of the planned facilities at the proposed site. A.R.S. § 40-360.08(B).

Upon timely request for review, the Commission must "balance, in the broad public interest, the need for an adequate, economical and reliable supply of electric power with the desire to minimize the effect thereof on the environment and ecology of this state." A.R.S. § 40-360.07(B). From 1971 to 1996, however, the Commission could only "confirm or modify any certificate granted by the committee, or in the event the committee refused to grant a certificate, the commission may issue a certificate to the applicant." A.R.S. § 40-360.07(B) (1996). In 1996 the statute was amended to allow the Commission also to "deny" a Certificate issued by the Siting Committee. A.R.S. § 40-360.07(B) (Supp. 2000).

In 1998 the legislature established as state public policy "a competitive market shall exist in the sale of electric generation service" and "the most effective manner of establishing just and reasonable rates for electricity is to permit electric generation service prices to be established in a competitive market." A.R.S. § 40-202 (B), (D). As a result, since 1999, non-PSC independent power producers have entered the competitive wholesale market and are included in the statutory definition of "utility" in the Act. Thus, the constitutionality of a legislative grant of power to the Commission to veto or modify Certificates issued by the Siting Committee, as applied to non-PSCs, arises for the first time in more than 100 cases in over 30 years because of Arizona's movement toward wholesale electric

competition. See *Arizona Pub. Serv. Co. v. Arizona Corp. Comm'n*, 189 Ariz. 192, 194, 939 P.2d 1345, 1347 (App. 1997) (1996 Commission rules adopted for transition from non-competitive to competitive electric market).¹

C. Vetoing Plant and Line Siting by Non-PSCs Is Not the Subject Matter of the Commission's Constitutional Power over PSCs.

Of the Commission's Article 15 powers, only its power to prescribe PSC classifications and rates arguably bears any relationship to § 40-360.07(B)'s purported delegation of authority to deny a Certificate issued to a non-PSC by the Siting Committee. Article 15, § 2 defines PSCs as including non-municipal corporations "engaged in furnishing gas, oil, or electricity for light, fuel, or power." Section 3 authorizes the Commission to prescribe classifications to be used and rates and charges to be made and collected by PSCs, rules governing PSCs, and health and safety regulations for PSCs. From this the trial court concluded, "Siting electric power plants and transmission lines is related to and certainly is not wholly alien to the Commission's constitutional powers over electric service in Arizona," and "Authority over the siting of new power plants is a matter of the same class as the regulation of electricity service." (Order at 5, 6.)

This reasoning ignores the fact that the Commission's *only* constitutional power related to electricity is supposed to protect consumers from overreaching PSCs with government-granted monopolies. Where the constitution requires the Commission to ascertain the fair value of a PSC's property for the purposes of setting the PSC's rates, power to disallow unnecessary capital expenses and thereby control rate increases is precisely the subject matter of the Commission's power over PSCs. Where the legislature has established as state public policy that

¹ The Court is not free to declare all of a statute unconstitutional if constitutional portions can be separated. *State Comp. Fund v. Symington*, 174 Ariz. 188, 195, 848 P.2d 273, 280 (1983). Only application of the words "deny or modify" in § 40-360.07(B) to non-PSCs need be declared unconstitutional. (Pet. for Special Action at 31-33.)

“the most effective manner of establishing just and reasonable rates for electricity is to permit electric generation service prices to be established in a competitive market,” preventing an independent power producer from risking private investment capital to stimulate a competitive electric generation market is directly contrary to and definitely *not* the subject matter, or of the same class, as the Commission’s § 3 power. See Ariz. Const. Art. 15, §§ 3, 14; *U.S. West Communications, Inc. v. Arizona Corp. Comm’n*, 198 Ariz. 208, 216-17, ¶ 25, 8 P.3d 396, 404-05 (App. 2000) (although framers may not have envisioned competitive market when they drafted Article 15, Commission must comply with constitutional fair value determination requirement until amended).

III. EVEN AS A DELEGATION OF STATE POLICE POWER, THE LEGISLATURE MAY NOT GRANT THE COMMISSION POWER TO VETO PLANT AND LINE SITING BY NON-PSCS BASED ON A DETERMINATION OF NEED FOR ELECTRIC POWER WITHOUT TEMPORAL OR GEOGRAPHIC CRITERIA.

The trial court not only concluded that delegation of power to veto plant and line siting by non-PSCs is permissible under Article 15, § 6’s express grant of authority to enlarge the Commission’s powers, it also found it to be a constitutionally permissible delegation of the state’s police power over “utilities,” including non-PSCs, independent from an express grant of authority in the constitution. (Order at 6, 10.) Under the trial court’s reasoning, the legislature could delegate to the Commission anything within the state’s police power over non-PSCs, thus rendering Article 15, § 6’s limited grant of enlargement authority virtually meaningless.

The trial court relied on *Wylie v. Phoenix Assurance Co.*, 42 Ariz. 133, 138-39, 22 P.2d 845 (1933), alone as a basis for justifying delegation to the Commission of power over non-PSCs pursuant to the state’s police power. (Order at 6 n.36.) *Wylie* rejected the contention that Article 15, § 6 authorized the

legislature to delegate to the Commission power to change the terms of the standard fire insurance policy adopted in statute, stating that § 6 authority is limited to enlarging and extending the Commission's powers and duties over PSCs, "powers formerly exercised by the Legislature, such as fixing rates and charges for services, forms of contracts, sanitary conditions, etc." 42 Ariz. at 139, 22 P.2d at 847. However, *Wylie* did not decide, and barely mentioned, whether the Commission's power to regulate the insurance business "receives its sanction under the police power of the state." *Id.* at 138-39, 22 P.2d at 847. Without further authority, the trial court stated, "Although the Court in *Wylie* struck down the Commission's action because it was deemed to be legislative, this Court reads *Wylie* to recognize Commission regulation granted pursuant to the police power of the state." (Order at 6.)

Wylie held that the legislature was prohibited from delegating its lawmaking authority to the Commission, a separate branch of government, because the delegation permitted the Commission to legislate a standard insurance form with entirely different terms and conditions than those previously prescribed by the legislature. 42 Ariz. at 139-40, 22 P.2d at 847. *Wylie* expressly held that the legislature may not delegate functions requiring legislative discretion. *Id.*; see *State v. Marana Plantations*, 75 Ariz. 111, 114, 252 P.2d 87, 89 (1953) (statute giving unlimited regulatory power to commission with no prescribed restraints offends constitution as delegation of legislative power); *Hernandez v. Frohmiller*, 68 Ariz. 242, 254, 204 P.2d 854, 862 (1949) (proper delegation must define discretion with sufficient clarity to enable agency to know its legal bounds).

Even if *Wylie* had held that the legislature may delegate a new power to the Commission "pursuant to the police power of the state," this delegation would violate the constitutional separation of powers as an invalid delegation of legislative discretion. A.R.S. § 40-360.07(B) purports to authorize the

Commission to deny a Certificate granted by the Siting Committee if the Commission complies with § 40-360.06's requirements imposed on the Siting Committee and "balance[s], in the broad public interest, the need for an adequate, economical and reliable supply of electric power with the desire to minimize the effect thereof on the environment and ecology of this state." The legislature previously stated that "there is at present and will continue to be a growing need for electric service which will require the construction of major new facilities," Ariz. Laws 1971, ch. 67, § 1, but in its balancing requirement, the legislature provided no temporal or geographic criteria for assessing the degree of "need for an adequate, economical and reliable supply of electric power." Should the Commission consider supply and demand within the state, a particular region of the state, region of the country, or outside of the country? Should the Commission consider current supply and demand or supply and demand projections for the next five years, ten years, or twenty years? Is a greater supply of wholesale electric power needed to maintain a competitive market and economical prices? Are more or newer transmission lines needed to provide an adequate and reliable supply of power as lines across the country are becoming outdated? The resolution of questions such as these requires an exercise of discretion.

The Commission's authority to deny Toltec's Certificates cannot rest on legislative delegation of state police power because, as to non-PSCs, the unchanneled discretion granted to the Commission under § 40-360.07(B) would violate the constitutional separation of powers.

IV. WHERE A.R.S. § 40-360.07(A) REQUIRES THE COMMISSION TO APPROVE AND AFFIRM A CERTIFICATE ISSUED BY THE SITING COMMITTEE EXCEPT WHEN A PARTY TIMELY REQUESTS THE COMMISSION TO REVIEW THE SITING COMMITTEE'S DECISION, AND § 40-360.07(B) LIMITS REVIEW TO THE GROUNDS STATED IN THE WRITTEN REQUEST, IF NO ONE FILES A TIMELY REQUEST FOR REVIEW, THE COMMISSION DOES NOT HAVE AUTHORITY TO REVIEW AND DENY A CERTIFICATE ISSUED BY THE SITING COMMITTEE.

The general principle that the Court must interpret a statute by looking first to its words and giving them their ordinary meaning, *Mail Boxes v. Indus. Comm'n*, 181 Ariz. 119, 124, 888 P.2d 777, 779 (1995), holds even more true here where the Court must strictly construe the Commission's authority. *Commercial Life Ins.*, 64 Ariz. at 139, 166 P.2d at 949. Even if Commission denial of Certificates granted by the Siting Committee to non-PSCs is otherwise constitutional, the plain words of § 40-360.07(A) require the Commission as a ministerial duty to approve and affirm Siting Committee decisions for which no party submitted a timely written request for review:

No utility may construct a plant or transmission line within this state until it has received a certificate of environmental compatibility from the committee with respect to the proposed site, **affirmed and approved by an order of the commission which shall be issued not less than thirty days nor more than sixty days after the certificate is issued by the committee, except that within fifteen days after the committee has rendered its written decision any party to a certification proceeding may request a review of the committee's decision by the commission.**

(Emphasis added.) Further, § 40-360.07(B) limits review to the grounds stated in the written request. Moreover, the Commission generally lacks jurisdiction to enter an order when it has failed to follow statutory procedural requirements. *Southern Pac. Transp. Co. v. Arizona Corp. Comm'n*, 173 Ariz. 630, 633, 845 P.2d 1125, 1128 (App. 1992).

Although no one requested review of Toltec's transmission lines Certificate, the trial court reasoned that requiring the Commission's approval under

§ 40-360.07(A) necessarily invests the Commission with discretion to veto a Certificate even without request for review because requiring it to “automatically approve” every Siting Committee decision would render its role meaningless. (Order at 9.) But the Commission is not required to approve *every* Siting Committee decision—only decisions granting Certificates that are not timely appealed and those granting Certificates to non-PSCs—a result consistent with the Act’s directive for prompt and definitive action. Rather than find an implied power, the trial court was required to strictly construe the Commission’s statutory authority as limited to a ministerial act of approval in cases where the Siting Committee has issued a Certificate and no party has requested review of the Siting Committee’s decision.

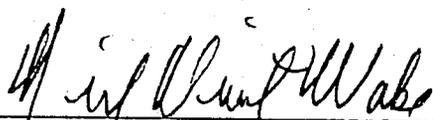
CONCLUSION

The Court should grant review of these issues of statewide importance, which are likely to recur, reverse the trial court’s June 25, 2003 Order, and direct entry of summary judgment in favor of Toltec.

Respectfully submitted,

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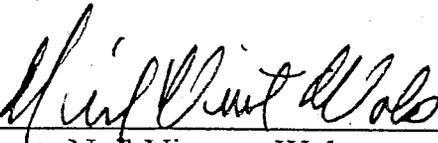
CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2003, I caused a copy of the foregoing Petition for Review to be served by hand delivery on each of the following:

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Neil Vincent Wake

FILED

AUG 21 2003

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PHILIP G. URRY, CLERK
By *[Signature]*

TOLTEC POWER STATION, L.L.C., a)
Delaware limited liability company,)

1 CA-SA 03-0166

Petitioner,)

DEPARTMENT C

v.)

MARICOPA County

THE HONORABLE MICHAEL D. JONES, Judge)
of the SUPERIOR COURT OF THE STATE OF)
ARIZONA, in and for the County of)
MARICOPA,)

Superior Court

No. CV02-00678

Respondent Judge,)

O R D E R

ARIZONA CORPORATION COMMISSION,)

Real Party in Interest.)

_____)

The court (Presiding Judge Philip Hall and Judges Daniel A. Barker and Donn Kessler) has considered the petition for special action.

IT IS ORDERED that the Court of Appeals, in the exercise of its discretion, declines to accept jurisdiction of this special action.

DATED this 21st day of August, 2003.

[Signature]
PHILIP HALL, Presiding Judge

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August 21, 2003

MARICOPA COUNTY
Superior Court
CV02-006785

A true copy of the foregoing
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1 CA-SA 03-0166

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Respondent Judge

Philip G. Urry , Clerk
By



Deputy Clerk

SUPREME COURT OF ARIZONA

TOLTEC POWER STATION, L.L.C., a
Delaware limited liability company,

Petitioner,

v.

HONORABLE MICHAEL D. JONES, JUDGE
OF THE SUPERIOR COURT OF THE STATE
OF ARIZONA, in and for the County of
Maricopa,

Respondent Judge,

ARIZONA CORPORATION COMMISSION,

Real Party in Interest.

Arizona Supreme Court
No. CV-03-0322-PR

Court of Appeals
Division One
No. 1 CA-SA-03-0166

Maricopa County
Superior Court
No. CV2002-006785

**ARIZONA CORPORATION COMMISSION'S
RESPONSE TO PETITION FOR REVIEW**

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ISSUES

1. In Menderson v. City of Phoenix, 51 Ariz. 280, 285, 76 P.2d 321, 323 (1938), this Court concluded that the Legislature may enlarge the powers of the Arizona Corporation Commission ("Commission") "over subject matter of which it has already been given jurisdiction, and other matters of the same class" In the Siting Act, A.R.S. §§ 40-360 to -360.13, the Legislature has delegated to the Commission, which has constitutional authority to regulate public service corporations,¹ the power to grant or deny Certificates of Environmental Compatibility ("CECs") for the siting of power plants and transmission lines. Is the subject matter of the Siting Act related to the Commission's jurisdiction to regulate public service corporations?

2. The Legislature may delegate authority to another agency of government as long as there are general standards to guide the agency in the exercise of its delegated power. In deciding whether to grant a CEC, A.R.S. § 40-360.07 requires the Commission to balance, in the broad public interest, the need for an adequate, economical, and reliable supply of electric power with the desire to minimize the effects thereof on the environment and ecology of the state. Does the balancing test contained in A.R.S. § 40-360.07 provide an adequate standard?

3. A.R.S. § 40-360.07(A) states that a utility may not construct a power plant or transmission line until it has a CEC "affirmed and approved" by an order of the Commission. Does the statute require the

¹ Article XV, § 2 of the Arizona Constitution defines "public service corporations" as "[a]ll corporations other than municipal engaged in furnishing gas, oil, or electricity for light, fuel, or power"

Commission to "affirm and approve" every CEC, or does it allow the Commission to exercise discretion?

STATEMENT OF FACTS

This litigation concerns an appeal of two Commission orders that deny Toltec Power Station, L.L.C. ("Toltec") the authority to construct a power plant and a related transmission line adjacent to the Ironwood National Monument and near Pichaco Peak State Park. (Pet'r SA App. 18). The Commission denied Toltec's applications because it concluded that the need for power failed to outweigh the environmental impacts of the proposed facilities. (Pet'r SA App. 14).

Toltec filed a complaint in Superior Court to appeal the Commission's orders. On June 25, 2003, the trial court issued a minute entry denying Toltec's motion for summary judgment. On August 21, 2003, the Court of Appeals declined to accept special action jurisdiction to review the Superior Court's Order. (08/21/03 Order (attached as Ex. A)). Toltec now seeks review in this Court.

REASONS TOLTEC'S PETITION SHOULD NOT BE GRANTED

I. **The Court of Appeals appropriately denied Toltec's request for special action review.**

A. **Granting special action relief will not end this litigation.**

If this Court overturns the denial of summary judgment, the Superior Court will still have to consider whether Toltec is a public service corporation. Toltec concedes that the Siting Act applies to public service corporations. (Toltec Pet. at 2). Although Toltec contends that it is not a public service corporation, the Commission disagrees. (Decl. of Tom Wray). The Superior Court has so far not

addressed this issue because “the parties rely on disputed facts,” making the issue inappropriate for summary judgment. (6125103 Minute Entry (“ME”) at 8). Accordingly, even if Toltec prevails on the merits before this Court, this case will still be subject to additional Superior Court proceedings.

In addition, if Toltec were to prevail on the merits, the likely relief would be a remand to the Commission. Accordingly, even if Toltec were successful, it would still have to pursue additional proceedings before the Commission. Toltec’s claim that special action relief will entirely dispose of this lawsuit is incorrect, and this Court should therefore deny Toltec’s Petition for Review.

B. Special action relief of a trial court’s denial of summary judgment is particularly inappropriate.

In this case, Toltec’s petition challenges the trial court’s denial of a motion for summary judgment. Granting special action review of denials of summary judgment “frustrates the expeditious resolution of claims, unnecessarily increases both appellate court caseload and interference with trial judges, harasses litigants with prolonged and costly appeals, and provides piecemeal review.” City of Phoenix v. Yarnell & Smith, 184 Ariz. 310, 315, 909 P.2d 377, 382 (1995). Because this special action will not end this litigation no matter how the Court rules, granting special action review in this case will be a waste of judicial resources.

Toltec complains that it will be required to pursue its litigation through a trial and regular appellate procedures if the Court refuses to grant special

action relief. Nearly every petitioner can make these same arguments. Special action jurisdiction is not available merely because traditional appellate review is more lengthy or more costly. Glenda v. Super. Ct., 103 Ariz. 240, 242, 439 P.2d 811, 813 (1968).

The Court of Appeals properly denied Toltec's request for special action jurisdiction, and this Court should similarly deny Toltec's Petition for Review.

II. **The Siting Act is consistent with the Arizona Constitution.**

A. **The Legislature may expand the Commission's powers pursuant to Article XV, Section 6 of the Arizona Constitution.**

In Arizona, Article XV of the Constitution establishes the Commission and grants it jurisdiction over public service corporations, creating, in effect, a fourth branch of government. State v. Tucson Gas, Elec. Light & Power Co., 15 Ariz. 294, 305, 138 P. 781, 786 (1914). Article XV gives the Commission certain power that the Legislature would otherwise hold. The Legislature retains the residual police powers. Elfbrandt v. Russell, 94 Ariz. 1, 9, 381 P.2d 554, 559 (1963); Adams v. Bolin, 74 Ariz. 269, 283, 247 P.2d 617, 626 (1952). Article XV, § 6 specifically empowers the Legislature to delegate authority to the Commission, thereby enlarging and extending the Commission's powers and duties. Ariz. Const. art. XV, § 6.

Toltec argues that the Legislature may expand the Commission's powers only with regard to those powers already granted to the Commission by the Constitution. (Toltec's Pet. at 3). But this construction would render Section 6

meaningless, as it would limit the Legislature to granting the Commission powers that it already has. Instead, § 6 empowers the Legislature to grant the Commission power that it otherwise would not have. In other words, § 6 enables the Legislature to delegate authority from its residual police power to the Commission. The Siting Act is an appropriate manifestation of the Legislature's Article XV, § 6 authority.

B. Siting electric power plants and transmission lines is related to the Commission's constitutional jurisdiction.

According to Toltec, Arizona case law has limited the Legislature's Article XV, Section 6 authority. (Toltec's Pet. at 3). Specifically, Toltec contends that Section 6 prevents the Legislature from enacting statutes for the Commission to administer unless those statutes apply only to public service corporations. Toltec's arguments are based upon a misreading of Rural/Metro Corp. v. Arizona Corp. Comm'n, 129 Ariz. 116, 629 P.2d 83 (1981), which holds that the legislature may not "give 'public service corporation' designation to corporations not listed in Article XV, Section 2." 129 Ariz. at 118, 629 P.2d at 85. Rural/Metro established that the legislature cannot subject non-PSCs to Article XV's regulatory jurisdiction by changing a constitutional definition, an act that would essentially amend the Constitution. Rural/Metro, however, does not establish that the Legislature cannot delegate aspects of its police power to the Commission.

The Siting Act applies to "utilities," not "public service corporations." For purposes of the statutory siting scheme, "utility" means any person engaged in the generation and transmission of electric energy, and clearly includes Toltec. See A.R.S. § 40-360.11. Toltec argues that this statutory definition is

unconstitutional because it enlarges the Commission's constitutional powers over non-public service corporations. But although Rural/Metro arguably prevents the legislature from expanding the constitutional definition of "public service corporation," it does not prevent it from delegating to the Commission its police power over "utilities," a term that is expressly defined in the Siting Act. Toltec is a "utility" as defined by these statutes and is therefore subject to the Commission's siting authority.

Toltec argues that the Superior Court mistakenly construed Clean Elections Comm'n v. Myers, 196 Ariz. 516, 1 P.3d 706 (2000), as an expansion of Article XV, Section 6. (Toltec's Pet. at 2). The Superior Court stated that, under Myers, a statute enacted under an express grant of power is valid if it "is related to and does not impair" an agency's function. (ME at 5 (citing Myers, 196 Ariz. at 520 n. 1, 1 P.3d at 710 n. 1 (2000))). This standard is not significantly different from that adopted by the Menderson Court: the Legislature "may enlarge or extend the powers and duties of the Commission over subject matter of which it has already been given jurisdiction and other matters of the same class, not expressly or impliedly exempt by other provisions of the Constitution." Menderson, 51 Ariz. at 285, 76 P.2d at 323 (emphasis added). Even if this Court were inclined to see a difference between the two standards, it is clear that the Superior Court applied the Menderson standard: in its concluding paragraphs, the Superior Court found that "[a]uthority over the siting of new power plants is a matter of the same class as the regulation of electricity service and . . . is not expressly or impliedly exempt by any other provision of the constitution." (ME at

6 (emphasis added)). Whatever the applicable standard, it cannot be reasonably argued that siting electric power plants and transmission lines is unrelated to the Commission's constitutional powers over electric service.

III. Pursuant to its police power, the Legislature may grant the Commission the authority to site power plants and transmission lines.

Toltec argues that A.R.S. § 40-360.07(B) is an unconstitutional delegation of legislative discretion. (Toltec's Pet. at 9). A.R.S. § 40-360.07(B) creates a balancing test:

In arriving at its decision, the commission shall comply with the provisions of A.R.S. § 40-360.06 and shall balance, in the broad public interest, the need for an adequate, economical and reliable supply of electric power with the desire to minimize the effect thereof on the environment and ecology of this state.

Toltec argues that the Legislature, in creating this balancing test, "provided no temporal or geographic criteria" for determining the degree of "need" for the power, thereby delegating "unchanneled discretion" to the Commission. (Toltec's Pet. at 10).

A grant of unlimited power to an agency may offend the constitution, but as long as there are standards to guide the agency in the exercise of its power, the legislative delegation is constitutional. 3613 Limited v. Dept. of Liquor Licenses and Control, 194 Ariz. 178, 183, 978 P.2d 1282, 1287 (App. 1999); State v. Marana Plantations, Inc., 75 Ariz. 111, 114, 252 P.2d 87, 89 (1953). Standards that are created by the legislature may be broad and in general terms. Ethridge v. Arizona State Bd. of Nursing, 165 Ariz. 97, 104, 796 P.2d 899, 907 (App. 1989);

State v. Arizona Mines Supply Co., 107 Ariz. 199, 205, 484 P.2d 619, 625 (1971).

The legislature need not supply administrative officials with a specific formula when flexibility and adaptability are necessary. State v. Birmingham, 95 Ariz. 310, 313, 390 P.2d 103, 105 (1964); Ethridge, 165 Ariz. at 104-05, 796 P.2d at 906-07; 3613 Limited, 194 Ariz. at 183, 978 P.2d at 1287. Legislative guidelines as broad as instructing an agency to regulate in the "public interest" have been upheld as valid delegations of legislative discretion. National Broadcasting Co. v. United States, 319 U.S. 190, 225-26 (1943); New York Central Securities Corp. v. United States, 287 U.S. 12, 24-25 (1932).

When the legislative delegation concerns discretion in applying the state's police power, the statutory guidelines are expected to be broad to allow flexibility. People v. Peterson, 734 P.2d 118, 121 (Colo. 1987) ("Where the power to be exercised is a police power, it is impracticable to fix rigid standards."); Matter of Dept. of Natural Resources and Environmental Control, 401 A.2d 93, 95 (Del. Super. 1978) ("Where the discretion to be applied at the administrative level involves the exercise of the police power, . . . the delegation of legislative authority may be cast in general terms."); City of Minneapolis v. Krebs, 226 N.W.2d 617, 620 (Minn. 1975) ("Where the act relates to the administration of a police regulation, . . . it is not essential that a specific prescribed standard be expressly stated in the legislation."). In areas dealing with complex economic or social problems, it is even more appropriate for the legislature to have flexibility in delegating its authority to an agency. Beverly-Enterprises-Florida, Inc. v. McVey,

739 So.2d 646, 649 (Fla. App. 1999); Swisher v. Brown, 402 P.2d 621, 627 (Colo. 1965).

In State v. Wacker, 86 Ariz. 247, 249, 344 P.2d 1004-1006 (1959), the legislature had enacted a statute empowering an agency to enact regulations as “are necessary to prevent the introduction of a crop pest or disease” The Court recognized that the term “necessary” is not subject to precise definition. However, the Court upheld the statute, concluding that the circumstances for control, suppression, and eradication of crop pests and diseases obviously varies from disease to disease, pest to pest, and locality to locality. Id. at 251, 344 P.2d at 1007. In that case, it was “plainly impossible for the legislature to designate a precise rule of conduct in advance of administrative determination.” Id. at 251, 344 P.2d at 1007.

The Wacker case provides a useful comparison to the present case. The area of utility regulation in general is highly complex, and individual plant or transmission line siting applications are fact specific. The law does not require the Legislature to prescribe a formula that will predetermine the outcome in these matters. The balancing test created by A.R.S. § 40-360.07(B) enables the Commission, which has special knowledge regarding the electric industry, to examine complex facts and competing interests and to then exercise discretion. This sort of standard is particularly appropriate in the area of plant and transmission line siting, and is a proper delegation of legislative authority.²

² In a footnote, Toltec suggests that the allegedly unconstitutional portions of A.R.S. § 40-360.07.B should be severed. (Toltec's Pet. at 7 n. 1). But Commission review is an important and interconnected feature of the Siting Act;

IV. The authority to grant a CEC of necessity includes the authority to deny a CEC.

Toltec argues that the Commission lacks the statutory jurisdiction to deny a CEC if no party files a request for review pursuant to A.R.S. § 40-360.07(A). In this case, there were no requests for review filed for Toltec's transmission line. Toltec claims that, in the absence of a request for review, the Commission must approve the Siting Committee's decision.

This argument runs contrary to common sense. The Commission has the power to evaluate the findings of the Siting Committee even when there has not been a request for review. A.R.S. § 40-360.07(A) provides that a utility may not construct its proposed plant until it has a CEC approved or affirmed by the Commission. "Affirm" has a different meaning than "approve." "Affirm" means to "ratify, make firm, confirm, establish, reassert." Black's Law Dictionary 81 (Rev. 4th ed. 1968). In other words, "affirm" carries with it an element of discretion that is missing from "approve."

To interpret the statute as requiring the Commission to automatically approve every Siting Committee decision would render the Commission's role meaningless. As the Superior Court correctly concluded, "[i]f the Commission is required by statute to automatically approve every Siting Committee decision, its role is meaningless and the 'approve and affirm' requirement of the statute is superfluous." (6/25/03 ME at 9). Moreover, the Commission acts through its

therefore, severance is not appropriate. See State Comp. Fund v. Symington, 174 Ariz. 188, 195, 848 P.2d 273, 280 (1993) (concluding that a statute will not be severed if the invalid and valid parts are "so intimately connected as to raise the presumption the legislature would not have enacted one without the other").

orders, which are voted on in public "open meetings." See A.R.S. § 40-102. By requiring a CEC to be granted to an applicant by "order of the Commission," the Legislature is requiring the Commission to vote on every proposed project. The outcome of this vote cannot be predetermined without running afoul of the Open Meeting Laws. See A.R.S. §§ 38-431 to -431.09.

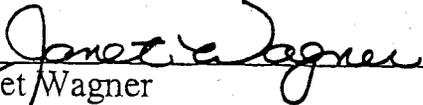
Finally, arguing that the Commission is required to automatically grant Toltec's transmission line CEC, even if Toltec's plant CEC is denied, is nonsensical. The need for the transmission line clearly evaporates once the CEC for the plant is denied. Under these circumstances, the Commission would be required to grant a CEC for a transmission line that would serve no purpose.

V. CONCLUSION

The Commission requests that this Court deny Toltec's Petition for Review. In the alternative, the Commission requests that the Court affirm the Superior Court's ruling.

RESPECTFULLY SUBMITTED this 15th day of October 2003.

ARIZONA CORPORATION COMMISSION



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CERTIFICATE OF SERVICE

I, Janet Wagner, hereby certify that on October 15, 2003, I caused the original and six copies of the foregoing Arizona Corporation Commission's Response to Petition for Review to be hand delivered for filing to:

Clerk
Arizona Supreme Court
1501 West Washington
Phoenix, Arizona 85007-3231

and that I caused two copies of the foregoing to be served by mailing via first-class mail, postage prepaid, on such date to:

Neil Vincent Wake
Linda D. Skon
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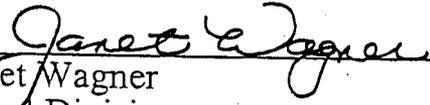
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NOËL K. DESSAINT
CLERK OF THE COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

October 29, 2003

RE: TOLTEC POWER STATION v HON. JONES/AZ CORP COM
Arizona Supreme Court No. CV-03-0322-PR
Court of Appeals Division One No. 1 CA-SA 03-0166
Maricopa County Superior Court No. CV02-006785

RECEIVED

OCT 30 2003

LEGAL DIV.
ARIZ. CORPORATION COMMISSION

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on October 28, 2003, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 29th day of October, 2003.

Noel K Dessaint, Clerk

TO:

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Munger Chadwick PLC
Hon Michael D Jones, Judge, Maricopa County Superior Court
David M Ronald; Janet F Wagner and Christopher C Kempley,
Arizona Corporation Commission, Legal Division
Timothy M Hogan, Arizona Center for Law in the Public Interest
Philip G Urry, Clerk, Court of Appeals, Division One
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MINUTES

No. 432

Arizona Supreme Court Tuesday October 28, 2003

CV-03-0322-PR TOLTEC POWER STATION v HON. JONES/AZ CORP COM
(55) *Court of Appeals Division One 1 CA-SA 03-0166*

ORDERED: Petition for Review = DENIED.