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OF COUNSEL TO  
MUNGER CHADWICK  
ATTORNEYS AT LAW

April 23, 2012

Chairman Gary Pierce  
Commissioner Bob Stump  
Commissioner Sandra L. Kennedy  
Commissioner Paul Newman  
Commissioner Brenda Burns

Arizona Corporation Commission  
DOCKETED  
APR 23 2012

DOCKETED BY [Signature]

Re: Chairman Pierce's April 20, 2012 Letter to Chairman John Foreman  
In Connection with Docket No. L-00000C-11-0400-0164  
(Siting Case No. 164)

Dear Chairman Pierce and Commissioners Stump, Kennedy, Newman and Burns:

**Introduction**

This letter is written on behalf of Scenic Santa Ritas<sup>1</sup> in response to your request in the above-referenced letter to "hear from the parties" with respect to certain questions posed in your letter. In so doing, Scenic Santa Ritas will address those questions below under appropriate topical headings and in the sequence set forth in your letter.

**Does The Commission Have Statutory Authority to Receive New Evidence in A Line Siting Case?**

The answer to this question is "yes." Despite Rosemont Copper Company's assertion to the contrary in its April 5, 2012 Application for Rehearing, there is no language in the statutory scheme set forth at A.R.S. § 40-360 et seq. which precludes the Commission from (i) conditionally confirming a Certificate of Environmental Compatibility ("CEC") and (ii) instituting a proceeding within the same docket pursuant to A.R.S. § 40-252 for the purpose of receiving additional evidence, in order that the Commission may have such additional information before it incident to reaching a final decision as to whether to confirm, deny or modify a CEC granted by the Power Plant and Transmission Line Siting Committee ("Siting

<sup>1</sup> Scenic Santa Ritas consists of Save The Scenic Santa Ritas Association, Sky Island Alliance, Center for Biological Diversity and Tucson Audubon Society.

Committee”). In that regard, the Commission has substantial latitude as to how it exercises discretion in reaching a decision pursuant to A.R.S. §40-360.07(B).

In this instance, the Commission determined that the evidentiary record developed by the Siting Committee in Siting Case No. 164 was incomplete. More specifically, in Decision No. 73074, the Commission found as follows:

“The Commission, in reaching this decision, finds that not all matters relevant and necessary to a full consideration of the Application are reflected in the record. The Committee excluded certain evidence that would have been helpful in accomplishing the balancing required by A.R.S. § 40-360.07(B).

Although Applicant Tucson Electric Power Company (“TEP”) presented evidence about the Rosemont Mine in order to support the need for the proposed transmission line, other evidence related to the Rosemont Mine offered by other parties was excluded. We do not have jurisdiction to site the Rosemont Mine; however, evidence concerning the Rosemont Mine and its environmental impacts would provide a helpful context for our full consideration of TEP’s Application, including the environmental impacts of the proposed transmission line. Further, bearing in mind the scope of our authority under the Siting Statutes, we believe that we can give such evidence the appropriate weight in our analysis.

Other evidence concerning the environmental impacts of the proposed transmission line was not admitted because its proponent’s intervention status was revoked. This additional evidence concerned the environmental impacts of the proposed transmission line and would have been helpful in accomplishing the balancing required by A.R.S. § 40-360.07(B).” [Decision No. 73074 at page 1, line 26 – page 2, line 14] [emphasis added]

These findings and conclusions were reiterated later in Decision No. 73074 at page 3, line 20 – page 4, line 3 and page 4, lines 10-13.

The importance of the evidence excluded by the Siting Committee as it relates to the ability of the Commission to fully discharge its statutory responsibilities, and the Commission’s desire to establish a procedure for receiving such evidence, were succinctly summarized in the following excerpt from Decision No. 73074:

“The conditions set forth herein resolve matters concerning the Commission’s ability, upon the existing record, to balance the need for the proposed transmission line against its impact upon the environment and ecology of the state, and as such, serve as the findings for the matters raised.” [Decision No. 73074 at page 4, lines 21-25] [emphasis added]

In summary, the Commission does have statutory authority to receive new evidence in a line siting case when it determines that the availability of such evidence is necessary to an informed and complete discharge of the Commission’s statutory responsibilities. The question

then is the procedural means by which such evidence may be made available to the Commission. The next section of this letter address that question.

**Does the Commission Have Authority to Remand the Case Back to The Line Siting Committee To Further Develop the Record?**

The statutory scheme set forth at A.R.S. §§ 40-360 et seq. is silent upon this question. However, as noted above, the Commission has substantial latitude in the exercise of its discretion incident to discharging its responsibilities under the statute. In that regard, in the two (2) cases cited in Rosemont's April 11, 2012 Request for Rehearing, the Commission appears to have exercised that discretion so as to use the Siting Committee as a fact-finder. However, such past practice does not mean per se that the Commission is precluded from using one of its Administrative Law Judges as a fact-finder within the context of the siting statutory scheme. In fact, it is Scenic Santa Ritas' understanding that the Commission did precisely that a number of years ago in connection with the resolution of a dispute as to whether or not Tucson Electric Power Company should be authorized to construct Unit 4 of its Springerville Generating Station.

Thus, the answer to the question posed above would appear to be "yes." The corollary question in this instance is whether or not the Commission should refer Siting Case No. 164 back to the Siting Committee to hear evidence upon the environmental impact of the Rosemont Mine and additional evidence on the related transmission line. Or, should the Commission continue to entrust that responsibility to its Hearing Division, as provided for in Decision No. 73074?

Scenic Santa Ritas' prefers that the Commission continue to use its Hearing Division, which has already conducted that Procedural Conference contemplated and directed by Decision No. 73074. [See Decision No. 73074 at page 3, lines 10-12] In fact, as a result of the Procedural Conference conducted on April 19, 2012, (i) Administrative Law Judge Jane L. Rodda now has the information she needs to establish the procedural schedule contemplated by Decision No. 73074; and, (ii) TEP has already prepared a draft Public Notice document.

As a final comment on this question, whether the Commission decides to use one of its Administrative Law Judges or the Siting Committee as its fact-finder for purposes of receiving the evidence that the Commission has determined should not have been excluded by the Siting Committee during the December 12-15, 2011 hearings, it is imperative that such evidence be objectively and impartially evaluated and the results of same provided to the Commission in such a manner as to enable an informed and full discharge of the Commission's responsibilities under A.R.S. § 40-360.07(B).

**Should the Evidentiary Hearing Be Held "In The Next Month Or So"?**

Scenic Santa Ritas believes that the proper way to answer this question is to determine how much time is necessary in order to allow for full and meaningful participation in the evidentiary hearing to be conducted pursuant to Decision No. 73074. In that regard, Decision No. 73074 provides as follows:

“The Commission shall expeditiously conduct a proceeding pursuant to A.R.S. § 40-252 in order to reopen the matter and to entertain requests for intervention, including requests from prospective interveners and requests from any other party who may desire to intervene.” [Decision No. 73074 at page 2, lines 23-26] [emphasis added]

In that regard, Scenic Santa Ritas believes that the conduct of the evidentiary hearing “in the next month or so” would not provide the aforementioned “prospective intervenors” and “any other party” with adequate time to request intervention, and, if intervention is granted, prepare an evidentiary case for presentation. Moreover, there has been no credible demonstration of a need to reach a decision by Judge Rodda or the Siting Committee (as the case may be) by June 1, 2012 as Rosemont has requested. Siting Case No. 164 was needlessly hurried to a decision in November and December of 2011. That mistake should not be repeated at the Commission level.

Thus, for these reasons, the answer to the question posed above is “no.”

### Conclusion

Thank you for the opportunity to submit these preliminary comments in response to the three (3) questions posed in Chairman Pierce’s April 23, 2012 letter to Chairman Foreman. In that regard, Scenic Santa Ritas plans to have a representative in attendance at the April 25, 2012 Commission Staff Meeting.

Sincerely,

Lawrence V. Roberson, Jr.

and

Robert J. Metli,

Attorneys for Save The Scenic Santa Ritas Association, Sky Island Alliance, Center for Biological Diversity and Tucson Audubon Society

By: Lawrence V. Robertson, Jr.  
Lawrence V. Robertson, Jr.

cc: Docket Control (Original and twenty-five copies)  
Honorable Jane L. Rodda  
Chairman John Foreman  
Siting Case No. 164 Service List