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BEFORE THE ARIZONA CORPORATION COMMISSION

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

CASE NO. 138

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

STAFF'S PRE-HEARING BRIEF

Arizona Corporation Commission
DOCKETED

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16 **I. INTRODUCTION**

17 On July 17, 2014, Arizona Public Service Company ("APS" or "Company") filed an
 18 application to amend Decision No. 70850 (March 17, 2009). Decision No. 70850 approved a
 19 Certificate of Environmental Compatibility ("CEC") permitting the Company to construct a 500 /
 20 230 kV transmission line in the Northwest Valley. APS's application included a request to extend
 21 the term to construct the facilities approved under the CEC as well to make several route
 22 modifications. Following an Arizona Corporation Commission ("Commission") Staff Open
 23 Meeting, the matter was scheduled for a Procedural Conference.

24 During the Procedural Conference held on October 6, 2014, the Administrative Law Judge
 25 directed parties to address the question of what standard applies to an evidentiary hearing upon a
 26 motion under A.R.S. § 40-252 to amend or modify a previously granted Commission decision
 27 approving a transmission line CEC. Alternative standards that were suggested during the procedural
 28 conference included, "the standard that the Line Siting Committee would be required to use", the

1 “balancing test standard that the Commission is required to use when it is reviewing a Line Siting
2 Committee decision” as well as a form of “new evidence or changed circumstance” standard.

3 Commission Utilities Division Staff (“Staff”) asserts that the relevant inquiry that the
4 Commission should undertake in this proceeding is what is reasonable, necessary and convenient
5 under the circumstances.

6 **II. DISCUSSION**

7 **A. The Standard Practice of Regulation Necessitates the Use of a Flexible** 8 **Approach to Modification of Prior Orders.**

9 The continuous nature of regulation requires adaptability to meet the varying issues that arise
10 in the course of the Commission’s oversight of utilities. Courts have recognized as much, noting that
11 administrative agencies wield authority that is judicial, executive, and legislative in nature.¹ When it
12 is issuing orders to prescribe future conduct, as in issuing a certificate upon which future
13 construction of transmission line facilities will be authorized, the Commission is exercising its
14 legislative authority.² The case law confirms that agencies wielding legislative power may further
15 legislate changes to previously issued legislative orders.³

16 Likewise, courts recognize regulatory agencies must have the ability to gauge the ongoing
17 wisdom of already issued orders and have the ability to issue new orders that could diverge from
18 what the agency ordered in the past.⁴ Thus a regulatory agency is not curtailed in its authority to
19 adjust previously issued permits and authorizations to resolve issues that were unforeseen at the time
20 of the order’s issuance.

21 **1. The Commission Should Use a Reasonable and Necessary Approach**

22 Staff would initially observe that CEC’s are frequently modified due to circumstances that
23 only fully come to light after the approval of the CEC. In such cases, the CEC holder files a request
24 to modify the Commission decision approving the CEC under A.R.S. § 40-252 to accommodate the

25
26 ¹ *Arizona Corporation Commission v. Superior Court of the State of Arizona*, 107 Ariz. 24, 26-27, 480 P.2d 988,
990-91 (1971); *Southwestern Bel Tel. Co. v. Ark. Public Svc. Comm’n*, 267 Ark 550, 556, 593 S.W.2d 434, 445
(Ark. 1980).

27 ² *Arizona Corporation Commission v. Superior Court of the State of Arizona*, 107 Ariz. at 26-27, 480 P.2d at
990-91.

28 ³ *Id.*

⁴ *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 863, 104 S.Ct. 2778, 2792 (1984)

1 changed circumstance.

2 A.R.S. § 40-252 does not explicitly provide a standard to govern proceedings initiated to
3 amend a prior Commission decision. The plain language of A.R.S. § 40-252 provides that

4 [t]he Commission may *at any time*, upon notice to the corporation affected, and after
5 an opportunity to be heard as upon a complaint, *rescind, alter or amend any order or*
6 *decision* made by it.

7 A.R.S. § 40-252 therefore provides the Commission with broad authority to change its prior
8 decisions so long as the statute's procedural requirements are met. *See* A.R.S. §§ 40-246, -252
(providing for notice and a hearing).

9 A.R.S. § 40-252 does not state a specific standard. The default evidentiary standard in civil
10 proceedings is the preponderance of the evidence standard.⁵ Based upon the discussion of the
11 applicable standard in the procedural conference, Staff infers that the question is what should be the
12 elements of the proceeding. Staff would suggest that the standard in this case is what is reasonable
13 and necessary under the circumstances to determine whether to modify an existing Commission
14 decision. Pursuant to A.R.S. §40-202(A), the Commission has the authority to "do all things,
15 whether specifically designated in this title or in addition thereto, necessary and convenient in the
16 exercise of that power and jurisdiction."

17 Staff believes a reasonable and necessary inquiry would be appropriate in this case.
18 Modifications to prior Commission orders on the basis of a flexible standard are appropriate and
19 resonate with case law discussing the bounds of regulatory decision making. As courts have stated,

20 [a]n agency must at all times be free to take such steps as may be proper in the
21 circumstances irrespective of its past decisions. Even when conditions remain the
22 same, the administrative understanding of those conditions may change, and the
23 agency must be free to act. So long as the Commission enters sufficient findings to
show that its action is not arbitrary and capricious, the Commission can alter its
decisions.

24 *Citizens Utils. Co. v. Idaho Pub. Utils. Comm'n*, 739 P.2d 360, 362 (1987). *See also Chevron v.*
25 *Natural Resources Defense Council*, 467 U.S. 837, 863, 104 S.Ct. 2778, 2792 (1984) (An agency
26 must have the flexibility to consider the wisdom of its decisions on a continuing basis).

27 _____
28 ⁵ Unless otherwise provided, the default evidentiary standard in civil proceedings is the preponderance of the
evidence standard. *Rasmussen v. Fleming*, 154 Ariz. 207, 224, 741 P.2d 674, 691 (1987); *Aileen H. Char Life*
Interest v. Maricopa Cnty, 208 Ariz. 286, 291, 93 P.3d 486, 491 (2004).

1 Under a reasonable and necessary standard, the Commission would consider the
2 appropriateness of the requested modifications from what was already approved by the Commission
3 decision. The type of evidence that may be relevant to demonstrating the necessity and
4 reasonableness of a modification to a CEC may well include evidence similar to what would be used
5 to demonstrate the appropriateness of issuing a CEC in the first instance. For example, because the
6 CEC decision involved determining the environmental impacts of the transmission line and
7 balancing them against the need for the new transmission, evidence regarding the modifications
8 could include evidence as to how the modifications affect the environmental impacts as well as the
9 need for the project. APS would still have the burden to supply facts sufficient to demonstrate that a
10 modification would be reasonable and necessary.

11 **2. The Proceeding Should Not Replicate the Line Siting Committee**
12 **Evaluation, Nor the Commission's Balancing Evaluation as for a New**
13 **CEC Application**

14 Even though evidence similar to what was considered in the original proceeding before the
15 Line Siting Committee may be relevant to determining the appropriateness of granting the
16 modifications requested here, Staff does not believe that a full "do over" is necessary. During the
17 procedural conference, two of the alternative standards that were discussed hearkened back to the
18 evaluations undertaken for an original CEC application. One suggested approach would be to
19 approach the current modification proceeding using the factor analysis employed by the Line Siting
20 Committee that is articulated under A.R.S. § 40-360.06. The other suggestion was that the current
21 proceeding could be in the nature of the inquiry the Commission employs when it performs its
22 statutory balancing of the environmental factors examined pursuant to A.R.S. § 40-360.06 against
23 the need for adequate, reliable and economic electric service as required under A.R.S. § 40-360.07.
24 Staff believes that the proper analysis is the standard applicable under A.R.S. § 40-252 which, here,
25 would be what is reasonable and necessary.

26 Staff agrees that similar evidence to what was used to satisfy the elements of the analysis
27 performed under both approaches⁶ may be relevant in a proceeding to consider modifying a

28 ⁶ Staff would observe that the Commission's balancing approach encompasses both the ambit of the Siting Committee's analysis as well as the need analysis since a consideration of the Siting Committee's analysis is embedded within the Commission's balancing analysis.

1 transmission line CEC. However, Staff does not believe that it would be appropriate or necessary to
2 replicate the full analysis performed by either the Siting Committee or the Commission reviewing a
3 Siting Committee CEC as if this were a new CEC application.

4 When the Commission issued Decision No. 70850 and the decision went unchallenged, the
5 decision became final pursuant to the provisions of A.R.S. § 40-252, and -360.07(C). It also became
6 more than a Siting Committee CEC by taking on the characteristic of being the Commission's
7 decision. As a final Commission decision no longer reviewable by appeal, it was only subject to
8 modification pursuant to A.R.S. § 40-252. While a review of the reasonableness and necessity of
9 granting the proposed modifications may involve examining evidence that could be used to
10 demonstrate environmental impacts and the need for adequate, reliable and economic transmission
11 facilities, it does not necessarily require the Commission to evaluate the issues anew. Rather, what
12 would be appropriate would be to examine the environmental and need impacts of the proposed
13 modifications.

14 The reason is that A.R.S. § 40-252 does not require a "do over".⁷ Such a result would be
15 incongruous with having the authority to modify a prior decision when the consequence is effectively
16 to impose the same burden to parties as a new application to substitute for the prior decision. Such
17 an interpretation would limit A.R.S. § 40-252 to the point of being superfluous.

18 Such an outcome would also be inconsistent with case law discussing the nature of a
19 regulatory agency's blend of executive, judicial and legislative power. When an agency decision
20 addresses prospective requirements and authorizations, it is exercising legislative authority whereas
21 when an agency is unravelling conduct that has already occurred under requirements that already
22 existed, the agency is wielding judicial authority.

23 A judicial inquiry investigates, declares, and enforces liabilities as they stand on
24 present or past facts and under laws supposed already to exist. That is its purpose and
25 end. Legislation, on the other hand, looks to the future and changes existing
26 conditions by making a new rule, to be applied thereafter to all or some part of those
27 subject to its power.

28 ⁷ Although Staff believes A.R.S. § 40-252 does not mandate a full replication of a process as if it were an original application, Staff acknowledges that A.R.S. § 40-252 has the inherent breadth to permit a full rehearing and such has occurred in instances where a process has been found deficient. *See, e.g.*, Decision No. 71957 (November 1, 2010) (approving CEC 151 following a full evidentiary hearing by the Commission that was reopened to permit intervention of parties who were not permitted to intervene in the original application).

1 *Arizona Corporation Commission v. Superior Court of the State of Arizona*, 107 Ariz. 24, 26-27, 480
2 P.2d 988, 990-991 (1971) quoting opinion of Justice Holmes in *Prentis v. Atlantic Coast Line Co.*,
3 211 U.S. 210, 226-27, 29 S.Ct. 67, 69-70 (US 1908) describing the differentiation of regulatory
4 authority.

5 The significance of the distinction is that courts have recognized that an administrative
6 agency that is exercising legislative rather than judicial power has flexibility when revisiting prior
7 orders. For example,

8 [R]es judicata has little application to regulatory action by an agency in fixing utility
9 rates, because ratemaking is a legislative, not a judicial function. It has been held that
10 every rate order may be superseded by another, not only when conditions change, but
also when the administrative understanding of the same conditions changes.

11 *Southwestern Bel Tel. Co. v. Ark. Public Svc. Comm'n*, 267 Ark 550, 556, 593, S.W.2d 434, 445
12 (Ark. 1980).

13 The issuance of an order granting new authority to build transmission facilities is
14 unambiguously an exercise of legislative regulatory authority. Staff contends that the current matter
15 remains in a legislative posture as well. APS has currently not exercised the authorizations under the
16 CEC to construct. Rather, it is requesting a change to the authorizations to resolve issues it has
17 identified in preparation to construct upon the already granted authorizations. Consequently, the
18 inquiry is prospective and legislative rather than retrospective and judicial.

19 **B. Heightened Standards Used in other A.R.S. § 40-252 Proceedings Reflect the**
20 **Exercise of the Commission's Judicial Authority Rather than Legislative.**

21 Staff acknowledges that there are instances when a heightened standard has been applied to
22 the exercise of the Commission's A.R.S. § 40-252 modification powers. As the circumstances
23 surrounding such cases illustrate, however, those instances involved the exercise of the
24 Commission's judicial power such as in cases involving the defense of an approved Certificate of
25 Convenience and Necessity ("CC&N") or enforcing compliance with an approved CECs obligations.
26 No aspect of the current application suggests that an exercise of the Commission's judicial power is
27 required in this case.
28

1 **1. Case Law Describing Heightened Standards in CC&N Modification**
2 **Cases Reflect Inherent Protections Attendant to Granted CC&Ns, Not a**
3 **Standard Integral to A.R.S. § 40-252.**

4 Some parties may suggest that cases involving matters decided under A.R.S. § 40-252 show
5 that A.R.S. § 40-252 proceedings require a higher standard than what is reasonable and necessary.
6 Those cases speak to certificates of convenience and necessity, a permit that carries protections in
7 favor of the CC&N holder. *See, e.g., James P. Paul v. Arizona Corporation Commission*, 137 Ariz.
8 426, 671 P.2d 404 (1983) (involving a request to delete a certificate of convenience and necessity
9 pursuant to A.R.S. § 40-252). Consequently, the hefty showing required in those cases reflects a
10 concern for the CC&N holder's interests in protecting its CC&N and not to an inherent requirement
11 of an A.R.S. § 40-252 proceeding.

12 Further, Staff asserts that those protections are likely only to apply to the CC&N holder and
13 not to other parties. Staff appreciates that parties other than a CC&N holder can be interested in the
14 parameters upon which a CC&N is granted. Nonetheless it is only the CC&N holder that was
15 granted rights and authorizations secured by the issuance of a CC&N. The heightened standard that
16 is arguably required to eliminate a CC&N is inapplicable in a circumstance where the CC&N holder
17 is requesting a modification to its CC&N.

18 **2. A Changed Circumstance Standard Would Be Inappropriate Because**
19 **the Modification Request Is Not to Conform, *Post Facto*, Noncompliant**
20 **Performance Under an Approved Certificate.**

21 Another alternative that was suggested during the procedural conference was that a changed
22 circumstance or some species of new evidence standard should apply. Staff notes that some cases,
23 reflecting the Commission's adoption of an enforcement posture that is consistent with an exercise of
24 judicial authority, have made use of a different approach than a reasonable and necessary standard
25 when evaluating requests to modify CECs. Although it is not a requirement found in Title 40, the
26 Commission⁸ has had occasion to turn to the "substantial change" evaluation (a feature of
27 rulemakings under the APA) when looking at certain requests to modify CECs. *See, e.g., Decision*

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⁸ Staff notes that the Committee also undertook a "Substantial Deviation" evaluation during the processing of this matter while it was before the Committee. *See* briefs of APS, Staff, 10,000 West, L.L.C., Vistancia L.L.C., DLGC II L.L.C. and Lake Pleasant Group L.L.C. filed on November 26 and 28, 2008, Docket No. L-00000-08-0330-00138. The circumstances prompting that round of briefing was a proposed change to the corridor routing that was outside the area noticed in the application and whether it would be within the Committee's jurisdiction to approve it.

1 No. 58793 (September 21, 1994) concerning CEC Case No. 70 (“Whispering Ranch”); Decision No.
2 69639 (June 6, 2007) concerning CEC Case Nos. 34 and 48 (“Devers”). In these cases, the CEC
3 holder had constructed facilities that were inconsistent with the approved CEC. Further, in these
4 cases, it was an act of the CEC holder that prompted the inquiry whether, under A.R.S. § 40-252, the
5 facilities as constructed were approvable *after the fact* in light of how the original applications for
6 CECs had been noticed and the conditions under which they were approved.

7 The present case is completely different from these cases. APS has not constructed facilities
8 out of conformity with its CEC. Likewise, persons affected by the modifications that are now being
9 requested have been noticed and will have an opportunity to intervene and address their concerns
10 regarding the requested changes *before* the changes have been made. To that end, APS has made
11 substantial efforts to notice interested parties and affected landowners. Furthermore, the facilities
12 APS intends to construct are of the same type as what APS noticed in its original CEC application.
13 For those reasons, Staff does not believe a substantial change standard would be appropriate to this
14 case.

15 **III. CONCLUSION**

16 A reasonable and necessary standard is more appropriate under the circumstances of this case
17 and is more typical for requests to modify Commission orders, including CECs. This is not an
18 enforcement proceeding for a nonconforming facility constructed in violation of a CEC. Staff
19 recommends using a reasonable and necessary standard in this case.

20 RESPECTFULLY SUBMITTED this 3rd day of November, 2014.

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22 

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