



0000157663

1 courtdocs@dickinsonwright.com
 James T. Braselton, SBN 010788
 2 jbraselton@dickinsonwright.com
 Gary L. Birnbaum – SBN 004386
 3 gbirnbaum@dickinsonwright.com
DICKINSON WRIGHT PLLC
 4 1850 North Central Avenue, Suite 1400
 Phoenix, Arizona 85004
 5 Phone: (602) 285-5000
 Fax: (602) 285-5100
 6 Attorneys for SFI Grand Vista LLC

Arizona Corporation Commission

DOCKETED

NOV 3 2014

DOCKETED BY 

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

8 BOB STUMP - CHAIRMAN
 9 GARY PIERCE
 10 BRENDA BURNS
 11 BOB BURNS
 12 SUSAN BITTER SMITH

ORIGINAL

13 IN THE MATTER OF THE
 14 APPLICATION OF ARIZONA PUBLIC
 15 SERVICE COMPANY, IN
 16 CONFORMANCE WITH THE
 17 REQUIREMENTS OF ARIZONA
 18 REVISED STATUTES §§ 40-360, et
 19 seq., FOR A CERTIFICATE OF
 20 ENVIRONMENTAL COMPATIBILITY
 21 AUTHORIZING THE TS-5 TO TS-9
 22 500/230 kV TRANSMISSION LINE
 23 PROJECT, WHICH ORIGINATES AT
 24 THE FUTURE TS-5 SUBSTATION,
 25 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.

DOCKET NO. L-00000D-08-0330-0138^D

CASE NO. 138

**MEMORANDUM OF SFI GRAND
VISTA, LLC REGARDING
APPLICABLE LEGAL STANDARDS**

RECEIVED
 2014 NOV - 3 P 3:49
 ARIZONA CORPORATION COMMISSION
 DOCKET CONTROL

1 SFI Grand Vista, LLC (“SFI Grand Vista”), by and through its undersigned
2 counsel, respectfully submits the following memorandum regarding the legal standard
3 applicable to proceedings before the Administrative Law Judge and before the Arizona
4 Corporation Commission, in connection with the pending “Application to Amend
5 Arizona Corporation Commission Decision No. 70850 Re: CEC 138 and Request for
6 Extension of CEC Term” (the “Application”). This Memorandum is filed in accordance
7 with the Orders entered by Administrative Law Judge Sarah N. Harpring (the “ALJ”) at
8 the procedural conference held on October 6, 2014, and in accordance with the
9 Procedural Order (Schedules Hearing) entered by the ALJ on October 10, 2014.

10
11 **I. INTRODUCTION AND SUMMARY.**

12 The Application pending before the ALJ is, to say the least, unusual. A final order
13 of the Arizona Corporation Commission (“ACC”) was entered in this matter on or about
14 March 17, 2009, granting to Arizona Public Service Company (“APS”) a Certificate of
15 Environmental Capability (“CEC”) authorizing the construction of approximately 40 miles
16 of 500/230 kV transmission lines on an approved alignment. The order of the ACC was
17 entered after an extended evidentiary proceeding before the Power Plant and Transmission
18 Line Siting Committee (the “Committee”), and after lengthy presentation and discourse
19 before the ACC itself. Further, the Arizona State Land Department (“ASLD”) was an
20 active participant in the discussions with APS that preceded the Committee hearings
21 (which hearings extended over approximately three weeks) and participated at the ACC
22 Hearing, during which then-Commissioner Mark Winkleman appeared to advocate for the
23 position (and desired alignment) of ASLD.

24 SFI Grand Vista is the current owner of a master planned community comprised of
25 approximately 5,000 acres of land in the vicinity of the proposed transmission line. SFI
26 Grand Vista’s predecessor in interest devoted many days to participation at the Committee
27 and ACC Hearings in 2009, and expended tens of thousands of dollars arguing in favor of,
28

1 and in opposition to, certain aspects of the Application then under consideration. The
2 transmission line alignment ultimately approved by the Committee, and thereafter by the
3 ACC, represents a carefully crafted compromise among various alternatives presented. In
4 the specific area of concern to SFI Grand Vista in this proceeding (235th Avenue to 211th
5 Avenue), the alignment approved by the ACC has minimal (albeit some) impact on SFI
6 Grand Vista, potentially abutting the planned community in only one location where the
7 alignment is effectively adjacent to a master planned area. Moreover, the approved 2009
8 alignment impacts very few existing homes and minimizes the impact on future planned
9 residences.

10 The Application now pending before the ALJ is very different. As the evidence at
11 the scheduled hearing will reveal, the proposed new alignment impacts a larger number of
12 existing homes, a number of platted lots not previously impacted, as well as sections of the
13 SFI Grand Vista mater plan not previously affected by the approved alignment, and it
14 increases (at least incrementally) the cost of transmission line construction within this
15 segment of the project -- at least in part because the proposed new alignment requires two
16 additional 90 degree turns.

17 In the abstract, these facts might -- or might not -- warrant a modification of the
18 approved alignment. However, in this case, there are no changed circumstances and no
19 new considerations that justify the proposed modification to an alignment approved five (5)
20 years ago. Stated simply, ASLD, a participant in the prior proceedings, has now suggested
21 a new alignment which was not even considered by the Committee, the ACC, the impacted
22 area landowners, or other area developers. Indeed, ASLD has acknowledged that while its
23 current proposal was not considered by these various interested parties, it actually was
24 discussed by APS and ASLD in conjunction with the lengthy Committee and ACC
25 Administrative processes in 2009. See Adams Aff. ¶11 (attached to the Application as
26 Exhibit "E").

1 For the foregoing reasons, SFI Grand Vista appears in this proceeding to urge the
2 denial of the current Application and the re-affirmance of the ACC's prior decision. It is
3 also for these reasons that SFI Grand Vista requested (and the ALJ granted) the opportunity
4 to briefly address the applicable standards that should apply to the proceedings before the
5 ALJ and, ultimately, to any further proceedings before the ACC.

6 **II. APPLICABLE STANDARDS FOR THE CONSIDERATION OF**
7 **THE PENDING APPLICATION TO AMEND THE APPROVED**
8 **CEC.**

9 Stated simply, it is SFI Grand Vista's position that any amendment of the final order
10 and Decision of the ACC, entered approximately five years ago, should require, at a
11 minimum, a showing of "changed circumstances" or "newly discovered evidence" of the
12 type required in a Superior Court proceeding in connection with the grant of a new trial.
13 There is substantial support in the statutory and the relevant decisional law for this
14 standard. Applying this standard to what is likely to be the undisputed record in this case
15 suggests, as a matter of fact, logic, and law, that the Application should be denied.

16 Neither the statutes nor the administrative regulations applicable to the proceedings
17 before the ALJ and/or the ACC expressly state a standard to be considered when an
18 application to amend a longstanding final order is presented. See Memorandum of Law
19 filed by the City of Peoria, Arizona and Diamond Ventures Inc. (October 10, 2014) at pp.
20 2-3. However, acknowledgment of this fact does not suggest that the statutory and
21 regulatory schemes provide no guidance regarding the applicable standard. Indeed,
22 precisely the opposite is true.

23 The Arizona Administrative Procedures Act ("APA") specifically incorporates a
24 standard to be considered during review of ACC decisions. The APA states that in
25 adjudicative proceedings, "rehearing or review shall be governed by agency rule drawn as
26 closely as practicable from Rule 59, Arizona rules of civil procedure." A.R.S. § 41-

1 1061(B). As the Court observed in Sw. Paint & Varnish Co. v. Arizona Dep't of Env'tl.
2 Quality, 194 Ariz. 22, 976 P.2d 872 (1999), A.R.S. § 41-1061(B) “requires an agency to
3 adopt a rule that provides an opportunity for rehearing. And the rule should look like Rule
4 59, Ariz. R. Civ. P.” Id. at 24, 976 P.2d at 874 (emphasis added). Thus, the Commission is
5 required to adopt standards that mirror those applicable in Superior Court for the
6 consideration of a request for a new trial.

7
8 In the context of a rehearing, Rule 59 provides that an applicant is not entitled to
9 modification of an agency decision unless the applicant presents “[m]aterial evidence,
10 newly discovered, which with reasonable diligence could not have been discovered and
11 produced” during the original hearing. Ariz. R. Civ. P. 59(a)(4). Once it is understood that
12 Rule 59 controls the framework for evaluation of the applicant’s claims, relevant case law
13 provides substantial additional guidance concerning this standard of review.

14 The Arizona Supreme Court has discussed the “newly discovered” evidence
15 standard while denying a Rule 59 motion for rehearing. See Black v. Black, 114 Ariz. 282,
16 560 P.2d 800 (1977). In Black, the appellant argued that the trial court should have granted
17 a rehearing in a child custody case because of applicant’s new evidence. Id. at 284, 560
18 P.2d at 802. Reviewing the proffered testimony, the Court noted that the appellant was
19 aware of the purportedly “newly discovered” evidence at the time of the original hearing.
20 Id. at 285, 560 P.2d at 803. Denying the motion, the court held that it must appear “that
21 such evidence would probably change the result upon rehearing and that it could not have
22 been discovered before the trial by the exercise of due diligence.” Id.

23 Recently, the Court of Appeals upheld the denial of a homeowner’s Rule 59(a)
24 motion for reconsideration with respect to a non-judicial foreclosure. See Waltner v.
25 JPMorgan Chase Bank, N.A., 231 Ariz. 484, 490, 297 P.3d 176, 182 (App. 2013).
26 Reaffirming the standard of review, the Waltner court noted that the homeowners were
27 required to prove several factors in order to obtain relief. Id. Specifically, the court held
28

1 that “the moving party must demonstrate that the evidence (1) is material, (2) existed at the
2 time of trial, (3) could not have been discovered before trial by the exercise of due
3 diligence, and (4) would probably change the result at new trial.” Id. Further, a party is
4 not entitled to relief if the new evidence was in the moving party’s hands before the
5 original judgment was rendered, because the evidence was not “newly discovered.”
6 Welding v. Sw. Sav. & Loan Ass’n, 143, Ariz. 599, 602, 694 P.2d 1213, 1216 (App. 1984)
7 (citing Roberts v. Morgensen Motors, 135 Ariz. 162, 659 P.2d 1307 (App. 1982).

8
9 In sum, the relevant and controlling statutes, regulations and case law make it clear
10 that APS/ASLD has the burden of proving each of the elements necessary to warrant re-
11 opening of a long-established final order of the ACC and to cause a new alignment to be
12 adopted. Consistent with the letter and spirit of Rule 59, that burden requires a
13 demonstration of “newly discovered evidence” or, at a minimum, some form of material
14 “changed circumstances” that could not have been discovered earlier, and that would likely
15 change the results in any further proceeding. Waltner, 231 Ariz. at 490, 297 P.3d at 182.

16 **III. CONCLUSION.**

17 SFI Grand Vista has attempted to limit this Memorandum to a single question of
18 law -- the applicable standard for review of the pending Application to the ALJ and,
19 eventually, the ACC. We recognize, however, that this question of law is inextricably tied
20 to certain factual questions, and to at least one related question regarding the applicable
21 legal standards. Accordingly, in conclusion, we offer the following brief synopsis of the
22 position of SFI Grand Vista:

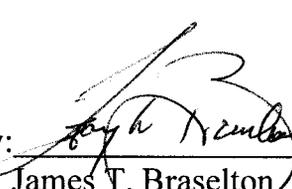
- 23 • Any request to modify a long-standing final order of the ACC -- such as
24 the pending Application -- should be reviewed under a standard similar to
25 or derived from Rule 59 of the Arizona Rules of Civil Procedure.

1 • Rule 59, by its express terms and through numerous interpretive decisions,
2 makes it clear that the proponent of a proposed Amendment must
3 demonstrate the existence of newly-discovered evidence that (1) is
4 material, (2) existed at the time of trial, (3) could not have been discovered
5 before trial by the exercise of due diligence, and (4) would probably
6 change the result at new trial. Whether phrased in this manner or in terms
7 of "changed circumstances," the application of this standard to the pending
8 Application is case-determinative.

9
10 • Because we anticipate that the Applicant will be unable to introduce any
11 evidence demonstrating the required existence of "newly discovered
12 evidence" or "changed circumstances," the magnitude of the applicant's
13 burden of proof in this case may well be academic. SFI Grand Vista
14 nevertheless notes its agreement with the City of Peoria and Diamond
15 Ventures Inc., who have jointly suggested in their legal memorandum that,
16 in the circumstances, "clear and convincing evidence" of compliance with
17 the applicable standards should be required.

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

19
20 **DICKINSON WRIGHT PLLC**

21
22 By: 

23 James T. Braselton

24 Gary L. Birnbaum

25 1850 North Central Avenue, Suite 1400

26 Phoenix, Arizona 85004

27 *Attorneys for Plaintiff*

1 ORIGINAL and 13 copies of the foregoing filed this 3rd day of November, 2014, with:

2 Arizona Corporation Commission
3 1200 West Washington Street
4 Docket Control, Room No. 108
5 Phoenix, AZ 85007

6 COPY of the foregoing mailed this 3rd day
7 of November, 2014, to:

8 John Foreman, Chairman
9 Arizona Power Plant and Transmission
10 Line Siting Committee
11 Office of the Attorney General PAD/CPA
12 1275 West Washington Street
13 Phoenix, AZ 85007

Frederick E. Davidson
Chad R. Kaffer
The Davidson Law Firm
8701 East Vista Bonita Drive, Suite 220
P.O. Box 27500
Scottsdale, AZ 85255

14 Joseph Drazek
15 Quarles & Brady LLP
16 One Renaissance Square Two North
17 Central Avenue
18 Phoenix, AZ 85004

Megan Grabel
Thomas L. Mumaw
Pinnacle West Capital Corporation
P.O. Box 53999, Station 8695
Phoenix, AZ 85072-3999

19 Scott Wakefield
20 Ridenour Hienton & Lewis PLLC
21 201 North Central Avenue, Suite 3300
22 Phoenix, AZ 85004

Thomas H. Campbell
Lewis Roca Rothgerber, LLP
201 East Washington Street, Suite 1200
Phoenix, AZ 85004

23 Scott McCoy
24 Earl, Curley & Lagarde, PC
25 3101 North Central Avenue, Suite 1000
26 Phoenix, AZ 85012

Andrew E. Moore
Earl, Curley & Lagarde PC
3101 North Central Avenue, Suite 1000
Phoenix, AZ 85012

27 David F. Jacobs
28 Assistant Attorney General
Attorney General's Office
177 N. Church Avenue, Suite 1105
Tucson, AZ 85701

Court Rich
Ryan Hurley
Rose Law Group PC
7144 East Stetson Drive, Suite 300
Scottsdale, AZ 85251

1 Christopher Welker
2 Holm Wright Hyde & Hays PLC
3 10201 South 51st Street, Suite 285
4 Phoenix, AZ 85044

5 Melissa M. Krueger
6 Linda J. Benally
7 Pinnacle West Capital Corporation
8 400 North 5th Street, MS 8695
9 Phoenix, AZ 85004

10 Garry D. Hays
11 The Law Office of Garry D. Hays PC
12 1702 East Highland Avenue, Suite 204
13 Phoenix, AZ 85016

14 Stephen J. Burg
15 Office of the City Attorney City of Peoria
16 8401 West Monroe Street
17 Peoria, AZ 85345

18 Michael D. Bailey
19 City Attorney
20 City of Surprise
21 16000 North Civic Center Plaza
22 Surprise, AZ 85374

23 Jeanine Guy
24 Town Manager
25 Town of Buckeye
26 1101 East Ash Avenue
27 Buckeye, AZ 85326

28 Art Othon
8401 West Monroe Street
Peoria, AZ 85345

Jay Moyes
Steve Wene
Moyes Sellers & Sims LTD
1850 North Central Avenue, Suite 1100
Phoenix, AZ 85004

Dustin C. Jones
Jon M. Paladini
Tiffany & Bosco, P.A.
2525 E. Camelback Road, Seventh Floor
Phoenix, AZ 85016-9240

Lawrence Robertson, Jr.
2247 East Frontage Road, Suite 1
P.O. Box 1448
Tubac, AZ 85646

Robert N. Pizorno
The Pizorno Law Firm PLC
P.O. Box 51683
Phoenix, AZ 85076-1683

Ruben Ojeda
Manager, Rights of Way Section
Arizona State Land Development
1616 W. Adams Street
Phoenix, AZ 85007

Edward Dietrich
Real Estate Division Planning Section
Arizona State Land Department
1616 West Adams Street
Phoenix, AZ 85007

Charles W. and Sharie Civer
42265 North Old Mine Road
Cave Creek, AZ 85331-2806

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Janice Alward
Chief Counsel Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

Steven M. Olea, Director
Utilities Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

Coash & Coash, Inc.
1802 N. 7th Street
Phoenix, AZ 85006

Bill Mundell
3838 N. Central Avenue, Suite 400
Phoenix, AZ 85012

Jack Haenichen
P.O. Box 2287
Overgaard, AZ 85933

David Eberhart
6801 W. Astor
Peoria, AZ 85361



A handwritten signature, possibly "John Doe", is written over a horizontal line. To the right of the signature, the date "11-3-14" is written.

PHOENIX 62467-1 179961v1