

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2023-050310

08/25/2023

HONORABLE MELISSA IYER JULIAN

CLERK OF THE COURT
A. Delgado
Deputy

PETER T ELSE

ILAN WURMAN

v.

ARIZONA CORPORATION COMMISSION

MAUREEN A SCOTT

SUNZIA TRANSMISSION L L C

ALBERT H ACKEN

WESLEY C VAN CLEVE
JUDGE JULIAN
KATHRYN UST
ARIZONA CORPORATION
COMMISSION
1200 W WASHINGTON ST
PHOENIX AZ 85007

UNDER ADVISEMENT RULING

Re: Order Affirming Commission Decision No. 78769

The Court has reviewed and considered the following:

1. Plaintiff's Opening Brief, filed May 12, 2023;
2. Defendant Arizona Corporation Commission's Answering Brief, filed June 12, 2023;
3. Response Brief of Intervenor SunZia Transmission, LLC, filed June 12, 2023;
4. Plaintiff's Reply Brief, filed June 22, 2023;
5. Defendant Arizona Corporation Commission's Motion for Judicial Notice, filed August 3, 2023; and
6. Intervenor SunZia Transmission, LLC's Notice of Errata, filed August 7, 2023.

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The Court has further considered the arguments of counsel presented on August 18, 2023. The Court finds as follows regarding Plaintiff's appeal from the Arizona Corporation Commission (the "Commission").

With respect to the Commission's Motion for Judicial Notice, filed August 3, 2023, no response or objection to the motion was filed and this Court finds good cause for taking judicial notice of the prior proceedings in this case.

IT IS THEREFORE ORDERED granting the Commission's Motion for Judicial Notice, filed August 3, 2023.

FACTUAL BACKGROUND

On February 22, 2016, the Commission issued Decision No. 75464 approving the CEC issued by the Arizona Power Plant and Transmission Line Siting Committee for Line Siting Case 171 ("CEC 171"). Plaintiff Peter Else ("Plaintiff") subsequently filed an action challenging the Commission's grant of CEC 171. The trial court held in favor of the Commission. In 2018, the Court of Appeals held in favor of the Commission.

On May 13, 2022, SunZia filed an Application to Amend CEC 171 pursuant to A.R.S. § 40-252 (the "Amendment"). In the Amendment, SunZia sought to modify CEC 171 to:

- A) authorize the use of updated structure designs and additional structure types that resulted from detailed engineering efforts; B) allow for separate assignment and future ownership of each approved transmission line and its associated facilities to enable project financing; and C) extend the expiration date of the CEC for SunZia line 1 from February 2026 to February 2028.

As an intervenor, Plaintiff filed a response to the amendment application, requesting either that SunZia be "directed to file the appropriate application with the LS Committee; or, in the alternative, that the Commission conduct its own evidentiary hearing."

On July 22, 2022, the Commission issued Decision No. 78600 and referred the matter to the LS Committee to conduct an evidentiary hearing regarding the proposed amendments to CEC 171. After the public meeting/hearing from September 6-9, 2022, the Chairman of the LS Committee filed two Notices of Filing Recommended Opinion and Order of the Arizona Power Plant and Line Siting Committee—one for CEC 171-A and CEC 171-B. The LS Committee recommended that the Commission:

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(1) explicitly authorize separate ownership of each transmission line; (2) authorize CEC 171-A for Line 1, which will operate as a DC facility; (3) authorize CEC 171-B for Line 2, which will operate as an AC facility; (4) authorize the use of updated AC and DC structure designs and additional structure types for Line 1; (5) extend the expiration date for Line 1, authorized in CEC 171-A, until February 22, 2028; (6) authorize construction of the 500-kV Willow Substation with Line 2 with an expiration date of February 22, 2031; and (7) adopt new Conditions 38 and 39 to both CEC 171-A and CEC 171-B.

On September 28, 2022, Plaintiff requested review of the decision by the LS Committee to approve the above recommendations. The Commission ultimately approved the LS Committee's recommendations for CEC 171-A and CEC 171-B as Decision No. 78769, finding that "the evidence supports approving the recommendations of the LS Committee as set forth in ROO CEC 171-A and ROO CEC 171-B."

Plaintiff brings this action pursuant to A.R.S. § 40-254. Plaintiff asks the Court to vacate CEC 171-A and CEC 171-B and direct the Commission to perform the statutorily required balance for each separately. (Opening Brief, at 40.)

STANDARD OF REVIEW

This Court is to give deference to decisions by the Commission "unless it appears that its decision was clearly arbitrary or capricious or in disregard of legal rights." *Arizona Water Co. v. Ariz. Corp. Comm'n*, 217 Ariz. 652, 659 ¶23 (Ct. App. 2008) (internal quotations and citations omitted). "[T]he burden of proof shall be upon the party adverse to the commission or seeking to vacate or set aside any determination or order of the commission to show by clear and satisfactory evidence that it is unreasonable or unlawful." A.R.S. § 40-254(E). "Clear and satisfactory" is the same as "clear and convincing," requiring a higher burden of proof than a "preponderance of the evidence." *Tucson Elec. Power Co. v. Ariz. Corp. Comm'n*, 132 Ariz. 240, 243 (1982).

On review of the Commission's factual findings, this Court is obliged "to uphold such determinations if they are supported by substantial evidence." *Grand Canyon Tr. v. Arizona Corp. Comm'n*, 210 Ariz. 30, 34, ¶11 (Ct. App. 2005). Substantial evidence "is evidence which would permit a reasonable person to reach the Commission's result." *Sierra Club—Grand Canyon Chapter v. Arizona Corp. Comm'n*, 237 Ariz. 568, ¶ 22 (Ct. App. 2015).

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ANALYSIS

At issue in this case is the Commission's approval of the Amendment to CEC 171, which allowed the CEC to be bifurcated to CEC 171-A and CEC 171-B. Pursuant to A.R.S. § 40-252, "[t]he commission may at any time, upon notice to the corporation affected, and after opportunity to be heard as upon a complaint, rescind, alter or amend any order or decision made by it. . . . In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive." A.R.S. § 40-252.

Plaintiff contends that the Commission made five legal errors in approving the Amendment: (1) the Commission failed to consider that the Amendment proposed a new deal and included substantial changes to CEC 171; (2) the statutorily required factors should have been weighed for CEC 171-A and CEC 171-B separately; (3) there is no substantial evidence of Arizona's need for the power; (4) a single line could be rerouted and the Commission failed to consider that possibility; and (5) the Commission relied on factors outside of the statute. (Opening Brief, at 30.) The Court will address each argument below.

(1) Failure to consider proposed amendment as a new project

Plaintiff first alleges error by the Commission's failure to view the proposed amendments as two separate projects, dramatically different from the project approved in CEC 171. Specifically, Plaintiff contends that the CEC's bifurcation created two new CEC's that required an independent evaluation under A.R.S. §§ 40-360.06 and -360.07.

The Court disagrees. The 2022 Decision was triggered by SunZia's application to amend pursuant to A.R.S. § 40-252; it was not a new CEC proceeding under §§ 40-360.06 and -360.07. In such proceedings, the Commission's review was appropriately limited to the issues presented in the application to amend. *Application of Trico Elec. Co-op., Inc.*, 92 Ariz. 373, 381 (1962); see also A.R.S. § 40-252.

As support for the argument that bifurcation created a radical change to CEC 171, Plaintiff contends that original CEC 171 required that the AC line would be built first as compared to the bifurcated CEC, which allows the DC line to be built first. As to the timing of the lines, the Commission found:

The record shows that the original CEC was approved with the option for two AC lines or one AC and one DC line that could be constructed at different points in time and that the lines were to be used to bring wind power resources from New Mexico to Central Arizona. The original CEC does not specify which line was to be

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built first. The record shows that there has not been a change in the anticipated use of the lines.

This Court defers to the Commission's interpretation of original CEC. *Di Giacinto v. Arizona State Ret. Sys.*, 242 Ariz. 283, 286, ¶ 9 (Ct. App. 2017) ("We give great weight to an agency's interpretation of a statute or regulation it implements."). Further, the record does not support Plaintiff's contention that the 2016 Decision required that an AC line be built first. Rather, Plaintiff infers such a requirement based upon testimony from the prior proceedings that the AC line would "likely" be constructed first and the fact that the Willow Substation also had a 10-year expiration term.

But the provision at issue does not state that Willow Substation was a necessary or "related facility" to the AC line. The 2016 Decision authorized SunZia to build both the first line and the Willow Substation by 2026 but did not require that they be built concurrently. The only restriction on the construction of the Willow Substation was that it be built within the ten-year term (amended to 15 years in the 2022 Decision). Finally, if the Commission had intended these timing constraints to actually impose an obligation to build the AC line first, it could have made that condition explicit, but it imposed no such condition. The Commission's finding that the original CEC did not contain a requirement for the AC line to be built first was not clearly erroneous.

Plaintiff also contends that bifurcation fundamentally alters the original CEC because it allows for the DC line to be built separately and without a dual requirement for construction of the AC line. In so doing, Plaintiff urges that bifurcation reflects an intent not to construct the AC line at all. Plaintiff's concerns that the AC line will never be constructed as a result of bifurcation is speculative and cannot be a basis for remanding the 2022 decision.

Indeed, this was an issue raised and rejected in the prior appeal of the Commission's 2016 decision. In Plaintiff's previous appeal of the original CEC, the Court of Appeals found: "Here, although Else argues the actual project will likely be substantially different from the proposed Project, he has provided no proof beyond his apprehension, which at this point is mere speculation." *Else v. Ariz. Corp. Comm'n*, 1 CA-CV 17-0208, 2018 WL 542924, at *5 ¶20 (App. Jan. 25, 2018). Similarly, Plaintiff's argument here that the AC line is unlikely to be built is speculation.

Plaintiff also contends that the Commission's descriptions of the Amendment as "narrow" and "limited" supports his position that the Commission failed to consider evidence and appreciate the significance of the Amendment. (Reply, at 12.) The Court does not find this argument persuasive. Although Plaintiff may disagree with the Commission's description of the Amendment, such description in and of itself does not show that the Commission acted arbitrarily and capriciously or that the Commission's decision is unsupported by the evidence.

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(2) Statutory factors should have been weighed for CEC 171-A and CEC 171-B separately

Plaintiff contends that CEC 171-A and CEC 171-B were evaluated together based on the record for CEC 171 in 2015. (Opening Brief at 33.) Plaintiff contends that the Commission should have evaluated each of the bifurcated CECs independently. As reflected in the 2022 decision, the purpose of bifurcation was administrative in nature and was requested to facilitate a partial assignment of the Project to ensure adequate financing could be obtained for construction of both lines.

The record does not support Plaintiff's claim that bifurcation constitutes such a substantial change to the original CEC that a new and independent analysis is required. Indeed, the original CEC contemplated a partial assignment. Condition 34 of CEC 171 states, "Applicant shall provide the Commission Staff with copies of any Agreement(s) it enters into with the entity or entities it selects to own and operate the 500 kV transmission facilities." Further, under Arizona law, the Commission's preapproval is not even needed for a partial or complete transfer of the CEC. *See* A.R.S. § 40-360.08(A).

There is substantial evidence supporting the Commissioner's decision to approve the bifurcation amendment to the CEC. Evidence presented to the Commission demonstrated that bifurcation would facilitate financing while retaining the same mitigation and notice conditions included within the original CEC. Thus, this is not a circumstance where the Commission failed to consider data relevant to the amendments or otherwise ignored important aspects of the changes proposed. *Compare with Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240, 253 (2d Cir. 1977).

The Court finds that Plaintiff has not shown that the Commission acted arbitrarily and capriciously by not evaluating the bifurcated CECs independently.

(3) No evidence to support need in Arizona for power

Next, Plaintiff contends that there is no substantial evidence to show that the wind power will meet a need in Arizona in violation of its obligations under § 40-360.07. (Opening Brief at 35.) Under that provision, the Commission "shall comply with the provisions of § 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).

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The plain language of the statute does not limit an evaluation of energy needs to those needs of Arizona consumers. To the contrary, the Commission has been given “considerable discretion . . . in how to determine need under the statute” and may consider interstate need in connection with its analysis. *Grand Canyon Tr.*, 210 Ariz. at 38 ¶35. In addition, the record for the 2022 Decision includes substantial evidence regarding how the Project as amended will meet the need for energy infrastructure in the southwest region. The Commission’s findings under § 40-360.07 as to the bifurcated CEC were not clearly erroneous.

(4) Single line could be routed elsewhere

Related to the assessment of each line, Plaintiff contends that once the lines are evaluated separately, it would be arbitrary and capricious for the Commission not to consider rerouting the lines. (Opening Brief at 36.) Plaintiff cites to the Commission Decision No. 58793 (“*Whispering Ranch*”) for the proposition that the change in lines from DC and AC requires reconsideration for the route. (Opening Brief at 36.)

Plaintiff’s reliance on *Whispering Ranch* is misplaced. In *Whispering Ranch*, SRP obtained a CEC for a DC line but began constructing the line as an AC line. (Opening Brief, Ex. A at 2-3.) Those are not the facts here. CEC 171 contemplated both the construction of both an AC and DC line and both lines are required in the amendments as set forth in CEC 171-A and CEC 171-B. *See Arizona Corp. Comm’n v. Tucson Ins. & Bonding Agency*, 3 Ariz. App. 458, 463 (1966) (“Arbitrariness of the commission’s action must rest on the factual setting of this particular case, not on other cases whose factual situations might be clearly distinguishable.”).

SunZia contends that the Commission had no duty to reexamine the alternative route and that the alternative route through Tucson was considered during the 2016 proceedings and was found to be unsuitable. (SunZia’s Resp., at 41-42.) The Commission contends that the route was not at issue because the application to amend did not modify the route in CEC 171. (ACC Brief at 31.) Plaintiff has not shown that the Commission erred by not reexamining an alternative route in connection with the CEC amendments, which did not alter the route already approved.

(5) Commission relied on factors outside of statute

A.R.S. § 40-360.06(A) sets forth the following factors the committee shall consider in evaluating an application for a certificate of environmental compatibility:

1. Existing plans of this state, local government, and private entities for other developments at or in the vicinity of the proposed site.

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2. Fish, wildlife and plant life and associated forms of life on which they are dependent.
3. Noise emission levels and interference with communication signals.
4. The proposed availability of the site to the public for recreational purposes, consistent with safety considerations and regulations.
5. Existing scenic areas, historic sites and structures or archaeological sites at or in the vicinity of the proposed site.
6. The total environment of the area.
7. The technical practicability of achieving a proposed objective and the previous experience with equipment and methods available for achieving a proposed objective.
8. The estimated cost of the facilities and site as proposed by the applicant and the estimated cost of the facilities and site as recommended by the committee, recognizing that any significant increase in costs represents a potential increase in the cost of electric energy to the customers or the applicant.
9. Any additional factors that require consideration under applicable federal and state laws pertaining to any such site.

In addition, “The committee shall give special consideration to the protection of areas unique because of biological wealth or because they are habitats for rare and endangered species.” A.R.S. § 40-360.06(B).

The Commission found: “The record shows that there will be no impact on the factors enumerated in A.R.S. § 40-360.06 as a result of the request to bifurcate the CECs for Line 1 and Line 2 or to extend the expiration date of CEC 171-A by two years.” Furthermore, the Commission approved the amendments after explicitly “[c]onsidering the provisions of A.R.S. 40-360.06, and balancing 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 Arizona.” After considering the relevant factors, the Commission found “that it is in the broad public interest to approve the proposed modifications in the 40-252 Application with the addition of Conditions 38 and 39.” These findings are entitled to deference by this Court.

Plaintiff nevertheless asserts error by alleging that the Commission improperly considered economic benefits, environmental justice, the Clean Power Plan regulation, and climate change. (Opening Brief at 36-40.) Plaintiff also asserts that some factors were improperly considered in the 2015 proceeding. (Opening Brief at 37.) The Court declines to revisit the 2015 proceeding.

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The Commission may consider the other factors under A.R.S. § 40-360.06(A)(9) allowing consideration of “additional factors that require consideration under applicable federal and state law pertaining to any such site.” Because the SunZia project (as originally approved and upon amendment) spans across several hundred miles of federal land, consideration of these other factors was not arbitrary or capricious nor did the Commission violate Arizona law by considering those issues along with the factors set forth in § 40-360.05(A).

Plaintiff has failed to demonstrate by clear and substantial evidence that the Commission’s decision to approve the Amendment was unreasonable, unlawful, or unsupported by the evidence. Neither was the Commission’s decision arbitrary or capricious.

IT IS THEREFORE ORDERED affirming the Commission’s Decision No. 78769.

IT IS FURTHER ORDERED denying Plaintiff’s request for an award of attorneys’ fees and costs.

IT IS FURTHER ORDERED that within 20 days from the filing date of this minute entry, counsel for the Commission shall submit a proposed form of judgment consistent with this ruling, which shall include rule 54(c) language.