Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2023-013467 01/22/2024

HONORABLE RANDALL H. WARNER

CLERK OF THE COURT
S. Ortega
Deputy

SIERRA CLUB

LOUISA SUE EBERLE

v.

ARIZONA CORPORATION COMMISSION, et al.

WESLEY C VAN CLEVE

J MATTHEW DERSTINE
KATHRYN M UST
MATTHEW E. PRICE
JUDGE WARNER

UNDER ADVISEMENT RULING

This is an appeal from Arizona Corporation Commission Decision No. 79020, which approved a Certificate of Environmental Compatibility for Salt River Project to add 12 new generating units to its Coolidge Generating Station. The Commission previously denied SRP's request to add 16 new units. After this Court affirmed the decision, the Commission approved a CEC for the modified Project.

The issues here are whether substantial evidence supports the CEC, and whether the process by which the Commission approved it was lawful. Decision No. 79020 is affirmed because Sierra Club has not shown it to be unreasonable or unlawful.

I. BACKGROUND.

The Salt River Project Agricultural Improvement and Power District ("SRP") is a political subdivision of the State of Arizona and a supplier of electricity. Under Arizona law,

electric utilities must obtain a certificate of environmental compatibility ("CEC") from the Arizona Corporation Commission ("the Commission") before building a new power plant. A.R.S. §§ 40-360.03, -360.07(A). The purpose of a CEC is to allow the Commission to balance the need for electricity against the environmental impact of a new plant or transmission line. A.R.S. § 40-360.07(B).

SRP applied in December 2021 for a CEC to add 16 new natural gas turbines to its Coolidge Generating Station ("the Project"). The application was referred to the Commission's Power Plant and Transmission Line Siting Committee ("the Siting Committee"), which by statute makes the initial decision on a CEC. A.R.S. § 40-360.06(A). Sierra Club and a group of residents from the nearby Randolph community intervened to oppose the application. Randolph is a historic Black community adjacent to the Coolidge Generating Station with about 150 to 250 residents. The Siting Committee held an 8-day evidentiary hearing and voted 7-2 to approve the requested CEC.

Sierra Club and the Randolph Intervenors requested review by the Commission under A.R.S. § 40-360.07(A). That statute authorizes the Commission to confirm, deny, or modify a CEC granted by the Siting Committee, or to issue one when the Siting Committee denied it. A.R.S. § 40-360.07(B). The Commission rejected the Siting Committee's decision and voted 4-1 to deny a CEC. It issued its findings and conclusions in Decision No. 78545 on April 28, 2022, and subsequently denied rehearing.

SRP appealed to Superior Court and this Court affirmed following an evidentiary hearing. *See* Case No. CV2022-008624, Minute Entry filed January 20, 2023 ("the January 20, 2023 Ruling"). The Randolph Intervenors' lawyer applied for around $171,000 in attorneys' fees, which this Court denied.

SRP went back to the Commission after this Court's decision and the 2022 General Election. It reached a settlement with the Randolph Intervenors whereby they agreed to withdraw their opposition to the Project in exchange for SRP's agreement to (1) reduce the number of generating units from 16 to 12, (2) not seek to add any more new natural gas generating units, (3) locate the new units further away from the Randolph community, and (4) include in the CEC an annual capacity factor limit of 30% averaged across the 12 new units. SRP also agreed that, if the Commission approved a CEC for the modified Project, it would fund a community center for Randolph, fund rehabilitation for Randolph homes, provide additional scholarship money, provide other benefits to the community, and pay attorneys' fees incurred by the Randolph Intervenors' pro bono lawyer.

SRP filed an Application to Amend Decision No. 78545 on June 14, 2023, requesting approval of a modified CEC consistent with the settlement agreement. The Commission placed

the Application on its June 21, 2023 open meeting agenda. There, it heard comments from SRP, counsel for the Randolph Intervenors, and members of the public. Sierra Club's counsel spoke in opposition to the Application. The Commission also placed two SRP employees under oath so Commission members could question them.

The Commission voted 4-1 at the meeting to rescind Decision No. 78545 and approve a CEC for the modified Project. It issued its findings and conclusions in Decision No. 79020 on June 28, 2022, and subsequently denied rehearing.

Sierra Club filed a timely appeal under A.R.S. § 40-254. In the interest of judicial economy, the parties agreed this Court would hear the second appeal, and that it would consider the record in CV2022-008624, including the exhibits and testimony admitted at the evidentiary hearing. The parties further agreed that an additional evidentiary hearing in Superior Court was not needed. The Court adopts and incorporates the January 20, 2023 Ruling, which is attached to the Complaint in this case.

II. THE COMMISSION'S DECISION.

The standard by which the Commission decides whether to approve a CEC is in A.R.S. § 40-360.07(B):

> In arriving at its decision, 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.

In its prior decision denying a CEC, the Commission found SRP's application incomplete because it lacked certain information the Commission deemed important to evaluate the Project's necessity in light of alternatives. It further found the Project's environmental impact outweighed the need for it. The Commission ultimately concluded: "The incomplete record as identified above and the negative impacts of the Project compel balancing the competing public interests in favor of protecting the people, environment, and ecology of the State of Arizona by denying Applicant a CEC." *See* Decision No. 78545 at 11, Conclusion 3.

This Court concluded that the Commission erred by deeming SRP's application incomplete, but the error did not require reversal. It further concluded that the Commission's balancing of interests was supported by substantial evidence and did not result from legal error:

> Here, the evidence would have supported a balancing of interests in favor of issuing a CEC for the Coolidge Power Plant, but does not compel that determination as a matter of law. It was within the Commission's range of discretion to find the need for the Coolidge Expansion Project less than SRP argued, the environmental impacts of the project greater than SRP argued, and the conditions in the CEC insufficient to mitigate those impacts.

See January 20, 2023 Ruling at 17.

In its subsequent decision approving a CEC for the modified Project, the Commission found that the changes and the additional conditions in the CEC altered the balance between the need for power and environmental considerations:

> The Commission finds that with the new terms and conditions discussed herein, balancing in the broad public interest the need for adequate, economical and reliable electric power with the desire to minimize the effect thereof on the environment and ecology of the state favors granting the Amended CEC.

See Decision No. 79020 at 13, ¶ 49. It further concluded:

> The evidence in the entire record and the conditions placed upon the CEC as set forth in the Amended CEC attached hereto are sufficient to weigh the balancing of the public interest in favor of granting the Amended CEC in this matter when all the factors set forth in A.R.S. § 40-360.06 are considered along with the need for an adequate, economical, and reliable supply of electric power.

Id. at 14, ¶ 4.

III. DISCUSSION.

A. Standard Of Review.

A.R.S. § 40-254 governs this appeal. Under that statute, Sierra Club has the burden to show by "clear and satisfactory evidence" that the Commission's decision was unreasonable or unlawful. A.R.S. § 40-254(E). A Commission decision is unreasonable if it is arbitrary or unsupported by substantial evidence. It is unlawful if it resulted from a legal error. *Tucson Electric Power Co. v. Arizona Corp. Comm'n*, 132 Ariz. 240, 243 (1982); *Grand Canyon Trust*

v. Arizona Corp. Comm'n, 210 Ariz. 30, 33-34 (App. 2005). The Court decides independently whether the Commission acted lawfully or correctly interpreted the law, but gives deference to the Commission's findings and ultimate balancing of public interests under A.R.S. § 40-360.07(B). *Sun City Home Owners Ass'n v. Arizona Corp. Comm'n*, 252 Ariz. 1, 5 (2021); *Grand Canyon Trust*, 210 Ariz. at 33-34.

B. A New CEC Application Was Not Required To Approve The CEC.

When it reviewed the Siting Committee's decision to approve a CEC, the Commission had the power under A.R.S. § 40-360.07(B) to confirm, deny, or modify the CEC. Having determined that the Project's environmental impact outweighed its need, the Commission could have at that time approved a modified CEC with conditions that decreased its environmental impact, assuming the conditions were lawful and supported by the evidence before the Siting Committee. But that is not what it did. Instead, the Commission voted to deny the CEC.

Under A.R.S. § 40-252, the Commission has the authority to rescind, alter, or amend its decisions. That statute says:

> The 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. When the order making such rescission, alteration or amendment is served upon the corporation affected, it is effective as an original order or decision. 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. Had the Commission changed its mind shortly after denying the CEC in April 2022, it could have rescinded Decision No. 78545 and issued a new decision approving or modifying the CEC, again assuming the record before the Siting Committee supported the decision.

Sierra Club argues that the Commission could not approve a modified CEC without requiring SRP to file a new CEC application, and without holding a new evidentiary hearing. It relies on the Commission's *Whispering Ranch* decision and others in which the Commission has required a new CEC application for a "substantial change" from a CEC. *See In Re Salt River Project Agr. Improvement & Power Dist. (Whispering Ranch)*, 1994 WL 711473 (Ariz. Corp. Comm'n Sept. 21, 1994).

The substantial change test does not apply here because SRP was not seeking to alter a power plant or transmission line built under an existing CEC. *See Whispering Ranch*, 1994 WL 711473 (describing the issue as whether a new or modified CEC is necessary for a change "to a transmission line for which a CEC has been granted"). It was seeking a modified version of a denied CEC. Thus, the question is not whether the modification was a substantial change from the Project as originally contemplated, but whether the existing record supports the modified CEC.

Even if the substantial change test applied, the Commission could reasonably determine that the modified CEC was not a substantial change from one approved by the Siting Committee. The changes here reduced the size of the Project by 25%, moved the new generating units further from the Randolph community, and limited the amount of time those new units could run. It was within the Commission discretion to deem those changes insubstantial within the meaning of *Whispering Ranch* because they did not increase the Project's environmental impact. *See Whispering Ranch*, 1994 WL 711473 ("By far the most significant change caused by conversion to AC, however, has to do with potential biological and health effects of the line."). And nothing in the Corporation Commission statutes or precedents required it to make explicit findings on why it did not require a new CEC application.

Sierra Club points to ways in which the changed project could have an increased environmental impact. It argues that, under the air quality permit contemplated by the original CEC, the new units would run only 11% of the time on average, whereas the modified CEC allows them to run up to 30% of the time. The Commission could reasonably find otherwise. In the original CEC, there was no legal restriction on how much the 16 generating units could run. The Commission could determine that the 30% limit in the modified CEC was more environmentally favorable than no limit.

Sierra Club also notes that placing 12 generating units further away from the Randolph community could have a different environmental impact than the previously planned 16 generating units. It is true that moving the units further away from Randolph moves them closer to one other property. But it was for the Commission to decide whether this change was an "environmentally significant modification" so as to require a new application or additional evidentiary hearings. *Jackson v. New York State Urban Development Corp.*, 494 N.E.2d 429, 444 (N.Y. App. 1986), *quoted in Whispering Ranch*. The Commission could reasonably find that moving the generating units further from the Randolph community and closer to one other property was a net positive environmental impact.

C. The Commission Made Sufficient Findings.

A.R.S. §§ 40-360.06 and -360.07 require the Commission to consider several factors when balancing the need for electric power against a project's effects on the environment, and Sierra Club argues that Commission failed to make sufficient findings under these statutes. But A.R.S. § 40-360.06 and A.R.S. § 40-360.07 do not require explicit findings on each factor, only that the Commission consider them. Instead, the Commission's findings must be sufficient "to make it possible for the court to make an intelligent review and to determine whether the facts as found provide a reasonable basis for the decision." *Hatfield v. Industrial Comm'n*, 89 Ariz. 285, 288–89 (1961); *accord Shelby School v. Arizona State Bd. of Educ*., 192 Ariz. 156, 163 (App. 1998) ("The findings need not be detailed nor in any particular form, though the reviewing court must be able to discern how the agency reached its conclusion.").

The Commission's findings satisfy this standard. First, it found a need for the Project:

> SRP continues to need additional capacity to meet a growing load demand in its service territory in the next several years. According to SRP, it needs a flexible resource to maintain reliable service in its service area and facilitate the integration of more renewable resources.

See Decision No. 79020, at 13 ¶ 48. As this Court ruled in the prior case, "need" under A.R.S. § 40-360.07(B) means need for a specific project, which is why the Commission may consider the cost and environmental impact of alternatives when deciding whether a project's environmental impact outweighs its necessity. *See* January 20, 2023 Ruling at 6-7.

Sierra Club argues that the Commission found only a need for power generally and not for this particular Project. But the Commission found the Project necessary when it referred to the need for "a flexible resource to maintain reliable service in [SRP's] service area and facilitate the integration of more renewable resources." A great deal of evidence and discussion at the Siting Committee was devoted to whether this Project was a necessary flexible resource given alternative of solar generation with battery storage. The Commission clearly considered that evidence, as shown by its prior decision, Decision No. 78545. And it reassessed its prior view in Decision No. 79020. The Commission's need finding was both specific to this Project and sufficient to permit judicial review. *See Hatfield*, 89 Ariz. at 288 ("The findings must be sufficiently definite and certain to permit a judicial interpretation."); *see also Grand Canyon Trust v. Arizona Corp. Comm'n*, 210 Ariz. 30, 38 (App. 2005) (the Commission has "considerable discretion" to determine need).

The Commission's findings are also sufficient to show it considered and balanced all relevant environmental considerations. The crux of Decision No. 79020 is that the new conditions decreased the Project's environmental impact, especially on the Randolph community, and therefore altered the balance in favor of approving a CEC. *See* Decision No. 79020, at 13 ¶ 49. There is no legal requirement that the Commission make explicit findings on each of the factors in A.R.S. § 40-360.06 so long as it considers them, which the record shows it did.

The Commission's findings "need not be detailed nor in any particular form" so long as the Court can discern how the Commission reached its conclusion. *Shelby School*, 192 Ariz. at 163. The Commission's findings here, especially in the context of its prior decision and the Siting Committee record, make clear that it revisited its decision concerning the need for the Project and weighed environmental considerations differently in light of the new conditions, which the Commission found reduced the Project's environmental impact. The Commission's findings are sufficient to permit meaningful review.

D. <u>Substantial Evidence Supports The Commission's Decision To Approve The CEC</u>.

Because the Commission did not hold an additional evidentiary hearing, its decision to approve a modified CEC was necessarily based on—and must be judged by—the existing Siting Committee record. Sierra Club argues that the existing record does not support the Commission's decision both because of changes to the Project and due to the time that passed since the Siting Committee hearing. But whether the evidence before it was recent enough and relevant enough is a matter to which the Commission receives deference. *Sun City Home Owners Ass'n*, 252 Ariz. at 5; *Grand Canyon Trust*, 210 Ariz. at 33-34. Sierra Club's burden is to show by clear and satisfactory evidence that the Commission acted unreasonably by approving the modified CEC based on the existing record. It has not met that burden.

In evaluating the sufficiency of the evidence, the Court has not considered as evidence supporting Decision No. 79020 the answers Mr. Olson and Mr. O'Connor gave under oath to Commission members at the June 21, 2023 open meeting. As discussed below, their answers cannot reasonably be considered evidence because they were not subject to cross-examination. But the questions and answers pertained largely to the process by which SRP decided to settle with the Randolph Intervenors, something of interest to Commission members but of no import to the Commission's balancing of need against environmental impacts under A.R.S. § 40-360.07(B).

To the extent Mr. Olson was questioned about need, cost, or factors under A.R.S. § 40-360.06, his answers only confirmed that circumstances at the time of the Siting Committee

hearings still existed. The record shows the Commission reversed course not because of new evidence at the open meeting, but because it deemed the changes to the Project sufficient to tip the balance of need against environmental considerations in the other direction. *See* Decision No. 79020 at 13, ¶ 49.

The evidence adduced over the 8-day evidentiary hearing before the Siting Committee was conflicting. SRP presented evidence of the need for additional electric power, and that the most reliable, economical way to meet that need was to add natural gas generating units to the Coolidge Generating Station. This included evidence that solar generation with battery storage is not a sufficiently reliable or economical alternative. SRP also offered evidence regarding the effects of the new generating units on the Randolph community and the environment generally. The Randolph Intervenors and Sierra Club presented contrary evidence, and the record shows the Commission considered all this evidence when deciding to issue a modified CEC.

Sierra Club argues that the evidence does not show how changes to the Project would affect the environment differently, or how SRP's costs would change. Based on the existing Siting Committee record, the Commission could reasonably find that reducing the Project from 16 generating units to 12 and placing a legal cap on how often they could operate would be less costly and have a lesser environmental impact than the Project as originally envisioned. It could also find that moving the generating units further from the Randolph community would decrease the Project's adverse effects for the vast majority of those living nearby.

Sierra Club argues that substantial evidence does not support the Commission's decision without updated information regarding baseline environmental conditions such as background noise, air quality, groundwater, and visual impacts. For most administrative decisions of this kind, there will be a time lag between when data is collected and when it is relied upon. Whether evidence is sufficiently timely to rely upon is for the Commission to decide. It chose to rely on the existing Siting Committee record without updates, and that choice was not unreasonable.

It was similarly reasonable for the Commission to rely on the existing record regarding SRP's need for this Project as a flexible resource to provide power during peak times, and to support other generation resources, including renewables. Neither a new study regarding need nor new evidence about alternatives was necessary for the Commission to make this decision.

Sierra Club points out that the record before the Commission lacked a map or diagram showing the revised location of generating units, and also lacked a copy of SRP's settlement agreement with the Randolph Intervenors. These omissions are insufficient to make the Commission's decision unlawful or unreasonable. First, a revised diagram was added to the record on June 22, 2023, before Decision No. 79020 was issued and before the Commission denied rehearing. Second, it was not necessary for the Commission to review the settlement

agreement in order to decide on the CEC. This is both because the material terms were not in dispute and because the Commission was not ruling on the settlement agreement. It was deciding on a CEC for a scaled-back Project, and reasonably determined that it did not need to see the written settlement agreement to decide the issue.

Ultimately, what the Commission decided in June 2023 is what it could have decided in April 2022: to approve a modified CEC that lessened the Project's environmental impact to the point where the balance tipped in favor of approval. A.R.S. § 40-360.07(B). The passing of around 15 months between the decisions would have justified the Commission in requiring more evidence, but instead the Commission chose to rely on the existing record. It did not act unreasonably by doing so.

E. The Commission Did Not Violate Sierra Club's Due Process Rights.

Sierra Club argues that the process by which the Commission approved the CEC was unlawful. Although SRP and the Commission argue that Sierra Club had no due process rights in the CEC proceedings, the Court disagrees. While Sierra Club may have had no constitutional right to intervene and participate in those proceedings, it acquired procedural rights when the Commission allowed it to intervene. But its due process rights were not violated. And, as discussed above, the Commission did not violate Arizona law by approving a modified CEC without requiring a new CEC application or additional evidentiary hearing.

To obtain reversal based on due process, Sierra Club must both prove a due process violation and demonstrate prejudice. *See, e.g., County of La Paz v. Yakima Compost Co.*, 224 Ariz. 590, 598 (App. 2010) ("Even assuming the County was deprived of its due process right to notice and an adequate opportunity to present its claims [citation omitted], because it fails to demonstrate how it was unreasonably prejudiced by the deprivation, we do not find reversible error."). Sierra Club's due process rights were not violated when Commission members questioned two SRP representatives under oath at the June 21, 2023 open meeting. The open meeting notice said the Commission could place witnesses under oath for questioning. And the information provided by Mr. Olson and Mr. O'Connor at the June 21 meeting was of minimal relevance and cannot reasonably be said to have affected the outcome. At most, it confirmed SRP's ongoing need for a flexible, reliable generating resource as testified to before the Siting Committee.

Sierra Club says it was not allowed to cross-examine Mr. Olson and Mr. O'Connor, nor to respond to their statements or present its own evidence. But Sierra Club made no proffer of what questions it would ask or additional evidence it would offer, not even in its motion for rehearing. Given the marginal import of Mr. Olson's and Mr. O'Connor's under-oath statements,

Sierra Club cannot show prejudice without showing what evidence it would have offered and how it might have affected the outcome.

Nor was Sierra Club denied due process by being denied access to the settlement agreement between SRP and the Randolph Intervenors. The Commission's task was to determine whether the need for the Project outweighed its environmental impact given the proposed changes. While concessions made to the Randolph Intervenors and their attorney mattered to Commission members, the CEC terms were public and other terms of the agreement were both uncontested and openly discussed. Sierra Club did not need the written settlement agreement to meaningfully argue against a modified CEC.

IV. ORDERS.

For the foregoing reasons,

IT IS ORDERED denying Sierra Club's appeal under A.R.S. § 40-254 and affirming Arizona Corporation Commission Decision No. 79020.

Given Arizona's power needs and the environmental interests at stake in this case, there is an urgent need for final resolution of whether SRP may build the Coolidge Expansion Project in accordance with the approved CEC. So as not to delay an appeal, the Court signs this minute entry as a Rule 54(b) judgment, and will enter final judgment after attorneys' fees, costs, and any other post-ruling issues are resolved. The Court finds no just reason for delay and directs entry of this partial final judgment under Ariz. R. Civ. P. 54(b) as to the merits of the appeal.

IT IS FURTHER ORDERED that a form of final judgment with Rule 54(c) language be lodged and any request for attorneys' fees or costs be filed within 30 days.

IT IS FURTHER ORDERED signing this minute entry as a formal written order of this Court.

THE HONORABLE RANDALL H. WARNER
JUDGE OF THE SUPERIOR COURT