

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-008624

01/18/2023

HONORABLE RANDALL H. WARNER

CLERK OF THE COURT

A. Meza

Deputy

SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT AND POWER DISTRICT

ERIC D GERE

v.

ARIZONA CORPORATION COMMISSION, et
al.

STEPHEN JOSEPH EMEDI

DIANNE L POST
ANDREW B TURK
JUDGE WARNER

MINUTE ENTRY

This is an appeal of an Arizona Corporation Commission decision denying SRP a certificate of environmental compatibility to expand its Coolidge power plant. The Commission, exercising its broad authority to balance public interests under A.R.S. § 40-360.07(B), determined that the need for the proposed project is outweighed by its environmental impact. SRP has not shown that decision to be unlawful or unreasonable. Therefore, based on the parties' briefs and argument, the entire record before the Commission, and the evidence presented at trial on January 4 and 5, 2023, Arizona Corporation Commission Decision No. 78545 is affirmed.

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. Although it is not generally regulated by the Arizona Corporation Commission ("the Commission"), SRP must obtain a certificate of environmental compatibility ("CEC") from the Commission before

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building a new power plant. A.R.S. §§ 40-360.03, -360.07(A). By statute, CEC applications are heard by the Commission's Power Plant and Transmission Line Siting Committee ("the Siting Committee"), which decides whether to issue a CEC. A.R.S. § 40-360.06(A). A party may request review of the Siting Committee's decision by the Commission, which can confirm, deny, or modify a certificate, or grant one if the Siting Committee denied it. A.R.S. § 40-360.07(B).

The purpose of this process is to allow the Commission to weigh the need for power generation and transmission facilities against their environmental impact. This purpose is reflected in the language of 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.

And it is explicit in the 1971 session law that enacted the siting statutes:

The legislature hereby finds and declares that there is at present and will continue to be a growing need for electric service which will require the construction of major new facilities. It is recognized that such facilities cannot be built without in some way affecting the physical environment where the facilities are located. The legislature further finds that it is essential in the public interest to minimize any adverse effect upon the environment and upon the quality of life of the people of the state which such new facilities might cause. . . . The legislature therefore declares that it is the purpose of this article to provide a single forum for the expeditious resolution of all matters concerning the location of electric generating plants and transmission lines in a single proceeding to which access will be open to interested and affected individuals, groups, county and municipal governments and other public bodies to enable them to participate in these decisions.

See Laws 1971, Ch. 67, § 1; *see also* Historical and Statutory Notes to A.R.S. § 40-360.

SRP applied in December 2021 for a CEC to add 16 new natural gas turbines to the existing 12 turbines at its Coolidge Generating Station. This "Coolidge Expansion Project" was designed to help meet increasing power demand by adding generation capacity that could ramp-up quickly to respond to fluctuations in demand and supply.

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The Sierra Club and a group of residents from the nearby community of Randolph intervened to oppose the application. Randolph is a historic Black community established around 1930. It has around 150 to 250 residents and is adjacent to SRP's property, around a half-mile from the existing turbines. The Randolph residents and the Sierra Club argued that the Coolidge Expansion Project would have significant adverse effects on the environment generally, and on the residents of Randolph in particular. And they argued that the need for the project was not as great as SRP urged because an alternative—solar generation coupled with battery storage—could provide comparable generation capacity at a comparable cost with less environmental effects.

The Siting Committee held an 8-day evidentiary hearing in February 2022. By a 7-2 vote, it approved the requested CEC. The Sierra Club and Randolph residents requested review by the Commission, which voted 4-1 to deny the CEC. The Commission's written findings and conclusions are in Decision No. 78545, issued on April 28, 2022. The Commission subsequently voted 3-2 to deny rehearing.

SRP appeals under A.R.S. § 40-254.

II. THE COMMISSION'S DECISION.

Decision No. 78545 states two independent grounds for denying a CEC, which are summarized in its "Standard for Review" section. First, SRP's application was incomplete:

[T]he CEC application submitted by SRP is not complete and the record is not sufficient to allow the Commission to find that the Coolidge Expansion Project meets the standard required by A.R.S. § 40-360.07(B) to approve the project.

See Decision No. 78545 at 9. The application was incomplete, the Commission found, because it lacked three things: a power flow and stability analysis as required by A.R.S. § 40-360.02(C)(7); a full copy of the environmental and economic analysis undertaken by SRP's consultant, E3; and evidence of an all source request for proposals ("all source RFP"). *Id.* at 9-10. The second ground for denying the CEC was that the environmental impact of the Coolidge Expansion Project outweighed the need for it:

Further, we find that regardless of the completeness of the application, the conditions contained in the CEC as issued do not go far enough for us to find that the need for additional reliable generation outweighs the negative impacts on the environment and people of the surrounding community and the state.

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See Id. at 10.

The Commission supported these determinations with 8 findings of fact and 4 conclusions of law. Key among them are:

Without the results of an ASRFP, the E3 Study, and the Power Flow and Stability Study, the record is not sufficient for the Commission to determine the economics of the CEP and whether there are alternatives available that would provide the same capacity, responsiveness, and reliability for SRP's customers but would be less costly and would potentially have less adverse impacts on the local residents or the environment and ecology of the state.

The evidence in the record shows that the proposed CEP will negatively affect the total environment of the area and state and have significant negative impacts on residents in Randolph from noise levels during construction and operation of the Project, increased lighting, emissions of greenhouse gases, worsened air quality, degraded views, and lower property values.

[T]he record indicates that the residents of Randolph, a historically Black community, have not been treated equitably with other more affluent white communities located in proximity to similar projects, and that Randolph citizens have suffered increased negative impacts on human health, their community and the environment as a result of the disparate treatment.

The evidence in the record is not sufficient to weigh the balancing of the public interest in favor of granting the 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.”

The conditions placed upon the CEC as issued by the Committee are not sufficient to weigh the balancing of the public interest in favor of granting the 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.

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See Decision No. 78545 at 10-11, Findings 6-7 and Conclusions 1-2. The Commission’s ultimate balancing of public interests under A.R.S. § 40-360.07(B) is summarized in Conclusion 3: “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.” *Id.* at 11, Conclusion 3.

III. DISCUSSION.

A. Standard Of Review.

A.R.S. § 40-254 governs this appeal, and under that statute SRP 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 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).

“Clear and satisfactory evidence” means the same as “clear and convincing evidence.” *Tucson Electric Power*, 132 Ariz. at 243. This burden of proof language is somewhat anomalous in A.R.S. § 40-254 since, under that statute, the standard of review is appellate and the Court does not find facts. But “clear and satisfactory evidence” is best understood as an expression of the high hurdle SRP must overcome to overturn the Commission’s decision. Although the Court decides independently whether the Commission correctly interpreted the law, it gives significant 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.

When reviewing the Commission’s decision, the Court may consider new evidence presented at trial, but only if it was available at the time of the Commission hearing. *Tucson Electric Power*, 132 Ariz. at 244. And the consideration of new evidence does not allow the Court to substitute its judgment for the Commission’s. Rather, “[t]he inquiry remains whether, even in light of the new evidence, there is substantial evidence supporting the Commission’s decision.” *Grand Canyon Trust*, 210 Ariz. at 34.

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B. The Commission Did Not Consider Improper Circumstances When Balancing The Need For The Project Against Its Environmental Impact.

1. *The Commission's Authority Under A.R.S. § 40-360.07(B).*

Several of SRP's assignments of error relate to factors or circumstances the Commission considered when deciding whether the environmental impact of the Coolidge Expansion Project outweighs the need for it. Unlike much of the Commission's authority, which comes from Arizona's Constitution, its authority over power plant siting is statutory. It comes from A.R.S. § 40-360.07(B), which requires the Commission to comply with A.R.S. § 40-360.06, and to balance need against environmental impacts "in the broad public interest."

Subsection A of A.R.S. § 40-360.06 lists several factors the Commission must consider "as a basis for its action with respect to the suitability of either plant or transmission line siting plans when balancing these interests." They include fish, wildlife, and plant life; noise emission levels; scenic areas and historical sites near the proposed site; and the "total environment of the area." A.R.S. § 40-360.06(A)(2), (3), (5), and (6). They also include the cost of proposed facilities. A.R.S. § 40-360.06(A)(8).

Under A.R.S. § 40-360.06(C), a CEC must require compliance with applicable air and water pollution standards, and the Commission may not impose pollution standards other than those established by environmental regulatory agencies.

2. *The Commission Properly Considered The Cost And Environmental Impact Of The Coolidge Expansion Project Relative To Alternatives.*

SRP argues that the Commission committed legal error by considering the economics of the Coolidge Expansion Project. It points out that the Commission does not regulate SRP the way it does other utilities, and therefore has no authority to consider its resource planning or the cost of its projects. It points to A.R.S. § 40-360.12, which prohibits the Commission from regulating entities like SRP, their rates, regulations, or conditions of service, except to the extent provided for in the siting statutes.

The legal premise of this argument is correct, but not its application to Decision No. 78545. The Commission could not lawfully deny SRP's application on the ground that the Coolidge Expansion Project would be too expensive or result in increased rates for SRP's customers. But that is not what the Commission did. Rather, when evaluating the need for the project, the Commission considered its cost and the cost of an alternative that, the Commission found, could have less of an environmental impact.

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This was within the Commission's authority. The Commission's charge under A.R.S. § 40-360.07(B) is to balance the need for a project against its environmental impact. To do this, the Commission must assess how much the project is needed, which can include considering alternatives.

The Commission construed A.R.S. § 40-360.06 and A.R.S. § 40-360.07(B) to require weighing the need for a particular proposed project, not just the need for power generally. *See* Decision No. 78545 at 9 ("Together these statutes require the Commission to determine the environmental impact and need for the proposed project."). Although the Court does not defer to the Commission's interpretation of a statute, this interpretation is correct. The siting statutes do not limit the Commission's consideration to the need for electricity generally. Rather, they direct the Commission to balance need against environmental considerations "in the broad public interest." This requires weighing both sides of the scale: the environmental impact of a project and the need for it.

The siting statutes recognize this. They require a CEC application to include the estimated cost of a proposed project, and they require the Commission to weigh cost as a factor. A.R.S. §§ 40-360.03, -360.06(A)(8); *see also* A.A.C. R14-3-219 (form of CEC application). The reason, as stated in A.R.S. § 40-360.06(A)(8), is that "any significant increase in costs represents a potential increase in the cost of electric energy to the customers or the applicant." The statute acknowledges that reducing environmental impacts may be costly, which may affect customer rates. This is necessarily a project-specific analysis.

Indeed, SRP's basic argument for the Coolidge Expansion Project is that it needs additional, flexible generating capacity to meet future demand, and this project is the most efficient and economical way to do that. This, according to SRP, is due largely to economic factors: it already owns the land, which has space for the expansion; transmission lines are already in place; gas lines are already in place; and it can use water it has stored underground without obtaining new water rights.

At the hearing before the Siting Committee, SRP offered testimony that it had no other viable alternatives to meet its identified need without increasing the cost to customers, reducing reliability, and/or delaying implementation. These are valid points, since the Commission must consider how the cost of mitigating environment impacts will affect customers. A.R.S. § 40-360.06(A)(8). And the Commission could have agreed with SRP, finding that the need for the Coolidge Expansion Project outweighs its environmental impact because, among other reasons, there is no other viable option.

But it was not required to. The Commission could lawfully question whether the Coolidge Expansion Project is as necessary as SRP claims. And just as SRP could argue that

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there are no other viable alternatives, the Commission could find that there are, or that SRP did not sufficiently explore alternatives to say it had none.

This is neither resource planning nor second-guessing SRP's power portfolio choices. It is, rather, an evaluation of the need for the Coolidge Expansion Project, which is within the Commission's statutory authority. As the Court of Appeals noted in *Grand Canyon Trust*: "The statute gives the Commission the obligation to conduct the balancing in the broad public interest and leaves considerable discretion to the Commission in how to determine need under the statute. A.R.S. § 40-360.07(B)." 210 Ariz. at 38.

Construing the siting statutes this way does not, as SRP suggests, constitute an unconstitutional delegation of authority. If the Legislature can authorize the Commission to make power plant and transmission line siting decisions—and SRP cites no authority that it cannot—then it can authorize the Commission to consider the necessity for a specific project. And assessing the need for a project can include exploring whether there are alternatives that would have less of an environmental impact at a comparable cost.

3. *The Commission Properly Considered The Nature Of The Randolph Community When Weighing The Project's Environmental Impact.*

When considering the Coolidge Expansion Project's impact on the surrounding area, the Commission considered the unique nature of the Randolph community. Randolph is the closest residential community to the Coolidge Generating Station, and is both historical and historically Black. The Intervenors urged the Commission to consider "environmental justice" when deciding on a CEC, and SRP argues that the Commission erred by doing so.

Environmental justice, according to testimony at the Siting Committee, involves the equal treatment of people with respect to environmental policy or, as one witness put it, "equal protection from pollution." The Intervenors presented evidence that the Randolph community has already suffered the adverse effects of being close to a power plant with transmission and natural gas lines, as well as to a railroad line and other industrial facilities. The Coolidge Expansion Project, they argued, would exacerbate existing environmental impacts. The Commission agreed, finding that Randolph residents "have not been treated equitably with other more affluent white communities located in proximity to similar projects" and that they "may have suffered increased negative impacts on human health, their community and the environment as a result of the disparate treatment." See Decision No. 78545 at 11, Finding 7. The evidence supports this finding.

The siting statutes do not expressly authorize the Commission to consider environmental justice, but they do require it to consider the effects of a project on nearby communities. These

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include considering noise, scenic areas, historic sites, and the “total environment of the area.” A.R.S. § 40-360.06(A)(3), (5), (6). They further require the Commission to balance need against environmental impacts “in the broad public interest.” A.R.S. § 40-360.07(B).

The terms “total environment of the area” and “broad public interest” give the Commission ample authority to consider the history, character, and makeup of communities near a proposed power plant. It is not required to assume the same environmental conditions—increased noise and light, air pollution, degraded views, etc.—will fall equally on all communities. It can consider whether nearby residents are more vulnerable to the environmental effects of a project, or have already been subject to too much adverse environmental effects. If, for example, a hospital, school, or religious institution were nearby, or an adjacent community had a higher proportion of children or elderly persons, the Commission could consider that as a factor in its balancing of public interests.

Here, the Commission found the Randolph community had suffered disparate and inequitable treatment, resulting in increased health and environmental impacts. Nothing in Arizona law prohibited it from weighing this as one factor in the balance between the need for the project and its environmental impact.

4. *The Commission Properly Considered The Proposed Project’s Effects On Air Quality.*

One effect of Coolidge Expansion Project the Commission considered was “worsened air quality.” *See* Decision No. 78545 at 11, Finding 7. SRP argues that the Commission committed legal error by considering air quality because A.R.S. § 40-360.06(C)(1) prohibits it from imposing air quality standards greater than those set by state and federal regulators. That statute states:

Notwithstanding any other provision of this article, the committee shall require in all certificates for facilities that the applicant comply with all applicable nuclear radiation standards and air and water pollution control standards and regulations, but shall not require . . . Compliance with performance standards other than those established by the agency having primary jurisdiction over a particular pollution source.

A.R.S. § 40-360.06(C)(1).

Based on this statute, if SRP complies with federal and state environmental regulations, the Commission could not issue a CEC requiring it to meet more stringent air quality standards.

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Nor could it condition issuance of a CEC on SRP complying with more stringent air quality standards. The siting statutes do not turn the Arizona Corporation Commission into an environmental regulator.

But they do require the Commission to consider a project's effect on "the environment and ecology of this state." A.R.S. § 40-360.07(B). And they require the Commission to consider the "total environment of the area." A.R.S. § 40-360.06(A)(6). Fairly read, these terms include air quality.

SRP would read "total environment of the area" to exclude air quality, water pollution, and any other aspect of the environment as to which the Environmental Protection Agency or the Arizona Department of Environmental Quality has a performance standard. Had the Legislature meant that, it likely would not have used the term "total environment." It is more likely that "the environment" means the same thing it means in Title 49. *See, e.g.*, A.R.S. § 49-104(A)(1) ("The department shall . . . Formulate policies, plans and programs to implement this title to protect the environment."). It means all those aspects of the environment normally encompassed by the word's plain meaning, including water, air, soil, noise, light, and other subjects encompassed by Title 49.

The most reasonable interpretation of A.R.S. § 40-360.06(C)(1) is that it means what it says and no more: the Commission cannot impose its own air quality standards on the Coolidge Expansion Project. But this does not preclude it from considering air quality as part of the project's total environment effects on the Randolph community and the state.

5. *The Commission Properly Considered CEC Conditions When Weighing The Need For The Project Against Its Impact.*

In Finding 8, the Commission found that the conditions in the CEC approved by the Siting Committee "do not adequately compensate the citizens of Randolph for the damages they would incur as a result of approving the Project." *See* Decision No. 78545 at 11. SRP argues that this finding is unreasonable because the Commission cannot award monetary compensation to Randolph residents or require SRP to pay monetary compensation, and therefore cannot deny a CEC based on lack of compensation.

Nothing in the siting statutes authorize the Commission to consider monetary compensation as part of the CEC process, let alone deny a CEC because the applicant has not sufficiently compensated nearby residents. But despite its finding regarding compensation, none of the Commission's conclusions show it denied the CEC because Randolph residents would not be monetarily compensated. Rather, it denied the CEC because the need for the Coolidge Expansion Project was outweighed by its environmental impact on the Randolph community and

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the state. And in making this decision, the Commission properly considered whether conditions in the CEC sufficiently mitigated that impact to alter the balance in favor of issuing a CEC.

The siting statutes authorize the Siting Committee to impose reasonable conditions on a CEC. A.R.S. § 40-360.06(A). When imposing conditions, the Committee must consider environmental factors, which suggests one purpose of CEC conditions is to ameliorate a project's adverse effects. *Id.* Thus, if the Siting Committee imposes conditions, the Commission must decide whether they sufficiently mitigate environmental impacts so as to tip the balance in favor of issuing a CEC.

That is what the Commission did here. At the Siting Committee, SRP and the Intervenors had discussions about conditions to limit the project's adverse impacts. The Commission ultimately found that the conditions the Committee imposed in the CEC were insufficient to tip the balance in SRP's favor. This was within its authority.

Thus, while it was legal error for the Commission to consider whether the CEC adequately compensated Randolph residents for damages, the Commission's ultimate balancing of public interests neither resulted from that error nor was infected by it.

C. The Commission Erred By Denying SRP's Application As Incomplete, But This Does Not Require Reversal.

1. *Statutory Requirements For SRP's Application.*

SRP argues that the Commission erred by finding its application incomplete and the record insufficient due to the absence of a power flow and stability analysis, the complete E3 report, and an all source RFP.

The statutory requirements for SRP's application are in A.R.S. § 40-360.02 and -360.03. Section 40-360.03 requires someone planning to build a power plant to apply for a CEC in a form the Commission prescribes. A.R.S. § 40-360.03. The application must be "accompanied by information with respect to the proposed type of facilities and description of the site, including the areas of jurisdiction affected and the estimated cost of the proposed facilities and site." *Id.* The Commission's prescribed form is in A.A.C. R14-3-219.

Ninety days before filing the application, the applicant must file a plan that includes the following "to the extent such information is available":

1. The size and proposed route of any transmission lines or location of each plant proposed to be constructed.

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2. The purpose to be served by each proposed transmission line or plant.
3. The estimated date by which each transmission line or plant will be in operation.
4. The average and maximum power output measured in megawatts of each plant to be installed.
5. The expected capacity factor for each proposed plant.
6. The type of fuel to be used for each proposed plant.
7. The plans for any new facilities shall include a power flow and stability analysis report showing the effect on the current Arizona electric transmission system. Transmission owners shall provide the technical reports, analysis or basis for projects that are included for serving customer load growth in their service territories.

A.R.S. § 40-360.02(C). By statute, this information is protected as confidential. A.R.S. § 40-360.02(D). And the Commission may refuse to consider an application if the applicant fails to submit all of this information. A.R.S. § 40-360.02(E).

2. *SRP's Application Was Incomplete Because It Did Not Submit A Power Flow And Stability Analysis, But This Is Not Grounds For Denying The Application On The Merits.*

A.R.S. § 40-360.02(C)(7) required SRP's 90-day plan to include "a power flow and stability analysis report showing the effect on the current Arizona electric transmission system." SPR concedes its 90-day plan did not include that report, but gives two reasons why that did not matter. First, it offered to make its power flow and stability analysis available to Commission staff upon execution of a protective agreement. Second, it did submit a power flow and stability analysis report in early 2022 with its 10-year plan required by A.R.S. § 40-360.02(A), so the Commission had that document in another docket.

Either reason would permit the Commission to excuse the lack of a power flow and stability analysis in SRP's 90-day plan. But it did not do so. The evidence supports the Commission's finding SRP failed to comply with A.R.S. § 40-360.02(C)(7).

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SRP notes that the statute only requires the report “to the extent such information is available,” but the report was available. And although SRP had legitimate confidentiality concerns, the power flow and stability analysis would have been confidential under A.R.S. § 40-360.02(E), and the evidence supports an inference that Commission staff was willing to sign a protective agreement.

But the statutory remedy for omitting required information from a 90-day plan is that the Commission may refuse to consider an application. A.R.S. § 40-360.02(E). The Commission did not do that. Instead, it fully considered SRP’s application, set a hearing before the Siting Committee, and reviewed the Siting Committee’s decision on the merits. Having elected to consider SRP’s application on the merits despite the lack of a power flow and stability analysis, the Commission could not then deny it on that basis.

3. *The Commission Could Not Deny SRP’s Application As Incomplete Based On The Absence Of The E3 Report And An All Source RFP.*

The Commission also found SRP’s application incomplete because SRP did not submit the full E3 report or evidence of an all source RFP. This finding is not supported by the evidence because neither item is required in a CEC application.

E3 is an economics and environmental consultant SRP hired to evaluate whether a solar and battery project could meet the same power needs for the same cost as the Coolidge Expansion Project. Its work product was a PowerPoint presentation, and a few of the slides were introduced as evidence before the Siting Committee, but not the entire presentation.

An all source RFP is designed to solicit bids from different sources to meet a given power need. The evidence supports an inference that conducting an all source RFP is common in the industry for exploring options when there is a need for additional generation resources. SRP often utilizes all source RFPs, but did not in this instance because, it claims, it already had sufficient reliability and cost information on alternatives, and it needed to move quickly.

The E3 report and an all source RFP pertain to the same question the Commission found important: Was the Coolidge Expansion Project the only viable option, as SRP argued? Or was there another option, such as solar generation combined with battery storage, that could provide the same generation capacity with similar reliability and at a similar cost, and with fewer adverse environmental effects? As discussed above, this is a proper factor for the Commission to consider. And the Commission could reasonably find the full E3 report relevant to that consideration, and that the results of an all source RFP were critical to evaluating the viability of alternatives.

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But the Commission could not deny SRP's application as incomplete due to the absence of these items because there is no legal requirement that they be submitted. No statute, rule, or Commission directive required SRP to hire a consultant like E3 and produce the results of its work. And no statute, rule, or Commission directive required SRP to conduct an all source RFP before proceeding with the Coolidge Expansion Project.

4. *The Commission Properly Considered The Absence Of Relevant Information When Balancing Need Against Environmental Impact*

Based on the above, one basis for denying the CEC is erroneous. The Commission could not lawfully deny SRP's application on the ground that it was incomplete because it did not include a power flow and stability analysis, the full E3 report, and the results of an all source RFP. But this does not require reversal because the Commission had other, independent grounds for denying the CEC. Its use of the words "regardless of the completeness of the application"—at the top of page 10 of Decision No. 78545—makes this clear.

Nor does it preclude the Commission from considering the absence of this information when balancing the need for the Coolidge Expansion Project against its environmental impact. In several places in its decision, the Commission expressed that, without that information, it could not find sufficient need to outweigh the project's environmental effects. The Commission's evaluation of SRP's claimed need was based both on the evidence presented, and on the absence of evidence it deemed important.

Decision No. 78545 says this in several places. For example, in the "Standard for Review" section, it says "the record is not sufficient to allow the Commission to find that the Coolidge Expansion Project meets the standard required by A.R.S. § 40-360.07(B) to approve the project" and "the record does not contain sufficient information to allow the Commission to find that the CEP is an economical supply of power." *See* Decision No. 78545 at 9. And in Conclusion 1 it says "[t]he evidence in the record is not sufficient to weigh the balancing of the public interest in favor of granting the CEC." *See* Decision No. 78545 at 11.

The Commission phrased the point differently in Finding 6, finding "the record is not sufficient for the Commission to determine the economics of the CEP and whether there are alternatives. . . ." *See* Decision No. 78545 at 11. SRP challenges this finding as unreasonable, arguing that there was ample testimony and documentary evidence to permit a finding about the economics of the project and alternatives. But it misconstrues what the Commission did. The Commission did not make a sufficiency of evidence determination like a court when ruling on motion for summary judgment or a motion for acquittal. There is no mechanism in the siting statutes for doing that, nor is there a minimum evidentiary threshold for proving need.

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Rather, the Commission found that, due to the absence of important information regarding alternatives, it could not adequately credit SRP's claim that the Coolidge Expansion Project was the only viable option. The siting statutes permit this.

D. The Commission's Decision Is Supported By Substantial Evidence.

Finally, SRP argues that the Commission's ultimate determination and several of its findings were unreasonable because they are not supported by substantial evidence. SRP's burden on this issue is high. Under the siting statutes, the Court must give substantial deference to both the Commission's factual findings and its balancing of public interests.

SRP challenges the Commission's findings regarding the need for the Coolidge Expansion Project. The Commission agreed with SRP that it has a need for additional power generation and a flexible resource to meet shifts in demand and supply. *See* Decision No. 78545 at 10. But it found the need to add 16 additional gas turbines to the Coolidge Generating Station insufficient to outweigh their environmental effects on the state and the Randolph community. And it based that finding in part on the absence of adequate information regarding alternatives, and in part on evidence the Intervenors offered about alternatives.

The record supports the Commission's findings in this regard. The Intervenors submitted evidence that battery storage coupled with solar generation could cost less than the Coolidge Expansion Project and produce a comparable amount of energy with fewer environmental effects. Although SRP challenges this evidence, it was up to the Commission to evaluate its credibility and decide how much weight to give it.

Similarly, the Commission could reasonably find that the absence from the record of a power flow and stability analysis, the full E3 report, and an all source RFP undermined SRP's claim of need because that information would have helped it evaluate whether the Coolidge Expansion Project truly was the only viable option. It could have reasonably come to the opposite conclusion, that those items were not critical and SRP had more than sufficient information to demonstrate the project's necessity. But choosing between these opposing views was within the Commission's range of discretion.

SRP suggests the Commission should defer to the Siting Committee on questions of credibility, since it listened to the testimony during its 8-day hearing. But the siting statutes do not support this view. No language in the siting statutes requires deference to the Siting Committee. Rather, A.R.S. § 40-360.07(B) suggests Commission's review is plenary.

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Evidence regarding the Coolidge Expansion Project's environmental effects was also conflicting. There is no real dispute that expanding the Coolidge Generating Station from 12 gas turbines to 28 would result in more noise, light, and air pollution, or that the project's construction would cause noise and dust. SRP does not argue that the project will have no environmental impacts, but rather that the impacts will not be significant. Although the Commission would have been within its discretion to agree, substantial evidence supports the contrary conclusion it reached.

SRP argues that the project will not significantly worsen air quality near the Coolidge Generating Station or in the State because SRP will comply with government air quality standards. As discussed above, the Commission's broad authority under A.R.S. § 40-360.07(B) allows it to consider the effects of air pollution as part of the total environment, even if air quality standards are met. And the evidence supports an inference that, due both to construction dust and the increase in gas turbines from 12 to 28, air quality will be worse with the Coolidge Expansion Project than without.

There is substantial evidence in the record that air quality in that part of Pinal County is already poor. And the Intervenors offered evidence, based on the Environmental Protection Agency's COBRA (Co-Benefits Risk Assessment) tool, that additional air pollution from the additional turbines will have significant health effects. Although SRP challenges that testimony, its arguments go only to the weight of the evidence.

SRP presented evidence that the additional turbines would cause a "barely noticeable" increase in noise, an insignificant increase in light, and only moderate impacts on scenery. But the Commission could appraise those changes differently in light of testimony by Randolph residents about existing noise, light, and scenery impacts. And it could reasonably find that additional noise and light, and the effect on views from the Randolph community, were sufficiently weighty to be considered as environmental impacts to be balanced against the need for the project.

The evidence also supports a finding that the Coolidge Expansion Project will adversely affect property values in the Randolph community. An effect on property values is not itself an environmental impact, but rather indicative of environmental impact. The Intervenors' evidence showed that property values are generally lower close to power plants, and the Commission could infer that the adverse effect on property values would be exacerbated if the plant more than doubled in size.

Ultimately, the Commission considered all these environmental effects together when balancing them against the need for the Coolidge Expansion Project. The Commission could reasonably find that, even if the impacts of this one project are marginal, the residents of

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Randolph already suffer significant environmental effects from their proximity to the existing power plant and other industrial properties, and should not have to bear more.

The Court's role under A.R.S. § 40-254 is not to reweigh the evidence, but to uphold the Commissions' findings and balancing of interests if supported by substantial evidence and not the result of legal error. Here, the evidence would have supported a balancing of interests in favor of issuing of 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.

Based on the entire record of this matter, the Court concludes that Decision No. 78545 is neither unlawful nor unreasonable. And although the Court heard some new evidence at the trial on January 4 and 5, 2023, it was not materially different from what was presented at the Siting Committee hearing, and only served to bolster each side's evidence. The Commission's decision is supported by the evidence with or without the new evidence presented at trial.

IV. ORDERS.

IT IS ORDERED denying SRP's appeal under A.R.S. § 40-254 and affirming Arizona Corporation Commission Decision No. 78545.

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. 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 final judgment under Ariz. R. Civ. P. 54(b) as to the merits of SRP's appeal.

IT IS FURTHER ORDERED that a form of final judgment be lodged and any request for attorneys' fees or costs be filed within 30 days.

/s/ RANDALL H. WARNER
JUDGE OF THE SUPERIOR COURT