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9 **BEFORE THE ARIZONA CORPORATION COMMISSION**

10 **IN THE MATTER OF THE) DOCKET NO. L-00000B-21-0393-00197**
11 **APPLICATION OF SALT RIVER)**
12 **PROJECT AGRICULTURAL)**
13 **IMPROVEMENT AND POWER)**
14 **DISTRICT, IN CONFORMANCE WITH)**
15 **THE REQUIREMENTS OF ARIZONA)**
16 **REVISED STATUTES, SECTIONS 40-)**
17 **360, ET SEQ., FOR A CERTIFICATE OF)**
18 **ENVIRONMENTAL COMPATIBILITY)**
19 **AUTHORIZING THE EXPANSION OF) SIERRA CLUB’S REQUEST FOR**
20 **THE COOLIDGE GENERATING) REHEARING AND**
21 **STATION, ALL WITHIN THE CITY OF) RECONSIDERATION OF DECISION**
22 **COOLIDGE, PINAL COUNTY,) NO. 79020**
23 **ARIZONA.)**

24 Pursuant to A.R.S. §§ 40-253(A) and 40-360.07(C), Sierra Club files this request for
25 rehearing and reconsideration of the Arizona Corporation Commission’s (“Commission”)
26 Decision No. 79020¹ to rescind its prior decision and grant an amended certificate of
27 environmental compatibility (“CEC”) to Salt River Project Agricultural Improvement and Power
28 District (“SRP”) for the revised Coolidge Expansion Project (“Project”). The Commission’s
decision to summarily grant a CEC for SRP’s revised Project, reversing its earlier denial (Decision
No. 78545), is unreasonable and unlawful because (1) the Commission lacked a proper evidentiary
basis for that decision and therefore its decision is not based on substantial evidence, (2) the
Commission improperly failed to conduct an evidentiary hearing prior to its decision regarding the
revised Project, and (3) the Commission’s rushed and biased decisionmaking process violated due
process requirements.

¹ Decision No. 79020, No. L-00000B-21-0393-00197 (June 28, 2023) [hereinafter “Decision No. 79020”].

1 In this docket, the Commission has taken the extraordinary step of rescinding a decision
2 that was *upheld* by the Superior Court.² The Commission voted to rescind its prior decision a mere
3 seven days after SRP requested that the Commission rescind its prior decision on the basis of an
4 agreement between SRP and certain residents of Randolph (“Randolph Intervenors”). Remarkably,
5 the Commission voted to approve SRP’s request on June 21 without ever having seen the
6 underlying agreement between SRP and certain Randolph residents that was the purported basis
7 of SRP’s request. Moreover, even after the Commission’s written decision was issued, the
8 agreement has still not been filed in the docket, and no parties other than SRP and the Randolph
9 Intervenors have been provided the agreement that is the primary basis for the Commission
10 rescinding its prior decision and granting the amended CEC. At its June 21 meeting, the
11 Commission swore in representatives only from SRP (but no other parties); did not allow cross-
12 examination of SRP’s representatives; and cut off Sierra Club’s representative when he attempted
13 to speak after his brief opening remarks.

13 The Commission’s rush to reach a politically-motivated, pre-determined outcome is
14 unlawful and unreasonable. The Commission should grant rehearing and reconsider Decision No.
15 79020, direct SRP to file an amended CEC application, and direct the Power Plant and Line Siting
16 Committee (“Siting Committee”) to hold an evidentiary hearing regarding the revised Project.

17 **BACKGROUND**

18 In order to construct a fossil fuel power plant larger than 100 MW, a utility must obtain a
19 CEC. A CEC requires a finding that the proposed project is environmentally compatible with the
20 proposed site after considering a project’s impacts on the “total environment of the area,” noise
21 impacts, visual impacts, the “estimated cost of the facilities,” and other factors.³

22 Ninety days before a utility applies for a CEC, it must file a plan with the Commission
23 describing the project and provide a power flow and stability analysis.⁴ SRP submitted a ninety-
24 day plan for the original Project on September 14, 2021, but SRP did not provide a power flow
25 and stability analysis with its ninety-day filing in this docket as required by A.R.S. §40-360.02.
26

27 ² *Salt River Project Agricultural Improvement and Power District v. Arizona Corporation Commission et al.*, No.
28 CV 2022-008624 (Maricopa County Sup. Ct. Jan. 20, 2023) (hereinafter “Superior Court Order”).

³ A.R.S. § 40-360.06(A).

⁴ A.R.S. § 40-360.02(B), (C).

1 On December 13, 2021, SRP applied to the Siting Committee for a CEC for the Project.
2 Sierra Club, the Randolph Intervenors, and Western Resource Advocates (“WRA”) intervened in
3 the proceeding. The Siting Committee held eight days of hearings on the CEC application in
4 February 2022, in which it heard testimony from 23 witnesses and considered 85 exhibits.

5 The record evidence presented to the Siting Committee demonstrated that the Project
6 would have had significant, quantifiable negative environmental impacts, including increased air
7 pollution and health impacts, noise impacts, light impacts and degraded views, and decreased
8 property values. The record showed that feasible, economical, and less environmentally harmful
9 alternatives to the Project were available. SRP did not present evidence on how the need for
10 additional capacity could have been met through a broad range of alternatives; instead it chose to
11 provide evidence regarding only the Project and a very limited set of alternatives which were not
12 the product of a competitive bidding process.

13 On February 23, 2022, the Siting Committee approved the CEC. Sierra Club and the
14 Randolph Intervenors petitioned the Commission for review of the Siting Committee’s decision.
15 When a Siting Committee CEC decision is challenged, A.R.S. § 40-360.07(B) requires the
16 Commission to consider the environmental factors in A.R.S. § 40-360.06 (including a project’s
17 impacts on the “total environment of the area,” noise impacts, and visual impacts, among others)
18 and to “balance, in the broad public interest, the need for an adequate, economical and reliable
19 supply of electric power with the desire to minimize the effect thereof on the environment and
20 ecology of this state.”

21 The Commission reviewed the record developed before the Siting Committee. After
22 briefing by the parties, the Commission heard oral argument on March 16, 2022. On April 12,
23 2022, the Commission voted 4 to 1 to reject the CEC for the Project. The four-Commissioner
24 majority cited concerns about the Project’s environmental and health impacts, and SRP’s failure
25 to adequately consider alternatives to the Project.

26 On April 28, 2022, the Commission issued Decision No. 78545 denying the CEC for the
27 Project. Applying the statutory factors in A.R.S. § 40-360.06, the Commission’s order found that
28 the Project would have significant negative environmental impacts, including air pollution,

1 greenhouse gas emissions, noise, light, visual impacts, and lower property values.⁵ The
2 Commission also found that there was insufficient evidence in the record showing that SRP had
3 considered whether there were feasible alternatives to the Project that would be less costly and
4 have lesser environmental impacts.⁶ The Commission therefore concluded that the Project failed
5 the balancing test under A.R.S. § 40-360.07, and that denial of the CEC was in the public interest.⁷

6 On May 16, 2022, SRP filed a request for rehearing and reconsideration of the
7 Commission’s decision. On June 6, 2022, the Commission voted 3 to 2 to deny SRP’s request for
8 rehearing, reaffirming its denial of the Project.⁸ On July 6, 2022, SRP filed a lawsuit in Maricopa
9 County Superior Court challenging the Commission’s denial of the CEC.

10 The Superior Court examined the administrative record and held a two-day trial on January
11 4 and 5, 2023. On January 20, 2023, the Court issued a merits order affirming the Commission’s
12 decision to deny the CEC.⁹ The Court held that “there is no real dispute that expanding the
13 Coolidge Generating Station from 12 gas turbines to 28 would result in more noise, light, and air
14 pollution,” and that “substantial evidence supports” the Commission’s conclusion that those
15 impacts would be significant.¹⁰ The Court also held that substantial evidence supported the
16 Commission’s conclusions that the Project would degrade air quality and cause adverse health
17 effects, and that the Project would adversely affect property values.¹¹

18 On January 25, 2023, the Commission voted to direct the Legal Division to engage in
19 discussions with SRP regarding the Superior Court’s decision. The Commission ratified that action
20 on February 22, 2023, but took no further action. On February 17, 2023, SRP appealed the Superior
21 Court’s decision.

22 On June 14, 2023, SRP filed an application to amend Decision No. 78545 pursuant to
23 A.R.S. § 40-252. SRP stated that it had reached an agreement with the Randolph Intervenors and

24 ⁵ Decision No. 78545 at 11:5-8, No. L-00000B-21-0393-00197 (Apr. 28, 2022) [hereinafter “Decision No. 78545”].

25 ⁶ *Id.* at 10:26-11:4.

26 ⁷ *Id.* at 11:15-27.

27 ⁸ Decision No. 79020 misstates the date of the Commission’s previous vote to deny rehearing of Decision 78545.
See Decision No. 79020 at 7:17-18. The Commission voted to deny rehearing on June 6, 2022, not July 12, 2023.

28 ⁹ Decision No. 79020 misidentifies the Commission decision that the Superior Court affirmed on January 20, 2023.
See Decision No. 79020 at 7:19-20. The Superior Court affirmed Commission Decision No. 78545, not Decision
No. 78454.

¹⁰ Superior Court Order at 16.

¹¹ *Id.*

1 asked the Commission to “(i) rescind[] the Commission’s prior denial of the certificate of
2 environmental compatibility (CEC) for the Coolidge Expansion Project . . . under Decision 78545
3 and (ii) approv[e] the Expansion Project under the terms and conditions of a proposed amended
4 CEC . . . that incorporates certain new terms and conditions agreed to by the Randolph Parties.”¹²

5 SRP’s application proposed several substantial changes to the Project: SRP proposed to change
6 the number of turbines from 16 to 12, relocate those turbines to a different part of the Project site
7 400 feet away from the original location, allow those turbines to operate up to a 30% capacity
8 factor, and make several changes to mitigation measures for the Project.¹³

9 Although SRP extensively referenced its agreement with the Randolph Intervenors in its
10 application and asked the Commission to approve the CEC on the basis of that agreement, SRP
11 did not provide a copy of its agreement with the Randolph Intervenors to the Commission or to
12 other parties to the proceeding prior to the Commission vote on June 21. Moreover, although SRP’s
13 revised Project involved relocation of the turbines and other Project elements on the Coolidge site,
14 SRP’s June 14 application filing did not include a diagram of the revised Project showing where
15 the turbines would be located.¹⁴

16 SRP’s application was scheduled for consideration at the Commission’s June 21, 2023
17 open meeting, only one week after it was filed by SRP. No staff memorandum or proposed order
18 was docketed prior to the Commission’s consideration of the application.

19 At the June 21 meeting, the Commission allowed multiple SRP representatives to make
20 statements under oath in support of SRP’s application. However, the Commission did not permit
21 counsel for Sierra Club to cross-examine or otherwise question those SRP representatives. Counsel
22 for Sierra Club was permitted to make a single brief statement, but the Commission did not allow
23 counsel for Sierra Club to ask any questions during the proceeding, rebuffing an attempted
24 question from Sierra Club’s attorney. Neither Sierra Club nor any party other than SRP was given
25 an opportunity to offer sworn testimony.

26 Counsel for SRP incorrectly asserted at the Commission meeting that the Randolph
27 Intervenors now support the Project. Counsel for the Randolph Intervenors corrected SRP’s
28 mischaracterization, clarifying that while they had withdrawn their opposition to the CEC pursuant

¹² Salt River Project’s Application to Amend Decision 78545 Pursuant to A.R.S. Section 40-252 at 1-2, No. L-00000B-21-0393-00197 (June 14, 2023) [hereinafter “Application to Amend”].

¹³ See Decision No. 79020 at 12:26-13:10.

¹⁴ See *id.* at 8 fn. 8.

1 to the agreement with SRP, the Randolph Intervenors did *not* support SRP’s revised Project.
2 Despite this, the Commission voted 4-1 to rescind Decision No. 78545 and to grant the amended
3 CEC for the Project.

4 On June 22, the day *after* the Commission voted on SRP’s application, SRP filed a “notice
5 of errata” to its application which for the first time included a diagram of the revised Project.¹⁵

6 On June 28, 2023, the Commission issued a written order, Decision No. 79020, rescinding
7 Decision No. 78545 and granting the amended CEC for the Project.

8 LEGAL STANDARDS

9 Any party to a proceeding may seek rehearing of a final Commission decision within
10 twenty days after that decision is entered pursuant to A.R.S. § 40-253(A). Upon rehearing, if “the
11 commission finds that the original order or decision or any part thereof is in any respect unjust or
12 unwarranted, or should be changed, the commission may abrogate, change, or modify the order
13 or decision.”¹⁶ Any party to a CEC decision under A.R.S. § 40-360.07(B) may request
14 reconsideration of that decision within thirty days after the decision is issued.¹⁷ A request for
15 reconsideration “shall set forth the grounds upon which it is based and state the manner in which
16 the party believes the commission unreasonably or unlawfully applied or failed to apply the
17 criteria set forth in [A.R.S.] § 40-360.06.”¹⁸

18 The Commission’s decisions must be supported by substantial evidence, and cannot be
19 arbitrary, capricious, or an abuse of discretion.¹⁹ Generally, agencies must articulate a
20 “satisfactory explanation” for their decisions, including a “rational connection between the facts
21 found and the choice made.”²⁰ Where an agency fails to articulate a rational basis for a decision,
22 that action is arbitrary and capricious.²¹ Before the Commission can rescind or amend a previous
23

24 ¹⁵ See Decision No. 79020 at 8 fn. 8.

25 ¹⁶ A.R.S. § 40-253(E).

26 ¹⁷ A.R.S. § 40-360.07(C).

27 ¹⁸ *Id.*

28 ¹⁹ *Sierra Club--Grand Canyon Chapter v. Ariz. Corp. Comm'n*, 237 Ariz. 568, 354 P.3d 1127, 1134 (Ct. App. 2015);
Hirsch v. Arizona Corp. Comm'n, 237 Ariz. 456, 461–62 (Ct. App. 2015).

²⁰ *Compassionate Care Dispensary, Inc. v. Ariz. Dep't of Health Servs.*, 244 Ariz. 205, 213 (Ct. App. 2018); *Sun
City Home Owners Ass'n v. Ariz. Corp. Comm'n*, 248 Ariz. 291, 299 (Ct. App. 2020), *aff'd in part, vacated in part
on other grounds*, 252 Ariz. 1 (2021).

²¹ *Compassionate Care Dispensary*, 244 Ariz. at 213; *Sun City Home Owners Ass'n*, 248 Ariz. at 299.

1 decision under A.R.S. § 40-252, it must show “due cause” for that action, which requires “an
2 affirmative showing that the public interest would thereby be benefited.”²²

3 4 ARGUMENT

5 I. THE COMMISSION’S BALANCING OF THE STATUTORY FACTORS IS 6 UNLAWFUL, UNREASONABLE, AND UNSUPPORTED BY SUBSTANTIAL 7 EVIDENCE.

8 The Commission’s decision to grant the amended CEC is unlawful, unreasonable, and
9 unsupported by substantial evidence. When considering a CEC application, A.R.S. § 360.07(B)
10 requires the Commission to determine whether the need for a proposed project outweighs the
11 project’s adverse environmental impacts, including the environmental factors specified by A.R.S.
12 § 360.06. To conduct the balancing test under A.R.S. § 360.07(B), the Commission must have
13 evidence of, and consider, the following: (1) the need for a project, which includes an assessment
14 of the need for the project relative to alternatives; (2) an adequate description of the project features
15 and design, including the location of each project element; (3) baseline environmental conditions
16 in the project vicinity, including background levels of air pollution and existing visual, lighting,
17 and noise conditions; and (4) the incremental impacts of the proposed project, including
18 environmental impacts such as air pollution, noise, light impacts, and visual impacts.

19 Here, SRP’s revised Project is substantially different than the project SRP originally
20 proposed, and conditions have changed significantly since SRP conducted the environmental
21 studies two years ago for its original CEC application. Yet SRP failed to update any of its original
22 analyses or provide any new evidence regarding the need for the revised Project, the revised Project
23 design and the locations of specific features, baseline environmental conditions in the area, or
24 environmental impacts of the revised Project. The Commission therefore lacked substantial
25 evidence on all of the factors needed to conduct the balancing test under A.R.S. § 360.07. To obtain
26 that evidence, the Commission should have required SRP to submit a new or amended CEC
27 application, and then held an evidentiary hearing on the revised Project. The Commission’s failure
28 to conduct a new evidentiary hearing, and decision to grant a CEC based on stale and insufficient
evidence, is unlawful.

²² *Ariz. Corp. Comm'n v. Tucson Ins. & Bonding Agency*, 3 Ariz. App. 458, 463–64 (1966); *see also Ariz. Corp. Comm'n v. Ariz. Water Co.*, 111 Ariz. 74, 76 (1974).

1 Specifically, the Commission’s decision to rescind Decision No. 78545 and grant the
2 amended CEC for the Project is unlawful and unreasonable for four separate reasons:

- 3 (1) The record prior to the Commission’s vote did not contain basic information about the
4 revised Project, such as the agreement between SRP and the Randolph Intervenors and
5 the map of the revised Project;
- 6 (2) The Commission did not determine that there was a need for this particular revised
7 Project, and could not have done so because the record contained no evidence regarding
8 the need for the revised Project as of June 2023;
- 9 (3) The Commission did not determine the incremental environmental impacts of the
10 revised Project, and could not have done so because the record contained no evidence
11 regarding the incremental impacts of the revised Project as of June 2023; and
- 12 (4) The Commission did not determine the background pollution levels as of June 2023 so
13 as to permit the Commission to evaluate the environmental impacts of the revised
14 Project, and could not have done so because the record contained no evidence regarding
15 baseline pollution levels as of June 2023.

16 **A. The Commission’s Decision About the Revised Project is Not Based on Substantial
17 Evidence Because the Commission Lacked Key Information About the Revised
18 Project.**

19 Decision No. 79020 is unlawful and unreasonable because the Commission failed to obtain
20 critical information about the revised Project prior to voting to grant a CEC for the Project. In
21 particular, the Commission failed to obtain and place in the record two key pieces of information
22 regarding the revised Project: the agreement between SRP and the Randolph Intervenors on which
23 the amended CEC is based; and a diagram of the location of the revised Project.

24 SRP’s request to rescind the original decision and grant the amended CEC was based on
25 an agreement between SRP and certain Randolph residents.²³ Remarkably, the Commission had
26 never seen that agreement before it voted on June 21 to grant the CEC, and it is unclear whether
27 the Commissioners had seen the agreement prior to issuance of Decision 79020. Moreover, the
28 agreement has not been entered into the record and Sierra Club has never seen the agreement,
either before or after the June 21 vote and the issuance of the written decision.

²³ Application to Amend at 2:27-3:5, 6:21-22, 11:8-11, 13:12-18.

1 Without the text of the agreement between SRP and the Randolph intervenors, the
2 Commission had no basis to evaluate SRP’s claim that the conditions contained in the agreement
3 mitigate Project impacts or “tip[] the public interest balancing overwhelmingly in favor of
4 approving the Amended CEC.”²⁴ The Commission therefore lacks support for its conclusion that
5 the conditions in the agreement favor granting the amended CEC.²⁵ It was unlawful and
6 unreasonable for the Commission to grant a CEC for the revised Project without ever having seen
7 the agreement which was the basis for SRP’s request to rescind the original order.

8 In addition, SRP’s revised Project proposal changed the number of generating turbines and
9 relocated those turbines to a different part of the Coolidge site.²⁶ Yet despite changing the number
10 and location of the turbines at the Project site, SRP’s application to amend Decision 78545 did not
11 provide a diagram of the revised Project to the Commission, or even a detailed written description
12 of where the revised elements would be located. SRP’s filing simply asserted that the relocated
13 turbines would be located somewhere east of the existing generators and would be “approximately
14 400 feet further away” from the Randolph community, without providing any further detail.²⁷ Prior
15 to the Commission vote on June 21, SRP did not provide any evidence to the Commission showing
16 the specific location of the relocated turbines or other design elements of the revised Project.

17 On June 22, 2023, the day *after* the Commission voted on SRP’s application, SRP filed a
18 “notice of errata” to its application which for the first time included a diagram of the revised
19 Project.²⁸ That diagram shows that the new generating turbines would be relocated to the
20 northeastern corner of the Project site, much closer to North Vail Road than they had been in the
21 original proposal.²⁹ The Commission did not have access to this information at the time of its vote.
22 Without adequate information on the design and location of core Project elements, the Commission
23 had no basis to evaluate Project impacts under A.R.S. § 360.06 or to determine that the Project
24 satisfied the balancing test under A.R.S. § 360.07(B). Therefore, the Commission’s decision was
25 not supported by substantial evidence and is unlawful.

26 ²⁴ Application to Amend at 13:17-18.

27 ²⁵ See Decision No. 79020 at 13:15-24.

28 ²⁶ Application to Amend at 10:24-25, 11:2-5.

29 ²⁷ *Id.* at 11:4-5.

30 ²⁸ SRP Notice of Errata, Exhibit A, No. L-00000B-21-0393-00197 (June 22, 2023) [hereinafter “SRP Notice of
31 Errata”].

32 ²⁹ Compare SRP Notice of Errata with SRP Application for a Certificate of Environmental Compatibility, Air
33 Dispersion Modeling Report at 4-5 (Figure 4), No. L-00000B-21-0393-00197 (Dec. 13, 2021) [hereinafter “CEC
34 Application”].

1 **B. The Commission Did Not Determine That There is a Need for the Revised Project,**
2 **and Lacked a Sufficient Record on Whether There is a Need for the Revised**
3 **Project, as of June 2023.**

4 The Commission violated A.R.S. § 40-360.07 and acted unreasonably by granting the
5 amended CEC without determining that there is a need for this particular revised Project, rather
6 than a generic need for additional capacity or even additional flexible capacity. Decision No. 79020
7 contains two sentences in which the Commission purports to determine the need for the Project:

8 SRP continues to need additional capacity to meet a growing load demand in its
9 service territory in the next several years. According to SRP, it needs a flexible
10 resource to maintain reliable service in its service area and facilitate the integration
11 of more renewable resources.³⁰

12 As explained below, there are two separate legal defects in the Commission’s consideration of the
13 “need” factor under A.R.S. § 40-360.07(B): first, the Commission failed to determine that there is
14 a need for this particular revised Project, rather than a generic need for additional capacity; and
15 second, the Commission failed to create a proper record on whether there is a need for the revised
16 Project as of June 2023, and therefore its decision regarding the need for the Project is not
17 supported by substantial evidence.

18 **1. The Commission Failed to Determine that there is a Need for this Particular**
19 **Project.**

20 In its original decision in this docket, Decision No. 78545, the Commission concluded that
21 SRP had failed to present adequate information on which the Commission could determine that
22 there was a need for the specific Coolidge Expansion Project.³¹ The Commission held that SRP
23 had failed to present information on alternative projects that could provide similar capacity and
24 other services, and thus the Commission lacked sufficient evidence to determine whether the
25 Coolidge Expansion Project was needed.³² The Superior Court upheld this part of the
26 Commission’s Order.³³

27 In Decision 79020, the Commission has violated A.R.S. § 40-360.07(B) by failing to
28 conduct the inquiry it conducted in Decision 78545, namely, failing to determine whether there is
29 a need for this particular Project. Instead, Decision No. 79020 determined only that there is a need

30 Decision No. 79020 at 13, ¶ 48.

31 Decision No. 78545 at 10-11.

32 *Id.*

33 Superior Court Order at 6-8.

1 for “additional capacity” and that SRP “needs a flexible resource.”³⁴ But many other types and
2 configurations of generating resources can provide flexible capacity. For example, SRP could
3 locate 12 combustion turbines at a site other than Coolidge and still obtain additional, flexible
4 capacity. Other types of gas turbines provide flexible capacity; batteries can provide flexible
5 capacity; batteries plus solar and/or wind can provide flexible capacity; and geothermal generating
6 resources can provide flexible capacity. Thus, even if SRP needs additional flexible capacity, that
7 does not mean that SRP needs to place 12 new gas-fired turbines at the Coolidge site.

8 The Superior Court rejected the exact legal interpretation that the Commission advances
9 here. The Superior Court rejected the notion that the “need” factor under A.R.S. § 40-360.07(B)
10 consists solely of whether a utility needs additional energy or capacity. Instead, the Court
11 concluded that the Commission must determine that there is a “need” for the particular project at
12 issue, which may require comparing it to alternative projects.³⁵ Decision No. 79020 violates A.R.S.
13 § 40-360.07(B), is inconsistent with the Superior Court’s decision, and is unreasonable.

14 **2. *The Commission’s Findings on Need are Not Based on Substantial Evidence.***

15 The Commission’s findings regarding the need for the revised Project are unlawful and
16 unreasonable because they are not based on substantial evidence. During the Siting Committee
17 hearing for this matter, SRP claimed that the Coolidge Expansion Project was needed primarily to
18 meet a near-term capacity need in the years 2024-2025.³⁶ SRP also claimed that it would take
19 approximately three years to construct the Project.³⁷ Given the three-year construction timeline,
20 the revised Project cannot be built and commence operation in 2024, and thus the revised Project
21 cannot fulfill the original need that SRP claimed.

22 Here, the existing record does not contain any information showing that, as of June 2023,
23 SRP needs the revised Project based on current conditions and available alternatives. All of the
24 record evidence regarding the need for the Project is based on the purported need for 16 turbines
25 at the Coolidge location based on the resources SRP had procured as of December 2021. That
26 evidence is now stale.

27 In the time since SRP’s Board voted in 2021 to move forward with its original CEC
28 application, SRP has issued two requests for proposals to acquire more generating and storage

³⁴ Decision No. 79020 at 13, ¶ 48.

³⁵ Superior Court Order at 7.

³⁶ Reporter’s Transcript of Proceedings Before the Arizona Power Plant and Transmission Line Siting Committee, Volume I, Certified Record Tab B-4 at 63:22-64:3, 120:13-15, No. L-00000B-21-0393-00197 (Feb. 7, 2022).

³⁷ CEC Application, Exhibit I at I-2.

1 resources.³⁸ In addition, in the time since SRP filed its original CEC application, SRP has begun
2 the process to install two new gas turbines originally purchased for the Coolidge Expansion Project
3 at the Copper Crossing site,³⁹ and is considering siting additional gas turbines at locations other
4 than Coolidge. In short, just as SRP’s proposed Project has changed significantly, SRP’s electrical
5 system has changed substantially since the time SRP filed its CEC application in December 2021.
6 The Commission had no evidentiary basis on which to determine whether SRP needs the revised
7 Project now, in the middle of 2023.

8 SRP has not provided any evidence that it reassessed the need for the Project between
9 December 2021, when it filed its original CEC application, and June 2023, when it asked the
10 Commission to rescind its decision. In addition to the new resources that SRP has procured and
11 SRP’s installation of gas turbines at another site, other significant developments have occurred
12 since December 2021 that could impact the need for the revised Project. For example, the federal
13 Inflation Reduction Act passed in August 2022 provides large financial incentives for a range of
14 technologies that could serve as alternatives to the gas-fired turbines in the revised Project.⁴⁰

15 Indeed, SRP’s application asserted that the need for the revised Project is different than the
16 need for the original Project. During the June 21 open meeting, SRP’s representative claimed that
17 the revised Project is now needed to meet capacity needs in 2026 and 2027. However, SRP claimed
18 that the original Project was needed to meet capacity needs in 2024 and 2025. There is not
19 substantial evidence in the record to support SRP’s claims regarding the need for the revised
20 Project in 2026 or 2027 and to support the conclusion under A.R.S. § 40-360.07(B) that the revised
21 Project is needed. After SRP filed its request to rescind the Commission’s original decision, the
22 Commission did not hold any evidentiary hearings. SRP’s statements made at the June 21 Open
23 Meeting do not constitute proper evidence, because parties were not given the opportunity to cross
24 examine SRP’s representatives.⁴¹ Moreover, no party other than SRP was given the opportunity to

25 ³⁸ SRP, “SRP Issues All-source RFP for New Power Generation Resources” (Oct. 29, 2021), *available at*
26 <https://media.srpnet.com/srp-issues-all-source-rfp-for-new-power-generation-resources/>; SRP, “SRP Issues 2023
27 All-source RFP for New Power Generation Resources,” (Feb. 27, 2023), *available at* [https://media.srpnet.com/srp-
28 issues-2023-all-source-rfp-for-new-power-generation-resources/](https://media.srpnet.com/srp-issues-2023-all-source-rfp-for-new-power-generation-resources/).

³⁹ SRP, “SRP Board Approves Continued Resource Development at Copper Crossing” (Sept. 12, 2022), *available at*
<https://media.srpnet.com/srp-board-approves-continued-resource-development-at-copper-crossing/>.

⁴⁰ Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (codified as amended at 42 U.S.C. §
16517).

⁴¹ See Section III, *infra*.

1 present testimony under oath. Thus, the Commission’s finding that there is a need for the revised
2 Project described in the amended CEC is not supported by substantial evidence and is unlawful.

3 **C. The Commission Did Not Properly Determine the Environmental Impacts of the**
4 **Revised Project and its Conclusions about Environmental Impacts are Not**
5 **Supported by Substantial Evidence.**

6 A.R.S. § 40-360.07(B) requires the Commission to weigh the need for a particular project
7 against the environmental impacts of the project and to consider the environmental factors in
8 A.R.S. § 40-360.06. The Commission violated A.R.S. § 40-360.06 and § 40-360.07 and otherwise
9 acted unlawfully and unreasonably by failing to properly determine the environmental impacts of
10 the revised Project and by making conclusions regarding environmental impacts that are not
11 supported by substantial evidence. In its original decision, the Commission assessed the
12 environmental impact of the proposed Project based on studies that first considered the existing
13 conditions at the site, including background levels of pollution, and then considered the additional
14 pollution and other impacts the Project would add to the baseline. Here, the Commission’s decision
15 is not supported by substantial evidence on the background levels of pollution and other conditions
16 that existed at the time of its decision in June 2023 and the additional pollution and other impacts
17 that would result from the revised Project.

18 ***1. The Commission Lacked a Sufficient Record on Background Levels of***
19 ***Pollution in 2023 to Assess the Environmental Impacts of the Revised Project.***

20 The Commission’s decision violates A.R.S. § 40-360.06 and § 40-360.07 and is not
21 supported by substantial evidence because the Commission lacked a sufficient record on baseline
22 conditions at the Project site in 2023, including background levels of air pollution and existing
23 noise, visual and lighting conditions. These baseline conditions are a necessary component of
24 determining the environmental impacts of the revised Project. When SRP filed its CEC application
25 in December 2021, it submitted environmental impact studies. These studies each estimated the
26 total impact of the proposed Project in the same general way, considering existing background
27 conditions plus the incremental impact of the Project in order to calculate the total environmental
28 impact of the Project. For example, the noise study examined the incremental noise increase from
the Project relative to background noise levels, and looked at whether the total noise (background
noise plus Project noise) would exceed a certain level of noise deemed to be harmful.⁴² Similarly,

⁴² See CEC Application, Exhibit I-1.

1 the air quality assessment looked at whether the total concentration of air pollutants (background
2 air pollutant concentrations plus Project emissions) would exceed certain thresholds.⁴³

3 There are two problems with the Commission relying on SRP's original environmental
4 impact studies to grant a CEC for the revised Project. First, the environmental studies that SRP
5 submitted with its original CEC application are stale. When SRP submitted its original CEC
6 application in December 2021, SRP filed studies of the noise, visual, and air quality impacts of the
7 proposed Project.⁴⁴ Those studies were conducted in 2021, two years ago.⁴⁵ Moreover, at least
8 some of the studies relied on data from 2018-2020 or even earlier to characterize background
9 values, and that data is now out of date.⁴⁶

10 Second, given that SRP has not provided the Commission with updated information on the
11 June 2023 background levels of noise, visual resources, and air pollution at the Project site, it is
12 impossible for the Commission to evaluate the impacts of SRP's revised Project. SRP argues that
13 the changes to SRP's original proposal would allegedly reduce the negative impacts of the
14 Project.⁴⁷ However, SRP has failed to provide any updated information on background noise,
15 visual and light conditions, and air pollution as of June 2023. Without providing updated
16 information about current background conditions, SRP has no way of knowing the impacts of its
17 revised Project. Thus, SRP has failed to provide the same information for its revised Project that
18 it provided in its analysis of the original Project, and the Commission's decision is not based on
19 the same kinds of information on which its original decision was based.

20 Even assuming for the sake of argument that the incremental impacts of the revised
21 Project would be less than that of the original Project (which SRP has not demonstrated and
22 Sierra Club does not concede), the impact of the revised Project could be the same or worse than
23 the original Project if the background levels of pollution in 2023 are worse than the background
24 levels in SRP's 2021 studies. For example, over the last several years, annual average

25 ⁴³ See CEC Application, Exhibit B-1, Appendix A & B.

26 ⁴⁴ See CEC Application, Exhibits B, B-1, E, I.

27 ⁴⁵ The Air Quality Assessment for the original CEC application is dated November 24, 2021. CEC Application,
28 Exhibit B-1. The Title V Air Permit Application is dated August 21, 2021. CEC Application, Exhibit B-1, Appendix
A. The Air Dispersion Modeling for the Title V Permit Application is dated September 2021. CEC Application,
Exhibit B-1, Appendix B. The Noise Technical Report is dated November 2021. CEC Application, Exhibit I-1.

⁴⁶ For example, SRP's Air Quality Assessment calculated background concentrations of air pollutants using data
from 2018-2020. CEC Application, Exhibit B-1 at 3 (Table 1).

⁴⁷ Application to Amend at 12:19-13:11.

1 concentrations of particulate matter (“PM”) have been increasing in Pinal County.⁴⁸ Thus, even
2 if the PM emissions from the revised Project were slightly lower than emissions from the
3 original Project (which, again, Sierra Club does not concede), if the background PM levels in
4 Pinal County are now higher than those calculated in SRP’s 2021 studies, the revised Project
5 could result in even more unhealthy levels of air pollution than the original project.

6 **2. *The Commission Lacked a Sufficient Record on the Incremental Impacts of***
7 ***the Revised Project and its Conclusions about the Impacts of the Revised***
8 ***Project are Not Supported by Substantial Evidence.***

9 In addition, the Commission’s decision violates A.R.S. § 40-360.06 and § 40-360.07 and
10 is not supported by substantial evidence because the Commission lacked a sufficient record to
11 evaluate the incremental environmental impacts of the revised Project. Decision No. 79020 cites
12 several conditions in the amended CEC that appear to have led the Commission to believe that the
13 revised Project would have less harmful environmental impacts than the original Project.⁴⁹
14 However, when the Commission voted on June 21, and when Decision 79020 was issued on June
15 28, the Commission had no evidence that the amended CEC would lead to less environmental
16 impacts than the original Project. In fact, the Commission had no evidence at all on the
17 environmental impacts of the conditions cited in paragraph 49 of Decision 79020, because the
18 Commission possessed no studies of the noise, light, or air pollution that would result from the
19 new conditions in the amended CEC.

20 Moreover, there is no rational basis on which the Commission could have assumed that the
21 new conditions in the amended CEC would lead to less significant environmental impacts than the
22 original Project. In particular, SRP’s commitment to restrict operation of the turbines to no more
23 than an average 30% capacity factor represents a substantial increase in the level of operations that
24 SRP described during the Siting Committee hearing. SRP repeatedly asserted that the 16 turbines
25 in the original Project would operate at no more than an annual average capacity factor of 11% in
26 a “worst-case scenario.”⁵⁰ Had SRP intended to operate the revised Project at levels similar to the
27 original Project, SRP could have committed to operate the revised Project at no more than an 11%
28 annual average capacity factor. The fact that SRP was unwilling to make that commitment in the

⁴⁸ Western Pinal County is designated by the U.S. Environmental Protection Agency as a “serious” nonattainment area for particulate matter with a diameter of 10 micrometers (“PM₁₀”), meaning that it classifies the area as having unhealthy levels of PM₁₀ pollution.

⁴⁹ Decision No. 79020 at 13, ¶ 49.

⁵⁰ See, e.g., Reporter’s Transcript of Proceedings Before the Arizona Power Plant and Transmission Line Siting Committee, Volume II, Certified Record Tab B-5 at 400:15-25, No. L-00000B-21-0393-00197 (Feb. 8, 2022).

1 amended CEC raises the distinct possibility that SRP could run 12 turbines at levels much higher
2 than the original 16 turbines, thereby generating equal or greater pollution than the original Project.

3 The Commission also cites SRP's commitment to not place any additional turbines on the
4 Coolidge site beyond the 12 turbines in the revised Project.⁵¹ But there is no evidence in the record
5 that SRP ever had plans to place additional turbines at the Coolidge Site after this Project. Thus,
6 there is no evidence that this commitment provides any concrete, additional benefit to anyone or
7 reduces any environmental impacts. SRP's commitment not to do something is meaningless when
8 there is no evidence that SRP ever intended to do that thing in the first place.

9 In addition, the Commission failed to assess the environmental impacts of moving the
10 location of the Project at the Coolidge site. There is no evidence in the record regarding the
11 potential noise impacts on nearby residences from those 12 turbines in their new location, or the
12 potential visual impacts of the turbines, which will now be located closer to North Vail Road than
13 before. At the time of the Commission vote, there was also no evidence on whether any of the
14 relocated Project components will be closer to the adjacent residence at 5310 North Vail Road, but
15 SRP's notice of errata indicates that the revised Project's evaporation ponds will be closer to that
16 residence than in the original proposal.⁵²

17 Because SRP's revised Project is substantially different than the original proposal, the
18 impacts of the Project likely differ as well, and therefore the Commission was required to evaluate
19 those differing impacts. Compared to its original CEC application, SRP's new proposal entails a
20 different number of turbines, a different location for those turbines at the Coolidge site, different
21 operations of the turbines, and different mitigation measures, each of which may change the nature
22 and magnitude of the Project's impacts.⁵³ All of the evidence in the record regarding the impacts
23 from the Project are based on a project with 16 turbines located in a particular part of the Coolidge
24 site. Thus, the Commission had no evidentiary basis for its decision to approve a significantly
25 different revised Project with 12 turbines rather than 16 turbines, relocated 400 feet away⁵⁴ in a
26 different part of the site.

27 ⁵¹ Decision No. 79020 at 13, ¶ 49.

28 ⁵² Compare SRP Notice of Errata, Exhibit A to SRP CEC Application, Air Dispersion Modeling Report at 4-5
(Figure 4).

⁵³ Application to Amend at 2:6-10, 10:24-11:7.

⁵⁴ *Id.* at 11:3-4.

1 In sum, the Commission conflated new conditions in the Amended CEC with evidence of
2 the environmental impacts of those conditions. The Commission’s decision violates A.R.S. § 40-
3 360.06 and A.R.S. § 40-360.07 by failing to make proper factual findings on the environmental
4 impacts of the revised Project and because its findings regarding the impact of the revised Project
5 are not supported by substantial evidence.

6 **II. THE COMMISSION ACTED UNLAWFULLY AND UNREASONABLY BY**
7 **FAILING TO CONDUCT A NEW EVIDENTIARY HEARING PRIOR TO**
8 **VOTING ON THE REVISED PROJECT.**

9 The Commission acted unlawfully and unreasonably in voting on the merits of SRP’s
10 request and issuing Decision No. 79020 without instructing SRP to file an amended CEC
11 application and without holding a new evidentiary hearing regarding the revised Project. The
12 Commission’s test for what constitutes a “substantial change” in an amended project for purposes
13 of A.R.S. § 40-252 was articulated in the *Whispering Ranch* case.⁵⁵ Under that test, if a project is
14 substantially different from one previously proposed in a CEC application or approved in a CEC,
15 the applicant must submit a new or amended CEC application, and the CEC must be amended if it
16 was previously granted.⁵⁶ The Commission has found that such “substantial changes” include
17 changes to the design or dimensions of transmission towers, or changes from DC to AC
18 transmission lines.⁵⁷

18 Where the Commission finds that there has been a substantial change in a project, it
19 generally directs the Siting Committee to hold a new evidentiary hearing to consider the effects of
20 that substantial change. For example, in a decision on an application to amend a CEC for the gas-
21 fired Harquahala power plant pursuant to A.R.S. § 40-252, the Commission noted that it had
22 ordered the Siting Committee to hold evidentiary hearings on the application because there had
23 been “changes to the original application and changes in the project” from the original CEC.⁵⁸
24 Similarly, in Decision No. 78600, the Commission ordered the Siting Committee to hold an
25 additional evidentiary hearing on an application to amend a CEC for a transmission line pursuant
26 to A.R.S. § 40-252 because Staff concluded there had been “major changes” to the project.⁵⁹ In

27 ⁵⁵ Decision No. 58793, No. 70 (Ariz. Corp. Comm’n Sept. 21, 1994) [hereinafter “Decision No. 58793”].

28 ⁵⁶ *Id.*

⁵⁷ *See, e.g., Id.*; Decision No. 69639, No. E-20465A-06-0457 (Ariz. Corp. Comm’n June 6, 2007).

⁵⁸ Decision No. 65654 at 1:21-22, No. L-00000M-99-0096 (Ariz. Corp. Comm’n Feb. 20, 2003).

⁵⁹ Decision No. 78600 at 3:5, No. L-00000YY-15-0318-00171 (Ariz. Corp. Comm’n July 11, 2022).

1 addition, where there have been substantial changes to a project, the Commission has required that
2 applicants submit a new or amended CEC application, rather than simply amending a previously-
3 granted CEC.⁶⁰

4 Here, SRP proposed a “substantial change” to its original CEC application. SRP’s revised
5 Project proposal changed the following key aspects of its original proposal:

- 6 • The number of proposed gas-fired turbines changed by 25%;
- 7 • The specific location at the Coolidge site where the turbines would be placed was
8 changed;
- 9 • The proposed operations of the turbines could be different; and
- 10 • The proposed mitigation measures are different.⁶¹

11 In addition, SRP claims that the need for the Project has changed since the time that SRP filed its
12 original application.⁶²

13 As of the time the Commission voted and issued the written Decision 79020, the
14 Commission did not have substantial evidence regarding the changes to the Project, the need for
15 the revised Project, or the impacts of the revised Project. SRP’s application to amend Decision
16 78545 is not evidence and cannot be treated as such—at most, the Commission may assign that
17 filing the same weight that it assigns to public comments.⁶³ The assertions of SRP’s representatives
18 at the June 21 open meeting are also not evidence.⁶⁴ The existing evidentiary record pertains only
19 to the original Project, not the revised Project.

20 Thus, to follow the *Whispering Ranch* line of decisions, and to comply with the
21 requirement that Commission decisions be supported by substantial evidence, the Commission
22 should have required SRP to file an amended CEC application and directed the Siting Committee
23 to hold new evidentiary hearings before the Commission voted on the merits of SRP’s revised

24 ⁶⁰ Decision No. 58793 at 36:25-37:2 (“[I]n this case, the modification is of such significance that the Commission is
25 of the opinion that an application should be made to the [Siting] Committee for an amended certificate”); *id.* at
26 43:22-25 (“The Siting Act imposes an implied burden on an applicant to make application for an amended CEC
27 when a substantial change is contemplated in a project for which a CEC has previously been granted.”).

28 ⁶¹ Application to Amend at 2:3-10, 10:24-11:7; *see also* Decision No. 79020 at 11:22-28, 12:26-13:10.

⁶² Application to Amend. at 2:20.

⁶³ *See Champion v. Ariz. Pub. Serv. Co.*, Decision No. 77292, 2019 WL 3361212, at *80 note 375 (Ariz. Corp.
Comm’n July 19, 2019) (“We treat both APS’s post-hearing bill impact analysis and Ms. Champion’s Response
thereto to be authorized post-hearing filings, but note that both filings make substantive assertions that have not been
subject to cross-examination. Thus, while we may consider them in our deliberations similar to how we consider
public comment, we do not afford them the weight of sworn and vetted testimony.”)

⁶⁴ *See Volk v. Brame*, 235 Ariz. 462, 469 (Ct. App. 2014) (“[W]hen counsel proceed by avowal, cross-examination
cannot occur—the finder of fact is left merely to consider argument, not evidence.”)

1 Project. The Commission acted unlawfully and unreasonably in voting on the merits of SRP's
2 request and issuing Decision No. 79020 without instructing SRP to file an amended CEC
3 application and without holding a new evidentiary hearing regarding the revised Project.

4 **III. THE COMMISSION'S APPROVAL OF THE REVISED CEC VIOLATED**
5 **SIERRA CLUB'S DUE PROCESS RIGHTS.**

6 Decision No. 79020 and the Commission's June 21 open meeting violated Sierra Club's
7 due process rights under the United States Constitution,⁶⁵ the Arizona Constitution,⁶⁶ and
8 Arizona caselaw,⁶⁷ for several reasons. First, the Commission allowed SRP representatives to
9 make statements under oath at the June 21 meeting, but did not permit counsel for Sierra Club to
10 cross-examine those representatives. This violated due process requirements. As a general rule, it
11 is a violation of parties' due process right for a decisionmaker to rely on testimony as evidence
12 without an opportunity for cross-examination.⁶⁸ "The right to cross-examination is fundamental
13 and attaches when ... any testamentary or documentary evidence [is received]."⁶⁹ Here, it was
14 improper and unlawful for the Commission to rely on new information from SRP representatives
15 that was presented under oath without an opportunity for Sierra Club or other parties to cross-
16 examine those SRP witnesses.⁷⁰ Thus, because Sierra Club was not allowed to cross-examine
17 SRP's representatives at the June 21 meeting, the Commission failed to provide due process to
18 Sierra Club and it was unlawful for Decision No. 79020 to rely on SRP's statements at the June
19 21 open meeting as evidence.

20 Second, despite allowing SRP representatives to make statements under oath at the June
21 21 meeting, the Commission did not provide an opportunity for representatives of Sierra Club or

22 ⁶⁵ U.S. Const. amend. XIV.

23 ⁶⁶ Ariz. Const. art. 2, § 4 ("No person shall be deprived of life, liberty, or property without due process of law.").

24 ⁶⁷ Before the Commission makes a final decision in a proceeding, it must provide parties with "basic due process
25 protections, including notice, a hearing, and the opportunity to present evidence and cross-examine witnesses."
26 *Johnson Utilities, L.L.C. v. Ariz. Corp. Comm'n*, 249 Ariz. 215, 228 (2020); *see also S. Pac. Co. v. Ariz. Corp.*
27 *Comm'n*, 98 Ariz. 339, 346–48 (1965) (stating that orders and other "judicial determination[s]" by the Commission
28 require due process).

⁶⁸ *See Johnson Utilities*, 249 Ariz. at 228 ("basic due process protections" in ACC proceedings require the
opportunity to cross-examine witnesses).

⁶⁹ *Volk*, 235 Ariz. at 469 (alteration in original) (quoting *Obersteiner v. Indus. Comm'n*, 161 Ariz. 547, 549 (App.
1989)).

⁷⁰ *See Volk*, 235 Ariz. at 469.

⁷⁰ *See Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on
questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."); *Gibbons*
v. Arizona Corp. Comm'n, 95 Ariz. 343, 346–47 (1964); *Volk*, 235 Ariz. at 469.

1 other parties to make statements under oath. Due process requires that all parties have “the
2 opportunity to present evidence.”⁷¹ Unsworn statements do not constitute evidence.⁷² Thus, by not
3 allowing anyone other than SRP to give sworn testimony, the Commission deprived Sierra Club
4 and other parties of due process. This unequal treatment gives the appearance of Commission bias
5 by providing an advantage to SRP and disadvantaging all other parties to the proceeding.

6 Third, the Commission did not allow counsel for Sierra Club to ask any questions at all
7 during the June 21 Commission meeting. Counsel for Sierra Club was only permitted to make a
8 single brief statement. When counsel for Sierra Club attempted to ask a question and respond to
9 SRP’s assertions during the proceeding, a Commissioner cut him off. A.R.S. § 40-252 requires
10 “opportunity to be heard as upon a complaint” before the Commission can “rescind, alter or amend
11 any order or decision made by it.” All affected persons must be given an opportunity to be heard
12 before the Commission can alter or amend an order.⁷³ By refusing to allow Sierra Club to ask any
13 questions, the Commission effectively denied Sierra Club a meaningful opportunity to be heard.

14 Fourth, the Commission asserts in Decision 79020 that it approved the CEC for the revised
15 Project because SRP reached an agreement with the Randolph Intervenors.⁷⁴ However, SRP did
16 not provide a copy of its agreement with the Randolph Intervenors to Sierra Club or any other
17 party to this proceeding prior to the Commission’s June 21 meeting or the issuance of Decision
18 79020 on June 28. Depriving parties of the opportunity to review material information relied on
19 by the Commission and the applicant is unlawful.⁷⁵

20 Fifth, as noted above, SRP did not provide a diagram of the revised Project before the
21 Commission vote. By failing to file any evidence documenting key details of the revised Project
22 location, design or features, SRP deprived Sierra Club of the opportunity to fully understand the
23 Project and its impacts. Again, depriving parties of the opportunity to review material information

24 ⁷¹ *Johnson Utilities*, 249 Ariz. at 228.

25 ⁷² *See, e.g.*, Ariz. Admin. Code § R14-3-109(F) (“[a]ll testimony to be considered by the Commission in formal
26 hearings shall be under oath, except matters of which judicial notice is taken or entered by stipulation.”); Decision
27 No. 71865 at 49, No. SW-02361A-08-0609 (Ariz. Corp. Comm’n Sep. 1, 2010); Decision No. 78017 at 5, No. SW-
28 02361A-19-0139 (Ariz. Corp. Comm’n May 18, 2021).

⁷³ *Gibbons v. Ariz. Corp. Comm’n*, 95 Ariz. 343, 346–47 (1964).

⁷⁴ Decision No. 79020 at 9, ¶ 38 and 11-12, ¶ 45.

⁷⁵ *See Smith v. Nat’l Transp. Safety Bd.*, 981 F.2d 1326, 1329 (D.C. Cir. 1993) (agency could not rely upon
document that had not been made available to the public prior to the agency’s decision); *Sierra Nevada Forest Prot.
Campaign v. Weingardt*, 376 F. Supp. 2d 984, 991 (E.D. Cal. 2005) (data underlying an agency’s decision must be
disclosed to the public prior to the agency’s decision).

1 relied on by another party violates due process.⁷⁶ SRP's belated filing of a notice of errata with
2 the Project diagram the day after the Commission vote does not cure this procedural defect.

3 In sum, the Commission's denial of due process to all parties reeks of a rushed attempt to
4 reach a pre-determined outcome. At the June 21 meeting, the Commission swore in representatives
5 from only SRP; did not allow parties to cross-examine SRP's representatives who had been sworn
6 in; prohibited Sierra Club's representative from asking questions or making a statement beyond its
7 opening statement; and failed to provide all parties with the very agreement that was the basis for
8 SRP's request to rescind the original order and was a basis for the Commission's written decision.
9 The Commission process deprived Sierra Club of a meaningful opportunity to make its case and
10 to evaluate SRP's claims about the Project, violating basic principles of fairness and Sierra Club's
11 right to procedural due process under federal and state law. This is unlawful and unreasonable.

12 CONCLUSION

13 In sum, Sierra Club respectfully requests that the Commission grant rehearing and
14 reconsider its decision to grant a CEC for the Project. The Commission's approval of SRP's
15 revised proposal without an adequate evidentiary basis will only lead to more delay and more
16 litigation. The Commission should direct SRP to file an amended CEC application and direct the
17 Siting Committee to hold a new evidentiary hearing on the amended application.

18 **RESPECTFULLY SUBMITTED** this 17th day of July, 2023.

19 SIERRA CLUB

20 */s/ Louisa Eberle*

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⁷⁶ See *id.*

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