ARIZONA COURT OF APPEALS

DIVISION TWO

PETER T. ELSE, Plaintiff-Appellant, v. ARIZONA CORPORATION COMMISSION, Defendant-Appellee, *and* SUNZIA TRANSMISSION LLC, Intervenor-Appellee	Division Two Case No. 2CA-CV-2023-0247 Division One Case No. CV-23-0668 Maricopa County Superior Court No. CV2023-050310

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE CASE 4

A. Statutory framework 4

B. SunZia applies to BLM and WECC 5

C. SunZia applies to the Commission 11

1. Technical differences between AC and DC lines 13

2. The importance of financing and an AC line 14

3. AC line to be built first 24

4. The proposed route 26

D. Mr. Else's prior lawsuit 28

E. The 2022 amendment proceedings 30

1. The Commission's failure to recognize a substantial change and to reweigh the statutory factors 30

2. Pattern cannot testify that Arizona needs its power 36

F. Superior Court's ruling 39

STATEMENT OF ISSUES 41

STANDARD OF REVIEW 42

SUMMARY OF THE ARGUMENT 43

ARGUMENT 45

I. The Commission acted arbitrarily and capriciously by failing to consider the amendment's substantial change in electric service and the consequences of granting a vertical monopoly, which undermined the grounds on which the original proposal was approved. 45

A. The proposed amendments reflected a substantial change in electric service and undermined the grounds on which the original proposal was approved. 48

1. The Superior Court was wrong to give deference to the current Commission's interpretation of the CEC when the CEC clearly indicated the original Commission's intent. 49

2. The Superior Court committed legal error by finding Mr. Else's arguments to be speculative because the arbitrary and capricious standard requires consideration of salient possibilities. 55

3. The Superior Court committed legal error by interpreting Arizona law to allow partial transfers of SunZia's unique CEC. 56

B. The Commission refused to address these important aspects of the problem because it erroneously believed it was bound by res judicata and law of the case, which are inapplicable to Commission decisions. 58

II. The major questions doctrine forbids the Commission from approving the destruction of Arizona's environment to transmit power from one third-party state (New Mexico) to another (California) without a clear statement from the legislature. 62

III. Without the benefits of an AC line, and with no evidence of need in Arizona, the Commission's approval was not supported by substantial evidence. 65

NOTICE UNDER RULE 21(A) 67

CONCLUSION 68

TABLE OF AUTHORITIES

Page(s)

CASES

APS v. ACC, 1-CA-CC 21-0002
(Az. Ct. App. Div. 1 Mar. 7, 2023) 44, 63

Babe Invs. v. Arizona Corp. Comm'n,
189 Ariz. 147 (Ct. App. 1997) 43

Billingsley v. Arizona Corp. Comm'n, 2019 WL 6130830
(Ariz. Ct. App. Nov. 19, 2019) 43

City of Tucson v. Citizens Utilities Water Co.,
17 Ariz. App. 477 (1972) 67

Commission Decision 58793 ..... 32, 33, 46

Commission Decision 69639 ..... 33, 46

Compassionate Care Dispensary, Inc. v. Arizona Dep't of Health Servs.,
244 Ariz. 205 (Ct. App. 2018) 43

Davis v. Ariz. Corp. Comm'n, 96 Ariz. 215 (1964) 44, 60

Else v. Arizona Corp. Comm'n,
2018 WL 542924 (Ariz. Ct. App. Jan. 25, 2018) 29

Farnsworth v. Hubbard, 78 Ariz. 160 (1954) 64

Fay v. Fox in & for Cnty. of Maricopa, 251 Ariz. 537 (2021) 52

FCC v. Fox Television, 556 U.S. 502 (2009) 54

Gaveck v. Arizona State Bd. of Podiatry Examiners,
222 Ariz. 433 (Ct. App. 2009) 42

Grand Canyon Tr. v. Arizona Corp. Comm'n,
210 Ariz. 30 (Ct. App. 2005) 42, 43, 63, 64

Kisor v. Wilkie, 139 S. Ct. 2400 (2019) 52

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 43, 44, 55, 63

Reynolds Metals Co. v. Indus. Comm'n, 98 Ariz. 97 (1965) 66

Richardson v. Perales, 402 U.S. 389 (1971) 66

Roberts v. State, 253 Ariz. 259 (2022) 64

State v. Salazar-Mercado, 234 Ariz. 590 (2014) 53

Sw. Lumber Mills v. Emp. Sec. Comm'n, 66 Ariz. 1 (1947) 53

Tucson Elec. Power Co. v. Arizona Corp. Comm'n,
132 Ariz. 240 (1982) 43

United States v. Nova Scotia Food Corp.,
568 F.2d 240 (2d Cir. 1977) 47, 55

STATUTES

A.R.S. § 12-120(E) 41

A.R.S. § 12-341 67

A.R.S. § 12-348(A)(2) 67

A.R.S. § 12-348(A)(7) 67

A.R.S. § 12-910(F) 51

A.R.S. § 40-1025 33

A.R.S. § 40-252 ..... 29, 60

A.R.S. § 40-253 39

A.R.S. § 40-254(E) 42

A.R.S. § 40-360.01 4

A.R.S. § 40-360.03 4

A.R.S. § 40-360.06 65

A.R.S. § 40-360.06(A) 5

A.R.S. § 40-360.06(B) 5

A.R.S. § 40-360.07(A) 4, 5

A.R.S. § 40-360.07(B) 5, 12, 45, 65

A.R.S. § 40-360.07(C) 39

A.R.S. § 40-360.08(A) 47, 57

INTRODUCTION

In 2016, the Arizona Corporation Commission (ACC or Commission) narrowly approved a single Certificate of Environmental Compatibility (CEC) for the construction of two 500 kilovolt (kV), extra high voltage (EHV) transmission lines that would span over five hundred miles from central New Mexico, where a potential future wind generation facility was contemplated, to Pinal County, Arizona. The two lines would traverse 33 miles of a previously undisturbed portion of the San Pedro Valley (the "Valley") in southeastern Arizona, which all parties agree is a unique biological watershed free of any major transmission lines.

In a 3-2 vote, the Commission approved the request by SunZia Transmission LLC, a private "merchant" entity, to construct the two power lines through the Valley as part of a single CEC. The approval was based on the construction of at least one alternating current (AC) line, which would provide various grid benefits to Arizona and allow multiple generators to interconnect with the line. The relatively virgin San Pedro Valley was chosen as the path for the lines because no other location could satisfactorily accommodate two lines while also traversing near Bowie, Arizona, where SunZia explicitly stated the lines would connect

to the Tucson power grid to create a reliability loop for the Tucson area. SunZia's owner, Southwestern Power Group (SWPG), also had authority to construct a gas-fired generation plant near Bowie, which could connect to the proposed lines.

In 2022, after SunZia failed to raise financing for its transmission project, SunZia sought permission, and the Commission agreed, to split the CEC into two separate CECs because SunZia wished to sell the right to build one of the approved lines to Pattern Energy, which would construct a single, direct current (DC) line that other generators would be unable to access. Pattern had already purchased the rights to build the large wind project in eastern New Mexico; it needed transmission to access the Western Power Grid to move that power to market. The Commission approved Pattern's plan to establish this vertical monopoly, while the approval of the original CEC was based on the benefits of at least one AC line to which multiple generators could interconnect. The Commission approved the split without performing the legally required environmental balancing review for each of the two resulting CECs, and without considering how the changed nature of the project would affect the grid in Arizona.

The Commission and SunZia insisted that the only changes at stake were those that SunZia itself identified in its amendment application, and which SunZia described as narrow and technical. The Commission ignored all evidence presented by Mr. Else related to the substantial change in SunZia's plan of electrical service, and even dismissed its own established criteria for determining what constitutes a substantial change in the project. But disaggregating the lines and creating a vertical monopoly fundamentally changed the statutory balancing analysis, which required weighing how much this new project would meet electrical power needs in Arizona against the environmental harms from building and operating the transmission line.

The Commission failed to engage in this balancing because it erroneously believed that it was bound by *res judicata* (which does not apply to Commission decisions) to stick with the originally approved route, which was based on two lines, and the original finding of need, which was based largely on the construction of an AC line. The Commission also incorrectly maintained in its formal order that a single, DC line was within contemplation of the original CEC—a conclusion to which the Superior Court deferred—even though the CEC itself announced that "at

least one line" was to be an AC line and established a construction deadline assuring that the AC line would be built first.

Additionally, the Commission's formal order falsely stated that the original CEC was approved without a plan of electrical service approved by the regulators of the western electrical grid, when in fact an approved plan based exclusively on the benefits of AC lines had been in place for a decade, including four years prior to the approval of the original CEC. That plan was presented as evidence of Arizona grid benefits during the 2015-16 hearings that preceded the approval of the original CEC, but its existence was capriciously and falsely denied in the subsequent amendment decision.

Plaintiff asks the Court to void the CECs and remand the matter back to the Commission with direction as to the review required.

STATEMENT OF THE CASE

A. Statutory framework

Under Arizona law, power plants and transmission lines must be approved by the ACC. If a utility seeks to build a plant or line, it must seek a CEC from what is known as the Line Siting Committee ("LS Committee" or "Committee"). A.R.S. §§ 40-360.01, .03, .07(A). The Committee holds a hearing where it must consider nine statutory factors, principally

environmental in nature, but also including a factor directly related to assessing cost impacts to electricity ratepayers. A.R.S. § 40-360.06(A). The Committee must also "give special consideration to the protection of areas unique because of biological wealth or because they are habitats for rare and endangered species." A.R.S. § 40-360.06(B).

Once the Committee approves a CEC, the Commission must separately affirm and approve it before an applicant can construct the plant or line. A.R.S. § 40-360.07(A). "In arriving at its decision, the commission shall comply with the provisions of section 40-360.06," and, in addition, it "shall balance, in the broad public interest, the need for an adequate, economical and reliable supply of electric power with the desire to minimize the effect thereof on the environment and ecology of this state." A.R.S. § 40-360.07(B). In other words, the Commission must balance the effect of a new plant or line specifically on the environment and ecology of Arizona against the need in Arizona for the electric power that the plant or line will supply.

B. SunZia applies to BLM and WECC

In 2008, SunZia proposed a series of routes to the Bureau of Land Management (BLM) for the construction of two EHV 500kV transmission

lines. The proposed lines would begin in central New Mexico, where the lines could connect to a potential future wind facility that a company called SunEdison proposed to build. And the lines would end at the existing Pinal Central Substation in central Arizona where the wind and other power generated along the lines could access the electrical grid for the western United States. Entry31_Tr.Vol.1_10/19/15 at 110:8; Entry15_SunZia.CEC.Application at 30 (map).[1]

SunZia began its line siting efforts with BLM even though only twenty-five percent of the Arizona portion of the proposed transmission lines went through BLM lands. Entry31_Tr.Vol.1_10/19/15 at 48:20-25; Entry23_Tr.Vol.8_11/04/15 at 1239:8-14. In October 2011, the Obama Administration, eager to show action on climate change, designated the SunZia project for fast-tracking through the federal permitting process. Entry16_Tr.ACC.Vol.2_02/03/16 at 213:1-4; Entry21_Tr.Vol.10_11/16/15 at 1729:3-6, 1749:8-13.

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[1] The relevant record excerpts and exhibits from the 2015-16 proceedings were not included by the ACC in the official administrative record. Plaintiff included them in an appendix to his brief and subsequently uploaded them to Division II after this case was transferred from Division I. These thirty documents are labeled "entry" for the entry number in the appellate record, along with a description of the document. All other entries are labeled with the Record on Appeal ("ROA") number.

All of SunZia's proposed routes entered Arizona in one of two locations and intersected at a proposed Willow Substation. Entry09_ACC.Ex.3_11/25/15 at 29-30; Entry15_SunZia.CEC.Application at 30 (map); see Figure 1 (below). All the routes then continued from the proposed Willow Substation and terminated at the Pinal Central Substation. Entry09_ACC.Ex.3_11/25/15 at 29-30; Entry15_SunZia.CEC.Application at 30.

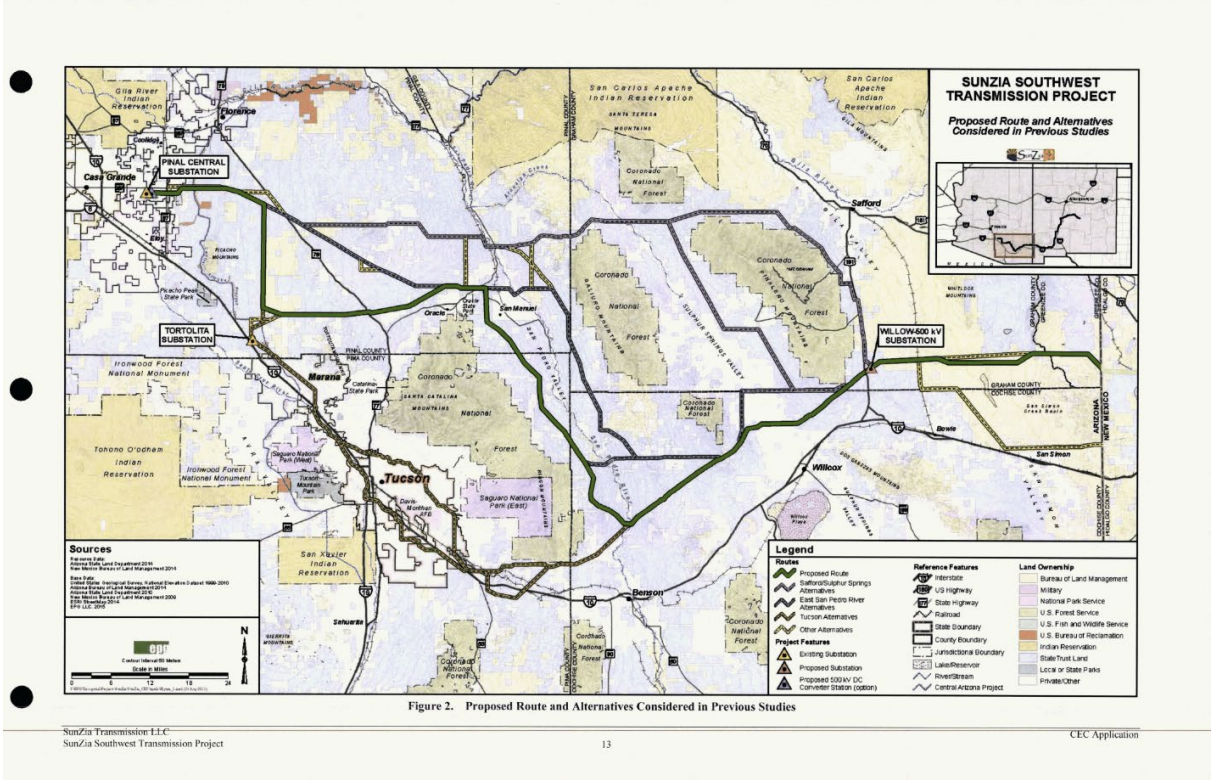

Figure 1 [Entry15_SunZia.CEC.Application at 30]

At the time of its BLM application, over ninety percent of SunZia was owned by Southwestern Power Group (SWPG). Entry31_Tr.Vol.1_10/19/15 at 81:15-17. The proposed Willow Substation was approximately

15 miles away from Bowie, Arizona, where SWPG owned a CEC to build a natural gas-fired power plant. ROA.12 at 3-4 (¶¶23-24); *see also* Entry30_Tr.Vol.2_10/20/15 at 352:18-22, 359:21–360:4; Entry15_SunZia.CEC.Application at 15; Entry04_Sun.Ex.12_11/25/15 at 8 (close-up map). At the time of the federal permitting process, SWPG stated that it might use the SunZia lines to connect to this gas-fired plant. Entry30_Tr.Vol.2_10/20/15 at 280:15-25, 301:1-10, 311:1-10. In a 2010 regulatory filing, SunZia specifically noted that "[i]t is possible that [e.g., SWPG] will also use some or all of their portion of the Project for affiliated generation (e.g., SWPG's Bowie power plant . . . .)." ROA.35 at 189; *see also* ROA.32 at 175 (350:16-23). No routes were presented to BLM that did not intersect at the proposed Willow Substation and pass within 15 miles of Bowie, Entry15_SunZia.CEC.Application at 27, 30. No routes were proposed through central or northern Arizona that could have been co-located with existing powerline corridors.

BLM found drawbacks with all the routes that were proposed through southern Arizona. It rejected the proposed routes through Tucson, where other major transmission lines were already located, out of "environmental justice" concerns because two lines of that size would

require the demolition of some 250 low-income homes. Entry30_Tr.Vol.2_10/20/15 at 257:1-5. BLM rejected SunZia's preferred route through the Sulphur Springs Valley due to opposition by the Arizona Game & Fish Department. Entry20_Tr.Vol.11_11/17/15 at 2133:8–2138:15; Entry19_Tr.Vol.12_11/18/15 at 2261:5–2262:20. BLM apparently also rejected the route that went up toward Safford. By eliminating the routes through Tucson, Safford, and the Sulphur Springs Valley, BLM ultimately settled on approving only one route, the proposed route through the San Pedro Valley. Entry31_Tr.Vol.1_10/19/15 at 47:5-11; Entry21_Tr.Vol.10_11/16/15 at 1739:10-24; Entry19_Tr.Vol.12_11/18/15 at 2263:1-5.

As ultimately approved by BLM, about forty-five miles of the project would go through the San Pedro Valley, primarily on the west side. Entry21_Tr.Vol.10_11/16/15 at 1865:3-25. There are no existing transmission lines or towers in the Valley of a similar scale, and no existing major transmission lines, towers, or other utilities on the west side of the San Pedro River for a thirty-three-mile portion of the route through the Valley. *Id.*

SunZia vehemently opposed the route in front of BLM. Entry21_Tr.Vol.10_11/16/15 at 1864:22–1866:18; ROA.35 at 228-32. Tom Wray, SunZia's project manager at the time, wrote a letter to BLM stating, "The BLM's Preferred Alternative . . . unnecessarily parallels the San Pedro River for 45 miles, cutting across perennial feeder streams and creating an increased likelihood of negative impacts to what was identified as a unique watershed and riparian environment during scoping." ROA.35 at 229. Wray wrote, "SunZia believes such damage will be very difficult to mitigate." *Id.* He explained that "only 12 miles of the 45-mile portion" of the route "that parallels the San Pedro River follows existing linear infrastructure," and that that "infrastructure is an *underground* pipeline," which is the "*only* area along the San Pedro River" where the route "follows an existing linear feature," and therefore "SunZia believes this amounts to an insignificant collocation of utility corridors." *Id.* (emphases in original).

While seeking approval for its proposed transmission lines from BLM, SunZia also sought approval for its plan to construct two new lines from the Western Electricity Coordinating Council (WECC). The WECC is the organization charged with analyzing any major additions to the

Western Interconnection, which is the electrical grid covering the western United States. Before being allowed to connect a new transmission line to the grid, one must get approval from the WECC showing that the new plan of electrical service with a specific transmission capacity (or "path rating") will not destabilize the grid.

In 2011, the WECC approved SunZia's plan of service for two AC lines and a total of 3,000 megawatts (MW) of power (each AC line would transmit up to 1,500 MW of power). Entry30_Tr.Vol.2_10/20/15 at 209:2-8, 232:6-13; ROA.12 at 28 (¶330). This plan of service was in place for ten years, until 2021. ROA.35 at 193-95. SunZia's project engineer, Mark Etherton, stated in 2015, "We believe we have demonstrated [regional reliability criteria] with the WECC three-phase rating." Entry30_Tr.Vol.2_10/20/15 at 243:23–244:1. The Commission's Utilities Engineer who testified in 2015 found it important that the project "achieved WECC Phase 3 status for a path rating of 3,000 MW." Entry11_ACC.Ex.1_11/25/15 at 10.

C. SunZia applies to the Commission

In September 2015, having received approval to build across BLM land and having obtained WECC approval for two AC lines, SunZia filed

an application with the Commission seeking a CEC permitting it to construct the Arizona portions of the transmission lines. In its application, SunZia proposed to build one AC line, and another line either AC or DC. Entry15_SunZia.CEC.Application at 18. SunZia requested up to 200 feet of right of way (ROW) for each transmission line with a typical separation of fifty feet between the two and up to 1,000 feet of separation at some points. SunZia therefore requested a single 2,500-foot-wide corridor—a width equaling the length of eight football fields—for the two lines. *Id.* at 21. As with the BLM application, the project definition included the Willow Substation, the AC substation located near Bowie. ROA.12 at 3, 13 (¶¶23, 142). (A substation converts higher voltage power to lower voltage power that can be used in homes and businesses.) The AC lines could each transmit up to 1,500 MW of power. Entry30_Tr.Vol.2 _10/20/15 at 405:15-24. The DC line, if constructed, could transmit up to 3,000 MW of power. *Id.*

Despite the known problems with the selected route, and despite the Commission's and Line Siting Committee's mandate to "site" lines in suitable locations, SunZia presented only the San Pedro Valley route that had been preapproved by BLM when it filed its application. SunZia's

application recognized the harm that would result to the Valley. Entry15_SunZia.CEC.Application at 44, 47, 66, 68. Because that harm was indisputable, SunZia had to convince the LS Committee and Commission that its proposed lines would meet a "need for an adequate, economical and reliable supply of electric power," which outweighed the harm, as mitigated, to the environment and ecology of this State, including to the San Pedro River Valley. A.R.S. § 40-360.07(B).

1. Technical differences between AC and DC lines

The difference between AC and DC lines is critical to understanding the Committee's and Commission's analysis in the 2015-16 proceedings. America runs on AC power. Electricity can be moved from the generation source as direct current, but at some point, it will need to be converted to AC power. A 500kV direct current transmission line can move more power over longer distances than an alternating current line of the same voltage. ROA.29 at 188-89 (¶48); ROA.31 at 116 (44:12-24); Entry30_Tr.Vol.2_10/20/15 at 247:16–250:3. A DC line is not a good value proposition for distances less than 400 miles, however, because of the expense of building a converter station to convert from DC to AC power. Entry30_Tr.Vol.2_10/20/15 at 224:6-7, 248:3-5, 248:19–250:3. DC

converter stations are substantially larger, more complex, and more expensive than AC substations. *Id.* at 220:15–222:19, 223:24-25, 224:6-7.

As opposed to a DC line, an AC line "allows for additional interconnections to the existing AC system" and "more read[il]y available equipment for those interconnections." *Id.* at 222:6-11. "[M]ultiple interconnections along . . . a long DC line" would be "very difficult to protect from a relaying and control standpoint when there are line faults on long DC lines." *Id.* at 249:15-18. SunZia's project engineer concluded that "typically greater than 400 miles" is when a "DC line is . . . more economical" than an AC line. *Id.* at 247:16-24. In short, a DC line is beneficial if one's goal is to move large amounts of power from a single source to a single terminus over 400 miles away. But if one's goal is to create a transmission line to and from which multiple entities along the line can upload and download power, an AC line is required.

2. The importance of financing and an AC line

In a traditional line-siting case where the applicant is a utility, the Commission usually determines "the need for an adequate, economical and reliable supply of electric power" through an analysis of load growth projections provided by Arizona utilities. Entry30_Tr.Vol.2_10/20/15 at

362:6–363:10. Because SunZia was a private-sector merchant and not a utility, it could not present such testimony; it could have, however, offered the testimony of utilities in Arizona who needed SunZia's power. It had no such testimony to offer. Quite the opposite: both the Salt River Project (SRP) and Tucson Electric Power (TEP) expressed limited if any interest in the project, despite both having a small ownership interest.

SRP had a 4.8 percent ownership interest in the SunZia project. Entry31_Tr.Vol.1_10/19/15 at 81:17-19. Despite its ownership interest, SRP responded to a Commission data request by stating it had "limited interest and participation in the SunZia Project." Entry07_ACC.Ex.5_ 11/25/15 at 2. SRP explained that it was initially interested in the wind resources, but as prices changed "SRP's focus has narrowed to mostly renewable resources located close to the load we serve, primarily solar projects in the Phoenix metropolitan area." *Id.* at 3. Additionally, it was interested in the SunZia project to be able to access "*existing* generation sources located in eastern Arizona"—which would require an AC line. *Id.* As for TEP, which had a 0.4 percent ownership interest in the project, Entry31_Tr.Vol.1_10/19/15 at 81:17-19, it saw the "opportunity for the potential to meet some of its renewable needs through the project, and

the potential to realize reliability benefits by having an additional EHV transmission line connected to its system." Entry06_ACC.Ex.6_11/25/15 at 2. In other words, TEP was mainly interested in creating a reliability loop, which would also require an AC line. Neither SRP nor TEP testified at the line siting hearing in 2015.

The designee of the Commission's Chairman on the LS Committee summarized the matter at the Commission's 2016 open meeting: "[S]ince there are no Arizona utilities that were witnesses at the hearing that said that they actually need it to serve their customers from a technical perspective, my opinion is there is not really a need for the line." Entry17_Tr.ACC.Vol.1_02/02/16 at 9:19-25. A Commission Staff witness testified at the 2015 hearings that Arizona utilities "would still function properly" even if the SunZia lines "didn't get built." Entry23_Tr.Vol.8_11/04/15 at 1398:13-20. As for SunEdison—at the time the developer of the wind project in New Mexico, Entry28_Tr.Vol.4_10/22/15 at 508:6–509:6—its witness merely testified that SunEdison "intend[ed]" to sell to Arizona utilities, *id.* at 536:19-21, and that it had been "marketing" to Arizona utilities for several years, *id.* at 577:10-12. The witness testified that it was possible that all the power from the wind project would be

delivered to California. *Id.* at 519:13–520:5, 524:25–525:22. SunZia itself could not "predict what distribution may, or may not, ultimately exist" because how the power flow "will be ultimately distributed depends on power purchase negotiations between utilities and generators in" New Mexico, Arizona, and California. Entry08_ACC.Ex.4_11/25/15 at 12.

Perhaps unsurprisingly, then, the LS Committee's proposed findings in the original CEC provided only that the project "**may**" aid the state in meeting the statutory requirements, Entry14_2015.CEC at 17:4-5, 17:6-7, 17:16-19, and the Commission's Utilities Division Staff took a neutral position because "the need could be presented as speculative." Entry31_Tr.Vol.1_10/19/15 at 71:22–72:5; *see also* Entry18_Tr.Vol.13_11/19/15 at 2525:2-6 (similar); Entry16_Tr.ACC.Vol.2 02/03/16 at 304:4–311:3, 310:20-24 (similar). SunZia produced no direct evidence that Arizona needed the power generation that the SunZia lines would transmit.

The LS Committee and Commission therefore focused on other evidence of need, including the prospect of financing: if there was no demand for the project, then SunZia would not be able to get financing. As counsel for Commission Staff argued in 2015, "[I]n the event that generators do arrive, the PPAs [power purchase agreements] they will enter

into with the SunZia or transmission access [agreements] will constitute a demonstration of the need for that transmission." Entry18_Tr.Vol.13_ 11/19/15 at 2525:15-19. The Commission's Staff witness repeated again and again: "Remember, this is a merchant project. And the need will determine whether or not they get financing. If there is no need, it is not going to get built because it is not going to get financed. And I think that's critical. I would like to say it about four more times." Entry23_Tr.Vol.8_ 11/04/15 at 1397:8-21.

The Committee and Commission also focused on the grid benefits that an AC line would bring. Specifically, witnesses repeatedly stated that (1) future generators would be able to interconnect with an AC line, thereby encouraging production of renewable energy, and particularly solar power, in southeast Arizona; (2) the line could interconnect with TEP's Springerville-Vail 345kV line to create a "reliability loop" around Tucson; (3) the line would relieve congestion and increase reliability generally by allowing other generators to upload and download power to and from the new line; and (4) the line would allow non-wind generators to hook up to the line and offset the intermittency of wind energy, also increasing reliability.

Beginning first with the development of renewables, Tom Wray, the project manager, testified in 2015:

> [T]here are solar resources in the Interstate 10 corridor particularly in Arizona, particularly in the area of the San Simon Valley in southeastern Arizona, north and south of Interstate 10 . . . . [T]his area of solar development here that's referred to as Arizona, this Arizona south here, I believe they have estimated somewhere around over 6,000 megawatts of developable solar resources in that area. . . . SunZia is interested in being able to harvest developable solar that could be scaled down here to meet both Arizona and other states' needs.
>
> Entry31_Tr.Vol.1_10/19/15 at 128:3–129:7.

The "take away" was that "the project literally goes through an area of major solar development along the Interstate 10 corridor," which needs "transmission to get over into markets to the west," *id.* at 137:9-19; that the project "can access solar zones, solar development zones along the Interstate 10 corridor," Entry30_Tr.Vol.2_10/21/15 at 176:25–177:1; and that "there are solar areas distributed along the Interstate 10 corridor that is [bisected] by the SunZia route that it would allow interconnection and put those future generation facilities into the market," Entry16_Tr.ACC.Vol.2_02/03/16 at 172:16-19.

Second, SunZia touted the AC line as being able to interconnect with a TEP 345kV line, thereby creating a reliability loop around

Tucson.[2] For example, Wray explained to the Commission Staff's attorney that "the reason the Willow substation at 500kV is in the project definition is to offer the interconnection with the Springerville-Vail 345kV system to create an on-ramp and off-ramp for others who have access to that system to do business onto SunZia." Entry30_Tr.Vol.2_10/20/15 at 376:8-13. In closing argument, counsel for SunZia similarly stated that "the Willow 500kV substation is necessary as part of this project to create the loop providing the benefits to Tucson," Entry18_Tr.Vol.13_11/19/15 at 2531:23-25, and that the substation "will enhance the electric system reliability of the Tucson metropolitan area," *id.* at 2532:5-7; *see also* Entry30_Tr.Vol.2_10/20/15 at 242:3–243:11 (similar testimony from Etherton). Simply put, without an AC line, there is no reliability loop.

Third, SunZia's witnesses testified in 2015 that an AC line would relieve congestion on existing lines by allowing additional interconnections. For example, the original CEC application declared that the "need for additional transmission infrastructure to increase transfer capability, improve reliability, and address existing congestion has been identified

2 *See generally* Entry31_Tr.Vol.1_10/19/15 at 89:1-4, 95:12-17; Entry30_Tr.Vol.2_10/21/15 at 212:4-8, 216:22-24, 217:12-13, 225:18-21, 225:22–227:12; Entry28_Tr.Vol.4_10/22/15 at 571:5-12.

in federal, regional, and state processes," and that one of the "purposes" of the SunZia project was to "contribute to improved system reliability with additional transmission lines **and substation connections** increasing transmission capacity where congestion exists and providing access where limited transmission currently restricts delivery to customers." Entry15_SunZia.CEC.Application at 19. And at the LS Committee hearing in 2015, SunZia testified to "relief of congestion on existing facilities . . . ." Entry31_Tr.Vol.1_10/19/15 at 136:4-8. It noted that there are "a few other locations . . . where the project could interconnect in the future," Entry30_Tr.Vol.2_10/20/15 at 212:8-12, and as the "long-term plan of the transmission system develops," interconnections to the "Saguaro and Tortolita substation where Tucson Electric and Arizona Public Service have 500kV terminations" could be "accommodated," *id.* at 212:17-23. Such interconnections would lead to "the reduction of congestion on existing facilities." *Id.* at 233:2, 233:18–238:9.

Fourth, because wind resources are intermittent, about half the time the wind facility in New Mexico would not be generating electricity. Entry30_Tr.Vol.2_10/20/15 at 203:18-24 ("the average capacity factor of the wind resource in New Mexico is about 45 to 47 percent, . . . [s]o . . .

half the time those turbines would not be producing"). Thus Wray testified:

> [I]t would be in the interest of all the users on any transmission line, including SunZia, to get that capacity factor up as high as possible, because it makes the unit cost to all the individual users lower than would otherwise be the case. So you want to get the thing operating at 80, 85 percent capacity factor*, and you do that by seeking as many interconnecters and generators as you can along the line.*

Entry20_Tr.Vol.11_11/17/15 at 2013:14–2014:15 (emphasis added). Hence, SunZia's proposal depended in part on other, non-wind generators accessing those lines.

It is important to note that to guarantee access to other generators, those other generators would be able to bid for access to the AC line during an auction conducted by the Federal Energy Regulatory Commission (FERC). Fifty percent of each transmission line would be allocated to the anchor tenant (SunEdison) developing the wind power in New Mexico, while the other fifty percent of each line would be allocated by FERC "on the open season." Entry28_Tr.Vol.4_10/22/15 at 566:18–567:3; *see also* Entry08_ACC.Ex.4_11/25/15 at 11 ("the remaining 50% of that merchant transmission capacity will be the subject of an open season auction . . . approved and regulated by FERC"); Entry31_Tr.Vol.1_10/19/15 at 84:14-

23 (similar). By allocating the transmission line to other generators, those generators would be able to use SunZia's lines; if such an allocation were entirely to the anchor tenant in New Mexico, no other generators would be able to use SunZia's lines for the benefits it touted.

As Wray explained, "There is very little opportunity for midway interconnections to [a] DC Circuit." Entry30_Tr.Vol.2_10/20/15 at 249:9-10. Therefore, without an AC line—and without the ability to access SunZia's line through FERC's "open season"—there is (1) no opportunity for future solar resources to connect to the line, (2) no opportunity for a reliability loop in Tucson, (3) no opportunity for congestion relief, and (4) no opportunity for non-wind resources to connect to the line to offset the intermittency of wind energy.

In summary, the Committee and Commission focused on the prospect of financing and on the benefits of an AC line. They also focused on the importance of compliance with the Obama Administration's since-invalided Clean Power Plan, Entry30_Tr.Vol.2_10/20/15 at 191:3-12, 195:10-11, 197:4-16, 384:20–385:20, and with economic benefits, Entry31_Tr.Vol.1_10/19/15 at 136:1-3; Entry30_Tr.Vol.2_10/20/15 at 198:19–201:9; Entry05_Sun.Ex.10_11/25/15 (economic impact

assessment). But there was no evidence that any wind power from New Mexico would be needed in Arizona.

3. AC line to be built first

As noted, SunZia proposed two alternatives to the LS Committee: one option to include two AC lines, and another option to include an AC line and a DC line. What is clear from both the testimony in 2015-16, as well as the actual language of the CEC, is that the AC line would be built first—that is because either option *required* at least one AC line. That makes sense; only that way SunZia could guarantee the multiple interconnections that it promised. Hence SunZia's project engineer testified, "Both options include one AC 500kV line as a primary component." Entry30_Tr.Vol.2_10/20/15 at 211:17-18. And SunZia stated to the Commissioners during the final day of the 2016 open meeting that the line segment between the Willow and Pinal Central Substations would be constructed first, thus providing reliability benefits for the Tucson area. Entry16_Tr.ACC.Vol.2_02/03/16 at 216:4-13.

The original CEC thus explicitly stated: "*At least one (1)* of the two (2) 500 kV transmission lines will be constructed and operated as an alternating current (AC) facility, the other transmission line will be either

an AC or DC facility. As contemplated and provided for in this Certificate, the two (2) transmission lines may be constructed at different points in time." Entry14_2015.CEC at 4:2-6 (emphasis added). The original CEC further provided:

> This authorization to construct the Project shall expire at two (2) different points in time, unless extended by the Commission, as provided below: a) The Certificate for the first 500 kV transmission line and related facilities and the 500 kV-Willow Substation shall expire ten (10) years from the date this Certificate is approved by the Commission, with or without modification, and b) The Certificate for the second 500 kV transmission line and related facilities shall expire fifteen (15) years from the date this Certificate is approved by the Commission, with or without modification.

Id. ¶23 at 12:22–13:3.

The Willow Substation is a substation for the AC line and is unnecessary for a DC line. Thus, this provision of the CEC specifically contemplated that the AC line would be built as the "first" line. That is consistent with the CEC's introductory explanation that "at least one" line will be AC. It is consistent with what the Commission's Chairman's designee on the LS Committee explained to the commissioners in their open meeting: "[T]he project consists of two 500kV, transmission lines. And *the first line* will be an alternating line, AC. The second line was approved to be either AC or DC." Entry17_Tr.ACC.Vol.1_02/02/16 at 7:25–8:3 (emphasis

added). And it is consistent with what SunZia's witnesses stated throughout the entire proceedings: both options included an AC line.

4. The proposed route

Because the LS Committee still had authority to choose a different route, *see* Entry30_Tr.Vol.2_10/20/15 at 270:19-25, SunZia had to justify its decision to present the single route through the San Pedro River Valley. SunZia repeatedly told the LS Committee that routes through south Tucson were unacceptable because of "environmental justice" impacts on low-income communities. For example, Wray testified that routes through "metropolitan Tucson were flawed heavily from the standpoint of significant immitigable environmental justice issues associated with removal of numerous homes in low-income areas." *Id.* at 257:1-5. Wray's rebuttal slides explained that up to 250 private homes might have had to be razed under the Tucson alternatives. Entry02_Sun.Ex.19 11/25/15 at 10.

The LS Committee approved the CEC on November 19, 2015. In casting his vote, the Chairman of the LS Committee stated, "I am very upset that there is not an alternate route. . . . The jewel, the San Pedro River Valley is pristine." He added, "BLM basically went through their

process and picked it" as "the path of least resistance," even though the San Pedro River Valley is "given special consideration by statute." Entry18_Tr.Vol.13_11/19/15 at 2704:4–2705:25.

The Commission then approved the CEC on February 3, 2016, by a 3-2 vote. The ACC's order stated in cursory fashion that "[t]he Project is in the public interest because it aids the state in meeting the need for an adequate, economical, and reliable supply of electric power." Entry13_Decision.No.75464 at 2. Chairman Doug Little published a dissent. *Id.* at 6-13. In that dissent, Chairman Little argued that "the record contains either no evidence or questionable evidence that any of . . . benefits will actually materialize" and that "[n]o Arizona utility has indicated that the proposed line is necessary for meeting future demand." *Id.* at 7.

More to the present point, the dissent lamented that "the Line Siting Committee and the Commission were effectively barred from considering alternative routes that avoided the San Pedro River Valley altogether severely limited what 'special consideration' could be given to the area," and here "the Line Siting Committee and the Commission were essentially presented with an 'up or down vote' on the entire route, as a whole," which was an "apparent usurpation of Arizona's jurisdiction by a

federal agency." *Id.* at 11. The dissent concluded, "[O]ur statutory requirement to 'give special consideration to protected areas unique because of biological wealth or because they are habitats for rare and endangered species' was impeded because we were unable to consider any other routes." *Id.* at 12.

D. Mr. Else's prior lawsuit

On April 25, 2016, Else filed an action in Superior Court challenging the Commission's granting of the original CEC. Given the nature of the project at that time, Else argued that SunZia's intent to bring wind power from New Mexico was questionable because, Else claimed, SunZia intended to connect SWPG's gas-fired Bowie plant to the first-planned line segment between the Willow and Pinal Central Substations in Arizona. Else also argued there was no substantial evidence of need for the project in light of the Southline project, which would provide an AC line in southeast Arizona. On December 15, 2016, the Superior Court held in favor of the Commission, concluding that Else failed to demonstrate that there was a lack of substantial evidence to support the Commission's decision to approve the SunZia project.

On appeal, Else argued that the Commission approved the SunZia project largely on the basis of speculative evidence, that speculation was not substantial evidence, and that the New Mexico wind facility might never be built. (At the time of Else's appeal, SunEdison had filed for bankruptcy.) The Court of Appeals disagreed, holding that there was substantial evidence, and concluding that "[w]hile there was no evidence presented that the New Mexico project had been built at the time of the CEC's grant, there was similarly no evidence to support Else's contention that the New Mexico project would never be built *or that SunZia's transmission lines would be incapable of carrying renewable energy from other sources*." *Else v. Arizona Corp. Comm'n*, 2018 WL 542924, at *4 (Ariz. Ct. App. Jan. 25, 2018) (emphasis added). The Court of Appeals further held that Else's claim that the project as constructed would constitute a substantial change from the proposal was not ripe because "we do not know at this time whether and to what extent the Project will ultimately transmit renewable energy, and we cannot speculate as to whether a substantial change will occur." *Id.* at *5. The Arizona Supreme Court denied review on September 27, 2018.

E. The 2022 amendment proceedings

SunZia filed an application to amend its CEC pursuant to A.R.S. § 40-252 on May 13, 2022. ROA.21 at 38-63; ROA.29 at 180 (¶3). The amendment application sought to authorize the use of updated structural designs and additional structure types associated with a DC line; to extend the expiration date of the CEC for the first line (now a DC line) from February 2026 to February 2028; and, most critically here, to bifurcate the original CEC into two CECs to provide for separate ownership of each line, which would better enable financing. ROA.29 at 180 (¶3). Two months later, Pattern Energy, which had acquired the rights to build the wind project in New Mexico from the defunct SunEdison, acquired the rights to build the DC line. ROA.31 at 124 (52:11-18).

1. The Commission's failure to recognize a substantial change and to reweigh the statutory factors

Mr. Else intervened in the proceedings and argued that the 2022 amendment application demonstrated that the nature of the SunZia project had changed. What was initially a transmission line that could bring various grid benefits to Arizona was now to be a single DC line owned by Pattern, which holds the rights to build the wind project in New Mexico. What was originally to be SunZia's first AC line was now called Rio Sol

and was to be owned by SWPG. ROA.31 at 124 (52:11-22). No one had filed for WECC approval for that line, and no representative of that project testified in the 2022 hearings.

In 2015, the Commission's witness explained that if the SunZia project could not get financing, that would be a demonstration of lack of need for the project. Yet the Commission entirely ignored this reasoning in 2022. SunZia was unable to get financing for the AC line, suggesting there is no need for it and that it will never get built. The only line that can apparently get financing is a single DC line—which in this case would create a vertical monopoly without any of the benefits touted in 2015.

Else repeatedly pointed out that the DC line "could turn out to be the only line associated with the original CEC that is ever constructed." ROA.21 at 72. And he repeatedly pointed out that the benefits SunZia touted in 2015 required an AC line. *Id.* at 72-73; ROA.21 at 93; ROA.21 at 149-50; ROA.32 at 186-87 (361:22–362:19), 198 (373:16-23), 176-78 (351:4-10, 352:23–353:1). Else noted that Pattern's proposed wind project was awarded 100% of the transmission capacity on the DC line by FERC's open solicitation process. ROA.31 at 118 (46:14-22). That is, Pattern was

awarded 100% of the transmission capacity because no other utility or plant would have the capability of interconnecting to Pattern's DC line without a prohibitively expensive DC converter station. One can understand the appeal of this setup for Pattern: its monopoly would allow it to transmit up to 3,000 MW of its own power, which is *four times as much power* as they would be able to transmit on an AC line. That is because an AC line can only transmit a total of 1,500 MW, and half of that transmission capacity would have to be shared with other generators.

Else also pointed out that SunZia did not have an approved WECC plan of service for the full 4,500 MW of power that would be transmitted on one DC and one AC line. ROA.32 at 179 (354:4-12). In fact, Pattern had only recently filed for a path rating from the WECC for its DC line, ROA.31 at 190-91 (118:15–119:11), while SWPG *had not filed for a WECC path rating for the Rio Sol line at all*, ROA.33 at 150 (570:15-24). He also noted that the competing Southline project already provided AC transmission capacity in southern Arizona, again suggesting that a bifurcated AC line might never be built. ROA.32 at 202 (377:1-21); ROA.35 at 249. And Else noted that a single DC line could at least be co-located with existing powerlines in central or northern Arizona because it has no

connection to the Willow Substation. ROA.32 at 203 (378:7-23); ROA.36 at 2.

Mr. Else also repeated six times in documents filed between April and October of 2022 the Commission's criteria for determining what constitutes a substantial change in a project. ROA.21 at 70, 91; ROA.27 at 218; ROA.28 at 88-89; ROA.32 at 156-60 (331:22–335:15); ROA.35 at 241. These criteria were adopted in Commission Decision 58793 (*Whispering Ranch*) (ROA.4) and in Commission Decision 69639 (*Devers Line*) (ROA.49), which includes the statement, "The question of what constitutes a substantial change must be made on the facts of each particular case using the criteria set forth in the Administrative Procedures Act (A.R.S. § 40-1025), which criteria were adopted by the Commission in the Whispering Ranch decision." *Devers Line*, ROA.49 at 15. These three criteria consider the stated basis of the original decision and the extent to which a change from the stated basis would have affected the understanding of affected persons; the subject matter of the original decision; and the effects of the original decision. *Whispering Ranch*, ROA.4 at 25-26. Mr. Else consistently stated that approving the construction of only a single DC line would constitute a substantial change from the original

CEC, which was intended to assure the grid benefits of constructing at least one AC line.

Despite repeatedly citing the Commission's criteria for assessing whether a substantial change had taken place, SunZia maintained that Else "raises several asserted concerns that are unrelated to the application at issue and reflect a desire to relitigate the Line Siting Committee's and Commission's original approval of the Project." ROA.21 at 81-82. The LS Committee chairman, mistakenly, agreed with SunZia and immediately sought to narrow the issues for consideration. Prior to public comments, for example, Chairman Katz stated that "[w]e're here only to look at the increased or changed configuration, some increased pole heights and the like. And the primary concerns would be the effect upon avian species, birds, and the effect on the visual appearance." ROA.31 at 212 (140:1-9). Despite all of Else's arguments, Chairman Katz later asked, "[I]f this Committee and, more importantly, the Corporation Commission, granted an Option B, which would allow this DC line, and it was planned to be 550-some miles long, how can we change that now? . . . I don't think we have authority to do that." ROA.32 at 199 (374:5-13). And Chairman Katz further stated, "I don't know that this Committee can get

into what's going on in FERC or WECC" and, "I don't think we need to get any further into what FERC or WECC have or might need to do." *Id.* at 182 (357:1-3, 18-20). Katz thus sustained an objection from SunZia and terminated Mr. Else's discussion about these relevant changes in the SunZia project.

The Administrative Law Judge (ALJ)'s report and recommendation, which was ultimately adopted by the Commission, was even firmer: it wrongly and irrelevantly maintained that the Commission's 2016 decision was "res judicata" and the "law of the case." ROA.29 at 209. In other words, the Commission entirely failed to recognize that a substantial change had occurred and failed to consider important issues that the new project raised.

Two other errors further demonstrate the Commission's failure to recognize that any change had occurred. Paragraph 116 of the ALJ findings adopted by the Commission falsely stated "that CEC 171 originally was approved without an approved WECC plan of service." ROA.29 at 208 (¶116). But as noted, the original SunZia project was approved by the Commission in 2016 with a WECC plan of service for two AC lines each intersecting the intermediary Willow Substation, as even SunZia admits.

ROA.12 at 28 (¶330). This was the WECC approved plan of service for the *ten-year period* between 2011 and 2021. ROA.35 at 191-98. Second, Paragraph 117 of the findings erroneously stated that "the original CEC was approved with the option for two AC lines or one AC and one DC line that could be constructed at different points in time" and it "does not specify which line was to be built first." ROA.29 at 208 (¶117). As referenced above, the initial CEC clearly indicated that the AC line and accompanying Willow Substation would be built first; but in all events, *at least one* had to be built as an AC line, of which there was now no guarantee. Else's exceptions to the report explicitly pointed out these errors, ROA.29 at 96, but the Commission simply adopted the ALJ's recommended order without providing any response to Mr. Else's exceptions.

2. Pattern cannot testify that Arizona needs its power

Because the benefits of an AC line had evaporated, Pattern could have at least offered testimony that its New Mexico wind power would meet a need for economical electric power in Arizona. That might have provided the Commission different grounds to approve the changed project. Pattern, however, could not (or would not) testify to such a need even when pressed by the LS Committee.

Kevin Wetzel, the new project manager, first explained that SunZia could not obtain financing for both lines and that the requested amendments are "required to be able to actually finance and begin construction in this project next year and bring it online in 2025 to meet the growing needs of the Southwest region." ROA.31 at 123-24 (51:25–52:8). He then testified "that Pattern Energy has talks on a regular basis with 60 or 70 counter parties for purchase of the wind generation, which parties include different utilities and largescale commercial and industrial customers across the West including Arizona." ROA.33 at 105 (526:12-18). But when specifically asked, "of those [counter parties] you are currently having discussions with, what percentage of those, say 60, are in Arizona?" Wetzel stated, "I don't think I can provide a specific percentage to you. I apologize, is to kind of [*sic*] current discussions with counter parties in one state relative to another." *Id.* at 106 (527:8-11).

Wetzel then reiterated that "we absolutely *are attempting to and hope to provide* a material amount of power to Arizona customers," although "it's dependent on market conditions and their interest in the product that we have to sell." *Id.* (527:12-16) (emphasis added). But when pressed again, "Can you disclose perhaps what number of megawatts

from the wind facility in New Mexico would end up in Arizona should you secure these potential contracts?," Wetzel again stated, "I don't think I can. Because, again, we just don't know about whether we will be selected and at what volume." *Id.* at 106-07 (527:25–528:9).

Tom Wray testified in 2015, however, that financing sufficient for construction required that 70-80 percent of transmission service agreements be in place. Entry30_Tr.Vol.2_10/20/15 at 183:17–184:1, 184:20–185:1, 364:16-20, 366:1–368:8. Staff similarly explained that "SunZia's method of financing, wherein *signed contracts* are needed to get financing, means it won't be built absent such contracts for taking service on the line." Entry10_ACC.Ex.2 11/25/15 at 7. Yet Wetzel testified in 2022 that construction of the first line is set to begin in mid-2023, ROA.31 at 124 (52:1), but would not testify as to any transmission service or power purchase agreements with Arizona utilities despite the imminence of construction.[3]

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3 Even though Pattern/SunZia will transport power from its own wind facility in New Mexico, and thus there is no need for any transmission service agreements with other generators, Pattern would still need to have some *power purchase agreements* with utilities or other large customers in place to ensure that that power has a buyer. Yet, Pattern could not testify to a single PPA with a single Arizona entity.

Nor could Wetzel testify as to whether Pattern's power would be *economical*. When pressed, he testified that "[on] any given day it could be cheaper or more expensive to take power from the grid relative to a long-term contract to buy power from the transmission-enabled wind projects." ROA.33 at 96-97 (517:4-7, 517:19–518:15). Indeed, Wetzel acknowledged that "Pattern is a for-profit enterprise," ROA.33 at 149 (569:15-19), and Else provided uncontradicted testimony that the average cost of energy per kilowatt hour to consumers in California was almost twice as much as in Arizona, ROA.32 at 184 (359:13-20). In other words, Pattern could not provide any evidence of need for its power despite the fact that all the benefits of an AC line had now evaporated.

F. Superior Court's ruling

After the LS Committee approved the application to amend and recommended approval of two new CECs, CEC-A and CEC-B, one for each line, Else filed a request for review, which led to the ALJ's report and recommendation, adopted by the Commission. On December 12, 2022, Else, now represented by counsel, brought a timely application for rehearing pursuant to A.R.S. § 40-253, and for reconsideration pursuant to A.R.S. § 40-360.07(C). The ACC did not respond to the request for

reconsideration and as a result it was deemed denied as a matter of law on January 3, 2023. Else timely filed the present action in Maricopa County Superior Court.

Plaintiff argued that the Commission acted arbitrarily and capriciously by failing to recognize the substantially changed nature of the project and that the original grounds for approval were no longer valid. Mr. Else asked for a partial do-over: send this back to the Commission with instructions to consider the implications of the changed nature of the project as mandated by Arizona law.

The Superior Court, however, upheld the Commission's decision because it believed its decision was supported by "substantial evidence," the standard for factual findings, even though the relevant part of Else's claim is a *legal* one under the arbitrary and capricious standard. ROA.75 at 6, 9. The Superior Court addressed his arbitrary and capricious argument in a single sentence, *id.* at 6, and did not once mention the fact that the Commission erroneously believed itself bound by *res judicata.* The Superior Court also deferred to the current Commission's interpretation that the original CEC did not require the AC line to be built first or even at all, *id.* at 5, despite the prefatory statement in the CEC specifically

stating the original Commission's intention that "at least one" line was to be an AC line.

Finally, the Superior Court found that there was substantial evidence of need despite no evidence that Pattern's power will be sold in Arizona because "[t]he plain language of the statute does not limit an evaluation of energy needs to those needs of Arizona consumers." *Id.* at 7. The Court reached this conclusion even though ordinarily statutes do not have extraterritorial effect, and whether to allow the destruction of Arizona's environment to facilitate the sale of power from one third-party state (New Mexico) to another (California) is the kind of "major question" on which the legislature would have expressed its intent clearly.

The Superior Court entered final judgment on September 22, 2023, and a notice of appeal was filed on September 26, 2023. The Court of Appeals for Division One transferred this appeal to Division Two on October 27, 2023, to equalize caseloads pursuant to A.R.S. § 12-120(E).

STATEMENT OF ISSUES

1. Was it arbitrary and capricious as a matter of law for the Commission to fail to address the amendment's substantial change in

electrical service and the consequences of a vertical monopoly, which undermined the grounds on which the original proposal was approved?

2. Does the major questions doctrine preclude relying solely on power needs outside of Arizona when the statute does not specify that extraterritorial needs may be considered?

3. When the correct standard is applied, was the Commission's finding of need supported by substantial evidence in the absence of grid benefits and of any evidence that Arizona customers needed Pattern's power?

STANDARD OF REVIEW

"In all trials, actions and proceedings the burden of proof shall be upon the party adverse to the commission or seeking to vacate or set aside any determination or order of the commission to show by clear and satisfactory evidence that it is unreasonable or unlawful." A.R.S. § 40-254(E). However, the courts apply this standard differently to questions of law and questions of fact. The latter are reviewed under the substantial evidence standard. *Grand Canyon Tr. v. Arizona Corp. Comm'n*, 210 Ariz. 30, 34 (Ct. App. 2005). "Whether substantial evidence exists is a question of law for [this Court's] independent determination," and this Court is

"not bound by an agency's or the superior court's legal conclusions." *Gaveck v. Arizona State Bd. of Podiatry Examiners*, 222 Ariz. 433, 436 (Ct. App. 2009).

Legal questions are reviewed *de novo*: "[B]oth the superior court and [the Court of Appeals] may depart from the Commission's legal conclusions or interpretation of a statute and determine independently whether the Commission erred in its interpretation of the law." *Grand Canyon*, 210 Ariz. at 33–34 (quoting *Babe Invs. v. Arizona Corp. Comm'n*, 189 Ariz. 147, 150 (Ct. App. 1997) (citation omitted)). Additionally, the arbitrary and capricious standard applies. *Tucson Elec. Power Co. v. Arizona Corp. Comm'n*, 132 Ariz. 240, 243 (1982).

SUMMARY OF THE ARGUMENT

The heart of this case is the Commission's failure to recognize that it approved a materially different project from what it approved in 2015, and that the bases for approval in 2015-16 were therefore inapplicable to the changed project in 2022. In other words, the Commission acted arbitrarily and capriciously in its approval because it "entirely failed to consider an important aspect of the problem" and did not consider relevant factors. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto.*

Ins. Co., 463 U.S. 29, 43 (1983); *see also Billingsley v. Arizona Corp. Comm'n*, 2019 WL 6130830, at *9 (Ariz. Ct. App. Nov. 19, 2019) (relying on *State Farm* standard); *Compassionate Care Dispensary, Inc. v. Arizona Dep't of Health Servs.*, 244 Ariz. 205, 213 (Ct. App. 2018) (same). The Commission effectively conceded that it did not consider these important problems because it believed it was prohibited by *res judicata* and the law of the case from considering the evidence of need or the route when addressing SunZia's amendment request. But *res judicata* does not apply to Commission decisions, *Davis v. Ariz. Corp. Comm'n*, 96 Ariz. 215, 218-19 (1964), and even if it did it would not apply to a project's *changes*.

The Commission independently erred when it exceeded its statutory authority. *State Farm*, 463 U.S. at 43 (an agency acts arbitrarily and capriciously if it "relied on factors which [the legislature] has not intended it to consider"); *see also APS v. ACC*, 1-CA-CC 21-0002 (Az. Ct. App. Div. 1 Mar. 7, 2023), at ¶¶29-31 (vacating decision as beyond Commission's statutory authority). Most egregiously, the Superior Court approved of the Commission's consideration of solely out-of-state power needs, even though the question of whether the Commission can

authorize the destruction of Arizona lands for the purpose of transmitting power entirely from another state (New Mexico) to still a third state (California) is a "major question" of the kind about which the legislature would have spoken clearly.

Finally, the Commission's finding of need is not supported by substantial evidence once the correct standards are applied. Without any grid benefits from an AC line and without any evidence of power needs in Arizona, there was simply no evidence that this new project—which, if not re-routed, will destroy a unique biological watershed—met any need "for an adequate, economical and reliable supply of electric power" in Arizona. A.R.S. § 40-360.07(B).

ARGUMENT

I. The Commission acted arbitrarily and capriciously by failing to consider the amendment's substantial change in electric service and the consequences of granting a vertical monopoly, which undermined the grounds on which the original proposal was approved.

The first ground for remand is that the Commission failed to address salient issues that go to the very heart of the statutory analysis. Mr. Else argues that because the original CEC was approved on the understanding that financing would demonstrate need and that an AC line would bring grid benefits, at a minimum the lack of financing for the AC

line and the failure even to apply for WECC approval for that line established that it was at least *possible*, if not highly likely, that only the DC line would ever be built. By bifurcating the CEC, moreover, there would no longer be any legal obligation to build the AC line—a fact that further suggested the line was unlikely to be built, and that in any case required independent consideration by the Commission of each applicant's new project. Had the CEC stayed intact, Pattern or SWPG would have had to build the AC line because the CEC required "at least one" AC line.

Mr. Else asked the Commission to *consider the possibility* that without financing, without WECC approval, without any legal obligation to build, and with the Southline AC line now approved, the DC line was likely to be the only line ever built and that that would undermine the entire basis for the original approval. Indeed, Mr. Else invoked the Commission's own prior precedents, which establish the criteria that the Commission uses to determine a substantial change in a project and which accord with the principles of arbitrary-and-capricious review. *Whispering Ranch* (ROA.4); *Devers Line* (ROA.49).

The Superior Court rejected his argument, however, for three reasons. First, the Superior Court gave deference to the current

Commission's interpretation of the original CEC, according to which a DC line could be built first, despite the prior Commission's clear intent *in the CEC itself* that "at least one" line had to be an AC line and that the AC line was to be the "first" line. ROA.75 at 5. Second, the Superior Court concluded that Else's argument that the AC line might never be built was "speculative." *Id.* But none of the underlying facts—lack of financing, WECC approval, or legal obligation—is speculative. It is *those* facts and their *implications* that the Commission had to address. *See, e.g.*, *United States v. Nova Scotia Food Corp.*, 568 F.2d 240, 253 (2d Cir. 1977) (concluding that certain comments raising various *possible* problems and solutions were relevant and that it was arbitrary and capricious to ignore them). Third, the Superior Court held that Arizona law allows "for a partial or complete transfer of the CEC," even though the statute requires compliance with the terms of the original CEC. Pattern's new plan for a single DC line cannot comply with an original CEC that required construction of at least one AC line. A.R.S. § 40-360.08(A) (allowing transfer of CEC "to any electric company or electric utility *agreeing to comply with the terms, limitations and conditions* contained therein"). Disaggregation of the two lines specified in this particular CEC has statutory

consequences that extend beyond a mere exercise in approving paperwork. This Court should reverse the Superior Court and remand to the Commission to address these important aspects of the bifurcation.

A. The proposed amendments reflected a substantial change in electric service and undermined the grounds on which the original proposal was approved.

No party seriously questions that *if* Mr. Else is right—if the new project undermined the grounds on which the original one was proposed and approved—then this case must be remanded to the Commission. No one disputes that the original bases for approval were (1) financing would demonstrate need and (2) an AC line would bring grid benefits to Arizona, even if the power ended up entirely in California. And no one disputes that *if* a single DC line is now constructed, that would be a dramatic change from the original proposal and the original grounds of approval. A single DC line would not have any grid benefits to Arizona because Pattern is the only entity that will be able hook up to it—which is why FERC has already awarded Pattern 100% of the line's transmission capacity. That vertical monopoly will allow Pattern to sell up to 3,000 MW of its own power at any given time, whereas a single AC line, which can carry only up to 1,500 MW of power and which other generators would

share, would allow Pattern to transmit only *one-quarter* of the amount of power that it could transmit on its own dedicated DC line.

The Commission and Superior Court simply denied that any change had occurred. They cited the three reasons above—ambiguity in the CEC, speculation, and the permissibility of transfers under Arizona law—but none is persuasive. What matters is the *grounds* on which the original Commission approved the original CEC. Those grounds are no longer valid, and Arizona law requires the Commission in approving the amendments to show an awareness of that problem and consider the significant change in circumstances. It did not.

1. The Superior Court was wrong to give deference to the current Commission's interpretation of the CEC when the CEC clearly indicated the original Commission's intent.

Assuming the original CEC required "at least one" AC line, then bifurcating the CEC into two CECs had dramatic consequences. Bifurcating into two CECs means that neither CEC will be violated if the AC line does not get built. Because Pattern Energy is only responsible for the DC line, it has no obligation to ensure that the AC line is ever constructed. As for SWPG, it may not get financing or may simply choose not to build the AC line because its CEC for the AC line is merely an

authorization to build; a CEC never requires construction. Only a CEC for the two lines together guarantees that if a DC line is built, the AC line must be built also. That was the deal the original CEC created—a deal that evaporated with the bifurcation. And it is why Pattern *sought* the bifurcation.

The original CEC specifically indicated that the AC line would be built first because the Willow Substation, which was for the AC line, was required to be built with the "first" line at the earlier expiration date. Entry14_2015.CEC at ¶23, 12:22–13:3. Moreover, to the extent that requirement is ambiguous as to timing, the prefatory statement in the original CEC announced the Commission's intention that "**[a]t least one**" AC line would be built. *Id.* at 4:2-6 (emphasis added). That makes sense, because SunZia's witnesses explained again and again that "[b]oth options include one AC 500kV line as a primary component." Entry30_Tr.Vol.2_10/20/15 at 211:17-18. And the LS Committee member present at the ACC open meeting *told* the ACC commissioners that the AC line was to be built first. Entry17_Tr.ACC.Vol.1_02/02/16 at 7:25–8:3. The Superior Court seized on a single statement from a single witness that the AC line was "likely" to be built first, ROA.75 at 5, but that does

not change the fact that *at least one* line *had* to be an AC line. That is what the Commission announced in the original CEC, and that is what would guarantee the various grid benefits of the project.

The Superior Court deferred to the Commission's interpretation, however, that the original CEC allowed the construction of a DC line first even if that is the only line ever constructed. The Superior Court argued that "the provision at issue does not state that Willow Substation was a necessary or 'related facility' to the AC line," and that "[t]he 2016 Decision authorized SunZia to build both the first line and the Willow Substation by 2026 but did not require that they be built concurrently." ROA.75 at 5. In other words, the Superior Court suggested, counterintuitively and counter to all testimony about the role of the Willow Substation, that under the original CEC SunZia might have built the DC line and AC substation together even though the AC substation is unrelated to the DC line. The Superior Court then added that "if the Commission had intended these timing constraints to actually impose an obligation to build the AC line first, it could have made that condition explicit," and concluded that the Court "defers to the Commission's interpretation of [the] original CEC." *Id.*

But deference is not a blank check, even if it still applies to Commission decisions. *See* A.R.S. § 12-910(F) (providing that courts "shall decide all questions of law"). Here, in Plaintiff's view, the CEC is not ambiguous at all. The LS Committee *told* the Commission that the AC line would be built first, and the CEC provided that "the first 500 kV transmission line and related facilities and the 500 kV-Willow Substation" were to be built within the earlier expiration date. There is nothing ambiguous about this provision. It would make no sense to provide the same expiration date for the AC substation along with the DC line.

Even if it *were* ambiguous, the Superior Court was wrong to defer to the current Commission's interpretation because several tools of statutory construction clarify the ambiguity. *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) (cabining deference to an agency's interpretation of its own regulation only after the court has "resorted to all the standard tools of interpretation"). First is the prefatory statement in which the original Commission *announced* that "at least one" line *must* be an AC line. The Arizona Supreme Court has held that "context may include a contemporaneous preamble or statement of purpose and intent, which we will consider even where the text is not ambiguous." *Fay v. Fox in & for Cnty. of*

Maricopa, 251 Ariz. 537, 540–41 (2021) (interpreting constitutional provision). When interpreting statutory meaning, it must be "remembered that the statute. . . enunciates and is addressed to a public policy; . . . that devices of every kind to defeat it are to be frowned upon and stricken down; and that" courts should interpret "in accord with its intent and objects as announced by the legislature in the preamble to the Act." *Sw. Lumber Mills v. Emp. Sec. Comm'n*, 66 Ariz. 1, 5 (1947). By bifurcating the lines *and* allowing the DC line to be built first, there is now no guarantee that there will be "at least one" AC line, defeating the very intention announced in the CEC's introductory language.

Statutory purpose and historical background must also be considered. *State v. Salazar-Mercado*, 234 Ariz. 590, 592 (2014) ("[I]f the language is ambiguous, we apply secondary principles of construction, such as examining the rule's historical background, its spirit and purpose, and the effects and consequences of competing interpretations."). Here, the entire *purpose* of the CEC was to allow the creation of at least one AC line to which multiple generators could interconnect and that would therefore bring grid benefits to Arizona. The "historical background" of the earlier Commission proceedings demonstrates that that was the

benefit the Commission was seeking to obtain. The Commissioners themselves were told by SunZia minutes before they voted in 2016 that the project would provide "multiple uses" that would benefit Arizona and not simply be a "gen[eration]-tie" line for New Mexico wind resources. Entry16_Tr.ACC.Vol.2_02/03/16 at 349:10-21. The ACC's competing interpretation would allow the creation of a vertical monopoly not contemplated by the original approval.[4]

In another sense the specific terms of the CEC do not even matter for the question of arbitrary and capricious review. That is because, whatever the CEC might say, the CEC was originally approved *because* certain reasons and arguments were presented to the Commission in 2015-16. It is *those reasons and arguments* that are no longer valid. The arbitrary and capricious standard requires at least an awareness of a substantial change in the grounds that initially led to approval. *See FCC v. Fox Television*, 556 U.S. 502, 515-16 (2009) (agency must "display awareness that it is changing position," must make a "conscious change of

[4] Pattern's behavior is also consistent with this interpretation. If Pattern truly believed the original CEC allowed it to build a DC line first and then to stop, it never would have filed a request to bifurcate. It could have simply adopted the original CEC.

course," and must provide a "reasoned explanation . . . for disregarding facts and circumstances that underlay . . . the prior policy"). Here, the Commission displayed no such awareness.

2. The Superior Court committed legal error by finding Mr. Else's arguments to be speculative because the arbitrary and capricious standard requires consideration of salient possibilities.

The Superior Court also rejected Else's argument as "speculative": "Plaintiff's concerns that the AC line will never be constructed as a result of bifurcation is speculative and cannot be a basis for remanding the 2022 decision." ROA.75 at 5. That is also legal error. Arbitrary and capricious review deals with salient issues and requires the agency to consider important problems and alternatives. All of these are "speculative" in the sense that no one can see into the future. But if the *possibility* is raised, and there are good reasons to worry about the possibility, then the agency must at least address itself to it. *Nova Scotia Food Corp.*, 568 F.2d at 253 (when major issue raised by comment to proposed rule "was neither discussed nor answered," the court held that "to sanction silence in the face of such vital questions" would fail to "safeguard against arbitrary decision-making"); *State Farm*, 463 U.S. at 43 (agency cannot entirely fail "to consider an important aspect of the problem").

None of the facts that underlie Mr. Else's concerns is speculative. It is not speculative that SunZia requested bifurcation because it could not get financing for both lines, that it previously maintained that financing would evidence need, and that therefore there does not appear to be any need for the AC line. Nor is it speculative that SWPG did not apply for a WECC path rating, or that the competing Southline AC line running parallel to SunZia's proposed route in southern Arizona makes it less likely that there will be a need for SunZia's AC line. And it is not speculative that no SWPG project manager testified at the 2022 hearings. Most of all, it is not speculative that with two bifurcated CECs there is no legal obligation to build the AC line. Those are all facts that no party disputes. Mr. Else merely asked the Commission to consider the *implications* of these facts—that is, to consider the important problems and possibilities that these facts raise. That is not speculation; that is the very essence of arbitrary-and-capricious review.

3. The Superior Court committed legal error by interpreting Arizona law to allow partial transfers of SunZia's unique CEC.

The Superior Court also rejected Mr. Else's argument about a substantial change because it believed that the original CEC as well as

Arizona law allowed for bifurcation. The Court first cited Condition 34, which deals with assigning ownership of transmission facilities, instead of Condition 25, which has to do with transfer of **the CEC itself**. Condition 34 of the original CEC stated, "Applicant shall provide the Commission Staff with copies of any Agreement(s) it enters into with the entity or entities it selects to own and operate the 500 kV transmission facilities." ROA.14 at 16. The Superior Court thought that this meant that "the original CEC contemplated a partial assignment." ROA.75 at 6. As noted, however, that has to do with agreements to operate the facilities. Condition 25 is what dealt with transfers of the CEC: "Any transfer or assignment of this Certificate shall require the assignee or successor to assume in writing **all responsibilities** of the Applicant listed in this Certificate and its conditions as required by A.R.S. § 40-360.08(A)." ROA.14 at 13.

As Condition 25 states, that is actually what Arizona law requires. The Superior Court discussed that statutory section, however, and interpreted it to mean that "under Arizona law, the Commission's preapproval is not even needed for a partial or complete transfer of the CEC." ROA.75 at 6. But that section provides, "[A] certification may be transferred to

any electric company or electric utility *agreeing to comply with the terms, limitations and conditions* contained therein." A.R.S. § 40-360.08(A). Quite obviously, bifurcating this CEC would *not* meet this statutory requirement because a key term and condition—the construction of at least one AC line—would no longer be required.

B. The Commission refused to address these important aspects of the problem because it erroneously believed it was bound by res judicata and law of the case, which are inapplicable to Commission decisions.

If the proposed amendments implicated salient changes whose consequences the Commission at least had to address, then the case for remand is clear. That is because the Commission *said* time and again that it did not address these arguments. First, the Commission said it thought it was bound by *res judicata*, even though that concept is inapplicable to Commission decisions (and in any event would not apply here). Second, throughout its briefing below, the Commission continued to describe the bifurcation request as "narrow" and "technical," which is a concession that the Commission did not understand the significant consequences of the change. Third, the Commission's errors in paragraphs 116 and 117 of the ALJ report confirm its confusion over the scope of the change.

Starting first with Plaintiff's central argument—completely ignored by the Superior Court—the Commission expressly stated that it was not considering Mr. Else's arguments because it believed itself bound by *res judicata* and law of the case. ROA.29 at 209 ("Decision No. 75464 is a final Decision of the Commission subject to the doctrine of *res judicata* and is the law of the case."). The Commission and SunZia persisted in this position below. "The route approved in the original CEC has already been litigated, and the issue is therefore barred by *res judicata*," the ACC argued in its brief. ROA.59 at 31. The issue of need, the ACC added, "was fully litigated in the Plaintiff's appeal of the original CEC, and its re-litigation is therefore barred by *res judicata*." *Id.*; *see also id.* at 22-23 (similar); ROA.61 (SunZia Br.) *passim* (arguing that Plaintiff is seeking to "retry" the 2016 decision).

These arguments miss the point. Mr. Else is not challenging prior judicial holdings that the Commission's initial CEC was valid. Mr. Else is challenging the Commission's splitting of the CEC into two parts without performing the legally mandated review. Mr. Else repeatedly stated that according to the Commission's own criteria for determining what constitutes a substantial change, the grounds for the approval of the

original CEC no longer applied to Pattern's new plan for CEC-A. The LS Chair and the ALJ simply denied that such a substantial change had occurred, and that was the narrative passed on to the Commissioners when they voted.

Moreover, *res judicata* does not even apply to the Commission reviewing a request for amendment. *Davis v. Ariz. Corp. Comm'n*, 96 Ariz. 215, 218-19 (1964) (*res judicata* does not apply to Commission decisions because Commission has "continuing" power to "rescind, alter or amend" its prior decisions "when the public interest would be served"); *see also* A.R.S. § 40-252. Therefore, the Commission's maintaining that its 2016 decision was "*res judicata*" and the "law of the case" is reversible error. It is the clearest indication that the ACC failed to conduct the relevant statutory review and to consider the vast implications of the requested amendments.

Second, the Commission's briefing below further demonstrates that it did not conduct the necessary review. The ACC described the amendments throughout its brief as "very narrow" or "narrowly tailored" or "specific" or "limited." ROA.59 at 9, 10, 22, 30. It focused its brief, just as it focused in the 2022 proceedings, on "updated new structure types,"

"visual impacts associated with the proposed structural changes," "the visual impacts near the San Pedro River Valley," the "new structures," "the structural changes," and the "impacts from the new structures." *Id.* at 36-38. It justified its failure to consider evidence of need by asserting that the amendment application "was not based on a substantial change in the need for the project." *Id.* at 31. In other words, the ACC effectively concedes that it did not appreciate the significance of the requested amendments.

Finally, of course, the Commission's persistent denial that a substantial change took place culminated with erroneous statements in its final order, leaving compelling evidence in the public docket that it failed to consider the relevant problems. The Commission made the contested and false statement that there was no WECC approved plan of service in place when the original CEC was approved. The Commission also erroneously stated that the CEC did not specify that the AC line would be constructed first, and then concluded that "The record shows that there has not been a change in the anticipated use of the lines." ROA.29 at 208 (¶¶116-17). But as Mr. Else pointed out in his exceptions—to which the Commission never responded before issuing its final order—there was

indeed a WECC approved plan of service in place for four years prior to approval of the original CEC that provided for AC lines with substations to which multiple generators could interconnect. And Mr. Else pointed out—as he does above—that the CEC did indeed indicate that the first line would be constructed with the same early deadline as the Willow Substation, meaning the first line was to be the AC line.

To summarize, it is significant that the two lines have been disaggregated, that SWPG was unable to finance the AC line, that there is now another competing AC line in the same region, and that there is no longer any legal obligation for Pattern or SWPG to build an AC line. If this Court agrees that these undisputed facts suggest that the AC line is unlikely to be built, or at least that it might not be built, then that is a recognition that the Commission must at least have *addressed* the consequences of that possibility. Its belief that it was bound by *res judicata*, its continuing to maintain that the bifurcation request was "narrow" and "technical," and its significant errors in paragraphs 116 and 117 of the final order establish that it did not do so.

II. The major questions doctrine forbids the Commission from approving the destruction of Arizona's environment to transmit power from one third-party state (New

Mexico) to another (California) without a clear statement from the legislature.

It is black-letter law that an agency cannot exceed statutory authority or consider factors irrelevant to the statute. *State Farm*, 463 U.S. at 43; *APS v. ACC*, *supra*, at ¶¶29-31. Here the Commission erred because it relied entirely on testimony of "regional" power needs without any evidence that Arizona customers would purchase Pattern's power. Without the grid benefits of an AC line, relying solely on out-of-state customers' needs would violate the statute, which requires balancing the need for power *in Arizona* against the environmental damage *to Arizona*.

The Superior Court disagreed, however, arguing that "[t]he plain language of the statute does not limit an evaluation of energy needs to those needs of Arizona consumers," ROA.75 at 7, citing to the Court of Appeal's decision in *Grand Canyon*. But there the court held that the Commission may consider need in other states *to the extent that* such needs might affect the availability of power in *this* state. *Grand Canyon*, 210 Ariz. at 37–38. Specifically, the court held that "the statute itself does not require that the need for power be determined based *solely* on the power needs of in-state consumers," and that "in an integrated wholesale market the need for wholesale power both in and out of the state" might

"affect the availability of power for consumers in Arizona." *Id.* at 38 (emphasis added). Moreover, in *Grand Canyon*, Tucson Electric Power had already established "that its retail consumers alone would need the power to be generated by" the facility in question, and that "its wholesale customers needed the power," including "Arizona-based users." *Id.* That is nothing like the case here, where Pattern specifically *refused to say* whether it had any contracts with Arizona customers.

Any other reading of the statute would violate the major questions doctrine. *See Roberts v. State*, 253 Ariz. 259 (2022). According to the Superior Court and the Commission, the statute would allow the Commission to approve the destruction of Arizona's natural environment *solely and entirely* for the purpose of transmitting power from one third-party state (here New Mexico) to another (California). Surely that is a hugely consequential power that the legislature would have delegated clearly if that had been its intent. Additionally, ordinarily statutes are understood to have only a territorial effect. *Farnsworth v. Hubbard*, 78 Ariz. 160, 168 (1954) ("statutory enactments of the legislature are presumed to be confined to the state in the absence of express statements to the contrary").

In this case, both doctrines are consistent with the natural reading of the statute: The LS Committee and Commission must balance "the need for an adequate, economical and reliable supply of electric power with the desire to minimize the effect thereof on the environment and ecology of this state." A.R.S. § 40-360.07(B). That is a requirement to balance the need *in this state* against the harm *to this state*.

Both the balancing mandate and the eighth factor in A.R.S. § 40-360.06 (consideration of costs to consumers) require that the Commission look out for the public interest in providing economical and reliable electricity for Arizona. The Commission is charged with protecting the public interest in this state, not the interests of other states or that of the merchant applicant. Looking out for the interests of other states involved with an interstate transmission project falls under federal purview, not the purview of the Commission. The Commission should not abdicate its primary responsibility to the electricity ratepayers in Arizona.

III. Without the benefits of an AC line, and with no evidence of need in Arizona, the Commission's approval was not supported by substantial evidence.

Once vague "regional" needs are discounted, and without the grid benefits of an AC line, there is no evidence of substantial need *in Arizona*

for Pattern's DC line. Without an AC line, the only benefit of the DC line is if New Mexico's wind power is needed to supply economical, reliable, and adequate power *to Arizona*. As noted earlier, Pattern specifically declined to specify how many Arizona contracts it had, *even though SunZia testified in 2015 that 70 percent of contracts would need to be in place for financing*. Entry30_Tr.Vol.2_10/20/15 at 183:17–184:1, 184:20–185:1, 364:16-20, 366:1–368:8. And SRP specifically disclaimed any need, and expressed interest to the limited extent that SunZia might allow it to interconnect with its existing generation sources in eastern Arizona—which a DC line cannot provide. Entry07_ACC.Ex.5_11/25/15 at 2. And TEP primarily sought a reliability loop in Tucson, which the DC line also cannot provide. Entry06_ACC.Ex.6_11/25/15 at 2.

The only evidence of any need, therefore, was the hearsay testimony from Pattern that Pattern was marketing to and was in "discussions" with utilities in Arizona. But ordinarily, hearsay evidence alone cannot constitute substantial evidence. *See Richardson v. Perales*, 402 U.S. 389 (1971). In Arizona, the rule is that a Commission "*may* act upon [hearsay] where the circumstances are such that the evidence offered is deemed by the Commission to be trustworthy." *Reynolds Metals Co. v.*

Indus. Comm'n, 98 Ariz. 97, 102 (1965). If hearsay alone is ordinarily not sufficient for substantial evidence, then certainly hearsay provided by a self-interested applicant is not sufficiently "trustworthy" to constitute substantial evidence. Even if the ACC could overcome this hurdle, the evidence would still be *speculative*—because none of it establishes that Pattern's wind power would be sold in Arizona. And speculation is also not substantial evidence. *City of Tucson v. Citizens Utilities Water Co.*, 17 Ariz. App. 477, 481 (1972).

As a matter of law, the Commission cannot approve a CEC when on one side of the balance is zero (no Arizona purchasers) or noneconomical power, and on the other side is environmental and ecological harm. This is an independent reason to remand: now that the CECs are split, the Commission must require Pattern to put on evidence of actual need in Arizona for Pattern's CEC.

NOTICE UNDER RULE 21(A)

Plaintiffs give notice that they intend to seek costs and attorney's fees for this appeal and litigation pursuant to A.R.S. §§ 12-341, 12-348(A)(2), and 12-348(A)(7); the private attorney general doctrine; and any other applicable statute, rule, or authority.

CONCLUSION

This Court should reverse the Superior Court and remand to the Commission with three instructions. First, the Commission must acknowledge the important issues raised by the bifurcation, namely the very real possibility that SWPG's AC line will no longer be built, thus undermining the basis on which the original CEC was approved. Second, it must reweigh the statutory factors for each proposed line independently without consideration of extraneous matters such as regional power needs in the absence of any concrete needs in Arizona. Third, in order to fulfill its statutory balancing mandate, it must either demand substantial evidence of meeting the need for economical and reliable electricity in Arizona or, if Arizona is to be used primarily as a pass-through state to meet California's needs, demonstrate that Pattern's amended SunZia project has chosen the route that best minimizes adverse impacts to the ecology, environment, and electrical grid of Arizona. Basic administrative law principles require a remand for at least those three discrete reasons.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief filed under Rule 14(a)(5) complies with the requirements of Rule 14 of the Arizona Rules of Civil Appellate Procedure in that it is 13,954 words and does not exceed the word limit established in Rule 14, and is written in double-spaced, Century Schoolbook, 14-point font.

Dated: December 13, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2023, I filed the foregoing Opening Brief electronically via Division II's electronic filing system with:

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